

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

**GALAXY TOWERS CONDOMINIUM  
ASSOCIATION**

**Respondent**

**And**

**Case 22-CA-030064**

**LOCAL 124, RECYCLING, AIRPORT,  
INDUSTRIAL & SERVICE EMPLOYEES**

**Charging Party**

**THE GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO  
RESPONDENT'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION**

Pursuant to Section 102.46(f)(1) of the Board's Rules and Regulations, this answering brief is submitted in response to Respondent's brief in support of cross-exceptions to the decision of the Administrative Law Judge (the "ALJ").<sup>1</sup> Respondent presents a potpourri of conflicting legal theories and misrepresentations of undisputed fact in a doomed attempt to prove that it was entitled to subcontract unit work after negotiations took place in 2011.<sup>2</sup>

The General Counsel will not attempt to address each baseless contention or track the scattershot presentation that constitutes Respondent's brief in support of cross-exceptions. Rather, the General Counsel will address Respondent's brief in the context of a more logical presentation that accurately reflects the facts and issues in this case. First, as the ALJ found, Respondent violated the Act by refusing to provide relevant information related to its decision to subcontract unit work (i.e., Respondent's Request for Proposal ("RFP") and the responsive subcontractor bids). [ALJD 15:33-37] Second, as the ALJ found, the parties did not reach impasse in negotiations over the Respondent's subcontracting decision because Respondent did not produce the information that the Union needed to conduct such negotiations and because the parties did not otherwise evince a mutual good faith

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<sup>1</sup> References to the ALJ's decision are cited herein as [ALJD page(s):line(s)]. References to the Respondent's brief in support of cross-exceptions are cited herein as [R. Exceptions Br. ]. References to the record are cited herein as follows: Transcript [Tr. ], General Counsel exhibits [GCX ], and Respondent exhibits [RX ].

<sup>2</sup> For example, at first, Respondent claims that the Union clearly acquiesced to Respondent's decision to subcontract the work of most bargaining unit employees. [R. Exceptions Br. p. 21-23] Respondent follows this contention with a contradictory claim that "the Union publically maintained an explicit and categorical opposition to subcontracting in any form and under any circumstances." [R. Exceptions Br. p. 24] In support of the latter assertion, Respondent misrepresents that Union Executive Treasurer James Bernadone stated in a March 17, 2011 letter "that the Union would never agree to subcontracting..." [RCX 31] Apparently, Respondent does not expect Board members to read the letter because it says no such thing.

understanding that further negotiations would be futile. [ALJD 16:1-26] Third, as the ALJ found, although the Union was willing to explore a mutually acceptable subcontracting arrangement, the parties reached no such agreement and the Union did not acquiesce to Respondent's subcontracting decision. [ALJD 12:1-6] Fourth, as the ALJ found, Respondent violated the Act by declaring impasse on and prematurely implementing a "last, best and final offer" that contained permissive demands (along with a management rights clause that sought the right to subcontract). [ALJD 16:40-42] Fifth, even if the parties had bargained to good faith contractual impasse, Respondent could not implement and rely upon a bargaining waiver (in the management rights clause of the LBFO) to which the Union had not agreed.

## **II. FACTS**

### **A. Summary Of Facts From 2006 To 2010**

Respondent's cross-exceptions largely concern the parties' negotiations in 2011. However, for clarity and context, the events that occurred before 2011 are summarized below.<sup>3</sup>

The parties initially engaged in bargaining from July to December, 2006, but did not reach a complete contract. At the start of negotiations on August 8, 2006, the parties executed a partial contract in the form of an Interim Agreement ("2006 Interim Agreement"), which provided for reduced hiring rates (\$3 less per hour), checkoff, no-strike/no lockout, and grievance/arbitration. [GCX 4] On January 2, 2009, the parties executed another partial contract in the form of a Memorandum of Agreement (the "MOA"), which identified and implemented additional economic terms (wages, medical coverage, and paid-time-off).

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<sup>3</sup> Early negotiations from 2006 to 2008 are described at greater length in the General Counsel's Brief in Support of Exceptions.

[GCX 11] The MOA did not implement other unspecified tentative agreements that were still conditioned upon the completion of a full and final collective bargaining agreement.<sup>4</sup> After the MOA was signed, on March 13, 2007, then Respondent attorney Steven A. Ploscowe submitted a full length contract proposal to the Union. [GCX 12]. The parties resumed negotiations through 2007 and 2008, but never reached or executed a complete agreement. [ALJD 7:34-35]

During these negotiations, on August 1, 2007, the Union withdrew from a pre-MOA tentative agreement on a management rights provision which included the right to subcontract. [GCX 15] On August 17, 2007, Respondent filed an unfair labor practice charge (22-CB-10448) alleging that the Union unlawfully withdrew from this and other tentative agreements without good cause. [Tr. 1478] [RX 14] On October 1, 2008, the parties executed an informal settlement agreement (the “Settlement Agreement”) in case 22-CB-10448 whereby the Union agreed that it would reinstate and not withdraw from such tentative agreements in future bargaining. [GCX 19] However, as noted above, the parties never reached a final contract and those tentative agreements were never implemented.

The MOA was scheduled to expire on May 31, 2009. In February, 2009, Ploscowe was replaced by Respondent attorney Michael Kingman. [Tr. 701] At this point, Kingman believed that Ploscowe’s unsigned March 13, 2007 proposal (which contained the pre-MOA tentative agreement on management rights) was actually the collective bargaining

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<sup>4</sup> See the General Counsel’s briefs in support of exceptions.

agreement.<sup>5</sup> [Tr. 709] [GCX 12, 24] Respondent also relied on the Settlement Agreement for the proposition that a management rights clause with subcontracting was in effect. [GCX 19, 24] [Tr. 711] Kingman was apparently unaware that Ploscowe's March 13, 2007 proposal was never signed and did not recognize that the Settlement Agreement referred to "tentative agreements" which were, by definition, still conditional and had not previously been implemented.<sup>6</sup> [Tr. 702, 711, 715-16] Accordingly, the parties argued over Respondent's alleged right to subcontract under the current "collective bargaining agreement." [Tr. 64]

Meanwhile, the parties attempted to bargain for a new contract, but with no success. [Tr. 1251, 1253] Respondent ultimately proposed that negotiations for a new contract be suspended and that the parties arbitrate whether Respondent had a unilateral right to subcontract under the current "collective bargaining agreement." [Tr. 67, 1253, 1384] In fact, Kingman drafted an interim agreement which would suspend negotiations for a new contract until an award issued in the subcontracting arbitration. [GCX 25] [Tr. 1384] The Union agreed and the parties executed an Interim Agreement to that effect on August 31, 2009 ("2009 Interim Agreement"). [GCX 25] However, the arbitration was delayed at Respondent's requests over the Union's objections. Thus, negotiations for a new contract remained suspended as well. [Tr. 71, 73, 81-85, 353] [GCX 32]

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<sup>5</sup> As Kingman testified, when he was retained, he did not recall examining agreements for signatures. [Tr. 702] Nevertheless, he was remarkably persistent in this misconception regarding the documents that made up the parties' contract. Kingman testified that, in its July 19, 2009 proposal, Respondent identified Ploscowe's unsigned March 13, 2007 proposal as the parties' "collective bargaining agreement," as further "[m]odified by the [MOA] and ratified by the [Settlement Agreement]..." [GCX 24] [Tr. 709] Kingman referred to Ploscowe's unsigned March 13, 2007 proposal the same way in another proposal that he would send to the Union over a year later on August 23, 2010. [RX 17]

<sup>6</sup> Throughout the trial, Kingman noted that he is not a labor lawyer and has very limited familiarity with that area of the law. [Tr. 700-701, 788]

In January, 2010, the Union filed for arbitration on grievances regarding vacation and temporary employees, relying on the partial 2006 Interim Agreement, the partial MOA, and the additional terms of Respondent's prior contract with Local 734, L.I.U., of N.A. AFL-CIO ("Local 734"), as necessary.<sup>7</sup> [Tr. 73-77] [GCX 2, 4, 11, GCX 26-31]

In about the spring 2010, the Union's welfare fund conducted an audit of Respondent and filed an ERISA lawsuit for the collection of delinquent contributions. [Tr. 78-79] The welfare fund determined Respondent's contribution liability to be about \$100,000. [Tr. 958]

On about August 3, 2010, at a grievance meeting, Kingman advised the Union that a company called Planned Building Services would be retained to perform unit work.<sup>8</sup> [Tr. 337-40, 828-29, 1367-69]. The meeting was not attended by the parties' broader bargaining committees and neither party took notes. [Tr. 828] Kingman drafted a revised management rights proposal with new language that still included a Union waiver of its right to bargain over subcontracting decisions. [Tr. 339-40, 829] However, the new language would allow senior employees to bump into other departments if the work in their own department (but not others) was subcontracted. [Tr. 339-40] [RX 17] Kingman asked the Union to contact

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<sup>7</sup> The Union replaced Local 734 as the representative of the bargaining unit. [GCX 2] [Tr. 32-33] At the start of negotiations, the parties confirmed that the terms of Respondent's contract with Local 734 would remain in effect until they were replaced. [Tr. 215, 272, 1072] [RX 32] The Act also requires that Respondent to maintain existing wages, hours, and other terms and conditions of employment while the parties negotiate a new contract. *University Moving & Storage Co.*, 350 NLRB 6, 7 (2007).

<sup>8</sup> Respondent ultimately subcontracted work to three companies: Planned Building Services, Planned Security Services, and Planned Lifestyle Services. These companies are referred to collectively herein and on the record as "Planned." [Tr. 1238-39]

Planned directly about a subcontracting arrangement.<sup>9</sup> [Tr. 337-40, 829, 950] The Union did not accept the new subcontracting language that Kingman proposed. [Tr. 337-40, 363, 958]

In the meantime, Kingman drafted a proposal which contained his revised management rights language and a requirement that the Union withdraw the subcontracting arbitration. [RX 17] Kingman e-mailed this proposal to the Union. The Union did not accept it. [ALJD 9:28] [Tr. 345-46, 363, 953-55]

On about August 17, 2010, Teamsters Local 966 (“Local 966”) filed a petition with the Board (case 22-RC-13150) to represent unit employees employed by Respondent. An election was conducted on September 24, 2010, and the Union won. Local 966 filed objections to the election. [Tr. 79-81] [GCX 79]

In October, 2010, the Union sought to resume bargaining for a new contract. At the time, employees were anxious for a pay increase. [Tr. 83-84, 351-52, 352, 355-56, 720-73] [GCX 33, 34] Respondent refused to negotiate with the Union on the grounds that objections to the election were still pending in case 22-RC-13150 and the identity of the Unit’s bargaining representative was in doubt.<sup>10</sup> [Tr. 84] [GCX 34] The Union filed an unfair labor practice charge (case 22-CA-29681) in order to compel Respondent to resume negotiations.

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<sup>9</sup> Although the Union did call Planned to schedule a meeting, after consulting in the interim with a representative of the international union, that meeting did not take place. [Tr. 336-38, 829, 950, 1369-70] IUJAT is the international with which the Union was then affiliated. [Tr. 31]

<sup>10</sup> Respondent did not contend that the 2009 Interim Agreement excused it from bargaining. [Tr. 1372-73] During the trial of the instant case, Respondent actually took the position that the Union breached and voided the 2009 Interim Agreement by demanding bargaining in the fall 2010. [Tr. 790, 1270-71, 1424] [GCX 35] This was a fairly remarkable position to take because the 2009 Interim Agreement extended the MOA which Respondent has relied upon in defense of the claim (through wrong) that its unilateral subcontracting decision was lawful. If the 2009 Agreement was voided, then the extension of the MOA (and any Union bargaining waivers therein) was voided as well.

[Tr. 84] [GCX 35, 53] On November 11, 2010, Respondent agreed to settle case 22-CA-29681 and resume negotiations. [Tr. 84] [GCX 53]

On November 19, 2010, Respondent issued an RFP to prospective subcontractors to solicit bids for the performance of unit work. [RX 47] [ALJD 9:30-35] The deadline for the submission of bids was December 22, 2010. [RX 47 p. 5] Respondent received five bids in response. [Tr. 95, 725, 1380] Respondent did not notify the Union of the RFP or bids, even though Respondent would ask the Union to submit a competitive proposal six months later. [Tr. 719, 725, 1380]

When negotiations resumed, Kingman represented Respondent with a bargaining committee of residents Ruth Olsen and Eugene Blum. [Tr. 1165, 1207] Labor consultant Louis DeAngelis, attorney Steven Kern and sometimes Bernadone represented the Union with an employee bargaining committee. [Tr. 87-88] The parties held bargaining sessions on December 8, 2010, March 16, May 9, May 23, June 7, June 20, June 30 and July 27, 2011. [GCX 41, 54, 59] On December 8, 2010, Respondent rejected (without counter) a proposal by the Union to implement an interim wage increase. [Tr. 88-90]

## **B. The 2011 Negotiations**

### **1. Respondent's "Last, Best, and Final Offer"**

In describing the events of 2011, Respondent wasted little time before misrepresenting the undisputed facts. On March 16, 2011, Respondent presented a "last, best, and final offer" ("LBFO") which was similar to its proposal in August, 2010, but contained in paragraph 3 a requirement that the "Welfare Plan shall dismiss the lawsuit in the federal District Court against the GTCA for additional benefit payments through 2009 with prejudice in return for payment of the sum of two thousand dollars (\$2,000.00)." [GCX 42]

Respondent contends, with regard to this demand, that Kingman subsequently “withdrew and never raised it again thereafter.” [R. Exceptions Brf. p. 7] This is a flagrant misrepresentation of undisputed fact since Kingman clearly testified, “I never said to the Union we are retracting paragraph three of the last best and final offer.” [Tr. 1387]

Indeed, although the Union advised Respondent that it was unlawful to include a demand for the settlement of welfare fund litigation in its LBFO, Kingman insisted throughout negotiations that the Union “sign off on all litigation.” [Tr. 103, 113, 534-35, 566, 643, 1280, 1387, 1606-7] Moreover, as Kingman admits, on June 30, 2011, he advised the Union that “we are not going to negotiate [the LBFO] piecemeal...” [Tr. 775-76] Olsen confirmed that Kingman told the Union it could not pick among provisions of the LBFO like a “Chinese menu.” [Tr. 1196-97] Rather, the LBFO had to be accepted or rejected in its entirety. [Tr. 775-76, 1196-97]

Given this wealth of undisputed evidence, the ALJ properly found that, “during the course of the bargaining, and at the last bargaining session on June 30, the Respondent insisted that the Union withdraw its ERISA lawsuit pending in federal court.” [ALJD 16:40-42] [ALJD 12:28-38]

At the March 16, 2011 bargaining session, Respondent advised the Union of its intention to subcontract all departments except maintenance.<sup>11</sup> [Tr. 91] The LBFO was for a retroactive two-year agreement ending May 31, 2011, since Respondent assumed that most unit work would be subcontracted. [Tr. 497-98, 735-36, 777] Respondent contemplated that the parties would negotiate a new agreement for the maintenance employees once it was

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<sup>11</sup> Maintenance is also referred to by Respondent as “In Unit Services.”

determined how much severance the departing employees would receive. [Tr. 778-80, 785] [GCX 50]

On March 17, 2011, Bernadone sent a letter to Respondent's "Owners/Residents" which urged them to reconsider the subcontracting of unit work. [RX 31] According to Respondent, in this letter, Bernadone announced the Union's "unequivocal refusal to even entertain the idea of subcontracting" [R. Exceptions p. 8] and "asserted that the Union would never agree to subcontracting..." [R. Exceptions Brf. p. 24]. This is simply false. The letter states no such thing. Respondent's contention in this regard is all the more remarkable because Respondent claims that the Union actually agreed to its subcontracting arrangement with Planned.

## **2. The Union's Information Request**

On May 9, 2011, for the first time, Respondent announced that it had issued an RFP and received five bids in response. [Tr. 93-97, 476-86] Using a power point presentation, based upon those bids, Respondent claimed it could save over \$1 million per year on the cost of labor by subcontracting. [Tr. 94-95, 717-19] [GCX 45] Respondent assured the Union that its decision was purely economic and asked the Union for a competitive proposal. [Tr. 484, 719] Respondent indicated that its time frame for subcontracting was July 1, 2011. [Tr. 732] [GCX 43]

The Union had no reason to believe Respondent's representation of alleged savings through subcontracting and requested "backup materials" to substantiate them. [ALJD 15:29-31] [Tr. 95-97, 382, 482, 500, 611, 972] [GCX 59 – 5/9/11 p. 1] Among these backup materials, the Union requested copies of the RFP and bids. [Tr. 95-97, 150-51, 382, 385, 431, 481-85, 500, 571-73, 598-99, 613, 617, 729-30, 972, 974, 985-86, 1189] [GCX 41 p. 4]

[GCX 59 – 5/9/11 p. 2] [GCX 54 p. 2] Kingman’s notes clearly reflect, “Union Request: Backup Material.” [GCX 59 – 5/9/11 p. 1] The Union also hoped to determine how (if true) Respondent expected to save so much money and prepare an intelligent counter proposal. [ALJD 15:24-27] [95-97, 385, 431, 500, 580, 613]

Nevertheless, Kingman disregarded the Union’s request for information. Rather, Kingman immediately asked the Union to “*assume*” that Respondent would subcontract unit work and make a proposal on effects. [Tr. 483, 730] [GCX 59 – 5/9/11 p. 2] Kingman testified that he did not actually believe that Respondent had an obligation to bargain over the decision to subcontract unit work. Respondent merely believed it had an obligation to bargain over the effects of that decision. [Tr. 788, 1193, 1332].

By letter dated May 11, 2011, Kern confirmed the Union’s information request. [GCX 44] By e-mail on May 19, 2011, Kingman provided an altered version of the power point presentation that it prepared and showed to the Union on March 16, 2011. [GCX 45] However, Kingman did not provide the RFP and bids that the Union requested as backup to substantiate Respondent’s claim of savings through subcontracting. [Tr. 100-1, 431, 485, 800] [ALJD 14:43-48] The Union reiterated its request for information at future bargaining sessions, but Respondent refused to provide it. [Tr. 98, 100, 371, 431, 532, 726, 757-58, 796-97, 800, 1295] [GCX 44]

Kingman never claimed during negotiations that the bids were confidential. On this point, the ALJ credited DeAngelis and Kern over the testimony of Kingman. [ALJD 15:18-20] [Tr. 1601-2, 1726, 1753] Indeed, Kingman was not corroborated by his committee members and no such claim is reflected in his or any other bargaining notes, his affidavit,

correspondence, and/or Respondent's position statement. [GCX 41, 45, 50, 54, 59-60] [RX 44, 59, 60]

As the ALJ found that, during negotiations, the Union did not tell Respondent it could not match Respondent's *unsubstantiated* claim of savings through subcontracting because the Union did not accept that claim at face value. [ALJD 15:27-32] [Tr. 96, 150, 381-382, 500, 683, 972] DeAngelis testified on cross-examination as follows [Tr. 381-382]:

Q The Galaxy had a proposal that saved X dollars, correct?

A They never proved - ...

Q They never proved that to you?

A No, because they never gave the information. They made up a figure \$1 million. They could have said \$2 million, \$5 million. I wanted to know that they can save \$1 million. So what I was doing was negotiating against a blind proposal. That was really the problem as to why we needed that information.

Likewise, Kern testified as follows [Tr. 500]:

And we want [substantiation] of that as in the bids. Let me see the bids. Let me see the RFP's, let me see the bids, which would substantiate that, you know, yep, these are the wages, these are the number of people, these are the hours that you're proposing they're going to work. So we know what we really are trying to match, other than somebody just sticks a number on a piece of paper.

Respondent's stubborn assertion that the union believed and accepted its unsupported claim of savings without requested backup materials is an example of its

attempts throughout negotiations to distort and mischaracterize the Union's positions.<sup>12</sup> [See e.g., *infra* p. 15 fn. 13]

### **3. Additional Bargaining From May 23 to July 27, 2011**

#### **(a) May, 23, 2011**

On May 23, 2011, as Kingman admits, the Union advised Respondent that subcontracting could not be discussed until the outstanding backup material was produced and analyzed. Kingman again ignored the Union's request for information. [Tr. 737-41]

As on May 9, 2011, Kingman asked the Union to assume that Respondent would subcontract unit work and discuss the effects. [Tr. 497-98, 739-43] [GCX 60 p. 11] Kingman asked what the Union would like to see in a contract between Respondent and a subcontractor, and whether such a subcontractor should be shown employee personnel files. [Tr. 741-43] Respondent also made reference to its arbitrary self-imposed time table for finalizing a subcontracting arrangement by July 1, 2011. [Tr. 739-40] [GCX 60 p. 11]

In addressing the LBFO, the Union specifically rejected any withdrawal of the subcontracting arbitration or the welfare fund's ERISA lawsuit. The Union also requested a third year that would extend the contract to May 31, 2012, as opposed to a two-year agreement through May 31, 2011 (just one week away). [Tr. 102-4, 493-98, 534-35, 566] [GCX 41 p. 7-8] [GCX 42] The request for a third year confused Kingman because he assumed that most unit work was going to be subcontracted. [Tr. 497-98, 735-36] [GCX 60 p. 11] Kingman said he would not rule out a three year agreement for maintenance

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<sup>12</sup> Although the Union did not represent that it could save Respondent \$1 million per year, the Union did not believe that it would necessarily have to do so (depending on Respondent's *actual* savings) in order to avoid the subcontracting of most unit work.

employees, but insisted that the parties first reach a severance agreement for departing employees. [Tr. 736] [GCX 60 p. 11 line 13-17]

**(b) June 7, 2011**

On June 7, 2011, the Union reiterated that it could not evaluate Respondent's proposal or develop counter proposals without the outstanding information. [Tr. 106-7] [GCX 41 p. 11, 13] [GCX 54 p. 6-8] [GCX 59 – 6/7/11 p. 1] The Union advised Respondent that it would file an unfair labor practice charge if the subcontracting decision was implemented. [GCX 59 – 6/7/11 p. 1] [Tr. 803]

As in previous bargaining sessions, Respondent ignored the Union's information request and insisted that the Union bargain over effects. The Union did discuss such matters, but subsequently reiterated its request for information and its opposition to subcontracting. [Tr. 505-6, 509-510, 533, 750-52] [GCX 41 p. 13] [GCX 54 p. 8] [GCX 59 – 6/7/11 p. 2] Kingman lost patience and told the Union it was a "fantasy" to act as though outsourcing was not going to happen. [Tr. 510-12, 629-30, 1331, 1400-2] [GCX 60 p. 14 ¶ 26]

After this outburst, Kingman composed himself and asked whether the Union wanted Respondent to postpone a June 9, 2011 vote of the Board of Directors which would authorize him to begin negotiating a contract with Planned. [Tr. 677-78, 755, 1322] However, Respondent was refusing to produce information and Kingman was indicating that further negotiations would be futile. [Tr. 512, 631-32] Further, the Board of Directors were not voting to accept a contract with Planned, but merely authorizing Kingman to begin negotiations with Planned as the preferred bidder. [Tr. 408, 677-78, 755, 1322] DeAngelis advised Kingman he could not tell Respondent what to do, but that the Union was available to negotiate. [Tr. 408, 512, 631-32]

(c) **June 20, 2011**

On June 20, 2011, despite Respondent's failure to provide information and bargain in good faith, the Union suggested a "concept" for labor savings that might convince Respondent not to subcontract. [Tr. 108-11, 143-44, 382, 402-4, 512-14, 533, 646, 651, 659, 682-83, 689-93] The Union proposed that all Unit employees be offered voluntary severance and indicated that about a third might take it. [Tr. 382] The Union noted that replacement employees would receive a lower rate of pay (\$3 less per hour) under the 2006 Interim Agreement [GCX 4], and offered to negotiate less expensive "Tier 2" terms (such as medical coverage) for newly hired employees. [Tr. 109-10, 116, 382, 404, 512-14, 533, 638, 682, 689-90, 986-88, 1177-78] [GCX 54 p. 9]

As noted above, through this cost savings concept, the Union was attempting to begin a discussion that might convince Respondent not to subcontract Unit work. [ALJD 16:4-8] [ALJD 12:1-6] [Tr. 108-111, 143-44, 402, 512-514, 533, 646, 651, 659, 682-683] [GCX 48, 57] The Union had requested information to substantiate Respondent's claim of savings and negotiate accordingly. It received none. Nevertheless, the Union made a "blind" proposal that, it hoped, would be sufficient to convince Respondent to forgo whatever alleged savings it was *actually* going to realize as a result of subcontracting. [Tr. 382] At trial, Kingman failed to articulate a coherent explanation why Respondent could not have accepted the Union's proposal and agree not to subcontract unit work. [Tr. 1396-1400] Certainly, he knew the Union would not complain if Respondent had done so. [Tr. 1304]

Alternatively, if Respondent would not even consider a reversal of its subcontracting decision regardless of any cost savings that the Union proposed, the Union did not rule out an arrangement whereby Respondent would require Planned to hire unit employees (who did

not take voluntarily severance) with an acceptable and agreed upon package of compensation. [Tr. 143-44, 402-3, 639-640, 646, 683-84, 689-90, 745, 971, 985-86, 1179, 1191-92, 1211, 1339, 1368, 1731] Even without the requested information, the Union was willing to at least discuss such a subcontracting arrangement that might save jobs without resort to litigation. [Tr. 143-44, 188, 402-3, 639-41, 644-46, 682-85, 689-90, 694, 745, 763-64, 1175, 1179, 1394, 1731] In fact, the Union requested that Respondent bring Planned to the bargaining table.<sup>13</sup> [Tr. 105, 143, 402, 684]

At the end of the June 20, 2011 bargaining session, Kingman insisted that any agreement be finalized before he left for vacation on July 2, 2011. Kingman also demanded that, as part of any agreement, the Union would have to “sign off on all litigation.” [Tr. 515, 806, 816-18, 1194] [Tr. 54 p. 11] [GCX 59 - 6/20/11 p. 3]

**(d) Correspondence Regarding the Status of Negotiations**

On June 23, 2011, Kingman made a written request that the subcontracting arbitration be held in abeyance pending the conclusion of effects bargaining on the subcontracting of unit work. [GCX 47] This implied that the Union had agreed to Respondent’s subcontracting decision and that negotiations were now limited to effects. [GCX 47] [Tr. 822]

By letter dated June 28, 2011, Kern advised Kingman that the Union had not agreed to subcontracting, had not received the information it needed to negotiate over that decision,

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<sup>13</sup> It is often said that no good deed goes unpunished. The Union went far above and beyond its bargaining obligation by attempting to negotiate without the requested information and explore a subcontracting arrangement that would lower Respondent’s costs (as paid to Planned), while saving jobs at acceptable rates of compensation. Unfortunately, Respondent chose to look this gift horse in the mouth and treat the Union’s flexibility as abject surrender. In this regard, Respondent would claim that the Union had agreed to or waived its right to bargain over the subcontracting decision with no assurance that employees would be retained and/or at what rates. [GCX 47] [Tr. 821-22]

and had not waived its right to bargain over the decision.<sup>14</sup> [GCX 48] Kern's letter reads in full as follows:

This is to confirm Local 124's position regarding certain issues that have arisen in bargaining. Discussion of matters incidental to the potential subcontracting of most bargaining unit work, and to Galaxy's expressed intention to subcontract, should in no way be construed as agreement by Local 124 that it should be done, or agreement that it may lawfully be done, in view of both the contract we are negotiating off of as well as the status of negotiations. Additionally, while the Union will continue to do its best to work from the limited economic information given to us regarding subcontracting, this does not mean we agree that Galaxy has provided all information requested and needed in order for the Union to properly assess Galaxy's proposals and formulate its own proposals. I am sure you understand that courtesy at the bargaining table does not equate to any waiver of any party's rights.

At trial, Kingman was ultimately forced to admit that the Union never stated during negotiations that it was agreeing to or waiving its right to bargain over the subcontracting decision.<sup>15</sup> [ALJD 12:14-15] [Tr. 743-44] Kern's June 28 letter confirmed this in unmistakable terms. [GCX 48]

**(e) June 30, 2011**

On June 30, 2011, the Union reiterated its desire to negotiate a full contract with Respondent and asked whether the LBFO was still on the table. [Tr. 112-13, 518-19, 653, 784-86] [GCX 41 p. 14; GCX 54 p. 11] DeAngelis again proposed a concept of labor savings through voluntary severance. The Union reduced its severance demand and offered

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<sup>14</sup> Shepherd also advised the arbitrator that the Union opposed any postponement of the subcontracting arbitration. [GCX 49]

<sup>15</sup> Alone, this admission negates Respondent's frivolous claim that the Union acquiesced to its decision to subcontract unit work.

to discuss additional reductions of Tier 2 benefits for lesser paid new hires.<sup>16</sup> [Tr. 116-17, 521] [GCX 41 p. 15] The Union was flexible and suggested that new hires might only receive medical benefits after one year, reduced paid time off, and overtime after 40 hours per week instead of eight hours per day. [Tr. 116-117] [GCX 41 p. 15]

Respondent stated that the parties reached impasse on the LBFO, which could not now be negotiated piecemeal. [Tr. 115, 520, 654, 775-76, 783-87] [GCX 41 p. 16] Respondent even refused to discuss a prospective contract for maintenance employees whose work was not being outsourced. [Tr. 112-18, 518-22, 654-55, 686-87, 782, 785-87, 824-27] Respondent insisted that severance pay be determined for departing employees before any agreement could be discussed for the maintenance employees who would remain. [Tr. 778-80, 785] [GCX50]

Kingman admits that Respondent did not declare impasse on the subcontracting decision. He only declared impasse on the LBFO. [Tr. 825-26] Nevertheless, Respondent advised the Union that it was proceeding with its subcontracting decision. [Tr. 825-26]

(f) **The Contract With Planned, The Charge, and the Conclusion of Bargaining**

On July 6, 2011, Respondent entered into a subcontracting agreement with Planned. [Tr. 1349] The Union filed the instant charge the same day. [GCX 1(a)]

On July 27, 2011, at the final bargaining session, the Union again requested outstanding information and Respondent refused to provide it. [Tr. 144, 525, 529, 532, 670] [GCX 41 p. 18] [GCX 54 p. 14-15] The Union reiterated its opposition to subcontracting

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<sup>16</sup> The Union reduced its severance demand from one week of pay per one year of service to one week of pay per two years of service. The Union also reduced its request for post-employment medical benefits from 6 months to 3 months. [GCX 41 p. 16]

and its desire to negotiate a contract. [Tr. 144, 149-50, 528-29] The Union also resumed its attempt to avoid the involuntary layoff of employees by discussing a cost savings concept of voluntary severance. In so doing, the Union reduced its severance demand to one that would be less costly. [Tr. 147-48, 523-25, 533] [GCX 41 p. 17] [GCX 54 p. 13-15] Respondent merely revised its offer of severance to be paid upon the involuntary layoff of all employees (except maintenance) without any assurance that employees would be retained (by Respondent or Planned) with a specific package of compensation. [Tr. 522-33, 669] The parties did not reach any agreement on voluntary or involuntary severance. [Tr. 1603-4, 1730] Likewise, the parties did not reach agreement for either Respondent or Planned to retain employees at Respondent's facility. [Tr. 1604-5, 1730-31]

Respondent now claims that, if the Union were attempting to make a "cost saving proposal through a package involving the voluntary separation" (a fact that it denies), the Union never committed to a specific number of employees who would take it. [R. Exceptions Brf. p. 25] Of course, as Kern and DeAngelis testified, Respondent is placing the cart before the horse. [Tr. 1602-3, 1730] The Union estimated that a third of the employees might take a severance package. However, the Union could not know exactly which or how many employees would accept voluntary severance without first determining the amount of severance that would be offered to them and/or the terms (as well as the employer) of employees who rejected severance and chose to remain. [Tr. 1602-3, 1730]

Effective August 1, 2011, Respondent laid off 67 Unit employees and subcontracted their work. [Tr. 1238-39, 1403] Planned hired four of those employees, leaving 63 without employment. [Tr. 1735]

### **III. ARGUMENT**

Although this case contains a long history of negotiation that date back to 2006, Respondent's defenses are easily dispatched upon the consideration of a few dispositive and undisputed facts. The Union requested backup material to substantiate Respondent's claim of savings through subcontracting. The information was unlawfully withheld. Respondent could not bargain to a good faith impasse without producing this information in negotiations over the subcontracting decision. Respondent unlawfully declared impasse and sought to implement the management rights provision (with the right to subcontract) in a LBFO that contained permissive demands. Regardless of contractual impasse, Respondent could not lawfully implement a management rights provision that purports to waive the Union's right to bargain over subcontracting decisions.

#### **A. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY FAILING TO PRODUCE REQUESTED INFORMATION**

As the ALJ found, Respondent violated Section 8(a)(5) of the Act by refusing to produce the RFP and bids that were requested by the Union. [ALJD 15:33-37] The Board has long held that an employer must provide information that would enable a union to assess the validity of economic claims that are made during bargaining. *National Extrusion & Manufacturing Company*, 357 NLRB No. 8, 2011 WL 3860607, \*2-3 (July 26, 2011); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1159-1160 (2006); *Curtiss-Wright Corp v. NLRB*, 347 F.2d 61, 68-69 (3d Cir. 1965); *I.T.T. Corp. v. NLRB*, 382 F.2d 366, 371 (3d Cir. 1967). More specifically, a union is entitled to a request for proposal, subcontractor bids, and other information to verify and formulate a counter proposal in response to an employer's stated reasons (e.g., cost savings) for subcontracting unit work. See *Sunoco, Inc.*, 349 NLRB 240,

242, 246-47 (2007); *National Grid USA Service Company, Inc.*, 348 NLRB 1235, 1245 (2006); *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557-58 (2006).

Here, Respondent emphasized on its own initiative that the subcontracting decision was based on potential savings which it discerned from the bids it received in response to the RFP. Respondent made those alleged savings central to negotiations. [Tr. 718] The Union was entitled to backup materials to substantiate Respondent's claim of labor savings and to evaluate Respondent's bargaining posture. *Id.*

As the ALJ found, Respondent did not claim during negotiations that the requested bids contained confidential information. On this point, the ALJ properly credited Kern and DeAngelis, and discredited Kingman. [ALJD 15:18-20] [*Supra* p. 10-11]

The Union's request for information was not part of any "sham" negotiation that was allegedly designed to delay a subcontracting decision which the Union somehow knew (perhaps by extra-sensory perception) it could not match. [R. Exceptions Brf. 1, 29] The only "sham" is Respondent's ridiculous assertion to that effect. The Union may or may not have been able to match Respondent's savings if Respondent were actually going to realize savings of \$1 million per year. However, the Union did not know whether it could match Respondent's claim of savings because Respondent would not provide materials to substantiate that claim. Indeed, Respondent frustrated any meaningful negotiations by so obstinately refusing to provide information to which the Union was legally entitled. In doing so, Respondent violated Section 8(a)(5) of the Act.

**B. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY UNILATERALLY SUBCONTRACTING UNIT WORK AND LAYING OFF UNIT EMPLOYEES**

**1. Respondent Did Not Bargain To Impasse Over Its Decision To Subcontract Unit Work And Lay Off Unit Employees**

As the ALJ found, Respondent did not bargain to good faith impasse over its decision to subcontract most unit work and lay off most unit employees. [ALJD 16:4-26] It is well settled that a failure to produce information that is relevant to negotiations precludes a finding of good faith impasse in those negotiations. *Caldwell Mfg.*, 346 NLRB 1159, 1160, 1170 (2006); *Pertec Computer*, 284 NLRB 81, 811-812 (1987); *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557-58 (2006). [ALJD 16:24- 26] The Union was clear at the bargaining table and in correspondence that it required the RFP and bids in order to verify, evaluate, and respond to Respondent's proposal on subcontracting. Nevertheless, Respondent refused to provide such materials, which it made central to negotiations. Respondent's failure to furnish relevant information precluded meaningful negotiation and the possibility of a good faith impasse on the decision to subcontract. *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 557-58 (2006) (no impasse where employer claimed that subcontracting would save \$1 million, but refused to provide bids among other information to verify that claim).

On its own, Respondent's failure to furnish the RFP and bids precludes a finding of impasse. *Id.* However, additional factors also suggest the absence of an impasse as well. In this regard, Respondent sought to bypass, rush, and prematurely terminate negotiations. Further, the Union was extremely flexible in its approach to negotiations, and the parties did not evince a mutual understanding that further negotiations would be futile.

Respondent repeatedly tried to bypass negotiations over the subcontracting decision as a forgone exercise in futility, proceed to an expedited negotiation over effects, and artificially rush the entire process. Although Kingman initially asked the Union for a competitive offer, Respondent quickly abandoned such a discussion when the Union asked for backup material. Rather, on May 9, 2011, Respondent immediately asked the Union to “assume” that Respondent would subcontract and bargain over effects. [Tr. 483] [GCX 59 – 5/9/11 p. 2] Respondent took the same approach on May 23 and June 7, 2011. [Tr. 100-1, 497-98, 505-6, 509-10, 533, 739-41, 750-52] [GCX 54 p. 8] [GCX 59 – 6/7/11 p. 2] Indeed, on May 23, 2011, Kingman categorically ruled out the possibility of an agreement going forward (as opposed to an entirely retroactive agreement) for non-maintenance employees whom he assumed would be outsourced. [Tr. 497-98, 735-36] [GCX 60 p. 11] On June 7, 2011, Kingman actually scolded the Union for adhering to the “fantasy” that subcontracting was not going to happen. [Tr. 510-12, 629-30, 1331, 1400-2] [GCX 60 p. 14 ¶ 26] Respondent also repeatedly insisted upon an arbitrary self-imposed time frame for implementing its subcontracting decision. [Tr. 732, 739-41] [GCX 43, 60 p. 11] Such an approach to bargaining does not qualify as a valid basis for good faith impasse.<sup>17</sup>

Respondent also attempted to distort and dictate the Union’s position as part of its ongoing attempt to avoid good faith negotiations. In a letter dated June 28, 2011, Kern made crystal clear that the Union was not waiving its request for information or its right to bargain

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<sup>17</sup> See, e.g., *Times Union, Capital Newspapers Division of the Hearst Corp.*, 356 NLRB No. 169, 2011 WL 2141744 \*31 (May 31, 2011) (no impasse where employer prematurely ended negotiations and failed to explore agreement because of its determination that layoffs should occur by a date certain); *Newcor Bay City Division of Newcor, Inc.*, 345 NLRB 1229, 1240 (2005) (no impasse where declaration is motivated by Respondent’s “determination to implement...regardless of the state of negotiations”).

over Respondent's subcontracting decision. [GCX 48] Kern emphasized that Respondent should not imply such waivers from the Union's willingness to "discuss matters incidental to the potential subcontracting" (e.g., severance) and its attempt to work without all the information it needs. Nevertheless, Respondent continually sought to insist upon the opposite. [GCX 48] In fact, Respondent is still making the absurd claim that the Union "acquiesced" to its subcontracting decision. By refusing to accept the Union's actual position in negotiations and address it, Respondent precluded a good faith impasse.<sup>18</sup>

Although Respondent now claims that the parties reached impasse on its decision to subcontract, Kingman admits that he did not actually declare impasse on the decision or implement Respondent's subcontracting decision on that basis. [Tr. 825-26] Rather, on June 30, 2012, Kingman merely declared impasse on the LBFO. [Tr. 825-26] As noted above, Kingman actually took the position that the Union had agreed to Respondent's subcontracting decision by discussing such topics as severance. See *Essex Valley Visiting Nurses Association*, 343 NLRB 817, 841 (2004) (no impasse where employer insisted that issue was "resolved" and failed to declare impasse).

In stark contrast to Respondent, the Union was extremely flexible in attempting to reach a viable agreement and never evinced a posture which would suggest that further negotiations were futile. See *Castle Hill Health Care Center*, 355 NLRB No. 196, 2010 WL 3797696, \*54 (Sept. 28, 2010) (overall course and conduct of the parties does not evidence a mutual understanding that further bargaining would not be fruitful). Despite Respondent's

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<sup>18</sup> See *Essex Valley Visiting Nurses Association*, 343 NLRB 817, 841 (2004) (no impasse where employer insisted that issue was "resolved" and sought to bypass negotiations despite Union's flexibility and attempts to negotiate); *Dorsey Trailers, Inc.*, 327 NLRB 835, 862 (1999) (employer engaged in bad faith bargaining when it sought to prematurely terminate negotiations on relocation decision and bargain exclusively over effects).

refusal to produce information and bargain in good faith, the Union sought to explore a cost saving concept of replacing current unit employees with less expensive new hires. See *Times Union, Capital Newspapers Division of the Hearst Corp.*, 356 NLRB No. 169, 2011 WL 2141744 \*31 (May 31, 2011) (no impasse where Union made proposals even though it “correctly believed that [r]espondent had presented it with a fait accompli”). The Union hoped to convince Respondent (1) not to subcontract or (2) compel Planned to retain current employees with acceptable compensation. In the process, the Union was willing to consider reduced terms for new hires, including a delay in medical coverage, reduced paid time off, and reduced overtime pay. The Union also systematically reduced its proposal for the voluntary severance to be paid to employees who agreed to leave. [Tr. 109-10, 116-17, 382, 404, 512-14, 521, 533, 638, 682, 689-90, 986-88, 1177-78] [GCX 54 p. 9] The Union’s fluid approach to bargaining indicates that the parties did not reach a deadlock. *Royal Motor Sales*, 329 NLRB 760, 772 (1999) (no impasse where union’s proposals demonstrated flexibility and further negotiation might have produced additional concessions).

Contrary to Respondent’s misrepresentation, the Union’s May 17, 2011 letter to residents did not suggest that the Union would never agree to subcontracting. [R. Exceptions p. 24] [RX 31] Of course, the Union opposed the mass layoff of unit employees with no assurance that a subcontractor would hire them at an acceptable rate of compensation. The Union attempted to convince Respondent not to subcontract and appealed to residents for support. [RX 31] The Union also, appropriately, threatened to file a charge in the event Respondent unilaterally subcontracted unit work on the basis of a “last, best and final offer” it made nearly two years after the parties engaged in any formal negotiations for a new contract. [RX 31] [*Supra* pp. 4-6] However, even while Respondent was refusing to produce

information and bargain in good faith, the Union made a herculean effort to reach some sort of agreement that would save the jobs of unit employees (even if it meant that employees went to work for Planned at a reduced cost to Respondent). [*Supra* p. 14-15, 23-24]

Respondent's contention that the parties reached impasse because the Union allegedly failed to provide "specific" cost savings is a complete red herring. [R. Exceptions Brf. 24-26] First, the Union went far beyond what was necessary by making proposals without the information it requested. Second, the Union could not determine exactly how many employees would accept severance (and be replaced by less expensive new hires) because Respondent refused to discuss the terms of employees who opted to remain and the parties did not reach agreement on the severance to be paid to departing employees. [Tr. 1175, 1602-3, 1730] Obviously, an employee would not be able to decide whether to stay or go until he/she understood the terms of continued employment and the severance to be paid upon departure. Respondent's failure to conclude such negotiations in advance of implementation must negate any specious claim that the Union prevented impasse by presenting offers that were insufficiently "specific."

## **2. The Union Did Not Acquiesce to Respondent's Subcontracting Decision**

Although Respondent insists that the parties reached impasse on its decision to subcontract, Respondent also takes the contradictory position that the Union agreed or acquiesced to that decision. Nothing could be farther from the truth.

The Union could not have been more explicit and repetitious in advising Respondent that outstanding information was needed to verify Respondent's claim of savings through subcontracting before it could prepare an appropriate response. [GCX 44, 48] [Tr. 96-98, 100, 106-7, 150, 371, 381-382, 431, 482, 499-500, 525, 529, 532, 670, 726, 757-58, 796-97,

800, 1295] These materials were never produced and without them, the Union had no idea what Respondent's actual savings were expected to be. [Tr. 96, 150, 381-382, 50] That Respondent has simply ignored the Union's information request and acted as though the Union conceded an inability to match its unsubstantiated claim of savings is laughable. Clearly, Respondent is engaged in a bad faith and disingenuous exercise of willful blindness by taking this position.

It is with equal hubris that Respondent claims that the Union acquiesced to the subcontracting decision as a result of Kingman's repeated attempts to bypass good faith negotiations over the subcontracting decision and discuss effects. On May 9, 2011, the same day that Respondent presented its decision to subcontract, Kingman pushed the Union to "assume" that most unit work would be subcontracted. [Tr. 483, 730] [GCX 59-5/9/11] He did this on May 23 and June 7, 2011 as well. On each occasion, Kingman asked the Union to bargain over effects.<sup>19</sup> [Tr. 497-98, 505-6, 509-10, 533, 739-41, 750-52, 1611-12, 1626] [GCX 41 p. 13] [GCX 54 p. 8] [GCX 59 – 6/7/11 p. 2] [GCX 60 p. 11]

Although the Union did not categorically reject Kingman's request to discuss such matters, Kern was clear in his June 28, 2011 letter to Kingman that "[d]iscussions of matters incidental to the potential subcontracting... should in no way be construed as agreement by [the Union] that it should be done, or agreement that it may lawfully be done..." [GCX 48] Kern added, "I am sure you understand that courtesy at the bargaining table does not equate to waiver of any party's right." [GCX 48] See *General Electric Co.*, 296 NLRB 844, 845

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<sup>19</sup> For example, on May 23, 2011, Kingman asked, "in the event [Respondent] entered into a contract with the alternative employer, what would [the Union] like to see in that contract." [Tr. 741] Kingman also asked the Union, "in the event of outsourcing... what do we do if the new vendor wants to see the personnel files?" [Tr. 742]

n.3, 855, 857 (1989) enf'd 915 F.2d 738 (D.C. Cir. 1990) (discussion of possible subcontracting and effects thereof does not imply that the union clearly and unmistakably acquiesced to the decision). Further, Kern made specific reference to Respondent's failure to provide "all information requested and needed in order for the Union to properly assess Galaxy's proposals and formulate its own proposals." [GCX 48] Obviously, the Union did not acquiesce or waive its right to bargain over Respondent's subcontracting decision.<sup>20</sup>

Respondent's attempt to manufacture an agreement where there was none is contrived in the extreme. Respondent admits that the Union opposed subcontracting. [Tr. 1179, 1199-1200, 1211, 1220, 1304] Respondent admits that the Union would not agree to subcontracting without some assurance that employees would be retained by Planned with an acceptable compensation package. [Tr. 1180, 1191-1192, 1211, 1339] Respondent admits that the parties never reached an agreement on either the amount of severance to be received by employees and/or the retention of employees by a specific employer with specific compensation. [Tr. 810-13, 1180, 1339-40, 1368] Nevertheless, Respondent took the position that the Union somehow agreed to an undefined package of involuntary severance (which was never determined) with no assurance that employees would be retained by Planned at acceptable terms. [*Supra* pp. 14-15] The suggestion is simply absurd.

Respondent is also completely unpersuasive in suggesting that the Union acquiesced to subcontracting by, on June 7, 2011, not demanding that Respondent postpone a June 9, 2011 Board of Directors vote which authorized Kingman to begin negotiating a contract with Planned. First, the Board of Directors was not voting to accept a contract (but merely to deal

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<sup>20</sup> Respondent must prove that the existence of a bargaining waiver is "clear and unmistakable." *Rose Fence Inc.*, 359 NLRB 1, 7 (2012).

with Planned as the preferred bidder) and the vote would not preclude continued negotiations. [Tr. 677-78, 755, 1322] Second, Respondent was refusing to produce relevant information and engage good-faith negotiations. In fact, on June 7, 2011, Kingman advised the Union that it was a “fantasy” to act as though outsourcing was not going to happen. [Tr. 510-512, 631-632] Thus, it was highly questionable whether further negotiations would be undertaken by Respondent in good faith and be fruitful. Given Respondent’s posture, DeAngelis advised Kingman that the Union could not tell Respondent what to do, but that the Union was available to negotiate. [Tr. 408, 632] The Union expressed a willingness to continue bargaining (despite Respondent’s bad faith) and pursued negotiations to the best of its ability. [Tr. 408, 632] The Union did not clearly and unmistakably waive its right to bargain over the subcontracting decision. *Rose Fence Inc.*, 359 NLRB 1, 7 (2012).

### 3. **The Parties Did Not Bargain To Impasse Over the LBFO**

As the ALJ found, Respondent did not bargain to good faith impasse before unlawfully implementing the LBFO. [ALJD 16:40-42] An employer may not bargain to good faith impasse upon a proposal that contains a permissive subject of bargaining. See *NLRB v. Borg-Warner-Corp.*, 356 U.S. 342, 349-350 (1958). Moreover, “where an impasse has been created, even in part, by insistence on bargaining about a permissive subject... none of the terms of a final offer predicated on such an improper impasse can be lawfully implemented.” *Retlaw Broadcasting Co.*, 324 NLRB 138, 143 (1997) citing *Boise Cascade Corp.*, 253 NLRB 462 (1987). [Tr. 566] It is well settled that a party’s demand to withdraw (or not file) litigation – including unfair labor practice charges, arbitrations, and/or lawsuits to collect fund contributions – are permissive subjects of bargaining. *WWOR-TV, Inc.*, 330 NLRB 1265, 1265-66 (2000); *Caribe Staple, Inc.*, 313 NLRB 877, 890 (1994); *International*

*Metal Specialties, Inc.*, 312 NLRB 1164, 1164-65 (1993); *Plattdeutsche Park Restaurant*, 296 NLRB 133, 137 (1989).

Here, Kingman admits that he did not retract the provision in the LBFO that required the Union's welfare fund to withdraw from ERISA litigation. [Tr. 1387] [GCX 42] Likewise, Respondent never retracted its demand in the LBFO that the Union dismiss the subcontracting arbitration. In fact, Kingman told the Union it could not negotiate "piecemeal" over the LBFO like a "Chinese menu," but must accept or reject it as a whole. [Tr. 774-76, 1196-97] Throughout negotiations, Kingman also advised the Union that it would have to "sign off on all litigation."<sup>21</sup> [Tr. 113, 534-35, 566, 1387, 1606-7] By including permissive demands in the LBFO, Respondent precluded impasse and lawful implementation on that basis. *Id.* [ALJD 16:33-38] [ALJD 12:25-38]

In addition, the short duration of and hiatus in negotiations suggest that the parties did not reach contractual impasse. See *Cibao Meat Products, Inc.*, 349 NLRB 471, 475 (2007). After bargaining was suspended as unproductive on August 31, 2009, the parties had only one informal discussion without their respective bargaining committees on August 3, 2010 (during a meeting on grievances) at which neither party took notes. [GCX 25] [Tr. 337-40, 828] Thereafter, the Union had to file a charge in order to bring Respondent back to the table. [Tr. 84] [GCX 53] It was not until March 16, 2011, after a two-year hiatus in formal negotiations, that Respondent presented a LBFO for the Union to accept or reject. [Tr. 774, 1196] Clearly, the parties had not exhausted negotiations or reached impasse. *Id.*

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<sup>21</sup> At trial, Kingman claimed that he was only asking the Union to "sign off" on any litigation that the Union had threatened to file with the Board. However, a demand that the Union "sign off" on an unfair labor practice charge is no less permissive than a demand that the Union welfare fund withdraw a lawsuit. See *Caribe Staple, Inc.*, 313 NLRB 877, 890 (1994) (demands that union withdraw charges and "cease making threats" to file new ones are permissive).

Good faith impasse may not be reached in the context of unfair labor practices, and Respondent presented the LBFO in just such an environment. *Royal Motor Sales*, 329 NLRB 760, 764-5 (1999); *Times Union, Capital Newspapers Division of the Hearst Corp.*, 356 NLRB No. 169, 2011 WL 2141744 \*28 (May 31, 2011); *Intermountain Rural Elec. Ass'n*, 305 NLRB 783, 789 (1991). Thus, Respondent was unlawfully refusing to provide information and bargain in good faith over its decision to subcontract unit work. Indeed, Respondent had been failing to notify the Union of its plans and preparations for subcontracting since it sent out the RFP on November 19, 2010. [GCX 47] [Tr. 719, 725, 1380] Accordingly, Respondent's contractual demand for the unilateral right to subcontract was not made in an environment of trust, free from unfair labor practices, that was conducive to a quick and uncoerced conclusion to negotiations. *Id.*

**4. Respondent May Not Lawfully Implement a Union Bargaining Waiver Upon Contractual Impasse**

Even if the parties had bargained to good faith contractual impasse, Respondent would not have been entitled to implement a bargaining waiver on subcontracting. The statutory right to bargain belongs to the Union and, even upon impasse, may only be waived by the Union. See *Colorado-Ute Electric Association, Inc.*, 295 NLRB 607, 609 (1989); *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1390-91 (1996); *Rotorex Co., Inc.*, 1998 WL 34058110 (N.L.R.B.G.C., April 9, 1998).

**C. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY DECLARING IMPASSE AND IMPLEMENTING ITS LBFO, AND BY REFUSING TO BARGAIN FOR A NEW CONTRACT**

For the reasons discussed above [*supra* §§ III.B(3) & (4)], as found by the ALJ, Respondent violated the act by declaring impasse on and implementing the LBFO. Further, as the ALJ found, Respondent unlawfully refused to bargain with the Union for a new contract. [ALJD 16:40-42] Respondent raises two defenses to these findings. First, Respondent claims that it had no obligation to bargain over the so-called “mid-term modification” of a collective bargaining agreement (i.e., the 2006 Interim Agreement and the MOA) that was extended by the 2009 Interim Agreement. [R. Exceptions Brf. §III.A.1] Second, in the alternative, Respondent claims that it never refused to bargain for a new contract. [R. Exceptions Brf. § III.A.2] Respondent’s defenses are wrong on the facts and the law.

**1. Respondent Had An Obligation To Bargain Over A New Contract**

First, Respondent’s position at trial actually contradicts its contention that the 2009 Interim Agreement is still in effect and, as such, has continued to extend the 2006 Interim Agreement and the MOA. [*Supra* p. 6 fn. 10] Contrary to Respondent, the General Counsel and the Union have always taken the position that the MOA did not clearly and unmistakably implement a Union waiver of its right to bargain over subcontracting decisions. Thus, for purposes of the subcontracting allegation, it does not matter whether the MOA was extended by the 2009 Interim Agreement. In fact, the General Counsel was operating under the presumption that the MOA was extended by the 2009 Interim Agreement. However, at trial, Respondent took the unexpected position that the 2009 Interim Agreement was breached and voided when the Union demanded negotiations in the fall 2009. [*Supra* p. 6 fn. 9] [Tr. 790,

1270-71, 1424] [GCX 35] Respondent cannot now claim that it had no obligation to bargain over the mid-term modification of a contract it claims to be void.<sup>22</sup>

Second, the extension of an old contract pending future negotiations of a successor contract does not excuse a parties' obligation to bargain over that successor agreement. *See, e.g., Essex Valley Visiting Nurse Association*, 353 NLRB No. 109 (March 6, 2009). Admittedly, unlike most such situations, the parties contemplated a suspension of negotiations for a successor contract while the 2009 Interim Agreement was in effect. However, as noted above, Respondent has taken the position that the 2009 Interim Agreement was breached when the Union demanded to negotiate. Moreover, Respondent acceded to the Union's demand to bargain and the parties decided to negotiate for a successor agreement. Thus, as Kingman effectively testified, the parties' standard bargaining obligations were reinstated and applied. [Tr. 790] When Respondent subsequently refused to bargain for a new contract, it did not rely on the 2009 Interim Agreement. Rather, Respondent simply refused to bargain over a new contract (which it assumed would only cover maintenance employees) until all issues related to its subcontracting decision were resolved. [Tr. 778-80, 785] [GCX50]

In this manner, Respondent actually turned its bargaining obligation on its head. It is well settled that an employer may not fragment negotiations by attempting to bargain over and implement individual contractual provisions in advance of overall impasse on an

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<sup>22</sup> Indeed, if the 2009 Interim Agreement was breached and voided, then the partial "collective bargaining agreement" (i.e., the 2006 Interim Agreement and the MOA) and any alleged bargaining waivers contained therein were voided as well. Accordingly, given this understanding of the 2009 Interim Agreement, Respondent may not rely on the MOA to the extent it allegedly contained a waiver of the Union's right to bargain over its subcontracting decisions.

agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (when parties are engaged in negotiations for a new contract, an employer is prohibited from implementing a proposal on a particular subject until an overall impasse has been reached on the agreement as a whole.); *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn.1, 802 (1992) (unlawful to fragment negotiations).

Here, Respondent proposed to outsource all unit employees except maintenance, and wanted to rely on the contractual outsourcing provision in the LBFO to do so. Respondent also insisted that the parties resolve the amount of severance to be paid to such departing employees before it would negotiate a new contract that would cover the remaining maintenance employees. However, the Union opposed any outsourcing and was attempting to negotiate an agreement whereby Respondent would retain all unit employees.<sup>23</sup> [ALJD 16:4-8] [ALJD 12:1-6] [Tr. 108-111, 143-44, 402, 512-514, 533, 646, 651, 659] [GCX 48, 57] Respondent was not entitled to carve out for preliminary negotiation and implementation the issue of subcontracting in advance of negotiations for an overall contract (which would cover maintenance employees and any other employees that Respondent might agree to retain).<sup>24</sup> *Id.*

Third, regardless of the status of the “collective bargaining agreement” (as extended or not by the 2009 Interim Agreement) and the parties’ obligation to bargain over a successor agreement, Respondent did, in fact, declare impasse and implement the LBFO. [Tr. 825-26]

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<sup>23</sup> This, perhaps, could be accomplished by reducing the compensation of some or all unit employees, including maintenance employees.

<sup>24</sup> By doing so, Respondent not only violated the Act by refusing to bargain with the Union over maintenance employees, but violated the Act by unilaterally implementing its subcontracting decision (under the management rights provision in the LBFO) in advance of overall contractual impasse. *Id.*

Respondent cannot now take a mulligan, claiming that it had no obligation to do so and retroactively retract what it has already done.

**2. Respondent Refused to Bargain With The Union For A New Contract**

Respondent is wrong in asserting that it did not refuse to bargain with the Union for a new contract. Respondent admittedly conditioned negotiations for a successor agreement on the resolution of an individual subject (i.e., subcontracting). As noted above, Respondent may not fragment negotiations in this manner and the record contains no evidence that Respondent changed its position in this regard. *Id.* Accordingly, Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union for a new contract.

**IV. CONCLUSION**

Based upon the foregoing, the ALJ must be affirmed in his finding that Respondent violated Section 8(a)(5) of the Act by refusing to furnish the Union with relevant information. The ALJ must also be affirmed in his refusal to find that Respondent lawfully subcontracted work on the basis of negotiations that took place in 2011. The remainder of the ALJ's findings and determination should be affirmed to the extent that the ALJ did not err, as reflected in the General Counsel's exceptions and briefs in support thereof.

Respectfully submitted this 17<sup>th</sup> day of December, 2012.

  
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