

**Public Service Company of Colorado and International Brotherhood of Electrical Workers, Local 111.** Case 27-CA-11650

September 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On May 6, 1992, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified below and to adopt the recommended Order as modified.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that employees Hill, O'Callaghan, and Johnson, although hired as temporaries, became permanent employees in accordance with art. 3, sec. 1 of the contract, since they worked longer than 6 months without the Union's being notified and agreeing to extend their temporary status. In doing so, we also rely on the parties' past practice. The record shows that normally when a temporary employee's 6-month term was ending, the parties would agree to extend the temporary period, terminate the employee, or make the employee permanent. In those instances when the Respondent continued such employment beyond the 6-month limit without notifying the Union and grievances were filed, the disputes were settled by making the employees permanent. Member Devaney finds it unnecessary to rely on the fact that past grievances over arguably similar disputes may have been settled by the Respondent by converting the temporary employee to regular status.

We also adopt the judge's finding that Hill, O'Callaghan, and Johnson were performing unit work. As the judge found, their skills and duties were substantially equivalent to that of unit employees; they had the same supervisor; they received the same or slightly greater pay; their work hours, rules, and holidays were the same; and they used the normal tools of unit employees. We also note that the record evidence shows that these employees were in daily contact with and worked alongside of other unit employees. However, we disavow the judge's reliance on the fact that Hill, O'Callaghan, and Johnson desired to be part of the bargaining unit, because employee desire is irrelevant to a determination of whether an employee is performing bargaining unit work. We also find it unnecessary to rely on the judge's dual function analysis.

In adopting the judge's finding that Hill, O'Callaghan, and Johnson executed valid checkoff authorization cards and that the Respondent unlawfully refused to process their cards, we note that the judge incorrectly used the date October 13. The record evidence shows that the checkoff authorizations were signed by Hill, O'Callaghan, and Johnson on October 12, 8, and 10, respectively, and that the Respondent notified the Union on November 28 that it would not process such cards.

1. The judge found that the Respondent violated Section 8(a)(1) and (5) by subcontracting unit work contrary to the provisions of art. 19, sec. 9 of the collective-bargaining agreement. Article 19 provides, in pertinent part, that the Respondent "will not contract any work which is ordinarily done by its regular employees for the specific purpose of laying off or demoting such employees." The judge found that employees Hill, O'Callaghan, and Johnson were laid off as a result of the Respondent's subcontracting unit work to another company, Natural Fuels, and thus concluded that the subcontracting was prohibited under the contract. We disagree.

The plain language of the contract requires that the subcontracting of unit work must be for the *specific* purpose of laying off unit employees. Simply put, to be unlawful under the contract it must be shown that *the specific* purpose of the subcontracting in question is to lay off unit employees, and not, as the judge found, that the subcontracting merely results in or causes employee layoffs or terminations.

Here, the record evidence does not establish that the Respondent's specific purpose in subcontracting the NGV project to Natural Fuels was to get rid of the three disputed employees. Rather, record testimony shows that the Respondent's purpose in forming a new company, and thereafter subcontracting the NGV work, was to have the work performed by a company which was less regulated than the Respondent's operation as a public utility and which could do the work more economically. According to Supervisor Gutierrez, there was an economic advantage to the Respondent in contracting out the work to Natural Fuels, because that company would only charge the Respondent for the time that its employees were actually working on site.

Moreover, the Respondent had been considering the creation of a separate company to build and maintain natural gas fueling stations since the mid- to late 1980s—long before the employees involved here were hired. In fact, the new company, Natural Fuels, was already in the process of being formed at the time Hill, O'Callaghan, and Johnson were hired, and shortly thereafter, the Respondent began drafting an agreement to subcontract the work to Natural Fuels. When the agreement was finally executed in December 1990, the Respondent no longer needed the services of the three employees. Thus, the layoff of employees Hill, O'Callaghan, and Johnson was simply the natural culmination of the Respondent's lengthy efforts to have the work done by a separate entity, and not, as prohibited by the contract, the specific purpose for which the Respondent decided to subcontract the work.

In addition, despite the fact that Gutierrez referred to Hill, O'Callaghan, and Johnson as playing "union games," there is no evidence that these employees were singled out for joining the Union. Indeed, the Re-

spondent has a long-established relationship with the Union which represents approximately 2700 of the Respondent's employees. Nor is there any evidence that would set these employees apart from any other unit employee. Accordingly, there is no record evidence to support a finding that the Respondent subcontracted for the *specific* purpose of laying off these particular employees.

However, although the Respondent's subcontracting of unit work does not violate the specific provisions of its collective-bargaining agreement with the Union, it is nevertheless unlawful because the Respondent subcontracted unit work without first providing the Union adequate notice and an opportunity to bargain.

It is well established that the contracting out of work regularly performed by unit employees is a mandatory subject of bargaining. *Fibreboard Paper Products Corp.*<sup>2</sup> Thus, an employer who unilaterally subcontracts unit work without first bargaining with its employees' representative about its decision, as well as the effect such contracting will have on unit employees, frustrates collective bargaining, and thereby violates Section 8(a)(5).<sup>3</sup>

The Respondent does not dispute that the subcontracting involved here is a mandatory subject of bargaining. Thus, the Respondent acted contrary to its statutory obligation when it failed to negotiate with the Union before implementing its decision to contract out unit work. Even though the Respondent had previously bargained with the Union over subcontracting—even to the extent of including a subcontracting provision in its contract—it ignored the Union and its duty to bargain when it decided to subcontract the NGV project. In addition, this decision was contrary to the Respondent's normal practice of notifying the Union of subcontracted work as well as its practice of not using temporary employees or subcontractors for unit work if it would result in the layoff or termination of unit employees. Here, of course, the Respondent's action clearly had that result as it caused the layoff of three unit employees, and thereby had a substantial adverse impact on the bargaining unit.

The fact that the Respondent had already bargained with the Union on the general topic of subcontracting and executed a specific contract provision with respect thereto did not relieve the Respondent of its statutory duty to bargain over specific instances of subcontracting. In this regard, *Island Creek Coal Co.*<sup>4</sup> is distinguishable. In that case, the parties agreed to a contract which contained detailed provisions concerning the

leasing, subleasing, and licensing out of coal lands. In particular, the contract prohibited subcontracting done for the purpose of avoiding other provisions of the contract or that would result in the laying off of the employer's employees. Otherwise, according to the contract, subcontracting would be permitted, provided that the subcontractor agreed to offer employment first to the employer's qualified employees who were on layoff status. In *Island Creek*, the employer subcontracted unit work in accordance with the provisions of its contract but without giving the union prior notice or an opportunity to bargain. The Board, in dismissing the 8(a)(5) allegation, found that, in executing the contract as described above, the respondent had fulfilled its affirmative obligation to bargain over the subcontracting of unit work.

In contrast, the subcontracting provision involved here is not nearly as extensive as the *Island Creek* provisions. Instead, it is a narrowly drawn provision which merely prohibits subcontracting in very limited circumstances. Nor is there any language in the contract providing procedures to be followed in the case of contractually permitted subcontracting. Thus, here, when the Respondent chose to subcontract without first discussing it with the Union, unlike the employer in *Island Creek*, it was not acting pursuant to specific provisions of a previously negotiated contract. Consequently, there is no basis here for finding that the Respondent has fulfilled its statutory obligation to bargain simply by executing the collective-bargaining agreement.

We also find that the Union did not waive its right to bargain over the Respondent's action in contracting to Natural Fuels. The Respondent claims that notice was given to the Union during the 1990 contract negotiations that it intended to subcontract the work, and that in not responding to this notice the Union waived its right to demand bargaining on this issue. Record evidence shows that at the bargaining table on July 2, the Respondent's manager of employee relations informed the Union's representative that the Respondent was going to contract out the job of maintaining and constructing natural gas fueling stations. The natural gas fueling station work, however, was not a topic which could be raised for negotiation at that time because the parties had previously agreed to limit the reopened talks to specific, listed items and work on the fueling stations was not an included topic. Instead, the record shows that the Respondent's remark was made in the context of discussing another, listed topic—a jurisdictional dispute between Public Service and West Gas over natural gas *vehicle* work. Thus, it was not intended, nor could it at that time, invite bargaining over the matter. Moreover, as the judge noted, the Respondent's statement did not indicate that any unit employees would be affected. In fact, the Respondent's rep-

<sup>2</sup> 379 U.S. 203 (1964).

<sup>3</sup> Member Raudabaugh does not agree that subcontracting of unit work is necessarily a mandatory subject of bargaining. He relies solely on the fact that Respondent does not dispute that the specific subcontracting involved herein is a mandatory subject.

<sup>4</sup> 289 NLRB 851 (1988).

representative did not know at the time, and did not tell the union representative, that any unit employees, especially Hill, O'Callaghan, and Johnson who would subsequently be laid off as a result of the Respondent's actions, were even working on the fueling station project. Thus, the Union had no way of knowing that the proposed subcontracting would warrant bargaining.

It is axiomatic that the waiver of a statutory right must be clear and unequivocal. *Chesapeake & Potomac Telephone Co.*<sup>5</sup> On the basis of the factual findings described above, we find that the Union did not, clearly and unmistakably, waive its right to bargain. The Respondent's statement, made under the circumstances described above, was not a sufficient notice to the Union to relieve the Respondent of its obligation to bargain over its decision to subcontract or the effect it would have on the unit.<sup>6</sup>

2. Although we have reversed the judge's 8(a)(1) and (5) finding that the Respondent's subcontracting violated its contract with the Union, we have found nevertheless that the Respondent violated Section 8(a)(1) and (5) by unilaterally subcontracting unit work without first bargaining with the Union. We, therefore, modify the judge's Order accordingly. We do not, however, modify the judge's remedy, which provides, inter alia, that the Respondent be ordered to offer Hill, Johnson, and O'Callaghan immediate and full reinstatement to their former jobs displacing, if necessary, any replacements or, if these jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges as regular employees, and make them whole for any loss of pay suffered as a result of the Respondent's action in bypassing their bargaining agent and unilaterally subcontracting their jobs. Since their loss of employment stemmed directly from the Respondent's unlawful action in failing to bargain with the Union over its decision to subcontract unit work, directing the Respondent

<sup>5</sup> 259 NLRB 225 (1981), and cases cited therein.

<sup>6</sup> We also find that the Union did not waive its general right to bargain over subcontracting by virtue of the "management rights" or "zipper" clauses of the parties' collective-bargaining agreement. See *Johnson-Bateman Co.*, 295 NLRB 180, 184-185 (1989); *General Electric Co.*, 296 NLRB 844, 851-852, 856-857 (1990). As in the cited cases, we note that here the contract's management-rights clause in art. 2, sec. 1, while reserving to the Respondent such matters as the right to direct its employees and to hire, discharge, discipline, and promote such employees, does not specifically reserve any rights with respect to subcontracting. Nor is there any other provision in the contract giving the Respondent the right to subcontract in all instances except for the one prohibited in art. 19. Moreover, although art. 30, sec. 1 of the contract states that this agreement constitutes the sole and complete agreement of the parties, such general terms do not demonstrate a mutual intent to waive bargaining as to all subjects not specifically negotiated. In fact, this clause specifically provides that the past practices of the parties shall continue.

to restore these employees to the positions they held prior to the Respondent's unlawful act is proper. *Fibreboard Paper Products Corp.*, supra, 138 NLRB at 555; *General Electric Co.*, supra, 296 NLRB at 857.

3. In its exceptions, the Respondent claims that the instant complaint is barred by Section 10(b) of the Act. The Respondent asserts that since the Union took no action with respect to the Respondent's July 2 notification that unit work would be contracted out, not only did it waive its right to demand bargaining but it also exceeded the 6-month time limitation of Section 10(b) as it did not file the instant charge until March 27, 1991. The Respondent also claims that the charge is untimely because the Union knew that the three disputed employees were working on the Respondent's fueling stations as early as late summer. The Respondent, however, did not raise this defense in its answer or at the hearing. Rather, it raised Section 10(b) for the first time in its posthearing brief to the judge and then in its exceptions to the Board. Section 10(b) is an affirmative defense and, if not timely raised, is waived. As the Respondent did not raise this defense until after the hearing had closed, it is clearly untimely. *K & E Bus Lines*, 255 NLRB 1022, 1029 (1981); *Laborers Local 252*, 233 NLRB 1358 fn. 2 (1977).

In any event, even if the Respondent had raised its 10(b) claim timely, its arguments are without merit. The fact that the Union knew about employees Hill, O'Callaghan, and Johnson by late summer is irrelevant. The Respondent did not commit an unfair labor practice until it refused to process their dues-checkoff cards on November 28. The Respondent's claim that its July 2 announcement triggered the 10(b) period is unsuccessful for the same reason. The Respondent's statement that it intended to subcontract unit work does not constitute a violation; only when the Respondent actually did so in mid-December without first bargaining with the Union was an unfair labor practice committed which, in turn, started the 10(b) period.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Public Service Company of Colorado, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Subcontracting unit work without bargaining with the Union."

2. Substitute the attached notice for that of the administrative law judge.

## 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 refuse to honor valid dues-checkoff authorizations submitted by bargaining unit employees.

WE WILL NOT subcontract unit work without first notifying and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer to Ronald Hill, James Johnson, and Michael O'Callaghan immediate and full reinstatement to their former jobs, displacing, if necessary any replacements, or if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges as regular employees, and WE WILL make them whole for any loss of pay suffered as a result of the discrimination against them.

WE WILL on demand offer to bargain with the Union over any subcontracting out of unit work.

WE WILL restore the subcontracted work in issue in this case to the bargaining unit described in the collective-bargaining agreement.

WE WILL honor the dues-checkoff authorizations for Hill, Johnson, and O'Callaghan and remit any deducted moneys to the Union, including that deducted from backpay.

PUBLIC SERVICE COMPANY OF COLORADO

*Barbara E. Greene, Esq.*, for the General Counsel.  
*Marla S. Petrini and Mary Will (Kelly, Stansfield & O'Donnell)*, of Denver, Colorado, for the Respondent.  
*Joseph M. Goldhammer, Esq. (Brauer, Buescher, Valentine Goldhammer & Kelman)*, of Denver, Colorado, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case,<sup>1</sup> was tried before me at Denver, Colorado, on January 14 and 15, 1992,<sup>2</sup> pursuant to a complaint issued by the Re-

<sup>1</sup> Respondent was originally charged with certain additional violations of the Act in Cases 27-CA-11683 and 27-CA-11698. The allegations contained therein were disposed of by private resolution and, on December 31, 1991, the Regional Director approved withdrawal of these complaints (G.C. Exh. 1h).

<sup>2</sup> All dates herein refer to 1990 unless otherwise indicated.

gional Director for the National Labor Relations Board for Region 27 on May 31, 1991, and which is based on a charge filed by International Brotherhood of Electrical Workers, Local 111 (the Union) on March 27, 1991. The complaint alleges that Public Service Company of Colorado (the Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

## Issues

(1) Whether since on or about October 13, Respondent has failed and refused to meet and bargain with the Union concerning wages, hours, and other terms and conditions of employment;

(2) Whether since on or about same date, Respondent has refused to honor dues-checkoff authorizations of unit employees Ronald Hill, James Johnson, and Michael Callaghan.

(3) Whether since on or about December 14, the Respondent has unilaterally contracted out unit work that had been done by the three employees named above for the purpose of laying off said employees.

(4) If Respondent engaged in one or more of the acts in paragraphs 1-3 above, whether Respondent violated the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

## FINDINGS OF FACT

## I. RESPONDENT'S BUSINESS

Respondent admits that it is a corporation which operates as a public utility in the generation, transmission, distribution, and sale of electricity and the distribution and sale of natural gas, with its headquarters located in Denver, Colorado. Respondent further admits that annually in the course and conduct of its business, that its gross volume exceeds \$250,000 and that annually it purchases and receives goods and material valued in excess of \$50,000 directly from points and places outside the State of Colorado. Accordingly Respondent admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Brotherhood of Electrical Workers, Local 111 is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

## 1. Introduction

On December 14, Respondent's temporary employees Ronald Hill, James Johnson, and Michael O'Callaghan were terminated from their jobs. The essential dispute in this case concerns the nature of the work the three had been performing for Respondent; if it was bargaining unit work, then notwithstanding the "temporary" status under which they were

initially hired, other questions and issues arise to be considered in light of the parties' collective-bargaining agreement which has been admitted into evidence as General Counsel's Exhibit 2. If the three employees were not performing bargaining unit work, the inquiry is ended and the case should be dismissed. To decide this important threshold question, I must of course consider carefully the testimony of Hill, Johnson, and O'Callaghan describing the work they were doing and the testimony of their supervisor, Michael Gutierrez, who hired them, with respect to the same subject. In addition, I will review the testimony of other witnesses who performed some or all the work in issue before Hill, Johnson, and O'Callaghan were hired. All this will make more sense in the context of relevant background which is essentially undisputed.

## 2. Background

### a. Respondent's business

As noted above, Respondent is a public utility subject to close state regulation, and according to Respondent witness Gutierrez, limited to 14-percent profit. Sometime in the mid-to late-1980s, Respondent elected to explore the possibility of branching out into a separate but related businesses involving the sale of natural gas as fuel for vehicles (NGV). Described by Gutierrez as nontraditional for a public utility, this program first needed the consent of the state Public Utility Commission to get underway. Then because this aspect of Respondent's business would be unregulated, Respondent needed to decide whether it would engage in this new business or whether a related business entity would be formed to undertake the work. This latter question was also important because Respondent maintained a collective-bargaining relationship with the Union dating from 1946; if a new company was to be formed, Respondent anticipated that it would be nonunion.

During the chronology involving the facts and circumstances of this case, as recited below, all these preliminary questions were resolved. In addition, Respondent hired qualified employees with appropriate background and skills to supplement Respondent's bargaining unit employees who from time to time were loaned to this new project. Also at certain times, independent contractors, both union and non-union, were brought into this nontraditional endeavor to further supplement Respondent's work force.

By the late 1980s and early 1990s new fueling stations were built, some on land owned by Respondent and some on land owned by others. The jobs of building and subsequently maintaining up to 15 fueling stations constitute the bulk of the work in controversy in this case. By comparison, the work of converting a number of vehicles to use natural gas as fuel plays little or no role in this case.

Respondent resolved the questions and performed the tasks recited above, while at the same time performing its traditional role as a public utility, where demands for its services increased with the extremes of weather. Clearly the uncertainties inherent in a new project like that described cannot be ignored.

### b. Certain key employees

So far as the instant case is concerned, a key employee is Gutierrez, employed by Respondent for 16 years. A high

school graduate with about 2 years of technical school training, Gutierrez rose rapidly in the company. Beginning as an apprentice for gas control equipment—a bargaining unit position—he advanced to repairman, then to technician in gas utilization and employee in the testing lab. For 3 years, he worked as an agent for Western Gas Supply Co. (West Gas).<sup>3</sup>

In the late 1980s Gutierrez was asked by his superiors to work on the NGV program on a temporary basis, as the technical coordinator, a supervisory position. Volunteers were solicited from Respondent's bargaining unit employees including West Gas, to work with Gutierrez on this new project. Answering the call for volunteers were three persons who testified for the General Counsel, Rand Myers and Ronald Witman, current employees with West Gas, but no longer associated with the NGV program, and Bruce Lawler, now an employee of the Union.

Because all three of these witnesses were selected from the ranks of OP&M bargaining unit employees to perform bargaining unit work on the project under the supervision of Gutierrez, and ultimately were replaced by Hill, Johnson, and O'Callaghan in early 1990, I examine in detail the testimony of Myers, Witman, and Lawler as to what work they were doing on the NGV program.

Myers (a West Gas employee) began working on the NGV program in the summer of 1989 and stopped in December 1989. He worked on the NGV project 3 days per week and was paid for this work out of a special account maintained by Respondent. The 2 remaining days per week Myers worked as a field operator at the lighting Gas Storage facility. Myers did construction work on the new MGCV service centers<sup>4</sup> during his months on the project. Located mostly in and around the Denver area, these service centers all had compressors and computers on which Myers performed electrical and other work. Other electrical work performed by Myers consisted of bringing power to the various refueling stations. While Myers worked on the MGCV project, he was classified as a natural gas vehicle mechanic; however, he did no work converting vehicles to natural gas.

In the course of performing his duties on the NGV project, Myers worked with Witman who did essentially the same job. Both of them also worked on the NGV project with other Respondent bargaining unit employees such as welders and mechanics.

Myers described employees from independent contractors also working on the NGV project while he was there. For example, Sturgeon Electric, a union employer, supplied employees for complex occasional electric problems. Total fuels, a nonunion employer, supplied employees to engage in the continuous program of rebuilding compressors.

<sup>3</sup> A wholly owned subsidiary of Respondent, West Gas has a separate collective-bargaining relationship with the Union, and is party to a separate contract. West Gas is involved in the transmission of gas while Respondent is involved in the distribution of gas and electricity. (Tr. 24–25.) Whereas West Gas has about 200 bargaining unit employees, Respondent has between 2600 to 2700 bargaining unit employees. Both these units cover operating, production, and maintenance employees (OP&M).

<sup>4</sup> As I understand the testimony, the refueling stations and service centers are different names for the same operation. Accordingly, I have used the terms interchangeably.

After Hill, Johnson, and O'Callaghan were hired, they consulted from time to time with Myers and Witman with respect to job-related questions.

Myers returned to his normal bargaining unit work in December 1989, after his supervisor told him Respondent was hiring employees from outside to perform the work he had been doing for the NGV program.

In September 1988, Witman was asked to volunteer for the NGV project on a 3-day-per-week basis. His assignment with Myers was to maintain the compressor sites and stations. At that time Witman had been a 12-year employee for West Gas as a field operator. He also helped construct some of the new stations.

Witman left the project in late January because he was needed back at his former position on a full-time basis and because Respondent was then in the process of hiring Hill, Johnson, and O'Callaghan.

Finally, as to Lawler, he worked for Respondent during two periods of employment, 1974-1978 and 1982-1989. During his first period, he was ultimately classified as an underground storage operator and was a member of the OP&M unit. Most of his work during this early stage of Respondent's alternate fuels program involved maintenance of a compressor at a single service center.

### 3. Employment of Hill, Johnson, and O'Callaghan

On or about January 21, Gutierrez hired Hill as an inspector of measurement and control. Hill had 22 years of training and experience in electrical technology working in the fields of gas and electricity. Of this time, 13-1/2 years had been spent in the military with the rest in the private sector. Hill has no college education or degrees.

Before he was hired by Gutierrez, Hill had worked for Respondent as an independent contractor for several months during late 1989. His primary job then was as an electrical worker with a specialty involving computers, programing, and systems design. His work included sales and service of personal computers. After he was employed by Respondent, a portion of his work continued to deal with computers, but not with computer programing. In particular, Hill worked with Tec-21 computers. When they needed repairs, Hill pulled the circuitry and sent it to the manufacturer. Occasionally a computer panel would need replacement and Hill could do that job, and so could, according to Hill, any electrician. Finally, Hill did some assembling of computers, using manuals prepared by the manufacturers.

Besides computer-related work, Hill also did construction work, first with Witman and later in 1990 with Johnson and O'Callaghan. In this work, Hill took direction from blueprints prepared by a company called Centennial Engineering.

Hill was paid \$18.63/hour. This is to be compared to the wages earned by Johnson and O'Callaghan who were paid \$16.58/hour. The parties stipulated that \$16.58/hour is identical to pay grade 24 which was paid to Myers and Witman during all times material to this case. (Tr. 286-288.) Pay grade 24 was one of the pay grades set forth in the collective-bargaining agreements between the Union and Respondent and West Gas. (Although separate agreements existed, the pay scales for the two OP&M units were identical.)

In late February or early March, Gutierrez placed a newspaper ad in a local paper. The ad reads as follows (G.C. Exh. 6):

Mechanic

Natural Gas  
Vehicle Station Mechanic

Public Service Company of Colorado is seeking a temporary Natural Gas Vehicle Station Mechanic. Will be involved with the construction, operation, and maintenance of Natural Gas Vehicle fueling and compression equipment. Must have experience with maintenance of high pressure gas compressors and related equipment. Must demonstrate the ability to read wiring and control diagrams and troubleshoot electrical control circuit systems. Should also have experience with high pressure stainless steel tubing. Salary is \$16.50 per hour. If you are qualified, please apply in person at 1400 Glenarm Place, Suite 100, between 9:00 a.m. and 1:00 p.m., during the week of January 22-26.

An Affirmative Action/  
Equal Opportunity Employer

About 15 to 20 persons responded to this ad and from this group 6 applicants were interviewed, and only two were hired, Johnson and O'Callaghan.

Unlike Hill whose independent contract with Respondent had expired or was about to expire when he was hired, Johnson and O'Callaghan were employed when they responded to the ad above. In fact, Johnson left a 5-year job and O'Callaghan left a 7-year job to work for Respondent. Before accepting Gutierrez' offer, both inquired as to the duration of the job. Both Johnson and O'Callaghan, as well as Hill, gave essentially the same account of their hiring interviews with Gutierrez. They were all told that except for paid Federal holidays off, they were to have no other benefits, including no health insurance. This information was of particular concern to O'Callaghan whose young son had a chronic medical condition. However, Gutierrez added to all three in separate interviews that after 6 months they would become permanent and regular employees of Respondent, or they would be afforded an opportunity to go with a new company, then in the process of being formed.<sup>5</sup> In fact sometime during the second quarter of 1990, a company called Natural Fuels was formed.<sup>6</sup> Respondent owned 80 percent of Natural Fuels and in June, Gutierrez' supervisor directed him to begin work on a draft agreement between Respondent and Natural Fuels for the latter to perform the maintenance and any remaining construction work on Respondent's natural gas fueling stations and the equipment such as computers and compressors contained therein. Gutierrez prepared the draft

<sup>5</sup> Gutierrez first testified on direct examination that he did not recall telling Johnson anything about an opportunity to rollover into a job with a new company after 6 months (Tr. 375). Then on cross-examination by Charging Party, Gutierrez reiterated that he never encouraged any of the three to believe they would get a permanent job, "especially with Public Service." (Tr. 419.) Under further cross-examination, Gutierrez testified he told the three "there's a possibility of opportunities," i.e., to work with the new company then being formed or continued employment with Respondent (Tr. 433-434).

<sup>6</sup> In concept, Natural Fuels was to be a nonunion company. The Union did not agree with that concept and attempted to organize Natural Fuels employees. After an election Natural Fuels remains nonunion, the union having lost the election by a single vote.

agreement as ordered (R. Exh. 2). By December, a formal agreement between Respondent and Natural Fuels had been executed (C.P. Exh. 3).

Allegedly because Natural Fuels employees were to perform the work done by Hill, Johnson, and O'Callaghan, they were terminated. However, between employment and termination other relevant events occurred. Returning briefly to their hiring, I note that Hill, Johnson, and O'Callaghan all agree that there was no mention of membership in a union, or performance of bargaining unit work. In fact, the subject of the Union or its collective-bargaining agreement was not to become an issue until Hill and the others had worked for several months.

Sometime in the late summer, Hill, Johnson, and O'Callaghan were all contacted by union stewards who noted the three appeared to be performing bargaining unit work. After the three confirmed the stewards' suspicions as to their job assignments and further expressed no reluctance at joining the Union, they contacted Nancy Sheehan, senior assistant business manager of the Union, and General Counsel witness at hearing, for the purpose of getting more information. In early October, Hill, Johnson, and O'Callaghan filled out applications to join the Union and executed dues checkoffs (G.C. Exhs. 5, 7, and 8) which the Union submitted to Respondent.

On November 28, Sheehan received a phone call from a Respondent clerical employee, informing Sheehan that the payroll dues-checkoff cards would not be honored. Sheehan then wrote a letter to Walt Wagner, Respondent's labor relations representative.<sup>7</sup> The letter reads as follows (G.C. Exh. 3):

International Brotherhood of Electrical Workers  
Local Union No. 111  
Denver Labor Center  
360 Acoma Street, Room 305  
Denver, Colorado 80223

November 28, 1990

Mr. Walt Wagner  
Senior Labor Relations Representative  
Public Service Company of Colorado  
P.O. Box 840  
Denver, CO 80201  
November 28, 1990

Dear Mr. Wagner:

This letter serves as a confirmation of our telephone conversation regarding the Natural Gas Vehicle Mechanics at Public Service Company of Colorado.

As I stated in that conversation, after it became clear that these three mechanics were doing bargaining unit work that had been performed in the past by West Gas employees, specifically Mr. Ron Witman, from Mesa Facility, and Mr. Grant Myer, from Leyden Mine Facility, it was then that I had these three employees sign membership cards for Local 111 and Public Service Company of Colorado Dues Checkoff Form. At this

time, it was not clear to this Local Union what department and division these bargaining unit members were working under.

On November 8, 1990, at 1:00 p.m., Chief Steward, Mr. James Burden and myself had a labor-Management Meeting with Mr. Gerry Venard and at that time, inquired as to the department status of these employees. Although Mr. Venard was cognizant of these three employees working on 3rd & Lipan's property, he was not sure as to where they belonged, but would investigate and get back to me. It was then, on November 9, 1990, that I contacted you and notified you of the situation.

This morning I was contacted by Debbie, from Public Service Company of Colorado's Payroll Department, notifying me that the payroll dues checkoff cards sent in for these employees are not to be processed for the month of December and to be returned to you.

I attempted to contact you, Monday, November 26, 1990, and instead spoke to Mr. Charles Rodgers regarding the Company's position on the department and division, the permanent status of these employees and benefits surrounding this status and any other items that need to be discussed and/or negotiated.

I would appreciate hearing from you as soon as possible, in order to take any necessary measures to adequately represent these Union members, in the event there is a dispute.

I once again thank you for your cooperation in this matter.

Very truly yours,

/s/  
Nancy M. Sheehan  
Senior Assistant Business Manager  
NMS: cb/opeiu#5  
cc: Mason  
Burden  
Hubbard  
Johnson  
O'Callaghan  
Miller

Wagner was called as an adverse witness by General Counsel. He testified that the dues checkoffs had not been honored because Hill, Johnson, and O'Callaghan were not doing exclusively bargaining unit work and therefore they were not covered by the collective-bargaining agreement. In addition, Wagner said, the three employees were to be laid off in the near future (Tr. 20). Wagner explained all this to Sheehan in a telephone conversation on December 4.

While the controversy over the status of the three employees continued between Respondent and the Union, working conditions for the three began to change. In mid-November, Hill, Johnson, and O'Callaghan had a conversation with Gutierrez at one of the refueling stations. The conversation was initiated by the three employees because they wished to clarify Respondent's priorities as to their work. Specifically, they asked Gutierrez whether they should concentrate efforts on maintenance of the stations already constructed or on construction of new stations. Implicit in the question was their inability to perform both activities competently as increasingly, they had been called on to do. To this question,

<sup>7</sup>This letter explains the delay between the time the Union received the executed dues-checkoff cards and the submission of these cards to Respondent's payroll department.

Gutierrez answered that their job was to maintain the stations and to get the construction done as soon as possible and his priority was to get rid of the three employees as soon as possible. No reply was made to Gutierrez' statement. Gutierrez testified that he made this blunt statement (or or about October 23) to the three employees as a kind of favor to them so they could see handwriting on the wall that their terminations were imminent (Tr. 456-457).

About this same time, Johnson overheard Gutierrez talking over the phone to someone saying these guys are playing "union games." When he hung up, Johnson stated he would appreciate it if Gutierrez would not stab him in the back as he and the others were working as fast and as safely as possible. Gutierrez told Johnson that Mike Boose, a supervisor at one of the fueling stations, had been complaining that Johnson, Hill, and O'Callaghan had been deliberately working at a slow pace. Gutierrez told Johnson he knew about this "union stuff." Gutierrez testified that he felt a work slowdown was in progress (Tr. 396).<sup>8</sup>

On or about December 4, Hill, Johnson, and O'Callaghan met with Gutierrez and his supervisor, Kin Hooker, who did not testify. Gutierrez told the three that they would be terminated just as soon as the Natural Fuels contract was signed. The three were then referred to Respondent's personnel department to inquire whether any jobs were available for persons with their qualifications. None were. Then on December 11, Gutierrez told the three employees that this was their last day of work. According to Gutierrez, there was an economic advantage to Respondent in contracting out the work to Natural Fuels. That is Natural Fuels only charges Respondent for the time that Natural Fuels employees are actually working on site (Tr. 438).<sup>9</sup>

#### B. Analysis and Conclusions

##### 1. Did Hill, Johnson, and O'Callaghan share a community of interest with OP&M bargaining unit employees

According to Gutierrez, he did not hire the three named above as bargaining unit members. Rather they were hired as technical employees with specialized skills which would keep them out of the unit. To ascertain whether Gutierrez achieved his goal, I begin with basic Board law as recited by Prof Morris, in *I Developing Labor Law*, p. 416 (2d Ed. 1983):

Community of interest is the fundamental factor in bargaining-unit determination involving previously unrepresented employees. . . . In *Kalamazoo Paper Box*

<sup>8</sup>I find no credible evidence of any work slowdown. First Mike Boose never testified, and the three denied, any such activity. I fail to see what they might gain by a slowdown. I also doubt that Gutierrez truly believed the three employees were so engaged. Even as they were about to be terminated, they were characterized by Gutierrez as "exceptional employees," and referred to Respondent's personnel office for new job leads. About 1 month before hearing, Gutierrez even gave Johnson a positive job recommendation. In any event the alleged slowdown played no role in the terminations of the three (Tr. 454).

<sup>9</sup>At least in the short run, Gutierrez admitted that Respondent's expected cost savings by subcontracting to Natural Fuels had not been realized. Accordingly, Gutierrez renegotiated the contract with Natural Fuels, the results of which remain to be seen. (Tr. 446.)

*Corp.*,<sup>15</sup> a unit-severance case, the Board enumerated the factors to be considered in determining community of interest apart from other employees:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment of plant situs . . . ; the infrequency of lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.<sup>16</sup>

<sup>15</sup>136 NLRB 134, 49 LRRM 1715 (1962). Cf. *Olincraft, Inc.*, 179 NLRB 414, 72 LRRM 1337 (1969) (refusing to sever truck drivers from a production and maintenance unit because of similarity of employee duties and interests).

<sup>16</sup>136 NLRB at 137. While the Kalamazoo case dealt specifically with severance of truck drivers from a production unit, the principles announced in that case have been given general application in cases involving unit severance and in cases involving previous unrepresented employees.

See also *NLRB v. Joe B. Foods*, 953 F.2d 287, 297 (7th Cir. 1992); *Armco, Inc. v. NLRB*, 832 F.2d 357, 362 (6th Cir. 1987).

By the standards described in the above-cited cases, I have little difficulty in finding that Hill, Johnson, and O'Callaghan were performing bargaining unit work and were therefore properly considered to be members of the OP&M unit described in the collective-bargaining agreement. As noted above, the agreement has been received into evidence and describes the relevant unit as follows (G.C. Exh. 2, art. 1, p.2):

#### ARTICLE 1

##### RECOGNITION

1. For purposes of collective bargaining, Company hereby recognizes Union as the exclusive representative of all Operating, Production, and Maintenance employees of the Gas and Electric Operating Departments, including Appliance Servicemen of the Commercial Department, Storekeepers and Warehousemen of the Accounting Department, Custodians, and Health Physics Technicians at Fort St. Vrain; all Electric Distribution Operations Dispatchers, Dispatch Coordinator, Gas Operations Center Dispatchers, Lead Dispatcher in Gas Operations Center, Division Dispatchers in the Boulder and Western Regions and Senior Clerk-Dispatcher in the Mountain Region and all Substation and Line Equipment Test employees; but excluding office clerical employees, managerial employees, professional employees, confidential employees, guards, part time employees doing miscellaneous work, all other employees of the Commercial and Accounting departments, all engineering and other technical employees and all supervisors as defined in the Act and all other employees.

2. Wherever the words "employee" and "employees" are used in the Agreement they shall be construed to refer only to employees included in the bargaining unit as described in Section 1 of this Article, unless otherwise noted herein.

3. This Agreement shall apply only to employees of the Company described in Section 1 of this Article, and shall embody general working rules, hours of work, rates of pay, grievance procedure, method of arbitration, and other conditions of employment as hereinafter outlined.

4. Positions outside bargaining unit. Company reserves the right to assign employees, when agreeable to employee, to supervisory or other positions outside this bargaining unit, which assignment if made, shall not be subject to the provisions of this Agreement.

Without repeating the evidence summarized above, I find that the skills and duties of Hill, Johnson, and O'Callaghan were substantially equivalent to unit employees such as Myers and Witman who came before the three or in the case of Witman overlapped with Hill's tenure. Basically, the three employees were performing construction and maintenance including laying of pipe, electrical work, painting, and mechanical works. The fact that Hill, et al., carried pagers while other unit employees did not, or had slightly greater authority to write purchase orders than other unit employees is of little consequence.

The pay of Hill, et al., was either equivalent to or slightly greater than Myer and Witman. The supervisor, Gutierrez, was the same for all employees, assigned to work on the NGV program during the time in question. Working conditions, work rules, day shift, hours of work, and paid holidays were all the same. As to training and education, I have referred to Hill's education above. Johnson is licensed by the FAA as an aircraft mechanic, and O'Callaghan has a bachelor's degree in Service Management with a State of Colorado teaching credential in vocational training. These differences in background do not support a conclusion different from the one I have reached. And Hill, Johnson, and O'Callaghan's desire to be part of Respondent's OP&M unit must be considered as a factor supporting my conclusion.

Of course, the three temporary employees did not receive the same benefits as regular employees. Even in the absence of a specific provision in the collective-bargaining agreement, this difference in benefits would not affect the status of employees as members of the bargaining unit. See *United States Aluminum Corp.*, 305 NLRB 719 (1991). Here however, there is a specific provision of the collective-bargaining agreement defining "temporary employees" (G.C. Exh. 2, art. 3, sec. 1, p. 6):

### ARTICLE 3

#### DEFINITIONS

1. Temporary Employee. A temporary employee is one hired for a specific job of limited duration not to exceed six (6) months unless a longer period is agreed to by Company and Union in each specific case. An employee may be transferred from temporary to regular employee status as defined in Section 2 below. The last continuous time served as a temporary employee shall be considered as part of the probationary time required in Section 2. Notwithstanding any other provisions in this Agreement to the contrary, temporary employees shall not be entitled to vacation allowance, sick leave

allowance, medical insurance, excused absence, or personal leave days.

It is clear from the above, that a temporary employee can be either bargaining unit or nonbargaining unit. In this case the three allegedly temporary employees drove Respondent vans, completed Respondent's driver training course, carried ID cards like unit employees, and wore Respondent hardhats and raingear. They worked with the normal tools of electricians, mechanics, and other unit employees and for all of the reasons stated above, I find that Hill, Johnson, and O'Callaghan share a community of interest with Respondent's regular OP&M unit described above. See *Capital Insulation Co.*, 233 NLRB 902 (1977).<sup>10</sup>

Finally, I note the testimony of Respondent official Walt Wagner, who testified Respondent refused to process the dues checkoffs for Hill, et al., because the work they were performing was not *exclusively* bargaining unit work (emphasis added) (Tr. 20). This suggests that even Respondent would concede that the three were dual function employees, i.e., employees who spend part of their time working within a bargaining unit and the balance of their time working for the same employer at tasks outside of the bargaining unit. II Morris, *Developing Labor Law*, supra at 1484. Assuming for the sake of argument only that Hill, et al., were dual-function employees, I still find they should be included within Respondent's OP&M unit as their greater community of interest lies there. See *Oxford Chemicals*, 286 NLRB 187 (1987); *Alpha School Bus Co.*, 287 NLRB 698 (1987).

2. Did Respondent violate Section 8(a)(5) and (1) of the Act as alleged

a. *The alleged refusal to honor the dues-checkoff authorizations*

At p. 18 et seq., of its brief, Respondent contends that even if Hill, et al., are found to be bargaining unit employees, it makes no difference to the ultimate outcome of the case. As I understand Respondent's argument, it first refers to temporary employees as defined in the collective-bargaining agreement and recited above (G.C. Exh. 2, art. 3, par. 1). Then Respondent notes the testimony of Union Official Sheehan that the Union usually has no problem in extending the time period worked of a union temporary employee until a project is completed. To be more specific, Sheehan testified that when Respondent has given proper notice to the Union that a temporary employee's 6-month tenure is about to expire "nine out of ten [times] we sit down and we agree to an extension." (Tr. 343.)

Thus, Respondent concludes that the Union would have agreed to an extension of temporary employee status for Hill, et al., if Respondent had acted correctly and as of December 14, they could still have been laid off with impunity. I reject this harmless error/de minimis' contention based on speculation, and note that no Board cases are cited in support of it. Moreover, this argument ignores the dues-checkoff component of the case.

<sup>10</sup> Because I find no independent judgment or specialized training present in the work performed by Hill, et al., I specifically reject any claim that they should be excluded from the unit on the grounds they are "technical employees." See II Morris, *Developing Labor Law*, supra at 1485 and cases cited at fn. 328.

The dues checkoff is a device whereby the employer deducts union dues directly from the employee's pay and remits the amount to the union. Its primary value to the Union is administrative convenience; the time and effort which otherwise would have to be spent making individual monthly collections is eliminated. II Morris, *Developing Labor Law*, supra at 1406.

In the instant case, there is no issue as to the validity of the dues-checkoff authorizations, that is, no claim they were coerced or otherwise invalid. Union security, including dues checkoff, is a mandatory subject of bargaining under Section 8(a)(5) and (d). *Textron, Inc. v. NLRB*, 401 F.2d 205, 210 (4th Cir. 1968). An employer who is a party to an existing collective-bargaining agreement may not modify any term or condition of employment established by that agreement without first obtaining the union's consent. *O.W. Hubbell & Sons, Inc.*, 305 NLRB No. 138 (Dec. 23, 1991) (not reported in Board volumes). This rule includes the dues checkoff which the parties agreed to in the collective-bargaining agreement. (G.C. Exh. 2, art. 2, sec. 4, p. 4.)

Because Respondent refused to abide by the contract and made a unilateral change, I find that on October 13, the date that Hill, Johnson, and O'Callaghan voluntarily executed their dues-checkoff authorizations, Respondent violated Section 8(a)(1) and (5) of the Act. Cf. *Presbyterian Hospital*, 241 NLRB 996 (1979); *R. T. Jones Lumber Co.*, 303 NLRB 841 (1991). See also *Sweet Kleen Laundry*, 302 NLRB No. 121 (Apr. 30, 1991) (not reported in Board volumes).<sup>11</sup>

b. *The alleged unlawful subcontracting*

Article 19, section 9 of the collective-bargaining agreement (G.C. Exh. 2, p. 56) reads as follows:

(a) The Company agrees that it will not contract any work which is ordinarily done by its regular employees for the specific purpose of laying off or demoting such employees. In contracting out work for any major project which is ordinarily done by employees and has not ordinarily been contracted out in the past, the Company shall require in its contracts that the contractor compensate its employees having comparable job classifications to those covered in this Agreement at a level at least equal to the wage scale in Exhibit "B" herein for such job classification or in accordance with any collective bargaining agreement between the contractor and its employees.

(b) In all new construction work where outside contractors may be employed it will be the established policy of the Company to have such work done under Union conditions if possible.

(c) The Company agrees that all contracts to which this section applies shall require the contractor to provide documentation of wage rates the contractor paid to its employees who performed work under the contract to the Company showing the contractor's compliance

with the provisions of the Labor Agreement mandated by this section upon written request from the Union. If a contractor fails to comply with the Labor Agreement provisions mandated by this Section, the Company agrees to take action.

Because I found above that Hill, Johnson, and O'Callaghan were bargaining unit employees covered by the collective-bargaining agreement, the next question is whether they are covered by Section 9 of the agreement recited above. That is, were they regular employees as of December 14. I find that they were. Under article 3, section 1, p. 6 (G.C. Exh. 2) recited above, a temporary employee is an employee hired for a specific job not to exceed 6 months. Through no fault of the Union, Hill, et al., worked in excess of 6 months. Therefore, I find they became regular employees according to the contract after completing 6 months' employment and after Respondent failed to give the Union proper notice that bargaining unit employees had been hired. Because they were laid off as a result of Respondent's subcontracting to Natural Fuels the work Hill, et al., had been doing, the subcontracting was prohibited under the contract.

At this point, it is helpful to refer to the testimony of Respondent's witness Gary Goodwin, Respondent's manager of employee relations. According to Goodwin, in a negotiating session on July 2, he told Union Official Mason, who did not testify, that Respondent would be subcontracting unit work to a new company, Natural Fuels. This statement to Mason was made at a time when there is no evidence to show that Mason was even aware of Hill, Johnson, and O'Callaghan, or that they were performing bargaining unit work, or that they would exceed their 6 months' tenure as temporary employees and therefore become regular employees. For these reasons, I find that the July 2 statement to Mason was not proper notice of Respondent's intent to make a unilateral change in the contract. See *NLRB v. Walker Construction Co.*, 928 F.2d 695 (5th Cir. 1991). It is also unnecessary to determine how, if at all, the case might be affected had the notice to Mason been valid. More specifically, I need not be concerned with any issue of Union waiver of its right to demand bargaining.

Because the collective-bargaining agreement specifically prohibited subcontracting where the result is layoff of regular employees, I find that Respondent violated Section 8(a)(1) and (5) of the Act as alleged by laying off Hill, Johnson, and O'Callaghan as of December 14.<sup>12</sup> In sum, I find the subcontracting in this case has resulted in a substantial adverse effect on bargaining unit employees, i.e., Hill, Johnson, and O'Callaghan. Accordingly, Respondent's failure to give adequate notice to the Union with an opportunity to demand bargaining has violated the Act. See *Equitable Gas Co.*, 245 NLRB 260 (1979), enf. denied 637 F.2d 980 (3d Cir. 1981).

<sup>11</sup> At pp. 10-11 of its brief, Respondent raises the issue of collateral estoppel and res judicata. These are affirmative defenses not raised by Respondent in its answer (G.C. Exh. 1e). It is not necessary to decide whether Respondent's reference to these issues during hearing suffices to put General Counsel on notice (Tr. 59-61). I find that Respondent has failed to meet its burden of proof to show these defenses apply to this case.

<sup>12</sup> At p. 19 of her brief, General Counsel cites *Westinghouse Electric Corp.*, 150 NLRB 1575, 1576 (1965). As I read that case, it applies only in the absence of a specific provision of the contract prohibiting unilateral subcontracting under certain conditions. Compare *Shell Oil Co.*, 166 NLRB 1064 (1967), where a contractual clause existed which implicitly recognized the employer's right to act unilaterally.

## CONCLUSIONS OF LAW

1. Public Service Company of Colorado is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 111 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times relevant herein, International Brotherhood of Electrical Workers, Local 111 was the exclusive representative of all the employees in the appropriate unit set forth below for purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act:

## ARTICLE 1

## RECOGNITION

1. For purposes of collective bargaining, Company hereby recognizes Union as the exclusive representative of all Operating, Production, and Maintenance employees of the Gas and Electric Operating Departments, including Appliance Servicemen of the Commercial Department, Storekeepers and Warehousemen of the Accounting Department, Custodians, and Health Physics Technicians at Fort St. Vrain; all Electric Distribution Operations Dispatchers, Dispatch Coordinator, Gas Operations Center Dispatchers, Lead Dispatcher in Gas Operations Center, Division Dispatchers in the Boulder and Western Regions and Senior Clerk-Dispatcher in the Mountain Region and all Substation and Line Equipment Test employees; but excluding office clerical employees, managerial employees, professional employees, confidential employees, guards, part time employees doing miscellaneous work, all other employees of the Commercial and Accounting departments, all engineering and other technical employees and all supervisors as defined in the Act and all other employees.

4. During all times relevant to this case Hill, Johnson, and O'Callaghan performed bargaining unit work and were therefore covered by the collective-bargaining agreement.

5. On October 13, Respondent violated Section 8(a)(1) and (5) of the Act by making a unilateral change in the collective-bargaining agreement in that Respondent failed to process valid dues-checkoff authorization for unit employees, Hill, Johnson, and O'Callaghan.

6. Hill, Johnson and O'Callaghan became regular employees after 6 months' employment as temporary bargaining unit employees, when Respondent failed to give the Union timely notice of their employment.

7. On December 14, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally subcontracting unit work that had been done by Hill, Johnson, and O'Callaghan, for the purpose of laying off said regular employees.

## THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, by making a unilateral change in the collective-bargaining agreement by failing to process valid dues-checkoff author-

izations for unit employees Hill, Johnson, and O'Callaghan and by unilaterally subcontracting unit work done by the same three regular unit employees for the purpose of laying off said employees, I shall recommend that Respondent be ordered to cease and desist from such conduct. I shall also recommend that Respondent be ordered to offer Hill, Johnson, and O'Callaghan immediate and full reinstatement to their former jobs displacing, if necessary, any replacements or, if these jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges as regular employees, and make them whole for any losses of pay suffered as a result of the discrimination against them with backpay computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962). I shall also recommend that Respondent be required to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

## ORDER

The Respondent, Public Service Company of Colorado, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to honor dues-checkoff authorizations for unit employees.

(b) Subcontracting unit work done by regular employees for the purpose of laying off regular employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

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

(a) Make Hill, Johnson, and O'Callaghan whole for any loss of pay suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Offer to Hill, Johnson, and O'Callaghan immediate and full reinstatement to their former jobs, as regular employees, displacing, if necessary, any replacements or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges as regular employees, said status beginning after 6 months of their employment as temporary employees.

(c) On demand, offer to bargain with the Union over any subcontracting out of unit work.

(d) Restore the subcontracted work in issue in this case to the bargaining unit described in the collective-bargaining agreement (G.C. Exh. 2).

(e) Honor the dues-checkoff authorizations for Hill, Johnson, and O'Callaghan and remit any deducted moneys to the Union, including that deducted from backpay.

<sup>13</sup>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."

(f) 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 analyze the amounts on backpay due under the terms of this recommended Order.

(g) Post at its refueling and service centers within the State of Colorado copies of the attached notice marked "Appendix."<sup>14</sup> Copies of said notice on forms provided by the Re-

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<sup>14</sup>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

gional Director for Region 27, after being signed by the Respondent's representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

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Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."