

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>
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**RESPONDENT MI PUEBLO FOODS' REPLY TO UNION'S ANSWERING BRIEF IN
OPPOSITION TO THE EMPLOYER'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

Respondent Mi Pueblo Foods (“Respondent”) submits the following brief responding to the Union’s Answering Brief in Opposition to the Employer’s Exceptions to the Decision of the Administrative Law Judge (“ALJ”). The Union’s arguments are contrary to longstanding Supreme Court precedent and at odds with the facts presented to the ALJ. Specifically, the Union argues long and loud that Respondent’s decisions were motivated by “labor costs” and provides speculative examples of labor cost concessions it believes would have resolved Respondent’s problem with drivers spending too much time waiting for trucks to dehumidify and driving half-loaded equipment. It also argues that Respondent’s decisions fall squarely under *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and that the Supreme Court’s analysis in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), is inapplicable.

The Union completely ignores the undisputed facts in this case and argues that any business decision that results in a transfer of work to a third party a fortiori constitutes *Fibreboard* “subcontracting,” and that, irrespective of context or underlying motive, such situations *always* fall under the *Fibreboard* line of cases, despite the obvious distinctions between these cases, which nearly all involve simple decisions to replace existing employees with those of an independent contractor to realize direct savings on wages and benefits, and the instant matter, which involved an obvious effort to eliminate operational inefficiencies and the wasteful use of rolling stock. In fact, several of the Board decisions on which the Union relies for its assertion that “the Board has affirmed that the balancing test is not required in . . . *Fibreboard*-type subcontracting cases” specifically involved employers making the simplistic subcontracting decisions that were not made here. *See St. George Warehouse, Inc.*, 341 NLRB 904, 924-25 (2004) (the employer eliminated unit work and transferred the work to agency employees); *Gaetano & Associates, Inc.*, 344 NLRB 531 (2005) (“[S]ubcontracting is a

mandatory subject of bargaining if it involves *nothing more than* the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise.”) (emphasis added).

A mechanical replacement of employees, as occurred in *Fibreboard*, did not occur here. As the Supreme Court has instructed, the Board must look behind the reason and motivation for any managerial decision, including subcontracting decisions. The evidence shows that the decisions Mi Pueblo made here were based solely on its desire to operate a more productive and efficient Distribution Center (“D.C.”) and eliminate practices – such as “back hauling,” “cross-docking” and using refrigerated vehicles unsuited to the hauling of sugar and salt – which wasted capital and human resources. That labor costs may have been impacted by those decisions does not, under existing law, necessarily translate into a duty to bargain a particular decision. If it did, virtually all decisions to more efficiently operate and employ capital resources would be subject to decision bargaining, and unions truly would become full “partners” in an employer’s business. Such is not the law, and the Union’s arguments otherwise are without merit.

II. ARGUMENT

A. Respondent’s Decisions Were Motivated By Non-Employment Related Concerns And Not Labor Costs

Regardless of whether the Supreme Court’s analysis in *First National* or *Fibreboard* applies, the ALJ and the Union claim, without *any* evidence in the record, that *all* of the decisions that Respondent made in the instant case were based on nothing more than “labor costs.” In fact, the Union claims – with no citation to supporting evidence – that Respondent has “admitted at every stage that it was motivated by its interest in reducing the amount of time it paid to drivers to perform work.” Union Brief at 7. This is false, and there is no credible evidence to support such a bald statement. Likewise, the Union’s claim that the “ALJ’s finding

that labor costs was a factor driving Mi Pueblo’s decision is supported by substantial evidence” is incorrect.¹ All that can be gleaned from the ALJ’s decision is that her conclusions were based on her notion of “common sense.” That is not substantial evidence. It is, rather, speculation, and will not withstand Board scrutiny.

The undisputed evidence shows that Respondent’s decisions were 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 broad set of operational changes at the D.C.,² affecting far more employees than simply drivers, designed to save the operation from closure.³ Arreaga credibly testified that the backhauls and pickups were causing significant delays at the vendors’ facilities. The two or three hour delays that drivers experienced had a direct impact on the D.C.’s efficiency, and thus the retail stores’ profitability, because at least one driver and truck had to sit and be unproductive while waiting to be loaded.⁴ Additionally, pickups from Durango Packing caused at least one driver and truck to be out of commission for an *entire day*, and for up to 12 hours due to the commute.

Moreover, the decision to consolidate routes and change schedules was focused on the “economic profitability” and efficiency of the D.C. operation, and only incidentally on

¹ There is no evidence to support the Union’s additional statement that “an integral part of making the DC more efficient was reducing the number of employees without affecting operations.” Union Brief at 11.

² Notably, the Union never objected to or filed an unfair labor practice charge challenging the multitude of managerial decisions that Respondent made during the relevant time period. These changes included refinements to the driver notification system; layoffs of order selectors; and the consolidation of D.C. assets.

³ The ALJ acknowledged that Respondent “either needed to fix the warehouse or shut it down.” (ALJD 3:40-41)

⁴ If “amenability to the collective bargaining process” is the test for determining whether a particular operational decision is subject to decision bargaining, one has to wonder what concessions the Union could have offered to alleviate these delays. They were inherent in the inefficient and illogical logistical system that had evolved at Mi Pueblo, which included inefficient backhauls and waiting for trucks to dehumidify, and which Arreaga was charged with rationalizing. So long as the back-hauling was continued, and so long as Mi Pueblo’s fleet consisted of refrigerated trailers which had to be kept cool for their principle deliveries, the inefficiencies could not be rectified by simply tweaking the existing operations. The Union could no more offer concessions that would decrease the delays and idle time that these practices were causing than it could propose changes to the laws of thermodynamics causing some of them.

employment-related concerns. 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. The 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 better utilize Respondent's equipment.⁵

Rather than offering any evidence that the Union had any control over or could have effectively bargained over any of the factors that Respondent considered when making its decisions, which is a key consideration under *Fibreboard* and the *First National* balancing test, the Union makes the nonsensical argument that, “[w]hile the Union cannot change the distance and humidity levels required to perform backhauls and pickups, ***the subcontractors have not and cannot change these facts either.***” The Union clearly fails to appreciate that subcontractors would not face any of the problems that Respondent faced with backhauls and pickups. For example, the D.C.’s trucks were refrigerated and, therefore, drivers had to wait at Morton Salt for their trucks to dehumidify before hauling the salt back to the D.C. Subcontractors, which had access to a wider array of equipment, do not use refrigerated trucks and, thus, do not face the same problem that Respondent faced. In addition, Respondent’s decision to eliminate pickups from Durango packing was due to the distance between the D.C. and the Durango packing facility in Dinuba, California. The subcontractor was not faced with driving this distance because it could deliver the products directly from Dinuba to Mi Pueblo stores.

Rather than present any meaningful discussion as to what concessions it might propose to control these uncontrollable factors, the Union resorts to making arguments that are false and have no relevance to the discussion herein. In fact, the Union goes so far as to suggest that

⁵ Again, one has to wonder what concessions the Union could have offered to fix the problem of trucks leaving the D.C. half full. Would a Union proposal to change work rules or decrease overtime have resulted in fuller trucks?

Respondent be required to present evidence that its subcontractors “performed the work more ‘efficiently’ or with greater ‘productivity.’” Union Brief at 11. What subcontractors do with their business and whether they want their drivers to waste time is not Respondent’s concern so long as the products were delivered to Mi Pueblo retail stores.

The Union completely misses the mark when addressing Respondent’s reliance on certain Board decisions to support its argument that bargaining was not required over any of the decisions at issue here, such as *Oklahoma Fixture Co.*, 314 NLRB 958 (1994) (where the subcontracting decision was based on concern over legal liability), and *Furniture Renters of America, Inc. v. NLRB*, 36 F.3d 1240 (3d Cir. 1994) (where the subcontracting decision was based on employee theft and misconduct). Respondent is not arguing that its decisions were based on concerns over legal liability or employee misconduct. Rather, both decisions demonstrate that, even under Board precedent, bargaining is *not* required when a decision is driven by non-employment concerns, and when labor costs did not *directly* factor into the decisions in any meaningful respect, as occurred in both *Oklahoma Fixture* and *Furniture Renters*. All of the evidence in the instant case demonstrates that Respondent’s sole concern when it made these important managerial decisions was efficiency and productivity.

B. Respondent’s Managerial Decisions Were Not Amenable To Bargaining And Requiring Respondent To Bargain Over Them Would Unduly Burden Respondent’s Business

In *First National*, the Supreme Court held that when a management decision has a “direct impact on employment . . . but” has as its “focus only the economic profitability of the business,” 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.” *First National*, 452 U.S. at 679 (emphasis added). The Court based its holding on its 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 (emphasis added).

Although the ALJ and the Union claim that the analysis in *Fibreboard* instead of *First National* applies here, thereby supposedly obviating any need to weigh the burdens on the business against the amenability of the issues “to resolution through the bargaining process,” both ignore the Supreme Court’s recognition in *First National* that the *Fibreboard* court “implicitly engaged in [this] balancing analysis.” The *First National* Court pointed out that in *Fibreboard*, the company’s basic operation had not been altered, there was no capital investment involved and existing employees were merely replaced with those of an independent contractor working under similar conditions. Thus, 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.

The ALJ’s failure to employ the *First National* balancing test here was error. The continued operation of Mi Pueblo’s D.C. and the trucking operations to and from it in the inefficient fashion that had evolved were untenable and, as the ALJ acknowledged, threatened the continued existence of the entire operation. The inefficiencies in the warehouse – including those in the trucking operations directed from it – had to be ironed out, or the warehouse and trucking operations would have been closed down. There is no evidence suggesting that the mechanical, logistical and geographic inefficiencies inherent in the way the trucking was being handled were amenable to bargaining. The Union, clearly, has not suggested what kinds of concessions could have alleviated these inefficiencies. The ALJ did not even attempt to do so.

Since the Supreme Court issued *First National*, federal appellate courts have reversed the Board for failing to engage in the *First National* balancing test. *NLRB v. Wehr Constructors*,

Inc., 159 F.3d 946 (6th Cir. 1998) (reversing a Board decision that relied solely on *Fibreboard* and failed to consider that bargaining would “significantly abridge” the employer’s ability to “manage its business”). According to the Sixth Circuit, “because the decision to subcontract is driven by labor costs **does not automatically mean** that bargaining . . . is mandatory. This benefit to the collective bargaining process **must still be weighed against the burden on the conduct of the company's business.**” *Wehr Constructors*, 159 F.3d at 954 (citing *First National*, 452 U.S. at 669 and *Fibreboard*, 379 U.S. at 213) (emphasis added).

Nowhere in the ALJ’s decision is there any attempt at balancing the benefit of the collective bargaining process against the burden on Respondent’s business. Nor is there any suggestion in the Union’s brief as to how “bargaining” over whether trucks should sit idle, or run half-empty, or go on extended forays into the San Joaquin Valley, would benefit the collective bargaining process. In fact, there is no evidence suggesting that there would have been **any** benefit to bargaining over these managerial decisions. Instead, the only way in which both the ALJ and the Union can credibly argue that Respondent’s decisions were amenable to bargaining is to claim, without **any** supporting evidence, that labor costs were a consideration in Respondent’s decisions.

As previously explained, there is no evidence, aside from pure speculation and what the ALJ believes to be is “common sense,” 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. *See First National*, 452 U.S. at 687. *See also Furniture Rentors*, 36 F.3d at 1246 (noting that the *First National* court “concluded that because the union had no control over the factors motivating the company's decision to subcontract, collective bargaining would have been futile and was therefore not required”).

That labor costs did not motivate Respondent in any of its managerial decisions undercuts any suggestion that these logistical and operational decisions were amenable to bargaining, or that requiring decision bargaining would result in any benefit outweighing the heavy burden on “entrepreneurial control” that such bargaining would impose on Respondent. If labor costs were not a motivating factor, then what labor concessions could have been offered? The Union argues that “the parties may have reached a multitude of mutually advantageous agreements, including but not limited to, trimming hours or pay, different route consolidations, adding driver job duties, changing other work rules, or employer concessions for layoffs.” Union Brief at 17-18. It is completely absurd for the Union to suggest that any of these changes would have, for example, reduced the amount of time that drivers spent waiting for trucks to dehumidify or resulted in trucks and trailers delivering more products to Respondent’s stores. How could changing work rules, given the nature of the problems Mi Pueblo was trying to address, have any impact on the volume of product that drivers hauled in Respondent’s trucks and trailers?

In sum, there is nothing the Union could have offered in the form of wage or benefit concessions that would have helped the D.C. achieve its goal of a more productive and efficient distribution center. In regards to the managerial decision to send out only full trucks, Respondent did so in an effort to better utilize its existing assets. By determining to fill its trucks before allowing a truck to leave the D.C., Respondent was able to realize increased savings to fuel and maintenance costs and fewer leases, as well as increased efficiency at the D.C. and retail stores. The Union cannot credibly argue that labor cost concessions would have had any impact on the wait times experienced while trailers dehumidified, or on the inefficient and costly use of Respondent’s trucks and trailers in backhauling, or on serendipitous sojourns half way across the State to pick up product from an isolated supplier.

C. The Evidence Is Insufficient To Prove That Respondent Refused To Bargain Over The Effects Of The Layoffs

There is no evidence in the record to support the ALJ's conclusion that Respondent "was not willing to engage in good faith collective bargaining" (ALJD 19:46-49). Although undisputed evidence proves that the Union and Respondent agreed to meet on April 7, 2011 and to bargain the effects of the layoffs, neither the General Counsel for the Union presented *any* evidence as to what transpired between the parties after reaching agreement on a date for further discussion. Without more, that is not sufficient as a matter of Board law to conclude that Respondent refused to bargain the effects of the layoff decisions in violation of Section 8(a)(5).

Board law is clear. An employer violates Section 8(a)(5) if it *refuses* to engage in meaningful bargaining with a union. 29 U.S.C. § 158(a)(5). There is no evidence of such a refusal. Rather, the undisputed evidence shows that: (a) on January 21, Respondent advised the Union of the layoffs and offered to bargain the effects (GC 4); (b) on January 25, Respondent again notified the Union of its desire to bargain the effects (*id.*);⁶ (c) on March 3, Respondent sent a letter to Mr. Hoyt and Mr. Blanchet which "reiterate[d] [Respondent's] willingness to discuss the effects of" the changes (GC 8); (d) the Union did not respond and request dates until mid-March (GC 9); (e) Respondent responded on March 18 and suggested that the parties meet on April 7 (GC 10); (f) the Union responded on March 23 confirming the meeting on April 7 and proposed a location to hold the meeting (GC 11); and (g) Respondent replied on March 31 confirming a date and location to meet (GC 12).

There is no evidence of what transpired between the parties after March 23. Respondent advised the Union of its layoff decision and provided the Union with an opportunity to bargain

⁶ On February 7, the Union notified Respondent in writing that Bill Hoyt and Bob Blanchet were appointed to "conduct bargaining on behalf of" the Union, and that future communications should be directed to those individuals. GC Ex. 6.

the effects of that decision. Although the Union delayed in requesting bargaining, the parties ultimately agreed to a date in which to meet for that purpose. Thus, on the record before the Board, there is no basis for concluding or inferring that Respondent violated any duty to bargain over the effects of its layoff decision.

III. CONCLUSION

For the reasons discussed herein, Respondent respectfully requests that the Board set aside the ALJ's decision and dismiss the complaint in its entirety.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2012, I caused an original of the foregoing **RESPONDENT MI PUEBLO FOODS' REPLY TO UNION'S ANSWERING BRIEF IN OPPOSITION TO THE EMPLOYER'S EXCEPTIONS TO THE DECISION OF THE 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:

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