Mi Pueblo Foods *and* International Brotherhood of Teamsters Local 853, a/w Change To Win. Case 32–CA–025677

June 11, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On February 9, 2012, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs. The General Counsel also filed cross-exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order. We shall also amend the conclusions of law and modify the Order and notice, as set forth in full below.[2]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing route and schedule changes, reducing the frequency or number of deliveries made by unit drivers from its distribution center (DC) to retail stores, eliminating or restricting backhauls and pickups of products and subcontracting that work, and laying off six unit drivers, all without affording the Union notice and an opportunity to bargain about these changes and their effects on unit employees. For the reasons stated by the judge, we agree that these unilateral changes were unlawful. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *O.G.S. Technologies, Inc.*, 356 NLRB 642 (2011). Contrary to the judge, however, we further find that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over its decision to eliminate the cross-docking of certain products and the effects of that decision.

The Respondent operates a chain of 21 grocery stores. The stores are serviced by its DC in Milpitas, California, which receives and stores merchandise from various vendors. The Respondent's DC employees prepare shipments and load grocery items onto trucks. The items are then delivered to the stores by the Respondent's drivers. In December 2010, pursuant to a Board election, the Union was certified as the representative of the Respondent's Milpitas drivers.

Between December 2010 and April 2011, the Respondent reorganized the DC's operations in order to cut costs, increase productivity, and improve the efficiency of the Respondent's shipping operations. The resulting changes included those found unlawful by the judge, as well as the elimination of the "cross-docking" of products from supplier Unified and contracting out the delivery of those products.

The Respondent has engaged in the cross-docking of products since 2008. This practice involved using a contract carrier, Continental C, to deliver products from wholesale grocery supplier Unified to the DC, where the products are unloaded, staged, and reloaded onto the Respondent's trucks for unit drivers to deliver to stores. In April 2011, the Respondent directed RJR Trucking to deliver the products directly to the Respondent's stores, eliminating this aspect of the unit's work. The Respondent cites a number of reasons for this decision, such as delivery delays and congestion in the DC created by both the cross-docking of Unified products and the increased volume of the Respondent's private-label merchandise stored at the DC. The Respondent, however, continued to use cross-docking for the distribution of Unified products to some of its smaller stores.

The judge found that the Respondent did not unlawfully refuse to bargain over its decision to have RJR Trucking drivers deliver Unified products directly to its stores, because the General Counsel failed to show that this decision had a "material, substantial and significant" impact on drivers' terms and conditions of employment. She found that no unit drivers were laid off and that the drivers' wages and hours were not significantly affected. Although the General Counsel presented evidence that prior to April 2011 the DC handled 88 pallets of Unified products daily and, upon the elimination of cross-docking, this number was reduced to zero, the judge found that these figures, standing alone, did not establish what, if any, impact the Respondent's changes had on the drivers' daily work.

We disagree with the judge's conclusion. By eliminating cross-docking, the Respondent assigned delivery

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to the violations found and to our standard remedial language. Additionally, we shall order the Respondent to compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee. We shall also substitute a new notice to conform to the Order as modified.

work to a subcontractor, specifically delivery of Unified products from the DC to stores that was previously performed by unit drivers. Under *Fibreboard,* supra, and *Torrington Industries*, 307 NLRB 809 (1992), the Respondent was required to bargain with the Union prior to contracting out this work. And bargaining is not excused simply because no driver was laid off or experienced a significant negative impact on his employment.

In *Torrington*, the Board applied the Supreme Court's holding in *Fibreboard* that an employer has a duty to bargain over decisions to subcontract work when the employer replaces employees in the existing bargaining unit with those of a contractor to perform the same work. The Court explained that requiring bargaining under these circumstances would not abridge an employer's freedom to conduct its business, particularly when the subcontracting involved no capital investments or change in the company's basic operations. The Court reasoned that the factors driving the decision to subcontract, such as cost reduction through work force reduction, or decreasing fringe benefits or overtime, are matters "peculiarly suitable for resolution within the collective bargaining framework." Id. at 213–214. Applying that rationale, the Board in *Torrington* found that employers are required to bargain over subcontracting decisions where "virtually all that is changed through the subcontracting is the identity of the employees doing the work," 307 NLRB at 811, because such decisions are not "at the core of entrepreneurial control." Id., quoting *Fibreboard*, 379 U.S. at 223.

Here, the Respondent continued to deliver Unified products between suppliers and its stores, changing only one aspect of that process—the delivery of the products to the stores—by having that work performed by RJR Trucking rather than unit employees. The Respondent's decision was not the result of a change in the scope or direction of the enterprise, but instead a substitution of one group of drivers for another. Given the "essential continuity in [the Respondent's] operations," it is no defense that the Respondent subcontracted the work in an effort to achieve increased efficiency and reduced congestion in the warehouse. See *O.G.S. Technologies*, supra, 645. Alternative solutions to these concerns, such as adjustments in staffing, scheduling, or distribution of work among unit employees, could have been explored through collective bargaining. Accordingly, the elimination of the cross-docking work falls squarely within the *Fibreboard* and *Torrington* framework. See also *O.G.S. Technologies,* supra at 645–646 (finding that the employer had a duty to bargain over a decision to subcontract a small portion of its overall work, explaining that the nature of the employer's business did not change; even though bargaining may not lead to a different result, national labor policy reflects the congressional judgment that the chance that it might warrants collective bargaining of such issues).

Thus, we disagree with our dissenting colleague and the Respondent that this decision was within the Respondent's entrepreneurial purview and should be exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In *First National Maintenance*, the Supreme Court distinguished *Fibreboard* and held that certain managerial decisions that amount to a "change in the scope and direction of the enterprise" were "akin to the decision whether to be in business at all." Id. at 677. In those circumstances, even though an employer's decision affects employment, the employer need only bargain about its decision "if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." Id. at 679.

The Respondent's change from a hub-and-spoke delivery system to a point-to-point system for distributing the products of one supplier does not represent the type of core entrepreneurial decision contemplated under *First National Maintenance*. Unlike *First National Maintenance*, the Respondent's decision to eliminate cross-docking was not akin to a closure or a partial closure of its business. The Respondent remained in the business of warehousing and delivering products, and the Respondent's decision to change the manner in which products of one of its suppliers reached most of its stores did not involve matters at the core of its enterprise.[3] However, even applying the balancing test of *First National Maintenance* to the facts here, we find that the potential benefits of seeking mutual solutions through collective bargaining considerably outweigh any temporary burden on the Respondent that bargaining over this change or its effects would entail.

The judge's failure to find that the Respondent violated its duty to bargain when it unilaterally eliminated the cross-docking derived from the incorrect premise that the

[3] We note that the Respondent continues to cross-dock Unified products for some of its smaller stores. Even if that were not the case, however, for the reasons set forth above, we do not agree with our dissenting colleague that the Respondent's decision to change the delivery method for one of its suppliers constitutes a change in its business model that requires analysis under *First National Maintenance*. See *Holmes & Narver*, 309 NLRB 146 (1992) (finding that an employer's internal reorganization and assignment changes in its motor pool that resulted in layoffs required bargaining, because the decision did not entail abandoning a line of business, ceasing business with a particular customer, or significantly altering the scope of the business; rather, the employer performed the same work with fewer employees, and its decision was "almost exclusively 'an aspect of the relationship' between employer and employee" amenable to bargaining).

General Counsel must show an immediate impact on the drivers' terms and conditions of work. While it is true, as the judge pointed out, that the subcontracting of this work did not result in layoffs or significantly affect wages and hours of work due to the increase in private-label deliveries, this may have only tempered the immediate impact of the loss of work on unit drivers who had previously transported 88 pallets of Unified products daily. Moreover, as discussed below, the Board has held that when bargaining unit work is assigned to outside contractors rather than bargaining unit employees, the bargaining unit is adversely affected. Absent an obligation to bargain, an employer could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the Union's bargaining strength.

In *Overnite Transportation Co*.[4] the Board found that an employer had an obligation to bargain over its decision to use subcontractors, rather than unit employees, to handle an influx of new work that unit employees could not handle. Noting that unit employees did not lose work as a result of the subcontracting, it held that its decision in *Torrington*, supra, requiring bargaining over subcontracting is not limited to situations in which it has been affirmatively shown that the employer has taken work away from current bargaining unit employees. In so finding, the Board reasoned:

> At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.

330 NLRB at 1276.

The Board reached similar conclusions in *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc*., 346 NLRB 696, 702–703 (2006). In both cases, the Board concluded that even absent an affirmative showing that subcontracting caused the layoff or job loss of current employees, issues amenable to the collective-bargaining process remained, such as the adjustment of unit employees' workloads or the reemployment of terminated bargaining unit members.

As in the above cases, we find that the Respondent's decision to eliminate cross-docking in favor of using a subcontractor to deliver Unified products raises issues amenable to resolution through the collective-bargaining process. For example, the parties could have bargained over retaining the Respondent's practice of cross-docking and handling any increase in warehouse work by modifying the schedules of unit employees, providing overtime opportunities, or expanding the unit.[5] Contrary to our dissenting colleague's suggestion, the potential that the Respondent would have eliminated cross-docking even after bargaining does not obviate its basic obligation under the Act to bargain over such decisions. "[A]lthough it is not possible to say whether a satisfactory solution could be reached" in bargaining, the Act requires that the opportunity be provided. *Fibreboard*, supra, 379 U.S. at 214.[6]

In reaching a contrary result, the judge distinguished *Overnite Transportation*, reasoning that the Respondent did not transfer unit work to subcontractors, because subcontractors had been delivering these products for the prior 2 years and the Respondent merely changed the manner in which the subcontractors made their deliveries. This rationale, however, ignores the fact that work previously performed by unit drivers—the delivery of Unified products from the DC to stores—is now being performed by a contractor. That Continental C had pre-

[4] 330 NLRB 1275 (2000), affd. in part, reversed in part mem. 248 F.3d 1131 (3d Cir. 2000).

[5] The parties could also have negotiated the recall of the six employees who we have found were unlawfully laid off as a result of the Respondent's previous unilateral changes.

[6] The Respondent cites a number of cases in which the Board found no bargaining obligation because the employer's decision to subcontract did not result in layoffs or additional duties for unit employees. Those cases, however, are distinguishable. For example, in *CII Carbon, LLC*, 331 NLRB 1157 (2000), the Board found that an employer did not need to bargain over its decision to subcontract unit work during an employee lockout. In so finding, the Board cited the parties' collective-bargaining agreement, which allowed the use of subcontractors as long as no unit employee was laid off as a result. In addition, the employer retained only a small number of subcontractors to replace employees who did not return to work. In *Louisiana-Pacific Corp*., 312 NLRB 165 (1993), enfd. 52 F.3d 255 (9th Cir. 1995), the employer shut down its pulp mill and contracted out that aspect of its operation, and the Board found that the employer could not feasibly reopen the mill to allow unit employees to perform the work. In *Newcor Bay*, 351 NLRB 1034 (2007), the Board found that using a contractor to perform work that amounted to 15 minutes of a single employee's time did not have a "substantial and significant effect on the terms and conditions of employment." Finally, in *Westinghouse Electric Corp.*, 153 NLRB 443 (1965), the Board found no evidence that an employer would have recalled an employee from layoff or assigned overtime to unit employees. Based on that lack of evidence, combined with the employer's willingness to bargain over subcontracting on numerous other occasions when requested and its previous concessions to the union on subcontracting issues, the Board found that the employer had satisfied the employer's bargaining obligation regarding its assignment of newly acquired unit work to contractors.

viously handled some Unified products in the past by delivering them to the DC does not change the fact that work was removed from the unit without bargaining. See *O.G.S. Technologies,* supra, slip op. at 645, 647 (finding that the employer had a duty to bargain over marginal increase in subcontracting its die-cutting work, from 85 to 100 percent). Based on all of the above considerations, we reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) by eliminating cross-docking and contracting out the delivery of Unified products without bargaining with the Union about this decision and its effects.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 5.

"5. By unilaterally implementing route and schedule changes impacting the unit drivers, thus reducing the frequency and/or number of deliveries made on a weekly basis from the DC to Respondent's retail stores; eliminating or severely restricting unit work involving backhauls and pickups of vendors' products, subcontracting out that work, and permanently laying off unit employees Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras; and eliminating cross-docking of products and subcontracting deliveries of those products to the Respondent's stores without notification to the Union or affording the Union an opportunity to bargain regarding these decisions and their effects, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2 (6) and (7) of the Act."

AMENDED REMEDY

Having found that the Respondent made additional unilateral changes to employees' terms and conditions of employment, we shall amend the remedy to order the Respondent to restore the status quo ante by assigning the unit work involving cross-docking to unit drivers.

In addition, we shall order the Respondent to compensate laid-off drivers Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

ORDER

The National Labor Relations Board orders that the Respondent, Mi Pueblo Foods, Milpitas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the International Brotherhood of Teamsters, Local 853, a/w Change to Win (the Union) and giving it an opportunity to bargain about the changes and their effects.

(b) Changing the terms and conditions of unit employees by unilaterally implementing route and schedule changes impacting the unit drivers, thus reducing the frequency and/or number of deliveries made on a weekly basis from the DC to the Respondent's retail stores; eliminating or severely restricting unit work involving backhauls and pickups of vendors' products, subcontracting out that work, and permanently laying off unit employees Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras; and eliminating cross-docking of products and subcontracting deliveries of those products to the Respondent's stores without notification to the Union or affording the Union an opportunity to bargain regarding these decisions and their effects.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time drivers employed by Respondent at its Milpitas, California facility; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Rescind the changes that were unilaterally implemented in January, February, and April 2011 involving subcontracting out vendor deliveries, backhauls, pickups, and cross-docking, and assign the work to unit drivers.

(c) Restore the driver routes and hours of work that existed prior to the unilateral changes implemented in January, February, and April 2011.

(d) Within 14 days from the date of this Order, offer Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, and Juan Caballero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras whole for any loss of earnings or benefits they may have suffered as a result of their unlawful

layoffs in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Compensate Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter, notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Milpitas, California facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 2011.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER JOHNSON, concurring in part and dissenting in part.

I concur with my colleagues and the judge in finding that the Respondent violated Section 8(a)(5) and (1) of the Act by its failure to engage in decisional bargaining with the Union prior to eliminating the backhauls and pickups of its products, and replacing this work with subcontractors.[1] However, I would not analyze these unilateral change allegations under the framework of *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *Torrington Industries*, 307 NLRB 809 (1992), as did the judge, nor would I also rely on *O.G.S. Technologies, Inc.,* 356 NLRB 642 (2011) cited by my colleagues. I would instead decide these allegations under the test set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Respondent's decision to use subcontractors to perform backhauls and pickups falls within the third type of management decision described in *First National Maintenance*. Id. at 676–677. Thus, it had a direct impact on employment, since unit jobs were eliminated, but had as its focus the economic profitability of the enterprise. In such a case, bargaining is to be required if the benefit for labor-management relations and the collective-bargaining process outweighs the burden placed on the conduct of the business. Id. at 674–680.

Here, I find it is clear that the potential benefits of collective bargaining outweigh the burdens that such bargaining would place on the conduct of the Respondent's business. The Respondent has not changed the scope and direction of its enterprise, and its mere assertion that bargaining would have been futile is unsupported and, accordingly, insufficient to show that the decision to cease having unit drivers do backhauls and pickups, and to subcontract out those deliveries was not amenable to bargaining. The Union should have been given an opportunity to bargain about alternatives prior to implementation of these changes. For these reasons, I agree with my colleagues that the Respondent's failure to engage in decisional bargaining was unlawful.[2]

[1] I join my colleagues in affirming the judges' findings, for the reasons she stated, that the Respondent violated Sec. 8(a)(5) by unilaterally altering schedule and route changes for unit drivers, and, consequently, laying off six drivers.

[2] I find it unnecessary to pass on the judge's finding that the Respondent failed to engage in effects bargaining for these matters. Because the Board is ordering the Respondent to rescind its unilateral changes involving the route and schedule changes and the elimination of backhauls and pickups, there is no need to require the Respondent to bargain about the effects of its changes. See *Grondorf, Field, Black & Co*., 318 NLRB 996 (1995) (in affirming the judge's findings that the

Unlike my colleagues, however, I would also affirm the judge's recommended dismissal of the cross-docking unilateral change allegation based on the rationale that the Respondent's decision to eliminate cross-docking was a core entrepreneurial management decision over which it was not obligated to bargain under *First National Maintenance*, supra. Here, the Respondent changed its entire business model with respect to the distribution of Unified products. In this regard, the Respondent made the core entrepreneurial decision to discontinue its business model under which Unified's products were first delivered by a contractor to Respondent's distribution center (DC), and then the Respondent's drivers subsequently delivered the products to the Respondent's retail stores. Under Respondent's new business model, Unified's products were delivered by a different contractor directly from Unified to the stores. In other words, Respondent went from a hub-and-spoke delivery system, with the DC serving as an intermediate hub through which all Unified products passed, to a point-to-point system where such products arrived at stores directly from Unified.[3] As my colleagues implicitly recognize above, this affects the basic number and sequence of steps in Respondent's fundamental distribution systems—steps of unloading, staging, and reloading products onto the Respondent's trucks for delivery to stores. Respondent's new plan also dramatically changed its basic overall routing concept for distribution purposes for Unified products, which were a large part of Respondent's inventory. [4]

This type of reconfiguration is a quintessential entrepreneurial decision. Moreover, there is no indication that bargaining would have or could have had any effect on the Respondent's need to eliminate cross-docking. Whether to cross-dock or not, in these circumstances, is dependent on the laws of time and space, factors that cannot be altered by bargaining. Thus, applying the balancing test of *First National Maintenance*, 452 U.S. at 679, I would find that the Respondent's need for unencumbered decisionmaking over its distribution model outweighed any potential benefits to the collective-bargaining process.

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 representatives 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 change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain about the changes and their effects.

WE WILL NOT change your terms and conditions of employment by unilaterally implementing route and schedule changes impacting the unit drivers, thus reducing the frequency and/or number of deliveries made on a weekly basis from the distribution center to our retail stores; eliminating or severely restricting unit work involving backhauls and pickups of vendors' products, subcontracting out that work, and permanently laying off unit employees Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David

employers unilaterally implemented their own fringe benefit plans, the Board found it unnecessary to reach or provide a remedy for the judge's additional finding that the employers failed to bargain over the effects of these changes).

[3] To the extent that Unified products now entirely came from Unified's single Stockton facility to Respondent's stores after the change, the elimination of cross-docking at the Respondent's DC in favor of this system effectively represented a complete switch of the central distribution hubs themselves for all Unified products. This further underscores the fundamentally entrepreneurial nature of the change resulting from the elimination of cross-docking.

My colleagues note that the Respondent continues to cross-dock Unified products for some of its smaller stores. However, the evidence shows that only a couple of the small stores continued to cross-dock Unified products.

[4] *Holmes & Narver*, 309 NLRB 146 (1992), cited by my colleagues, is distinguishable. In that case, the employer reduced its motor pool operation from three divisions to two. Id. at 146. The Board found that the employer's decision to combine jobs, reassign work, and lay off employees was a mandatory subject of bargaining and that the employer had unlawfully failed to bargain with the Union over that decision. Id. The Board noted that it was "dealing with layoffs . . . made in connection with the decision to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments." Id. at 147. Thus, the Board found that the employer "did not abandon a line of business . . . or make any other change that significantly altered the scope and direction of its business." Id. By contrast, in the instant case, the Respondent's decision to eliminate cross-docking and adopt a point-to-point delivery system for Unified products did not involve the consolidation of work nor a continuation of the same work with the same technology. Rather, the Respondent altered the scope and direction of its entire business by changing its business model with respect to the distribution of Unified products, because, as noted, Unified supplied such a large volume of products to Respondent's inventory.

Barreras; or eliminating cross-docking of products and subcontracting deliveries of those products to our stores without notification to the Union or affording the Union an opportunity to bargain regarding these decisions and their effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time drivers employed by us at our Milpitas, California facility; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL rescind the changes that we unilaterally implemented in January, February, and April 2011 involving subcontracting out vendor deliveries, backhauls, pickups, and cross-docking, and assign the work to unit drivers.

WE WILL restore the driver routes and hours of work that existed prior their change in January, February, and April 2011.

WE WILL, within 14 days of the Board's Order, offer Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, and Juan Caballero immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras whole for any loss of earnings or benefits they may have suffered as a result of their unlawful layoffs.

WE WILL compensate Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras, and WE WILL, within 3 days thereafter, notify them in writing this has been done and that their layoffs will not be used against them in any way.

MI PUEBLO FOODS

The Board's decision can be found at www.nlrb.gov/case/32–CA–025677 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Gary M. Connaughton and *Gabriela Alvaro,* for the General Counsel.
Patrick W. Jordan and *Noah J. Woods,* for the Respondent.
Teague Patterson and *Susan Garea,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Oakland, California, on October 3–5, 2011. The International Brotherhood of Teamsters Local 853, a/w Change to Win (the Union) filed the charge in Case 32–CA–025505 on December 7, 2010, and filed the charge in Case 32–CA–025677 on April 13, 2011. The General Counsel consolidated the cases and issued a Consolidated Complaint on July 29, 2011. Respondent filed a timely answer on August 11, 2011. The General Counsel issued an Amended Consolidated Complaint on September 13, 2011, and Respondent filed a timely answer on September 23, 2011, denying all material allegations in the complaint. On September 29, 2011, the General Counsel issued on Order Severing Cases and Withdrawing Portions of the Amended Consolidated Complaint. The Order withdrew the allegations set forth in Case 32–CA–025505. Both the hearing and this decision, therefore, address the allegations from Case 32–CA–025677 only.

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally: (1) subcontracting out some of the work its delivery drivers had previously performed; (2) reducing the frequency of deliveries from its distribution center to its retail stores; (3) changing the schedules of its delivery drivers, including elimination of Sunday deliveries; and (4) changing the manner in which products from one of its vendors, Unified, were delivered to its stores.

On the entire record, including my observation of the witnesses' demeanor, and after considering the General Counsel and Respondent's briefs,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, is engaged in operating a chain of retail grocery stores in northern California. During the past 12 months and at all material times, it derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of California. Respondent admits, and I find, that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find, and it is uncontested, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates a chain of retail grocery stores in northern California. At the hearing, Respondent operated 21 stores and had roughly 3200 employees. As discussed in detail below, its operations include a distribution center in Milpitas, California, where it stores and stages products for delivery to its stores. Respondent employs drivers to deliver grocery and other products to its retail stores. (Tr. 305, 336–337.)[2]

On or around December 1, 2010, a majority of Respondent's transport drivers who voted in a representation election selected the Union as their exclusive collective-bargaining representative. The Union was certified as the exclusive collective-bargaining representative on December 9, 2010.[3] On December 14, 2010, the Union filed a charge, and on December 29, 2010, the General Counsel issued a complaint that Respondent unlawfully failed to recognize and bargain with the Union.[4] The Region filed a Motion for Summary Judgment with the Board, and on March 4, 2011, the Board issued a decision finding that Respondent had violated Sections 8(a)(1) and (5) by refusing to recognize and bargain with the Union. *Mi Pueblo Foods*, 356 NLRB No. 107 (2011) (not reported in Board volumes). Respondent challenged the Board's decision, and on December 27, 2011, the Court of Appeals for the District of Columbia denied Respondent's petition for review and granted the Board's cross-application for enforcement. *Mi Pueblo Foods v. NLRB,* Nos. 11–1074, 11–1100 (December 27, 2011; not selected for publication in the Federal Reporter). The Union, therefore, is the exclusive collective-bargaining representative for Respondent's drivers. The collective-bargaining unit is comprised of all full-time and regular part-time drivers employed by Respondent at its Milpitas, California facility; excluding all other employees, guards, and supervisors as defined in the Act. *Mi Pueblo Foods,* supra.

It is undisputed that, as of the time of the hearing, Respondent did not recognize the unit, and therefore did not engage in collective bargaining with it.

B. The Distribution Center

Since roughly 2006, Respondent has operated a Distribution center (DC or warehouse) to service and support its stores. In early 2007, based on expectations that Respondent would open an additional 20 stores, Respondent leased an 89,000-square-foot warehouse in Milpitas, California, to operate as its DC.[5] (Tr. 299.) The DC is a "cost center," meaning that it is a cost to run, and has no potential to generate profits independently. (Tr. 118.)

Prior to the December 2010/January 2011 time period, the DC employed seven receivers, responsible for unloading trailers, reviewing incoming products for quality, and receiving incoming product into the warehouse's inventory. There were three shippers, also referred to as loaders, responsible for loading Respondent's trailers for delivery to its stores. Roughly, 30 order selectors[6] at the DC received orders for products from stores on "picking tickets" and retrieved the products from their storage locations in the warehouse. Finally, there were 16 drivers to deliver Respondent's products. (Tr. 119–121, 127, 143.) With regard to relevant equipment, Respondent delivers its products using tractor-trailers and smaller bobtails. As of the hearing, Respondent utilized 8 tractors, 15 53' refrigerated trailers, and 2 smaller bobtail trucks. (Tr. 57; R. Exh. 1.) A class A license is required to drive a tractor-trailer and a class B license is required to drive the bobtail. Respondent had previously leased 30 trailers, but only about 20 were being used. It also had leased 11 tractors. (Tr. 142.)

Vincent Alvarado was Respondent's vice president of operations from approximately 2005–2007. Respondent re-hired Alvarado in 2010, as VP of operations, and he was later promoted to chief operating officer. (Tr. 282, 293–294.) In both capacities, he oversaw the DC. When Alvarado returned in 2010, driver Oscar Vega informed him that there was thievery at the DC and that its director, Luis Alcala, was mismanaging it. (Tr. 294.) Alvarado followed up, and on his first visit to the DC, he observed that it was in a state of "chaos." He described what he saw as follows:

> As I observed how they were operating the warehouse, it was complete chaos. There was no structure in the warehouse. Everybody was doing what they wanted. Drivers were coming in at 5 in the morning, not leaving until 8, 9:00, midmorning. And so I mean they were wasting four hours just waiting for loads.
>
> The warehouse was completely disorganized. My first visit there, all the aisles were blocked. You could not pick an order. It was in complete disarray. I would add that there was (sic)

[1] The Union did not file a brief.

[2] Abbreviations used in this decision are as follows: "Tr" for transcript; "R." for Respondent's exhibit; "GC" for General Counsel's exhibit; "R. Br." for Respondent's brief.

[3] The election was conducted and certification issued in Case 32–RC–05794.

[4] Case 32–CA–025518.

[5] The DC had previously been housed in a 20,000-square-foot building. (Tr. 289, 292.)

[6] The order selectors are sometimes referred to as order "pickers" or "pullers." There were employees other than order selectors who also helped pull orders. (Tr. 126.)

> so many employees that you couldn't find a parking spot at the location.

(Tr. 295.) Alvarado also observed that trailers would leave the DC only partially full, and he witnessed order selectors just walking around the warehouse. Alvarado determined that he either needed to fix the warehouse or shut it down. He gave Alcala 3 to 4 weeks to improve the DC's operations, and when this did not occur, Alcala was terminated. Alvarado placed Francisco Ochoa, a store manager, into the DC director position on a temporary basis. (Tr. 299–300.)

Ochoa made some improvements during his tenure as temporary DC director, including elimination of some slow-moving products from the warehouse, "re-slotting" products so that they could be pulled by weight, and better rotation of products. He also enforced work schedules, including the drivers' schedules. (Tr. 301–302.)

On December 6, 2010, Alvarado hired Augustin Arreaga as the DC director.[7] Arreaga had managed several of Respondent's stores. Prior to that, he had gained extensive experience with warehouse operations, having worked his way up to assistant general manager at Costco over the course of 15 years. (Tr. 93, 303–304.) Upon his arrival, Arreaga promptly returned 3 leased tractors and 15-leased trailers. (Tr. 142.)[8]

Alvarado charged Arreaga with making the DC more efficient and productive. (Tr. 59.) Arreaga began this process by reviewing the order selectors' productivity reports. He determined that they were very slow. To Arreaga, order selector problems were "key" to the DC's inefficiencies, because if orders were not pulled on a timely basis, pallets could not be loaded and ready for the delivery trucks at 5 a.m. He observed that employees were both pulling orders and driving forklifts, so he designated each employee to do one or the other, based on his observation of the employees' respective strengths and weaknesses. He implemented a stamp timeclock to track how the order selectors were working hour by hour. Arreaga also separated the order selectors into two teams, one for produce, and one for grocery items. Following these changes, order selector productivity increased significantly, from an average of 80–90 cases per day in the fall of 2010 to more than 130 cases per day in January 2011. This created greater overall efficiencies, because products were staged and ready for the loaders when they arrived at 2:30 a.m., and the trucks were loaded and ready to go when the delivery drivers arrived at 5 a.m. (Tr. 131–140; R. Exh. 7.)

As a result of the order selectors' increased productivity, and based on Arreaga's belief that efficiencies were increased even more with fewer employees, 14 order selectors were laid off in January 2011. Arreaga created a productivity incentive plan effective March 2011, whereby order selectors who pulled more than 1200 cases per day would receive $.016 per case pulled each quarter, and order selectors who pulled more than 1500 cases per day would receive .0344 cents per case. With implementation of the program, the order selectors' productivity continued to increase. (Tr. 135–141; R. Exh. 6, 7.)

[7] Three days later, on December 9, 2010, the Union was certified.

[8] Arreaga estimated this created a savings of approximately $100,000.

C. Changes to Driver Routes and Schedules

The DC's top priority is to service its stores. (Tr. 146.) Accordingly, after becoming DC director, Arreaga promptly talked to all of the store directors in an effort to improve service. Many of the store directors wanted to eliminate Sunday deliveries because that is the busiest day of the week at the stores, making it more difficult for store employees to take the time to receive products. Arreaga also discussed with the store directors ways to make deliveries to the stores more efficient. (Tr. 147–150; GC Exh. 14.) He informed them that he was going to enforce the 8 a.m. cutoff time for the stores to place orders to the DC. This had not previously been enforced, resulting in stores placing multiple orders, and drivers making multiple piecemeal deliveries. (Tr. 108, 206.) He also asked the store directors to have their receivers prioritize deliveries from Respondent's trucks, and to have the receivers unload the products more efficiently. (Tr. 207.)

Arreaga counted the number of pallets going to each store to give him an idea of how many trailers he could fill. He concluded that the DC was using an inefficient delivery system, with stores receiving deliveries every day, sometimes in multiple shipments, and with drivers delivering products using only partially full trucks. He began to group stores for delivery according to their geographic locations and service needs. (Tr. 61–62, 143–151; GC Exh. 14, 16, R. Exh. 14.) He grouped together stores 22, 12, 14, and 3, all of which are in San Jose, for night deliveries. Previously, the night driver only delivered to stores 4 and 12. He also determined that similar changes to the various day driver routes, and elimination of Sunday deliveries, resulted in fewer deliveries with fuller trucks. (Tr. 65–66, 115–116, 143, 156-64, 270–272; GC Exh. 15.)

On or around January 24, 2011, Respondent eliminated Sunday deliveries and made the route consolidation changes described above. On February 7, 2011, the night driver's hours were changed from 5 p.m.–1:30 p.m. to 1–9:30 p.m. On February 14, the night driver's hours were changed to noon-8:30 p.m. (R. Exh. 12). The delivery route consolidations and schedule changes led to the elimination of 46 routes. (Tr. 156–157, 272.)

D. Elimination of Backhauls and Pickups

Respondent purchases products for its stores from various vendors. The products are transported to the DC, placed in the warehouse stock, and then delivered to the retail stores as they are ordered. (Tr. 56–57, 76.) Prior to 2011, Respondent's drivers as well as some third-party carriers transported the vendors' products. Some of these deliveries were referred to as "backhauls" and "pickups." A backhaul occurs when a driver delivers a load to a store, and then hauls back a product to a nearby vendor. A pickup occurs when the driver goes to a vendor empty and comes back full. (Tr. 76; GC Exh. 2.) In January 2011, Arreaga began looking at alternatives to having Respondent's drivers perform backhauls and pickups. (Tr. 76–82.)

Historically, Respondent's drivers had delivered Morton Salt products to the DC as backhauls after making store deliveries. Arreaga noticed that drivers were experiencing long delays when they went to pick up Morton Salt's products. This occurred because, to transport the salt, the trailer had to be dry with zero humidity. Because the products that were delivered to

the stores were refrigerated, when the driver arrived, the humidity in the trailer was not where it needed to be in order to load the salt. As a result, the drivers had to wait, often for several hours, to load the trucks with salt for the backhaul. Arreaga considered this to be an inefficient use of the drivers' time. Consequently, beginning in January 2011, Respondent decided to eliminate the backhauls, and it contracted with Continental C, and later RJR Trucking, to transport the salt from Morton Salt's warehouse in Newark, California, to the DC. (Tr. 76–78; GC Exh. 2; R. Exh. 20.) Of the 33 deliveries from Morton Salt to the DC between February 10, 2009, and January 13, 2011, Respondent's drivers made 30 and Continental C made 3. Of the 11 deliveries from Morton Salt between February 15, 2011, and August 26, 2011, Respondent's drivers made two, Continental C made three, and RJR Trucking made six.[9] (GC Exh. 2.)

Between 2009 and early 2011, C&H Sugar[10] products were delivered to the DC as backhauls from the C&H facility in Crockett, California. Arreaga discontinued these backhauls because his drivers were experiencing extreme delays waiting for C&H's products to be loaded onto their trucks. In January 2011, Respondent contracted with Continental C, and later RJR Trucking and "JT,"[11] to deliver C&H's products to the DC. (Tr. 80, 231–232; R. Exhs. 18, 19.) Between February 3, 2009, and February 2, 2011, Respondent's drivers made 18 of 25 deliveries of C&H's products to the DC, with Continental C making the remaining 7.[12] Between March 4 and August 25, 2011, of the 16 C&H deliveries to the DC, Respondent's drivers made none, Continental C made 7, RJR Trucking made 7, and JT made 2. (GC Exh. 2.)

Durango Packaging provides produce products to Respondent. When Arreaga began as DC director, Respondent's drivers drove to Dinuba, California, to pick up the produce from Durango. It was taking drivers up to 12 hours to drive to Dinuba, which is approximately 200 miles from the DC, pick up the produce, and return to the DC. (Tr. 80–81.) Beginning in January 2011, Respondent contracted with Juarez Transportation to pick up and deliver Durango Packaging's produce. From December 15, 2010, to February 12, 2011, Respondent's drivers made 8 of the 10 scheduled pickups, with Continental C making the remaining 2. From February 19 through September 2, 2011, Juarez Transportation made all of the 39 scheduled deliveries. (GC Exh. 2.)

Prior to April 2011, Respondent's drivers backhauled Mazola Oil products from ACH Food Companies' warehouse in Tracy, California. Between February 2, 2009 and April 7, 2011, Respondent's drivers made 21 deliveries and Continental C made 6. In April 2011, Respondent discontinued ACH Mazola Oil backhauls.[13] (Tr. 81–82; GC Exh. 2.)

E. Driver Layoffs

Following the route and schedule changes, Arreaga determined that he no longer required 16 drivers, and that he needed only 8 class A drivers and 2 class B drivers. (Tr. 164, 270; GC Exh. 16, R. Exh. 9, 10.)

On January 21, 2011, Respondent's attorney, Patrick Jordan, called union attorney, Teague Patterson, to inform him "off the record" that Respondent was making operational changes at the DC, including impending layoff of six drivers on Monday, January 24. Jordan followed up the conversation with a letter recounting his view of the conversation, and stating that while Respondent had no duty to bargain over its decisions, it was willing to "discuss" a process for implementing the layoffs if the Union wanted them based on something other than seniority. Patterson responded, disagreeing with Jordan's recollection of the conversation, and informing him that the individuals authorized to bargain for the Union were business representatives Bobby Blanchett and Bill Hoyt. (Tr. 44–50; GC Exh. 4–5.) Following the layoffs, a series of exchanges between Jordan and Hoyt ensued, and it is unclear whether or not they met. It is clear that they did not meet prior to Respondent's implementation of the layoffs, however, and that they never engaged in collective bargaining. (GC Exhs. 6–13.)

On January 24, 2011, Respondent laid off six bargaining unit drivers in order of seniority.[14] The DC was able to deliver its products efficiently following the layoffs, without incurring additional overtime. (Tr. 176.)

F. Elimination of Cross-Docking Unified Products

Unified, one of two wholesale grocery suppliers in northern California, supplies a large volume of dry goods and perishables to Respondent.[15] (Tr. 290.) Its warehouse is located in Stockton, California. Respondent's retail stores order products they need directly from Unified, which has its own ordering system that operates independently from the DC's ordering system. Prior to 2008, Respondent had Unified deliver its products directly to Respondent's retail stores utilizing Continental C, a contract carrier. (Tr. 82, 274–275, 290.) Beginning in 2008, Respondent changed this practice, and instead had Continental C deliver Unified products to the DC. Once at the DC, Unified products were unloaded, staged, and then reloaded onto

[9] Respondent does not explicitly argue that having third-party contractors do some of the backhauls and pickups was a "past practice" that the Union had accepted, thus barring its current contesting of contracting out. Given that Respondent did not recognize the Union as the collective-bargaining representative, any such argument would be misplaced.

[10] C&H is also referred to as Domino Foods, which is C&H's distributor. (Tr. 79.)

[11] "JT" is presumably Juarez Transportation.

[12] Respondent's drivers making a delivery in early February does not negate testimony that the decisions to enter into the contract with the third-party carrier occurred in January, as it is logical that there would be a brief period of time between the decision and its implementation.

[13] Arreaga testified he was not sure what company assumed this work. (Tr. 82.)

[14] The laid-off drivers are Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras. (Tr. 30.) On April 2 2011, driver Oscar Vega was terminated, and Barreras, who was next in line based on seniority, was offered and accepted his job back. (Tr. 239.)

[15] Unified is also referred to as "Western Growers."

Respondent's trucks for delivery to the stores.[16] This process is referred to as cross-docking.[17] (Tr. 82–85.)

Shortly after Alvarado returned to work for Respondent at the end of April 2010, he asked Hector Mantilla, wholesale buyer, to look into prices for other third-party carriers to deliver Unified products to the DC. The process of obtaining quotes from contractors took several months, in part because escalating fuel prices made it difficult to get companies to give hard quotes. (Tr. 284–285, 315.) In or around mid-September 2010, Mantilla informed Alvarado that there was potential savings in having Unified products delivered directly to the stores. As of October 2010, Respondent was looking at all options for delivery of Unified products, but was primarily focused on direct transport to the stores. (Tr. 284–285.)

Alvarado could see "no productivity or logic" to cross-docking Unified products. He questioned the previous DC Director, Alcala, about this practice, and received no valid explanation.[18] Alvarado observed that cross-docking Unified products resulted in delivery delays of the products to the stores, because Unified's products arrived late. (Tr. 241, 298.) When Arreaga became DC director in December 2010, he expressed concern over problems related to cross-docking. He observed that it created congestion because Unified products were staged in the warehouse aisles. This occurred because other areas of the warehouse were already being used for the various different products the DC received. (Tr. 244.) Arreaga discussed the potential to discontinue cross-docking with Mantilla and Hector Salas, vice president of human resources, in the December 2010/January 2011 timeframe. Arreaga and Mantilla discussed that, given Unified's independent system for the stores to order its products, it made sense to have their products delivered directly to the stores. (Tr. 249–250.)

Around February/March 2011, Respondent created a "Distribution Center Utilization Analysis," proposing changes to how Unified's products should be delivered. The analysis addressed concerns about the DC's finite space and the increase in Respondent's private label products being stored at and shipped from the DC. The analysis concluded that eliminating cross-docking would result in considerable savings.[19] (R. Exh. 21).

In April 2011, Respondent decided to resume direct delivery of Unified products to its stores.[20] (Tr. 86–87, 241, 254, 286.) As a result, Continental C no longer delivers Unified products to the DC for Respondent's drivers to deliver to the stores. Instead, Respondent contracts with RJR Trucking to have the products delivered from Unified's warehouse in Stockton, California, directly to its stores.

The number of deliveries from the DC to the stores has remained generally the same both before and after April 2011. This is due to an increase in private label products Respondent carries at its stores. (Tr. 241.) No drivers had their hours reduced or were subject to layoffs as the result of the decision to eliminate cross-docking Unified products. (Tr. 240–241, 273–274.)

[16] Unified would continue to deliver directly to a newly opened store in its initial phase of operations. (Tr. 101).

[17] "Cross-docking" is repeatedly referred to mistakenly as "cross-stocking" in the transcript.

[18] Alvarado opined that Alcala was cross-docking Unified products to make the warehouse look busy. (Tr. 298.)

[19] The initial calculation was a savings of $1.2 million per year, but Salas testified that he had made a mathematical error, and the actual savings would be approximately $577,000. (Tr. 345; R. Exh. 22.)

[20] For some of the smaller stores, cross-docking Unified products continued. (Tr. 87.)

III. ANALYSIS AND DISCUSSION

A. The Duty to Bargain

The National Labor Relations Act, at § 8(a)(5), provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8 (d) as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The duty to bargain only arises if the changes to terms and conditions of employment are "material, substantial and significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001). The Act does not define "terms and conditions" of employment. Consequently, as discussed in context below, the Board and Supreme Court's decisions have helped define this phrase. Regarding topics other than wages, hours, or other terms and conditions of employment, "each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Borg-Warner*, 356 U.S. 342, 349 (1958).

It is undisputed that Respondent did not bargain over the various issues presented in this case. Rather, what is contested is whether or not there was a duty to bargain.

B. The Decision to Eliminate Backhauls/Pickups and Contract out those Deliveries

Because the law serving as the framework for most of the issues in this case initially arose in the context of subcontracting out unit work, I will begin with the issue of whether there was a duty to bargain over the decision to subcontract out delivery work previously performed by unit drivers. As set forth fully above, in January 2011, Respondent ceased its practice of backhauling Morton Salt and C&H Sugar products to the DC, and discontinued having its drivers pick up citrus products from Durango Packaging. Instead, it contracted with Continental C, and later RJR Trucking, to have outside drivers perform this work. It also discontinued backhauls from ACH Mazola in April 2011.

For the reasons detailed below, I find that Respondent violated Section 8(a)(1) and (5) of the Act by its failure to bargain with the Union prior to eliminating the backhauls and pickups, and replacing this work with subcontractors.

Determining whether the decision to subcontract work is a mandatory subject for bargaining starts with a discussion of the Supreme Court's decisions in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

Fibreboard involved a paper manufacturing plant in Emeryville, California. The East Bay Union Machinists, Local 1304, United Steelworkers of America, AFL–CIO (the Union), represented a unit of the company's maintenance employees.

The company undertook a study, and realized it could save money by contracting out its maintenance work. A series of communications between the company and the Union ensued. The end result, however, was that the company terminated the employment of its maintenance workers, and employees of Fluor Maintenance, Inc., an outside company, took over their work.

The Court in *Fibreboard* found that there was a duty to bargain, noting that "inclusion of 'contracting out' within the statutory scope of collective bargaining . . . seems well designed to effectuate the purposes of the National Labor Relations Act." 379 U.S. at 211. The Court emphasized that the company's basic operation was not altered, as the work in question had to be performed regardless. No capital investment was contemplated or effectuated. The company merely replaced its unit employees with other workers to do the same work.

The *Fibreboard* Court further emphasized that the decision to contact out the maintenance work resulted from a desire to reduce labor costs, a matter "peculiarly suitable for resolution within the collective bargaining framework." Specifically, the Court explained that the company "was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework . . ." Id. at 213–214. The Court expressly limited the *Fibreboard* decision to the specific facts of the case, stating:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case–the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment–is a statutory subject of collective bargaining under § 8 (d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

Id. at 215 (footnote omitted).

In *First National Maintenance*, the company provided cleaning services. Among its customers was Greenpark, a nursing home. At some point, Greenpark cut its weekly fee for the company's services in half. The company, realizing it was losing money on the contract, asked Greenpark to restore its fee to the previous level. Greenpark declined, and the company decided to discontinue the contract. It gave notice of termination to the roughly 35 employees servicing that contract. The Union attempted to delay the termination in order to bargain over it, but the company refused, stating, in relevant part, that the termination of the Greenpark contract was purely a financial matter.

The Court began its discussion in *First National Maintenance* by delineating business decisions into three general categories:[21]

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. *See Fibreboard*, 379 U.S., at 223 (STEWART, J., concurring). Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. *Chemical Workers*, 404 U.S., at 178. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Fibreboard*, 379 U.S., at 223 (STEWART, J., concurring). *Cf. Textile Workers v. Darlington Co.*, 380 U.S. 263, 268 (1965) ("an employer has the absolute right to terminate his entire business for any reason he pleases"). At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs. See *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735–736 (CA3 1978); *Ozark Trailers, Inc*., 161 N.L.R.B. 561, 566–568 (1966).

452 U.S. at 676–677.

Looking toward labor law practice as an indication of what is feasible through bargaining, the Court observed that provisions giving unions the right to participate in decisions regarding alterations to the scope of an enterprise are rare, while provisions regarding notice and effects are more common. The Court, noting that management must be "free from the constraints of the bargaining process" so as to run a profitable business, held that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." Id. at 679. It concluded that the potential harm to the company's "need to act freely when deciding whether to shut down part of its business solely for economic reasons outweighed the incremental benefit that might be gained through the union's participation in making the decision." Id. at 684. Accordingly, it held that the decision to cease doing business with the nurs-

[21] These three categories came from Justice Stewart's concurring opinion in *Fibreboard*, which was influential to the Court in deciding *First National Maintenance*.

ing home was not a "term or condition of employment" requiring bargaining.[22]

The Court distinguished *Fibreboard*, explaining that the company there had merely replaced its unit employees with other workers to perform the same work, and pointing out the emphasis on labor costs, which the *Fibreboard* Court found to be "peculiarly suitable for resolution within a collective bargaining framework." Id. at 680, *quoting Fibreboard,* 379 U.S. at 214. It further noted that unlike in *Fibreboard*, the most the union could do in *First National Maintenance* would be to offer advice and concessions that the customer, Greenpark, had no duty to consider. Finally, the Court emphasized the limitations of its holding. It stated, "In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." Id. at fn. 22.

I find that the present situation is governed by the principles set forth in *Fibreboard*, and that Respondent was under a legal obligation to afford the Union an opportunity to negotiate and bargain concerning its unilateral decision to discontinue the backhauls and pickups, and hire subcontractors to perform that work.

The decision to use subcontractors to do a relatively small portion of the work the unit drivers used to perform, under the facts presented here, is not a "change in the scope and direction of the enterprise" that is "akin to the decision whether to be in business at all" as contemplated by *First National Maintenance*. Here, as in *Fibreboard,* Respondent did not decide to shut down part of its business. It decided to change how one relatively small component of its deliveries were made. The result was it paid an outside company to perform essentially the same work its unit drivers had previously performed. See *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994).

The backhauls and pickups occurred on a sporadic basis and were not part of Respondent's daily operations. For example, backhauls from Morton Salt generally occurred anywhere from once a month to three times a month between February 2009 and January 2011, with no backhauls in February or May 2010. Respondent's drivers made 17 backhauls from C&H between February 2009 and January 2011. (GC 2.) Rather than an alteration of the basic operation of its enterprise, the decision to subcontract out this work was an incremental improvement to its method of transporting certain grocery products, and did not alter the nature or scope of its business—the operation of retail grocery stores.[23]

Moreover, no external changes beyond Respondent's control drove the decision to subcontract out the backhauls and pickups. In *First National Maintenance*, the driving factor behind the decision to terminate the contract at issue was the customer's unwillingness to negotiate a fee. The vendors did nothing here to alter the terms of their respective relationships with Respondent. Had the vendors demonstrated an unwillingness to do business in a manner that was economically feasible to Respondent, the situation would be somewhat more akin to *First National Maintenance*.

Respondent argues that this case is distinguishable from *Fibreboard* because labor costs did not factor into its decision to contract out the backhauls and pickups. The Board held, in *Torrington Industries,* 307 NLRB 809, 810 (1992), that when the record shows that essentially *Fibreboard* subcontracting is involved, "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain." Specifically, it stated that it did not see the usefulness in applying the "labor cost concession" test set forth in *Dubuque Packing Co*., 303 NLRB 386 (1991), "in cases involving decisions that, unlike the plant relocation decision at issue in *Dubuque*, are not likely to be entwined with changes in the operation of the enterprise that go well beyond merely the replacement of one set of employees doing work by another set of employees." *Torrington,* supra at fn. 14. It therefore declined to independently analyze whether labor costs drove the company's decision therein.[24]

Though under *Torrington Industries,* disposition of this case does not necessarily turn on the impact of labor costs, *Fibreboard* considered labor costs as a significant factor, and therefore the topic merits discussion.[25] The apparent logic behind Respondent's argument is that since the DC is only a cost center, it is not required to maintain its labor costs as a percentage of sales, as it has no sales; consequently, it cannot consider labor costs.[26] Arreaga testified he has no labor costs budget, and the DC does not consider labor costs as part of its operations. Rather, his "decisions were based sheerly upon increasing efficiency, productivity, and better use of company assets." (R. Br. 44.)

I find Respondent's argument on this point lacks merit, and conclude that labor costs plainly factored significantly into Respondent's decision to discontinue having its drivers do pickups and backhauls and to contract out that work. That the DC is not a revenue-generating facility is inapposite, and strikes me as somewhat of a red herring. Respondent has pointed to no authority in support of its contention that the term "labor costs" is so narrowly defined as to require measurement

[22] The Court found, however, that *First National Maintenance* violated the Act by failing to engage in effects bargaining.

[23] The situation would be somewhat closer to *First National Maintenance* if Respondent had determined that it was no longer profitable take or receive deliveries from these vendors and therefore decided to terminate its respective relationships with them altogether. See also *Holiday Inn of Benton*, 237 NLRB 1042 (1978) (Changing restaurant that utilized waiters and waitresses to a cafeteria operation was not an alteration of company's "basic operation."). Though *Holiday Inn of Benton* was decided before *First National Maintenance*, its rationale is nonetheless instructive.

[24] In fn. 14, the *Torrington Industries* majority stated that "to the extent" the concerned employees' ability to operate new trucks, could be considered a "labor cost" in the broad sense of the term, it made the finding that labor costs were involved.

[25] Discussion of this topic is also useful in the event that a reviewing body determines the test set forth in *Dubuque Packing Co.,* 303 NLRB 386 (1991), applies here, as concurring Member Raudabaugh asserts it should in *Torrington Industries* and in other decisions.

[26] As Respondent points out in its brief, Alvarado testified that the DC had a profit and loss (P&L) accounting, but Arreaga testified he had never seen a P&L. For reasons discussed herein, the presence or absence of a P&L does not impact the outcome of this decision.

against a profit.[27] In addition, Respondent's repeated assertions, based on Arreaga's "unrefuted testimony" that labor costs were not considered are belied by the evidence, and impress me as a cumbersome post hoc justification to comport with troublesome case law.[28] To start, it is difficult to square Arreaga's testimony that, as DC director, he was given control over operating and labor costs, with his testimony and Respondent's argument that he did not consider labor costs as part of his operations. (Tr. 55.) Admittedly, one of Respondent's key concerns was the amount of time drivers were wasting waiting for products to be ready to load onto its trucks. As such, the changes were driven by Respondent's understandable desire to utilize its drivers' time more efficiently. That these driver wait times translated into labor costs is not only common sense, but is demonstrated by a January 4, 2011, email Yurida Estrada[29] sent, noting that a driver's 3-hour wait at C&H "can be very costly to our payroll." (R. Exh. 19.) Moreover, Arreaga acknowledged that the strategy to reduce costs "includes reduction of labor force and use of unnecessary equipment," and noted a 33 percent reduction in labor in connection with his decision to consolidate routes, discussed below. (GC Exh. 16.) For these reasons, I discredit Arreaga's testimony that labor costs could not be considered, and were not considered, at the DC.

Respondent admits and even emphasizes that the changes that transpired, including the decision to discontinue backhauls and pickups and contract out that work, were part of a concerted effort to make the DC, an existing entity, more efficient. This was a successful effort, in no small part due to the vision and leadership of Arreaga, who is clearly highly competent at running the DC. As detailed above, an integral part of making the DC more efficient was the elimination of employees, *i.e.,* reduction of labor costs.[30] Respondent's attempt to separate out labor costs from the desire to run an efficient DC therefore fails.

Respondent argues, inter alia, that it based its decisions on a desire to decrease fuel and equipment costs. (Tr. 248; R. Br 37.) Turning to fuel costs, Arreaga testified that he did not know how much fuel the trucks held. Alvarado testified he gave input into the fuel costs in connection with the February/March 2011 utilization analysis that supported elimination of cross-docking, discussed below. (Tr. 246, 248, R. Exh. 21.) Likewise, Salas testified about consideration of fuel costs in connection with elimination of cross-docking. (Tr. 344–47, R. Exh. 23.) There is no evidence to support that, before the decision was made to discontinue the backhauls and pickups, fuel costs were calculated or considered.[31]

Regarding equipment, here as in *Fibreboard*, there was no significant expenditure or withdrawal of capital. It is undisputed that Respondent discontinued leases on tractors and trailers, as discussed above. The underutilization of the excess tractors and trailers Respondent leased was present, however, when Arreaga arrived at the DC, before the changes at issue took place. (Tr. 141–142.) The tractors and trailers were excess assets even when the DC was not operating efficiently, and therefore the rationale for the decision to end the leases was present before and after the changes.[32] Accordingly, the decision to return 3 leased tractors and approximately 15 leased trailers is attenuated from the decision to discontinue backhauls and pickups. The only other evidence regarding reduction of equipment costs is tied to the decision to eliminate cross-docking, discussed below.

One difference between *Fibreboard* and the instant case that requires discussion is that the subcontracted maintenance workers in *Fibreboard* performed work in the company's plant using the company's equipment. Regarding location, both Respondent's drivers and the subcontracted drivers performed work on the road delivering vendors' products.[33] The use of equipment, however, differs. Once the work was contracted out, the drivers used their own company's trucks, not the trucks Respondent leased. I find this difference insufficient, particularly in light of the discussion of expenditure/withdrawal of capital directly above, to negate *Fibreboard's* applicability. See *Whitehead Bros. Co.*, 263 NLRB 895 (1982) (Duty to bargain existed despite the fact that company sold its trucks and subcontractors used their own); See also *Acme Die Casting*, 315 NLRB 202 (1994) (applying *Fibreboard* and *Torrington Industries* despite change in location of subcontracted work).

The instant case is distinguishable from *Summit Tooling Co.,* 195 NLRB 479, 480 (1972), and like cases where a company discontinues a line of business. In *Summit Tool,* the Board found the company's decision to close a subsidiary was not a mandatory subject because "its practical effect was to take the Respondent out of the business of manufacturing tool and tooling products." Here, Respondent's business stayed the same. Respondent still operated grocery stores, ran a distribution center, and delivered products using drivers.

[27] Referenced for illustration purposes only, businessdictionary,com defines the term "labor costs" as "The cost of wages paid to workers during an accounting period on daily, weekly, monthly, or job basis, plus payroll and related taxes and benefits (if any)." www.businessdictionary.com/definition/labor-cost.html.

[28] Any assertion that labor costs are not considered as part of Respondent's operations is squarely refuted by the Chief Operating Officer Alvarado, who testified that his input into the analysis regarding cross-docking, discussed below, was to provide "labor numbers, fuel numbers, and how much the equipment cost . . ." (Tr. 248.) Clearly, labor is accounted for at the DC.

[29] Her job title us unknown.

[30] Because this is not an animus case, the fact that both unit and non-unit employees comprised the labor costs is not relevant on this point.

[31] Both common sense and the record reflect that fuel costs are a consideration in the fee Respondent pays to the contractors. (Tr. 315.)

[32] Respondent's also discusses in its brief the return of leased pallet jacks as part of the overall plan to increase efficiency. While this decision may have been possible due to the elimination of cross-docking, described below, Respondent has not shown how having drivers other than unit drivers deliver products to the DC relates to the return of pallet jacks, as the products would need to be unloaded regardless, either at the DC or the stores.

[33] While logic dictates that there will be some differences in schedules and routes, as the subcontractors would not sometimes combine their deliveries with deliveries to Respondent's stores as the unit drivers did, the evidence shows there was no set schedule beforehand, and therefore this is not a material difference. (GC Exh. 3.)

This case is also meaningfully distinguishable from *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), upon which Respondent relies. There, the company completely shut down its entire distribution function and sold all its trucks to independent distributors. Once the independent distributors took the products from the company's docks, Adams had no further responsibility to sell the products. As the court noted, "the work done by the independent contractors, contrary to the situation in *Fibreboard*, was not performed at the Adams plant for the benefit of the dairy." 350 F.2d at 111. Here, the work the subcontractors perform is for the benefit of Respondent, *i.e.,* to deliver the products to Respondent's DC so Respondent can sell the products at its stores. Moreover, *Adams Dairy* involved a complete liquidation of the company's dairy distribution function, replacing all its driver-salespersons with independent distributors. Respondent's decision here to utilize contractors rather than unit drivers to transport vendors' products to the DC falls far short of Adams' decision to entirely close out the distribution end of its business.

The court in *Adams Dairy* also found significant that Adams had recouped its capital investment by selling all of its trucks to independent distributors. Here, as discussed above, Respondent discontinued some leases, and made the decision to do so, at least for some of the equipment, prior to the decision to use subcontractors to deliver products from its vendors. It neither made a significant capital investment nor recouped significant capital through the sale of assets.[34]

Respondent also points to *Oklahoma Fixture Co.*, 314 NLRB 958 (1994), for support. There, the Board held that the company's decision to subcontract out all of its electrical work was not a mandatory subject of bargaining. It based its conclusion on credited testimony from a company vice president that the decision was based on concerns about legal liability and the risk of losing "virtually all" of its customers in the event of electrical damage. The Board pointed out that *Oklahoma Fixture Co.* was the "unusual situation" it had referred to in *Torrington Industries* where a "nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject . . . ." 314 NLRB at 960.[35]

Respondent argues in its brief that discontinuing the leases on some of the equipment lessened its legal liability. There was no testimony or documentary evidence regarding the legal liabilities associated with either the leased trucks or the contracts at issue, much less how any particular liabilities factored into the decision to discontinue the backhauls and pickups. Therefore, any argument that concerns for legal liability motivated Respondents' decision making fails.[36] Likewise, Respondent presented no evidence or argument that its decision was based on concerns about losing "virtually all" of its customers. Because of these important factual distinctions, reliance on *Oklahoma Fixture Co.* is misplaced.

Finally, because the decision to subcontract the deliveries at issue contributed to reduction of work for drivers, ultimately resulting in layoffs, I find it had a significant impact on the unit.[37]

Based on the foregoing, I find the instant case is properly analyzed under *Fibreboard andTorrington*, supra.[38] Accordingly, for the reasons set forth above, I find Respondent violated Section 8(a)(1) and (5) when it decided, unilaterally, to cease having unit drivers do backhauls/pickups, and to subcontract out those deliveries.

C. Changes to Driver Routes and Schedules and the Subsequent Layoffs

1. Work schedules

I find that failure to provide notice to or bargain with the Union about the changes to driver work schedules violated Section 8(a)(1) and (5) of the Act. *88 Transit Lines*, 300 NLRB 177, 184 (1990).

As noted above, on or around January 24, 2011, Respondent unilaterally eliminated Sunday deliveries and, on various dates thereafter, changed the hours for the night drivers. The Union requested bargaining over the schedule changes on January 6, 2011. (GC Exh. 3.)

The duty to bargain regarding work hours comes from the Act itself, and therefore resolution of this issue requires little discussion. Consistent with the statutory language, the Board has held that hours are a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp.*, *Wooster Division*, 356 U.S. 342, 349 (1958). The term "hours" has been interpreted to include work schedules and whether there should be work on Sunday. See *Timken Roller Bearing Co.*, 70 NLRB 500 (1946). Likewise, the "particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain*." Meat Cutters Local 18 v. Jewel Tea Co*., 381 U.S. 676, 691 (1965).

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[34] See also *Whitehead Bros*., supra (Duty to bargain existed before ceasing delivery of products to customers using company's own trucks even though decision to have outside carriers make all its deliveries was based on desire to cut costs and retrieve the capital it had invested in its trucking fleet. Significant that operations remained the same, *i.e.,* the company continued to deliver its products to its customers by way of truck.).

[35] The Board held that the Respondent in *Oklahoma Fixture Co.* violated the Act by failing to engage in effects bargaining.

[36] As there was no evidence presented regarding legal liabilities, this argument appears to have been thought up after the fact to comport with existing case law.

[37] The discontinuation of ACH Mazola Oil backhauls did not result in layoffs, as this change did not take place until April 2011.

[38] Respondent argues that relying on *Fibreboard* without conducting the *First National Maintenance* balancing test is error. While it is true that some courts have disagreed with the Board's approach in *Torrington Industries*, the law that applies to the instant proceeding, at least at this juncture, comes from the Board and the U.S. Supreme Court. Accordingly, consistent with *Fibreboard* and *Torrington Industries*, I find that balancing test does not apply here. Respondent also urges application of *Dubuque Packing Co.*, 303 NLRB 386 (1991). That case, however, is limited to relocation of unit work and does not apply. *Torrington Industries,* supra.

Respondent argues that the changes to the drivers' work hours should be analyzed under *First National Maintenance, supra.* The statutory language explicitly includes "hours" as a mandatory topic of bargaining, and I therefore need not belabor the application of *First National Maintenance* or its progeny to determine that changing the unit drivers' work hours without first bargaining violated the Act.

2. Route consolidations and layoffs

Detailed in the statement of facts, Respondent decided to deliver products to its stores more efficiently by filling its trucks and consolidating delivery routes based on store needs. The changes led to the elimination of 46 routes. Arreaga testified that he grouped together stores 22, 12, 14, and 3, all of which are in San Jose, for night deliveries. Prior to this change, the night driver only delivered to stores 4 and 12. By making this change, the night driver delivered to four stores rather than two in the same 8-hour shift. (Tr. 156–7, 272.) Similar changes to the various day driver routes resulted in fewer deliveries with fuller trucks. The end result was the layoff of six drivers.

The General Counsel argues that the increase in deliveries from two stores to four imposed greater duties on the night driver because the drivers are expected to help unload the trucks once they reach the stores. The record is devoid of evidence as to how many pallets the night driver helped unload before and after the changes. Similarly, it is not clear from the record whether the day drivers had established routes, or how the stores were grouped for product delivery prior to Arreaga's changes. (Tr. 67–68.) What is apparent, however, is that the consolidation of routes and the decision to send out trucks as full as possible resulted in fewer drivers delivering a similar volume of products than before the layoffs. This alone would not necessarily translate into additional work for the drivers. Arreaga testified, however, that, as a result of his directives, drivers began working more efficiently with the receivers "on a daily per load occurrence."[39] (Tr. 115.) As the daily load per driver has increased, there has clearly been an increase in the work the drivers and receivers perform unloading the products.[40]

The General Counsel analyzes the layoffs separately from the decisions to change the volume of the loads and consolidate routes. In my view, however, the Board's approach in *Holmes & Narver*, 309 NLRB 146 (1992), which evaluated the decision to consolidate work in conjunction with the layoffs that ensued, is the better approach. *Holmes & Narver* involved consolidation of work and layoffs within the employer's motor pool. The Board described the issue before it as follows:

> We are dealing with layoffs that are made in connection with a decision to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments.

309 NLRB at 147.

Viewing the case in light of *Fibreboard* and *First National Maintenance,* the Board in *Holmes & Narver* noted that the employer "did not abandon a line of business or cease a contractual relationship with a particular customer, or make any other change that significantly altered the scope and direction of its business." Id. Though performed with fewer employees, the Board pointed out that the actual work performed in the motor pool did not change appreciably. Accordingly, it found that the decision to consolidate work and lay off employees fell within the category of "management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules," that are "almost exclusively 'an aspect of the relationship' between employer and employee" Id., citing *First National Maintenance Corp. v. NLRB,* supra, 452 U.S. at 677, quoting *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 178 (1971). It therefore declined to apply "any extended multistep analysis to determine whether the parties must bargain over layoffs thus linked to work reassignments."[41]

One important factual distinction between the instant case and *Holmes & Narver* is that in the latter case, the employer "did no more than consolidate and change the jobs in the motor pool—a small unit—and lay off a few employees elsewhere." Here, the layoffs were part of a broader set of changes involving multiple types of employees, most significantly the order selectors. This factual distinction, however, does not result in a legal distinction for a couple of reasons. First, the Board in the next sentence, stated: "Indeed, the Respondent's decision might fairly be analogized to increasing the production quotas of certain employees so that others may be laid off." That is what happened in the instant case, albeit with both unit and non-unit employees.

More importantly, the analytical significance of the fact that the company in *Holmes & Narver* merely consolidated work in a small unit and laid off a few employees elsewhere relates to the category of management decision applicable under *First National Maintenance,* discussed above. The question in the instant case is the same: Were the changes here in more akin to "management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules" that are almost exclusively "an aspect of the relationship" between employer and employee? *First National Maintenance,* supra; citing *Chemical Workers*, supra. If so, the second category applies. Or were the changes "a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of [a contract] . . . a con-

[39] Prior to Arreaga becoming the DC director, some drivers helped unload, while others did not. (Tr. 113.)

[40] The General Counsel relies on *Ironton Publications*, 321 NLRB 1048 (1996), to argue that the imposition of additional duties is a mandatory bargaining topic. In that case, however, pressroom employees were given a new duty to empty trashcans and an assistant foreman was given a new position description that set forth a number of supervisory duties not previously performed. There were no new and different duties alleged here, and therefore this case is not directly on point.

[41] Member Raudabaugh issued a concurring opinion, asserting, *inter alia,* that the test set forth in *Dubuque Packing Co.,* supra, has broader application and is not limited to decisions over relocation of unit work. Applying that test, he came to the same result as the majority. For essentially the same reasons set forth in the concurrence, applying *Dubuque* to the facts herein would yield no different result.

cern under these facts wholly apart from the employment relationship"? If so, the third category would apply.

I find the facts presented in this case are more akin to *Holmes & Narver* than *First National Maintenance*, and the pertinent decisions therefore best fit into the second category of management decisions *First National Maintenance* delineates. The analysis regarding the lack of change in the scope and direction of the business, set forth in the section on subcontracting, is applicable to the decisions to operate fuller trucks, consolidate routes, and conduct layoffs, and is incorporated by reference. Likewise, the prior observation that the changes resulted from internal rather than external forces is reiterated in the context of these decisions. At its core, the very same operation ran more efficiently following the changes Respondent implemented. That the changes impacted both unit and non-unit works, or that they may have originated from inefficiencies outside the unit, does not alter this fact.

The changes resulting in fuller trucks, consolidation of routes, more efficient operations, and layoffs once again inexorably lead to the question of labor costs. The Board in *Holmes & Narver*, in an analysis parallel to *Torrington Industries,* supra, held that there was no need to engage in a multi-step analysis, including the consideration of labor costs, where the decision fell into the second category of management decisions under *First National Maintenance.* Even so, a discussion of labor costs is warranted here in light of the Supreme Court's emphasis on them in *Fibreboard*, and considering Respondent's repeated assertions that bargaining would have been futile.[42]

Crediting Respondent's assertions that inefficiencies in the DC led to the instant changes, these inefficiencies, in the end, boil down to labor costs. The inefficiencies resulting in the layoff of order selectors stemmed from too many employees doing too little work in an inefficient manner. The inefficiencies of half-full trucks, poor route planning, chaotic deliveries and the like boil down to too many people being paid to do what fewer may accomplish. Moreover, Arreaga acknowledged that the strategy to reduce costs "includes reduction of labor force and use of unnecessary equipment," and noted a 33 percent reduction in labor in connection with his decision to consolidate routes. (GC Exh. 16.)

Respondent again points to fuel costs as a reason for its decisions. As discussed in the section on subcontracting above, there is no evidence that fuel costs were considered for any decision other than the elimination of cross-docking. For other decisions, it is a post hoc justification, no matter how logical or environmentally sound. Likewise, any argument regarding equipment or capital investments fails for the reasons explained above.

Finally, even though the layoffs may be economically motivated, as the Respondent contends in this case, the Respondent must still notify the Union of contemplated action and bargain over the question. *Gulf States Mfrs.*, 261 NLRB 852 (1982); *Farina Corp.*, 310 NLRB 318, 320 (1993). "[I]n the absence of an agreed-upon contractual provision on the subject, an employer is obligated to bargain with an incumbent union with respect to both the decision to conduct a layoff and the effects of any such decision." *Alpha Associates,* 344 NLRB 782, 785 (2005).[43]

Accordingly, I find Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain over the decisions to consolidate work and impose layoffs.

D. Respondent's Arguments Regarding the Futility of Bargaining

The decision to eliminate backhauls/pickups and subcontract out that work is governed by *Torrington Industries,* supra. The decisions culminating in the elimination of routes are governed by *Holmes & Narver,* supra. Neither requires an independent analysis of amenability to bargaining. Given respondent's repeated assertions that bargaining would have been futile, I find it important to briefly address this issue.

Because, as previously discussed, I find consideration of labor costs factored into the decisions set forth above, I find, in turn, that they were amenable to bargaining. *Fibreboard,* supra. As the Board stated in *Holmes & Narver,* 309 NLRB at 47, relying on a then-recent survey discussing alternatives to downsizing:

> [M]any companies that downsize make efforts to minimize employee separations by implementing a variety of alternatives, which—had the Respondent been willing to bargain—the Union might have offered as concessions or accepted as proposals. Among the many alternatives to downsizing, other than reducing wages, are modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications.
>
> (Footnote omitted.) Respondent's assertions that the Union could have offered nothing through collective bargaining are speculation. Respondent did not claim to know what proposals the Union would have made regarding the changes, or what alternative solutions the give-and-take of bargaining might have generated.

Moreover, the record suggests that Respondent had a bias in favor of viewing bargaining as futile. The Union requested bargaining, but Respondent repeatedly asserted it had no duty to bargain, as it was contesting the Union's certification. While steadfast in its assertion that there was no duty to bargain, Respondent agreed to "meet and confer" and "discuss" the changes, including the layoffs. (GC Exhs. 4–13.) It is unclear whether or not such meetings took place. What is clear, however, is good faith collective bargaining did not take place and was never going to take place as long as Respondent was not recognizing the Union as the drivers' bargaining representative. To assert that bargaining would have been futile in this context strikes me as rather disingenuous.

E. Effects Bargaining

There is no dispute that the union must be given a significant

[42] I also think consideration of the futility or, conversely, suitability of bargaining is important for the reasons set forth in fn. 25.

[43] The bargaining obligation occurs even though the layoffs in question are permanent rather than temporary. *Winchell Co.*, 315 NLRB 526 (1994).

opportunity to bargain about matters of job security as part of the "effects" bargaining mandated by Section 8(a)(5). See, e. g., *NLRB v. Royal Plating & Polishing Co*., 350 F.2d 191, 196 (3d Cir. 1965); *NLRB v. Adams Dairy, Inc*., 350 F.2d 108 (8th Cir. 1965), cert. denied 382 U.S. 1011 (1966). "[B]argaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy." *First National Maintenance Corp. v. NLRB,* supra at 681–682.

The Union requested bargaining over the effects of the layoffs. (GC Exh. 11.) As discussed above, Respondent offered to "discuss" the matter, but it was not willing to engage in good faith collective bargaining. As such, I find Respondent failed to engage in effects bargaining in violation of Section 8(a)(1) and (5).

F. Elimination of Cross-Docking Unified Products

To summarize, in April 2011, Respondent decided that rather than having Unified deliver its products to the DC, and then have its drivers deliver the products to the stores, it made more sense to have Unified deliver its products directly to the stores.

The General Counsel bears the burden of establishing that a change was "material, substantial, and significant." *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). I find, for the reasons explained below, that the elimination of cross-docking Unified products was not a "material, substantial and significant" change to the terms and conditions of the unit drivers' employment. *Angelica Healthcare Services Group, Inc*, 284 NLRB 844, 853 (1987); *Flambeau Airmold Corp*., 334 NLRB 165, 171 (2001).

It is undisputed that the decision to have Unified deliver its products directly to the stores did not result in the layoff of any additional drivers, nor did it significantly impact their wages or hours of work. The nature of the work the drivers performed did not change. Both before and after cross-docking was eliminated, Respondent's drivers delivered products from the DC to the stores.

Though the General Counsel points out that regular hours worked dropped by 86 from April to May, and overtime hours dropped by 17.5, this snapshot is not useful when viewed in the context of fluctuations both before and after cross-docking was eliminated. For example, from July to August 2010, regular hours decreased by 1085 and overtime hours decreased by 1035 despite the fact the Unified products were cross-docked both months. In July 2011, after the implementation of cross-docking, both regular hours and overtime hours were higher than in any month from January–June and November 2010, as well as February and March 2011.[44] (R. Exh. 15.) This evidence shows that there were fluctuations of a similar nature both before and after elimination of cross-docking Unified products.

The General Counsel also argues that the volume of the deliveries changed. It did not present evidence, however, to support this contention. It points to the fact that, prior to the change, 88 pallets of Unified products were cross-docked and then loaded onto Respondent's truck daily. (R. Exh. 21, p. 5.) Respondent presented evidence, however, that it made up this volume by increasing its private label products and adding stores. (R. Exh. 21; Tr. 241, 274.) The General Counsel did not sufficiently refute this evidence, and therefore did not prove that the volume of work for the unit drivers changed.[45]

The General Counsel points to *Overnite Transportation Co.* 330 NLRB 1275, 1276 (2000), applying *Torrington Industries*, supra, for the proposition that the bargaining unit is adversely affected "whenever bargaining unit work is given away to non-unit employees." I find this case to be distinguishable, however.[46] Unlike in *Overnite Transportation Co.*, the elimination of cross-docking was not a decision to simply substitute one group of drivers for another to perform the same work. For 2 years prior to the changes, a subcontractor delivered Unified products to the DC. The change that took place here was to have the subcontractor deliver their products differently, *i.e.,* directly to the stores.[47] Deliveries that were previously subcontracted out were still subcontracted out, just in a different manner. This was part of a broader decision involving overcrowding in the warehouse and the redundant work on the part of the loaders, as the products had to be unloaded from the subcontractor trucks, stored, and then reloaded onto Respondent's trucks.[48]

The Board in *Overnite Transportation Co.* also found that even if the unit did not actually lose work, the potential that unit employees "might" have lost additional work was sufficient to require bargaining. This potential for lost additional work is not of significant concern under the facts presented here. The unrefuted evidence shows that Respondent has moved toward increasing its private label products and has continued to utilize the DC to store and stage its products for delivery. Unified is the only vendor from which stores order products directly, and no evidence was presented to show that Respondent was contemplating expanding this method to other vendors. Respondent's utilization analysis specifically states that the elimination of cross-docking will not require decrease of the labor force. (R. Exh. 21.) Perhaps most importantly, both witness testimony and the utilization analysis establish that overcrowding and space considerations in the DC limited the amount of additional products it could service. The General Counsel has not rebutted this evidence. As the DC was operating at capacity both before and after elimination of cross-

[44] For reasons unknown, January 2011 is not reflected in R. Exh. 15.

[45] The General Counsel did not have any driver testify that the volume of work, or any other aspect of the work, changed with the elimination of cross-docking, nor did it present documentation reflecting such a change. It takes issue with Respondent's exhibit reflecting pallets shipped to stores for not reflecting Unified products. (R. Exh. 14.) The General Counsel has the burden of proof, however, and therefore was responsible for gathering and presenting evidence to establish a change in volume.

[46] The General Counsel notes Respondent's contemplation that it would discontinue leases on three more tractors and trailers. It is not clear whether or not this took place.

[47] That Unified drivers made some deliveries, or that Respondent decided to change subcontractors from Continental to RJR, does not change the analysis.

[48] The General Counsel does not argue, and has not presented evidence, that labor costs involving the drivers in the unit factored into this decision in any meaningful way.

docking, the loss of the potential to expand the unit by increasing the workload would require expansion of the DC.

Based on the foregoing, I find the General Counsel has failed to prove that the decision to eliminate cross-docking was a material, substantial and significant change to the delivery drivers' terms and conditions of employment. I therefore recommend dismissal of paragraph 14 of the amended consolidated complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers employed by Respondent at its Milpitas, California facility; excluding all other employees, guards, and supervisors as defined in the Act.

4. At all times material since December 9, 2010, the Union, by virtue of Section 9(a) of the Act has been, and is, the exclusive representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act.

5. By unilaterally implementing route and schedule changes impacting the unit drivers, thus reducing the frequency and/or number of deliveries made on a weekly basis from the DC to Respondent's retail stores, eliminating or severely restricting unit work involving backhauls and pickups of vendors' products and subcontracting out that work, and permanently laying off unit employees Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras, without notification to or affording the Union an opportunity to bargain regarding the effects of these decisions, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action, including the posting of the customary notice, designed to effectuate the policies of the Act.

Having found that Respondent has unlawfully made unilateral changes in the employees' terms and conditions of employment, I shall recommend that Respondent be ordered to restore the status quo ante by:

Assigning the work involving backhauls and pickups from vendors Morton Salt, Inc., C&H Sugar Company, Inc., Durango Packaging, Inc., and Mazola (ACH Food Companies), to unit drivers at the same relative volume, or as similar a volume as feasible, as the drivers performed this work prior to implementation of the decisions to subcontract out the vast majority of this work to third-party carriers.

Restoring the driver routes and hours of work that existed prior their changes in January and February 2011.

Recalling Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, and Juan Caballero, and offering to reinstate them to the positions they held before their unlawful layoff or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges.

Making Luis Sanchez, Avelardo Geronimo, Juvenal Geronimo, Guadalupe Quezada, Juan Caballero, and David Barreras[49] whole for any loss of earnings they may have suffered by reason of the unlawful actions against them. Backpay shall be based on earnings which each such employee would have earned from the January 24, 2011, the date of the layoffs. The backpay will be less net earnings during such period and shall be computed on a quarterly basis, plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily. *Kentucky River Medical Center*, 356 NLRB 6 (2010); see also *Times Union,* 356 NLRB 1339 (2011) (applying remedy to 8(a)(5) violation).

I further recommend that Respondent be ordered to cease and desist from implementing unilateral changes to wages, hours, and other terms and conditions of unit employees without first bargaining with the Union that represents them.

[Recommended Order omitted from publication.]

[49] Barreras has already been called back, but this was more than 3 months after the layoffs.