Fairfield Tower Condominium Association & Fairfield Presidential Management Corp., Joint Employers *and* Local 32B-32J, Service Employees International Union, AFL–CIO. Case 29–CA–24243

December 8, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On September 24, 2002, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and a reply brief in further support of its exceptions. The Charging Party filed an exception, and an answering brief to the Respondent's exceptions.

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

The 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,[1] and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Sections 8(a)(1) and (3) by failing to reinstate striking employees upon their unconditional offer to return to work. He also found that the Respondent violated Section 8(a)(5) and (1) by unilaterally entering into a subcontracting agreement with another employer to provide services previously performed by striking employees. The Respondent filed exceptions to these findings. We find no merit in the Respondent's exceptions, and adopt the judge's findings and conclusions for the reasons set forth in this decision.

I. FACTS

The Respondent and the Union have had a longstanding bargaining relationship covering superintendents, maintenance employees and porters working at the Respondent's apartment complex consisting of 19 buildings. The porters are the least skilled employees in the unit; their duties include collecting garbage, cleaning floors, washing windows, and shoveling snow. The parties' most recent collective-bargaining agreement was effective from April 1997 to April 20, 2000.[2] At the time of the expiration of that contract, there were 2 superintendents, 10 maintenance employees, and 19 porters, a total of 31 unit members.

The parties began to bargain for a successor agreement at the end of 2000. The Union submitted its bargaining proposals to the Respondent at a bargaining session on November 16, 2000. The Respondent submitted its counterproposals, including a management-rights clause containing a subcontracting provision, to the Union on December 22, 2000. The Respondent's subcontracting proposal provided that Respondent had "the absolute right to subcontract out to agencies or others any of its work as it, in its sole discretion, deems necessary." The prior collective-bargaining agreement did not include this language in its management-rights clause. The Union proposed that there be no change in the existing management-rights provision.

After the December 22, 2000 bargaining session, the Respondent began hearing rumors that the unit employees might go on strike. Between late December 2000, and early January 2001,[3] the Respondent contacted three or four independent contractors to discuss coverage of the porters' work if they went on strike. According to the Respondent, only one of the contractors, "Mr. Klean," expressed an interest in performing the work. On January 10, the Respondent met with Mr. Klean to discuss the potential job.

The Respondent and the Union engaged in a final bargaining session on February 21. There was no discussion of subcontracting at that session or any of the previous bargaining sessions. Shortly after the beginning of the February 21 meeting, the union representatives convened separately, and returned to the meeting announcing that they were calling a strike. The bargaining session imme-

[1] In its exceptions, the Respondent contends that the judge committed prejudicial error by issuing a decision containing verbatim portions of the Charging Party's and General Counsel's posthearing briefs. The Board has stressed that it does not condone a judge's extensive use of partisan briefs. *Regency Electronics,* 276 NLRB 4 fn. 2 (1985)*; Washington Beef Producers*, *Inc.*, 264 NLRB 1163 fn. 2 (1982), enfd. mem. 735 F.2d 1371 (9th Cir. 1984). However, the Board has repeatedly found that where a judge has carefully reviewed the record and has determined that one of the briefs submitted to the judge fully and accurately discusses the case, it is permissible to rely on portions of that brief in the judge's decision; such reliance is not per se prejudicial and does not otherwise constitute reversible error. *Waterbury Hotel Management LLC*, 333 NLRB 482 (2001), enfd. 314 F.3d 645, (D.C. Cir. 2003); *Washington Beef Producers, Inc.*, supra, 264 at 1163 fn. 2, citing *Shield-Pacific, Ltd. & West Hawaii Concrete, Ltd.*, 245 NLRB 409, 410 fn. 2 (1979), enfd. mem. 647 F.2d 172 (9th Cir. 1981). The record in this case reveals that the judge relied on substantial portions of both the Charging Party's and General Counsel's briefs, but did not rely entirely on either. The judge's decision is comprehensive in its consideration of all of the relevant evidence and legal issues, and the Board itself has independently reviewed the entire record in consideration of the exceptions and briefs. Although we continue to discourage extensive use of partisan briefs, we conclude that the judge's reliance here on the Charging Party's and General Counsel's briefs does not constitute reversible error.

[2] We correct an inadvertent error in the judge's decision stating that the collective-bargaining agreement expired on April 20, 2001, instead of April 20, 2000. The Charging Party submitted a technical exception to this finding. The record evidence confirms that the agreement expired on April 20, 2000.

[3] All dates hereafter are 2001, unless otherwise indicated.

diately concluded. The bargaining unit, including 19 porters, began an economic strike that morning.

Later that day, the Respondent signed a contract with Mr. Klean to provide 19 employees to perform unit work at the Respondent's facility.[4] Under the terms of the contract, Mr. Klean was to provide janitorial services for a period of 1 year, renewable from year to year. The Respondent had a right to cancel the contract only if Mr. Klean's services were unsatisfactory, and with a 90-day notice. Mr. Klean drafted the contract, and the Respondent signed it as written, without discussion. There is no evidence that Mr. Klean insisted on the 1-year term or any other provision of the contract. Pursuant to the agreement, Mr. Klean began performing porter services for the Respondent on February 21.

By letter dated February 27, the Respondent informed the Union that it was "canceling" its previous collective-bargaining agreement with the Union (which had expired on April 20, 2000), and that its December 22, 2000 counterproposal was its last and final offer.

On May 7, the Union made an unconditional offer to return to work on behalf of the bargaining unit employees. In a May 8 letter to the Union, the Respondent acknowledged receipt of the offer, but informed the Union that all striking employees except one (a superintendent) had been permanently replaced.

By letter dated February 14, 2002, the Respondent advised the Union that it was willing to accept the Union's previous unconditional offer to return to work, and to reinstate striking porters effective February 21, 2002.[5] The letter also asserted that the Respondent was accepting the Union's offer to return because its contract with Mr. Klean was scheduled to expire on February 20, 2002. Fifteen out of the 19 striking porters returned to work on February 21, 2002.

II. ANALYSIS

The judge found that the Respondent violated Section 8(a)(1) and (3) by refusing to reinstate the striking employees who had unconditionally offered to return to work, and that it "derivatively" violated Section 8(a)(5) when it unilaterally implemented the subcontract with Mr. Klean. In exceptions, the Respondent contends that: (a) it had a legitimate and substantial business justification for entering into the contract with Mr. Klean, i.e., the exigent need to collect trash and, thus, maintain health and safety during the strike; (b) the contract was effective for 1 year and, thus, it legitimately could not offer to reinstate strikers during the contract term; and (c) that it was privileged to subcontract the unit work, because the parties had bargained to impasse on that issue. We reject the Respondent's exceptions.

A. The 8(a)(1) and (3) Violation

An employer violates Section 8(a)(1) and (3) if it fails to immediately reinstate striking workers on their unconditional offer to return to work, unless the employer can establish a "legitimate and substantial business justification" for its failure to do so.[6] The employer bears the burden of proving the existence of such a legitimate and substantial business justification.[7]

An employer may take legitimate measures to maintain operations during a strike—including hiring permanent or temporary replacements, or *temporarily* subcontracting out performance of unit work—without the necessity of showing a business justification. However, before an employer may lawfully enter into a *permanent* subcontract to replace strikers, it must establish a valid business justification.[8]

The judge found that the Respondent's contract with Mr. Klean was a permanent subcontract based on the Respondent's admission in a June 27, 2001 letter from its counsel to the Board's Region 29. The Respondent did not file a specific exception to this finding. We adopt the judge that this was a permanent subcontract, relying additionally on the fact that the term of the contract was unrelated to, and extended beyond, the duration of the strike.[9]

We find, in agreement with the judge, that the Respondent failed to establish a legitimate business justification for entering into a permanent contract with Mr. Klean. The judge found that the Respondent entered into the contract as drafted by Mr. Klean without attempting to negotiate terms consistent with the lawful measures available for maintaining operations during the strike. Accordingly, contrary to the Respondent's claim, the judge found no evidence that Mr. Klean "insisted" on the contract's terms. Further, the judge reasonably found it

[4] Work to be performed under the contract included only the work that had been performed by the porters, and not the work of the superintendents or maintenance employees in the unit.

[5] The letter specified that if any of the porters did not return to duty on February 21, 2002, the Respondent would conclude that those individuals were declining to return to work.

[6] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Capehorn Industry*, *Inc.,* 336 NLRB 364, 365 (2001).

[7] *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *Capehorn Industry*, 336 NLRB at 365.

[8] *Land-Air Delivery*, 286 NLRB 1131 (1987), enfd. 862 F.2d 354 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989); *Capehorn Industry*, 336 NLRB at 366–367. Compare *Elliott River Tours*, *Inc*., 246 NLRB 935 (1979) (2-year temporary contract to perform work of strikers justified in view of contractor's demand for contract term, highly skilled, seasonal nature of work, and other unique aspects of employer's business).

[9] *Land-Air Delivery*, 286 NLRB at 1132 fn. 8; *Capehorn Industry*, 336 NLRB at 367.

"incredible that Respondent would not have been [able] to find, had it tried, a ready supply of temporary replacements," as porters are "non-skilled, low-wage workers." Moreover, the Respondent failed to explain why it did not use maintenance employees, "a supply of which, [Respondent's supervisor] Moerman admitted, he had ready access to," to remove refuse during the strike.

Because the Respondent has failed to come forward with evidence of a legitimate motive for subcontracting the work of the striking employees for a term extending beyond the duration of the strike, we need not decide the degree to which the subcontracting of unit work might have affected employee rights. The Respondent simply did not meet its burden to establish a legitimate business justification. Accordingly, we do not rely on the judge's analysis and finding that the Respondent's conduct was "inherently destructive" of employee rights as described in *NLRB v. Great Dane Trailers*.[10]

Consequently, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by failing to immediately reinstate the striking employees on their unconditional offer to return to work.[11]

B. The 8(a)(5) and (1) Violation

It is undisputed that the Respondent entered into, and implemented, the contract with Mr. Klean without notifying or bargaining with the Union.

In general, an employer may lawfully make unilateral changes in terms and conditions of employment under negotiation only if the parties have bargained to impasse and the changes are reasonably comprehended within the employer's pre-impasse proposals.[12] Otherwise, such changes, if made without proper notification and bargaining with the union, violate Section 8(a)(5) and (1).[13]

The Respondent contends that it was privileged to enter into its subcontract with Mr. Klean because its pre-impasse collective-bargaining proposals included a proposal permitting it to unilaterally subcontract, and the parties bargained to impasse. The judge did not decide whether impasse was reached. Rather, he found that, assuming impasse occurred, the subcontracting provision was unlawful under the standard set by the Board in *McClatchy Newspapers*.[14]

We find, contrary to the Respondent's contention, that the parties had not reached an impasse in negotiations and, thus, the Respondent was not privileged to contract out the unit work. Accordingly, we need not reach the issue whether, under *McClatchy Newspapers*, the Respondent's implementation of its management-rights/subcontracting provision comes within an exception to the Board's implementation-on-impasse rule.

Neither do we believe this violation of 8(a)(5) and (1) can be found "derivatively," as did the judge of the 8(a)(3) violation. Rather, the 8(a)(5) violation can be established independently because we cannot find the existence of impasse on the basis of the evidence here. The entire record of the parties' negotiations consists of the following: The Union submitted its initial bargaining proposals (maintaining the existing management-rights clause, which did not address subcontracting) in November 2000. The Respondent, in December 2000, submitted its counterproposals adding a subcontracting provision to the management-rights clause. On February 21, the parties met briefly, without engaging in extensive negotiations, and ceased to meet when the Union announced the strike. The Respondent informed the Union on February 27 that its December 2000 counterproposal was its "last and final offer." The parties stipulated that they never discussed the Respondent's subcontracting proposal during their collective-bargaining negotiations. And there is no evidence that either party expressed to the other the opinion that they were at impasse.

Consequently, we find that the Respondent violated Section 8(a)(5) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 4.

"4. Since May 8, 2001, the Respondent has failed and refused to reinstate the economic strikers of the porter classification in the collective-bargaining unit because they joined, supported or assisted the Union, and in order to discourage them from engaging in such activities or other concerted activities in violation of Section 8(a)(1) and (3) of the Act."

2. Add the following as Conclusion of Law 5.

"5. From February 21, 2001, through February 20, 2002, the Respondent has unilaterally contracted out the work performed by unit employees in the porter classification, without notifying or bargaining with the Union, in violation of Section 8(a)(1) and (5) of the Act."

[10] 388 U.S. at 26.

[11] We shall not order the Respondent to offer reinstatement to the strikers because, as stated above, the Respondent has already extended offers of reinstatement.

[12] *NLRB v. Katz*, 369 U.S. 736, 746–747 (1962); *Taft Broadcasting Co.*, 163 NLRB 475 (1964), rev. denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[13] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687 (1981); *Land-Air Delivery,* supra, 286 NLRB at 1132; *American Cyanamid Co.,* 235 NLRB 1316, 1323 (1978), enfd. 592 F.2d 356 (7th Cir. 1979).

[14] 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997).

ORDER

The National Labor Relations Board adopts orders that the Respondent, Fairfield Tower Condominium Association & Fairfield Presidential Corp., Joint Employers, Brooklyn, New York, their officers, agents, successors, assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate employees in the following unit who were engaged in a lawful economic strike upon their unconditional offer to return to work:

> All full-time and regular part-time superintendents, maintenance employees and porters employed by Respondent Fairfield at its 1019 Van Siclen Avenue, Brooklyn, New York facility, but excluding all other employees and supervisors as defined in Section 2(11) of the Act.

(b) Unilaterally entering into an agreement to contract out the work of the unit employees.

(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) Make whole, with interest, the striking employees unlawfully refused reinstatement upon their unconditional offer to return to work for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at the facility set forth above copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 and members 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 reinstate unit employees who were engaged in a lawful economic strike upon their unconditional offer to return to work.

WE WILL NOT fail and refuse to bargain collectively with Local 32B-32J, Service Employees International Union by unilaterally contracting out unit work, or otherwise unilaterally changing wages, hours, and other terms and conditions of employment of employees in the following bargaining unit:

> All full-time and regular part-time superintendents, maintenance employees and porters employed by Respondent Fairfield Tower Condominium Association at its 1019 Van Siclen Avenue, Brooklyn, New York facility, but excluding all other employees and supervisors as defined in Section 2(11) of the Act.

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

[15] 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."

WE WILL make whole the striking employees we unlawfully refused to reinstate upon their unconditional offer to return to work for any loss of earnings and other benefits suffered as a result of the discrimination against them.

FAIRFIELD TOWER CONDOMINIUM ASSOCIATION & FAIRFIELD PRESIDENTIAL MANAGEMENT CORP., JOINT EMPLOYERS

James P. Kearns, Esq., for the General Counsel.
David Lew Esq. (Peckar & Abramson, PC), for the Respondent.
Judith I. Padow, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 1, 2002, in Brooklyn, New York.

On May 14, 2001, Local 32B-32J, Service Employees International Union, AFL–CIO (the Union), filed an unfair labor practice charge in Case 29–CA–24243, which alleged Fairfield Tower Condominium Association and Fairfield Presidential Management Corp., as joint employers (Respondent), violated Section 8(a)(1), (3), and (5) of the Act. The Union amended its charge on May 24, 2001.

On November 27, 2001, the Regional Director issued a consolidated complaint and notice of hearing in Cases 29–CA–24243, 29–CA–24327, and 29–CA–24561, alleging that Respondent violated Section 8(a)(1), (3) and (5) of the Act. On April 24, 2002, the Regional Director approved a settlement agreement in Cases 29–CA–24327 and 29–CA–24561. On April 23, 2002, the Regional Director issued an order severing cases and amending complaint.

At the beginning of the trial all parties agreed that the allegations of Cases 29–CA–24327 and 29–CA–24561 were settled. Accordingly the complaint was amended to exclude these charges and the complaint allegations relating thereto. Therefore paragraphs 16 through 18 are deleted, paragraphs 19, 20, and 21 were amended to become paragraphs 16, 17, and 18.

Lastly the complaint was amended to delete the reference to paragraphs 16 through 18 in the new paragraph 17.

Based on the entire record herein, including my observation and demeanor of the witnesses, the position papers submitted by counsel for Respondent, and briefs submitted by counsel for the General Counsel, counsel for the Union, and counsel for the Respondent, I make the following findings of fact and conclusions of law.

Respondent Fairfield and Respondent Presidential are domestic corporations with offices and a place of business located at 1019 Van Siclen Avenue, Brooklyn, New York. Respondent Fairfield is engaged in the ownership of residential apartment buildings. Respondent Presidential is engaged in providing managing agent services for residential apartment buildings. Annually, in the course and conduct of their business operations, Respondent Fairfield and Respondent Presidential each individually derive gross revenues in excess of $500,000, and purchase and receive at their Brooklyn facilities goods valued in excess of $5000 directly from points located outside the State of New York. Respondents are joint employers for the employees of Respondent.

It is admitted, and I conclude that Respondents are joint employers, and employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The essential facts in this case are not in dispute. The Union has had a series of collective-bargaining agreements with Respondent covering a unit of superintendents, maintenance employees and porters, employed at Respondent's apartment complex consisting of 19 buildings. Respondent and the Union engaged in collective-bargaining negotiations for a new contract during the entire year, 2000 until about February 21, 2001.

When the contract expired on April 20, 2001, there were 19 porters, 10 maintenance persons, and 2 superintendents in the unit for a total of 31 bargaining unit employees. Porters are the least skilled of the classifications, and receive the lowest compensation porters' duties include collecting garbage, sweeping and mopping floors, washing windows, and shoveling snow.

Fairfield's attorney, David Lew, a highly skilled labor attorney, especially in Board law, did not become involved in negotiations until the fall of 2000, and was involved in only three negotiating sessions, on November 16 and December 22, 2000, and February 21, 2001. At the December 22 session, Attorney Lew introduced a counterproposal to proposals the Union proposed made on November 20. The counterproposal's terms would have afforded Respondent the right to set wage rates for new hires, unilaterally increase wages, lay off employees at will, modify or discontinue operations, determine the number of employees necessary for operations, have supervisors and nonunit employees perform bargaining unit work, summarily discharge workers, inter alia, for incompetency, without recourse to grievance or arbitration, and the "absolute right to subcontract . . . any if its work, at it, in its sole discretion, deem[ed] necessary."

There was no discussion of Respondent's counterproposal's including its management-rights clause, or of the subcontracting provision within the management-rights clause, at any bargaining session.

After introducing the counterproposal on December 22, Fairfield Supervisor Samuel Moerman, concerned that a strike about which there had been "rumblings" might occur and because Fairfield "definitely needed to be prepared for the possibility of a strike," began looking for replacement contractors for the porters. According to Moerman, he spoke with only three or four contractors. One of them, "Mr. Klean" was interested. Moerman met with Nat Brown of Mr. Klean on or about January 10, 2001, and several days later took him on a tour of Respondents' housing complex. During the tour, Mr. Moerman reiterated that a strike was possible, and obtained Mr. Brown's assurance that Mr. Klean was interested in providing cleaning service in the event of a strike.

On February 21, 2001, the Union commenced a lawful economic strike of Respondents unit employees. The same day the workers went on strike, Fairfield permanently subcontracted all

of its porter work to Mr. Klean. Replacement employees were hired for the superintendents.

Respondent did not enter into a subcontract employees with the maintenance employees.

That the subcontract for the parties was a permanent subcontract is conclusively established by Respondent's counsel's letter to Region 29 dated June 27, 2001, wherein he states "that Fairfield's decision to hire a *permanent* subcontractor did not violate the Act because the parties bargained to impasse, and the issues of hiring subcontractors was submitted in Fairfield's pre-impasse proposals." The proposals referred to above were the December 22 proposals, described above.

On August 1, Respondent counsel sent another letter to the Regional Director consisting of four pages of legal argument concluding in the final page that:

> In light of the foregoing, as a result of the impasse, Fairfield did not violate the Act when it *permanently* [hired] a subcontractor to perform some of the unit work because . . . the decision was clearly within the ambit of its pre-impasse proposals.

I conclude the subcontract was a permanent subcontract, as distinguished from a temporary subcontract, based on the admissions by Respondent attorney, notwithstanding a letter to the Regional Director dated February 26, 2002 wherein Respondent counsel asserted that the porter work had never been removed, and that the subcontract entered into was a *temporary* subcontract because its only from year to year.

The Board has consistently held that position papers submitted an attorney for a party to the trial are admissible as admissions against the party he represents. See *Black Entertainment Television,* 325 NLRB 1161 (1997); *Steve Aloi Ford,* 179 NLRB 229 fn. 2 (1969); *Albion Poultry & Egg Co.,* 134 NLRB 827 fn. 1 (1961), and often highly probative in assessing motivation of parties and or the credibility of witnesses. *Bond Press,* 234 NLRB 1227, 1231–1232 (1981); *Operating Engineers Local 150 (Willbros Energy Services)*, 307 NLRB 272, 275 (1992); *Dimensions in Metal,* 258 NLRB 563, 576–577 (1981).

On May 7, 2001, the Union, on behalf of the unit employees, made an unconditional offer to return to work. By letter dated May 8, 2001, Respondent advised the Union that, with the exception of one superintendent, all unit employees, including the 19 porters, had been "*permanently replaced*." Shortly thereafter, the Union, having been advised by the Region that Respondent had not hired permanent replacements for the porters, but instead had contracted out their work, requested that Respondent provide a copy of the subcontract. Respondent refused to do so, claiming that the contract was proprietary and irrelevant to the Union as collective-bargaining representative.

On November 27, 2001, the Board issued a complaint that Respondent's refusal to rehire the porter and its use of a permanent subcontractor to replace them violated Section 8(a)(1), (3), and (5) of the Act.

On February 14, 2002, Fairfield offered to reinstate the porters, pursuant to their May 7, 2001 offer to return to work. On February 22, 2002, 15 of the 19 porters returned to Fairfield.

Analysis and Conclusions

Respondent used the opportunity presented by the February 21 strike to attempt to eliminate the porters from the bargaining unit. It did so by entering into a permanent subcontract of their work, immediately upon the commencement of the strike. Its position was that pursuant to its last contract proposals, it had a legal right to take such action.

The right to strike is an essential component of the collective-bargaining system, and it is well established that employer discouragement of participation in lawful strike activity violates Section 8(a)(3). *Capehorn Industry,* 336 NLRB 364, 365 (2001).

While 8(a)(3) violations normally require proof of unlawful motivation, where employer conduct is "so 'inherently destructive of employee interests' . . . it may be deemed proscribed without need for proof of an underlying improper motive. . . . That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears its own indicia of intent.'" *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33, 87 (1967), and 388 U.S. 575 (1967) (internal citations omitted). See also *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 228 (1963).

Board precedent also supports the conclusion that an employer's permanent removal of work from a bargaining unit in response to a strike is so inherently destructive of the employees' protected right to strike, that derogation of that right must have been the intended consequence.

Thus, in *International Paper Co.,* 319 NLRB 1253 (1995), enfd. denied 115 F.3d 1045 (D.C. Cir. 1997), the Board found that permanently subcontracting unit work during a lockout was inherently destructive because, among other things, "it imposed the most severe penalty . . . employees could have suffered: permanent loss of employment and employee status," reasoning that "[t]here can be . . . no greater obstacle to the exercise of employee rights than the permanent loss of employment and employee status." 319 NLRB at 1270.

Although the D.C. Circuit declined to enforce the Board's decision in *International Paper,* finding that the adverse effect on employees of the unilateral permanent subcontract in the circumstances of that case was "comparatively slight" as opposed to "inherently destructive," *International Paper* is still Board law.

I reject Respondent's argument that *International Paper* is not relevant in this case because that case involved a lockout rather than an economic strike. In the instant case I conclude that Respondent faced with a possible economic strike made a premeditated decision to rid itself of the porters from the bargaining unit by a permanent subcontract based upon its last contract proposal. Therefore I find such action was similar to a lockout.

See also *Capehorn,* 336 NLRB 364 (2001), where the Board found that entering into a permanent subcontract of bargaining unit work during a strike was inherently destructive of the right to strike. The decision set forth that the permanent subcontract negated the strikers' rights to recall under *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F. 2d 99 (7th Cir. 1966), cert. denied 397 U.S. 920 (1970), and "upset the historically set balance between the rights of employees to engage in economic

strikes without losing their jobs [and status as employees] as opposed to the rights of employers to maintain their business operations during the course of a strike." *Capehorn,* supra at 370. The administrative law judge therefore concluded that

> Where . . . subcontracting is undertaken solely for the purpose of replacing strikers, and the employer thereafter refuses to reinstate employees when they offer to return to work, the inevitable consequence of those actions, and therefore their intent, is to deny employment . . . to employees because they engaged in Section 7 protected activity.

International Paper, supra 319 NLRB at 1274 (permanently replaced employees remain employees, are subject to recall, and have voting rights in representation elections, as opposed to workers displaced by a permanent subcontract who have none of these rights).

In *International Paper,* 319 NLRB at 1269–1270, the Board recognized four "guiding principles" in determining whether conduct is inherently destructive of employee rights.

The Board examines (1) "the severity of the harm suffered by the employees for exercising their rights as well as the severity of the impact on the statutory right being exercised," and whether the conduct (2) "is potentially disruptive of the opportunity for future employee organization and concerted activity," (3) "exhibits hostility to the process of collective bargaining," and (4) "discourages collective-bargaining in the sense of making it seem . . . futile . . . in the eyes of the employees." Id. at 1269–1270 (internal quotations omitted). While all four "guideposts" are not required for conduct to be inherently destructive, all are present in this case. Id. at 1270 fn. 37.

By exercising their statutory right to strike, the porters suffered the ultimate in industrial capital punishment—permanent loss of employment. As the Board in *International Paper* and the administrative law judge in *Capehorn Industry* recognized, nothing could be more destructive of employee rights or send a more effective message about the dangers and ultimate futility of engaging in lawful concerted activity in furtherance of collective-bargaining. See also *International Paper,* supra at 1270.

With respect to the other factors, the Board found that the employer's act of engaging in a permanent subcontract would significantly adversely impact the rights of the employees who did not lose their jobs and would serve to chill their future exercise of Section 7 rights. Likewise, the superintendents and maintenance employees of Respondent would certainly be hesitant to engage in another strike after being witness to the consequences of the first strike suffered by the porters. Finally, the Board also noted that the employer's action would be destructive of the ongoing bargaining process and would hinder future collective bargaining. Id. at 1269–1273.

Respondent contends that pursuant to his last management rights provisions, described above he was entitled to permanently subcontract out work. Thus, in addition to permanently subcontracting the porter positions, under Respondent's reasoning, it could act further and eliminate the entire unit at any time. The Board has found that this type of clause that permits an employer to make repeated changes without the Union's consent is unlawful. In *McClatchy Newspapers,* 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), the employer implemented its proposed merit increase system that granted the employer absolute discretion over wage increase. The Board found this type of proposal was inherently destructive of the principles of collective bargaining. The Board found this type of proposal to be an exception to the rule that an employer may implement its proposals after impasse. It reasoned that permitting an employer to repeatedly act unilaterally would disparage the collective-bargaining process. Id at 1390–1391. In comparison to unilateral wage increases, the Board would certainly find that the unilateral elimination of the unit is destructive to employees Section 7 rights.

The Board has also found the permanent subcontract of unit work during a strike to be unlawful without reaching the conclusion that it was "inherently destructive." In *Land Air Delivery*, 286 NLRB 1131 (1987), the Board stated that when faced with a strike, an employer can replace strikers with permanent replacements or contract out the work temporarily. The Board found that the employer's unilateral permanent subcontract after a strike commenced was not permissible under the act absent proof that the two options, permanent replacement and temporary contract, were not available. Id. at 1131–1132). As set forth below, Respondent failed to demonstrate that other options were unavailable before resorting to a permanent subcontract at the commencement of the strike.

It is well established, that because the right to strike is so fundamental, an employer must reinstate economic strikers who make an unconditional offer to return to work, unless it can establish a "legitimate and substantial business justification" for refusing to do so. *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967); *Capehorn,* supra at 367 ("employer must establish a legitimate and substantial business reason for implementing [a] permanent subcontract during a strike").

Where, however, an employer's conduct in refusing to reinstate strikers is found to be inherently destructive, an even stricter standard applies, and "the Board may find an unfair labor practice notwithstanding that the employee . . . was motivated by business considerations." *Great Dane,* supra, 388 U.S. at 34.

Respondent has offered no business justification for unilaterally entering into a permanent subcontract of porters work. All of its defenses apply only to temporary subcontracts. As set forth above, I have concluded Respondents' subcontract with Mr. Klean was a permanent subcontract, on a yearly basis. The subcontract was not for a substantial or legitimate business reason.

At the trial, Respondent by its counsel's statements and through the testimony of Moerman, attempted to justify its conduct on the basis that Respondent Fairfield had no notice of the strike, that health issues allegedly required precipitous action, and that Mr. Klean had insisted upon a 1-year contract.

As for the lack of notice of the strike, the record evidence establishes that, after Respondent submitted its counterproposals on December 22, 2001, Respondent was well aware a strike was real possibility, and took measures to ensure continued operations during such strike. In the connection, Moerman

testified that he contacted Mr. Klean because Respondent "definitely needed to be prepared for the possibility of a strike.

As to the alleged health issues, that garbage might pile up for a day or so, or that floors might not be mopped or windows washed, I find that these are not justifications for entering into a permanent subcontract, or any subcontract. If that were so, any strike at a residential housing complex would justify permanent subcontracting of janitorial work, effectively removing from the ambit of permissible economic weapons the strike at residential apartment buildings, because any such strike would involve the very same "health" issues upon which Fairfield purports to rely to justify its subcontract.

While the Union does not deny that garbage would have to be removed, supervisors can remove garbage and so can other non-unit employees. So can maintenance workers, a supply of which, Moerman admitted, he had ready access to. Respondent could have used temporary or even permanent replacements, or the employees of temporary contractors. However, as set forth in *Land Air Delivery*, 286 NLRB at 1132, what the law does *not* permit Respondent to do is to insure the removal of garbage during a strike, is to unilaterally permanently subcontract that work, absent proof that *none* of these other options were available.

The evidence clearly establishes Respondent never explored any other possibility other than the permanent subcontract. Moreover, since porters are non-skilled, low-wage workers, it is incredible that Respondent would not have been above to find, had it tried, a ready supply of temporary replacements.

As to the defense that Mr. Klean insisted on a 1-year subcontract, in view of my conclusion that the subcontract was a permanent subcontract, as intended by Respondent by its attorney, I reject this defense.

Both because the unilateral permanent subcontract was inherently destructive of employees' protected right to strike, and because Respondent had no legitimate business justification for entering into it, I find Respondent violated Section 8(a)(1) and (3) when it refused to reinstate the striking porters who unconditionally offered to return to work, and also derivatively violated 8(a)(5) when it unilaterally implemented the subcontract. *International Paper,* 319 NLRB at 1276.

Respondent contends the fact of the case are similar to *Elliot River Tours*, 246 NLRB 935 (1979). Even if one were to assume that Mr. Klean subcontract was a temporary subcontract as in *Elliot River*, supra, the facts of this case are clearly distinguishable from *Elliot River.*

Elliot River involved a nonrenewable subcontract of 2 years' duration entered into by a wilderness travel company that organized commercial river trips for tourists in remote areas of Oregon. The employees were professional river guides who led the river trips during the tourist season. When the guides threatened to strike 2 weeks before trips were scheduled to begin, the employer made arrangements to subcontract their work. The Board found that that particular subcontract was an economic and business necessity because (1) absent the contract, vacationers who had "made arrangements to travel long distances to . . . Oregon" would have had to "abruptly [cancel]" their plans, and because (2) "the outfitter who agreed to undertake the . . . commercial river trips for the 1978 season did so only on the condition that he also receive the 1979 trips." 246 NLRB 935.

Respondent contends that the unique circumstances of *Elliot River* are "remarkably similar" to its situation. That is patently untrue. As discussed, there is no evidence that Mr. Klean insisted on a one-year contract. Moreover, even if it had, given the specialized nature of the services involved in *Elliot River,* it is clear that the travel company in *Elliott River,* as opposed to Respondent, would have had *no way* of conducting business without the subcontractor's employees. *River* guides in Oregon simply do not compare to the removal of garbage by an unskilled labor force in a city like New York with a vast pool of unemployed workers. Nor is a temporary decrease in the extent of custodial services in an apartment building comparable, as a business matter, to a company's cancellation of a season of river tours in the Oregon wilderness.

To say that *Elliot River* is applicable is to say that all an employer need do is contract a few cleaning contractors who allegedly state that they won't provide services during a strike enter into a contract with the first one who says that it will, on whatever terms that contractor proposes, and blame the union for not giving adequate notice of the strike. With these few steps, says Respondent an employer may walk away from the bargaining unit, with impunity, for a year or two.

CONCLUSIONS

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent and the Union are parties to a collective-bargaining agreement covering a unit of:

> All full-time and regular part-time superintendents, maintenance employees and porters employed by Respondent Fairfield at its 1019 Van Siclen Avenue, Brooklyn, New York facility, but excluding all other employees and supervisors as defined in Section 2(11) of the Act.

4. Since May 8, 2000, Respondent has failed to re-employ the economic strikers of the porter classification in the unit described above because its employees joined, supported, or assisted the Union, and in order to discourage its employees from engaging in such activities, or other concerted activities in violation of Section 8(a)(1), (3), and (5) of the Act.

REMEDY

Having found that Respondent Fairfield has engaged in the unfair labor practices described above, I find Respondent must be ordered to cease and desist and take certain action designed to effectuate the policies of the Act.

Accordingly, I shall issue a recommended order requiring Respondent to cease and desist from unilaterally subcontracting unit work, to make the parties whole in losses they sustained, and to post appropriate notices customarily required.

Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and with interest in the manner and amount prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]