

**Tel Plus Long Island, Inc., Tel Plus Communications, Inc., Tel Plus New York City, Inc., and Siemens Information Systems, Inc., a single employer and Local 25, International Brotherhood of Electrical Workers, AFL-CIO. Case 29-CA-13233**

November 26, 1993

**PROPOSED DECISION AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH**

Upon a charge filed by Local 25, International Brotherhood of Electrical Workers, AFL-CIO (Local 25), on September 25, 1987, and an amended charge filed on October 25, 1988, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on November 30, 1988, alleging that Tel Plus Long Island, Inc., Tel Plus Communications, Inc., and Siemens Information Systems, Inc. (collectively the Respondents) violated Section 8(a)(5) and (1) of the Act by engaging in the following actions: unilaterally and without the consent of the Union, Local 25, and in derogation of the terms of the collective-bargaining agreement, ceasing operations at its Tel Plus Long Island facility and transferring the unit work that had been done there to outside sources in order to reduce labor costs; making unilateral midterm modifications in unit employees' terms and conditions of employment; and refusing to negotiate a successor agreement or otherwise bargain with Local 25. The Respondents filed a timely answer, admitting in part and denying in part, the complaint's allegations. From March 6 through June 16, 1989, Administrative Law Judge Harold Lawrence presided over 12 days of hearing, during which all sides presented documentary and testimonial evidence and had an opportunity for cross-examination.<sup>1</sup> After the close of hearing, but prior to the issuance of a decision, Judge Lawrence died. Thereafter, the parties agreed to transfer the proceeding directly to the Board for decision. All parties filed briefs to the Board.<sup>2</sup>

<sup>1</sup>At the outset of the hearing, counsel for the General Counsel moved to amend the complaint by adding Tel Plus New York City as an additional Respondent. We affirm the judge's ruling granting the amendment.

<sup>2</sup>The Charging Party Union filed a motion to reject the Respondents' posthearing brief, the Respondents replied and the Charging Party responded to the Respondents' reply letter. Thereafter, the Respondents notified the Board of alleged misrepresentations in the briefs of the Charging Party and the General Counsel; the Charging Party responded that the Respondents' brief contained objectionable and inappropriate statements, to which the Respondents countered with citations to Board rules prohibiting such response; and the General Counsel moved to strike the Respondents' letter reply brief. Given the unusual posture of this case, in that the Board is acting as the trier of fact, and in the interest of protecting the parties' due process rights, the Board is exercising leniency in the enforcement of its rules in this instance to allow the parties to air fully their posi-

On the entire record<sup>3</sup> and briefs, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, Tel Plus Long Island, Inc. (TPLI), until its dissolution on about March 31, 1988, was a New York corporation with an office and principal place of business in Ronkonkoma, New York, where it was engaged in the sale, installation, and maintenance of communications equipment. During the 12-month period preceding its cessation of operations and corporate dissolution, a representative period, TPLI in the course and conduct of its operations purchased and received at its New York facility, goods and materials valued in excess of \$50,000 purchased directly from sources outside the State of New York. The Respondent, Tel Plus Communications, Inc. (TPC), a Delaware corporation with an office and principal place of business in Boca Raton, Florida, is engaged in the sale and maintenance of communications equipment. During the 12-month period preceding issuance of the complaint, a representative period, TPC in the course and conduct of its operations purchased and received at its New York facility, goods and materials valued in excess of \$50,000 directly from sources located outside the State of New York. The Respondent, Tel Plus New York

City, is engaged in the sale and maintenance of communications equipment. Therefore, the Board accepts the Respondents' brief and will accord the subsequent contentions of the parties in their various communications the weight due them.

It should be noted further that on June 14, 1991, the Board issued its decision in *Dubuque Packing Co.*, 303 NLRB 386, enfd. in relevant part 142 LRRM 2001 (D.C. Cir. 1992). Because certain contentions of the parties in the instant case relate to issues dealt with in *Dubuque*, by order of December 6, 1991, the Board provided the parties an opportunity to submit supplemental briefs. The General Counsel, the Respondents, and the Charging Party each filed supplemental briefs. Thereafter, the Respondents requested leave to file a reply brief. The Charging Party and the General Counsel opposed this request. The Board granted the Respondents' motion. All parties subsequently filed reply briefs.

Finally, on October 25, 1993, the Respondents filed a motion to reopen the record for the introduction of supplementary evidence demonstrating that certain remedies sought by the General Counsel would be inappropriate and unduly burdensome in light of events which occurred subsequent to the close of hearing. The General Counsel and the Charging Party filed oppositions to the reopening motion, and the Respondents filed a reply to the opposition. We deny the Respondents' motion and note that the Respondents will have the opportunity to introduce all relevant evidence at the compliance stage of this proceeding. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

<sup>3</sup>As described above, this case was transferred directly to the Board for decision as a result of the expressed preference of all the parties. Unlike a presiding judge, however, the Board is not able to make credibility determinations based on demeanor and must, instead, rely solely on the record of the proceedings below. Accordingly, we have relied on admitted or stipulated facts, uncontroverted testimony, nonself-serving testimony, documentary evidence, and logical inferences drawn therefrom in reaching our findings concerning the events of this case.

City (TPNYC), a New York corporation with an office and principal place of business in Long Island City, New York, is engaged in the sale, installation, and maintenance of communications equipment. During the 12-month period immediately prior to the issuance of the complaint, a representative period, TPNYC in the course and conduct of its operations purchased and received at its New York facility, goods and materials valued in excess of \$50,000 directly from sources located outside the State of New York. The Respondent, Siemens Information Systems, Inc. (Siemens), a Delaware corporation with a principal office and place of business in Boca Raton, Florida, is engaged in the sale of communications equipment. During the 12-month period preceding issuance of the complaint, a representative period, Siemens purchased and received at its Florida facility, goods and materials valued in excess of \$50,000 directly from sources located outside the State of Florida.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union (Local 25) is a labor organization within the meaning of Section 2(5) of the Act.

## II. CONDUCT OF HEARING

During the hearing, counsel for the General Counsel called eight witnesses: John Gilday, Local 25 business representative and its chief negotiator and contract administrator dealing with the Employer since 1981; Richard Brook, legal counsel for Local 25; John Kennedy, Local 25 business manager; Anthony Padrevita, Local 25 unit member; Pasquale Santoro, unit member; Richard Lockwood, unit member; Patrick Walsh, unit member; and Joseph Hart, former Local 25 unit member who later worked at Long Island as a Local 1109 Communications Workers of America (CWA)/TPC employee.

The Respondents called five witnesses: Glen Means, TPC's director of business administration for the eastern region; Paul McDonough, counsel for TPC; Patricia Dinon, TPC's district operations manager for New York City; David Montanaro, former vice president and later consultant for TPC; and Thomas Piekara, an associate with the law firm representing the Respondents in this proceeding.

## III. BACKGROUND

TPLI, the immediate Employer of the unit employees, was the final incarnation of a business that had been party to successive collective-bargaining agreements with Local 25 for over 10 years. In January 1976, Telecom Equipment Corporation (TEC), a telephone interconnect company located in Long Island

City,<sup>4</sup> entered into its initial collective-bargaining agreement with Local 25. The contract covered technicians who performed telephone installations, moves and changes, and service work for the Employer in Nassau and Suffolk counties.<sup>5</sup>

Initially, the employees were dispatched by telephone from Long Island City to their worksites on Long Island. TEC maintained only a desk and a locker at a small leased space in Syosset, Long Island. In 1978, TEC opened a small sales office, staffed with a receptionist and secretary, in Melville, Long Island. In 1979, the Long Island operation was relocated to a larger facility in Lindenhurst, which housed the sales and warehouse functions as well as the dispatching operations. There were approximately 20 employees in the unit at that time. In 1981, on acquiring Unitel Resources Corporation (Unitel), TEC relocated its sales, installation, service, and moves and changes departments to Unitel's building in Ronkonkoma, Long Island. TEC recognized Local 25 as representative of Unitel's 25 previously unrepresented technicians, who then became part of the bargaining unit.

On May 1, 1982, on the expiration of the contract between TEC and Local 25, Unitel signed a 2-year agreement with Local 25. In November 1982, TEC changed its name to Telecom Plus International, Inc. (TPI) and Local 25 sought to have the contract modified to reflect this new nomenclature. In mid-1983 Unitel's president signed revised contract pages showing that the Employer's name had changed to Telecom Plus of Long Island, Inc., (TPLI) an operating company of TPI. In August 1984, TPI and Siemens Communications Systems, Inc.,<sup>6</sup> created a holding company called Tel Plus Communications, Inc. (TPC). TPI's 15 former operating companies, including TPLI, became TPC subsidiaries. Siemens held 20 percent of the TPC stock and TPI held 80 percent. TPC's corporate headquarters was established in Long Island City, at a joint location with TPI.

Late in 1984, TPI acquired Noramco, an interconnect company with operations in New York State, New Jersey, and Florida. TPI absorbed Noramco's customers. TPLI took over Noramco's Long Island operation and added its formerly unrepresented technicians to the bargaining unit.

In 1986, Telecom Plus of Long Island, Inc., became known as Tel Plus Long Island, Inc. (TPLI). During June 1986, TPLI signed a successor agreement with Local 25, running through April 1988. On March 24,

<sup>4</sup>Long Island City is located in the borough of Queens in the city of New York.

<sup>5</sup>The unit was limited to employees working within Nassau and Suffolk counties (Long Island) because the Union's geographic jurisdiction was limited exclusively to those counties (c)

<sup>6</sup>Siemens Communications Systems changed its name to Siemens Information Systems in 1985.

1987, Siemens purchased all shares of TPC, becoming its sole stockholder.

Throughout this period of change and growth, the manner in which employees received assignments and performed their work remained unaffected. The Employer used a telephone dispatch system and delivered supplies directly to customer sites, thereby eliminating the need for employees to report to a central facility each day to receive assignments and pick up equipment. Technicians were provided with company trucks, which they could drive home at the end of each workday, and they reported directly to telephonically assigned job locations the following morning. Unit employees, therefore, were required to report to the Employer's facility only when it was necessary to pick up their paychecks or to obtain additional supplies.

05 ✓ **3A. Work Preservation Clauses**

Since the inception of the parties' bargaining relationship, each successive contract has contained certain clauses relating to work preservation and subcontracting. Those appearing in the parties' most recent contract (the 1986-1988 agreement) include: Section 2.02—"Scope of the Work," which defines bargaining unit work to include installation, repair, service and maintenance work, and requires that all bargaining unit work be performed by bargaining unit employees.<sup>7</sup> Section 2.03—"Area" outlines the contract jurisdiction as extending to all unit work performed in Nassau and Suffolk counties on Long Island.<sup>8</sup> Section 7.01—"Union Obligations to IBEW" restricts the employer from subcontracting bargaining unit work if such action would cause the loss of work for the unit.<sup>9</sup> Sec-

<sup>7</sup> Art. II sec. 2.02—Scope of Work

This Agreement shall govern the performance of the work performed now or in the past by the bargaining unit and shall include, but is not limited to, the following tasks and jobs by the Employer and its Employees: all installation . . . and all directly related work which becomes an integral part of the telephone and/or telephone related system, repair, and service maintenance work at the premises of the Employer or its customers of Telephone Communications systems and devices . . . The aforesaid tasks shall be referred to hereinafter as the "telephone unit" or "telephone employees" or as the "bargaining unit" or "bargaining unit Employees." It is understood that all bargaining unit work is to be performed by bargaining unit employees.

<sup>8</sup> Art. II sec. 2.03—Area

This Agreement shall govern all of the Employer's bargaining unit work as described in Section 2.02 of this Article within the territorial jurisdiction of the Union which consists of Nassau and Suffolk Counties in the State of New York.

<sup>9</sup> Art. VII sec. 7.01—Union Obligations to IBEW

The Employer further agrees that he will not sublet, assign or transfer any work covered by this Agreement to any other person, firm or corporation if such subletting, assigning or transfer will cause the loss of work opportunities to Employees in the Employer's establishment covered by this Agreement. Any such subletting, assigning or transfer shall be allowable after mutual determination has been made by the representatives of the parties hereto that such action is not in conflict with the preceding sentence.

tion 24.01—"Transfer of Business, Relocation" requires the employer to notify Local 25 in the event of the sale or transfer of the business and requires any transferee to assume the collective-bargaining agreement.<sup>10</sup> With the exception of section 2.02 which was added in 1986, these clauses have been maintained virtually unchanged since 1976.

**B. The Parties' Dealings** 5-1

During contract negotiations in 1984, TPLI sought to modify the language in article VII restricting subcontracting. Its proposal would have permitted the Employer to subcontract work as long as no layoff, discharge, or termination of a currently employed unit employee resulted. Local 25 did not agree to the change. During the same negotiations, TPLI also unsuccessfully sought to eliminate the transfer of business/contract obligation clause from section 24.01.

In 1985, TPLI again proposed changing article VII to broaden its subcontracting rights. Again, Local 25 did not agree. The following year, citing increasing financial losses, TPC Eastern Region Group Vice President David Montanaro asked corporate counsel, Paul McDonough, to try to negotiate relief from the contract's restrictions on subcontracting. TPLI's/TPC's first proposal would have given it the absolute right to subcontract work to any Local 25 subcontractor (i.e., any company having a collective-bargaining agreement with Local 25) and to subcontract to any non-Local 25 subcontractor so long as no current employee would be laid off. The second proposal would have permitted unrestricted subcontracting to any Local 25 subcontractor as well as subcontracting to any subcontractor if both Local 25 and TPC determined that unit employees would suffer no loss of work opportunities as a result. The Employer's third proposal would have permitted unrestricted subcontracting of small installations to any Local 25 subcontractor, but with advance notice to Local 25 which could reject the assignment within 24 hours for good cause. Local 25 did not agree to any of these proposals. In a further effort to achieve more latitude in work assignments, TPLI also unsuccessfully attempted in 1986 to limit the scope of the bargaining unit work to work being performed at that time at the customer's worksites.

In July 1986, at the conclusion of negotiations and not long before a scheduled move into a new facility in Commack, Long Island, Montanaro announced that the move would not be taking place. At about the same time, TPLI Vice President John Peters advised

<sup>10</sup> Art. XXIV sec. 24.01—Transfer of Business, Relocation

If the Employer sells, assigns, leases or otherwise transfers the control, operation or assets of its business to another person, company, corporation or firm, the Employer will, (a) notify the Union . . . (b) notify such transferee . . . (c) require such transferee to assume the obligations as well as the benefits of this Agreement.

Local 25 Business Representative John Gilday that the Company had decided to take the following steps to resolve certain market and internal problems: parts of the Ronkonkoma, Long Island facility would be consolidated with the TPNYC operation located in Long Island City so that TPLI would be operating as a branch of TPNYC; and all Long Island support functions, including dispatch, material control, accounting, and some sales support would be transferred to Long Island City. Peters stated that these changes would have no effect on unit employees. The changes occurred shortly thereafter.

In December 1986, McDonough and Peters, in a meeting with Gilday to discuss TPLI's continued financial losses, raised the possibility of a wage freeze or rollback for unit employees. Gilday testified that he told them that employee ratification of a freeze would be "difficult" because all of its telephone bargaining group employees, not just the TPLI unit, would have to vote on it, and not all employers were facing the same problems as TPLI.<sup>11</sup> McDonough testified that Gilday stated that the matter was "not even worth formally proposing" because of problems associated with most favored nations clauses and prevailing wage standards linking all other IBEW companies into the process. Gilday also stated at this meeting that a number of employees had complained to him about operational inefficiencies which they attributed to the transfer of the dispatch and parts functions to Long Island City.

On February 26, 1987,<sup>12</sup> TPLI's attorney, Robert Lewis, sent Gilday a letter advising him of TPLI's agreement to sell its interest in TPC, TPLI's owner, to Siemens. Lewis also requested a meeting to discuss the collective bargaining agreement between Local 25 and TPLI.

During the first quarter of 1987, Montanaro met several times with Siemens' president and chief executive officer (CEO), H. Werner Krause, to discuss the Company's losses. In March 1987, when Krause also became president and CEO of TPC, he asked Montanaro for a report on TPC's eastern region and instructed him to find ways to decrease costs through staff reductions and by consolidating or eliminating unprofitable operations.

On March 25, Gilday and Local 25's attorney, Richard Brook, met with Lewis and his associate, Tom Piekara. Lewis announced first that Siemens had acquired full ownership of TPC the day before and, second, that although its contract with Local 25 remained

<sup>11</sup> Local 25's contracts with telephone industry employers contained a "Most Favorable Terms" clause requiring Local 25 to: (1) notify them of any agreement with other employers providing better terms than those set forth in the contract and (2) to make those terms available to other employers.

<sup>12</sup> Dates hereafter refer to 1987 unless otherwise indicated.

in effect, TPLI was suffering substantial financial losses and was interested in increasing profitability. Citing the practice of the Company's competitors, Lewis asked whether Local 25 might agree to the subcontracting of installation work. Gilday did not agree to any form of subcontracting outside of the procedures set forth in the contract, and simply reiterated employees' observations about dispatch inefficiencies and problems with materials.

In April, TPC Representatives Montanaro and Means reported back to Krause with recommendations to reduce and consolidate staff in an effort to achieve savings.<sup>13</sup> While concurring with their recommendations, Krause stated that these measures were still insufficient and that he wanted further staff reductions. Montanaro testified that the only area left to consider was the consolidation of field operations. He said he believed that the Company would achieve certain efficiencies and economies by consolidating the TPLI and TPNYC field operations into a unified work force. He cautioned Krause, however, that any such changes would require discussions with the appropriate unions prior to any decisions or actions. Montanaro testified that among the problems associated with integrating the TPLI and TPNYC work forces were differences in the geographic jurisdictions and work rules of the two unions that represented them. For example, TPNYC employees, represented by CWA Local 1109, could be assigned to work throughout TPNYC's entire service area, whereas the TPLI employees, represented by Local 25, were limited to jobs located within Nassau and Suffolk counties. Montanaro testified that if the work force could be consolidated, the elimination of geographic dispatching boundaries would lead to superior customer service through quicker response times.

On May 21, Lewis, McDonough, and Piekara met with Brook and Gilday. Lewis reported that TPLI had sustained significant losses during the first quarter of the year and that while management had taken Local 25's reports of inefficiencies to heart, it had considered every option short of closing the TPLI operation to try to save money. Lewis stated that closing appeared now to be a possibility. McDonough described TPLI's overhead as the overriding issue; Lewis added that a general restructuring was underway. The Respondents' representatives were unable to answer Gilday's question concerning the likelihood of obtaining new installation work, nor were they able to predict what would

<sup>13</sup> Montanaro testified that he made the following recommendations: staff reductions in nearly every department; deferring the implementation of a new telemarketing department; consolidating management by combining the Marlton, New Jersey, and Philadelphia operations into a single facility in Cherry Hill, New Jersey; combining West Haven and Norwalk into an office in Shelton, Connecticut; consolidating the New York and Long Island operations; bringing management from Newburgh, New York, into Albany; and combining Binghamton with Syracuse.

happen to unit employees' jobs if the Ronkonkoma facility closed. The meeting ended without proposals from either side as to how to deal with the situation. The next day Brook wrote to Lewis requesting the opportunity for a Local 25 accountant to review some of TPLI's financial documents before making a final decision.

By letter of May 26, Lewis requested a meeting with Gilday to discuss the possible cessation of TPLI operations. The letter stated that TPLI did not consider itself legally obligated to discuss the matter and asked that Local 25 keep the situation confidential in order to lessen the potential loss of business from public disclosure. Lewis further stated that if a decision to close TPLI were made, it would meet with Local 25 to discuss the effects on employees.

A meeting was held on June 16. In attendance were Lewis, Piekara, McDonough, Brook, and Local 25 Business Representative John Kennedy. Lewis described ongoing corporate restructuring and changes in corporate titles among Respondent companies. Brook stated that he wanted to meet with the individual responsible for making decisions regarding corporate changes in order to discuss the continuation of bargaining unit work. Lewis replied, "I am it. I am authorized to meet with you and will relay your position."

Lewis outlined three possible options for the future of TPLI. The first was to continue operations status quo. The second was to close the Long Island operation and have its work done out of the Long Island City facility. The third was to sell the Long Island accounts to another company. In response to Brook's question as to what the impact of the various options would be on the bargaining unit, Lewis said that the first option would leave the unit unaffected; the second would eliminate the unit; and the third presented an open question, in that the accounts could either be scattered piecemeal to different companies or sold in their entirety to a single company.

Brook wrote to Lewis, 10 days later, concerning a rumor circulating among employees that a TPLI customer stated that TPC planned to eliminate the bargaining unit by October. Brook stated that Local 25 would not accept the elimination of the unit.

The parties met on June 30 to discuss the future of TPLI. Lewis stated that no decision had been made regarding TPLI's continued operation<sup>14</sup> and reiterated the three options under consideration. Brook stated that option one would be fine with Local 25, that its position on option two was that the contract's work preservation clauses would bind TPLI to its obligations under the collective-bargaining agreement, and that as

<sup>14</sup>Lewis also responded to the concerns raised in Brook's letter. By letter dated June 30, Lewis stated that TPLI could not be responsible for statements from third parties and that no decision about the Long Island operation had yet been reached.

to option three, section 24.01 of the contract would require a purchaser to assume the obligations of the collective-bargaining agreement. Noting that Local 25 was not proffering any suggestions at that point, Lewis stated that he would let them know what was decided.

### *C. Announcement of Unit Termination Decision and Subsequent Dealings*

By letter dated July 17, Lewis notified Brook that TPC had decided to terminate TPLI's operation on September 30.

On July 21, John Peters met with TPLI employees in the Ronkonkoma parking lot to tell them of the Respondents' plans. He said that financial losses suffered during the past 2 years, coupled with TPLI's desire to subcontract installation work in the face of limitations imposed by Local 25's jurisdictional boundaries prompted the decision to end TPLI's operation. He stated that TPLI's existing accounts would be taken over by Long Island City.

On July 22, Brook responded in writing to Lewis' letter. He asked what TPLI anticipated occurring on September 30 and reminded him of Local 25's position that a physical relocation of the Ronkonkoma office staff to Long Island City should not affect the operation of the Long Island work. He further stated that because TPLI appeared to be planning to continue to provide service to its Long Island customers, the collective bargaining agreement remained in effect and its work preservation clauses protected the unit's employment opportunities.

By letter of July 31, Lewis replied that he expected the TPLI operations to terminate on September 30 and that technicians employed at that time would be available for Local 25 to refer to other jobs. Asserting his belief that no legal deterrent affected the Respondents' plan, Lewis asked Brook to cite specifically the work preservation clauses that he believed limited the Respondents' action.

On August 7, in a letter requesting that the Respondents reconsider their decision, Brook listed the parts of the contract (outlined above) he believed were relevant. By letter of the same date, Lewis asked whether Brook wanted to meet to discuss the Respondents' decision.

On August 10, Brook advised Lewis that because Local 25 wanted TPLI to continue to employ its members and operate under the terms of the collective-bargaining agreement, it wanted TPLI to reconsider the decision to transfer the unit work to nonbargaining unit employees. Brook asked what Local 25 could do to cause the decision to be changed. Brook also noted that Lewis had been the conduit for all prior discussions between the parties, that Local 25 was never permitted to meet directly with senior company officials, and that Lewis had not given Local 25 any suggestions

as to what concession might persuade the Company to abide by the collective-bargaining agreement. That same day, Lewis sent Brook a letter requesting a meeting to discuss the effects of the planned "closing" on Local 25 members.

Several letters between Lewis and Brook followed, each essentially reiterating the parties' respective positions concerning the propriety of the proposed closing of TPLI and transfer of its operations. On August 21, Lewis advised Brook by letter that the Respondents had reaffirmed their decision concerning the Ronkonkoma facility, but that the effective date would be extended 1 month to October 30 to allow more time for effects bargaining.

On September 25, Brook wrote to Lewis that because Local 25 did not accept the decision to cease using bargaining unit employees, it would not agree to meet for effects bargaining, but that the Union remained willing to meet to discuss the decision itself. On the same date, Local 25 filed the instant unfair labor practice charges.

During October, a series of three layoffs of unit employees took place. The last of these resulted in the termination of the entire bargaining unit.

On October 30, Lewis wrote to Gilday advising him that with the cessation of TPLI's operations, the collective bargaining agreement, which by its terms was effective through April 30, 1988, was being terminated. Brook advised Lewis by letter, 5 days later, that Local 25 did not agree that TPLI had ceased its operations on Long Island, but that, in fact, a "new" work force had started working on Long Island before October 30.

On November 20, Local 25 filed a grievance alleging violation of the contract's work preservation clauses. By letters of November 25<sup>15</sup> and December 9, Lewis addressed the scheduling of a "step two" grievance meeting. On January 27, 1988, however, Lewis' letter indicated that if Local 25 decided to seek arbitration, TPLI would claim that the grievance was not arbitrable. Subsequently, according to Brook's testimony, Local 25 made a tactical decision not to pursue the grievance and elected instead to continue with the unfair labor practice charges.

On January 26, 1988, Local 25 Business Manager Kennedy notified TPLI in writing that Local 25 sought to negotiate a successor agreement. By letter of February 1, 1988, Lewis replied, "The agreement you refer to was terminated October 30, 1987 upon cessation of operations . . . . Accordingly, we decline your request."

<sup>15</sup> In his November 25 letter to Gilday, Lewis pointed out that he was not conceding the grievability of the subject being grieved by Local 25.

#### IV. ANALYSIS

##### A. Deferral

The Respondents have raised as an affirmative defense that the complaint allegations are not properly before the Board because the matter should have been deferred to the arbitration process. For the following reasons we disagree and we find that the issues are appropriate for resolution by the Board.

The evidence shows that following the Respondents' October 1987 termination of the unit employees, the Union filed a grievance alleging that the termination breached several articles of the collective-bargaining agreement.<sup>16</sup> On receipt of the grievance, by letter of November 25, the Respondents, through Attorney Lewis, refused to concede the grievability of the issue and questioned Local 25's noncompliance with "step one" of the grievance process. Lewis' letter did not offer an explanation for its espoused positions. A month later, following the parties' first meeting on the grievance,<sup>17</sup> the Respondents disputed the arbitrability of the issue. At that point Local 25 decided to pursue its remedies exclusively through the then pending unfair labor practice charges.

A year later, on January 3, 1989, in answer to the Board's complaint, the Respondents first asserted that the matter should be resolved through the grievance machinery. The Respondents later reasserted the deferral defense during the sixth day of hearing in this proceeding as well as in their posthearing briefs.

The Board enunciated the standards it would follow for deferring to the parties' grievance-arbitration procedures in *Collyer Insulated Wire*, 192 NLRB 837 (1971): First, the dispute must arise "within the confines of a long and productive collective bargaining relationship" and no "enmity by Respondent to employees' exercise of protected rights" may exist. Second, the Respondent must have "credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace the 'dispute before the Board.'" Finally, the contract and its meaning must lie at the center of the dispute.<sup>18</sup>

In urging deferral, the Respondents characterize their relationship with Local 25 as "good" and "very cordial," noting particularly TPLI's voluntary recognition of Local 25 as representative of the formerly unrepresented Unitel employees following the acquisition of that company. In fact, the record supports the Respondents' characterization of the parties' relationship

<sup>16</sup> A copy of the grievance, signed by Gilday, was entered into the record as G.C. Exh. 17. While the date appearing at the bottom of the grievance is somewhat unclear, we find, based on other record evidence, that the grievance was signed on November 19, 1987.

<sup>17</sup> The parties held a step two meeting on December 29, 1987.

<sup>18</sup> 192 NLRB at 842.

as long established and, at least until the events here complained of, amicable. In addition, the Respondents assert that: (1) the contract's grievance-arbitration language was sufficiently broad to encompass this dispute; (2) resolution of the contractual dispute through arbitration will also resolve the statutory issues; and (3) it is now willing to move forward with an arbitration proceeding and to waive any procedural claims that it may otherwise have asserted regarding the timeliness of Local 25's initial grievance action.

The General Counsel and Local 25, on the other hand, argue that deferral is inappropriate inasmuch as the contract provisions at issue are clear on their face and do not require the special interpretive skills of an arbitrator; the Respondents' conduct constituted a repudiation of the principles of collective bargaining and an abrogation of its bargaining relationship with the Union; the Respondents had manifested reluctance to use the grievance-arbitration mechanisms at the time Local 25 filed the grievance; and arbitration will not provide a full remedy for the violations alleged.<sup>19</sup>

We conclude that deferral to the parties' negotiated grievance procedure is unwarranted in this case. Contrary to the Respondents' fundamental contention, we find that by dismissing all unit employees, terminating the collective-bargaining agreement at midterm, and subsequently refusing Local 25's request to negotiate a successor agreement, the Respondents demonstrated quite the opposite of a currently "productive collective bargaining relationship." Instead, those actions suggest that the Respondents may have been attempting to escape altogether their contractual obligations rather than to resolve their disputes through mutually agreed-upon methods. Thus, the conduct at issue does not involve a simple question of whether an employer breached a particular contract term—a matter within the special competence of an arbitrator—but rather deals with issues presented by the Respondents' wholesale repudiation of an entire collective-bargaining relationship. As stated in *United Technologies Corp.*,<sup>20</sup> the Board will not defer in cases "where the respondent's conduct constitutes a rejection of the principles of collective bargaining."<sup>21</sup> In circumstances such as these, where there is no simple issue of contract interpretation, but instead an overriding issue of fundamental compliance with the Act—a matter within the Board's special

<sup>19</sup> Two grounds are asserted for this contention: (1) because TPLI was the only corporate entity that was party to the contract, an arbitrator may be unwilling or unable to impose remedial liability on the other corporate entities comprising the single employer; and (2) an arbitrator may not be able to order the Respondents to restore the lost work or to compel the negotiation of a successor agreement.

<sup>20</sup> 268 NLRB 557 (1984).

<sup>21</sup> *Id.* at 560, citing dissent in *General American Transportation Corp.*, 228 NLRB 808, 817 (1977).

competence—deferral will be denied.<sup>22</sup> Accordingly, we find that deferral to the parties' grievance-arbitration mechanism is not warranted and the allegations of the complaint should be decided by the Board.<sup>23</sup>

### B. Single Employer Status

The Respondents admit that: (1) on June 11, 1986, TPLI and TPNYC became a single employer; (2) since March 24, 1987, TPC has been a wholly owned subsidiary of Siemens; (3) on September 29, 1988, TPLI was merged into TPC; (4) on October 1, 1988, TPNYC and TPC became a single employer; (5) on October 15, 1988, TPNYC was merged into TPC. Thus, the Respondents are admitting the single employer status of TPC, TPLI, and TPNYC, leaving in dispute only the status of Siemens vis-a-vis these other entities.

The standards for assessing single employer status are aptly summarized in *Central Mack Sales*, 273 NLRB 1268, 1271-1272 (1984), citing *Bryar Construction Co.*, 240 NLRB 102, 103-104 (1979), as follows:

In determining whether two or more businesses are sufficiently integrated so that they may be fairly treated, for jurisdictional and other purposes, as a single enterprise, the Board looks to four principal factors: (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; and (4) common ownership or financial control. *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 905, fn. 4 (9th Cir. 1964). "The Board has determined that no single criterion is controlling, although it considers the first three, which evidence operational integration, more critical than the fourth, common ownership." *N.L.R.B. v. Triumph Curing Center and M. F. Lee d/b/a Lee's Sewing Company, Inc.*, 571 F.2d 462, 468 (9th Cir. 1978), enfg. 222 NLRB 627 (1976).

The matter of ownership is clear: Siemens purchased all shares of TPC and became its sole owner on March 24, 1987. TPLI and TPNYC are wholly owned subsidiaries of TPC. Thus, common ownership is established.

Interconnection among the various entities is also shown by the number of individuals holding ranking

<sup>22</sup> See also *Teamsters Local 284 (Columbus Distributing Co.)*, 296 NLRB 19, 23 (1989); *Rappazzo Electric Co.*, 281 NLRB 471, 471 fn. 1, and 477-479 (1986); *O. Voorhees Painting Co.*, 275 NLRB 779, 785-786 (1985).

<sup>23</sup> In so finding that the matter is properly before the Board for decision, we find it unnecessary to address the other bases asserted by the General Counsel and the Union for urging the Board to retain jurisdiction.

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management roles in more than one of these companies. The most prominent of these is H. Werner Krause who, from March 1987 through May 1989, served as president and chief executive officer of both TPC and Siemens as well as a director on the board of both companies. In addition, the following individuals played significant multiple corporate roles: (1) Kenneth Russell served on the board of directors of both TPLI and TPNYC as well as corporate secretary for TPLI, TPNYC, TPC, and Siemens; (2) Dietrich-Arndt Diehn simultaneously held the offices of vice president of administration, treasurer, controller, and assistant secretary of Siemens, was a director of TPNYC, TPLI, and TPC, became executive vice president of both TPLI and TPNYC in March 1987, and served as executive vice president, treasurer, and assistant secretary of TPC; (3) Winfried Siringhaus served on the board of directors or as an officer for each of the Respondents, as director of business administrative services and director of controlling for Siemens, served as a director for TPLI and TPNYC, vice president of TPLI and TPNYC, and assistant treasurer of TPC; (4) both Paul S. McDonough and Robert Lewis served as legal counsels for all the Respondents at the instant hearing and had represented individual corporate entities in various legal and/or labor relations matters in the past.

Four individuals, Krause, Russell, Diehn, and Siringhaus, served on the boards or were officers of each of the Respondents prior to the time the decision was made to close TPLI. The fact that these four held high-level management roles in each of the entities at issue establishes that responsibility for critical decisions concerning the direction of all these businesses was largely concentrated among the same people.

The record shows that within this group, Krause exercised the most active and hands-on control. Beginning in March 1987, he simultaneously held the highest positions of authority (CEO and president) at both Siemens and TPC. The most significant example of Krause's managerial control at TPC is demonstrated by the events leading up to and including the decision to close the Ronkonkoma facility. In his capacity at TPC, heads of various TPC divisions reported to him. During the first months of 1987, just prior to Siemens' acquiring full ownership, Krause met with TPC's eastern regional group vice president, Montanaro (who was also TPNYC and TPLI's president), to discuss the financial condition of the companies within the eastern group. According to Montanaro's testimony, Krause stated that he wanted the company to "make improvements through organizational changes" and to "address all of the unprofitable locations."<sup>24</sup> Krause asked Montanaro to "incorporate staff reductions as a method of reducing costs" and to look into "consolidating

or eliminating unprofitable operations."<sup>25</sup> The next month, Montanaro and TPC's eastern director of business administration, Means, presented a report to Krause, recommending the elimination and consolidation of a number of eastern regional offices.<sup>26</sup> While endorsing the proposed changes, Krause instructed Montanaro to seek even further cuts. It was then, on Krause's direction, that Montanaro identified the only remaining option for cost containment, the combining of the two Long Island field offices, TPLI and TPNYC, into a single operation. Krause endorsed the proposal and it was consequently carried out. Thus, Krause is shown to have exercised direct managerial control over the decision to shut down TPLI's Ronkonkoma operation.

Krause's other activities also establish that the operations of Siemens and TPC were interrelated. Upon Siemens' acquisition of TPC, Krause sent letters, dated March 25, 1987, to all TPC and Siemens employees, as well as to TPLI customers, advising them of the new ownership and of the benefits to be derived from the relationship. Customers were told of plans to improve TPLI's operations, while TPC employees were welcomed into the "Siemens family" and were described as "Siemens ambassadors to the U.S. market." A major reorganization of TPC's management structure was begun and certain top officials of TPC were eliminated.

A few months later, Krause addressed TPC employees by videotape concerning the ongoing reorganization. In that speech Krause made the following observations: that since Siemens had acquired TPC it had "streamlined operations" and "eliminated many double functions" of the two entities; that all supporting functions had been taken over by Siemens in order to allow TPC to concentrate on sales, installation, and service; and that all TPC companies had been reorganized into three regions. He also announced the appointment of several new vice presidents, including one whose immediately prior position had been with Siemens.<sup>27</sup>

Krause's video address also revealed his involvement with TPC's labor relations. Krause told employees that customer satisfaction was a primary concern and, for that reason, he was instructing all managers in operations to become directly involved in resolving complaints and was ordering the human resource staff to hire better qualified people. He further noted that a new compensation plan was being introduced and that training facilities were being improved. Krause stated that he had an "open ear" for employees and if they

<sup>25</sup> Tr. 1172.

<sup>26</sup> See fn. 13, *supra*.

<sup>27</sup> Further evidence of Siemens' and TPC's organizational integration is, according to Glenn Means' testimony, that after March 1987, TPC changed its fiscal year to match Siemens' accounting calendar.

<sup>24</sup> Tr. 1133.

felt that something was wrong or could be improved, they should not hesitate to write to him. The record shows that at least two TPLI employees accepted Krause's invitation for communication, and wrote to Krause concerning their dissatisfaction following the announcement that the TPLI facility would be closed.

Krause's involvement with labor relations is further revealed in a document dated October 28, 1987 entitled "Union Labor Relations." In summarizing the status of labor relations at certain TPC facilities, Krause noted that certain specific union demands "cannot be agreed to" and that the Company "should be prepared to attempt to rebut" anticipated organizing efforts by the CWA in New York.

Based on the foregoing, we find that since March 1987, the relationship between TPC and Siemens became one of single employer. The evidence outlined above establishes that these companies manifest all the relevant characteristics of a single employer relationship: common ownership/financial control, common management, interrelation of operations, and centralized control of labor relations. Accordingly, we find that Siemens stands equally responsible with TPC and its component companies for any actions at issue in this proceeding found to violate the Act.

*C. The Respondent's Violation of Section 8(a)(5) and (1)*

The General Counsel and the Charging Party each argue that, although the Respondent closed TPLI's Ronkonkoma facility and terminated the unit employees, it did not close its business. Rather it transferred the work previously done by those employees either to employees of subcontractors or to TPNYC employees who were given work assignments out of the Long Island City facility and who were represented by CWA Local 1109. The General Counsel and the Charging Party further argue that this action constituted a mandatory subject of bargaining and that it was done in contravention of express terms of the collective-bargaining agreement. They contend that the Respondent violated Section 8(a)(5) and (1) because the action in question constituted a midterm modification of the collective-bargaining agreement done without the consent of Local 25. They submit that a finding that this was a mandatory subject of bargaining is consistent with principles set out in the Supreme Court's decisions in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and the Board's decision concerning plant relocation decisions in *Dubuque Packing Co.*, supra, 303 NLRB 386. In arguing that the action was unlawful because it was done without the consent of Local 25, they rely on the principles set out in *Milwaukee Spring Division (Milwaukee Spring II)*, 268 NLRB 601 (1984), and *Brown Co.*, 278 NLRB 783 (1986). Fi-

nally, they contend that the Respondents committed an additional violation of Section 8(a)(5) and (1) by refusing the Union's request, made in January 1988, to negotiate a successor collective-bargaining agreement to the one that expired by its terms on April 30, 1988.

The Respondents contend: (1) that the shutdown constitutes a partial closing subject to the holding of *First National Maintenance*, supra, and therefore is not a mandatory subject of bargaining; (2) that even assuming it was a partial relocation of unit work, there would still be no bargaining obligation because the action was motivated by factors other than labor costs and it was not otherwise shown to be a mandatory subject under the test set out in *Dubuque Packing Co.*, supra; and (3) that, even assuming it was a mandatory subject of bargaining, there is no violation of Section 8(a)(5) and (1) because it was not in contravention of any express provision of the collective-bargaining agreement. The Respondents note that the complaint rests solely on a theory that the Respondents' action violated the agreement, not that the Respondents failed to provide notice and an opportunity to bargain over the subject. Finally, the Respondents argue that, if, consistent with its submission, its closure of the Ronkonkoma facility and termination of all the TPLI unit employees was lawful, then there was no longer any bargaining obligation respecting those employees, and it lawfully refused Local 25's request for bargaining over a successor agreement.

For reasons set out in subsection 1 below, we agree that the Respondents' action at issue was a mandatory subject of bargaining. For reasons set out in subsection 2 below, we find that the Respondents' action violated Section 8(a)(5) and (1) because it was in contravention of express provisions of the collective-bargaining agreement between the Respondents and Local 25, and was done without the latter's consent. For reasons set out in Subsection 3, we find that the Respondents also violated Section 8(a)(5) and (1) by refusing to bargain with Local 25 for a successor agreement.

1. The Respondents' actions were a mandatory subject of bargaining because the unit work continued to be done through subcontracting and a partial relocation

In determining whether a particular management decision or set of decisions amounts to an entrepreneurial decision "involving a change in the scope and direction of the enterprise"<sup>28</sup> and therefore falls outside the ambit of mandatory subjects of bargaining as defined by Section 8(d) of the Act, it is essential to ascertain

<sup>28</sup> *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 677, quoting *Fibreboard*, supra, 379 U.S. at 223 (Stewart, J. concurring).

what changes the employer has made, regardless of the label the employer chooses to place on them.

If it appears that work formerly done by unit employees is now being done by employees of subcontractors and little has changed regarding that work other than the identity of the employees performing it, then the Board will ordinarily find that the decision to subcontract was a mandatory subject of bargaining. *Furniture Renters of America*, 311 NLRB No. ~~75~~ (May 28, 1993), citing *Fibreboard Corp. v. NLRB*, supra, and *Torrington Industries*, 307 NLRB 809 (1992).

The Board acknowledged in *Dubuque Packing Co.*, supra, however, that when a physical relocation of operations is the cause of the termination of unit jobs, considerations in addition to those involved in a normal subcontracting case are presented. Taking account of principles announced in both *Fibreboard*, supra, regarding subcontracting and *First National Maintenance*, supra, regarding partial closings, the Board announced the following test for a determination whether a relocation of operations is a mandatory subject of bargaining:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.<sup>29</sup>

To establish its prima facie case, the General Counsel subpoenaed former TPLI employees Joseph Hart and Pasquale Santoro to testify. Former technician Hart had worked for TPLI in Ronkonkoma performing telephone repairs from July 1985 until he was laid off in October 1987. He was subsequently hired by TPNYC

in January 1988. His job at TPNYC has been repairing telephone systems at customers' premises on North Shore and Nassau in Long Island, including some of the same customers he had serviced while working for TPLI. Hart testified that since working under TPNYC, he spends about 95 percent of his time at Long Island locations. Just as he had at TPLI, Hart has exclusive use of a company van that he drives home at night. Because of the telephone dispatch system of assigning duties and the delivery of ordered parts directly to worksites, Hart can go directly to customer locations from home. He reports to the Long Island City office only when it is necessary to pick up equipment or to attend a meeting.

Santoro's testimony also shows that TPLI's former business operations continued beyond the October 1987 closing. Santoro was a unit foreman at TPLI until the October 23, 1987 layoff. In November 1987, he formed his own company which specialized in installing telephone equipment and providing related services. He, thereafter, heard from the secretary of TPLI's operations manager, John Peters, that the Respondents were looking for subcontractors to do work on Long Island. Based on his established relationship with Peters, he was able to secure installation work for his new company with TPNYC.

In addition, former TPLI unit employee Anthony Padrevita testified about Peters' statements concerning TPLI's closing.<sup>30</sup> According to this testimony, in July 1987, Peters called employees together in the company parking lot to tell them about the planned shutdown. During his remarks he said that the accounts then being serviced by TPLI would be taken over by the Long Island City people. A few weeks later, during a private conversation in Peters' office, Peters told Padrevita that while the closing was not Local 25's fault, their expertise was too costly for the Respondents.

Other evidence proffered by the General Counsel also shows that TPLI's unit work continued to be done, but with a different work force. In a letter dated October 22, 1987, the Respondents advised customers that the services TPLI employees had been providing for them would henceforth be performed by members of CWA, Local 1109 based in Long Island City. The letter highlighted the experience of the new work force and noted particularly that they were competent to handle any problems involved in the servicing of their telephone systems, including "Repair, Moves and Changes or Installation." This description of the work parallels that performed by the Ronkonkoma bargaining unit employees.

TPLI unit employee Patrick Walsh's uncontradicted testimony also supports a finding that TPLI's work was carried on beyond its closing date. He testified

<sup>29</sup> *Dubuque Packing Co.*, supra, 303 NLRB at 391.

<sup>30</sup> Peters was not called as a witness in this proceeding.

that on the morning of the day of the layoff, October 23, 1987, he and five fellow workers were installing cable and a telephone system at a customer's facility when he was called by Santoro from the TPLI office. Santoro told him that he and the others should report to the office by 1 o'clock and that he thought they would be laid off. After advising the customer of these instructions, Walsh and the other employees loaded their materials onto the truck. On arriving at the office, they were laid off along with other unit employees. His layoff slip cited lack of work as the basis for the action. In midafternoon, Walsh drove his own car back to the customer's site where he observed the arrival of a van with "Tel Plus Long Island City" written on the side. Two men exited the van and entered the customer's premises.

Finally, Krause's October 28, 1987 internal memo described TPLI's labor relations status as follows: "The Long Island operation was officially closed on October 23 . . . Tel Plus of New York City has taken over the customers with labor belonging to the CWA." This succinctly describes the Respondents' action.

In rebuttal, the Respondents contend that the closing of the Ronkonkoma facility constituted a partial closure in keeping with an ongoing corporate restructuring and thereby exempted the Respondents from any obligation to bargain. They do not, however, offer evidence contrary to the General Counsel's, described above, concerning the Respondents' continuation of telephone installation and repair business on Long Island.

While it is true that in October 1987, the Respondents literally ceased operating the TPLI Ronkonkoma facility, the evidence shows that after that time, TPLI's work continued to be performed by the Respondents in much the same way, for the same customers, and located in the same places. The only difference was that it was thereafter being done by people working under the auspices of TPNYC rather than TPLI. The work did not vary from that which had been unit work. The Respondents, therefore, have not shown that there was a basic change in their Long Island operation after TPLI's closing. To the contrary, the evidence establishes that it was the same type of operation, with only a somewhat modified organizational structure. The record establishes that during the entire course of the bargaining relationship with Local 25, the Respondents had undergone substantial growth and changes in its organization. They had acquired other companies on Long Island, moved offices, and consolidated and restructured various departments, all the while preserving the overall corporate purpose of providing telephone system installation and service within the same Long Island customer area. Throughout these developments, the work performed by the unit employees remained fundamentally unaffected. Thus, the Respondents' de-

cision to change the locus of distributing the Long Island work from Ronkonkoma, Long Island to Long Island City in the borough of Queens in New York City, was not a change in the scope and direction of the enterprise, but only a modification in the way they conducted their Long Island operation. Accordingly, we find that the Respondents' closing of TPLI constituted a work relocation, and that the General Counsel has made a prima facie showing that the Respondents' decision was a mandatory subject of bargaining.

The Respondents argue that even if the shutdown of the Ronkonkoma facility was not a partial closing, there was still no bargaining obligation inasmuch as labor costs were not a motivating factor in that action. They cite Montanaro's testimony in support of this argument. Montanaro enumerated the following factors as contributing to the decision that TPLI should be closed: (1) the Long Island operation was experiencing massive and escalating losses; (2) consolidation of the operation with TPNYC would increase efficiency and provide greater work force flexibility; (3) the change was consistent with other ongoing reorganizations within TPC; (4) projections to Krause on regional staff reductions were based in part on TPLI's closing; and (5) TPLI was not able to engage in competitive subcontracting.

Montanaro testified as to the seriousness of TPC's financial picture by recounting the series of measures taken to try to stem the losses. During 1986, TPLI terminated or demoted certain corporate officers, and consolidated administrative, dispatch, material control, and accounting functions with TPNYC. Nevertheless, TPLI sustained losses totalling \$2 million in 1986. In early 1987, Montanaro recommended fairly widescale staff reductions, departmental consolidations, and overhead reductions for the eastern regional offices of TPC. In March 1987, TPLI consolidated its sales function with TPNYC, leaving only its technical work force operating independently on Long Island. In the first 6 months of 1987, however, TPLI still suffered another million dollar loss.

During consultations in March and April 1987, Krause told Montanaro that more cost-saving measures were necessary. As the sole remaining function at the Ronkonkoma facility was the technical operation, it would not only be consistent with the Respondents' overall trend toward consolidation to transfer the work to TPNYC, but Montanaro testified that he believed that other benefits would result from the move. Specifically, in contrast to the limited (two Long Island counties) servicing area permitted by Local 25's jurisdiction, the absence of geographic restrictions on the CWA Local 1109 represented TPNYC work force would offer greater flexibility for serving customers throughout the entire New York city area.

Montanaro also testified that the restrictions on subcontracting under the terms of the collective-bargaining agreement at TPLI and Local 25's unwillingness to provide relief in this area limited the Respondents' ability to obtain new installation work. In his April 3, 1987 memo to Krause concerning various money saving measures that had been taken, Montanaro highlighted this aspect of the TPLI situation as follows:

Although the above measures reduce costs and are expected to produce increased sales, they can not effectively reach one of the basic problems—TPLI's inability to effectively compete in the increasingly competitive Long Island market. A major contributing factor has been restrictions in TPLI's union contract. One serious restriction concerns subcontracting. TPLI's contract with Local 25, International Brotherhood of Electrical Workers, provides that subcontracting shall be allowable only after "mutual determination." In practice, this restriction allows subcontracting to only Local 25 IBEW companies. Consequently, unlike many of our competitors and other Tel Plus companies, we can not utilize traditional competitive bidding.

During the 1984 contract renewal negotiations, we appealed to Local 25 to allow limited subcontracting. We proposed subcontracting only on new installation work, with the assurance that no subcontracting would occur where it caused the layoff or termination of any existing employee. I addressed our employees at a group meeting, explaining by allowing TPLI to be more competitive, which would bring in more new jobs and enhance their job security.[sic] Our proposal was rejected.

As recently as March 25th, we met with the Union on this issue. We reminded them of our losses, stating we had to be competitive to survive. Again, our pleas fell on a deaf ear. Local 25 offered no viable alternative to the contract's restrictions.

Consequently, I recommend that the Ronkonkoma, Long Island branch be closed and consolidated with TPNYC. The existing customer base would be serviced by the TPNYC work force, represented by a different union.

The Respondents contend that it was common industry practice to engage in competitive subcontracting for telephone system installation. Because TPLI's collective-bargaining agreement left virtual veto power in Local 25's hands, however, TPLI's ability to compete for and develop new business was sorely affected. Montanaro described the situation as being "not on a level playing field with its competitors."<sup>31</sup>

The Respondents explained why they believed subcontracting the installation process would enhance their ability to compete effectively. System installation is one of the most costly and risky aspects of the telecommunications business. Installations are complex and may involve underground cabling, trenching, inside wiring, and other areas where problems may arise. Installation also involves risks of customer delays, delays in receiving equipment and material, and job site coordination problems. By subcontracting the installation aspect of a project, a company can eliminate these areas as potential financial risks. These risks are assumed by a subcontractor instead, which will be responsible for calculating the costs of installation and providing a solid figure for the job. A company that subcontracts installations can then rely on a firm dollar figure for that aspect of the project and thereupon formulate a realistic, competitive bid to its potential customer. Thus, the Respondents assert, subcontracting installation work would not only decrease the financial risks by offering predictability in the area of installation costs, but increase the likelihood of obtaining jobs in the first place.

The Respondents contend that the contract's subcontracting restrictions were a longstanding impediment to resolving TPLI's business problems. They point to their repeated efforts, beginning with the 1984 collective bargaining talks, to negotiate relief from these strictures, as evidence of the seriousness of the problem and of Local 25's unwillingness to make accommodations. Despite the Respondents' attempts in 1985 to modify the language of article VII to broaden its subcontracting rights and in 1986 to redefine the scope of unit work, the restraints remained in place to the detriment of the Respondents' competitive status.

The Respondents further contend that TPC's overall financial picture was so bleak and its reorganization so pervasive that labor costs, as a separate, identifiable objective, did not independently enter their decision-making process. Montanaro testified that he made no comparisons and did not know the relative wage and benefits costs of the Local 25 and CWA Local 1109 contracts. TPC corporate counsel, Paul McDonough, concurred by testifying that during his March 1987 discussions with Montanaro regarding the closing of TPLI, labor rates were not discussed.

Finally, the Respondents argue that there is nothing that Local 25 could have offered in the area of labor cost concessions that would have been sufficient to alter their decision. The Respondents cite Local 25's failure to offer meaningful suggestions in response to TPLI's \$2 million loss during 1986 as proof that the problem was beyond the Union's ability to address. Specifically, in a meeting on March 25, 1987, the Respondents asked Local 25 directly how it might be able to help profitability. In reply, Local 25 identified only

<sup>31</sup> Tr. 1093.

problems in service, dispatch, and material, none of which were within the Union's authority or ability to control. Further, during the May 21, 1987 meeting concerning additional losses, when Local 25 was told that the Company might have to consider closing TPLI, the union representatives responded only that they were "sorry to hear that." The Respondents assert that even after reviewing financial records, Local 25 did not propose any steps it could take to counter the Respondents' deteriorating situation. Thus, the Respondents conclude that there was nothing Local 25 could have done to alter or prevent the decision to remove the work from TPLI.

The General Counsel and Local 25, however, both contend that the decision to close TPLI was motivated by labor costs and that if Local 25 had been given an opportunity, it could have responded to the Respondents' needs. They argue that an analysis of the Respondents' asserted reasons for the closure will reveal that these reasons are merely extensions of an underlying concern about labor cost containment. We agree.

The evidence discloses that Local 25's labor costs were, in fact, higher than those applicable under the CWA Local 1109 contract. The average straight hourly wage rate for TPLI unit employees was \$17 while the CWA Local 1109 rate was \$14.89 per hour. In addition, the Local CWA 1109 contract prescribed payment at the rate of time and a half for hours worked over 40 during a week, while the Local 25 contract required payment of time and a half for work performed outside of regularly scheduled hours and Saturdays and for double time pay on Sundays. Employer benefit contributions under the Local 25 contract was 43.625 percent of the gross labor payroll while the CWA Local 1109 benefit package was 11.8 percent of gross regular wages plus \$1.25. The hourly combined wage/benefits costs under the Local 25 contract amounted to \$24.42 as contrasted with \$17.90 for CWA Local 1109. During the 12 months prior to TPLI's closing, the Respondents paid over \$894,000 in Local 25 benefit contributions alone. An analysis of the overall comparative labor costs shows that Local 25's rates were between 23.94 percent and 35.96 percent higher than the CWA Local 1109 costs.<sup>32</sup> Thus, it is established that CWA Local 1109's labor costs were lower than Local 25's.

<sup>32</sup>Local 25 Business Representative Gilday, found by Judge Lawrence to be an expert on union affairs and handling of contractual matters, testified about the comparative labor costs of the Local 25 and the CWA Local 1109 employees. The cost differential is stated as a range rather than an exact number because the Respondents disputed the inclusion of certain job classifications and rates that Gilday considered in his initial analysis. A recomputation of the rates using the figures supplied by the Respondents, however, resulted in an even greater disparity between Local 25 and Local 1109 rates than Gilday had originally calculated. We find it unnecessary to resolve which set of figures was more accurate and note merely that at least a 24 percent direct labor cost advantage accrued to the Respondents from their use of the Local CWA 1109 work force.

The Respondents counter that the mere fact that labor cost savings could be achieved does not establish that it was the actual basis for the decision. They note that Montanaro's list of reasons does not include labor costs. The General Counsel and Local 25 argue, however, that the asserted reasons for closing TPLI include those that are related, directly or indirectly, to labor costs associated with the collective-bargaining agreement. Again, we agree.

The Respondents' claims of increased efficiency and work force flexibility are directly related to labor costs. TPLI was precluded under the contract from sending unit employees on jobs outside Nassau or Suffolk Counties without obtaining Local 25's permission. Under the CWA Local 1109 contract, employees could be sent to any location to work. By using CWA Local 1109 employees rather than Local 25-represented employees, the Respondents would not only be free to dispatch employees throughout the New York area, but they would also achieve direct labor cost savings by virtue of the lower hourly wage/benefit rates. In addition, because the CWA Local 1109 agreement did not, in contrast to the Local 25 contract, specify the number of journeymen, technicians, and foremen to be used for jobs of various sizes, the Respondents could realize labor cost savings by sending fewer employees to jobs. Further, because the CWA Local 1109 contract, in contrast to the Local 25 agreement, did not contain an automatic progression from apprentice to journeyman, with the commensurate increase in wage rates, the Respondents could achieve even more labor cost savings. Thus, while transferring the work to TPNYC would result in increased efficiency and flexibility as the Respondents claim, the Respondents in fact would realize significant direct labor cost savings as well.

The Respondents' earlier attempts to be released from subcontracting restrictions on installation projects also indicate that it viewed labor costs and their reduction, to be crucial. While denying that labor costs entered his analysis, Montanaro nonetheless testified that installation work is the "most labor intensive part of a project,"<sup>33</sup> and that installations are "all labor for the most part."<sup>34</sup> Despite the Respondents' deft characterizations of their objectives in subcontracting as eliminating the risks inherent in the installation process and enhancing their competitiveness in job bidding, Montanaro's own words establish that labor costs were at the core of these objectives. To illustrate: the risks the Respondent identified as associated with the installation process include: (1) unforeseen logistical problems—which might require spending additional time and/or using additional employees to finish a job; and (2) delays—which might necessitate paying employees

<sup>33</sup>Tr. 1095.

<sup>34</sup>Tr. 1211.

for unproductive "down" time. Both of these potential problem areas involve the same ultimate risk: higher labor costs. By transferring the responsibility for these risks to a subcontractor, however, the Respondents could calculate their labor costs at an exact figure and thereby be more assured of a certain level of profit. In addition, because the Respondents would not have to factor these risks into job bid estimates, they could calculate a fixed amount for their total labor cost and possibly offer a lower total package price to customers. Thus, no matter how they are characterized, the very advantages the Respondents admit they sought to achieve through the freedom to subcontract relate directly to the containment of labor costs.

Moreover, the Respondents' streamlining and consolidating various parts of its operation in an effort to cut costs had not sufficed to stem the financial losses incurred in operating TPLI. Additional cost-cutting measures were needed, therefore, and the cost of labor was the only apparent remaining area of expense available to the Respondents in which to pursue such measures. The Respondents recognized this early on by seeking to obtain Local 25's agreement to permit, under certain circumstances, the subcontracting of installation work. Beginning with negotiations in 1984, and in subsequent discussions with Local 25 representatives, TPLI sought to have the contract's restrictions on subcontracting relaxed and to have other work preservation clauses modified to increase TPLI's competitive advantage. The record is clear that over the years the Respondents made repeated appeals to Local 25 to accede to greater managerial latitude in work assignments. The failure of these efforts only accelerated the need for reduced labor costs. Indeed, when asked what Local 25 could have done in 1987 to make him change his mind about relocating the unit work, Montanaro testified, "I guess they could have said, we're going to, you know, work for half the wages or something."<sup>35</sup> Montanaro's own words thus establish the link between the Respondents' concern over labor costs and its relocation decision.

In light of the above, we find that the Respondents have not carried their burden of establishing that labor costs were not a factor in the decision to relocate unit work. As the undisputed evidence discloses, the Respondents were facing serious financial problems at the time of the Siemens takeover in the spring of 1987. It is also undisputed that Montanaro, under direction from and in consultation with Krause, examined TPC's entire Eastern Region in order to address unprofitable locations and identify areas in which costs could be reduced. It was in this process that Montanaro suggested a series of consolidations and staff reductions which led, ultimately, to the decision to relocate the TPLI bargaining unit work. Of those consolidations and staff

reductions, the last and most significant moving force behind the decision was the substantial financial gain to be realized by eliminating, through termination of the bargaining relationship with Local 25 and the employment of the TPLI unit employees, the relatively expensive wages, benefits, manpower requirements, and subcontracting restrictions imposed on the Respondents by the TPLI-Union contract—i.e., labor costs—and substituting for them the substantially less expensive terms of the TPNYC-CWA contract and a work force that would be more flexible both geographically and in its manning requirements. Accordingly, we find that the savings in labor costs that the Respondents realized by relocating the work being done by the unit employees played a key role in the Respondents' relocation decision.

Finally, we find that the Respondents have not established that Local 25 would have been unable to provide proposals in the area of labor cost concessions which could have changed the decision. In this regard, the General Counsel and Local 25 both contend that the evidence indicates that the Respondents had actually reached the decision to relocate the unit work in the early spring of 1987, and that the subsequent discussions with Local 25 representatives were essentially devoid of purpose and did not provide that Union with a genuine opportunity to affect the decision-making process. We find merit in their contentions. In so finding, we recognize that in past years the parties had discussed the contract's restrictions on subcontracting and other work preservation clauses, with the Respondents seeking to broaden their rights in these respects and Local 25 seeking to hold on to its rights. It is also true that in December 1986, the Respondents asked if Local 25 would forgo a scheduled wage increase. In making this request, however, the Respondents did not present the issue as the only alternative to a loss of jobs. In fact, no particular urgency attached to the Respondents' proposal, thereby permitting Local 25 to believe that this was just another example of business-as-usual. Even in subsequent meetings, when the possibility of discontinuing the Long Island-based operation was becoming more real to the Respondents' decision-makers, the Respondents failed to reveal to Local 25 the apparent severity of the situation or to identify areas in which specific union action in the form of cooperation or concessions might contribute to the future of TPLI. Further, the evidence fails to show that when the decision to remove the work was imminent, the Respondent clearly communicated that the demise of TPLI and the bargaining unit was likely unless Local 25 was able to help it reach certain financial goals. In this regard, we do not find that the Respondents' previous requests for a wage freeze and increased subcontracting rights were sufficient to have placed Local 25 on notice that the unit's continued existence was in peril;

<sup>35</sup> Tr. 1249.

those requests were no more than a reiteration of a recurrent management theme which Local 25 had consistently rejected without placing the unit in jeopardy. In short, the Respondent did not convey its latest requests for relief in a manner that distinguished them from its oft-repeated, and oft-rejected, proposals.

In fact, it was not until the May 21, 1987 meeting between Lewis, McDonough, and Piekara, and Gilday and Brook—some 7 weeks after Montanaro's memo to Krause recommending TPLI's closing—that union representatives were advised, by Lewis, that closing was a real possibility. Instead of reiterating the point made in Montanaro's memo, however, i.e., attributing paramount importance to the contractual restrictions on subcontracting, or citing any of the other factors on which Montanaro placed reliance, McDonough alluded only to TPLI's "overhead" as an overriding issue in TPLI's future. Clearly, a vague allusion to "overhead" was not something over which Local 25 could intelligently offer relief. Had the Respondents at that time specifically advised the Union about what their perceived financial needs were in order for the unit work to remain at TPLI, and had the Respondents, for example, then reemphasized their concerns about subcontracting, thereby making Local 25 aware of the critical role the contract restrictions were playing in the bargaining unit's future, it may reasonably have recognized the new nature of urgency in the situation at TPLI and might have been able to respond with concessions sufficient to accommodate the Respondents' financial needs, thus enabling TPLI's field operations to survive. The Respondents, however, failed to disclose to Local 25 its analysis of how the latter could assist the Respondents in meeting their newly defined needs. As a result, Local 25 lacked information sufficient to enable it to proffer suggestions or concessions which might have led to a different decision concerning the unit work.

We find that Lewis' May 26 letter to Gilday, in which he stated that TPLI did not consider itself legally obligated to discuss the cessation of TPLI's operations but only the effects on the unit employees of TPLI's closure, offers the explanation for the Respondents' behavior at the May 21 and subsequent meetings between the parties. Simply put, the Respondents did not believe that the decision to close was a bargainable issue. Thus, there was no reason to inform Local 25 of what the Respondents wanted—indeed expected—from it to help them save TPLI and the bargaining unit. For this reason, at the June 16 and 30 meetings, none of the Respondents' representatives in attendance made any proposals that sought contractual concessions or other cost-saving measures relating to the terms and conditions of employment of the unit employees. Nor did they solicit Local 25's help or advice in these regards. Instead, Lewis merely outlined three

options for the future of TPLI: (1) to continue TPLI's operations; (2) to close TPLI and transfer its work to the Long Island facility; and (3) to sell TPLI's accounts to another company. At no time in those meetings did Lewis so much as indicate to Local 25 what part it could play to make the first option, rather than the other two, a reality. In such circumstances, it is understandable why Brook responded that his client preferred option one, and that its position on two and three were defined by the contract's work preservation and successorship clauses, respectively. Thereafter, by letter of July 17, Lewis notified Brook that TPC had decided to terminate TPLI's operation on September 30, thereby foreclosing any further meaningful opportunity for Local 25 to persuade the Respondents not to close TPLI.

Accordingly, for all the reasons stated above, we find that the Respondents have failed to establish that labor costs were not a factor in its decision to relocate unit work and have failed to show that Local 25 could not have offered concessions that could have changed its decision. We therefore find that the actions of the Respondent leading to the termination of the unit employees were a mandatory subject of bargaining.

2. The Respondent's actions constituted a modification of provisions of the collective-bargaining agreement without union consent

In *Milwaukee Spring II*, supra,<sup>36</sup> an employer was alleged to have violated the Act by deciding to transfer work from a unionized plant to a nonunion facility during the term of a contract without having obtained the union's consent to the transfer. Having already determined that the employer had fulfilled its 8(a)(5) obligation to bargain with the union to impasse on the subject, the Board addressed the further implications of Section 8(d)<sup>37</sup> as follows:

<sup>36</sup> As the Board explained in *Brown Co.*, 278 NLRB at 783:

The analysis in *Milwaukee Spring II* is premised on the well-established proposition that an employer may not make unilateral changes in mandatory subjects of bargaining prior to a good-faith impasse in bargaining . . . Sec. 8(d) adds the further requirement that, when there is a contract in effect, the employer may not make changes in the mandatory terms and conditions in the contract without the consent of the union.

<sup>37</sup> Sec. 8(d) of the Act provides, in pertinent part, as follows: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—(1) serves a written notice upon the other party . . . sixty days prior to the time it is proposed to make such termination or modification; (2) offers to meet and confer . . . for the purpose of negotiating . . . the proposed modifications; and (4) continues in full force and effect, without resorting to strike or lock-

*Continued*

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Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modify . . . the terms and conditions contained in" the contract: the employer must obtain the union's consent before implementing the change.\*\* If the employment conditions the employer seeks to change are not "contained in" the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.

\*\* *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), *enfd.* 505 F.2d 1302 (5th Cir. 1974), *cert. denied* 423 U.S. 826 (1975).<sup>38</sup>

The Board ruled in *Milwaukee Spring II* that no contravention of Section 8(d) could be substantiated unless a *specific* contract term could be identified as having been modified by the employer. Finding that neither the contract's wage and benefits provisions nor its recognition clause specifically precluded the employer from relocating its operations, the Board determined that no term in the parties' collective-bargaining agreement required the work to remain at the unionized site. Accordingly, the Board concluded that the employer's decision to relocate the work did not unlawfully modify the contract and, therefore, did not violate the Act.

Thereafter, the Board applied the *Milwaukee Spring II* standard in a supplemental decision on remand in *Brown Co.*, *supra*. Having determined in the original *Brown* decision<sup>39</sup> that the employer had transferred work from a unionized operation to a nonunion subsidiary because of labor cost considerations,<sup>40</sup> the Board examined the collective-bargaining agreement for language addressing the subject of work transfers. Article XIX of that agreement stated that it was the "intent of the parties to protect the work performed by employees in the bargaining unit."<sup>41</sup> Further, the Board found that the company, in practice, "promised to use its own equipment and drivers to the greatest extent possible" and that the parties contemplated "resort to noncompany trucks only . . . where company truck resources had been exhausted."<sup>42</sup> The Board concluded that the contract's work preservation clause, neither ambiguous on its face nor waived by the union, restricted the employer's action. The employer's unilateral removal of the work to a nonunionized facility, in contravention of the promise to keep work at the origi-

out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

<sup>38</sup> *Milwaukee Spring II*, *supra* at 602.

<sup>39</sup> *Brown Co.*, 243 NLRB 769 (1979).

<sup>40</sup> In the underlying decision, the Board determined that the employer's decision to relocate the work was based on its desire to escape wage obligations under the contract and to take advantage of lower wage rates elsewhere.

<sup>41</sup> *Brown*, *supra* at 784.

<sup>42</sup> *Ibid.*

nal jobsite, breached the collective-bargaining agreement. Because this change affected a mandatory subject of bargaining—labor costs—under the then-applicable test in *Otis Elevator*,<sup>43</sup> the employer was found to have violated Section 8(a)(5) and (1) by virtue of its failure to comply with the requisites of Section 8(d).

In this case, the General Counsel and Local 25 cite to four contract clauses, identified above, comprising a work preservation commitment precluding the Respondents' action. The Respondents, on the other hand, argue that no specific contract provisions barred it from relocating its operations nor required it to keep unit work at the facility for the duration of the agreement. The merits of the parties' respective positions must be determined by examining the relevant contract language.

As described above, section 2.02, the "Scope of the Work" clause, defines the bargaining unit work as encompassing the "installation . . . and directly related work which becomes . . . part of the telephone and/or telephone related system, repair, and service maintenance work at the premises of the Employer or its customers . . ." This "telephone work" encompasses all work which had historically been done by Local 25-represented TPLI employees prior to their October termination. This is also precisely the work which the Respondent continued to do, using workers who were not a part of the Local 25 bargaining unit, following TPLI's October 1987 demise. Section 2.03, "Area," limits the application of the agreement to that telephone work performed within Nassau and Suffolk Counties in New York, Local 25's jurisdiction. This geographic area is the same location in which the Respondents continued to perform telephone work after October 1987. Clearly, then, the work itself and the area in which the work is being done are both specifically addressed within the terms of the contract. While these provisions identify the disputed work, they do not, by themselves, restrict the Respondents' conduct of their operations. Two additional contract articles address this issue.

Section 7.01, entitled "Union Obligations to IBEW," states that TPLI agrees to the following:

that he [sic] will not sublet, assign or transfer any work covered by this Agreement to any other person, firm or corporation if such subletting, assigning or transfer will cause the loss of work opportunities to Employees in the Employer's establishment covered by this Agreement. Any such subletting, assigning or transfer shall be allowable after mutual determination has been made by the representatives of the parties hereto that such action is not in conflict with the preceding sentence.

<sup>43</sup> 269 NLRB 891 (1984).

The plain meaning of the words in this section is that the Respondents (acting as TPLI) promised to keep the bargaining unit work within TPLI's control in order that employees within the TPLI bargaining unit might perform that work. This unit work is not to be sublet, assigned or transferred unless, as the second sentence states, the employer and the union together conclude that unit employees will not thereby lose work. The facts of this case reveal that the Respondents did, in fact, remove the work from TPLI, which directly caused the loss of work for the Local 25-represented unit employees. The record reveals that this work was reassigned from TPLI to TPNYC, whereupon it was variously distributed to CWA Local 1109-represented employees or subcontracted to outside employers. Irrespective of who performed this work for TPNYC, however, the Respondents' action in reassigning the work falls squarely within the meaning of the words "sublet, assign or transfer" so as to cause the loss of work for unit employees. Further, inasmuch as Local 25 did not concur in the reassignment decision, there was no "mutual determination" concerning compliance with the terms of the contract. To the contrary, discussions between Local 25 and the Respondents were characterized by Local 25's insistence that the Respondent adhere to language in the first part of this section, prohibiting the transfer of work outside Local 25's reach. Thus, we find that the language of section 7.01 of the parties' contract, like the language found in *Brown*, supra, specifically addresses the issue of work reallocation and by its terms proscribes the Respondents' action here under dispute.

Another clause cited as restricting the Respondents' action is section 24.01, "Transfer of Business, Relocation." In that article, Respondent-TPLI agreed that if it "sells, assigns, leases or otherwise transfers the control, operation or assets of its business to another company, corporation or firm," it will notify Local 25 of that event and it will require that the transferee honor the terms of the collective-bargaining agreement. In this case, the Respondents transferred the operation of TPLI, the contract signatory, to TPNYC, a separate corporate entity, albeit one within the Respondents' overall intercorporate superstructure.<sup>44</sup> As has been determined above, the Respondents did not go out of the business in which TPLI had engaged nor did it cease doing business within the geographic area previously

<sup>44</sup>The Respondents' reliance on *Lever Bros. Co.*, 65 LA 1209 (1976), is misplaced. In that case, the arbitrator found that the employer, a soap manufacturer, did not violate the contract by moving certain soap-making operations from one of its unionized facilities to another, where the contract stated only that the employer "must notify the Union in advance of intention to assign [unit] work to outside contractors." The arbitrator concluded that the specific reference to "outside contractors" could not reasonably be construed to apply to the transfer of work from one part of a single corporate entity to another part.

served by TPLI. Instead, the Respondents simply transferred the operation of TPLI's on-going business to another entity—an event specifically contemplated and addressed within the terms of section 24.01. The Respondents did not, however, comply with the requirements regarding such transfer set forth in section 24.01. Rather than assign the contract obligations to TPNYC along with the work, the Respondents chose to declare the contract terminated and to disavow all recognitional obligations. Thus, the Respondents have breached the terms of this section of the contract as well.

We are not persuaded by the Respondents' contentions that its actions somehow fit within the intent of the parties' agreement as shown by the contract's evolution throughout several years of bargaining history. The record shows that the parties' successive contracts have consistently contained restrictions on the Respondents' discretion over work reassignment/subcontracting matters. The language to which the Respondents had agreed in negotiations leading to the 1986–1988 contract was not substantially different from that which had appeared nearly a decade earlier. There is neither ambiguity in the meaning of the terms to which the Respondents had agreed to be bound nor is there any evidence that Local 25 had by any action—word or deed—waived its rights under the contract. Accordingly, we conclude that the Respondents have transferred work outside the bargaining unit in violation of express prohibitions of the collective-bargaining agreement, and that this action was taken with respect to a mandatory subject of bargaining. By thus modifying terms of the collective-bargaining agreement during its term without the consent of Local 25, the other party to the agreement, the Respondents have violated Section 8(a)(5) and (1) of the Act.

### 3. The Respondents unlawfully refused to bargain for a successor agreement

The duration clause of the 1986–1988 collective-bargaining agreement between local 25 and TPLI/TPC provided that the agreement would expire on April 30, 1988. As set out in the fact statement above, on January 26, 1988, the business agent of Local 25 wrote Robert Lewis as representative of TPLI/TPC requesting the commencement of negotiations for a successor agreement. Lewis responded by declaring that the 1986–1988 agreement had been terminated pursuant to a "cessation of operations," and he declined the request for bargaining.

The Respondents' defense to the charge that this was an unlawful refusal to bargain essentially rests on their claim that "[i]f the closing was lawful, TPC's obligation to bargain over a new contract ceased." For the reasons set forth in subsections 1 and 2 above, we

have rejected the Respondents' claim that their actions constituted a lawful closing. Accordingly, we find that the bargaining unit represented by Local 25 was still in existence, and the Respondents violated Section 8(a)(5) and (1) by declining the request to bargain for a successor agreement.

#### CONCLUSIONS OF LAW

1. Tel Plus Long Island, Inc., Tel Plus Communications, Inc., Tel Plus New York City, Inc., and Siemens Informations Systems, Inc., together comprise a single employer within the meaning of Section 2(6) and (7) of the Act.

2. Local 25 is a labor organization within the meaning of Section 2(5) of the Act, and it is the exclusive representative of employees of the Respondents within an appropriate unit.

3. By removing bargaining unit work from the unit employees at the Tel Plus Long Island, Inc., facility in Ronkonkoma, Long Island, subcontracting part of it, and transferring the rest to employees in a different bargaining unit at the Respondents' Tel Plus New York City, Inc., operation in Long Island City, New York, all without the consent of Local 25, the Respondents modified mandatory terms of a collective-bargaining agreement during its term and thereby engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 8(d) of the Act.

4. By refusing, on request, to bargain for a successor collective-bargaining agreement, the Respondents violated Section 8(a)(5) and (1) of the Act.

#### REMEDY

Having found that the Respondents have engaged in certain unfair labor practices within the meaning of Section 8(d) and Section 8(a)(5) and (1) of the Act we shall order the Respondents to cease and desist from engaging in such conduct and to take certain action to effectuate the policies of the Act. We shall order the Respondents to restore the unit work to the Local 25-represented employees,<sup>45</sup> to offer reinstatement to all unit employees who were laid off or terminated as a result of the transfer of the unit work, to make whole any employees who were laid off or terminated as a result of the decision to transfer the telephone unit work by the payment of backpay, including fringe benefits, but less interim earnings, from the date of their

<sup>45</sup> Because the restoration of unit work to union employees does not necessarily require the reestablishment of a physical plant within the Union's Long Island jurisdiction, we are not ordering the Respondents to reopen a Ronkonkoma facility, but rather only to take whatever steps are necessary to return the work previously done by union-represented employees to those employees. As the record in this case establishes, the point from which employees receive their work assignments is not determinative of where those assignments are carried out.

termination or layoff. Backpay is to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall further order the Respondents to bargain, on request, with Local 25 concerning all terms and conditions of employment at its Long Island location and, if an understanding is reached, to embody that understanding in a signed agreement.

Finally, in view of the fact that the Respondents have closed their Ronkonkoma, Long Island facility, we shall require the Respondents in addition to posting the notice, to mail to each employee terminated or laid off as a result of the decision to relocate the unit work that had been done at the Long Island facility a copy of the attached notice marked "Appendix."

On these findings of fact and conclusions of law and on the entire record in this proceeding, we issue the following proposed order.

#### ORDER<sup>46</sup>

The Respondents, Tel Plus Long Island, Inc., formerly of Ronkonkoma, New York; Tel Plus Communications, Inc., Boca Raton, Florida; Tel Plus New York City, Inc., Long Island City, New York; and Siemens Information Systems, Inc., Boca Raton, Florida, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discontinuing its telephone installation and related work at its Tel Plus Long Island, Inc. facility, located at Ronkonkoma, Long Island, and subcontracting and/or transferring that work to employees working for Tel Plus New York City, Inc., located in Long Island City, New York, in contravention of the terms of a collective-bargaining agreement and without the consent of Local 25.

(b) Failing and refusing to bargain with Local 25 for a successor collective-bargaining agreement.

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

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

(a) Resume recognition of and, on request, bargain collectively for a successor agreement with Local 25 as the exclusive collective-bargaining representative of the following unit found herein to be appropriate and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

<sup>46</sup> 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.

All employees employed by Respondent Tel Plus Long Island, including, but not limited to, all Employees designated as General Foreman, Sub-Foreman Telephone Foreman, Telephone Journeyman, Communications Technicians-Telephone Apprentices who were engaged in the performance of the following tasks within Nassau and Suffolk Counties in the State of New York: all installation and erection of equipment, apparatus or appliances, cables and/or wire, emergency power (batteries) and all directly related work which becomes an integral part of the telephone and/or telephone related system, repair and service maintenance work of Telephone Inter-Connect Communications Systems, and devices, including, but not limited to, Private Branch Exchanges (PBX-PABX), Key Equipment and associated devices and/or telephone related systems, customer-owned or employer-owned, excluding guards and supervisors as defined in the Act.

(b) Restore the telephone installation and related work formerly carried on at Tel Plus Long Island, Inc., in Ronkonkoma, Long Island, to the above-described unit employees, reopening the Ronkonkoma facility if necessary.

(c) Offer full reinstatement to all unit employees who were laid off or terminated from their jobs during October 1987 as a consequence of the decision to remove work from the Tel Plus Long Island, Inc. bargaining unit and subcontract and/or transfer that work outside the bargaining unit.

(d) Make whole, with interest, all laid-off or terminated employees for any loss of earnings or benefits they may have suffered as a result of the decision to remove work from the Ronkonkoma, Long Island facility.

(e) Preserve, and on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at their facilities in Long Island City, New York, copies of the attached notice marked "Appendix."<sup>47</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative shall be posted by the Respondents 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

<sup>47</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."

by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Mail to the unit employees terminated or laid off as a result of the closing of the Ronkonkoma, Long Island facility, copies of the attached notice marked "Appendix."

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

Dated, Washington, D.C. November 26, 1993

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James M. Stephens, Chairman

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Dennis M. Devaney, Member

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John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT, in contravention of the terms of an existing collective bargaining agreement, discontinue telephone installation and related work at the Tel Plus Long Island, Inc., facility located in Ronkonkoma, Long Island, or subcontract and/or transfer that work to employees working for Tel Plus New York City, Inc., located in Long Island City, New York.

WE WILL NOT withdraw recognition from, refuse to recognize, and refuse to bargain for a successor agreement with Local 25, International Brotherhood of Electrical Workers AFL-CIO, as the exclusive representative of employees in the appropriate unit, described below.

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

WE WILL resume recognition of and, upon request, bargain collectively with Local 25 as the exclusive bargaining representative of the following unit:

All employees employed by Respondent Tel Plus Long Island, including, but not limited to, all Employees designated as General Foreman, Sub-Foreman Telephone Foreman, Telephone Journeyman, Communications Technicians-Telephone Apprentices who were engaged in the performance of the following tasks within Nassau and Suffolk Counties in the State of New York: all installation and erection of equipment, apparatus or appliances, cables and/or wire, emergency power (batteries) and all directly related work which becomes an integral part of the telephone and/or telephone related system, repair and service maintenance work of Telephone Inter-Connect Communications Systems, and devices, including but not limited to, Private Branch Exchanges (PBX-PABX), Key Equipment and associated devices and/or telephone related systems, customer-owned

or employer-owned, excluding guards and supervisors as defined in the Act.

WE WILL restore the telephone installation and related work formerly carried on at Tel Plus Long Island, Inc., in Ronkonkoma, Long Island, to the above-described unit employees and, if necessary, reopen the Ronkonkoma facility.

WE WILL offer reinstatement to their previous (or equivalent) jobs to all employees who were terminated or laid off in October 1987 as a result of the decision to subcontract and/or transfer the unit work in contravention of the terms of the then-existing collective bargaining agreement with Local 25.

WE WILL make whole, with interest, all terminated or laid-off employees for any losses in earnings and benefits they may have suffered as a result of the decision to subcontract and/or transfer work from the Ronkonkoma, Long Island facility.

TEL PLUS LONG ISLAND, INC., TEL PLUS COMMUNICATIONS, INC., TEL PLUS NEW YORK CITY, INC., SIEMENS INFORMATION SYSTEMS, INC.