

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24**

RIGID PAK CORP.

and

UNION DE TRONQUISTAS DE PUERTO
RICO LOCAL 901, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

CASE 12-CA-152811

**RESPONDENT'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION OF JUNE 8, 2016**

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I. INTRODUCTION

This brief is submitted by Rigid Pak, Corp. (“Respondent”) in support of its Cross-Exceptions to the Decision of the Administrative Law Judge Ira Sandron (“ALJ”), issued on June 8, 2016, in the referenced case.

II. STATEMENT OF THE CASE

On May 22, 2015, the Unión de Tronquistas de Puerto Rico, Local 901 (hereinafter referred to as “the Union”) filed an unfair labor practices charge against Rigid Pak for alleged violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act (“the Act”). On August 31, 2015, the Union amended the charge.

After investigating the charge, on January 29, 2016, the Regional Director issued a complaint against Rigid Pak for alleged violations to Section 8(a)(1) and (5) of the Act. In essence, the regional office alleged that on February 12, 2015 Respondent and Alpla Caribe, Inc. (“Alpla”) executed a Supply Agreement pursuant to which Respondent subcontracted the work of the Unit employees to Alpla to be performed in Alpla’s facility and, as a result, laid off all of the unit employees; that around March 31, 2015, the Respondent subcontracted the work of the Unit employees at Respondent’s facility to

employees of temporary employment agencies. The regional office further alleged that the Respondent failed to provide adequate notice to the Union about the decision to subcontract and without affording an opportunity to bargain with respect to the conduct and its effects.

As a remedy, the regional office requested that the Respondent be ordered to restore its operations, as they existed before February 12, 2015 and make whole all of the employees in the Unit. In the alternative, the regional office requested that the Respondent make whole all employees in the manner set forth in Transmarine Navigation Corp., and in addition, requiring that Respondent make whole all of the employees in the unit for all the work performed by employees of temporary employment agencies.

On February 12, 2016, the Respondent filed its Answer to the Complaint. In essence, the Respondent alleged that it had not violated sections 8(a)(1) and (5) of the Act since it had not subcontracted the employment of the unit employees, but rather closed its manufacturing operations and changed the scope nature and direction of the enterprise. It further alleged that the closing of operations was due to economic reasons, and neither the bargaining unit nor labor costs were considered as part of the decision. As such, the decision to close was not amenable to resolution through the bargaining process. It added that Rigid Pak was only required to bargain about the effects of the closing, which it did and reached a stipulation with the Union on April 15, 2015.

The hearing in this case was held on April 20 and 21, 2016. On June 8, 2016, Honorable ALJ Ira Sandron issued a Decision holding that Respondent violated Section 8(a)(1) and (5) of the Act by not engaging in bargaining over the decision to contract out unit work with Alpha and laying off unit employees and that Respondent failed to meet its

obligation to bargain over the effects of the contract out of unit work and layoff of unit employees.

The ALJ concluded that the restoration of operations to the status quo ante was not a suitable remedy inasmuch as it as “the Respondent subcontracted its operation for nondiscriminatory economic and related business reasons.” (JD 17:40). The ALJ further concluded that “ordering restoration to the status quo ante would place an unreasonable hardship on the Respondent and possibly its contract with Alpla, potentially throwing its entire operation in chaos and resulting in great financial detriment to the Company without any benefit to unit employees.” (JD 18:6-9). The ALJ, however, determined that a Transmarine remedy was appropriate. (JD 18:6-9).

Rigid Pak submits that the ALJ erred by concluding that Respondent had a duty to bargain over its decision to close its blow molding operation and enter in the agreement with Alpla with regard to the injection molding operations and that Respondent failed to bargain over the effects of said decision in violation of Section 8(a)(1) and (5) of the Act. Respondent further submits that the ALJ erred by concluding that the Union did not waive its right to bargain over the warehouse work related to the production prior to the closing and by holding that Rigid Pak subcontracted the work in its facilities after closing of March 31, 2015. Accordingly, Respondent respectfully requests that the Board decline to adopt the ALJ’s Decision and dismiss the Complaint in its entirety.

III. STATEMENT OF THE ISSUES

The principal issues are:

1. Whether Respondent had a duty to bargain over its decision to close its blow molding operation and enter in the agreement with Alpla with regard to the injection molding operations?

2. Whether Respondent negotiated over the effects of its decision to close its manufacturing operations?

3. Whether the Union waived its right to bargain over the warehouse work related to the production prior to the closing?

4. Whether Rigid Pak subcontracted the work in its facilities after closing its manufacturing operations on March 31, 2015?

IV. STATEMENT OF FACTS

A. Rigid Pak prior to March 31, 2015

Rigid Pak is a family corporation dedicated to the manufacturing and sale of plastic products. Before March 31, 2015, Rigid Pak had two divisions. (JD 2:45 to 3:50, Tr. 28). One division was dedicated to the manufacturing of plastic bottles made with high-density polyethylene through a blow-molding process. (JD 4:25-26, Tr. 28, 152). This division had five-blow molding machines identified by letters A, B, C, D and F. (Tr.164). The other division manufactured open head containers and milk crates using high-density polyethylene through an injection molding process. (JD 4:26-27, Tr. 28,152). The injection molding machines were identified as 1, 2, 6 and 7. (Tr. 164).

Prior to March 31, 2015, Rigid Pak mostly manufactured bottles through blow molding. (JD 4:25-30, Tr. 34). In terms of units, Rigid Pak would manufacture millions of bottles, but only hundreds of thousands of pails. (Tr. 34). It would also package, store and ship the manufactured products to its customers. (JD 4:33-37, Tr. 33). Rigid Pak did

not have any contracts with its customers to manufacture products. (Tr.188). It would receive purchase orders from the customers. (Tr. 188). It had no obligation to the customers in terms of volume or quantities. (Tr. 188).

As of March 31, 2015, Rigid Pak had 27 unit employees. (JD 4:33-37, Tr. 34). Unit employees would work both injection and blow molding machines (JD 4:33-36, Tr. 34,151). Employees that packaged the product would receive the product from the machine and would have to finish it by packaging. (JD 4:35-37, T. 34). Unit employees would also work in maintenance and the warehouse indistinctively with blow and injection products. (JD 4:30-33, Tr. 39). After the products were manufactured, they would be placed in the warehouse where an employee would load the products into containers. The products would be taken to the customers by independent truckers. (JD 4:35-39, Tr. 39).

B. Rigid Pak's financial situation

Beginning in the year 2013, Rigid Pak began losing money due to the economic situation of the island. (JD 4:40-44, Tr. 174). For the year fiscal year 2013-2014, Rigid Pak suffered a net income loss of \$296,045. This loss increased to \$908,465 for the year 2014-2015. (R. Ex. 2 p. 6 of 14; JD 4:40-45).

In the year 2014, Rigid Pak had a total net operating loss of \$902,647.00. (R. Ex. 1 p. 5 of 5). The costs associated to direct wages related to production amounted to \$363,311.00. See (R. Ex. 1 p. 5 of 5). Meanwhile, other direct costs amounted to \$2,795,558, of which \$582,982.00 corresponded to utilities and \$519,447.00 to total wages. (R. Ex.1 p. 5 of 5).

As of January 31, 2016, Respondent was carrying a net financial loss of \$199,954.84. (R. Ex. 4 p. 2 of 2).

C. CBA Negotiations

On April 30, 2014, the Union, through its secretary treasurer, Alexis Rodríguez, requested to bargain over a new CBA. (CG Ex. 3; JD 3:35-37). As a result, around September of 2014, José I. Carvajal (“Carvajal”), Rigid Pak’s president and part owner, met with Rafael Rosario, Union representative, David Rodríguez, union delegate, and Brenda Rosario, union delegate, to talk about the new CBA. (JD 3:40-41, Tr. 44). During the meeting, Carvajal informed the Union that the Company was in a bad financial situation inasmuch as sales had gone down. (JD 4:5-6, Tr. 45). He explained that he was in the midst of negotiating a loan with the bank and that he could not make a long term commitment like a CBA because he did not know what was going to happen with the Company. (Tr. 46). He informed the Union that he had several alternatives such as **closing**, trying to look for an alliance in order to increase their workload or look for new markets outside of Puerto Rico in order to improve sales. (JD 4:5-7, Tr. 46, 110, 130).

Carvajal told the Union that he would continue to pay the Union the same salaries and benefits until he found a way to pull the Company out of the financial trouble or until it had to close. (JD 4:6-9, Tr. 47). Labor costs were not the reason Rigid Pak was facing financial problems. (JD 4:8-10, Tr. 47). Note that since Rigid Pak’s production function is not labor oriented, direct labor costs represented only 6% of total manufacturing costs. (R. Ex. 1 p. 5 of 5).

During the meeting, Carvajal offered to show the Union Rigid Pak’s financial statements so that they could corroborate the financial situation of the Company. (JD

5:10-15, Tr.128). However, Rafael Rosario declined the offer to look over the financial statements. (JD 5:10-15, Tr.128). Carvajal told the Union that he was not going to use the bad financial situation of the Company to ask for concessions from them, especially since any concessions they could make would not make a difference in the outcome of the economic situation of the Company. (JD 5:5-10, Tr. 46).

Carvajal requested an extension or renewal of the CBA without an increase in payments because the Company could not afford any increases. (JD 5:5-10, Tr. 110). Rafael Rosario agreed to take the offer to the unit. **It was the only concession that the Union was willing to offer to the Company.** (JD 5:10-15, Tr. 129, 131). The Union agreed to an extension of the CBA for a year, but nothing was put in writing. (JD 5:10-15; Tr. 111).

After the September 2014 meeting, Rafael Rosario went to Rigid Pak on several occasions and spoke with Carvajal about the financial situation of the Company. (Tr. 48). Rafael Rosario would tell Carvajal about other companies closing and the difficult economic times the island was going through. (JD 4:40-45; Tr. 48).

D. Respondent's efforts to improve financial situation

As a result of the dire financial situation of the Company, Carvajal began to look for ways to increase sales. (JD 5:10-15; Tr. 176). He looked to export products, tried to make alliances with competitors and looked into going into new products. (JD 5:10-15; Tr.176). Carvajal considered producing clear plastic bottles (water bottles), which are a big selling item in Puerto Rico. (JD 5:10-15; Tr. 176).

This endeavor, which began in October 2014, led him to Alpla, which sells the raw material necessary to produce clear plastic bottles. (JD 5:15-19; Tr. 176). As such,

Carvajal contacted Alpha's General Manager, Richard Lisch, to let him know his desire to explore the possibility of blowing clear plastic bottles. (JD 5:15-19; Tr. 177). Lisch invited Carvajal to Alpha's facilities in Guayama to show him the process to blow clear plastic bottles, and the raw material involved. (JD 5:15-19; Tr. 178).

After seeing the equipment and the facilities, Carvajal came to the realization that there was no way that Rigid Pak could blow clear plastic bottles because it did not have the capital nor the human resources necessary to buy and run efficiently such sophisticated equipment. (JD 5:20-22; Tr. 178). Rigid Pak did not own machines that could manufacture clear plastic bottles so it would have to acquire new machinery. (JD 5:22-25; Tr. 178).

At this point, Carvajal came to the realization that Rigid Pak had no future as an ongoing manufacturing operation. The efforts to export the products were unsuccessful because he could not compete with manufacturers outside of Puerto Rico and he could not enter into the new line of business. (JD 5:15-17, Tr. 179). He realized that he was losing the business as it had existed. (Tr. 179). At this point, the Company owed over \$2,500,000.00. (Tr. 180).

As such, Carvajal decided that he had to close the plastic bottle manufacturing business because it did not have the updated equipment and the cost structure to compete in the market. **Rigid Pak had to close the blow molding division.** (JD 5:22-24; Tr. 180). Carvajal considered selling all of the machinery to cover some of the liabilities. (JD 5:20-25; Tr. 180). However, the injection molding machines owed more than its value in the market. (Tr. 180). Thus, selling those machines would not eliminate the debt.

E. The Agreement

Carvajal decided to discuss with Alpla the possibility of placing the injection molding machines in Alpla facilities so that Alpla, which had space in its plant and the expertise to run the machines, would operate the machines and sell the products. (JD 5:24-25; Tr. 180). Alpla was not in the injection molding business, so they would not be in competition. (JD 5:30-35; Tr. 180). **With this arrangement, Rigid Pak would be able to continue selling injection molded containers and repay back the debt on the injection molding equipment.** (JD 5:30-35; Tr. 181). Rigid Pak would buy the products at a discount and resell them at a small profit. (JD 5:30-35; Tr. 181). **The arrangement would also eliminate all the high costs and risks related to the operation of the injection molding operation such as energy costs and water costs.** (JD 5:30-35; Tr. 181). Likewise, it would eliminate the costs associated with damage and/or defective products.

The negotiations with Alpla were confidential and only disclosed to Rigid Pak's controller. (JD 6:5-10; Tr. 181). Carvajal could not disclose the negotiations because if the competitors found out about the closing they would have run to the customers and Rigid Pak would have lost the few customers it had left. (JD 6:5-10; Tr. 182). **Likewise, Carvajal could not disclose any the discussions inasmuch as the parties were bound by a confidentiality clause.** (GC Ex. 4 at 9 of 14). This was due to the fact that the parties were exchanging proprietary and confidential information as part of the agreement.¹

¹ Article X Confidentiality of the Agreement states, in pertinent part, that:

Buyer and Alpla agree that each will not disclose to any third party, other than its attorneys, accountants or consultants or utilize for its own benefit or that of any third party, proprietary and confidential information obtained from the other party and designated in writing as confidential (including, without limitation, formulae, ingredients,

As a result of the negotiation, Rigid Pak and Alpla reached a Supply Agreement on February 12, 2015. (GC Ex. 4 at 9 of 14; JD 5:30-45; Tr. 53). Pursuant to the Agreement, Rigid Pak would simply buy injection-molded products from Alpla at a discount because it has the machinery and molds from Rigid Pak (JD 5:30-35; Tr. 184). Rigid Pak, however, remained the owner of the injection molding machines and molds. (JD 5:30-32; Tr. 54). In exchange, Rigid Pak forfeited all control over the manufacturing process of the injection molding products. (JD 5:30-35; Tr. 185). Rigid Pak cannot instruct Alpla on how to produce, package, store and maintain the equipment and the molds. (Tr. 186). **Rigid Pak has no control over Alpla's employees.** (Tr. 188). Rigid Pak cannot direct Alpla in any way with regard to the injection molding. (Tr. 187).

Under the Agreement, Alpla is in charge of everything that has to do with manufacturing of the injection molded product. It includes the manufacturing, quality control, the storage, the shipment, and the maintenance of the injection molding machines. (JD 5:30-35; Tr. 184). Rigid Pak has no say in the process of manufacturing. (GC Exhibit 4; JD 5:30-35; Tr. 185). It has even forfeited the ability to see the machines. In order to do so, it has to ask Alpla permission to go inside the plant and see the machines. (Art.5.4 of GC Ex 4; JD 5:40-45; Tr. 185).

Pursuant to the Agreement, Rigid Pak may purchase injection-molded products from a third party if Alpla is unable to comply with the orders. (Art. 6.1 of GC Ex. 4). Likewise, Rigid Pak may reject products, which have not been produced, and package in

marketing information, manufacturing processes, samples for testing and storage, records and charts) unless the parties have entered into contractual arrangements providing for the use of such information. The term "confidential information" as used herein will include this Agreement, including all exhibits or attachments, and all forecasts related hereto...

compliance with the specifications, formulas and standards set in the Agreement. (Art. 6.1 of GC Ex.4).

Furthermore, under the Agreement, Alpla may use Rigid Pak's injection molding machines to manufacture products for other customers, other than Rigid Pak. (Art. 1, Equipment and molds, section 1.1, GC Ex. 4 p. 1 of 14). Under this scenario, Alpla pays Rigid Pak for the use of the machinery.

Rigid Pak no longer has to carry the costs of the plant, the infrastructure, the maintenance, the upkeep, electricity and the things associated cost-wise with the production of the injection molded containers. (Tr. 186). Prior to the Agreement, Rigid Pak would be responsible for the costs associated with defective products, costs increased and changes in the costs of production. (Tr. 186). For example, if a whole batch of products in a pallet is lost, Alpla is responsible for the costs associated with the loss. (Tr. 186).

F. Notice of closing to the Union

After deciding to close the blow-molding division and reaching the Agreement with Alpla as to the injection molding products, Carvajal had to determine the plan for the shutdown. (JD 6:25-30; Tr. 189). He had to take into account how much time it was going to take before stopping the machines and Alpla starting the machines in its plant. (JD 6:25-30; Tr. 189). Rigid Pak had to build some inventory so that the customers supply would not be interrupted. (Tr. 189).

It took Carvajal a couple of weeks to set a date where looking at his predictions and estimates of what it had in inventory, what the customers were ordering and how much time was needed to close the plant without any hitches and so customers would not

be affected. (Tr. 189). Carvajal could not let the customers know what was happening until it had delivered to them from the new plant in order to satisfy any question that they might have. (Tr. 190).

Around March 5, 2015, Carvajal began calling Alexis Rodríguez, Secretary Treasurer of the Union, to let him know what was going to happen. (JD 6:16-24; Tr. 190). On Monday, March 9, 2015, Carvajal was able to contact Alexis Rodríguez and informed him that it was urgent that they meet. (JD 6:16-24; Tr. 190). Alexis Rodríguez said he could meet until March 17, 2015. (Tr.190).

On March 17, 2015, Carvajal met with Alexis Rodríguez informed him about the closing of the blow-molding operation and about the contract with Alpla. (JD 6:25-30; Tr. 55, 194). During the meeting, Carvajal informed Alexis Rodríguez that he was closing the plant at the end of March because the Company had sustained over a \$1,000,000 in losses. (JD 6:25-30; Tr. 55, 194). Carvajal told him that they were going totally out of the blow-molding business and selling the machines and molds. (Tr. 56).

About the injection molding, Carvajal informed Alexis Rodríguez that he was moving the machines to Alpla and gave him a brief description of the arrangement with Alpla. (JD 6:25-30; Tr. 56). Alexis Rodríguez asked Carvajal whether there was any money for a severance package. (JD 6:35-40; Tr. 58). Carvajal informed Alexis Rodríguez that due to the huge losses there was no money for severance packages. (JD 6:35-40; Tr. 58). Carvajal asked Alexis Rodríguez for help in informing the employees the closure of the plant. (JD 6:35-40; Tr. 58). Alexis Rodríguez asked Carvajal if he could meet with the employees at Rigid Pak's facilities to inform them about the closing. (JD

6:35-40; Tr. 58). Alexis Rodríguez told Carvajal that he would inform Rafael Rosario and get back to him. (JD 6:35-40; Tr. 58).

G. Rigid Pak negotiated the effects of this decision

On March 26, 2015, Carvajal met with Rafael Rosario, Brenda Berríos, David Rodríguez and Eric Romero, Rigid Pak's controller, to inform them that he was forced to close the plant due to the financial situation, and that it was going out of the blow molding business. He also informed them about the Agreement with Alpha. (JD 7:1-5; Tr. 63, 197). It was on this date that Carvajal informed all non-unit employees that the manufacturing operations were closing. (JD 7:10-15; Tr. 63).

During the meeting, Rafael Rosario inquired whether the employees would be reemployed if the Company reopened within two years. (JD 7:15-20; Tr.120). Carvajal responded that he was not thinking about reopening the operations. (JD 7:15-20; Tr.120). Rafael Rosario requested that the laid off employees be given a bonus, Carvajal responded the Company had no money that that was the reason it was closing. (JD 7:15-20; Tr.120). Rafael Rosario requested Carvajal that the Christmas bonus, which by law must be paid in December, be advanced. (JD 7:20-25; Tr. 121). He also requested that an agreed upon date for the payment of the accrued vacation and sick leave be set. (JD 7:20-25; Tr.121). Rosario also requested that termination letters be provided to the unit employees. Rosario asked for an additional month of health insurance and Carvajal agreed. (JD 7:20-25; Tr.121, 159). Carvajal agreed to the requests by the Union. (Tr. 133). Nothing was discussed about the inventory that was left in the warehouse. (Tr. 87).

An agreement was reached as a result of the negotiations of the closing. (Tr. 135). The Union prepared a Stipulation and sent it to Carvajal, who signed it on the 15th of

April. (GC Exhibit 7; JD 7:30-35, Tr. 68). In the Stipulation, it was agreed that as a result of the Closing, the Company would advance the Christmas bonus due in December. (GC Exhibit 7).

On March 31, 2015, production was stopped. All the unit employees were provided termination letters on said date. (GC Ex.8 (A) p. 1 of 56; JD 7:30-35; Tr. 69). Managerial and administrative employees were also laid off.

H. Production after March 31, 2015

After March 31, 2015, the Respondent turned on two injection-molding machines and one blow-molding machine. (JD 7:40-45; Tr. 70). The machines were turned on for maintenance purposes. (Tr. 93). Rigid Pak has not manufactured any more products, nor has any employees working on the plant. (Tr.93). In May 18, 2015, the Union picketed in front of Rigid Pak's premises. (JD 8:30-35; Tr. 89). As a result of the picketing, Carvajal invited Alexis Rodríguez, Rafael Rosario and Brenda Rosario to enter the facilities to show them that the manufacturing operation was closed. (GC Ex. 9; JD 8:30-35; Tr. 89). Carvajal offered the Union to visit any time they wanted so that they could confirm that the Company's manufacturing operations were closed. (GC Ex. 9 p. 4 of 4).

I. Rigid Pak as of today

Today Rigid Pak no longer manufactures blow molding or injection molding products. (JD 8:6-10, Tr. 199). It changed from a manufacturing operation to a reseller. Rigid Pak no longer manufactures or packages. (Tr. 199). Rigid Pak has only administrative (Tr.199), three persons in accounting, a messenger and a handyman as well as Carvajal and his nephew. (Tr.199). Rigid Pak does not have production, maintenance nor warehouse personnel. (Tr. 200). Rigid Pak buys containers in the market

and negotiates discounts to have a margin to resell those containers. (Tr. 199). Rigid Pak only sells bottles to customers that buy pails. (Tr. 95).

Ninety-five percent of the products purchased from Alpla are delivered directly to the customers. (JD 8:1-5, Tr. 97). The other five percent is a safety stock that Rigid Pak has in its facilities. (JD 8:1-5, Tr. 97). For small companies that buy two or three pallets, Rigid Pak keeps a safety inventory so they can come a pick it up in small trucks. (JD 8:1-5, Tr.98). Rigid Pak no longer keeps raw materials to produce injection molded or blow molded products in its facility. (JD 8:6-10, Tr. 101).

On July 1, 2015 Rigid Pak sold its biggest blow-molding machine: Uniloy Model 350 R2(5) Head Blow Molding Machine for \$120,000.00. (R. Ex. 3). The other blow-molding machines and molds have been up for sale since April 1, 2015 through International Packaging Company, LLC. (R. Ex. 6, 7, 8; Tr. 102). Rigid Pak's facilities are up for sale. (Tr. 102).

Rigid Pak costs have decreased insofar as it no longer has the costs related to the plant and infrastructure. (Tr. 208). The office is the only part of the facility that is working. (Tr. 209). As such, Rigid Pak's electricity and water costs have decreased. (Tr. 209). As of today, Rigid Pak does not have high electricity costs nor maintenance costs related to the maintenance of the machines, the chillers, the cooling towers, transformer stations, equipment to move resin around. (Tr. 219). Rigid Pak has been able reduced its costs in over \$1,000,000.00. (Tr. 219). However, Rigid Pak is still a failing business.

V. ARGUMENT

A. The ALJ erred by concluding that Rigid Pak had duty to bargain over its decision to close its manufacturing operations.

The ALJ concluded that Respondent violated sections 8(a)(1) and (5) of the Act by failing to bargain with the Union over its decision to subcontract the work of the unit by entering into an Agreement with Alpla. It is Respondent's position that the ALJ erred since the evidence shows that Rigid Pak did not subcontract the work of the unit but rather closed its operations and changed the scope, direction of its business. As such, pursuant to First National Maintenance Corp., and subsequent interpretations, Rigid Pak did not have to negotiate over said determination insofar as it was not amenable to resolution through bargaining. See AG Communications Systems, 350 NLRB 168 (2007). Respondent was only required to negotiate over the effects of the decision, which it did as shown by the evidence proffered.

In First National Maintenance, the Supreme Court held that an employer had no duty to bargain over its decision to terminate a nursing home contract, but was required to bargain about the effects of that decision. In said case, the employer was a corporation engaged in the business of providing housekeeping, cleaning, maintenance and related services for commercial customers. The employer had a contract with a nursing home to perform maintenance work. See First National, 452 U.S at 669. Given that the contract was not remunerative and the employer was losing money, the employer decided to discontinue its operations in the nursing home. This decision led to the discharge of the employees performing maintenance work in the nursing home. The employer notified the decision while negotiations for a new collective bargaining agreement were taking place. Id. at 669.

In analyzing whether First National had a duty to bargain over its decision to discontinue operations, the Supreme Court identified three types of management

decisions: (1) those with “only an indirect and attenuated impact on the employment relationship”; (2) those that “are almost exclusively ‘an aspect of the relationship’ between employer and employee,” such as “the order of succession of layoffs and recalls ... [and] work rules”; and (3) those “that [have] a direct impact on employment... but have as [their] focus only the economic profitability of” non-employment-related concerns. Id. at 677.

The Court indicated that “the concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties’ economic weapons will result in decisions that are better for both management and labor and for society as a whole.” Id. at 678. The Court stressed that “this will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice.” Id. at 679.

To that effect, the First National Court established that “in view of an employer’s need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining, outweighs the burden placed on the conduct of the business.” Id. at 679.

The Court reasoned that requiring an employer to bargain over a decision to close an operation could hamper the employer’s need for speed, flexibility and secrecy in meeting business opportunities and exigencies. Id. at 683. It stressed that “the publicity

incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer may also have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.” Id. at 683. The Court added that requiring bargaining over this type of decision “could afford a union a powerful tool for achieving delay, a power that might be used to thwart management’s intentions in a manner unrelated to any feasible solution the union might propose.” Id. at 683

Lastly, it concluded that “the harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business for purely economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision, and we hold that the decisions itself is not part of §8(d)’s “terms and conditions[] over which Congress has mandated bargaining.” Id. at 683. The Court emphasized that employees’ interests are significantly protected by the requirement of bargaining over the “effects” of a closing and that the union is protected by section 8(a)(3) from a partial closing that is motivated by anti-union animus. Id. at 683.

On the other hand, the Board has stated that “the distinction between subcontracting and partial closing... is not readily apparent.” See Chemical Solvents, Inc., 362 NLRB 164 (2007) citing Bob's Big Boy Family Restaurants, 264 NLRB 1369, 1370 (1982). It added that “it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer’s involves and aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues ‘particularly suitable for resolution within the collective

bargaining framework.’ If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents ‘a significant change in operations’, or a decision lying ‘at the very core of entrepreneurial control’, the decision will not fall within the scope of the employer’s mandatory bargaining obligation.” Id.

In Dubuque Packing, 303 NLRB 386, *enforced sub nom* United Food & Commercial Workers, Local 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993), the Board established a test for determining a decision to relocate work is mandatory subject of bargaining. This case was cited by the GC in its Post Trial Brief, as applicable to the instant case. (CG Post Trial Brief 20).

Under the Dubuque Packing test, the General Counsel has the initial burden of showing that the decision was “unaccompanied by a basic change in the nature of the employer’s operation.” Id. at 391. The Respondent then has the burden of rebutting the General Counsel’s prima facie case by establishing: (1) “that the work performed at the new location varies significantly from the work performed at the former plant,” (2) “that the work performed at the former plant is to be discontinued entirely and not moved to the new location,” or (3) “that the employer’s decision involves a change in the scope and direction of the enterprise.” Id. **Alternatively, the employer may show either that “labor costs (direct and/or indirect) were not a factor in the decision” or that “even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer’s decision to relocate.”** Id. (emphasis ours).

Applying the tests established in First National Maintenance and Dubuque Packaging to the facts of this case, it must be concluded that the ALJ erred by concluding that that Rigid Pak had a duty to bargain with the Union over the decision to close the blow molding operation and enter into the agreement with Alpla with regard to the injection molding operations. This insofar as Rigid Pak's decision fits squarely on the third type of management decisions identified by the Supreme Court in First National. That is, managerial decisions "that [have] a direct impact on employment... but have as [their] focus only the economic profitability of" non-employment-related concerns." Additionally, the evidence clearly showed that the labor costs were not a factor in the decision and that the union could not have offered any concessions that could have changed Rigid Pak's decision.

The record is clear that Respondent's decision to close the manufacturing operations and reach the agreement with Alpla was based on pure economic reasons. Labor costs were not a factor in the decision. It was a decision that involved considerations of corporate strategy fundamental to preservation of the enterprise. See Oklahoma Fixture Co. 314 NLRB No. 159 (1994) (holding that a decision to subcontract and immediately lay off the unit employees did not violate section 8(a) (5) and (1) of the Act.)

What is more important, the evidence shows that the decision to close was not amenable to resolution through bargaining. The Union had no control authority or even potential control over the basis for the decision. To this effect, the record shows that there were no concessions that the Union could have provided which would have changed the employer's decision. The Respondent had a net loss of over \$900,000.00 in

the year 2014, while the manufacturing labor costs amounted to around \$369,000.00. These labor costs represented only 6% of the total manufacturing costs. Therefore, even assuming arguendo that the Union would have agreed to work pro bono for a whole year, the Company still would have experienced huge losses and be forced to close. As to this point, it must be taken into account that the only concession that the union was willing to make was granting an extension or renewal of the CBA. Clearly, this concession would have been futile.

The ALJ, however, declined to follow Rigid Pak's contention that due to the financial situation of the Company bargaining would have been futile and that no amount of concessions would have made any difference relying in the case of Pertec Computer Corp., 284 NLRB 810 (1987). (JD 13:45-50). The facts and holding in Pertec are wholly distinguishable from the instant case and thus, should not be applied to the instant case.

In Pertec, the Board rejected the employer's bare assertion that bargaining over the decision to relocate and subcontract unit work would be pointless because the union would never agree to wage cuts substantial enough to make reversal of the decision economically sound. In said case, the employer's decision to relocate was based on a consultant's cost study, which projected savings in manufacturing costs of \$2.6 million, \$2 million of which was attributed to labor costs. Id. at 810. Labor costs were the main reason for the decision. Id. What is more, in Pertec the employer refused to provide the union with the cost study on which it based its decision to relocate. Id. at 811. Contrary to Pertec, in the instant case, Respondent provided all the financial information on which it based its decision to close, labor costs were not a factor and Rigid Pak even informed the Union that closing was a possibility due to the serious financial struggles. However,

the Union, did not offer any concessions, other than staying the CBA negotiations. As such, Pertec's holding is inapplicable to the present case.

Furthermore, based on the evidence on the record, it is clear that requiring bargain over the decision to close and reach the agreement with Alpla would have placed a significant burden on the Respondent's efforts to save the Company. See AG Communications Systems, 350 NLRB No. 15 (2007) (holding that requiring the Respondent to bargain over the its decision to integrate two unit was not suitable for resolution because it lied at the core of the Respondent's entrepreneurial control and decision making and the burden placed in the employer outweighed any benefit that might have been gained from bargaining). To this effect, the publicity incident to the normal process of bargaining could have injured the possibility of a successful transition or increase the economic damage to the business.

The ALJ stated that "to assume that the Union would have breached the Respondent's confidentiality concerns is as unwarranted as assuming bargaining over the decision would have been futile." (JD 14:22-24). This conclusion is mistaken since, as established, bargaining over the decision would have been futile and because the premature publicity regarding the negotiations could have jeopardized the agreement.

In Willamette Tug & Barge Co. 300 NLRB 282, 283 (1990), the Board, analyzing the employer's duty to notify the union about the sale of the business, held that "sales negotiations may be complex, conditioned on other factors, and delicate, and as a result the seller may desire, or the purchaser may insist on, strict secrecy to ensure against economic injury to the business such as the loss of customers until the sale agreement is executed." Id. "Premature publicity regarding sales negotiations, rather than promoting

the opportunity for effects bargaining, may damage the viability of the operation and needlessly jeopardize the likelihood of any sales agreement being reached in the first.” Id. The Board added that the “sale of a business does not depend just on the seller’s desire to sell. The sale of a business to a purchaser necessarily requires the purchaser’s assent to the terms of the sale before the sale actually takes place. Even after the purchaser and seller agree on the terms, significant contingencies may remain...Until these contingencies are satisfied, the seller may not be able to say with any degree of assurance that the sale will go through.” Id.

Although the present case did not involve the sale of the business, Willamette’s reasoning regarding the need for confidentiality during business negotiations between companies should be applied to the instant case. The evidence in this case clearly supports said reliance. To this effect, the evidence clearly shows that Rigid Pak could not disclose with the union the negotiations with Alpla since the disclosure was precluded by the parties and it could have jeopardize the negotiations. (JD 6: 5-10; Tr. 181, 182, GC Exhibit 4 at 9 of 14). Accordingly, it must be concluded that the ALJ erred by concluding that Respondent’s confidentiality concerns were unwarranted.

From the above discussion, it is clear that the harm likely to be done to the Respondent’s need to operate freely in deciding whether to shut down part of its business for purely economic reasons outweighed the incremental benefit that could have be gained through the union’s participation in making the decision. As such, it must be concluded that Rigid Pak’s decision to close its manufacturing operations is not part of §8(d)’s “terms and conditions[] over which Congress has mandated bargaining.”

The evidence shows that the decision to close the manufacturing operations and enter into the agreement with Alpla constituted a significant change in operations and a decision lying at the very core of entrepreneurial control which does not fall within the scope of the employer's mandatory bargaining obligation. See Chemical Solvents, Inc., 362 NLRB 164 (2007).

To this effect Rigid Pak is no longer the same enterprise it was prior to March 31, 2015. Rigid Pak has become a reseller. It purchases products in the open market and resells them to customers that place orders. Rigid Pak only has administrative employees and no longer has the costs associated with the manufacturing operations. **The blow molding operation no longer exists.** Rigid Pak sold its biggest blow molding machine for \$120,000.00 on July 1, 2015 and the rest of the blow molding machinery is up for sale along with the molds. Rigid Pak only resells blow-molded products to customers that buy injection molded containers. Furthermore, and more important, Rigid Pak has no control over the operations of the injection molding machines placed in Alpla. It is simply a customer who buys the injection-molded containers from Alpla. All the risks and costs associated with manufacturing have been passed on to Alpla. Rigid Pak no longer has to deal with defective products or the energy costs associated with the operation of the machinery. Furthermore, Alpla may manufacture injection-molded products using Rigid Pak's machinery and sell it to third parties. Lastly, Rigid Pak may purchase injection-molded products from third parties if Alpla is unable to do so.

Therefore, contrary to the ALJ's conclusion, Rigid Pak's decision to enter into the agreement for injection molded products with Alpla is not subcontracting. The decision was a change in the scope and direction of the enterprise which is clearly supported by

the management-rights clause of the CBA which allows management to act unilaterally in regards to the methods, procedures and the means of manufacturing, distribution and management as well as to warehouse and plant relocation. (GC Ex. 2(B) page 17 of 23). Furthermore, the decision cannot be considered subcontracting insofar as the record clearly shows that Rigid Pak does not have the ultimate control over the employees that operate the injection molding machinery. See Torrington Industries, 307 NLRA 809 (1992) (holding subcontracting was mandatory because that was involved is the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer.).

On the contrary, Rigid Pak has no control over the manufacturing process nor over the employees working the machines. Moreover, Rigid Pak **purchases products** manufactured by Alpla, it does not pay Alpla to operate the machines and manufacture the products. In spite of the fact that Respondent no longer has control over the production of the injection-molding process, the ALJ understood that Respondent subcontracted the injection-molding operation because “it maintains some oversight authority over the manufacturing process and, consequently, Alpla does not have unfettered sole control.” (JD 13:13-15). This conclusion by the ALJ is insufficient to sustain that the Respondent subcontracted the injection-molding process. As it pertains to the Act, the only aspect of subcontracting that should be considered is the labor aspect. This aspect is clearly under the unfettered control of Alpla. (JD 13:13-15).

In light of the above, it must be concluded that the Respondent’s decision to close its manufacturing operations and enter into the agreement with Alpla to purchase

injection molded products was a management decision exempt from bargaining under First National Maintenance.

In the alternative, based on the particular facts of this case, the ALJ should have concluded that Respondent did not have a duty to bargain over the decision to close the blow-molding division, but only as to the effects of said decision. With regard to the injection-molding division, assuming that the agreement with Alpla constituted mandatory bargaining subcontracting, the ALJ should have ordered negotiations as to the decision and its effects. Contrary to the ALJ's conclusion, this type of bargaining would have been feasible by using the seniority of the unit employees.

B. Rigid Pak's negotiated over the effects of its decision as required under the Act.

Although Rigid Pak was exempt from bargaining about its decision to close its manufacturing operations pursuant to First National Maintenance, it was obligated to bargain over the effects of the closing in a meaningful manner and at a meaningful time. See AG Communications Systems, 350 NLRB No. 15 (2007).

Contrary to the ALJ's conclusion, the record shows that Rigid Pak bargained over the effects of the closing with the Union in meaningful manner and time. Carvajal attempted to contact the union as soon as he determined the date of the closing. It could not be done prior to said date insofar as there were confidentiality issues and because it was necessary in order to minimize a potential losses of clients due to the uncertainty created as a result of a closing. The Respondent was able to contact Alexis Rodríguez on March 9, 2015 to inform him about the decision.

However, in spite of the fact that Carvajal said it was urgent Alexis Rodríguez said he could not meet until March 17, 2015. On said date, Carvajal informed Alexis of

the expected closing by March 31, 2015 and the agreement. However, it was not until March 26, 2015, nine days later that the Union met with Carvajal, upon his insistence to discuss the effects of the closing.

During the March 26 meeting, the Union and the Respondent were able to reach an agreement as to the effects of the closing. As result, it was agreed that the unit employees would be paid an additional month of health insurance, and the Christmas bonus would be advanced. Likewise, termination letters would be provided at the date of the closing and liquidation of accrued sick leave and vacation would be paid on an agreed upon date. On April 15, 2015, a stipulation was signed by the Union and the Respondent.

Therefore, it is clear that Rigid Pak negotiated in good faith the effects of the closing of operations. See Chemical Solvents, Inc., 362 NLRB N. 164 (2015) (holding that effects bargaining is intended to provide a union with an opportunity to bargain in the employees' interest for such benefits as severance pay, payments into pension funds, preferential hiring, reference letters, health insurance and retraining funds.).

Even though the Union and the Respondent negotiated over the effects of the closing and reached an Agreement, the ALJ concluded that the Respondent failed to meet its obligation to bargain over the effects because it did not notify the decision to the union with sufficient time prior to the implementation. (JD 15:49-50).

It is Respondent's position that the ALJ erred insofar as Respondent had valid confidentiality concerns regarding the disclosure of the closing of operations and the agreement with Alpla. As to this point, Respondent refers to its previous discussion regarding the applicability of Willamette Tug & Barge Co. 300 NLRB 282, 283 (1990) to the instant case.

Additionally, it is Respondent's position that the Union was well aware of the Company's financial difficulties since at least September of 2014. It was even aware of the possibility of closing of the Company. (JD 4 5:10). Therefore, the ALJ's conclusion that "Carvajal's telling Alexis Rodríguez on March 9 that it was 'urgent' that they meet failed to amount to valid notice of the shutdown" (JD 15:15-16) is incorrect. The Union should have known that closing (or something similar) was impending when the employer unilaterally contacted its representative and requested an urgent meeting. This especially since the Union was aware of the financial struggles of the Company. Moreover, had the Union been more assertive it would have inquired about the "urgent" reason on March 9, 2015, not wait eight days (until March 17) to finally discover basis for the urgency. What is more, on March 17, the Union could have requested to begin the effects negotiations immediately instead of waiting 9 days, until March 26 to begin the negotiations.

Interestingly, in spite of the fact that the ALJ found that the timing of Respondent's notifications precluded meaningful effects bargaining, the evidence clearly establishes that the Union and the employer were able to negotiate about the effects of the closing even reaching an agreement over said negotiations.

In light of the foregoing, it must be concluded that the ALJ erred in concluding that Respondent failed to meet its obligations to bargain over the effects of the closing.

C. The Union waived its right to bargain over the warehouse work related to the production prior to the closing.

The ALJ held that Rigid Pak used non-unit employees to move the merchandise produced prior to the closing in violation of Section (a)(1) and (5) of the Act. It is Rigid

Pak's position that the ALJ erred insofar as by reaching the closing agreement, the Union waived its right to bargain over who would move said products after the closing.

When relying on a claim of waiver of a statutory right to bargain, an employer has the burden of proving a clear relinquishment of that right. See Oklahoma Fixture Company, 314 NLRB No. 159 (1994). Under Section 8(d) of the Act, a union's right to bargain is limited to matters of "wages, hours and other terms and conditions of employment." Id. As such, a union's obligation to request effect bargaining, if it wishes to exercise its statutory right and avoid waiver, may only be triggered by a clear announcement that a decision affecting the employees' terms and conditions of employment has been made and that the employer intends to implement this decisions. Id.

In the case at bar, the evidence demonstrates that the Union waived its right to bargain about the warehouse work related to the merchandise produced prior to the closing. This insofar as the Union, while it was bargaining the effects of the closing, knew that there was merchandise left in the warehouse that needed to be moved and loaded into trailers. Obviously, this merchandise had to be sold and moved, at some point. In spite of its knowledge the Union did not request to bargain over said matters. The Union's failure to request bargaining over said matters with clear knowledge of the decision constitutes a clear waiver.

As to this point, it must be noted that Carvajal testified that the union did not inquire about who would move the merchandise left in the warehouse. (Tr. 87). In turn, Rafael Rosario testified that he inquired about who would move the inventory and that Carvajal responded that the merchandise would stay there. (Tr.135). Rosario's testimony

is not plausible taking into account that the Company was in dire financial troubles and needed to sell products. As such, Rafael Rosario's testimony as to this point should have been disregarded completely and Carvajal's testimony fully credited. See Golden Hours Convalescent Hospitals, 182 NLRB 796, 797 (1970) (the trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole).

Accordingly, it must be concluded that the ALJ erred by concluding that the union did not waive its right to bargain over the warehouse work related to the merchandise produced prior to the closing.

D. Rigid Pak did not subcontract the work in its facilities after closing

The ALJ held that Rigid Pak subcontracted the work in its facilities after the closing. As the record shows, after closing, Rigid Pak had to operate the machinery for maintenance purposes. Failure to do so would eventually make the machinery non-operational and decrease its value. The Respondent did not notify the Union since it understood that the employees would not be interested since the work would be very limited. As such, the employees who were receiving unemployment benefits would be affected. Since the machinery was operated for maintenance purposes only, it must be concluded that Respondent did not violate Section 8(a)(1) and (5) of the Act.

VI. CONCLUSION

In light of the above, it must be concluded that the ALJ erred by finding that Respondent violated Section 8(a)(1) and (5) of the Act. Consequently, this Honorable Board should not adopt the ALJ's Decision and dismiss the Complaint in its entirety.

VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY: That on this same day, a copy of the preceding Answer has been filed electronically through the Agency's Website and notified via regular mail to Margaret J. Díaz, Regional Director, National Labor Relations Board, Region 12, 201 E. Kennedy Blvd, Suite 530, Tampa Florida, 33602; by electronic mail to José Carreras, Esq., tronquistalu901@gmail.com; Ayesha K. Villegas, Counsel for the General Counsel, National Labor Relations Board, Subregion 24, avillega@nlrb.gov; Ricardo Goytia, Esq. rgoytia@gdaolaw.com.

RESPECTFULLY SUBMITTED, this 27th day of July, 2016.

s/Bayoán Muñiz
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