

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

RIGID PAK CORP.

and

Case 12-CA-152811

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

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S  
DECISION**

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## I. STATEMENT OF THE CASE

On July 27, 2016, Respondent filed exceptions to the Decision of the Administrative Law Judge Ira Sandron (the ALJ) in the above caption matter of Rigid Pak, Corp., Case 12-CA-152811, reported at JD-47-16, along with a supporting brief with the Board.<sup>1</sup>

Pursuant to Section 102.46 of the Rules and Regulations of the Board, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision (ALJD) for the Board's consideration.

On June 8, 2016, the ALJ issued his Decision in which properly found that Rigid Pak, Inc. (Respondent) violated Section 8(a)(1) and (5) of the Act by laying off all unit employees on March 31, 2015, without having afforded the Union adequate notice and an opportunity to meaningfully bargain over the decision to subcontract unit work and the effects of that decision.<sup>2</sup> The ALJ also properly found that Respondent violated Section 8(a)(5) and (1) of the Act by transferring bargaining unit work to non-unit employees and supervisors without providing the Union with notice and an opportunity to bargain.

Respondent excepts to the ALJ's findings that it subcontracted bargaining unit work without notifying and bargaining with the Union about the subcontracting decision and its effects. Respondent also excepts to certain findings of fact that led to the conclusion that it had subcontracted bargaining work in violation of Section 8(a)(5) of the Act.

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<sup>1</sup> General Counsel previously filed exceptions regarding the remedy and a supporting brief, and Respondent filed an answering brief to General Counsel's exceptions.

<sup>2</sup> As used herein "JD" refers to the ALJ's Decision, followed by the page and line numbers; "Tr" refers to the transcript followed by the page and line numbers; "R. Brief" refers to Respondent's Brief in Support of Exceptions to the ALJ's Decision, "GC Ex." refers to General Counsel's exhibits; "J Ex." refers to Joint exhibits; and "R Ex." refers to Respondent's exhibits.

For the reasons discussed below, the General Counsel urges the Board to deny Respondent's exceptions in their entirety, and to affirm the ALJ's findings of fact and conclusions of law.<sup>3</sup>

## **II. STATEMENT OF FACTS**

### **a. The Collective Bargaining History**

Respondent is engaged in the manufacturing and distribution of injection-molded and blow-molded containers at its facility in Juncos, Puerto Rico. (JD 2:45 to 3:5, 4:25-31; GC Ex. 18-19; R. Ex. 6). The Union has represented a bargaining unit of Respondent's production and maintenance employees since about March 11, 1983. [JD 3:5-15; J Ex. 1; GC Ex. 2]. The most recent collective-bargaining agreement between the Union and Respondent effective by its terms from August 1, 2010, to July 31, 2014. [JD 3: 5-18]. As of March 31, 2015, Respondent employed 28 bargaining unit employees. [J Ex. 1, paragraph 8; GC Ex. 8].

On April 30, 2014, Union Secretary Treasurer Alexis Rodriguez sent a letter to Respondent's President and part owner José Carvajal demanding to bargain a new contract. [JD 3:35-38; GC Ex. 3]. Sometime between September and December 2014 the parties held their first and only bargaining meeting for a successor agreement to the one that expired on July 31, 2014. Carvajal, Respondent's accountant Eric Romero, Union Business Representative Rafael Rosario and employees Brenda Rosario and David Rodriguez attended the meeting, which was held in the conference room at Respondent's facility. [Tr. 43:20 to 45:8, 109:8 to 110:6, 155:14 to 156:12]. During this meeting Carvajal informed the Union that the company had been experiencing financial difficulties and was in the midst of negotiating new financing with its bank, and sales had

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<sup>3</sup> Respondent filed 12 exceptions. This answering brief addresses Respondent's exceptions 2 through 12. General Counsel does not dispute Respondent's Exception 1, but the information disputed in that exception is not a basis to change the ALJ's finding and conclusions of law.

decreased; and that Respondent's alternatives were to close, look for new markets and clients outside of Puerto Rico and increase sales, or look for an alliance with another company in order to increase Respondent's workload. Carvajal asserts that he told the Union representatives that he would not ask for concessions from the bargaining unit because such concessions would not make a difference in Respondent's economic situation. Carvajal further testified that he told the Union that Respondent would continue paying the unit employees their current wages and benefits until he found a way to pull Respondent out of its financial problems or until Respondent had to close. He asked the Union to agree to maintain the existing wages and benefits of the collective-bargaining agreement, claiming that Respondent could not make a long term commitment on a collective-bargaining agreement because Respondent's future was uncertain. Union representative Rafael Rosario stated that if bargaining unit health insurance costs increased, Respondent should absorb that cost. Carvajal agreed to talk about a health benefit cost increase if that occurred. Union agent Rafael Rosario told the Respondent representatives that he would confer with unit employees and get back to Respondent. [JD 4:5-15; Tr. 46:2 to 48:1, 110:13 to 111:18, 128:8-13; 129:19-22; 156:13-22].

There is no evidence that Respondent informed the Union of any decision to close or reduce its operations at the parties' lone bargaining session. Rather, as noted above, by Carvajal's admission, Respondent informed the Union that Respondent was working on increasing sales and its workload. No potential dates of closing were mentioned, and there is no evidence that subcontracting or layoffs was discussed.

**b. Respondent's Operation and Bargaining Unit Work**

Since about 1980, the Respondent has been manufacturing plastic bottles or containers through a blow molding process, and open-head containers, lids and milk crates through an

injection molding process. [JD 4:25-28; Tr. 28:13-19, 31:11 to 32:1, 32:13 to 33:8, 37:2-6, 152:12-21; GC Ex. 17, 18 and 19]. Equipment and machines operated by unit employees were used to manufacture the containers and bottles in both processes. [JD 4:29-32; Tr. 36:5-25]. A total of nine machines were utilized in the operation. Specifically, machines 1, 2, 6 and 7 performed injection molding work, and machines A, B, C, D and F performed blow molding work. [Tr. 163:13 to 164:]. Respondent sold injection-molded containers to customers Lancos, Glidden, Enco, Edelcar, Crossco, Suiza Dairy and Tres Monjitas, to name just a few. [Tr. 39:23 to 40:20]. Some of Respondent's clients for blow-molded bottles were Edelcar, Laser Products, American Petroleum, and All American Containers.<sup>4</sup> [Tr. 41:3-18].

Unit employees were responsible for packaging and storing the merchandise. [JD: 4:33-38; Tr. 33:18-23, 34:14 to 35:10, 38:16 to 39:3]. This was done by wrapping the products, and then placing the product on pallets. Unit employees referred to as "suppliers" moved the pallets outside the production area with fork lifts. Unit warehouse employees would in turn transport the products to Respondent's warehouse. [Tr. 39:4-22, 165:2 to 166:7]. The warehouse employees were responsible for storing the pallets in the warehouse by properly stacking them or placing them inside containers, which would be ultimately delivered to the clients of Respondent. [Tr. 39:4-19, 166:8-12, 166:25 to 167:6]. Respondent also manufactured bleach bottles. During Respondent's first shift, when the adjacent operations of Laser Products, Inc. (Laser) were open, the bleach bottles were placed on a conveyor which connected Respondent's facility and Laser's facility. During the second and third shifts, when Laser was not open, the bleach bottles were packed by unit employees and transported from Respondent's warehouse to Laser's premises by unit employee Joseph Saldana. [Tr. 166:8-12, 167:7 to 170:4].

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<sup>4</sup> Laser Products, Inc. and Edelcar are commonly owned with Respondent. [R. Ex. 2, page 12].

All unit employees worked indiscriminately on both injection molded and blow molded products, and they were not assigned to any specific area. Machine operators could work a portion of the work day on blow-molding machine and then move to an injection molding machine. Unit employees would change machines at any given time of the day depending on operating needs. Packing employees received both blow molded or injection molded containers, and finished the assembly process, including painting, attaching handles, and boxing the products. Subsequently, these products would be move to the warehouse area by warehouse employees. [Tr.34-39].

**c. The Subcontracting Agreement with Alpla Caribe Inc.**

Toward the end of 2014, Respondent President Carvajal has a series of conversation with Richard Lisch, General Manager for Alpla Caribe Inc. (Alpla), located in Guayama, Puerto Rico, about subcontracting the manufacture of Respondent's plastic bottlers and containers. [JD. 5:15-19; Tr. 50:22 to 51:23, 176:2 to 190:3]. On February 12, 2015, Respondent entered into a 5-year "supply agreement" with Alpla. (JD 5:30-32; GC Ex. 4; GC Ex. 4, p.11 as to location of Alpla). Respondent engaged Alpla to supply it with all of Respondent's manufacturing, packaging and storing needs for both blow molded and injection molded containers. [Tr. 22-25, 50:22 to 51:23, 184:2-8; GC Ex. 4, Art. 2.2; GC Ex. 23]. Respondent agreed to "end its manufacturing operations and... rely on Alpla for all of its manufacturing needs." [GC Ex. 4, page 1, second "Whereas" clause].

**d. The Layoff of Unit Employees**

After signing the contract with Alpla on February 12, 2015, Respondent waited over one month, until March 17, 2015, to say anything to the Union. [Tr. 55:7-22, 56:16-25; 58:8-11, 59:7-9, 192:12 to 193:6]. Respondent President Carvajal called Union Secretary Treasurer Alexis Rodriguez on March 9, 2015, to request a meeting. Carvajal *intentionally* did not inform

Rodriguez about the purpose of the meeting because he did not want to advance any information to the Union. [Tr. 56:3-11, Tr. 190:16-23]. In addition, Carvajal did not want his customers to find out about his decision to cease manufacturing (and subcontract the manufacturing process to Alpla). [Tr. 189:20-25]. Carvajal wanted the changeover between the manufacturing of the products by Respondent to Alpla to be “seamless,” so customers would not find out. [Tr. 189:8-16]. He took into account the time it would take for Respondent to build up its inventory so that the flow of supply to customers would not be interrupted during the movement of machinery from Respondent’s facility to Alpla’s facility and the start-up of the manufacturing process at Alpla. [Tr. 189:12-19].

On March 17, 2015, Carvajal told the Union that Respondent was closing its plant and shutting down manufacturing by the end of March, thus providing just two weeks’ notice. [JD.6:20-31, Tr. 56:18-23, 59:7-9, 192:17 to 193:6]. At that time, Carvajal also informed the Union for the first time that Respondent had an agreement with Alpla. He told the Union that Respondent was going totally out of the blow molding business (which was not true, see *infra*) and was going to sell all of Respondent’s machines and molds and everything, and was moving its equipment to Alpla. [Tr. 56:21-25, 59:7-9, 193:1-5]. Rodriguez requested a severance package for the unit employees, which Carvajal rejected. [Tr. 58:14-17, 59:8-9, 193:10-14].

On March 26, 2015, Respondent and the Union met once again to discuss the layoffs. [Tr. 114:5-14]. Present at this meeting were Respondent’s comptroller Eric Romero and Carvajal, Union Business Agent Rafael Rosario, and unit employees Brenda Rosario and David Rodriguez. [Tr. 63:13-17]. Carvajal claimed that Respondent was going out of business because of its financial situation, and that Alpla would manufacture the injection molded containers. [Tr. 62:21 to 63:2, 119:21 to 120:5]. The Union requested a severance package and advance payment of any

and all monies owed to unit employees, mainly vacation and sick days accrued, and the accrued portion of the employees' Christmas bonus. [Tr. 63:6 to 65:1, 121:7-23, 132:18-24, 197:7-15]. The Union also asked Respondent to pay an additional month of medical plan coverage for the unit employees. Respondent, by Carvajal, rejected that proposal, arguing Respondent had already paid a month in advance of the unit employees' medical plan without having spoken to the Union about that. [Tr. 133:13-17, 197:15-18]. Business Agent Rosario asked Carvajal whether unit employees could be rehired if the facility reopened in the future, but Carvajal flatly claimed that Respondent was closing completely, that everything would be sold, and that there were no plans to reopen the operations in the future. [Tr. 120:17 to 121:2, 135:1-2, 136:6-8, 197:19-25]. Business Agent Rosario also inquired about the products that remained at the facility at the time and asked who was moving the same. Carvajal explained that the products were to remain at the facility. [Tr. 134:9-25, 136:1-8]. The parties did not reach any agreement that day. The Union representatives explained they needed to analyze the information and reduce the same to writing. [Tr. 67:8-15].

On March 30, 2015, Carvajal sent a letter to the Union reiterating the decision to cease manufacturing products at its facility in Juncos, Puerto Rico, effective on March 27, as notified during the meetings on March 17 and 26, 2015. Carvajal confirmed in this letter that the last day of work for bargaining unit employees would be March 31. [GC Ex. 3]. On March 31, Respondent laid off all 28 unit employees. [JD 7:29, Tr. 68:19 to 69:11, GC Ex. 8].

On April 15, 2015, Respondent and the Union executed a short agreement entitled "Stipulation." [Tr. 67:16-20, 67:23 to 68:4; GC Ex. 7]. The document provides for the payment of the employees' accrued Christmas bonus benefit. There is no reference to sick leave, accrued vacation or health insurance. [JD 7:30-33, GC Ex. 7].

**e. Respondent's Operations Pursuant to the Supply Agreement with Alpla.**

As set forth in the supply agreement, since March 31, 2015, Respondent has essentially ceased manufacturing at its own facility and has purchased blow-molded and injection-molded containers and bottles to sell to its customers from Alpla. [JD 8:1-2; GC Ex. 12-16]. Under the terms of the supply agreement, Respondent delivered its four injection-molding machines (machines A, B, C and D) and its injection molds to Alpla at the total cost of \$22,500, but retained ownership of the machines and molds, which are exclusively used by Alpla for the manufacture of products of Respondent under Respondent's logo. [JD 5:30-36; Tr 53-54; GC Ex. 4, Art. 1.1 and 5.8(a) and (b); J Ex. 1, paragraphs 20 to 22; GC Ex. 20, 21, 22]. Respondent's logo is embossed in the molds delivered to Alpla, so every container produced by Alpla using the molds has Respondent's logo on the bottom or the side. [Tr. 54:17-25, 55:1-6]. Respondent provides Alpla with the raw materials to manufacture the injection molded products. [JD 5:36-38; GC Ex. 4, Art.2.4]. Alpla is only permitted to use Respondent's equipment to manufacture products for entities other than Respondent if Respondent and Alpla enter into a separate written agreement. [GC Ex. 4, Art. 1.1]. There is no evidence of such a separate agreement. Although Alpla is to perform routine maintenance on Respondent's equipment under the supply agreement, Respondent remains responsible for keeping the equipment in proper working order, which includes paying for specialized technical support, spare parts and replacement parts when necessary. [Tr. 17-23, 54:4-7; GC Ex. 4, Art. 1.3]. Respondent is also responsible for reimbursing Alpla for any taxes paid by Alpla on Respondent's equipment. [GC Ex. 4, Art. 1.4]. In addition, Alpla is required to maintain Respondent's molds in good condition and bear the cost of any necessary repair or replacement of the molds, and the molds are subject to removal from Alpla's plant by Respondent at any time. [GC Ex. 4, Art. 5.8 (c) and (d)]. As

agreed, Alpla is to use the molds to manufacture products exclusively for Respondent and may not manufacture or sell crates or five gallon containers within the Commonwealth of Puerto Rico. [GC Ex. 4, Art. 3.5, 5.8].

The price for injection molded products produced by Alpla for Respondent does not include the cost of packaging materials (boxes and pallets), which are provided by Respondent to Alpla unless Respondent instructs Alpla to purchase packaging materials for those products at Respondent's cost. [GC Ex. 4, Art. 4.1; GC Ex. 23]. The cost of the products manufactured by Alpla for Respondent takes into consideration Alpla's labor costs, based on increases in the minimum wage, adjusted every two years. [GC Ex. 4, Art. 4.3(a); GC Ex. 23 refers to a yearly labor cost adjustment]. The price charged to Respondent by Alpla for manufacturing is also adjusted quarterly based on Alpla's energy costs. [GC Ex. 4, Art. 4.3; GC Ex. 23]. Respondent has agreed to absorb losses in materials up to a maximum loss allowance. [GC Ex. 4, Section 4.5].

With respect to blow molding, Alpla is to provide blow molds at its own cost to produce blown bottles for Respondent. Respondent President Carvajal admitted that Respondent purchases blow-molded containers from Alpla for sale to many of the same customers to whom it sold blow-molded containers which Respondent had produced until March 31, 2015. [Tr. 99:4-13; 212:5-19]. It has largely retained the same customers that it had before March 31, 2015. [Tr. 95:16 to 99:17, 100:7-16, 187:15-22, 212:7-13]. As in the past, Respondent's customers deal directly and exclusively with Respondent, not Alpla. [Tr. 98:12-24, 101:2-8].

Since March 31, 2015, Respondent has continued to deliver bottles and containers to its customers by independent truckers, mostly from Alpla's premises, but sometimes from Respondent's own facility, in the same manner as deliveries were performed before Respondent transferred its injection molding machines and manufacturing process to Alpla. Thus, some of the

products purchased from Alpa are stored at Respondent's facility. [Tr. 101:9-11]. Moreover, the delivery of Respondent's products has always been done by independent truck drivers and that remains the case. Respondent pays the transportation costs, even when the products are delivered directly from the Alpa premises. [Tr. 98:2\_0 to 99:3; GC Ex. 23, showing Respondent pays Alpa nothing for freight or packaging costs].

Respondent has continued to employ its supervisor, Edward Rivera Mojica. Rivera-Mojica has been performing the work of the former bargaining unit employees, mainly loading the products manufactured by Respondent and the loading of products now manufactured by Alpa, at Respondent's facility. (JD 8:44-46 to 9:2, Tr. 76:6-18, 79:13-23, 80:1-22, 81:18 to 82:1, 86:22 to 87:8, 94:22-25; 214:1-19). In addition to Rivera-Mojica, Respondent admitted it uses two employees on the payroll of Laser Products, a related company, to work at its Rigid Pak facility handling Rigid Pak products, including products that are now manufactured by Alpa for Respondent and delivered to Respondent's warehouse, for eventual delivery to or pick up by Respondent's customers. (JD 8:44 to 9:2, Tr. 82:2 to 86:9).

Respondent still owns and has possession of its former manufacturing facility. (Tr. 102:5- 8). It still employs administrative and accounting employees, a messenger, a handyman, Rivera- Mojica, President and part-owner Jose Carvajal and Carvajal's nephew at that facility. (JD 9:2- 5). In addition, although Respondent sold one of its five blow-molding machines, the other four of those machines remain at its facility. (Tr. 102:5-14, 199:20 to 200:16, 204:6-11, 209:7 to 210:18, 213:16-25; R. Ex. 3).

### **III. ARGUMENT**

**A. Respondent continues to advertise as a manufacturer of injection and blow molded products. (Respondent Exception 2).**

The ALJ correctly concluded based on the evidence that the Employer continued to advertise as a manufacturer of both injection-molded and blow molded products. (JD 9:10-15). On Respondent's website, [www.rigidpak.com](http://www.rigidpak.com), it states that it manufactures and distributes a complete line of injection and blow molded plastic containers and bottles. (GC Ex. 17). The website further provides a list and pictures of blow molded bottles and injection molded containers. (GC Ex. 18-19). In this regard, Respondent stipulated that this information regarding Respondent's business, and the products it manufactured and distributed was found on Respondent's website on April 19, 2016, the day before the hearing in this matter started. (J. Ex. 1, paragraphs 17, 18 and 19). Based on the above, Respondent Exception 2 has no merit, and should be denied.

**B. Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting the unit employee's work to Alpla and laying off unit employees, without giving the Union adequate notice or bargaining about that decision. (Exceptions 3, 4, 6, 9 and 10).**

Respondent argues that the ALJ erred by concluding that its subcontracted bargaining unit work. Respondent contends that it closed its operations and changed the scope and direct of its business.

Before and after the subcontract with Alpla, Respondent has been engaged in the business of providing blow-molded and injection-molded containers to its customers. The only difference is that the manufacturing work is now performed by Alpla employees pursuant to the supply agreement, which is, in effect, a subcontracting agreement. Thus, the nature and direction of Respondent's business was not substantially altered. Under the terms of the supply agreement, Alpla produces the products previously made by the Respondent's bargaining unit employees.

Respondent pays for much of the cost of manufacturing of the injection molded products itself, including the machinery, raw materials, packaging and shipment, and, it appears, only pays Alpla for the cost of labor on those products. Respondent also purchases blow molded products manufactured by Alpla and pays for the shipment. Alpla sells the injection and blow molded products to the essentially the same longstanding customers it had before it entered into the agreement with Alpla.

The supply agreement prohibits Alpla from selling any products to Respondent's clients and prohibits Respondent from manufacturing any of the products itself. The injection-molded containers are produced on Respondent-owned machines, which were relocated to Alpla's facility at Respondent's own cost. The agreement further sets forth certain specifications that the products must meet, and it reserves to the Respondent the right to inspect the manufacturing process, to reject and return items that do not meet its standards. Respondent admitted during trial that it carefully planned the manufacturing changeover so that supply to customers would not be interrupted or affected. It was important that it remained "seamless" to its customers.

**1. Respondent is engaged in *Fibreboard*<sup>5</sup> subcontracting of unit work to Alpla.**

It is "well established that contracting out of work regularly performed by unit employees is a mandatory subject of bargaining" and that "an employer who unilaterally subcontracts unit work without first bargaining with its employees' representative about its decision, as well as the effect such contracting will have on unit employees, frustrates collective bargaining, and thereby violates Section 8(a)(5)."<sup>6</sup> In *Torrington Industries*,<sup>7</sup> the Board streamlined its *Fibreboard* subcontracting analysis, holding that an employer's decision to engage in subcontracting is a mandatory subject of

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<sup>5</sup> *Fibreboard Paper Product Corp. v. NLRB*, 379 U.S. 203 (1964).

<sup>6</sup> *Public Service Co.*, 312 NLRB 459, 460 (1993).

<sup>7</sup> 307 NLRB 809 (1992).

bargaining, regardless of whether it is motivated by labor costs in the “strictest sense of the term.”<sup>8</sup> The Board concluded that *Fibreboard* controls when the decision involves “unit employees’ terms of employment and [does ] not ‘lie at the core of entrepreneurial control.’”<sup>9</sup> The Board explained that if “virtually all that is changed through the subcontracting is the identity of the employees doing work,” the decision does not involve a change in the scope and direction of the enterprise and thus is not a core entrepreneurial decision outside the scope of mandatory bargaining.<sup>10</sup> Therefore, in cases factually similar to *Fibreboard*, “there is no need to apply any further tests” because the Supreme Court in *Fibreboard* already determined that bargaining is appropriate.<sup>11</sup>

The arrangement between the Respondent and Alpla constitutes *Fibreboard* subcontracting and was thus a mandatory subject of bargaining. There has been no major change in Respondent’s basic operation. It remains in the business of producing and supplying plastic bottles and containers to the same range of customers. In fact, Respondent made every effort to keep its clients from knowing that it was subcontracting out the manufacturing of its products. Indeed, under the terms of the contract with Alpla, the Respondent retains significant rights over the production process itself, including the right to inspect the manufacturing process, reject items, and terminate the contract. Nor has there been any substantial change in the Respondent’s capital structure. The Respondent even continues to work its injection molding machines, which are now

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<sup>8</sup> 307 NLRB at 811.

<sup>9</sup> *Id.* (citing *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring)).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 810; *see also Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000) (reaffirming *Torrington* framework), *affirmed in part and reversed in part*, 248 F.3d 1131 (3d Cir. 2000) (unpublished table decision).

operated by Alpla employees at the Alpla facility. The Respondent's operational changes consist primarily of replacing the unit employees with Alpla employees to do essentially the same work.<sup>12</sup>

Contrary to Respondent's contentions, its subcontract with Alpla does not significantly change the nature or direction of its business and is not akin to the "partial closing" at issue in *First National Maintenance*.<sup>13</sup> Respondent did not close its facility. It merely relocated its manufacturing work and some of its equipment to Alpla.

Board law requires bargaining over the subcontracting decision in these circumstances. For example, in *Bob's Big Boy*,<sup>14</sup> the employer discontinued the shrimp processing part of its food processing operation, sold the processing equipment, and contracted with another company to provide processed shrimp to its restaurants.<sup>15</sup> The Board held that the employer's subcontracting decision was a mandatory subject of bargaining because the employer had not changed the nature and direction of its business; the employer was still in the business of providing foods, including processed shrimp, to its restaurants. Far from closing a "separate and distinct" business, the employer had merely subcontracted an integral part of its business.<sup>16</sup> In this regard, the Board distinguished *First National Maintenance* and other cases, which involved the complete termination of a business independent from the rest of the employer's operation.<sup>17</sup> Similarly, in *Michigan Ladder*,<sup>18</sup> the employer stopped manufacturing ping pong tables and ladder parts, and contracted with a subcontractor to manufacture those items at the employer's facility. The employer leased its equipment to the subcontractor and paid for the finished product. Although the

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<sup>12</sup> *Fibreboard*, 379 U.S. at 213.

<sup>13</sup> *First National Maintenance Corp., v. NLRB*, 452 US 666 (1981).

<sup>14</sup> 264 NLRB 1369 (1982).

<sup>15</sup> *Id.* at 1369-70.

<sup>16</sup> *Id.* at 1370-71.

<sup>17</sup> *Id.* at 1371 n.12.

<sup>18</sup> 286 NLRB 21 (1987).

product had to be produced to the employer's specifications, the subcontractor had the contractual right to direct the method of production. The Board, upholding the administrative law judge's decision, rejected the employer's assertion that it was no longer in the business of manufacturing tables and ladder parts and therefore had changed the scope or direction of its business. Rather, since the employer still marketed and distributed tables and ladders, which it was having manufactured subject to its ultimate control, its decision to subcontract was a mandatory subject of bargaining.<sup>19</sup>

As in *Bob's Big Boy* and *Michigan Ladder*, and as noted in connection with the *Fibreboard* analysis above, Respondent has not ceased any portion of its business. This is not a closing of operations as it contends. Rather, the Respondent has merely subcontracted with Alpla to produce containers according to its specifications, using much of Respondent's own machinery, equipment and materials, for sale by Respondent to the same group of clients. The Respondent has not closed a separate and distinct business, but has merely subcontracted an integral part of its business. Therefore, it has not changed the nature or direction of its business so as to remove the decision to subcontract from the bargaining obligation. The instant case is a subcontracting of unit work, and is distinguishable from the employer's decision to partially close in *First National Maintenance*.

The cases where subcontracting decisions have been held not to require bargaining because they involved major changes in the enterprise are distinguishable. In *Adams Dairy*,<sup>20</sup> for example, the employer terminated the distribution part of its dairy business, contracted with independent distributors to deliver milk to retailers, and terminated its driver-salesmen. The employer did not subcontract a part of its operation on which it relied in conducting the rest of its operation. Adam's

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<sup>19</sup> *Id.* at 21 & n.3, 29.

<sup>20</sup> 350 F.2d 108, 111 (8th Cir. 1965), denying enf. to 137 NLRB 815 (1962).

Dairy had nothing whatever to do with its product once the milk was sold to the independent distributors, who took title to it and sold it to whomever, and however, they chose. Thus, the decision to cease milk distribution was akin to a decision not to be in part of the business, rather than to subcontracting an integral part of the business. In the instant case, subcontractor Alpha manufactures containers for the Respondent, and Respondent sells them to its own customers. As in *Fibreboard*, Respondent merely uses different employees, employed by a subcontractor, to perform the work that must be performed in order for the Employer to conduct its ongoing business.

In *Kroger Company*,<sup>21</sup> the employer closed its "nest run" egg processing facility (which utilized eggs obtained from farmers), and began obtaining finished eggs for its grocery stores from an "integrated" egg processor, which used its own hens at the processing facility, because the supply of unfinished eggs not being used by integrated processors had decreased and become inordinately expensive. The Board held that the decision to close was not a mandatory subject of bargaining, in part because the decision represented a change in the nature of the employer's business in that the employer no longer operated any egg processing facility. However, in *Kroger* the employer did not merely subcontract the work previously performed by its employees, but began purchasing eggs, from a company that was producing them in a substantially different manner, in order to terminate an outmoded operation. Thus, the decision was similar to an employer's decision to introduce a different method of production or operation into its own enterprise, which would be an entrepreneurial decision outside the bargaining obligation. In the instant case, the Respondent merely subcontracted with another company to manufacture its

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<sup>21</sup> 273 NLRB 462 (1984).

products in substantially the same manner as the Respondent had manufactured them, and, with respect to injection molded products, with Respondent's own equipment.

**2. In the alternative Respondent's decision to contract with Alpla was a mandatory subject of bargaining under *Dubuque Packing*.**

In the alternative, the contract with Alpla is a mandatory subject of bargaining under the test set out in *Dubuque Packing*.<sup>22</sup> The *Dubuque Packing* test, although specifically relevant to work relocation decisions, can also be an appropriate framework for determining when an employer has a duty to bargain over types of employer decisions, that arguably fall within the spectrum between *Fibreboard* and *First National Maintenance*, that have a direct impact on employment but focus on the employer's economic profitability. Under the *Dubuque Packing* analytical framework, the General Counsel must establish that the employer's decision involved a relocation of unit work, unaccompanied by a basic change in the nature of the employer's operation.<sup>23</sup> The employer then has the burden of coming forward with evidence to rebut the prima facie case. If the employer establishes that the employer's decision involved a change in the scope and direction of the enterprise, the employer has no duty to bargain over the decision.<sup>24</sup> Failing that, the employer can still raise two affirmative defenses; first, it can show that labor costs, direct or indirect, were not a factor in its decision, or second, if such costs were a factor, that the union could not have offered sufficient concessions to change the employer's decision.<sup>25</sup>

The Board has held that there is no change in scope and direction of the enterprise where the employer continues to manufacture or provide the same products or services. Thus, for

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<sup>22</sup> 303 NLRB 386 (1991), *enforced sub nom. United Food & Commercial Workers, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993).

<sup>23</sup> 303 NLRB at 391.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

instance, in *O.G.S. Technologies, Inc.*, the Board determined that the employer’s unilateral subcontracting of die engineering work to a contractor who used a Chinese automated method, which produced the die approximately six to eight times quicker, was not a change in the scope and direction of the employer’s brass button business.<sup>26</sup> The Board explained that both before and after the subcontracting, the company produced and supplied brass buttons “to the same range of customers.”<sup>27</sup> Therefore, “[g]iven this essential continuity in its operations,” it did not rise to the level of a change in the scope of the enterprise or its direction.”<sup>28</sup>

Similarly, in *Mi Pueblo Foods*, the Board determined that the employer’s decision to eliminate cross-docking from its shipping operations in order to increase efficiency and reduce congestion in its warehouse did not change the scope and direction of the enterprise.<sup>29</sup> Cross-docking entailed receiving goods in the warehouse and repacking those items onto trucks for delivery to stores; after the change, goods were delivered directly from one of its suppliers to the employer’s larger stores. The Board held that there was “essential continuity” in the employer’s business because its work delivering products between suppliers and its stores remained the same following the subcontracting.<sup>30</sup>

Here, the “supply agreement” between Alpla and Respondent did not constitute a change in the scope and direction of Respondent’s enterprise. Respondent continues to sell its same products, blow-molding and injection-molding containers, to the same group of customers.

Finally, Respondent cannot make out either of the affirmative defenses permitted under *Dubuque Packing*. Although Respondent argues that labor costs were not a factor in its decision

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<sup>26</sup> 356 NLRB 642, 645 (2011).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 360 NLRB No. 116 (2014).

<sup>30</sup> *Id.*

because the Union could not offer concessions to offset the value of the supply agreement, in *O.G.S. Technologies, Inc.*, where the same argument was made by the employer, the Board observed that it is “authorized to insist that such argument be presented first to the union in the bargaining context.”<sup>31</sup> In this case Respondent signed its contract with Alpla on February 12, 2015, but intentionally failed to inform the Union about the contract until March 17, 2015. In August or September 2014, when the Union and Respondent held their first and only bargaining negotiation in which the extension of the collective-bargaining agreement was discussed, Respondent had not yet started discussions with Alpla and had not yet decided to subcontract any unit work. Respondent merely informed the Union that it was considering options for the continuation of its business. Later, on March 17, 2015, almost five weeks after entering into the subcontracting arrangement with Alpla, Respondent first informed the Union of its decision to subcontract work and layoff the unit employees. However, there is no evidence that Respondent informed the Union at that time or at any time preceding the layoffs, that labor costs were insufficient to offset any savings it would obtain from its arrangement with Alpla. Moreover, Respondent presented no evidence of the savings it has achieved based on its arrangement with Alpla. Thus, Respondent’s argument that the Union could not have afforded concessions, which preceded its total failure to notify and bargain with the Union its decision to subcontract, is a bare unsupported assertion that should be rejected.<sup>32</sup>

The Board expressed in *Pertec Computer*, that “to conclude in advance of bargaining that no agreement is possible is the antithesis of the Act’s objective of channeling differences.”<sup>33</sup> Respondent in this case failed to notify the Union of its decision to subcontract well over a month

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<sup>31</sup> 356 NLRB at 646, citing, *Rock-Tenn Co., v. NLRB*, 101 F. 3d 1441, 1446 (D.C. Cir. 1996).

<sup>32</sup> See *Pertec Computer Corp.*, 284 NLRB 810, fn. 3 (1987).

<sup>33</sup> *Id.*

after it had executed its agreement with Alpla. One party cannot side-step mandatory bargaining simply by declaring that negotiations would be fruitless, as collective bargaining is mandated for the purpose of attempting to resolve even the most difficult disputes.<sup>34</sup> Thus, the ALJ's reliance on *Pertec Computer* is correct. Respondent unlawfully failed to afford the Union with any opportunity to suggest alternatives to subcontracting.

In addition, it is noted that in the parties' bargaining session for a new contract in August or September 2014, Respondent had prevailed upon the Union to maintain current economic terms, without increases, as part of Respondent's overall attempt to keep the company operating. This suggests that labor costs were indeed a factor in Respondent's decision to subcontract. Additionally, labor costs were considered by Respondent in the agreement reached with Alpla, which provides that Respondent's costs are tied to adjustments in the federal minimum wage.

Respondent's reliance on *Oklahoma Fixture Co.*<sup>35</sup> is misplaced. There, the Board held that the company's decision to subcontract all of its electrical work was not a mandatory subject of bargaining. The Board based its conclusion on credited testimony from a company vice president that the decision was based on concerns about the legal liability and the risk of losing "virtually all" of its customers in the event of electrical damage. The Board pointed out that *Oklahoma Fixture Co.*, was the "unusual situation" it had referred to in *Torrington Industries* where "nonlabor-cost reasons for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject."<sup>36</sup> The *sole reason* for the employer's subcontracting decision in that case was the need to immunize it from legal liability to customers and third parties. The instant case presents no such "unusual situation."

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<sup>34</sup> *H.K. Porter Co. v NLRB*, 397 U.S. 99, 103 (1970).

<sup>35</sup> 314 NLRB 958 (1994), *enforcement denied on other grounds*, 79 F. 3d 1030 (10<sup>th</sup> Cir. 1996).

<sup>36</sup> *Id.* at 960.

With respect to Respondent's argument that there were no concessions that the Union could have provided to avoid its subcontracting decision, Respondent submitted its 2014 tax return and its financial statements for the years ended June 30, 2015 and June 30, 2014. [R. Ex. 1 and 2]. Although the financial statement shows a net loss for the year ending June 30, 2015 of \$908,465, it is noted that the last three months of that year occurred after the effective date of the subcontracting to Alpla, and it appears that Respondent stockpiled inventories, which were valued at \$1,353,475 for the year ending June 30, 2015, but were only \$130,332 for the year ending June 30, 2014. Similarly, net cash provided by operating activities for the year ending June 30, 2015 of \$463,338 was a much rosier picture than net case of negative \$293,636 for the year ending June 30, 2014. [R Ex. 2, pages 6-7]. Respondent failed to adequately or convincingly explain the information in its tax return and financial statements. Moreover, Respondent failed to prove that its arrangement with Alpla created savings unrelated to labor costs. In sum, even if Respondent had given the Union the required notice of its decision to subcontract, which it did not, Respondent failed to establish that labor costs were not a factor in its decision.

Based on the above, Respondent Exceptions 3, 4, 6, 9 and 10 have no merit, and should be denied.

**C. The ALJ properly concluded that the Respondent failed to show that the Union would have breached the Respondent's confidentiality concerns. (Exceptions 8 and 12).**

Respondent argues notifying the Union about its decision to subcontract work from Alpla would have jeopardized its negotiations with Alpla and was further precluded by the confidentiality clause in the supply agreement between Respondent and Alpla. Respondent's president, Carvajal, testified that Respondent could not disclose its negotiations to the Union because if competitors found out about its plans, it would also have to inform its customers. [Tr.

181]. Contrary to Respondent's exceptions, the ALJ properly determined that Respondent failed to show that its confidentiality concerns were warranted. Respondent's alleged fear that it could lose customers if they found out about its effort to subcontract manufacturing to Alpla does not excuse it from its bargaining obligation. Respondent failed to establish a legitimate confidentiality interest. Moreover, even if it could establish a confidentiality interest, it was required to provide the Union with an opportunity to meet that interest, and it failed to do so.

There is nothing in the supply agreement confidentiality provision that prohibited Respondent from disclosing its negotiations with Alpla to the Union, or from disclosing the existence of its agreement with Alpla to the Union before March 17, 2015. [GC Ex. 4, Article X, p. 9-10]. Rather, the supply agreement defines confidential information as information obtained from the other party and designated in writing as confidential such as formulas, ingredients, marketing information, manufacturing processes, samples for testing and storage, records and charts. Respondent did not provide any other agreements entered into with Alpla regarding confidentiality. Thus, there is no evidence that Alpla precluded Respondent from informing the Union about a potential contract between Respondent and Alpla before February 12, 2015, or about the existence of the supply agreement after it was executed on that date.

Regarding Respondent's concern about loss of customers, in *Willamette Tug*,<sup>37</sup> the Board recognized that employers may have a genuine interest in maintaining secrecy about certain business transactions, but held that the employer violated the Act by failing to provide any meaningful prior notice to the union that it was ceasing business and terminating employees.<sup>38</sup> The Board added: "that circumstances may compel confidentiality in arriving at a sales agreement does

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<sup>37</sup> 300 NLRB 282 (1990).

<sup>38</sup> *Id.* at 282-283.

not obviate the employer's duty to give pre-implementation notice to the union to allow time for effects bargaining."<sup>39</sup> In this case, Respondent could have notified the Union that it would provide information about its consideration of entering into an arrangement to subcontract work dependent on the Union providing Respondent with confidentiality assurances. However, Respondent failed to give the Union any opportunity to provide confidentiality assurances.

If Respondent could establish a confidentiality interest regarding the fact that it was negotiating and/or had entered into an agreement with Alpha, the situation would be analogous to cases where a union requests that an employer provide information which the employer considers confidential. The Board has held that if the employer can establish a confidentiality interest, it has the duty to seek an accommodation through the bargaining process. *National Steel Corp*, 335 NLRB 747, 752 (2001). As part of this, the employer must bargain towards an accommodation of both the union's need for the information, as well as the employer's legitimate and substantial confidentiality concerns. *Exxon Co. USA*, 321 NLRB 896, 899 (1996). If an employer can establish a confidentiality interest, it has a duty to seek an accommodation through the bargaining process.<sup>40</sup> Likewise, Respondent could have sought a confidentiality agreement with the Union. Absent proof that the Union is unreliable in respecting confidentiality agreements, Respondent's failure to test the union's willingness to hold information confidential weighs against its defense. There is no evidence that the Union could not be relied on to maintain confidentiality.<sup>41</sup> Respondent never sought such an accommodation of its confidentiality concerns and there is no evidence the Union could not be relied on to maintain confidentiality.

Based on the above, Respondent Exceptions 8 and 12 have no merit, and should be denied.

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<sup>39</sup> Id. at 282.

<sup>40</sup> *National Steel Corp.*, 335 NLRB 747, 752 (2001).

<sup>41</sup> See *Pertec Computer*, 284 NLRB 810 (1987).

**D. The ALJ correctly found that bifurcating Respondent's bargaining obligations with respect to the injection-molding and blow molding operations is not feasible. (Exception 5).**

Contrary to Respondent's exception, the ALJ correctly determined that bifurcating Respondent's bargaining obligation with respect to the blow-molding and injection molding manufacturing would be infeasible. [JD 13:33-36]. Respondent's president Carvajal testified that unit employees worked interchangeably on the production of both injection molded and blow molded products. [Tr. 34-35]. Employees were not assigned to a specific area. In fact, unit employees would change machines at any given time of the day depending on the needs, whether to cover a bathroom break or just simply help with the workload. [Tr. 38]. Respondent's own testimony established that the manufacturing of both type of containers was intertwined and inseparable. Based on the above, Respondent Exception 5 should be denied.

**E. Respondent failed to demonstrate any justification for its failure to bargain with the Union until it reached an overall impasse. (Exception 7).**

Respondent argues that bargaining to impasse with the Union would have jeopardized its business. However, the ALJ correctly held that Respondent presented no evidence supporting that claim. The Board's rules regarding the obligation of an employer to refrain from making unilateral changes in terms and conditions of employment are well established. The general rule is that absent overall impasse, an employer must refrain from implementation of any unilateral change. The Board has, however, recognized two limited exceptions to the general rule: when the union engages in tactics designed to delay bargaining, and when economic exigencies compel prompt action. *Bottom Line Enterprises*, 302 NLRB 373 (1991). Preliminarily, there is no evidence here that the Union engaged in tactics to delay bargaining.

Regarding the economic exigencies exception, in the most severe circumstance, extraordinary events which are unforeseen and which have a major economic effect requiring immediate action may serve to entirely excuse an employer's obligation to bargain. In such a case, the employer has the *heavy burden* of demonstrating the existence of circumstances which required implementation at the time the action was taken, or an economic business emergency that required prompt action. There are, however, other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that may constitute exigent circumstances. In this second situation, an employer satisfies its obligation to bargain by providing the union with adequate notice and opportunity to bargain. In that event, the employer can act unilaterally if either the Union waives its right to bargain or the parties reach impasse on the matter proposed for change. This second exception is limited only to those exigencies in which time is of the essence and which demand prompt action. The employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. In such time-sensitive circumstances, bargaining need not be protracted. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995).

Here, Respondent failed to establish exigent circumstances. Rather, Respondent asserted to the Union that it was in a precarious financial situation in August or September 2014, yet it did not enter into an agreement with Alpla until five or six months later, on February 12, 2015. This establishes that Respondent's financial situation was not so urgent that it was excused from its bargaining obligation. Respondent failed to proffer any evidence that it was faced with an emergency or that an economic exigency was caused by external events not foreseeable or beyond its control. On the contrary, the Respondent was well aware of its financial situation for at least five or six months before entering into the supply agreement with Alpla, and negotiated with Alpla

from late 2014 until February 12, 2015. Yet, it failed to inform the Union until March 17, 2015. Respondent has failed to demonstrate the existence of an economic emergency of the kind that would have entirely or partially excused its obligation to bargain.

Based on the above, Respondent Exception 7 has no merit, and should be denied.

**F. Respondent failed to bargain about the effects of its decision to subcontract bargaining unit work. (Exception 11).**

Respondent admits that it had an obligation to bargain about the effects of its subcontracting decision in a meaningful manner and at a meaningful time, but it incorrectly argues that it complied with its responsibility to engage in effects bargaining.

At the outset, the Respondent has admitted that it purposely waited for almost five weeks after the execution of the subcontracting agreement to inform the Union about its decision to subcontract and lay off all bargaining unit employees. [JD 15:5-10]. As the Board has held, an employer has an obligation to engage in effects bargaining, regardless of whether the decision itself is a mandatory subject of bargaining. *Fresno Bee*, 339 NLRB 1214, 1214 (2003) (although employer had no duty to bargain over its decision to implement a new printing system, it did have a duty to bargain over discretionary effects, such as changes in lunch period and shifts). Thus, even if an employer lawfully makes a unilateral decision, it still must bargain over any changes constituting discretionary effects of that non-bargainable decision. *Id.*; see also *Goya Foods of Florida*, 351 NLRB 94, 97 (2007) (decision to employ new routing software lawful because decision was made before election; nonetheless, employer had duty to bargain over discretionary effects of software, such as changes to routes and wages), *enfd. mem.*, 309 F. Appx. 422 (D.C. Cir. 2009). That is because, in most such situations, “[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [change at issue] without calling into

question the employer's underlying decision." *Fresno Bee*, 339 NLRB at 1214 (internal quotation marks omitted; brackets in original) (quoting *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999)). For example, where a business closure is concerned, effects bargaining may encompass the manner in which the employer "wind[s] down its operations." *Lenz & Riecker*, 340 NLRB 143, 145 (2003) (effects-bargaining obligation encompassed "[t]he manner in which [the employer] was going to complete those orders pending at the time it decided to liquidate its business"). Similarly, where a decision resulting in layoffs is concerned, effects bargaining may cover issues such as opportunities for recall, severance pay, post-termination health insurance coverage, preferential hiring at another jobsite, and reference letters for prospective employers. *See Allison Corp.*, 330 NLRB 1363, 1365 at fn.14 (2000).

As to the duty to engage in effects bargaining in "a meaningful manner," the Board and courts have condemned, among other things, employer misrepresentations that undermine the bargaining process. For example, in *NLRB v. Waymouth Farms Inc.*, 172 F.3d 598, 600 (8th Cir. 1999), the court affirmed the Board's finding that an employer violated Section 8(a)(5) by providing misleading information to the union about its decision to relocate operations. The court explained that "[h]onest relocation information was necessary if the [u]nion were adequately to represent the employees . . . with respect to the effects of the relocation" and that "[b]ecause the [u]nion received misleading information, it concentrated its efforts on seeking severance pay rather than negotiating about the effects of the plant closing." *Id.* (emphasizing that employer had a "duty to supply truthful information so that the bargaining over the effects of the relocation decision could be conducted in a meaningful manner").

Here, the timing and manner of the Respondent's conduct precluded any meaningful effects bargaining. First, Respondent delayed for over a month (33 days) before notifying the Union about

the decision to subcontract operations to Alpla and lay off all unit employees. Second, Respondent misled the Union concerning post-layoff labor needs. The Union broached that subject during negotiations by asking whether any operations would continue after March 31, 2015. The Union also inquired whether employees could be rehired if the facility reopened within two years. These were key issues that the parties could have bargained over at the time, even though Respondent's decision to subcontract unit work had already been made. *See, e.g., Allison Corp.*, 330 NLRB at 1365 n.14 (effects bargaining can cover layoff and recall procedures). Yet, Respondent President Carvajal unequivocally, and falsely, responded to the Union that all operations would end on March 31, and that no other employees would be hired, and unit employees would not be needed thereafter. [JD 16:2-4, Tr. 120:17 to 121:2, 135:1-2, 136:6-8, 197:19-25]. In direct contravention of these representations, after March 31, Respondent used Laser employees to perform unit work by manufacturing, packing, moving and storing products. [Tr. 70:1-19, 72, 73:2-4; GC Ex. 10,11]. Even then, Respondent failed to inform the Union about this ongoing work.

Nothing about Respondent's subcontracting decision precluded it from negotiating with the Union over the allocation of subsequent unit work at the Respondent's facility. The use of non-unit employees to do this work clearly was not an "inevitable consequence" of the subcontracting decision, but was instead something about which the parties could have meaningfully bargained.

Respondent's failure to bargain in good faith with the Union over the effects of its subcontracting and layoff decisions also likely tainted the parties' negotiations over accrued employee benefits, a subject of effects bargaining. *See NLRB v. Waymouth Farms Inc.*, 172 F.3d at 600 (misrepresentations affected union's bargaining strategy); *Sheller-Globe Corp.*, 296 NLRB 116, fn.3 (1989) (noting that severance agreement was negotiated on false premise that employer

would discontinue operations). If Respondent complied with its duty to bargain over the assignment of post-layoff unit work, rather than unlawfully removing it from negotiations via its misrepresentations, a different agreement could have been reached. For example, the Union may have been able to obtain additional benefits for unit employees by agreeing to the Respondent's use of non-unit employees' post-layoff. Thus, Respondent's unlawful actions undermined the entire effects-bargaining process.

Respondent further argues that the Union had ample notice that it would cease its manufacturing operations because Carvajal called Union's official Alexis Rodriguez on March 9 and informed him that he needed an "urgent" meeting. However the ALJ correctly found that this vague information did not constitute adequate notice. [JD 15:13-19]. In this regard, the Board has found that an employer's general statements of intent to lay off employees in the future are not specific enough to provide a union with a reasonable opportunity to bargain.<sup>42</sup> Also in *Oklahoma Fixture Co.*,<sup>43</sup> the Board held that the employer's "inchoate and imprecise" statement about future plans was insufficient notice to trigger the union's duty to request bargaining.

Additionally, Respondent argues that the Union waived its right to bargain over the work performed at the Respondent's facility after March 31, because it failed to request bargaining over such matters. Again Respondent's misses the point with respect to its obligation to notify the Union in order to trigger the Union's responsibility to request effects bargaining. In the absence of such a notification from the Respondent, the Union could not have waived its right to bargain over such matter. An employer's obligation is to give notice and afford a reasonable opportunity to

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<sup>42</sup> *Pan American Grain Co.*, 343 NLRB 318 (2004), remanded on other grounds, 448 F. 3d 465 (1<sup>st</sup> Cir. 2005).

<sup>43</sup> 314 NLRB 958, 960-61 (1994), *enforcement denied on other grounds*, 79 F. 3d 1030 (10<sup>th</sup> Cir. 1996).

bargain. There can only be a waiver by the union if the employer first meets that obligation.<sup>44</sup>  
Respondent failed to do that here.

Based on the above, Respondent Exception 11 has no merit, and should be denied.

#### **IV. CONCLUSION**

For the reasons set forth herein, Counsel for the General Counsel respectfully urges the Board to deny Respondent's exceptions to the ALJ's Decision in its entirety.

**DATED** at San Juan, Puerto Rico, this 2<sup>nd</sup> day of September, 2016.

Respectfully submitted,

*/s/ Ayesha K. Villegas Estrada*

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<sup>44</sup> See *Gibbs & Cox, Inc.*, 292 NLRB 757 (1989); *Citizens National Bank of Willmar*, 245 NLRB 389 (1979).

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, I served General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision upon the following persons, by means set forth below:

By electronic filing to:

Hon. Gary W. Shiners  
Executive Secretary  
National Labor Relations  
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