

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

DATE: March 6, 2017

TO: Garey E. Lindsay, Regional Director
Region 9

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

SUBJECT: Mikesell's Snack Food Company
f/k/a Mike-Sell's Potato Chip Company
Case 09-CA-184215

First Nat'l Maint. Chron
530-6050-0825-3300
530-6067-4011
530-6067-4011-2200
530-6067-4011-3300
530-6067-4011-4600
530-6083-0150-5050
530-8049
530-8052-0000-0000
530-8054-1000
530-8054-7000
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This case was submitted for advice as to whether the Employer was obligated to bargain over its sale of four delivery routes to independent distributors, whether the Union waived its right to bargain over this issue, and whether the Employer unlawfully refused to provide financial and other information concerning the route sales. We conclude that the Employer violated Section 8(a)(5) by refusing to bargain over each decision to sell routes because such decisions were a mandatory subject of bargaining and the Union did not waive its interest in the matter contractually, by prior acquiescence, or by inaction. Consequently, the Employer also violated its bargaining duty by failing to provide information the Union requested in order to prepare for such negotiations. Finally, we conclude that this case is not a good vehicle to urge the Board to adopt Member Liebman's concurring opinion from *Embarq Corp.*,¹ which proposed modifying the duty to provide information in the

¹ 356 NLRB 982, 983-84 (2011).

*Dubuque*² context. Thus, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) as set forth above.

FACTS

Mikesell's Snack Food Company ("Employer") manufactures and distributes snack foods to retailers in Ohio, Indiana, and Kentucky. For a number of years, the Employer has recognized Teamsters Local Union No. 957 ("Union") as the representative of a unit of drivers, including route sales drivers. Route sales drivers are tasked with loading and delivering products to local stores, stocking, rotating and removing products on customer shelves, performing point-of-sale marketing, and developing sales at stores along their routes.

The parties' most recent collective-bargaining agreement was in effect from November 17, 2008 to November 17, 2012. That agreement contained two clauses pertinent to the instant case. First, the management rights clause grants the Employer the right to "improve manufacturing methods, operations and conditions and distribution of its products," among other things. Second, a route-bidding provision affords drivers the right to bump a less senior employee "[i]n the event that it becomes necessary to eliminate a route or combine one route with another."

For years, the Employer has distributed its products using its own route sales drivers in conjunction with independent distributors. These distributors assume the risk of loss by purchasing the products from the Employer and then re-selling them to retailers to earn back their costs. In relevant part, the independent distributor agreement provides that distributors have primary responsibility for the wholesale distribution of the company's products within their given territories, but the Employer retains the right to sell to institutional suppliers, vending companies, and select employer accounts within such territories. Independent distributors are obligated to use their best efforts to sell, promote, and distribute the Employer's products to retailers, and they are required to maintain sufficient inventory to meet the needs of retailers in their territories. Although the distributors generally negotiate their own prices with retailers, the Employer sets maximum prices for certain chain stores. If a distributor chooses not to sell to some chain retailers, it must notify the Employer and permit another distributor or route sales driver to sell the products instead. The Employer retains the right to terminate the relationship with 30 days' notice or upon material breach of any distributor obligation, approve any assignments or transfers of the agreement, and change the territory area in its sole discretion.

² *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enforced sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993).

In recent years, the Employer has increasingly relied on independent distributors to sell and deliver its products. Currently, there are 16 route sales drivers, who typically service one route each, and 34 independent distributors, who service a total of 173 routes. Between 2009 and 2011, the Employer sold five routes to independent distributors. On each occasion, the Employer notified the Union steward (but not the business agent) of the impending sale, and the Union did not object. During this same period, independent distributors returned routes to the Employer on three occasions. One of those routes was re-sold to another distributor, and the other two were brought back in-house.³

In late 2011, the Union filed a grievance challenging the sale of one employee's unprofitable route which covered a remote area serviced by the Columbus, Ohio distribution center. Before the arbitrator, the Employer argued that nothing in the collective-bargaining agreement prohibited such a sale, and that the parties contemplated the transfer of work from route sales drivers to independent distributors as demonstrated by the route-bidding provision and the Union's failure to object to past sales. The Employer admitted, however, that the collective-bargaining agreement was silent as to its right to change distribution methods or enter into relationships with independent distributors. The Union argued that the sale amounted to subcontracting, which is impliedly prohibited under longstanding arbitral authority when it is done for the purpose of saving on labor costs. It also argued that its failure to object to prior sales was due to a lack of proper notice, and therefore did not demonstrate the Union's consent to the transfer of unit work to independent distributors.

In September 2012, the arbitrator denied the grievance, concluding that the contract did not expressly restrict the Employer's inherent authority to control distribution and determine profitability. The following month, the Employer announced additional route sales to independent distributors, which resulted in the layoff of about 30 drivers. In light of the arbitrator's decision, the Union only sought bargaining over the effects of this decision.⁴

Upon expiration of the contract in November 2012, the Employer unlawfully implemented its final offer in the absence of a valid impasse.⁵ The Employer

³ The Employer abandoned a portion of one of these routes, but continued to service the remainder of that route by adding it to an existing route.

⁴ See *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 135 & n.14 (2014), *enforced*, 807 F.3d 318 (D.C. Cir. 2015).

⁵ *Id.* at 139-40.

approached negotiations for a successor agreement with a “keen interest” in negotiating a reduction in its operating expenses, having suffered a loss of almost \$5.5 million during the course of the 2008-2012 contract.⁶ In June 2013, the Employer implemented somewhat different employment terms, those contained in its revised final offer. The Region has determined that the parties did not reach a good-faith impasse prior to implementation of this revised offer. The management rights clause and route-bidding provision in the revised final offer are substantively indistinguishable from those contained in the expired collective-bargaining agreement.

In 2013, after the collective-bargaining agreement had expired, the Employer sold additional routes, eliminating nine positions in the bargaining unit. Again, the parties only bargained over the effects of the route sales. The Union explains that it did not file grievances challenging sales post-dating the arbitrator’s decision because they were factually similar to the route at issue in the arbitration, that is, the routes were in remote areas and most, if not all, were unprofitable.

In April 2016, the Employer notified the Union that, in accordance with its management rights as recognized in the above arbitration decision, it intended to sell three routes operating out of the main Dayton, Ohio distribution center.⁷ The Employer indicated that it would post public advertisements shortly and expected to make a decision as to which routes would be impacted within three to six months. Once a final decision had been made, the Employer promised to notify the Union and honor its obligation to bargain over effects. The Employer sent similar letters to its employees, inviting them to apply to become independent distributors. The Union filed a grievance and the parties met in mid-June to discuss the matter. At that meeting, the Employer provided a copy of the arbitration decision and asserted that there was no basis for the Union’s grievance in light of that earlier determination. The Employer asked why the Union was suddenly objecting to the route sales, and the Union explained that the prior sales had been in low volume areas (i.e. routes that paid lower commissions).

In July, the Employer informed the Union that it had decided to sell Dayton route number 102, effective about two weeks later. Its letter cited the arbitration decision as the basis of for its action. The Employer contends that the Union did not object to this sale in any way. While there is no evidence the Union filed a grievance in response to this sale announcement, the Union claims it met with the Employer to discuss such a grievance in late July. In that meeting, the human resources

⁶ *Id.* at 132.

⁷ All subsequent dates are in 2016 unless otherwise indicated.

manager asserted that it was the Employer's prerogative to sell routes as it saw fit and that the Employer would weigh profitability and proximity to the Dayton distribution center in making such decisions. According to the Union, the Employer indicated that it wanted to move away from the distribution part of the business because it did not want to assume the liability associated with distribution and it believed that production was the profitable side of the business.

In August, the Employer notified the Union of two additional route sales, Dayton routes 104 and 122, effective one week later. The Union not only filed a grievance, but also demanded bargaining via letter. Specifically, the Union contended that these route sales were factually distinct from the one at issue in the 2012 arbitration decision, because they were located within the Dayton service area and the Employer had not claimed they were unprofitable. Furthermore, the Union requested the following information in order to prepare for such bargaining: financial documents in order to compare the profitability of these routes to all the other routes, the sales agreements with the purchasers, a description of how the distributors will receive Employer products, and correspondence between the Employer and the purchasers.

By letter dated September 12, the Employer rejected the Union's demand for bargaining over the sale of routes 104 and 122 and declined to provide the profitability and sales information requested.⁸ In its view, the arbitrator's decision affirmed its inherent management right to sell routes without bargaining with the Union, and was not limited in its application to unprofitable routes or remote routes that are costlier to service. The Employer asserted that the decision not only produced financial benefits—namely, revenue from selling the trucks and territories as well as savings on truck maintenance—it also enabled the Employer to focus on its core business of manufacturing and branding. Although the Employer declined to engage in bargaining over the decision itself, it offered to negotiate concerning the effects of that decision.

That same day, the Employer informed the Union of the sale of Dayton route 131, effective five days later. The Union again filed a grievance alleging that the sale violated the expired collective-bargaining agreement.

Since the Employer timed the sales to coincide with employee retirements or resignations, no employees were laid off as a result of these four route sales. However, two employees lost their routes and were forced to bid on other routes of

⁸ The Employer provided aggregate profitability figures to the Union on September 6 in response to a separate information request in an unrelated matter, but those figures did not include route-specific profitability figures.

less senior drivers. According to the Union, these employees ended up in lower paying routes as a result. In addition, the Union contends that the unit lost one of the highest paying routes available to route sales drivers.

According to summary data provided by the Employer, its route operations were unprofitable in each year since 2013, and all four routes sold in 2016 were unprofitable in that year. The best performing route, route 104, lost over \$11,000 in the first 35 weeks of 2016, and the worst performing route, route 102, lost over \$46,000 during that same period. (b) (4)

[REDACTED]

ACTION

We conclude that the Employer violated Section 8(a)(5) by refusing to bargain over each decision to sell routes to independent distributors because such decisions were mandatory subjects of bargaining and the Union did not waive its interest in the matter contractually, by prior acquiescence, or by inaction. Furthermore, the Employer also unlawfully withheld information related to those sales that would be pertinent in such decisional bargaining. Finally, we conclude that this case is not a good vehicle to urge the Board to adopt Member Liebman's proposed modification to employers' duty to provide information in the *Dubuque* context.

⁹ (b) (4)

[REDACTED]

¹⁰ (b) (4)

[REDACTED]

¹¹ In calculating this figure, we made the same assumptions explained in footnote 10.

I. The Employer's Decisions to Sell the Four Routes Were Mandatory Subjects of Bargaining

In *Fibreboard Paper Products Corp. v. NLRB*,¹² the Supreme Court held that an employer's subcontracting of bargaining unit work, in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment, was a mandatory subject of bargaining.¹³ The Court stated that, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment and had not altered the company's basic operation, requiring the company to bargain about the decision "would not significantly abridge [the company's] freedom to manage the business."¹⁴ Moreover, because the decision turned on labor costs, it was "peculiarly suitable for resolution within the collective bargaining framework."¹⁵

In *First National Maintenance Corp. v. NLRB*,¹⁶ the Supreme Court held that an employer's decision to close down part of its business was not a mandatory subject of bargaining because it was a decision "akin to the decision whether to be in business at all" and, in that situation, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision."¹⁷ In examining management's interests, the Court noted that employers will be motivated to confer with the union when labor costs are an important factor in making a closure decision. But at other times, employers have a "great need for speed, flexibility, and secrecy," and, in such circumstances, bargaining might be detrimental to the business.¹⁸ The Court stated that each case involving economic decisions that impact employees, "such as plant relocations, sales, other kinds of subcontracting, automation, etc." must be considered on its particular facts to determine whether

¹² 379 U.S. 203 (1964).

¹³ *Id.* at 213.

¹⁴ *Id.*

¹⁵ *Id.* at 213-14.

¹⁶ 452 U.S. 666 (1981).

¹⁷ *Id.* at 677, 686.

¹⁸ *Id.* at 682-83.

“the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”¹⁹ The Court noted that it had implicitly engaged in such balancing in *Fibreboard*.²⁰

In *Dubuque*, the Board enunciated the test for determining whether a work relocation decision, which it considered closer to a subcontracting decision than a partial closure decision, is a mandatory subject of bargaining.²¹ Under this test, the General Counsel has the initial burden of showing that the decision was “unaccompanied by a basic change in the nature of the employer’s operation.”²² The employer then has the burden of rebutting the General Counsel’s prima facie case by establishing that: (1) “the work performed at the new location varies significantly from the work performed at the former plant”; (2) “the work performed at the former plant is to be discontinued entirely and not moved to the new location”; or (3) “the employer’s decision involves a change in the scope and direction of the enterprise.”²³ Alternatively, the employer may avoid bargaining by proving certain affirmative defenses. First, the employer may demonstrate that labor costs (direct and/or indirect) were not “a factor” in the decision.²⁴ Second, even if labor costs were a factor, the employer may show that the union could not have offered labor cost concessions sufficient to change the employer’s decision.²⁵

As set forth below, we conclude that a *Dubuque* analysis is applicable here, which leads to the conclusion that the Employer’s decisions to sell the routes were mandatory subjects of bargaining. In the alternative, application of the balancing test from *First National Maintenance* results in the same conclusion.

¹⁹ *Id.* at 679, 686 n.22 (emphasis added).

²⁰ *Id.* at 679-80.

²¹ 303 NLRB at 391-93.

²² *Id.* at 391.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

A. *Dubuque* Analysis

Although *Dubuque* specifically concerned work relocation decisions, its principles are applicable to other “Category III” management decisions²⁶—decisions that have a direct impact on employment but have as their focus the economic profitability of the employing enterprise—that fall within the spectrum between *Fibreboard* and *First National Maintenance*.²⁷

The *Dubuque* test should be applied in this case because the Employer’s actions lie somewhere between the circumstances considered in *Fibreboard* and *First National Maintenance*. Initially, the Employer’s decisions are not within the parameters of *Fibreboard*. It has not merely subcontracted its delivery work by substituting one group of employees for another who perform the same work under the same conditions, but has sold distribution routes and delivery trucks to independent distributors. Instead of selling its products directly to retailers, the Employer sells them to the distributors who assume the risk of loss and the primary responsibility for supplying retailers in their territories with the Employer’s products. On the other hand, the Employer’s decisions are not the kind of “partial closing” that was at issue in *First National Maintenance*. It has not gone out of the distribution side of its business entirely. It continues to sell products directly to retailers in territories serviced by its remaining route sales drivers, and also services certain customers within the distributors’ territories, namely, institutional suppliers, vending companies, select employer accounts, and chain stores that distributors choose not to service. Thus, *Dubuque* provides the most appropriate analysis here.²⁸

²⁶ See *First Nat’l Maint.*, 452 U.S. at 677 (referring to a “third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the [employer’s decision to terminate one of its service contracts], but had as its focus only the economic profitability of the contract”); *Dubuque*, 303 NLRB at 390 (“the decision to relocate falls within the third category of management decisions described in *First National Maintenance*”).

²⁷ See, e.g., *Rigid Pak Corp.*, Case 12-CA-152811, Advice Memorandum dated Jan. 12, 2016, at 8; *United States Postal Service (Staples)*, Case 05-CA-140963, Advice Memorandum dated May 21, 2015, at 6; *Rotorex Co.*, Case 5-CA-27338, Advice Memorandum dated Apr. 9, 1998, at 14.

²⁸ See *Winter Gardens Salad Co.*, Case 5-CA-26026, Advice Memorandum dated May 19, 1997, at 6 (applying *Dubuque* to the decision to enter into and expand agreements with independent distributors).

Applying the *Dubuque* test, the Employer's actions did not effect a basic change in the nature of the business or constitute a change in the scope and direction of the enterprise. The Employer has a history of utilizing both route sales drivers and independent distributors in order to distribute the products it manufactures. The sale of these four additional routes thus represents a marginal change in the Employer's distribution operations.²⁹ The Employer did not abandon or meaningfully shrink any part of its business.³⁰ As explained above, the Employer continues to distribute its products directly to customers in about 14 territories, as well as to select customers within the territories it has sold. Moreover, the Employer has taken care to ensure that customers located within the sold territories will continue to be supplied with its products. In this regard, distributors are contractually obligated to use their best efforts to generate sales and to maintain sufficient inventory to meet demand, and the Employer can cancel the arrangement if the distributor does not perform satisfactorily. Also, when distributors are unwilling to sell products to chain stores at the Employer's negotiated prices, the Employer has the contractual right to arrange delivery for those stores. Finally, it is significant that the Employer retains the option to bring routes back in-house and has, in fact, done so when distributors abandoned routes in the past. Thus, the

²⁹ See *id.* at 6-7 (concluding that employer's expanded use of independent distributors did not significantly change the nature or direction of the business); *O.G.S. Technologies, Inc.*, 356 NLRB 642, 645 (2011) (marginal increase in subcontracting of die-cutting work did not involve a partial closing or other change in the scope and direction of the enterprise where business "remained devoted to the manufacture and sale of brass buttons to the same range of customers").

³⁰ Compare *O.G.S. Technologies*, 356 NLRB at 645, with *Garwood-Detroit Truck Equipment*, 274 NLRB 113, 113-15 (1985) (employer had no duty to bargain over decision to abandon its service and mounting part of the business and contract out that work), and *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 111 (8th Cir. 1965) (employer's decision to terminate distribution part of its dairy business, and sell its milk to independent distributors who would deliver it to retailers, was not a mandatory subject of bargaining because the employer had "liquidated that part of its business" and thus brought about a "basic operational change"). We note that the continued viability of *Garwood-Detroit* is questionable because it was based largely upon *Otis Elevator Co.*, 269 NLRB 891 (1984), and issued before the Board formulated the *Dubuque* test. Thus, in *Garwood-Detroit*, the Board found the employer's decision to be a change in the direction of the enterprise because it did not turn on labor costs (although labor costs were a factor), but on massive overall overhead costs. 274 NLRB at 115.

Employer has not permanently surrendered its interest in distributing products to customers in sold territories.³¹

Having determined that the General Counsel can satisfy his initial burden under *Dubuque*, and that the facts above preclude the Employer from rebutting that initial showing, we further conclude that the Employer has not established any of the *Dubuque* affirmative defenses. The Employer has not raised such defenses, and to the extent it submitted evidence relevant to such inquiries, the evidence is insufficient. Thus, the Employer has not met its burden of demonstrating that labor costs were not a factor. The unprofitability of the routes appears to be the primary motivating factor in the Employer's decision to sell the routes. Since labor costs comprise a substantial portion of operating expenses, it follows that unit-related costs were at least "a factor" in its decision.³² Additionally, the Employer approached negotiations for a successor agreement with the goal of reducing operating expenses, and there is no evidence suggesting that this concern had been alleviated in the intervening period.³³ To the contrary, route operations continued to be unprofitable each year since 2013. In light of these facts, the Employer cannot reasonably take the position that labor costs played no role in its decisions to sell the four routes.

The Employer has also failed to provide sufficient evidence showing that the Union could not have offered concessions to change the Employer's mind. (b) (4)

³⁴ This sum appears to be well within the range of

³¹ See *O.G.S. Technologies*, 356 NLRB at 646 n.14 (noting that the increase in subcontracting was "not necessarily permanent" in finding that there was no change in the business's scope and direction). *But see Garwood-Detroit*, 274 NLRB at 115 (although the subcontract could be terminated, it was evident that the employer had no intention in the foreseeable future of reassigning the service work to its own employees).

³² See *Rock-Tenn Co.*, 319 NLRB 1139, 1139 n.2 (1995) (noting that subcontracting decision was amenable to bargaining where employer's primary reason was to "reduce its trucking expenditures, a substantial portion of which was labor costs"), *enforced*, 101 F.3d 1441 (D.C. Cir. 1996).

³³ Cf. *Owens-Brockway Plastic Products*, 311 NLRB 519, 522 (1993) (finding labor costs to be a factor in relocation decision based on employer's underscoring of need for wage concessions in months leading up to the plant relocation).

³⁴ As noted above, these estimates were derived by making certain assumptions about direct labor costs based on data provided for the four eliminated routes. (b) (5)

concessions a unit of employees might reasonably absorb.³⁵ We note that the feasibility of concessions should be based on whether the Union could have offered concessions that cover the net loss for each individual route, rather than the aggregate loss for all four routes, since the decisions were made at different times (except perhaps for routes 104 and 122, where the Employer's decisions were announced simultaneously) and were not dependent on one another. Additionally, there is no evidence suggesting that the unit's labor costs were "so low that it was clear on the basis of those figures alone that the employees could not make up the difference."³⁶ In sum, the Employer has not established that decisional bargaining would have been futile.

B. *First National Maintenance* Analysis

Although the decision at issue here is not the kind of partial closing or going out of business that was at issue in *First National Maintenance*, the Board has applied the *First National Maintenance* balancing test as an alternative basis for finding a violation in some cases where the facts are arguably distinguishable from *Fibreboard*.³⁷ Thus, the Region should argue in the alternative that the Employer's

(b) (4)

³⁵ Compare *Nu-Skin International*, 320 NLRB 385, 386 & n.4 (1995) (practically, union could not have offered sufficient concessions where relocation offered recaptured savings of \$310,000 monthly, representing 66 percent of labor costs at prior location, among other factors); *Kaumagraph Corp.*, 316 NLRB 793, 801 (1995) (Board affirmed judge's finding that there was no duty to bargain where labor costs were not a significant factor in the decision and \$520 monthly wage cut per employee necessary for rent relief was "unrealistic"); *Westinghouse Electric Company, LLP*, Case 6-CA-32131, Advice Memorandum dated Nov. 6, 2002, at 1, 3, 6 (no decisional bargaining obligation where required wage cuts of between 39 to 48 percent were unrealistic and illusory).

³⁶ *Dubuque*, 303 NLRB at 391-92.

³⁷ See, e.g., *O.G.S. Technologies*, 356 NLRB at 646-47 (Board would similarly conclude that subcontracting out of die engineering work was a mandatory subject of bargaining even if it applied *First National Maintenance* rather than *Fibreboard*); *Mi Pueblo Foods*, 360 NLRB 1097, 1098-99 (2014) (even applying *First National Maintenance* balancing test instead of *Fibreboard*, Board would find that decision to eliminate unit work by changing from a hub-and-spoke delivery system to a point-to-point system was subject to bargaining).

actions in this case were unlawful under the *First National Maintenance* balancing test because the Employer has not demonstrated that it had a need for unencumbered decision-making, e.g., that it had a need for “speed, flexibility, and secrecy” in selling routes, and the issues here were well suited to bargaining since labor costs were a factor.³⁸ It is plain that this type of route sale does not require speed or secrecy, since the Employer informed the Union and its employees in April that it was considering selling some Dayton routes within three to six months and would post public advertisements for the sale of the routes. Thus, “the potential benefits of seeking mutual solutions through collective bargaining considerably outweigh any temporary burden on the [Employer] that bargaining over this change . . . would entail.”³⁹

Accordingly, under either *Dubuque* or *First National Maintenance*, we conclude that the sale of delivery routes to independent distributors was a mandatory subject of bargaining, and the Employer had an obligation to engage in decisional bargaining prior to implementation, absent waiver on the part of the Union.⁴⁰

II. The Union Did Not Waive Its Right to Bargain Over the Route Sales

The Employer’s contention that its actions were privileged based on the expired contract’s language, the terms of its revised final offer, the arbitrator’s decision, or the parties’ past practice is unavailing. The Employer cannot rely on the management rights clause, or any functional equivalent, contained in the 2008-2012 collective-bargaining agreement because it expired years before these routes were sold in 2016, and thus any Union waiver contained in that agreement was no longer

³⁸ See *First Nat’l Maint.*, 452 U.S. at 679-80, 682-83; *O.G.S. Technologies*, 356 NLRB at 646-47.

³⁹ *Mi Pueblo Foods*, 360 NLRB at 1098.

⁴⁰ We note that these sales had a material, substantial, and significant impact on the bargaining unit even though no employees were laid off because unit work was eliminated and some employees apparently had to bump into less lucrative and/or more onerous routes. See *Mi Pueblo Foods*, 360 NLRB at 1097, 1098-99 (decision to assign bargaining unit work outside the unit by ceasing cross-docking of products in favor of having contracted supplier deliver goods directly to employer’s stores had a “material, substantial and significant” impact, notwithstanding fact that there were no layoffs and wages and hours did not significantly change).

effective.⁴¹ Nor can the Employer defend its actions on the grounds that its revised final offer in June 2013 contained clauses constituting Union waiver. The Region has determined that such terms were unlawfully implemented because the parties had not reached impasse. Even assuming those terms were lawfully implemented, it is clear that the Employer could not impose a management rights clause, or its functional equivalent, without the Union's consent because such clauses are contract-dependent.⁴² In any event, the provisions of the revised final offer are too general to privilege the Employer's unilateral actions since they do not specifically address the right to sell or eliminate routes.⁴³ The management rights clause merely grants the Employer the right to "improve manufacturing methods, operations and conditions and distribution of its products." And the route bidding provision does not speak to the Employer's prerogative to sell routes; it merely

⁴¹ See, e.g., *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) ("some terms and conditions of employment . . . do not survive expiration of an agreement"); *E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 4 (Aug. 26, 2016) (management-rights waivers, like arbitration and no-strike/no-lockout clauses, do not survive contract expiration as part of the status quo that must be maintained by operation of statute); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001) ("[T]he essence of the management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls."), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003).

⁴² See *McClatchy Newspapers*, 321 NLRB 1386, 1390 (1996) (contract proposals that are "contract bound" or involve a "statutorily guaranteed right" cannot be unilaterally implemented after impasse without the union's agreement to be bound), *enforced in relevant part*, 131 F.3d 1026 (D.C. Cir. 1997); *Du Pont*, 364 NLRB No. 113, slip op. at 4 (management rights clauses are "creatures of contract and involve the surrender of a statutorily-protected bargaining right").

⁴³ See *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1022 n.8, 1033 (1994) (management rights clause providing that the employer had the right to "transfer employees" and "change existing methods or facilities" did not privilege employer's decision to halt operations at unionized plant, lay off employees, and transfer work to employees at non-unionized facility), *enforced in relevant part*, 87 F.3d 1363 (D.C. Cir. 1996); *Public Service Co.*, 312 NLRB 459, 460-61 & n.6 (1993) (union did not waive its right to bargain over subcontracting by virtue of general management rights clause or negotiation of specific provision prohibiting subcontracting in very limited circumstances); *Reece Corp.*, 294 NLRB 448, 448, 450-51 (1989) (no waiver where management rights clause and severance pay provision only addressed permanent abandonment of production, not transfer of work elsewhere).

addresses one effect of such a change, the opportunity for employees to bid on the routes of less senior drivers. Finally, the arbitrator's decision does not compel the conclusion that the Union had waived its right to bargain, since the arbitrator merely determined that the contract did not prohibit the Employer from selling routes, not that the contract privileged it to do so.⁴⁴

Nor can waiver be established by the fact that the Employer had a history of selling routes both during the life of the collective-bargaining and after its expiration without objection from the Union. The Board recently ruled that practices created pursuant to a management rights clause and implemented during the life of the contract cannot be continued as part of the status quo after contract expiration.⁴⁵ Thus, even assuming the Union had waived its right to bargain under the collective-bargaining agreement, the Employer could not continue unilaterally selling routes pursuant to that practice after the contract expired. In addition, the Union's failure to object to numerous route sales postdating the arbitration decision does not establish waiver. It is a "well-established waiver principle that 'a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'"⁴⁶ Thus, the Union's failure to request bargaining over the sale of routes in late 2012 and 2013 does not preclude it from reasserting its interest in the matter once the Employer began selling higher volume routes in the Dayton area that were more valuable to the unit.

⁴⁴ See *Dubuque*, 303 NLRB at 398 (no waiver where arbitrator merely held that relocation of unit work did not constitute subcontracting and therefore did not violate the contract, but did not address the separate question of whether the management rights clause contained a waiver of the union's bargaining rights).

⁴⁵ See *Du Pont*, 364 NLRB No. 113, slip op. at 3-4 (returning to the rule that "unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause").

⁴⁶ *Id.*, slip op. at 6 (quoting *Owens-Corning Fiberglas*, 282 NLRB 609, 609 (1987)). See also *Mississippi Power Co.*, 332 NLRB 530, 531-32 (2000) ("union acquies[c]ence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past") (quoting *Exxon Research & Engineering Co.*, 317 NLRB 675, 685-86 (1995), *enforcement denied on other grounds*, 89 F.3d 228 (5th Cir. 1996)), *enforced in part*, 284 F.3d 605 (5th Cir. 2002).

Finally, even assuming the veracity of the Employer's contention that the Union never objected to the sale of route 102 in July 2016, such a failure would not constitute waiver-by-inaction. Given the Employer's invocation of the arbitration decision in its July notice to the Union and, moreover, its assertion in September in response to the Union's bargaining demand that it had no duty to engage in decisional bargaining, it is clear that any bargaining request would have been futile.⁴⁷ Therefore, the Union did not relinquish its right to bargain over the sale of route 102 through inaction.

III. The Employer Violated Section 8(a)(5) by Failing to Provide Relevant Information

It is well settled that a collective-bargaining representative is entitled to information relevant and necessary to carrying out its statutory duties and responsibilities, including negotiating over mandatory bargaining subjects and policing a collective-bargaining agreement.⁴⁸

When the requested information deals with the terms and conditions of employment of bargaining unit employees, the Board will deem the information presumptively relevant and necessary to the union's statutory duties.⁴⁹ But when the information requested is not presumptively relevant, the burden is on the union to demonstrate its relevance.⁵⁰ In such cases, it must be established either that (1) the union demonstrated the relevance of the nonunit information, or (2) the relevance should have been apparent to the employer under the circumstances.⁵¹ If

⁴⁷ See *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42-43 & n.7 (1997) (finding that union request to bargain would be futile where employer's witness testified at hearing that he believed employer had no obligation to bargain over changes), *enforced*, 162 F.3d 513 (7th Cir. 1998); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) ("if the notice is too short a time before implementation or . . . the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*"), *enforced*, 722 F.2d 1120 (3d Cir. 1983).

⁴⁸ *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-38 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956).

⁴⁹ *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

⁵⁰ *Id.*

⁵¹ *Id.* at 1258.

an employer has been made aware of only invalid reasons for the information, it will be under no duty to accede to the information request even if other legitimate reasons for the information request conceivably might exist.⁵²

Given our conclusion that the route sales were mandatory subjects of bargaining, it follows that the Union was entitled to the requested information concerning those sales in order to engage in decisional bargaining.⁵³ The information requested—route profitability figures, sales agreements, correspondence with the purchasers, and information about how distributors will receive the product—would have enabled the Union to meaningfully evaluate the need for concessions, develop proposals to offset the routes' losses, and assess the impact on the unit. Although the Union now asserts to the Region that the information is also necessary to process grievances, it has failed to demonstrate the request's relevance for this alternate purpose, given that the collective-bargaining agreement does not contain any provisions restricting the sale of routes.⁵⁴

⁵² See *Emery Industries*, 268 NLRB 824, 824-25 (1984).

⁵³ See *Naperville Ready Mix, Inc.*, 329 NLRB 174, 177, 181, 184 (1999) (union was entitled to information about truck sales, including purchase contracts and maintenance arrangements, where employer's decision to engage in de facto subcontracting was a mandatory subject of bargaining), *enforced*, 242 F.3d 744 (7th Cir. 2001); *Litton Systems*, 283 NLRB 973, 974-75 (1987) (employer unlawfully failed to provide information relevant to bargaining over plant relocation, including financial data documenting the plant's annual losses), *enforcement denied on other grounds*, 868 F.2d 854 (6th Cir. 1989).

⁵⁴ Article XIV of the expired agreement, which prohibited the use of owner-driver equipment and the Employer's rental or lease of equipment to Union members or others where it has the effect of defeating the terms of the agreement, does not provide a sufficient basis for the information request. Given the Employer's historical reliance on independent distributors, the parties plainly did not intend for this provision to operate as a prohibition on the use of such distributors. Nor is there any contention that the Employer has leased, rather than sold, equipment to independent distributors. Thus, the Union has not demonstrated a "reasonable belief, supported by objective evidence, that the requested information is relevant." *Disneyland Park*, 350 NLRB at 1258 (no reasonable belief that subcontracting information was relevant where contract permitted subcontracting so long as it did not result in termination, layoff, or failure to recall employees and union made no claim that such circumstances had occurred).

Finally, we conclude that the instant case does not present a good vehicle for pursuing Member Liebman's proposed approach to *Dubuque* information sharing. In *Embarq*, Member Liebman, concurring, recommended that in future *Dubuque* cases employers be required to provide unions with information about relocation decisions whenever there is a reasonable likelihood that labor cost concessions might affect the decision.⁵⁵ The primary rationale for this proposal was the concern that extant law put the Board in the difficult position of engaging in after-the-fact guesswork to determine whether a union could have offered adequate concessions to change the employer's mind. Here, the Employer has not yet argued that the route losses were too large for the unit to absorb, and it would be difficult to do so given that the sales decisions were made independently and each route's losses constituted (b) (4) [REDACTED]. Thus, this case does not effectively illustrate the pitfalls of the current system and, therefore, is not the most persuasive vehicle for presenting this issue to the Board.

CONCLUSION

Based on the preceding analysis, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) by refusing to bargain with the Union concerning the sale of routes to independent distributors and withholding information relevant to such decisional bargaining.

/s/
B.J.K.

ADV.09-CA-184215.Response.Mikesell's [REDACTED]

⁵⁵ *Embarq*, 356 NLRB at 983.