

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

MIKE-SELL'S POTATO CHIP COMPANY

and

Case 09-CA-184215

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS (IBT), GENERAL TRUCK DRIVERS,
WAREHOUSEMEN, HELPERS, SALES, AND
SERVICE, AND CASINO EMPLOYEES,
TEAMSTERS LOCAL UNION NO. 957**

Linda Finch, Esq.,

for the General Counsel.

Jennifer Bame and Jennifer Asbrock, Esqs.,

for the Respondent.

John R. Doll, Esq.,

for the Charging Party.

SUPPLEMENTAL DECISION

I. INTRODUCTION¹

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. On July 25, 2017, I issued a decision in the above-referenced matter (“Initial Decision”) finding that Mike-sell’s Potato Chip Company (“Respondent”) violated Section 8(a)(5) and (1) of the National Labor Relations Act (“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” or “Charging Party”) about the sale of four company sales routes to independent distributors, and (2) by refusing to provide the Union with requested information related to two of the routes sold. In finding the violations, I rejected the Respondent’s defense that, assuming the sale of the routes at issue 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*”), I reasoned that Respondent could not rely upon its prior unilateral sales of company sales routes both before and after the expiration of the parties’ collective-bargaining agreement to establish a waiver of the Union’s right to bargain over the four sales at issue in 2016.

¹ References to the initial and supplemental transcript record will be designated as (“Tr.” and “Supp. Tr.”); references to Joint Exhibits will be designated as (“Jt. Exhs.”); references to General Counsel’s Exhibits at the initial and supplemental hearings will be designated as (“G.C. Exh.” and “Supp. GC Exh.”); references to the Charging Party’s Exhibits at the initial and supplemental hearings will be designated as (“CP Exh.” and “Supp. CP Exh.”); and references to Respondent’s Exhibits at the initial and supplemental hearings will be designated as (“R. Exh.”), with the exhibits offered during the supplemental hearing beginning with R. Exh. 44.

On December 17, 2017, the Board issued its decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), in which the Board overruled *DuPont 2016* (and the precedent upon which that holding relied) and held that an employer's established past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from that past practice, regardless of the circumstances under which that practice developed.

On August 2, 2018, the Board remanded my Initial Decision in light of *Raytheon* for further consideration. 366 NLRB No. 143 (2018). On August 3, 2018, I issued an order inviting the parties to submit their positions on whether to reopen the record to submit new evidence in light of the *Raytheon* decision. On August 23, 2018, Respondent filed a motion to reopen the record to offer additional evidence on its alternative defense that, assuming the decision to sell a company sales route is a mandatory subject of bargaining, the four sales at issue were consistent with its established past practice of unilaterally eliminating routes by selling them to independent distributors. On September 7, 2018, the General Counsel and the Charging Party filed oppositions to Respondent's motion. On October 1, 2018, I issued an order granting Respondent's motion and scheduled a supplemental hearing to allow the parties to present new evidence of instances (prior to 2016) in which Respondent sold a company sales route (i.e., one operated by a unit driver at the time of sale) to an independent distributor. The supplemental hearing occurred on November 19, 2018, in Cincinnati, Ohio. Thereafter, Respondent, the Charging Party, and the General Counsel filed post-hearing briefs, which I have carefully considered.²

The following incorporates and supplements the findings and conclusions contained in my Initial Decision.³

II. RAYTHEON DECISION

In *Raytheon*, the company operated a manufacturing facility in Fort Wayne, Indiana where it employed about 35 production and maintenance employees in a bargaining unit represented by the Steelworkers Union. In 1999, the company implemented a nationwide comprehensive "cafeteria-style" benefit plan called the Raytheon Unified Benefits Program ("Raytheon Plan") for its supervisory and non-union employees. Thereafter, when the company and the Steelworkers negotiated a successor collective-bargaining agreement, they agreed to make coverage under the

² 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 citations, but rather on my review and consideration of the entire record from both the initial and supplemental hearings. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was incredible and unworthy of belief.

³ Prior to the commencement of the supplemental hearing, the parties discussed but could not agree on certain factual stipulations. Respondent later attempted to introduce the document containing the proposed factual stipulations to show what had been discussed by the parties. I rejected the exhibit, and I maintain that ruling as Respondent has failed to establish relevance. At the hearing, Respondent did not withdraw the exhibit or request it be placed in the rejected exhibit file. Following the hearing, Respondent's counsel sent correspondence requesting that the document be placed in the rejected exhibit file. There was no objection to this request. As a result, the document has been placed in the rejected exhibit file as Rej. R. Exh. 54.

Raytheon Plan available to the unit employees. Beginning in January 2001, and through 2012, the unit employees received coverage under the Raytheon Plan on the same basis as was offered to the company's non-unit employees. Raytheon Plan documents provide that "the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated [therein] from time to time, including, but not limited to, the right to reduce or eliminate benefits," and the parties' collective-bargaining agreements incorporated this right. The relevant collective-bargaining agreements also included provisions stating that the company "reserves the right to amend or terminate said Group Benefit Plans," and that "[a]ll benefits . . . are subject in every respect to the terms of the applicable Plan documents under which payment is claimed."

Every fall from 2001 to 2011, the company notified participating employees of upcoming modifications to the Raytheon Plan, including changes to benefits, premiums, deductibles, and copayments, which would be effective January of the following year. Each of those years, the company made changes to the Plan, such as increasing premiums for health insurance and/or altering available benefits, medical options, deductibles, and copayments. The Steelworkers never objected to or sought to bargain over any of these changes. There is no dispute that the modifications were authorized by the collective-bargaining agreements and Plan documents referenced therein.

The parties' 2009-2012 agreement was set to expire on April 29, 2012. In February 2012, the Steelworkers informed the company that it wanted to open negotiations and schedule bargaining sessions for a successor contract. During the negotiations that followed, the Steelworkers submitted proposals to change contract provisions granting the company the right to make annual changes to unit employees' health insurance. One such proposal was to strike the "pass through" language in the expiring contract and to require that the Raytheon Plan benefits (and other benefits) offered to the unit employees remain the same for the duration of the contract. The Steelworkers also stated that it was no longer willing to waive its right to bargain over a mandatory subject of bargaining, such as health benefits. The company rejected the Steelworkers' proposals. The contract eventually expired, but the parties continued to negotiate. During a post-expiration negotiating session, the Steelworkers inquired whether the unit employees would be asked to participate in the upcoming enrollment period for the Raytheon Plan, and the company informed the Union that open enrollment was about to commence and that it would proceed as planned for all employees based on the company's belief that this was required by the terms of the expired contract. The Steelworkers asked the company to exclude the unit employees from the enrollment, and the company refused. On January 1, 2013, the company, over the objection of the union, implemented changes to the Raytheon Plan that affected the unit employees.

The union filed an unfair labor practice charge, and a complaint issued alleging that the company's announcement and implementation of the 2013 changes to the Raytheon Plan violated Section 8(a)(5) of the Act. The judge found the 2013 modifications constituted a change to mandatory subjects which required notice and an opportunity to bargain, even though the modifications were consistent with the company's preexisting practice of making annual changes in each of the preceding ten years.

The Board, in a 3-2 decision, reversed the judge and dismissed the complaint. In so doing, the majority overruled *DuPont 2016*, where the Board held that, when evaluating whether actions constitute a "change," parties may not simply compare those actions to past actions, but must look at whether the past unilateral actions were privileged by an existing collective-bargaining agreement that was no longer in effect. According to *DuPont 2016*, if the contractual basis for the unilateral

change was no longer in effect, the employer’s continued unilateral action constitutes a “change” even if it consistent with the employer’s past practice. The *DuPont 2016* majority also held that, if the employer’s past and present actions involved any “discretion,” any exercise of that discretion was always a “unilateral change” requiring that the employer provide the union with advance notice and the opportunity for bargaining.

In *Raytheon*, the Board majority held that *DuPont 2016* was inconsistent with the Supreme Court’s decision in *NLRB v. Katz*, 369 U.S. 736 (1962), and that:

Henceforth, regardless of the circumstances under which a past practice developed—i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action—an employer’s past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.

365 NLRB No. 161, slip op. at 16.

The *Raytheon* majority, however, was careful to point out that *Katz* does not permit employers to evade their duty to bargain under Section 8(d) and 8(a)(5) of the Act:

Even though employers, under *Katz*, have the right to take unilateral actions where it can be seen that those actions are not a substantial departure from past practice, employers still have an obligation to bargain upon request with respect to all mandatory bargaining subjects—including actions the employer has the right to take unilaterally—whenever the union requests such bargaining. The Act imposes two types of bargaining obligations upon employers: (1) the *Katz* duty to refrain from making a unilateral “change” in any employment term constituting a mandatory bargaining subject, which entails an evaluation of past practice to determine whether a “change” would occur if the employer took the contemplated action; and (2) the duty to engage in bargaining regarding any and all mandatory bargaining subjects upon the union’s request to bargain. Existing law makes it clear that this duty to bargain upon request is not affected by an employer’s past practice.

Id., slip op. at 11 (internal footnotes omitted).

Thus, an employer remains obligated to bargain *upon request* even where unilateral action is permitted under a past practice:

Even if an employer has taken actions involving wages or other employment terms in precisely the same way, the existence of such a past practice does not permit the employer to refuse to bargain over the subject if requested to do so by the union. In other words, even though *Katz* permits the employer to take unilateral actions to the extent they are consistent with past practice and therefore not a “change,” the employer must engage in bargaining regarding those actions whenever the union requests such bargaining, unless an exception to the duty to bargain applies—e.g., unless the union has waived bargaining over the subject contractually or bargaining over the subject has already occurred.

Id. (internal citations omitted).

5 In applying the new standard, the *Raytheon* majority concluded the company’s post-
 expiration changes maintained the status quo created by its prior changes, and, therefore, were not
 unlawful. It found the company had an established past practice of unilaterally implementing the
 announced changes in January of every year from 2001 to 2012, and those changes included, without
 exception, increases in premiums, changes in available benefits, medical options, deductibles, and
 10 copayments. 365 NLRB No. 161, slip op. at 18. It also held the changes were not random or lacking
 definable criteria, but rather were all “typical of the changes one regularly sees from year to year in
 cafeteria-style benefit plans.” Id. Finally, it held the changes at issue did not materially vary in kind
 or degree from the changes made in prior years. Id.

15 However, in reaching its conclusion, the majority noted the allegations were litigated solely
 under a *Katz* “unilateral change” theory, and not under a “refusal to bargain” theory. Id., slip op. at
 19, fn. 88. Also, because the company’s benefit changes did not alter the status quo, and, therefore,
 did not require notice and an opportunity to bargain before implementation, the majority held it was
 not necessary to reach the question of whether the Steelworkers had waived its right to bargain. Id.,
 slip op. at 2, fn. 3.

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III. ANALYSIS POST *RAYTHEON*

25 As stated, in my Initial Decision, I found Respondent violated Section 8(a)(5) and (1) of the
 Act by failing or refusing to bargain with the Union about the decision to sell Routes 102, 104, 122,
 and 131 to independent distributors, and by refusing to provide the Union with requested information
 related to Routes 104 and 121. I concluded the decisions to sell these company sales routes during
 the hiatus period constituted changes over which Respondent had an obligation to provide the Union
 with prior notice and opportunity to bargain, and Respondent failed to establish that the Union
 waived its right to bargain over these decisions. Thereafter, the Board remanded my Initial Decision
 30 to reexamine my findings and conclusions in light of *Raytheon*.⁴ As stated, *Raytheon* set forth the
 standard to apply when determining whether a unilateral action constitutes a change or the mere
 continuation of an established past practice.

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A. Route 102

1. *Background and Allegation*

40 On April 27, 2016, Respondent sent the Union a letter stating it was seriously considering the
 elimination of three Dayton, Ohio sales routes by selling them to independent distributors. (Jt. Exh.
 3). Respondent noted that if it ultimately decided to sell one or more of these routes to independent
 distributors, it would provide the Union with timely notice of its decision, bargain over the effects of
 the route elimination(s), and accord affected drivers with seniority based bumping rights. On May 6,

⁴ At the time of my Initial Decision, there was pending the compliance proceedings over the Board’s Order, reported at 360 NLRB 131 (2014), finding that Respondent had violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its bargaining proposals in November 2012, after prematurely declaring that the parties were at an impasse in their negotiations for a successor agreement. The compliance hearing has since occurred, and Administrative Law Judge David I. Goldman issued his supplemental (compliance) decision, which the Board affirmed, as reported at 366 NLRB No. 29 (2018).

2016, the Union, through steward Richard Vance, filed a grievance over Respondent’s announced intent to sell these routes. (Jt. Exh. 4). Respondent denied violating any provisions of the parties’ expired agreement and stated that it had the prerogative to sell the routes under the Paolucci decision. (Tr. 151–152). The Union made no demand to bargain because no routes had been selected at that time. (Tr. 375).

On July 11, 2016, Respondent sent the Union a letter stating that, in accordance with its “rights” as recognized in the Paolucci decision, Respondent will be selling Route 102 (Xenia, Ohio territory), effective July 24, 2016. (Jt. Exh. 5).⁵ The unit driver assigned to the route had announced his retirement. The Union did not file a new grievance after receiving this notification because Vance believed his May 6, 2016 grievance already covered this particular sale. The Union did not make a demand to bargain over the sale of Route 102, or its effects.

Paragraph 6 of the amended complaint alleges that Respondent unilaterally sold Route 102 to an independent distributor without affording the Union an opportunity to bargain over the decision and/or without first bargaining with the Union to an overall good-faith impasse, in violation of Section 8(a)(5) and (1) of the Act. In my Initial Decision, I found that the sale was a change to a mandatory subject of bargaining, and the Union’s failure to request bargaining over this change was excused because Respondent presented the sale to the Union as a *fait accompli*. I further found the Union did not waive its right to bargain over the change.

2. *Legal Standard*

Under *Raytheon*, where, as here, the employer is alleged to have committed a unilateral change to a mandatory subject of bargaining, the issue is whether the employer’s action amounted to a change or the mere continuation of the status quo. To prove the latter, the evidence must prove that: (1) the employer has an established past practice of the unilateral action at issue; and (2) the action at issue did not materially vary in kind or degree from that established past practice. The Board has held the burden of proof is on the party asserting the existence of a past practice. *Catapillar Inc*, 355 NLRB 521, 522 (2010) (quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007)). To meet this burden, the party must show the prior action 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. *Id.* See also *Consolidated Communication Holding, Inc.*, 366 NLRB No. 152 (2018); *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), *reaffd.* 363 NLRB No. 164 (2016); and *Ampersand Publishing, LLC*, 358 NLRB 1415, 1416 (2012), *reaffd.* 362 NLRB No. 26 (2015).⁶

⁵ The four routes operated out of the Dayton distribution center. The cities and their approximate distances from Dayton, Ohio are: Middletown (25 miles), Springboro (16 miles), Xenia and Bellbrook (15 miles), and Beavercreek (9 miles). I take judicial notice of this geographical information. Fed. R. Evid. 201; *United States v. Johnson*, 726 F.2d 1018, 1021 (4th Cir. 1984) (“geographical information is especially appropriate for judicial notice.”)

⁶ In overruling *DuPont 2016*, the *Raytheon* majority held it was restoring “the correct analysis to this area” as reflected in cases such as *Shell Oil*, 149 NLRB 283, 287 (1964) and *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965). In *Shell Oil*, the Board found the company’s “frequently invoked practice of contracting out occasional maintenance work on a unilateral basis, while predicated upon observance and implementation of [the agreement], had also become an established employment practice and, as such, a term and condition of employment.” 149 NLRB at 287. In *Westinghouse Electric Corp.*, which also involved subcontracting, the Board held there was “no departure from the norm in the letting out of the

3. *Prior Transfers of Company Sales Routes*

5 The purpose of the supplemental hearing was to allow Respondent the opportunity to present evidence of prior unilateral sales of company sales routes to independent distributors sufficient to meet its burden under *Raytheon*. Respondent provided evidence of sales between 1998 and 2013.

10 In the late 1980s, Respondent had 10 distribution centers in Ohio (Dayton, Columbus, Cincinnati, Springfield, Sabina, Greenville, Versailles, Hamersville, Portsmouth, and New Paris).⁷ (Supp. Tr. 36-37). Respondent has since closed all but the Dayton distribution center. In 1998 or 1999, Respondent closed its Hamersville distribution center. (Supp. Tr. 44-45). Former human resource manager, Barry Wilson, who retired in 2006, testified about this closure and the two company sales routes that operated out of that location. One route was sold to an unidentified independent distributor and the other was transferred (along with the unit driver who performed it) to the Cincinnati distribution center. (Supp. Tr. 46-48). According to Wilson, Respondent took these actions because it was not profitable to continue operating these routes out of the Hamersville location. (Supp. Tr. 91-92). Wilson believed Respondent notified the Union regarding the sale. (Supp. Tr. 50).⁸ Wilson “[did] not recall” Respondent bargaining with the Union over this sale, or if the Union filed a grievance or an unfair labor practice charge over it. (Supp. Tr. 51). There was no other evidence introduced regarding this sale.

25 In 2002, Respondent elected to close its Portsmouth distribution center because, according to Wilson, it “was not making money for the company.” (Supp. Tr. 52). Respondent notified the Union that it was closing the center and eliminating its four company sales routes. (Supp. Tr. 72-73). The parties engaged in effects bargaining and negotiated a severance package for the affected unit drivers. (Supp. Tr. 54-56). The agreement states that “[b]oth parties regret that the current distribution arrangement in the Portsmouth Market is unworkable because of high operating costs and low sales base.” (R. Exh. 47). The agreement also states, “If the employee elects to leave the company, the following compensation will be provided, with the understanding that the company reserves the right to service any/all customers in the Portsmouth market by alternative means/methods.” *Id.* At some later point, Respondent entered into an independent distributor agreement with Ken Bartley (a former zone manager) for a geographic territory that overlapped with portions of the four eliminated routes.⁹ (Supp. Tr. 105-106; 129). Respondent notified the Union that it entered into this agreement. The Union made no request to bargain over the decision to eliminate the routes or to later sell territory

thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with [the employer’s] usual method of conducting its manufacturing operations ... It does not appear that the subcontracting engaged in during the period in question materially varied in kind or degree from that which had been customary in the past.” 150 NLRB at 1576.

⁷ The transcript incorrectly spells Hamersville as “Hammersville.” Those errors are hereby corrected.

⁸ Wilson testified that it “would have been” vice president of marketing Nat Chandler that notified the Union. (Supp. Tr. 75-76). But Wilson acknowledged he was not present for any conversation with the Union regarding the closure or the sale of the route. (Supp. Tr. 89-91).

⁹ Initially, Wilson testified the routes were sold to an independent distributor. (Supp. Tr. 52-53). Later, on cross-examination, he testified they were not sold, but rather “eliminated,” and the company later sold “a certain area” that included portions of the four eliminated routes to an independent distributor. (Supp. Tr. 70; 103). Respondent’s zone manager, Mark Plummer, testified the four routes were sold. (Supp. Tr. 127-129). I credit Wilson that the four routes were eliminated as opposed to sold. I found Wilson had a more honest and forthright demeanor while testifying, and he personally was involved in the effects bargaining negotiations.

covering portions of those routes to an independent distributor. It also never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 129-130).

5 In September 2006, Respondent sold its Muncie, Indiana (Route 335) company sales route. (Supp. Tr. 131). This sale occurred after Christy Hensall, the unit driver, quit. Respondent posted the route for bid, but no one bid to take over her route. (Supp. Tr. 133-134). Respondent eventually sold the route and the van used to service the route to independent distributor Francis Distributing. (R. Exh. 48). Respondent notified the Union steward about the sale. (Supp. Tr. 135-137). The Union did not request to bargain over the decision to sell the route, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 138). There was no bargaining over effects because no unit employee was affected by the sale. (Supp. Tr. 135).
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15 In early 2009, Respondent sold the Mansfield, Ohio company sales route to independent distributor Snyder's of Berlin. (Supp. Tr. 136-137). The displaced unit driver, Nancy Higginbotham, was offered the opportunity to bump into a route out of the Columbus distribution center, but she declined and chose to resign. Respondent notified the Union steward about the sale. The Union made no request to bargain over the decision to sell the route, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 138).

20 In late 2009, Respondent sold its Newark/Granville/Zanesville and its Lancaster/Hocking Hills/Athens company sales routes to independent distributor Ohio Citrus. (Supp. Tr. 138-139) (R. Exh. 49). Those routes had been serviced by unit drivers Patrick Kenny and Jim Philippi. (Supp. Tr. 180). Kenny bumped into another route; Philippi resigned. Respondent notified the Union steward about the sale. The Union made no request to bargain, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 140-141).
25

30 In late 2010, Ohio Citrus "returned" the two routes it bought the year before. (Supp. Tr. 141-142). After the Newark/Granville/Zanesville route reverted back to Respondent, it was assigned to a unit driver (Ronnie Page) to perform. (Supp. Tr. 142). The Lancaster/Hocking Hills/Athens route reverted back to Respondent and it was later resold to independent distributor Snyder's of Berlin in around July 2011. (Supp. Tr. 142). There is no evidence whether this reverted route was (re)assigned to, or performed by, a unit driver between when it reverted back and when it was resold.

35 Snyder's of Berlin later returned the Mansfield route and the Lancaster/Hocking Hills/Athens route. (Supp. Tr. 144-145). Respondent abandoned the Mansfield route and all but the Lancaster portion of the Lancaster/Hocking Hills/Athens route. (Supp. Tr. 145). The Lancaster portion was added to the Lexington route already assigned to a unit driver. (Supp. Tr. 182). The record does not address if Respondent provided the Union with notice that it was abandoning portions of these routes, but the Union made no request to bargain, and it never filed a grievance, an unfair labor practice charge, or an information request. Additionally, there was no bargaining over effects because there were no unit employees handling (portions of) these routes when they reverted back and were abandoned. (Supp. Tr. 146).
40

45 In August 2011, the Company sold the newly combined Lancaster/Lexington company sales route and the Newark/Granville/Zanesville company sales route to independent distributor Buckeye Distributing. (Supp. Tr. 147). Each of the displaced drivers bumped into other routes. Respondent notified the Union steward about these sales. (Supp. Tr. 184). The Union made no request to

bargain, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 150-151).

5 In October 2011, Respondent informed the Union that it intended to sell a remote sales route in Marion, Ohio (Angie Watson's route) to an independent distributor (later Buckeye Distributing). On November 9, 2011, the Union business agent, Michael Maddy, filed a grievance over this announced sale, alleging that it would violate the parties' agreement. Maddy requested to bargain over the decision and the effects of that decision, prior to taking any action. (R. Exh. 50 and Supp. CP Exh. 1, pgs. 1-2). On November 14, 2011, human resources director Sharon K. Willie responded, stating:

15 The Company denied the grievance that was filed on November 9, 2011, by the sales/over-the-road employees to challenge the Company's potential decision to subcontract one of its routes in Columbus, Ohio, to an independent contractor. We believe the Company has the right to subcontract routes based on the Management Rights Article of the Labor Agreement, as well as a long-standing past practice of subcontracting other routes without objection from the Union. However, the Company is willing to meet with the Union to discuss this subcontracting matter at your earliest convenience, and the Company is willing to bargain with the Union over the effects of any final decision....

20 (Supp. CP Exh. 1 pg. 3).

25 On December 8, 2011, Maddy sent Willie a letter outlining a proposed settlement to resolve the outstanding grievance. The proposal contained terms similar to the arrangement the parties negotiated for the four drivers whose routes were eliminated with the closure of the Portsmouth distribution center. That same day, Willie responded to Maddy's letter, stating:

30 I received your letter today offering to settle this grievance.

35 As you know from our meeting yesterday, Mike-sell's has a long standing practice of changing the distribution method of its products, both sending the distribution in some areas out to distributors and bringing it back in-house numerous times over the years. Article XIX, Section 1 of the CBA gives Management that right.

40 In this particular grievance, Ms. Watson's route was transferred to Buckeye Distributing for economic and logistical reasons. Ms. Watson was then permitted to bump into the local Distribution Center and had her choice of any of some 17 routes. Ms. Watson did select a route and bump into the local Distribution Center. Ms. Watson has now decided she does not want the route she selected and that she in fact wants to leave the Company and she gave a two week notice yesterday of intent to end her employment with Mike-sell's effective December 21, 2011.

45 Your letter indicates the Union now wants the Company to pay her \$5,000 and sixty days additional health coverage or the Union will move this case to arbitration. We will not agree to this arrangement however, we will agree not to contest any claim for unemployment compensation

(R. Exh. 50).

On December 12, 2011, after the parties were unable to resolve the grievance, the Union notified Respondent that it would take the matter to arbitration. (Supp. CP Exh. 1, pg. 6). The arbitration hearing occurred on June 27, 2012. Respondent and the Union submitted post-hearing briefs.¹⁰ On September 26, 2012, Arbitrator Paolucci issued his decision, holding that absent clear contractual language, the management rights provision gave Respondent the right to control distribution and determine profitability, which included the right to sell the unprofitable Marion route to a third party. (R. Exh. 2).

In May 2012, Respondent sold the Celina/Coldwater company sales route to independent distributor Ryan Young Distributing. (Supp. Tr. 160-161).¹¹ The unit driver (Todd Regelsberger) for this route bumped into another route out of the Greenville distribution center. (Supp. Tr. 168). Respondent notified the Union steward about this sale. The Union made no request to bargain. It

¹⁰ In its post-hearing brief to the arbitrator, Respondent discussed the struggles with having Watson operate the Marion route, and the steps it took over the years to address those matters:

For the first six years of her employment; Grievant traveled from her home in Marion, Ohio, to the Columbus Distribution Center in order to pick up product to be delivered. According to Grievant, this was a 136-mile round-trip commute (i.e., 68 miles each way) Starting in 2000, in order to become more cost-effective, the Company arranged for a temporary storage bin to be maintained in Mansfield, Ohio, which allowed Grievant (as well as a sales route driver in Mansfield) to travel to the Mansfield storage bin instead of to the Columbus Distribution Center in order to pick up product. According to Grievant, this was a round-trip commute of over 80 miles (i.e., over 40 miles each way). In 2006 or 2007, in an effort to achieve even greater efficiency, the Company closed the Mansfield storage bin and opened a new storage bin in Marion, Ohio, where Grievant then picked up the product to be delivered.

(CP Exh. 1, pg 5 fn. 5).

Also, Respondent went on to state that despite these steps to make the route “economically feasible,” by October 2011, it “was losing over \$1,100.00 per week ... due in large part to costs for the storage bin and the over-the-road drivers used to deliver product to this remote area of the Columbus Distribution Center territory.” (CP Exh. 1, pgs 5-6). In its post-hearing brief, which was served on the Union, Respondent argued it was permitted to sell the Marion route unilaterally because:

The Labor Agreement does not prohibit the selling of routes to independent distributors, the management rights clause grants the Company the exclusive right to control (among other things) distribution methods, and Mike-sell's has a long history of making such decisions unilaterally. The Company's unilateral right to sell routes to independent distributors is amply demonstrated by the fact that the Union has been aware of the sale of outlying routes on several occasions yet has failed to object to their sale, either through the filing of a grievance or an unfair labor practice charge.

(CP Exh. 1, pgs 6-7).

¹¹ At the hearing, Respondent sought to introduce a bill of sale and independent distributor agreement between Respondent and Ryan Young Distributing to corroborate that Respondent sold the Celina/Coldwater route to Ryan Young Distributing. The documents, however, relate to other routes (in Lima, Ohio), but include a map of the sales territory conveyed to Ryan Young Distributing, and it encompasses the Celina/Coldwater area. Counsel for General Counsel and Charging Party's counsel objected to the introduction of the document. I sustained the objection and placed the document in the rejected exhibit file. (Rej. R. Exh. 51). I am reversing my ruling and now receive the document over objection. The document reflects the Celina/Coldwater area as part of Ryan Young Distributing's territory, and I have credited Plummer's independent testimony that Ryan Young Distributing purchased the Celina/Coldwater route. That testimony was largely corroborated by Sharon K. Willie, who created the document. (Supp. Tr. 275-277).

also never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 169-170).

5 On October 10, 2012, on the first day of bargaining over a successor contract, Respondent informed the Union that it intended to sell 29 company sales routes in Columbus, Sabina, and Cincinnati, Ohio, effective November 18, 2012, because of Respondent's "dire" financial situation. (Tr. 302-303). Respondent eventually sold these 29 routes to independent distributor Keystone Distributing, Ltd./Buckeye Distributing Company. The Union never demanded to bargain over the decision to sell these routes, but it did request, and the parties met, to bargain over the effects. (Tr. 10 305). 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, and the parties met, to bargain over the effects. (Tr. 316-321). About a month later, Gaudio's parent company filed for bankruptcy, and the five Greenville routes reverted back to Respondent. In July 2013, Respondent resold these five Greenville routes to an independent distributor Helm Distributing. Respondent did not provide the Union with notice that these routes reverted back or that they were going to be, or had been, resold to Helm Distributing. (Tr. 327-331). There is no evidence as to who serviced these routes between reversion and resale. (Tr. 703).

20 On July 17, 2013, Respondent notified the Union 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 did not make a demand to bargain over the decision to sell the routes, but it did request, and the parties met, to bargain over the effects. The next time Respondent sold a company sales route to an independent distributor was almost three years later, in 2016, when Respondent began selling the four routes at issue.¹²

4. *Analysis*

30 Applying *Raytheon*, Respondent must prove that: (1) it had an established past practice of unilaterally selling company sales routes to independent distributors; and (2) the sales at issue in 2016 did not materially vary in kind or degree from that established past practice. Based on the evidence, I find Respondent has failed to meet its burden. First, Respondent has not established that it unilaterally sold company sales routes to independent distributors with such regularity and frequency that employees could reasonably expect those sales would continue or reoccur on a regular or consistent basis. As the following illustrates, Respondent's prior sales of company sales routes were neither regular nor consistent:¹³

¹² As explained on pages 5-6 of my Initial Decision, Respondent resold 38 routes from 2013 through 2015 that reverted back to Respondent after the independent distributors that purchased those routes went bankrupt or were no longer able to perform the routes. They included the 29 routes in Columbus, Sabina, and Cincinnati, Ohio, the five routes in Greenville, Ohio, and the four routes in Springfield, Ohio. The (re)sales of these routes are distinguishable from the sale of "company sales routes" because after they reverted back to Respondent, they were not reassigned to, or performed by, unit employees. Instead, the independent distributor (or a third party) continued to operate the route(s) until they were resold to a different independent distributor.

¹³ At the hearing, the Union argued Respondent failed to prove the Union had timely notice of Respondent's decisions to sell those routes because Respondent, at most, notified Union stewards about the sales, and stewards are not designated to receive notice of such changes. I reject this argument. The Board has held that notice to stewards may not be sufficient to serve as notice to the union. See *Brimar Corp.*, 334 NLRB 1035, 1035 fn. 1 (2001) (union steward's knowledge of a unilateral change could not be imputed to the union because

Year	# of Company Sales Routes Sold	Routes Sold
1998-1999	1	Hamersville route
2000	0	
2001	0	
2002	4	Portsmouth routes ¹⁴
2003	0	
2004	0	
2005	0	
2006	1	Muncie route
2007	0	
2008	0	
2009	3	Mansfield, Newark/Granville/Zanesville, and Lancaster/Hocking Hills/Athens routes
2010	0	
2011	3	Lancaster/New Lexington, Newark/Granville/Zanesville, and Marion routes
2012	30	Celina/Coldwater and 29 Columbus, Sabina, and Cincinnati routes
2013	9	5 Greenville and 4 Springfield routes
2014	0	
2015	0	

5 Second, the circumstances surrounding these sales materially varied in kind and degree. Respondent sold or transferred the Hamersville routes and closed that distribution center because it was not profitable to continue operating those two routes out of that center. In 2002, Respondent

steward had no role in matters relating to bargaining and the employer had no reason to believe otherwise); and *Catalina Pacific Concrete Co.*, 330 NLRB 144, 144 (1999) (employer had no reasonable basis to believe union steward had the authority to act as the union's agent with respect to receiving notice of proposed unilateral changes), *enfd.* 19 Fed. Appx. 683 (9th Cir. 2001). However, Respondent's witnesses (Mark Plummer and Barry Wilson) confirmed they notified the local Union steward regarding prior sales and were never told they had to notify someone else in the Union, other than the steward, about these matters. (Supp. Tr. 28; 123-124). Additionally, Respondent provided notice of certain of these sales to then-Union steward Stephen Donnell, who also was a member of the Union's negotiating committee, including the one that negotiated the parties' 2008 collective-bargaining agreement. (Supp. Tr. 172-174). Donnell testified he was not aware of any rule or policy that Respondent was required to communicate directly with a Union business agent or officer, as opposed to a steward. (Supp. Tr. 176-177). The Union never informed Respondent after any of these prior sales that stewards lacked authority to receive notice, or that notice to them did not constitute notice to the Union. I, therefore, find that, absent evidence to the contrary, it was reasonable for Respondent to conclude that notice to a steward constituted notice to the Union. That being said, I make no findings as to whether the notice given was sufficient to trigger the Union's duty to request to bargain or was notice of a *fait accompli*. The record evidence is limited to when notice was given. In response to leading questions, Plummer and Donnell both confirmed the Union received "advanced notice" of the sales. (Supp. Tr. 134, 153, 169, 177, 180, 182-184, and 187). The only specific information concerned the Marion and Mansfield routes. Donnell estimated Respondent informed him about a week or two prior to those sales. (Supp. Tr. 190-191; 193-194).

¹⁴ Although I credited Wilson that Respondent eliminated (as opposed to sold) the Portsmouth routes, I have included them because it later sold an area covering portions of those routes to an independent distributor.

eliminated the four Portsmouth routes and closed that distribution center because it was not profitable, and then sold a portion of the territory covered by those routes to an independent distributor. In 2006, Respondent sold the Muncie, Indiana route after the unit driver quit and no one else bid to take over her route. In 2012, Respondent sold the 29 routes in Columbus, Sabina, and Cincinnati to Keystone Distributing, Ltd./Buckeye Distributing Company, because of the company's "dire" financial situation. Other routes were sold when their assigned distribution center closed (e.g., Greenville) (Tr. 691-693).

In 2012, Respondent argued in the Watson arbitration that the Marion route continually lost money, primarily because of the high costs of maintaining the storage bin and delivering the product to a remote area. Arbitrator Paolucci relied upon that evidence and concluded that Respondent had the management right to unilaterally sell unprofitable routes. (R. Exh. 2, pp.18-21). Respondent later relied upon the Paolucci decision when it sold the 2016 routes. But I find the sale of the Marion route is distinguishable. Unlike the Marion route, Route 102 (Xenia) received its product directly from the Dayton distribution center, which was about 15 miles away, and there was no evidence presented, or argument made, to the Union that Respondent was selling the route because it was continually losing money. The same is true regarding the other three routes sold in 2016.

Respondent has argued that individual route profitability was never a factor in its decisions to sell any of the four routes at issue in 2016. Rather, it sold these routes as part of its plan to move away from distribution and focus more on product development and marketing its brand. As such, the sales in 2016 materially varied in kind and degree from the prior sales.¹⁵

In light of the foregoing, I find Respondent failed to prove an established past practice and/or that the unilateral sale of Route 102 was mere continuation of the status quo. I, therefore, maintain my prior findings and conclusions that these sales constituted changes to mandatory subjects of bargaining, which Respondent made without affording the Union prior notice and an opportunity to bargain, in violation of Section 8(a)(5) and (1) of the Act.

¹⁵ At the supplemental hearing, Respondent attempted to establish commonality between the prior sales and the 2016 sales, primarily through the testimony of zone manager Mark Plummer. Plummer testified that Respondent sold all the routes between 2002 and 2013 based on: (1) overall company profitability; (2) profitability of the company's route sales division; and (3) the company's desire to move away from distribution and focus on manufacturing. Plummer's testimony on this point appeared rehearsed; he gave the same rote, seemingly scripted response eight separate times when asked how Respondent determined which routes to sell. (Supp. Tr. 129, 134, 135, 137, 141, 143, 150, 153, and 169). In fact, he gave this same stock response regarding why Respondent decided to sell the Muncie route, even though the evidence establishes Respondent sold the Muncie route only after the assigned driver quit and no one bid to take it over. Furthermore, Respondent offered no documentary evidence (e.g., correspondence, planning documents, meeting notes, etc.) that this was how or why it sold these routes, which is remarkable considering the Respondent's argument that the sales were part of a greater initiative to shift the corporate focus away from distribution toward manufacturing. Finally, Stephen Connell, a former Union steward who later became a manager, was *called by Respondent* to testify about his experiences receiving notice from Respondent that it was selling company sales routes. According to Connell, Respondent never mentioned that its route sales division was not profitable, or that it wanted to move away from distribution and focus more on manufacturing. (Tr. 214-215; 217).

B. Routes 104 and 122

On August 29, 2016, Respondent sent the Union a letter stating that it will be eliminating two positions through the sale of Routes 104 and 122 (covering territory in Bellbrook and Beavercreek, Ohio), effective September 4, 2016. (Tr. 82-83; 153-155)(Jt. Exh. 6). Respondent noted that the affected drivers (Jerry Lake and Gerald Shimmer) would have an opportunity to rebid into other routes on September 1, 2016. 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 based on the unprofitability of the route caused by the cost of providing product to that remote location, and the fact that similar unprofitable routes have been sold in the past. In contrast, the Union argued that no information has been provided showing that Routes 104 and 122 were unprofitable. The Union also pointed out the two routes at issue were within the Dayton, Ohio area and providing product to those routes 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 by requesting 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 replied to the Union's August 31, 2016 letter. Respondent disputed 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 distributors 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.

(Jt. Exh. 9).

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. (Jt. Exh. 9). Respondent did not provide the Union with the information it requested and it refused the Union's request to bargain over the decision to sell these two routes. (Tr. 475).

Paragraph 7 of the amended complaint alleges that Respondent failed and refused the Union's request to bargain over the decision to sell Routes 104 and 122, in violation of Section 8(a)(5) and (1) of the Act. Unlike the allegation over the sale of Route 102, which was a "unilateral change" allegation, this is a "refusal to bargain" allegation. The *Raytheon* majority made clear that its holding did not alter an employer's statutory obligation to bargain, upon request, regarding a mandatory subject of bargaining, and the existence of an established past practice does not permit the employer to refuse to bargain over the subject if requested to do so by the union.¹⁶ Respondent, therefore, cannot rely upon its alleged past practice--which it has failed to establish--as a defense for refusing the Union's request to bargain over the sales at issue. And, for the reasons set forth my Initial Decision (sans any reliance on *DuPont 2016*), Respondent has failed to establish waiver. The *Raytheon* majority held waiver of this right may only occur contractually or if bargaining over the subject has already occurred. In this case, the management rights provision relied upon in the Paolucci decision expired and, as previously stated, even if Respondent had established a past practice of selling company sales routes without objection or requests for decisional bargaining by the Union, that does not constitute a waiver of the Union's right to bargain over the sale of the routes at issue. I, therefore, conclude Respondent had an obligation to bargain, upon request, over the decisions to sell Routes 104 and 122, and it violated Section 8(a)(5) and (1) of the Act when it refused the Union's request to do so. Respondent also violated Section 8(a)(5) and (1) of the Act when it failed or refused to provide to the Union with the information requested in the Union's August 31, 2016 letter and demand to bargain.

¹⁶ In *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), the Board majority held 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 times." *Id.* at 609 (citing to *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983)). In *NLRB v. Miller Brewing Company*, 408 F.2d 12 (9th Cir. 1969) *enfg.* 166 NLRB 831 (1968) the Court of Appeals held that:

[I]t is not true that a right once waived under the Act is lost forever.... Each time the bargainable incident occurs ... [the] Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent "close out" ...

(Internal citations omitted).

C. Route 131

On the same day (September 12, 2016) Respondent refused to bargain over the sale of Routes 104 and 122, stating it had the right to take such action unilaterally, and refused to provide the Union with the information it requested on August 31, 2016 regarding those sales, Respondent sent the Union a separate letter stating that in accordance with its “rights” as recognized in the Paolucci decision, Respondent was selling Route 131 (covering territory in Middletown and Springboro, Ohio), effective September 17, 2016. (Jt. Exh. 10). On that same date, Union 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 expired collective-bargaining agreement.

Paragraph 8 of the amended complaint alleges Respondent refused the Union’s request to bargain over the sale of Route 131, in violation of Section 8(a)(5) and (1) of the Act. Like the sale of Routes 104 and 122, this is a “refusal to bargain” allegation, and not a “unilateral change” allegation. The difference is that, unlike the sales of Routes 104 and 122, the Union did not make an actual request to bargain over the sale of Route 131. As stated in my Initial Decision, I find that the Union’s failure to request bargaining over this particular sale is excused because Respondent announced the sale of Route 131 as a *fait accompli*. The cited evidence--not the least of which is Respondent’s September 12, 2016 response to the Union’s information request--establishes Respondent had a fixed intent and was not willing to bargain over the decision to sell this, or any other, route. Again, for the reasons set forth in my Initial Decision (sans any reliance on *DuPont 2016*), and for the reasons stated above regarding the sales of Routes 104 and 122, I find that Respondent’s other waiver arguments fail. I, therefore, conclude Respondent also violated Section 8(a)(5) and (1) of the Act when it refused the Union’s request to bargain over the decision to sell Route 131.

IV. 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 and/or refusing to bargain with the Union about its decision to subcontract bargaining unit work from unit employees to others outside the bargaining unit when it sold Routes 102, 104, 122, and 131; 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.

REMEDY

10

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 refusing the Union's request to bargain over the subcontracting of bargaining unit work associated with the sale of Routes 102, 104, 122, and 131 to independent 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 recommended¹⁷

40

ORDER

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

¹⁷ 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.

1. Cease and desist from

(a) Failing or refusing to bargain with the Union as the designated collective-bargaining representative of the following bargaining unit of the employees regarding their wages, hours, and other terms and conditions of employment, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

[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) 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 necessary to the Union's role as collective-bargaining representative.

(c) 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) Bargain, upon request, with the Union regarding 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 refusal to bargain over 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.¹⁸ 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

¹⁸ 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."

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.

5

(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.

10 Dated, Washington, D.C., December 27, 2018.



Andrew S. Gollin
Administrative Law Judge

15

APPENDIX**NOTICE TO EMPLOYEES
POSTED BY 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 requests 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 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 employees.

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
(Employer)

DATED: _____ **BY** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at 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.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACE, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3733.