Century Air Freight, Inc., Century Services, Inc. and Century Marine, Inc. *and* Union de Tronquistas de Puerto Rico, Local 901 a/a International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 24–CA–4616

30 June 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 13 December 1982 Administrative Law Judge James L. Rose issued a decision in this proceeding, finding that the Respondent had engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, by terminating its trucking operations and subcontracting the bargaining unit work without bargaining with the Union; by discharging its unit employees to avoid the consequences of a threatened strike; and by refusing to furnish the Union with requested information. On 15 November 1984 the Board in this proceeding issued an Order Remanding Proceeding to Administrative Law Judge for reconsideration and preparation of a supplemental decision in light of the Board's decision in *Otis Elevator*, 269 NLRB 891 (1984), and to afford the judge the opportunity to resolve certain factual issues not resolved in the earlier decision.[1]

On 7 May 1985 Administrative Law Judge James L. Rose issued the attached supplemental decision. The judge, after consideration of the Respondent's decision to close its trucking operations and subcontract the bargaining unit work under the analysis set forth in *Otis Elevator*, concluded that the Respondent's decision to terminate trucking operations and subcontract the work was a mandatory subject of bargaining, and thus its failure to negotiate with the Union violated Section 8(a)(5) of the Act. The judge reaffirmed his previous findings that the Respondent violated Section 8(a)(3) and (1) by discharging its bargaining unit employees and that the Respondent violated Section 8(a)(5) of the Act by failing to supply the Union with requested information. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached supplemental decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order as modified.

The Respondent, Century Air Freight, Inc., which ships cargo by air, Century Marine, Inc., which ships cargo by sea, and Century Services, Inc., which transports cargo by truck to and from customers and the Respondent's terminal, are separate corporate entities which constitute a single integrated enterprise engaged in the shipping of cargo. Century Services, Inc., when formed in 1976 to provide trucking service to the Respondent's operations,[2] voluntarily recognized the Union as the collective-bargaining representative of its employees. The Respondent and the Union entered into a series of collective-bargaining agreements, the most recent of which expired 7 January 1981.[3] At the Respondent's request, the parties agreed to a 6-month wage freeze and extended the contract for that period based on the Respondent's claim that it was in dire economic straits.

Following expiration of the contract's extension in July, the parties again met for negotiations. The Union requested a wage increase of $3 per hour over a 3-year period. The Respondent again claimed that it was in serious financial trouble, and asked for a further extension of the contract and a wage freeze. The Union then offered to accept a wage increase of $2 per hour over a 3-year period. The Respondent rejected that offer and said it could not give any wage increases since it was suffering serious losses. The Union requested proof that the Respondent was suffering losses and the Respondent agreed to provide its books for inspection.

The Respondent's labor consultant, Casaine, met briefly with Union Secretary-Treasurer Cadiz on 10 August, but neither party moved from its previous position. The Respondent did not make its books available for inspection at that meeting, but Casaine testified without contradiction that he asked the Union to have its accountants and lawyers contact him to set up a meeting to review the books. On 20 August Casaine addressed the Respondent's assembled employees. Casaine told the employees that the Respondent was in serious economic trouble, that it was suffering losses, and tes-

[1] Members Johansen and Babson were not members of the Board at the time the remand order was issued

[2] Prior to the formation of Century Services, the Respondent subcontracted its trucking operations, first to Trans Island Co., owned by Salvatore Cerami, the Respondent's owner, and then to Terminal Cargo Services.

[3] All dates are in 1981 unless otherwise indicated.

tified that he told the employees that if the losses continued the Respondent would have to close.[4]

On 25 August Casaine and Cerami, the Respondent's general manager and the son of the owner, met with union officials, including shop steward Maldonado. The Union informed the Respondent that its membership had voted to reject a further extension of the contract. The Respondent refused to make or accept any offer other than an extension of the old contract. Maldonado then stated that the employees were prepared to strike if they did not get a raise. Cerami said, "You mean you would rather see the company close than accept a wage freeze?" Maldonado replied, "yes." When Cerami repeated his question, Maldonado retorted, "If you're going to close, close." Other than this exchange, there was no mention of the Respondent having to close if its proposal for a wage freeze was not accepted. There was no mention of the possibility of subcontracting the trucking operations. The Respondent did not have its financial records at this meeting, but again Casaine asked the Union to set up a meeting with its accountants and lawyers.

On the same afternoon, Cerami called his father and said they should consider subcontracting their trucking. Cerami immediately began preparations and had the arrangements finalized by 26 or 27 August. On 27 August Casaine visited the union hall. When asked if he had come with an offer from the Respondent, he said no, that there was no money with which to negotiate. Casaine testified that he told Cadiz that the Respondent would close if the wage freeze were not accepted; Cadiz denies that he heard anyone say the Company might close. Casaine admitted, however, that by that time the Respondent had already decided to subcontract the trucking services.

On 31 August, when the employees arrived at the Respondent's warehouse for work, Cerami told them that the Company was forced to close and that "no union worker is going to be working here." The uncontradicted record evidence shows that the Respondent's supervisor Toledo told the employees that "union people wouldn't work there any more." No union members were allowed to work that day or any subsequent day. Uncontradicted evidence shows that two employees who were not union members performed bargaining unit work on 31 August and were then referred by Toledo to the subcontractor, who promptly hired them. No union members were referred to the subcontractor.

[4] No union officials were present at this meeting.

At the hearing, employee Otero testified without contradiction that when Cerami interviewed him for employment at the Respondent approximately 9 months before the subcontracting, Cerami told him, in Otero's words, "I couldn't enter the Union because they wanted to move the union aside." Cerami testified regarding his decision to subcontract that "when we saw that there was no way out, either they wanted their $2 raise or they were going to go on strike, well, then we decided to farm the work out." He explained that "it was due to wages, we couldn't afford it and things like this, and they're threatening to go on strike. They know as well as I do that if we go on strike, or if they went on strike this would probably paralyze us."

I. THE 8(A)(3) DISCHARGES

The judge, in his supplemental decision, reaffirmed his previous finding that the Respondent's discharge of the employees on 31 August violated Section 8(a)(3) of the Act. He relied on Cerami's admission that the Respondent subcontracted its trucking operations because the employees had threatened to strike and that "would probably paralyze us." The judge reasoned that when an employer eliminates an entire bargaining unit during the course of contract negotiations and subcontracts the work because it fears the employees may strike, such conduct is inherently destructive of their Section 7 rights, citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). He further found that even without evidence of overt antiunion animus, such discharges result from an unlawfully discriminatory motive and thus violate Section 8(a)(3) and (1) of the Act. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged its employees on 31 August, but only for the reasons set forth below.

In *NLRB v. Great Dane Trailers*, the Supreme Court held that an employer violated Section 8(a)(3) of the Act by paying accrued vacation benefits to employees who had not participated in a recent strike, and refusing to pay vacation benefits, to the employees who had engaged in the strike. As noted by the judge, the Supreme Court recognized that some conduct was "inherently destructive" of employee rights and thus no proof of antiunion motive was required to prove a violation of the Act. The Supreme Court further stated, however (388 U.S. at 34), that:

> if the adverse effect of the discriminatory conduct is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business

> justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. [Emphasis in original.]

The Supreme Court concluded that because the employer had failed to come forward with *any* evidence of a legitimate motive for its discriminatory conduct the Board's finding of a violation should be upheld.

Analyzing this case as the Supreme Court analyzed *Great Dane,* we find it unnecessary to pass on the judge's conclusion that the Respondent's conduct was "inherently destructive" of Section 7 rights in light of our finding below. In this regard, we agree with the judge that the Respondent's conduct had a discriminatory effect on those rights and that the employer has failed to come forward with evidence of a legitimate and substantial business justification for its conduct. As an initial matter, in finding that the Respondent's conduct was discriminatory, we note that Cerami's testimony clearly demonstrates that the employees' protected activity was a motivating factor in the Respondent's decision to subcontract. Cerami testified that when he saw that the employees would go on strike he had to "farm the work out," and that a strike would probably "paralyze" the Respondent. Thus, the Respondent admittedly discharged its employees in response to the employees' demand for a wage increase and threat to strike, and in order to avoid the consequences of a potential strike. We thus find that the Respondent's discharge of its employees to forestall their engaging in protected concerted activity was at the least "discriminatory conduct which could have adversely affected employee rights to some extent." 388 U.S. at 34.[5]

As in *Great Dane,* the Respondent failed to come forward with evidence of any legitimate and substantial business justification for its conduct. Thus, as noted above, the Respondent's only proffered explanation for the discharges was that the employees had demanded a wage increase and were threatening to engage in protected concerted activity that would paralyze its operations. Admittedly, it is undisputed that at the time the Respondent's overall financial condition was not favorable due to a downswing in airfreight, which was the most lucrative part of its business. The Respondent failed to demonstrate, however, how the precipitous closing of its trucking operations would enhance its balance sheet.[6] Moreover, even accepting as true the Respondent's contention that a wage freeze was essential to its survival, there is a vast and critical difference between refusing in the course of negotiations to agree to any wage increases and the Respondent's discharge of its employees in order to forestall the exercise of their right to engage in protected activities by striking. Thus, the Respondent has failed to meet its burden of proof. In short, having found "discriminatory conduct carrying a potential for adverse effect upon employee rights . . . and no evidence of a proper motivation," 388 U.S. at 35, we conclude that the Respondent's discharge of its employees violated Section 8(a)(3) and (1) of the Act.[7]

II. THE REFUSAL TO BARGAIN

In his supplemental decision, the judge, applying the Board's analysis in *Otis Elevator,* concluded that the Respondent's decision to subcontract the bargaining unit work was a mandatory subject of bargaining under Section 8(d) of the Act. In so doing, the judge found that the decision to subcontract the trucking services turned upon labor costs, rather than a change in the nature and direction of the business. Thus, the judge concluded that in failing to negotiate with the Union over the decision, the Respondent violated Section 8(a)(5) of the Act. We agree with the judge's conclusion.

In applying *Otis Elevator,* the judge, in effect, applied the test set forth in the Board's plurality opinion which considered whether the employer's decision turns on a change in the nature or direction of the business, or turns on labor costs. Member Dennis and former Member Zimmerman, who both concurred separately in the dismissal of the complaint's allegations of an unlawful refusal to bargain over the plant closure, each utilized tests that differed from that set forth by the plurality. Members Johansen and Babson find it unnecessary in this case to choose among these tests since in their

[5] Furthermore, although not crucial to our analysis, we find that the record contains evidence of actual antiunion animus on the Respondent's part. Thus, employee Otero testified without contradiction that Cerami told him they wanted to move the Union aside and both Cerami and Toledo told the employees that no union workers would be working at Century anymore. In addition, the Respondent admitted that two employees who were not union members were allowed to work on 31 August, and were shortly thereafter referred to and hired by the Respondent's subcontractor. In contrast, no union members were allowed to work that day or were referred to the subcontractor.

[6] Indeed to the extent the Respondent alludes to savings in overhead other than wages we note that the exhibits indicate that although the Respondent closed its trucking operations in August, it did not sell its trucks to the subcontractors until the latter part of November.

[7] See also *Maietta Construction Co*, 265 NLRB 1279 (1982), enfd. 729 F 2d 1448 (3d Cir. 1984), *C-F Air Freight,* 247 NLRB 403 (1980).

view the same result is dictated regardless of which test is applied. Indeed, no other outcome would appear to be consistent with the Supreme Court's decision in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964).

In *Fibreboard*, the employer, concerned with the high labor costs of its maintenance operations, concluded it could effect substantial savings by subcontracting maintenance work, and did so without bargaining with the union. The Supreme Court held that this decision to subcontract bargaining unit work involved "terms and conditions of employment" and thus was a mandatory subject of bargaining under Section 8(d), and that the employer's failure to bargain with the union was a violation of the Act. The Court reasoned that (379 U.S. at 211):

> [t]o hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

The Court observed in *Fibreboard* (id. at 213) that the employer's decision to subcontract the work did not alter the employer's basic operation. The work still had to be performed; the employer . . . merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.[8]

We find no meaningful distinctions between this case and *Fibreboard*. In this regard, it is clear from Cerami's testimony that had the employees agreed to a wage freeze the Respondent would not have subcontracted the work. Thus, the conceded motivating factors in the Respondent's decision to subcontract were containing labor costs and avoiding a strike, which have "long been regarded as matters peculiarly suitable for resolution within the collective-bargaining frame work." 379 U.S. at 213–214.

It is clear that the Respondent did not bargain with the Union over the possibility of subcontracting the work. Indeed, the Respondent does not even claim it mentioned the possibility of subcontracting in discussions with the Union. Instead, the Respondent argues that it had no obligation to bargain over the decision to subcontract because it occurred in the context of a partial closing, and was a change in the scope and direction of the enterprise, relying on *Otis Elevator* and *First National Corp.* Alternatively, the Respondent argues that even if it had an obligation to bargain to do so would have been futile in light of the Union's insistence on a wage increase and its "clear request that the company close its operation if such an increase were not granted." We find no merit in the Respondent's arguments.

Regarding the Respondent's contention that it fundamentally changed the nature and scope of its business, Cerami's testimony clearly demonstrates that the decision to subcontract was prompted solely by the employees' demand for a wage increase and the threat of a strike if the increase were not granted; and that the Respondent did not actually close down part of its business, nor change the scope or direction of the enterprise. The Respondent still provided a truck delivery service to its clients. Indeed, Cerami testified that an integral part of the overall shipping service it provides is to transport the merchandise from the factory to the

[8] Although in *First National Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court limited its holding in *Fibreboard*, in our view *First National Corp.* is distinguishable from the instant case. There, the employer, without bargaining with the union, terminated its operations and discharged its employees after its client reduced its management fee by 50 percent. The Supreme Court (452 U.S at 679), in finding no violation of the Act in the unilateral decision to close, stated that not all management decisions were amendable to resolution in the collective-bargaining process, and found that:

> . . . bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business

The Court concluded that 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 by bargaining over the decision, and thus the decision was not subject to mandatory bargaining However, the Court, in order to "illustrate the limits" of its holding, noted that the employer had no intention of replacing the discharged employees, or moving its operations elsewhere; there was no claim of antiunion animus, and the motivating factor in the closing was the size of the management fee, a factor over which the union could have no control

It is instructive in this regard to refer back to Justice Stewart's concurring opinion in *Fibreboard*, which was later emphasized by the Court in *First National Corp* Justice Stewart stated 379 U S. at 224–225:

> Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company. While such a situation might well be considered a § 8(a)(3) violation on a finding that the employer discriminated against the discharged employees because of their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work schedule and remuneration, and so an evasion of its duty to bargain on these questions, which are concededly subject to compulsory collective bargaining Similarly, had the employer in this case chosen to bargain with the union about the proposed subcontract, negotiations would have inevitably turned to the underlying questions of cost, which prompted the subcontracting Insofar as the employer frustrated collective bargaining with respect to these concededly bargaining issues by its unilateral act of subcontracting this work, it can properly be found to have violated its statutory duty under § 8(a)(5).

airport, and that the trucking work has to be done for the Respondent to stay in business. Like the employer in *Fibreboard*, the Respondent still included the trucking services in its operation; it "merely replaced existing workers with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 213.

Furthermore, we find that the Respondent is not relieved of its obligation to bargain based on its claim that bargaining would be futile. The Respondent has offered no evidence supporting its claim of futility. Instead, it claims that the Union, through its shop steward, requested the Company to close if it would not grant a wage increase, and that the Union refused to negotiate over the wage increase, steadfastly demanding a $2-per-hour wage increase to be given over a 3-year period. We find the Respondent's arguments unpersuasive. We note that the Union's original wage request was lowered to the $2 figure through negotiations. Moreover, the Respondent never presented the Union with the possibility of subcontracting the bargaining unit work, so the Respondent cannot now speculate that the Union's response would not have been constructive. Finally, the Respondent cannot rely on a single, rather emotional remark made by the shop steward in response to a similarly provocative question by Cerami to prove that negotiations would have been futile. In this regard, the shop steward was not the primary negotiator or spokesman for the Union and, in any event, even in that heated exchange Cerami did not mention the possibility of subcontracting. Thus, the Respondent has failed to show that bargaining over the decision to subcontract would have been futile. As the Supreme Court stated in *Fibreboard*, "[w]hile the Act does not encourage a party to engage in fruitless marathon discussions . . . it at least demands that the issue be submitted to the mediatory influence of collective negotiations." 379 U.S. at 214.

In sum, in our view, this case falls squarely within the Supreme Court's holding in *Fibreboard*. We find that under any of the views expressed in *Otis Elevator* the Respondent's decision to subcontract the bargaining unit work was subject to the mandatory bargaining provisions of Section 8(d) of the Act.[9] Secondly, we find that by failing to bargain over its decision the Respondent violated Section 8(a)(5) and (1) of the Act.[10]

III. THE INFORMATION REQUESTS

The judge found that the Respondent violated Section 8(a)(5) of the Act by failing to furnish the Union with records supporting its claim that it was suffering losses. Although the judge found that the Respondent agreed to provide the Union with the information, the judge concluded that the Respondent did not offer to provide the Union with information concerning the air and ocean shipping companies, and that the Union had the right to "know the whole picture." Thus, he found the Respondent did not fulfill its obligations under Section 8(a)(5) of the Act. We disagree.

We find that the General Counsel failed to prove that the Respondent refused to provide the requested information. While it is true that Casaine responded in the negative when he specifically was asked during the hearing whether he had "offered" to show the Union the books of Century Air Freight and Century Marine, according to testimony of the Union's as well as the Respondent's witnesses, the Union never made a request to the Respondent more specific than its general request for proof of the Respondent's financial losses. In response to this request the Respondent consistently, and in equally general terms, responded that it would be willing to make the books available to the Union's accountants or attorneys and that the Union should set up a meeting. There is no evidence that the Union ever attempted to set a date for examining the Respondent's records. Thus, the Union never put the Respondent to the test on its information offer and because the Union never saw what the Respondent was offering, it never rejected the offer as insufficient or further specified the nature of the information required. In short, there is no substantial evidence that the Union's request for information was denied by the Respondent.

The Board has long held that parties should bargain in good faith regarding conditions under which relevant information is to be furnished.[11]

---

[9] The plurality's discussion in *Otis Elevator* of *NLRB v. Adams Dairy*, 137 NLRB 815 (1962), enf. denied in relevant part 350 F 2d 108 (9th Cir. 1965), cert. denied 382 U.S. 1011 (1966), does not compel a different result In *Adams Dairy*, the employer employed drivers to deliver its product and also sold its product to independent distributors who took title to the product at the loading dock. The employer decided to get out of the distribution business altogether, unilaterally discontinued its delivery operations, and arranged to sell all its products to independent distributors. Thus, its responsibility for and control over its product ended at the loading dock. The Otis plurality stated that it would find that decision to subcontract not subject to mandatory bargaining because the decision involved a fundamental change in the scope and direction of the enterprise. In that case, however, the employer retained no control over the equipment, the employees, or the product, or over the distribution of its product. In contrast, in the present case the trucking services are an integral part of the business Moreover, the record indicates that the Respondent retained some control over the subcontractor's employees and operations and had ultimate control over and responsibility for the shipping process.

[10] See also *Pennsylvania Energy Corp.*, 274 NLRB 1153 (1985); *University Health Care Center*, 274 NLRB 764 (1985)

[11] See, e g., *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), enfd. 711 F 2d 348 (D C Cir. 1983); *Colgate-Palmolive Co.*, 261 NLRB 90 (1982), enfd. 711 F.2d 348 (D.C Cir 1983) See generally *Detroit Edison Co. v. NLRB*, 440 U S 301 (1979).

Here, the Respondent requested that the Union's accountants or attorneys be present when it showed the requested information to the Union. The Union neither protested this condition nor attempted to comply with it. The Union "precluded, in effect, a test of the Respondent's willingness to give the Union access to the . . . information involved on mutually satisfactory terms.[12] Accordingly, we find that the Respondent did not fail to provide relevant information requested by the Union in violation of Section 8(a)(5) and (1) of the Act.

In conclusion, we find that by unilaterally terminating its trucking operations, subcontracting the bargaining unit work, and discharging the members of the bargaining unit, the Respondent violated Section 8(a)(5), (3), and (1) of the Act. Accordingly, we shall adopt the judge's recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Century Air Freight, Inc., Century Services, Inc., and Century Marine, Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and renumber the remaining paragraphs.
2. Delete paragraph 2(c) and renumber the remaining paragraphs.
3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN DOTSON, concurring.

I join my colleagues in finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally terminating its trucking operations and subcontracting the bargaining unit work without bargaining with the Union.[1] In so finding, however, I rely solely on the judge's findings and conclusions, based on the opinion of former Member Hunter and myself in *Otis Elevator*, 269 NLRB 891 (1984), that the Respondent's decision turned on labor costs and was therefore a mandatory subject of bargaining. In light of this finding, I find it unnecessary to pass on the judge's finding that the Respondent's elimination of the bargaining unit also constituted a violation of Section 8(a)(3) of the Act. See *Brown Co.*, 278 NLRB 783 (1986).

[12] *American Cyanamid Co. (Marietta Plant)*, 129 NLRB 683 (1960).

[1] I also join my colleagues, for the reasons stated by them, that the Respondent did not fail to provide relevant information requested by the Union in violation of Sec. 8(a)(5) and (1) of the Act.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate a portion of our business and subcontract the work in order to discourage employees from engaging in union or other protected concerted activity or without bargaining with Union de Tronquistas de Puerto, Local 901, a/a International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Juan de la Cruz, Carlos Betancourt Torres, Eduardo Perez Otero, Josue Dones Castro, Eduardo Figueroa Rosario, Ramon Gonzales Tapia, Roman Gonzalez Santaliz, Jose A. Rosario Osorio, Eufrasio Medina Gonzalez, Victor L. Stand Gomez, Pedro Maldonado Rodriguez, Edwin Morales Santiago, Luis Rodgriguez, Juan Marin, Wilfredo Cruz, Jorge A. Cruz, and Arturo Caraballo, if we have not already done so, full and immediate reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of wages or other benefits they may have suffered by reason of our unlawful discharges.

WE WILL notify each of them that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

CENTURY AIR FREIGHT, INC., CENTURY SERVICES, INC., AND CENTURY MARINE, INC.

Efrain Rivera Vega, Esq., for the General Counsel.
Rafael Medina, Zerpa Esq., and *Luis F. Padilla, Esq.*, of San Juan, Puerto Rico, for the Respondents.

SUPPLEMENTAL DECISION

JAMES L. ROSE, Administrative Law Judge. On 15 November 1984 the Board remanded this matter to me "in order to afford the judge the opportunity to resolve such factual issues as were not resolved in his earlier decision" given the Board's subsequent decision in *Otis Elevator Co.*, 269 NLRB 891 (1984). The parties were then

requested to submit their respective positions with regard to the Board's remand, the factual and legal issues to be reconsidered and whether a supplemental hearing would be necessary. On 11 February 1985 responses were received from the General Counsel and counsel for the Respondent. Both agree that the initial record is sufficient.

Thus before me for decision in light of *Otis Elevator II* is the complaint allegation that the Respondent violated Section 8(a)(5) of the National Labor Relations Act 29 U.S.C. § 151 et seq., by unilaterally transferring to a subcontractor all of the work performed by bargaining unit employees.[1]

On the Board's remand to consider the issues of this case in the context of its *Otis Elevator II* decision, and on the record as a whole, including supplemental statements of position from the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *The Material Facts*

A brief recapitulation of the facts underlying this matter seems appropriate.

The business of the Respondent is to consolidate and ship freight from mainland United States to Puerto Rico and vice versa. During the time material, the Respondent operated three functionally separate companies (though constituting a single employer): Century Air Freight for air shipment; Century Marine for maritime shipment; and Century Services to transport freight to and from the Puerto Rico warehouse to the Puerto Rico customers.

Prior to 1976 the Company subcontracted for this latter service. Since creation of Century Services in 1976, its employees have been represented by Union de Tronquistas de Puerto Rico, Local 901 a/a International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union). The Union and Respondent had successive collective-bargaining agreements covering a unit of truckdriver and warehouse employees.

The most recent collective-bargaining agreement between the Company and the Union expired on 7 January 1981. After some preliminary discussions the Union agreed to the Respondent's request for a 6-month extension of the contract and a wage freeze for that period. Thus the collective-bargaining agreement was extended to 8 July. Following expiration of the extension, the parties met again to negotiate a new agreement. In brief, the Union wanted a $2-per hour wage increase over the next 2 years. The Company contended that it was unable to grant any wage increase inasmuch as it was suffering serious losses.

At the last bargaining session on 25 August the Respondent's representatives, including Michael Cirami and Sergio Casaine (who had been retained on 6 August as a management consultant) met with representatives of the Union.

Union negotiators stated that the Company's request for an additional 6-month freeze had been rejected by the employees. But they reduced the wage demand from a $1 per hour increase each year for 2 years to $2 per hour over 3 years.

No counteroffer was made by the Company at this meeting nor did the Company indicate that absent agreement it would terminate the trucking aspect of its business. Indeed, at this point the determination to terminate the trucking operation had not been made or even discussed.

According to Cirami after this meeting he called his father who stated that they should begin thinking about subcontracting the bargaining unit work. The next day

---

[1] It was alleged, and I found, that the Respondent discharged its bargaining unit employees on 31 August 1981 in violation of Sec 8(a)(3) and (1) of the Act Michael Cirami, son of the principal owner, testified that employees had threatened to strike and such "would probably paralyze us." Thus the Company unilaterally discontinued the trucking aspect of its business. Clearly all the bargaining unit employees were terminated because they had rejected the Company's bargaining demand and to guard against the perceived adverse consequences of a potential strike. The Respondent's action against bargaining unit employees whom it anticipated might engage in protected activity was inherently destructive of Sec 7 rights. Without more such proves a violation of Sec. 8(a)(3) and (1). *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). On the facts here, independent evidence of antiunion motive was not necessary to prove a violation.

Because there was no allegation of an 8(a)(3) violation in *Otis Elevator*, presumably the Board's remand was not meant to touch on this aspect of the case. However, in her partial dissent to the remand, Member Dennis did indicate an interest in matters which relate to this issue. Eduardo Perez Otero testified without contradiction that when interviewed for a job by Michael Cirami in January or February 1981 he was told, "I couldn't enter the union because they wanted to move the union aside." This happened about the time the Respondent asked for and received a contract extension with a wage freeze, infra. Though occurring some 8 months before the terminations it does suggest antiunion animus. Felix Sanchez testified that Sergio Casaine, the Respondent's negotiator, said he would withdraw because the Company planned "dirty tricks." This was denied, a denial that I credit. Though seemingly important on its face, no mention of such a statement appears in notes made by Sanchez at the time of this alleged event.

According to Casaine at the 25 August meeting, during which he translated between employees and Cirami, Cirami interpreted remarks by union steward Maldonado as stating that employees would rather the Company close than agree to a further wage freeze. At the 20 August meeting Respondent negotiators had said a wage freeze was necessary to avoid continued losses; and if losses did continue the Company would have to close Accepting Casaine's testimony (which appeared credible) at best Maldonado's statement was simply responsive to the Company. Things like this are said during negotiations and in the context here it has little significance. Certainly it does not excuse the Respondent's unfair labor practices.

In any event the 8(a)(3) aspect of this matter was not remanded. Further, a review of the record and the supplemental statements of position from counsel do not suggest any compelling reason to reconsider and reverse my previous conclusion that when the Respondent terminated its trucking operation effective 31 August 1981, and discharged all the bargaining unit, it violated Sec. 8(a)(3) and (1). Even without evidence of overt antiunion animus, when an entire bargaining unit is eliminated because Respondent fears employees might engage in the protected activity of a strike, such necessarily carries with it an unlawfully discriminatory motive

Similarly, it was alleged, and I concluded, that the Respondent refused to furnish certain records requested to support the contention that it was economically incapable of meeting the Union's wage demand. This aspect of the case was not covered by the Board's remand and, again, I have not reconsidered this issue, nor does there appear to be any particular basis to do so. I reaffirm my conclusion that the Respondent's failure to supply the requested information was in fact violative of its bargaining obligations under Sec. 8(a)(5).

Finally, it was undenied that the Respondent also failed to bargain over the effects of terminating bargaining unit jobs, a failure that is violative of Sec. 8(a)(5) even if the decision itself is not a mandatory subject. Cf. *Kroger Co.*, 273 NLRB 462 (1984) However, in view of the remedy recommended for the Respondent's unfair labor practices, a remedy for that violation would not be meaningful.

Cirami met with the owners of an independent trucking company. In his direct examination Cirami testified:

> I explained to them [the independent trucking company] the situation that we're having with the union. I went into detail, it was due to wages, we couldn't afford it and things like this, and they're threatening to go on a strike. They know as well as I do that if we go on strike, or if they went on strike this would probably paralyze us, you know, because it would go on to strike one hour, and within that one hour every other forwarder would have know [sic] that Century Air Freight is on strike, the Century Services is on strike, and then of course their salesman go out, don't use Century, they have problems with the union . . . .

The Respondent made an agreement to contract the trucking portion of its business to the independent trucker and some 3 months thereafter in fact sold its trucks to that company. There is no evidence of whether, or to what extent, this amounted to a capital divestiture. As of 31 August the Respondent terminated all its bargaining unit employees and began having the truck delivery aspect of its business performed by the independent contractor.

No one for the Respondent told the Union that subcontracting was a possibility or that beginning 26 August discussions were underway to that end.

B. *Analysis and Concluding Findings*

There is no doubt that the Respondent's decision was a preemptive change in operation. Michael Cirami so testified. There is no doubt this matter was not discussed with the Union. Thus the issue is whether such a preemptive change in operation is a mandatory subject of bargaining under Section 8(d) of the Act. I believe it is.

In *Otis Elevator II*, the Board set forth the manner of analyzing whether management decisions are within or without the mandatory bargaining obligations of Section 8(d). The Board held that whether such a decision is a mandatory subject of bargaining depends on "the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees or the union's ability to offer alternatives." In reaching this conclusion in *Otis Elevator II* the Board followed the United States Supreme Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), in which the issue was an economically motivated decision to shut down part of a business; as well as *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), which involved subcontracting to reduce labor costs.

Although the Board set forth broad guidelines in *Otis Elevator II*, the crucial facts involved in that matter are worth considering. Briefly, Otis Elevator Co. had been acquired by United Technologies following which studies of the Otis operation were made. It was found that Otis had research facilities scattered throughout the United States and that "work performed in one location was being duplicated elsewhere." United Technologies was also doing elevator related research at a major facility. Thus consolidation seemed appropriate. This consolidation involved a "capital investment of between 2 and 3 million dollars." Though failing to bargain about the basic determination to consolidate, the company did bargain about the effects of the ultimate decision to terminate the facilities in question and the resulting transfer of bargaining unit employees.

On these facts, the Board reasoned that the management decision to consolidate research facilities, though resulting in the shutdown of the place where bargaining unit employees were working, was not a mandatory subject of bargaining, citing *First National Maintenance* and *Fibreboard*. The Board noted specifically: "These facts establish that the Respondent's decision did not turn upon labor costs, even though that factor may have been one of the circumstances which stimulated the evaluation process which generated the decision." Thus the essence of the decision involved a change in the nature and direction of the business and was therefore not a mandatory subject of bargaining.

But the Board noted (269 NLRB at 893):

> Included within Section 8(d), however, in accordance with the teachings of *Fibreboard*, are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on direct modification of labor costs and not on a change in the basic direction or nature of the enterprise.

The Respondent seeks to clothe itself with protective cover of "change in the nature and direction of a significant facet of the business." However, the decision here had practically nothing to do with the nature and direction of the Respondent's business. It had everything to do with labor costs involved in the trucking aspect. From the testimony of Michael Cirami it is clear that had the Union agreed to extend the expired contract with the wages frozen, there would have been no subcontracting. But, employees wanted to be paid more. There can be no question that had employees accepted the Company's negotiation proposal for a continued wage freeze there would have been no change in the manner in which goods were transported to and from customers in Puerto Rico.

The Respondent's decision was not to consolidate duplicate capacity, as in *Otis*. Nor did it involve a change in the basic nature of the business. The Respondent's decision simply was a preemptive change in the manner in which it paid for a particular service. The Respondent's business is to consolidate and ship freight between Puerto Rico and mainland United States. As part of this business, freight must be transported to and from the Puerto Rico terminal to customers throughout the island. To accomplish this trucks must be used. The trucks must have drivers. Whether the drivers are on the Respondent's payroll or paid by someone else has little, if any, significance to the business of the Respondent. What they are paid does. The facts of this case clearly show that the Respondent's decision turned fundamentally on

the labor costs of the trucking. As such it was the type of decision contemplated by the Board as being within the mandatory bargaining obligations of Section 8(d).

I conclude that under the Board's guideline in *Otis Elevator II*, the Respondent's decision to change the method by which it had freight delivered to and from its Puerto Rico warehouse was a mandatory subject of bargaining. In failing to negotiate with the Union concerning this, the Respondent thereby violated Section 8(a)(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Century Air Freight, Inc., Century Services, Inc., and Century Marine, Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating a portion of its business and subcontracting bargaining unit work in order to discourage employees from engaging in union or other concerted activity for their mutual aid and protection.

(b) Terminating a portion of its business and subcontracting bargaining unit work, where the unit employees are represented by the Union, without first negotiating and bargaining with the Union over the decision.

(c) Refusing, on request, to furnish the Union during contract negotiations all relevant financial information to support its claim of economic inability to pay a wage increase.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[3]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with Union de Tronquistas de Puerto Rico, Local 901 a/a International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the designated representative of employees in the following appropriate unit:

> All truck drivers, helpers, and warehousemen of Respondent employed at the San Juan, Puerto Rico, warehouse exclusive of all other employees, guards, and supervisors as defined in Section 2(11) of the Act.

(b) Reinstitute its trucking operation (Century Services, Inc.), and offer immediate reinstatement to unit employees (named in the remedy section) and make them whole for any losses they may have suffered in accordance with the provisions of that section.

(c) Furnish all relevant financial information to the Union to support its claim of economic inability to grant a wage increase.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to effectuate the backpay provisions of this Order.

(e) Post at its facility in San Juan, Puerto Rico, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 24, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be in both English and Spanish.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] The unfair labor practices here are substantial and show a sufficient proclivity to engage in unfair labor practices that a broad remedial order is appropriate. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."