JD(ATL)–34–12
San Juan, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HORIZON LINES OF PUERTO RICO, INC.

and **CASE 24–CA–75533**

INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 1575

Ayesha K. Villegas, Esq.,
for the Acting General Counsel.[1]
Antonio Cuevas-Delgado, Esq.,
for the Respondent.[2]
Arturo Luciano Delgado, Esq.,
for the Charging Party.[3]

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on September 20 and October 2, 2012.[4] The Union filed a charge initiating this matter on February 28, and the Acting General Counsel issued the complaint on June 29. The Government alleges the Company on or about February 29, changed the employment status of four employees from regular or fixed employees to casual and/or temporary employees relegated to be called for work from a "supplemental employee list" without prior notice to the Union and without affording the Union an opportunity to bargain with the Company with respect to this conduct and the effects of this conduct, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

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1 I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the National Labor Relations Board (the Board) as the Government.

2 I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

3 I shall refer to counsel for the Charging Party as counsel for the Union and I shall refer to the Charging Party as the Union.

4 All dates are 2012, unless otherwise indicated.

The Company in a timely filed answer to the complaint denies having violated the Act in any manner alleged in the complaint, but, rather asserts its actions were permitted by the parties collective-bargaining agreement and by past practice and habit.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations in making credibility determinations here. I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company did not violate the Act in any manner alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION, SUPERVISORY/AGENCY STATUS, AND LABOR ORGANIZATION STATUS

The Company is a corporation, with an office and place of business in San Juan, Puerto Rico, where it has been, and continues to be, engaged in the handling, loading, and unloading of cargo. During the past calendar year, a representative period, the Company derived gross revenues in excess of $50,000 for the transportation of freight directly from points outside the Commonwealth of Puerto Rico and, performed services valued in excess of $50,000 in States other than the Commonwealth of Puerto Rico. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

It is admitted that, at all times material here, Labor Relations Director Manuel Lopez Llavona (Labor Relations Director Lopez Llavona or Lopez Llavona), Land Operations Manager Roberto Batista Pastrana (Operations Manager Batista or Batista), and General Manager Richard Rodriguez (General Manager Rodriguez or Rodriguez) were supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

The parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act. It is admitted Francisco Diaz Morales (Union President Diaz or Diaz), at times material here, has been, and continues to be, president of Local 1575 of the Union.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Government's evidence

Diaz has been president of the local union since 2008 and conducts negotiations for the Union. On February 27, Labor Relations Director Lopez Llavona notified Diaz, in writing, that effective February 29 the Company would no longer be recruiting for certain regular positions by work area, namely, one utility and two facilities maintenance department employees and one janitorial marine department employee. Lopez Llavona states in his letter that in keeping with the practice and habit of the parties in the past under similar circumstances, as well as pursuant to the party's collective-bargaining agreement, the employees affected will on February 29 be

placed first on the corresponding lists of replacements. Lopez Llavona also wrote if Diaz was interested in discussing the effects, if any, of this decision "we" will be available Tuesday, February 28, and Wednesday, February 29. Diaz testified the employees involved or impacted by the decision were Ramon Ojeda, Juan Garcia, Rolando Soto, and janitorial employee Oppenheimer.

According to Diaz, a regular or fixed employee works Monday through Friday and is guaranteed 40 hours work per week. Diaz specifically testified, "Everybody who is recruited as a fixed employee must work Monday through Friday and work 40 hours a week." Workers on the casual, alternate, or replacement list must show up daily at a "shapeup" at the worksite to see if they will be needed for work that day. Those at the "shapeup" are assigned work, if at all, by seniority. Diaz testified that before February 29 the four impacted employees did not have to be present at the daily "shapeup" because they were told the day before where to work the following day and went directly to their assigned worksites. Diaz explained that each workday the Company, at around 4 p.m., provides him a work complement list for the next day and he made sure the Company had the full complement of workers, then signs off on the list, and returns the list to the Company.

On February 27, Diaz advised the International Union of Lopez Llavona's letter. On February 28, he emailed and telephoned General Manager Rodriguez, whom he described as being "in charge of everything that has to do with Horizon Lines . . . in Puerto Rico." In his email, Diaz asked Rodriguez to meet that afternoon at the Union. Shortly thereafter Rodriguez responded he had a staff meeting that afternoon but could meet early the next day. Rodriguez inquired if Diaz would be alone or with his team. Rodriguez advised that if Diaz was accompanied by others he (Rodriguez) would bring Lopez Llavona.

During the afternoon of February 28, Diaz telephoned Rodriguez with others from the Union listening on a speaker phone. Those listening were International Union Vice President Juan Velez, Local 1575 Vice President Felipe Garcia Cortijo, and International Vice President for Puerto Rico Efraim Robles (Robles). Diaz testified he asked Rodriquez to meet the next day to see if an agreement could be reached, or, to leave things on the status of the four employee positions as they were until an agreement could be reached. According to Diaz, Rodriquez said he "could not stop it, that it was already an agenda, that he could not stop it." Robles testified, essentially as Diaz, about the conversation and added Rodriguez did not agree to meet with the Union.

Diaz received a reply email from Rodriguez on February 29 in which Rodriguez wanted to put into effect an agreement, which Diaz contended had not been reached with the Company, addressing the issue of an employee, Roberto Reyes (also referred to as Chito), being allowed to work on Sundays, which Diaz said was not permitted by the parties collective-bargaining agreement. In his reply email Diaz stated, "Put [back] all of the positions [not being recruited] and I'll let you report on Sundays until twelve mid-day and remember that Lopez Llavona cannot negotiate with us." Diaz testified he never received a response from Rodriguez.

Diaz denied he canceled the meeting for February 29 between the Company and the Union because Rodriguez would be bringing Labor Relations Director Lopez Llavona to the

meeting. Diaz added the meeting was not canceled for that reason and denied he canceled the meeting. Diaz testified Rodriguez never confirmed a meeting with the Union.

Diaz testified, on cross-examination, he had been advised by company officials, including the chief operating officer, that Lopez Llavona was their representative in dealings with the Union about payroll issues. Diaz denied he did not want to deal with Lopez Llavona, but explained there was an agreement between the parties that he would communicate with the Company from the top down in management, and if, following that procedure, no one above Lopez Llavona was available he would then deal with Lopez Llavona.

Local Union President Diaz wrote General Manager Rodriguez on March 2 acknowledging the Company's February 27 letter regarding the elimination (or not recruiting) for the four positions in the maintenance and marine departments. Diaz challenged the Company's reasons for its actions contending their actions violated the parties collective-bargaining agreement and asserted such actions did not follow past practice or habit of the parties. Diaz advised Rodriguez if the Company implemented eliminating the positions the Union would take action to enforce its contractual rights. Diaz further wrote, "On the other hand, any matter must be discussed between the union and you. Otherwise the agreement executed between the parties on August 25, 2010, which established that important labor affairs would be discussed between you and the union would be breached."

On cross-examination, Diaz acknowledged that on February 28 Rodriguez in an email reply agreed to meet with the Union on February 29; however, Diaz described it as Rodriguez agreeing to a dialog with the Union. Rodriguez' reply email, in part, states, "I checked . . . and I have a slot open from 10:00 to 11:00. I'll be there with Tony Lopez Llavona and Roberto Batista." Diaz specifically denied he canceled the meeting because Lopez Llavona was going to be present adding, "It was not because of that issue."

Diaz also acknowledged, on cross-examination, the Company had eliminated fixed positions before but stated it involved situations where employees had retired and the Company did not fill the positions. Diaz acknowledged there were prior occasions when the Company informed the Union it was not going to recruit fixed positions and said the Union has cases of that nature in arbitration.

2. Company's evidence

Labor Relations Director Lopez Llavona has held that position from around 1989 through various predecessor employers, namely Sea-Land and CSX Lines. Lopez Llavona testified that during that time he has been the chief spokesperson for the Company in negotiations with the Union. Lopez Llavona explained workers are recruited for work pursuant to the parties collective-bargaining agreement based on seniority within classifications and added those provisions of the contract have never been changed. Lopez Llavona described a "fixed" employee as one called for work when work is available, while a "casual" employee is one called for work when a fixed employee is absent or additional employees are needed. There is no definition of "fixed" or "casual" employees set forth in the party's collective-bargaining agreement. Lopez Llavona testified, "Nobody in the docks has [a] 40 hour a week guarantee." According to Lopez Llavona, there has been no negotiated change with respect to

the absence of a 40- hour workweek guarantee in the contract since 1989. Lopez Llavona said the collective-bargaining agreement at article VIII, paragraph 2, authorizes the Company to determine: the number of workers to be employed, the types of work to be performed, the location of the work, the duties and obligations of every worker, the methods for performing the work and, the starting and stopping times for each workday. According to Lopez Llavona, these provisions have been in the party's collective-bargaining agreements since 1983 and stated the Company has exercised and implemented its prerogatives therein on many occasions. Lopez Llavona specifically testified it was the Company that determined the number of workers per classification.

Lopez Llavona testified that in June 1999 an official of a predecessor company notified the then union president it would be eliminating certain positions from its operations but would meet with the Union to discuss the effects of the eliminations. Lopez Llavona said all the positions eliminated were, at the time, filled. Lopez Llavona testified that in keeping with the collective-bargaining agreement and past practice, the employees, whose positions were eliminated, were placed on the casual or supplemental list, for call, by seniority.

Lopez Llavona testified that pursuant to the management-rights provision of the party's collective-bargaining agreement the Company is permitted to not recruit workers and that its contractual obligations are to discuss and negotiate with the Union only the effects of not recruiting and he states the Company has been doing just that since 1993. Lopez Llavona testified that in the situation here the Union never showed up to negotiate about the effects of the Company's nonrecruitment of employees.

Article V- "Management and Direction of Personnel" provision of the party's collective-bargaining agreement reads as follows:

> The operation of the Company's business and the direction of working forces are vested exclusively in the Company, provided that such functions shall not be exercised contrary to any provision contained in this Agreement or to any law. The Union does not hereby waive its legal right to be timely informed of any proposed changes by the Company and to discuss and/or grieve the effects of same as set forth in the grievance and arbitration provision and as permitted by law.

Company General Manager Rodriguez testified he was instructed by Company Chief Operating Officer Brian Taylor (Chief Operating Officer Taylor or Taylor) to cut costs. Rodriguez said the Union would not agree to concessions, or any type relief, so he ordered department heads to determine how many less workers the Company could operate with without affecting services provided to their customers. The department heads arrived at a number. Rodriguez designated Director of Labor Relations Lopez Llavona to "notify the Union, explain to them what we needed . . . and to go ahead and meet with them to see what the consequences were towards our decision to hire less personnel." Rodriguez said the collective-bargaining agreement gave the Company the right to determine the number of workers needed. Rodriguez referred to the portion of the agreement that states: "The Company will determine the number of workers to be employed, the type of work, and the place or location where the work is to be performed." Rodriguez explained he designated Lopez Llavona to inform and

confer with the Union about these matters because he had been given instructions by his boss, Chief Operating Office Taylor, "that all labor related issues had to go through Tony [Director of Labor Relations Lopez Llavona]."

Rodriguez testified Union President Diaz emailed, as well as telephoned, him on February 28 concerning a meeting to discuss the recruiting of less workers. Rodriguez testified that in one of the telephone conversations with Diaz he was told the Union had him on a speaker phone with Juan Velez and Felipe Garcia. Rodriguez testified he told them while the Company could not meet on February 28 they could and would meet with them at the union hall on February 29. Rodriguez sent an email to Diaz confirming the meeting and advising that Lopez Llavona and Roberto Batista would be coming with him. Diaz replied asking Rodriguez to call him which Rodriguez did. According to Rodriguez, Diaz asked that he hold off on the decision to not recruit the four workers. Rodriguez told Diaz he could not make that decision by himself but would be happy to discuss it the next day, February 29. Rodriguez testified he reconfirmed Lopez Llavona would be with him at the meeting to which Diaz responded, "[B]asically forget it, that we are not going to meet with [Lopez Llavona]. And it basically ended there." Rodriguez said the Union also threatened to telephone his boss, Chief Operating Officer Taylor, about his bringing Lopez Llavona to the meeting. Rodriguez then emailed Taylor to update him on his communications with the Union. Rodriguez explained to Taylor, that when he mentioned to the Union he would not be coming alone ". . . the crap hit the fan . . . they asked who would be joining me and when [he] replied 'Robert and Tony [Lopez Llavona]' kaboom!!!!! it appears that Tony being present is the deal breaker. . . ." Rodriguez told Taylor he was providing the update just in case the Union telephoned him about the situation.

Rodriguez testified that the following day, as per common practice, company department heads along with Diaz and his team met to discuss "day-to-day stuff." According to Rodriguez, Operations Manager Fernando Guardiola attempted, at the meeting, to persuade the Union to be more flexible on calling labor on weekends and in turn the Company would hire a supplemental worker (nicknamed Chito) in exchange for the Union's flexibility. In an email of February 29, Rodriguez opined that the agreement for more flexibility for weekend help should be worked out but he also stated he could not do anything with the reduction of fixed workers explaining the situation that led to the reduction was critical.

The Union's reply to Rodriguez' earlier email stated, "Put [back] all the positions [not recruited] and I'll let you report on Sundays until noon, and remember that [labor relations director] Lopez Llavona cannot negotiate with us." Rodriguez testified he tried to remind Union President Diaz it was the Company's position Lopez Llavona was their chosen representative for their dealings with the Union. According to Rodriguez, Diaz indicated that if Lopez Llavona was the Company's choice he should have their chief operating officer tell that to International Union President Harold Daggett at an upcoming meeting the following month. Diaz then told Rodriguez the recruiting of less workers was not negotiable and suggested the Company start saving money to pay back wages for all those the Company no longer recruited.

Rodriguez testified the Company stands ready to meet and negotiate with the Union and said he has had no complaints from the Union that the Company is not willing to meet with the Union on this or any other issue(s). Rodriguez testified the Union continues to inform the Company if it [the Union] perceives the Company is violating the party's collective-bargaining

agreement by not hiring, or by recruiting less workers than the Union considers the correct number of workers.

Chief Operating Officer Taylor in an email letter to Union President Diaz on April 15 explained he needed Rodriguez and Lopez Llavona involved in any labor discussions in San Juan and asked the Union to afford that courtesy to the Company and explained the law actually required that the Company be able to chose its own representative(s) for negotiations with the Union. Taylor further asked for Diaz' support in finding a solution for the difficult times the Company was going through.

On April 19, Diaz emailed his response:

> Definitely you can count with my total support to help the improvement of Horizon critical financial situation. I just want to remember you the fact that a written agreement was settled on subject of reference on last August 25th. Nevertheless I have a solid financial proposal to help you achieving your objective. I only need to meet with Richard alone to comply with previous written agreement.

There are no minimum manning requirements in the parties collective bargaining for janitorial, utility, or facility employee classifications. There are, however, certain listed and established minimum fixed manning requirements set forth in the parties' collective-bargaining agreement. An example is, there will be one "water boy" per company vessel, except when the "Ponce gang" works a vessel because the "Ponce gang" provides its own "water boy." Additionally, the Company, by the contract, agreed to utilize two checkers and one Hatch-tender per each work gang. The Company also, agreed in the collective-bargaining agreement, to recruit a "fixed floater" to work in terminal operations Monday through Friday. The collective-bargaining agreement provides that where a vessel has more than 11 containers on the third tier, 9 workers will be recruited for "lashing" and "unlashing" the containers. The parties agreement also provides for fixed numbers of operators, checkers, longshoremen, drivers, and top loaders per week when there are, or are not, vessel operations in port.

3. Credibility

While the essential facts here are, and as discussed in the analysis section below, for the greater part, not in dispute; it is nonetheless helpful to explain certain credibility determinations. I found Company General Manager Rodriguez to be a truthful witness. I was impacted by impressions I formed as I observed him testify. Related correspondence he was questioned about, or made reference to while testifying, supported the accuracy of his testimony. For example, in Rodriguez' testimony he agreed to meet and discuss, or bargain with the Union, the effects of recruiting less workers, on February 29 was confirmed in an exchange of emails. Rodriguez' testimony that Union President Diaz told him in a telephone conversation to forget the meeting if the negotiators for the Company included Labor Relations Director Lopez Llavona is supported, in part, by Diaz' written communication of February 29, which stated, "[R]emember that Lopez Llavona can not negotiate with us." Furthermore, Local Union President Diaz, in his March 2 letter, to Company General Manager Rodriguez, told Rodriguez that "any matter must be discussed between the union and you [Rodriguez]." Diaz'

reply of April 19 to Company Chief Operating Officer Taylor's April 15 email stated, in part, "I only need to meet with Richard [Rodriguez] alone. . . ."

I am also persuaded Company Labor Relations Director Lopez Llavona, an animated and vigorous witness, testified truthful. I conclude his testimony may have been more spirited by the fact, it appears, the Union does not wish to deal with him at all when it communicates or negotiates with the Company. I credit Lopez Llavona's testimony. Any conflict between Diaz/Robles and Rodriguez/Lopez Llavona's testimony I rely on Rodriguez and Lopez Llavona's testimony.

III. ANALYSIS, DISCUSSION, AND CONCLUDING FINDINGS

The issue here, is whether the Company violated Section 8(a)(5) and (1) of the Act, on or about February 29, by changing the employment status of four employees from regular or fixed employees to casual and/or temporary employees to be called for work from a supplemental employee list. Included is the issue of whether the status change constituted a mandatory subject of bargaining that materially, substantially, and significantly impacted the affected employees' terms and conditions of employment. And, additionally there is the issue of whether the change was made without prior notice to the Union and without affording the Union an opportunity to bargain with the Company with respect to the change and the effects of the change.

The change of status for the four employees here from fixed to casual is inextricably intertwined with, and a result of, the Company's decision to recruit a lesser number of workers for certain specific job classifications.

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with representatives of his employees." Pursuant to *NLRB v. Katz,* 369 U.S. 736 (1962), unilateral changes to mandatory subjects of bargaining generally violate the Act. Stated differently, an employer with an outstanding bargaining obligation can not unilaterally alter or change an existing benefit, which is regarded as a mandatory subject of bargaining, without providing prior sufficient notice to and bargaining with the union.

The Company's February decision to recruit less workers in certain job classifications is a mandatory subject of bargaining. An employer is required to bargain with respect to wages, hours of employment, and other terms and conditions of employment. Recruiting less workers and, as a result thereof, moving those workers from "fixed" to "casual" work lists materially, substantially, significantly, and directly impacts (as explained below) the employees wages and other terms and conditions of employment. Being a "fixed" employee means if there is work to be performed the fixed employee performs it. A "casual" employee may, or may not, obtain work on any given day based on the absence of a fixed worker or the Company needing additional workers beyond the number of "fixed" workers. The Company did not bargain about its decision to recruit less workers.

Normally, at this point a violation would be found unless the union waived its right to bargain over the decision. A union may waive its right to bargain regarding a particular term or condition of employment; however, such a waiver must be "clear and unmistakble." *Provena*

St. Joseph Medical Center, 350 NLRB 808, 810–812 (2007); see *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). "The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, supra. This high standard reflects the Board's policy choice, grounded in the Act, that favors collective bargaining concerning changes in working conditions that might bring about labor disputes or unrest.

I find the Company did not violate the Act with respect to its February decision to recruit a lesser number of "fixed" employees in certain job classifications which resulted, as alleged in the complaint, in at least four employees being placed on a "casual" rather than "fixed" employee list. Application of the clear and unmistakable standard reveals that certain provisions of the parties collective-bargaining agreement, taken together, explicitly authorized the Company to take the action it did regarding recruiting a lesser number of fixed workers for specific job classifications and that the Company was obligated only to bargain about the effects of its actions. Article VIII of the collective-bargaining agreement provides, in part, that the Company may determine "the number of workers to be employed, the type of work, and the place or location where work is to be performed." The collective-bargaining agreement further permitted the Company, in its judgment and for the most efficient and economic operation of its business, to "particularly determine:" "[t]he duties and obligations of each . . . and every one of the workers employed by the Company in the contracting unit"; "[t]he hours to start work . . ." and, the "selection and employment of personnel according to requirements of the Company's business." Here, the Company explored with the Union, however unsuccessfully, about how to reduce its costs and after failing in its efforts, decided to reduce the number of workers it recruited. Labor Relations Director Lopez Llavona credibility testified the provisions of the collective-bargaining agreement, referred to earlier, have been in the parties collective-bargaining agreements, albeit some with predecessor employers, since 1983 and have been exercised and implemented on many occasions. According to Lopez Llavona, a predecessor company, in June 1999, notified the then union president it would be eliminating or not recruiting, certain job classifications but would meet with the Union to discuss the effects of the job eliminations. Lopez Llavona testified all positions eliminated, or not recruited, were filled at the time of elimination and those occupying the positions were placed on the casual work lists by seniority. Lopez Llavona stated the Company here, followed that same past practice when it decided to recruit less workers. Lopez Llavona testified the management-rights provision of the parties collective-bargaining agreement permitted the Company to not recruit workers with its only obligation being to negotiate with the Union the effects of recruiting less workers. He stated the Company had followed that practice and procedure since 1993. I am persuaded article V, "Management and Direction of Personnel," and other provisions of the collective-bargaining agreement, clearly supports the Company's position regarding its obligations related to recruiting (or not recruiting) workers and its bargaining obligations. Article V in part states, "The operation of the Company's business and the direction of working forces are vested exclusively in the Company," with a proviso that the exercise of those functions not violate any provisions of the agreement or law; and, that the Union did not waive its right to be timely informed of proposed changes "and to discuss and/or to grieve the effects of same. . . ." Here, the Company gave notice (more on the notice hereinafter) to the Union and offered to bargain regarding the effects of its decision to recruit

less workers. Company General Manager Rodriguez specifically designated Labor Relations Director Lopez Llavona to "notify the Union, explain to them what we [the Company] needed . . . and to go ahead and meet with them to see what the consequences were towards our decision to hire less personnel."

The fact the Company was contractually obligated to recruit or establish certain minimum fixed manning requirements, if it recruited any workers at all, does not somehow require a different result than I reach here. The issue is whether the Company could recruit a lesser number of workers without bargaining with the Union about the decision. I find the Company could do so. It is a separate matter, not at issue here, that if the Company recruits workers at all, it must under certain circumstances, recruit "a water boy," "checkers," a "fixed floater," and a certain number of workers if work is performed at a certain level (third tier) on a vessel. The record does not establish that any classification had a guaranteed 40-hour workweek.

The Company had, it appears, a contractual obligation to bargain with the Union about the effects of its decision to recruit less workers. Even if the parties collective-bargaining agreement did not call for effects bargaining, the Company here would still have such an obligation. As the Board noted in *Allison Corp.,* 330 NLRB 1363, 1365 (2000), that even though a union may waive its right to bargain about a specific action, an employer is still obligated to bargain about the effects of its action. The Board explained:

> While a contract clause may constitute a waiver of a bargaining right, it does not automatically follow that the same contract clause waives a party's right to bargain over the effects of the matter in issue. As the Board has stated:
>
> > An Employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself. *Kiro, Inc*., supra [317 NLRB 1325, 1327 (1995)] (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682).

I find, under the circumstances here, and as explained below, the Company fulfilled its effects bargaining obligations.

Once the Company made its decision to recruit less workers, it had an obligation to give pre-implementation notice to the Union to allow for meaningful effects bargaining. The Company, on February 27, notified the Union, in writing, that effective February 29 it would no longer be recruiting certain regular positions (described elsewhere herein) and offered to meet and negotiate concerning the effects of the decision on February 28 or 29. While the notice given and implementation date selected were extremely short, approximately 3 days, the Union's actions upon notification nullified the Company's effects bargaining obligations notwithstanding the short timeframe between the notice and implementation.

Company General Manager Rodriguez, in a telephone conversation with Local Union President Diaz, and others, on February 28, informed the Union the Company could meet with the Union the next day to discuss recruiting less workers. Rodriguez confirmed the meeting in

an email to Diaz and advised the Union he would be accompanied by Batista and Labor Relations Director Lopez Llavona. Diaz, in a telephone conversation with Rodriguez shortly thereafter, told Rodriguez that if Lopez Llavona would be at the negotiating meeting the next day to forget it, that the Union was not going to meet with Lopez Llavona. According to Rodriguez, Lopez Llavona's potential presence was a deal breaker for the Union. The meeting never took place. Rodriguez' efforts to address weekend work with the Union also included mention of recruiting less workers. Diaz responded in an email that under certain conditions the Union would agree to certain weekend work and added, "Lopez Llavona cannot negotiate with us." In an April email exchange between Company Chief Operating Officer Taylor and Local Union President Diaz, Diaz was again reminded the Company needed Rodriguez and Lopez Llavona involved in any labor relations discussions in San Juan. Diaz responded in an email he "only need to meet with Richard [Rodriguez] alone to comply with previous written agreement." It is clear the Union initially and consistently refused to meet with the Company if Lopez Llavona was one of the Company's designated representatives.

Simply stated, the failure to meet in February was a direct result of the Union's unwillingness to meet with one of the Company's designated representatives. A refusal to meet for bargaining, as was the case here, due to the identity of a representative for the other side has been rejected by the Board as a valid grounds for refusing to meet and bargain. Section 8(b)(1)(B) of the Act even provides it shall be an unfair labor practice for a labor organization to restrain or coerce "an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances." In *Teamster Local 70 (Kockos Bros.)*, 183 NLRB 1330 (1970), the Board found a violation of 8(b)(1)(B) and (3) of the Act where a union refused to bargain with the representative chosen by the employer where the chosen representative had formerly been president of the local union and had thereafter accepted a position with the employer and became its designated representative. As recently stated by the Board in *Wellington Industries*, 357 NLRB No. 135 fn. 1 (2011):

> Longstanding precedent establishes that "[e]mployers and unions have the right 'to choose whomever they wish to represent them in formal labor negotiations.'" *Palm Court Nursing Home*, 341 NLRB 813, 819 (2004) (quoting *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969). Parties must deal with the chosen representatives who appear at the bargaining table except in the rare circumstances when "the presence of a particular representative…makes collective bargaining impossible or futile." *Fitzsimons Mfg. Co*., 251 NLRB 375, 379 (1980). See also *R.E.C. Corp.*, 307 NLRB 330, 333 (1992).

Here, Diaz and the Union refused to meet and bargain with the Company if Labor Relations Director Lopez Llavona was part of the Company's negotiating team. There is no showing on this record that Lopez Llavona's presence would create such ill will that good-faith bargaining would be impossible. See *Neilmed Products*, 358 NLRB No. 8 (2012).

I reject, as factually inaccurate, the Union's apparent contention it did not have to meet with Lopez Llavona based on an agreement with the Company dated August 25, 2010. The August agreement, received in evidence, primarily addresses trustees of a fund and the retaining of certain real estate located on John F. Kennedy Avenue in San Juan, Puerto Rico. The parties agreed that in implementing its August agreement they would have a direct line of

communication between union officials and senior company management. Any communication procedure in the August agreement appears to be limited to that agreement and not to restrict the parties choice of bargaining representatives in the future.

I find the fact the Company gave the Union very little time between notice and implementation of its decision regarding effects bargaining is immaterial. The Union refused to meet, at all, as long as Lopez Llavona was one of the Company's representatives. The Union's refusal effectively constituted negotiations and its refusal also constituted a waiver of its right to effects bargaining. Simply stated, the Union's refusal to meet with Lopez Llavona waived its right to effects bargaining.

For the reasons discussed above, I conclude and find that the allegation the Company violated Section 8(a)(5) and (1) by, since on or about February 29, changing the employment status of four employees from regular or fixed employees to casual and/or temporary employees relegated to be called for work from a "supplemental employee list" without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct, should be dismissed.

CONCLUSIONS OF LAW

1. The Company, Horizon Lines of Puerto Rico, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Longshoreman Association, Local 1575, is a labor organization within the meaning of Section 2(5) of the Act.

3 The evidence does not show that the Company committed the violations alleged in the complaint.

On these findings of the fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

Dated, Washington, D. C. December 14, 2012

William N. Cates
Associate Chief Judge

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.