

**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**

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

AARON B. SUKERT
COUNSEL FOR THE GENERAL COUNSEL
National Labor Relations Board
Region Three
Niagara Center Building
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202-2465

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I. BACKGROUND:

On February 19, 2014, Counsel for General Counsel and the Charging Party filed Cross-Exceptions to the Decision of Administrative Law Judge (ALJ) Steven Davis in the above-captioned matter.¹

On March 4, 2014, Respondent filed an Answering Brief to the Union's Cross-Exceptions. In its Answering Brief to Union's Cross-Exceptions, Respondent states that in its exceptions it already addressed the issue raised by General Counsel's single cross-exception, regarding the appropriateness of a remedy under Transmarine Navigation Corp., 170 NLRB 389 (1968). Respondent does not otherwise comment on General Counsel's single cross-exception. However, Respondent addressed various cross-exceptions raised by the Charging Party.

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. __). 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.

On March 5, 2014, the General Counsel filed an Answering Brief to Charging Party's Cross-Exceptions to the Decision of the Administrative Law Judge.

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, General Counsel, by the undersigned, submits this Reply Brief to Respondent's Answering Brief to Charging Party's Cross-Exceptions.

II. RESPONDENT'S ANSWERING BRIEF ADDRESSING CHARGING PARTY'S CROSS-EXCEPTIONS 4 AND 5:

In this Reply Brief, General Counsel addresses only "Point III" raised in Respondent's March 4, 2014 Answering Brief to Charging Party's Cross-Exceptions, at pages 5-7.

In Point III, Respondent addresses Charging Party's Cross-Exceptions 4 and 5. Charging Party's Cross-Exception 4 states the following:

"4. The finding that '[i]n a letter dated March 20, [2012] [Company representative Thomas] Cammuso sent detailed information to the Union which the Union agrees satisfied the request for information set forth in its August 29 [,2011] letter' and that 'the Union agrees that it has received the information set forth in [its] August 29 [,2011] letter which is the basis for the alleged violation.' ALJ Decision at 11, 24."

Charging Party's Cross-Exception 5 states the following:

"5. The finding that '[i]n mid to late 2010, the Union requested information concerning subcontracting and the Employer sent responses which included the specific information requested.' ALJ Decision at 12."

Respondent contends in its Answering Brief, that Respondent provided extensive responsive information for the Union in both 2010 and in 2012. Respondent further notes that the Union did not request effects bargaining about any of the information provided in 2010, and did not request to effects bargain after having received information on March 20, 2012.

III. ARGUMENT:

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, in its March 5, 2014 Answering Brief to Charging Party's Cross-Exceptions at page 5, submits that the Union never conceded at the hearing that it had received all of the information on March 20, 2012, which it had requested in its August 29, 2011 information request regarding subcontracting.² By the same token, General Counsel, in its March 5, 2014 Answering Brief to Charging Party's Cross-Exceptions, at page 5, 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).³

However, General Counsel disagrees with Respondent's contention in its March 4, 2014 Answering Brief to Charging Party's Cross-Exceptions at page 6, that the Union's failure to engage in effects bargaining upon receipt of information on March 20, 2012, reflects a waiver of the Union's right to bargain, or a disingenuous interest to engage in effects bargaining on the part of the Union. In short, Respondent attempts to blame the Union for the ramifications of its own unlawful conduct.

Effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a *fait accompli*. (18 ALJD 6-9). Heartland Health Care Center-Plymouth Court, 359 NLRB No. 155, slip op. at 1, n.1 (2013); Woodland Clinic, 331 NLRB 735, 737-738 (2000). The ALJ properly found that Respondent's seven-month delay in notifying the Union that it entered into subcontracting projects/master service agreements, and in providing relevant requested information, deprived the Union of notice and an opportunity to

² In fact, the ALJ discusses that the Union business manager testified the Union was not satisfied 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). Thus, 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.

³ General Counsel has alleged an unlawful delay in providing information until 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).

engage in meaningful effects bargaining at a meaningful time. (19 ALJD 5-9; 23 ALJD 40-46; GC Exh. 15-21; GC Exh. 48-51). Allison Corp., 330 NLRB 1363, 1366-1368 (2000).

On August 29, 2011, the Union requested to bargain about the effects of any subcontracting. (GC Exh. 28). The Union could not be expected to engage in meaningful bargaining post-implementation, on March 20, 2012, after Respondent had already entered into subcontracts, and work had been performed pursuant to those subcontracts. (16 ALJD 20-26; 17 ALJD 6-8). It would have been futile for the Union to have engaged in bargaining at that point, especially, as the ALJ found, when the Union no longer retained any bargaining power over the subcontracts. (21 ALJD 46-50). The Union then understandably filed a charge in Case 03-CA-081230 on May 17, 2012, alleging in pertinent part, that Respondent failed to engage in timely effects bargaining over subcontracting of unit work to named subcontractors.

Respondent, in its March 4, 2014 Answering Brief to Charging Party's Cross-Exceptions, when referring to Charging Party's Cross-Exception 5, and R Exh. 19 and other exhibits, faults the Union for not requesting effects bargaining about the subcontracting listed in those exhibits.⁴

In Charging Party's Cross-Exception 5, it excepts to the ALJ's finding as to whether Respondent, on November 23, 2010, (R Exh. 19), 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). First, it should be noted that the information requested in 2010 regarding subcontracting to Premier Utility Services, and the e-mail updates are beyond the scope of the Amended Consolidated Complaint. (GC Exh. 1(o)). See General Counsel's

⁴ Beyond the scope of Charging Party's Cross-Exception 5, (12 ALJD 45-49), which dealt with only R Exh. 19, Respondent also adds onto this argument a discussion about weekly updates to the Union on its use of subcontractors, from November 8, 2010 through May 2, 2011, which predate the August 29, 2011 information request to bargain. (R Exh. 17, 18, 22, 24, 26, 30-40, 44-47, 49, 50, 52, 54, 55, 57, 60, 62, 63). Respondent asserts that the Union should have engaged in effects bargaining in response to receiving these communications.

Answering Brief to Charging Party's Cross-Exceptions, at pages 5-7.⁵

The ALJ, supported by the record, appropriately found that the Union did not waive its right to bargain about the seven subcontracts at issue in Case 03-CA-081230, when it received prior communications about subcontracting. Notwithstanding any of Respondent's communications with the Union that predated the August 29, 2011 request to bargain/information request, the ALJ properly concluded that the Union was entitled to engage in effects bargaining with respect to each new subcontract Respondent had entered into and implemented. (20 ALJD 20-24, 28-31; 21 ALJD 46-49; 22 ALJD 38-45; 23 ALJD 7-11, 25-30, 38-45; GC Exh. 15-21, 48-51). Public Service Co. of Colorado, 312 NLRB 459, 460 (1993). The ALJ properly concluded that the fact that the Union was aware of prior subcontracting projects cannot constitute adequate advance notice as to the seven specific subcontracting jobs at issue in GC Exh. 15-21. (Tr. 312-315; 12 ALJD 27-29; 13 ALJD 28-29; 15 ALJD 45-47; 22 ALJD 34-36; 23 ALJD 25-30).

The e-mails, purportedly received by the Union, did not provide proper notice and opportunity to bargain, and did not constitute advance notice. (22 ALJD 21-26). The ALJ appropriately found that the notices failed to advise the Union before the work began, and did not provide a meaningful opportunity to bargain. (12 ALJD 38-44). The ALJ properly found that Respondent's provision of documents advising the Union of jobs that were already in

⁵ On June 2 and July 27, 2010, dates prior to the earliest date alleged in the Amended Consolidated Complaint, para. VII(a), 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). 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 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.

Likewise the e-mails and attachments referenced by Respondent in its March 4, 2014 Answering Brief to Charging Party's Cross-Exceptions at pages 5-6, contained data outside the relevant time frame; some data regarding subcontractors not even named in the complaint; as well as some data regarding subcontracting performed for NYSEG instead of Respondent (RG&E). The documents refer to subcontracting prior to the effective dates of subcontracts at issue. (Tr. 124, 228-229, 389, 534-536; GC Exh. 15-17, 19-21, 48-51; GC Exh. 71-72).

progress only further “proved the violation,” by demonstrating that the data was not provided in a timely manner for pre-implementation effects bargaining. (22 ALJD 21-26).⁶

IV. CONCLUSION:

Based on the above, General Counsel contends that the arguments raised in Point III of Respondent’s Answering Brief to Charging Party’s Cross-Exceptions should be rejected in their entirety.

DATED at Buffalo, New York, this 19th day of March, 2014.

Respectfully submitted,

/s/ Aaron B. Sukert
AARON B. SUKERT
COUNSEL FOR THE GENERAL COUNSEL
National Labor Relations Board, Region 3
Niagara Center Building, Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202
(716) 551-4931
Aaron.Sukert@NLRB.gov

⁶ The ALJ also properly found that the Union’s unfair labor practice charges regarding effects bargaining over subcontracting, filed prior to the August 29, 2011 request to bargain/information request, clearly demonstrated that the Union had not waived its right to engage in effects bargaining. (23 ALJD 31-36). 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 rather, 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. (4 ALJD 1-10; 23 ALJD 31-36; Tr. 143, 198-200, 205-207, 237-238, 987, 989, 1004-1005, 1011-1012, 1181; GC Exh. 31, 32, 36, 39, 40, 122, 123, 125, 131, 132, 133, 134, 137, 140; R Exh. 6, 19, 71).

STATEMENT OF SERVICE

I hereby certify that on March 19, 2014, copies of General Counsel's Reply Brief to Respondent'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:

For Rochester Gas & Electric Corporation

James S. Gleason, Esq.
Dawn J. Lanouette, Esq.
Hinman Howard & Kattell, LLP
700 Security Mutual
80 Exchange Street,
P.O. Box 5250
Binghamton, NY 13901-3490
E-mail: jgleason@hhk.com
E-mail: dlanouette@hhk.com

For International Brotherhood of Electrical Workers Local Union 36

James R. LaVaute, Esq.
Brian J. LaClair, Esq.
Blitman & King, LLP
443 North Franklin Street, Suite 300
Syracuse, NY 13204
E-mail: jrlavaute@bklawyers.com
E-mail: bjlaclair@bklawyers.com

Dated: March 19, 2014

/s/ Aaron B. Sukert

Aaron B. Sukert, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 3
Niagara Center Building, Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202
Aaron.Sukert@NLRB.gov
(716) 551-4931