United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 21, 2015

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United States Postal Service
Case 05-CA-140963

530-6067-4011-1100
530-6067-4022-1100
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725-6733-9000-0000

The Region submitted this case for advice on whether the United States Postal Service violated the Act by unilaterally entering an agreement with Staples that would result in Staples employees performing bargaining unit work in all of the approximately 1,300 Staples stores nationwide. We conclude that this outsourcing of bargaining unit work under the Staples agreement was a mandatory subject of bargaining and that the Employer's unilateral action constituted a mid-term contract modification in violation of Section 8(d) or, in the alternative, an unlawful unilateral change in violation of Section 8(a)(5) and (1).

FACTS

The United States Postal Service (the "Employer") and the American Postal Workers Union (the "Union") have a long-standing collective bargaining relationship covering postal clerks, maintenance employees, motor vehicle employees, mail equipment shops employees, material distribution center employees, and operating services and facilities services employees. The parties' most recent collective-bargaining agreement is effective from November 21, 2010 until May 20, 2015. Article 32 provides that:

> The Employer will give advance notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet with the Union while developing the initial Comparative Analysis report. The Employer will consider the Union's views on costs and other factors, together with proposals to avoid subcontracting and proposals to minimize the impact of any subcontracting. . . . No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union.

A related memorandum between the parties provides that "the Union will be afforded opportunities for briefings, meetings and information sharing" as a proposed concept involving a significant impact on bargaining work is being developed. It explains that the purpose of the memorandum "is to allow the Union an opportunity to compete for the work internally at a point in time contemporaneous with the outsourcing process and early enough to influence any management decision" and so that the Union "may suggest less restrictive work rules, mixes of employee categories, lower wage rates that may improve the efficiency and lower the costs of an in-house operation."

The early notice requirements of Article 32 and the related memorandum stem from the Union's proposals during the interest arbitration of the 2000 contract. The Union proposed the changes after it had lost bargaining unit work in transportation equipment service centers because the Employer made the decision to outsource without giving the Union a chance to compete. Even though the bargaining unit could do the work more inexpensively at certain sites, the Employer was unwilling to reconsider its decision.[1]

Since 2005, the Employer has maintained an Approved Shipper Program at approximately 2,000 private sector retailers and 6,500 of their facilities. The Employer sells its postal service products to Approved Shipper stores who in turn sell those products to the public from its own storefronts. Clerks at Approved Shipper locations do the same work as bargaining unit clerks, including selling stamps and offering priority mail, first-class shipping, signature confirmation, and other postal services.

During the term of the current contract, the Employer made a number of statements indicating its intention to reduce labor costs through further expansion of this "alternative access" program. On November 8, 2011, the Employer's Vice President sent a letter to the United States Government Accountability Office stating that the Employer's retail strategy over the past five years increased alternative access revenue from 24% to 35% and that "[t]his is one of the contributing factors that enabled operations to reduce window work hours by 23.7% during the same period of time." According to its 2013 Five Year Business Plan, the Employer planned to save $20 billion annually and decrease the volume of mail it handles by 21 billion pieces over the course of five years, in part by "streamlin[ing] and consolidat[ing]" mail processing facilities and increasing alternative access retail revenue from 40% to 60%. As part of its "strategic initiatives," the report named "[t]ransaction shift to alternate access to create a decrease in Post Office workload."

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[1] *See United States Postal Service*, Case 05-CA-119507, JD 48-14, 2014 WL 3957232, slip op. at 16 (Aug. 13, 2014), currently pending before the Board on exceptions.

In 2013, the Employer and Staples entered into a pilot program (the "Pilot Program") at 82 Staples locations that was essentially the same as the Approved Shipper Program.[2] In December 2013, the Union filed a charge in Board Case No. 05-CA-119507 alleging that the Employer refused to respond to its information request about the Pilot Program. On January 24, 2014,[3] the Union filed a contractual National Dispute concerning the Staples Pilot Program. On July 7, the Employer informed the Union that the Pilot Program would be transitioned into the Approved Shipper Program at the 82 Staples locations as of August 1.

On August 13, the Administrative Law Judge in Case 05-CA-119507 determined that the Employer had violated Section 8(a)(5) by delaying and failing to provide relevant requested information that, with few exceptions, was not confidential.[4] The ALJ determined that the Employer "was having Staples employees perform a broad array of bargaining unit work" and that Staples employees were performing "many of the central functions of bargaining unit employees[.]"[5] The ALJ further noted that many of the Staples stores in the Pilot Program were located less than a mile from the nearest post office and that some locations were "literally across a parking lot or across a street."[6] Evidence in the instant case indicates that after the Staples Pilot began, the Employer reduced hours of several post offices close to Staples stores. At least one post office hung a sign informing customers that the post office was reducing its hours but that a nearby Staples store could provide alternate access to post office products and services after the post office had closed.

The ALJ further credited the Union's testimony about the Employer's "Point of Sale System," which records every transaction at the post office and calculates "earned hours" by showing how many transactions occur during a shift. The Employer attempts to bring staffing down based on the number of transactions during each shift. Thus, if the bargaining unit loses transactions to Staples, unit employees

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[2] The Pilot Program differed from the Approved Shipper program in that under the Pilot Program, the Staples stores were not also permitted to sell competitor's products, the Employer could maintain its signage at Staples, and Staples could not charge convenience fees for postal services.

[3] All dates hereafter are in 2014 unless otherwise noted.

[4] *United States Postal Service*, Case 05-CA-119507, JD-48-14, slip op. at 23-48.

[5] *Id.*, slip op. at 29.

[6] *Id.,* slip op. at 30.

lose work hours and ultimately the Employer may lay off employees and consolidate branches or stations based on lost transactions.[7] The ALJ further credited testimony from the Employer that the number of post offices declined by around 1600 from the years 2000 to 2013.[8]

On August 29, the Union sent the Employer an information request relating to the Staples Approved Shipper Program agreement. The Region has determined that the Employer violated Section 8(a)(5) by refusing to provide the requested information.

On October 2, the Employer informed the Union that it would expand the Approved Shipper Program to all of the approximately 1,300 Staples stores nationwide (the "Staples Approved Shipper Program"). This is the largest single expansion of its Approved Shipper Program. As of late January 2015, the Approved Shipper Program had been implemented in more than 300 Staples stores. The Employer has never negotiated with the Union concerning the Approved Shipper Program agreements, and the Union has not requested bargaining in the past about agreements entered into with other approved shippers.

ACTION

We conclude that the Employer's decision to enter into the Staples Approved Shipper Program was a mandatory subject of bargaining under *Fiberboard*[9] and alternatively *Dubuque Packing*.[10] We further conclude that the Employer violated Section 8(d) or, in the alternative, Section 8(a)(5) and (1) by failing to negotiate with the Union before entering into the Staples Approved Shipper Program.

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[7] *Id.*

[8] *Id.* There are currently 31,662 post offices across the United States. *See* http://about.usps.com/who-we-are/postal-facts/size-scope.htm (last visited May 20, 2015).

[9] *Fiberboard Paper Products v. NLRB*, 379 U.S. 203 (1964).

[10] *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enforced sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993).

I. The Employer's Decision to Enter Into the Staples Approved Shipper Program Agreement Was a Mandatory Subject of Bargaining

The initial question here is whether the Employer's decision to enter into the Staples Approved Shipper Program amounted to subcontracting or some other management decision that constitutes a mandatory subject of bargaining. Under Board and Supreme Court law, it is "well established that contracting out of work regularly performed by unit employees is a mandatory subject of bargaining."[11] In *Fibreboard Paper Products*, the Supreme Court held that an employer's subcontracting of its maintenance work, in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar employment conditions, was a mandatory subject of bargaining.[12] The Court stated that, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment, and had not altered the employer's basic operation, it "would not significantly abridge [the company's] freedom to manage the business" to require the employer to bargain about the subcontracting decision.[13] Moreover, because the decision turned on labor costs, it was "particularly suitable for resolution within the collective-bargaining framework.
. . ."[14]

In *Torrington Industries*, the Board determined that it would apply *Fibreboard* to a subcontracting decision "in which virtually all that is changed through the subcontracting is the identity of the employees doing the work" regardless of whether the decision was motivated by labor costs in "the strictest sense of the term[.]"[15] In such cases, the Board has determined that there is no change in the scope or direction of the enterprise.[16]

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[11] *Public Service Co.*, 312 NLRB 459, 460 (1993) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964)).

[12] 379 U.S. 203 (1964).

[13] *Id.* at 213.

[14] *Id.* at 214.

[15] *Torrington Industries*, 307 NLRB 809, 811 (1992).

[16] *See id.* at 810.

We conclude that the Staples Approved Shipper Program is a form of *Fibreboard* subcontracting and therefore a mandatory subject of bargaining. And, the Employer cannot evade its bargaining obligation merely because there is no evidence that specific bargaining unit employees have lost work as a result of this subcontracting.[17]

In the alternative, the program is a mandatory subject of bargaining under the test set out in *Dubuque Packing* or under the *First National Maintenance* balancing test. The *Dubuque Packing* test, although specifically relevant to work relocation decisions, can also be an appropriate framework for determining when an employer has a duty to bargain over types of employer decisions, other than *Fibreboard* subcontracting, that have a direct impact on employment but focus on the employer's economic profitability.[18] Under that framework, in order to make a prima facie case that a management decision, such as a decision to relocate unit work, is a mandatory subject of bargaining, the General Counsel must show that the decision involved a change in the unit work "unaccompanied by a basic change in the nature of the employer's operation."[19] The employer then has the burden of coming forward with evidence to rebut the prima facie case. If the employer establishes that the employer's decision involved a change in the scope and direction of the enterprise, the employer has no duty to bargain over the decision.[20] Failing that, the employer can still raise two affirmative defenses; first, it can show that labor costs, direct or indirect, were not a factor in its decision, or second, if such costs were a factor, that

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[17] *See, e.g., Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000) ("we think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunion employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees."), *aff'd in part, rev'd in part mem.,* 248 F.3d 1131 (3d Cir. 2000); *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 2 (June 11, 2014) (finding that "bargaining is not excused simply because no driver was laid off or experienced a significant negative impact on his employment"); *Dorsey Trailers, Inc.*, 321 NLRB 616, 617 (1996) (finding that subcontracting work to reduce a backlog of orders was a mandatory subject because "the potential loss of overtime or reasonably anticipated work opportunities poses a detriment to unit employees" even though no employees lost their jobs), *enforcement denied in relevant part*, 134 F.3d 125 (3d Cir. 1998).

[18] These are so-called "Category III" cases described in *First National Maintenance Corporation v. NLRB*, 452 U.S. 666, 677 (1981).

[19] 303 NLRB at 391.

[20] *Id.*

the union could not have offered sufficient concessions that could have changed the employer's decision.[21]

The Board has held that there is no change in scope and direction of the enterprise where the employer continues to manufacture or provide the same products or services. Thus, for instance, in *O.G.S. Technologies, Inc.*, the Board determined that the employer's unilateral subcontracting of die engineering work to a contractor who used a Chinese automated method, which produced the die approximately 6-8 times quicker, was not a change in the scope and direction of the employer's brass button business.[22] The Board explained that both before and after the subcontracting, the company produced and supplied brass buttons "to the same range of customers." The employer had previously used subcontractors to perform die cutting and had merely increased the percentage of work subcontracted.[23] Therefore, "[g]iven this essential continuity in its operations," the marginal increase in subcontracting to take advantage of more advanced die-cutting technologies "does not rise to the level of a change in the scope of the enterprise or its direction."[24]

Similarly, in *Mi Pueblo Foods*, the Board determined that the employer's decision to eliminate cross-docking from its shipping operations in order to increase efficiency and reduce congestion in its warehouse did not change the scope and direction of the enterprise.[25] Cross-docking entailed receiving goods in the warehouse and repacking those items onto trucks for delivery to stores; after the change, goods were delivered directly from one of its suppliers to the employer's larger stores. The Board held that there was "essential continuity" in the employer's business because its work delivering products between suppliers and its stores remained the same following the subcontracting.[26]

Here, the Staples Approved Shipper Program agreement was not a change in the scope and direction of the enterprise. The post office continues to sell its same products and services, both in-house and through its Approved Shipper Program.

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[21] *Id.*

[22] 356 NLRB No. 92, slip op. at 3 (Feb. 11, 2011).

[23] *Id.*, slip op. at 4.

[24] *Id.*.

[25] 360 NLRB No. 116, slip op. at 2.

[26] *Id.*

Staples employees now perform the same work done by bargaining unit clerks, and no capital investment was contemplated. And since the Employer had a history of entering Approved Shipper agreements with other private sector retailers, as in *O.G.S. Technologies,* it was in effect simply increasing the percentage of work subcontracted.[27]

To the extent that the Employer contends that the Staples arrangement will expand sales to customers who might not otherwise visit post office stations, that does not amount to a change in the scope and direction of its enterprise. While the Board looks to whether an employer is still serving the same "range of customers" in determining where there has been such a change, the Board's focus is not on whether the employer is able to reach more individual persons, but rather, on whether a change in the range of customers indicates that the employer has changed the direction of its business.[28] Here, the Employer sells its same products and services to the same range of postal service customers who purchased those products before, even if the Staples arrangement might result in additional sales to new individual customers.

Finally, the Employer cannot make out either of the affirmative defenses permitted under *Dubuque Packing.* As to the first defense, labor costs were clearly a factor in the decision. For instance, in 2011, the Employer stated that increasing alternative access revenue was a "contributing factor" that enables the Employer to significantly reduce window work hours, and explained in 2013 that part of its strategic initiatives was to shift more work to alternative access programs to "create a decrease in Post Office workload." And, the Employer has presented no evidence that would suggest that it could establish the second *Dubuque Packing* affirmative defense, that the Union could not offer concessions to offset the value of the Staples Approved Shipper agreement.[29]

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[27] *See* 356 NLRB No. 92, slip op. at 4.

[28] *See O.G.S. Technologies*, 356 NLRB No. 92, slip op. at 4. *See also Beverly Enterprises, Inc.*, Case 12-CA-19915, Advice Memorandum dated September 21, 1999, at 16 (concluding that employer violated Section 8(a)(5) and (1) by unilaterally subcontracting nursing home rehabilitation work, even though the subcontractor would use new mobile services that would reach beyond the company's nursing homes to new customers in new geographical clusters, and produce even greater profits). *Cf. Overnite Transportation Company,* 330 NLRB at 1278 (finding unlawful unilateral subcontracting where subcontracting enabled employer to retain customers that arguably would have otherwise used another shipping company).

[29] Indeed, that lack of Employer information is the reason for the Union's information requests and related charges in Board Case 05-CA-119507 and the instant case.

Although the decision at issue here is not the kind of partial closing or going out of business that was at issue in *First National Maintenance,* the Board has applied a *First National Maintenance* balancing test as an alternative basis for finding a violation in some kinds of subcontracting cases.[30] In *First National Maintenance,* the Supreme Court held that with respect to managerial decisions affecting employment that involve a "change in the scope and direction of the enterprise," the employer need only bargain about its decision "if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."[31] (b) (5) [redacted][32]

Accordingly, we conclude that the Employer's decision to enter an Approved Shipper Agreement with Staples constituted a mandatory subject of bargaining.

(b) (5) [redacted]

[30] *See, e.g., O.G.S. Technologies, Inc.*, 356 NLRB No. 92, slip op. at 4-6 (balancing the employer's need for unencumbered decision-making against the benefit that mandatory bargaining would have to labor-management relations in finding that subcontracting of die engineering work to a contractor that used an automated method capable of much faster production was a mandatory subject of bargaining); *Mi Pueblo Foods,* 360 NLRB No. 116, slip op. at 2-3 (finding that decision to eliminate cross-docking and have suppliers ship goods directly to employer's stores raised issues amenable to collective bargaining that outweighed any burden on the employer that bargaining would cause).

[31] 452 U.S. at 677, 679.

[32] *Id.* at 679, 682-83; *O.G.S. Technologies*, 356 NLRB No. 92, slip op. at 5-6.

II. The Employer Violated Section 8(d) and, in the alternative, Section 8(a)(5) and (1) by Entering into the Staples Approved Shipper Program without Bargaining with the Union

We further conclude that the Employer's unilateral implementation of its decision amounted to an unlawful mid-term modification of Article 32 of the parties' contract in violation of Section 8(d) because the Employer is not relying in good faith on a sound arguable interpretation of that provision.[33] In the alternative, the Employer's action should be treated as an unlawful unilateral change under Section 8(a)(5) because the Union did not clearly and unmistakably waive its right to bargain over the Staples agreement.

A. The Employer Violated Section 8(d) by Unilaterally Modifying the Parties' Collective-Bargaining Agreement

To establish a Section 8(d) violation, the General Counsel "must show a contractual provision, and that the employer has modified the provision."[34] In such cases, the Board must determine whether the employer has altered the terms of the contract without the union's consent.[35] The Board will not find a Section 8(d) violation if the employer has a "sound arguable basis" for its interpretation, and the employer is not motivated by animus, acting in bad faith, or in any way seeking to undermine the union's status as collective bargaining representative.[36] In sum, "a contract modification does not exist if there is good faith reliance on a sound and arguable interpretation of the contract."[37]

The Board assesses whether a party's contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation.[38] The

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[33] (b) (5)

[34] *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *affirmed sub nom.*, *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

[35] *Id.* at 501.

[36] *Id.* at 501-502.

[37] *Id.* at 502.

[38] *Conoco, Inc.*, 318 NLRB 60, 62 (1995), *enforcement denied*, 91 F.3d 1523 (D.C. Cir.1996).

parties' actual intent underlying the contractual language in question is paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks both at the contract language and any relevant extrinsic evidence, such as the parties' past practice regarding the implementation of the contract provision, or the bargaining history of the provision.[39] Where there are "two equally plausible interpretations of the contract," the Board will not serve the function of arbitrator in determining which party's interpretation is correct.[40]

Here, the Employer has violated Article 32. It has engaged in what is essentially subcontracting and that subcontracting will have a significant impact on unit work; and it has done so without providing the Union an opportunity to meet and bargain. Although the Employer argues that the notice and bargaining requirements of Article 32 are inapplicable because the impact of the Staples agreement on bargaining unit work will not be "significant," this interpretation of Article 32 does not have a sound arguable basis. It is clear by the magnitude of the subcontracted work that the impact on bargaining unit work will be significant. Over the course of a decade, the Approved Shipper Program grew to include 2,000 private sector retailers and 6,500 of their facilities. However, with the Staples Approved Shipper Program agreement, the Approved Shipper Program was enlarged at once by approximately 20%, the largest single expansion in the Approved Shipper Program's history.

Moreover, the Employer's own statements belie any argument that this massive Approved Shipper Program expansion will not have a significant impact on bargaining unit work. According to the Employer, the point of its Approved Shipper and other programs is to greatly reduce bargaining unit work. Thus, the Employer noted in 2011 that its retail strategy over the past five years increased alternative access revenue by 11% and that "[t]his is one of the contributing factors that enabled operations to reduce window work hours by 23.7% during the same period of time." In 2013, the Employer explained that it planned to save $20 billion annually and decrease the volume of mail it handles by 21 billion pieces by 2017, in part by "streamlin[ing] and consolidat[ing]" mail processing facilities and increasing alternative access retail revenue. Most directly, the Employer explained its strategy as a "[t]ransaction shift to alternate access to create a decrease in Post Office workload." Indeed, in light of these statements, any assertion that Article 32 should not be interpreted to apply to the Staples agreement not only lacks a sound arguable basis, but also appears to be made in bad faith.

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[39] *See, e.g., Mining Specialists*, 314 NLRB 268, 268-69 (1994), *enforced*, 326 F.3d 602 (4th Cir. 2003).

[40] *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

The Employer's Point of Sale System also demonstrates how the Staples Approved Shopper Program will significantly impact bargaining unit work. According to the Union's testimony in Board Case 5-CA-119507, the Employer uses its "Point of Sale System" to bring staffing down to reflect the number of transactions during shifts. Thus, if the bargaining unit loses transactions to Staples, they will lose bargaining unit jobs, and additional branches or stations could consolidate as a result of the lost transactions.

Finally, the Employer could foresee from the results of the Pilot Program that the Staples Approved Shipper Program would have a significant impact on bargaining unit work. Evidence indicates that after the Staples Pilot Program began, the Employer reduced hours of several post offices close to Staples stores. At least one post office hung a sign informing customers that the post office was reducing its hours but that a nearby Staples store could provide alternate access to post office products and services after the post office had closed. The Pilot Program was only 6% of the size of the Staples Approved Shipper Program and still had a significant impact on bargaining unit work. With over 31,000 post offices nationwide, the proximity impact of competition from 1,300 Staples stores will be greatly multiplied.

Accordingly, the Employer's argument that the Staples Approved Shipper Program agreement's impact on bargaining unit work will not be significant lacks a sound arguable basis. Thus, the Employer unlawfully modified the contract in violation of Section 8(d) by entering into the Staples Approved Shipper Program without following the terms of Article 32 and the related memorandum.

B. The Employer Violated Section 8(a)(5) by Making a Unilateral Change to a Mandatory Subject of Bargaining

Even assuming, *arguendo*, that the Employer has a sound arguable basis for its interpretation of the collective-bargaining agreement, the Employer violated Section 8(a)(5) by unilaterally implementing the Staples Approved Shipper Program. In contrast to Section 8(d) contract modification cases, Section 8(a)(5) unilateral change cases "do[] not require the General Counsel to show the existence of a contract provision[.]"[41] Rather, the General Counsel "need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*."[42] To the extent that the contract is at issue, the Board's focus in unilateral change cases is whether

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[41] *See Bath Iron Works Corp.*, 345 NLRB at 501.

[42] *Id.* (emphasis in original).

there is anything in the contract that privileged the Employer's conduct, *i.e.* whether the Union contractually waived its right to bargain.[43]

The Board applies a "clear and unmistakable" waiver standard to determine whether a union has waived its right to bargain about a mandatory subject of bargaining during the term of a collective-bargaining agreement.[44] The Board will find a waiver if the contract either "expressly or by necessary implication" confers on management a right to unilaterally take the action in question.[45] In interpreting the parties' agreement, the relevant factors include: (1) the wording of the pertinent contractual provisions; (2) the parties' bargaining history; (3) the parties' past practice; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent.[46] To constitute a waiver, it is not sufficient that the contractual language can be reasonably interpreted to cover certain conduct.[47]

Applying these factors here, we conclude that the Union did not clearly and unmistakably waive its right to bargain over the Staples Approved Shipper Program agreement. As for the relevant contract language, nothing in Article 32 or any other provision of the collective-bargaining agreement or related memorandum waives the Union's right to bargain over subcontracting. Instead, Article 32 *preserves* the Union's right to bargain about subcontracting that will have a "significant impact" on bargaining unit work. While Article 32 discusses an early notification procedure where subcontracting that is being considered will have a "significant impact" on bargaining unit work, it is silent about the procedure for all other subcontracting. This does not negate the Employer's obligation to bargain about non-significant impact subcontracting that falls outside of Article 32. Further, the bargaining history strongly suggests that there was no waiver. Evidence about the bargaining history introduced in Board Case 5-CA-119507 confirms that the Union proposed the early

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[43] *Id.* at 502.

[44] *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-811 (2007).

[45] *See id.* at 812, n. 19.

[46] *See Johnson-Bateman Co.*, 295 NLRB 180, 184-89 (1989) (no waiver of right to bargain about drug/alcohol testing requirement where the management rights clause was generally worded, issue was not "fully discussed and consciously explored" during negotiations, and past practice of union acquiescence to other unilateral work changes did not waive the right to bargain about such changes for all time).

[47] *See Provena*, 350 NLRB at 810 (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

notice requirements to further *strengthen* its right to bargain over subcontracting, not to waive any of its rights. Finally, the Union's past acquiescence to the Approved Shipper Program does not constitute a past practice. It is well established that a union's prior acquiescence to a unilateral change does not constitute a waiver of its right to bargain that subject the next time the employer may wish to make such a change, even when it is the same type of change.[48] In any event, the magnitude of the subcontracting in the Staples Approved Shipper Program agreement makes it a material departure from any past practice.[49] Additionally, the Union's actions relating to the Staples Pilot Program, which is substantively similar to the Staples Approved Shipper Program, are further evidence of its lack of acquiescence to Staples subcontracting. The Union filed an information request, a National Dispute, and a ULP charge, which resulted in a complaint that the Union is pursuing before the Board. Therefore, we conclude that the Union did not waive its right to bargain in Article 32.[50]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Sections 8(d) and 8(a)(5) and (1), consistent with the analysis herein.

/s/
B.J.K.

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[48] *Id*. at 815 n. 35 ("union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past") (citing *Amoco Chemical Co*., 328 NLRB 1220, 1222 n. 6 (1999), *enf. denied*, 217 F.3d 869 (D.C. Cir. 2000)); *Caterpillar, Inc*., 355 NLRB No. 91, slip op. at 3 (Aug. 17, 2010) (employer's series of disparate changes to its prescription-drug plan without bargaining merely established that the union waived its right to bargain on several past occasions and did not establish a past practice).

[49] *See, e.g., Caterpillar, Inc*., 355 NLRB No. 91, slip op. at 3 (an employer violates Section 8(a)(5) if the unilateral change at issue constitutes a "material departure" from a well-established past practice).

[50] The Union also did not waive its right to bargain by not making a formal bargaining demand. It is well established that a request for information "is tantamount to" a request for bargaining. *See, e.g., Dubuque Packing Co.*, 303 NLRB at 398, n. 36 (collecting cases); *see also Biewer Wisconsin Sawmill*, 306 NLRB 732, 732 n.4 (1992).