Bob's Tire Co., Inc. and B.J.'S Service Company, Inc. *and* United Food and Commercial Workers International Union, Local 328. Case 01–CA–183476

July 31, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On December 7, 2018, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order, to amend the remedy,[3] and to adopt the judge's recommended Order as modified and set forth in full below.[4]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and bargain with the Union before subcontracting bargaining-unit work from November 6, 2015, to October 15, 2016.[5] The judge additionally found that the Respondent violated Section 8(a)(5) and (1) by failing to pay its employees a Christmas bonus in 2015 without giving the Union prior notice and opportunity to bargain. Contrary to the judge, and as explained below, we find the evidence does not establish that the failure to pay the Christmas bonus was unlawful.

The judge's latter finding was based on the credited testimony of former employee Tomas Ventura. Ventura testified that he received a Christmas bonus each year from 2008 through 2014. He stated that he did not remember the exact amount of each year's bonus, but that he probably received a $20 bonus for 2 or 3 years, a $50 bonus for 1 or 2 years, and a $100 bonus for 1 or 2 years. It is not disputed that in 2015, without notifying the Union, the Respondent did not pay its employees a Christmas bonus.

Based on Ventura's testimony, the judge found that the "Respondent violated the Act in failing to pay its employees a Christmas bonus in 2015 because such a bonus was paid with sufficient regularity that employees would have been justified in expecting to receive such a bonus as part of their wages." We disagree that the nonpayment of the bonus in 2015 was unlawful.

In determining whether a bonus constitutes a term and condition of employment over which an employer must bargain, the Board considers both the regularity of the bonus and whether payment of the bonus was tied to employment-related factors. See, e.g., *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008). Here, the credited testimony shows that the Respondent paid its employees a holiday cash bonus for 7 consecutive years, but it leaves unclear the amount paid in any particular year and it is silent as to whether the bonus was tied in any way to employment-related factors. In the absence of additional and more specific evidence about the amount and nature of the bonuses, there is no basis to find that these payments were anything more than gifts over which the Respondent was not required to bargain. See *Harvstone Mfg. Corp.*, 272

[1] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally implementing a performance-based bonus program in January 2016 and unilaterally discontinuing this program in September 2016.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We amend the judge's remedy to provide that the make-whole remedy for the Respondent's subcontracting of bargaining-unit work is to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, supra at 683; see also *Pepsi-America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003). In addition, we amend the judge's remedy for the unilateral implementation and subsequent cessation of the performance-based bonus program to require the Respondent to restore this program and maintain it in effect either until the Union requests its rescission or the Respondent and Union negotiate an agreement on modifications to the program. Finally, we amend the judge's remedy to require the Respondent to make its bargaining-unit employees whole for any loss of earnings and other benefits attributable to the Respondent's cessation of the performance-based bonus program, computed in accordance with *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

[4] We shall modify the judge's recommended Order to conform to the amended remedy and to our findings below, and we shall substitute a new notice to conform to the Order as modified.

[5] In finding this violation, Chairman Ring and Member Kaplan agree with the judge that the record does not establish that the Respondent changed the nature, scope, or direction of its business, but they find it unnecessary to rely on *O.G.S. Technologies*, 356 NLRB 642 (2011), cited in support by the judge.

NLRB 939, 939 fn. 1 (1984) (employer did not violate the Act by discontinuing Christmas bonus given for 10 years, where bonuses were in the nature of gifts rather than terms and conditions of employment).

In finding the violation, the judge cited in support *Waxie Sanitary Supply*, 337 NLRB 303 (2001), and *Sykel Enterprises*, 324 NLRB 1123 (1997). The judge's reliance on these cases is misplaced, as both cases included evidence establishing that the holiday bonus at issue was clearly a term and condition of employment. In *Waxie Sanitary Supply*, the amount of each employee's bonus was a specified percentage of the employee's annual salary, and that percentage depended on the employer's gross profits for the year. 337 NLRB at 304. In *Sykel Enterprises*, the employer considered the employee's attendance and performance in determining the bonus amount. 324 NLRB at 1124. Here, as mentioned above, the record does not specify the amount of the Christmas bonus in any particular year, and it is silent as to whether the bonus was tied to any employment-related factor.[6]

Absent evidence sufficient to establish an obligation to bargain over the Christmas bonuses, we find the Respondent's failure to give the Union notice and opportunity to bargain before withholding a Christmas bonus in 2015 did not violate Section 8(a)(5) and (1) as alleged. Accordingly, we reverse the judge's finding of a violation and dismiss this allegation of the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Bob's Tire Co., Inc., New Bedford, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Subcontracting bargaining-unit work without first notifying United Food and Commercial Workers International Union, Local 328 (the Union) and giving it an opportunity to bargain.

(b) Changing the terms and conditions of employment of unit employees regarding performance-based bonuses without first notifying the Union and giving it an opportunity to bargain.

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

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

(a) Before subcontracting bargaining-unit work or implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc. working at Bob's Tire Co. location on Brook Street, New Bedford, MA but excluding all other employees, mechanics, shredder operators, truck drivers, clerical employees and supervisors as defined in the Act.

(b) Restore the performance-based bonus program and maintain it in effect until either the Union requests its rescission or the Respondent and Union negotiate an agreement on modifications to the program.

(c) Make bargaining-unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's subcontracting of bargaining-unit work and cessation of performance-based bonuses in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate bargaining-unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) 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.

(f) Within 14 days after service by the Region, post at its New Bedford, Massachusetts facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 1,

[6] Because *Waxie Sanitary Supply* and *Sykel Enterprises* involved bonus payments tied to employment-related factors, we disagree with the judge's statement that these two cases are "possibly inconsistent" with *Benchmark Industries*, 270 NLRB 22 (1984), where the Board found no obligation to bargain over gifts that were "given to all employees regardless of their work performance, earnings, seniority, production or other employment-related factors." 270 NLRB at 22.

[7] 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."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 November 6, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 31, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated 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 subcontract bargaining-unit work without first notifying United Food and Commercial Workers International Union, Local 328 (the Union) and giving it an opportunity to bargain.

WE WILL NOT change your terms and conditions of employment regarding performance-based bonuses without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before subcontracting bargaining-unit work or implementing any changes in wages, hours, or other terms and conditions of your employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc. working at Bob's Tire Co. location on Brook Street, New Bedford, MA but excluding all other employees, mechanics, shredder operators, truck drivers, clerical employees and supervisors as defined in the Act.

WE WILL restore our performance-based bonus program and maintain it in effect until either the Union requests its rescission or we negotiate with the Union an agreement to modify the program.

WE WILL make you whole for any loss of earnings and other benefits suffered as a result of our unlawful subcontracting and cessation of our performance-based bonus program, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each bargaining-unit employee.

BOB'S TIRE CO., INC.

The Board's decision can be found at www.nlrb.gov/case/01-CA-183476 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

Richard Concepcion and *Meredith B. Garry, Esqs.,* for the General Counsel.

Gregory J. Koldys, Esq. (Koldys and Kelleher, P.C.), of Dartmouth, Massachusetts, for the Respondent.

Marc B. Gursky, Esq. (Gursky Wiens), of North Kingston, Rhode Island, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Pawtucket, Rhode Island on September 24 and 25, 2018. United Food and Commercial Workers (UFCW) Local 328 filed charge 1–CA–183476 on September 2, 2016, alleging that Respondent unilaterally changed its bonus system and illegally subcontracted unit work to the Masis Staffing Agency. The General Counsel issued the initial complaint in this case on December 30, 2016. The fifth and last consolidated complaint issued on May 29, 2018.

A week prior to the trial in this case, the parties settled most of the outstanding allegations of the fifth consolidated complaint. There was no non-admissions clause in the settlement agreement. Thus, Respondent conceded that it violated the Act with respect to the settled charges, which involved, among other things, Respondent's failure to comply or timely comply with union information requests.

Therefore, only paragraphs 29 and 30 of the complaint were litigated. Paragraph 29 alleges that since November 15, 2015, Respondent subcontracted bargaining unit work to non-unit employees. Paragraph 30 alleges that since January 1, 2016, Respondent materially modified its discretionary bonus system for unit employees.

The Charging Party Union and B.J.'s Service Company, which is a staffing agency, entered into a non-Board settlement prior to hearing, thus only allegations concerning Bob's Tire Company were litigated.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, recycles car and truck tires at its facility in New Bedford, Massachusetts. Respondent annually purchases and receives goods valued in excess of $50,000 directly from points outside of Massachusetts. It also sells and ships goods valued in excess of $50,000 directly to places outside of Massachusetts. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, UFCW Local 328 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Bob's Tire Co. has been in business since 1976. It has a yard in Bedford, Massachusetts to which tires are either delivered by other companies or brought in my trucks belonging to Respondent. In the yard employees separate the good tires from the unsalvageable tires. Good tires are resold; damaged tires are shredded and sent to a paper mill in Maine. For a period of time, employees in the yard cut the treads of passenger car tires, banded them together and loaded them into sea containers for shipment to India.

After winning a Board election, on October 1, 2015, United Food and Commercial Workers Local 328 was certified as the exclusive bargaining representative of the following stipulated bargaining unit:

> All full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc. working at Bob's Tire Co. location on Brook Street, New Bedford, MA but excluding all other employees, mechanics, shredder operators,[1] truck drivers, clerical employees and supervisors as defined in the Act.

For some period of time prior to October 1, 2015, Respondent acquired labor for its yard from B.J.'s Service Company, a staffing agency. These employees constituted most or all of the bargaining unit to which the parties stipulated.

Five weeks after the Union was certified, on November 6, 2015, Respondent Bob's Tire Co. entered into an agreement with Masis Staffing Solutions to provide Bob's with employees who would perform light industrial loading and unloading work (GC Exh. 11), and Exhibit A to the staffing agreement. Thus, by the terms of the staffing agreement Masis was to provide employees to perform unit work. The agreement stated that the employees provided to Bob's were employees of Masis and were not employees of Bob's. Respondent did not inform the Union of this staffing agreement. The Union discovered this from bargaining unit employees in March 2016.

On November 13, 2015, the Union requested that Respondent provide it with a list of all employees in the bargaining unit. On

[1] This exclusion applies to one specific employee, Andrus Legaro Marrick. Masis Staffing, discussed below, did not provide Respondent with a shredder operator.

December 4, 2015 Respondent provided a spreadsheet of all employees on Bob's payroll. This included employees hired through B.J. Service Co. but not through Masis. Employees provided by Masis worked at Bob's yard starting the week ending November 14, 2015 (GC Exh. 16). The Union's November 13 request also included all benefits offered to unit employees, including bonuses. Respondent's December 4 response did not include any information about bonuses. In fact, some or all of Bob's employees received a cash bonus at Christmas every year between 2008 and 2014 (Tr. 86–87). The amount of the bonus steadily increased from $20 to $50 and then to $100.[2] It did not pay a Christmas bonus in December 2015.

In January 2016, without notifying the Union, or giving it an opportunity to bargain, Bob's started paying some employees a bonus (or incentive payment) by check (11 or 12 employees per GC Exh. 64). This bonus was a paid for exemplary performance (Tr. 143). The checks were $50 to some employees and $100 to others (GC Exh. 64). Respondent withheld taxes from the bonus, which it had not done when paying bonuses in cash. In September 2016, Bob's unilaterally stopped paying bonuses altogether.

On November 24, 2015, the Union requested documents pertaining to contracts under which either entity agreed to loan, sell and/or contribute equipment, services, money and/or anything of value to the other entity (GC Exh. 6). Bob's response on December 10, informed the Union of its contract with B.J.'s Service to provide workers to Bob's, but did not mention its contract with Masis.

At a bargaining session in early March 2016, two of Respondent's employees, who were members of the Union's negotiating team, advised the Union that employees provided by Masis were working in Bob's New Bedford yard.

On March 10, Union counsel Marc Gursky wrote Respondent's counsel Greg Koldys stating that the it had come to the Union's attention that Bob's was using Masis employees to do bargaining unit work. Gursky requested that Respondent provide it with the staffing agreement and a list of all Masis employees. On June 14, Respondent provided the Union with the staffing agreement without objection.

On August 18, Respondent provided the Union with the names of employees supplied to Bob's by Masis. On September 14, 2016, the company provided a list of Masis employees annotated with a code of the type of work they performed at Bob's. A very large majority performed only general labor work. The testimony of Tomas Ventura, a former employee of Respondent, confirms that in many instances Masis employees did the same work as Bob's employees. Even the owner of Respondent, Robert Bates, testified that at least on some occasions, Masis employees performed bargaining unit work. Respondent's list shows that only 4 of the 111 Masis employees exclusively cut and strapped tire sidewalls and treads, the only type of work which even arguably could be considered non bargaining unit work.

Employees who had been sent to Bob's by B.J.'s Service Company continued to work at the yard at the same time as the employees sent by Masis. Much of the "B.J.'s" employees' work was unloading tires from trucks, then placing tires on a conveyor which took them to a shredder machine. Masis employees at least sometimes did the same work. Masis employees continued working at Bob's through Masis until the week ending October 15, 2016. Some were then directly hired by Bob's or B.J.'s. The number of Masis employees at the yard in a particular week varied and the number of hours they worked varied as well. A quick review of the Masis invoices indicates that the number of Masis employees working at Bob's in any 1 week was generally in the 18–24 range. Some of these worked a significant number of overtime hours.

Some Masis employees at times did different work than employees working through B.J.'s. For example, the cutting and banding of tire treads for shipment to India was done exclusively or almost exclusively by Masis employees. Masis employees also cut sidewalls from passenger car tires, which were shipped to Arizona. Bob's B.J.'s employees used a different machine than Masis employees to cut sidewalls from truck tires. In 2015 Respondent purchased 3 machines to cut the sidewalls off of car tires and a machine to cut the tread from passenger car and truck tires. It had not cut sidewalls from car tires prior to October 2015.

The work, however, performed by Masis employees did not require significant training or special skills and could have been done by the employees working at Bob's through B.J.'s.

It is unclear as to whether B.J.'s sent any additional employees while Masis employees were on the site. When Bob's stopped using Masis in October 2016, it continued to employ some Masis employees at the yard via B.J.'s. After that, the former Masis employees performed work that was historically performed by "B.J.'s" employees.

Analysis

Subcontracting

An employer may violate Section 8(a)(5) and (1) of the Act by subcontracting bargaining unit work. Subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise, *Fibreboard Corporation v. NLRB,* 379 U.S. 203 (1964); *Sociedad Espanola de Auxilio Mutuo y Beneficia de P.R.,* 342 NLRB 458, 459 (2004). Bob's Tire has not established that its subcontracting involved a change in the nature, scope or direction of its operation. Masis employees recycled tires, sidewalls and treads, as did unit employees. The fact that they may have sometimes or often used different machinery, or prepared recycled tires for different customers

[2] With regard to the frequency of Christmas bonus payments prior to 2016, I credit former Bob's employee Tomas Ventura's testimony over that of Respondent's owner Robert Bates, who testified that he gave bonuses sporadically. Ventura had no reason to fabricate this testimony.

On the other hand, Ventura's testimony regarding cash bonuses paid to employees who worked on Saturdays is hearsay and is not credited.

Robert Bates' testimony at Tr. 134–139, establishes that between October 15, 2015, and January 15, 2016, Respondent paid cash bonuses in uncertain amounts to some employees. The General Counsel has not established that any employees were receiving these payments on a regular schedule prior to January 2016 or that any received less money as the result of Respondent making the payments by check and withholding taxes.

does not constitute a change in the nature, scope or direction of its business, *O.G.S. Technologies,* 356 NLRB 642 646 (2011).[3]

Robert Bates, Respondent's owner, admitted that the reason he contracted with Masis was that he could not get enough employees from B.J.'s (Tr. 174, 217), and that he could have performed the work subcontracted to Masis with employees he hired directly (Tr. 227). The employees working at Bob's through B.J.s were just as capable of performing the work done by Masis employees as were the Masis employees (Tr. 244–245).

The fact that no unit employees may have lost their jobs as a result of the subcontracting is not dispositive as to whether Respondent violated the Act in subcontracting unit work unilaterally, *Overnite Transportation,* 330 NLRB 1275, 1276 (2000); *Acme Die Casting,* 315 NLRB 202 fn. 1 (1994). A bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees regardless of whether the work would have been done by employees already in the unit or by employees who would have been hired into the unit. As in *Overnite,* it is not clear that unit employees did not suffer lost work opportunities due to the subcontracting to Masis. There certainly appears to have been opportunities for increased overtime for unit employees that were adversely affected by the influx of Masis employees. Moreover, Respondent appears to have admitted to laying off employees in violation of the Act (CP Exh. 2).

In sum, Respondent violated Section 8(a)(5) and (1) by subcontracting unit work to Masis. By doing so, it was merely substituting Masis employees for employees who worked for it, either directly and/or through B.J.'s.

Bonus

Respondent violated Section 8(a)(5) and (1) by failing to pay employees a Christmas bonus in December 2015.

Respondent violated the Act in failing to pay its employees a Christmas bonus in 2015 because such a bonus was paid with sufficient regularity that employees would have been justified in expecting to receive such a bonus as part of their wages, *Waxie Sanitary Supply,* 337 NLRB 303, 304 (2001); *Sykel Enterprises,* 324 NLRB 1123, 1125–1126 (1997).[4]

Respondent violated the Act between January and September 2016 in unilaterally paying selected employees a bonus for excellent work and then unilaterally discontinuing that bonus.

A bonus paid on the basis on employee's performance on the job constitutes part of an employee's compensation, rather than a gift. *Ohio Edison Co.,* 362 NLRB 777, 777, 786–792 (2015), *enforcement denied on other grounds,* 847 F.3d 806 (6th Cir. 2017). As such, such a bonus may be initiated and may be terminated only after giving the employees' union notice and an opportunity to bargain. In this case, Respondent initiated a weekly payment of $50 to some employees; $100 to other employees and none to all other unit employees (GC Exh. 64. Since this was tied to the work performed of employees, these payments could be characterized as "incentive payments" to selected employees, rather than, or as well as a bonus. It made these payments without notifying the Union or giving it an opportunity to bargain. Nine months later it discontinued this "bonus" unilaterally. Both by initiating these payments and stopping them unilaterally, Respondent violated Section 8(a)(5) and (1) of the Act, *Memc Electronic Materials,* 342 NLRB 1172, 1184, 1192 (2004).

Conclusions of Law

Respondent, Bob's Tire Co., Inc. violated Section 8(a)(5) and (1) by failing to notify the Charging Party Union in advance and offering it an opportunity to bargain about the subcontracting of unit work to Masis Staffing Solutions. Respondent violated the Act in failing to pay unit employees a Christmas bonus in 2015 as it had in previous years. Respondent violated the Act in unilaterally initiating bonus or incentive payments to unit employees in January 2016 and then unilaterally terminating these payments in September 2016.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully subcontracted with Masis Staffing and having failed to pay unit employees a Christmas bonus in 2015 must make unit employees whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall file a report with the Regional Director for Region 1 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate unit employees for the adverse tax consequences, if any, of receiving one or more lumpsum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey,* 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Bob's Tire Co., New Bedford, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[3] In a somewhat different context the Board has found that a change in the identity of customers served, or the use of newer equipment to perform the same service, does not affect what is an appropriate bargaining unit or whether there is a continuity of operations to deem a company a successor employer, *A.J. Myers & Sons, Inc.,* 362 NLRB 365, 371 (2015); *Ports America Outer Harbor, LLC, Currently Known as Outer Harbor Terminal, LLC,* 366 NLRB No. 76 (2018).

[4] These decisions strike me as possibly inconsistent with *Benchmark Industries,* 270 NLRB 22 (1984). This case could be distinguished, however, in deeming the cash payments herein as something other than the "token" gift of a 5 lb. ham that Benchmark ceased to provide its employees.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Unilaterally subcontracting bargaining unit work.

(b) Failing to pay a Christmas bonus which is an established past practice.

(c) Unilaterally paying bonuses or incentive payments to unit employees.

(d) Unilaterally stopping its payment of bonuses or incentive payments to unit employees.

(e) 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 unit employees whole for any loss of earnings and other benefits suffered as a result of their unlawful subcontracting and its failure to pay a Christmas bonus in 2015 in the manner set forth in the remedy section of this decision.

(b) File a report with the Social Security Administration allocating backpay for these employees to the appropriate calendar quarters.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(d) 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.

(e) Within 14 days after service by the Region, post at its New Bedford, Massachusetts facility copies of the attached notice marked "Appendix"[6] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 November 6, 2015.

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

Dated, Washington, D.C. December 7, 2018

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 subcontract bargaining unit work without first notifying United Food and Commercial Workers Local Union 328 and providing it an opportunity to bargain over such proposed subcontracting.

WE WILL NOT fail to pay you a Christmas bonus in the manner such bonus was paid prior to the certification of the United Food and Commercial Workers Local Union 328 on October 15, 2015.

WE WILL NOT initiate or terminate bonus or incentive payments to unit employees without first notifying United Food and Commercial Workers Local Union 328 and offering it an opportunity to bargain about such payments.

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

WE WILL make unit employees whole for any loss of earnings less any net interim earnings and other benefits resulting from our unilateral subcontracting to Masis Staffing Solutions in 2016 and our failure to pay a Christmas bonus in December 2015 with interest compounded daily.

WE WILL file a report with the Social Security Administration allocating these employees' backpay to the appropriate calendar quarters.

WE WILL compensate these employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

BOB'S TIRE CO., INC. AND B.J.'S SERVICE COMPANY, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-183476 or by using the QR code

[6] 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."

below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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