

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

DATE: April 7, 2020

TO: Nancy Wilson, Regional Director  
Region 6

FROM: Richard A. Bock, Associate General Counsel  
Division of Advice

SUBJECT: Jersey Shore Steel Co.  
Cases 06-CA-236244, 246027

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The Region submitted these cases for advice as to whether the Employer violated Section 8(a)(5) by unilaterally subcontracting unit work post-contract expiration during successor contract negotiations, based on subcontracting waivers in the expired collective-bargaining agreements (“CBAs”) that were not in the same sections as the management rights clauses.<sup>1</sup> We conclude that the Employer violated Section 8(a)(5) because: (1) its subcontracting involved a mandatory subject of bargaining; (2) any waivers of the Union’s statutory rights to bargain expired along with the CBAs; and (3) the Employer cannot rely on a past practice or economic exigency to privilege its unilateral conduct.

**FACTS**

Jersey Shore Steel Co. (“the Employer”) operates two industrial steel facilities – a Rolling Mill (“Mill”) and a Fabrication Plant (“Fab Plant”) in central Pennsylvania. The production and maintenance employees at the Mill are represented by Steelworkers Local 4907-03, and at the Fab Plant they are represented by Steelworkers Local 4907-04 (collectively “the Union”). The parties’ bargaining history dates back about 30-40 years.

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<sup>1</sup> Jersey Shore Steel Co., Cases 06-CA-235415, et al., which the Region submitted to ILB for authorization to initiate Section 10(j) proceedings, is not addressed in this memorandum. Although the Board on March 24, 2020 authorized the Region to initiate Section 10(j) proceedings, the District Court for the Middle District of Pennsylvania has ordered that all in-person proceedings be continued for 60 days due to the coronavirus pandemic.

The Mill and Fab Plant facilities have had their own separate CBAs with their respective Locals. On January 31, 2017, the Mill CBA expired, and on December 2, 2017, the Fab Plant CBA expired. At various times in 2017, the Employer engaged in separate successor contract negotiations with the respective Locals.

The expired CBAs contained nearly identical management-rights and subcontracting clauses; the subcontracting clauses were not located in the management-rights sections. The subcontracting clauses stated in part, “[i]n furtherance of [Employer] rights to decide what products are to be manufactured, the [Employer] shall have the right to contract out such of its work as it may decide is necessary. It is agreed however, that the [Employer] will not subcontract its work when subcontracting would result in lay-offs for employees of the [Employer], or when there are employees laid off who are capable of doing the work.”

Around late 2017, the Employer experienced a change in management when one of the co-owners stepped down and subsequently his son became the new President and CEO around early 2018. On February 28, 2018, the Employer signed an initial contract with Aerotek, a third-party labor supplier, to fulfill non-bargaining unit work needs. (The Employer did not begin using Aerotek workers to perform bargaining-unit work at that time.) In March 2018, the Employer resumed collective-bargaining negotiations with the Union only for the Fab Plant and began proposing that it have the unrestricted right to subcontract unit work.

In the past, the Employer had not used subcontractors to perform unit work at either the Fab Plant or the Mill. At the Fab Plant alone, there was a practice of using referrals from a temp agency, but that practice differed from subcontracting because the Employer hired those individuals as probationary employees and placed them on its payroll as full-time employees covered by the CBA. Those employees were compensated at the rates outlined in the CBA, limited to working no more than 90 days (the length of the probationary period under the CBA), their production output counted for purposes of calculating employee bonuses, and if the Employer decided to hire them permanently, their time spent working was credited toward the 90-day probationary period.

Around August 2018, the Employer began running job advertisements and participating in job fairs to recruit applicants but was unsuccessful in hiring candidates due to its starting wage not being competitive in a tight labor market with low unemployment rates. The Employer feared this could lead to an inability to timely fill customer orders. At no time did the Employer bargain with the Union over specific responses or strategies it wished to pursue to resolve its hiring and retention problem, including subcontracting.

In mid-October 2018, unknown to the Union, the Employer signed an amended contract with Aerotek, but this time to provide workers to perform bargaining-unit

work. Around October 28, the Employer began using Aerotek workers to perform unit work at the Fab Plant. In March 2019, the Employer also began using Aerotek workers to perform unit work at the Mill, including reassigning unit employees from the rail yard to positions inside the Mill and giving the Aerotek workers the rail yard work. The Employer asserts it is more costly to pay Aerotek for its workers than it is to pay full-time unit employees.

Unlike the temp agency-referred probationary employees the Employer had previously hired at the Fab Plant, the Aerotek workers are not on the Employer's payroll, are not paid the CBA rates, are not subject to the 90-day probationary term limit, do not have their production included for calculating employee bonuses, and in the instances where the Employer has hired Aerotek workers permanently, their prior work has not been credited toward satisfying the 90-day probationary period.

In February and August 2019, the Union filed the current charges alleging unlawful unilateral subcontracting.<sup>2</sup> In defense of its actions, the Employer relies on, inter alia, compelling economic circumstances, that the decision was not itself amenable to bargaining, and on the expired contractual provisions allowing for subcontracting.

### **ACTION**

We conclude that the Employer violated Section 8(a)(5) because: (1) its subcontracting at both facilities was a mandatory subject of bargaining; (2) any contractual waiver of the Union's statutory right to bargain expired along with the CBAs; and (3) the Employer cannot rely on a past practice or economic exigency to privilege its unilateral conduct.

#### **I. The Employer's Subcontracting Is a Mandatory Subject of Bargaining**

Employers have a statutory duty to bargain in good faith with their employees' union representatives about mandatory subjects of bargaining under Sections 8(a)(5) and 8(d) of the Act.<sup>3</sup> It is well-settled that the subcontracting of unit work is a

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<sup>2</sup> On February 10, 2020, the Region issued a second amended consolidated complaint (consolidating ten other charges) against the Employer that alleges various violations only at the Fab Plant, including withdrawal of recognition from the relevant Local. Based on that complaint, the Region obtained authorization to initiate the Section 10(j) proceedings referred to above in footnote 1. The ALJ hearing for that complaint was scheduled to begin March 31, 2020 but is being postponed indefinitely due to the coronavirus pandemic.

<sup>3</sup> See, e.g., *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958).

mandatory subject of bargaining unless an employer can demonstrate either a change in the nature, scope, or direction of the business, or compelling economic reasons.<sup>4</sup> Absent those circumstances, an employer violates Section 8(a)(5) when it unilaterally contracts out unit work without bargaining to agreement or impasse with the union, unless it is privileged to do so by a union's waiver of bargaining rights.<sup>5</sup>

Here, the Employer simply substituted and replaced one group of workers for another to perform the same work at the same plants, which is a mandatory subject of bargaining absent one of the justifications listed above.<sup>6</sup> While the Employer does not assert there was a change in the nature, scope, or direction of its business, it appears to claim, as noted above, that it had a compelling economic reason. Specifically, the Employer asserts it had a hiring and retention problem that could have potentially resulted in a failure to meet orders and deadlines, which could have resulted in a loss of customers. The Employer avers that since August 2018 it ran advertisements and attended job fairs to recruit candidates but was unsuccessful in hiring enough due to its starting wage not being competitive in a tight labor market. Even assuming this could be characterized as an exigency, the Employer has failed to demonstrate that it was caused by external events, was beyond its control, or was not reasonably foreseeable. In fact, the Employer admits its staffing issues were foreseeable and its inability to hire was attributable to a non-competitive starting wage, which is a matter within its control and uniquely suited for collective bargaining. Accordingly,

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<sup>4</sup> See, e.g., *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R.*, 342 NLRB 458, 458 (2004), *enforced*, 414 F.3d 158 (1st Cir. 2005).

<sup>5</sup> See, e.g., *Ingham Regional Medical Center*, 342 NLRB 1259, 1261 (2004). Although it is not necessary to reach this issue since the subcontracting here occurred post-contract expiration, we note that it is not clear if the subcontracting clause in the CBAs would have privileged the Employer to act unilaterally had the CBAs been in effect at the relevant time. See *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11 (Sept. 10, 2019). The clause at issue here states that the Employer has the right to contract out work "in furtherance of [Employer] rights to decide what products are to be manufactured." The Employer neither asserted that its subcontracting stemmed from a change in its product line or manufacturing, nor offered any evidence of such a change. Instead, the Employer relied solely on a claimed hiring and retention problem, further discussed below, which does not appear to fall within the terms of the contractual waiver.

<sup>6</sup> See *Sociedad Espanola*, 342 NLRB at 458.

the Employer's economic arguments do not rise to the level of an unforeseen event that compelled immediate action and obviated its bargaining obligation.<sup>7</sup>

The Employer also asserts it was privileged to act unilaterally because this was not a decision amenable to collective bargaining. But the Employer does not claim the subcontracting stemmed from a change in the scope or direction of its business that is outside the scope of bargaining. Rather, as noted above, the Employer admits that its hiring troubles were due to its noncompetitive starting wages, the most fundamental of subjects about which bargaining is compulsory.<sup>8</sup> The Employer also admits it was not burdened by a lack of funds since it claims using Aerotek workers is more costly than using unit employees.

The Employer also fails to justify its conduct by stating no unit employee was adversely affected by its use of Aerotek employees. Contrary to the Employer's position, the Board has consistently found that bargaining unit employees *are* adversely affected when an employer unilaterally subcontracts unit work even absent any immediate job loss because they might lose the opportunity for additional work, which has a material impact on their earnings.<sup>9</sup> Additionally, employee bonuses have been affected because production by Aerotek workers is not included in the Employer's bonus calculations. Notably, unfettered subcontracting in response to regular employee attrition could result in the elimination of the bargaining unit.<sup>10</sup> In sum, the Employer has failed to demonstrate that its subcontracting did not involve a mandatory subject of bargaining.

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<sup>7</sup> See *Kankakee County Training Ctr. for the Disabled, Inc.*, 366 NLRB No. 181, slip op. at 2-3 (2018) (finding initial subcontracting of unit IT work was *lawful* where computer system that handled employer's billing and payroll unexpectedly crashed, but subsequent subcontracting months later when the server crashed again was *unlawful* because it was foreseeable given earlier crash).

<sup>8</sup> It is well settled that all aspects of wages, including starting wage rates, are mandatory subjects of bargaining. See, e.g., *Monterey Newspapers*, 334 NLRB 1019, 1020 (2001) ("wage rates that job applicants were offered [and, thus, that newly hired employees were paid] are mandatory subjects of bargaining"); *NLRB v. Katz*, 369 U.S. 736, 745-46 (1962) (merit pay); *Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989) (wage incentive programs); *Smith Cabinet Mfg. Co.*, 147 NLRB 1506, 1508 (1964) (shift differentials).

<sup>9</sup> See *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), *reversed in part mem.*, 248 F.3d 1131 (3d Cir. 2000); *Acme Die Casting*, 315 NLRB 202, 202 n.1, 209 (1994) (noting current unit employees "might" have lost additional overtime).

## **II. The Subcontracting Clauses in the Expired CBAs Do Not Waive the Union's Bargaining Rights**

The Employer also cannot establish that the Union waived its right to bargain over subcontracting. Although the Employer asserts it merely maintained the status quo set by the expired CBAs, the subcontracting waivers contained in the Fab Plant and the Mill CBAs expired along with the respective CBAs in 2017, well before the Employer began subcontracting unit work in October 2018 (at the Fab Plant) and March 2019 (at the Mill). Board law is clear that waivers of a union's statutory right to bargain over mandatory subjects expire with the agreement absent evidence of a clear and unmistakable intent to the contrary.<sup>11</sup> Here, the subcontracting clause in the expired contracts on its own, and without reference to the management rights clause, contained a waiver of the Union's bargaining rights. But as the cases cited above establish, it is immaterial in what section a waiver is found, what title it is given, or if it is contained in documents incorporated by reference.<sup>12</sup> Here, there is no language in the subcontracting clause of the expired CBAs to show that the parties had any intent whatsoever to extend the subcontracting waivers beyond the expiration of the CBAs. Because the Employer cannot rely on a waiver of bargaining rights concerning a mandatory subject, its unilateral subcontracting of unit work post-contract expiration violated Section 8(a)(5).

## **III. The Employer's Unilateral Subcontracting Was Not Privileged by Past Practice or Economic Exigency**

Although the Employer cites to *Raytheon Network Centric Sys.*,<sup>13</sup> the Employer does not factually expound on any history of subcontracting unit work. The lack of previous examples does not support a defense that the Employer was privileged by past practice to unilaterally subcontract unit work.

Regarding the Fab Plant only, the Employer did have a practice of hiring employees referred by a temp agency. The Employer directly hired those individuals

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<sup>11</sup> See, e.g., *Ironton Publications*, 321 NLRB 1048, 1048 (1996) (finding a waiver regarding the timing and amount of merit wage increases – contained in an article other than a management rights clause – did not survive the expiration of the contract).

<sup>12</sup> In light of the above cases, there is no need to assert that the management-rights and subcontracting clauses must be read in tandem to find that the waiver expired with the CBAs.

<sup>13</sup> 365 NLRB No. 161 (2017).

from the temp agency as its own probationary employees and applied the terms of the CBA to them. For example, they were compensated at the CBA wage rates, were limited to 90 days (at which point the Employer had the option of discharging them or hiring them permanently), were credited for time spent working towards the required 90-day probation period under the CBA, and their production output counted for purposes of calculating bonuses. Thus, the Employer's use of Aerotek workers to perform unit work beginning in October 2018 at the Fab Plant marked a stark departure from this practice because Aerotek workers are employed and paid by Aerotek (not the Employer), are not paid the CBA rates, and their production is not included for purposes of calculating employee bonuses. As for the Mill, the Employer never used temp agency referrals or third-party subcontractors of any kind to perform unit work prior to March 2019. Moreover, the Employer did not have a practice of reassigning unit employees from the Mill rail yard to inside the plant. In short, the Employer cannot rely on past practice to justify unilateral subcontracting of unit work since October 2018.

As discussed above, there is also no evidence that the Employer was compelled by economic exigency to contract out unit work while the parties were engaged in successor contract negotiations.<sup>14</sup> "Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action."<sup>15</sup>

In conclusion, for the foregoing reasons the Employer violated Section 8(a)(5) by unilaterally subcontracting unit work at both facilities. Thus, the Region should issue complaint, absent settlement.

/s/  
R.A.B.

H://ADV.06-CA-236244.Response.JerseyShoreSteel. (b) (6), (b) (7)

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<sup>14</sup> See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enforced mem. sub nom.*, *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).; *RBE Elecs. of S.D., Inc.*, 320 NLRB 80, 81-82 (1995).

<sup>15</sup> *RBE Elecs. of S.D., Inc.*, 320 NLRB at 81.