

**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 ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS**

**BAYOÁN MUÑIZ CALDERÓN, ESQ.**  
SALDAÑA, CARVAJAL & VÉLEZ-RIVÉ, P.S.C.  
166 De La Constitución Ave.  
San Juan, P.R. 00901  
Tel: 787-289-9250  
Fax: 787-289-9253  
E-mail: [bmuniz@scvrlaw.com](mailto:bmuniz@scvrlaw.com)

**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

**TABLE OF CONTENTS**

<b>Table of Authorities</b> .....	ii-iii
<b>I. Statement of the Case</b> .....	1
<b>II. Statement of the Facts</b> .....	4
A. Background .....	4
B. Respondent’s Financial Situation.....	5
C. CBA Negotiations .....	5
D. Respondent’s efforts to improve financial situation .....	7
E. The Subcontracting Agreement .....	8
F. Notice of Closing .....	10
G. Respondent’s negotiation of the effects .....	12
H. Production after March 31, 2015 .....	13
I. Respondent as of today.....	13
<b>III. Argument</b> .....	15
A. The ALJ erred by finding that a restoration remedy would be unduly burdensome and by failing to recommend that Respondent be required to restore its manufacturing operation, and fully reinstate and make whole the 28 laid of employees, and by failing to include appropriate remedies. (GC Exceptions 2 to 4) .....	15
B. The Board should award search-for-work and work-related expenses regardless of whether these amounts exceed interim earnings. (GC Exception 5).....	21
<b>IV. Conclusion</b> .....	23
<b>V. Certificate of Service</b> .....	23

**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

**TABLE OF AUTHORITIES**

<i>Automatic Sprinkler Corp. of America,</i> 319 NLRB 401 (1995) .....	18
<i>Bob’s Big Boy Family Restaurant,</i> 264 NLRB 1369, 1372 (1982) .....	21
<i>Century Air Freight, Inc.,</i> 284 NLRB 730 (1987) .....	18
<i>Crossett Lumber Co.,</i> 8 NLRB 440 (1938) .....	22
<i>Deena Artware, Inc.,</i> 112 NLRB 371 (1955) .....	22
<i>Enter Leasing Co. Of Florida, LLC d/b/a Alamo Rent-A-Car &amp; Teamsters Local Union No. 769,</i> 362 NLRB No. 135 (2015) .....	15
<i>Great American Sewing Company,</i> 227 NLRB 1670 (1989) .....	20
<i>Lear Siegler, Inc.</i> 295 NLRB 857, 861 (1989) .....	17, 18
<i>National Family Opinion, Inc.,</i> 246 NLRB 521 (1979) .....	20
<i>Power Inc.,</i> 399 NLRB 599, 600 (1993) .....	16
<i>Triumph-Adler-Royal,</i> 298 NLRB 609 (1990) .....	19

<i>Westchester Lace, Inc.</i> 326 NLRB 1227 (1998) .....	18, 19
<i>Winn-Dixie Stores,</i> 147 NLRB 788 (1964) .....	15
<i>Woodline Motor Freight,</i> 278 NLRB No. 152 (1986) .....	20

**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

**ANSWERING BRIEF TO GENERAL COUNSEL’S EXCEPTIONS**

Respondent Rigid Pak Corporation, (herein after the “Respondent” or “Rigid Pak”), through its undersigned counsel and pursuant to Sections 102.46(d) and (j) of the Board’s Rules and Regulations, submits the following Answering Brief in response to the Exceptions filed by the General Counsel in the above matter on July 13, 2016, and states as follows:

**I. 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 employee; 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 Alpla 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.<sup>1</sup>

In the Decision, 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 it 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). The Transmarine remedy was the alternative remedy requested by the GC. The ALJ also denied GC’s request for an order requiring the Respondent to reimburse the laid off employees for search-for-work and work-related expenses that they have incurred while searching for work regardless of whether they received interim earning for a particular quarter. (JD 19:104).

After requesting an extension, on July 13, 2016, the GC filed its Exceptions to the Decision.<sup>2</sup> In its exceptions, the GC argues 1) that the ALJ erred by failing to recommend a remedy that requires Respondent to restore its operations as they existed before it subcontracted out the unit work in violation of Section 8(a)(1) and (5) of the Act on March 31, 2015 and to fully reinstate and make whole the laid off employees; and 2) that the ALJ erred by failing to recommend a remedy that requires, as part of the make whole remedy, that Respondent

---

<sup>1</sup> Respondent has filed cross exceptions to these determinations.

<sup>2</sup> It must be noted that Respondent did not agree to the request of extension since it cannot afford any delays which could increase any back pay obligations. Respondent attempted to mediate with the Region and the Union through the Board’s ADR program. However, the GC did not even respond to the requests to mediate choosing instead to continue pursuing the present case against the Respondent in what can only be characterized as an attempt to punish the Respondent.

reimburse employees for search for work and work related expenses caused by loss of their employment, without regard to whether interim earnings are in excess of these expenses.

For the reasons set forth below, Rigid Pak requests that the GC's exceptions be denied inasmuch as 1) the evidence considered by the ALJ clearly established that the restoration and make whole remedy would not be appropriate based on the particular facts of this case, and 2) Board precedent does not support the request of search-for-work and work related expenses remedy.

## **II. STATEMENT OF FACTS**

### **A. Background**

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 Alpla'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 Alpla'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.<sup>3</sup>

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

---

<sup>3</sup> 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, 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...

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

Furthermore, pursuant to 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 Alpla. (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 15<sup>th</sup> 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.

### III. ARGUMENT

**A. The ALJ acted correctly by finding that a restoration remedy would be unduly burdensome and by not recommending that Respondent be required to restore its manufacturing operation, and fully reinstate and make whole the 28 laid off.**

The GC alleges that the ALJ erred by deciding that restoration of Respondent manufacturing operations would place an unreasonable hardship on Respondent and potentially jeopardize its contract with Alpla. The GC's contention is meritless and contrary to the purposes of the Act since, in essence, seeks the imposition of punitive measures against Respondent. See Enter. Leasing Co. of Florida, LLC d/b/a Alamo Rent-A-Car & Teamsters Local Union No. 769, 362 NLRB No. 135 (June 26, 2015) (reiterating that the Board's powers under the Act are remedial, not punitive.); see also Winn-Dixie Stores, 147 NLRB 788 (1964) (holding that the remedy should be tempered by practical considerations).

The GC argues that the ALJ's conclusion was not supported by the evidence and is speculative. GC is mistaken since the evidence clearly supported the ALJ's conclusion.

The evidence introduced and considered by the ALJ consisted of Rigid Pak's 2014 Income Tax Returns filed before Puerto Rico's Treasury Department and signed by a Certified Public Accountant (R. Ex. 1) and Rigid Pak's Audited Financial Statements as of June 30, 2015 and 2014 (R. Ex. 2). These documents established that 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. (REx. 2 at 6). They further established that 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. (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.Exhibit 1 page 5 of 5). As of January 31, 2016, Respondent the Company was carrying a net financial loss of \$199,954.84. (R. Ex. 4 p. 2 of 2).

The GC argues that this information was insufficient since Respondent failed to explain the documents. (GC Exceptions 9). This contention is egregious taking into account that the documents are clear, self-explanatory and certified by a CPA firm. Moreover, the GC had the opportunity to cross examine Respondent about its financial situation. As to this point, it is worth noting that the reason for Respondent's closing of its operations and changing the nature and scope of the business was precisely its financial situation. As such, GC cannot seriously argue that it was not prepared to litigate this issue.

It is clear that there was ample evidence to support ALJ's contention that restoration is not appropriate in the present case. Respondent introduced into evidence the best information available to establish its financial situation: the tax returns submitted to the Puerto Rico Treasury Department and its audited financial statements. These documents are self-explanatory and the GC cannot contest their validity.

On the other hand, GC argues, without any support, that "the Board has held that an order to reinstate operations in an appropriate remedy for the unilateral subcontracting of bargaining unit work." (GC Exceptions 10). Additionally, the GC sustains that restoration is appropriate because the evidence submitted is insufficient to establish that said remedy would be unduly burdensome. To support its position, the GC includes several Board decisions. However, as explained below, said cases are clearly distinguishable from the instant case.

In Power Inc. 399 NLRB 599, 600 (1993), the Board found that restoration was appropriate insofar as the decision to subcontract was based primarily on a desire to reduce costs and the employer had only closed a portion of its manufacturing operation. Id. at 599. Additionally, in said case it was found that the employer had discriminated against unit employees due to their union activities.

In Lear Siegler, Inc. 295 NLRB 857, 861 (1989), the Board found that the employer had violated Section 8(a)(3) and (1) of the Act by ceasing production in one plant and transferring to another plant, subcontracting warehousing functions and laying off its production employees because of their actions in pursuing union representation. In said case, the employer did not even contend that the decision to subcontract was economically motivated. As such, the Board concluded that the reason to subcontract the warehouse work was the union organizing campaign. Id. at 859. The Board agreed with the ALJ that the evidence introduced at the hearing did not establish that it would be unduly burdensome for the Respondent to reestablish its operation. Id. at 861. The Board noted that the employer admitted that most of its equipment remained at the facility and that all that would be necessary for restoration of production would be people and materials. Id. at 861. The Board stated that “the Respondent did not offer to show that it would be unprofitable to restore the [] operation.” Id.

More importantly, in Lear Siegler, Inc., the Board held that it is its “usual practice in cases involving **discriminatory** relocation of operations to require the employer to restore the operation in question and to reinstate all discriminatorily terminated employees, unless respondent can demonstrate that restoration of the status quo ante is inappropriate. Id. at 861.(emphasis ours). In said case, the Board decided to establish the “unduly burdensome” standard where restoration of the status quo ante was at issue. Id. The Board chose to adopt this

standard because it believed that the continued viability standard (used until that moment) was too stringent. Id.

The Board reasoned that the “continued viability standard” implied that a “restoration remedy is appropriate unless the respondent can show that its very existence would be imperiled by restoration of closed or transferred operations.” Id. The Board went on to conclude that “such a standard is unrealistically high, especially in the case of multifacility business such as the Respondent. Requiring such an entity to reopen a demonstrably unprofitable facility might not be found to threaten the survival of the enterprise if it could offset losses from the reopened facility with profits from others; however, in many instances, requiring such cross-subsidization (for indefinite periods) might well be found unduly burdensome.” Id.

In Automatic Sprinkler Corp. of America, 319 NLRB 401 (1995), the Board confirmed the ALJ’s finding that the Respondent’s decision to subcontract the unit work was discriminatorily motivated as is sought to rid itself of union-represented employees. In said case, the Respondent had stated that the decision to subcontract would “gain control of labor costs, eliminate labor negotiations, eliminate costs associated with union grievances and allow [it] to become competitive against non union contractors.” Id. at 2. The Board also confirmed that restoration was appropriate since the Respondent acted in bad faith bargaining and simply substituted unit employees with those of a subcontractor. Id. at 3.

In Century Air Freight Inc., 284 NLRB 730 (1987), the Board found that the employer had violated Sections 8(a) (5), (3) and (1) of the Act by unilaterally terminating its trucking operations, subcontracting the bargaining unit work and discharging the members of the bargaining unit. Id. at 8. In said case, the decision to subcontract was based solely on labor costs. Id. at 5.

Lastly, in Westchester Lace, Inc., 326 NLRB 1227 (1998), the Board adopted the ALJ's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act when it subcontracted the work in one of its facilities and laid off the employees who worked at that site. Id. at 1227 In said case, the decision to subcontract was based on production and scheduling problems that the employer believed were aggravated by the unit employee's contractual benefits. Id. at 1228.

The present case is clearly distinguishable from the aforementioned cases cited by the CG in support of its exceptions. First and foremost, in the instant case there is not a shred of evidence that the decision to close was discriminatory. To the contrary, the ALJ held: **"it is clear that the Respondent subcontracted its operation for nondiscriminatory economic and relate business reasons."** (JD 17:43-46) (emphasis ours). In all the cases cited by the GC the employer had discriminated against the unit employees. Furthermore, in the cases cited by the GC the employers' decisions to subcontract were based primarily on a desire to reduce costs and simply entailed the closing of part of the operation.

In the instant case, Rigid Pak's decision was based on a desire to try to save the Company. Labor costs were not the reason for the decision. As the evidence clearly shows the total costs direct costs of the operation amounted to \$2,795,558, of which \$582,982.00 corresponded to utilities and \$519,447.00 to total wages. As to this point it worth reiterating that since Rigid Pak's production function is not labor oriented, direct labor costs represented only 6% of total manufacturing costs.

Additionally and contrary to the employers in the cases by the GC, Rigid Pak did not close a section or part of its operations; it closed its entire manufacturing operation, laying off not only the unit employees but also managerial employees and administrative personnel. As of today, Rigid Pak's entire workforce consists of seven employees.

In sum, it is Rigid Pak's position that the evidence supports the ALJ's conclusion that restoration is not appropriate. This conclusion would be supported not only under the undue burdensome standard but also under the continued viability standard (which the Board decline to adopt because it was too stringent). To this effect, the evidence clearly establishes that Rigid Pak was in serious financial trouble, losing \$908,000.00 during the year 2014-2015. (JD 4 40:45 to JD 5 1:10). What is more, even after closing, Rigid Pak continues losing money. (JD 5 1:10). See Triumph-Adler-Royal, 298 NLRB 609 (1990) (holding that restoration would not effectuate the policies of the Act sine it would require the Respondent to reopen a financially unprofitable operation requiring the expenditure of substantial sums of money); National Family Opinion, Inc., 246 NLRB 521 (1979) (holding that restoration remedy would be undue burdensome even though the employer's decision to close had be discriminatorily motivated.); Great Chinese American Sewing Company, 227 NLRB 1670 (1989) (even though the plant closure and consequent termination of the unit employees violated Section 8(a)(3) of the Act the Board did not adopt the ALJ's restoration order because it would force the employer to reestablish an unprofitable operation.).

The GC further argues that the evidence as a whole militates in favor of a restoration remedy because Rigid Pak still owns and uses its original facility, and owns the molds and all but one of the machines that it used to manufacture its bottles and containers until it laid off the unit employees. (GC Exceptions 10).

GC's argument is flawed inasmuch as the evidence shows that the reasons to close the operation were the high costs related to the operation (maintenance of the machinery and utilities costs) as well as the decrease in sales. (JD 5: 1-10). Therefore, ordering restoration would

require the Respondent to incur in the operations costs that led to losses amounting \$908,000.00. Again, this is not a case where labor costs were the factor to close the operations.

The GC also argues that the expenditures of \$22,500 pertaining to the moving of the injection molding machinery to Alpha were not so great as to make a restoration remedy inappropriate. The GC makes this assertion without any support and completely disregarding that the Respondent is in dire financial straits. See Woodline Motor Freight, 278 NLRB No. 152 (1986) (holding that remedies are unduly burdensome where they would require capital investment disproportionate to a respondent's resources or impose substantial, continuing losses). On what the GC bases this contention is incomprehensible if one considers the huge losses experienced by the Company.

Lastly, it is the Respondent's position that the ALJ did not err by relying in Bob's Big Boy Family Restaurant, 264 NLRB 1369, 1372 (1982) to decline to order a restoration remedy. Applying the facts of said case to the facts of the present case clearly shows that restoration is not appropriate and that the ALJ acted correctly. To this effect, in Bob's Big Boy, the Company simply closed part of its operation, while Rigid Pak closed its entire operation. In Bob's Big Boy the subcontractor continued working in the Respondent's premises. In this case, Rigid Pak closed its entire blow molding operation and the injection molding machinery was transferred to another company—no manufacturing is done at Rigid Pak's facilities. In Bob's Big Boy, the Respondent's reasons to close a department were escalating costs and portion control. In the present case, the reason to close its manufacturing operations was its effort to not go out completely out of business.

In light of the foregoing, it must be concluded that the ALJ acted correctly by not ordering the restoration and make whole remedy since, based on the particular facts of this case,

said remedy would be unduly burdensome and would lead to the complete shutdown of the Company. Accordingly, the GC's exception must be denied and the recommended Transmarine Remedy adopted.

**B. The Board should not award search-for-work and work-related expenses regardless of whether these amounts exceed interim earning.**

In its Exceptions to the ALJ decision, the CG alleges that “[t]he ALJ erred by failing to recommend a remedy including reimbursement of the laid off employees for search-for-work and work-related expenses as part of the make whole remedy regardless of whether the employees received interim earnings for the quarters in which those expenses were incurred.” (GC Exceptions at 3, paragraph 5). In this respect, the CG further states in its Brief in Support of Exceptions that the “[d]iscriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent.” (GC Brief in Support of Exceptions at 12). To support this proposition, the GC cites Deena Artware, Inc., 12 NLRB 371, 374 (1955), and Crossett Lumber Co., 8 NLRB 440, 498 (1938). In addition, the GC contends “the Board has considered these expenses as an offset to a discriminatee’s interim earnings rather than calculating them separately.” (GC Brief in Support of Exceptions at 12). However, the GC’s arguments are inapplicable to the instant case.

As a threshold matter, pursuant to the Decision, the search for work remedy requested by the GC is unavailable to the Union because there was no discriminatory conduct in this case. Specifically, the ALJ stated that “it is clear that Respondent subcontracted its operation for nondiscriminatory economic and related business reasons.” (JD 17:40-50). What is more, the GC did not even allege that the Respondent’s decision was due to discriminatory animus.

Beyond that, the GC requests this Board to allow the purported reimbursement of expenses incurred while seeking employment and that the same be calculated separately, instead of being offset from the interim earnings. This argument is totally unavailing since the GC is requesting the Board to change a long-standing rule and precedent clearly established by its case law, as the ALJ clearly ruled. Accordingly, the GC's arguments on this respect are meritless and should be disregarded.

#### **IV. CONCLUSION**

In light of the above, the Respondent respectfully requests that the GC exceptions to ALJ's decision be denied and that the recommended Remedy set forth in the ALJ's Decision be adopted as the Board's remedy.

#### **V. 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](mailto:tronquistalu901@gmail.com); Ayesha K. Villegas, Counsel for the General Counsel, National Labor Relations Board, Subregion 24, [avillega@nlrb.gov](mailto:avillega@nlrb.gov); Ricardo Goytia, Esq. [rgoytia@gdaolaw.com](mailto:rgoytia@gdaolaw.com).

**RESPECTFULLY SUBMITTED**, this 27<sup>th</sup> day of July, 2016.

s/Bayoán Muñiz  
**BAYOÁN MUÑIZ, ESQ.**  
SALDAÑA, CARVAJAL & VÉLEZ-RIVÉ, P.S.C.  
166 De La Constitución Ave.  
San Juan, P.R. 00901  
Tel: 787-289-9250 / Fax: 787-289-9253  
E-mail: [muniz@scvrlaw.com](mailto:muniz@scvrlaw.com)