

Wilco Manufacturing Company and Union of Needletrades, Industrial and Textile Employees. Case 10-CA-28252

August 23, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On April 12, 1996, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Wilco Manufacturing Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off bargaining unit employees without notifying and affording Union of Needletrades, Industrial and Textile Employees a reasonable opportunity to bargain about the decision and its effects on the unit employees.

(b) 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.

¹ The Respondent relies on *Shane Felter Industries*, 314 NLRB 339 (1994), for its claim that employees Gordon and Newcomb were terminated, rather than laid off as the judge found. In adopting the judge's finding that the Board's decision in *Shane Felter* (where the Board found the employees were terminated rather than laid off, even though the separations had been called layoffs) is distinguishable from the present situation, we stress that the evidence in that case showed that the employees' conduct in walking off the job precipitated the "layoffs" that occurred the following day, that they were the only employees let go that day, and that the record did not show that there was no work available for the "laid off" employees to perform. The Respondent, by contrast, had made seasonal layoffs for many years at about the time of year it laid off discriminatees Gordon and Newcomb, had told the Union that the Respondent was going into its slow season and orders were significantly down, and treated them no differently at the time than five other employees it laid off on the same day.

² We shall modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

(a) On request, bargain with and supply requested information to the Union as the exclusive representative of the employees in the following appropriate unit concerning its decision to lay off unit employees on December 30, 1994:

All full-time and regular part-time production, maintenance, and warehouse employees employed by the Respondent at its facility located at 3760 Southside Industrial Parkway, S.E., Atlanta, Georgia, but excluding all office clerical employees, technical and professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days of this Order, offer Lela Gordon and Robert Newcomb 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 and privileges previously enjoyed.

(c) Make Lela Gordon and Robert Newcomb whole for any loss of earnings and other benefits they suffered as a result of the Respondent's unlawful layoffs in the manner set forth in the remedy section of the decision.

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

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Atlanta, Georgia facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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

³ 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."

and former employees employed by the Respondent at any time since February 21, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director 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.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off bargaining unit employees without notifying and affording Union of Needletrades, Industrial and Textile Employees a reasonable opportunity to bargain about the decision and its effects on the unit employees.

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

WE WILL, on request, bargain with and provide requested information to the Union as the exclusive representative of the employees in the following appropriate unit concerning its decision to lay off unit employees on December 30, 1994:

All full-time and regular part-time production, maintenance, and warehouse employees employed by us at our facility located at 3760 Southside Industrial Parkway, S.E., Atlanta, Georgia, but excluding all office clerical employees, technical and professional employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days of the Board's Order, offer Lela Gordon and Robert Newcomb 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 and privileges previously enjoyed.

WE WILL make Lela Gordon and Robert Newcomb whole for any loss of earnings and other benefits they

suffered as a result of our unlawful layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Lela Gordon and Robert Newcomb, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WILEN MANUFACTURING COMPANY

Frank Rox Jr., Esq., for the General Counsel.
James C. Hoover, Esq., for the Respondent.
Harris Raynor, of Union City, Georgia, for the Charging Party.

DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Atlanta, Georgia, on February 9, 1996. The charge was filed on February 21, 1995. The complaint issued on September 25, 1995.

Respondent, the Union, and the General Counsel were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue on the record. Upon consideration of the entire record and briefs filed by Respondent and the Charging Party, I make the following findings.

Respondent is a Georgia corporation with a place of business in Atlanta, Georgia, where it is engaged in manufacturing cleaning implements. During the past calendar year, a representative period, it purchased and received at its Atlanta, Georgia facility materials and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Georgia. Respondent admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (the Act).

Respondent admitted that the Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

The following described collective-bargaining unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. On April 15, 1994, in a Board-conducted election, the employees in the following unit selected the Union as their collective-bargaining representative. On June 2, 1994, the Board certified the Union as the exclusive collective-bargaining representative for the employees in that unit:

All full-time and regular part-time production, maintenance, and warehouse employees employed by Respondent at its facility located at 3760 Southside Industrial Parkway, S.E., Atlanta, Georgia, but excluding all office clerical employees, technical and professional employees, guards and supervisors as defined in the Act.

Respondent admitted that the Union has been the representative of the employees in the above unit since April 15, 1994.

I. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The only disputed allegation in the complaint is that Respondent laid off unit employees without affording the Union a reasonable opportunity to bargain collectively over the layoff procedure.

The parties stipulated that Respondent laid off employees in December 1994.

The litigation here is involved with only two of the laid-off employees, Robert Newcomb and Lela Gordon. Although other unit employees were alleged as wrongful layoffs, the parties agreed out of Board to a settlement involving those other layoffs.

The Union's assistant southern regional director, Harris Raynor, testified that Respondent and the Union negotiated a collective-bargaining agreement that was signed on February 20, 1995.

The parties met in several negotiation sessions. One session was on December 12, 1994. During that session Respondent's chief negotiator told the Union that Respondent anticipated having a layoff sometime around December 20, 1994. He wanted to discuss the layoff with the Union. He did not know the employees that would be laid off but "ball parked" the number around 15 or 20 employees. Respondent proposed that employees would be selected for layoff in consideration of job attendance and performance.

The Union responded that they needed to know what positions would be involved in the layoff but absent factors associated with particular positions, the Union recommended that there were more than enough probationary employees to cover the number needed for layoff. The Union asked to be provided with information including the number of probationary employees, their job classifications and the job classifications of the planned layoffs.

The Union and Respondent had not agreed to a layoff procedure at the end of the December 12 meeting. They had agreed on a number of other contract items.

Harris Raynor testified on cross-examination that he had heard rumors of some layoffs shortly before the December 12 meeting. Raynor brought up the question of those rumors on December 12.

By letter faxed on December 20, Respondent supplied the Union with a list of all probationary employees. The list of probationary employees was the only information the Union received from Respondent regarding the layoff issue before they met again on December 22, 1994.

During the December 22 negotiation session Respondent advised the Union that the date of the layoff had been moved to January 3. Respondent had not resolved the details as to how many employees would be laid off and which job classifications would be involved. Respondent was interested in discussing the matter with the Union including Respondent's contention that layoffs should not be selected strictly according to seniority.

The Union did not take a position. It pointed out that it was difficult to take a position without knowing which job classifications would be involved in the layoffs. Absent knowing about the affected job classifications the Union stated that all the layoffs should be probationary employees. Respondent told the Union that nothing would happen until the Union received a proposal if the layoffs were to be selected from other than probationary employees.

The Union heard nothing from Respondent before learning from negotiation committee members that some of them had been laid off on December 30, 1994. Seven unit employees were laid off on that date. The Union did not receive a layoff proposal, or a listing of job classifications and employees to be included in the layoff before that time.

Respondent's president, Joseph Wilen, testified that he discussed the December 1994 layoffs with the Union in November 1994. Union Representatives Deborah Lane and Tanya Wallace, union stewards, and employees on the negotiating committee were touring the plant. Wilen told them that Respondent was going into its slow season, that orders were down almost 70 percent and that there would be a layoff in December as normal. Wilen testified that Respondent has had layoffs at that time every year during the 27-year history of the plant.

According to Wilen, employees were selected for layoff on the basis of their department in view of the work on hand for that department and on the basis of their productivity and their absentee records. He testified that Lela Gordon had never met production standards. Robert Newcomb was a truck driver and Respondent, because of a move of facilities, no longer needed a truck.

Five of the seven employees laid off around December 30 were recalled in January 1995. Lela Gordon and Robert Newcomb were not recalled. According to Wilen they were not recalled in accord with Respondent's policy of not recalling employees unless they were productive and needed.

Wilen testified that he called for the December 30 layoff because business was off and he felt negotiations were at impasse. He felt that he had complied with the law in November by advising the Union of the layoff.

II. FINDINGS

A. *Credibility*

The testimony of Harris Raynor and Joseph Wilen was not disputed as to probative testimony. Wilen testified that he met with two union representatives, union stewards, and members of the union negotiation committee in November and told them a layoff would occur in December because it was the slow season. That testimony was not disputed and is credited.

Harris Raynor testified about the December 12 and 22, 1994 negotiation sessions. That testimony was not disputed and is credited.

As shown in the transcript I do not credit hearsay testimony of Joseph Wilen to the extent it tends to show what may have been said by representatives of Respondent to the Union at times when Wilen was not present. Wilen was not present during the December 12 and 22 negotiation sessions and his testimony is not probative of what was actually said to the Union during those sessions. Wilen's testimony as to what he may have told his representatives to tell the Union is not probative to the issues in this proceeding and I do not rely on his testimony in that regard.

B. *Facts and Law*

Employers have a statutory bargaining obligation regarding management decisions such as layoffs. *First National Maintenance*, 452 U.S. 666, 676-677 (1981). Normally layoffs after a union certification are not a management prerogative

and are a mandatory subject of collective bargaining. *NLRB v. Advertising Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987); *Farina Corp.*, 310 NLRB 318 (1993); *Porta-King Building Systems*, 310 NLRB 539 (1993). In a recent Board decision, it was found that the bargaining obligation occurs even though the layoff in question was permanent rather than temporary. *Winchell Co.*, 315 NLRB 526 (1994). Where a company lays off employees for the expressed reason that the Company was experiencing a drastic decline in work orders, whether those layoffs should be effected, whom to include in the layoffs and what if any benefits should be given to laid-off employees are mandatory subjects of collective bargaining. *Dickerson-Chapman, Inc.*, 313 NLRB 907, 942 (1994).

Here Respondent laid off nonprobationary employees at a time when there was no agreement as to the layoff procedure. At that time Respondent and the Union were involved in ongoing initial contract negotiations.

There was no evidence disputing that Respondent notified the Union of impending layoffs. During November Respondent's president told union representatives, during a tour of the plant, that it was entering its slow season, that orders were down almost 70 percent, and there would be a layoff.

Before the parties met in a December 12, 1994 negotiation session, the Union heard rumors that Respondent did lay off a number of its employees. Respondent's representative admitted that some people had been let go a few days before the meeting but he didn't know whether that was from unsatisfactory probation or of a lack of need for those individuals. Respondent's negotiation notes for that session reflect that the Union asked if those people laid off before December 12 were nonprobationary. Respondent did not know whether those earlier layoffs had been limited to probationary employees.

The matter of layoffs before December 12 is not material to these proceedings.

During December 12, 1994 contract negotiations, Respondent advised the Union that it expected to lay off 15 or 20 employees around December 20. It proposed those employees be selected for layoff on the basis of job attendance and performance. The Union asked for information including the number of probationary employees, their job classifications, and the job classifications of the planned layoffs. The Union suggested that the layoffs be selected from among the probationary employees and that the Union would not object to the layoff of probationary employees.

On December 20 the Union received from Respondent a list of all the probationary employees. The Union was not informed of job classifications of the probationary employees or of the job classifications planned for layoff.

During the December 22 negotiation session Respondent told the Union that the layoff had been delayed until January 3. Respondent had not determined the details including how many employees would be laid off and the job classifications involved. Respondent pointed out that it did not believe the employees should be selected for layoff solely on the basis of seniority. The Union stated that it was difficult to take a position until it knew which job classifications would be included in the layoffs and absent that knowledge it felt that all the layoffs should be limited to probationary employees.

The Union received no additional information before Respondent laid off seven nonprobationary unit employees on

December 30, 1994. At that time the Union had not received any additional information from Respondent in response to its requests.

The testimony of Joseph Wilen failed to show that he sought advice of counsel before calling the December 30 layoff. Instead he determined on his own that negotiations were at impasse and that he had complied with the law by advising the Union of the upcoming layoffs.

The above shows that although the Respondent engaged in apparent good-faith bargaining through December 22, 1994, it made a decision to lay off unit employees on December 30 without providing the Union with requested information. The fact that the Union knew of an impending layoff did not provide the Union with enough information to permit negotiations in view of Respondent's failure to respond to the Union's specific requests for information. The requested information was relevant to the issues involved in the layoffs. The Union was not advised before the layoffs as to the job classifications involved in the layoffs and it was not advised of which employees were selected or specifically why Respondent selected those particular employees. Under those circumstances it is apparent that the Union was prevented from engaging in bargaining over a mandatory subject. *Dickerson-Chapman, Inc.*, supra.

Joseph Wilen contended that the December 30 layoffs were consistent with its past practice of laying off employees each year during slow time. Here, after 1993 the Union was certified as the unit employees' collective-bargaining representative. The Board has established that even where there is a history of layoffs, "because of the intervention of the bargaining representative, the Respondent could no longer continue unilaterally to exercise its discretion with respect to layoffs." *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989). See also *Daily News of Los Angeles v. NLRB*, 73 F.3d 406 (D.C. Cir. 1996), for discussion of the issue of negotiations and established practices.

The record shows that the parties were never at impasse over the layoff issue. It is clear from Raynor's credited testimony of the December 12 and 22, 1994 negotiations that the parties were never deadlocked over that issue. After requesting information, Raynor told Respondent that he was willing to immediately start negotiations regarding the layoffs. Afterward, as shown above, the Union did not receive all the information it requested and that information was relevant and necessary to consideration of the layoff issue. The Board has consistently refused to require a party to accept a proposal before being given a chance to review requested information that is relevant and necessary to the issue under negotiation. *Circuit-Wise, Inc.*, 309 NLRB 905, 919 (1992).

Respondent raised several arguments in its brief. It argued that the two employees involved herein, Newcomb and Gordon, were not involved in the December 30 layoff. Instead it contended that Newcomb and Gordon were discharged on December 30 and even though their termination papers showed they were laid off, that was done in order to permit them to draw unemployment insurance. Respondent also argued that the Union was aware that Newcomb and Gordon were never intended to be included in negotiations over the December 30 layoff. Respondent argued that it was necessary to layoff employees on December 30 because the Union was not diligent in negotiating on that issue. Finally, Respondent argued that even if the layoff was a technical violation of

Section 8(a)(5), the parties resolved that violation by a subsequent settlement agreement.

As to Respondent's contention in its brief that Newcomb and Gordon were discharged rather than being laid off and its contention that the Union was aware that Newcomb and Gordon were never intended to be included in negotiations over the December 30 layoff: Respondent contended in its brief that Newcomb and Gordon—unlike the five other employees that were laid off on December 30—were actually discharged. As to discharged employees Respondent contended that it is not required to bargain with the Union before terminating those employees.

Although Respondent contends that employees Gordon and Newcomb were actually terminated rather than being laid off, it conceded in its brief that their separation papers show they were laid off for lack of work. Respondent argued their termination showed lay off for lack of work in order to permit the employees to collect unemployment compensation since neither Gordon nor Newcomb had been terminated because of disciplinary problems.

The record shows that Respondent and the Union agreed to a settlement in Cases 10-CA-27703 and 10-CA-27997 on February 20, 1995. In that settlement some employees were reinstated with backpay, some employees were not reinstated but received backpay, and some employees were shown as simply receiving backpay with no indication of whether reinstatement was involved. The settlement agreement concluded with the following statement:

The Union reserves the right to pursue charges concerning the layoff of Lelia Gordon and Robert Newcomb, who are not specifically named in the Complaint, as amended, herein.

There was no showing that Lelia Gordon or Robert Newcomb was alleged as a discriminatee in any of the cases prior to the instant proceeding. Nor is there a contention that the settlement in those prior cases bars the instant proceeding.

On the very next day after the parties signed the above settlement, February 21, 1995, the Union filed the instant charge.

As to Respondent's action on December 30 regarding the layoff of some employees and what it contends was the discharge of Gordon and Newcomb, the evidence shows that no distinction was drawn between Gordon, Newcomb, and the other employees.

Indeed Respondent President Wilen testified that employees are regularly selected for layoff on the basis of their productivity and work attendance and as to reinstatement rights:

They virtually have very little rights, other than if we call them back and need them back for a production job, we bring them back if we need them and on a production and attendance—the same way we laid them off, we bring them back in reverse. The best producer of those people we laid off and the least attendance problems that we had and they get called back.

Q. Now, in past years, would everybody be recalled or would some be terminated?

A. Oh, many of them would be terminated because they never made production or they had such poor attendance that you couldn't call them back.

Subsequently when questioned by the Union, Wilen testified that layoff

is a termination basically, as far as we're concerned, we don't need the employees because, obviously, of an economic condition that's generally what we mean.

Q. So when you speak of a layoff, you think that—you say that is equivalent to a termination?

A. That's the way we feel about it.

According to Wilen's testimony Lelia Gordon was selected for layoff because of poor production and Robert Newcomb was selected because his job, a truckdriver, was no longer required. That testimony shows that Gordon and Newcomb were selected for layoff in the same or similar manner that Wilen used in selecting others for layoff.

Wilen's testimony is in line with the testimony of Harris Raynor to the effect that Respondent expressed during negotiations, the desire to select employees for the December 30 layoff on the basis of productivity and attendance.

Joseph Wilen testified over the General Counsel's objection, that Respondent and the Union engaged in contract and settlement discussions in January 1995. During those discussions, according to Wilen, the Union offered to settle as to Gordon and Newcomb without reinstatement provided backpay was agreeable. However, settlement was not reached as to those two. Wilen testified that after their negotiations with the Union, the Union came back and said they had made a mistake and that Newcomb did wish to return to work. Respondent took the position that the Union had already agreed that Newcomb was not entitled to reinstatement.

In view of the above and the full record, I find that Gordon and Newcomb were laid off on December 30. The record showed Respondent treated them in the same manner it treated other layoffs. There was no evidence that any precipitating event occurred which caused their layoff other than the business decline which caused all the December 30 layoffs. This situation must be distinguished from the discharge of two alleged discriminatees in *Shane Felter Industries*, 314 NLRB 339, 345, 346 (1994), cited by Respondent. There the administrative law judge in finding that a violation did not occur held "that the evidence does not establish that the termination of Sellong and Workman were economically motivated layoffs rather than disciplinary actions." The judge found that the credited evidence proved that Sellong and Workman had walked off the job in violation of the orders of their supervisor and were discharged for cause. Here, as shown above, Respondent conceded that Gordon and Newcomb were not laid off for disciplinary reasons. I find that the credited evidence shows that Newcomb and Gordon were laid off along with other employees on December 30, 1994, and Respondent had a duty to negotiate with the Union regarding their layoffs.

As to the January negotiations toward contract or settlement, the record proved only that charges, including Case 10-CA-28153, were settled between the Union and Respondent, non-Board on February 20, 1995. The charge in Case 10-CA-28153 alleged violations of Section 8(a)(1), (3), and (5) and included at paragraph 2:

On or about December 30, 1994, the above named employer changed the terms and conditions of employ-

ment by laying employees off without fulfilling its obligation to notify and bargain with the (Union).

The out-of-Board settlement between the parties listed several employees as being entitled to reinstatement, backpay, or both. However, the non-Board settlement agreement included nothing regarding the alleged failure to bargain regarding the December layoffs. The settlement agreement included the following paragraph:

The parties agree that this Agreement resolves the allegations in Charge Nos. 10-CA-27703, 10-CA-27997, and 10-CA-28153, and that the Union will withdraw these charges. The Union reserves the right to pursue charges concerning the layoff of Lelia Gordon and Robert Newcomb, who are not specifically named in the Complaint, as amended, herein.

The settlement agreement was signed by the Union and by Respondent but not by the Regional Director. The settlement was approved by an administrative law judge.

As to Respondent's contention regarding the January negotiations toward settlement or contract, there was no evidence illustrating anything more than an offer to settle the questioned layoff or termination of Gordon and Newcomb on a backpay without reinstatement basis. Such evidence is not probative of whether Respondent engaged in unlawful conduct in laying off Gordon and Newcomb. At the most it may be argued that that evidence reflects that the Union may have doubted whether Gordon and Newcomb were entitled to reinstatement or the Union may have felt that Gordon and Newcomb did not desire reinstatement. Even if the Union did harbor doubts as to entitlement to reinstatement, that should have no bearing on my determination of whether Respondent engaged in unlawful conduct. Moreover, the settlement agreement in the prior cases clearly shows that the Union retained the right to pursue charges concerning the alleged layoffs of Gordon and Newcomb.

Respondent also argued that the settlement agreement disposed of alleged 8(a)(5) violations and the Union's conduct during negotiations toward that agreement show that the Union never intended to allege that Newcomb and Gordon's terminations support an 8(a)(5) violation. However, the record contains nothing showing that the Union intended to waive its right to pursue any type of charge regarding the layoffs of Gordon and Newcomb. *Kiro, Inc.*, 317 NLRB 1325, 1328 (1995); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991). In fact the settlement agreement, by showing that the Union reserved the right to pursue charges regarding the layoffs of Gordon and Newcomb, shows that the Union did not waive its right to allege an 8(a)(5) violation as to their layoffs. The prior settlement agreement was a non-Board agreement between the parties and was not approved by the Regional Director. *Auto Bus, Inc.*, 293 NLRB 855 (1989); cf. *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993), where the parties failed to specifically reserve the then alleged unfair labor practices from a prior settlement.

As to Respondent's argument that the Union was not diligent in negotiating the December 30 layoff issue the record shows otherwise. When the parties met on December 12 and Respondent told the Union they anticipated a need for layoffs around December 20, the Union asked for a list of the probationary employees and argued that the layoff could be limited

to probationary employees. Respondent did not supply that list to the Union until December 20 and the parties next met on December 22. At that meeting Respondent did not present a layoff plan. According to the undisputed and credited testimony of Harris Raynor, Respondent said that it would take no further action on the layoffs until it presented a plan to the Union. Respondent never presented a layoff plan and it did not respond to the Union's December 22 request for information. Respondent conceded in its brief that it was unable to reach its negotiation representative during the week after December 22 and Harris Raynor did tell Respondent during the December 22 negotiation session that he would not be available the next week. The unavailability of Harris Raynor during one week did not materially affect Respondent's actions in view of the unavailability of Respondent's representative during the same period and in view of Respondent's failure to supply the Union with requested relevant information at any time.

I find that the record evidence failed to show that the Union was not diligent in negotiations over the December 30 layoffs. The record evidence illustrated that the Union did not engage in tactics designed to delay bargaining. *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995).

Respondent stated during the hearing that it was not contending that it was compelled by a calamity to take immediate action in laying off employees on December 30, 1994 (see *RBE Electronics of S.D., Inc.*, supra; *Bottom Line Enterprises*, 302 NLRB 373 (1991)), and the record evidence did not show that "economic exigencies" existed on or before December 30, 1994. As shown above, I credit Harris Raynor's testimony that he informed Respondent of his willingness to negotiate immediately upon receipt of the information requested by the Union. Moreover the record shows that the layoff on December 30 was reasonably foreseeable. Joseph Wilen admitted that he knew and told the Union of the anticipated layoff during November. See *RBE Electronics of S.D., Inc.*, supra.

I find that the record illustrated that the Union was diligent in meeting its bargaining responsibility and Respondent, by its action in not supplying the Union with requested and relevant information, failed to provide the Union with the opportunity to negotiate before December 30. See *Kiro, Inc.*, 317 NLRB 1325, 1328 (1995).

Finally, Respondent argued that the parties resolved any potential violation by a subsequent settlement agreement. However, as found above, the credited record failed to support Respondent. Instead the record proved that Respondent engaged in a clear violation of Section 8(a)(1) and (5) and the parties had not resolved the alleged violation as to the layoffs of Gordon and Newcomb by settlement agreement. In fact the settlement agreement included a specific provision whereby the Union reserved the right to pursue charges concerning the layoffs of Gordon and Newcomb. *Auto Bus, Inc.*, supra; cf. *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993), where the parties had not specifically reserved the alleged unfair labor practices charges from a prior settlement. Nor may it be determined the the Union waived its right to pursue charges involving Gordon and Newcomb. *Kiro, Inc.*, supra at 1327, 1328; *Intermountain Rural Electric Assn.*, supra. Moreover, I find that Respondent did not remedy the alleged violations herein by its subsequent negotiations with the Union. As to Gordon and Newcomb there has been no

remedy. Neither have been reinstated nor compensated for lost earnings.

In view of the entire record, I find that Respondent laid off employees Lelia Gordon and Robert Newcomb on December 30, 1994, without affording the Union a reasonable opportunity to bargain collectively over the layoff procedure.

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 and has been at all material times the certified collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

All full-time and regular part-time production, maintenance, and warehouse employees employed by Respondent at its facility located at 3760 Southside Industrial Parkway, S.E., Atlanta, Georgia, but excluding all office clerical employees, technical and professional employees, guards and supervisors as defined in the Act.

3. By laying off bargaining unit employees on or around December 30, 1994, without affording the Union an opportunity to bargain over the layoff decisions, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully laid off bargaining unit employees on or about December 30, 1994, without affording the Union an opportunity to bargain over the layoff decision, it is ordered to bargain with the Union concerning the layoff decision, furnish information requested by the Union and to offer employees Lela Gordon and Robert Newcomb reinstatement and make them whole for loss of earnings and other benefits resulting from the unilateral layoffs. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988); *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146, 147 fn. 3 (1992); *Synergy Gas Corp.*, 309 NLRB 179 (1992). The make-whole Order shall include interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent's backpay liability shall run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]