

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

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I. INTRODUCTION

Respondent Mi Pueblo Foods (“Respondent”) submits the following Answering Brief to the Acting General Counsel’s Cross-Exceptions to the Decision of the Administrative Law Judge (“GC’s Cross-Exceptions”). At issue here is Administrative Law Judge Eleanor Laws’ (“ALJ”) conclusion that Respondent did not violate Sections 8(a)(1) and (5), 29 U.S.C. §§ 158(a)(1) and (5), of the National Labor Relations Act (“Act”) when it changed the manner in which products from one of its vendors, Unified Western Growers (“Unified”), were delivered to Respondent’s retail stores by eliminating the disruptive and inefficient practice of first “cross-docking” Unified’s goods at Mi Pueblo’s Distribution Center.

The Board has long held that a Section 8(a)(5) violation occurs *only if* the unilateral change has a material, substantial and significant impact on employees’ terms and conditions of employment. Here, as the ALJ found, the General Counsel presented no evidence that the decision to eliminate the cross-docking and have Unified’s products delivered directly to Respondent’s retail stores had any impact on drivers whatsoever. As noted by Judge Laws, Respondent laid off no driver as a result of this change, and drivers saw no increase or decrease in their work load, or any other change to their terms and conditions of employment. Thus, the ALJ correctly concluded that this particular operational change did not violate Section 8(a)(5) of the Act. On this issue, accordingly, the Board should affirm the ALJ’s decision and overrule the General Counsel’s exceptions.

II. 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.

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) In response, Respondent made numerous operational changes that have resulted in a far more efficient and productive distribution center, including eliminating the cumbersome and disruptive cross-docking of Unified product at the D.C. which is the subject of the General Counsel's cross-exceptions.

B. Mi Pueblo Eliminates Cross-Docking of Unified Products

Unified (also known as Western Growers), one of two wholesale grocery suppliers in Northern California, supplies a large volume of dry goods and perishables to Respondent's retail stores. Unified's warehouse is located in Stockton, California. Respondent's retail stores order products they need directly from Unified, which has its own ordering system that operates independently from the D.C.'s ordering system. Before 2008, Respondent used a contract carrier, Continental C, to deliver Unified's products directly to Respondent's retail stores. (TR 82; 274-75; 290) Beginning in 2008, Respondent changed this practice and, instead, had Continental C deliver unified products to the D.C. Once at the D.C., Unified products were

unloaded, staged and then reloaded onto Respondent's trucks for delivery to the retail stores.¹ This process is referred to as "cross-docking." (TR 82-85)

In addition to the many problems facing the D.C., Respondent became concerned about the inefficient and disorganized practice of cross-docking Unified products at the D.C. prior to delivering those items to the stores. (TR 296) Mi Pueblo's managers came to realize that it made no operational sense to cross-dock Unified shipments at the D.C. prior to delivering the products to Respondent's stores. Doing so created a one-day delay in the stores' receipt of product. Worse, 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 and less efficient.² (TR 298-300)

Discussions about these concerns ensued in which Respondent considered the elimination of cross-docking Unified products at the D.C., alternative methods of getting Unified product to the stores from Stockton, and other means to address warehouse inefficiencies. (TR 297-298; 311-312, 314) As it looked closely at the practice, Respondent discovered that cross-docking Unified products created the following problems:

- It added unnecessary work for order selectors and loaders, in the form of unloading the Unified product from the third party carrier, staging the product, and then reloading the product into Distribution Center trailers to be delivered to the stores. (TR 252-3)
- Cross-docking caused delays because Continental C was often late with its deliveries of Unified product, thus forcing D.C. drivers to hold off on departing for store

¹ There is no evidence that any bargaining unit driver performed the tasks of unloading, staging and reloading any Unified product.

² 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.

delivery until such time as Continental C arrived and its product was loaded onto D.C. trailers. (TR 241-2)

- Unified's cross-docked pallets would often need to be staged overnight in the D.C. aisles, which caused significant congestion. (TR 242-3) This congestion in turn caused delay and inefficiencies amongst D.C. order selectors as they built their loads, which in turn had an effect on the entire operation. (TR 242-3) The congestion caused by the Unified cross-docked items also had a negative impact on forklift drivers as they attempted to navigate throughout the D.C. to refill slots. (TR 243)

Finally, in April 2011, the D.C. ceased contracting with Continental C to have Unified products cross-docked at the D.C. (TR 240-241). In other words, Respondent discontinued its three-year unsuccessful experiment of having Unified products picked up by a third party (Continental C) at Unified's facility in Stockton and dropped off at the D.C., and then having the product reloaded onto a D.C. truck by loaders and delivered to Mi Pueblo stores by D.C. drivers. This was nothing more than a return to its earlier, and far more coherent, practice of having products delivered directly from Unified's warehouse in Stockton, California to the Mi Pueblo store locations. (TR 286) This was another attempt to further increase D.C. efficiencies, which were being stymied by the cross-docking as outlined above.³

There is no dispute that the decision to cease cross-docking of Unified products has led to increased efficiency. (TR 244) Order selectors are now better able to select orders without being delayed by congested aisles, as are the forklift driver operators.⁴ (TR 244) This increased efficiency has in turn had a positive impact on the ability of such employees to prepare loads by

³ Mi Pueblo's "Distribution Center Utilization Analysis," an exhibit that the ALJ credited, demonstrates the wisdom in Respondent's decision to discontinue its practice of cross-docking Unified products.

⁴ Order selectors and forklift drivers are not bargaining unit employees.

the time Distribution Center drivers arrive in the morning. (TR 244) Neither the General Counsel nor the Union disputed this evidence or provided any competing evidence.

The ALJ accepted Respondent's evidence demonstrating that the decision to stop cross-docking Unified products in April 2011 had no effect on D.C. drivers, e.g. there was no change in the number of deliveries made to the stores by D.C. drivers, nor was there a reduction in driver hours worked. (TR 240-241, 273-274) In fact, it is undisputed that the decision to stop cross-docking Unified products at the D.C. resulted in *no* change in the number of deliveries or hours worked by drivers. This is because around the time that the D.C. ceased to cross-dock Unified products, it also began to stock more private label products, which increased the number of pallets going to the stores from the D.C. The number of deliveries and pallets did not change as a result of the cross-docking decision and, therefore, the decision had no effect on D.C. drivers.⁵ (TR 241, RX 21) As the ALJ correctly found: "No drivers had their hours reduced or were subject to layoffs as the result of the decision to eliminate cross-docking Unified products." (ALJD 8:13-14)

III. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT DID NOT VIOLATE THE ACT WHEN IT SUBCONTRACTED THE UNIFIED PRODUCTS DELIVERIES

The burden of proving that an employer has violated Section 8(a)(5) of the Act rests with the General Counsel. For a unilateral change to violate the Act, the change must materially, substantially and significantly impact employees' terms and conditions of employment. *Ironton Publ'n, Inc.*, 321 NLRB 1048, n.2 (1996). An employer is *not* obligated to bargain over changes so minimal that they lack an impact. *Rust Craft Broad. of N.Y.*, 225 NLRB 327 (1976); *Peerless Food Products, Inc.*, 236 NLRB 161 (1978) (where there has been no material, substantial, and

⁵ If anything, the decision impacted non-bargaining unit employees (e.g., loaders, order selectors and forklift drivers).

significant change in a condition of employment, the unilateral action will not constitute a breach of an employer's bargaining obligation); *Alan Ritchey, Inc.*, 2002 NLRB LEXIS 140, at *129 (Apr. 19, 2002) (the change must "have a real impact on or be a significant detriment to the employees or their working conditions") (internal quotations omitted; citations omitted). The General Counsel bears the burden of establishing that the change was material, substantial and significant. *North Star Steel Company*, 347 NLRB 1364 (2006).

The change at issue here is Respondent's decision to eliminate cross-docking of Unified products. Indeed, as Mi Pueblo came to realize, there was no valid business reason for subcontractors to deliver Unified's products to the D.C. (where Respondent's non-bargaining unit employees would unload the products, stage them and reload them onto Respondent's trucks for delivery to retail stores) when the subcontractors could easily and more efficiently deliver those products directly to the stores without disrupting the D.C.'s operations. As the ALJ correctly found:

[T]he decision to have Unified deliver its products directly to the stores did not result in the layoff of any additional drivers, nor did it significantly impact their wages or hours of work. The nature of the work the drivers performed did not change. ***Both before and after cross-docking was eliminated, Respondent's drivers delivered products from the DC to the stores.***⁶

(ALJD 20:14-18) (emphasis added). Thus, the ALJ's conclusion that Respondent did not violate Section 8(a)(5) when it made this change must stand.

⁶ There is no evidence in the record to establish that any driver was laid off as a result of the discontinuance of cross-docking at the D.C. Notably, the General Counsel cited to no such evidence. Nor did he cite to any evidence to demonstrate that drivers experienced ***any*** change in their terms and conditions of employment as a result of the change at issue in the GC's Exceptions.

The General Counsel claims that the ALJ erred for two reasons. First, the General Counsel claims that under *Overnite Transportation*, 330 NLRB 1275 (2000)⁷ and *Torrington Indus.*, 307 NLRB 809 (1992), Respondent was obligated to bargain the decision to discontinue cross-docking by characterizing the change as “the substitution of one group of workers for another.” (GC Exceptions at 5) Next, he claims, again without any citation to the record, that the change had a direct impact on the work of drivers or, in the alternative, there was a “possibility” that drivers would experience an increase or decrease in their work load. (GC Exceptions at 4-5) The General Counsel’s arguments fail.

A. Respondent Was Not Required To Bargain Over The Decision To Discontinue Cross-Docking Because The Change Did Not Result In One Group Of Workers Replacing Another Group Of Workers

The General Counsel claims that Respondent was required to bargain with the Union over the decision to discontinue cross-docking under the Board’s decisions in *Overnite* and *Torrington*. In this regard, the General Counsel claims that the decision to have Unified deliver products directly to Mi Pueblo stores instead of the D.C. was “a classic case of the substitution of one group of workers for another.” (GC Exceptions at 5) The General Counsel’s attempt to fit the change to cross-docking practices under the *Torrington* umbrella fails on the facts and the law.

In *Torrington*, the employer unilaterally replaced two bargaining unit drivers with non-bargaining unit drivers and independent haulers. Citing *Fibreboard*, the Board found that the employer had unlawfully failed to bargain over the decision to replace the drivers. The Board majority noted that “*Fibreboard* subcontracting” occurs where the employer merely replaces one set of employees with another. Similarly, in *Overnite*, the employer unilaterally subcontracted

⁷ In an unpublished decision, the Third Circuit Court of Appeals reversed the Board’s decision in *Overnite. Overnite Transp. Co. v. NLRB*, 248 F.3d 1131 (3d Cir. 2000).

its transportation services because the company experienced a substantial increase in freight demands that were overwhelming its ability to service customers using regular employees, experienced a high degree of absenteeism and had difficulty hiring new drivers because of licensing requirements. In both cases, one group of employees (i.e., the subcontractor's employees) were merely substituted for another group of employees (i.e., the employer's employees).

Here, no drivers were replaced as a result of the decision to have Unified deliver its products directly to Mi Pueblo's retail stores. In fact, it is hard to imagine how the elimination of cross-docking can be viewed as resulting in the simplistic substitution of one group of drivers for another to perform the same work. Indeed, the ALJ correctly rejected the General Counsel's argument that this change had the same result as in *Overnite* and *Torrington*. Specifically, for two years before the change, a subcontractor delivered Unified products to the D.C. The only change that took place was to have the subcontractor deliver their products differently, i.e., directly to the stores. Deliveries that were subcontracted were still subcontracted out, but in a different manner. This was part of a broader decision involving overcrowding in the warehouse and the redundant work on the part of the loaders, as the products were being unloaded from the subcontractor's trucks, stored and then reloaded onto Respondent's trucks for delivery to Mi Pueblo stores. The ALJ correctly concluded that merely eliminating the stop between Unified's location and Mi Pueblo stores did not result in the substitution of one group of workers for another. There is no bargaining obligation under these facts. The ALJ's decision should be upheld.

B. The General Counsel Failed To Meet His Burden Of Proving That The Change Materially, Substantially And Significantly Affected Drivers' Terms And Conditions Of Employment

The General Counsel claims that the ALJ erred in concluding that the elimination of cross-docking of Unified products did not result in a material, substantial and significant change affecting drivers' terms and conditions of employment. Rather than point to any evidence rebutting the ALJ's finding that there was no impact on drivers' terms and conditions of employment as a result of elimination of cross-docking, the General Counsel faults the ALJ for purportedly failing to adequately explain how Respondent's evidence established that it did, in fact, make up for any lost volume resulting from elimination of cross-docking. In addition, the General Counsel claims that the mere "possibility" of a change in terms and conditions of employment is sufficient to require a finding that Respondent's change to the cross-docking process violated the Act. Again, the General Counsel's arguments are unsupported by either the law or the facts.

First, the ALJ correctly rejected the General Counsel's evidence that drivers experienced a reduction in hours after cross-docking was eliminated given evidence demonstrating "that there were fluctuations of a similar nature both before and after elimination of cross-docking Unified products." (ALJD 20:20-28) The General Counsel claims it to be "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" (GC Exceptions at 6) The General Counsel, however, failed to refute evidence that Respondent presented which unquestionably supports the ALJ's conclusion that Respondent "made up this volume by increasing its private label products and adding stores." (ALJD 20:33-36) The ALJ correctly reminded the General Counsel that he has the burden of proof and that he "therefore was responsible for gathering and presenting evidence to establish a change in volume." (ALJD 20:34-36; 20:47-49)

Notably, the General Counsel cites no such evidence in his brief. Rather, he criticizes the quality of Respondent's evidence and the conclusions the ALJ drew from it. Having failed to present evidence showing an increase or decrease in the volume of loads after the change, or that such a change was traceable to the elimination of cross-docking, or to show that drivers were impacted by the change in any respect, the General Counsel's claims simply fail on the facts.

The General Counsel's reliance on *Overnite* is likewise unavailing. As noted above, the Third Circuit Court of Appeals reversed the Board's decision in *Overnite* and, therefore, neither its holding nor reasoning has any application here. Regardless, *Overnite* is readily distinguishable. There, the Board concluded that even if the employees did not actually lose work, the potential that unit employees "might" have lost additional work was sufficient to require bargaining. However, the ALJ here correctly found that the "potential for lost additional work is not of significant concern under the facts presented here." More specifically:

The unrefuted evidence shows that Respondent has moved toward increasing its private label products and has continued to utilize the DC to store and stage its products for delivery. Unified is the only vendor from which stores order products directly, and no evidence was presented to show that Respondent was contemplating expanding this method to other vendors. ***Respondent's utilization analysis specifically states that the elimination of cross-docking will not require decrease of the labor force.*** Perhaps most importantly, both witness testimony and the utilization analysis establish that overcrowding and space considerations in the DC limited the amount of additional products it could service. ***The General Counsel has not rebutted this evidence.*** As the DC was operating at capacity both before and after elimination of cross-docking, ***the loss of the potential to expand the unit by increasing the workload would require expansion of the DC.***

(ALJD 21:10-23) (emphasis added).

Finally, the General Counsel appears to suggest that ***any time*** an employer subcontracts bargaining unit work, the employer has violated the Act regardless of the impact of the change on bargaining unit employees. The General Counsel's argument in this regard is inconsistent

with longstanding Board authority. For example, in *Newcor Bay City Div. of Newcor*, 351 NLRB 1034 (2006), the administrative law judge noted that “[e]ven if the Complaint had alleged that Respondent had violated Section 8(a)(5) by subcontracting without first notifying and bargaining with the Union, ***the evidence must establish that an employer’s unilateral action had a material, significant and substantial effect on the terms and conditions of employment.***” (Emphasis added). See also *CII Carbon, LLC*, 331 NLRB 1157 (2000) (“Since the subcontracting therefore had no ‘material, substantial and significant’ impact on the employees, the Respondent’s decision to subcontract the dock work was not unlawful.”); *Louisiana-Pacific Corp., Western Division*, 312 NLRB 165 (1993) (“[A]n employer is not obligated to bargain over a decision to subcontract unit work if the decision would have no substantial, significant, or material effect on the employees’ terms and conditions of employment.”); *Westinghouse Electric Corp.*, 153 NLRB 443, 446-447 (1965) (no violation where employees suffered no “significant detriment” as a result of subcontracting unit work).

Here, the General Counsel failed to point to any evidence, either at the hearing or in his brief, showing that the decision to discontinue cross-docking resulted in ***any*** change to the drivers “wages, hours, or terms and conditions of employment,” let alone a material, substantial and significant change. The General Counsel’s arguments notwithstanding, the ALJ correctly concluded, based on the law and the undisputed facts before her, that Respondent did not lay off any drivers and no drivers experienced any increase or decrease in their work loads, or changes to their wages or other terms and conditions of employment, because Mi Pueblo discontinued cross-docking at the D.C. warehouse. The Board should uphold the ALJ’s decision.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2012, I caused an original of the foregoing **RESPONDENT MI PUEBLO FOODS' ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S CROSS-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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