

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: March 7, 2017

TO: Charles L. Posner, Regional Director,  
Region 5

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: American Red Cross, Greater Chesapeake and  
Potomac Blood Services Region  
Case 05-CA-180170

530-6067-4022-0000  
625-4410-0000-0000  
625-6625-4400-0000  
625-8883-2400-0000

The Region submitted this case for advice on the appropriateness of a modified *Transmarine*<sup>1</sup> bargaining order. The Employer violated Section 8(a)(5) of the Act by refusing to bargain over the effects of imposing additional job duties on unit employees. The Region's proposed order would require the Employer to pay the difference between the pay earned by the unit employees and the starting wage rate paid to Teamsters-represented drivers who had previously performed the work, from five days after the order is issued until one of the four *Transmarine* conditions is met. We conclude that the proposed order is unwarranted because unit employees have not suffered economic loss and the Union has remained the collective-bargaining representative of the Employer's employees with sufficient economic strength to negotiate successfully. The Region should instead issue an affirmative bargaining order compelling the Employer to bargain over the effects of its nonbargainable managerial decision, absent settlement.

### FACTS

The American Red Cross Greater Chesapeake and Potomac Blood Services Region ("the Employer") is a nonprofit organization that collects, manufactures, and distributes blood and blood products in and around Washington, D.C. It is part of the larger American National Red Cross nonprofit entity. Chapter 3652, Metropolitan District, 1199DC, NUHHCE, AFSCME ("the Union") represents the Employer's

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<sup>1</sup> *Transmarine Navigation Corp.*, 170 NLRB 389, 389 (1968).

collection technicians. The Employer and Union are parties to a local agreement and, because the AFCSCME is a member of the Coalition of American Red Cross Unions (“Coalition”), a national agreement.

In or around November 2015, the American National Red Cross introduced a nationwide “45/45/45 program” (“Program”) to standardize blood-drive setup and breakdown activities. The Union became aware of the Program around October or November 2015, and the Employer implemented it around December 1, 2015. The Program consists of four phases: pre-drive truck load (45 minutes), drive setup (45 minutes), drive breakdown (45 minutes), and post-drive truck offload. The first and final phases are exclusively performed by Teamsters-represented drivers. Drive setup and breakdown are largely performed by Union-represented collections technicians.

During drive setup, collections technicians must meet the driver at the truck, assist unloading it if necessary, and push supply and equipment carts to the drive location. If the facility does not have a ramp, they may be required to carry carts and supplies up and down stairs. This work may have to be performed in inclement weather or extreme temperatures and may require long walks between the truck and blood-drive site.

During drive breakdown, collection technicians repack supply and equipment totes, stack totes and equipment on carts, ensure the carts are strapped down properly, and assist the driver with pushing the carts to the truck. This process includes pushing the carts up the truck ramp or onto a lift gate. Once completed, the driver departs and collections technicians may clock out.

Before the Program was implemented, the Teamsters-represented drivers were solely responsible for unloading the truck, pushing carts from the truck to the blood-drive site, and during breakdown, stacking boxes on carts inside the blood drive, pushing the carts to the truck and reloading it. After implementation, collection technicians were expected to perform these duties.<sup>2</sup>

On November 30, 2015, the Union emailed the Employer to request negotiations over a wage increase to offset the effects of the Program.<sup>3</sup> The parties agreed to meet on January 4, 2016. In the ensuing months, the Employer maintained that while it would “meet with [the Union] to discuss” whether wages in the region

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<sup>2</sup> Section 3, A9 of the National Agreement states that collections staff may be required to assist in setup and tear down of blood drives and may need to assist in the loading and unloading of equipment.

<sup>3</sup> The National Agreement states that “the Employer and Union will negotiate any appropriate base wage increases related to the duties discussed in Section 3, A9 above.”

were in line with wages paid to other Coalition locals, it would not agree to a wage increase for the implementation of the Program because other locals had not requested bargaining over this issue.

The Region has determined that the Employer has violated Section 8(a)(5) by refusing to bargain over the effects of its Program. It seeks advice only on whether a modified *Transmarine* remedy is appropriate under these circumstances. The Region's proposed order is as follows:

[T]he Employer should pay each eligible collection technician the value of the pay differential between that earned by collections technicians and the starting wage rate paid to the Teamster-represented Mobile Unit Drivers . . . who had previously performed the work, for the portion of their shifts performing the tasks added as a result of the 45/45/45 program, from five days after [the] Board's order issues until the occurrence of one of the four *Transmarine* conditions is satisfied.

### **ACTION**

We conclude that the proposed order is not warranted because unit employees have not suffered economic loss and the Union has remained the collective-bargaining representative of the Employer's employees with sufficient economic strength to negotiate successfully. The Region should instead issue an affirmative bargaining order compelling the Employer to bargain over the effects of its nonbargainable managerial decision, absent settlement.

In *Transmarine Navigation Corp.*, the employer refused to bargain over the effects of its decision to close one of its terminals and terminate the employees who worked there.<sup>4</sup> The Board ordered the employer to engage in effects bargaining with the union, at the union's request, and to pay the terminated employees their normal wages starting five days after the Board issued its decision, until one of the following conditions was met: (1) the parties reached agreement; (2) the parties reached bona fide impasse in bargaining; (3) the union failed to request bargaining; (4) the union failed to bargain in good faith.<sup>5</sup> However, in no event would the backpay amount be less than what the employees would have earned for a two-week pay period at their normal rate.<sup>6</sup>

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<sup>4</sup> 170 NLRB at 389.

<sup>5</sup> *Id.* at 390.

<sup>6</sup> *Id.*

Generally, *Transmarine* bargaining orders are appropriate where the union was not given an opportunity to bargain over effects prior to the employer implementing its decision, when it would have been most effective to do so.<sup>7</sup> However, a *Transmarine* remedy is not automatic whenever the employer failed to engage in effects bargaining at the appropriate time.<sup>8</sup> The Board has explained that a *Transmarine* remedy is appropriate to “make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties’ bargaining position is not entirely devoid of economic consequences for the [employer].”<sup>9</sup> Thus, the Board has granted a *Transmarine* remedy in cases where unit employees have suffered an economic loss,<sup>10</sup> and in cases where there has

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<sup>7</sup> See *Rochester Gas & Electrical Corp.*, 355 NLRB 507, 508 (2010) (ordering a *Transmarine* backpay remedy where “the Respondent’s unfair labor practice . . . deprived the Union of ‘an opportunity to bargain . . . at a time prior to [implementation of the decision] when such bargaining would have been meaningful in easing the hardship on employees’”) (alteration in original) (citing *Transmarine Navigation Corp.* 170 NLRB at 389), *enforced sub nom. Local Union 36, Int’l Bhd. of Elec. Workers v. NLRB*, 706 F.3d 73 (2d Cir. 2013). Cf. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681–82 (1981) (“[B]argaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.”); *Metropolitan Teletronics Corp.*, 279 NLRB 957, 959 n.14 (1986) (“[A]bsent special justification, pre-implementation notice is required to satisfy the obligation to bargain over effects.”), *enforced*, 819 F.2d 1130 (2d Cir. 1987) (unpublished table decision).

<sup>8</sup> *AG Communication Systems Corp.*, 350 NLRB 168, 173 (2007) (“[T]he Board may consider any particular or unusual circumstances of the case” in deciding whether a *Transmarine* remedy is appropriate.) (citing *Compact Video Services*, 319 NLRB 131 n.1 (1995)), *enforced sub nom. Int’l Bhd. of Elec. Workers v. NLRB*, 563 F.3d 418 (9th Cir. 2009).

<sup>9</sup> *Transmarine Navigation Corp.*, 170 NLRB at 390 (citing *Royal Plating and Polishing Co.*, 160 NLRB 990, 997–98 (1966)); see also *Richmond Convalescent Hospital*, 313 NLRB 1247, 1249 (1994) (granting *Transmarine* remedy where the union might have secured additional benefits for employees had the employers bargained in a timely manner over effects).

<sup>10</sup> *Comar, Inc.*, 339 NLRB 903, 903, 909 (2003) (*Transmarine* remedy warranted, in addition to affirmative bargaining order, where half of the employees lost their jobs after a plant relocation and those who relocated had several detrimental changes to their terms and conditions of employment), *enforced*, 111 F. App’x 1 (D.C. Cir. 2004); see also, e.g., *Rochester Gas & Electrical Corp.*, 355 NLRB at 508 (ordering modified *Transmarine* remedy where employer refused to engage in effects bargaining over decision to eliminate vehicle benefit that caused unit employees to incur economic

been no clear economic loss but the remedy is needed to ensure that meaningful bargaining can occur by restoring “some measure of economic strength” to a union.<sup>11</sup> On the other hand, the Board has not granted a *Transmarine* remedy where there were no economic losses *and* the remedy was not needed to ensure that meaningful bargaining could occur, e.g., where the union remained the collective-bargaining representative of the employer’s employees and there would be consequences for the employer’s failure to bargain in good faith.<sup>12</sup>

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losses in the form of greater commuting costs); *Rochester Gas & Electrical Corp.*, Case 03-CA-075635, Advice Memorandum dated December 20, 2012 (concluding that *Transmarine* remedy was appropriate where employer refused effects bargaining over decision to subcontract bargaining unit work, which resulted in “palpable financial harm” for unit employees). The Board has also ordered modified make-whole remedies for economic loss, in lieu of *Transmarine*-type backpay awards, where such remedies were better suited to the circumstances of the case. *See Columbia College Chicago*, 360 NLRB 1116, 1118 (2014) (rejecting ALJ’s proposed *Transmarine* remedy but ordering employer to pay one-time fee to affected employees in addition to issuing affirmative bargaining order).

<sup>11</sup> *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1041–42, 1050 (1990) (*Transmarine* remedy granted notwithstanding no loss of employment or reduced wages, but there was a question of whether employees’ accrued time off and overtime benefits were at risk; union otherwise would have no bargaining strength given that the employer sold the hospital and was no longer in business). *See also, e.g., Sea-Jet Trucking Corp.*, 327 NLRB 540, 548–49 (1999) (*Transmarine* remedy issued where job loss from relocation unclear, but employees were unrepresented after plant relocation such that effects bargaining would be devoid of any economic consequences for the employer), *enforced per curiam*, 221 F.3d 196 (D.C. Cir. 2000).

<sup>12</sup> *See, e.g., Naperville Jeep/Dodge*, 357 NLRB 2252, 2254–55 (2012) (no *Transmarine* remedy where the union remained the collective-bargaining representative of the employees because the Board granted an affirmative bargaining order), *enforced*, 796 F.3d 31 (D.C. Cir. 2015); *AG Communication Systems Corp.*, 350 NLRB at 173 (although relocated employees were accreted into another unit, Board emphasized that a *Transmarine* remedy was unwarranted because the employees continued to retain union representation, albeit by a different union); *see also American Medical Response/EMSC*, Case 31-CA-029869, Advice Memorandum dated June 25, 2012 (concluding *Transmarine* remedy not warranted for employer’s failure to bargain over effects of facility closure and relocation where employer had ongoing bargaining obligation with the affected employees’ union and there was no loss of wages or benefits).

In the instant case, neither rationale for granting a *Transmarine* remedy applies. Although the unit employees have been tasked with additional, uncompensated duties, they have not suffered any economic loss<sup>13</sup> and the Union continues to represent them and can do so effectively. As in *Naperville Jeep/Dodge*, where an effects bargaining violation warranted an affirmative bargaining order but not a *Transmarine* remedy, the “imposition of a continuing bargaining obligation . . . subsume[d] the need . . . to impose a *Transmarine* remedy.”<sup>14</sup> Further, there is no basis for concern that the Union will not have sufficient economic strength, under an affirmative bargaining order, to engage in meaningful effects bargaining over additional compensation for the new duties imposed by the Program.

In sum, under the circumstances of this case, we conclude that the proposed *Transmarine* order is not warranted. The Region should instead issue an affirmative bargaining order compelling the Employer to bargain over the effects of its nonbargainable managerial decision, absent settlement.

/s/  
B.J.K.

ADV.05-CA-180170.Response.American Red Cross. [REDACTED]

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<sup>13</sup> *Cf. Good Samaritan Hospital*, 335 NLRB 901, 904 (2001) (issuing affirmative bargaining order to remedy effects bargaining violation that resulted in additional duties for unit members).

<sup>14</sup> 357 NLRB at 2256 n.2 (Member Hayes, dissenting in part).