

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

SPARTAN PRODUCTS, LLC

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO

Case: 12-CA-192417

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.42 of the National Labor Relations Board's Rules and Regulations, the undersigned submits this brief in support of the position of the General Counsel of the National Labor Relations Board (herein called the Board) in the above-captioned proceeding held on June 12 and 13, 2018, before the Honorable Administrative Law Judge Elizabeth Tafe, at Christiansted, USVI.

I. STATEMENT OF THE CASE AND OVERVIEW

This case concerns two unlawful layoffs, subsequent subcontracting of unit work, and a delay in responding to an information request. The charge in this case was filed against Spartan Products, LLC (Respondent) by International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), on February 3, 2017, and was served upon Respondent on the same date. [GC Ex. 1(a) and 1(b)].¹ Three amendments to the charge were filed by the Union on March 2, April 28, and May 31, 2017, and served upon Respondent on the same date of each filing. [GC Ex. 1(c); 1(d); 1(e); 1(f); 1(g); and 1(h)].

On June 30, 2017, a Complaint, Compliance Specification and Notice of Hearing (hereinafter “Complaint”) issued in this matter, alleging that Respondent failed and refused to bargain collectively and in good faith with the Union, in violation of Section 8(a) (1) and (5) of the Act, by failing to give prior notice to the Union and to afford it an opportunity to bargain over its decision to lay off employees Ramon Murrain-Benjamin and Benson Morton, and over the effects of such decision. The Complaint also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by subcontracting unit work, in particular Ramon Murrain-Benjamin’s

¹ As used herein, “GC Ex.” refers to General Counsel’s exhibits, “R. Ex.” refers to Respondent’s exhibits, “J. Ex.” refers to Joint exhibits, and “Tr.” refers to the transcript. Transcript citations may just include page numbers, such as “Tr. 1-2”, may contain page and line numbers, such as “Tr. 1: 4-6,” which refers to page 1, lines 4 to 6, or such as “Tr. 1:4-2:10,” which refers to the portion of the transcript beginning on page 1, line 4, through page 2, line 10.

welding duties, after the unilateral layoffs.² The Complaint further alleges that Respondent unreasonably delayed in furnishing the Union with relevant and necessary information that was requested since February 3, 2017, in violation of Section 8(a)(1) and (5) of the Act. [GC Ex.1(i)].

Respondent filed its Answer to the Complaint on July 19, 2017, denying that it engaged in any unfair labor practices. It claims that it did not subcontract unit work and did not unreasonably delay the production of information requested by the Union. [GC Ex. 1(l)].

During the hearing on June 12, 2018, the Union, Respondent, and Counsel for the General Counsel entered into a stipulation of facts and documentary evidence (J. Ex. 18), including Joint Exhibits 1 to 17.³ Also, Counsel for the General Counsel moved to amend paragraph 6(c) of the Complaint twice, to allege that “on various dates since on or about February 1, 2017, Respondent has subcontracted the work of unit employees and assigned the work of unit employees to employees of Heavy Materials, LLC, who are not in the unit described in paragraph 5(a).” (Tr. 10-13; 114-115; 117-119).

II. STATEMENT OF FACTS

A. Jurisdiction and labor organization status

Jurisdiction and labor organization status are admitted. Respondent is a U.S. Virgin Islands limited liability company with an office and place of business in St. Croix, U.S. Virgin Islands (Respondent’s facility), and has been engaged in the manufacture and delivery of ready mixed concrete and aggregates. During the past 12 months, in conducting its business operations, Respondent purchased and received at its St. Croix, U.S. Virgin Islands facility, goods valued in excess of \$50,000 directly from points outside the U.S. Virgin Islands. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6),

² As will be discussed further, paragraph 6(c) of the Complaint was verbally amended, twice, during the June 12 hearing.

³ As the record reflects, there is no Joint Exhibit 12. (Tr. 86:5-14)

and (7) of the Act. [GC Ex. 1(l)]. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. [J. Ex. 18, paragraph 1].

B. Bargaining History Between Respondent and the Union

On October 3, 2016, the Union was certified as the exclusive bargaining representative of a unit consisting of all full-time and regular part-time truck drivers, mechanics, welders, painters, laborers, and loaders or loader operators (the Unit). [J. Ex. 18, paragraph 3]. At all material times, the Union has been the exclusive collective-bargaining representative of the Unit. [GC Ex. 1(l)]. The parties began negotiations for a collective-bargaining agreement around February or March 2017. (Tr. 141:3-7).

C. Respondent's Decision to Lay Off Two Unit Employees

On January 30, 2017, at 3:11 p.m., Union President Mervyn Constantine received an e-mail with an attached letter from Respondent's legal representative, Michael Quinn. [J. Ex. 1]. The same letter was also sent via e-mail by attorney Quinn to the Union's Grand Lodge Representative, Javier Almazan, that same afternoon, at 4:08 p.m. [J. Ex. 1]. In the letter, Respondent notified, for the first time, that "[e]ffective at the close of business on Tuesday, January 31, 2017, the employment of Spartan employees and union members Ramon Murrain-Benjamin, a welder, and Benson Morton, a yard man, will be terminated." Respondent attributed these two layoffs to the depressed state of the local economy as well as to a new competitor that had entered the market and appeared to be undercutting Respondent's business by underpricing its products. In the letter, Respondent further asserted that this drove it to make adjustments to its operating expenses.⁴ [J. Ex. 1]. Respondent stipulated that this letter constituted the first

⁴ It should be noted that, after most of these events, in an e-mail sent from one of Respondent's legal representatives (George Dudley) to the Union on July 21, 2017, Respondent wrote that "[a]t no time has Spartan stated it had financial difficulties. What was stated was that given the state of St. Croix economy and the slowdown in the

communication to the Union concerning these layoffs. (J. Ex. 18, paragraph 11). This was also admitted by Respondent's General Manager, Dion Alibocas.⁵ (Tr. 28).

The Union reacted to the Employer's unexpected notification the following morning of January 31st. Union President Mervyn Constantine first sent an e-mail to attorney Quinn requesting to meet with either him or anyone from Respondent's management to discuss the layoffs. [J. Ex. 3]. Later that morning, Union President Constantine sent an e-mail to Respondent's General Manager Alibocas, also copying attorney Quinn and Respondent's agent, Kurt Nose,⁶ this time requesting that Respondent "cease and desist" from terminating the employment of Murrain-Benjamin and Morton, and to discuss the matter with the Union prior to implementation. [J. Ex. 2]. Respondent's General Manager admitted that he received Joint Exhibit 2 from the Union asking Respondent to cease and desist implementation of the layoffs; he further admitted that Respondent did not provide a response to the Union. (Tr. 28).

D. Respondent Implements the Layoffs of Two Unit Employees

Despite the Union's request to bargain with Respondent prior to implementing any layoffs, Respondent laid off its welder, Ramon Murrain Benjamin, and a yardman, Benson Morton. [Joint Stipulation, J. Ex. 17, paragraphs 4 and 5]. On January 31, 2017, Respondent sent a letter by certified mail to Ramon Murrain-Benjamin, Respondent's only welder in the Unit, notifying him that, as of close of business that same day, he was being laid off from his duties with Respondent. [J. Ex. 4] (Tr. 26). In the letter, Respondent alleged that its decision was based on the downturn in its business. [J. Ex. 4]. Respondent's General Manager, Dion Alibocas,

demand for concrete....it was prudent to avoid any increase in the cost of its operations and, where possible, to reduce those costs." (J. Ex. 16)

⁵ Dion Alibocas is also one of the participants of Respondent's negotiating committee. (Tr.55-56; 64).

⁶ The record suggests that Kurt Nose shared the same title as Pete Myers, Executive Regional Vice President. (Tr. 56:6-11)

testified that the letter was sent by mail to Murrain-Benjamin because, at that time, the former employee was on vacation. (Tr.26). In this regard, Murrain-Benjamin testified that he found out about his layoff sometime in February 2017, when he came back from a vacation and went to the post office to pick up his mail. That was where he found Respondent's layoff letter. (Tr. 106:24-107:9.)

The next day, February 1st, 2017, Respondent's General Manager handed a similar letter to Benson Morton, a unit employee who worked as a yardman for Respondent. [J. Ex. 5] (Tr. 25:17-22; 139: 11-14). General Manager Alibocas testified that he gave the letter to Morton in the presence of the Union shop steward, Angel Rexach, and that this was the first time he notified the layoff to both Morton and the shop steward. (Tr. 26).

E. Respondent did not Negotiate the Layoffs with the Union

Angel Rexach, the Union shop steward testified that he found out about Murrain-Benjamin's and Benson Morton's layoffs for the first time on the same day they were terminated, around January 31, 2017. (Tr. 89:1-17). Rexach was present when Respondent's General Manager notified Morton of the layoff. He told General Manager Alibocas that Respondent had to cease and desist from the layoffs because they had to negotiate them with the Union. (Tr. 90:1-6). According to Rexach's testimony, which is consistent with the documentary evidence in the record, the Union was notified about the layoffs that same morning or late on the preceding day. (Tr. 90:13-16).

Union's Grand Lodge Representative, Javier Almazan, further confirmed that Respondent did not have any conversations with the Union regarding the layoffs by the time it sent its notification on January 30, 2017. Almazan further testified that Respondent did not

negotiate the decision to layoff these two unit employees or the effects of the decision, even after they were implemented. (Tr. 77: 10-78:8).

Respondent's General Manager Alibocas confirmed that the parties did not engage in any bargaining before the implementation of the layoffs. With regard to exchanges between the parties after the implementation of the layoffs, Alibocas testified to being present during a conversation sometime around February, 2017, between Union representative Almazan and Respondent's agent, Kurt Nose, concerning the layoffs of Morton and Murrain-Benjamin. According to Respondent's General Manager, Almazan was not happy with Respondent's decision to lay off these two unit employees, so Almazan protested the layoffs and asked Respondent "to stop" implementation. According to General Manager Alibocas, Nose replied that Respondent was going forward with the layoffs because of economic reasons. (Tr. 164: 14-25; 174).⁷ Alibocas further admitted that, even then, the parties did not negotiate with regard to that matter. (Tr. 165:7-13; 174).

F. The Union's Request for Information

In further response to Respondent's abrupt notification of the layoffs, on February 3, 2017, the Union, through Grand Lodge Representative Javier Almazan, sent a letter to Respondent's General Manager, Alibocas, with a request for financial information and other documents. [J. Ex. 17 and J. Ex. 18, paragraph 8]. One of Respondent's legal representatives, Michael Quinn, was among the individuals copied in the letter.

⁷ In this regard, Almazan testified that it was not until March 2017 that he met with Respondent's agent, Kurt Nose, at the bargaining table for the first time. He did not recall having spoken to Nose by phone before. (Tr. 63:3-21). Even then, he did not recall the parties bargaining or exchanging discussions about the layoffs. Almazan further testified that, although he did engage in conversations with Respondent's attorney, George Dudley, while the parties began negotiations for a collective-bargaining agreement, those exchanges were limited to the collective-bargaining agreement and to potential settlements of pending NLRB charges. There was no mention of the parties ever bargaining or exchanging discussions about the layoffs. (Tr. 60:15-61:4; 62:2-170).

In its letter, the Union stated that the information being requested was necessary to properly represent its members by assessing the economic justification claimed by Respondent in its decision to terminate two unit employees, as well as the effects such decision will have on the affected unit employees. [J. Ex. 17]. In summary, the Union requested Respondent's financial statements; audited statements; statements of income; audited balance sheets; a breakdown of sales costs of goods/services sold, and general and administrative expenses; material loss of revenue for 2016; business plans; studies and reviews; budgets and expected performance; plans and studies related to any restructuring and reorganizing; cuts of wages and fringe benefits to other groups of employees; labor costs and costs of operation; data regarding Respondent's competitors and the "new competitor" referenced by Respondent in its January 30 letter; Respondent's plan on how welding and yardman work will be performed; information regarding who will be performing that work; amounts of accrued benefits and total compensation payout; and recall language for all affected employees. [J. Ex. 17].

Respondent's General Manager Alibocas admitted receiving the Union's request for information letter, marked as Joint Exhibit 17, and that he never replied to the Union. He testified about handing over the Union's letter to Respondent's legal counsel. (Tr. 44: 6-24). The next communication between the parties regarding this matter came from the Union in a letter dated April 28, 2017, from representative Almazan to Respondent's attorney, George Dudley, and to Respondent's agent Kurt Nose. [J. Ex. 8] (Tr. 81:20-82:4). In this letter, the Union reminded Respondent that it had not yet received the information requested on February 3, 2017. [J. Ex.8] In this regard, Union Representative Almazan testified that, since the date the initial request was made, Respondent never mentioned anything concerning such request, until about May 2017. (Tr. 78:14-79:4).

Respondent stipulated that its first response to the Union's information request came on May 15, 2017, three months after the initial request was made, in an e-mail from Respondent's attorney, Michael Quinn, to Union Representative Almazan. [J. Ex. 9; J. Ex. 18, paragraph 19] (Tr. 78:20-79:4; 82:1-4). Respondent replied that, since the Union had requested sensitive financial information, it was attaching a confidentiality agreement for the Union's review to get things moving. [J. Ex. 9]. The Union replied that same day that its legal department would review the confidentiality agreement. [J. Ex. 10].

In an e-mail dated May 22, 2017, the Union sent its proposed changes to Respondent's confidentiality agreement. [J. Ex. 11]. Respondent replied the following day acknowledging that it would let the Union know about the requested changes. [Jt. Ex. 13]. A letter dated June 1, 2017, from the Union to Respondent reflects that the parties finally reached an acceptable agreement regarding the confidentiality agreement.⁸ [J. Ex. 14]. The Union mentioned it was ready to sign the agreement as soon as it received a draft from Respondent, incorporating the agreed upon changes. [J. Ex. 14]. Respondent sent a modified draft that same afternoon, which the Union signed and sent back to Respondent on June 2, 2017. [J. Ex. 15].

It was several more weeks before Respondent finally furnished the information, despite the confidentiality agreement being signed by the Union on June 2. On July 21, 2017, Respondent's attorney, George Dudley, sent an e-mail to the Union attaching documents in response to items 3, 4, and 5 of the Union's information request. Respondent stated that documents responsive to the first two items of the Union's request would be made available for inspection, and asked the Union to suggest several dates for the review of this information as well as provide the name of the person who would inspect the documents. [J. Ex. 15].

⁸ There is no additional evidence in the record as to any other communications exchanged between the parties in the meantime.

Throughout all these communications, Respondent never offered any explanation to justify its delay in replying to the Union and furnishing the information.

G. Welding Work at Respondent's Facility

According to Respondent's General Manager, Dion Alibocas, Respondent's facility has always had its own welder. (Tr. 29:19-22). Respondent's General Manager, who supervises all employees who work at Respondent's facility, testified that the specific duties that welders performed at Respondent's facility consisted of any kind of repair work. Welders could also perform welding work on capital expense projects, a type of project that is expensed over a period of time. (Tr. 38: 3-22).

Ramon Murrain-Benjamin testified that he worked as a welder/fabricator for Respondent from about June 2002 until he was laid off on January 31, 2017. (Tr. 104:2-6). During this time he was the only welder at Respondent's facility. (Tr. 25). Murrain-Benjamin described that his welding duties consisted of fabricating Respondent's water tank, repairing the brackets and repairing the batch plant. Also, Respondent sometimes assigned him to work on the ships, where he would perform welding repairs on the batch of the ships and to the ships themselves. (Tr. 104:8-17; 110:16-25). The tools he used to perform these welding duties were the welding machine, gas tanks, and a torch. (Tr. 104:18-21).

Murrain-Benjamin testified that, besides welding work, he performed work as a mechanic helper. This work consisted on changing out differentials, changing truck parts, and repairing chassis. He testified that, when he was not performing welding, he would be doing mechanic work; thus, there was always work for him to do. (Tr. 113:17-22). He explained that he performed his mechanic helper duties at the same place in Respondent's

facility where the welding machine is located at, because while he was carrying out mechanic assistant duties, he would oftentimes need to weld. He testified that he commonly did both, mechanic and welding work, at the same time. (Tr. 105:6-17; 106:1-4). Murrain-Benjamin's testimony was essentially confirmed by that of Respondent's General Manager, who admitted that, besides welding, Murrain-Benjamin also assisted with mechanic work. (Tr. 140:10-14). This was also corroborated during shop steward Rexach's testimony. (Tr. 94:1-13).

H. Availability of Welding Work at Respondent's Facility

Murrain-Benjamin testified that he worked from 7:00 a.m. to 3:00 p.m., five days a week, and oftentimes, he would have to stay working late if a truck broke down. Sometimes he had to come in on Saturdays or on Sundays, because trucks often needed to be repaired by Monday. (Tr.106:9-17).

Respondent's General Manager Alibocas testified that employees are not guaranteed forty (40) hours of work. (Tr. 47:5-14). It is a common practice at Respondent's facility that, when work is slow or work is finished, employees can go home early. (Tr. 46:11-19). He further testified that, on occasions, Murrain-Benjamin and Morton had been sent home early as a result of this practice. (Tr. 47:5-14). Alibocas also testified that it is a common practice at Respondent's facility that employees can interchange work and perform other types of duties if they are cross-trained to do so. As an example of this practice, he mentioned that, aside from Murrain-Benjamin's duties as a welder, he also performed work as assistant mechanic. Likewise, he admitted that Morton has performed a multitude of tasks under his duties as yardman. (Tr. 47:22- 48:12). After Murrain-Benjamin's layoff, welding has been necessary when emergency events or unforeseen situations arise at the plant. (Tr. 32:14-8). He admitted

that, within the past year, the batch plant (a piece of equipment or structure that mixes loose material to create concrete) has broken several times and has needed welding repairs. (Tr. 33:18-34:5). He also admitted that there has been a need for welding repairs on company trucks and truck parts. (Tr. 34:5-11). This was confirmed by shop steward Rexach, who testified that, within the past year, there have been a lot of welding jobs at Respondent's facility, particularly involving trucks and the batch plant. (Tr. 93:14-18).

I. Respondent Assigned Unit Welding Work to Non-Unit Employees

Respondent and Heavy Materials, LLC, (hereinafter Heavy Materials) are sister companies owned by U.S. Concrete, the parent company. Respondent is the concrete manufacturer, and Heavy Materials is the quarry and crushed aggregates manufacturer. The USVI Region of U.S. Concrete is overseen by Pete Myers, Executive Regional Vice President, who oversees both Spartan and Heavy Materials directly. (121:15-122:8; 91:1-3). Heavy Materials' facility is located about ten minutes away from Respondent's facility, by car. (Tr.122:18-20).

Respondent stipulated that, on at least ten different dates after laying off its welder, a non-Unit employee from Heavy Materials performed welding tasks at Respondent's facility. Respondent stipulated that welding was performed at its facility by a Heavy Materials employee on February 23, 2017, two dates in mid-April 2017, May 11, 2017, July 24, 2017, October 20, 2017, November 15, 2017, February 13, 2018, February 27, 2018, and March 7, 2018. [J. Ex. 18, paragraph 6]. Respondent further stipulated that it did not give prior notice about this to the Union and did not discuss it with the Union. [J. Ex. 18, paragraph 7].

According to the testimony of Respondent's General Manager, after the layoffs, employees of Heavy Materials have been coming over to Respondent's facility to perform welding jobs when there is an emergency repair or unforeseen event that needs immediate

attention.⁹ (Tr. 36:6-18). Respondent's General Manager testified that, when instances that required welding arose, he would make a phone call to Heavy Materials and would inquire if a welder was available to deal with the situation at Respondent's facility. A Heavy Materials employee, who is supposed to clock-in in the morning at Heavy Materials' facility, would drive to Respondent's facility to perform the welding work. (Tr. 134: 5-14). The facilities are about ten minutes away from each other. (Tr.122:18-20). When Heavy Materials employees arrive at Respondent's facility to work on a welding job, they report to the dispatcher, the mechanic, or the General Manager to learn about the issue that needs their attention. They are not required to sign in when they arrive to work on these welding duties. (Tr. 186:13-24).

a. A Welder from Heavy Materials, Evelle Walters, Performed Welding for Respondent

During his testimony, Respondent's General Manager admitted that, after Murrain-Benjamin's layoff, a welder from Heavy Materials has been performing the welding work that Murrain-Benjamin used to perform at Respondent's facility. (Tr.42:16-22). He identified this Heavy Materials welder as Evelle Walters. (Tr. 36:16-18). According to the General Manager, Walters has performed welding repairs on a ruptured pressurized water tank, truck parts, and the batch plant, in particular on a broken cement scale. (Tr. 37: 5-17). For these welding repairs, Walters uses a welding machine and a cutting torch. (Tr. 37:18-38:8).

Shop steward Rexach confirmed that, after the layoffs, a welder from Heavy Materials continued to perform the welding duties that Murrain-Benjamin used to perform

⁹ Respondent testified that it also used Heavy Materials employees for jobs that did not involve unforeseen repairs, but that none of them involved welding. (Tr. 180:19-25.) In those non-emergency jobs, Respondent kept time cards as record of the jobs performed by Heavy Materials employees. (Tr.181:1-65).

when he was employed as a welder for Respondent.¹⁰ (Tr.90: 22–25). He specifically recalled observing Evelle Walters, Heavy Materials’ welder, performing welding on a water tank at Respondents facility. (Tr. 91:15-123). He also observed Walters doing welding “on the batch plant, concrete plant, on the Silo, and on the scale,” which is where the cement falls in. (Tr. 92: 1-3). He further observed Walters using welding tools such as the welding machine, the welding torch, and other cutting tools. (Tr. 92: 4–6). Rexach recalled having observed Walters performing welding for Respondent around March, 2017. (Tr. 91:10–14).

The fact that a non-bargaining Unit employee from Heavy Materials was performing welding work at Respondent’s facility was also corroborated by Murrain-Benjamin’s uncontested testimony. In this regard, Murrain-Benjamin testified that, after he was laid off, a person from Heavy Materials who he referred to as “Evelle” was performing the duties he used to perform for Respondent. Murrain-Benjamin explained that, on more or less three times, he went to the company located next door to Respondent’s facility to look for a job and observed Evelle welding at Respondent’s facility. Murrain-Benjamin recalled that the last time he observed this was very recent, on June 5, 2018. (Tr.107:10-24). According to Murrain-Benjamin, he could not see the specific welding job being performed by Evelle because he was far away, at the company next door. Nonetheless, Murrain-Benjamin described he could see the reflections (flashes or rays) from the welding machine and a vehicle identified with a Heavy Materials sign parked next to where the welding was being done. (Tr. 10: 2-6).

¹⁰ Rexach knows the employees who work for Heavy Materials because he used to work with them. (Tr. 91:4-6).

b. Heavy Materials' Mechanic, Julius James, Performed Welding for Respondent

Respondent's General Manager Alibocas admitted that the mechanic from Heavy Materials, Julius James, works at Respondent's facility on a regular basis, not only for unforeseen situations, and even clocks in and out at Respondent's facility. (Tr. 172:1-21; 185:15-18). The General Manager further admitted that Respondent expenses this Heavy Materials mechanic when he performs work for Respondent. (Tr. 181:9-16). In this regard, he admitted that although James is paid as a mechanic and does mechanic work on a regular basis for Respondent, he is also assigned to carry out welding jobs when needed. (Tr. 184:9-25).

Union shop steward Rexach also testified that he has observed James undertaking welding work at Respondent's facility. Rexach testified that he saw James doing welding work on the batch plant and also on company trucks. When asked how often he had witnessed this, Rexach testified that he saw James performing welding repairs on Rexach's own company truck more than ten times. (Tr. 92: 21- 93:7). Furthermore, Rexach also testified that, after the layoffs, he has also seen James carrying out assistant mechanic duties for Respondent. (Tr. 94:1-13).

J. Respondent has a Dispatch Log that Reflects Some of the Instances When Heavy Materials Employees Have Performed Welding for Respondent

Respondent's General Manager testified that Respondent does not keep any business record of the irregular jobs performed by Heavy Materials employees at its facility, except for a dispatch log, which is an electronic spreadsheet used to chart efficiency and the hours and yardage of the work. (Tr. 143:15-25). The dispatch log is filled out by Respondent's dispatcher, who is the person who dispatches trucks, takes orders, and instructs the drivers

where to go with the concrete. (Tr. 170:11-13). If any emergency welding job was done on a specific day by a Heavy Materials employee, it would be reflected in the notes section of the dispatch log. (Tr. 156-157). These notes and comments are all written by Respondent's dispatcher.¹¹ While the dispatcher is carrying out its own assigned duties, he takes notes of situations that come up during the day and enters them on the log. Respondent's General Manager does not enter any notes or information on the log; he just reviews the log and makes spelling corrections, if necessary. (Tr. 169:6-25). General Manager Alibocas claims that, if anything happens outside the dispatcher's presence, the dispatcher is supposed to be informed about it and then log it. However, Alibocas could not affirm this. He "could not answer" if it is possible for certain welding work to not be recorded in the log. (Tr. 171:4-12).

Respondent's General Manager further testified that Respondent Exhibit 3 contains selective portions of the dispatch log recording welding work performed at its facility by Heavy Materials employees. [R. Ex. 3] (Tr. 156:22-157:4). In this regard, Respondent Exhibit 3 shows that, on February 23, 2017, the cement scale had a crack and was repaired after the last load was batched. Respondent's General Manager testified that he can deduce from that comment that welding was needed that day. Similarly, on July 24, 2017, the log reflects that a ladder was broken and needed to go into the shop to be welded. [R. EX. 3]. Respondent's General Manager testified that a welding job was needed that day as well, and he recalled that particular job was performed by Julius James, Heavy Materials' mechanic. Respondent's General Manager testified that he could tell that James worked on this welding repair because of the nature of the injury of the truck, as described in the log.

¹¹ Halvor Berg used to be Respondent's dispatcher. The record does not reflect the exact period during which he held this position. Currently, Dorrett Maynard holds this position. (Tr. 39:6-9).

(Tr. 146:8-147:1). Respondent further testified that he did not have to call Heavy Materials to send over James for the repair, as was the practice when Respondent needed a welder when it no longer had Murrain-Benjamin, because James was already at Respondent's facility that morning. (Tr. 147:2-6).

According to Respondent's General Manager, the dates on Respondent Exhibit 3 are the dates he identified on the dispatch log when welding was performed by Heavy Materials employees at Respondent's facility. (Tr. 157:1-4). The dates reflected on the dispatch log portions that make up Respondent Exhibit 3 are the same dates in paragraph 6 of the parties' Joint Stipulation, with the exception of two dates in mid-April 2017, that are mentioned in the stipulation and do not make up part of Respondent Exhibit 3.¹² [R. Ex. 3; and J. Ex. 18, paragraph 6]. Respondent's General Manager could not recall if there were any other times besides the ones displayed in Respondent Exhibit 3 when Heavy Materials employees came over to Respondent's facility to perform welding work. His testimony was that "there might have been other times," although he suggested they were a limited amount. (Tr. 160:12-161:16). This testimony is consistent with the fact that he is not the person who writes the notes on the log or the person unforeseen welding situations are reported to; so it is not possible for Alibocas to attest that the log reflects every single situation around the plant that required welding.

Respondent's General Manager admitted he is not always present when a welder from Heavy Materials performs repairs. (Tr.187:19-22). However, to Respondent's Counsel's questions, the General Manager testified that the repairs that require welding take up any time from fifteen to ninety minutes, on average. (Tr. 187:9-12). He claimed

¹² The dispatch log entry dates as reflected in R. Ex. 3 are the following: 2/23/2017; 5/11/2017; 7/24/2017; 10/20/2017; 11/15/2017; 2/13/2018; 2/27/2018; and 3/07/2018.

that he is able to deduce how much time the welding took by looking at what is recorded in the dispatch log, even though he did not necessarily witness the repair and even though he reiterated throughout his testimony that the log does not reflect any times spent on a job or repair. (Tr. 39:22-40:4; 40:16-20; 188 2–21; 144-148; 177:5-15). Respondent’s testimony as to the dispatch log is inconsistent and not credible. On the previous day, during the hearing, when Respondent was first interrogated about this same matter by Counsel for the General Counsel, his response was the opposite. When asked by CGC to give an average, by looking at the dispatch log, of the time it took a Heavy Materials employee to perform welding in these so called unforeseen situations, the General Manager answered “I’m not a welder, and I cannot ascertain the time as for how long it would take to weld something.” (Tr. 42:2-6). When he was recalled by Respondent the following day, and confronted with the fact that he is not a welder, the General Manager confidently asserted the opposite—that his experience in the industry allowed him to be able to tell how long a welding job took just by looking at the dispatch log. (Tr. 187-188).

K. Respondent did not Pay Heavy Materials Employees for the Welding Jobs they Performed at its Facility

General Manager Alibocas testified that Respondent does not pay for the welding jobs that Heavy Materials employees have performed at Respondent’s facility. Rather, it is Heavy Materials who pays their employees for those jobs. (Tr.122: 9-13). In this regard, Respondent does not reimburse Heavy Materials for the hours its employees spend doing welding work for Respondent. (Tr. 178:7-15). Other than the dispatch log, Respondent does not keep records of the instances when Heavy Materials employees perform welding for Respondent, since it alleges they only come to weld when irregular situations arise. (Tr. 180:7-8).

Respondent's accountant, Shirley Winslow, testified about how Respondent and Heavy Materials handle finances when it comes to the work that Heavy Materials mechanic Julius James does for Respondent. Winslow corroborated that Respondent keeps time cards for the time that the Heavy Materials mechanic, Julius James, works at Respondent's facility. (Tr. 193:15–25; 194:15–25). No funds are exchanged between Heavy Materials and Respondent for the work performed by this mechanic. The only funds exchanged between the two companies are for aggregates, materials that Respondent purchases from Heavy Materials. (Tr. 194: 11–14; 200:2-6). At the end of every month, Winslow makes adjustment entries that take off the expenses of each company. Respondent keeps record of what it owes to Heavy Materials and what Heavy Materials owes to Respondent. (Tr.194:1-4). The system Winslow uses to make these entries is called Oracle, and it is used by all the companies owned by US Concrete. (Tr.202:6-12).

Winslow clarified that Respondent just writes a check to Heavy Materials for aggregate expenses, but in the case of the mechanic, Julius James, Respondent's books reflect journal entries for the time he spent performing work for Respondent. She explained that this time has a dollar amount value based on time cards kept, because James uses Respondent's clock to log in when he comes in and out of Respondent's facility. (Tr. 194: 15–25; 199:20–24).

The amount Respondent owes to Heavy Materials for James' work is recorded as a profit and loss statement, where Heavy Materials' expenses are less than Respondent's, because Respondent is using Heavy Materials' mechanic. (Tr. 200:16 -201:3). Winslow further explained that, when it writes a check to pay for materials it purchased from Heavy Materials, there is no discount or credit for the expense of the mechanic's work, which is not a Heavy Materials expense. The expense of the mechanic remains as a profit and loss statement that is entered to Heavy Materials' books. Winslow clarified that, although both companies keep separate books

and have separate accountants, Winslow is allowed to make entries to Heavy Materials' books in the Oracle system for the amount representing the mechanic's work. The system then does an offsetting entry for that portion. (Tr. 201:6-202:12; 202:15-25).

III. ARGUMENT

A. Respondent violated Section 8(a)(1) and (5) of the Act by Laying off Benson Morton and Ramon Murrain-Benjamin and by Subcontracting Unit Welding Work to Heavy Materials Without Giving Prior Notice to the Union and Without Bargaining with the Union

a. Respondent's Decision to lay off Morton and Murrain-Benjamin is a Mandatory Subject of Bargaining

Section 8(a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. As provided in Section 8(d) of the Act, an employer has the obligation to bargain with respect to wages, hours, and other terms and conditions of employment. *Rigid Pak Corp.*, 366 NLRB No. 137 (2018); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209 (1964).

It is well settled that an employer must bargain with its employees' collective-bargaining representative over any changes to terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Unilaterally instituting changes regarding matters that are mandatory subjects of bargaining constitutes a violation of Section 8(a)(1) and (5) of the Act. *Id.*

An employer's decision to lay off unit employees is a change in terms and conditions of employment and a mandatory subject of bargaining. *Tri-tech Services*, 340 NLRB 894 (2003). In *Pan American Grain Co.*, 351 NLRB 1412, 1414 (2007), the Board stated that an employer's decision to lay off employees for economic reasons, rather than due to a change in the scope of its operations, is a mandatory subject of bargaining. An employer is obligated to bargain with a union with respect to the decision to conduct layoffs and the effects of such decision. *Alpha*

Associates, 344 NLRB 782, 785 (2005). See *Farina Corp.*, 310 NLRB 318, 320 (1993)(“The fact that the contemplated layoff may be prompted by bona fide economic reasons and is in no way discriminatorily motivated does not remove it from the umbrella of the bargaining obligation.”); *NLRB v. 1199 National Union of Hospital and Health Care Employees*, 824 F.2d 318 (4th Cir. 1987) (the employer’s decision to lay off employees reflected more a desire to reduce labor costs than an exercise of entrepreneurial prerogative or control, thus, it was amenable to resolution through the collective bargaining process). See also, *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985).

In *First National Maintenance*, the Supreme Court distinguished fundamental managerial decisions from those decisions whereby an employer intends to reduce labor costs. The Court concluded that a decision based on the reduction of labor costs must be pursued through the collective bargaining process. *First National Maintenance*, 452 U.S. 666 (1981). An employer's decision to lay off unit employees that is motivated by economic considerations does not relieve an employer of its duty to bargain, unless it can demonstrate that “economic exigencies” compelled it to take prompt action. *Id.* See also *Bottom Line Enterprises*, 302 NLRB 373 (1991). Whenever “economic exigencies” are absent, an employer must provide adequate notice to the union and bargain the layoff decision and its effects. *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954-955 (1988). In this regard, the economic exigency exception has been characterized by the Board as a heavy burden, therefore, the application of this exception has been limited to “extraordinary events” which are “an unforeseen occurrence, having a major economic effect [requiring] the company, to take immediate action.” *Hawkins Lumber Co.*, 316 NLRB 837, 838 (1995); *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1997). (“Although an employer may properly decide that an economic layoff is required, once such a

decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.”). Further, “absent a dire financial emergency, the Board has held that economic events such as the loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortage do not justify unilateral action.” *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Farina Corp.*, supra. The Board has further stated that “business necessity is not the equivalent of compelling considerations which excuse bargaining.” *Farina Corp.*, supra, at 321. If it were, an employer facing a gloomy economic outlook could take any unilateral action simply because it was struggling financially. *Id.* Furthermore, in order to satisfy its bargaining obligation, an employer must provide the union with a reasonable opportunity to evaluate the employer's proposals and present counter proposals before the employer implements change. *Gannett Co.*, 333 NLRB 355, 357 (2001). Notice must be given “sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain [I]f the notice is too short . . . [or] the employer has no intention of changing its mind, then the notice is nothing more than a *fait accompli*.” *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983). See also *ILGWU*, 463 F.2d 907, 919 (D.C. Cir. 1972).

In this case, there is no dispute that Respondent laid off two unit employees, Morton and Murrain-Benjamin, without first notifying and bargaining with the Union over its decision and the effects of said decision. It is submitted that the decision to lay off these two unit employees constitutes a change in their working conditions that needed to be bargained with the Union.

As the evidence in the record reflects, Respondent’s decision to layoff these unit employees was based on economic considerations. In this regard, Respondent informed the

Union in its January 30, 2017 letter that it would effectuate the layoffs due to its projection of the future of the local economy, material loss of revenue, and a new competitor in the market, all which allegedly drove it to adjust its operating expenses. (J. Ex. 1). In the layoff letters given to Morton and Murrain-Benjamin, Respondent restated that St. Croix's economic situation caused a downturn in its business. (J. Ex. 4 and 5). Moreover, in Joint Exhibit 16, Respondent mentioned that, given the state of the economy in St. Croix and the slowdown in the demand for concrete, it was prudent to avoid increases to the cost of its operations and to reduce those costs. (J. Ex. 16). Thus, there is no dispute that the layoffs were for economic reasons and a mandatory subject of bargaining.

The above general references made by Respondent with regard to the local economy and the slowdown in business do not constitute "economic exigencies" that relieve an employer from its duty to bargain; neither does its claim that it had a competitor offering lower prices, which is usual in any kind of business. This is because none of the economic reasons proffered to the Union in order to justify the layoffs were of the nature as to compel Respondent to take prompt action, as the extant case law requires. Moreover, Respondent clarified in an e-mail to the Union that "at no time has Spartan stated it was having financial difficulties." (J. Ex. 16) Respondent just wanted to reduce labor costs. Accordingly, from the evidence in the record, it cannot be construed that the financial circumstances surrounding Respondent at the time of the layoffs were emergencies that required imminent action. In this regard, it is submitted that Respondent was not relieved from its duty to bargain over the layoffs.

Additionally, Respondent did not give sufficient notice to the Union about the layoffs, since Respondent stipulated, and through its General Manager Alibocas admitted, that the first communication announcing the layoffs was sent to the Union on January 30, 2017, hours before

implementing the decision. (J. Ex. 18, paragraph 11). When the Union responded asking Respondent to cease and desist, and to discuss the decision with the Union, Respondent simply ignored the request and failed to respond. Respondent's Alibocas confirmed that the parties did not engage in any bargaining with relation to these layoffs, even when the Union requested so. Therefore, as admitted by Respondent, and corroborated by the Union shop steward and the documentary evidence in the record, it is submitted that Respondent did not bargain with the Union about its decision to layoff Murrain-Benjamin and Morton, and did not bargain with the Union about the effects of that decision, in violation of Section 8(a)(1) and (5) of the Act.

b. Under *Fibreboard*, Respondent had an Obligation to Notify and Bargain with the Union Over its Decision to Subcontract Unit Welding Work to Non-unit Employees Employed by Heavy Materials

In *Fibreboard Paper Products Corp., supra*, at 210, the Court established that “contracting out unit work” that unit employees are capable of continuing to perform is a mandatory subject of bargaining that falls under Section 8(d) of the Act. This “even more plainly cover[s] termination of employment which...necessarily results from the contracting out of work performed by members of the established bargaining unit.” *Id.* The Court further stated that,

The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

Id., at 213–214.

In *Fibreboard*, the Supreme Court stated that the employer's decision to subcontract unit work was based on its desire to reduce labor costs, and this was a matter “peculiarly suitable for resolution within the collective bargaining framework.” *Id.*; See also, *Rigid Pak, supra*. “The

Court clarified that its decision was limited to subcontracting where bargaining unit employees are replaced with those of an independent contractor to do the same work under similar conditions of employment.” *Rigid Pak*, supra, citing *Fibreboard*, at 215. Here, the Supreme Court was faced with the question of deciding whether an employer's decision, motivated by economic considerations, to subcontract maintenance work performed by its employees, was covered by the phrase "terms and conditions of employment" within the meaning of Section 8(d) and a subject that the employer was obligated to bargain under Section 8(a)(5). The Court affirmed the Board's finding that subcontracting was a mandatory subject of bargaining and stated:

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railway Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

Fibreboard, at 210.

In *Torrington Industries*, 307 NLRB 809 (1992), the Board applied this holding that an employer has a duty to bargain over decisions to subcontract work when it replaces bargaining unit employees with employees of a contractor to perform the same work. The Court reasoned that, requiring an employer to bargain under these circumstances would not abridge its freedom to conduct its business, particularly when the subcontracting involved no capital investments or change in the company's basic operations. *Id.*, at 213-214. The Board in *Torrington* found that an employer is required to bargain with the Union over subcontracting decisions where "virtually all that is changed through the subcontracting is the identity of the employees doing the work,"

since those decisions are not “at the core of entrepreneurial control.” *Id.*, at 811, quoting *Fibreboard*, at 223.

Under the *Fibreboard* line of cases, Respondent had an obligation to bargain with the Union prior to getting rid of its welder, Murrain-Benjamin, and subsequently using Heavy Materials employees to continue performing the welding and mechanic duties he used to perform. Respondent's decision to lay off Murrain-Benjamin and to transfer some of his welding and mechanic work to Heavy Materials' welder and Heavy Materials' mechanic was not the result of a change in the scope or direction of its business, but instead, the mere substitution of a unit employee for two non-unit employees. This decision to subcontract unit work, as argued above, was based on economic considerations. In this regard, it is submitted that Respondent remained in the business of producing and distributing concrete, and continued using employees from Heavy Materials to carry out welding duties it needed to conduct the operation of said business. Respondent admitted that it did so without providing notification or bargaining with the Union, therefore violating Section 8(a)(1) and (5) of the Act.

c. Respondent's Assignment of Unit Welding Work to Two Employees of Heavy Materials Constituted Subcontracting

Respondent may argue that that it did not subcontract any welding work to Heavy Materials employees and that it only called Heavy Materials employees to perform welding duties when emergency situations or unforeseen events arose at Respondent's facility. This argument is not supported by the record. Both Murrain-Benjamin and shop steward Rexach testified that there was a lot of welding work available at Respondent's facility and that the batch plant and trucks needed maintenance and welding repairs. Union shop steward Rexach testified that, after Murrain-Benjamin was laid off, his truck required welding repairs on more than ten times. He also witnessed Heavy Materials' welder performing welding around the plant on

several other occasions. In addition, Respondent stipulated to at least ten different occasions it brought an employee from Heavy Materials to do welding, after laying off its welder, without notifying and bargaining with the Union. Respondent stipulated that welding was performed at its facility by a Heavy Materials employee on the following dates: February 23, 2017, two dates in mid-April 2017, May 11, 2017, July 24, 2017, October 20, 2017, November 15, 2017, February 13, 2018, February 27, 2018, and March 7, 2018. [J. Ex. 18, paragraph 6]. As the above evidence suggests, these were not the only dates when welding was subcontracted, especially considering Respondent's admission that there might have been instances not recorded in the dispatch logs when welding was performed by Heavy Materials employees.

Furthermore, Respondent's General Manager admitted that Respondent expenses Heavy Materials' mechanic, Julius James, who works at Respondent's facility on a regular basis. As the Union shop steward testified and Respondent's General Manager corroborated, James performed both welding and mechanic duties for Respondent. James performed welding repairs on the Union shop steward's truck on more than ten times and performed welding repairs around the plant according to his skill. Respondent's General Manager even knew, from the nature of a rupture, which welding repairs were performed by James. To be able to know this, Respondent must have been very familiar with James' welding capabilities. The above contravenes Respondent's argument that the only instances that required welding were emergency situations and that, if any existed, they would be limited to those reflected in the selective dispatch logs submitted as Respondent Exhibit 3.

The record evidence demonstrates that Respondent subcontracted James as a mechanic and used him to perform welding work because, after laying off its only welder, Respondent still needed someone to continue performing welding duties to maintain its basic operations running.

Respondent interchanged James' duties as welder and as a mechanic, just as it did with when it had Murrain-Benjamin working as a welder and assistant mechanic.

Furthermore, Respondent's General Manager admitted that Respondent had a need for a welder, since it used either Julius James or Evelle Walters from Heavy Materials to perform welding when emergencies caused production to stop and the batching operation was down. This means that, without those welding repairs, Respondent could not have continued running its normal operations. Respondent needed a welder to conduct its business, regardless of the economic situation it was facing. Besides Julius James, Respondent subcontracted Evelle Walters from Heavy Materials, to perform welding duties in particular. In Walter's case, he was not called to Respondent's facility on a regular basis, but he was called whenever welding was needed. As Respondent's General Manager testified, Walters also performed the same welding duties and used the same welding tools as Murrain-Benjamin did when he was employed by Respondent.

Based on the above, it is submitted that Respondent continued to perform welding and mechanical work as part of its operations, and subcontracted this work to Heavy Materials when it merely substituted Murrain-Benjamin for Julius James and Evelle Walters to perform the same work.

B. Respondent Violated Section 8(a)(5) of the Act by Unreasonably Delaying the Provision of Information Requested by the Union on February 3, 2017

a. Legal Standard

It is well settled that an employer has a duty to provide to the union, on request, information "relevant in carrying out its statutory responsibilities." *Postal Service*, 276 NLRB 1282 (1985); *NLRB v. Acme Industrial Co.*, 385 U.S. at 437 (1967); *Truitt Mfg. Co.*, 351 U.S. 149 (1956). Whether the requested information is relevant and necessary is determined by the

factual circumstances on a case-by-case basis. *Interstate Food Processing*, 283 NLRB 303 (2015); *Postal Service*, supra, at 1285; *Washington Hospital Center*, 270 NLRB 396 (1984). Certain types of requested information that pertain to wages, hours, and working conditions of bargaining unit employees are so intrinsic to the core of the employer-employee relationship that they are considered presumptively relevant. *Postal Service*, supra. However, when the representative requests information that does not concern the terms and conditions of employment for the bargaining unit employees—such as data or information pertaining to nonunit employees—there is no such presumption of relevance, and the potential relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 258-259 (1994). The burden to show relevance is “not exceptionally heavy,” *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983), and “[t]he Board uses a broad, discovery-type of standard in determining relevance in information requests.” *Shoppers Food Warehouse*, supra, at 259. In this regard, the Board has also stated that the “information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it.” *Postal Service*, supra, citing *Pfizer, Inc.*, 268 NLRB 916, 918 (1984). The Union need show only a “potential or probable relevance ... to give rise to an employer’s obligation to provide information. *Shoppers Food Warehouse*, supra, at 315 (1994).

An employer’s statements and bargaining proposals can make non-unit information relevant to negotiations. *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006). If a party asserts a claim and then refuses to provide requested information to substantiate that claim, collective bargaining is frustrated and rendered ineffective. *Leland Stanford Junior Univ.*, supra, at 145. In *Caldwell Manufacturing, Co.*, at 1160, the Board held that the employer violated the Act by refusing to provide information to substantiate claims made in bargaining. The Board held that

relevancy was established because the information would assist the union in verifying the employer's claims concerning its proposals and would allow the union to make counter proposals. *Id.* at 1160. The Board reached the same result in *AI Door and Building Solutions*, 356 NLRB 499 (2011). In that case, the employer claimed that it was paying too much to the union employees in wages and benefits, which affected its ability to get and receive job bids. The union requested information regarding job bids, and the employer refused to provide the job bid information. The Board held that the union's information request was relevant to evaluate the accuracy of the employer's specific claims and ordered that the employer provide the information. *Id.*, at 502.

Once the initial showing of relevance has been made, “the employer has the burden to prove a lack of relevance ... or to provide adequate reasons as to why he cannot, in good faith, supply such information.” *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989); *San Diego Newspaper Guild [Local 95 v. NLRB]*, 548 F.2d 863 (9th Cir. 1977)] at 863, 867. An employer’s obligation to operate “in good faith” when bargaining collectively also applies to the attitude with which an employer considers a union's requests for information. *Interstate Food Processing*, *supra*.

Section 8(a)(5) of the Act not only requires an employer to furnish a union with requested information relevant and necessary to its role as the exclusive bargaining representative of its employees, it also obligates an employer to respond to a union’s request in a timely manner. The Board has stated that “[T]he duty to furnish information requires a reasonable good-faith effort to respond to the request as soon circumstances allow.” *Monmouth Care Center*, 354 NLRB 11, 52 (2009) (citations omitted), reaffirmed, 356 NLRB 152 (2010); *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993) (“[I]t is well established that the duty to furnish requested

information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow”). In evaluating the promptness of the response to an information request, “the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.” *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (citations omitted).

An unreasonable delay in furnishing information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). “Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch ‘as the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible.’” *Woodland Clinic*, 331 NLRB 735, 737 (2000). (citations omitted).

The Board has consistently found an unjustified delay in furnishing relevant information to be unlawful. See e.g. *Woodland Clinic*, supra, at 736 (delay of seven weeks unreasonable, absent explanation); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (delay of over two months unreasonable, and explanation offered for delay inadequate); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (employer replied within two weeks, providing some information, but did not supply rest of information required until six weeks later and no explanation provided for “foot dragging”); *International Credit Service*, 240 NLRB 715, 718 (1979) (unexplained delay of six weeks unreasonable); *Local 12 Engineers*, 237 NLRB 1556, 1558-1559 (1978) (information supplied six weeks after initial request and after charge filed); *Pennco Inc.*, 212 NLRB 677, 678 (1974) (employer unreasonably failed to respond to information requests for over one month and did so only after charge filed).

b. Respondent's Three Month Delay in Responding to the Union's Information Request, Without an Explanation, Constitutes a Violation to Section 8(a)(5) of the Act

In this case, the information was requested by the Union on February 3, 2017, and the Union followed up on its request on April 28, 2017. At the outset, it is important to note that the information in question is relevant and necessary to Union's role as bargaining representative. In this regard, among the items requested, the Union asked for information regarding bargaining-unit work and employee benefits, in particular concerning welding and yardman maintenance work. (J.Ex.17). This information pertains to terms and conditions of employment of bargaining unit employees and is presumptively relevant. As with the rest of the information requested, financial records and discussion of competition,¹³ the Union requested this information to ascertain the validity of the Employer's claim that it needed to layoff two employees in light of the "depressed state of the local economy," because a "new competitor that had entered the market," and because it needed to "adjust its operating expenses." In this regard, the Union explained that the information was necessary "in response to its recent indication to us [the Union] that due to financial difficulties, the company is proposing changes in the work force...the IAM has a vital stake in being able to assess the economic justification of the company's decision to terminate two employees, [and] the effects that any company decision may have on the affected employees we represent." (J. Ex. 17).

Here, like in *Caldwell*, Respondent "premised its bargaining positions on specific assertions and the [union] requested information to evaluate and verify [these] assertions and develop its own bargaining positions." *Caldwell*, supra, at 1160. As such, in the course of

¹³ In general, this portion of the request included Respondent's financial statements; audited statements and balance sheets; sales costs of goods/services and administrative expenses; material loss of revenue for 2016; business plans and studies; budgets and expected performance; cuts of wages and fringe benefits to employees; labor costs and costs of operation; and data regarding Respondent's competitors. (J. Ex. 17).

bargaining, Respondent made the information relevant and created the obligation to provide the requested data. *Id.* When there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for nonunit employees. *Id.*, at 1159-1160. Thus, as in *Caldwell*, the Union here was entitled to the requested information to test the validity of Respondent's claims to justify the unit employees' layoffs, in order to be able to engage in meaningful bargaining concerning these layoffs.

Notwithstanding the above, Respondent waited until May 15, 2017, over three months after the initial request, to respond to the Union and tell it for the first time that a confidentiality agreement needed to be signed for the information the Union was requesting. It was by then that the parties began exchanging proposals regarding the confidentiality agreement. Respondent did not provide any explanation for the three-month delay in its response to the Union, even though Respondent's General Manager admitted that he received the Union's information request and handed it over to Respondent's legal representative.

Although Respondent eventually complied with the Union's requests by making the information available for review when the confidentiality agreement was signed, Respondent failed to justify the delay, and the information and documents sought by the Union were neither complex nor difficult to retrieve. It is therefore submitted that this three-month delay to merely begin negotiating a confidentiality agreement before furnishing the information requested is in and on itself a violation to Section 8(a)(5) of the Act.

Respondent may argue that the Union did not follow up or reiterate its request until April 28, 2017, despite having been in communication with agents of Respondent for negotiations for the collective-bargaining agreement. It may also argue that the request was sent to Respondent's

General Manager, Dion Alibocas, instead of Respondent's legal representatives or upper management, with whom the Union had communication. None of these arguments merit consideration and do not constitute a proper explanation as to why Respondent ignored the Union's request for information. There is no requirement that the Union must reiterate or follow-up on its request if the employer has not responded. After a relevant request has been made, it is the employer's obligation to timely respond. In any case, the Union did follow up in April 2017, when it reminded Respondent it had not received the information. The Union should not have the burden of reminding Respondent of what it has or has not done. It was Respondent's obligation to respond to the Union when it received the request. Moreover, Respondent's General Manager, Dion Alibocas, is admittedly an agent of respondent, as well as a member of the bargaining committee and was the person who drafted Morton and Murrain-Benjamin's layoff letters. He was also the person who notified Morton of Respondent's decision to terminate him. Hence, it was reasonable for the Union to address the request for information to General Manager Alibocas, especially when he is the point of contact, physically present, at Respondent's facility, and would have direct access to the information requested. In any event, Respondent's legal representative, Michael Quinn, was copied in the request for information letter sent by the Union, and Respondent's General Manager testified that he passed the Union's request to Respondent's attorney. (J. Ex. 17). Thus, Respondent has no basis for not having responded to the Union's request until over three months after it received it.

IV. CONCLUSION

For the reasons set forth above, and based on the record as a whole, it is respectfully submitted that Respondent violated the Act in all respects alleged in the Complaint, as amended. Accordingly, Counsel for the General Counsel respectfully requests that the Administrative Law

Judge recommend that the Board order Respondent to cease and desist from engaging in the unfair labor practices alleged in the Complaint, as amended, and bargain in good faith with the Union with respect to the wages, hours, and other terms and conditions of employment of unit employees before implementing any such changes. It is further requested that Respondent be ordered to make whole Benson Morton and Ramon Murrain-Benjamin for the losses they suffered as a result of their 2017 layoff, plus interest compounded daily, including but not limited to payment for consequential economic harm incurred as a result of Respondent's unlawful conduct, and to offer them immediate and full reinstatement to their former jobs.¹⁴

Respondent should also be required to post a Notice to Employees, both in English and Spanish, as is customary in SubRegion 24. A proposed Notice to Employees is submitted herewith.

Dated at San Juan, Puerto Rico, this 3rd day of August, 2018.

Respectfully submitted,

/s/ Manijée Ashrafi-Negroni

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¹⁴ Respondent should also be ordered to determine the proper tax withholding on the backpay amounts, and to pay the employer's matching FICA tax contributions on the backpay amounts, for submitting proper tax payments and reports to tax authorities, as well as for providing tax reports to each employee to use in filing income tax returns.

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2018, I served Counsel for the General Counsel's Brief to the Administrative Law Judge in the matter of Spartan Products, LLC, Case 12-CA-192417, upon the following persons, addressed to them at the below electronic addresses, by the means set forth below:

By Electronic Filing to:

Hon. Elizabeth Tafe
Administrative Law Judge
National Labor Relations Board
Division of Judges

By Electronic Mail to:

Michael Quinn, Attorney
Dudley, Topper and Feuerzeig, LLP
1000 Frederiksberg Gade
St. Thomas, U.S. Virgin Islands 00802
mquinn@dtflaw.com

Javier Alamazon
Grand Lodge Representative
IAMAW Southern Territory
jalamazon@iamaw.org

/s/ Manijée Ashrafi-Negroni

Manijée Ashrafi-Negroni
Counsel for the General Counsel
National Labor Relations Board, Subregion 24
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San Juan, PR 000918-1002
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Fax. 787-766-5478
Email: manijee.ashrafi-negroni@nlrb.gov

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
 - Act together with other employees for your benefit and protection;
 - Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit with respect to wages, hours and other terms and conditions of employment:

All full-time and regular part-time truck drivers, mechanics, welders, painters, laborers, and loaders or loader operators employed by Spartan Products, LLC in St. Croix, U.S. Virgin Islands; excluding all office clerical employees, professional employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

WE WILL NOT lay off employees, subcontract or transfer unit work to non-unit employees, or make other changes to the wages, hours of work, or terms and conditions of employment of our employees in the above-described bargaining unit without first giving the Union notice and an opportunity to bargain with us over such decisions and its effects on you.

WE WILL NOT fail or refuse to furnish, or unreasonably delay to furnish, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) with information it requests that is relevant and necessary to its performance of its duties as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL, on request, bargain in good faith with the Union concerning our decision to subcontract unit work to Heavy Materials, LLC, to use non-unit employees to perform unit work at our facility, and its effects on you.

WE WILL, on request, bargain with the Union regarding our decision to lay off any employee in the above bargaining unit.

WE WILL make whole Ramon Murrain-Benjamin and Benson Morton for any loss of earnings and other benefits resulting from their layoffs on or about January 31, 2017, less any net interim earnings, plus interest and **WE WILL** offer them immediate and full reinstatement to their former jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL remove from our records all references to the layoffs of Ramon Murrain-Benjamin and Benson Morton and within three days thereafter **WE WILL** notify each of them in writing that this has been done and that their layoffs will not be used against them in any way.

WE HAVE provided the Union, or made available for the Union's inspection, the information that it requested on February 3, 2017.

SPARTAN PRODUCTS, LLC

(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

NLRB Region 31

11500 West Olympic Blvd.
Suite 600
Los Angeles, California
90064

Telephone: (310) 235-7351

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.