

Electronic Alert

Volume 23, Issue 65

December 16, 2020

No Harm, No Foul? Not for Employers Subcontracting Union Work

By Nicole Elgin & Natalie Pattison

A recent appellate court decision serves as an important reminder for employers when subcontracting union work: the duty to bargain is not contingent on reduced hours for union employees. In the case of *Bob's Tire Co., Inc. v. NLRB*, the D.C. Circuit Court ruled the employer violated federal labor law by failing to bargain before subcontracting work, even when the subcontracting did not result in employee layoffs.

Subcontracting is the practice of using non-bargaining unit employees to perform work traditionally performed by bargaining unit employees. As a general rule, an employer has a duty to bargain with the union before subcontracting; however, there is an exception when the subcontracting would only indirectly impact employment security.

In this case, the employer argued the bargaining unit employees were not harmed by its subcontracting decision because no bargaining unit employees were laid off or replaced. The Court rejected the employer's argument and held that a union is adversely affected whenever its work is given away to non-bargaining unit employees. Even without layoffs, the union still "had an interest in understanding, discussing, and possibly objecting to the use of non-unit employees," the Court said. The Court further held that subcontracting out work to non-bargaining unit employees deprived bargaining unit members the opportunity to potentially obtain extra shifts, work overtime, or expand the bargaining unit.

This case means an employer cannot avoid the obligation to bargain over subcontracting just because there are no layoffs due to the subcontracting, unless there is clear contract language to support such a decision. Before making decisions about subcontracting, including entering into service agreements with a staffing agency, employers should carefully consider the indirect impacts on the bargaining unit. Keep in mind that if an employer is found to have violated the NLRA by its subcontracting, the employer may also be required to pay backpay.

If you have questions about subcontracting or how to negotiate subcontracting provisions into your union contract, contact Nicole Elgin at nelgin@barran.com or Natalie Pattison at npattison@barran.com.