BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: BAJA CONCRETE USA CORP., ROBERTRO CONTRERAS, NEWWAY FORMING, INC., and ANTONIO MACHADO from a Final Order of the Decision issued by the Director, Seattle Office of Labor Standards	Hearing Examiner File Nos.: LS-21-002 LS-21-003 LS-21-004 **APPELLANT NEWWAY FORMING, INC.'S REPLY BRIEF**

I. INTRODUCTION

The City has the burden of proving that Newway is a joint employer of the Workers, and they have not done so in either the hearing nor its Closing Brief. The City's Closing Brief clearly focuses on Baja being the employer of the Workers, not Newway. This is for good reason - the relationship between Newway and Baja was that of a typical contractor-subcontractor, and the evidence demonstrates that Newway did not employ the Workers.

It is clear is that Newway did not, as the City claims, use Baja as an "intermediary to hire and pay workers or by attempting to shift responsibility to a transient and judgment-proof labor broker." The evidence undoubtedly shows that Newway contracted with Baja simply because it was busy. This is no different from any other contractor-subcontractor relationship, and the City has not proven otherwise. The Workers also knew of the fracture between the companies. In fact, many of them testified that the Newway employees got paid significantly more, including overtime wages. Some Workers even went to work for Newway after they quit

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working for Baja. The Workers knowing that their employer was Baja - not Newway - establishes that Baja was not just a labor broker.

It should also be noted that the City's Closing Brief contains many statements that it claims to be testimony from the hearing. However, these statements lack actual citations to the testimony, and are simply the City's interpretation of what the testimony was. A close review of the evidence and actual testimony proves that Newway was not a joint employer.

II. ARGUMENT

A. Balancing *Becerra* Factors Demonstrates Newway was Not a Joint Employer

As an initial note, the City's brief (and case-in-chief) only focuses on a select few *Becerra* factors which allegedly weigh in favor of Newway being a joint employer. However, even assuming these couple factors lean towards joint employment (which, as addressed in Newway's Closing Brief, do not), the totality of the circumstances taken in light of industry norms demonstrates that Newway did not employ the Workers.

i. No Evidence that Newway Controlled Hiring and Living Arrangements

The City's Closing Brief first focuses on the hiring and living arrangements of the Workers, presenting absolutely no evidence that Newway was involved in either of these activities. As the City admits, all the Workers testified that it was Roberto/Baja who hired them and arranged their living conditions. The Workers also testified that it was Roberto/Baja who transported them to and from work. Even more, the Workers were told that they were going to work for Baja – not Newway. There has been no evidence presented that Newway played any role in the hiring or firing of the Workers or in their living arrangements.

ii. Control of the Schedule is Typical in a Contractor-Subcontractor Relationship.

As discussed in Newway's Closing Brief and as demonstrated by the evidence, Onni set the site schedule, and would relay that on to Newway. Newway, in turn, relayed this

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information onto Baja. This is simply how construction sites work. If Newway did not tell Baja what to do next, Baja would simply not know what to do and the Project would not succeed. Washington case law establishes that the economic realities test is not intended to inhibit normal contracting relationships. See, *Jacobson v. Comcast Corp.,* 740 F. Supp. 2d 683, 689 (D. Md. 2010). That is exactly what the City is trying to do here.

iii. City Presents No Evidence that Newway Exercised Control over Pay and Payroll

Similar to the hiring and living arrangements, the City again focuses on Baja controlling the pay and payroll, as that is what the evidence supports. Not surprisingly, the only "evidence" that the City puts forth regarding Newway exercising control relates Newway's signatures on the timesheets that were prepared by Soto Contreras. This is nothing more than a red herring – the evidence overwhelming demonstrates that the only purpose of the signature on the timesheets was to verify that Baja was invoicing Newway correctly. It was simply backup. This is the same purpose behind the timeclock, that again, only Baja workers (not Newway workers) used. Despite the City arguing that this "shows an unusually close relationship between Baja and Newway", it was actually the opposite. As Ms. Forler-Grant and Mr. Pilling testified, there was evidence of distrust between the two companies, and evidence of Baja overbilling Newway, which is why Newway required that Baja back-up its invoices.

iv. No Evidence that Control was More than Typical Contractor-Subcontractor Relationship

In support of its argument regarding control, the City claims that Baja's General Manager, Roberto Soto, received direction from Newway supervisors. Again, this is typical at a jobsite. It is not only common, but necessary for contractors to inform subcontractors what

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to do. Further, as the testimony demonstrates, Newway received its scope of work, including daily schedules, from Onni. Newway then relayed that information to its subcontractor, Baja.

Even more, any evidence that "Pedro", "Victor", or "Juan Cantos" from Newway directed the Workers is hearsay. The City did not present any evidence or testimony from Pedro, Victor, or Juan Cantos. In fact, the OLS did not even interview these individuals during the course of its investigation. Further, the hearsay does not come from a reliable source (HEX Rule 2.17), as the Workers have a direct financial gain from the OLS assessing this massive fine. Even assuming this testimony is true, it does not mean that Newway is a joint employer. As outlined in Newway's closing brief, some supervisory control is reserved to the general contractors. *See, Bozung v. Condominium Builders, Inc*., 42 Wn. App. 442, 444 (Div. III 1985). This is the same regarding corrective work – surely it cannot be expected that Newway would witness defective work from the company it hired and not take any steps to ensure that work was corrected. This is recognized by the courts. Newway is entitled to verify that the services it is paying for are being performed adequately and to raise dissatisfaction issues without being considered a joint employer. *See Jacobson v. Comcast Corp*., 740 F. Supp. 2d 683, 690 (D. Md. 2010).

Regarding safety meetings, the Workers testified that Baja supervisor Soto Contreras – not Newway - told them to sign in under Newway, but all the Workers were very clear that they did not work for Newway. In fact, when Newway's Kwynne Grant learned that Baja workers were signing in under Newway, she immediately took steps to stop it, including sending numerous emails to Baja/Soto Contreras telling him to stop having Baja's Workers sign in under Newway.[1]

[1] Hearing Examiner Exhibits 44 and 45.

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Finally, regarding the meal and rest breaks, as Adam Pilling testified, the nature of the concrete business naturally requires that breaks be taken at certain times. This does not mean that Newway exercised the requisite control to be considered a joint employer.

Simply put, the City has not put forward any evidence in either its case-in-chief nor its closing brief to demonstrate that the level of control that Newway exercised over the Workers amounts to something greater than what is expected in a typical contractor-subcontractor relationship at a construction site.

B. Lack of Actual Proof Regarding Missed Meal and Rest Breaks

The City has not presented any reliable evidence demonstrating that the Workers were not given proper meal or rest breaks. The City's entire case related to missed meal and rest breaks pertains to a small sample of Workers who just simply said they were not given proper meal and rest breaks. However, the OLS never explained to the Workers what proper meal and rest breaks meant, nor did it define or explain the legal definition to the Workers. The Workers testimony is simply what the Workers believe is a proper meal or rest break – not what the law says. The City has not met its burden to determine that the Workers were not given proper breaks.

C. Joinder in Machado's Closing Brief regarding Damages and Penalties being Unconstitutional Excessive and Evidentiary Rulings

Newway respectfully joins in Machado's closing brief argument relating to the damages and penalties assessed being unconstitutionally excessive. Newway, like Mr. Machado, had no control or power to mitigate the total amount of unpaid wages as it was not involved in Baja's payroll.

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Newway also joins in Machado's closing brief argument related to evidentiary errors. The testimony demonstrates that the OLS investigators are not neutral parties and that the OLS' privilege claim prejudiced Newway's ability to prepare and defend itself at the hearing.

III. CONCLUSION

The OLS investigation and subsequent determination which wrongfully found Newway to be a joint employer has had a devastating impact on Newway. For over 30 years, Newway operated in the US with no complaints and a flourishing business. Newway has taken great pride in always treating its employees well. Even the Baja Workers testified that Newway treated its employees well. The OLS, however, was simply focused on finding as many "employers" as it could to get the biggest pot of money. The OLS never visited the site, never requesting to interview the owners or anyone involved in payroll from Newway and failed to consider how contractor-subcontractor relationships work. Unfortunately, the consequences of the OLS determination based on such limited "evidence" of joint employment has essentially extinguished Newway.

Newway respectfully requests that this Hearing Examiner find that Newway is not a joint employer of the Workers and is therefore not liable for the fine assessed against it.

Dated this Wednesday, November 15, 2023.

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CERTIFICATE OF SERVICE

The undersigned certified under penalty of perjury under the laws of the state of Washington that on this Wednesday, November 15, 2023, I caused true and correct copies of the foregoing document to be delivered to the following parties and in the manner indicated below:

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