UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORPORATION, Respondent, and LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Charging Party.	Cases 03-CA-075635 03-CA-081230

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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STATEMENT OF THE CASE

On February 3, 2014, Respondent Rochester Gas & Electric Corp. filed its exceptions and supporting brief to the decision and recommended order issued by Administrative Law Judge Steven Davis on January 8, 2014. This is the Charging Party Union's answering brief.

ARGUMENT

POINT I

THE ALJ CORRECTLY FOUND RESPONDENT UNLAWFULLY FAILED TO PROVIDE NOTICE AND OPPORTUNITY TO BARGAIN OVER THE AUGUST, 2010 – DECEMBER, 2011 SUBCONTRACTS.

A. Respondent Violated Section 8(a)(5) by Entering into Seven Agreements for Subcontracting Between August 2010 and November 2011 (not provided to the Union until March, 2012), Without First Providing the Union With Notice and an Opportunity to Engage in Effects Bargaining.

The ALJ properly found this violation (ALJD 20, 24). Respondent entered into subcontracting agreements with O'Connell Electric, D&D Power, Power & Construction Group, Michels Power, and Northline Utilities on November 14, 2011 (GC-15-16; GC-19-21; GC-48), with Premier Utility Services on December 5, 2011 (GC-17), and with O'Connell Electric on December 21, 2011 and March 5, 2012 (GC-49-51). The agreements established the terms under which Respondent would subcontract the work, including the nature and scope of the work, labor costs, and subcontractor training and safety requirements, and the agreements

contained provisions that directly affected unit employees. GC-15-21; CG-49-51.[1] These agreements first came to the Unions' attention in March 2012, and the violations are properly included in the Complaint. This failure to provide notice and an opportunity to bargain is a separate bargaining violation from the information allegations, so Respondent's argument that the Unions' 2011 information request could not be fulfilled with respect to the prior subcontracting agreements (Resp. Brief at 24) is of no moment.

B. The ALJ Properly Found Violations for Failing to Bargain Before Letting the Individual Work Projects.

The ALJ correctly found that each specific project was the product of a purchase order and a discretionary decision making process to decide what work would be done in unit or by a subcontractor. (ALJD at 4-5, 22-23). These findings are well supported by the record and by Board law cited by the ALJ (ALJD at 17-18).

Respondent accordingly had an obligation to bargain with the Union each time it subcontracted a particular project that involved bargaining unit work. See Pub. Serv. Co. of Colo., 312 NLRB 459, 460 (1993) ("The fact that the Respondent had already bargained with the Union on the general topic of subcontracting and executed a specific contract provision with

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[1] The following provisions directly affected unit employees:
WORK STOPPAGE: Restriction on employees honoring picket lines or participating in strike.
Art 26/Page 24 (O'Connell GC-18, Michels GC-19, Northline GC-16, Power GC-20, D&D GC-21)
Art 26/Page 23 (Premier GC-17)

EMPLOYEE SOLICITATION: Restrictions on offering Respondent's employees jobs.
Art 46/Page 30 (O'Connell, Michels, Northline, Power, D&D)
Art 46/Page 29 (Premier)
Para 13/Page 7 (Stanley Wright, Heath)

INDEPENDENT SUPPLIER: RG&E restricted from any control or direction of subcontractor activities and employees, which implicates safety of operations' impact on unit employees.
Art 13/Page 19 (O'Connell, Northline, Power, D&D, Michaels)

respect thereto did not relieve the Respondent of its statutory duty to bargain over *specific instances of subcontracting."* (emphasis added)). Each piece of subcontracted work in this case required a separate decision-making process of Respondent, during which it sought to "balance[] the work between internal and external resources based on numerous factors including available staffing, the nature of the work, and whether the work is peak work." GC-15-21. Indeed, the testimony of Respondent's gas and electric operations managers (Messrs. Frank and Pozzuolo) shows that each decision to subcontract work was a discretionary process whereby they considered whether to subcontract work, whether to also use unit employees to do the work, and how to allocate the work between the two groups, among other things. Tr. at 653-36, 820-23, 832 (Frank), 852-57 (Pozzuolo). Also, specific order numbers are assigned to each discrete subcontracting project Respondent engages in, and those managers were tasked with reviewing and approving purchase orders for those discrete pieces of work. Tr. at 604-08, 822, 827 (Frank), 855-56 (Pozzuolo), 440, 458-59, 462 (Kelly). Finally, most of the master agreements that Respondent entered into with the subcontractors at issue provide that "an enforceable agreement for Services shall result only when an authorized Purchase Order for such Services...is accepted by the Supplier," and that each such purchase order "constitutes a separate and distinct contract for the particular Services set forth" therein. See GC-16-17 § 2.2; GC-19-21 § 2.2; GC-43 § 2.2. Thus, each such subcontracting project was a bargainable event.

C. Prior Subcontracting by RG&E and the Union's Receipt of Prior Information Did Not Relieve Respondent From Providing Notice and Opportunity to Bargain Over These Projects.

Respondent relies on its subcontracting in prior years, with Union knowledge of it, to argue that it was relieved from providing notice and opportunity to bargain over current and future subcontracting of unit work. R. Br. at pp 23-24, 26. (Respondent asserted in its answer that the Union waived its statutory right to bargain over the effects of subcontracting because it did not request effects bargaining in prior instances when Respondent used subcontractors to perform unit work. Resp.'s Answer ¶¶ 20-23). These claims must be rejected, as they are contrary to well-established Board and Circuit Court law.

First, "[t]he failure to demand bargaining in the past, without more, does not waive that bargaining right forever." NLRB v. Roll & Hold Warehouse Dist. Corp., 162 F.3d 513, 518 (7th Cir. 1998); see Nat'l Steel Corp. v. NLRB, 324 F.3d 928, 933-34 (7th Cir. 2003) (same); Roll & Hold Warehouse & Dist. Corp., 325 NLRB 41, 42 (1997) ("A mere failure to invoke bargaining rights over particular changes in the past does not represent a waiver of such rights over other changes in the future." (citing NLRB v. Miller Brewing Co., 408 F.2d 12, 15 (9th Cir. 1969)). Rather, "'each time [a] bargaining incident occurs . . . [t]he union has the election of requiring negotiations or not.'" Roll & Hold Warehouse, 162 F.3d at 518 (quoting NLRB v. Miller Brewing Co., 408 F.2d 12 (9th Cir. 1969)). Indeed, the Board has consistently held that "a union's acquiescence in previous unilateral conduct does not necessarily operate *in futuro* as a waiver of its statutory rights under Section 8(a)(5)." E.R. Steubner, Inc., 313 NLRB 459 (1993).

Secondly, that Respondent may have subcontracted bargaining unit work to the subcontractors at issue in the past, does not establish a practice that relieved Respondent of its

bargaining obligations here. There can be no established past practice of unilateral subcontracting where Respondent's unilateral right to subcontract was derived from the management rights clause in the 2003 CBA, which, of course, was removed from the 2008 CBA. As the Board held in E.I. Dupont de Nemours, 355 NLRB No. 176 (2010), slip opinion page 2, "[i]t is apparent that a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would acquiesce to additional changes made after that management-rights clause expired." Certainly, the same logic applies to situations like this one, where the management rights clause under which the alleged practice operated has been replaced in a new contract.

Even if there had been an established practice and the changes to the management rights clause somehow did not impact it, Respondent's drastic changes to subcontracting levels changed the practice and prevent Respondent from relying on any past practice. Tr. at 189-91, 198-99 (Irish), 748 (Frank). At the same time Respondent was increasing its subcontracting around 2009-2010, it implemented new policies aimed at scaling back its internal workforce. As admitted by Respondent's witness, Mr. Frank, parent company Iberdrola executives handed down an edict around 2009 stating that employees were only to work emergency (as opposed to scheduled) overtime and that there was to be no external hiring. Tr. at 715 (Frank). Mr. Frank also testified that during the last two years or so[2], he has not been permitted to "add to [his] head count" despite the fact that the electric operations department had lost numerous employees to retirement, and he was aware of a company policy aimed at restricting in-house employees to performing only "core" work; Mr. Pozzuolo provided similar testimony. Tr. at

[2] Frank's testimony was given in 2013; two years before places the restrictive policies around 2011, when the Union was demanding bargaining.

705-09 (Frank), 923-24, 942-48 (Pozzuolo). This shift in policy is reflected in the findings of a 2012 audit commissioned by the New York State Public Service Commission, stating that Respondent's "substantial usage of contractors in Electric Operations underscores the question of the adequacy of internal resources." GC-45 at I-14. In fact, in 2010, Respondent stated that it intended to drastically increase its use of subcontractors vis-à-vis the in-house workforce in connection with written testimony it jointly submitted (with NYSEG) to the Public Service Commission:

> The Companies' use of outside contractors will increase. Although the Companies currently use outside contractors for many tasks, that practice will not only continue but will be expanded for capital construction, leak surveys, facility locating, corrosion surveys and engineering.

CP-7 at 5. Thus, the evidence shows that Respondent's subcontracting vis-à-vis its in-house workforce change substantially by 2010, and thus no controlling past practice can be relied on by Respondent here.[3]

Moreover, Respondent cannot seriously argue that the Union acquiesced in its subcontracting practices to the point of waiver, or that subcontracting constituted an accepted past practice after the major shift described above. While it was (and continues to be) the Union's understanding that Respondent's exclusive right to subcontract was removed with the change to the management rights clause in the 2008 contract, the evidence demonstrates that the Union has consistently and vigorously opposed Respondent's subcontracting of unit work since 2010. For example, after receiving notification from Respondent in June 2010 that it intended to implement a new subcontracting project involving Premier Utility Services

[3] This is so regardless of whether the increase in Respondent's subcontracting arose from its obligations under its rate case settlement with the Public Service Commission. In other words, the reason for the dramatic increase does not change the fact that the change defeats its past practice defense.

performing stakeout work, the Union immediately objected and sent an information request to Respondent on June 2, 2010. Tr. at 201 (Irish); GC-131-132. The next day, upon learning that the subcontracting project would be more expansive than the employer previously let on, the Union submitted a more expansive information request. See id. Moreover, on July 27, 2010, the Union sent an information request to Respondent pertaining to all subcontracting of bargaining unit work. GC-38. After Respondent expressed to the Union its position that Article 15 granted it the unilateral right to subcontract (GC-133), the Union responded by letter dated August 2, 2010, making very clear that it strenuously disagreed and wanted the requested information and an opportunity to bargain over subcontracting decisions and their effects prior to implementation. GC-40; GC-134. When Respondent refused to provide the requested information, the Union filed unfair labor practice charges with the Board, including one on December 2, 2010 concerning the subcontracting of stakeout work (GC-31-32), and another on January 31, 2011 concerning the subcontracting of pole-setting work (GC-34; Tr. at 208-09 (Irish)). Those charges were not fully resolved until May 9, 2011, and August 2, 2011, respectively. GC-119; GC-125. The underlying bargaining demand and information request in this case was sent to Respondent on August 29, 2011, on the heels of the non-binding administrative determinations disposing of the Union's pending Board charges regarding subcontracting and its effects on unit employees. It is difficult to imagine how Respondent could have reasonably believed that the Union had acquiesced in its subcontracting of bargaining unit work. See Tocco Division of Park-Ohio Industries, Inc., 357 NLRB 413, 414 (1981) (finding no merit in employer's contention that union's acquiescence in earlier transfers of work established a waiver where union challenged employer's later actions).

Respondent's past practice argument also fails because an employer's repeated *discretionary* actions do not establish a past practice. See NLRB v. Katz, 369 U.S. 739, 745-47 (1962) (no past practice where merit pay increases were "in no sense automatic [and] were informed by a large measure of discretion"); Eugene Iovine, Inc., 353 NLRB 400, 407 (2008) ("practice" of layoffs, while a feature of employer's business, "involve[d] a significant degree of discretion on the part of employer's foremen, discretion exercised on an ad hoc basis in each layoff situation"); Eugene Iovine, Inc., 328 NLRB 294, 294 (1999) (no past practice established where "employer's discretion to decide whether to reduce employee hours 'appears to be unlimited'"; such discretionary acts must be bargained). The testimony of Respondent's gas and electric operations managers in this case established that each decision to subcontract work was a discretionary process whereby they considered whether to subcontract work, whether to also use unit employees to do the work, how to allocate the work between the two groups, among other things, and measured those considerations against a number of nonuniform factors. Tr. at 653-56, 820-23, 832 (Frank), 852-57 (Pozzuolo).

Finally, to the extent Respondent argues that the Union did not engage in bargaining (R. Brief at 38-41), it fails to recognize that a union's obligation to demand bargaining is triggered only when the union has been formally and fully apprised of the employer's decision in advance of that decision. See Johnson-Bateman Co., 295 NLRB at 180 (1989) (waiver will be inferred from bargaining history only if matter was "fully discussed and consciously explored" and party "consciously yielded or clearly and unmistakably waived its interest"). As the Board explained in Embarq Corp., 358 NLRB No. 134 (2012), "the Union was not required to demand actual bargaining at any point before the Respondent confirmed that the decision would be

implemented on a specific date." Id., slip op. at 2. Indeed, "[a] union's responsibility to demand bargaining is not triggered when the employer indicates only 'future plans about which the timing and circumstances are unclear.'" Id. (quoting Pan American Grain Co., 343 NLRB 318, 338 (2004)). Moreover, when an employer's decision is announced and presented as a fait accompli, the Union does not waive a right to bargain by not immediately demanding bargaining in a futile effort to turn back the clock. See Racetrack Food Servs., Inc., 335 NLRB No. 76 (2008).

Respondent has not produced any evidence suggesting that the Union was given adequate advance notice of any of the subcontracting projects covered by the complaint, i.e., those involving one of the eight named subcontractors and occurring after the Union's August 29, 2011 request. Vague and inchoate notification of prior subcontracting projects involving those subcontractors, whether presented as a fait accompli or otherwise, do not constitute such notice and thus did not trigger the Union's obligation to demand bargain or lose its right to demand bargaining with regard to that contractor for all time. More particularly, although the Union sought detailed information in July 2010 as to all unit work being put out to bid, with time to bargain prior to commencement of work (Resp. Exh. 6), no response was made by Respondent until November, and the details and documents requested were not provided. The "Sardisco E-mails" (Resp. Exh. 19, see Resp. Brief at 6) were untimely, lacking in detailed information and were not an offer to bargain. Moreover, they have no application to the current information and bargaining demands as to future projects, made by the Union in August 2011. See Cone Mills Corp., 169 NLRB 449, 456 (1969), enforced in relevant part, 413

F.2d 445 (4th Cir. 1969) (each information demand is actionable under §10(b); Public Service Co., supra page 2 (each project is subject to effects bargaining before it is let).

Thus, Respondent has not established its affirmative defenses based on waiver by inaction or past practice.

D. Complaint is Not Barred by Section 10(b).

For similar reasons, Respondent's Fifth Affirmative Defense based on Section 10(b) must fail. Resp.'s Answer ¶ 25; Resp. Brf. at 25. While the Union may have had general knowledge of Respondent's subcontracting and previous use of some of the subcontractors named in the complaint, that is simply not enough to trigger the Section 10(b) limitations period with regard to the specific violations alleged in this case. See Leach Corp., 312 NLRB 990, 991 (1993) ("The 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act.").

POINT II

THE ALJ CORRECTLY FOUND A FAILURE TO EFFECTS BARGAIN OVER THE HEATH GAS WALKING SURVEY SUBCONTRACT.

Despite its clear obligation to do so, Respondent simply refused to provide the Union with notice and an opportunity to bargain over the effects of its subcontracting to Heath before implementing the subcontract.

Respondent's Manager Pozzuolo contacted Union Business Manager Irish by telephone on Friday, August 26, 2011, and informed him of Respondent's intention to use a subcontractor to perform gas walking survey work after September 1, 2011. Tr. at 50 (Irish), 898 (Pozzuolo); GC-4. Mr. Pozzuolo did not identify the subcontractor or otherwise provide Mr. Irish with any other details on the subject. Tr. at 50 (Irish). Mr. Irish objected to Respondent's proposed

subcontracting and demanded effects bargaining. Tr. at 50 (Irish); GC-4. The Union then sent a letter to Respondent the following Monday, August 29, 2011, demanding "effects bargaining over each instance of subcontracting of unit work" and requesting information in connection therewith. Tr. at 55-56; GC-28 at 2.

Despite having received and reviewed the Union's written demand for effects bargaining and information on August 29, 2011 (Tr. at 1060, 1110, GC-120, GC-141), Respondent simply ignored it and implemented its subcontracting of the gas walking survey work to Heath Consultants on September 6, 2012. Tr. at 13; GC-6. Thus, Respondent failed to give the Union adequate notice and an opportunity to bargain over the effects of its subcontracting of unit work prior to implementing the subcontracting. See Fresno Bee, 339 NLRB 1214 (2003) (employer "was not free to implement [its] decision . . . until it consulted with the Union regarding the effects of its decision."). Because Respondent was obligated to provide the Union with adequate notice and an opportunity to bargain *before* implementing the subcontracting, it is of no moment that Respondent later informed the Union, by letter dated September 16, 2011, that it was willing to engage in effects bargaining. GC-5. Indeed, Respondent's September 16 letter still did not identify the subcontractor or specifically describe the work to be subcontracted, its location, or the time period of that subcontract, or otherwise respond to the Union's information request. GC-5. Nor was Respondent's unlawful refusal to bargain somehow undone when, on September 23, 2011, it provided information in the form of assertions about the nature of the gas walking survey subcontracting, but none of the requested documentation. GC-6. Similarly, the information provided by Respondent on October 11, 2011, arrived more than a month after Respondent had implemented the

subcontracting and, in any event, fell significantly short of what the Union had requested. GC-7.

Respondent argues, by way of its Ninth Affirmative Defense, that it should be excused from failing to provide the Union with adequate notice and an opportunity to bargain over the subcontracting to Heath because of a "natural disaster necessitating a state of emergency." Resp.'s Answer ¶¶ 32-34. Specifically, Respondent claims that Hurricane Irene and Tropical Storm Lee "excused RG&E from more quickly providing the information sought by the Union or engaging in effects bargaining sooner." Id. ¶ 33. The ALJ properly rejected this claim (ALJ at 18). This defense fails to meet the Board's "consistently maintained . . . narrow view" of the defense. Port Printing & Specialties, 351 NLRB 1269, 1269-70 (2007).

First, it should be noted that Respondent's decision to subcontract the gas walking survey work to Heath Consultants and implement that work on September 6, 2011, did not arise from any emergency storm situation and the gas walking survey was not part of any emergency restoration efforts. Rather, that subcontracting decision had already been made and was driven by Respondent's concern that it would not meet its internal deadline for completing the survey work. Tr. at 50 (Irish); GC-4; Tr. at 887-92 (Pozzuolo); Tr. at 1007-10 (Pozzuolo). Further, while Respondent sent several gas operations employees to the NYSEG territory to assist with storm restoration work (Tr. at 993-94 (Pozzoulo)), this had no impact on the gas walking survey work because no underground utility employees had been sent away (Tr. at 554-55).

Second, Respondent's defense is belied by the fact that, prior to serving its Answer in this case, it had not previously asserted that storms had prevented it from giving adequate

advance notice, providing the requested information, or engaging in effects bargaining. During their telephone conversation of August 26, 2011, Mr. Pozzoulo told Mr. Irish that the reason for the proposed subcontracting was Respondent's impending internal deadlines, not any coming storms. Tr. at 50 (Irish); GC-4. Further, Respondent's communications to the Union in the weeks following the implementation of the subcontracting did not indicate that Respondent was required to take action without bargaining due to the storms. GC-5 to GC-7.[4] And Respondent did not raise this excuse in February 2012 during its meetings with the Union on the subject. Tr. at 523-24 (Rode).

Finally, to the extent Respondent's defense is based on Mr. Shapiro's testimony that he was personally preoccupied with the impact of the storms, it should be disregarded. According to Mr. Shapiro:

> Well, right about August 30th – you know, this letter came in on the 29th. On about August 30th, in response to the first storm, the Hurricane, I went out to the Oneonta division and, you know, worked storm responsibilities, you know, in the office that week. And then over the next Labor Day weekend I went with, you know, various, you know, company representatives into the flooded areas, into the devastated areas, you know, both to support the workers and as kind of, you know, an opportunity to – you know, to really gauge the damage.

Tr. at 1061-62 (Shapiro). Mr. Shapiro also testified that he was personally affected by Tropical Storm Lee and the flooding it caused in his community. Tr. at 1062-63. The implication of Mr. Shapiro's testimony is that, as a result of the storms, he simply did not have time to address the Union's letter of August 29, 2011, prior to the implementation of the subcontracting with Heath Consultants. Tr. at 1063 (Shapiro testified that after receiving the Union's August 29 letter, he

[4] Respondent's representation in its letter of September 23, 2011, that it decided to subcontract work to Heath Consultants because was behind pace on the walking survey as a result of "employee vacation entitlements and storm restoration work" (GC-6), merely references factors (and very foreseeable factors, at that) that Respondent considered in deciding to subcontract the work in the first place, and was not meant as an excuse for not bargaining pre-implementation. See Tr. at 892 (Pozzoulo).

"passed [it] right along to one of the people who work for [him]."). But this is not what the evidence reflects. In fact, Mr. Shapiro read the Union's August 29 letter and covering email, forwarded it to Ms. Lamoureux and counsel for Respondent, as well as to Mr. Cammuso, and then scheduled a meeting to discuss the same with those individuals the next day. Tr. 1060, 1110; GC-120; GC-141. Then, after his personal circumstances were eased, he never followed up with Mr. Cammuso after Mr. Cammuso's incomplete response to the Union went out (Tr. at 1112-13), a telling admission that belies Mr. Shapiro's supposed great concern over Respondent's information responsibilities (Tr. at 1094-96, 1115-16). Respondent has failed to show why *Mr. Shapiro's* apparent storm-related distractions should excuse the *entire company* from failing to meet its statutory bargaining obligations. Respondent has not established its Ninth Affirmative Defense.

Accordingly, Respondent unlawfully refused to bargain with the Union regarding its subcontracting of the gas walking survey work to Heath Consultants as alleged at paragraph VII(b) of the Complaint.

POINT III

RESPONDENT'S SUBCONTRACTING IMPACTED UNIT EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT.

It is generally recognized that subcontracting bargaining unit work impacts unit employees' terms and conditions of employment, and thus is a mandatory subject of bargaining. See Public Service Co. of Colo., 312 NLRB 459, 460 (1993). As demonstrated at the hearing, Respondent's subcontracting in this case had a material impact on the terms and conditions of employment for unit employees in the following ways: (a) unit employees lost opportunities to work additional hours and earn additional wages on an overtime basis; (b) the

size and strength of the bargaining unit was diminished, thereby reducing all of the benefits that inure to employees as a result of having an expanded or at least stable unit; and (c) unit employees were subjected to increased safety risks on the job.

A. Loss of Opportunity to Work Overtime.

The Board has recognized that subcontracting of bargaining unit work necessarily impacts unit employees in that it constrains work opportunities available to them. See Quickway Transport, 354 NLRB 1, 2 (2009), reaff'd 355 NLRB 140 (2010). For example, but for the subcontracting, "[u]nit employees might otherwise have been given overtime pay to perform the work that was subcontracted." Spurlino Materials, LLC, 353 NLRB 1198, 1198, 1219 (2009), reaff'd 355 NLRB 77 (2010); see Acme Die Casting, 315 NLRB 202 n.1, 207 (1994) ("The fact that no employees were laid off or suffered a reduction in their workweek—even if true—is irrelevant. The crux of their grievance is that they lost additional overtime work that they might have enjoyed if the Respondent had left the work in the plant."); Public Service Co. of Colorado, 312 NLRB at 460.

The evidence establishes that bargaining unit employees were qualified to perform the work that was subcontracted, available to work additional hours on an overtime basis, and desirous of working such overtime. Gas operations employees with the following classifications were qualified to perform the gas walking survey work that Respondent subcontracted to Heath Consultants in September 2011: Underground Utility Inspector, Senior Gas Serviceworker, First Class Pipefitter, Gang Foreman, and Gas (or M&O) Technician. Tr. at 510-14 (Rode). According to Mr. Rode, a union official and crew leader who was generally familiar with gas operations employees' workload and schedules, there were many qualified unit

employees who were available and willing to perform gas walking survey work on an overtime basis when Respondent used Heath to perform that work. Tr. at 513-14. Moreover, Mr. Welch, an Underground Utilities Inspector qualified to perform the gas walking survey work, was available to perform that work on an overtime basis (as reflected in his pay stubs), and he would have worked such overtime if given the opportunity. Tr. at 390-96; GC-25.[5] Further, Mr. Welch testified that there were numerous other qualified employees who were available to perform that work on an overtime basis. Tr. at 396-99. Indeed, overtime data provided by Respondent shows that qualified employees, i.e., those in the classifications listed above, generally worked a very modest number of overtime hours in the third quarter of 2011—when the gas walking survey work was subcontracted to Heath Consultants—and thus were available to perform that work on an overtime basis. GC-22.

With regard to the underground pulling and other cable-related work subcontracted to Stanley M. Wright & Sons, the following classifications of unit employees were qualified to perform that work: Lead Cable Splicer, Cable Splicer First Class, Gang Foreman—Underground, and Line Worker. Tr. at 316-17, 320; GC-15. The following classifications of unit employees were qualified to perform the electrical line construction work subcontracted to Northline Utilities, O'Connell Electric, Michels Power, and D&D Power: Lead Line Worker, Line Worker First Class, Gang Foreman (Construction & Maintenance), Gang Foreman (Underground), Lead Cable Splicer, and Cable Splicer First Class. Tr. at 317-24; GC-16, GC-18, GC-19, GC-21. The stakeout work performed by Premier Utilities could have been performed by employees with

[5] The testimony of Respondent's current employees—Messrs. Welch, McKerrow, and Moore—should be considered particularly reliable given that it is "potentially adverse to their own pecuniary interests." Gaylord Hospital, 359 NLRB No. 143, slip op. at 11 (2013) (citing Covanta Bristol, Inc., 356 NLRB No. 46, slip op. at 8 (2010) and Flexsteel Industries, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996)).

the classification of Underground Utility Inspector. Tr. at 321; GC-17. Finally, unit employees with the following classifications were qualified to perform the line trouble and operating and maintenance work subcontracted to Power & Construction Group: Gang Foreman (TM&R), Lead Trouble Worker, Trouble Worker First Class, Lead Line Worker, Line Worker First Class, and Gang Foreman (Construction & Maintenance). Tr. at 326-27; GC-21.

The evidence shows that there were many qualified unit employees who were available and willing to perform the above-described work that Respondent had subcontracted out. Mr. McKerrow, a Lead Cable Splicer, testified that he had worked significant amounts of scheduled overtime on capital or electrical construction work toward the end of 2011, indicating that he was generally available and very much willing to perform such work on an overtime basis. Tr. at 405-08. Similarly, Mr. Moore, a Gang Foreman (Construction & Maintenance), testified that he and the five crews of line workers underneath him worked significant amounts of scheduled overtime on line construction projects in the latter part of 2011. Tr. at 418-20. However, in late December 2011, Respondent determined that electrical employees were no longer permitted to work any scheduled overtime in 2012. Tr. at 408-09, 410 (McKerrow), 420-21 (Moore), 592-93 (Hagadorn). Unit workers' overtime levels dropped significantly starting in

2012, despite their continued willingness to perform scheduled overtime. Tr. at 409, 422-24, 592.[6]

Thus, numerous unit employees were qualified, available, and willing to perform the work subcontracted out on an overtime basis, and Respondent's decision to subcontract that work adversely impacted their opportunities to work additional scheduled overtime.

B. Diminution of the Bargaining Unit.

Another bargainable effect of Respondent's subcontracting of unit work is the resultant diminution of the bargaining unit. The Board has recognized that in the absence of subcontracting of bargaining unit work, an employer might have hired additional unit employees, resulting in jobs for them and benefits for the Union and existing unit employees in having an expanded unit. See Spurlino Materials, LLC, 353 NLRB 1198, 1198, 1219 (2009); Overnite Transportation Co., 330 NLRB 1275 (2000) ("We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit."). In Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), the Supreme Court recognized that protection of the bargaining unit itself is an important goal of the union that is part of Section 8(d)'s mandatory bargaining. The Court quoted its previous decision in Teamsters v. Oliver, 358 U.S. 283, 294 (1959), where the Court stated that among the subjects of mandatory bargaining are

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[6] Respondent introduced various charts reflecting the total number of overtime hours worked by electrical-side employees from 2010-12 (see R-138-140); however, those charts do not account for the different types of overtime, including storm restoration work or mutual aid call-outs which would inflate overall overtime figures. See Tr. at 783, 812-13. In any event, the charts do not disprove that there were numerous unit employees who were qualified, available, and willing to perform the subcontracted work on a scheduled overtime basis. In fact, Mr. Frank admitted that Respondent could not dispute that unit employees would have been willing to work the additional scheduled overtime. Tr. at 813-15.

the union's interests in: "'Prevent[ing] possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit.'" Fibreboard, 379 U.S. at 212 (quoting Teamsters v. Oliver, 358 U.S. at 294). This legitimate union goal of protecting the present and future bargaining unit through effects bargaining is applicable to the subcontracting by Respondent. Thus, by subcontracting unit work, Respondent's actions had an adverse impact on the size and strength of the bargaining unit, and thus on unit employees' terms and conditions of employment.

Here, Respondent used subcontractors to perform bargaining unit work that otherwise would have been performed by unit employees, on an overtime basis or otherwise. As a result, there has been no hiring into the unit and the size and strength of the unit has been significantly diminished. In fact, from the time the Union was certified in 2003 until 2011, Respondent had not hired a single person into the gas or electric field operations areas (excluding intra-company transfers), and had promoted only one unit employee during that time. Tr. at 68-69, 71 (Irish), 922-23 (Pozzoulo), 593-94 (Frank). During this time, unit employee levels declined significantly due to attrition, including retirements and disabilities, dropping from 420 members in 2005 to about 340 in 2011. Tr. at 190-91 (Irish), 593-94 (Hagadorn), 543-44 (Rode), 923-24 (Pozzuolo). As Mr. Irish testified, under the previous contract, Respondent used subcontractors to supplement the existing workforce, but in 2009-10 the nature and scope of Respondent's subcontracting substantially increased and Respondent began *supplanting* unit workers with subcontractors in numerous areas of work. Tr. at 189-91, 198-99. Further, Respondent's Electrical Operations Manager, Richard Frank,

admitted that Respondent has restricted him from hiring additional employees to replace the 15 or so employees who had retired from his department in recent years. Tr. at 705-08 (Frank).

Accordingly, Respondent's subcontracting had the effect of diminishing the bargaining unit and that adversely impacted unit employees.

C. Increased Safety Risks.

To be sure, the unit employees in this case are employed in a dangerous line of work. Whether they are working on Respondent's gas or electric system, workers are regularly exposed to hazardous and potentially fatal levels of energy. Tr. at 59 (Irish), 329 (Sondervan). Therefore, employee safety and training requirements and responsibilities are very important aspects of unit employees' terms and conditions of employment.

The Union had a legitimate interest in bargaining with Respondent over the effects of its subcontracting in the form of the training and safety specifications of the subcontractors' employees. As Mr. Sondervan testified:

> [W]e want to know the training and the safety standard of these employees because it will, often time, will come that our unit members will effectively work in conjunction with these folks so that they would be exposed to either proper training, proper safety skills or the lack thereof, possible putting our folks at risk. "[T]here may have been some subcontracted work that was done possible substandard or not to safety specifications and that can put our folks at—in harm's way.

Tr. at 289-90. Mr. Irish also aptly explained how subcontracting affects unit employees by virtue of creating a more hazardous working environment:

> Well, any work that a subcontractor does on a gas and electric system, being that they are both hazardous energy, can directly, while they're doing the work, affect bargaining unit employees. The quality and nature of how they complete the work can also affect anyone—any bargaining unit employee that comes along and works on that piece of equipment later.

Tr. at 59 (Irish).

There was also specific evidence presented at the hearing proving that Respondent's subcontracting has, in fact, created additional work place hazards for unit employees. For example, Mr. Hagadorn testified at length about various incidents involving subcontractors that created additional safety risks for unit employees. Tr. at 566-90, GC-29-29(a); see Tr. at 658-67 (Frank); GC-73-77. Thus, safety of unit employees is clearly a bargainable effect of Respondent's subcontracting.

POINT IV

THE ALJ PROPERLY DETERMINED THAT RESPONDENT VIOLATED THE ACT BY FAILING TO TIMELY RESPOND TO THE UNION'S AUGUST 29, 2011 INFORMATION REQUEST.

The Complaint alleges that Respondent unreasonably delayed in furnishing the Union with information that it requested which was necessary for, and relevant to, the Union's performance of its duties as bargaining representative. See Compl. ¶ VIII. It is well established that a union is statutorily entitled to information relevant to assessing its representational rights. Mercywood Health Building, 287 NLRB 1114, 1124 (1988); Compact Video Services, 319 NLRB 131, 143-44 (1995). Indeed, part of an employer's statutory duty to bargain collectively in good faith under the Act is the obligation to provide the union, upon request, with information sufficient to permit intelligent bargaining. See Levingston Shipbuilding Co., 244 NLRB 119, 121 (1979), enforced, 617 F.2d 294 (5th Cir. 1980).

A. The Requested Information Was Relevant.

Respondent argues, by way of its Sixth and Eighth Affirmative Defenses, that it was not obligated to provide the requested information because the Union "offered no explanation as

to the relevance or necessary of this information," and that it did not unreasonably delay in providing information "[g]iven the nature of the materials sought, the time the materials were sought and the number of irrelevant and burdensome information requests made by the Union." Resp.'s Answer ¶¶ 26, 32. These defenses are in no way supported by the evidence or Board law.

The ALJ correctly found that all of the requested information was relevant (ALJD at 14).[7] To establish relevance, the union need "only demonstrate that the requested information is probably relevant and that it will be of use to the union in carrying out its statutory duties and responsibilities." Kathleen's Bakeshop, LLC, 337 NLRB 1081, 1093 (2002). The Board has adopted a "liberal discovery type standard" which allows unions to access a broad range of potential useful information for the purposes of effectuating the bargaining process. NLRB v. Acme Industrial Corp., 385 U.S. 432 (1967). Indeed, "not much is required to justify a union's request for information that is related to its bargaining unit representation functions." Crowley Marine Services v. NLRB, 234 F.3d 1295, 1297 (D.C. Cir. 2000). Certain information is presumptively relevant and the failure to produce it will not be excused based on defenses rooted in relevance. See U.S. Information Services, 341 NLRB 988 (2004). Information that pertains to terms and conditions of employment of unit employees is presumptively relevant and must be produced. Good Samaritan Hosp., 335 NLRB at 901 (2001) ("We note that all of the information requested appears to relate directly to the terms and conditions of employment for bargaining unit employees."). For example, information concerning the total

[7] Respondent's defenses based on the irrelevance of the requested information puts the relevance of the Union's entire information request at issue, even though the Complaint allegations are more restrictive. See Vico Prods. Co., 336 NLRB 583, 589-90 (2001) (ALJ erroneously disallowed exploration of issue at hearing on grounds that issue not raised in complaint because issue was raised by respondent as an affirmative defense); Dayton Newspapers, 339 NLRB 650 (2003).

hours and overtime hours worked by each unit employee is presumptively relevant and necessary, regardless of the reason for the request. See U.S. Information Services, 341 NLRB 988 (2004); Blue Cross & Blue Shield of New Jersey, 288 NLRB 434, 436 (1988). Finally, even where the employer asserts that an underlying decision—such as subcontracting—is not subject to mandatory decision bargaining, relevant requested information still must be provided to the union. See Northstar Steel Co., 347 NLRB 1364, 1368 (2006); Kennametal, Inc., 358 NLRB No. 68, slip op. at 3 (2012); see also Champion Int'l Corp., 339 NLRB 671, 692, n.31 (2003) (that same information might have been requested for decision bargaining purposes does not defeat the right to the information for effects bargaining).

By letter dated August 29, 2011, the Union requested specified information from Respondent that it needed in connection with its demand for effects bargaining over all instances of subcontracting of unit work. GC-28. Specifically, the Union requested: (1) basic information about the subcontractor and scope of the project, including a copy of the contract and communications with the subcontractor regarding scope of the work, which would "aid the Union in ascertaining the scope of the subcontract so that the Union can assess the impact of the subcontract on the workload, hours and pay of affected unit employees" (GC-28); (2) financial cost of the subcontracting project so the Union could formulate effects bargaining aimed at giving cost savings to Respondent; (3) a list of unit employees qualified to perform the subcontracted work and their levels of overtime for preceding two years so the Union could know who was affected and how their wages and hours were impacted; (4) analysis done supporting the reason or necessity for subcontracting the work, which would allow the Union to formulate proposals through effects bargaining and future contract negotiations that would

prevent the diminishment or stagnation of the unit; (5) training and safety guidelines applicable to the subcontractor because the Union has an important interest in maintaining a safe work environment for unit employees; and (6) identification of persons supervising and managing the subcontracted project so the Union can determine who in fact is the employer of the subcontractor's workers and also assess any safety implications. GC-28.

Much of the information requested by the Union is plainly related to the terms and conditions of unit employees' employment. As such, it is presumptively relevant and Respondent was required to produce the same. The other requested information, i.e., that pertaining to financial data and other, was necessary for the Union to formulate meaningful effects bargaining proposals, as explained in the August 29 letter itself and elaborated upon by Union officials at the hearing. GC-28; Tr. at 57-62 (Irish), 286-91 (Sondervan). And as noted above, the Union's August 29 information request very clearly explains why the Union needed that information and why it was relevant to its demand for effects bargaining. See KIRO, 311 NLRB 745, 746 (1993) ("[T]he determination of relevance 'depends on the factual circumstances of each particular case."). Further, Board law is clear that the Union was only required to indicate the reason for its request, not provide specific details as to why each aspect of the request was relevant. See Peterbilt Motors Co., 357 NLRB No. 13, slip op. at 3 (2011); Contract Flooring Systems, 344 NLRB 925, 925 (2005).

B. Respondent Did Not Timely Provide the Requested Information.

An employer commits an unfair labor practice when it refuses to provide or unreasonably delays in providing the union with requested relevant information. See Bundy

Corp., 292 NLRB 671 (1989) (delay of two-and-a-half months unreasonable where union needed information to engage in bargaining).

In this case, the only information that Respondent provided in response to the Union's August 29 letter were some bare assertions (in the body of Respondent's letter) about the nature of the gas walking survey subcontracting (GC-6), a copy of the contract with Heath Consultants concerning nonmandated gas walking survey work, and some overtime data (GC-7). Crucially, this information did not satisfy all of the Union's requests and arrived well after Respondent had already implemented the subcontracting project. GC-6. Moreover, Respondent did not provide a shred of information with respect to any other subcontracting projects until March 2012. GC-16-21. And even that information did not come easily, as the Union had to cajole Respondent into producing the information during meetings in February 2012. Tr. at 294-312 (Sondervan), 517-24 (Rode), 560-66 (Hagadorn).

There can be no question that the Union's August 29 letter sought information with regard to *all subcontracting* of bargaining unit work, not just with respect to the gas walking survey subcontract. GC-28. Mr. Shapiro's suggestion that he understood the information request to relate to the gas walking survey subcontracting only is simply not credible in light of his express admission that he read the entire information request upon receipt (including the parts referencing "all subcontracting") and understood the information request to pertain to more than just the gas walking survey subcontracting. Tr. at 1060, 1112. Further, there was no evidence presented to support Respondent's allegation that there were "representations of Union officials that RGE did not have to supply the information sought in the August 29, 2011 letter for all subcontractors" which would have excused its failure to respond to that letter.

Resp.'s Answer ¶¶ 27-31. That Respondent was unable to produce any evidence to back this allegation up speaks volumes. To the extent Respondent's allegation refers to comments made by Mr. Schlosser at the February 1, 2012 meeting, which the Union immediately corrected (Tr. at 299-301 (Sondervan); GC-10), it does not help. Mr. Schlosser's comments were made more than five months after the Union's demand for effects bargaining and information on all subcontracting and Respondent's decision to simply ignore the same.

In sum, Respondent's failure to provide the requested information prevented the Union from engaging in meaningful bargaining concerning the impact of Respondent's subcontracting on unit employees. See Peterbilt Motors Co., 357 NLRB No. 13, slip op. at 3 (2011). Absent the requested information, the Union could not effectively participate in effects bargaining. See Fresno Bee, 339 NLRB at 1215, 1215 n.4; Comar, Inc., 349 NLRB 342, 355 (2007) (finding it "hard to imagine how the Union could bargain intelligently" about issues without requested information). Thus, the Employer violated Sections 8(a)(5) and (1) by failing to timely provide the requested relevant information.

POINT V

THE UNION DID NOT CONTRACTUALLY WAIVE ITS RIGHT TO BARGAIN.

Respondent has raised several affirmative defenses based on arguments that the Union waived its right to bargain over the effects of Respondent's subcontracting on unit employees. See Resp.'s Answer ¶¶ 14-39. However, it has failed to establish those defenses, and thus it is not shielded from liability for refusing to bargain with and provide information to the Union.

A. Respondent Has Not Established a Contract Waiver of Decision Bargaining.

Respondent's argues, by way of its First and Twelfth Affirmative Defenses, that the Union necessarily waived its statutory *effects*-bargaining rights with respect to subcontracting because it has waived its statutory *decision*-bargaining rights. See Resp.'s Answer ¶¶ 14, 36. According to Respondent, the CBA gives it the unilateral right to subcontract bargaining unit work, and thus "[e]ffects bargaining is not required because the effects are inherent in the decision to subcontract the work." Id. ¶ 36. But there is no contract waiver of the Union's decision-bargaining rights in this case, and thus Respondent's affirmative defenses must fail.[8]

As a preliminary matter, the issue of whether the CBA contains a waiver of the Union's decision-bargaining rights with regard to subcontracting is properly before the ALJ. Union's Cross-exceptions. While the Acting General Counsel has not alleged a decision-bargaining violation (thus preventing the ALJ from finding a decision-bargaining violation), Respondent has raised affirmative defenses to the effects-bargaining allegations that necessitate findings on whether there has been a decision-bargaining waiver. See Vico Prods. Co., 336 NLRB 583, 589-90 (2001) (ALJ erroneously disallowed exploration of issue at hearing on grounds that issue not raised in complaint because issue was raised by respondent as an affirmative defense); Dayton Newspapers, 339 NLRB 650, 656, 667 (2003) (Board considered and found lockout to be unlawful in response to respondent's business justification defense for failing to reinstate strikers, despite fact that Regional Director had dismissed charge alleging unlawful lockout). It does not matter that the Regional Director and General Counsel have previously decided not to pursue charges filed by the Union alleging decision-bargaining violations arising from

[8] As discussed below, even if there was a contract waiver of decision-bargaining rights, there was no contract waiver of effects-bargaining rights.

Respondent's subcontracting practices: "Prosecutorial decisions by the Regional Director and General Counsel are not adjudications and have no preclusive effect on future actions of the Board." O'Dovero v. NLRB, 193 F.3d 532, 536 (D.C. Cir. 1999) (citing cases); see Int'l Union of Elec. Workers v. Gen. Elec. Co., 407 F.2d 253, 264 (2d Cir. 1968) ("[T]he proceeding before the Board was administrative only, neither formally adversarial nor like a trial. As such, it has no collateral estoppel effect.").

Respondent has failed to establish a clear and unmistakable waiver of decision bargaining by the Union. While a union may contractually waive statutory bargaining rights, only "clear and unmistakable" waivers of such rights are recognized by the Board. See Provena Hospitals, 350 NLRB 808, 809-15 (2007). This is because our "national labor policy disfavors waivers of statutorily protected rights." Olivetti Office USA, Inc. v. NLRB, 926 F.2d 181, 187 (2d. Cir. 1991). As the Board in Provena Hospitals recognized, the "clear and unmistakable" waiver standard has been approved by the Supreme Court. See Provena Hospitals, 350 NLRB at 812 (citing NLRB v. C&C Plywood Corp., 385 U.S. 421 (1967) (upholding Board's application of the "clear and unmistakable waiver" standard in finding that a provision in a collective bargaining agreement did not constitute a waiver of the union's bargaining rights) and Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.")). To be sure, the employer raising a defense based on contract waiver bears the burden of proving the waiver. See Olivetti, 926 F.2d at 187; NLRB v. N.Y. Tel. Co., 930 F.2d 1009 (2d Cir. 1991) ("The

employer bears the weighty burden of establishing that a "clear and unmistakable' waiver has occurred.").

In this case, there is no contract language that establishes a "clear and unmistakable" waiver of the Union's right to bargain over Respondent's decisions to subcontract bargaining unit work. Article 15, which addresses subcontracting, provides as follows:

> 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-3(a) at 11.

Contract waiver principles are set forth in the Board's oft-cited decision in Tocco Division of Park-Ohio Industries, Inc., 257 NLRB 413 (1981). The employer there claimed that the union had waived its right to bargain over the employer's transfer of work, by virtue of having agreed to a provision for severance pay "in the event 'the company determines' to . . . transfer a Tocco operation." Id. at 413 n.1. The Board refused to find that this clause constituted a waiver of the union's "statutory right to be consulted in advance about respondent's decision to transfer work." Id. at 414. The Board explained:

> The severance pay provision speaks only of the severance pay to be provided in the event of the closure of the Tocco plant or transfer of a Tocco operation. The provision is at best equivocal, however, as to the waiver issue before us, it contains no specific reference to a right by Respondent to transfer work to Boaz without prior notice or consultation with the Union.

Id. at 414. In reaching this conclusion, the Board in Tocco dealt with the employer's claim that a waiver finding was compelled by the Board's decision in another case where "the contract afforded employer 'the exclusive right' to 'change, modify or cease its operation, processes, or production in its discretion' as well as provisions that 'the employer shall be the sole judge of all factors involved including location of business and personnel." Id. at 414 n.7. The Board in Tocco rejected reliance on the other decision because the case before it "contain[ed] no such explicit language." Id. The same is true of Article 15 here. Indeed, the ALJ noted the absence here of such explicit language. (ALJD at 21).

In Consolidated Foods Corp., 183 NLRB 832, 833 (1970), the Board found a contract waiver was afforded by language granting the employer "the exclusive right" to "unilaterally" transfer certain work. Significantly, the Board distinguished its previous decision in Weltronic Company, 173 NLRB 235, enforced, 419 F.2d 1120 (6th Cir. 1989), cert. denied, 398 U.S. 938 (1970), stating that the contract there,

> included no language expressing union assent to management's right to unilaterally make business decisions having an adverse impact on unit employees. Thus, unlike the instant case, the clause in issue there was devoid of language investing management with "exclusive" or "sole" discretion as to changes in mandatory subjects of collective bargaining. Nor did the Weltronic contract provisions have the scope of the instant one, which gives Respondent exclusive right at all times to "change, modify or cease its operation, processes, or production." Additionally, that contract involved another clause protecting employees against the effects of job eliminations and transfers, and such a restriction, not present here, was viewed as significant to the finding that the union in Weltronic had not waived its right to be consulted about the transfer of work from one plant to another.

Id. at 833 n.5.

This analysis of Weltronic is easily applied to the baseline conditions Article 15 places on Respondent's subcontracting. Article 15 states that Respondent "may" subcontract (the Union

reasonably interprets this to mean *might* subcontract), in which case there can be no employees in the affected classifications on layoff. Article 15 does not contain any *explicit* language of the type quoted above and emphasized by the Board as necessary to a waiver finding. In fact, language similar to the quoted explicit language—found in the management rights clause—was *removed* from the terms of the parties' collective bargaining agreement at the Union's insistence. GC-3(a) at 7; GC-3(b) at 4; Tr. at 221-24 (Irish), 250-51, 256-59, 1217-19 (Flanagan). The analogy is persuasive. Just as the Board cited the absence of any clear and explicit language before it in Park-Ohio and Weltronic, the parties here chose to eliminate such language from the current agreement. The result is that Article 15 does not constitute a clear and unmistakable waiver by the Union of the right to be consulted in advance about subcontracting; Article 15 speaks only of baseline conditions that come into play *in the event there is subcontracting.* In the words of one court, Article 15 is but a "tidbit" [that] 'falls far short of the 'clear and unmistakable' evidence by which the company must demonstrate the Union's waiver of a statutory right." Sw. Steel & Supply v. NLRB, 806 F.2d 1111, 1115 (D.C. Cir. 1986).

A finding of waiver based on the language in Article 15 would be akin to the approach rejected by the Board in Reece Corp., 294 NLRB 448, 449 (1989), where the Board rejected the administrative law judge's finding of a contract waiver that was, in his view, "clear implication." Interpreting "may subcontract" as an authorization for unilateral action, instead of a mere possibility of action after lawful bargaining, which is the other available interpretation of the words, is engaging in "normal contract interpretation"; this is inadequate to find clear and unmistakable waiver. Valley Programs, Inc., 300 NLRB 423, 424 (1990). The Union's reading of

"may subcontract" is "at least arguable," precluding a finding of waiver as to decision bargaining. Ironton Publications, Inc., 313 NLRB 1208, 1208 n.3 (1994). The burden is on Respondent to prove this defense, and the risk of any ambiguity in the language falls on the Respondent. St. Luke Lutheran Home for the Aging, 317 NLRB 575, 578 (1995). Thus, the language of Article 15 does not reflect a clear and unmistakable waiver by the Union of its decision-bargaining rights.

Moreover, there is nothing in the bargaining history of the parties that suggests a clear and unmistakable waiver as to subcontracting decisions by the Union under the current contract. See Pepsi-Cola Distrib. Co., 241 NLRB 869, 869 (1979) (considering "the facts and circumstances surrounding the making of the contract" in determining whether contract waiver has occurred). In Johnson-Bateman Co., 295 NLRB 180, 184 (1989), the Board explained: "[T]he issue . . . is not solely a matter of contract interpretation. . . . [T]he bargaining history of the instant contract documents do not establish that [the alleged waiver] was discussed in contract negotiations." Similarly, in KIRO, Inc., 317 NLRB 1325 (1995), the employer decided to produce a news program to air on another television station. The claim was made that the union waived the right to bargain over the effects of this in the contract, because the management rights clause reserved to the employer the right to "schedule," "assign work," and establish "production standards." The Board found, however, that the waiver was not clear and unmistakable based on the contract language and that the evidence pertaining to bargaining history did not support the employer's defense:

> [T]he judge correctly emphasized the absence of evidence that the parties discussed the possibility of producing a 10 p.m. news program, to air on another station, during the negotiation of the current agreement. The Union thus could

not have "consciously yielded or clearly and unmistakably waived its interest" in bargaining about the effects of a decision to produce such a program.

Id. at 1328.

In Park-Ohio, discussed above, the Board's conclusion that there was no contract waiver was also based on a finding that the bargaining history did not support such a waiver. 257 NLRB at 414. In that case, the Board noted that the employer never submitted a contract proposal which sought to limit or restrict the union's statutory right. Id. A similar lack of evidence was present in Flatbush Manner Care Center, 315 NLRB 15 (1994). The employer claimed that the union waived the right to bargain with respect to certain bonus payments. The Board approved the administrative law judge's rejection of this defense, where the ALJ stated: "Respondents who have the burden of proof of the waiver which it asserts as an affirmative defense have failed to adduce any evidence relating to the contemporary negotiations, bargaining history, or past practices, which support a clear and unmistakable waiver." Id. at 20; accord Allison Corp., 330 NLRB 1363, 1365 (2000).

In the instant case, the evidence from the bargaining history for the applicable current agreement is that the Union insisted on eliminating Respondent's exclusive right to act in subcontracting decisions, which it reasonably considered to derive from the broad management rights clause contained in the 2003 CBA. Tr. at 221-23 (Irish), 250-51, 256-59, 1217-19 (Flanagan). Indeed, the management rights clause in the previous version of the CBA expressly provided that Respondent had the exclusive right "to subcontract, contract out, close down, or relocate the Company's operations or any part thereof." GC-3(a) at 7. The Union was successful in getting that language removed for the current contract. GC-3(b) at 4. Respondent was at the very least put "on notice that the [Union] contemplated a change in the bargaining

relationship in that respect." Gannett Co., 305 NLRB 906, 906 n.1 (1991). Further, Respondent did not put forth persuasive evidence to the contrary in terms of the parties' bargaining history. Thus, the 2008-09 negotiation history does not show that the Union clearly and unmistakably waived its right to decision bargaining over subcontracting.

Moreover, other provisions added to the CBA in 2009 show an intent by the parties that Respondent would *not* have the right to rely on a pre-existing practice, and they must be considered in assessing whether Article 15 is a waiver. See Ironton Publications, Inc., 313 NLRB 1208, 1208 n.3 (1994). Under the new Article 7(A) and Section (9) of the 2008 MOA, subcontracting was not agreed to as an "existing practice" and Respondent therefore could not subcontract unilaterally. GC-3(b). As found by Arbitrator Maroney in a case involving an analogous issue, if no agreement was reached under the new procedure on an existing regulation, or here, a practice, then Respondent could not rely on it to act unilaterally. CP-3 at 10-11. This arbitration award should be considered in determining whether on balance, the Union granted Respondent the unilateral right to subcontract. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 709 n.13 (1983). Respondent's affirmative defenses premised on the claimed contract waiver of the Union's decision-bargaining rights should be rejected.

B. Respondent Has Not Established a Contract Waiver of Effects Bargaining.

Finally, assuming that Article 15 did contain an express contractual waiver of the Union's right to engage in decision bargaining over subcontracting (and it does not), that would not mean that the Union also waived its effects-bargaining rights. The Board has made clear that even explicit contractual language such as, "[t]he Company shall have the exclusive right to . . .

subcontract," does not amount to a waiver of *effects* bargaining over subcontracting. Allison Corp., 330 NLRB 1363 (2000).

Respondent nevertheless argues that the Union waived its right to bargain about the effects of subcontracting because "such effects are clearly spelled out in" and "covered by" the Collective Bargaining Agreement. Resp.'s Answer at 7 ¶¶ 34-35. Simply put, that is not true.

As discussed above, any contractual waiver of statutory rights—be they decision-bargaining rights or effects-bargaining rights—must be "clear and unmistakable." See Provena Hospitals, 350 NLRB 808, 809-15 (2007). In this case, there simply is no language in the current contract which establishes a "clear and unmistakable" waiver of the Union's right to bargain over the effects of Respondent's subcontracting. The language in Article 15 regarding Respondent's obligation to recall laid off employees, on its face, merely establishes a *condition precedent* to any subcontracting done by Respondent, and does not show that the Union intended to waive its right to bargain over all effects of subcontracting. Indeed, that language does not address layoffs that *result from* subcontracting, rather it addresses Respondent's obligation to recall employees who, at the time of the subcontracting, had already been laid off.

This reading of the contract language is borne out by the testimony regarding contract negotiations. Mr. Irish testified that the Union proposed that language during negotiations in 2003 as a "condition[]" on subcontracting, not in an effort to address all possible effects subcontracting might have on unit employees. Tr. at 83, 88. And Respondent failed to elicit evidence suggesting that this language was in any way meant to address such effects. Further, Mr. Flanagan, who was the chief negotiator for the Union during the 2003 negotiations, testified that the Union expressly reserved the right to bargain over the effects of Respondent's

subcontracting. Tr. at 244-47, 264-66. Indeed, according to Mr. Flanagan's undisputed testimony, Respondent's chief negotiator, Mr. Corbett, expressly confirmed to him that the Union would always have the right to negotiate over the effects of any subcontracting. Id.[9] And, the ALJ expressly rejected, on credibility grounds, Respondent's contention that the Union waived the right to effects bargaining in the 2008 negotiations. ALJD at 20.

Similarly, the side letter between the parties which states that Respondent "will endeavor, but will not guarantee, to avoid having employees work in the same vehicle or on the same jobsite as contractors" (GC-3(a) at 21), does not on its face reflect an unequivocal waiver by the Union of its right to bargain over the effects of subcontracting. The testimony elicited at the hearing makes clear that this provision was a purely philosophical concern of the International Union over having members working alongside non-members, i.e., it was unrelated to the concerns raised in the Union's August 29, 2011 letter. Tr. at 245, 260-61 (Flanagan). Respondent presented no evidence to the contrary. Thus, the side letter did not arise after a full and conscious exploration by the parties of the effects of subcontracting on unit employees. See Amoco Chem. Co., 328 NLRB 1220, 1221-22 (1999) ("Either the contract language relied on must be specific or the employer must show that the issue was fully

[9] The ALJ specifically noted this testimony. ALJD at 3. None of Respondent's witnesses were directly involved in the 2003 contract negotiations, including Mr. Benson. Tr. at 1153 (Benson), 1211-12 (Flanagan). As such, any of their testimony purporting to contradict that of Mr. Irish and Mr. Flanagan should be disregarded.

discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.").[10] Again, not only were the effects of subcontracting not fully explored, but the Union *expressly reserved the right* to bargain over such effects. Tr. at 244-47, 264-66.

In any event, even if the above provisions in fact dealt with certain effects items, such does not amount to a waiver by the Union to bargain over other effects of subcontracting at the appropriate time. See KGTV, 355 NLRB 1283, 1285 (2010) (layoff clause); see also Mount Sinai, 331 NLRB 895, 911 (2000) (contract provision regarding information was not a waiver of the right to other information).

While the Union made proposals regarding Article 15 and subcontracting during negotiations for the current contract, the undisputed testimony shows that Respondent rejected them out of hand and the parties did not discuss the proposals. Tr. at 197-98 (Irish), 261-62, 1213-14 (Flanagan); see Aeronca, Inc., 253 NLRB 261, 265 (1980) (no waiver or right to bargain over turkey bonus where employer "took a brief look" at union proposals regarding same and "concluded that it was too ponderous a basis for meaningful negotiations"). In fact, the Union's Article 15 proposals were formally withdrawn in December 2008. Tr. at 198, 259. They had been submitted as an alternative in the event the Union was unsuccessful in removing the offensive management rights clause (Tr. 223-24).

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[10] On cross-examination, Mr. Irish testified (over counsel for the General Counsel's objection) that safety "could have been one of" the Union's concerns with regard to the side letter. Tr. at 89-90. However, such equivocal testimony is not enough to show that effects of subcontracting was "fully discussed and consciously explored." See Amoco Chem. Co., 328 NLRB at 1221-22. Further, Mr. Flanagan was the lead negotiator at the time, not Mr. Irish, and Mr. Flanagan confirmed that the Union's concern was philosophical and not in any way related to safety concerns.

Thus, neither the contract language, nor the parties' actions, reflect a clear and unmistakable relinquishment of the Union's right to bargain over the effects of Respondent's subcontracting.

POINT VI

THE ADMINISTRATIVE LAW JUDGE PROPERLY FOUND TRANSMARINE APPLICABLE.

The Board has explicitly stated that Transmarine Navigation Corp., 170 NLRB 389 (1968) is warranted when work is removed from the bargaining unit, and this is such a case. See Heartland Health Care Ctr. 359 NLRB No. 155 (2013), slip opinion at 2. Transmarine is therefore applicable.[11]

CONCLUSION

For the foregoing reasons, the Board should reject Respondent's exceptions in their entirety.

Respectfully submitted,

Dated: March 10, 2014

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[11] The Union has cross-excepted to the ALJ's modification of the standard Transmarine remedy, and the Union's assertions are fully set out in its brief in support of its cross-exceptions. This portion of the Union's answering brief, therefore, merely addresses the Respondent's position that no Transmarine remedy is warranted.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORPORATION, Respondent, and LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Charging Party.	Cases 03-CA-075635 03-CA-081230

CERTIFICATE OF SERVICE

James R. LaVaute, attorney for the charging party in the above captioned matter, certifies that on March 10, 2014 a copy of the within Charging Party's Answering Brief to Respondent's Exceptions was served by electronic mail upon Respondent's attorneys and upon Region 3:

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