UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
THIRD REGION

ROCHESTER GAS & ELECTRIC CORPORATION

and

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

REPLY IN SUPPORT OF RESPONDENT'S EXCEPTIONS

Case No.: 03-CA- 081230
03-CA-075635

PRELIMINARY STATEMENT

Before the Board are Exceptions, Cross-Exceptions, Answering and Reply Briefs that fully set out the parties' positions regarding the Administrative Law Judge's Decision. Notably, in their Answering Briefs to Rochester Gas's Exceptions, the Union and General Counsel do not agree about what the ALJ's decision requires Rochester Gas to do going forward. Their conflicting arguments demonstrate that the decision is not only incorrect, it will be impossible for Rochester Gas to comply. The Decision should be reversed and the charges should be dismissed.

ARGUMENT

POINT I.

THE COMPLAINT REGARDING SUBCONTRACTING TO HEATH FOR A *DE MINIMUS* AMOUNT OF THE GAS WALKING SURVEY SHOULD BE DISMISSED.

The Union and General Counsel admit that Rochester Gas advised the Union about the Heath subcontracting eleven (11) days prior to actually implementing the subcontracting. Yet, they contend it was reasonable for the Union to resort to a burdensome and unnecessary information request rather than effects bargain during that eleven days. Similarly, the Union and General Counsel acknowledge that

Rochester Gas contracted out far less of the gas walking survey than it had in the past, and that, in total, a very small percentage of the survey was contracted out. They also acknowledge (as did the ALJ) that Union employees worked ten-hour days both before and after the contractor performed its work. Yet, they argue any violation was not *de minimus* because there might have been some unit employees who might have been able to perform additional overtime beyond what they were already doing.

Neither the Union nor the General Counsel has any real idea whether there were people qualified to perform gas survey work that were not already working overtime;[1] whether additional work could have been accomplished by people only able to contribute an hour or two[2]; or whether there was sufficient equipment to perform this ad hoc work. Their assertion that this very minimal subcontracting affected the bargaining unit makes no sense.

Likewise, the General Counsel's suggestion that the internal e-mail on August 26 indicates some special importance of the location of work done by contractors is incorrect. One of the locations in the e-mail is not even a location where the contractor actually did work—bargaining unit employees finished the work there while the contractor was sent to a different town. The location of the performed work does not transfer this minor work into something bigger than it was.

Finally, there were no effects to bargain about for this very short work in isolated towns. Rochester Gas complied with the CBA regarding avoiding shared workspace

[1] In fact, the UUI and construction workers were already all working overtime on the gas walking survey.

[2] The only reasons subcontracting was necessary in the first place is that union employees were unable to perform sufficient numbers of gas walking surveys between March and August.

and no lay-offs occurred. The bargaining unit was not affected by the gas walking subcontracting, and the charge should be dismissed.

POINT II.

ROCHESTER GAS GAVE THE UNION NOTICE OF THE SUBCONTRACTING ALLEGED IN THE COMPLAINT IN NOVEMBER 2010 AND THE COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS.

There is no dispute that Rochester Gas sent the Union a list of all currently on-going and planned subcontracting projects in November 2010. There is also no dispute that the spreadsheet named the contractor and detailed the work being performed (or scheduled for performance) by Stanley Wright, Power and Construction, O'Connell Electric, and Premier. There is agreement that the spreadsheet detailed the work (though the contractor was not yet known) planned for the following year and performed by D&D, Michel's Power, and Heath.[3] In November 2010, the Union was in possession of sufficient information to know what work was planned to be subcontracted in the coming year. In all but three cases, the Union knew who the planned contractor was.[4] The Union possessed notice of the subcontracting and sufficient information to at least allow it to begin bargaining. The Union knew about the subcontracting and knew what information had and had not been provided in 2010. Yet, the Union did nothing, except once again say the information they received was insufficient.

Instead, two years later, the Union filed this charge. The charge is untimely and should be dismissed.

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[3] The spreadsheet indicated the gas walking survey work would likely be subcontracted to Premier. Heath's bid was lower than Premier.

[4] As explained, Northline did no work at RGE during the time period. Neither the Union nor the General Counsel disputed this. The charge as to Northline should be dismissed. The charge as to Michel's should also be dismissed as Michel's did no bargaining unit work. The work Michel's did was always performed by contractors. Neither the General Counsel nor the Union argue that these charges should not be dismissed.

POINT III.
THE SUBCONTRACTING WAS CONSISTENT WITH PAST PRACTICE

The ALJ found, and the Union and General Counsel concede, that Rochester Gas had subcontracted work in the past using the same method to determine what work to subcontract and the same method to notify the Union. In fact, the work subcontracted to Stanley Wright had been subcontracted to Stanley Wright for 30 years; the work subcontracted to Premier Utilities was the subject of a previous unfair labor practice that was dismissed; the work subcontracted to LL&P had been the subject of a previous grievance, and the work subcontracted to KBH had been subcontracted for at least 20 years.

The Union concedes the only difference in the subcontracting this time is the scope of certain subcontracting in 2009-2012. But, in an effort to argue that this work was not just different in volume but in type, the Union and General Counsel greatly exaggerate the effect this change in this subcontracting had on the bargaining unit.

The Union and General Counsel ignore that the increase in the 2009-2012 capital budgets increased both unit overtime and use of subcontractors to fill in the gaps. Of course the goal each year is to get as much of the capital work done using internal crews without overtime—that makes business sense. In these years, due to the expanded capital budgets, the unit employees had significantly expanded overtime in addition to the contractors' work. The Unit did not lose those overtime opportunities.

Further, the Union and General Counsel should not be allowed to cherry pick the PSC audit report for language supporting their position while ignoring the rest of the report that contradicts their position. The PSC audit report praises Rochester Gas for subcontracting stakeout work to Premier and suggests Rochester Gas look to

subcontract other similar work. It also relied heavily on its conclusion that Rochester Gas should engage in additional cross-territory work with New York State Electric and Gas, but the Union has repeatedly objected and refused to even negotiated concerning a broad cross-territory work agreement. The audit report is the opinion of the auditors, nothing more. It does not demonstrate impact to the bargaining unit any more than it demonstrates cross-territory work should occur.[5] In fact, the auditor report completely ignores the fact that Rochester Gas's workforce is unionized and that to make some of the changes suggested, the Union would have to be involved. Its conclusions should be disregarded.

POINT IV.

THE COMPLAINT REGARDING THE INFORMATION REQUEST SHOULD BE DISMISSED AS THE INFORMATION SOUGHT WAS NOT RELEVANT AND WAS PROVIDED ONCE THE UNION COMMUNICATED WITH ROCHESTER GAS REGARDING THE REQUEST.

Throughout this process, the Union has continued to assert its claim that it has a right to bargain about the decision to subcontract work as well as the effects. In its responding brief, the Union further asserts that even if the information it sought in the letter was only relevant to decisional bargaining, it still had to be provided to the Union. This statement of the law is incorrect and is not consistent with even the ALJ's decision, but it is telling about the Union's real purpose in requesting the information. To support its position, the Union relies heavily on *Pub. Serv. Co. of Colo.*, 312 N.L.R.B. 459 (1993). But, in *Public Service Company*, the Board found the CBA did not address subcontracting and therefore, the Respondent was required to provide information and

[5] The PSC audit report does not even address the impact a unionized workforce has on its recommendations.

bargain about both the decision to contract work and the effects of that decision. The General Counsel has declined to charge Rochester Gas with a failure to engage in decisional bargaining. The information request sought a broad range of information that related solely to decisional bargaining and was not relevant.

Even if it were relevant, the ALJ, Union and General Counsel continue to ignore the role the Union played in causing the delay in a response to the information request. Bargaining is a give and take process. The Union cannot simply sit back, not communicate with Rochester Gas, and then file a charge. Irish did not correct Rochester Gas's mis-impression that the information sought related to Heath; the International Representative advised Rochester Gas that it did not have to comply with the information request, Sondervan refused to discuss modifying the information request or to consider obtaining the information through conversations with people rather than a supply of documents. Throughout the process, the Union demonstrated its real goal was to trip up Rochester Gas so it could file an unfair labor practice and claim a *Transmarine* remedy. The charge should be dismissed as the Union's tactics played a significant role in delaying Rochester Gas's response.

POINT V.
OVERTIME IS NOT A SUBJECT OF EFFECTS BARGAIN AS IT RELATES DIRECTLY TO THE DECISION.

The General Counsel attempts to defend the ALJ's decision that overtime is an effects bargaining issue by relying on *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996) for the proposition that overtime instead of subcontracting is a subject of effects bargaining. But *Dorsey Trailers* actually supports Rochester Gas's position that whether work is performed with union overtime or with subcontractors is the decision itself. In *Dorsey*

Trailers, the Board found respondent violated the act by failing to bargain about the *decision* to subcontract work, holding that the *decision* to subcontract work affected unit employees because the employer chose subcontracting instead of overtime. That is exactly Rochester Gas's point. Overtime is not an effects bargaining issue because whether there is overtime or not is inherent in the *decision* to subcontract work or perform the work using overtime. Rochester Gas has the right to make that decision without bargaining about the use of overtime or the use of subcontractors. [6]

POINT VI.

THE ALJ'S DECISION IS IMPOSSIBLE FOR ROCHESTER GAS TO COMPLY WITH GIVEN ITS LACK OF CLARITY AND ITS POTENTIALLY UNREALISTIC IMPLEMENTATION IN ROCHESTER GAS'S BUSINESS AND THE CHARGES SHOULD BE DISMISSED AS EFFECTS BARGAINING IS NOT REQUIRED

One thing is clear from the Union and General Counsel's Answering Briefs—no one knows what the ALJ's Decision requires. Is Rochester Gas supposed to bargain with the Union before entering a subcontract as the General Counsel asserts? If so, how is Rochester Gas supposed to fulfill the Union's information request seeking a copy of the subcontract and the other related information if that subcontract is not yet finalized? Is Rochester Gas supposed to bargain after a subcontract is entered but before the work is fully determined? Or, as the Union asserts, is Rochester Gas required to bargain each time a purchase order for work is issued under the subcontract, effectively grinding Rochester Gas's operations to a halt and limiting its flexibility to deal with the inevitable emergencies inherent in the gas and electric

[6] *Live Oak Skilled Care*, 300 NLRB 1040 (1990) does not address overtime, but what the union might have achieved during a takeover. Respondent does not deny that effects bargaining may be appropriate during a major change in business operations such as a takeover.

business? How much time must Rochester Gas give the Union to bargain—must it delay work?

These issues are precisely why Rochester Gas negotiated with the Union for Article 15 of the Collective Bargaining Agreement permitting Rochester Gas to subcontract work. These questions are the reason why Rochester Gas refused to change Article 15 during the subsequent negotiations and why Rochester Gas has steadfastly insisted it needs flexibility to manage its workforce and subcontract work when needed. They demonstrate the absurdity of these charges and the ALJ position that Rochester Gas must effects bargain about subcontracting when subcontracting has already been addressed by the parties in the collective bargaining agreement and other related documents. The decision is unworkable and the complaint should be dismissed.

POINT VII.

A *TRANSMARINE* REMEDY IS INAPPROPRIATE.

The Union and General Counsel assert the ALJ erred in awarding a modified *Transmarine* remedy based loosely on the lost overtime to the unit. Rochester Gas agrees, but there should be no *Transmarine* remedy at all. In this case, the evidence demonstrates the Union worked significantly more overtime during the period in question than previously. The Union still represents the employees on whom Rochester Gas relies for work, and the parties still have an active relationship. There is no negative impact on the bargaining unit and the only purpose of a *Transmarine* remedy in this case would be to punish Rochester Gas and give a windfall to the Union. Neither is a proper purpose of a remedy. *See AG Commun. Sys. Corp*., 350 N.L.R.B. 168, 173

(N.L.R.B. 2007) (declining to issue *Transmarine* remedy where only purpose would be windfall to the unit).

CONCLUSION

For the foregoing reasons and those set out in Rochester Gas's original brief in support of objections, the decision of the ALJ should be reversed and the complaint should be dismissed.

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Binghamton, New York

/s/ James S. Gleason
James S. Gleason, Esq.
HINMAN, HOWARD & KATTELL, LLP
Attorneys for Respondent Rochester Gas & Electric
Office and Post Office Address
Hinman, Howard & Kattell, LLP
P.O. Box 5250
Binghamton NY 13902-5250
[Telephone: (607) 723-5341]
jgleason@hhk.com