STATE OF CONNECTICUT
DEPARTMENT OF LABOR

CONNECTICUT STATE BOARD OF LABOR RELATIONS

In the Matter of

PLAINVILLE BOARD OF EDUCATION

- and -

LOCAL 1303 OF COUNCIL #4, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO

Case No. MPP-2605

Decision No. 1192

Decided: January 3, 1974

Issued: January 18, 1974

A P P E A R A N C E S :

David Koskoff, Esq.,
for the Municipal Employer

William S. Zeman, Esq.,
for the Union

DECISION AND ORDER

Statement of Proceedings

On August 8, 1973, Local 1303 of Council #4, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter the Union, filed with the Connecticut State Board of Labor Relations, hereinafter the Board, its amended complaint alleging that the Town of Plainville, Board of Education, hereinafter the Municipal Employer, or Employer, had engaged and was engaging in prohibited practices within the meaning of Section 7-470 of the Municipal Employee Relations Act, thereinafter the Act, in that:

> "COUNT I: On or about June 12, 1973, while negotiations over wages involving the job of 'Head of Maintenance' were in progress, the Respondent unilaterally and without the consent of the Union, eliminated said job.
>
> COUNT II: When the new addition to the Plainville High School was turned over to the Town by the builder in April of 1973, the Town unilaterally, and without the consent of the Union, decided that custodial work to be performed in said annex would not be in the Bargaining Unit."

The Union requested the "[a]ppropriate statutory remedy . . . with respect to each Count."

After the requisite administrative steps had been duly taken the matter was brought on for hearing before the Board at the Plainville High School on October 18, 1973. Both parties appeared at the hearing and were represented by counsel. Full opportunity was given to adduce evidence, examine and cross-

examine witnesses, and make argument. Both parties filed written briefs which were filed on December 7 and 10, respectively.

On the whole record before us, we make the following findings of fact and conclusions of law.

Findings of Fact

1. The Plainville Board of Education is a municipal employer within the meaning of the Act. Section 7-467(1).

2. Local1303 of Council #4, AFSCME, AFL-CIO, is an employee organization within the meaning of the Act. Section 7-467(3).

3. At all times material hereto. the Unian has been the exclusive statutory bargaining representative for a unit of employees of the Employer designated as "custodians and maintenance men."

4. The Union and the Employer entered into a collective bargaining agreement effective as of July 1, 1972, and to remain in full force and effect through June 30, 1974 (with renewal provisions not here material). This will hereinafter be called the Contract.

5. Article I of the Contract, entitled Recognition, reads as follows:

> "The Board recognizes the Union as the sole and exclusive bargaining agent of its Custodian and Maintenance employees for bargaining purposes on matters of wages, hours of employment and other conditions of employment."

6. Article IV, §4.0 of the Contract reads as follows:

> "The Board agrees to meet annually with the Union to negotiate monetary matters at least one hundred twenty (120) days prior to the deadline for the submission of the Budget for adaption."

7. Article IV, §4.1 of the Contract reads as follows:

> "Wage scales and classifications shall be negotiated, and made a part of this Agreement. (Appendix "A")."

8. Appendix A of the Contract sets "forth pay schedules for the following classifications of employees: custodian, head custodian, maintenance, and head maintenance.

9. At all material times before June 12, 1973, Salvatore Fortuna held the position of head of maintenance and was paid accordingly.

10. On June 12, 1973, pursuant to action taken by the Board of Education on May 14th, Henry L. Bremner, Superintendent of Plainville schools, wrote the following letter to Fortuna:

> "Please be advised that by unanimous action of the Board of Education the title of Head of Maintenance "be eliminated, effective immediately."
>
> The rationale behind this move is that it appears to be in the best interests of the school system to continue with the plan of having individual maintenance workers assigned to individual schools, with a

minimum of "crew jobs."

The duties of the before-mentioned position will be absorbed by my office with me or my designate, acting in the role of "assigner of work to be done."

For you, this means that you will be assigned to individual schools with salary commensurable to other maintenance workers.

The principals of the various schools will be called upon to share in this responsibility. It has worked well in the past and should continue to be successful.

If you wish to discuss the situation with me, please feel free to do. so."

11. The reassignment of Fortuna indicated in this letter resulted in a reduction of his salary from that of head maintenance to that of other maintenance men (viz. $200 a year).

12. The actions described in paragraphs 10 and 11, supra, were not agreed to by or negotiated with the Union.

13. From March through August, 1973, the parties were engaged in active negotiations over "monetary matters" including the compensation for the position of head maintenance man.

14. During the term of the Contract a new addition to the Plainville high school building was completed consisting of new facilities for gymnasium, cafeterias, class rooms, special purpose rooms, and pool. The addition is approximately a third the size of the original high school building. to which it is physically attached.

15. The addition was completed and taken over by the Employer in stages, beginning in October 1972 and ending in April 1973.

16. When the Employer first began to move in the building contractor had a contract with Beaver Cleaning Service to perform custodial work in the parts of the building under construction, and the Employer made day by day arrangements with Beaver to perform like services in the rooms taken over.

17. In March of 1973, when complete takeover was in prospect, the Employer contracted with DeFrank Cleaning Service to perform the custodial work in the classroom portion of the new addition.

18. This was done after receiving bids and comparing the cost of contracting out the service with having it done by bargaining unit employees.

19. The cost of contracting out the service was substantially less and the decision to contract out was based on this fact and not on anti-union bias.

20. The maintenance work - as distinct from the custodial work - on the new addition has at all times been done by bargaining unit employees.

21. The custodial work in the pool area, gymnasium and locker room area of the new addition has at all times been performed by bargaining unit employees.

22. No member of the bargaining unit has been laid off or reduced in pay or seniority as a result of the contracting out.

23. One man was added to the bargaining unit to perform custodial work described in paragraph 21, supra.

24. Had the other custodial work in the addition not been contracted out, the Employer would have hired three persons to perform it, who would have become members of the bargaining unit.

25. The members of the bargaining unit get no overtime work or pay in the ordinary course of events. Sometimes extra work is done for private persons or companies but this is all in the original building and is assigned to bargaining unit employees.

26. On about ten occasions members of the bargaining unit have been assigned to do custodial work in the new addition on a more or less emergency basis.

27. The contracting out of the custodial work in the new addition was done without agreement by or negotiation with the Union.

28. There was no evidence of any past practice of contracting out bargaining unit work.

29. The Contract provided for time-and-a-half for overtime and double pay for work performed on Saturdays, Sundays, and Holidays.

Conclusions of Law

1. Since counsel for the Employer acknowledges that it did not bargain collectively within the meaning of Section 7-470(4) prior to the elimination of the position of head custodian, the Board accepts the acknowledgement and rules in accordance with it.

2. The custodial work in the new addition to the Plainville High School is, under the facts of this case and the Contract, bargaining unit work.

3. Since this custodial work is substantial in quantity and permanent in nature, and since the evidence shows no past practice of contracting out such work, the contracting out of such work affects the basic bargaining relationship between the parties and necessarily impairs the reasonably expected work opportunities of the bargaining unit and generates fears by its members of further encroachment upon its work.

4. Whenever that is the case and there is no unreasonable difficulty in bargaining about decisions to contract out the work (as where multiple decisions are needed) then such a decision is a mandatory subject of bargaining and the unilateral making of it constitutes a violation of Section 7-470(4) of the Act.

I.

The brief for the Employer commences with the following statement:

"Counsel for the Board insists that the Board proceeded in good faith, but acknowledges that it did not bargain collectively within the meaning of section 7-470(4) prior to elimination of the position in dispute."

In view of this statement, no further discussion of the point is called for.

II.

The federal courts, N.L.R.B. and this Board have all held that unilateral action by an employer which changes wages, hours, or working conditions of employees represented by a statutory bargaining agent constitutes, under some circumstances, a refusal to bargain in good faith with the representative (union) and so a violation of national and parallel state labor relations statutes. See, e.g., NLRB v. Katz, 385 U.S. 421 (1967); Town of Hamden, MPP-2228, Dec. No. 1044 (1972); Newington Board of Education, MPP-2383, Dec. No. 1116 (1973). Appeal from the Newington decision has been dismissed by the Court of Common Pleas in a decision by Kinmonth, J., which includes the statement, "unilateral action is usually sufficient to establish a violation of the Act."*

From early days in the history of labor relations statutes courts and boards have been troubled with the question whether a unilateral decision to contract out bargaining unit work constitutes a practice forbidden by such acts or instead, an exercise of management's right to make economic decisions not expressly prohibited by a collective bargaining agreement. See Timkel Roller Bearing Co., 70 NLRB 500 (1946) (holding contracting out to be a mandatory subject of bargaining). One line of cases in the federal courts of appeal held that where the decision to contract out stemmed from purely economic considerations and was not motivated by anti-union bias or a desire to hurt the union, it was the exercise of a management prerogative and consequently could be taken unilaterally, without negotiation with the union. At a time when such decisions represented a majority view our Supreme Court relied on them in coming to a similar conclusion. Hoyt-Bedford Co. v. Conn. St. Bd. of Lab. Rel. 147 Conn. 142, 157 A.2d 762 (1960). The last of this line of decisions was NLRB v. Adams Dairy Co., 322 F. 2d 553 (8th Cir 1963).

The next step in this development was the Supreme court decision in Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964). In this case the Court upheld a board's ruling that a unilateral decision to contract out maintenance work formerly done by bargaining unit employees constituted an unfair labor practice. In its opinion the Court cited with approval the Timken decision, 379 U.S. at 213. After this decision the Supreme Court granted certiorari in the Adams Dairy case and ruled: "The judgment is vacated and the case remanded to the United States Court of Appeals for the Eighth Circuit for reconsideration in light of" Fibreboard. NLRB v. Adams Dairy Co., 379 U.S. 644 (1965).

Since Fibreboard, NLRB and the federal courts have charted a fairly consistent line between situations where unilateral contracting out is permissible and those where it is not. Fibreboard itself was a case where the employer's action actually displaced bargaining unit employees. And, as the Employer's brief points out, it has not been read as proscribing all contracting out under any circumstances. The Employer points to the fact that its action in the present case has caused no member of the bargaining unit to be laid off or reduced in pay or seniority rights, and it cites federal cases to support a contention that where this is true no prohibited practice may be found. Puerto Rico Tel. Co., v. NLRB, 359 F. 2d 983 (1st Cir. 1966); NLRB v. King, 416 F. 2d 569 (10th Cir. 1969).

We think the Employer's reading of these cases is too broad. It is true that in them the employer's action caused no present disturbance of wages, hours and working conditions of bargaining unit members; but we do not think these cases stand for the proposition that wherever that is so there can be no prohibited practice. We find the decisions much narrower than that; they dealt with situations which in other respects are quite different from that shown here. In both of them the work contracted out was of a temporary nature. A later decision cites the Puerto Rico Tel. Co. case for the following statement: "The changes made here resulted from temporary needs, permitting the Board to excuse them as

* This decision has been appealed to the Supreme Court.

inconsequential matters not designed to affect the basic bargaining relationship." Sign & Pictorial Union Local 1175, B.P.D. & P of A, AFL-CIO v. NLRB, 419 F.2d 726, 735 note 5 (D.C. Cir. 1969). (emphasis supplied). Cf. Puerto Rico Tel. Co. v. NLRB, 359 F.2d at 987, stating that the subcontracts were to meet temporary and transient needs "rather than to alter the basic structure of the enterprise."

We are satisfied that the rule which the Employer would have us derive from these cases would be an unwarranted over-simplification of the approach taken by NLRB and the federal courts to the problem. A reading of other cases, not cited in either brief, convinces us that these tribunals have weighed many factors in determining where the line should be drawn between management and union rights. Thus in a leading decision NLRB declared:

> In the Fibreboard line of cases, where the Board has found unilateral contracting out of work to be a violation of Section 8 (a) (5) and (1), it has invariably appeared that the contracting out involved a departure from previously established operating practices, effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit. Westinghouse Electric Corp. (Mansfield), 150 NLRB 1574, 1576, 58 LRRM 1257, 1258 (1965)*

Another factor of significance appeared in this case. The past practice concerned "thousands of annual subcontracting decisions which involved unit work." The difficulties which such a situation would entail if full scale collective bargaining for each decision should be required are thoughtfully analyzed in District 50 UMW of A Local 13942 v. NLRB, 358 F. 2d 234, 238 (4th Cir. 1966).

It is true all the cases state that unilateral contracting out must have some kind of substantial impact on the bargaining unit before an unfair (or prohibited) practice may be found. And of course this impact may consist in lay-offs, loss of seniority rights, and the like. But the decisions also make it clear that the requirement may be satisfied where the "impact" is much more indirect and subtle. Thus "departure from previously established operating practices," and "impairment of . . . reasonably anticipated work opportunities" are recognized, each as a separate and distinct ground for finding substantial impact. So is a practice which generates fears of future encroachment upon bargaining unit work. As the court recognized in the District 50 case, supra, 358 F. 2d 234, 237, such "fears are palpably real and disturbing."

We have taken pains to explore the federal decisions because our courts have often stated that where our statute is patterned after the federal act we should accord the greatest weight to the decisions of the tribunals charged with interpreting and administering the federal model. Here we adopt the federal rule as we understand it not only for this reason but also because we believe it will best implement the policies of our own statute. It remains to consider how these rules should be applied to the facts of this case.

The first question is whether the contracting out here involved bargaining unit work. If it did not, all that has been said above has no application. Central Soya, Inc., supra. The Employer claims that cleaning work in the new addition is not bargaining unit work but we reject that claim. In the Contract the Employer recognizes the Union as "sole and exclusive bargaining agent of its Custodial and Maintenance employees." This, we hold, covers at least all custodial and maintenance functions in existing buildings

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* See also Central Soya Co., Inc., 151 NLRB 1691, 58 LRRM 1667 (1965); American Oil Co., 152 NLRB 56, 59 LRRM 1007 (1965); Westinghouse Electric Corp. (Bettis), 152.NLRB 443, 59 LRRM 1355 (1965).

and additions thereto. Conceivably if the Employer had undertaken an entirely new project or built an entirely new building there might be grounds for claiming that work on it was not meant to be covered by the Contract. On the other hand if a single class room had been added to an existing building there could be little basis for claiming that cleaning it did not constitute bargaining unit work. The process would be something like accretion. We think that is the case here. Additional factors supporting this conclusion are (1) the fact that all maintenance work done in the addition is done by bargaining unit employees; (2) the fact that the custodial work in substantial parts of the addition is still done by bargaining unit employees; (3) the fact that on approximately 10 occasions bargaining unit employees have been used to do the work which the contractor's employees are engaged to do and, of course, (4) the fact that the custodial work in the addition is substantially the same as that in the original building.

Since we conclude that the work contracted out is bargaining unit work we must make the further inquiries called for by the analysis of federal decisions set out above. In the first place the custodial work in the addition is not trivial and it is not temporary; it is substantial in amount and permanent in nature. Moreover the evidence shows no settled past practice to contract out similar work from the bargaining unit. There was an oblique reference in the testimony (Tr. 54) to contracting out some work in a named school (Teffelone) but neither the work nor the school was otherwise identified. This falls far short of the kind of showing made, for example, in the Westinghouse and American Oil cases, cited supra. We must assume then that there has been no such past practice.

When bargaining unit work of a permanent nature is contracted out as a new departure from past practice we believe this action does "affect the basic bargaining relationship" between the parties, and that it necessarily impairs the "reasonably expected work opportunities for those in the bargaining unit." And it tends, inevitably we think, to generate "palpably real and disturbing" fears about the future of tenure and conditions of employment in the bargaining unit. Moreover there is in this case no countervailing consideration caused by the prospect of intolerably repeated full-scale bargaining (as in Westinghouse); here there is only a single event to be bargaining about.

For the foregoing reasons we conclude that the matter of contracting out the custodial work in the addition to the high school is a mandatory subject of bargaining between the parties, and that the Employer's unilateral decision in the matter constituted a prohibited practice even though it was made in good faith and for economic reasons. The proper remedy in this case is an order to bargain; it does not include anything more since no past pecuniary loss to anyone in the bargaining unit has been shown.

O R D E R

Board of Labor Relations by the Municipal Employee Relations Act, it is

ORDERED, that the Plainville Board of Education shall

I. Cease and desist from

(a) classifying and paying Salvatore Fortuna as anything other than head of maintenance pursuant to the Contract, and from

(b) contracting out the custodial work in the new addition to the high school, unless and until such classification or contracting out is agreed to by the Union after negotiation, or until final impasse in such negotiations has been reached.

II. Take the following affirmative steps which the Board finds will effectuate the purposes of the Act:

(a) pay to Salvatore Fortuna the difference between the compensation for head of maintenance and what he has received from the time of his assignment to the position of maintenance, pursuant to the terms of the Contract or of any modification thereof agreed to by the parties.

(b) bargain with the Union upon request with respect to reclassifying Fortuna and contracting out the custodial work for the high school addition unless the Employer abandons either or both of these projects.

(c) Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees involved customarily assemble, a copy of this Decision and Order in its entirety.

(d) Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order of the steps taken by the Plainville Board of Education to comply therewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

By _____
Chairman

_____
Member

_____
Member