

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

5

LAWRENCE LIVERMORE NATIONAL
SECURITY, LLC

10

and

Case No. 32-CA-23902

15 SOCIETY OF PROFESSIONALS,
SCIENTISTS, AND ENGINEERS
LOCAL 11 - UNIVERSITY PROFESSIONAL
AND TECHNICAL EMPLOYEES (UPTE),
COMMUNICATIONS WORKERS OF AMERICA (CWA)
20 LOCAL 9119, AFL-CIO

*Jeffrey L. Henze, Esq., Oakland, CA,
for the General Counsel*

25 *Douglas Barton, Esq., of Hanson Bridgett, LLP,
San Francisco, CA, for the Respondent*
*Kate Hallward, Esq., of Leonard Carder, LLP,
Oakland, CA, for the Union*

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DECISION

Statement of the Case

35 **Gerald A. Wacknov, Administrative Law Judge:** Pursuant to notice a hearing
in this matter was held before me in Oakland, California on July 27 and 28, 2009. The
captioned charge was filed on May 21, 2008 by Society of Professionals, Scientists, and
Engineers Local 11 - University Professional and Technical Employees (UPTE),
40 Communications Workers of America (CWA) Local 9119, AFL-CIO (Union). On
March 31, 2009, the Regional Director for Region 32 of the National Labor Relations
Board (Board) issued a complaint and notice of hearing alleging violations by Lawrence
Livermore National Security, LLC, (Respondent) of Section 8(a)(1) and (5) of the
National Labor Relations Act, as amended (Act). The Respondent, in its answer to the
45 complaint, duly filed, denies that it has have violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and
cross-examine witnesses, and to introduce relevant evidence. Since the close of the
hearing, briefs have been received from Counsel for the General Counsel (General

Counsel), Counsel for the Union, and counsel for the Respondent. Upon the entire record,¹ and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

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Findings of Fact

I. Jurisdiction

10 The Respondent, a Delaware limited liability corporation with an office and place of business in Livermore, California, has been engaged in the operation of a scientific laboratory for the United States Department of Energy. In the course and conduct of its business operations the Respondent annually receives gross revenues in excess of \$50,000 from the United States Department of Energy. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce 15 within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organizations Involved

20 It is admitted, and I find, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. Alleged Unfair Labor Practices

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A. Issues

The principal issue in this proceeding is whether the Respondent laid off bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act.

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B. Facts

35 On October 1, 2007, the Respondent became the Federal Government's contractor to operate the Lawrence Livermore Laboratory, and the Laboratory's approximately 7000 public sector employees who had formerly been employed by The Regents of the University of California, thereby became employees of the Respondent.

40 In about September, 2007, prior to the Respondent becoming the Laboratory's successor employer, the Laboratory advised its employees that in 2008 the Laboratory could anticipate a 20 percent decrease in its 2008 budget and a concomitant serious impact upon its workforce largely due to a reduction in funding by the Department of Energy, together with increased costs due to the change from the publicly-run entity to private management by the Respondent. Between October 1, 2007 and May 26, 2008,² 45 the Respondent proceeded with a three-phase reduction in force totaling some 1100 employees. The three phases were, first, the involuntary layoff of supplemental or flex term employees, second, the voluntary separation of employees who opted to leave the Respondent's employ, and third, the involuntary layoff of additional employees so that, in total, the goal of reducing the total employee complement by some 1100 employees would be realized. This reduction in force plan was authorized by the Department of

¹ The Respondent's unopposed motion to correct the transcript is hereby granted.

² All dates or time periods hereinafter are within 2008 unless otherwise specified.

Energy upon the application of the Respondent. Michael C. Kane, Associate Administrator for Management and Administration, a representative of the Department of Energy, notes in his recommendation for approval to the Administrator of the Department of Energy, under the heading of "URGENCY," that "Reductions are required as quickly as possible to minimize budget impacts."

On September 26, 2007, pursuant to a card-check procedure, the Union was certified by the Californian Public Relations Board as the collective bargaining representative of some 140 skilled crafts Laboratory employees, including air conditioning mechanics, boiler and pressure systems workers, carpenters, electricians heavy equipment mechanics, locksmiths, maintenance mechanics, painters, plumbers/fitters, riggers, sheet metal workers, trades helpers and welders.

As noted above, the Respondent became the successor employer some six days later. Thereupon, the Union requested that the Respondent recognize the Union. The Respondent declined, noting that the Union had been certified on the basis of a card check and without a hearing to resolve a dispute regarding the appropriateness of the unit. The Union filed unfair labor practice charges with the Board regarding this matter. Then, in January, during the implementation of phase 1 of the reduction in force, the Respondent laid off 19 bargaining unit employees without bargaining with the Union. As a result, the Union filed additional charges with the Board. On February 28, the parties entered into a private settlement agreement, not under the auspices of the Board, resolving their differences. The Respondent agreed to recognize and bargain with the Union for an initial contract and, in addition, to bargain over the effects of the aforementioned layoffs.

The first negotiating session was held on March 4. At that initial meeting the Union's Statewide Representative, Jelger Kalmijn, spoke for the Union, and the Respondent's chief negotiator, Staff Relations Manager Robert Perko, spoke for the Respondent. The parties' respective negotiating teams were present, as was James Wolford, who became the chief negotiator for the Union at all subsequent meetings. The Union presented the Respondent with a letter to Perko, signed by Wolford, headed "RE: Information request #1 in preparation for bargaining." The letter begins as follows:

In preparation for negotiating both the effects of layoffs that have already occurred and for a full contract for the skill (sic) trades bargaining unit and Lawrence Livermore National Security we request the following information.

The letter then goes on to list some 16 items, including "All plans and projections for additional layoffs."

Kalmijn stated at this first meeting that the Union wished to proceed with bargaining over the effects of the January layoffs, and to defer bargaining over the initial contract until "after the effects bargaining was completed." The Respondent agreed to this approach, and this established the ground rules for the ensuing negotiations

Asked why the bargaining "started with the question of effects rather than jumping right into first contract negotiations," Wolford testified:

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[T]here were a number of reasons...if we were going to have any kind of bargaining position at all, when it came to the contract, we needed to show early progress and... to focus on that layoff...

5 Another reason is basically on the job training. I had no experience, none of my team had any experience...we wanted the experience under our belts of a simple agreement, like the effects agreement on the layoff, accomplished before we tried to move on, and it's a means we had of learning how it worked, the basic mechanics of bargaining...how you meet, how you propose, how you get information requests, how you get information back and so forth.

15 There were various bargaining sessions thereafter. There was no bargaining for an initial contract until after July 10, on which date the parties signed off on an agreement resolving the effects bargaining over the January layoffs.³

20 While the parties were engaging in effects bargaining, the Respondent was continuing with the aforementioned phased overall reduction in force. The reduction in force process had reached stage 3, necessitating the involuntary layoff of up to 535 additional employees in order to meet the Laboratory's goal.

25 On several occasions, the Union, anticipating that there would be additional layoffs of bargaining unit members, requested the Respondent to specify the names and other pertinent information of all bargaining unit employees "selected to be laid off in the future." To such requests Perko responded that the rather complex process was ongoing and there was nothing specific to report to the Union.

Then, on April 24, Perko wrote to Wolford as follows:

30 As you know, the Laboratory Director recently announced and explained the need to proceed with an involuntary separation program that will have the effect of reducing up to 535 career indefinite positions at the Laboratory. This significant reduction in staff results from several factors, including the reduced federal budget and higher operating costs. While

35 the Laboratory has been able to streamline some of its operating costs, the Laboratory management has nonetheless concluded it must reduce staff to meet its cost reduction goal and hold the Laboratory's cost of doing business in fiscal year 2009 to the same level as in fiscal year 2007.

40 We presently anticipate that these necessary staff reductions will result in the elimination of 10 to 15 positions in the Skilled Crafts Unit that your Union represents.

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The Laboratory anticipates that the 10 to 15 layoffs within the Skilled Crafts Unit will be strictly in accordance with the inverse order of seniority.

³ The initial contract was agreed upon in February 2009, and was ratified by the bargaining unit in March 2009.

* * *

5 Applicable policies also provide for the affected employee to receive at least thirty (30) calendar days' notice of layoff or pay in lieu thereof. We anticipate that layoff notices will be issued during the week of May 19, 2008. Laboratory policies also provide for preferential transfer and recall as outlined in the enclosed policy.

10 The Laboratory regrets the need to take these actions within the Skilled Crafts Unit and elsewhere within the Laboratory. We trust, however, that you understand why the Laboratory must nonetheless proceed with this significant reduction in force. Please feel free to contact me if you have any questions or seek additional information. We will meet with you in the event you wish to discuss any aspect of this anticipated staff reduction as it affects the Skilled Crafts Unit and will consider any suggestions or concerns you wish to express or propose concerning the anticipated reduction in force or the impact it may have upon the members of the bargaining unit you represent. Please feel free to contact me to discuss these matters or to schedule a meeting for that purpose.

25 During the course of bargaining over the effects of the January layoff, Wolford argued on behalf of the Union that having fewer skilled trades employees on hand created an unsafe environment for the unit employees as well as the "general Laboratory population," and had increased the likelihood of individual exposure to hazards. In a May 1, letter to Perko, Wolford reiterated this argument, stating that the announced additional layoffs in the Skilled Crafts Unit would only exacerbate the situation, and further stated, "we strongly urge [the Respondent] to cancel [additional layoffs] and agree to bargain the health and safety effects of the layoff that has already taken place."

30 Further, in a May 6 petition to Dr. George Miller, Director of the Laboratory, signed by some 73 bargaining unit members, the unit employees again reiterated this position, stating, *inter alia*:

35 We come to you because you have stated in the past that you care deeply about the safety of employees on the job. As we have done in writing to your Chief Negotiator, Robert Perko, we urge the Lab to cancel the layoff planned for May within the bargaining unit, and instruct your bargaining team to respond in good faith to our proposals for improving health and safety as it was affected by the January 2008 layoff.

45 By letter dated May 7, Perko reviewed the discussions that had taken place during bargaining negotiations, and reiterated the Respondent's reasons for concluding that the January layoffs of bargaining unit employees did not adversely affect the health and safety of the remaining employees "because the Respondent believes it has appropriate staffing protocols in place at the present time and will continue to have appropriate staffing after the anticipated layoffs are implemented." Further, Perko stated that the Respondent respected the Union's right to bargain about the effects of the January 2008 layoffs as well as the anticipated layoff of additional bargaining unit employees as described in his April 24 letter, and Perko reiterated what he had

previously told the Union during bargaining negotiations, namely, that the Union's proposals regarding health and safety matters "could be advance and considered anew when we bargain for a new contract."

5 By letter of May 12, headed "Request for Information," Wolford states that "To continue bargaining meaningfully" the Union requires for the next bargaining session... "A comprehensive list of Skilled Trades bargaining unit members selected to be laid off in the future, including their name, job title, current assignment, final rate of pay, date of hire, date of separation, and home address and telephone number."

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By letter of May 13, Perko replied that the Laboratory was currently in the process of identifying crafts to be reduced and the effected employees, that the process has not yet been completed, and that "As soon as the final review is complete, I will provide the requested information to you." A similar request by Wolford and reply from Perko was made at the March 18 bargaining session.

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As noted, throughout the course of bargaining the Union anticipated that there would be an additional layoff of bargaining unit members, and Wolford repeatedly requested the names of unit members slated for layoff. Perko replied that he had no specific information in response to such requests, as matters regarding additional layoffs had not been finalized. Wolford testified that he made such repeated requests because:

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We needed this to develop our bargaining position. I mean...our bargaining to that point...was specifically focused on health and safety. Our plan for moving forward was basically to argue on an individual basis that whoever we eventually learned would be laid off, the specific individuals, you know, if there were circumstances out of their training or their experience that would have qualified them for other jobs...either within the bargaining unit or outside it, or if...there were life circumstances in their case that would have allowed them to accept reduced hours, we wanted the wherewithal to argue that, and that's what this request was about every time we made it.

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Finally, at the May 14 bargaining session, Perko told Wolford that he would probably be able to furnish him the names of the selected employees on May 19.

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On May 19, Perko handed Wolford a letter stating, "Pursuant to your request for information dated May 12, 2008, attached is a list of bargaining unit employees proposed for layoff." Attached to the letter was a list of 9 unit employees along with their job titles, addresses and phone numbers.⁴ Perko advised Wolford that the employees were receiving notice that day "because he had concerns about safety and security that they were also being escorted off the site that day." According to Wolford's testimony, the employees were being escorted off the premises that morning at about the same time he received the list.

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⁴ I credit Perko's testimony, which is consistent with his Board affidavit, that he received the list of employees on May 16, a Friday, and "On [Monday] May 19 I checked to determine if that list was final and after learning that, it was provided to Wolford that same day."

By letter to Perko dated May 19, Wolford protested the layoff “without the opportunity to bargain the layoff decision or its implementation.” The letter, *inter allia*, goes on as follows:

5 As a final attempt at resolving this through the bargaining process, we ask
 that you restore *status quo* by returning the separated workers to their
 positions pending a meaningful opportunity to bargain constructive
 alternatives to a layoff, such as reduced hours and job sharing. Such
 bargaining would benefit from the availability of a financial officer who can
 10 explain the budget considerations that led to your deciding to proceed
 with this layoff.

Perko replied by a lengthy letter dated May 22, headed “Re: Layoffs in the Skilled
 Crafts Unit and Our Recent Discussions and Communications about Them.” Perko
 15 states that, as he so advised Wolford on May 19, the layoff notices would issue on
 May 22, but for safety and security reasons, each laid off employee would be placed on
 paid leave from the 19th through the 22nd of May and such leave would then continue for
 the duration of the layoff notice period. He further reminds Wolford of his earlier April 24
 20 letter in which Perko was advised that layoff notices within the Skilled Crafts Union were
 expected to issue during the week of May 19.

The letter goes on as follows:

25 You also complain that we didn’t provide you with the names of those to
 be laid off until May 19 even though you had requested the names on
 May 12. Yet, we did not yet have a final list until shortly before providing
 it to you. Given that we had previously assured you that those laid off
 would be according to inverse order of seniority within job classifications,
 30 the only uncertainty concerned the number to be laid off and the
 classifications to be affected. That required careful planning with the
 ultimate result that the number to be laid off was less than the low end of
 the previously estimated range.

* * *

35 You ask that we return those laid off to their positions pending a
 “meaningful opportunity to bargain constructive alternatives to a layoff
 such as reduced hours and job sharing.” I have repeated advised you of
 our willingness to bargain both about the decision to lay off bargaining
 40 unit members and the effects of that decision. You did present some
 proposals concerning the effects of layoffs and we did bargain about
 them. You have not previously proposed “alternatives to layoffs, such as
 reduced hours and job sharing.” We’ll certainly meet with you to bargain
 about these topics if you wish. But your reference to them for the first
 45 time now again seems entirely tactical and not consistent with the Union’s
 duty of good faith. We’re not willing, based on such a flimsy premise, to
 bring back to work those employees who are now on paid leave pending
 formal notice of layoff, in disregard of the safety and security concerns
 that such actions would raise, as you have acknowledged.

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C. Analysis and Conclusions

5 The complaint alleges that “since March 4, 2008, Respondent and the Union have been engaged in negotiations for an initial collective bargaining agreement,” that a layoff took place on May 19, and that Respondent engaged in the layoff “without first bargaining with the Union to an overall good faith impasse” over the initial collective bargaining agreement.

10 It is crystal clear from the foregoing facts that the parties did not begin negotiations for an initial collective bargaining agreement until after July 10, the date negotiations for effects bargaining over the January layoff had been completed and an agreement had been reached. It was at the request of the Union, for the reasons noted above, that the Union and the Respondent, at the outset of bargaining, unequivocally agreed to bifurcate the bargaining process by first negotiating an agreement on the effects bargaining over the January layoffs before commencing negotiations on an initial collective bargaining agreement.

20 The General Counsel and the Union maintain that despite this basic ground rule established by the parties, the Respondent should have known that the Union’s information requests, seeking information that went beyond information necessary for effects bargaining, was pertinent to an overall initial collective bargaining agreement; therefore, it is argued, the Union’s agreement to bifurcate negotiations was not “unequivocal.” I do not agree. Clearly the Respondent reasonably understood under the circumstances that the information requests were preliminary to bargaining a contract, and that such bargaining would not commence until some indefinite date in the future.

30 The General Counsel and Union further assert that because the parties discussed health and safety matters during the effects bargaining phase of negotiations, and because health and safety concerns were also relevant to the additional layoffs announced by the Respondent (*infra*) as well as to the initial contract bargaining phase of negotiations, the Respondent should have known that matters pertaining to an initial contract were in fact being negotiated from the outset; therefore, it is argued, negotiations were not bifurcated. I do not agree. Clearly, at the outset of bargaining, the Respondent reasonably understood that it was negotiating one agreement at a time even though health and safety matters happened to be pertinent to both sets of negotiations; and the fact that the Union also voiced health and safety concerns during negotiations over the recently announced layoffs did not thereby alter the parties’ May 4 understanding that contract negotiations were to begin only after effects bargaining had ended.

40 Under the circumstances above, the Respondent was not obligated to bargain to an overall good faith impasse over the initial collective bargaining agreement before laying off the unit employees. Accordingly, as no initial agreement was being bargained at the time of the layoffs, *Bottom Line Enterprises*, 302 NLRB 373(1991) and *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1985), upon which cases the theory of the complaint relies, are inapposite. I shall therefore dismiss the foregoing complaint allegations.

50 During the course of the hearing the General Counsel moved to amend the complaint to include an alternative allegation, namely, “that Respondent engaged in the layoff without affording the Union an adequate opportunity to bargain...with respect to

the layoff and the effects of the layoff.” I denied the General Counsel’s motion to amend the complaint, but, over the Respondent’s objection, advised the parties that since the proposed amendment seemed to encompass all the evidence the parties had presented or intended to present vis-à-vis the original complaint allegations, that “this issue, having
 5 been litigated, as far as I am concerned, it’s the same as the complaint having been amended.”⁵

10 The gravamen of the General Counsel’s alternative theory appears to be that the Respondent did not timely furnish the Union with the names of the employees who were selected for layoff, and thereby precluded the Union from engaging in meaningful bargaining over the layoff.

15 As noted above, Perko’s April 24 letter advised the Union that layoff notices would be issued during the week of May 19, and that applicable policies provided for pay in lieu of thirty days notice. Perko furnished the names of the selected employees to Wolford on the morning of May 19, at about the time the named employees were being escorted off the premises. The Union, in various information requests, had previously asked for the names of the employees who were to be laid off, and Perko, who was not
 20 involved in the selection process, replied that he did not have this information. Wolford did not advise Perko why the Union could not make further proposals without this information. Further, neither the General Counsel nor the Union have demonstrated that the Union needed the names of the laid off employees in order to make additional bargaining proposals. The Union’s May 19 letter, following the layoff, suggests that it wanted “a meaningful opportunity to bargain constructive alternatives to a layoff, such as
 25 reduced hours and job sharing.” However, these “constructive alternatives” do not appear to be dependent upon the identity of the employees who were to be laid off, as the Union could have proposed the concepts of reduced hours and job sharing without knowing which employees would be affected. Wolford also testified that he needed the names of the laid off employees in order to ascertain whether specific laid off employees
 30 would be willing to job share with other specific willing employees who had not been laid off. Again, this was something that Wolford could have articulated but did not articulate to the Respondent during the negotiations prior to the layoffs.⁶

⁵ The Respondent’s counsel, in support of his objection, stated that the Region had initially issued a complaint with only the General Counsel’s alternative theory alleged as a violation, but then withdrew and never reissued that complaint. The General Counsel represented that the Region withdrew the initial complaint so the matter could be sent to the Division of Advice, and thereafter issued the instant complaint with a different theory. Thus, the Region apparently decided not to include in the complaint the alternative theory that the General Counsel now wants to litigate. Having reconsidered my ruling, I now believe it would be improper to permit the General Counsel to, in effect, amend the complaint under the foregoing circumstances. Nevertheless, my analysis of the merits of the proposed amendment is contained herein.

⁶ The Union pursued none of these matters following the layoff despite Perko’s invitation to do so. Thus, in his May 22 letter, Perko advised Wolford, “ You have not previously proposed ‘alternatives to layoffs, such as reduced hours and job sharing.’ We’ll certainly meet with you to bargain about these topics if you wish. But your reference to them for the first time now again seems entirely tactical and not consistent with the Union’s duty of good faith.” Although the laid off employees were not physically at work, having been escorted off the site for safety and security reasons, they were on paid leave status for over thirty days thereafter. Moreover they remained on a preferential hiring list. Further,

Thus, as far as the Respondent was aware, at the time of the layoffs the Union had nothing further to propose or discuss that had not been proposed and discussed. I find no merit the General Counsel's alternative theory.

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Accordingly, for the foregoing reasons, I shall dismiss the complaint in its entirety.

Conclusions of Law

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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.

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3. The Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended:

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ORDER⁷

The complaint is dismissed in its entirety.

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Dated: Washington, D.C. November 9, 2009

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Gerald A. Wacknov
Administrative Law Judge

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there is no showing that the Respondent had failed to timely respond to all the Union's information requests, or that it had not engaged in good faith negotiations with the Union regarding all matters the Union wanted to discuss. Under these circumstances, I question Woford's testimony that, in his estimation, further meaningful discussions could not occur until after the laid off employees were back at work.

⁷ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

