

UNITED STATES OF AMERICA
BEFORE THIS NATIONAL LABOR RELATIONS BOARD
REGION 1

BOB'S TIRE CO., INC. AND B.J.'S SERVICE COMPANY, INC. (a Joint Employer)	Case No.:	01-CA-169949 01-CA-169956 01-CA-169959 01-CA-169968 01-CA-173156
And		01-CA-183476 01-CA-183482
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 328		01-CA-186451 01-CA-186462 01-CA-198705 01-CA-203805

BOB'S TIRE CO., INC.

BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGIONS 01 AND SUBREGION 34

Bob's Tire Co., Inc. and B.J.'s Service)	
Company, Inc.)	
)	Case No. 01-CA-183476
and)	
)	
United Food and Commercial Workers)	
International Union Local 328)	

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

Pursuant to Rules and Regulations of the National Labor Relations Board, including Section 102.467 thereof, Bob's Tire Co., Inc. ("Bob's") submits this Brief in Support of its Exceptions to the Decision of Administrative Law Judge, Arthur J. Amchan ("ALJ") dated December 7, 2018 ("Decision").

The General Counsel's Fifth Consolidated Complaint in this case alleged that Bob's violated Section 8(a)(1) and (5) of the Act by failing to bargain with the United Food and Commercial Workers International Union, Local 328 (the "Union") regarding (i) subcontracting bargaining unit work to non-bargaining unit workers, and (ii) making material modifications to a discretionary bonus system.

The parties participated in a hearing in the matter on September 24, 2018 and September 25, 2018 with the Honorable Arthur Amchan presiding. General Counsel presented Carlos Gonzalez, a Union representative/service agent for the Union, Tomas Ventura, a former employee at Bob's and Miguel Cosme Sam Perez, a current employee of Bob's. Bob's presented Robert Bates, the owner of Bob's.

Bob's seeks review of the Decision which determined that it violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act") by failing to pay a Christmas bonus in 2015 and by subcontracting unit work to non-unit employees. For reasons set forth herein, Bob's respectfully requests that the Decision be reversed and the Complaint in this matter be dismissed in its entirety.

II. FACTUAL BACKGROUND

Bob's has been in the scrap tire recycling/repurposing business [Tr. pg. 181; 10-16] since 1976. [Tr. pg. 135; 25] It takes used tires and recycles them or, if they are not in good condition, shreds them into chips which are burned for energy. Throughout that time it has used a combination of direct employees and temporary agency supplied workers [Tr. pg. 228; 9-17] in its workforce. In October of 2015, it was using temporary workers from B.J.'s Service Company, Inc. ("BJ's").

On October 1, 2015, the Union was certified as the bargaining representative of the following unit: "all full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc. working at Bob's Tire Co., Inc. location on Brook Street, New Bedford, MA, but excluding all other employees, mechanics, shredder operators, truck drivers, clerical employees and supervisors as defined in the Act." Bob's was considered a joint employer with BJ's of the BJ's workers.

A. Masis Workers

In November 2015, Bob's suffered a precipitous drop in the value of tire chips when the pricing for the chips dropped dramatically [Tr. pg. 211; 10-20] Tire chips went from producing a profit to being an expense to dispose of. [Tr. pg. 214; 3-8] As a result, Bob's had an increasing pile of chips in its yard. [Tr. pg. 214; 17-21] Not wanting to add to the pile, Bob's began looking for an outlet for tires that didn't involve shredding them into chips. [Tr. pg. 215; 1-11] Bob's then began a new operation which it had not previously engaged in, namely taking the tread off of tires and packaging them up for shipment overseas. [Tr. pg. 211; 3-25; pg. 212; 1-5] Due to a lack of availability of temporary

employees from B.J.'s Service Company with whom it had contracted to obtain workers, Bob's contracted with a company called Masis to provide workers to engage in the new operation.¹ [Tr. pg. 174; 1-10] The new venture operated for approximately a year but eventually did not work out and the Masis workers were no longer used after October, 2016. [Tr. pg. 252; 14-19]

The work performed by the Masis workers was work that Bob's had not done before. [Tr. pg. 215; 9-15] When the new venture did not work out, the Masis arrangement terminated [Tr. pg. 252; 14-19] Bob's continued to hire some workers through BJ's during the period Masis' workers were used. [Tr. pg. 61; 8 -14] No bargaining unit members were laid off or lost any time as a result of the use of Masis workers. [Tr. pg. 217; 19-25; pg. 218; 1]

B. Christmas Bonus Payments

General counsel contends that Bob's paid Christmas bonuses for each year going back from 2008 until 2015, shortly after the Union was certified as the bargaining agent for certain employees, and that shortly after the election, the Christmas bonus was not paid in 2015. It is not disputed that no bonus was paid in 2015. However, only minimal bonuses were paid prior to the Union's certification and were not of a fixed nature or paid over a long period of time. [Tr. pgs. 139-142]

III. THE ALJ'S DECISION

A. Bonuses

In his decision, ALJ Amchan erroneously determined that Bob's violated Section 8(a)(5) and (1) of the act by failing to pay employees a Christmas bonus in December, 2015. ALJ Amchan appears to have reached that decision based solely on the testimony of Tomas Ventura, a former worker at Bob's, who testified he received a bonus each year, [Tr. pg. 75; 4-11] the amount of which varied from

¹ The Masis workers engaged primarily in the new operation but occasionally filled in on other work if there was a shortage of B.J.'s workers. [Transcript pg. 176, lines 6-12]

\$20 in the first years and up to \$100 in later years, and that he saw other employees receive bonuses.

[Tr. pg. 75; 4-11]

B. Subcontracting

ALJ Amchan also concluded that Bob's violated Sections 8(a)(5) and (1) of the Act by subcontracting unit work to non-unit Masis workers. He determined that the work done by Masis workers was not a change in the scope, nature or direction of Bob's business. He also determined that the Masis workers were not considered Bob's employees and therefore were not part of the bargaining unit because the Masis contract stated the workers were Masis' employees. He further ruled that the fact that no unit employees may have lost their jobs or any benefit as a result of the alleged subcontracting was not dispositive as to whether Bob's violated the Act.

IV. ARGUMENT

A. Christmas bonuses

The ALJ's determination that Bob's violated Sections 8(a)(5) and (1) of the Act by unilaterally changing a term and condition of employment, namely the cessation of Christmas bonuses, is unsupported by the record.

For a bonus to be considered a term and condition of employment as part of an employee's wages, it has to be of such a fixed nature, paid with sufficient regularity over a sufficient length of time such that employees would have been reasonably justified in expecting to receive the bonus as part of their wages. Waxie Sanitary Supply, 337 NLRB 303, 304 (2001); NLRB v. Nello Pistorresi & Son, Inc., 500 F. 2d 399, 400 (9th Cir. 1974). Payments that are fixed as to timing but discretionary in amount do not become part of the employee's reasonable expectation and therefore are not considered "terms and conditions" of employment. Phelps Dodge Mining Company, Tyrone Branch v. NLRB, 22 F. 3d 1493, 1496 (1994). See Daily News of Los Angeles vs. NLRB, 979 F. 2d 1571, 1575 (D.C. Cir. 1992).

The only testimony regarding Christmas bonuses came from Tomas Ventura, a former worker at Bob's, and Robert Bates. Mr. Ventura testified he received a bonus each year he worked and saw others receiving such bonuses. However, on cross examination, when asked in which year he received a bonus, he said he was not sure. [Tr. pg. 86; 17-19] He had no recollection of how much he received in any particular year, but did say it varied over the years. [Tr. pg. 87; 3-10] He filed no tax return for those years indicating a bonus payment. [Tr. pg. 87; 11-13] He did not report receiving any bonus to anyone. [Tr. pg. 87; 14-17] He had no records of receiving any bonus in the years he worked. [Tr. pg. 87; 18-21] He testified that he saw other employees receive bonuses, but provided no information as to who, amounts each received or when. To conclude from Mr. Ventura's testimony that all employees routinely received year-end bonuses is an unjustified leap, particularly in the face of the uncertainty of his testimony, the lack of any documentation supporting his testimony, and the contrary testimony of Robert Bates that only a small number of bonuses were paid over the period from 2008 to 2014. [Tr. pgs. 139-142] In short, the record does not support a finding that bonuses were of a fixed nature and paid with sufficient regularity over a sufficient length of time to have become a reasonably expected part of wages.

In addition, in light of Mr. Ventura's testimony that the amounts varied, ranging from \$20 in some years to \$100 in others, and he did not know when he received what amounts, even if you credit his testimony completely and discount the testimony of Robert Bates, at best the time of the alleged bonuses was fixed, but the amounts were clearly not. With the amounts being discretionary and not consistent, employees could not have a reasonable expectation of receipt of any bonus. *Phelps, supra*. In the absence of a basis for a reasonable expectation, the alleged bonuses are not wages and do not become terms and conditions of employment and the termination of them is not a change in the terms and conditions of employment requiring bargaining. *Phelps, supra*.

B. Masis workers

The ALJ's determination that Bob's subcontracted unit work in violation of Sections 8(a)(5) and (1) of the Act is based on two premises, first that the work being done by Masis employees was not a change in the scope, nature and direction of Bob's business, and second that the Masis workers are not considered Bob's employees and therefore not part of the bargaining unit.

1. Scope, nature and direction of business

The determination that Bob's was not engaged in a change in scope, nature and direction of its business was not supported by the record. The Masis workers were primarily engaged in work never before done by Bob's. [Tr. pg. 211; 3-25; pg. 212; 1-5; pg. 215; 9-15] It was born out of the collapse of the market for tire chips. It constituted a change from shredding tires into chips to generating entirely different products for new customers in a new market. [Tr. pg. 174; 6-10] It was on a trial basis. [Tr. pg. 211; 3-25; pg. 212; 1-5] The trial ultimately failed and the work was stopped. [Tr. pg. 207; 1-2] While BJ's workers were capable of doing the work, they were already working substantial overtime and did not have enough time in the day to perform the new operation. [Tr. pg. 222; 20-25; pg. 225; 22-25; pg. 226; 9-13; pg. 227; 6-10] This constituted a potential change in the nature and direction of the business, going from creating tire derived fuel chips to an entirely different product for an entirely different market.

2. Status of Masis employees

The ALJ's determination that the Masis workers were not considered to be Bob's employees and therefore not included in the bargaining unit appears to be based on the terms of the Masis agreement which stated that the Masis workers provided to Bob's were to be employees of Masis and not Bob's, and on the fact that Bob's did not report them to the Union as unit workers.

The notion that the terms of the Masis agreement would control the determination of whether the Masis workers were considered Bob's employees for purposes of the Act is not supported by the applicable case law. Under Browning-Ferris Industries, 362 NLRB 185 (2015) and the line of

cases, how workers are identified in an agreement is not a factor in determining whether those workers are employees of a joint employer.² Instead, that determination is based on the circumstances of the employment, including who has control over the workers and the essential terms and conditions of employment. In this case, notwithstanding the language of the Masis agreement, the workers were controlled and directed by Bob's. Bob's supervisors controlled the work to be done, the work schedule, the manner of performing the work and the hours of work. [Tr. pg. 230; 23-25] Pursuant to Browning, *supra*, Bob's is considered to be a joint employer with Masis and the Masis workers are considered to be Bob's employees for purposes of the Act. As Bob's employees doing unit work, they would be part of the bargaining unit, and therefore, there was no subcontracting of work to non-unit workers. Bob's failure to list them in information provided to the Union would not change their status.

Bob's has traditionally used temporary employees in its workforce. [Tr. pg. 228; 6-20] The source of those employees has varied over time. The use of temporary workers was consistent with how Bob's conducted its business prior to the Union's presence. [Tr. pg. 228; 9-11] The use of Masis to provide temporary workers was for a new project and was due to a lack of available employees from BJ's Service Co. [Tr. pg. 174; 1-5] and the inability of the existing BJ's employees to perform the extra work due to the lack of time. [Tr. pg. 222; 20-25; pg. 225; 20-25; pg. 226; 9-13; pg. 227; 6-10]

The use of workers from Masis resulted in no adverse consequences to the existing BJ's workers. [Tr. pg. 217; 19-25; pg. 218; 1]

The Act does not provide for the imposition of a penalty on a party found to have breached its provisions. Orders fashioned by the ALJ or the Board must be remedial, not punitive. Torrington Extend-A-Care Employer Ass'n v. NLRB, C.A. 2 1994, 17 F. 3d 580. Imposition of an order requiring back pay for losses suffered by unit employees as a result of Bob's use of Masis where

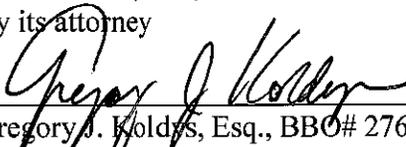
² The joint employer standard is currently the subject of a proposed rule substantially narrowing the conditions which would establish a joint employer situation.

the record indicates only that no BJ's workers suffered any loss of jobs or pay would result in the imposition of a penalty on Bob's and a windfall to the employees in violation of the purposes and intent of the Act. See Equitable Gas Company v. National Labor Relations Board, 637 F. 2d 980 (1981); W. Mass Elec. Co. v. NLRB, 573 F. 2d 101, 106 (1st Cir. 1978); Puerto Rico Tel. Co. v. NLRB, 359 F. 2d 983, 987 (1st Cir. 1966); Westinghouse Electric Corp. (Mansfield Plant), 150 NLRB 1574 (1965)³

V. CONCLUSION

Consistent with the authorities cited herein, the record evidence from the hearing, and the exceptions to the decision of the Administrative Law Judge filed herewith, Bob's respectfully requests dismissal of the complaint.

Robert Bates, Inc., successor
By its attorney



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³ Respondent acknowledges that the question of adverse impact on existing employees has been determined not to be a factor in subcontracting claims. See: *Sociedad Espanola de Auxilio Mutuo Beneficiencia De P.R. a/k/a Hospital Espanola Auxilio Mutuo De Puerto Rico, Inc. v. National Labor Relations Board*, 414 F. 3d 158 (1st Cir. 2005); *Acme Die Casting* 315 NLRB 202 (1994). *Sociedad* was based on the board's determination in *Acme* that the Board's interpretation of the Act was entitled to deference. Respondent contends that the Board's decision in *Acme* was not consistent with the Act and potentially results in a penalty against an employer rather than a remedial action. See *Torrington Extend a Care Employer Ass'n v. NLRB*, C.A. 2 1994.

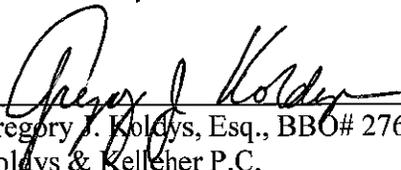
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CERTIFICATE OF SERVICE

I, Gregory J. Koldys, of Koldys & Kelleher P.C., attorneys for Bob's Tire Co., Inc., hereby certify that on January 4, 2019, I served Respondent's Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Respondent's Exceptions to the Decision of the Administrative Law Judge by causing an original to be electronically filed and copies emailed to Marc Gursky, Esq., at *MGursky@rilaborlaw.com* and by first class mail to Gursky/Wiens, 4220 Scrabbletown Rd., Suite C, North Kingston, RI 02852; and by email to John F. Whiteside, Jr., at *john@jwhiteside.com* and by first class mail to Law Office of John F. Whiteside, Jr., P.C., 678 State Road, Dartmouth, MA 02747.

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