

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

<p>In the Matter of:</p> <p>MI PUEBLO FOODS</p> <p style="text-align:center">Employer,</p> <p>and</p> <p>INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 853, affiliated with CHANGE TO WIN,</p> <p style="text-align:center">Charging Party.</p>	<p>Case No. 32-CA-25677</p>
---	------------------------------------

**RESPONDENT MI PUEBLO FOODS' BRIEF IN SUPPORT OF EXCEPTIONS TO
DECISION OF ADMINISTRATIVE LAW JUDGE**

Richard A. Leasia
Littler Mendelson, P.C.
50 West Fernando Street, 15th Floor
San Jose, CA 95113
(408) 795-3427

Jennifer L. Mora
Littler Mendelson, P.C.
2049 Century Park East, 5th Floor
Los Angeles, CA 90067
(310) 772-7243

Attorneys for Employer
Mi Pueblo Foods

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. PROCEDURAL HISTORY	2
III. THE ALJ’S DECISION	3
IV. FACTUAL BACKGROUND	4
A. Mi Pueblo’s Distribution Center	4
B. Respondent Expands the D.C. in 2007	5
C. Augustin Arreaga Becomes D.C. Director In December 2010 And Makes Numerous Changes, Not At Issue In The Instant Case, That Resulted In A New And Improved Distribution Center	7
1. Arreaga Sets Out To Analyze How To Make The D.C. More Efficient	8
a. Discussions With Store Directors To Improve Core Service	8
b. Arreaga Analyzes Efficiencies	10
c. Arreaga Develops A Strategy For Making The D.C. More Efficient	10
d. Arreaga Refines Driver Notification System To Increase Efficiency	11
2. The D.C. Lays Off Order Selectors	12
3. Arreaga Consolidates The D.C.’s Assets	13
D. The D.C. Eliminates Backhauls And Pickups Due To Major Delays And Resulting Inefficiencies	14
1. Elimination Of Morton Salt Deliveries	15
2. Elimination Of C&H Sugar Deliveries	15
3. Elimination Of Pickups From Durango Packaging	16
4. Elimination Of Backhauls From Mazola Oil	17
E. The D.C. Modifies Schedules And Consolidates Routes To Improve Efficiency And Productivity	17

TABLE OF CONTENTS
(CONTINUED)

	PAGE
F. Mi Pueblo Attempts To Bargain Over The Effects Of Its Operating Changes Upon The Drivers.....	19
V. THE PURPORTED NEW MEMBERS OF THE NLRB WERE NOT VALIDLY APPOINTED AND, THEREFORE, THE AGENCY LACKS A QUORUM TO ACT IN THIS CASE	20
VI. SPECIFICATION OF THE ISSUES RAISED BY RESPONDENT’S EXCEPTIONS	23
VII. ARGUMENT IN SUPPORT OF EXCEPTIONS TO ALJ’S DECISION	24
A. Under First National, Certain Managerial Decisions Are Not Mandatory Subjects Of Bargaining.....	24
B. The ALJ Erred By Finding That Respondent’s Decision To Eliminate Backhauls And Pick-Ups And Subcontract The Work Violated The Act	29
1. Respondent’s Decision To Subcontract Backhauls And Pick-Ups Was Not A Mandatory Subject Of Bargaining Under First National Because Respondent’s Decisions Was Not Driven By Labor Costs Or Any Factors Within The Union’s Control	30
2. The ALJ Erred By Ignoring First National And Relying Solely On Fibreboard.....	35
C. The ALJ Erred By Finding That Respondent’s Decision To Change Schedules And Consolidate Routes Violated The Act	38
D. Respondent’s Decisions To Subcontract And To Change Schedules And Consolidate Routes Were Not Amenable To Bargaining.....	40
E. Respondent’s Decisions To Subcontract Backhauls And Pick-ups And To Change Schedules And Consolidate Routes Are Not Mandatory Subjects Of Bargaining Under Dubuque Packing Company	41
F. Respondent Attempted To Negotiate The Effects Of Its Decisions With The Union	44
VIII. CONCLUSION.....	46

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Dubuque Packing Co.</i> , 303 NLRB 386 (1991)	41, 42, 44
<i>Evans v. Stephens</i> , 387 F.3d 1220 (11th Cir. 1994)	21
<i>Federal Election Commission v. NRA Political Victory Fund</i> , 6 F.3d 821 (D.C. Cir. 1993)	20
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964)	passim
<i>First National Maintenance</i> , 242 NLRB 462 (1979) enf'd 627 F.2d 596 (2d Cir. 1980) cert. granted 449 U.S. 1076 (1981)	26, 27
<i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981)	passim
<i>Kennedy v. Sampson</i> , 511 F. 2d 430 (D.C. Cir. 1974)	21
<i>New Process Steel, L.P. v. NLRB</i> , 130 S.Ct. 2635 (2010)	20, 22, 23
<i>New Process Steel, L.P. v. NLRB</i> , Case No. 08-1457 (Mar. 23, 2010)	22
<i>NLRB v. W-hr Constructors, Inc.</i> , 159 F.3d 946 (6th Cir. 1998)	35, 36
<i>Oklahoma Fixture Co.</i> , 314 NLRB 958 (1994)	31
<i>Otis Elevator Co.</i> , 269 NLRB 891 (1984)	24
<i>Ryder v. United States</i> , 515 U.S. 177 (1995)	20
STATUTES	
29 U.S.C. §§ 158(a)(1), (3) and (5)	3

I. INTRODUCTION

This matter is before the Board on Respondent Mi Pueblo Markets' Exceptions to the Decision of Administrative Law Judge Eleanor Laws dated February 9, 2012. Sec. 102.46 et seq, NLRB Rules & Reg's, 29 CFR Sec. 102.46. At issue is Respondent's decision to make a number of operational changes to its Distribution Center for the sole purpose of improving efficiency and productivity at the Center to provide a higher level of service to the Mi Pueblo retail markets that the Distribution Center services. Under the United States Supreme Court's holding in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), Respondent did not violate the Act when it made these decisions without bargaining over them, for the simple reason that they were not amenable to bargaining. As explained below, the undisputed evidence establishes that Respondent's decisions were not driven primarily or even significantly by labor costs. Rather, the decisions were prompted by factors over which the Union had no control and, therefore, factors as to which it was unreasonable to require "decision" bargaining.

Despite the absence of any evidence suggesting that Respondent's decision was driven by labor costs, the ALJ speculates that Mi Pueblo must have considered labor costs in reaching its decisions because, according to the ALJ, labor costs ultimately were impacted after the operational changes were made. That conclusion, however, is wholly inconsistent with the Supreme Court's holding in *First National* and other Board and federal court cases that have considered decisions similar to those made here. As recognized in a number of cases, virtually any decision that an employer makes about its business will directly or indirectly impact labor costs. That does not mean, as the ALJ concluded here, that labor costs were the reason for those decisions and, therefore, that all of such decisions are subject to a bargaining obligation. Rather, an obligation to bargain over a managerial decision may be summarily mandated without further analysis only if the decision was made for the simple purpose of reducing labor costs. To hold

otherwise would result in labor organizations becoming “equal business partners” with employers, which is neither required by the Act nor intended by Congress.

The Supreme Court explained in *First National* that the question of whether a duty exists to bargain over managerial decisions like those the Respondent made here “can only be answered by looking to the reasons underlying management’s decision” *First National*, 452 U.S. at 676-78. All of the record evidence and the ALJ’s own factual findings clearly and unequivocally demonstrate the Respondent’s basic motive for all the decisions at issue here: to operate a more efficient and productive Distribution Center and to provide a higher level service to Respondent’s stores. Any labor cost savings realized by these increased efficiencies were incidental. At most the impacts on the Mi Pueblo bargaining unit at issue were subject to a duty to bargain over the decisions’ *effects*. To impose a duty to bargain over the *decisions* themselves went beyond the bargaining obligation imposed by the Act.

Rather than accept this evidence and find, as *First National* instructs, that Respondent’s decisions were not amenable to bargaining, the ALJ issued a results-oriented opinion and speculated, without supporting evidence, that Respondent’s decisions were driven by labor costs. Her conclusion in this regard is contrary to the law and the facts. Accordingly, the Board should set aside the ALJ’s decision and find that Respondent did not violate Sections 8(a)(1) or (5) when it implemented the important business decisions that were necessary for the continued survival of its Distribution Center.

II. PROCEDURAL HISTORY

As related in the decision below, this matter began in the late Fall, 2010. On approximately December 1, 2010, transport drivers employed at Mi Pueblo’s Milpitas, California Distribution Center elected International Brotherhood of Teamsters Local 853 (“Union”) as their collective bargaining representative. The Union was certified on December 9. NLRB Case No.

32-RC-5794. As related in ALJ Laws' decision, Mi Pueblo challenged the certification, the Union filed refusal to bargain charges, the Board issued a complaint, and the initial certification was summarily affirmed by the Board in the ensuing unfair labor practice proceedings. *Mi Pueblo Foods*, 356 NLRB No. 107 (2011). Ultimately, the Board's certification was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. *Mi Pueblo Foods v. NLRB*, Nos. 11-1074, 11-1100 (December 27, 2011) (unpub'd). (ALJD 1:26-37)

On April 7, 2011, meanwhile, the Union filed the unfair labor practice charge underlying this matter alleging that Mi Pueblo violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 158(a)(1), (3) and (5), by refusing to bargain with it over operational decisions it had made in the Winter of 2010 and 2011 at the Distribution Center, which had led to various operational, route and schedule changes, and the layoff of six bargaining unit drivers. On October 3, 4 and 5, 2011, a hearing was held in the instant case before Judge Laws.

III. THE ALJ'S DECISION

Administrative Law Judge Laws issued her decision on February 9, 2012. Therein, *inter alia*, she found that Mi Pueblo had violated the Act by refusing to bargain with the Union over the operational decisions it had made in an attempt to increase the efficiency of the Distribution Center. Specifically, she ordered that Mi Pueblo:

1. Reassign certain work involving "backhauls" and "pick-ups" from third party common carriers, to whom it had been contracted, to unit drivers "at the same relative volume, or as similar a volume as feasible," as had been the case before this work had been discontinued during the Respondent's reorganizing efforts;
2. Restore the driver routes and hours of work that existed prior to their change in the reorganization in January and February 2011;

3. Recall five drivers who had been laid off as part of the reorganization¹; and
4. Make the six drivers who had been laid off “whole” for any loss of earnings suffered by their layoff.

ALJD 22:19-47. Judge Laws declined the General Counsel’s request that Mi Pueblo be ordered to resume certain inefficient “cross-docking” practices that it had discontinued at the Distribution Center, finding “that the elimination of cross-docking Unified products was not a ‘material, substantial and significant’ change to the terms and conditions of the Unit drivers’ employment.”

ALJD 20:8-12.

IV. FACTUAL BACKGROUND

A. Mi Pueblo’s Distribution Center

Mi Pueblo Foods is a growing chain of retail grocery stores in Northern California. In approximately 2006, Respondent opened and began operating a small distribution center, consisting of approximately 20,000 square feet, for the purpose of providing service and support to Respondent’s 10 stores then in existence. (TR 289, 292) The Distribution Center (hereinafter “D.C.”) provides Mi Pueblo’s stores with high volume products such as paper and sugar, as well as ethnic products that are difficult to come by in large quantities. (TR 289, 292) When opened, the D.C. was so small that it employed only two drivers with two tractors and four trailers.

Respondent obtains the majority of its products directly from Unified Western Growers (“Unified”), one of two wholesale grocery suppliers in Northern California. (TR 290) Until 2008, product that Respondent purchased from Unified was delivered from Unified’s Stockton, California facility directly to the 10 stores that Respondent then operated, either by Unified drivers or those employed by a third party freight carrier. (TR 290-91; ALJD 7:12)

¹ One driver, David Barreras, had already been recalled by the time of the hearing.

B. Respondent Expands the D.C. in 2007

For approximately two years, from 2005 through 2007, Vince Alvarado was Respondent's Vice President of Operations and in charge of the D.C. (TR 288, 293) During Mr. Alvarado's absence, Luis Alcala had become the D.C.'s Director, a post he retained until 2010. (ALJD 3:22:26)

In around February 2007, expecting to open an additional 20 stores in the next few years, Respondent leased an 89,000 square foot warehouse in Milpitas, California. (TR 299) And, over the next two years, the expected rapid growth occurred. But the growth in the chain was also accompanied by a series of poor entrepreneurial and managerial decisions, including decisions regarding D.C. operations. In short, Respondent lost its direction, especially with respect to its D.C. operations. (TR 293) Recognizing the need for managerial skill, Respondent rehired Alvarado in 2010 as Vice President of Operations.² (TR 293-94) Soon, and in reaction to a report from an employee about theft at the D.C., Alvarado visited the D.C. to observe its operations. He found the facility in a state of chaos. (ALJD 3:23-37)

Alvarado immediately determined that there was limited management, and what management there was led to gross inefficiencies and disorganization. (TR 295) During Alvarado's first visit to the D.C., he observed the following: (1) "[d]rivers were coming in 5 in the morning, not leaving until 8, 9:00, midmorning"; (2) warehouse aisles were blocked with pallets of product that could not be loaded onto trailers; (3) trailers were leaving the D.C. half empty and, on some occasions, with only two to three pallets of product; (4) the D.C. was significantly overstaffed; and (5) there were not enough parking spaces at the facility for all D.C. employees. (TR 295-96; ALJD 3:30-40)

² Alvarado's current position is Chief Operating Officer, a position he has held since approximately October 2010. (TR 282)

Faced with these facts, Alvarado questioned the D.C.'s then Director, Luis Alcala, about basic managerial issues: the lack of accountability for employees, including drivers; lack of accountability for freight arriving at and leaving the D.C.; failures to meet delivery schedules; and the inefficient and disorganized practice of "cross-docking" Unified product at the D.C. prior to delivering those items to the stores, rather than the practice in effect when Alvarado had last worked for Respondent of having Unified deliver its products directly to stores by a third party carrier. (TR 296) Alvarado viewed the cross-docking process in particular as a serious mistake because it made no economic or operational sense to cross-dock Unified shipments at the D.C. prior to delivering the products to Respondent's stores. The process adopted since Alvarado had left Mi Pueblo created a one-day delay in the stores' receipt of product. Perhaps most troubling, however, was that the Unified cross-docking caused the D.C.'s aisles to become blocked and congested, making the job of order selectors far more difficult. (TR 298-300)³

Consistent with his base concern over cross-docking, Alvarado began meeting with Hector Mantilla, Mi Pueblo's Main Grocery Buyer with considerable distribution experience, in and around May 2010. (TR 311-12) His discussions with Mantilla included considering the elimination of cross-docking Unified products at the D.C., considering alternative methods of getting Unified product to the stores from Stockton, and any other means to address warehouse inefficiencies. (TR 311-312, 314) The situation was so bad that, as Judge Laws found, "Alvarado determined that he either needed to fix the warehouse or shut it down." (ALJD 3:40-41)

By July, seeing no meaningful improvements, Alvarado terminated Alcala's employment. (TR 299-300; ALJD 3:41-42) His search for a permanent replacement ensued. Meanwhile,

³ The fact of this congestion and its impact upon the delivery process is not in dispute. Addressing this issue was essential to running a profitable business.

Francisco Ochoa was put in place as an interim Director of the D.C. (TR 299-300) Before addressing systemic issues, Ochoa attempted to take short-term actions which would increase efficiency and productivity in the D.C. (TR 302-03) These actions included the elimination of “slow-moving” products from warehouse inventory, the realignment and “re-slotting” of product locations and strict enforcement of driver schedules to improve timeliness of store deliveries. (TR 302-03; ALJD 3:42-4:2)

C. Augustin Arreaga Becomes D.C. Director In December 2010 And Makes Numerous Changes, Not At Issue In The Instant Case, That Resulted In A New And Improved Distribution Center

On December 6, 2010, Respondent hired Augustin Arreaga as Director of the D.C. (TR 55, 303-04) Respondent tasked Arreaga with responsibility for hiring, employee discipline, overseeing the transportation of product in and out of the D.C. and controlling operating and labor costs. (TR 55) At the time Arreaga was hired, the D.C. employed approximately seven receivers,⁴ three shippers,⁵ 30 order selectors⁶ and 16 drivers. (TR 119-20, 126, 166) In addition, the D.C. was leasing approximately 30 trailers, only 20 of which were being utilized. (TR 141-2) The other 10 trailers were parked indefinitely in a lot in front of the D.C., for which Respondent was paying leases on each individual parking space. (TR 141) At this time, the D.C. operated seven days per week, which included both pulling orders and delivering to Respondent’s stores. (TR 143)

⁴ Receivers are responsible for unloading trailers, reviewing the incoming product to ensure quality and receiving the incoming product into inventory. (TR 120).

⁵ Shippers primarily load Respondent’s trailers before delivery to its stores and ensure that the weight of shipments is properly distributed. (TR 120-121).

⁶ After a store submits an order for product with the D.C., the order selectors are responsible for printing the order, known as a “picking ticket,” which contains the items ordered, the quantity of the item and the location in the D.C. where the item can be found. (TR 127) If an order selector is inefficient in pulling orders, then the pallets will not be ready for the loaders to load the trailers and, therefore, the drivers will be unable to leave the D.C. on time. (TR 132) For this reason, the order selectors are critical to the efficiency of the entire D.C. (TR 132)

1. Arreaga Sets Out To Analyze How To Make The D.C. More Efficient

Alvarado's initial instructions to Arreaga were simple: make the D.C. more efficient and productive so that it services Respondent's retail stores properly.⁷ (TR 59; ALJD 4:10) In an effort to achieve this goal, Arreaga immediately began analyzing D.C. operations for inefficiencies and at the same time began speaking with Respondent's retail store directors to obtain their input regarding store needs. (TR 56-60, 62-63)

a. Discussions With Store Directors To Improve Core Service

In January 2011, Arreaga spoke with each of Respondent's store directors regarding key service issues, including but not limited to: how many times per day and the number of days per week they were receiving deliveries from the D.C.; how many pallets were being delivered on each delivery; what days of the week would be optimum times for deliveries; and what problems, if any, Sunday deliveries posed for retail operations.⁸ (TR 145, GC 14; ALJD 4:35-40)

In response to Arreaga's inquiries, nearly half of the store directors informed him that they opposed Sunday deliveries because it was one of the busiest retail days of the week and, therefore, receiving product on Sunday was an unnecessary interruption. (TR 147, GC 14; ALJD 4:37-39) Recognizing that the D.C.'s primary focus was to service stores, and not vice-versa, Arreaga authorized the cessation of Sunday deliveries in late January or early February 2011. (TR 152) There is no dispute that Arreaga's decision to eliminate Sunday deliveries had no negative impact on drivers' hours worked, and it was completely consistent with the D.C.'s

⁷ Alvarado did not instruct Arreaga to include in his analysis a requirement that the number of bargaining unit drivers be reduced. Rather, Arreaga was tasked with looking at the operation to meet the goal of making the D.C. more efficient and adequately servicing retail stores. There is no evidence to suggest to the contrary. In addition, neither the General Counsel nor the Union offered any evidence to suggest that Arreaga's analysis was driven by anything other than efficiency, productivity and considerations of asset use.

⁸ Arreaga's notes on his efforts and discussions were contemporaneous in nature and admitted into evidence as GC 14.

mission of serving stores in the most efficient and productive ways.⁹ (TR 152)

Aside from Sunday deliveries, various store directors voiced their opinions about other issues. For instance, Store 9's store director informed Arreaga that because he had a very small back room at the store and, therefore, limited storage, he was routinely receiving deliveries of half loaded trailers at least three times per week. (TR 148, GC 14) Upon hearing this, Arreaga's commonsense response was to combine Store 9's orders with Store 17's orders. Because Store 17 also had a very small backroom and therefore could not accept full trailer loads of product, Store 17's director agreed to this proposed solution, as he too preferred product coming in more often without having to order as much. (TR 148-49, GC 14) Stores 9 and 17 are located in Modesto and Atwater, California, respectively, each located relatively close together, but approximately 100 miles, or a two-and-a-half hour drive, from the D.C. (TR 149, GC 14) Thus, by combining loads for Stores 9 and 17, the D.C. eliminated a commute of approximately 200 miles round trip and associated fuel costs, as well as five hours use of Respondent's tractor/trailer.

Arreaga also discussed with store directors ways in which the stores could assist in making the D.C. more efficient. (TR 206) As an example, Arreaga encouraged store directors to require their receivers to give D.C. drivers priority when they arrived at a store's receiving dock and to have store receivers work with D.C. drivers to unload product more efficiently. (TR 207) Arreaga also instructed store directors to abide by the D.C.'s 8:00 a.m. cut-off time for placing orders for product shipment. (TR 206) Arreaga had noticed that retail stores would often call in after 8:00 a.m. to request product they had failed to place on their original order, thereby requiring the D.C. to select more product and further delay deliveries. (TR 206) Arreaga made

⁹ The General Counsel did not challenge or question Arreaga's testimony on this point.

it clear that placing orders after the 8:00 a.m. cut-off time delayed D. C. operations and therefore he would no longer accept orders for same day delivery after 8 a.m., absent a store emergency. (TR 207-208; ALJD 4:39-43)

b. Arreaga Analyzes Efficiencies

In addition to making inquiries of store directors, Arreaga also asked himself how many drivers he would need in order to most efficiently take care of the stores. (TR 144-145, GC 14) Arreaga also pondered why the D.C. was still doing pickups from third party vendors, when the D.C.'s priority was servicing Respondent's stores. (TR 144-147, GC 14) Arreaga began counting pallets that were being delivered by D.C. trailers on a daily and weekly basis to get an idea of how many full trailer loads of deliveries would be required on a weekly basis to each store. (TR 150-1, 153, RX 14A; ALJD 4:47-48) This was a critical factor in his analysis.

c. Arreaga Develops A Strategy For Making The D.C. More Efficient

Sometime in late-December/early-January, Arreaga put together a list of ways in which the D.C. could do a better job servicing the stores. (TR 178-179, GC 16) In summary, Arreaga considered the following:

- (1) the ineffective use of transportation at the D.C. had put Respondent in a position to restructure schedules and take another look at store deliveries and what is needed to operate an effective warehouse department;
- (2) the elimination of deliveries with trailers less than full could be accomplished with a new operating schedule wherein only trailers full of product are sent to stores (this elimination would help Respondent reduce the amount of equipment necessary to service its stores);
- (3) based upon a decrease in store order volume, the D.C. needed to become more efficient in its operations;
- (4) the Distribution Center's ineffective use of equipment and employees;
- (5) inventory control at store level is a requirement, with a reduction of back stock to reduce "shrink";

- (6) the restructuring of the Distribution Center's delivery schedule to meet the needs of the stores, and a reduction of delivery days to all stores based upon each store's average pallets ordered;
- (7) the delivery of only full trailers to each store which will save on operating costs by reducing the amount of fuel used;
- (8) due to decreased store demand, the reduction of days per week that deliveries are made out of Distribution Center from seven days per week to six;
- (9) the reduction in Distribution Center workforce due to reduction of deliveries to stores and reduction in days of operation;
- (10) the reduction of equipment at the Distribution Center, such as tractors, trailers, electric pallet jacks, and forklifts, which will result in lower operating costs; and
- (11) the necessity, based upon current economic environment, to reduce costs of doing business in order to be successful, which includes reducing the workforce and the amount of equipment being used.

(TR 179-185, GC 16)

d. Arreaga Refines Driver Notification System To Increase Efficiency

At the time Arreaga took over as Director of the D.C., he learned that there was a notification system in place wherein drivers could communicate via e-mail with other drivers and stores regarding, among other things, their location, time of arrival, time of departure and expected delays.¹⁰ (TR 208-210) After learning about the system, Arreaga contacted Respondent's IT Department and asked to be added to the notification list for such e-mails. (TR 209) Arreaga set out to use these notifications from drivers to assist him in understanding the D.C.'s inefficiencies as well as better utilizing D.C. assets. (TR 210) For instance, Arreaga was able to observe when drivers left the D.C., when they arrived at their delivery location, how long they were delayed at each delivery location and how long it took drivers to return to the D.C. (TR 210) Arreaga used this information to assist him in determining how many trucks the D.C.

¹⁰ See also RX 16-20 for examples of driver e-mail notifications.

actually needed, and how efficiently they were servicing the stores. (TR 210)

2. The D.C. Lays Off Order Selectors

When Arreaga became D.C. Director, he examined the productivity and efficiencies of D.C. order selectors. (TR 126-28) At that time, the D.C. employed approximately 30 order selectors, which did not take into account other employees with different job titles who also assisted with pulling orders. (TR 126)

Arreaga examined productivity and efficiencies by reviewing “Weekly Productivity Reports” from September and October 2010, which tracked the amount of cases pulled by individual order selectors. (TR 128-129, RX 6) Based on this review, Arreaga concluded that the order selectors were very inefficient.¹¹ (TR 130) Once Arreaga had concluded that the D.C.’s order selectors had low selector productivity, he set out to observe the order selectors while performing their duties to determine the root of the problem. (TR 131) Arreaga observed that several of the order selectors were much more efficient than others, and also that some of the order selectors were better at certain tasks than others. (TR 131) As a result, Arreaga started designating order selectors to perform specific tasks based upon their strengths and weaknesses.¹² (TR 131) Arreaga also separated order selectors into two teams: one team assigned to pull orders only for grocery items, and the other assigned to pull orders only for produce items. (TR 131) This decision improved order selector efficiency and productivity because it allowed order selectors on each team to focus on a smaller area of the D.C. to pull

¹¹ Arreaga, who had previously worked as an Assistant Store Director and Store Director at several Mi Pueblo stores, testified that in his experience, 70 to 80 cases pulled per hour is pretty average for a young man working at a grocery store, and this included time spent assisting store customers. Thus, using this as a reference, and comparing the situation to order selectors in the D.C. who did not have to deal with customers, the order selectors’ average cases per hour (80 to 90) represented in the Productivity Reports from September and October was much too low. (TR 130, RX 6).

¹² As an example, Arreaga designated one order selector who was particularly efficient on the forklift to be a full-time forklift driver.

from, thus preventing long trips to the other side of the warehouse. (TR 131-2)

These changes resulted in increased productivity, as can be seen by comparing the Weekly Productivity Reports from September and October 2010, showing 80 to 90 cases per day, and the Weekly Productivity Reports from January 2011, wherein order selectors were averaging over 130 cases per day. (RX 6, 7) In addition, Arreaga believed a smaller group of order selectors could be more productive than a larger group. (TR 128) As a result, Arreaga laid off 14 of the 30 order selectors in January 2011.¹³ (TR 135, 141; see generally, ALJD 4:10-27)

Shortly after these layoffs, the D.C. started to see dramatic increases in order selector productivity. (TR 136-137) In fact, by February 2011, an average order selector pulled approximately 939 cases per day, a nine fold increase from September and October 2010.¹⁴ (TR 135, RX 6, 7) Not only did order selector efficiency and productivity increase, but order selector overtime hours decreased.¹⁵ (TR 137) In addition, increased productivity with the order selectors resulted in pallets being ready for loading by the time the loaders arrived at 2:30 a.m., and trailers being ready when the drivers arrived for the day at 5:00 a.m., all of which led to overall increased efficiency. (TR 137-8; ALJD 4:19-23)

3. Arreaga Consolidates The D.C.'s Assets

Upon Arreaga's arrival in December 2010, the Distribution Center was leasing approximately 30 trailers, only 20 of which were being used. (TR 141-2) Arreaga immediately

¹³ The General Counsel did not allege that Respondent's decision to lay off 14 order selectors, which created efficiencies and speeded up order selection and load times, and in turn, reduced the need to 16 drivers, involved a mandatory subject of bargaining. These layoffs are not at issue here.

¹⁴ In March 2011, the D.C. introduced an Order Selector Productivity Incentive, which provided quarterly bonuses to order selectors for reaching certain daily average productivity levels at two different tiers: 1,200 cases and 1,500 cases. (TR 140-141; RX 8) The average tier 1 bonus was over \$1,000 per quarter. (TR 141) By late-March or early-April 2011, individual order selector productivity was up to 1,268 cases per day, and nine out of 16 order selectors received a bonus for the second quarter. (TR 138, 141; RX 7 and 8)

¹⁵ From December 2010 to April 2011, Mi Pueblo opened two new stores in Seaside and Vallejo, California. Despite this, and the associated increased workload at the D.C., no new order selectors were hired nor was any additional overtime incurred. (TR 139; 240)

set out to eliminate these underutilized and wasted assets. (TR 142) Arreaga returned three of the leased tractors and approximately 15 of the leased trailers. (TR 142) He estimates that the return of these unused tractors and trailers saved approximately \$100,000 per year in lease and mileage costs. (TR 142-3; ALJD 4:7-8) Arreaga also had a surplus of electric pallet jacks at the D.C. (TR 184-5) With the knowledge that several stores had electric pallet jacks which were under lease with Yale Materials Corp., Arreaga had the leased electric pallet jacks removed from the stores and returned to Yale. (TR 184-5) He then gave the stores the D.C.'s excess pallet jacks. (TR 184-185).

D. The D.C. Eliminates Backhauls And Pickups Due To Major Delays And Resulting Inefficiencies

The first change at issue in the instant case involves the D.C.'s decision in January 2011 to eliminate pickups and backhauls ("pickups/backhauls") of certain vendors' products, which were being performed by Respondent's drivers and some third-party contractors. (TR 76-82) A "backhaul" occurs when a driver delivers a load to a Mi Pueblo store, and then hauls product from the store back to a nearby vendor. A "pickup" occurs when a driver takes an empty trailer to a vendor and returns to the D.C. with the trailer full of the vendor's products. (TR 76; ALJD 5:21-24)

As will be described more fully below, the decision to have third-party contractors take over all of the pickups/backhauls was based on significant delays associated with the pickups/backhauls at the vendors' facilities and the resulting inefficient use of driver time and D.C. assets. (TR 78) In sum, Respondent decided to completely eliminate this aspect of its operations and business altogether and, therefore, Respondent no longer handles pickups/backhauls. (TR 78)

1. Elimination Of Morton Salt Deliveries

Prior to 2011, D.C. drivers delivered Morton Salt products on their way back from making store deliveries. (TR 77) Respondent made the decision to discontinue Morton Salt deliveries in January 2011 because of the major delays that D.C. drivers experienced when they arrived at Morton Salt to obtain product. (TR 77) These delays often lasted up to several hours and were a result of the nature of the product being picked up: salt. (TR 77) As Arreaga explained, transportation and storage of salt requires the product to be kept in dry conditions, as close to zero percent humidity as possible. (TR 77) Thus, because D.C. trailers are refrigerated, and because Morton Salt was obtained via backhaul (after a refrigerated delivery had been made using the trailer), the D.C. driver had to wait until his trailer reached zero percent humidity before the salt could be loaded into the trailer. (TR 77-78) These delays could last several hours, and resulted in the waste of driver time, as well as inefficient use of D.C. assets, such as tractors and trailers.¹⁶ (TR 78)

Respondent had in fact never completely discontinued its use of a third-party carrier to haul Morton Salt products. (GC 2) But the inefficiency of using Mi Pueblo's own equipment to do so, which often had to dry out before it could be loaded, was obvious. So the practice was ultimately discontinued. The only difference is that the number of deliveries that the third-party transportation company made to and from Morton Salt products increased, and D.C. drivers were allowed to spend more time delivering product between the D.C. and Mi Pueblo stores.

2. Elimination Of C&H Sugar Deliveries

A similar problem afflicted the deliveries of C&H Sugar, which also was susceptible to humidity. Prior to January 2011, the D.C. had obtained C&H Sugar products both via backhaul

¹⁶ As an example, on January 5, 2011, D.C. driver Oscar Coronado arrived at Morton Salt at 2:48 p.m., and did not leave the facility until 5:33 p.m. (TR 235, RX 20)

on its own vehicles and via third party carrier Continental C.¹⁷ (TR 79, GC 2) As did the Morton Salt backhauls, the C&H Sugar backhauls caused major delays.¹⁸ (TR 80) These delays often lasted several hours, and resulted in a waste of driver time, as well as inefficient use of the D.C.'s tractors and trailers. (TR 80) Considering that it normally takes only 20 minutes to load a 53 foot trailer, these delays were highly unreasonable. (TR 237)

For example, on January 4, 2011, Distribution Center driver Juvenal Geronimo arrived at C&H Sugar at 9:05 a.m. for a 9:10 a.m. appointment and did not leave the facility until 1:33 p.m., a delay of over four hours. (TR 231, RX 19). This delay was even more discouraging considering that the D.C. had called ahead to obtain an appointment to expedite the backhaul and Mi Pueblo personnel were in contact with C&H Sugar inquiring about the delay and requesting assistance in getting their driver on the road.¹⁹ (TR 231-232, RX 19)

Once again, Respondent's decision to eliminate the C&H Sugar deliveries merely resulted in the third-party transportation company increasing the number of deliveries for which it was responsible from 50 percent to 100 percent. (GC 2) In addition, D.C. drivers were put to better use delivering product between the D.C. and Mi Pueblo stores.

3. Elimination Of Pickups From Durango Packaging

In January 2011, the D.C. also ceased picking up product from Durango Packaging in Dinuba, California, relying instead on a third-party transportation company. (TR 80-81) The decision to make this change was simple: the distance between the D.C. and Dinuba was approximately 200 miles. (TR 81) As a result, it took D.C. drivers approximately 12 hours to pick up Durango product and return it to the D.C., which resulted in an entire tractor/trailer and

¹⁷ Before January 2011, D.C. drivers and a third-party company picked up and delivered C&H Sugar products to and from the D.C. Each group delivered approximately 50 percent of the time. (GC 2)

¹⁸ The General Counsel stipulated that there were in fact delays at C&H Sugar during backhauls.

¹⁹ As another example, on February 2, 2011, Distribution Center driver Domingo Ferreira arrived at C&H Sugar at 10:58 a.m. and did not leave the facility until 2:42 p.m., another delay of almost four hours. (TR 230, RX 18)

driver being unavailable for store deliveries. (TR 81) This was an inefficient use of D.C. assets and driver time – drivers who were primarily employed to run product from the D.C. to Mi Pueblo’s markets. (TR 81, 267)

4. Elimination Of Backhauls From Mazola Oil

In April 2011, Respondent eliminated backhauls of Mazola Oil product by D.C. Drivers. (TR 82) Prior to April 2011, both D.C. drivers and third-party transportation companies obtained Mazola Oil product for the D.C. (TR 82, GC 2) The decision to discontinue Respondent’s backhauls of Mazola Oil’s product appears to have been the result of negotiations directly between the vendor and Mi Pueblo, with Mazola agreeing to pick up the costs of its own deliveries to the D.C.²⁰ (TR 267)

E. The D.C. Modifies Schedules And Consolidates Routes To Improve Efficiency And Productivity

Shortly after Arreaga began to see the D.C. operating more efficiently and productively in January 2011, and after speaking with store directors regarding how to better service the stores, he began to look at driver’s schedules to determine how many drivers were required for the available work. (TR 137, 153) Arreaga diagramed store groupings for deliveries to create a more efficient delivery schedule, based upon store needs, and each store’s proximity to one another. This led to an examination of how many stores each driver could deliver to and from per day, and how many drivers would be needed on a daily basis.²¹ (TR 154, GC 15) This further resulted in Respondent consolidating certain routes and changing drivers’ schedules such that 46 routes were eliminated. (TR 156-64).

Arreaga concluded that a restructured delivery schedule would no longer require 16

²⁰ Moreover, as Judge Laws herself notes: “The discontinuation of ACH Mazola Oil backhauls did not result in layoffs, as this change did not take place until April 2011.” (ALJD 15, fn. 37)

²¹ Arreaga testified that these notes were merely a preliminary analysis and, for the most part, were not ultimately implemented as diagramed. (TR 156) Wage rates were not a factor.

drivers, and that he most likely needed only eight Class A drivers and two Class B drivers. (TR 164, RX 10) Arreaga spoke to Hector Salas, Mi Pueblo's Vice-President of Human Resources, regarding what could be done with all 16 of the D.C. drivers, based upon his revised delivery schedule. (TR 164-5) Salas and Arreaga came to the conclusion that because of increased D.C. efficiency levels in early 2011, and the newly revised route proposals, they had too many drivers. (TR 165) Salas and Arreaga reasoned that if they were to utilize all 16 drivers, they would end up with drivers delivering to a single store, and then having nothing else to do for the rest of their eight hour shift, thus defeating the efficiency realized by the revised route schedule. (TR 165, RX 9) For example, Arreaga knew that based upon a revised route schedule (RX 9), he had 14 stores which needed deliveries on Wednesdays, and 16 drivers on staff, leaving two drivers without any deliveries to make on Wednesdays, even if each driver only delivered to one store, which for efficiency reasons clearly was not an option.²² (TR 165-6, RX 9, 10)

Arreaga next put together a delivery schedule for eight Class A drivers, and two Class B drivers, with five drivers being laid off, and one driver being reassigned, based upon seniority.²³ (RX 11A, 169-170, 172) On January 24, 2011, the D.C. laid off five drivers and reassigned an additional driver to other duties. (TR 176) The D.C. implemented its revised schedule which now consisted of eight Class A drivers, and two Class B drivers delivering to all 21 Mi Pueblo Stores. (TR 176, RX 12) These deliveries included all orders being placed by the stores to the D.C., as well as the delivery of Unified products that were then being cross-docked at the D.C. (TR 176) Despite the reduction of six drivers, and 14 order selectors, the D.C. was able to

²² This overstaffing problem becomes clearer when looking at RX 9 for other days of the week when even fewer stores are scheduled for deliveries. For instance, on Thursdays, only 10 stores are scheduled for deliveries, many of which are to be served by one driver. (RX 9)

²³ Arreaga set the new schedule to begin on January 24, 2011, because this was the scheduled date for the driver layoffs to occur. (TR 172)

efficiently deliver all product to the stores. Significantly, it did so without additional overtime.²⁴ (TR 176).

F. Mi Pueblo Attempts To Bargain Over The Effects Of Its Operating Changes Upon The Drivers

On Friday, January 21, 2011 Mi Pueblo's attorney, Patrick Jordan, placed a call to the Union's counsel, Teague Paterson.²⁵ According to a confirming letter Jordan wrote on January 25, he explained to Paterson that while Respondent did not feel it was obligated to bargain over the *decisions* it had made to change its various operating methods, and while Respondent was unwilling to waive its position that the Union had been improperly certified, it was prepared to consider a different selection process for the layoffs of the drivers if the Union was dissatisfied with the seniority basis upon which the layoffs had been conducted. (GC 4) Cf., *Show Industries, Inc.*, 326 NLRB 910 (1998).

Paterson responded by, amongst other things, disclaiming the authority to bargain on behalf of the Union. Instead he directed Jordan to two agents of Teamsters Local 287, who Patterson reported had been appointed to bargain on Local 853's behalf. (GC 5) There ensued a number of exchanges between Jordan and the Union representatives, in which Jordan expressed his client's "willingness to discuss the effects of certain operational changes made by the Company in connection with its warehouse and driver operations that had an impact on employees Local 853 claims to represent." (*See*, i.e., GC 8). The Union responded by demanding bargaining over "the decision to lay [the drivers] off and the effects of the layoff." Noting that the Board had just affirmed the Union's certification, the Union also requested bargaining over a full collective bargaining agreement. (GC 9) Jordan responded by declining

²⁴ These facts are not in dispute.

²⁵ In his January 25 letter memorializing the conversation, Jordan misstates the date of the call as "Friday, January 20." (GC 4) In 2011, that Friday fell on January 21, as the ALJ correctly recites. (ALJD 4:28)

the Union's offer to waive its right to appeal the Board's certification decision, but reiterated Respondent's "willingness to meet and confer over the impact of the layoffs and the method by which we selected drivers for layoff." (GC 10; see also, GC 11, 12) While the correspondence thus reflects communications regarding Respondent's attempts to initiate "effects bargaining," no testimony was elicited as to whether such discussions ever occurred. (ALJD 6:28-39) Ultimately, it does not appear that the Union accepted Mi Pueblo's offer to bargain over the effects of its decisions on the drivers.

V. THE PURPORTED NEW MEMBERS OF THE NLRB WERE NOT VALIDLY APPOINTED AND, THEREFORE, THE AGENCY LACKS A QUORUM TO ACT IN THIS CASE

On January 3, 2012, Board Member Craig Becker's term expired, leaving the Board with only two members out of five seats. In effect, the agency stopped functioning that day because the Supreme Court has held that the Board lacks authority to act with only two members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Numerous other courts have held that an agency whose members have been improperly appointed in violation of the Appointments Clause of the U.S. Constitution or related provisions lacks authority to act, and that private parties who are adversely affected by such ultra vires agency action are entitled to injunctive relief. *See Ryder v. United States*, 515 U.S. 177 (1995) (individuals threatened with enforcement action by agency whose members have been appointed in violation of the Appointments Clause entitled to injunction); *see also Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

Here, three of the current putative members of the Board were appointed in violation of the Appointments Clause of the U.S. Constitution. Indeed, the President attempted to appoint Members Block, Griffin and Flynn without seeking or obtaining the Senate's Advice and Consent, in violation of Article II, Section 2, Clause 2 of the Constitution, even though the U.S.

Senate was still in session at the time of the purported appointments.²⁶ The President’s claim that these appointments were somehow valid “recess” appointments is inconsistent with Article II, Section 2, Clause 3 of the Constitution, which requires that the Senate actually be in recess when such appointments are made. *See Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 1994) (requiring a “legitimate Senate recess” to exist in order to uphold a recess appointment); *see also Kennedy v. Sampson*, 511 F. 2d 430 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages).

The Senate was not in fact in recess when the President’s latest three appointments to the Board were attempted. Between December 17, 2011, and January 23, 2012, the United States Senate held a series of “pro forma” sessions to break the intervening period into three-day adjournments so as to comply with its obligation under the Constitution, Art I, §5, ci. 4, not to adjourn for more than three days during a congressional session without the consent of the House of Representatives. *See* Statement of Charles J.Cooper before the House Committee on Education and Workforce concerning “The NLRB Recess Appointments: Implications for America’s Workers and Employers,” § I (Feb. 7, 2012).²⁷ At one of these pro forma sessions, the Senate passed a two-month extension of the payroll tax cut, as requested by the President. 157 Cong. Rec. S8749 (daily ed. Dec. 17, 2011). Furthermore, on January 3, 2012, the Senate met in pro forma session to comply with the requirement of the Twentieth Amendment to the Constitution that “Congress shall assemble at least once in every year, and such meeting shall

²⁶ The Senate voted unanimously to remain in session for the period of December 20, 2011 through January 23, 2012. Sen. Ron Wyden, “Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012,” remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8785). Moreover, the House of Representatives never gave its consent to a Senate recess of more than three days, as would have been required by Art. I, Section 5, Clause 4 of the Constitution.

²⁷ This Statement is available on the Committee’s website: <http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventD=277173>.

begin at noon on the 3rd day of January, unless they shall by law appoint a different day.” The Senate did not go into recess at the conclusion of that day’s assembly. Rather, the Senate was scheduled to meet in pro forma session again on January 6, 2012. *See* Testimony of Sen. Michael S. Lee before the House Committee on Oversight and Government Reform concerning “Unchartered Territory: What are the Consequences of the President’s Unprecedented ‘Recess’ Appointments” at 1 (Feb. 1, 2012).²⁸ The following day, January 4, 2012, the President made four “recess” appointments, including Sharon Block, Terence F. Flynn, and Richard Griffin to fill three vacant seats on the Board. The longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term “recess” as applied to intra-session appointments includes only those intra-session breaks that are of “substantial length.” *See* Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992)²⁹ (involving an 18-day recess). The Obama Administration’s Solicitor General stated on the record at the U.S. Supreme Court during oral argument in *New Process Steel* that a recess must be longer than three days in order for a recess appointment to occur. Transcript of Oral Argument in *New Process Steel, L.P. v. NLRB*, Case No. 08-1457 (Mar. 23, 2010).

Attorney General Daugherty’s 1921 opinion established the consistently followed rule that for recess appointments to be made the recess should be of such duration that the Senate could “not receive communications from the President or participate as a body in making appointments.” 33 Op. Att’y Gen. 20, 24 (1921). No such break ever occurred when the President attempted, albeit improperly, to appoint Members Block, Griffin and Flynn to the Board. Rather, the Senate was in session during the period when the appointments were made

²⁸ This testimony is available on the Committee’s webpage:

[http://oversight.house.gov/index.php?option=com_content&view=article&id=1574%3A2-1-12-qunchartered-territory-what-are-the-consequences-of-president-obamas-unprecedented-qrecessq &catid=12%3Afull-committee-hearings&Itemid=1](http://oversight.house.gov/index.php?option=com_content&view=article&id=1574%3A2-1-12-qunchartered-territory-what-are-the-consequences-of-president-obamas-unprecedented-qrecessq&catid=12%3Afull-committee-hearings&Itemid=1)

²⁹ Available at <http://www.justice.gov/olc/schmitz.10.htm>.

and was able to receive communications and participate in the appointment process. That the Senate passed the payroll tax bill and communicated with the President and the House with regard to that important legislation a few days before the Obama recess appointments proves that the Senate was still in session. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed that legislation and never challenged its enactment due to a congressional recess.

In sum, because neither the House nor the Senate declared themselves in recess, the purported recess appointments to the NLRB are invalid. The President did not obtain the advice and consent of the Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires and, therefore, the appointments of Members Block, Griffin and Flynn violate Articles I and II of the U.S. Constitution. Lacking a quorum under *New Process Steel*, the Board should issue no decision in this case until the Board has a properly appointed lawful quorum.

VI. SPECIFICATION OF THE ISSUES RAISED BY RESPONDENT'S EXCEPTIONS

1. Is the ALJ's conclusion that Respondent had a duty to bargain over the decision to discontinue backhauls and pick-ups and to subcontract that work supported by the preponderance of the evidence and applicable law? (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 22, 23 and 24).

2. Is the ALJ's conclusion that Respondent had a duty to bargain over the decision to change schedules and consolidate routes supported by the preponderance of the evidence and applicable law? (Exceptions 14, 15, 16, 17, 18, 19, 22, 23 and 24).

3. Is the ALJ's conclusion that Respondent's decisions to subcontract work, change schedules and consolidate routes were amenable to bargaining supported by the preponderance of the evidence and applicable law? (Exceptions 20, 21, 22 and 24).

4. Is the ALJ's conclusion that Respondent failed to bargain with the Union over the decision to lay off six drivers and the effects of those layoffs supported by the preponderance of the evidence and applicable law? (Exceptions 15, 23 and 24).

VII. ARGUMENT IN SUPPORT OF EXCEPTIONS TO ALJ'S DECISION

A. Under *First National*, Certain Managerial Decisions Are Not Mandatory Subjects Of Bargaining

Core entrepreneurial management decisions are exempt from decisional bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Although the Supreme Court limited its *First National* holding to the specific facts of the case, which was in the context of a partial shut-down, its analysis is applicable to a wide range of managerial decisions. In *Otis Elevator Co.*, 269 NLRB 891, 897 (1984), Member Dennis appropriately stated that the *First National* analysis should apply to decisions including, but not limited to, plant relocations, consolidations, automation, and certain types of subcontracting.

Generally, absent a "clear and unmistakable" waiver, employers are obligated to bargain over any decision affecting the "wages, hours and terms and conditions of employment" of employees represented by a certified or recognized collective bargaining agent. Whether a decisional bargaining obligation exists with respect to operational changes (falling short of the sale or closure of an entire business, where no bargaining obligation exists regarding the decision, *Textile Workers vs. Darlington Co.*, 380 U.S. 263, 268 (1965)) depends upon how the change is characterized and the *reason* for the change. "Section 8(a) of the Act, . . . does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees." *First National Maintenance*, supra, at 676, citing, *Chemical & Alkali Workers v. Pittsburgh Plate*

Glass Co., 404 U.S. 157, 178 (1971). “[I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place” *Id.*

In the context of operational changes, like those made in the instant case, the Supreme Court has interpreted the statutory phrase “terms and conditions of employment” in two leading cases: *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National*, *supra*. In *Fibreboard*, the Court considered whether a manufacturing company’s decision (based in part on labor costs) to hire an independent contractor to perform maintenance work previously performed by bargaining unit employees violated the Act. After the independent contractor assumed maintenance responsibility, the company terminated its maintenance employees. The Court observed that “contracting out” is a subject amenable to the collective bargaining process and found that the company’s contracting decision did not alter the company’s basic operation because “maintenance work still had to be performed in the plant.” *Id.* at 213. Noting that the company never contemplated capital investment and that “the [c]ompany merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment,” the Court ruled that the company’s decision to contract out its maintenance work fell within the ambit of the phrase, “terms and conditions of employment,” and thus, the company’s unilateral actions violated the Act. *Id.* at 215. The company’s labor cost rationale for its subcontracting was found to be “peculiarly suitable for resolution within the collective bargaining framework.” *Id.* at 214. The Court cautioned, however, that its decision did “*not* encompass other forms of ‘contracting out’ or ‘subcontracting’” and that each situation

was to be judged on its own facts. *Id.* at 215 (emphasis added).

The Supreme Court further defined the duty to bargain in *First National Maintenance*, where it addressed the issue of whether “an employer, under its duty to bargain in good faith with respect to wages, hours, and other terms and conditions of employment . . . [must] negotiate with the certified representative of its employees over a decision to close a part of its business.” 452 U.S. at 667. There, a cleaning company, following a fee dispute with its customer, unilaterally discontinued performing cleaning services for that customer and discharged the employee who had worked on the account. The Board found that the company’s unilateral action violated its duty to bargain. *First National Maintenance*, 242 NLRB 462 (1979) enf’d 627 F.2d 596 (2d Cir. 1980) cert. granted 449 U.S. 1076 (1981).

On appeal, the Supreme Court identified three types of management decisions:

- (1) those that have “only an indirect and attenuated impact on the employment relationship,” such as decisions regarding advertising and financing;
- (2) those that are “almost exclusively an aspect of the relationship between employer and employee,” such as decisions relating to production quotas and work rules; and
- (3) those that have “*a direct impact on employment ... but [have] as [their] focus only the economic profitability of the business.*”

Id. at 677-78 (emphasis added). The Court categorized this last category as one in which there has been a “change in the scope and direction of the enterprise,” which has an impact on employees but is not primarily about conditions of employment or the employment relationship.

Id. at 676.

In considering the case before it, the *First National* Court found that because the employer's decision to terminate one part of its business affected employment, but was motivated by considerations unrelated to the employment relationship, the decision fell into the third category of management decisions. Thus, the Court held that when a management decision falls within the third category, decisional bargaining "should be required **only if** the benefit, for labor-management relations and the collective-bargaining process outweighs the burden placed on the conduct of the business." *Id.* at 679 (emphasis added). The Court based its holding on the conclusion that mandatory decisional bargaining will result in decisions that are better for management and employees as a whole "only if the subject proposed for discussion is amenable to resolution through the bargaining process." *Id.* at 678.

In concluding that the employer in *First National* did not have a bargaining obligation, the Court based its decision on the fact that management decisions *were not driven by labor cost considerations*. Rather, the employer's decision was based on the economic infeasibility of continuing to operate with a lower management fee. In this regard, because the Court concluded that the union had no control over the factors motivating the employer's decision to subcontract, collective bargaining would have been futile and, therefore was not required. *Id.* at 687.

Although the Court in *First National* expressed no view as to other types of management decisions, such as plant relocations, new plant openings and other types of subcontracting, it did observe that "*Fibreboard* implicitly engaged in the balancing analysis." In discussing the *Fibreboard* decision, the *First National* Court pointed out that in the earlier case, the company's basic operation had not been altered (as maintenance work still had to be performed), that there was no capital investment involved and that existing employees were replaced with those of an

independent contractor working under similar conditions. Accordingly, the *First National* Court concluded that in *Fibreboard*, the employer's freedom to manage the business was not significantly abridged by having a duty to bargain imposed on it. To support its finding that the circumstances in *Fibreboard* were amenable to the bargaining process, the Court highlighted the employer's principle motivation to reduce labor costs as a basis for its subcontracting decision, and the prevalence of subcontracting provisions in collective bargaining. *Fibreboard*, supra, at 211-212, 213. In contrast, the *First National* Court found that an economically motivated decision to shut down part of a company's business was *not* a mandatory subject of bargaining. *First National*, supra, at 686.

In *Torrington Indus.*, 307 NLRB 809 (1992), the Board reaffirmed the principles set forth in *Fibreboard*. There, the employer laid off two unionized employees and transferred their truck driving work to non-bargaining unit employees and independent contractors without bargaining with the union. The Board concluded that it was presented with nothing more than an instance of "*Fibreboard* subcontracting," "with the possible exception of one factor." *Id.* at 810. In eschewing a balancing test to evaluate the costs and benefits of requiring bargaining, the Board explained that when a *Fibreboard* subcontracting situation is present, "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is." *Id.* Thus, the Board concluded that the employer violated the Act because its subcontracting decisions "had nothing to do with a change in the 'scope and direction' of its business."³⁰ *Id.* at 810.

Significantly, and unlike the situation in the instant case, the employer in *Torrington*

³⁰ A "change in the "scope and direction" of a business, of course, is not in fact a prerequisite to finding that an employer's "decision" had "as its focus only the economic profitability" of an aspect of a business operation, which is the defining trait of the "third type" of employer decision identified in *First National*. Decisions that change the scope and direction of a business are, however, *one kind* of such decision that the Supreme Court has identified. *First National*, supra, at 677.

failed to demonstrate that its decision encompassed “entrepreneurial decisions that are outside the range of bargaining or decisions dictated by emergencies that render bargaining impractical.” Instead, the Board found, the employer merely “replaced two employees hauling sand and stone with a nonunit employee and independent contractors, also hauling sand and stone.” *Id.* Because the two laid off employees were “simply replaced,” the subcontracting decision “clearly involved unit employees’ terms and conditions of employment and it did not ‘lie at the core of entrepreneurial control.’” This, according to the Board, obligated the employer to bargain with the union over its decision. *Id.* at 811 (citing *Fibreboard*, 379 U.S. at 223, Stewart, J., concurring).

As will be discussed in more detail below, the undisputed evidence during the hearing here established that all of the decisions that Respondent made were based upon non-employment related concerns, “which had as [their] focus only the economic profitability” of the D.C., *First National*, supra, at 677, including the decision to more efficiently use assets and service stores. There is no evidence, aside from pure speculation, that wage rates or labor costs played any direct role in the decisions at issue here, or that the decisions were prompted by any factors within the Union’s control. That labor costs may have been impacted by those decisions did not, without more, translate into an obligation to bargain the decision to make those changes. On the contrary, the relevant consideration, under the teachings of *Fibreboard*, *First National* and *Torrington*, are the factors that actually motivated the employer’s decision – not the end result. Accordingly, for the reasons that follow, the ALJ erred in imposing a decisional bargaining obligation on Respondent.

B. The ALJ Erred By Finding That Respondent’s Decision To Eliminate Backhauls And Pick-Ups And Subcontract The Work Violated The Act

The ALJ concluded that Respondent violated Sections 8(a)(1) and (5) of the Act by its

alleged “failure to bargain with the Union prior to eliminating the backhauls and pick-ups, and replacing his work with subcontractors.” (ALJD 9:1-3; 15:15-17; 22:4-11) In doing so, however, the ALJ incorrectly refused to engage in the balancing test required under *First National*, and held instead – applying a virtually *per se* test said to be authorized by *Torrington* – that such decisions were subject to mandatory bargaining under *Fibreboard*. (ALJD 11:6-9; 15:14-15; 15:45-49) The ALJ found that Respondent’s decision to have third-party contractors take over hauling that was obviously and grossly inefficient was amenable to bargaining because, according to the ALJ, labor costs “plainly factored significantly into Respondent’s decision,” since driver efficiency “translated into labor costs” and that an “integral part of making the D.C. more efficient was the elimination of employees, *i.e.*, reduction of labor costs.” (ALJD 12:15-17; 12:28-29; 13:10-11). Finally, the ALJ rejected Respondent’s argument that bargaining with the Union over these subcontracting decisions would have been futile and concluded, instead, that such a subject is in fact amenable to bargaining. (ALJD 19:9-10; 19:21-22).

1. Respondent’s Decision To Subcontract Backhauls And Pick-Ups Was Not A Mandatory Subject Of Bargaining Under *First National* Because Respondent’s Decisions Was Not Driven By Labor Costs Or Any Factors Within The Union’s Control

The decision to subcontract backhauls and pick-ups falls into the third category of decisions outlined in *First National*. Specifically, Respondent’s decision to discontinue performing backhauls and pick-ups is a decision that has a “direct impact on employment,” but has as its “focus only the economic profitability of” non-employment concerns. *First National*, *supra* at 677. The undisputed evidence at the hearing demonstrates that Respondent’s decision was based solely on non-employment concerns: the productivity and efficiency of the D.C. and the resulting enhanced service provided to Respondent’s stores. The pickup and backhaul decisions were part of a much broader set of operational changes at the D.C., affecting far more

employees than simply the drivers, designed to save the operation from closure: as Judge Laws herself found, “Alvarado determined that he either needed to fix the warehouse or shut it down.” (ALJD 3:40-41) There simply is no evidence to suggest that Respondent was motivated solely or even primarily by labor costs. The ALJ nevertheless concluded that Respondent had a duty to bargain over this decision. The ALJ erred in this regard.

In considering Mi Pueblo’s decision in the instant case, the Board should not follow its holding in *Torrington*, because the circumstances and context of that case are distinguishable from the circumstances and context in this case, and *Torrington’s* mechanical holding is completely inconsistent with *First National’s* teachings. In fact, Board and court decisions issued since *Torrington* demonstrate that an employer is not required to bargain about its subcontracting decisions if those decisions are unrelated to labor costs or are driven by a change in its operation’s scope and direction, even if they affect labor costs.

In *Oklahoma Fixture Co.*, 314 NLRB 958, 959 (1994), for example, the Board found the subcontracting decision at issue was outside the scope of mandatory bargaining. In that case, the employer decided to contract out all of its electrical work, which had previously been performed by in-house electricians. The employer explained that its decision to subcontract and layoff the electricians was based upon concern over legal liability in the event of electrical damage caused by an employee. *Id.* The Board affirmed the administrative law judge’s conclusion that the employer’s decision was not a mandatory subject of bargaining. *Id.* The Board based its opinion on the fact that the employer’s decision to subcontract was one of “core entrepreneurial concerns outside the scope of bargaining,” and involved “considerations of corporate strategy fundamental to the preservation of the enterprise.” *Id.* at 960. The Board also based its decision on the fact that labor costs, even in the broadest sense of the term, were not a factor in the decision. *Id.*

Although the Board frequently has applied *Torrington* in a largely mechanical manner, the Third Circuit has twice rejected the Board's application of that framework in subcontracting cases. In *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240 (3d Cir 1994), the Third Circuit denied, in part, enforcement of the Board's order finding the employer violated Section 8(a)(5) by failing to bargain with the union before subcontracting its furniture delivery services. The court accepted the ALJ's factual findings - that the employer subcontracted its delivery work because of repeated and serious incidents of employee misconduct, including theft of company property - but faulted the Board for expanding the term "labor costs" beyond its ordinary and usual meaning.

Specifically, the Third Circuit took issue with the Board's failure to analyze whether the subcontracting decision was prompted by "factors that are within the union's control and therefore 'suitable for resolution within the collective bargaining framework.'" 36 F.3d at 1248. Instead, the court explained, the Board was required to consider "not just the employer's decision to contract work out . . . but whether [the decision] was *driven* by labor costs or some other difficulty that could be overcome through collective bargaining." *Id.* (emphasis). "As we have previously recognized employers may make business decisions based on general 'economic reasons,' which 'are not reasons distinct and apart from a desire to decrease labor costs,' but that does not mean that labor costs are somehow implicated by every employer decision intended to improve the business's bottom line." *Furniture Rentors*, supra at 1249-50 (quoting from *Arrow Automotive Indus., Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988)). The Third Circuit remanded the case to the Board to evaluate "the likelihood and degree of benefit, if any, to be derived from the collective bargaining . . . and to weigh that benefit against the employer's considerable interest in taking prompt action."

The Third Circuit revisited *Torrington* in *Dorsey Trailers v. NLRB*, 134 F.3d 125 (3d Cir. 1998), and again denied enforcement of a Board order finding an 8(a)(5) failure to bargain violation. Dorsey manufactured and assembled truck trailers in a unionized facility in Pennsylvania. Because of diminished production capabilities, a rising backlog of work orders and increasing customer demand, Dorsey subcontracted flatbed and dump truck trailers production responsibility to Bankhead Enterprises, located in Georgia. The Board modified the ALJ's order that no bargaining obligation existed because it found that Dorsey's decision to subcontract was motivated in part by labor costs, i.e., a desire to reduce overtime to zero, and thus constituted a mandatory subject of bargaining.

On review, the Third Circuit disagreed with the Board, finding that in light "of management's reasons for subcontracting, i.e., to avoid lost sales, this, without more does not justify mandatory bargaining." *Id.* at 132. The court further explained that while both employers performed the same manufacturing work, the subcontract between them "properly centered around the scope and direction of Dorsey's future viability." *Id.* The court concluded that Dorsey was not obligated to bargain with the union over its decision because its sole motivation in subcontracting with Bankhead was a "need to fill orders and maintain a healthy, viable business." *Id.* at 133.

The instant case is no different. The ALJ disregarded the vast preponderance of evidence demonstrating that Mi Pueblo's decisions were driven by non-employment related concerns, and that labor costs did not directly factor into the decisions in any meaningful respect. Arreaga credibly testified that the backhauls and pick-ups were causing significant delays at the vendors' facilities. In fact, the undisputed evidence proves that drivers sometimes experienced delays of approximately two or three hours. These delays had a direct impact on the D.C.'s efficiency, and

thus the retail stores' profitability, because the delays caused at least one of Respondent's trucks and one truck driver to sit and be unproductive while waiting to be loaded. Additionally, as Arreaga credibly testified, pickups from Durango Packing caused at least one truck and one driver to be completely out of commission for an entire day, and for up to 12 hours, as the commute from the D.C. to the Durango Packing facility was approximately 200 miles. The General Counsel never disputed that these delays occurred and that they directly impacted the efficiency and productivity of the D.C.'s operations; the ALJ's factual findings confirm the problems.

Beyond this, there is no evidence in the record that the Union had any control over or could have effectively bargained over any of the factors that Respondent considered when reaching its decision, a key consideration under *Fibreboard* and the *First National* balancing test. Many of the efficiency improvements affecting Mi Pueblo's trucking operations involved employees and operations the Union does not represent. It cannot bargain over the humidity in Mi Pueblo's trailers, nor change the outlier location of remote suppliers, which makes direct hauling by Mi Pueblo impractical. Yet the effect of Judge Laws' decision would be to give the Union just such power over Respondent's business planning, making it an "equal partner" in the business: a power that Congress never intended to confer when establishing the bargaining duty. *First National*, supra, at 676.

The ALJ really never even considered this issue. But she was required to do so before concluding that these decisions were amendable to bargaining because, as the Court explained in *Fibreboard*, it is only when an employer's decision is prompted by factors within the union's control that the decision becomes "suitable for resolution within the collective bargaining framework." The Union had no control over, nor could it present alternative arrangements to fix,

the distances that Respondent's employees had to drive along with the long delays that drivers experienced while delivering backhauls and pick-ups. Plainly, under the standards set down by the Supreme Court in *Fibreboard* and *First National*, decision bargaining was not required in this instance. The ALJ erred in holding otherwise.

2. The ALJ Erred By Ignoring *First National* And Relying Solely On *Fibreboard*

That the ALJ strictly relied on *Fibreboard* without conducting the *First National* balancing test is error. As is clear from the language of its opinion, the Supreme Court in *First National* intended for its decision to further refine the standards set forth in *Fibreboard* regarding the duty to bargain over managerial decisions when it stated:

[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

First National, supra at 679. The ALJ does not address or even consider the impact that bargaining in this instance would have had on Respondent's business. It was error for her to fail to do so.

Since the Supreme Court issued its decision in *First National*, the United States Courts of Appeals have struck down opinions dealing with managerial decisions to subcontract when the Board relied only on *Fibreboard* and failed to conduct the *First National* balancing test. For instance, in *NLRB v. W-hr Constructors, Inc.*, 159 F.3d 946 (6th Cir. 1998), the Court of Appeals reversed a Board decision which relied solely on *Fibreboard* when conducting its mandatory bargaining analysis concerning a managerial decision to subcontract.

In that case, the Sixth Circuit stated that as "*Fibreboard* and *First National* make clear, a decision to subcontract is not necessarily subject to mandatory collective bargaining; whether

such bargaining is mandatory can only be answered by looking at the particular facts presented in the individual case.” *Id* at 953. The Court in *W-hr Constructors* next reviewed the Board’s decision and concluded that it had failed to conduct the *First National* balancing test in making its decision, and relied solely on *Fibreboard*. The Court noted that the Board’s strict reliance on *Fibreboard* was “misplaced” and after conducting the *First National* balancing test determined that the subcontracting at issue was not a mandatory subject of bargaining because bargaining over the subcontracting decision would “significantly abridge W-hr’s ability to manage its business,” which compelled the Court to conclude that “this burden outweighs the benefit such bargaining would provide to the collective bargaining process.” *Id* at 955. As such, the Court refused to enforce the Board’s order. *Id*.

Here, the ALJ concluded that under *Fibreboard*, the Respondent was required to bargain over its managerial decisions regarding subcontracting, irrespective of any balancing of the benefits and burdens to the parties. Aside from the facts that the decisions in *Fibreboard* and the decisions here were made for completely different reasons, and that even under the *Fibreboard* analysis the Respondent’s managerial decisions would not be found to be mandatory (as will be discussed below), it was a critical mistake for the ALJ to neglect the balancing test outlined above in *First National*.

Even if the ALJ’s rejection of *First National* and her reliance on *Fibreboard* were proper, the majority opinion’s analysis in *Fibreboard* demonstrates that the managerial decision to subcontract certain backhauls and pick-ups did not give rise to a duty to bargain here. The reason is simple. The Court in *Fibreboard* expressly limited its holding to the specific facts before it: a situation where a company merely replaced existing employees with those of an

independent contractor to do the same work under similar working conditions.³¹

Nothing in the record before the ALJ supports her conclusion that the subcontracting decision here was similar to the subcontracting decision in *Fibreboard*. Such a simplistic replacement of employees, as occurred in *Fibreboard*, did not occur here. Instead, the managerial decision to eliminate a small subset of backhauls and pick-ups is more factually similar to a partial plant closing, rather than class “subcontracting,” as Respondent concluded that it would no longer perform backhauls and pick-ups at various third party vendors due to lengthy delays. In other words, Respondent concluded that it wanted to get out of the backhaul and pick-up business entirely for purposes of efficiency, just as it determined to discontinue cross-docking and Sunday store deliveries, to stop sending out trailers half full, and to “specialize” the functions of the order selectors. All of these, plainly, were focused on the “economic profitability of the” business, not solely, or even principally, on “labor costs” or “terms and conditions of employment.”

There are several other reasons that the ALJ improperly relied on *Fibreboard* in concluding that Respondent had a duty to bargain over the decision to discontinue backhauls and pick-ups. Specifically:

- In *Fibreboard*, the company did not alter its business operations. Instead, a subcontractor was hired to perform *identical* duties as the laid off unit employees. Here, the undisputed evidence demonstrates that Respondent profoundly altered its business operations by creating a more efficient D.C. and refocusing its business model on servicing Respondent’s stores.

³¹ “We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of ‘contracting out’ involved in this case – the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment – is a statutory subject of collective bargaining under § 8 (d). *Our decision need not and does not encompass other forms of ‘contracting out’ or ‘subcontracting’ which arise daily in our complex economy.*” *Fibreboard*, supra, at 215 (emphasis added).

- Unlike *Fibreboard*, where the subcontracted work would still be performed at the employer’s facility, none of the subcontracted work at all would be performed at the D.C. or would be performed using Respondent’s equipment. In addition, Respondent did not merely replace existing employees with those of an independent contractor to perform the same work under the same working conditions: most of the drivers remain employed.
- In *Fibreboard*, capital investments were never contemplated in the employer’s decision. Here, on the other hand, Arreaga testified without contradiction that the value and use of assets, including unnecessary costs incurred for trucks and parking spaces that were never used, were considered in the decisions.

In addition, although the ALJ speculates throughout her opinion that labor costs were the predominate factor motivating Respondent’s decision to subcontract the backhauls and pick-ups, there simply is no record evidence to support her conclusion. The absence of such evidence here contrasts sharply with *Fibreboard*, where there was clear evidence that the employer’s decision was directly and principally based on an attempt to save labor costs such as fringe benefits, overtime and headcount.³² These kinds of “labor costs” were plainly not the principle focus of the Respondent’s efforts to rationalize the D.C. operations. In sum, the ALJ erred in refusing to apply the analysis from *First National* and holding instead that the facts before her more analogous to those in *Fibreboard*.

C. The ALJ Erred By Finding That Respondent’s Decision To Change Schedules And Consolidate Routes Violated The Act

The ALJ also concludes that Respondent violated the Act by changing drivers’ schedules

³² “The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments.” *Fibreboard*, supra, at 213.

and consolidating routes to increase efficiency and productivity, thereby resulting in the layoff of six drivers. (ALJD 16:42-43; 22:4-11). In this regard, the ALJ incorrectly analyzed the two business decisions separately rather than considering that the decisions were part of an overall plan to improve the efficiency and economic profitability of the business. In addition, in applying the analysis in *First National*, the ALJ incorrectly concluded that the decision to consolidate routes was “more akin to ‘management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules’ that are almost exclusively ‘an aspect of the relationship between employer and employee.’” (ALJD 17:34-37:17:44-45; 18:1). Like Respondent’s decision to subcontract certain backhauls and pick-ups, the ALJ again concludes that the overall decision to consolidate routes “boil[ed] down to labor costs” and “was amenable to bargaining.” (ALJD 18:19-32; 19:1-5)

The ALJ’s conclusion that Respondent was required to bargain its decision to change schedules and consolidate routes is erroneous. Like Respondent’s subcontracting decisions, the decision to change employee schedules and consolidate routes to conform with the other operational changes it was making falls into the third category of decisions outlined in *First National*. In this regard, the evidence during the hearing overwhelmingly demonstrated that the focus of those changes was on the “economic profitability” and efficiency of the D.C. operation, and only incidentally on employment-related concerns. Specifically, the record evidence shows that the decisions were based on the desire to more efficiently use D.C. assets and provide improved service to Mi Pueblo stores. Arreaga testified that the management decision to fill D.C. trucks before sending them out to stores, which sometimes resulted in the consolidation of routes, was based solely on Respondent’s desire to increase D.C. efficiency, and the efficient use of those assets, so as to provide better service to its retail stores. (See, ALJD 4:35-36) No

consideration was given to wages, benefits or any other term or condition of employment, and there is no evidence to the contrary.

D. Respondent's Decisions To Subcontract And To Change Schedules And Consolidate Routes Were Not Amenable To Bargaining

As required by *First National*, once it has been determined that the managerial decisions fit within the third category of decisions, which is the case here, the next question is whether “the subject proposed for discussion is amenable to resolution through the bargaining process.” *First National*, supra at 678. The ALJ erred in concluding that Respondent's decision to subcontract backhauls and pick-ups was amenable to bargaining. She further erred in holding that Respondent's decision to modify driver schedules and consolidate routes was amenable to bargaining.

Specifically, the decision to eliminate backhauls and pick-ups was an effort to better utilize company assets (e.g., the doing away with unnecessary wait times so as not to waste the use of a tractor/trailer sitting at the vendor's facility or traveling to distant locations for upwards of 12 hours). In addition, the decision was an effort to eliminate excess fuel usage and fuel costs associated with driving up to 400 miles round trip to pick up product. Next, the decision was part of Respondent's efforts to refocus the D.C.'s operations to better service Mi Pueblo retail stores.

In addition, the decision to consolidate routes was based on, and really a consequence of, a decision to increase efficiency at the D.C. and ensure better utilization of D.C. assets, such as tractors and trailers. By electing to fill its trucks before allowing a driver to leave the D.C., Respondent realized cost savings associated with (1) fewer trucks on the road; (2) reduced fuel and maintenance costs; (3) fewer tractor and trailer leases; and (4) increased efficiency at the D.C. and Respondent's retail stores.

There simply is nothing the Union could have offered in the form of wage or benefit concessions that could have helped the D.C. achieve these goals. Neither the General Counsel nor the Union offered any evidence to support their claim that this decision was amenable to bargaining. No wage and/or benefit concessions within the Union's gift could have assisted Respondent in accomplishing its goals of operating the D.C. more efficiently and providing better service to its stores. In the absence of evidence to demonstrate how Respondent's decision to subcontract backhauls and pick-ups was amenable to bargaining, it was purely speculative for the ALJ to hold otherwise.

E. Respondent's Decisions To Subcontract Backhauls And Pick-ups And To Change Schedules And Consolidate Routes Are Not Mandatory Subjects Of Bargaining Under *Dubuque Packing Company*

In *Dubuque Packing Co.*, 303 NLRB 386 (1991), the Board followed the teaching of *Fibreboard* and *First National* by fashioning standards for mandatory bargaining that focused generally on the amenability of the disputed issue to resolution through the collective bargaining process, and specifically on the role of labor costs in the employer's decision. *Id.* at 391. The *Dubuque* decision contained a thoughtful discussion of the bargaining obligation imposed by the Act that accurately reflected the framework established by *Fibreboard* and *First National*. Although the *Dubuque* holding was limited to managerial decisions regarding relocating unit work, its detailed analysis is persuasive and helpful in deciding the issues presented here.

The *Dubuque* Board found that a managerial decision to relocate clearly fell within the third category of decisions articulated in *First National* (i.e., decisions which have a direct impact on employment but have as their focus the economic profitability of the employing enterprise). *Dubuque*, supra at 390. The Board noted that decisions falling under this category "are neither clearly covered by nor clearly excluded from Section 8(d)'s 'terms and conditions of employment' over which Congress has mandated bargaining." *Id.*

Next, the Board attempted to harmonize the decisions in *First National* and *Fibreboard* by considering three important points. First, in *First National*, the employer “had no intention to replace the discharged employees or to move that operation elsewhere.” *Id.* at 390. By contrast, *Fibreboard* involved the “replacement] [of] existing employees with those of an independent contractor.” *Id.* Second, in *First National*, the Board was confronted with a decision changing the scope and direction of the enterprise “akin to the decision whether to be in business at all.” *Id.* In *Fibreboard*, the employer's decision “did not alter the Company's basic operation.” *Id.* Third, and finally, in *First National*, the employer's decision was based “solely [on] the size of the management fee [the nursing home] was willing to pay.” *Id.* at 391. In *Fibreboard*, “a desire to reduce labor costs . . . was at the base of the employer's decision to subcontract.” *Id.*

Given these differences, the Board then announced a new test for determining whether an employer's decision to relocate is a mandatory subject of bargaining. The General Counsel must initially establish a *prima facie* case for mandatory bargaining by showing that the employer's decision involved a transfer of unit work unaccompanied by a basic change in the nature of its operation. Then, the burden of production shifts to the employer, who can rebut the *prima facie* case by showing that its decision involved a change in the direction of the business, or by showing: “(1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision” *Id.* at 391.

Analyzing the facts of the instant case using the test outlined in *Dubuque*, and assuming that General Counsel could even establish a *prima facie* case, which Respondent disputes, it is clear that Respondent easily satisfied its burden of showing that its decision involved a change in the direction of the business, and that labor costs were not a factor in its decisions. As Arreaga

testified, when he was hired as Director of the D.C. in late-2010, he was tasked with making the D.C. more efficient, and in returning D.C. operations back to its original purpose: to provide better service to Mi Pueblo stores. The managerial decisions at issue in the instant case reflect a variety of fundamental changes in the direction of the D.C. which occurred in late-2010 and early-2011. In addition, there is absolutely no evidence that labor costs served as a principle, motivating factor in any of the managerial decisions at issue here.

Furthermore, even if the managerial decisions in question did have an indirect impact on total labor costs, the evidence demonstrates that the union could not have offered hourly labor cost concessions that would have changed Respondent's decisions. For instance, in regards to the managerial decision to send out only full trucks, the Respondent did so in an effort to better utilize D.C. assets such as tractors and trailers. By determining to fill its trucks before allowing a truck to leave the D.C., Respondent was able to realize increased cost savings associated with fewer trucks on the road, including reduced fuel and maintenance costs, and fewer tractor and trailer leases, as well as increased efficiency at the D.C. and the retail stores. What, it may be wondered, would the Union have been able to propose otherwise: continued use of half empty trailers? Continued waits at salt and sugar suppliers to allow trailers to dehumidify? Slower and less efficient practices amongst the non-unit order selectors, so that wait times at the D.C would be increased? Obviously, labor cost concessions by the union would not have resolved any of the Respondent's efficiency problems, and requiring the Respondent to bargain over these underlying operational *decisions* would have been absurd.

In regards to the managerial decisions to eliminate backhauls and pick-ups of vendor's products, Arreaga testified that pick-ups and/or backhauls were causing significant delays at the vendor's facilities, in upwards of three to four hours each trip. These delays had a direct impact

on the D.C.'s efficiency, and thus the retail stores profitability, because they put at least one of Respondent's trucks and one truck driver out of commission while they waited for the third party vendor. Again, labor cost concessions by the union would not have resolved any of the efficiency problems that Respondent experienced with backhauls and pick-ups.

Accordingly, even if this case were to be analyzed in the same way as a decision to relocate work is analyzed under *Dubuque*, the facts here demonstrate that Respondent did not have a decision bargaining obligation with respect to any of the managerial decisions made in this case.

F. Respondent Attempted To Negotiate The Effects Of Its Decisions With The Union

Administrative Law Judge Laws' rulings are almost all based upon her conclusion that Mi Pueblo violated a duty to bargain over its operational decisions. In Part III(E) of her decision, however, she addresses the Respondent's duty to bargain over the effects of its decision to lay off six of Mi Pueblo's D.C. drivers in the wake of its improved efficiencies.

The Union requested bargaining over the effects of the layoffs. (GC 11). As discussed above, Respondent offered to "discuss" the matter, but it was not willing to engage in good faith collective bargaining. As such, I find Respondent failed to engage in effects bargaining in violation of Section 8(a)(1) and (5).

(ALJD 19:46-49) It is the sole point in the decision where the issue of "effects" bargaining is discussed.

The ALJ's conclusion is not supported by the record evidence. On January 21, Mi Pueblo's counsel, Patrick Jordan, contacted the Union's attorney to advise of the planned layoffs, and to specifically offer to bargain over the layoff. (GC 4) Jordan followed up this telephone call with a confirming letter on January 25, in which, after explaining the seniority basis of the decisions reached on the layoffs, he indicated that "we are prepared to consider a different

selection process” without waiving its position in the then pending proceedings testing the Union’s certification. (GC 4). As related above in the Background Facts, there followed a number of exchanges between the parties in which the Company offered to “meet and confer” over the layoffs and other operational changes, and “discuss the effects of certain operational changes that had an impact on employees Local 853 claims to represent.” (GC 7, 8, 9, 10, 12) The Union appears to at one point have agreed to such a meeting. (GC 11) The last letter in the chain has Jordan attempting to set a date for the negotiations. (GC 12)

Judge Laws found that “[f]ollowing the layoffs, a series of exchanges between [the parties] ensued, and it is unclear whether or not they met. It is clear that they did not meet prior to Respondent’s implementation of the layoffs, however, and that they never engaged in collective bargaining.” (ALJD 6:36-39) It is upon this factual finding that she bases her ruling. But the evidence does not support it. Jordan in fact contacted the Union’s counsel by telephone on Friday, January 21, before any layoffs occurred. (GC 4) The evidence does not suggest that the Union requested any delay in implementing the decision. Afterwards, Jordan offered to reconsider the seniority-based procedure that was used to select those laid off, as well as other “effects” of the operational changes. For reasons undisclosed by the record, those discussions never occurred.

But it cannot be inferred from this record that Mi Pueblo’s offer was either untimely or improper. The issue was simply not explored by the General Counsel at hearing, despite the presence of both Jordan and one of the designated Union negotiators, Bill Hoyt. On the record before the Board, there is no basis for concluding or inferring that the Respondent violated any duty to bargain over the effects of its operational decisions, whether as regards the layoffs or anything else.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2012, I caused the foregoing **RESPONDENT MI PUEBLO FOODS' BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE** to be filed and served electronically (www.nlr.gov) with the National Labor Relations Board, and further certify that I have caused a copy of the foregoing document to be served via electronic mail on the following:

Attorneys for Petitioner

Teague P. Paterson

TPaterson@beesontayer.com

Beeson Tayer & Bodine

Ross House, Suite 200

483 Ninth Street

Oakland, CA 94607-4051

National Labor Relations Board

Regional Director, William A. Baudler

Attn: Gary Connaughton

Gary.Connaughton@nlrb.gov

Region 32

1301 Clay Street, Room 300-N

Oakland, CA 94612-5211

/s/ Jennifer L. Mora

Jennifer L. Mora