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**Mike-Sell's Potato Chip Company and International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957.** Case 09–CA–184215

August 2, 2018

ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

On July 25, 2017, Administrative Law Judge Andrew S. Gollin issued his decision in this proceeding finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice and an opportunity to bargain about its decision to sell four company sales routes to independent distributors and by failing to provide the Union with requested information related to the sale of the routes. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed reply briefs.<sup>1</sup>

In finding that the Respondent unlawfully failed to bargain about its decision to sell the four sales routes, the judge rejected the Respondent's defense that, assuming the sale of the routes was a mandatory subject of bargaining, its decision was consistent with its past practice of selling routes to independent distributors. Citing *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont 2016*), the judge reasoned that the Respondent could not rely upon its prior unilateral decisions to sell routes to independent distributors both before and after the expiration of the parties' collective-bargaining agreement.

After the issuance of the judge's decision, the Board issued its decision in *Raytheon Co.*, 365 NLRB No. 161 (2017), in which the Board majority expressly overruled the majority's holding in *DuPont 2016* and the precedent upon which that holding relied. In light of the holding in *Raytheon*, we remand this case to the judge for further consideration, to include permitting the parties to file supplemental briefs to the judge. Further, the judge may reopen the record to obtain evidence relevant to deciding this issue.

<sup>1</sup> On January 9, 2018, the Respondent filed a motion and supporting brief for leave to file supplemental authority in support of its exceptions. In its brief, the Respondent contends that the Board's recent decision in *Raytheon Co.*, 365 NLRB No. 161 (2017), provides further support for its past practice defense.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Andrew S. Gollin for appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. August 2, 2018

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Linda Finch, Esq.*, for the General Counsel.

*Jennifer Asbrock, Esq.*, for the Respondent.

*John R. Doll, Esq.*, for the Charging Party.

DECISION

I. INTRODUCTION<sup>1</sup>

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried in Cincinnati, Ohio, from May 31 through June 2, 2017. The complaint, as amended, alleges that Mike-Sell's Potato Chip Company (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by: (1) failing or refusing to bargain with the International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) about the decision to sell four company sales routes to independent distributors; (2) failing to bargain with the Union prior to selling two delivery vehicles to independent distributors; and (3) refusing to provide the Union with requested information related to the sale of the

<sup>1</sup> Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exhs." for Joint Exhibits; "GC Exh." for General Counsel's Exhibit; "C.P. Exh." for Charging Party's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br. \_" for General Counsel's brief; "C.P. Br. \_" for Charging Party's brief; and "R. Br." for Respondent's brief.

company sales routes. Respondent denies the alleged violations, contending its decision to sell the routes was not a mandatory subject of bargaining. And, even if it had been, Respondent argues the Union waived its right to bargain over the decision, which obviates the Union's claimed need for the requested information. Respondent contends the allegation over the vehicle sales has no merit and is untimely under Section 10(b) of the Act. Based upon the evidence and applicable law, I find the decision to sell the four sales routes amounted to subcontracting of unit work, which is a mandatory subject of bargaining. I further find that the Union did not waive its right to bargain, and that the requested information was both relevant and necessary to the Union for its role as bargaining representative. As for the sale of the delivery vehicles, the General Counsel's post-hearing brief does not address this allegation, and, thus, it appears to have been abandoned. In any event, I find the allegation is barred under Section 10(b) of the Act, because the Union had constructive notice of those sales more than 6 months prior to the filing of the amended charge.

#### II. STATEMENT OF THE CASE

On September 14, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 09-CA-184215, alleging violations of the Act related to the sale of the routes. On December 9, 2016, the Union filed a first-amended charge in Case 09-CA-184215. Based on its investigation, on March 17, 2017, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint against Respondent alleging that it violated Section 8(a)(5) and (1) of the Act when it failed to bargain with the Union regarding the decision to sell the four routes and when it failed or refused to provide the Union with the requested information. On March 27, 2017, Respondent filed its answer, and, on April 24, 2017, filed its amended answer, denying the alleged violations of the Act.

On May 31, 2017, prior to the start of the hearing, the Union filed a second-amended charge in Case 09-CA-184215, adding an allegation that Respondent violated Section 8(a)(5) and (1) of the Act since September 2016, when it unilaterally changed terms and conditions of employment by entering into contracts to sell owner-operator equipment. At the conclusion of its case-in-chief, the General Counsel orally moved to amend the complaint to include allegations that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally sold two delivery vehicles without bargaining with the Union. At the hearing, Respondent denied the amended allegations, as both untimely and without merit. (Tr. 220-221; 1062-1064.)

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent, Charging Party, and General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I

make the following<sup>2</sup>

#### III. FINDINGS OF FACT<sup>3</sup>

##### A. Jurisdiction

Respondent is a corporation with an office and place of business in Dayton, Ohio (Respondent's facility), and has been engaged in the manufacture and distribution of snack foods. In conducting its operations during the 12-month period ending March 15, 2017, Respondent has purchased and received goods at its facility valued in excess of \$50,000 directly from points outside the State of Ohio. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

##### B. Collective-Bargaining Relationship

For over 30 years, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees, within the meanings of Section 9(a) and (b) of the Act:

[A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

Respondent's recognition of the Union as the collective-bargaining representative of the above unit has been embodied in a number of successive collective-bargaining agreements, with the most recent agreement being in effect from November 17, 2008, to November 17, 2012.<sup>4</sup>

The following are provisions contained in the parties' most-recent collective-bargaining agreement:

#### ARTICLE VIII-B ROUTE BIDDING

*Section 5* In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee. However, displacements shall be restricted to the employees' service location.

#### ARTICLE XIV OWNER-DRIVER EQUIPMENT

*Section 1* The Company agrees that it will not employ or con-

<sup>2</sup> On July 7, 2017, Respondent filed a motion to correct approximately 100 typographical errors in the transcript. After reviewing the transcript, I grant Respondent's unopposed motion.

<sup>3</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

<sup>4</sup> The Union also is the exclusive bargaining representative of Respondent's warehouse employees, which are in separate unit and covered by a separate collective-bargaining agreement.

tract for owner-driver equipment, and that the Company shall not rent, lease or sublease equipment to members of the Union or any other individual, firm, cooperation or partnership which has the effect of defeating the terms and provisions of this Agreement.

#### ARTICLE XIX MANAGEMENTS RIGHTS

*Section 1* Management of the plant and the direction of the working force, including the right to hire, promote, suspend for just cause, disciplining for just cause, discharge for just cause, transfer employees and to establish new job classifications, to relieve employees of duty because of lack of work or economic reasons, or other reasons beyond the control of the company, the right to improve manufacturing methods, operations and conditions and distribution of its products, the right to maintain discipline and efficiency of employees is exclusively reserved to the company. It is understood however, that this authority shall not be used by the company for the purpose of discrimination against any employee because of their membership in the union, and that no provision of this paragraph shall in any way interfere with, abrogate or be in conflict with any rights conferred upon the union or its members by any other clause contained in this agreement, all of which are subject to the grievance procedure.

(Jt. Exh. 1.)

#### *C. Background*

##### 1. Respondent's operations

Respondent is headquartered in Dayton, Ohio, and has two production facilities: one in Dayton, where it manufactures its potato chips, and one in Indianapolis, Indiana, where it manufactures its extruded corn products. Respondent currently has one distribution center, located in Dayton, Ohio.<sup>5</sup> Respondent distributes its snack products to Ohio, Indiana, Illinois, Kentucky, Pennsylvania, and Michigan. (Tr. 232–233.)

Respondent has two distribution methods: direct store delivery and warehouse or direct sales. The direct store delivery method is where a salesperson travels around to retail customers within a geographic territory to take orders and deliver products. The warehouse or direct sales method is where a retailer (e.g., Big Lots) purchases and picks up products from Respondent and then distributes the products out to the retailer's individual stores. (Tr. 233–234.)

Direct store delivery is handled by route sales drivers and independent distributors. Route sales drivers are bargaining unit employees represented by the Union. As the title indicates, these drivers are assigned a route and are responsible for servicing the customers (e.g., grocery stores, retail stores, gas stations, restaurants, etc.) on that assigned route. Their duties include reviewing orders, loading their company-owned trucks with product, traveling to customers, stocking customer shelves, rotating unsold product, performing point-of-sale marketing, and removing expired product. The drivers track orders, deliveries, and sales using a company-owned handheld

electronic device. Route sales drivers are paid a commission based on the type and amount of product they sell, as well as additional benefits (e.g., health and welfare benefits, pension, leave, etc.) per the collective-bargaining agreement. The routes can vary as far as number of customers, size of orders, geographic proximity, and sales volume. Routes are assigned to drivers through a seniority-based bidding system.

Independent distributors are individuals or entities that enter into agreements with Respondent for the primary right to distribute Respondent's products within a defined geographic territory.<sup>6</sup> Independent distributors perform the same core tasks as route sales drivers as far as servicing the customers, but, unlike the route sales drivers, they assume the costs and liabilities associated with purchasing, storing, transporting, and selling those products. For example, in addition to paying for the products they sell, distributors are responsible for acquiring, maintaining, and insuring their own delivery vehicle(s), storage location(s), and other tools and equipment. Independent distributors are paid a contractually-agreed upon margin based on the type and amount of product they sell, but do not receive any additional pay or benefits. The specific terms of the arrangement between Respondent and distributors are set forth in the individual independent distributor agreements.<sup>7</sup>

<sup>6</sup> For the purposes of this case, territory and route are used interchangeably. (R. Br. 3, fn. 4.)

<sup>7</sup> The following are some of the terms and conditions contained in the individual distributor agreements. The agreement affords the independent distributor the nonexclusive right to buy, sell, and distribute Respondent's products in the distributor's territory. The distributor agrees to use its best efforts to sell, promote the sale of, and distribute the products to retailers located within the territory. If there is any dispute as to the territory boundaries, the final decision is made by Respondent as to which distributor is to service the territory in question, without recourse from the distributors involved. Respondent agrees to sell and deliver to the distributor, in the quantities required for the distributor's wholesale business, and the distributor is expected to sell the product line available. The distributor understands and agrees that Respondent may in its sole discretion, at least once annually, adjust upward or downward any distributor margins, as long as the Respondent provides the distributor with 30-days' written notice. The distributor is required to adhere to the delivery and merchandise standards prescribed by its customers and by Respondent, and to submit all invoices to the Respondent, without exception, within the timeframe set forth in the agreement. The distributor agrees to maintain sufficient inventory of products to meet the needs of the retailers in the distributor's territory. The distributor agrees to indemnify and hold Respondent harmless for any and all losses, damages, and expenses in any way connected with conducting the distributor's business. To that end, the distributor agrees to maintain liability insurance at the level set forth within the agreement. The distributor agrees to accept full responsibility for, and to pay, all of the costs and expenses incurred by it, or any agent, employee, or representative authorized to act on the distributor's behalf in conducting its business. Respondent and the distributor agree that their relationship is that of a seller and independent buyer, and the distributor shall remain, while the agreement is in effect, an independent contractor whose own judgment and sole discretion shall control activity and movement, the means and methods of distribution, and all other matters pertaining to its business operations. Respondent has no right to require the distributor to work any specific place or time for any purpose, to devote any particular time or hours to the business, to follow any specified schedule routes, to confine or extend business to any particular

<sup>5</sup> Prior to 2012, Respondent had six distribution centers in Ohio (Cincinnati, Columbus, Sabina, Springfield, Greenville, and Dayton).

In the last several years, Respondent has experienced a steady decline in its overall net worth (\$18 million in 1999, to \$5 million currently). (Tr. 235–236). Phil Kazer, Respondent’s Executive Vice President of Sales and Marketing, attributed this decline, in part, to larger competitors, such as Frito-Lay, being better positioned because of their size to market, promote, and aggressively price their products; and to grocery and retail stores, such as Kroger, Meijer, and Walmart, increasingly selling snack products under their own private labels—both reducing the retail space available to Respondent to sell its products. Another reason Kazer cited for the decline in net worth is the annual losses Respondent has experienced in its company route sales division (totaling \$9 million in losses from 2006 to 2016). (Tr. 243–244). Kazer opined that by using company route sales drivers Respondent remains responsible for the costs, both labor and nonlabor, including, but not limited to, the storing, transporting, and stocking of product, as well as the cost of any unsold product. (Tr. 245–246.) Kazer testified that by selling routes to independent distributors, Respondent transfers this risk of loss from the company onto them.

Kazer testified that in this current changing environment, Respondent believes its greatest opportunity for growth is to move away from distributing and focus more on manufacturing and branding quality products. To that end, over the last several years, Respondent has been selling company delivery routes to independent distributors. In around 2012, Respondent had approximately 70 company driver routes. Today, it has approximately 12 routes. In around 2012, there were approximately 100 routes owned by independent distributors. Today, there are over 170. (Tr. 246–247.)

## 2. The 2012 arbitration award

In October 2011, Respondent informed the Union that it intended to sell a remote sales route in Marion, Ohio, to an independent distributor (Buckeye Distributing). Respondent was selling the route because, despite various efforts to make it profitable, it continued to lose approximately \$1100 per week. Respondent informed the Union it intended to sell the route within the next 3 or 4 weeks, and that per article VIII-B, section 5 of the parties’ collective-bargaining agreement, the affected route sales driver (Angie Watson) would be allowed to use her seniority to bump into another route. The Union filed a grievance over the sale and the matter went to arbitration.<sup>8</sup> The Un-

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retail customer, to use any specified techniques for soliciting sales or displaying merchandise, to employ or refrain from employing helpers or substitutes, to make reports to the company, to keep records other than those necessary for invoicing, etc. Respondent may, from time to time, in exercise of its sole judgment, increase or reduce the size of, replace or transfer/reassign any retail outlet to any other distributor, or otherwise change the distributor’s territory, but Respondent will notify the distributor that it is considering such a revision and consult with the distributor relative to the changes that are being considered. Either party may terminate this agreement, at will, with or without cause, by giving 30 days’ written notice to the other party. (Jt. Exh. 12.)

<sup>8</sup> The arbitration decision refers to instances in 2009, 2010, and 2011—during the life of the collective-bargaining agreement—in which Respondent sold routes serviced by unit drivers to independent distributors in which Respondent notified the Union of the decision, and the Union did not object. (Jt. Exh. 1.)

ion argued the sale amounted to unlawful subcontracting of unit work not permitted under the parties’ agreement. Respondent countered that it was not subcontracting, but rather a change in the Company’s distribution methods to reallocate risk of unprofitable routes. Respondent argued it was permitted under the management-rights clause (art. XIX), and was consistent with prior sales of routes that occurred without the Union’s objection. On September 26, 2012, Arbitrator Michael Paolucci issued his decision. He found that this was not a typical subcontracting case, but rather a change in the methodology of how Respondent operated its business—a change that involved the transfer of an entire business unit (the route), including its expenses and potential revenue, to a third party. Arbitrator Paolucci held, in pertinent part:

Absent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company. The language that the Union cites, where the parties contemplated situations where it “becomes necessary to eliminate a route or combined one with another” in Article VIII-B, must be found as supportive of this decision. The “elimination” of a route is fairly interpreted as either being elimination due to the ending or selling of a route. It would not be logical to only make the language applicable to a situation where the Company determines that the lack of profitability only necessitates the complete withdrawal from a market. The elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company’s control. This broader meaning is justified based on the Company’s business practices as currently configured. Since it has over 100 distribution partners and only 80 [route sales drivers] then it follows that the parties intended the elimination provision to cover all transfers of the work from the bargaining unit member to a third party, or to the ending of the work, while the other part of the provision covers other situations where the work is merged with another route.

To find otherwise would mean that the parties knew enough to address situations where a route was ended completely when the Company would withdraw from a market; and they knew enough to address situations when routes were merged; but that they lacked enough foresight to understand that routes could be sold and a route could be eliminated in that fashion. This does not follow since the Company has had third-party distributors as part of the business for some time. It is a more reasonable interpretation that they intended the two (2) instances in the provision—i.e., “elimination” or “merger” to cover all expected situations.

Based on the foregoing, it must be found that the language supports the analysis above, and expressly addresses the situation of the Grievant. Her work was eliminated through the sale of the route and she was given the opportunity to bump. Her work was not subcontracted, it was unprofitable and the business was sold to third party.

Based on this analysis it must be found that the company did not violate the agreement.

(R. Exh. 2, pp. 20–21.)

### 3. Collective-bargaining negotiations and subsequent route sales

The parties' collective-bargaining agreement expired on November 17, 2012. On October 10, 2012, the parties met for their first bargaining session over a successor agreement. At the start of this session, Respondent informed the Union that it intended to sell its 29 sales routes in Columbus, Sabina, and Cincinnati, Ohio, effective November 18, 2012. (Tr. 302–303.) Respondent sold these routes to independent distributor Keystone Distributing, Ltd./Buckeye Distributing Company because of Respondent's "dire" financial situation. The Union never demanded to bargain over the decision to sell these routes, but it did request to bargain over the effects. (Tr. 305.) The parties met for effects bargaining and later entered into an agreement in which Respondent would provide severance or modified bumping rights to the affected bargaining unit drivers.<sup>9</sup> (Tr. 307.) The Union never filed a grievance or an unfair labor practice charge regarding the sale of these routes.

On November 18, 2012, Respondent unilaterally implemented its last, best, and final offers to the Union, claiming the parties had reached an impasse. The Union filed an unfair labor practice charge regarding the implementation, and a hearing was held before Administrative Law Judge Geoffrey Carter on April 15–17, 2013.

On April 24, 2013, prior to a contract negotiation session, Respondent informed the Union that it intended to sell five company sales routes in Greenville, Ohio, to independent distributor Earl Gaudio & Son, Inc., effective June 2013. The Union again did not request to bargain over the decision, but it did request to bargain over the effects. (Tr. 316–318.) The parties later met and the Union sought a similar arrangement to the one the parties reached when Respondent sold its routes in Columbus, Sabina, and Cincinnati. Respondent, however, was unwilling to provide severance or bumping rights to four of the five affected employees because the drivers were, in Respondent's opinion, low performers. But Respondent did agree to pay severance to the fifth affected driver. The Union never filed a grievance or an unfair labor practice charge regarding the sale of these Greenville, Ohio routes. (Tr. 320–321.)

About a month later, Gaudio's parent company filed for bankruptcy. Per the terms independent distributor agreement, the Greenville routes reverted back to Respondent immediately.<sup>10</sup> In July 2013, Respondent resold these Greenville routes to independent distributor Helm Distributing Company. Respondent did not provide the Union with notice that the routes

<sup>9</sup> Art. VIII-B, Sec. 5 of the collective-bargaining agreement allowed for employees to bump into other routes within their service location. However, in this case, Respondent had sold all of the routes within the employees' service location, so there were no other routes that they could bump into. As a result, the parties agreed that the affected drivers could bump into routes in other service locations. (Tr. 307.)

<sup>10</sup> There is no evidence introduced regarding who serviced these routes between when they reverted back to Respondent and when they were sold to Helm Distributing. (Tr. 703.)

had reverted back, or that they had been resold to Helms Distributing Company. (Tr. 327–331.)

On June 18, 2013, Administrative Law Judge Geoffrey Carter issued his decision finding that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its November 18, 2012 offers to the Union without first bargaining to a good-faith impasse. Administrative Law Judge Carter found the parties were not at impasse at the time of the implementation through March 2013, in part, because the parties continued to meet and the Union continued to make conciliatory offers toward an agreement. See *Mike-Sell's Potato Chip Co.*, JD–40–13.<sup>11</sup>

On July 17, 2013, Respondent provided the Union with written notification that it was selling its (four) Springfield routes to an independent distributor (Helm Distributing Company), effective August 17, 2013. (R. Exh. 8.) (Tr. 338–340.) The Union again did not make a demand to bargain over the decision to sell the routes, but it did request to bargain over the effects. Respondent and the Union did meet, and the parties ultimately agreed to provide severance or bumping rights to the affected bargaining unit drivers. (Tr. 345.) The Union did not file a grievance or an unfair labor practice charge over the sale of the Springfield routes. (Tr. 346.)

At some point in 2014, Buckeye Distributing Company filed for bankruptcy liquidation, and all 29 sales routes it had acquired in Columbus, Sabina, and Cincinnati, Ohio reverted back to Respondent, per the terms of the independent distributor agreement. (Tr. 358.) Prior to Buckeye filing for bankruptcy, Kazer testified that he was in discussions with Snyder Lance, the second largest snack food manufacturer and distributor in the country, about acquiring the routes at issue "because of the job that Buckeye was doing." (Tr. 358–359.) Kazer did not provide any more information as to what he meant by that statement. Respondent eventually transferred the 29 routes to Snyder Lance after Buckeye Distributing Company filed for bankruptcy.<sup>12</sup> There is no evidence Respondent notified the Union that these routes had reverted back, or that they were later transferred to Snyder Lance.

In November or December 2015, Helms Distributing Company also filed for bankruptcy, and the Greenville and Springfield routes Helm Distributing Company had acquired reverted

<sup>11</sup> On June 13, 2013, Respondent unilaterally implemented a revised final offer. (R. Exh. 3.) There has been no finding, one way or another, whether the parties had reached a good-faith impasse as of the time Respondent implemented its revised final offer in June 2013. The parties agree that the issue of impasse will be addressed in the compliance proceeding related to Respondent's unlawful unilateral implementation of its November 18, 2012 final offer, and, therefore, it was not an issue litigated in this proceeding.

On January 15, 2014, the Board affirmed Administrative Law Judge Carter's decision. See *Mike-Sell's Potato Chip Co.*, 360 NLRB 131 (2014). Respondent appealed the Board's decision to the D.C. Circuit Court of Appeals, and the Board cross-petitioned for enforcement. On December 11, 2015, the Court of Appeals enforced the Board's order. *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318 (D.C. Cir. 2015). This enforced Board order is the subject of the previously mentioned compliance proceeding.

<sup>12</sup> The former Buckeye Distributing Company employees continued to service the routes between when they reverted back to Respondent and when they were sold to Snyder Lance. (Tr. 701.) There is no other evidence in the record regarding the terms or conditions associated with having these individuals continue to service the routes during this period of time.

back to Respondent. On December 15, 2015, Respondent resold those routes to an independent distributor, Big TMT Enterprize, LLC.<sup>13</sup> Respondent did not provide the Union with notification that the routes had reverted back, or that they were resold to Big TMT Enterprize.<sup>14</sup>

The parties met for bargaining over a successor agreement from October 2012 through June 2014. Thereafter, the parties met to discuss a global settlement. Those discussions continued through 2016. From October 2012 through June 2014, the parties met approximately 14 times. In those negotiations, the parties made proposals regarding the language in article VIII-B, section 5, addressing bidding. Respondent sought to modify the language to: “In the event that it becomes necessary to terminate or sell a route or combine one with another, the displaced employee or employees who lose their routes due to this combination or elimination may use their seniority to bump any less senior employee within their currently assigned location.” (R. Exh. 3, p. 9.) The Union sought to maintain the existing language. Respondent eventually agreed to maintain the existing language because the Union stated no change was needed. (Tr. 273–275.) In November 2016, as part of the global settlement discussions, the Union proposed inserting into the management-rights clause the following language: “Notwithstanding anything contained in this Agreement to the contrary, the Company shall not sell, transfer, or otherwise assign any current routes, in one transaction or series of transactions, to any other person or entity without the agreement of the Union.” (R. Exh. 4.)

#### *D. Alleged Unfair Labor Practices*

##### 1. April 27, 2016 notification about possible sales and resulting grievance

On April 27, 2016, Respondent sent the Union a letter stating that in accordance with Respondent’s “rights” as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent was seriously considering the elimination of three Dayton, Ohio sales routes by selling them to independent distributors. (Jt. Exh. 3.) The letter stated that, although the specific routes ultimately eliminated will depend on the terms negotiated with the independent distributor(s), it is possible that any of the current routes may be affected, and that a final decision would be made within 3–6 months. Respondent noted that if it ultimately decided to sell one or more of these routes to independent distributors, it would provide the Union with time-

<sup>13</sup> The former Helm Distributing Company employees continued to service the routes between when they reverted back to Respondent and when they were sold to Big TMT Enterprize, LLC. (Tr. 700.) There is no other evidence in the record regarding the terms or conditions associated with having these individuals continue to service the routes during this period of time.

<sup>14</sup> Respondent contends that the Union, through its steward Richard Vance, should have been aware that these routes were resold because Big TMT Enterprize temporarily worked out of Respondent’s Dayton distribution center where Vance and other bargaining unit employees worked, and Vance and the others likely would have seen Big TMT Enterprize employees loading their trucks. (Tr. 356–357.) I find, however, Respondent failed to present sufficient evidence to establish the Union had actual or constructive notice.

ly notice of its decision, bargain over the effects of the route elimination(s), and that affected drivers would have seniority-based bumping rights. That same date, Respondent sent all employees a letter informing them of its plan to sell Dayton sales routes to independent distributors, and if employees were interested in becoming a distributor, they should contact the Company. (Jt. Exh. 2.) On May 6, 2016, the Union, through Steward Richard Vance, filed a grievance over Respondent’s announced intent to sell these three routes. (Jt. Exh. 4.) The grievance went through the various steps, and Respondent denied violating any provisions of the parties’ expired agreement.

The parties had a third-step grievance meeting in June 2016. At this meeting, the Union expressed frustration that Respondent sent a letter to employees soliciting them to become distributors. (Tr. 374.) The Union also requested that Respondent not select the more senior routes to sell. Respondent informed the Union that all routes were under consideration. (Tr. 375.) Respondent stated that it had the prerogative to sell the routes under the Paolucci decision. (Tr. 151–152.) The Union did not demand to bargain over the sale of the routes because no routes had been selected at that time. (Tr. 375.)

##### 2. Notification regarding the sale of Route 102

On July 11, 2016, Respondent sent the Union a letter stating that, in accordance with its “rights” as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be selling Route 102, Xenia territory, effective July 24, 2016. (Jt. Exh. 5.) The unit driver assigned to the route had announced his retirement. The Union did not file a new grievance after receiving this notification. Vance testified he believed that his May 6, 2016 grievance covered this particular sale. The Union never demanded to bargain over this sale or its effects. The route was eventually sold to Big TMT Enterprize, LLC. (Tr. 375.)

##### 3. Notification regarding the sales of Routes 104 and 122

On August 29, 2016, Respondent sent the Union a letter stating that in accordance with its “rights” as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be eliminating two positions through the sale of Route 104 and Route 122, effective September 4, 2016. (Jt. Exh. 6.) Respondent noted that the affected drivers (Gerald Shimmer #122 and Jerry Lake #104) would have an opportunity to rebid on September 1, 2016. On September 29, 2016, the Union, through Steward Richard Vance, filed a grievance regarding the sale of these two routes. The parties met on this grievance at the various steps, and Respondent again denied committing any violations of the parties’ expired agreement.

On around August 30, 2016, Gerald Shimmer, one of the affected drivers, informed Vance that he was told that his delivery vehicle was being sold, and that he (Shimmer) needed to unload his truck and use a spare vehicle for the last few days of his route. (Tr. 114–115.)

The two routes were eventually sold to BLM Distributing, LLC. (Tr. 382.) The owner of BLM Distributing is Lisa Krupp. Krupp is a former unit driver that provided relief coverage when the other unit drivers were on vacation or leave.

#### 4. Union's demand to bargain and information request

In addition to the grievance, on August 31, 2016, the Union, through Business Representative Alan Weeks, sent Respondent a letter disputing Respondent's claim that the Paolucci arbitration decision gave it the right to sell Routes 104 and 122. (Jt. Exh. 8.) Specifically, the Union argued that Arbitrator Paolucci found no obligation to bargain because of the demonstrated unprofitability of the Watson route, the fact that the Watson route was far away from the Columbus, Ohio distribution center increasing the cost of providing product to the route, and the fact that similar unprofitable routes have been sold in the past. In contrast, the Union argued that no information has been provided to the Union showing that Routes 104 and 122 were unprofitable; the two routes at issue are within the Dayton, Ohio area and providing product did not cost more than providing product to any other route out of the Dayton distribution center; and Respondent has not previously sold a route within the Dayton service area. Based on these factors, the Union demanded Respondent meet and bargain over the decision to sell Routes 104 and 122. In order to be prepared for such bargaining, the Union requested the following information:

1. All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so comparison can be made as to the profitability of all the routes on Route No. 104 and Route No. 122.
2. A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold.
3. A description of how Mike-Sell's product is to be received by the entity to whom [R]oute No. 104 and Route No. 122 is scheduled to be sold.
4. A copy of all correspondence, including electronic correspondence, between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016.

The Union concluded the letter by requesting that Respondent delay the sale of the two routes until the Union had an opportunity to review the requested information and the parties met for bargaining. (Jt. Exh. 8.)

On September 12, 2016, Respondent sent a reply to the Union's August 31, 2016 letter. (Jt. Exh. 9.) In its reply letter, Respondent disagreed with the Union's interpretation of the Paolucci arbitration decision, arguing that the Union was reading the decision too narrowly, particularly that it only applied to the sale of unprofitable routes. Respondent noted that the arbitrator "specifically rejected the Union's argument 'that the Company did this simply because the costs were too high,' finding instead that '[w]here an entire business unit is transferred, the factors justifying the change are much more numerous than a simple measure of cost savings.'" In short, Respondent argued that the arbitrator "recognized that [t]he Company has chosen a different manner of operating its business, and [a]bsent clear contract language, it must be found that the management right to control distribution, and determine profitability, allows the [Company to sell its routes to independent dis-

tributors without bargaining with the Union.]" (internal quotations omitted). Respondent went on to say that it exercised its "inherent management right" to determine methods of distribution by selling Routes 104 and 122, just as it did by selling Route 102 in July 2016. The last paragraph of Respondent's letter states:

Because Arbitrator Paolucci's award makes it clear that Mike-Sells has the management right to change distribution methods in accordance with strategic objectives, we respectfully decline to bargain over our decision to sell Company routes; to delay the sale of Routes 104 and 102 pending such decisional bargaining; or to respond to information request designated specifically for the purpose of engaging in such decisional bargaining.

In a footnote, Respondent stated it remained willing to bargain over the effects of the route eliminations, if any, and remained willing to provide relevant information for that purpose. But because the arbitration award confirmed that Respondent had the managerial discretion to unilaterally sell company routes, it is not a mandatory subject of bargaining; therefore, Respondent did not believe that the Union's August 31 information request (which was made for the purpose of decisional bargaining) was presumptively relevant or necessary for the Union to perform its statutory duties. Respondent did not provide the Union with the information it requested. (Tr. 475.)

#### 5. Notification of sale of Route 131 and resulting grievance

Also, on September 12, 2016, Respondent sent the Union a separate letter stating that in accordance with its "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be selling Route 131, effective September 17, 2016. (Jt. Exh. 10.) On that same date, the Union, through Steward Richard Vance, filed a grievance regarding the sale of Route 131. The route was eventually sold to Big TMT Enterprize, LLC. The parties later met on these and other grievances in January 2017, and Respondent denied any violations of the parties' expired collective-bargaining agreement.<sup>15</sup>

#### 6. Sale of delivery vehicles to independent distributors

On September 4, 2016, Respondent sold a delivery truck to independent distributor Lisa Krupp's company BLM Distributing LLC. On September 11, 2016, Respondent sold a delivery truck to independent distributor Charles Morris's company Big TMT Enterprize, LLC. (Tr. 222.) There was no grievance filed regarding the sale of the vehicles.

#### 7. Costs and revenue associated with sales

At the hearing, Kazer estimated that Respondent recognized approximately \$229,000 in total savings in labor costs from selling the routes (i.e., \$152,000 in commissions, \$35,000 in pension contributions, \$14,000 in vacation pay, holiday pay and sick day pay, \$13,000 in employment taxes, \$7000 in

<sup>15</sup> Respondent participates in the Union's Central States Pension Fund. As a participant in this Fund, Respondent is subject to a withdrawal liability of \$20 million if the number of contribution based units (CBUs) drops below a certain amount. Kazer testified that Respondent has not sold more routes out of concern that further sales would trigger the withdrawal liability. (Tr. 579.)

healthcare costs, \$6000 in workers' compensation payments, and \$1100 in supplemental life insurance payments). He estimated approximately \$195,000 worth of nonlabor savings, including the elimination two nonunion positions; the costs associated with maintaining and insuring the four vehicles that were sold; costs of stale products; etc. Kazer also identified several intangible cost savings. He also identified Respondent received \$74,000 from selling the routes and \$34,000 from selling the trucks to the independent distributors, and \$18,000 in inventory liquidation. However, Kazer noted that the sale of the four routes meant paying the independent distributors \$324,000 in distributor margins. (Tr. 538–542.)

#### IV. CONTENTIONS OF THE PARTIES

The General Counsel contends that Respondent's decisions to sell the four company routes at issue to independent distributors amounts to subcontracting of bargaining unit work, which is a mandatory subject of bargaining, and Respondent's failure or refusal to bargain with the Union over those decisions violated Section 8(a)(5) and (1) of the Act. The General Counsel also contends that the information the Union requested from Respondent on August 31, 2016, was relevant and necessary for the Union's role as collective-bargaining representative, and that Respondent's failure or refusal to provide that requested information violated Section 8(a)(5) and (1) of the Act.

Respondent denies the alleged violations. Respondent contends selling the company sales routes was not a mandatory subject of bargaining because it was part of Respondent's decision to fundamentally change its business model by discontinuing these discrete business units. Moreover, even if the sales were a mandatory subject of bargaining, Respondent contends that the Union waived its right to bargain. And because there was obligation to bargain over the sales, Respondent argues it had no obligation to provide the Union with the requested information.

#### V. LEGAL ANALYSIS

##### A. Decisions to Sell the Routes Were Mandatory Subjects of Bargaining

Section 8(d) of the Act imposes an obligation on an employer to bargain with respect to wages, hours, and other terms and conditions of employment. Section 8(a)(5) makes it an unfair labor practice for an employer to make unilateral changes to these mandatory subjects without first providing the union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The issue, therefore, is whether Respondent's decision to sell the four company routes at issue amounted to a mandatory subject of bargaining.

In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964), the Supreme Court found that an employer's subcontracting of maintenance work to a third party was a mandatory subject of bargaining, holding that:

The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of

employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

379 U.S. at 213–214.

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court held that not all decisions that result in the displacement of employees require bargaining. In that case, the employer provided maintenance and housekeeping services for commercial establishments, including a nursing home. Under the service contract, the home reimbursed the employer for its labor costs and paid a fixed management fee. The employer terminated its contract with the home over a dispute about the management fee, which led it to discharge its employees working there without bargaining with the union. In deciding the matter, the Court divided management decisions into three categories for bargaining purposes. First, “[s]ome management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship” and are thus not mandatory subjects of bargaining. Second, “[o]ther management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively ‘an aspect of the relationship’ between employer and employee” and are thus mandatory subjects. 452 U.S. at 677. Third, a decision that had a direct impact on employment because it involves the elimination of jobs, but which had as its focus only the economic profitability of the contract, a matter wholly apart from the employment relationship. The Court stated that the employer's decision to terminate its contract with the home involved a change in the scope and direction of the enterprise and was akin to a decision whether to be in business at all, “not in [itself] primarily about conditions of employment.” 452 U.S. at 677, quoting from *Fibreboard*, 379 U.S. 203, at 223 (1964) (Stewart, J. concurring). In determining whether there is a bargaining obligation in this third category, the Court set forth the following test:

[I]n view of an employer's need for unencumbered decision making, bargaining over management's decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

*First National Maintenance*, 452 U.S. at 678–679.

The Court noted that the employer had no intention of replacing the discharged employees or to moving the operation elsewhere, that the sole purpose for the closing was to reduce economic loss, and that the employer's decision was based on a factor over which the union had no control or authority. As such, the employer's only obligation was to bargain over the effects of the decision. The Court, however, was careful to clarify that its holding was limited to the particular situation presented and was not intended to cover other types of management decisions, such as “plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts.” *Id.* at 686 fn. 22.

In *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1370 (1982), the dispute was over whether a change should be char-

acterized as a mandatory subcontracting decision under *Fibreboard*, or as a nonmandatory partial closing under *First National Maintenance*. In that case, the employer operated a commissary where it prepared and distributed food products to a restaurant chain. Without bargaining with the union, the employer decided to discontinue its shrimp processing operation and subcontract that work to a third party, which resulted in the termination of 12 employees. The Board, in a 3–2 decision, held:

The distinction between subcontracting and partial closing, however, is not always readily apparent. Thus, it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control," the decision will not fall within the scope of the employer's mandatory bargaining obligation. A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives.

Id. at 1370 (internal citations omitted).

The Board concluded the employer subcontracted the work of shrimp processing, rather than partially closed its food preparation business, because there was no major shift in the direction of employer's business. The Board found that, both before and after the subcontract, the employer engaged in the business of providing prepared foodstuffs to its various stores, and it appeared to continue supplying processed shrimp to its constituent restaurants. The only difference is that the processing work was performed by the third-party's employees pursuant to the subcontract rather than by employer's employees. Accordingly, the Board held that the nature and direction of the employer's business was not substantially altered by the subcontract.

The Board also observed that the closure did not constitute a major capital modification. Although the corporation did sell \$30,000 worth of equipment to the third party, this was not so substantial a change as to remove the decision from mandatory bargaining. Finally, the Board held that since escalating costs and proper size grading of the shrimp were the primary reasons for the employer's decision to subcontract, the employer's concerns were of the type traditionally suitable for the collective bargaining process. Thus, the Board found its decision was consistent with *First National Maintenance* as well as *Fibreboard*.

In *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in relevant part 1 F.3d 24, 31–33 (D.C. Cir. 1993), the Board

set forth the test it would use to apply the Court's *First National Maintenance* decision for determining whether a work relocation decision is a mandatory subject of bargaining. Under this test, the General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses. Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision. The Employer may also avoid bargaining if it can show that (1) labor costs were not a factor or (2) even if labor costs were a factor, the union, could not have offered sufficient labor cost concessions to alter its work relocation decision. Id. at 391. Although *Dubuque* concerned work relocation decisions, the test is applicable to decisions that have a direct impact on employment, but, have as their focus the economic profitability of the employing enterprise.

In *Torrington Industries*, 307 NLRB 809 (1992), the employer unilaterally replaced two union truck drivers with non-bargaining unit drivers and independent contractors, but claimed that its decision was entrepreneurial and did not turn on labor costs. The Board concluded that the *Dubuque Packing* test did not apply because the employer's reasons had nothing to do with a change in the scope and direction of its business. Instead, the Board concluded that the case involved subcontracting decisions similar to those in *Fibreboard*, and, therefore, were mandatory subjects of bargaining, even though the decision was not motivated by labor costs.

In *O.G.S. Technologies, Inc.*, 356 NLRB 642, 645 (2011), a successor employer unilaterally subcontracted die-cutting work, resulting in the replacement of its own die engineers by outside firms. The Board applied *Torrington* and concluded the employer's termination of a portion of its operation constituted subcontracting that required decisional and effects bargaining, holding:

In contrast to *First National Maintenance*, OGS made certain operational changes, but they did not amount to a 'partial closing' or other 'change in the scope and direction of the enterprise,' which remained devoted to the manufacture and sale of brass buttons to the same range of customers. Before and after the decision to subcontract die cutting, OGS produced and supplied brass buttons to customers. . . . The decision at issue simply resulted in a marginal increase in the percentage of cutting work the [r]espondent subcontracted and a modest change in the functions performed in-house, but not the abandonment of a line of business or even the contraction of the existing business.

Id.

In *Mi Pueblo Foods*, 360 NLRB 1097 (2014), the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to

deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The Board held that the employer had an obligation to bargain over the decision and the effects of changing from a hub-and-spoke delivery model to a point-to-point model even though that change “did not result in layoffs or significantly affect wages and hours.” The Board held that whenever bargaining unit work is assigned to outside contractors, the unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer “could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion’s bargaining strength.” 360 NLRB at 1099.

In light of the foregoing, the core question is whether the scope and direction of Respondent’s business was substantially altered when it sold the four company sales routes at issue to the independent distributors. I find it was not. Respondent has been, and continues to be, a manufacturer *and* distributor of snack foods. It has two distribution methods: direct store delivery and warehouse or direct sales. The direct store delivery method is effectuated by the use of company route sales drivers and independent distributors. Although the percentage of routes covered route sales drivers versus independent distributors has changed over the years, Respondent continues to use both to distribute its products to its customers. As for the four routes at issue, Respondent continues to distribute products to those customers. The only difference is that independent distributors are delivering the products on those routes rather than the company route sales drivers.

Under *Fibreboard*, the issue is whether the employer is replacing existing employees with those of an independent contractor to do the same work under similar conditions. In this case, that is what Respondent has done. Respondent contends that, unlike company route sales drivers, independent distributors make significant investment in purchasing their territory, acquiring, maintaining, and insuring storage space, vehicles, equipment, and purchasing product; and these independent distributors assume sizable risk that they will be able to sell the products they buy and have a profitable business. However, at its core, both groups are responsible for delivering Respondent’s products to its customers. Both groups acquire or are assigned a route or territory. Both of the groups review orders, load the products onto their vehicles, travel to customer locations, stock customer shelves, rotate unsold product, perform point-of-sale marketing, and removing expired product. Both use handheld electronic devices to track orders, deliveries, and sales. And both are primarily paid based on what they sell.<sup>16</sup> There clearly are differences between the two, but *Fibreboard* refers to *similar* conditions, not identical ones. And despite the differences, I find that the independent distributors perform the

<sup>16</sup> Under the parties’ agreement, route sales drivers are paid a flat rate for route riding and pull up (stocking) work. Otherwise, they are paid a commission. (Jt. Exh. 1, pg. 7.)

same core work under similar conditions as the route sales drivers. As a result, based on established precedent, I find the sales of these four company routes in 2016 are akin to subcontracting, and, therefore, are mandatory subjects of bargaining.

Respondent contends it has no obligation to bargain because while labor costs were a factor in deciding to sell the routes, it actually costs Respondent more to use independent distributors because their margins. But because I conclude that there was no actual change in Respondent’s operations, and labor costs played a role in Respondent’s decision to sell the routes, Respondent had an obligation to bargain over the decision to sell the four routes at issue.

Respondent cites to *West Virginia Baking Co.*, 299 NLRB 306 (1990), *enfd.* 946 F.2d 1563 (D.C. Cir. 1991), for support that it did not have an obligation to bargain over its decision to sell the company routes. In that case, the administrative law judge dismissed the complaint, including the allegations the employer violated Section 8(a)(5) and (1) of the Act when it unilaterally converted all its bargaining unit driver-salesmen to independent distributors after bargaining to an impasse with the union. The judge found that the decision to convert all the unit drivers to independent distributors was not a mandatory subject of bargaining. On appeal, the Board held:

We agree with the judge’s conclusion that the Respondent did not refuse to bargain in good faith over the decision to convert its driver-salesmen to independent distributors and the effects of that decision *and, in fact, did bargain in good faith over the decision and its effects until impasse and lawful implementation of the distributorship program.* Accordingly, we find it unnecessary to pass on whether the Respondent’s decision to convert its driver-salesmen to independent distributors is a mandatory or permissive subject of bargaining.

299 NLRB at 306 fn. 3 (italics added).

I find this case to be inapposite. To begin with, the employer sought to completely eliminate all of its driver-salesmen and convert them to independent distributors. It then met and bargained with the union over its decision and its effects. After the parties reached an impasse, the employer implemented the change. As stated above, the Board chose not to address whether the employer’s conversion decision was a mandatory subject of bargaining.

Respondent also cites to *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), *cert. denied* 382 U.S. 1011 (1965), for support. In that case, the court of appeals denied enforcement of the Board’s decision in *Adams Dairy*, 137 NLRB 815 (1962), in which the administrative law judge and the Board concluded that the employer violated Section 8(a)(5) and (1) of the Act when it had independent distributors take over the driver-salesmen routes, without giving the Union prior notice or an opportunity to bargain. I am bound by Board law and cannot rely upon the reasoning of the court of appeals for not enforcing the Board’s order. Even were that not true, I find the case to be inapposite because the employer completely eliminated all driver-salesmen routes and sold all of its trucks. In the present case, Respondent continues to employ company route sales drivers and possess trucks, and, based on Kazer’s testimony, it likely will continue to employ route sales drivers out of concern

that to do otherwise would trigger significant pension withdrawal liability. (Tr. 581–582.)

*B. The Union Did Not Waive its Right to Bargain Over the Decision to Sell Routes 102 or 131 by Failing to Request Bargaining*

An employer violates Section 8(a)(5) when it unilaterally institutes changes in mandatory terms of employment without bargaining in good faith. *NLRB v. Katz*, 369 U.S. at 743. In general, good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding a proposed change. See *Wackenhut Corp.*, 345 NLRB 850, 868 (2005); *Brimar Corp.*, 334 NLRB 1035, 1035 (2010). Once notice is received, the union must act with “due diligence” to request bargaining, or risk a finding that it has waived its bargaining right. See *KGTV*, 355 NLRB 1283 (2010). A union may be excused from requesting to bargain if the employer’s notice provides too little time for negotiation before implementation, or if the employer otherwise has made it clear that it has no intention of bargaining about the issue. In these circumstances, a bargaining request would be futile, because the employer’s notice informs the union of nothing more than a fait accompli. In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the proposed change and the employer’s decisionmaking process. *Id.* (union’s “subjective impression of its bargaining partner’s intention is insufficient” to establish fait accompli). While presenting a proposed change as a fully formulated plan or the use of positive language does not definitively establish a fait accompli, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented fait accompli by telling union that layoff was a “done deal”); *Pontiac Osteopathic Hospital*, 336 NLRB at 1023–1024 (notice stating that changes “will be implemented” and other “unequivocal language” evidence of fait accompli). The Board also evaluates the timing of the employer’s statements vis-a-vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a “fixed intent” to make the change at issue which obviates the possibility of meaningful bargaining. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983), *Northwest Airport Inn*, 359 NLRB 690, 693 (2013) (fait accompli established given owner’s testimony that a decision to subcontract bargaining unit work had already been made and implemented, and union bargaining proposals regarding employee compensation “made no difference”).

As previously stated, on April 27, 2016, Respondent sent the Union a letter stating that, in accordance with Respondent’s rights as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent was seriously considering the elimination of three Dayton, Ohio sales routes by selling them to independent distributors. The letter stated that a *final decision* would be made within 3–6 months. Respondent noted that if it ultimately decided to sell one or more of these routes to independent distributors, it would provide the Union with time-

ly notice of its decision, bargain over the effects of the route elimination(s), and that affected drivers would have seniority-based bumping rights. At the June 2016 third-step grievance meeting over the Union’s May 2016 grievance, Respondent informed the Union that it had the right to make the sales under the Paolucci decision. On July 11, 2016, Respondent sent the Union a letter stating that it will be selling Route 102, Xenia territory, effective July 24, 2016. There is no dispute the Union took no action after it received Respondent’s July 11 letter notifying it of the sale of Route 102. Respondent contends that the Union’s failure to request bargaining over the sale of the route amounts to a waiver of its right to bargain. The General Counsel counters, arguing that the Union had no obligation to request bargaining because Respondent announced the sale of Route 102 as a fait accompli.

I find the combination of Respondent’s April 27 and on July 11 letters amounted to a notice of a fait accompli. Respondent’s April 27 letter to the Union stated that in accordance with its rights, it would make a “final decision” within 3–6 months, and Respondent would notify the Union of that decision and “bargain over the effects of the route elimination(s).” *Sutter Health Central Valley Region*, 362 NLRB No. 199, slip op. at 3 (2015) (fait accompli when the announcement or notification is presented as a “final decision”). As promised, on July 11, Respondent notified the Union of its final decision to sell Route 102, which would be effective on July 24, 2016. The only reasonable reading of these letters is that Respondent had no intention of bargaining with the Union regarding the decision to sell these routes; only that it would be willing to bargain over the effects. This conclusion is further supported by Respondent’s September 12, 2016 response to the Union’s August 31, 2016 request to bargain over the decisions to sell Routes 104 and 122, when Respondent stated that, per the arbitration decision, it had no obligation to bargain with the Union over the sale of these routes. Consequently, under these circumstances, I find that the Union’s failure to request bargaining over the sale of Route 102 does not constitute a waiver of its right to bargain.

Similarly, I find the Union did not waive its right to bargain over the sale of Route 131 by failing to make a request to bargain after receiving notice of that decision to sell. Respondent provided the Union with notice of that sale the same day it provided its reasoning as to why it did not have an obligation to bargain over the sale of Routes 104 and 122. Based on that information, I find Respondent announced the sale of Route 131 as a fait accompli because it had a fixed intent and was not willing to bargain over the decision.

*C. The Union Did Not “Clearly and Unmistakably” Waive Its Right to Bargain Over the 2016 Decision to Sell of the Four Company Routes*

Respondent contends that the Union has waived its right to bargain over the sale of company routes. An employer may escape liability for a unilateral change if it proves that a union has expressed or implied a “clear and unmistakable waiver” of its right to bargain. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007). A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a term

and condition of employment and cedes full discretion to the employer on such a matter. However, the Board narrowly construes waivers and has been hesitant to imply waivers not explicitly mentioned in the parties' collective-bargaining agreements. *Mississippi Power Co.*, 332 NLRB 530 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002) (rejecting employer's waiver argument that the unions incorporated the benefit plans' reservation of rights clauses into the contract based on a "course of conduct" of copies of the benefit plans provided to the unions and incorporated into the collective-bargaining agreements). A clear and unmistakable waiver can be gleaned from the parties' past practice, bargaining history, prior action or inaction. *American Diamond Tool*, 306 NLRB 570 (1992). However, Board precedent makes clear that a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time. *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993). The burden is on the party asserting the waiver to establish the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent initially contends that it had no obligation to bargain because it had an inherent right, separate from the expired agreement, to make these decisions to sell routes. I have already addressed and rejected that argument. Respondent also indirectly relies upon the language of the parties' expired collective-bargaining agreement, and the arbitration decision in the Watson matter, as supporting its waiver argument.<sup>17</sup> As previously stated, the parties' agreement does not address the subcontracting of bargaining unit work. Arbitrator Paolucci acknowledged this in his decision. He concluded that the sale of the company route was permitted under the management-rights clause, which allowed Respondent the discretion to control distribution methods. However, the Board consistently has held that a waiver of bargaining rights under a management-rights clause does not survive the expiration of a contract. *Buck Creek Coal*, 310 NLRB 1240 (1993); *Control Services*, 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992), enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

Regardless, a waiver of a statutory bargaining right must be "clear and unmistakable" and will not be inferred from general contract language. *Provena St. Joseph Medical Center*, supra; *Control Services*, supra. The contract language falls well short of this standard. It makes no reference to the period beyond the contract's expiration, and fails to unequivocally and specifically express an intention to permit the Respondent to continue implementing unilateral changes of this sort after contract expiration. *The American Red Cross, Great Lakes Blood Services Region and Mid-Michigan Chapter*, 364 NLRB No. 98, slip op.

<sup>17</sup> At the hearing Respondent cited to its June 2013 revised final offer and its modified language addressing bidding rights. Respondent argued that, under either the prior language or revised language, the Union waived its right to bargain over the sale of company routes. However, in its communications with the Union announcing these sales, Respondent never cited to or relied upon the modified bidding language in its June 2013 revised final offer to support its unilateral action. Respondent, instead, repeatedly relied solely upon Arbitrator Paolucci's decision—and the language that existed then—to support its action.

at 4 (2016).

Respondent further argues that the Union waived its right to bargain by the past practice that has developed as a result of the Union's failure to object to or demand bargaining over the sales of company routes to independent distributors prior to 2016. To establish a past practice of subcontracting justifying a refusal to bargain, an employer must show that the previous subcontracting was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. A history of subcontracting on a random, intermittent, or discretionary basis is insufficient. *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), reafd. 363 NLRB No. 164 (2016); *Ampersand Publishing, LLC*, 358 NLRB 1415, 1416 (2012), reafd. 362 NLRB No. 26 (2015); and *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R.*, 342 NLRB 458, 468–469 (2004), enfd. 414 F.3d 158, 165–167 (1st Cir. 2005). See also *E. I. du Pont de Nemours*, 364 NLRB No. 113 (2016).

In *E. I. du Pont de Nemours*, supra, the Board, upon remand from the D.C. Circuit Court of Appeals, reexamined whether the employer violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employees' benefit plan at its facilities post contract expiration at a time when the parties were negotiating for successor agreements and were not at impasse. The Board, pursuant to the Court's remand instructions, returned to the rule it followed in its earlier decisions, including *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353 (2003), that discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause are unlawful. The majority overruled precedent, including the Board's decisions in the *Courier-Journal* cases, 342 NLRB 1093 (2004), and 342 NLRB 1148 (2004), *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006), to the extent that those Board decisions conflicted with well-settled waiver principles, and were inconsistent with the Act's goal to encourage the practice of collective bargaining.

Applying the status quo doctrine under *NLRB v. Katz*, supra, the Board held that during negotiations for a successor agreement, the employer has a statutory duty to maintain the status quo by continuing in effect the employment terms and conditions that existed at the expiration of the parties' agreement. *Id.* slip op. at 4. But because the essence of a management-rights clause is the union's consensual surrender of its statutory right to bargain during the term of the contract, that waiver, like any waiver of a statutory right, does not survive contract expiration, absent evidence of the parties' contrary intent. Thus, the status quo doctrine under *Katz* does not privilege the employer to continue making unilateral changes that, during the term of the agreement, would have been authorized by the now-expired management-rights clause. *Id.*, slip op. at 5. And, because unilateral changes implemented during the term of a contract under the authority of a management-rights clause are based on a union's bargaining waiver, the right granted to an employer to make changes to employees' terms of employment under that clause does not create a past practice permitting an employer to

continue to unilaterally implement changes post contract expiration. Id., slip op. at 5–6.

Having overruled the *Courier-Journal* decisions and *Capitol Ford*, the majority found that the employer's wide ranging and varied changes to the benefits of unit employees, made with no cognizable fixed criteria, did not establish a past practice that the employer was permitted to continue when the applicable collective-bargaining agreements had expired. Therefore, the majority held that following the expiration of the parties' collective-bargaining agreements, the employer had the statutory obligation to adhere to the terms and conditions of employment that existed on the expiration date until it bargained to agreement or reached a good-faith impasse in overall bargaining for a new agreement.

Applying these principles to the instant case, I find that Respondent cannot rely upon its prior, unilateral decisions to sell company routes to independent distributors, both before and after the expiration of the parties' agreement, as establishing a waiver of the Union's right to request bargaining over the sale of the four company routes at issue. As established in all the letters Respondent sent to the Union announcing its intent to sell the routes, as well as its response to the Union's August 2016 demand to bargain, Respondent relied upon Arbitrator Paolucci's decision, which found Respondent had the right sell company routes based on the language of the now expired management-rights clause.<sup>18</sup>

Relying on Arbitrator Paolucci's decision, Respondent argues that article VIII-B, section 5, which sets forth employees' bidding rights when a route is eliminated or merged, supports finding a waiver. Arbitrator Paolucci held the "elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company's control." To begin with, I am not bound by an arbitrator's decision. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1081 (1955). And, in this case, I do not agree with the Arbitrator's interpretation or reasoning. Article VIII-B, section 5 does not give Respondent the right to unilaterally sell routes, and it does not constitute a clear and unmistakable waiver of the Union's right to bargain. The provision addresses bidding rights in the event routes are elimi-

<sup>18</sup> Respondent argues that Arbitrator Paolucci recognized that Respondent had an "inherent management right" to sell company routes. I reject that argument. The Arbitrator stated that "[a]bsent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company." The management-rights provision of the expired agreement states that the "right to improve manufacturing methods, operations and conditions and distribution of its products . . . is exclusively reserved to the company." I find that Arbitrator Paolucci was relying upon this language as giving Respondent the right to sell the route in that case, and he was not concluding that there was some extra-contractual right. See generally *Weavexx, LLC*, 364 NLRB No. 141, slip op. 3 (2016); and *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, enf. 722 F.2d 1120, 1126 (1983) ("The arbitrator's conclusion that an extra-contractual residual rights theory authorizes management to make unilateral decisions on mandatory subjects of collective bargaining not specifically covered in a collective bargaining agreement disregards clear Board precedent.").

nated or merged. However, when Respondent sells a route to an independent distributor, it is not eliminated—it continues to exist. It merely is being serviced by an independent distributor, as opposed to a unit driver.

Moreover, Respondent argues these sales to independent distributors involve the transfer of a discrete business unit. But, according to the independent distributor agreement, Respondent is transferring a primary, not exclusive, right to distribute its products within a defined territory, and the distributor has certain rights and obligations regarding servicing of that territory. And, if the distributor is unable to service that route, it reverts back to Respondent. This occurred on three separate occasions following the expiration of the parties' collective-bargaining agreement, when the independent distributors went bankrupt.<sup>19</sup>

The result is there is no provision, other than the management-rights clause, that arguably gives Respondent the authority to subcontract work by selling routes. Absent some other contractual provision waiving the Union's right to bargain over the subcontracting of unit work through the sale of the route to an independent distributor, the default, or the status quo, is the statutory obligation to bargain over those decisions.

Respondent points to the numerous routes it sold prior to and after the expiration of the collective-bargaining agreement to support its waiver argument. However, as stated above, the Board has held that prior changes, made with no cognizable fixed criteria, do not establish a past practice that the employer was permitted to continue postcontract expiration, even if earlier changes also occurred during contract hiatuses pursuant to the expired management-rights provision. *E. I. du Pont de Nemours*, supra. In this case, there were no set criteria used to decide which routes to sell. Kazer testified the decisions to sell were based on what routes the distributors wanted to buy and whether Respondent believed that they could handle the routes.<sup>20</sup>

<sup>19</sup> As previously stated, prior to Buckeye filing for bankruptcy, Kazer testified that he was in discussions with Snyder Lance, the second largest snack food manufacturer and distributor in the country, about Buckeye's 29 sales routes in Columbus, Sabina, and Cincinnati, Ohio. Kazer explained that he contacted Snyder Lance about taking over these routes "because of the job that Buckeye was doing." (Tr. 358–359.) Kazer did not provide any more information as to what he meant by that statement; however, it suggests that Respondent retains certain control and authority over routes that are sold to independent distributors to ensure that the routes are being properly handled.

<sup>20</sup> The General Counsel and the Union further argue that the Union's failure to demand bargaining over the prior sales does not constitute waiver because the 2016 sales were different, largely because they were located in and around Dayton, and Respondent had not sold Dayton routes in the past. The Union asserts that Routes 102, 104, 122, and 131 were some of the more profitable routes, unlike the routes sold in the past. The Union believes that part of the reason these routes were more profitable was because of their proximity to the Dayton distribution center, which reduced the transportation costs associated with those routes, as compared to the other routes sold that were located in outlying areas. The General Counsel and the Union argue that because of these differences, and the fact that Respondent never sold Dayton routes before, the Union's failure to bargain over the other routes is irrelevant to whether they clearly and unmistakably waived the routes at issue. I need not address this contention, because I have concluded Respondent has failed to establish a clear and unmistakable waiver.

Regardless, I find that Respondent's waiver arguments, whether based on the management-rights clause in the expired contract, the arbitration decision which relied upon the management-rights clause, or the past practice that developed pursuant to the management-rights clause or arbitration decision, all fail under current Board precedent. As such, I find Respondent had a statutory obligation to bargain with the Union over the decision to sell the four routes at issue, and its failure to do so violates Section 8(a)(5) and (1) of the Act.

*D. Respondent Had an Obligation to Provide the Union with the Information Requested on August 31, 2016*

The General Counsel contends that Respondent had an obligation to provide the Union with the information it requested on August 31 related to the sales of routes at issue. It is well settled that an employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to a union that is the collective-bargaining representative of the employer's employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). This duty is not limited to contract negotiations but extends to requests made during the term of the contract for information relevant to and necessary for contract administration and grievance processing. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). The standard for determining the relevancy of requested information is a liberal one and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Id.* at 437. See also *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), and cases cited therein. Therefore, the information must have some bearing on the issue between the parties but does not have to be dispositive. *Kaleida Health, Inc.*, 356 NLRB 1373, 1377 (2011).

Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). Where the requested information pertains to matters outside the bargaining unit and is not presumptively relevant, the information must be provided if the surrounding circumstances put the employer on notice as to the relevance of the information or if the union shows why the information is relevant. *National Extrusion & Mfg. Co.*, 357 NLRB 127 (2011). Where a showing of relevance is required because the request concerns nonunit matters, the burden is "not exceptionally heavy." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held that information requested pertaining to

subcontracting agreements, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting situations, the Board in *Disneyland Park* held that a broad, discovery-type standard is utilized by the Board in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Id.* In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the employer under the circumstances. *Disneyland Park*, supra at 1258; Absent such a showing, the employer is not obligated to provide such requested information. The Board has also held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258 fn. 5; *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989); see also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003).

In its August 31 letter demanding to bargain, the Union disputed Respondent's claims that Arbitrator Paolucci's decision gave it the authority to sell the routes at issue. The Union distinguished that case from the known facts about the routes at issue. The Union stated in this letter that in order facilitate bargaining, particularly in light of Respondent's reliance on the past arbitration decision which largely hinged on route profitability, the Union requested the following: (1) All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so comparison can be made as to the profitability of all the routes on Route No. 104 and Route No. 122; (2) A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold; (3) A description of how Mike-Sell's product is to be received by the entity to whom [R]oute No. 104 and Route No. 122 is scheduled to be sold; and (4) A copy of all correspondence, including electronic correspondence, between Mike-Sell's in the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016. Based on the wording of the letter, and the context in which it was sent, I find that the Union demonstrated the relevance of the information request, or that the relevance of the information should have been apparent under the circumstances. As such, Respondent's failure to provide the requested information violates Section 8(a)(5) and (1) of the Act.

*E. The Allegation That Respondent Failed to Bargain with the Union Regarding the Sale of the Company Vehicles to the Independent Distributors is Either Abandoned or Barred by Section 10(b) of the Act*

At the hearing, the General Counsel amended the complaint to include allegations that Respondent violated Section 8(a)(5) and (1) of the Act when it sold the delivery trucks to independent distributors. The parties entered into stipulations limiting

this allegation to Respondent's sale of a delivery truck to independent distributor Lisa Krupp's company BLM Distributing LLC on around September 4, 2016; and Respondent's sale of a delivery truck to independent distributor Charles Morris's company Big TMT Enterprize, LLC on September 11, 2016. (Tr. 222.)

An employer has a duty to bargain with the representative of its employees prior to making any changes in wages, hours or other working conditions if the change is a "material, substantial and a significant" one affecting the bargaining unit's terms and conditions of employment, and the General Counsel bears the burden of establishing that the change was material, substantial and significant. *Central Telephone Co. of Texas*, 343 NLRB 987, 1000 (2004). In this case, the Counsel for General Counsel completely failed to address this allegation in her posthearing brief. Similarly, the Union failed to present any argument or authority in support of this allegation. Thus, the allegation appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

Even if the General Counsel had established the sales to be unlawful, there is the issue of whether the allegation was timely. As indicated above, Respondent contends the allegation over the sale of the vehicles is barred under Section 10(b) of the Act. Section 10(b) of the Act provides, in pertinent part, "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is well established that the 10(b) limitations period does not begin to run "until the charging party is on 'clear and unequivocal notice,' either actual or constructive, of a violation of the Act." *Ohio & Vicinity Regional Council of Carpenters (The Schaefer Group, Inc.)*, 344 NLRB 366, 367 (2005) (citation omitted). Under this standard, adequate notice will be found where the conduct was sufficiently "open and obvious to provide clear notice" to the charging party. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enfd. sub nom. East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007)), or where the charging party was "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred," and could have discovered the violation by exercising reasonable diligence. *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001). See also *St. George Warehouse*, 341 NLRB 905, 905 (2004) ("In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence."). Respondent, in this case, shoulders the burden in establishing this affirmative defense. *Broadway Volkswagen*, *supra*.

On August 29, 2016, Respondent sent the Union a letter stating that Respondent will be eliminating two positions through the sale of Route 104 and Route 122, effective September 4, 2016. Respondent noted that the affected drivers (Gerald Shimmer #122 and Jerry Lake #104) would have an opportunity to rebid on September 1, 2016. On August 30, 2016, Gerald Shimmer informed union steward Rick Vance that he was told that his delivery vehicle was being sold, and that he (Shimmer) needed to unload his truck and use a spare vehicle for the last few days of his route. (Tr. 114–115). I find the timing of these

notifications was sufficient to put the Union "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred" and that the Union could have discovered whether there had been a violation "by exercising reasonable diligence." Despite this notification, the Union failed to exercise reasonable diligence to determine whether the sale of this vehicle, or any other vehicles, at or around the time these two routes were sold constituted a violation. Consequently, I find that the allegation was filed more than 6 months after the Union had constructive notice of the alleged violations, and, therefore, should be dismissed as untimely.

#### CONCLUSIONS OF LAW

1. Respondent, Mike-Sell's Potato Chip Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the certified collective-bargaining representative for the following unit of Respondent's employees:

[A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

4. Respondent has violated Section 8(a)(5) and (1) of the Act since July 2016 by failing to give the Union notice and an opportunity to bargain about its decision to unilaterally subcontract bargaining unit work to others outside the bargaining unit; and by failing to provide the Union information requested on August 31, 2016, that is relevant and necessary to its role as collective-bargaining representative.

5. By this conduct Respondent has engaged in unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as set forth above.

7. I recommend dismissing that portion of the amended complaint which alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing or refusing to bargain with the Union before unilaterally selling the delivery vehicles.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Affirmatively, Respondent shall, upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131. Respondent shall, upon request, bargain with the Union regarding the decision to subcontract or sell company sales routes. Respondent shall make any employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work associated with the sale of Routes 102, 104, 122, and 131 to inde-

pendent distributors. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the information requested in its August 31, 2016 information request.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's Dayton facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 11, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

#### ORDER

Respondent, Mike-Sell's Potato Chip Company, at its Dayton, Ohio facilities, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees regarding their wages, hours, and other terms and conditions of employment:

[A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

(c) Failing or refusing to provide the Union with requested information, such as the Information requested in the Union's August 31, 2016 information request that is relevant and neces-

<sup>21</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

sary to the Union's role as collective-bargaining representative.

(d) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

(b) Upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131 to independent distributors.

(c) Make affected employees whole, with interest, for any loss of earnings resulting from the subcontracting of unit work through the sale of Routes 102, 104, 122, and 131 to independent distributor, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(d) Compensate affected employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days after service by the Region, post at its facilities in Dayton, Ohio copies of the attached notice marked Appendix A.<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places throughout its Dayton, Ohio facility, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed certain facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 25, 2017.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

<sup>22</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

An Agency of the United States Government  
FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All sales drivers, and extra sales drivers at the [Respondent's] Dayton Plant, Sales Division and at the [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over-the-road drivers employed by the [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by the [Respondent].

WE WILL NOT refuse to meet and bargain in good faith with your Union over any proposed changes in wages, hours, and working conditions before putting such changes into effect.

WE WILL NOT change your terms and conditions of employment by unilaterally selling our routes without notification to the Union or affording the Union an opportunity to bargain regarding these decisions.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees about the sale of Routes 102, 104, 122 and #131.

WE WILL if requested by the Union, rescind the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union and assign those routes to unit employ-

ees.

WE WILL pay you for the wages and other benefits lost because of the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement, a report allocation the backpay award to the appropriate calendar year(s).

WE WILL promptly furnish the Union with the following information requested in its August 29, 2016 information request letter: (1) documents showing the profitability of Respondent's routes for the period September 1, 2014 through August 1, 2016, so a comparison could be made between all of the routes to Routes 104 and 122; (2) a copy of the agreement between Respondent and the entity who is scheduled to purchase these routes; (3) a description of how Respondent's product is to be received by the entities purchasing these routes; and, (4) a copy of all correspondence between Respondent and the entity who is scheduled to purchase these routes.

MIKE-SELL'S POTATO CHIP COMPANY

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/09-CA-184215> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E. Washington D.C. 20570, or by calling (202) 273-1940.

