

**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

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CASE 12-CA-152811

**RESPONDENT'S REPLY'S BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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**I. INTRODUCTION**

On September 2, the General Counsel (“GC”) filed its Answering Brief to Respondent’s Exceptions to the Administrative Law Judge’s Decision. In essence, the GC submits that the ALJ acted correctly by holding that the Respondent had a duty to bargain over its decision to close its blow molding operation and enter into the agreement with Alpla with regards to the injection molding operation and that Respondent failed to bargain over the effects of said decision in violation of Section 8(a)(1) and (5) of the Act. In doing so, the GC fails to address several issues which are central for the analysis and adjudications of the present controversy. For example, the GC fails to address how Respondent’s decision to close the blow molding operation and enter into the agreement with ALPLA as to the injection molding products was amenable to resolution through the collective bargaining framework, as required by Board precedent and disregarded by the ALJ. The GC, additionally, fails to address the financial information introduced at trial which clearly depicts that labor costs (direct and/or indirect) were not a factor in the decision and that the union could not have offered labor costs concessions that could have changed Respondent’s decision. The GC also omits information pertaining to the need for confidentiality by the Respondent which precluded Respondent from notifying the Union about the agreement with ALPLA.

Respondent addresses these issues, and others, in the present reply and for the reasons set forth herein, in conjunction with the reasons set forth in the cross exceptions and their supporting brief, requests that the Board decline to adopt the ALJ's decision and dismiss the Complaint in its entire

## II. ARGUMENT

### **A. Respondent did not subcontract the work of the unit but rather changed the scope direction of the enterprise.**

As argued in the exceptions, applying the test established in First National Maintenance, 452 U.S. 666 (1981) to the facts of this case, it must be concluded that Respondent did not have a duty to bargain with the Union over the decision to close the blow molding operation and enter into the agreement with Alpla with regard to the injection molding operations. Rigid Pak's decision fits squarely on the third type of management decisions identified by the Supreme Court in First National. That is, managerial decisions "that [have] a direct impact on employment... but have as [their] focus only the economic profitability of" non-employment-related concerns."

The record is clear that Respondent's decision to close the manufacturing operations and reach the agreement with Alpla was based on pure economic reasons. Labor costs were not a factor in the decision. It was a decision that involved considerations of corporate strategy fundamental to preservation of the enterprise.

What is more important, the evidence shows that the decision to close was not amenable to resolution through bargaining. The Union had no control authority or even potential control over the basis for the decision. To this effect, the record shows that there were no concessions that the Union could have provided which would have changed the employer's decision. The Respondent had a net loss of over \$900,000.00 in the year 2014, while the manufacturing labor

costs amounted to around \$369,000.00. These labor costs represented only 6% of the total manufacturing costs. Therefore, even assuming arguendo that the Union would have agreed to work pro bono for a whole year, the Company still would have experienced huge losses and be forced to close. Note that the only concession that the union was willing to make (as testified during the trial) was granting an extension or renewal of the CBA. Based on the evidence introduced at trial, said concession was insufficient to change the decision to close.

In spite of the above, the GC argues that by entering the agreement with ALPLA, Respondent subcontracted the work of the unit insofar as is still engaged in the business of providing blow-molded and injection molded containers to its customers. This contention is unfounded insofar as the evidence established that the only products that ALPLA produces are those related to injection molding. As the ALJ clearly concluded, the blow molding operation was closed completely. (JD 13:35-40). Note that Respondent only buys blow molded products in limited circumstances and in order to sell them to customers that buy injection molded products.

The GC contends that the only difference before and after the agreement with ALPLA is that the manufacturing work is now performed by ALPLA employees and that Respondent pays for most of the manufacturing costs. This contention is also unfounded since the evidence clearly showed that after closing Rigid Pak does not have the high electricity costs or costs related to the maintenance of the machines, the chillers, the cooling towers, transformer stations and equipment to move resin around. More so, the lack of merit of this contention is highlighted by the ALJ in page 9 of the Decision holding that **“[p]rior to the closing, the Respondent’s utility and maintenance costs were nearly \$2 million a year. As a result of the closing of the manufacturing operation at the facility, the Respondent has greatly**

**reduced maintenance, infrastructure and utility costs, and is no longer responsible for defective products.”** (JD 9: 10-14).

Additionally, and more importantly, pursuant to the agreement with Alpla, Rigid Pak has no control over the operations of the injection molding machines placed in Alpla. It is simply a customer who buys the injection-molded containers from Alpla. All the risks and costs associated with manufacturing have been passed on to Alpla. Rigid Pak no longer has to deal with defective products or the energy costs associated with the operation of the machinery. Furthermore, Alpla may manufacture injection-molded products using Rigid Pak’s machinery and sell it to third parties. Also, Rigid Pak may purchase injection-molded products from third parties if Alpla is unable to do so.

On the other hand, the GC cites cases in support of its contentions which are either inapplicable to the facts of present case such as Bob’s Big Boy, 264 NLRB 1369, 1372 (1982) and Michigan Ladder, 286 NLRB 21 (1987) or support Respondent’s position, as is the case with NLRB v. Adams Dairy, 350 F.2d 108 (1965) and Kroger Co. 273 NLRB No. 70 (1984).

For example, in Bob’s Big Boy,<sup>1</sup> the employer simply closed a department, the subcontractor continued working in the Respondent’s premises and the reasons were escalating costs and portion control. In the present, Rigid Pak closed its entire manufacturing operation (no manufacturing is done at the plant) and the reason to close were the unsurmountable manufacturing costs of which labor costs only constituted a 6%.

In Michigan Ladder, 286 NLRB 21 (1987), like in Bob’s Big Boy, the employer continued manufacturing table tennis tables and most of the production of its wooden ladders in its facilities using a subcontractor and the reason to subcontract were high labor costs. Again,

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<sup>1</sup> It must be noted that in Bob’s Big Boy there were two dissenting members who understood that the decision to close down the shrimp processing operation was outside the scope of its mandatory bargaining operation.

this was not the case with Respondent who does not conduct any manufacturing at its facilities and labor costs were not the factor (or even a factor) to close the operations. It is worth noting that Michigan Ladder was analyzed under the Otis Elevator test, which was overruled by the Board in Dubuque Packing.

The present case is more akin to the NLRB v. Adams Dairy, 350 F.2d 108 (1965) case cited by the GC. In said case, the Court found that the employer did not have to negotiate about its decision to completely change its distribution system by selling its products to independent contractors. The Court reasoned that requiring the employer to negotiate over said decision would have significantly abridged the employer's freedom to manage the business. In reaching its determination, the Court considered that the independent distributors took title to the products at dockside, and Adams, thereafter, legally had no concern with what was done with the products; that the work done by the independent contractors was not primarily performed in the Adams plant for the benefit of the dairy; and it was not directly concerned with whether or not any given distributor sustained a profit or loss, as would have been the situation with the driver-salesmen.

In the instant case, like in Adams Dairy, Rigid Pak decided to close its manufacturing operation and become a reseller of injection molding products and, in certain circumstances, of blow molding products. Rigid Pak has no ownership of the products manufactured by Alpla as they are delivered FOB. In other words, any defective products or damaged products prior to the delivery are Alplas's responsibility; prior to the closing, this was Rigid Pak's responsibility. Lastly, Respondent has no control over the employees that Alpla chooses to operate the injection molding machinery and the work is not performed at Respondent's facility. And, as in

Adams Dairy, in the present case there was more involved than just the substitution of one set of employees for another.

Also similar to the instant case is the decision in Kroger Co. 273 NLRB No. 70 (1984) cited by the GC. In said case, the Board held that the closure of the Respondent's plant constituted a significant change in the scope, nature and direction of the business since it was done "not because of labor costs arising under its collective bargaining agreement with the union, which constituted a relatively insignificant amount of the production costs, but rather because of the lack of raw materials at a competitive price." Id. at 2. In the present case, like in Kroger, labor costs were not considered as part of the decision insofar as they constituted a relatively insignificant amount of production costs (a mere 6% percent of the total manufacturing costs).

Based on the above, it must be concluded that Rigid Pak, like Adams Dairy and Kroger did not subcontract the unit work but rather changed the scope, nature and direction of the business. Accordingly, the ALJ's decision should not be adopted.

**B. Under the Dubuque Packing test, it is clear that Respondent's decision to close was not a mandatory subject of bargaining.**

The GC argues that the decision to close the manufacturing operations was a mandatory subject of bargaining pursuant to the Dubuque Packing<sup>2</sup> test. As argued in the exceptions, if applied to the present case Dubuque Packing test clearly establishes that Respondent did not have a duty to negotiate with the Union about its decision to close the manufacturing operations. This is so since the evidence clearly showed that labor costs (direct and/or indirect) were not a factor in the decision and the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

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2 303 NLRB 386 (1991).

To this effect, the record shows that there were no concessions that the Union could have provided which would have changed the employer's decision. In the year 2014, Respondent 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).

In its Answering Brief, the GC totally disregards this information. Instead, the GC tries to depict a different picture about Respondent's financial situation without any basis or support other than counsel's assertions. For example, the GC contends that there is no evidence that "Respondent informed the Union at that time or any time preceding the layoffs, that labor costs were insufficient to offset any savings it would obtain from its arrangement with Alpla." This assertion is meritless taking into account that the losses sustained by the Company were much higher than the labor costs. What concession could the Union had made under these circumstances is beyond comprehension? See Mi Pueblo, 360 NLRB No. 116 (2014)(holding that alternative solutions to the employer's concerns regarding efficiency as adjustments in staffing, scheduling could have been explored through collective bargaining). In the instant case there were no alternative solutions which could have been explored through collective bargaining.

In sum, it is Respondent's position that applying the Dubuque Packing test to the present case leads to the inescapable position that Respondent did not have a duty to negotiate with Union about its decision to close manufacturing operations.

**C. Respondent's confidentiality concerns were legitimate.**

The GC argues that the ALJ acted correctly when he determined that Respondent's confidentiality concerns were not legitimate in light of the evidence. As to this point, Respondent reiterates its position as stated in the Brief in Support of Cross Exceptions. However, Respondent finds it necessary to bring to the attention of the Board that the GC purposely omitted information regarding the confidentiality agreement between Alpha and Respondent which supports Respondent's position.

On page 22 of the Answering Brief, the GC states "[r]ather, 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." This assertion is misleading since the Article X Confidentiality of the Agreement states, in pertinent part, that:

Buyer and Alpha 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... (emphasis ours).

Accordingly, and contrary to the GC's contention, the Agreement and the discussion related to it were confidential information which could not be disclosed by Respondent to the Union or anyone else.

**D. GC's admission of Respondent's Exception 1 supports Respondent's position that it did not subcontract its manufacturing operations but rather closed its manufacturing operations.**

Respondent cross excepted to the ALJ's determination that Respondent purchases blow-molding products with its logo. GC did not dispute this exception. It rather stated that the information disputed in the exception is not a basis to change ALJ's finding and conclusions of law. GC's admission of this exception does change the ALJ's finding since it supports Respondent's position that the blow molding operation was completely closed and that only the injection molding manufacturing is part of the agreement with Alpla.

This admission by the GC also supports Respondent's position that the ALJ erred by concluding that bifurcating the blow-molding operation from the injection molding operation in terms of the bargaining obligation would be unfeasible and unworkable. To this effect, the determination of which employees would remain working could have been easily made using the seniority system of the CBA. It would have been no different as the layoffs that occurred while Respondent was operating. Only the most senior employees would be assigned to work.

**E. Respondent does not continue to advertise as a manufacturer of injection and blow molded product.**

The GC argues that ALJ did not err by concluding that Respondent continues to advertise as a manufacturer of injection and molded products because Respondent stipulated the printouts of the website. The GC makes this assertion omitting that Respondent's witness testified that the molds of the products are on sale, that most of the products depicted in the website had not been manufactured for several years prior to the closing and that the website had not been taken down from the internet as an oversight. It must be noted that the website is no longer working. What is more, the ALJ's conclusion as to the website is mistaken taking into account that the ALJ concluded that the blow molding operations had been closed. As

such, it is contradictory that a business would advertise about products which it no longer produces.

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

The GC argues that the ALJ did not err by concluding that the Respondent failed to bargain about the effects of the closing. Respondent reiterates its position as stated in its Brief in support of its Cross Exceptions. However, Respondent must reiterate that the record and evidence unequivocally show that the Union and the Respondent bargained over matters which are considered subject to negotiation during effects bargaining, such as severance pay, preferential hiring, reference letters and health insurance. See Chemical Solvents, Inc., 362 NLRB N. 164 (2015) (holding that effects bargaining is intended to provide a union with an opportunity to bargain in the employees' interest for such benefits as severance pay, payments into pension funds, preferential hiring, reference letters, health insurance and retraining funds.). The fact that the Union failed to be more assertive during the negotiation cannot be a basis to punish the Respondent. This more importantly taking into account that Respondent as concluded by the ALJ acted based on "non discriminatory economic and related business reasons." (JD 17:44-45).

**III. CONCLUSION**

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

**IV. CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY:** That on this same day, a copy of the preceding Reply 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 16<sup>th</sup> day of September, 2016.

s/Bayoán Muñiz

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