

Eagle Transport Corporation and International Brotherhood of Teamsters, Georgia-Florida Conference, AFL-CIO. Cases 12-CA-21397-3, 12-CA-21397-4, 12-CA-21397-14, and 12-CA-21494

November 4, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On May 15, 2002, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

The judge dismissed the Union's claims that the Respondent unilaterally announced and implemented a schedule change and rescinded a wage increase in violation of Section 8(a)(5) and (1) of the Act. We agree with the judge's disposition of these claims.

The Respondent operates a petroleum products delivery business from terminals in several States including Florida. On December 21, 2000, the drivers and mechanics at its Cocoa, Florida facility elected the Union as their bargaining representative.

In the fall of 2000, before the advent of the Union, Cocoa Terminal Manager John Fitzgerald mentioned to several of the Cocoa terminal drivers that the Respondent was considering a new work schedule. On January 1 or 2, 2001, Fitzgerald discussed the proposed change with the Cocoa employees during a safety meeting and indicated that drivers would be permitted to begin signing up for preferred schedules based on seniority. The drivers began to do so on January 2. On January 4, the Union was certified, and, on January 15, the Respondent recognized the Union.

In a letter dated January 22, the Respondent informed the Union that it intended to modify the drivers' schedules and offered to discuss this plan with the Union. On January 23, after receiving the Union's response that such a modification would be an unlawful unilateral change, the Respondent ceased soliciting driver shift preferences. A new schedule was never implemented.

Thereafter, before bargaining with the Union had begun, the Respondent notified employees at all of its terminals

¹ No exceptions were filed regarding the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally subcontracting bargaining unit work, or her dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(1) by engaging in surveillance of employees engaged in union activities.

except the Cocoa facility that they would be receiving a wage increase. However, on February 1, when the increase was implemented, the raise was also granted to the Cocoa drivers as a result of a computer programming error. On February 15, when one of the drivers informed the Respondent of the error, the Respondent corrected the error, returning the employees to their previous wage rates.

We agree with the judge that the Respondent's conduct concerning its planned shift change is distinguishable from the unilateral changes found unlawful in *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998), and *ABC Automotive Products*, 307 NLRB 248 (1992).² In those cases, the Board found that the employer's announcement of changes would suggest to the employees that their collective-bargaining representative "had no voice" regarding the impending change because the changes were effectively implemented when they were announced. *Kurdziel*, supra at 156. In this case, by contrast, we find that a reasonable employee would not understand Terminal Manager Fitzgerald's discussions about the proposed schedule change as the announcement of a change that was effectively implemented. *ABC Automotive*, supra at 250.³ Thus, no message that the Respondent was taking it on itself to set new terms and conditions of employment was conveyed. Moreover, the Respondent's discontinuation of its planned changes after it notified the Union of its plan and the Union objected would tend to reinforce, not undermine, the Union's relevance with respect to the employees' working conditions.⁴

We also agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) by returning unit employees to their previous wage rates. This was not a situation involving the granting and subsequent rescission of a wage increase. Rather, an administrative error resulted in

² Member Cowen agrees with his colleagues that the instant matter is distinguishable from *Kurdziel Iron* and *ABC Automotive*; thus, he finds it unnecessary to consider the continuing validity of those decisions.

³ We find it unnecessary to rely on the judge's finding that Fitzgerald did not announce the scheduling change because, even if his conduct could be construed as an announcement, it would not have caused the employees to believe that their working conditions had actually changed. Cf. *Kurdziel*, supra at 155-156.

Member Cowen agrees with his colleagues that it is not technically "necessary" to rely on the judge's finding regarding the alleged announcement. Nevertheless, Member Cowen is of the view that it is important for the Board to provide guidance to the General Counsel and the public regarding such issues. In this respect, Member Cowen notes his agreement with the judge that Fitzgerald's discussions with the employees did not rise to the level of announcing a change in the schedules.

⁴ Member Liebman notes that the General Counsel has neither alleged nor argued that the Respondent's conduct in soliciting driver shift preferences constituted direct dealing with employees in violation of Sec. 8(a)(5). In joining this decision, she expresses no opinion on the viability of such a claim here.

the miscalculation of wages in a single paycheck, and the Respondent promptly corrected the error upon discovering it. We find that this correction did not involve a change in the employees' terms and conditions of employment and, therefore, did not require bargaining.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eagle Transport Corporation, Cocoa, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Christopher Zerby, Esq., for the General Counsel.
Thomas Hodges, Esq. and *Howard Daniel, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Cocoa, Florida, on April 11, 2002. The charge in Case 12-CA-21397-3¹ was filed by International Brotherhood of Teamsters, Georgia-Florida Conference, AFL-CIO (the Union) on March 21, 2001, against Eagle Transport Corporation (the Respondent). The original charge in Case 12-CA-21397-4 was filed by the Union on March 21, 2001, and amended on July 27, 2001. The original charge in Case 12-CA-21397-14 was filed by the Union on March 21, 2001, and amended on June 17, 2001. The Union filed the charge in Case 12-CA-21494 on May 2, 2001. Based on these charges, the Regional Director for Region 12 of the National Labor Relations Board (the Board) issued an Order consolidating cases, consolidated complaint, and notice of hearing on November 30, 2001. The consolidated complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by announcing and implementing a new work schedule and job bidding system, rescinding a wage increase, and subcontracting work without prior notice to the Union and without affording the Union an opportunity to bargain with respect to conduct. The consolidated complaint further alleges that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees engaged in union activities.

Respondent filed an answer denying the essential allegations in the complaint, and asserting certain defenses.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs³ filed by the General Counsel and Respondent, I make the following

¹ All dates are in 2001 unless otherwise indicated.

² In his brief, counsel for the General Counsel confirms that the court reporting service was notified that portions of the testimony were omitted from the original transcript. By memorandum dated April 25, 2002, the court reporting service acknowledged that after an extensive audit, the transcript was redone and an amended and corrected transcript was submitted.

³ After filing its posthearing brief, Respondent filed a motion to file a reply brief. Respondent asserts that the motion is based upon its desire to distinguish a Board case cited by counsel for the General

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the nonretail transport and delivery of petroleum products at its facilities in Cocoa and Jacksonville, Florida, where it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Florida. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent admits, and I find, that the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers (dispatched out of Cocoa, Florida) and mechanics employed by the Respondent at its Cocoa, Florida facility, excluding all other employees, guards and supervisors as defined in the Act.⁴

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the business of transporting and delivering gasoline and diesel fuel products. In mid-2001, Respondent operated 18 terminals in six States including terminals in Cocoa, Jacksonville, Tampa, and Fort Lauderdale, Florida. On December 21, 2000, a majority of the employees in the unit described above, elected the Union as their bargaining representative. On January 4, 2001, the Union was certified as the exclusive bargaining representative of the unit. In a letter dated January 15, Respondent recognized the Union as the exclusive bargaining representative for the Cocoa unit employees and acknowledged its willingness to negotiate with the Union. The first bargaining session for the Respondent and the Union occurred on February 28. Respondent's facility in Cocoa, Florida, remained in operation until September 2001 when the facility closed. Neither the closure of Respondent's Cocoa facility nor any matter relating to the closure is alleged as a violation in the current proceeding.

B. Facts as Presented by the Parties

1. Allegation of unilateral implementation of new work schedule and job bidding system

Paragraph 6 of the consolidated complaint alleges that on or about a date in January 2001, Respondent announced and began

Counsel in his posthearing brief. Counsel for the General Counsel subsequently filed an opposition to Respondent's motion. Attached to the respective motion and opposition to motion, Respondent and counsel for the General Counsel included the underlying reply brief and answer to the reply brief. The Board's Rules and Regulations make no specific provision for the filing of a reply brief and I set no briefing schedule to include the filing of a reply brief. After giving due consideration to Respondent's motion, it is hereby denied.

⁴ These employees hereinafter will be described collectively as the unit.

implementing a new work schedule and job-bidding system for drivers employed in the unit. The consolidated complaint further alleges that Respondent did so without affording the Union an opportunity to bargain with the Respondent concerning this mandatory subject of collective bargaining.

During 2000 and 2001, John Fitzgerald was employed by Respondent as terminal manager for the Cocoa, Florida terminal facility. Fitzgerald recalled that in early 2000, Respondent's business was growing to such an extent that new drivers and transportation units were needed at the Cocoa facility. Respondent's practice was for the newly hired drivers to take whatever shifts available and as they gained seniority they moved into more desirable shifts. In fall 2000, Respondent lost Speedway, which was one of Respondent's largest customers. Fitzgerald testified that upon losing this business, Respondent found itself overstaffed with more drivers than work available. While natural attrition prevented his having to lay off drivers, he was nevertheless faced with gaps in the drivers' work schedules. Fitzgerald recalled that even before the Union petitioned for an election, he began talking with the drivers about his plans to set up a new work schedule utilizing seniority. Fitzgerald remembered talking with Paul Brezina, John Pabst, and Chuck Kendrow.⁵ Fitzgerald estimated that during the last week of December or the first week of January, he again talked with Paul Brezina about the change in schedule. Fitzgerald described Brezina as the lead trainer, his most senior driver, and someone to whom he could "bounce ideas off." He also explained that Brezina had been the union observer in the election and his "only real contact with the Union."

Fitzgerald prepared a proposed schedule preference form based upon seniority. Beginning on January 2 and continuing through January 23, Respondent gave its 30 drivers at the Cocoa facility the opportunity to indicate their shift preference based upon their seniority.⁶ Respondent does not deny that during this period of time when the drivers indicated their shift preference, there were no discussions with the Union about the proposed change in schedules. In a letter dated January 22, Respondent's vice president of human resources, Ron Thomas, informed the Union that Respondent intended to modify the drivers' schedules with the selection of schedules based on seniority. Thomas confirmed however, that Respondent had not made any final decision in this regard and extended an offer for discussion. In a letter dated January 22, the Union's legal department informed Respondent that hours and work schedules are considered mandatory bargaining subjects and unilateral changes by the employer constitute violations of Section 8(a)(5) of the Act. On January 23, Fitzgerald received a telephone call from Thomas, informing him that he couldn't continue the schedule change because Respondent had not talked with the Union. Fitzgerald testified that he immediately stopped the process and none of the drivers' choices were implemented. Drivers Phil Huddy Jr. and Rafael Burgos testified that while they were given the opportunity to

select a new work schedule in January 2001, the changes were never implemented.

Thomas testified that Respondent submitted their proposal to modify the work schedules in their first meeting with the Union on February 28. Phil Huddy, who served as a union representative on the negotiating committee, recalled the Union took the position that it would not agree to interim schedule changes, wanting only to negotiate a full package covering all subjects. No agreement was ever reached by the parties concerning the proposed change in shift schedules.

2. The alleged rescission of the wage increase

Paragraph 7 of the consolidated complaint alleges that on or about February 15, 2001, Respondent rescinded the February 1, 2001 wage increase that it had granted to drivers employed in the unit. It is undisputed that on January 31, 2001, Respondent notified all drivers in 17 of its 18 terminals that they would receive a wage increase beginning with the February 4 pay period. Drivers in the Florida terminals were notified that they would receive a 5-percent increase and the drivers in the other terminals were notified that they would receive a 2-1/2-percent increase. Ron Thomas testified that the drivers of the Cocoa terminal were excluded because such a pay increase to them would constitute a unilateral change. Thomas also explained that since Respondent was scheduled to begin bargaining with the Union, it needed something in its pocket for negotiation. Thomas recalled that during the union campaign, he made speeches to the Cocoa drivers. In his presentation to the drivers, he told them that if the Union won the election, the Respondent would have to bargain about wages and other conditions of employment. Thomas told the drivers that their wages would be frozen until after bargaining with the Union.

On the payday when the scheduled increase was to be paid, Fitzgerald learned from one of the Cocoa drivers that the pay increase had been mistakenly included in the drivers' pay. Fitzgerald immediately contacted Ron Thomas and informed him that the Cocoa drivers had received the wage increase. Thomas testified that he had been a "little upset" upon hearing this and he then contacted the payroll manager in the corporate office. Thomas learned that because of a malfunctioning computer program, the Cocoa drivers were inadvertently included in the February wage increase. The computer error was immediately corrected and the Cocoa drivers were removed from the wage increase. Respondent asserts that since the payment of the wage increase for this one pay period was not the fault of the drivers, the unit employees were not required to return the money they received in error. Thomas further testified that while the Union filed charges concerning the wage increase, the Union never requested to bargain about the recession of the wage increase.

3. The alleged subcontracting of work

Paragraph 8 of the consolidated complaint alleges that from on or about March 5, 2001, to on or about March 9, 2001, Respondent subcontracted loads of work regularly performed by employees in the unit to subcontractors Infinger and Tank Wagon. Respondent does not deny this allegation.

"Runouts" are periods in which customers no longer have product to sell. Both Fitzgerald and Thomas testified that runouts

⁵ Driver Phil Huddy recalled that Fitzgerald talked with him about the proposed schedule change approximately a week before the election.

⁶ The seniority list with the drivers' preferences was received as GC Exh. 4.

typically occur in Florida during the peak business season from late fall to early spring. When Respondent has a runout, the customer may fine Respondent or give the business to a competitor. Fitzgerald recalled that Respondent was experiencing frequent runouts in February and March. He explained that while customers do not want to see runouts even as often as two or three times a week, Respondent was experiencing runouts as frequently as five to six times a day. During this period, Pantry, which was one of Respondent's major accounts, not only imposed fines, but also gave the business to one of Respondent's competitors. To balance out the work, Fitzgerald asked for volunteers to come in for extra shifts. While a few drivers volunteered, there were not enough to solve the problem. Thomas Lovett, director of operations, advised Fitzgerald to contract with Infinger and Tank Wagon to deliver some of excess fuel loads. During the period of time between March 5 and 9, 35 loads of fuel were subcontracted to Respondent's competitors.

Describing the circumstances as an emergency situation, Fitzgerald confirmed that there had been no contact with the Union prior to subcontracting this work. Lovett testified that Respondent had previously used interim subcontracting with outside carriers for its other terminals during periods when Respondent could not get the required loads to the customers. The subcontracting to outside carriers is more expensive for Respondent because the outside carriers charge a higher freight rate than what Respondent charges its customers. Lovett explained that Respondent had the runouts in March because of its inability to get enough drivers scheduled properly. He explained that his choices were to pay the runout charges and jeopardize the relationship with customers or to use outside carriers. Lovett admitted that not only had he failed to notify the Union about the subcontracting, he had not even thought about doing so. He said that he had simply made the decision out of habit because he had done so in the past. Fitzgerald testified, without contradiction, that this period of subcontracting had no adverse effect on either the pay or the hours for the Cocoa drivers.

4. The alleged surveillance by Tom Lovett

It is undisputed that all of Respondent's terminals are designated no-smoking areas. Each terminal has a designated smoking area that must be 25 feet away from the terminal shop area or the truck parking area. There is no dispute that the designated smoking area for the Jacksonville terminal is the area immediately outside the door to the metal garage. It is also undisputed that the Jacksonville designated smoking area is where drivers, dispatchers, and management congregate to not only smoke but also to "hang out" and talk.

As director of operations for Florida, Lovett has occasion to visit the Jacksonville facility at least once a month. He estimates that he may visit more often if he is involved in hiring or training. While at the facility, he reviews the driver inspection reports and driver logs and he also inspects the equipment and shop area. While at the Jacksonville facility, Lovett may leave the building to smoke in the designated smoke area, to receive calls on his cellular phone, or to obtain files from his car.⁷

⁷ Lovett explained that cellular phone reception is poor within the metal building at Jacksonville. Lovett also explained that because he

Brad O'Malley testified that as a project organizer for the Union, he visited Respondent's Jacksonville terminal facility on several occasions between February and May 2001. O'Malley testified that when he visited the terminal, he stood or walked on the sidewalk at the front of the terminal and attempted to talk with drivers and give them flyers as they exited the terminal. O'Malley estimated that he remained outside the terminal for about an hour during his first visit on February 19. He visited the terminal more than once between February 25 and 27, and on one of these visits, he recalled being at the terminal for about 2 hours. O'Malley visited the terminal again on March 7. When he arrived at approximately 11 to 11:30 a.m., he saw Lovett in the area where employees congregate to smoke and talk. O'Malley recalled that Lovett was outside the terminal approximately a half hour to 45 minutes. O'Malley remained at the terminal for about 2 hours. During the time that Lovett was outside the facility, he spoke with the three to six drivers who were also outside in the smoking area and he stood facing east and away from O'Malley. O'Malley did not speak with Lovett on March 7. When O'Malley visited the terminal again in April 1,⁸ he again saw Lovett outside in the same location and again facing east. He estimated that Lovett had been about 60 feet away from him. On that same day, O'Malley walked over to Lovett and told him to stop surveilling the drivers. Lovett replied, "I'm out here smoking a cigarette." O'Malley alleges that when he challenged Lovett on how many times he had seen him smoking a cigarette in the past, Lovett responded that he could "do whatever the fuck he wanted to do and watch whomever he wanted." O'Malley contends Lovett also stated, "[T]his is my mother-fucking terminal and I will do what I want to do." O'Malley asserts that he threatened to file charges against Lovett and then left the area where Lovett was located. Lovett denied making any of these statements to O'Malley.

When O'Malley visited the terminal on May 1 or 2, he arrived sometime between 3 and 3:30 p.m. He testified that he later saw Lovett outside in the same area around 3:45 to 4 p.m. O'Malley recalled that Lovett and Terminal Manager Tim Collier remained outside the terminal until approximately 6 p.m. Jacksonville driver, Robert Mathis, testified that he had been present with Lovett and Collier outside the terminal on the day in May when O'Malley came to the terminal. Mathis confirmed that while he was smoking with Lovett and Collier, a guy unknown to him came up and stood in the driveway. Mathis later learned that the individual was O'Malley. While O'Malley was standing in the driveway, mechanic James Butler drove out of the driveway and in the course of doing so spun his tires. Mathis recalled that O'Malley called out to Lovett, "Is that the way you teach your damn drivers?"⁹ While O'Malley yelled out something to Butler, Mathis had been unable to hear what was said. Mathis heard

travels to the various terminals, his office is virtually in the trunk of his car.

⁸ During his testimony, O'Malley refers to the visit as being on both April 3 and 7.

⁹ When O'Malley recalled the conversation with Lovett, he recalled that he had asked Lovett if he taught that kind of driving at the "Tom school of safety." O'Malley also recalled that Lovett said, "Get the F— out of this property, Nobody wants you around here. I'm going to call the police."

Lovett tell O'Malley, "Don't talk to my drivers like that." Mathis recalled that Lovett instructed Collier to contact the police.¹⁰

In contrast to O'Malley, Mathis recalled that Lovett was only outside the terminal for about 10 to 13 minutes on May 1 or 2. While Mathis recalled that he had remained outside in the smoking area with the other drivers for 30 minutes to an hour, he recalled that Lovett was inside the building for most of this time. Mathis also confirmed that this was not the first time that he had ever seen Lovett outside in this area. During the 2-1/2 years that Mathis has worked for Respondent, he has often seen Lovett in this same area.

Analysis and Conclusions

A. New Work Schedule and Job Bidding System

Although the complaint alleges that Respondent announced and began implementation of a new work schedule and job bidding system, there is no dispute that the proposed schedule change was never implemented. It has been established that the "real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees."¹¹ The Board has found that such damage to the Union's bargaining authority may be accomplished merely by the threat to implement, as such threat emphasizes to employees that there is no necessity for a collective-bargaining agent.¹² Relying upon such authority,¹³ General Counsel argues that an employer may not even announce a unilateral change without violating Section 8(a)(5) and (1) of the Act and a violation occurs even though the schedule change was never actually implemented by Respondent. I find the circumstances of this case distinguishable from those instances in which the mere announcement of a proposed change constitutes a unilateral change in violation of Section 8(a)(5).

In the instant case, I do not find the evidence demonstrates that Respondent threatened or even announced that it would implement a change in its scheduling of drivers. True enough, Fitzgerald spoke with the drivers, including the driver that he perceived as his "Union contact" about his desire to change the schedule. He even went so far as to ask them to designate their shift preference for a new schedule. Respondent did not however, proceed beyond this point in its planning and decisionmaking. When notified by the Union that such schedule change would be viewed as a unilateral change, Respondent immediately abandoned its plan to implement a schedule change. The evidence reflects that even when Respondent could not schedule sufficient drivers to handle its work in March, Respondent nevertheless refrained from instituting such desired schedule changes. There is no evi-

¹⁰ Lovett testified that he told O'Malley that he (Lovett) could do whatever he wanted and that he would let the police settle it. Lovett however, recalled that the incident with Butler had occurred in March rather than May.

¹¹ *Page Litho, Inc.*, 311 NLRB 881 (1993).

¹² *ABC Automotive Products Corp.*, 307 NLRB 248 (1992); *J. Josephson, Inc.*, 287 NLRB 1188, 1190 (1988).

¹³ In *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998), the employer summoned employees to the office to inform them of a reduction of time for their lunchbreaks. The respondent employer also displayed a written memo announcing the lunchtime reduction.

dence that Respondent's consideration of the schedule change and obtaining driver preferences undermined the Union's position in bargaining on this issue. The evidence reflects that Respondent first discussed this change with drivers even before the Union was elected to represent the unit employees and the proposed change was discontinued prior to any bargaining with the Union. Accordingly, I find insufficient evidence to support that the Respondent announced and implemented a new work schedule and job bidding system in violation of Section 8(a)(5) of the Act.

B. Unilateral Recession of Wage Increase

There is a long line of Board and court opinions that have consistently held that an employer is obligated to maintain the status quo, as it existed before the Union achieved representational status during its initial bargaining with a newly certified Union. *General Motors Acceptance Corp.*, 196 NLRB 137 (1972), enfd. 476 F.2d 850 (1st Cir. 1973). An employer is prohibited from changing the wages, hours, terms, and conditions of employment of its bargaining unit employees without giving notice to their bargaining representative and affording the representative the opportunity to bargain over the change. *NLRB v. Katz*, 369 U.S. 736 (1962). General Counsel argues that Respondent violated Section 8(a)(5) of the Act by its recession of the February 2001 wage increase to the bargaining unit employees. Respondent however, argues that it did not rescind the wage increase but merely corrected a computer programming error that mistakenly included the bargaining unit employees in a wage increase. Respondent argues that its actions were simply returning the employees' wages to what existed prior to the Union and maintaining the status quo as mandated by the Board and the courts.

The pivotal question becomes to what extent Respondent's wage increase was customary or established through past practice. An employer violates Section 8(a)(5) and (1) of the Act by withholding a customary across-the-board wage increase. *Burrows Paper Corp.*, 332 NLRB 82 (2000). Even where the amount of the increase is discretionary, the employer nonetheless violates the Act when it withholds a wage increase from unit employees where the granting of the increase has become an established practice. *Central Maine Morning Sentinel*, 295 NLRB 376 (1989). The Board has long held that to the extent that a wage increase is devoid of discretion, the employer is obligated to continue such wage increase even without notice or bargaining. To the extent that the employer retained discretion however, it is obligated to consult with the employees' bargaining representative before taking any action. *Hanes Corp.*, 260 NLRB 557 (1982);¹⁴ *Oneita Knitting Mills, Inc.*, 205 NLRB 500, fn. 1 (1973). In *Daily News of Los Angeles*, 315 NLRB 1236 (1994),¹⁵ the Board affirmed the proposition that an employer that has a practice of granting merit raises that are fixed as to timing but discretionary as to amount may not discontinue that practice without bargaining to agreement or impasse with the union.

¹⁴ Overruled in part on other grounds in *Adair Standish Corp.*, 292 NLRB 890 (1989).

¹⁵ Enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

In *American Mirror Co.*, 269 NLRB 1091, 1093 (1984), the Board affirmed the judge's decision in finding no violation in the employer's withholding of wage increases where the increases were not an established practice because of their variance in past years as to both timing and amount. The judge stated that to find otherwise would subject the employer involuntarily to grant some type of interim raises, while facing the obligation to negotiate an additional or different wage program without certainty in its outcome or economic effect.

As stated by the Board in *Daily News of Los Angeles*, supra at 1237 "The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge." The overall evidence of this case fails to show an established practice of Respondent in the timing or the amount of wage increases to its employees. On the contrary, the evidence shows that even in the February wage increase, employees at Respondent's Florida terminals received a different amount than employees in other terminals. General Counsel does not allege nor is there evidence to show that Respondent has a past practice of awarding wage increases at any established time or in any specific amount. There was no evidence that this was a customary wage increase or that there was an established practice of an annual wage increase.

Counsel for the General Counsel submits in his brief that mistakenly implemented changes require the employer to give notice and an opportunity to bargain before the employer can rescind the change, citing *JPH Management, Inc.*, 337 NLRB 72 (2001). In *JPH Management*, the employer and union were involved in negotiations for a successor collective-bargaining agreement. A tentative agreement was reached and the bargaining unit employees ratified the agreement. Seven days later the employer implemented the wage increase that had been included in the agreement. After the employees had been receiving the wage increase for approximately 5 weeks, the employer's president rescinded the wage increase upon her return to the United States. In the instant case, Respondent corrected the computer error that resulted in an incorrect payment to employees in one paycheck. I find these circumstances distinguishable from *JPH Management* where the respondent appeared to simply revoke the collective-bargaining agreement and rescinded the wage increase after 5 weeks. Accordingly, I do not find that Respondent rescinded the February 2001 wage increase to bargaining unit employees in violation of Section 8 (a)(5) and (1) of the Act.¹⁶

C. Subcontracting Work

The Board has clearly held that subcontracting is a mandatory subject of bargaining. *Torrington Industries*, 307 NLRB 809 (1992), and the bargaining obligation endures even when the subcontracting does not result in the loss of work for unit employees. See *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994). In *Bottom Line Enterprises*, 302 NLRB 373 (1991), the Board held that where parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from

unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. The Board recognized that the employer must also refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board however, also noted two limited exceptions to this general rule: when a union engages in tactics designed to delay bargaining and "when economic exigencies compel prompt action." Respondent argues that its subcontracting was clearly motivated by economic reasons and was an attempt to salvage relationships with customers.

In *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979), the Board identified some circumstances that would justify or excuse an employer's taking action while bargaining is ongoing. These circumstances were described in *Winn-Dixie* as involving "extenuating circumstances" and a "compelling business justification." The Board recognizes "compelling economic considerations" as extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action.¹⁷ Since its decision in *Bottom Line*, the Board has further characterized the economic exigency exception as requiring a heavy burden, and involving the existence of circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action.¹⁸ In *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987), the Board identified "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action'" as the only compelling economic considerations that would entirely excuse bargaining. In *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), the Board reiterated its position that absent a dire financial emergency, economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral change.¹⁹

In its decision in *RBE Electronics*, the Board also identified other economic exigencies that although not sufficiently compelling to excuse bargaining altogether, should nonetheless fall within the *Bottom Line* exception. Where an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, it will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. The Board clarified that because the *Bottom Line* exception is limited only to those exigencies in which time is of the essence and which demand prompt action, an employer will be required to show a need that the particular proposed action be implemented promptly. The employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. If the employer has demonstrated that a situation meets these require-

¹⁷ *Maple Grove Health Care Center*, 330 NLRB 775, 779 (2000), citing *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

¹⁸ *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992); *Firefighters*, 304 NLRB 401 (1991); and *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991), enf.d. 984 F.2d 1562 (10th Cir. (1993)).

¹⁹ *Farina Corp.*, 310 NLRB 318, 321 (1993); *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414, 418 (1994).

¹⁶ *Lamonts, Apparel, Inc.*, 317 NLRB 286 (1995).

ments, it would satisfy its statutory obligations by providing adequate notice and an opportunity to bargain over the changes that it proposes in to respond to the exigency. Thus, even where the employer has demonstrated that the changes were compelled by an exigency caused by external events, not reasonably foreseeable, and beyond the employer's control, the employer was nonetheless under an obligation to provide the union with adequate notice and an opportunity to bargain.

In its brief, Respondent cites *General Electric Co.*, 264 NLRB 306 (1982),²⁰ for the proposition that an employer's unilateral subcontracting of unit work will not be held to be an unfair labor practice where certain criteria are met. The criteria are identified as: (1) the subcontracting is motivated solely by economic considerations; (2) it comports with the company's traditional methods of conducting its business operations; (3) it does not vary significantly from prior established practices; (4) it does not have a demonstrative adverse impact on the employees in the bargaining unit; and (5) the union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings. Respondent argues that the facts of this case establish each criterion. I agree that Respondent presented evidence in support of the first four criteria set out by Judge McLeod in this 1982 decision. With respect to the fifth criteria, Respondent asserts that the Union and Respondent discussed the schedule problems and the effect on the terminal's ability to service its customers at every negotiation meeting, and thus, the Union had the opportunity to negotiate the issue. This assertion however, is not supported by the testimony of Respondent's own witnesses. Lovett admits that no notice was given to the Union prior to the subcontracting in issue. Contrary to counsel's argument, Fitzgerald admitted that the first bargaining session with the Union in which schedule changes were discussed was after the subcontracting of work.

In this case, Respondent would argue that it was faced with an economic exigency of such a compelling nature as to relieve it from all bargaining obligations. Lovett testified that he chose to subcontract 35 loads rather than to pay runout charges and jeopardize Respondent's relationship with customers. John Fitzgerald testified that there was no contact with the Union about subcontracting and characterized the circumstances as an emergency situation. He said that he was concerned that customers would pull their business because he had seen this happen with other terminals. I note that in a recent case, the Board found that the fact that an employer had been threatened with liquidated damages by its customer was insufficient to sustain the claim of dire financial emergency. See *Ryder/Ate, Inc.*, 331 NLRB 889 (2000). As the Board stated in *Farina Corp.*, 310 NLRB 318, 321 (1993), "Loss of a customer account does not constitute a compelling economic consideration justifying a failure to bargain." Respondent argues that the need to subcontract was triggered by its inability to schedule its drivers more evenly and it was unable to change the schedules because of the opposition of the Union. Respondent also admits however, that these runouts occurred during the seasonal period when runouts are likely. Thus, while the employer may have been limited in its ability to

schedule drivers, the likelihood of runouts was certainly foreseeable.

Applying the principles of the Board's holdings in similar cases, it is clear that the Respondent's claimed exigency is not the type of "extraordinary event" that justifies unilateral action without bargaining. The question then follows as to whether it is of a compelling type defined in *RBE Electronics*, i.e., whether the employer would be entitled to take unilateral action if bargaining over the particular matter resulted in impasse. Based upon the testimony of Fitzgerald and Lovett, it is apparent that time was of the essence and prompt action was required in dealing with its "runouts." It is undisputed however, that even if Respondent's claimed exigency met the criteria for the less compelling event, Respondent made no attempt to notify the Union or initiate any bargaining about the subcontracting of its work. Lovett admitted that he not only failed to notify the Union, but he had not even thought about doing so. He implemented the subcontracting out of habit because he had done so in the past.

In summary, Respondent had a statutory obligation to provide notice and an opportunity to bargain with the Union before making any changes in the existing terms and conditions of employment of its employees. Respondent makes no claim of impasse or that the Union was engaging in delay tactics in bargaining. As discussed above, the Respondent has failed to establish an economic exigency that would waive its bargaining obligation. In a recent case, a Respondent employer argued that liability and customer dissatisfaction contributed to its need to unilaterally subcontract unit work. Citing *Vincent Industrial Plastics*, 328 NLRB 300 (1999), enfd. in relevant part 209 F.3d 727 (D.C. Cir. 2000), the Board acknowledged that the risks faced by the employer may have led to its decision to make changes, but were not so compelling as to justify unilateral implementation of these changes. *Brede, Inc.*, 335 NLRB 71 (2001). Accordingly, I find that by unilaterally subcontracting the delivery of loads of fuel in March 2001, the Respondent violated Section 8 (a)(5) and (1) of the Act.

D. Lovett's Alleged Surveillance

In support of complaint paragraph 11, General Counsel presented only the testimony of union organizer, Brad O'Malley. O'Malley recalled visiting the Jacksonville terminal a number of times between February and May 2001. While at the facility, he usually stood on the public sidewalk or walked across the driveway and appeared to always have a full view of the entrance to the facility. Any individuals standing in the designated smoking area just outside the front door would likewise have had the opportunity to view O'Malley as he attempted to talk with drivers and hand out union flyers. O'Malley testified that when he visited the terminal on or about May first or second, he saw Thomas Lovett outside the terminal at approximately 3:45 to 4 p.m. He asserts that Lovett remained outside the terminal with Terminal Manager Timothy Collier until 6 p.m.²¹ In contrast to O'Malley's testimony, Mathis testified that on this same day, Lovett had only been outside the terminal for 10 to 13 minutes. Mathis recalled that while he had been outside in the designated

²⁰ The Board affirmed the decision of Administrative Law Judge Philip P. McLeod without comment.

²¹ Collier neither recalled how long he and Lovett had been outside the terminal nor how long O'Malley remained in the terminal.

smoking area for 30 minutes to an hour, Lovett had been back in the building for most of that time. I found Mathis' testimony to be credible and straightforward. He appeared to give a truthful account of events without any attempt to embellish or exaggerate. Generally the testimony of current employees is entitled to considerable weight because it is not likely to be false. Normally such weight is accorded the employee's testimony because such testimony is adverse to an employee's pecuniary interest.²² In this instance, I am cognizant that Mathis was in a more tenable position as he was testifying on behalf of the Respondent. In evaluating the testimony of O'Malley and Mathis, I nevertheless find Mathis to be more credible. While O'Malley asserts that Lovett engaged in surveillance on May 1, he also acknowledges that Lovett was in the same area when O'Malley visited the facility on prior occasions. On both March 7 and April 1, Lovett stood in the smoking area facing away from O'Malley. O'Malley does not deny that he spoke first to Lovett on both April 1 and May 1. While O'Malley visited Respondent's Jacksonville facility numerous times from February to May and saw Lovett in this same area previously, he alleges that Lovett engaged in surveillance only on May 1.

Even without my crediting the testimony of Mathis and Lovett, the evidence does not support a finding of unlawful surveillance. An employer's mere observation of open public union activity on or near its property does not constitute unlawful surveillance. *Villa Maria Nursing & Rehabilitation*, 335 NLRB 1345 (2001). *Emenee Accessories*, 267 NLRB 1344 (1983). As the Board found in *Milco Inc.*, 159 NLRB 812, 814 (1966), enfd. 388 F.2d 133 (2d Cir. 1968), "union representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." One administrative law judge has stated in a decision adopted by the Board, "The notion that it is unlawful for a representative of management to station himself at a point on management's property to observe what is taking place at the plant gate is too absurd to warrant comment. If a union wishes to organize in public it cannot demand that management must hide." *Tarrant Mfg. Co.*, 196 NLRB 794 (1972).

In his brief, counsel for the General Counsel agrees that in general when union activity is conducted on or near an employer's premises, there can be no complaint that the employer is engaging in surveillance of that activity. *Brown Transport Corp.*, 294 NLRB 969 (1989). General Counsel points out however, that the Board in *Brown* also identified factors that may indicate a deliberate interference with union activity and thus constitute unlawful observation. In the instant case, there is no evidence of any other acts to interfere with the Union's handbilling nor is there any evidence that Lovett's presence outside the terminal was a departure from his customary or normal practice while at the Jacksonville terminal. In crediting the testimony of Mathis, there was no evidence that Lovett's observation of O'Malley's union activity was of such a duration as to be suspect. During General Counsel's cross-examination of Lovett, he acknowledged that he was the same Tom Lovett mentioned in *Penn Tank*

Lines, 336 NLRB 1066 (1999). General Counsel argues that the Board's finding of Lovett's past unlawful response to union organizing campaigns is further support for finding that Lovett's observation of O'Malley on May 1 was violative of 8(a)(1) of the Act. In its brief, Respondent argues that the *Penn Tank Lines* case reveals no discussion of any alleged surveillance by Lovett. A review of the case indicates that an employee solicited employees to sign a petition in support of the union after unsuccessful negotiations and the respondent employer's withdrawal of recognition of the union. The judge found that the employer's terminal manager, Tom Lovett, observed the employee soliciting drivers' signatures for the petition and accused the employee of harassing and threatening other drivers. When the employee denied the accusations, Lovett suspended him. The judge found that Lovett later met with the employee and offered him reinstatement if the employee would stop "harassing" the other drivers. The employee refused and was not reinstated. The Board ultimately found that Lovett's admonition to the employee to "leave the men alone" would reasonably tend to interfere with the employee's free exercise of his Section 7 right to solicit employees to sign the petition favoring the Union, in violation of Section 8(a)(1). While the Board's order included an order to cease and desist from conditioning reinstatement to employment on employees refraining from engaging in union or protected activities, there was no finding nor any order concerning unlawful surveillance. I do not find that Lovett's conduct in *Penn Tank Lines* evidences a proclivity for engaging in unlawful surveillance or a basis to find that he has engaged in such conduct herein. Accordingly, I find insufficient evidence to support paragraphs 11 and 12 of the consolidated complaint.

CONCLUSIONS OF LAW

1. Respondent, Eagle Transport Corporation, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, International Brotherhood of Teamsters, Georgia-Florida Conference, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By unilaterally subcontracting bargaining unit work, the Respondent has violated Section 8(a)(1) and (5) of the Act.
4. Respondent did not violate the Act in the other ways alleged in the complaint.
5. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

As the evidence in this case does not show that the unilateral changes have had any material or measurable effect on the earnings of the bargaining unit employees, I conclude that no backpay remedy is warranted. Nevertheless, as these changes affect and tend to undermine the process of good-faith bargaining, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²³

²² *Shop-Rite Supermarket, Inc.*, 231 NLRB 500 (1977); *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961), modified on other grounds 308 F.2d 89 (5th Cir. 1962).

²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondent, Eagle Transport Corporation, Cocoa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Unilaterally subcontracting bargaining unit work performed at its Cocoa, Florida facility.
 - (b) In any like or related manner interfere with, restrain, or coerce 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) On request, bargain with the Union regarding any changes in wages, hours, or other terms and conditions of employment for the employees in the bargaining unit described in the decision above.
 - (b) Within 14 days after service by the Region, post at its office copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Inasmuch as the Respondent has closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to the Union and to all current unit employees and former unit employees employed by the Respondent at any time since March 5, 2001.
 - (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

mended 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.

²⁴ 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."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Insofar as the complaint alleges matters not found herein to have violated the Act, the complaint is dismissed.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally subcontracting bargaining unit work.

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, on request, bargain with the Union as the exclusive representative of our employees in the bargaining unit regarding any changes in wages, hours, and terms and conditions of employment and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time drivers (dispatched out of Cocoa, Florida) and mechanics employed by the Employer at its Cocoa, Florida facility, excluding all other employees, guards and supervisors as defined in the Act.

EAGLE TRANSPORT CORPORATION