UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

MI PUEBLO FOODS

and **Case 32-CA-25677**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 853, A/W CHANGE TO WIN

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Preliminary Statement

On February 9, 2012, Administrative Law Judge Eleanor Laws, herein called the Judge, issued her Decision in this matter, finding that Respondent violated Section 8(a)(5) and (1) of the Act by various acts and conduct. However, the Judge failed to find that certain other acts and conduct by Respondent also alleged to be unlawful similarly violated the Act. In addition, the Judge's Conclusions of Law fail to clearly reflect her findings that Respondent failed to bargain over its decision to change its delivery schedules and to consolidate routes, to subcontract out the backhauls and pickups, and to layoff six bargaining unit employees. Counsel for Acting General Counsel has filed exceptions to these aspects of Judge's Decision and Order and this brief is submitted in support of the Acting General Counsel's exceptions.

II. The Judge's Findings Of Fact Regarding Respondent's Subcontracting Of The Delivery Of Unified Products From The DC To Its Retail Stores.

Unified is a wholesale grocery supplier located in Stockton, California that supplies a large volume of dry goods and perishables to Respondent. Prior to 2008, Respondent had Unified products delivered directly to its stores by a third-party

contractor. In 2008, Respondent discontinued this practice and instead had a third-party contractor deliver Unified products to Respondent's distribution center, herein called the DC, located in Milpitas, California. Once Unified products were delivered to the DC, the products were unloaded off the third-party contactor's trucks, staged and then reloaded onto Respondent's trucks for delivery to its retail stores. This procedure is called cross-docking. (ALJD 7:7-15)[1]

Around February or March 2011, Respondent developed a "Distribution Center Utilization Analysis," herein called the Analysis, that proposed changes to how Unified products were distributed to Respondent's retail stores. The Analysis addressed, among other things, concerns about the finite space limitations of the DC and increases in Respondent's private label products that are stored at the DC until shipment to its retail stores. The Analysis recommended that Respondent return to direct delivery of Unified products from Unified's Stockton warehouse to Respondent's retail stores. The Analysis indicated that Respondent's drivers delivered 88 pallets of Unified products to Respondent's retail stores each day. (ALJD 7:29-40, 8:1-3; R 21)

In April 2011, Respondent decided to resume the direct delivery of Unified products to its retail stores. As a result of this decision, the third-party contractor no longer delivers Unified products to the DC for delivery by bargaining unit drivers to the retail stores. Instead, Unified products are now delivered directly to the retail stores from Unified's Stockton warehouse by a third-party contractor. (ALJD 8:11-14)

Despite this change, the Judge found that the number and volume of deliveries from the DC to the retail stores has remained generally unchanged. (ALJD 8:11-12) The

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[1] References to the Judge's decision are listed as "ALJD _: _," and references to Respondent's exhibits are listed as "R _."

Judge found that this was due to an increase in the amount of private label products that is delivered from the DC to its retail stores. (ALJD 8:12-13) However, the Judge failed to show how what appears in the Analysis as a small projected increase in the sale of private label products immediately made up for the 88 pallets a day of Unified products that were no longer being delivered from the DC to the retail stores as the result of the elimination of the cross-docking practice.[2] Thus, contrary to the Judge's findings, the elimination of cross-docking and the subcontracting of the work of delivering Unified products from the DC to Respondent's retail stores did immediately result in the reduction of the work performed by bargaining unit drivers, that is, the drivers delivered fewer pallets to the retail stores even if the number of deliveries did not change. Although the Judge also found that no drivers had their hours reduced or were subject to layoffs as the result of Respondent's implementation of its decision to eliminate the cross-docking of unified products, this finding, as discussed below, is not dispositive as to whether this subcontracting violated the Act.(ALJD 8:13-14).

III. Argument

A. The Judge Erred By Failing To Find That Respondent's Subcontracting Out Of The Bargaining Unit Work Of Delivering Unified Products From The DC To Respondent's Retail Stores Violated The Act. [3]

The Judge found that the subcontracting of the bargaining unit work of delivering Unified products from the DC to Respondent's retail stores was not a material, substantial and significant change to the terms and conditions of employment of bargaining unit drivers and thus found that Respondent had not violated the Act by unilaterally subcontracting this work. (ALJD 20:9-11) In support of this finding, the Judge relied on,

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[2] The Analysis spoke of only a five percent increase in the shipment of private label products for all of 2011.

[3] The following argument pertains to Cross-Exceptions Nos. :1-7, 10-12.

among other things, her findings that the subcontracting did not result in the layoff of additional drivers[4] nor significantly impact the wages or hours of bargaining unit drivers. (ALJD 20:4-17) She also relied on her finding that even though drivers delivered 88 fewer pallets of Unified products a day to the retail stores as a result of this subcontracting, this loss of work was made up by the increase in the deliveries of private label products from the DC to the retails stores. (ALJD 20:30-35) Finally, the Judge found that the Board's decision in *Overnite Transportation*[5] was inapplicable to facts of this case because the nature of the subcontracting was different in this case and because bargaining unit employees did not even lose the potential for additional work as a result of the subcontracting. As discussed below, the facts and the relevant case law demonstrate that the Judge erred in finding that Respondent's subcontracting the Unified deliveries without first bargaining with the Union did not violate the Act. (ALJD 21:10-23)

In *Overnite Transportation Co.*, supra at 1276, the Board, in expressly adhering to its holdings in *Torrington Industries*,[6] held that subcontracting that involved the substitution of one group of workers for another but did not involve a change in the scope and direction of the enterprise is a mandatory subject of bargaining even if the subcontracting decision is not based on labor costs. Id. The Board further held that this subcontracting is a mandatory subject of bargaining even if no current employee lost his/her job and there was no direct adverse impact on the bargaining unit. Id. In fact, the Board found that the "bargaining unit is adversely affected whenever bargaining unit work is given away to non-unit employees ...." Id. In support of this position, the Board

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4 Six drivers were laid on January 24, 2011 and the Judge found these layoffs to be unlawful(ALJD)
5 330 NLRB 1275 (2000).
6 307 NLRB 809 (1992).

pointed to its earlier decision in *Acme Die Casting*, 315 NLRB 202 (1994), wherein the Board stated that "the reasoning of *Torrington Industries* is not limited to situations in which employees are laid off or replaced." Id. The Board in *Overnite* found it sufficient to establish that subcontracting of bargaining unit work violated the Act if bargaining unit employees "might" have lost at least the opportunity for additional work as a result of the subcontracting. Id.

Since the subcontracting of the delivery of Unified products from the DC to Respondent's retail stores did represent the substitution of one group of workers for another but did not represent a change in the nature and direction of the enterprise, the holdings in *Overnite* and *Torrington Industries* apply to this case. In this regard, the Judge attempts to distinguish the subcontracting in this case from that in *Overnite* are unpersuasive. For example, the Judge found that Respondent did not merely substitute one group of workers for another but instead completely changed the way Unified products were delivered to the retails stores, that is, after the subcontracting, the Unified products were delivered directly from Unified's Stockton, California warehouse to Respondent's retail stores. However, the Judge's attempt to distinguish *Overnite* misses the point, which is that prior to April 2011 and for well over two years, the delivery of Unified products to Respondent's retail stores was done by its drivers and that after April that work was done by a third-party contractor, i.e., this a classic case of the substitution of one group of workers for another.

Furthermore, in view of the Board's holdings in *Overnite*, the Judge's reliance on the fact that no drivers were laid off as a result of the subcontracting decision and the fact that the subcontracting did not significantly impact the drivers' wages and hours of work

is misplaced. Here, as in *Overnite*, it is sufficient to find a violation if the subcontracting might have resulted in the loss of at least the opportunity for additional work. Here, it is undisputed that the volume of deliveries changed as a result of the subcontracting and that Respondent's drivers delivered 88 fewer pallets a day to the stores. (ALJD 20:30-33; R21, p. 5) Per *Overnite*, this alone is sufficient to establish an adverse impact on the bargaining unit.[7]

The Judge's other attempts to distinguish the instant case from *Overnite* also fail. For example, the Judge found that there was no potential for additional work if the delivery of Unified products was not subcontracted out because she found that the DC was "operating at capacity both before and after the elimination of cross-docking." (ALJD 21:21-23) However, this finding is not supported by the record. Thus no witness testified that the DC was at full capacity either before or after the elimination of cross-docking. Furthermore, while the Analysis expressed concern about the "finite space considerations" at the DC, it said nothing about the DC being at near capacity. (R 21) Thus, the Judge failed to show that as the result of the subcontracting of the Unified work, bargaining unit employees did not lose the potential for additional work.

In sum, the Judge erred by finding that Respondent did not violate Section 8(a)(5) and (1) of the Act by subcontracting the delivery of Unified products from the DC to

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[7] Although the Judge found that Respondent made up for these 88 fewer pallets by increasing its delivery of private label products to its stores, there is no evidence that, at least in the short run, the increase in private label products made up for the loss of 88 pallets a day. In that regard, the Analysis projects that private label products would increase by five percent in 2011 but it does not project as to when the increase in private label deliveries would make up for the loss of the 88 pallets of Unified that had been delivered from the DC to the stores prior to the subcontracting. Moreover, since the Analysis simply projects what could happen, there also could be a drop of five percent.

Respondent's retail stores because this subcontracting removed unit work and did not change the nature or the direction of Respondent's enterprise. [8]

B. The Judge Erred By Failing To Include In Her Conclusion Of Law No. 5 That Respondent Violated Section 8(a)(5) And (1) Of The Act By Failing To Bargain Over The Decisions To Make The Unilateral Changes Listed Therein[9]

The Judge found in the analysis sections of her decision that Respondent violated the Act by failing to bargain with the Union over its decisions to unilaterally: (1) subcontract out the backhauls and pickups; (2) change the drivers schedules and routes; and (3) permanently layoff six bargaining unit drivers, as well as the effects of those decisions.[10] However, the Judge failed, apparently inadvertently, to include in her Conclusion of Law No. 5, which enumerates these unilateral changes, that Respondent violated Section 8(a)(5) and (1) by not bargaining over its decisions to implement these changes. (ALJD 22:4-11) Clearly, the Judge erred by not including in Conclusion of Law No. 5 that Respondent violated Section 8(a)(5) and (1) by not bargaining over the decisions to implement the unilateral changes listed therein.

IV. Conclusion

For the reasons set forth above, it is respectfully requested that the Board find merit to the Acting General Counsel's cross-exceptions and find that Respondent violated Section 8(a)(5) and (3) of the Act as alleged herein, and that it modify the Judge's

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[8] Since the Judge erred by not finding and concluding that Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting out the delivery of Unified products from the DC to Respondent's retail stores, the Judge also erred by failing to include in her recommended remedy that Respondent be ordered to restore the status quo ante by rescinding this subcontracting and restoring the cross-docking as it existed prior to the change. Furthermore, the Judge erred by failing to include in her recommended order that Respondent cease and desist from subcontracting out the unit work of delivering Unified products from the DC to Respondent's retail stores.

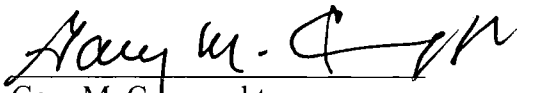
[9] The following argument pertains to Cross-Exceptions Nos. 8-9.

[10] For the reasons discussed above in n Section III. A , the Judge also erred by not including in Conclusion of Law No. 5 that Respondent violated the Act by unilaterally subcontracting out the work previously performed by bargaining unit drivers of delivering Unified products from the DC to its retail stores.

findings of fact, conclusions of law, proposed remedy and recommended order in the manner set forth herein.

DATED AT Oakland, California this 18th day of April 2012.

Respectfully submitted,



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AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, state under oath that on **April 18, 2012,** I served the above-entitled document(s) *electronically*, upon the following persons, addressed to them at the following addresses:

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