

**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
REPLY TO RESPONDENT'S ANSWERING BRIEF**

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 Respondent violated Section 8(a)(5) of the Act by subcontracting out the delivery of Unified products from Respondent's distribution center (DC) to its retail stores. The Acting General Counsel filed cross-exceptions to this aspect of the Judge's decision and Respondent filed an answering brief. The following is Counsel for the Acting General Counsel's reply to Respondent's answering brief.

II. Argument

Respondent raises two arguments in its answering brief. First, Respondent argues that when it subcontracted the delivery of Unified products from the DC to its retail stores, it was not obligated to bargain with the Union over this decision because this subcontracting did not fall within the type of subcontracting found to be a mandatory subject of bargaining by the Supreme Court in *Fibreboard Paper Products Corp. v.*

*NLRB*¹ because it did not involve the replacement of one group of workers with another but instead merely changed the way that Unified products were delivered to its retail stores. Second, Respondent's argues that it had no obligation to bargain with the Union over its decision to subcontract bargaining unit work because the changes it made were not material or substantial and did not significantly impact the terms and conditions of bargaining unit employees. As shown below, both of Respondent's arguments are meritless.

A. Respondent's Argument That It Did Not Engage In *Fibreboard* Subcontracting Is Without Merit

In *Fibreboard*, the Supreme Court held that an employer's "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 mandatory subject of bargaining. *Id.* at 215. The facts in the instant case on this issue are clear: in April 2011, Respondent discontinued the use of bargaining unit drivers to deliver Unified products to its retail stores and subcontracted this work to a third party contractor.² As a result of this change, Unified products were delivered directly from Unified's warehouse to Respondent's retail stores by an outside contractor. Thus, work formerly performed by bargaining unit employees was now being performed by an outside contractor, albeit in a slightly different manner. Furthermore, this change did not amount to a change in the scope or nature of Respondent's business because the Unified products continued to be delivered to Respondent's retail stores and Respondent continued to operate its DC. In

¹ 379 U.S. 203 (1964).

² At all times material herein Respondent has subcontracted the delivery of Unified products from Unified's warehouse to the DC.

these circumstances, Respondent was obligated to bargain with the Union before implementing its decision to subcontract out this work.

**B. Respondent's Argument That Its Changes
Were Not Material And Substantial Is Without merit.**

Respondent argues that its subcontracting of bargaining unit was not a substantial and material change because no drivers were laid off or had their hours reduced as result this change. However, it is well established that the Board does not require that unilateral subcontracting result in layoffs or reductions in hours in order for the change to constitute a mandatory subject of bargaining. In *Acme Die Casting*,³ the Board held that subcontracting of bargaining unit work does not have to result in layoffs or the replacement of workers in order to trigger an employer's obligation to bargain over the decision to subcontract. Similarly, in *Overnite Transportation Co.*,⁴ the Board held that a bargaining unit is adversely affected "whenever bargaining unit work is given away to non-unit employees."⁵ In this regard, the Board's *Overnite* decision quoted with approval the Administrative Law Judge's statement in *Acme* that "[t]he fact that no employees were laid off or suffered a reduction in their workweek - even if true - is irrelevant." *Id.* at 1276. Finally, 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. *Ibid.*

In the instant case, Respondent's unilateral subcontracting out of bargaining unit work involved the potential loss of additional work for bargaining unit employees. In that

³ 315 NLRB 202, fn. 1 (1994).

⁴ 330 NLRB 1275, 1276 (2000).

⁵ Respondent also argued that the Board should not follow its decision in *Overnite* because the Third Circuit Court of Appeals "reversed" the Board's decision in that case. However despite what the Third Circuit may have done, *Overnite* remains the existing Board law.

regard, if the delivery of Unified work from the DC to the retail stores had not been subcontracted out and if Respondent continued its planned increase in the volume of private label products that it delivers to its stores and continued to open new stores as it planned to do, then there would have been additional work for the drivers.⁶

In addition, the amount of work removed from the bargaining unit was substantial. The immediate effect of the subcontracting of the delivery of Unified products was that the drivers delivered 88 fewer pallets of Unified products per day to the retail stores. (R 21, p. 5)⁷ While Respondent contends that this drop in volume was made up by the increase in the stocking of private label products, it does not seem possible that Respondent's own projected gradual increase in volume of private label products could immediately make up for the precipitous and sudden drop in the delivery of Unified products. (R 21) At least in the short run, the subcontracting out of Unified deliveries reduced the volume of goods transported by Respondent's drivers from the DC to its retail stores. Furthermore, as noted above, but for the subcontracting of the Unified deliveries, the increasing volume of private label products and Respondent's continuing to open new stores serviced by the DC might have resulted in more hours for the drivers.

The cases cited by Respondent in support of its arguments are inapposite. In that regard, Respondent cites to the administrative law judge's decision in *Newcor Bay City Division*⁸ but that case does not even involve a Section 8(a)(5) allegation and any remarks by the administrative law judge about Section 8(a)(5) are nothing more than dicta.

⁶ Respondent argues that there was no potential for such growth because as the Judge found the facility was operating at capacity. However, there is no factual basis in the record for the conclusion that the DC was at or near capacity at the time that Respondent subcontracted out the delivery of Unified products to its retail stores.

⁷ References to Respondent's exhibits are listed as "R _."

⁸ 351 NLRB 1034 (2007).

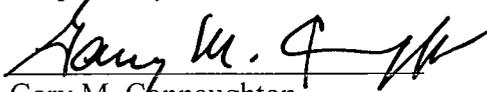
Further, although Respondent cites the Board's decision in *CII Carbon, L.L.C.*,⁹ it actually relies on remarks made by Board member Hurtgen in a footnote that were not adopted by the majority. Finally, Respondent's two remaining citations – *Louisiana-Pacific Corp., Western Division*¹⁰ and *Westinghouse Electric Corp.*¹¹ - pre-date the Board's decision in *Overnite* and thus cannot provide any meaningful guidance concerning how that case should be interpreted or applied.

III. Conclusion

For the reasons set forth above, it is respectfully requested that the Board reject Respondent's arguments in its answering brief, find merit to the Acting General Counsel's cross-exceptions, and find that Respondent violated Section 8(a)(5) and (1) by subcontracting the Unified work and order the appropriate remedies.

DATED AT Oakland, California this 30th day of May 2012.

Respectfully submitted,



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⁹ 331 NLRB 1157 (2000).

¹⁰ 312 NLRB 165 (1993).

¹¹ 153 NLRB 443 (1965).

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**AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S BRIEF
IN REPLY TO RESPONDENT'S ANSWERING BRIEF**

I, the undersigned employee of the National Labor Relations Board, state under oath that on **May 30, 2012**, I served the above-entitled document(s) *electronically*, upon the following persons, addressed to them at the following addresses:

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