UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

ROCHESTER GAS & ELECTRIC CORPORATION

and **Cases 03-CA-075635**
03-CA-081230

LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO CHARGING PARTY'S CROSS- EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 (f)(1) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in response to Charging Party's cross-exceptions to the Administrative Law Judge's Decision in the above-captioned cases.

I. INTRODUCTION

On March 6-8, April 17-19, and May 13, 2013, a hearing concerning this matter was held before Administrative Law Judge Steven Davis. On January 8, 2014, Administrative Law Judge (ALJ) Steven Davis issued his Decision and Order.[1] The ALJ concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing or refusing to bargain with the Union by failing to timely furnish the Union with requested relevant and necessary information in paragraphs 1, 5, and 6 of its August 29, 2013 information request. Furthermore, the ALJ

[1] Administrative Law Judge Steven Davis will be referred to herein as ALJ. All references herein to the Administrative Law Judge's Decision, JD(NY)-01-14, will be ALJD, with the page number preceding ALJD, and the line number after ALJD, as __ AJD _. The transcript will herein be cited as (Tr. __). Charging Party's February 19, 2014 Brief in Support of Cross-Exceptions will be herein cited as CP BSCE, p. __. All references to Counsel for General Counsel's, Respondent's and Charging Party's exhibits will herein be GC Exh. __, R Exh. __, and CP Exh. __ respectively. Joint Exhibit 1 shall be referred to as Jt. Exh.1.

concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing to give timely notice and by failing to afford the Union an opportunity to bargain over the effects of its decision to subcontract bargaining unit work to Heath Consultants, and to seven named subcontractors. (24 ALJD 30-44).

On February 19, 2014, Charging Party filed its Cross-Exceptions and Brief in Support of Cross-Exceptions. Charging Party objects to several factual and legal findings made by the ALJ. Counsel for General Counsel maintains that Charging Party's cross-exceptions are without merit. Counsel for the General Counsel submits that the ALJ's findings are supported by the record and by extant Board law.

Cross-exceptions 1 and 2:

In cross-exception 1, Charging Party contends that the ALJ erroneously rejected the Union's argument in its post-hearing brief to the administrative law judge that the Union did not contractually waive its right to bargain about the decision to subcontract. The ALJ stated the reason for the rejection was because the Charging Party cannot "enlarge upon or change the General Counsel's theory of the complaint," *citing* United Nurses and Allied Professionals (Kent Hospital), 359 NLRB No. 42, slip op. at 2, n.4 (2012). (17 ALJD 46-51 [note 4]). The ALJ also further states in his analysis: "First, the language of the parties' contract, although it gives the Respondent the right to unilaterally subcontract unit work, is silent as to effects bargaining […]" (21 ALJD 5-6).

Charging Party contends in its brief in support of cross-exceptions, (CP BSCE, pp. 9-10, 13-23), that Respondent's affirmative defenses [that the Union waived its right to bargain over the effects of subcontracting because it waived its right to bargain over subcontracting decisions] necessitated a finding by the ALJ on whether there had been a decisional bargaining waiver.

(GC Exh. 1(s), 1st aff. def., para. 14, 15; 12th aff. def., para. 36). In its cross-exception 2, Charging Party asserts the ALJ erroneously found that Respondent had the right to subcontract unit work based upon the contractual language. (17 ALJD 21-23; 21 ALJD 5-6). Charging Party also points to the ALJ's comparison of the contract clause at issue, Article 15, (which states that Respondent "may subcontract" work),[2] with the contractual language in a case, such as Allison Corp., 330 NLRB 1363, 1365 (2000), granting the employer the exclusive right to subcontract, as evidence that the ALJ erred in finding a clear and unmistakable waiver of the unilateral right to the decision to subcontract. (CP BSCE, pp. 10, 15- 23; GC Exh. 3(a), 3(b); 21 ALJD 9-18).

The ALJ correctly and repeatedly explained that the issue before him was not whether Respondent validly subcontracted work, but rather whether it had subcontracted work without affording the Union an opportunity to bargain with the Respondent in good faith as to the effects of the subcontracting of unit employees. (4 ALJD 12-14; 17 ALJD 19-23; 21 ALJD 5-18). By the same token, the ALJ commented in his decision that Respondent did have the right to subcontract work.[3] (4 ALJD 12-14; 17 ALJD 22-23; Tr. 310, 363).

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[2] Article 15 reads:

> The employer may subcontract work performed by the classifications designated in NLRB Decision 3-RC-11307. An employee laid off during the term of this agreement from a classification within the bargaining unit shall be recalled if the Company contracts out work that is normally and customarily performed by the classification such employee was laid off from.
>
> In selecting contractors to perform work by the classifications designated in NLRB Decision 3-RC-11307, the Company will use reasonable efforts to secure contractors in good standing with the trades. Nothing herein shall require the Company to bear additional costs, to delay the work, or to violate Federal or State laws. (GC Exh. 3(a)).

[3] The ALJ agreed to admit prior decisional documents into the record from Region Three and the Office of Appeals regarding the expansion of subcontracting work to Premier Utility Services [03-CA-027891], and subcontracting of pole-setting work, [03-CA-027954], without commenting on the merits of the administrative findings as to whether there was a waiver of the right to the decision to unilaterally subcontract. (GC Exh. 119, 125, R Exh. 71; Tr. 237-238, 1029-1030). Union business manager Jeffrey Sondervan testified that during a February 23, 2012 meeting with Respondent, he affirmed that the NLRB had found that the Union had waived the right to bargain about the decision to subcontract. (Tr. 310, 363). Thus, the ALJ's conclusion that the Union waived its right to bargain about the decision had a basis in the record.

Charging Party disagrees with the ALJ"s ruling that the Union, through contractual language, in Article 15, had waived the right to bargain about the decision to subcontract. The issue of Respondent's obligation to bargain about the decision to subcontract, was, and still remains outside the scope of General Counsel's amended consolidated complaint, GC Exh. 1(o). General Counsel's amended consolidated complaint, GC Exh. 1(0), para. VII(d), deals solely with Respondent's effects bargaining obligation; there is no allegation regarding a failure to bargain about the decision to subcontract. The decisional bargaining obligation was never advanced by the General Counsel in its case in chief. At the hearing, General Counsel litigated the case solely on the effects bargaining allegation.

General Counsel agrees with the ALJ's sound conclusion that even if the Union had waived its right to bargain about the decision to subcontract, it did not inherently clearly and unmistakably waive its right to bargain over the effects of the decision to subcontract. (21 ALJD 9-18). Allison Corp., *supra*. The Charging Party's attempt to broaden the scope of the hearing and associated litigation to address the contractual waiver of the decision to subcontract, is not necessary to resolve any of General Counsel's complaint allegations. Accordingly, General Counsel submits that Charging Party's cross-exceptions 1 and 2 should be rejected.

Cross-exception 3:

In Charging Party's cross-exception 3, it excepts to the ALJ's modification of the remedy under Transmarine Navigation Corp., 170 NLRB 389 (1968) for Respondent's effects bargaining violations. (24 ALJD -27 ALJD; specifically 25 ALJD 33-44). General Counsel has taken cross-exceptions on the same basis. See General Counsel's February 19, 2014 cross-exceptions and brief in support of cross-exceptions filed with the Board.

Cross-exception 4:

In its cross-exception 4, Charging Party excepts to the ALJ's finding that the Union agreed that the March 20, 2012 provision of information, GC Exh. 15-21, satisfied the Charging Party's August 29, 2011 information request as it pertained to the seven named subcontractors. (11 ALJD 16-17). General Counsel submits that the Union never conceded at the hearing that it had received all of the information on March 21, 2012, which it had requested in its August 29, 2011 information request regarding subcontracting. In fact, the ALJ discusses that the Union business manager testified the Union was unsatisfied with the March 20 response letters and notification that the seven contractors were then currently performing work, as "not the kind of notice and information requested in the Union's August 29 letter." (12 ALJD 9-11; Tr. 367). However, the statement that the Union "conceded" that Respondent on March 20, 2012 fully satisfied the information request, at most amounts to an inadvertent error by the ALJ. More importantly, General Counsel, whose theory is controlling, agrees with the ALJ's conclusion that Respondent fully satisfied the information request on March 21, 2012, as to the seven named subcontractors in the amended consolidated complaint, para. VII(a). General Counsel has alleged an unlawful delay in providing information, as of March 20, 2012, rather than an outright failure to provide information. (GC Exh.1(o), para. VII(a), VIII(c); 13 ALJD 18-21; 24 ALJD 30-34).

Cross-exception 5:

In cross-exception 5, and in its CP BSCE, pp. 34-35, Charging Party excepts to a finding as to whether whether Respondent, on November 23, 2010, fully satisfied the Union's information requests from June 2 and July 27, 2010, regarding the expansion of subcontracting to Premier Utility Services. (12 ALJD 45-49). This issue raised by Charging Party is beyond the

scope of the amended consolidated complaint. (GC Exh. 1(o)). On June 2 and July 27, 2012, dates prior to the earliest date alleged in the amended consolidated complaint, para. VII(a),[4] the Union requested information necessary for decisional and effects bargaining related to the expansion of subcontracting of stakeout work to Premier Utility Services, LLC. (R Exh. 19). Respondent responded with a November 23, 2010 e-mail, in R Exh. 19, which contained attached spreadsheets about subcontractors, including many not even named in the complaint. (Tr. 125-127).

General Counsel adduced evidence on the record to show that the Union did not have a history of just "sitting on its hands" in response to prior subcontracting, but that it requested effects bargaining, information for effects bargaining purposes, and filed unfair labor practice charges alleging Respondent's failed to engage in effects bargaining on various occasions. As part of that evidence, General Counsel addressed the 2010 subcontracting to Premier. On August 2, 2010, in GC Exh. 134, the Union protested Respondent's decision to subcontract work to Premier, and asserted its right to engage in effects bargaining. On December 2 and 8, 2010, in Case 08-CA-027891, the Union filed charges alleging, in part, that Respondent failed to bargain about the effects of subcontracting to Premier. (4 ALJD 1-10; 23 ALJD 31-36; GC Exh. 31, 32, 134).

General Counsel's purpose in adducing any evidence at the hearing regarding the 2010 subcontracting to Premier was to demonstrate that the Union did not waive its right to bargain about effects by prior inaction. Accordingly, the ALJ properly found that the December 2010 charges demonstrated that in the past, the Union did not waive its right to bargain with

[4] The earliest alleged date of August 11, 2010, in GC Exh. 1(o), para. VII(a), is taken from Respondent's subcontract with O'Connell Electric Company, Inc., GC Exh. 18, dated August 11, 2010, which was first provided to the Union on March 20, 2012. (Tr. 312-315; GC Exh. 1(o), para. VII(a); GC Exh. 18; 1 ALJD).

Respondent about the effects of subcontracting. (23 ALJD 31-36).

However, at no point did General Counsel allege that the November 23, 2010 response, in R Exh. 19, was a separate or independent refusal to furnish information in violation of Section 8(a)(5) of the Act. Such an analysis would deal with facts and circumstances outside the scope of the amended consolidated complaint, para. VII. (GC Exh. 1(o), para. VII). As such, General Counsel submits that Charging Party's cross-exception 5 should be rejected.[5]

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Counsel for the General Counsel respectfully requests that the Board deny Charging Party's Cross-Exceptions to the ALJ's Decision and adopt the findings of fact and conclusions of law reached by the ALJ.

DATED at Buffalo, New York this 5th day of March, 2014.

Respectfully submitted,

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[5] General Counsel does not address Charging Party's cross-exception 6.

STATEMENT OF SERVICE

I hereby certify that on March 5, 2014, copies of Counsel for the General Counsel's Answering Brief to Charging Party's Cross-Exceptions to the Decision of the Administrative Law Judge in Cases 03-CA-075635 and 03-CA-081230 were served by electronic mail upon:

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