

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 34

BOB'S TIRE CO., INC.

and

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 328

Case 01-CA-183476

COUNSELS FOR THE GENERAL COUNSEL'S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Before: Arthur Amchan, Deputy Chief Administrative Law Judge

Respectfully submitted,

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I. **STATEMENT OF THE CASE: "IT'S MY FAULT, I GUESS"**

This is a case about an employer that unilaterally subcontracted a significant portion of unit work for about a year, and also unilaterally modified and terminated discretionary bonuses for unit employees, both of which were meaningful to otherwise low-wage earning workers. The employer, Respondent Bob's, took both of these actions in the period immediately following the certification of the Union as the collective bargaining representative of its production workers, consisting primarily of yard workers, machine operators, and truck loaders and unloaders. Displaying a lack of even scant interest in meeting its lawful obligations, Respondent Bob's took each of these unilateral acts without ever notifying, or providing the Union with an opportunity to bargain about the subcontracting of unit work and the modification and termination of bonuses for unit employees. Instead, the unilateral acts were so apparent in their nature that Respondent Bob's owner, Robert Bates, first openly conceded that he "just did it" (referring to the above unilateral acts) without ever notifying the Union; and then explained his utter failure to do so with the following confession: "I don't know anything about the union, okay. *It's my fault, I guess.*"

More specifically, in October 2015, the Union was certified as the collective bargaining representative of the employer's 70 or so production employees, all of whom worked in the smallish two-to-three-acre yard at the employer's facility where it was engaged in the recycling and sale of new and shredded tires. In what can only be termed as an employer's sullen vindictiveness to its employees' union activities, over the course of the next year or so, Respondent Bob's, through Bates, engaged in a course of conduct that eventually became alleged in the Complaint as 16 independent

violations of Section 8(a)(1)(3) and (5) of the Act, including unlawful layoffs and the above alleged unilateral acts. On the eve of trial, Respondent Bob's entered into a Board settlement, agreeing to remedy all but the alleged subcontracting and bonus issues. With regard to these two latter allegations, as reflected by Bates' concessions above, the volume of evidence handily showed that beginning in November 2015, the month following the Union's certification, Respondent Bob's surreptitiously subcontracted certain aspects of Unit work to a temporary agency named Masis and kept the Union in the dark, even upon the latter's multiple and ongoing requests about the nature of the work performed by the Masis-supplied workers. In December 2015, two months after the Union's certification, Respondent Bob's cancelled the long-maintained Christmas bonus for its production workers. The following month, January 2016, Respondent Bob's unilaterally modified its discretionary cash bonus granted to Unit employees who worked on a Saturday. Worse, nine months later, Respondent Bob's unilaterally and unapologetically terminated this latter bonus as the Union began receiving the information it had requested about this bonus.

In its defense, Respondent Bob's initially claimed that the subcontracted work was limited to performing functions that were part of a new operational venture and, therefore, it did not unilaterally transfer Unit work. However, as evidence mounted at trial that the subcontracted work was that which was precisely encompassed by the Unit description in the parties' Stipulated Election Agreement, Respondent Bob's pivoted to an incongruous second line of defense. In striking contrast to its original defense, a plaintive Bates eventually questioned aloud in his testimony why the subcontracted workers could not have been in the Union all along. Bates next conceded that he would

have hired the same production workers (i.e., Unit employees) to perform the “new venture” duties through its joint employer and traditional source, BJ’s Service Company -- instead of the group of subcontracted workers -- but for BJ’s alleged inability to locate such workers, an admission that all but drowned out the original defense that the work was non-Unit work.

With regard to the unilateral modification and termination of the Christmas and Saturday work bonuses, Respondent Bob’s did not muster much, if anything, of a defense, which was limited to Bates’ acknowledgement that he “just did it” because he did not know he needed to notify and/or provide an opportunity to the Union to bargain about bonuses generally. A midnight-hour attempt by Bates on the stand claiming that Respondent Bob’s was unable to pay these bonuses lacked any measure of evidentiary support.

Failing to establish that its unilateral subcontracting of Unit work, and its unilateral modification and termination of two bonuses to Unit employees, were privileged by lawful considerations, Respondent Bob’s conduct in this case constitutes a clear violation of its good faith bargaining obligation, thereby violating Section 8(a)(5) of the Act.

## **II. FACTS**

### **A. Procedural History**

The charges and amended charges in this case were filed by the United Food and Commercial Workers International Union, Local 328 (herein “Union”) against Bob’s Tire Co., Inc. (herein “Respondent Bob’s”) and BJ’s Service Company (herein “Respondent BJ’s”)(herein collectively referred to as “Respondents”) on various dates

between February 18, 2016 and April 13, 2018 (GCX 1(a), (c), (e), (g), (i), (k), (m), (o), (q), (s), (u), (w), (y), (aa), (cc), (ee), (gg), (ii), (qq), (ss), (uu), (ww), (eee), (ggg), (ooo), (aaaa), (cccc)), culminating in the issuance of a Fifth Order Consolidating Cases, Fifth Consolidated Complaint and Notice of Hearing dated May 29, 2018 (herein "Complaint")(GCX 1(eeee)).

The Complaint alleges that Respondents each violated Section 8(a)(1)(3) and (5) of the Act by conduct dating back to as early as October 2015, immediately following the certification of the Union as the employees' collective-bargaining representative, as described below. In this regard, the Complaint alleged that Respondents, through Robert (Bob) Bates, violated Section 8(a)(1) from October through December 2015 by: 1) threatening and coercing employees with retaliation by immigration authorities; 2) threatening to call immigration authorities; 3) interrogating employees about their Union activity; 4) threatening employees with unspecified reprisals if they supported the Union; and 5) informing employees that it would be futile for them to select the Union as their bargaining representative by telling them that nothing will change with a union. The Complaint further alleged that Respondent, through Robert Bates, continued to violate Section 8(a)(1) in 2016 and 2017 by: 1) informing employees they faced deportation because they had engaged in Union and other protected concerted activities; 2) making an obscene gesture at an employee and physically assaulting an employee by spitting on the employee in the presence of other employees because of that employee's union activities and/or because Respondent Bob's believed that the Union had contacted OSHA concerning employees' working conditions; and 3) threatening employees with

unspecified reprisals because Respondent Bob's believed that the Union had contacted OSHA concerning employees' working conditions.

The Complaint further alleged that between December 2015 and August 2017, Respondents, through Robert Bates, violated Section 8(a)(3) of the Act by: 1) disciplining a Union supporter; 2) changing the work assignment of a different employee; 3) subjecting six employees to greater supervision; and 4) laying off five employees because of their Union and other protected concerted activities.

Finally, the Complaint alleged that Respondents violated Section 8(a)(5) of the Act by: 1) failing to fully furnish information requested by the Union, including information critical to bargaining for a first contract; 2) unilaterally modifying and then terminating an established bonus system; and, 3) engaging in unlawful subcontracting.

On June 11, 2018, Respondent Bob's filed a timely Answer to the Complaint (GCX 1(gggg)). In its Answer, Respondent Bob's generally denied the commission of any unfair labor practices, but admitted that: 1) it purchased and received goods valued in excess of \$50,000 at its New Bedford, Massachusetts facility from points located outside the State of Massachusetts; 2) it was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act at all relevant times; 3) the Union was a labor organization within the meaning of Section 2(5) of the Act; and 4) Robert Bates was a supervisor of Respondent Bob's within the meaning of Section 2(11) of the Act, and an agent of Respondent Bob's within the meaning of Section 2(13) of the Act (GCX 1(gggg)). In its Answer, Respondent Bob's also admitted that it had laid off five of the six named discriminatees, and further admitted that it had "terminated the discretionary bonus program" in or about September 2016.

Following the issuance of the Complaint, but prior to the hearing in this matter, Respondent BJ's and the Union entered into a non-Board settlement agreement (which is pending approval by the Regional Director), whereby Respondent BJ's agreed to remedy certain Complaint allegations and the Union agreed to withdraw all charges and Complaint allegations against Respondent BJ's. Additionally, Respondent Bob's simultaneously entered into an informal Board settlement agreement with the Region regarding all Complaint allegations *except* the Section 8(a)(5) allegations regarding the unilateral modification to the bonus system and the unlawful subcontracting (CPX 2). This Board settlement, which provided for a reading of the Notice to Employees, did not include a non-admissions provision.

On September 24 and 25, 2018, a hearing was held in Pawtucket, Rhode Island before Administrative Law Judge Arthur Amchan. This is Counsel for the General Counsel's brief in support of the Complaint allegations that remain following the above Board and non-Board settlements; specifically, whether Respondent Bob's violated Section 8(a)(5) of the Act by unilaterally modifying and terminating the bonus system and unlawfully subcontracting Unit work.

**B. Background**

**1. Respondent's Operations**

Respondent Bob's, with its principal facility in New Bedford, Massachusetts (herein Respondent's "New Bedford yard" or "yard"), has been in business since about 1976 and is engaged in the recycling of tires (Tr. 147). Primarily responsible for Respondent's overall operations is Owner and President Robert Bates (Tr. 134).

Respondent BJ's, with an office in New Bedford, Massachusetts, provides temporary employees to various employers, including to Respondent Bob's.

Respondent Bob's operations consist of purchasing used tires from a number of vendors -- car dealers, transfer stations, state government, truck and tire companies -- and then re-selling those tires, some in their current state, others in shredded form, depending on their condition (Tr. 181-182). In this regard, in some cases these vendors deliver the various tires to Respondent Bob's New Bedford yard -- roughly two-to-three acres in size -- while in other cases a complement of Respondent Bob's truck drivers, along with an assistant, use company trucks to pick up the used tires from the vendor (Tr. 148, 182, 212). In either case, Respondent Bob's yard employees first unload the incoming tires and then sort them based on by their future suitability (Tr. 182-184, 212).

Yard workers manually place "good" tires into trailers located within the yard and "bad" tires onto piles from where they are eventually placed in one of the two "shredders," each of which is located inside a building at the New Bedford facility and is operated by a "shredder operator" (Tr. 149-150, 162-163, 183-186, 212). Two yard workers "feed" tires onto the belt leading to the shredder (Tr. 163-164, 183-186). Heavier truck tires are placed on the belt by a machine called a grapppler, which is operated by a mechanic (Tr. 185-186). Shredded tires, also known as tire chips, return to the yard via a conveyor belt where they are collected by yard workers and placed in piles (Tr. 187, 211-213). Historically, according to Bates, these tire chips were sold to various mills and other plants (Tr. 211-213).

In addition, incoming tires that contain rims must be "de-rimmed" before being shredded (Tr. 186). To this end, yard workers roll such tires to, and actively operate,

separate “car tire derimmer” and “truck tire derimmer” machines to remove such rims (Tr.188). Yard workers also roll tires to, and independently operate, several other pieces of machinery located within the yard, including the “car tire sidewall cutter” and “truck tire sidewall cutter” machines, which as the names suggest, take the sidewalls off tires (Tr.188). These machines are also referenced in the record as “donut” machines because they take the sidewall off of the tires, leaving the end product looking like a donut (Tr. 20-22, 26).

At its New Bedford facility, the vast majority of Respondent Bob’s employees perform the above “yard work” (also referred to by Bates as “general labor”) outside in the yard (Tr. 20-22, 26, 148, 194-195). As described by Union representative Carlos Gonzalez, yard workers perform a wide variety of duties that are “mostly anything related” to tires, including the above-described loading and unloading of tires from trucks, using various machines to shred and cut tires, sorting tires into piles, transporting tires around the yard, assisting truck drivers, and generally, performing all aspects of tire-related functions in the yard, generally referred to as “yard work” (Tr. 20-22, 26). Many of the yard workers are cross-trained (Tr. 58-59). It is undisputed that to perform some of this work, yard workers operate the following eight machines, all of which are located in the yard: 1) car tire derimmer machine; 2) car tire dismount machine; 3) truck tire derimmer machine; 4) truck tire dismount machine<sup>1</sup>; 5) car tire inspection machine; 6) truck tire inspection machine; 7) car tire sidewall cutter; and 8)

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<sup>1</sup> Bates referred to machines that take rims out of tires that are no longer usable as “crushers” and further testified that the employer has about three of these machines located in the yard, all of which have been in the yard since prior to the certification of the Union (Tr. 151-153, 192). He also testified that machines that take rims out of tires that can be re-used are referred to as “truck tire dismounters,” of which there are two in the yard, both of which pre-date the certification of the Union (Tr. 151-153, 192).

truck tire sidewall cutter (Tr. 22-23: GCX 7, page 2). According to Bates, these eight machines represent the totality of machines that are located in the yard (Tr. 151-160).

## **2. The Union Campaign**

In about early September 2015, the Union began organizing the approximately 70 to 79 yard employees employed by Respondent BJ's who were referred to work to Respondent Bob's, which hired them as yard workers (Tr. 21-22). The Union's campaign led to the filing of separate election petitions against Respondent Bob's and Respondent BJ's.<sup>2</sup>

On September 16, 2015, the parties signed a joint Stipulated Election Agreement naming Respondents as the joint employers of the following Unit:

All full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters, and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc., working at the Bob's Tire Co., Inc., location on Brook Street, New Bedford, MA, but excluding all other employees, mechanics, shredder operators, truck drivers, clerical employees, and supervisors as defined in the Act.

(GCX 2). On September 23, 2015, an election was held, which the Union won by a final tally of 65 to 5 (GCX 3). On October 1, 2015, the Union was certified as the collective bargaining representative of the Unit (GCX 4).

## **3. The Parties' Negotiations for an Initial Collective Bargaining Agreement**

By letter dated November 13, 2015, the Union, through its attorney Marc Gursky, confirmed that the parties would meet for negotiations on Thursday, December 10, 2015 (GCX 5, page 1). In the same letter, the Union requested information from Respondents

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<sup>2</sup> The Administrative Law Judge is requested to take administrative notice that the Union filed two petitions at that time, one naming Respondent BJ's as the employer (01-RC-159405); the other naming Respondent Bob's as the employer (01-RC-159425)(GCX 2).

covering 18 separate inquiries in order to prepare for bargaining (GCX 5)<sup>3</sup>. Of these inquiries, the following three inquiries (in relevant part) are of particular significance in the instant matter:

1. A list of all employees in the bargaining unit, with their job classifications, seniority or hire date(s), hire rate, pay increases and current wage rates;
4. A detailed description of all benefits offered to any bargaining unit employees, including but not limited to bonuses;
9. A list of all tools and machinery utilized by bargaining unit employees, together with the vendor, purchase date and purchase price.

By letters dated December 4 and 10, 2015, Respondent Bob's, through its attorney Greg Koldys, responded to the Union's above requests for information (GCX 7, GCX 8). In response to the three above-cited inquiries, Respondent Bob's provided the following answers, in relevant part:

1. A spreadsheet of the current individuals on the payroll is attached;
4. Health insurance/sick time information will be provided by BJs. Viper gloves and inserts are provided -- 1 pair per week;
9. The machinery utilized is as follows:
  - \* Car tire derimmer
  - \* Car tire dismount machines
  - \* Truck tire derimmer
  - \* Truck tire dismount machine
  - \* Car tire inspection machine
  - \* Truck tire inspection machine
  - \* Car tire sidewall cutter
  - \* Truck tire sidewall cutter

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<sup>3</sup> By letter dated November 24, 2015, the Union sent an additional request for information to Respondents seeking information on 17 different items (GCX 6).

(GCX 7, pages 1-2). As can be gleaned from its response, Respondent Bob's indicated that each and every piece of machinery located outside in its yard, including the car tire sidewall cutter, was machinery that was to be utilized by Unit employees to perform Unit work. Respondent Bob's also failed to identify the fact that it annually paid cash Christmas bonuses to Unit employees, as well as periodic cash bonuses to certain employees who worked on Saturdays.

By letter dated December 29, 2015, the Union requested information which Respondent Bob's had failed to provide in its two above responses. More specifically, on the three relevant inquiries identified above, the Union sought the job classifications that Unit employees worked and the purchase date of all tools and machinery used by Unit employees (GCX 9, pages 1-3).

#### **4. Respondent Bob's Unilaterally and Unlawfully Subcontracts Bargaining Unit Work**

By early March 2016<sup>4</sup>, the Union learned from Unit employees Tomas Ventura and Jose Mateo (both of whom were on the Union's bargaining committee), that Respondent Bob's had been subcontracting Unit work to a temporary employment firm named Masis (Tr. 28-29). According to Union representative Gonzalez, at a caucus during the March 3 bargaining session, Unit employees Ventura and Mateo confirmed that Masis employees were operating machines and performing Unit work throughout the yard (Tr. 28-29). At the end of that session, Attorney Gursky asked Respondent Bob's attorney, Greg Koldys, about the Masis workers, specifically asking who these workers were, what duties and functions were they performing, and what were the hours they worked (Tr. 30-31). According to the uncontested testimony of Union

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<sup>4</sup> All subsequent dates are in 2016 unless otherwise specified.

representative Gonzalez, Attorney Koldys acknowledged that Masis workers were at the yard, working alongside Unit employees while performing different work in the yard, but provided no further details (Tr. 30-31).

Accordingly, by email dated March 4, Attorney Gursky wrote to Attorney Koldys, in relevant part, as follows:

It has come to our attention that Bob's is utilizing Massis<sup>5</sup> Staffing to provide employees engaged in bargaining unit work. These employees operate machinery previously designated by Bob's as bargaining unit work, yet neither Bob's nor B.J.s identified these employees in response to previous information requests. We view this omission as an attempt to evade Bob's/BJ's bargaining obligation. Please provide the following information:

36. Any agreements with Massis (sic) Staffing, or any other temporary staffing agency currently providing employees at Bob's Tire Recycling. If no written agreement exists, please provide the terms of the agreement(s);
37. A list of all Massis (sic) Staffing employees, including date of hire, position, salary, benefits, and home address;
38. A list of all employees operating any machinery, including but not limited to mounting/dismounting, derimming, air testing and sidewall removal.

(Tr. 235-236; GCX 10). By the time of the May 5 bargaining session, Respondent Bob's had not yet provided the above information (Tr. 32). At that session, the Union reiterated its interest in obtaining the above information (Tr. 32). At the next bargaining session, on May 26, Attorney Koldys informed the Union that he would obtain and provide the Masis agreement to the Union once it was obtained (Tr. 32-33). At that session, Attorney Gursky continued asking the same set of questions regarding the parameters of the work performed by Masis-supplied workers, but received no answers (Tr. 33).

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<sup>5</sup> The correct name for this staffing agency is Masis Staffing, not Massis, as incorrectly referred to by the Union in the instant email. Accordingly, this staffing company will be referred to herein as Masis.

By email dated June 16, Respondent Bob's, through Attorney Koldys, sent the Union a copy of the agreement between Masis Staffing and Respondent Bob's covering temporary workers referred by Masis to Respondent Bob's (Tr. 36-37; GCX 11). It is noteworthy that Respondent Bob's did not claim that the requested information was not relevant or necessary because it related to non-Unit employees or non-Unit work. Instead, it forwarded the Masis Staffing Agreement without raising any legal objections. The Masis agreement reveals that it was specifically prepared on November 6, 2015 by Masis for Robert Bates of Respondent Bob's, and executed by both parties on the same date -- about a month following the certification of the Union (GCX 11, page 1 of agreement).

Under Section 1 of the Masis Agreement, Masis agreed to "recruit, screen, interview, select, hire and assign its employees to perform the type of work described on Exhibit A attached hereto" at Respondent Bob's New Bedford facility (GCX 11, page 2). The attached Exhibit A shows that the designated work to be performed by Masis-supplied employees was limited to: 1) "Light Industrial-Loaders/Unloaders" at an hourly rate of \$9, **the same work at the same hourly rate performed by Unit employees;** and 2) "Working Supervisor/Leader" at an hourly rate of \$10 (GCX 11, page 10). Masis charged Respondent Bob's a 35% premium or markup above the hourly rate earned by each referred employee (Tr. 179-180; GCX 11, page 10). Under Section 1.g of the Masis Agreement, eligible referred employees received full health insurance, as described in Exhibit B of that agreement (GCX 11, pages 3 and 12). According to Union representative Gonzalez, Respondent Bob's had not previously informed the Union

about the nature of the duties performed by Masis employees; the Masis Agreement provided the first documentary glimpse of those duties (Tr. 37).

By email dated August 18, Respondent Bob's provided the Union with "a list of the people provided by Masis who have worked at Bob's at various times" (GCX 12). The list contained a total of *111 such workers* and it was the first time the names of these workers had been identified to the Union (Tr. 37-38; GCX 12). In the same email, Respondent Bob's also informed the Union it would "forward information as to what work they specifically performed" (GCX 12). By email dated August 22, Respondent Bob's informed the Union that it "was working on getting the information on the Masis folks and will forward it as soon as" it received that information (GCX 13).

By email dated September 14, Respondent Bob's, through Attorney Koldys, finally provided a spreadsheet to the Union showing the duties and functions that each of the 111 Masis workers had performed while employed at Respondent Bob's yard (Tr. 40-42; GCX 14). The spreadsheet provided overwhelming proof that each and every one of the 111 Masis employees had performed significant amounts of Unit work -- in some cases exclusively performed Unit work. More specifically, the spreadsheet, which was prepared by Respondent Bob's, showed that 101 of the 111 Masis workers performed "general labor" in the yard, which is the very essence of Unit work, as defined by the unit description (i.e. "yard workers") in the Stipulated Election Agreement (Tr. 41; GCX 3; GCX 14). Of these 101 workers, the great majority -- 67 workers -- exclusively performed "general labor" in the yard (Tr. 41; GCX 14). Six (6) Masis workers (part of the 101 workers who performed "yard work") were also listed as having served as "helper on truck," another undisputed Unit position (Tr. 41, GCX 14). Twenty-two (22) of

the 111 Masis workers were listed as having “cut and strapped tire tops (threads),” another undisputed aspect of Unit work (Tr. 41; GCX 14). Thirty (30) Masis workers were listed as having “cut and strapped sidewalls” -- more Unit work -- as part of their work duties (Tr. 40; GCX 14). Only four (4) of these 30 Masis workers (Cavanaugh, Coelho, DeSouza, and Doyle) *exclusively* “cut and strapped sidewalls, which contradicted Respondent Bob’s subsequent claim that all Masis workers exclusively performed this function. Finally, four of the 111 Masis workers were listed as having performed all of the above duties, as well as operating Bobcats, forklifts and other machinery, which was all considered Unit work (Tr. 41; GCX 14). According to Gonzalez’ undisputed testimony, the spreadsheet was the first time the Union learned from Respondent Bob’s about the specific components and volume of Unit work that Masis employees had been performing (Tr. 43).

It is undisputed that prior to the disclosure of the Masis spreadsheet, Respondent Bob’s had never informed the Union that it had subcontracted Unit work to Masis employees, and, of course, never offered to bargain with the Union about that subcontracting (Tr. 45). In this regard, although Respondent Bob’s owner, Bates, once escorted Union representative Gonzalez through the yard, Bates never indicated that new equipment -- purportedly involving non-unit duties -- had ever been purchased (Tr. 50-51). It is also undisputed that the Union never acquiesced to the subcontracting of Unit work (Tr. 45-46). Admitted into the record is a copy of each weekly invoice from Masis to Respondent Bob’s for all temporary workers hired from November 2015 through October 2016 (GCX 15 through GCX 63).

Buttressing the above undisputed documentary spreadsheet showing that Masis employees performed significant amounts of Unit work, two Unit employees credibly testified about their observations. First, former Unit employee Tomas Ventura testified that at some point following the election, he began observing about 10 workers from Masis show up weekly at the yard (Tr. 77). According to Ventura, on one occasion, a job applicant sought employment at the yard in Ventura's presence, at which point owner Bates informed the applicant *and* Ventura that "if somebody wanted to work for him (Bates), he has to apply through. . . Masis" (Tr. 77-78, 88-90). According to Ventura, Masis employees used a machine to cut the lateral walls of the tires and put them on the line (Tr. 79). Ventura further testified, without contradiction, that Unit employees formally used an older version of the same machines to perform the same task, i.e., cutting the tires' sidewalls (Tr. 79-82). Ventura further testified that he had also observed Unit employees, including Jose Mateo, work on the newer sidewall cutting machines on certain days when the Masis workers did not appear at the yard (Tr. 91-93, 96). Ventura further testified that he observed Masis employees load and unload trucks, separate tires and put the tires in the line, confirming what the spreadsheet had already revealed (Tr. 82-83).

Ventura also testified that Masis employees operated machines that removed the middle of tires, either akin to, or exactly as, the donut/ sidewall cutter machines (Tr. 83). Ventura also testified that in March 2016, he was suddenly laid off for several days, but returned to the yard in the interim and personally observed Masis-supplied workers and Bates' son, Tyler, an admitted supervisor, both performing Unit work (Tr. 84).

In addition to Ventura, current Unit employee Miguel Sam Perez testified that he was initially hired through Masis to work in Respondent Bob's yard, but only after Bates gave him a Masis job application and not a BJ's application (Tr. 106-107). According to Sam Perez, who testified pursuant to a subpoena, when he was initially hired through Masis he was assigned to "working with tires and taking the metal (rims) out of the tires," and then stacking the tires -- exactly the type of tire-derimming work that Unit employees had traditionally performed (Tr. 107-108, 116)<sup>6</sup> Although there were periodic issues surrounding the interpretation of Sam Perez' testimony, the majority of his testimony was clear in its description and import of work performed by Masis employees, including himself. In this regard, Perez clearly explained that he: 1) loaded and unloaded tires into and out of trucks while employed by Masis, and observed other Masis workers perform the same loading/unloading tasks (Tr. 108-109, 112-113, 128-130); 2) frequently cut tire sidewalls using a machine in the yard (Tr. 109, 112); 3) observed Masis co-workers using the same machine to remove the metal rims out of tires "just like us" (Tr. 110-111, 113-114, 118-119); and 4) importantly, that he was ultimately converted from a Masis-supplied worker into a BJ's-supplied worker, but did not observe any differences between the work he performed under the auspices of Masis from that which he performed while under the auspices of Respondent BJ's (Tr. 114-115, 118). In this latter regard, Perez repeatedly testified that he currently takes the metal rims off tires just as he did while under contract with Masis (Tr. 118-119, 124). He also testified that he exclusively received his daily work instructions from, and supervised by, the same individual, owner Bates, regardless of whether he was working

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<sup>6</sup> Sam Perez first appears on the Masis invoices on the week of June 12, 2016 (GCX 45) and subsequent invoices show that he continued to work through Masis at Respondent Bob's facility through October 19, 2016, at which time, he was converted into a Respondent BJ's-supplied employee (GCX 46-GCX 63).

under the Masis or BJ's banner (Tr. 114-115, 129) and was never supervised by a Masis individual (Tr. 129).

In its defense, Bates testified that two of the entities that formerly purchased tire chips -- a paper mill in Maine and a tire energy plant in Connecticut -- each ceased operations at some unspecified date, creating a logjam of tire chips in the New Bedford yard (Tr. 211, 214)<sup>7</sup> According to Bates, in about late 2015 the company began baling tire treads and delivering them by truck to sea containers en route to India (Tr. 215). Bates testified that to do so, he purchased about three new car sidewall cutting machines beginning in the fall of 2015 and hired Masis workers to "cut the treads and bale them and load them into containers and trailers (Tr. 161, 215-219). Bates succinctly described the work performed by Masis workers as follows: "They would cut and load passenger sidewalls" and "cut and load treads" (Tr. 218-219). According to Bates, he was hopeful this operation would continue indefinitely, but it only lasted about a year (Tr. 216).

On one hand, Bates attempted to claim that the work was not Unit work because the machines were new. On the other hand, Bates seemed to strongly imply during his testimony that the work was Unit work all along and wondered aloud several times during his testimony, as described below, why Masis workers could not be in the Unit.

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<sup>7</sup> Bates' testimony in this regard seems to be untrue. In August 2017, his outside accountants prepared a financial report regarding Respondent Bob's operations and noted that "Management developed a plan for operations which they believe will improve the Company's financial position in 2017 and going forward. Management's plan includes...reducing transportation costs by utilizing Company owned vehicles and employees to transport shredded tires to the mill in Maine and place less reliance on more costly third-party haulers" (RX 1 at page 7). Clearly, according to this report, Respondent Bob's was still transporting shredded tires to the mill in Maine, which is contrary to Bates' testimony that he only contracted the Masis workers to work on shipping tire chips to India, in part, because that mill had closed in 2015.

Bates again added inserted his odd understanding of the situation, which ultimately underscored that he believed the Masis work was Unit work all along, as seen by the following passage:

Q. (by Attorney Concepcion):

You didn't offer to bargain with the Union because you didn't know you had to, correct?

A. (by Bates): I had more employees. Better for them, right?

Q. So they were your employees?

A. They were taking care of by one other person on that side. It was a whole different side of the yard, a whole different operation.

Q. It's the same yard?

A. I couldn't even say that.

Q. It's the same yard, right?

A. Yes.

Q. Three-acre yard?

A. Yes. It was a new project. That's the whole thing. There were not enough hours in the day. And why couldn't they be union employees? I don't get it. *I don't know anything about the union, okay. It's my fault, I guess.*

(Tr. 174-175)(Emphasis added). Beyond the fact that Bates' testimony (directly above) is the polar opposite of the legal position that Respondent Bob's has taken in this matter (i.e., Masis employees should not be considered Unit employees because they performed non-Unit work), it amounted to another tacit admission by Bates that he considered the work performed by Masis workers to fall within the confines of what should be considered "Union" work. Moreover, Bates testified that he hired workers through Masis to perform the tire sidewall cutting work *only because* BJ's "just didn't have the people" -- a further implicit admission by Bates that the work assigned to Masis

Regarding the first of these approaches, as discussed in greater detail below, Bates was unable to successfully claim that the tire sidewall cutting function was “new.” In this regard, Bates explained that Unit employees historically employed a “truck sidewall cutter” machine that featured a blade to cut the sidewalls off trucks (Tr. 161). Bates conceded that the most recently purchased “car sidewall cutter” machines, which also featured a blade and which were purchased in the fall of 2015, performed the same function and used the same process as the “truck sidewall cutter,” albeit on cars instead of trucks (Tr. 161). Importantly, Bates conceded that all the machines in the yard that he described, including the “car sidewall cutter,” were part of the Unit work description in the stipulated Unit description (Tr. 168).

Regarding the second approach, when confronted with the issue of whether Respondent Bob’s had ever informed the Union that non-Unit employees from Masis would be performing Unit work, or working on machines that cut the sidewalls off cars, Bates oddly and wildly veered off course and answered:

I don’t understand. Why are they nonunion? I don’t get it. The reason I got these people is because BJ’s could not give me enough people. I never refused one person that BJ’s sent me, not one. I asked for more people and they couldn’t come up with them. We are doing a whole different operation and it’s not sidewalls, it’s the treads. They were getting sent to India. They were loading those and they were banding those. When it stopped they were gone.

(Tr. 173-174). Bates admitted that he was sure that BJ’s-supplied employees were competent to perform the car tire sidewall cutting function, yet conceded that Respondent Bob’s failed to inform the Union in advance about the fact that non-Unit employees from Masis would be performing work on the car tire sidewall cutters, simply explaining away such a failure with a shrug: “*I didn’t know I had to*” (Tr. 174, 225-227)!

workers fell squarely within the ambit of what all otherwise considered to be Unit work (Tr. 217). Bates further conceded that: 1) Masis workers performed other yard duties, typically performed by Unit employees, as necessary (Tr. 217); 2) he could have directly hired employees to amplify the existing corps of Unit employees instead of hiring through Masis (Tr. 227-228); 3) he or other supervisors employed by Respondent Bob's trained the incoming Masis workers to perform the yard work at issue (Tr. 230-231, 244); and 4) Masis employees did not have any special skills, licenses, or certifications and there was nothing in the work performed by Masis workers that could not have been performed by BJ's workers, candidly adding: "You could probably teach an eight-year old in a day" to do the Masis work (Tr. 244-245). Finally, Bates admitted that he did not have any documentary proof to back up his claim that for the period of November 2015 through October 2016, BJs did not have additional workers to supply to Respondent Bob's to perform other aspects of yard work (Tr. 229-230).

As a final nod to the fact that Masis workers had been performing Unit work all along, in October 2016, Respondent Bob's simply cancelled the Masis Staffing agreement, and re-hired all the former Masis employees through Respondent BJ's, whereupon they were all assigned to perform yard work alongside Unit workers, a function they continue performing to the present (Tr. 250-252).

**5. Respondent Bob's Unilateral Termination of Christmas Bonus, and Unilateral Modification and Termination of Bonus Paid for Work Performed on a Saturday**

**a. Unilateral Termination of Christmas Bonus**

According to former long-term employee Ventura, Respondent Bob's maintained an established bonus system from at least 2008 through about September 2015

whereby Unit employees annually received a Christmas bonus. More specifically, Ventura testified without contradiction that Respondent Bob's paid an annual Christmas bonus in cash to each Unit employee, including one to Ventura in each of those years, in amounts ranging between \$20 and \$100 (Tr. 75-77, 86-87)<sup>8</sup> According to Ventura, following the certification of the Union, Respondent Bob's failed to pay a Christmas bonus to all Unit employees, including to Ventura, in 2015 (Tr. 76, 86-87). Bates did not specifically refute Ventura's testimony regarding the employer's historical annual payment of Christmas bonuses, or the sudden cessation of that bonus in December 2015. Nor did Bates provide much of a defense to this issue other than to generally state that he did not know he needed to notify and/or bargain with the Union about bonuses (Tr. 141-145).

It is also clear that the Union never waived its right to bargain about this matter inasmuch as Respondent Bob's never notified the Union about the existence of the annual Christmas bonus in its response to the Union's November 13, 2015 letter wherein the Union specifically sought information about "benefits offered to any bargaining unit employee, including. bonuses." There is no evidence that Respondent Bob's later reinstated the Christmas bonus in 2016 or thereafter, or sought to bargain with the Union about that bonus.

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<sup>8</sup> Bates never specifically denied that he had paid Christmas bonuses. However, Bates testified that he had only paid bonuses to a few employees from 1976 through 2015, which would limit the amount of Christmas bonuses that had been paid. Clearly, wherever Ventura and Bates' testimony clashed, Ventura should be credited and Bates should not be. Ventura, who testified with siren-smooth directness, was clearly more credible than Bates in every respect. On the other hand, Bates, who wobbled through his testimony like an angry puppet on a string, constantly contradicted himself, displayed bouts of brusqueness, and, despite sitting empirically on the stand with a constant smirk, appeared entirely unprepared to testify about matters of any significance.

**b. Unilateral Modification and Termination of Bonus Paid for Work Performed on a Saturday**

Apart from the annual Christmas bonus, Ventura testified that, prior to the Union's certification, Respondent Bob's also historically paid a cash bonus to those employees who performed work on a Saturday (Tr. 76). Bates did not specifically refute Ventura's testimony. On the contrary, under cross-examination, Bates grudgingly conceded (in seeming agreement with Ventura's testimony) that Respondent Bob's had paid discretionary cash bonuses to Unit employees for such work from at least October 2015 through January 2016 (during the post-certification period) (Tr. 135-136, 139).

In about January 2016, Respondent Bob's began paying such bonuses in check form rather than in cash, making tax deductions from these bonus checks, which had not occurred with the cash bonuses (Tr. 140, 142). At this time, Respondent Bob's had not informed the Union about the existence of such a bonus, nor did it notify, or seek to bargain with, the Union regarding the January 2016 change in how the bonus was paid (i.e., cash without deductions versus check form with deductions) (Tr. 46). As reflected by Respondent Bob's documents in evidence, for the period of January 2016 through September 16, 2016, Respondent Bob's paid weekly bonuses in amounts of \$50 or \$100 to about 11 Unit employees for work they performed on a Saturday (GCX 64).

According to Union representative Gonzalez, at one of the bargaining sessions in May 2016 the Union first learned from bargaining committee members Ventura and Mateo about the existence of such a bonus (Tr. 33-34, 65-66). At the same bargaining session, Union attorney Gursky then requested specifics about this ongoing bonus program: why were Unit employees receiving bonuses; which employees received

them; and, how often such bonus payments were made (Tr. 34-35). Respondent Bob's representatives said they would get back to the Union with these details (Tr. 35).

By September 2016, the Union had not yet received any of the bonus-related information it had requested in May, as described above (Tr. 44-45, 63-65). Consequently, at one of the bargaining sessions in September, Attorney Gursky renewed the request, at which point Attorney Koldys informed the Union that Respondent Bob's was terminating the bonus altogether effective immediately (Tr. 44-47, 62-63)<sup>9</sup>. As previously noted, Respondent admitted in its Answer that it terminated these bonuses in September 2016 (GCX 1(gggg)). In his testimony, Bates confirmed that Respondent Bob's had terminated these bonuses in September 2016 (Tr. 146). As of September 16, 2016, Respondent Bob's was paying approximately \$800 in weekly bonuses to Unit employees (Tr. 220; GCX 64).

It is undisputed, as confirmed by the testimony of Union representative Gonzalez and conceded by Bates in his testimony, that Respondent Bob's never informed the Union, or asked to bargain with the Union, about its January 2016 decision to immediately change the discretionary cash bonus without deductions for work performed by Unit employees on a Saturday to a check-based bonus with deductions (Tr. 45-46, 141-142, 145). Rather, according to Bates, he "just did it" (Tr. 145). Bates further conceded he never bargained with the Union about the bonus amounts, the frequency of bonus payments, the basis for the bonus payments, or the employees who

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<sup>9</sup> Respondent Bob's never provided the bonus-related information requested by the Union in May and September 2016 (Tr. 45, 47), the failure of which was alleged as a Section 8(a)(5) violation in the Complaint. As previously noted, Respondent Bob's eventually entered into a Board settlement covering, *inter alia*, all "information request" allegations.

should receive the bonuses issued in check form that were regularly granted beginning in January 2016 (Tr. 143-145).

Equally important, as Gonzalez described in his testimony and Bates conceded in his, Respondent Bob's never informed or asked to bargain with the Union about the sudden and complete termination of this bonus in September 2016 (Tr. 46-47, 146-147). In this regard, Gonzalez testified that Respondent Bob's never provided notice to the Union that such a change was afoot until suddenly announcing the immediate termination of the bonus at a September bargaining session; Bates testified that he terminated the bonuses in September 2016, but did not recall informing the Union at a negotiation session that he was doing so (Tr. 204). Again, according to Bates, he "just did it" because he did not think he had to bargain with the Union about this matter (Tr. 145).

Rather than relying on the usual defenses to an alleged unilateral change (e.g., agreement, waiver, impasse, estoppel, no change), Bates instead relied on economics as his primary defense, stating that he terminated the bonus in September 2016 because he could no longer afford it based upon: 1) a forecasted increase to Massachusetts' minimum wage scheduled to begin in January 2017; and 2) a financial loss, as revealed by a financial statement prepared by his outside accountant nearly a year later -- in *August 2017* (Tr. 205-210; RX 1). In so doing, Respondent Bob's appeared to claim that an economic exigency justified the immediate termination of the bonus. However, beyond the fact that Respondent Bob's would not know the details of its outside accountant's financial report for another 11 months, there is no evidence that an economic exigency ever existed in September 2016, or at any time thereafter. Thus

the record shows that Respondent Bob's remains in business to date, and there is no evidence that Respondent Bob's has ever filed for any form of bankruptcy after September 2016 (Tr. 220-221). Indeed, the record shows that on or about September 18, 2016 -- the day the bonus for work performed on a Saturday by Unit employees was terminated -- Respondent Bob's was still employing about 22 workers referred from Masis, each of whom was earning considerable amounts of overtime at the time (Tr. 221-222).

### III. ARGUMENT

#### A. **General Legal Principles Applicable to Section 8(a)(5) Allegations Involving Unilateral Changes**

Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees." 29 U.S.C. 158(a)(5).<sup>10</sup> "Unilateral action by an employer without prior discussions with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." NLRB v. Katz, 369 U.S. 736, 747 (1962). An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are a mandatory subject of bargaining. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." Katz, supra at 742; United Cerebral Palsy of New York City, 347 NLRB 603, 606 (2006).

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<sup>10</sup> In addition, an employer who violates Section 8(a)(5) derivatively violates Section 8(a)(1). ABF Freight System, 325 NLRB 546 fn. 3 (1998).

Before taking any unilateral action on a mandatory subject of bargaining, an employer is required to provide the Union with advance notice and an opportunity to bargain. "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the Union of a fait accompli." Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982)(footnotes omitted), enfd. 722 F.2d 1120 (3d. Cir. 1983). "[A]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." Pontiac Osteopathic Hospital, 336 NLRB 1021, 1023 (2001), quoting NLRB v. Citizens Hotel, 326 F.2d 501, 505 (5<sup>th</sup> Cir. 1964). Toma Metals, 342 NLRB 787 fn. 4 (2004)(announcement of layoffs on day they occurred does not satisfy duty to provide notice and an opportunity to bargain).

**B. Respondent Violated Section 8(a)(5) by Unilaterally Subcontracting Unit Work**

It is well settled that the subcontracting of bargaining unit work that does not constitute a change in the nature, scope, or direction of the business, but only involves the substitution of one group of workers for another to perform the same or similar work, is clearly a mandatory subject of bargaining. Spurlino Materials, Inc., 353 NLRB 1198, 1218 (2009); Kingsbury, Inc., 355 NLRB 1195 (2010). See also, St. George Warehouse, Inc., 341 NLRB 904 (2004)("Respondent's unilateral transfer of unit work to temporary agency employees violated Section 8(a)(5) and (1)"), enfd. 420 F.3d 294 (3d Cir. 2005); Mission Foods, 350 NLRB 336, 344-345 (2007)(Where subcontracting involves merely

“the substitution of one group of workers for another to perform the same work,” the union must be given notice and a meaningful opportunity to bargain); O.G.S. Technologies, Inc., 356 NLRB 642 (2011)(herein “OGS”), discussing Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964), Torrington Industries, 307 NLRB 809 (1992).

In this case, it cannot be seriously disputed that beginning in November 2015 and continuing through October 2016, Respondent Bob’s contracted out bargaining unit work -- primarily loading and unloading trucks, operating all machines other than the shredder machine, and general yard work related to the shredding and sale of recycled tires -- to Masis temporary employees without advance notice to the Union and, therefore, without providing the Union with an opportunity to bargain about Respondent Bob’s desire to contract out the work. Although Respondent Bob’s initially put forth a lukewarm claim that the work performed by Masis workers was not unit work, the evidence undermining that claim was overwhelming.

To begin with, the unit description in the Stipulated Election agreement clearly defines the following classification of workers as being in the unit:

All full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters, and truck helpers employed by Bob’s Tire Co., Inc. and/or B.J.’s Service Company, Inc., working at the Bob’s Tire Co., Inc., location on Brook Street, New Bedford, MA.

The same agreement has only the following classification exclusions from Unit work:

but excluding all other employees, mechanics, shredder operators, truck drivers, clerical employees, and supervisors as defined in the Act.

Of the excluded classifications, only one, the shredder operator, involves the operation of a machine; in this case, a very specific machine called “a shredder.” In initially seeking that exclusion, Respondent Bob’s submitted its Statement of Position filed in response to the Union’s election petition, wherein it sought to exclude “mechanics” and “shredder operators,” but only because both classifications had specific training and duties that were different from others in the proposed unit “and as such have different interests and concerns” (CPX 1, page 1). The “shredder operator” classification that Respondent sought to exclude only had one individual, Andres Lazaro Maric, who was classified as a shredder operator (CPX 1, page 4), a fact that Bates later confirmed in his testimony (Tr. 164-167). Otherwise, the unit description sought and agreed to by Respondent Bob’s specifically included all other “machine operators” who worked *on all other machines* in Respondent Bob’s yard. To that end, Respondent Bob’s attached all remaining machine operators to its Statement of Position because it acknowledged that they were considered by the parties to be appropriate for, and therefore to be included in, the proposed Unit (CPX 1, pages 2-4). Since it is undisputed that some of the Masis temporary employees operated tire machines located in the yard other than the shredder, it is clear they were involved in performing unit work, as specifically provided for in the Stipulated Agreement. The lone differences between the machines operated by Unit employees and Masis employees is that the latter operated some newer versions of the same car tire sidewall cutter machines that Unit employees once operated; and the purchaser of the shredded car tire chips was different (i.e., Bates’ claim that the new tire chips were sold to a shipping company as opposed to various mills). Neither difference is remotely significant by itself, or in combination, to

undermine the fact that the work performed by Masis employees -- operating machines in the yard involved in the tire recycling operation -- is the central function engaged in by Unit employees.

Second, Bates testified that Masis employees mostly operated newly purchased "car tire sidewall cutter" machines. These are precisely the same set of machines that Respondent Bob's identified as one of eight machines in the yard that would be operated by bargaining unit yard employees in its December 4, 2015 response to the Union's information request (GCX 7, page 2). As such, Respondent Bob's essentially admitted in this response that any worker who operated any car sidewall cutting machine ---irrespective of whether the machine was older or newly purchased -- would be performing bargaining unit work. Indeed, as noted above, according to Ventura's uncontested testimony, Unit employees formerly used an older version of the same machine to perform the same task, i.e., cutting the sidewalls of car tires. Ventura further testified that he had observed Unit employees, including Jose Mateo, work on the new sidewall cutting machines on certain days when the Masis workers did not appear at the yard, meaning such work was clearly within the ambit of unit employees' ability to perform.

Third, it is undisputed that apart from operating car tire sidewall cutter machines, Respondent Bob's contracted out a significant array of other Unit work to the temporary workers supplied by Masis. Overwhelming proof of this fact is reflected in the September 14, 2016 spreadsheet provided by Respondent Bob's to the Union during negotiations, which showed the specific tasks that each of the 111 Masis workers who had ever worked for Respondent Bob's had performed. As previously noted, the

spreadsheet provided demonstrative proof that each and every one of the 111 Masis employees performed significant amounts of Unit work -- and, in some cases, *exclusively* performed Unit work. More specifically, the spreadsheet, which was prepared by Respondent Bob's, showed that 101 of the 111 Masis workers performed "general labor" in the yard -- the very essence of Unit work, as defined by the unit description in the Stipulated Election Agreement. Of these 101 workers, the great majority (67) *exclusively* performed "general labor" in the yard; six (6) workers served as a "helper on truck," another undisputed aspect of Unit work; and (22) of the overall group of 111 Masis workers were listed as having "cut and strapped tire tops (threads)," another undisputed aspect of Unit work. Thirty (30) Masis workers were listed as having "cut and strapped sidewalls" (more Unit work) as part of their work duties. According to the spreadsheet, only four (4) Masis workers (Cavanaugh, Coelho, DeSouza, and Doyle) *exclusively* "cut and strapped sidewalls," which contradicted Respondent Bob's subsequent claim that all Masis workers *exclusively* performed this function. Finally, four of the 111 Masis workers were listed as having performed all of the above duties, as well as operating Bobcats, forklifts and other machinery, which was all considered Unit work (Tr. 41; GCX 14).

Buttressing the information provided on the spreadsheet, Ventura testified without contravention that he observed Masis employees load and unload trucks, separate tires and put the tires in the line- all traditional bargaining unit work. Additionally, current Unit employee Miguel Sam Perez testified that he was initially hired through Masis to work in Respondent Bob's yard, and was assigned to "working with tires and taking the metal (rims) out of the tires," and then stacking the tires -- exactly

the type of tire derimming work that Unit employees had traditionally performed. Sam Perez further described that he: 1) loaded and unloaded tires into and out of trucks while employed by Masis, and observed other Masis workers perform the same loading/unloading tasks; 2) observed Masis coworkers use the car tire sidewall cutter to remove the metal rims out of tires (and not to create tire chips); and 3) was ultimately converted from a Masis-supplied worker into a BJ's-supplied worker, but did not observe any differences between the work he performed under the auspices of Masis from that which he performed while under the auspices of Respondent BJ's. In this latter regard, Sam Perez repeatedly testified that he currently takes the metal rims off tires just as he did when referred by Masis.

In summary, it is clear that the work performed by Masis workers fits neatly within the stipulated Unit description. Thus, as described above, Masis workers: 1) performed an array of traditional bargaining unit duties, as reflected by the spreadsheet and the testimony of Ventura and Sam Perez; 2) performed the same removal of car sidewalls, albeit with newer machines, as previously performed by Unit employees; and 3) operated machines that were included as Unit work in the Stipulated Agreement, and which Respondent Bob's later confirmed in its December 4 admission where it admitted that car tire sidewall cutters were machines operated by Unit employees.

Other factors point to the same conclusion: the agreement between Masis and Respondent Bob's shows that the work to be performed by Masis-supplied workers was limited to "Light Industrial Loaders/Unloaders at an hourly rate of \$9" -- the same job duties performed by Unit employees at exactly the same hourly rate. Additionally, Respondent Bob's did not raise any objections on the basis of relevance to the Union's

multiple requests for information about Masis workers, objections that likely would have been made if Masis employees were not performing unit work. Finally, Bates' various concessions about the facts that the work performed by Masis workers could have easily been performed by unit employees ("You could probably teach an 8-year old in a day" to learn the Masis work), and, significantly, that he would have hired the same workers through Respondent BJs instead of Masis (as he ultimately did) to perform the work at issue, but for the inability of Respondent BJs to supply more workers. Based on the foregoing, it is clear that Respondent Bob's contracted out Unit work to Masis-supplied employees, but that Bates did not initially think to include them in the Unit because, as he conceded, "I didn't know I had to."

It is obvious that the contracting out of this Unit work materially affected Unit employees: Unit workers were denied the additional hours and overtime that were eventually worked and earned by Masis workers; and, as described by Ventura, Unit workers were actually laid off for brief periods while Masis workers continued to work. It bears noting that the Complaint alleged, and Respondent Bob's admitted in its Answer, that Respondent Bob's had unlawfully laid off certain Unit employees, but it settled that allegation through a Board settlement immediately in advance of the instant proceedings. See also, Overnite Transportation Co., 330 NLRB 1275, 1276 (2000) where the employer subcontracted unit work, and the Board held that "the bargaining unit is adversely affected whenever bargaining unit work is given away to non-unit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit."

It is also undisputed that Respondent Bob's never provided notice, or an opportunity to bargain, to the Union regarding its action of assigning Masis temporary workers to perform bargaining unit work. Indeed, the Union only learned about this action in March 2016 -- five months after it had already begun -- and even then, only learned about it through its bargaining committee members, not the employer. Thus, there is no possibility that the Union ever waived its rights to bargain over this matter, or could have agreed to it before it began.

Respondent Bob's defense on this matter consisted of two antipodean approaches: first, that the duties performed by Masis workers were a wholly new function, which presumably amounted to a change in the scope, nature, or direction of the enterprise, meaning they were not engaged in performing unit work; and, second, that Bates erred by failing to initially include them in the Unit ("I guess it's all my fault") and contending they should have been unit employees all along. Neither defense has merit.

Regarding the first of these two defenses, i.e., the change in scope, nature, or direction of the operation, it is apparent from the record that Respondent Bob's did not meet the legal standard set by the Board and courts to show that it engaged in such entrepreneurial conduct. For example, in OGS, supra, the employer subcontracted certain die cutting work because it determined it could not produce the work as quickly as a subcontractor. Nevertheless, the Board concluded that OGS had violated Section 8(a)(5) by unilaterally subcontracting that die cutting. The Board explained:

In contrast to First National Maintenance,<sup>11</sup> 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

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<sup>11</sup> First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

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. Before and after the decision, OGS, either directly or indirectly, or through its subcontractors, used a mix of technologies to cut the dies needed to produce the buttons. Before and after, OGS utilized subcontractors to perform the vast majority of the die cutting (85 percent before and 100 percent after). The decision at issue simply resulted in a marginal increase in the percentage of cutting work the Respondent subcontracted and a modest change in the function performed in-house, but not the abandonment of a line of business or even the contraction of the existing business. Given this essential continuity in its operations, OGS' action in marginally expanding its subcontracting in order to avail itself of more advanced technologies for cutting dies does not rise to the level of a change in the scope of the enterprise or its direction.

See also, Winchell Co., 315 NLRB 526 (1994), *enfd.* 74 F.3d 1227 (3d Cir.

1995)(holding that a printing company could not unilaterally lay off pre-press employees because the company had invested in desktop computers that allowed customers to prepare their own material for printing. The Board reasoned that the technological advance of the desktop computers changed the Respondent's operations by degree, not kind).

Here, as in OGS, Respondent Bob's made certain minor operational changes that did not involve a "partial closing" or other "change in the scope and direction of the enterprise," which otherwise remained devoted to the shredding and sale of recycled tires. That is, Respondent Bob's did not hire the Masis employees because it abandoned a line of business, or contracted an existing business. Rather, it merely expanded a part of its ongoing enterprise -- the sale of recycled and shredded tires -- to include a new purchaser (the shipping company) using a newer version of the same car sidewall tire shredding machines it had always employed in its yard, which had been

traditionally operated by the yard workers who ultimately came to be represented by the Union. At most, any operational “change” in this case was one of degree, not of kind. See, Winchell Co., supra. Accordingly, this claim fails and must be rejected.

Regarding Respondent Bob’s second defense, i.e., Bates’ mistaken belief about whether he had a duty to bargain about the work contracted to Masis, such a defense is simply inadequate inasmuch as mistake is not a viable defense to the General Counsel’s contention that Respondent Bob’s had a duty to notify and offer to bargain about its interest in subcontracting the work that was performed by Masis-supplied workers. Allied Aviation Fueling of Dallas, 347 NLRB 248, 256 (2006)(Mistaken belief not a valid defense to an 8(a)(5) unilateral change allegation). Indeed, more generally, with regard to unilateral changes, motive is not relevant. A unilateral change in a mandatory subject of bargaining is a *per se* breach of the Section 8(a)(5) duty to bargain, without regard to the employer’s subjective bad faith. NLRB v. Katz, 369 U.S. at 743 (“though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargaining to that end. .an employer’s unilateral change in conditions of employment under negotiations is a violation of Section 8(a)(5)”). Thus, this claim also fails and must be rejected.

Based on the above, it should be found that Respondent Bob’s violated Section 8(a)(5) of the Act by contracting out bargaining unit work without notice, or an opportunity to bargain to the Union.

**C. Respondent Violated Section 8(a)(5) by Unilaterally Modifying and Terminating the Established Bonus Program<sup>12</sup>**

As noted above, an employer must bargain with the union before changing existing terms and conditions of employment. NLRB v. Katz, supra. Any bonus paid to unit employees, including a holiday bonus, is a mandatory bargaining subject if the employer's conduct raised the employees' reasonable expectation that the bonus will be paid. Sykel Enterprises, Inc., 324 NLRB 1123, 1124-1125 (1997). Gas Machinery Co., 221 NLRB 862, 865 (1975)("What is crucial in determining whether a bonus is part of the wage structure rather than a gift is. . .whether, by course of conduct or otherwise, Respondent has justified its employees' expectations that they would receive the bonus as part of wages."); Waxie Sanitary Supply, 337 NLRB 303 (2001); Laredo Coca-Cola Bottling Co., 241 NLRB 167, 173-174 (1979), enfd. 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980). See also, U.S. Information Services, Inc., 341 NLRB 988 (2004)(Christmas bonus paid on a nonregular or intermittent basis to some but not all bargaining unit employees still considered a mandatory subject of bargaining).

Here, Respondent's conduct caused employees to reasonably expect payment of both the Christmas bonus and the Saturday work bonus. In this regard, according to Ventura's uncontested testimony, the Christmas bonus was paid for seven consecutive

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<sup>12</sup> The Complaint broadly words the allegation involving the modification and termination of bonuses as follows: "Since about January 1, 2016, Respondents have materially modified the discretionary bonus system for Unit employees." In its Answer, Respondent Bob's admitted that "it terminated the discretionary bonus program." Although the Complaint does not specifically refer to a "Christmas" bonus, the Complaint allegation adequately covers that bonus inasmuch as that bonus was "discretionary" and was "modified" in or about late 2015, or early 2016, and never reinstated -- a permanent modification. In any event, "it is well-settled that the Board may find and remedy a violation in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." Hi-Tech Cable Corporation, 318, 280, 280 (1995), quoting Pergament United Sales, 296 NLRB 333, 334 (12989), enfd. 920 F.2d 130 (2d Cir. 1990). See also, Williams Pipeline Co., 315 NLRB 630 (1994). Here, the termination of the Christmas bonus is closely related to the modification and termination of the Saturday work bonus, both in terms of timing and Respondent Bob's overall defense: Bates did not know he needed to bargain with the Union about bonuses, generally speaking.

years (from 2008 to 2014), and was discontinued immediately following the Union's certification without notice to the Union. Additionally, the bonus based on work performed on a Saturday was paid for many years prior to the Union's certification, and it was clearly regularly paid following that certification on a weekly basis (to at least 11 Unit employees) until about September 18, 2016, at which time Respondent Bob's unilaterally discontinued it, again, without advance notice to the Union. Moreover, bonuses are considered to be wages (and therefore mandatory subjects of bargaining), and not gifts when the payment is tied to various employment-related factors, such as hours worked. See Benchmark Indus., 270 NLRB 22, 22 at fn. 5 (1984), *affd.* Amalgamated Clothing v. NLRB, 760 F.2d 267 (5<sup>th</sup> Cir. 1985); Waxie Sanitary Supply, 337 NLRB at 304; Stone Container Corp., 313 NLRB 336, 337 (1993); Mr. Potty, Inc., 310 NLRB 724, 729-730 (1993). Here, Respondent Bob's predicated the "Saturday bonus" exclusively on work performed on a Saturday- a direct causal link between the bonus and a work-related factor (i.e., when the hours were worked).

Finally, Respondent has nowhere suggested that it was free to take unilateral action regarding either the Christmas bonus or the Saturday work bonus on the basis that the bonuses were not mandatory subjects of bargaining, much less that they were "gifts." In this regard, there is no evidence that Respondent Bob's ever informed employees that either bonus was a gift; there is no evidence that it ever informed the Union that such bonuses were "gifts;" it never informed the Region in defense of the charge that such bonuses were gifts; and, most significantly, it never presented evidence at trial, including Bates' testimony (who effectively testified twice), that either type of bonus was a gift.

It is undisputed that Respondent Bob's never notified, or provided an opportunity to the Union to bargain, before modifying the Saturday work bonus, or terminating either bonus. Rather, as Bates acknowledged, he simply "did it" because he "didn't know" he had to bargain with the Union about bonuses. Based upon the above, it should be found that Respondent Bob's violated Section 8(a)(5) by unilaterally terminating the Christmas bonus, and by first modifying and then terminating the bonus for Saturday work.

#### **IV. CONCLUSION**

Counsel for the General Counsel respectfully submits that the record evidence supports the Complaint allegations that Respondent Bob's violated Section 8(a)(1) and (5) as alleged. The Administrative Law Judge is, therefore, urged to make appropriate findings of fact and conclusions of law and to issue the requisite remedial order. As part of the remedy, Respondent should be ordered to cease and desist from, and to take certain affirmative action, designed to effectuate the purposes of the Act, including, but not limited to: 1) posting appropriate notices in their respective offices and/or facility; 2) cease and desist from failing and refusing to bargain with the Union as the representative of Unit employees by unilaterally contracting out bargaining unit work, and by modifying and/or terminating employee bonuses, without providing the Union notice and an opportunity to bargain; 3) restoring the status quo ante of all terms and conditions of employment for Unit employees, including bonus payments, in existence as of October 1, 2015, the date the Union was certified by the Regional Director, that Respondent Bob's unilaterally changed after that date; and, 4) making all affected Unit employees whole, with interest, for any loss of earnings and other benefits suffered as a result of Respondent Bob's unilateral subcontracting of Unit work from November 2015

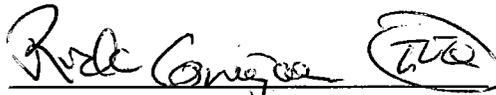
Based on the above, it is therefore abundantly clear that both the Christmas bonus and the Saturday work bonus were mandatory subjects of bargaining. As such, Respondent could not lawfully terminate any existing bonus, or implement any new bonus arrangement in the bargaining unit without first notifying the Union of its intentions and, on the Union's request, bargaining in good faith over the proposed arrangement. This is because the discontinuation of the Christmas bonus, and the change in form to Saturday work cash bonuses from without payroll deductions, to the issuance of payroll-type checks with deductions, as implemented in January 2016, represented a change to the status quo in a mandatory subject of bargaining.

The impact of the termination of the Christmas bonus is obvious and bargaining may have offset the effect. With regard to the Saturday work bonus, the initial modification of that bonus from a cash bonus without deductions to a check-based bonus with deductions also had a material effect on unit employees -- the loss of earnings, which perhaps could have been ameliorated with good-faith bargaining. In this regard, given the opportunity, the Union may have bargained for higher bonus amounts to offset the tax implications; or may have bargained for continued payments in cash, after deductions, due to the well-publicized problems low wage earners who are unable to maintain bank accounts incur in cashing checks without resorting to third parties that charge high fees for check-cashing services. The spectrum of bargaining outcomes is incalculable, but that's the problem: the Union was never presented with the opportunity to navigate that spectrum. The impact of the termination of this bonus in September 2016 is also obvious: the employer ceased paying about \$800 per week to a handful or so of Unit employees.

through about October 2016, and for Respondent Bob's unilateral modification and termination of all bonus programs, specifically the Christmas bonus and the Saturday work bonus.

Dated at Hartford, Connecticut this 20th day of November, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Concepcion", followed by a circular stamp or mark containing the initials "TW".

Rick Concepcion  
Meredith B. Garry  
Counsels for the General Counsel  
National Labor Relations Board  
Region One, Subregion 34  
Hartford, Connecticut

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 34

BOB'S TIRE CO., INC.

and

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, LOCAL 328

Case 01-CA-183476

**AFFIDAVIT OF SERVICE OF: CONSELS FOR THE GENERAL COUNSEL'S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 20, 2018, I served the above-entitled document(s) by **email or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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November 20, 2018

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Signature