Failure to Bargain Over Subcontracting Violates NLRA
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The National Labor Relations Board (the "NLRB") recently ruled that an employer's decision to subcontract work, even where the decision to subcontract is unrelated to labor costs, is a mandatory subject of bargaining, and that a failure to bargain before subcontracting is an unfair labor practice. In Mid-State Ready Mix, 307 N.L.R.B. No. 129 (1992), the NLRB held that laying off unit employees and replacing them with nonunit employees without first giving the union notice and an opportunity to bargain violates Section 8(a)(5) of the National Labor Relations Act (the "NLRA").

The dispute in the Mid-State Ready Mix case concerned two employees, represented by Local 182, IBT (the "Union"), who were engaged in the hauling of cement powder, sand and stone as part of the employer's concrete business. One employee was transferred to another part of the business, while the other was laid off. The work previously performed by the two employees was then assumed by non-union outside contractors. The employer did not notify or bargain with the Union concerning the decision to subcontract this work. The Union filed unfair labor practice charges, alleging that the employer's decision to subcontract was a mandatory subject of bargaining and that the employer therefore violated the NLRA by failing to bargain with the Union over the issue. The employer argued that the decision to subcontract was unrelated to any concession that the Union could have given during bargaining, and that under the NLRB's ruling in Dubuque Packing Co., 303 N.L.R.B. No. 66 (1991), it therefore had no obligation to bargain concerning the decision to subcontract. In Dubuque Packing (discussed in the September 1991 issue of this Newsletter), the NLRB ruled that entrepreneurial decisions such as plant relocations are not a mandatory subject of bargaining if they involve a fundamental change in the nature of the business and if either labor costs are not a factor in the decision or the union would be unable to offer concessions that would change the employer's decision. In Mid-State Ready Mix, the company contended that the transfer of the work was necessitated by the break-down of a company-owned truck and by seasonal fluctuations in the business. Since those factors were not subject to alteration by agreement of the Union, the employer reasoned, bargaining would be a useless exercise.

The NLRB rejected the employer's argument, holding that the subcontracting merely involved the replacement of the existing bargaining unit personnel with independent contractors and that Dubuque Packing Co., which involved an employer's decision to relocate a portion of its business, was inapplicable. Bargaining is not required under Dubuque Packing only where an employer undertakes a fundamental change in the nature and direction of its business that is not based on labor costs. Subcontracting, however, ordinarily does not involve such a fundamental change and is generally considered a mandatory subject of bargaining under the U.S. Supreme Court's 1964 decision in Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964). In Fibreboard, the Court held that the replacement of employees in an existing
bargaining unit with those of an independent contractor to do the same work under similar conditions of employment is a mandatory subject of bargaining. The NLRB in Mid-State Ready Mix noted that, as in Fibreboard, "all that is involved is the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer." Such decisions, the NLRB held, do not involve a "change in the scope and direction in the enterprise and thus are not core entrepreneurial decisions which are beyond the scope of the bargaining obligations defined in the NLRA."

The majority opinion was careful to note that the NLRB was "not fashioning a per se rule that any subcontracting decision that does not involve a significant change in scope and direction of the enterprise is a mandatory subject of bargaining." The decision affects only those cases, similar to Fibreboard, in which virtually all that is changed through the subcontracting is the identity of the employees performing the work. Despite this disclaimer, however, it appears that bargaining will be required in the vast majority of subcontracting cases; the Dubuque Packing holding will generally be inapplicable to subcontracting issues, which are ordinarily not "at the core of entrepreneurial control."

In a concurring opinion, NLRB Member Raudabaugh stated that he would apply the Dubuque Packing analysis to all cases involving subcontracting. Under Dubuque Packing, the employer could argue that the decision to subcontract did not turn on labor costs, and that bargaining would have been futile: "[T]here is no point requiring bargaining where such bargaining can have no meaningful result other than to delay the effectuation of the employer's decision."

Nevertheless, Member Raudabaugh agreed with the majority that, on the facts of Mid-State Ready Mix, the decision about subcontracting was sufficiently related to labor costs and other bargainable issues that the employer violated the NLRA by failing to bargain with the Union, regardless of whether the Dubuque Packing test was applied.

The Mid-State Ready Mix decision is only the latest in a series of cases in which the NLRB has struggled to determine when an employer's entrepreneurial decision is so related to the employees' terms and conditions of employment that it becomes a mandatory subject of bargaining. In light of the evolution of the law in this area, an employer that undertakes subcontracting (or other actions which adversely affect the bargaining unit) without bargaining does so at some risk. If the NLRB later finds the failure to bargain was improper, it can order the employer to terminate the subcontracting and to reinstate any laid-off employees with back pay. However, it is important to note that an employer's obligation to bargain with a union over a decision to subcontract does not mean that the employer cannot act without the union's consent. Provided the employer bargains in good faith to impasse over a decision to subcontract, it may proceed to implement its subcontracting decision even over the union's objection. Thus, in many
cases, providing the union with an opportunity to bargain over such a decision is the most prudent course.