UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: **MI PUEBLO FOODS** Employer**,** and **INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 853, affiliated with CHANGE TO WIN,** Charging Party.	**Case No. 32-CA-25677**

RESPONDENT MI PUEBLO FOODS' REPLY TO GENERAL COUNSEL'S ANSWER TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Respondent Mi Pueblo Foods ("Respondent") hereby submits the following reply brief to the Acting General Counsel's Brief ("GC Brief") in Answer to Respondent's Exceptions to the Decision of the Administrative Law Judge.

The General Counsel claims that the decisions that Respondent implemented in the instant case "represented merely the substitution of one group of workers for another to do the same work in similar circumstances," and, therefore, argues that the Supreme Court's analysis in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1986), rather than *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), applies to this case. In essence, the General Counsel claims that any business decision that results in a transfer of work to a third party a fortiori constitutes *Fibreboard* subcontracting and that, regardless of the context or the underlying motive for the decision, such situations ***always*** fall under the *Fibreboard* line of cases, despite the obvious distinctions between those cases and the instant case.

The General Counsel also claims that Respondent's managerial decisions were "closely tied to a desire to reduce labor costs . . . ." GC Brief at 7. However, there is no record evidence to support this conclusion. Finally, the General Counsel claims, without citing to any evidence, that Respondent refused to bargain with the Union regarding the effects of Respondent's layoff decision. On the contrary, the evidence shows that Respondent offered to bargain with the Union over the effects of the layoff decision and that the parties had agreed to a date and location for that purpose. For the reasons that follow, the General Counsel's arguments fail on the law and the facts.

II. ARGUMENT

A. Respondent's Managerial Decisions Must Be Analyzed Under *First National* Instead Of *Fibreboard* Or *Torrington*

The General Counsel claims that application of the third category of decisions outlined in *First National* "fails because application of the third category requires a change in the scope and direction of the enterprise." GC Brief at 6. The General Counsel also claims that *First National* is not the applicable standard in this case because "when the record shows that *Fibreboard* subcontracting is involved, as is the case herein, 'there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain.'" GC Brief at 3. Finally, the General Counsel claims that the Board's holding in *Torrington Industries*, 307 NLRB 809, 810 (1992), which also involved the simplistic replacement of bargaining unit employees, governs the dispute in this case.

The problem with the General Counsel's argument is that it presupposes that *Fibreboard* and *Torrington* subcontracting occurred here despite record evidence to the contrary, and his statement that the "only change was that one group of workers were substituted for another . . ." (GC Brief at 6), is false. Even if the ALJ were correct in applying *Fibreboard* rather than *First National*, which Respondent disputes, there is no evidence that the subcontracting decision at issue in this case was similar to the subcontracting decision in *Fibreboard*. That situation involved a simple decision to replace existing employees with those of an independent contractor ***for the purpose of realizing direct savings on wages and benefits***, whereas Respondent's situation involved an obvious effort to eliminate operational inefficiencies and the wasteful use of rolling stock without any regard for labor costs.

One group of employees did not replace any of Respondent's drivers. Instead, Respondent subcontracted to third-party contractors the task of delivering products that had

previously been delivered by Respondent's drivers to Mi Pueblo retail stores. After this change occurred, Respondent's employees continued to do what they had done all along: deliver products to and from the D.C. and Mi Pueblo stores. In the absence of evidence to demonstrate that *Fibreboard* and *Torrington* subcontracting occurred in the instant case, it was inappropriate for the ALJ to analyze the facts herein under *Fibreboard* rather than *First National*.

In addition, unlike the situation in *Fibreboard*, where the employer's decision did not "alter the Company's basic operation," Respondent's decisions here were "akin to the decision whether to be in [the backhaul and pickup] business at all." The undisputed evidence shows that Respondent could not survive without making the operational changes at issue here. Accordingly, it was error for the ALJ to analyze the instant case under the simplistic framework set forth in *Fibreboard* and *Torrington*.

B. Labor Costs Did Not Motivate Respondent's Managerial Decisions

The General Counsel's response to Respondent's Exceptions merely reiterates the speculative conclusions from the ALJ's decision that "labor costs did factor significantly into Respondent's decision to eliminate the backhauls and pickups." GC Brief at 4. Rather than point to evidence proving that labor costs motivated Respondent's decisions, the General Counsel claims that "common sense" suggests that "drivers' long wait times translated into labor cost." *Id*. But "common sense" is not evidence and the General Counsel's characterization of the ALJ's conclusions in this manner is an implicit admission that no such "evidence" of Respondent considering labor costs ever existed.

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 broad set of operational changes at the D.C.,[1] affecting far more employees than simply drivers, designed to save the operation from closure.[2] 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 one truck had to sit and be unproductive while waiting to be loaded. Additionally, pickups from Durango Packing caused at least one truck and one driver 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 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.

Board and court decisions that have issued since *Torrington* have demonstrated 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. *See Oklahoma Fixture Co.*, 314 NLRB 958 (1994) (no duty to bargain where the subcontracting decision was based on concern over legal liability); *Furniture Renters of America, Inc. v. NLRB*, 36 F.3d 1240 (3d Cir. 1994) (no duty to bargain where the subcontracting decision was based on

[1] 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.

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

employee theft and misconduct). The General Counsel did not address either of these on-point decisions.

Another decision the General Counsel failed to address is the Third Circuit's decision in *Dorsey Trailers v. NLRB*, 134 F.3d 125 (3d Cir. 1998), which is similar to the facts at issue in the instant case. Dorsey manufactured and assembled truck trailers in a unionized facility. 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 another state. The Board 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.

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," and, therefore, the employer did not have a duty to bargain. *Id*. at 132. 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 undisputedly ignored clear evidence demonstrating that the decisions were driven by non-employment related concerns, and that labor costs did not factor into the decisions in any respect. Specifically: backhauls and pickups caused significant delay; trucks and trailers were not being used efficiently; and trucks were leaving the D.C. half empty. Like the situations in *Dorsey Trailer*, where the decision was based on a desire to avoid lost sales (and unrelated to labor costs); *Oklahoma Fixture*, where the decision was based on concern over legal liability (and unrelated to labor costs); and *Furniture*

Renters of America, where the decision was based on employee theft (and unrelated to labor costs), the decisions and changes made here were purely operational decisions that were not motivated by labor costs and are not amenable to the collective bargaining process.

In sum, that Respondent's decisions ultimately had an indirect impact on labor costs does not translate into an obligation to bargain those decisions. To hold otherwise would turn virtually any managerial decision into a mandatory subject of bargaining and require unions to become business partners with employers, which is contrary to the Supreme Court's holdings in both *Fibreboard* and *First National*.

C. Respondent's Managerial Decisions Were Not Amenable To Bargaining And Requiring Respondent To Bargain Over These Managerial Decisions Would Burden Respondent's Business

The General Counsel did not respond to Respondent's argument in its exceptions brief that none of the managerial decisions at issue in the instant case were amenable to bargaining. That is because there is nothing the Union could have offered in the form of labor concessions to remedy the significant problems facing Respondent's D.C. For example, with respect to the problem of pickups from Durango Packing causing at least one truck and one driver to be out of commission for an ***entire day***, and for up to 12 hours due to the commute, would the Union have proposed to require drivers to perform additional tasks while driving a large truck with a trailer? And, with respect to the problem of drivers having to wait for their trucks to dehumidify while picking up Morton Salt, would the Union have proposed that those drivers clock out while they sit and wait? What labor concessions could the Union have offered that would have resolved the issue of trucks leaving the D.C. half full?

The ALJ's failure to employ the *First National* balancing test here was error. The continued operation of the D.C. and the trucking operations to and from it in the inefficient manner 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 shut 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 ALJ, the General Counsel and the Union never attempted to suggest what kinds of concessions could possibly have alleviated these inefficiencies.

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?

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. That the General Counsel merely opines that the managerial decisions made in this case were amenable to bargaining does not mean that the benefit of collective bargaining outweighs the burden that would have been imposed on Respondent had it been required to bargain over these critical operational changes. As the ALJ acknowledged, the situation at the D.C. was so bad that Respondent "determined that [it] either needed to fix the warehouse or shut it down." (ALJD 3:40-41)

D. 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 nor 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 in violation of Section 8(a)(5).

Board law is clear. An employer violates Section 8(a)(5) of the Act if it *refuses* to engage in meaningful bargaining with a union. 29 U.S.C. § 158(a)(5). There is no evidence that Respondent refused to bargain with the Union regarding the effects of its layoff decision. Rather, the undisputed evidence demonstrates that:

- on January 21, Respondent advised the Union of the layoffs and offered to bargain the effects (GC 4);
- on January 25, Respondent again notified the Union of its desire to bargain the effects (*id*.);
- 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);
- the Union did not respond and request dates until mid-March (GC 9);[3]
- Respondent responded on March 18 and suggested that the parties meet on April 7 (GC 10);
- the Union responded on March 23 confirming the meeting on April 7 and proposed a location to hold the meeting (GC 11); and
- Respondent replied on March 31 confirming a date and location to meet (GC 12).

[3] 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.

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 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

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 GENERAL COUNSEL'S ANSWER TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be filed and served electronically (www.nlrb.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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