

2	Whether the news media were notified of the event by the Union is immaterial. Employee expectations are not the criteria upon which a violation of the Act is predicated.	P. 3:5-6
3	The determination of the Union not to publish photographs that it had taken of the picketing in which individual employees were identifiable because of concerns of retaliation expressed to Business Agent Newman confirm the validity of Board precedent.	P. 3:10-12
4	The Respondent, by photographing employees engaged in protected concerted union activity violated Section 8(a)(1) of the Act.	P. 3:14-15
5	The collective-bargaining agreement covering the clerical unit is effective by its terms from April 1, 2009 through March 31, 2012.	P. 4:13-14
6	The parties have been operating under the current agreement since October 26.	P. 4:45
7	Senior Assistant Business manager of the Union Jesse Newman, spokesperson for the Union, recalled the Basile mentioned "a possible change with the retail cashiers," involving the "possibility of" a layoff but that he did know if or when it was going to happen." Newman commented that "this was not the appropriate time to be discussing" that matter, that since Basile "didn't have the appropriate information . . . that it would be more appropriate at a different time," and that the Union would be requesting to bargain the decision and effects of whatever change was contemplated.	P. 5:42-48
8	The testimony of Basile and Newman and the notes of Christy Gray confirm that the Union was not informed of the Company's "intent to eliminate" the retail cashier position. Rather, the Union was informed that the Company was "moving in the direction of eliminating" the position but that it was "not 100 percent decided."	P. 6: 20-23
9	The email confirms that Newman sought to find out when any contemplated change would occur and stated the intent of the Union to bargain the decision and effects.	P. 6: 23-25
10	Following the testimony by Christy Gray, whose notes did reflect discussion, Randall located the notes of the meeting that he had taken. His notes confirm that there was discussion of the seniority of the nine retail cashiers and their rights under the contract. Newman questioned whether the work would remain. Basile responded that the work would remain, that payments would be received by the automatic payment machines or retail sales consultants, noting that their receipt of payments would give them the opportunity to make a sale. Newman questioned whether	P. 6: 36-44

	retail cashiers existed at other locations. Anthony Gates stated that he believed retail cashiers existed in North Carolina and “possibly other places,” but that the elimination related only to Nevada.	
11	Notwithstanding the existence of the powerpoint presentation dated September 11 that, inter alia, sets out the labor cost savings resulting from elimination of the retail cashiers, Basile’s letter of December 8 represents that there were no such documents.	P. 9: 44-46
12	Although Vice President Oberschlep claimed that he did not believe that any documents existed that reflected the amount of money collected by cashiers as opposed to automatic payment machines, I question that claim. Retail cashiers and retail sales consultants had tills from which they made change as necessary and were, as stated in the job description for the position and explained by retail cashier Kathryn Dawkins, required to balance their cash registers at the end of each day. The testimony of retail sales consultant Kathlene Selcke establishes that a deposit slip was collected from each automatic payment machine each day.	P. 9:50-52; P.10:1-4
13	The work previously performed by retail cashiers continues to be performed, albeit by retail sales consultants. Counsel for the General Counsel points out that this was not a “run-of-the-mill” layoff. I agree. Although the Respondent couched its action as a layoff, the elimination of the position of retail cashier resulted in the termination of all retail cashiers. Retail sales consultants assumed the work of the retail cashiers. The Respondent’s unilateral determination to eliminate the job classification of retail cashier is confirmed by the September 11 powerpoint document, which states on the fifth page: “Reduce headcount by eliminating the ‘cashier’ position.”	P. 10: 23-24; 32-37
14	In 2004, the Union specifically rejected proposed language giving the Respondent the right to lay off when it “deems that it is advisable” to do so.	P. 10:46-48
15	The waiver argument might have arguable merit if the Respondent had determined the number of employees whose services it did not need due to diminished traffic and revenue and, consistent with the “lack of work” provision in paragraph 8.02 of article 8 of the contract, laid off in inverse order of seniority. Layoffs pursuant to the unilateral elimination of a contractual job classification are not privileged under any reading of the contract.	P. 10: 48-52

16	Insofar as fewer customer visits to retail stores suggested a need for fewer employees, there would have been a concomitant reduction in the number of retail sales consultants absent the transfer of the work of retail cashiers to retail sales consultants.	P. 11:2-4
17	Although that is not what Basile stated to the Union, his report confirms that the action of the Respondent was elimination of a classification, not a reduction in force carried out consistently with the contractual requirement of layoff by seniority.	P. 11:6-8
18	“Once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board.”	P. 11:12-15
19	No collective-bargaining agreement provision gave the Respondent the right to unilaterally eliminate a unit classification.	P. 11:15-16
20	The Union did not waive its right to bargain.	P. 11:18
21	That contractual provision became a nullity when the Respondent eliminated the position.	P. 11: 19-20
22	The decision to eliminate the retail cashier position was a mandatory subject of bargaining insofar it directly affected the wages, hours, and working conditions of the retail cashiers, all of whom were terminated when the position was eliminated.	P. 11:20-22
23	Consistent with its desire to reduce “headcount,” the Respondent could have approached the Union and proposed elimination of the retail cashier position. If the Union did not agree to do so, the Respondent was required by the contract to lay off by inverse seniority which, in the absence of reassignment of the job duties of retail cashiers, would have assured that a number of retail cashiers remained employed.	P. 11:24-28
24	The Respondent was not privileged to eliminate a contractually established position without the consent of the Union.	P. 11:28-29
25	The Union did not waive its right to bargain regarding the Respondent’s action. The right to eliminate a job classification is not “enumerated as one of the rights of management” in the management rights clause. See <i>Miami Systems Corp.</i> , 320 NLRB 71, (1995). The elimination of the bargaining unit classification of retail cashier required that the Respondent not only bargain with the Union regarding its decision but also obtain the consent of the Union before implementing its decision. Implementation of the Respondent’s decision directly affected the wages,	P. 11:31-37

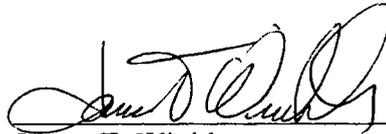
	hours, and working conditions of the retail cashiers, all of whom were terminated.	
26	The Respondent argues that the action of the Union in seeking an early announcement of its decision constituted a waiver of its right to bargain. I disagree. Until October 1, nothing was definite.	P. 11:39-41
27	An “inchoate and imprecise” announcement of future plans” is insufficient to trigger an obligation to request bargaining or risk waiving the right to bargain.	P. 11:42-43
28	On August 26, nothing was 100 percent certain. Basil’s email of August 26 summarizing the bargaining session confirms that formal notification of the Union would occur “once we make this official.”	P. 11:43-46
29	The Union, on August 26, told the Respondent that it would seek to bargain regarding the decision and effects.	P. 11:46-47
30	As of September 16, the date for the proposed action was uncertain, and the Union had been requested to keep the matter confidential.	P. 11:47-48
31	The Union, not wanting to violate the request for confidentially, requested the Respondent to notify the affected employees prior to the ratification vote.	P. 11:48-50
32	The Union was unaware that its request had been granted and a date for elimination of the position had been set until it received the email and attached letter on October 1 stating that the affected employees would be notified the next day and would be laid off on December 4.	P. 11:50-52; P. 12:1
33	On October 13, less than 2 weeks after receiving that notification and almost 2 months prior to the proposed action, the Union, consistent with the position it had taken on August 26, requested to bargain over the decision and effects.	P. 12:1-3
34	The Respondent cites no precedent, and I am aware of no precedent, holding that cooperation regarding procedural matters constitutes waiver of substantive and statutory rights. I concur with the observation in <i>St. Vincent Hopsital</i> , 320 NLRB 42, 50 (1995), that it “would be utterly unfair were the law to permit party to an agreement to seek the help of the other party . . . [and then] hold the cooperation against it . . .” The Union agreed to keep what the Respondent was “looking at,” confidential. When informed on September 16 that the Respondent would eliminate the retail cashier position but that the date had not been firmly decided, the Union realized the potential fallout of conducting a ratification vote without disclosing the intention of the Respondent to elimination retail cashiers. The request for disclosure constituted neither acquiescence	P. 12:5-16

	in the elimination of the position nor waiver of the Union's announced intention to request bargaining over the decision once it ceased to be confidential. The Union requested announcement to the affected employees prior to the ratification vote.	
35	The Union, less than 2 weeks after that announcement and almost 2 months prior to the date of implementation, requested bargaining. If Respondent had not refused to bargain, there would have been ample time to address the issues. The Union did not waive its right to bargain over the decision to eliminate the position of retail cashier. The Union did not consent to the elimination of this classification, the wage rates of which are set out in the collective-bargaining agreement.	P. 12:16-21
36	The Respondent, by refusing to bargain with the Union regarding its decision to eliminate the contractual classification of retail cashier and by eliminating that position without the consent of the Union, violated Section 8(a)(5) of the Act.	P. 12:23-25
37	I have found that the Respondent was obligated to bargain with the Union and to obtain the consent of the Union regarding its decision to eliminate the unit classification of retail cashier. Thus the claim that the information sought was not relevant because the Respondent had no obligation to bargain over the decision, only the effects, has no merit.	P. 12:46-49
38	As Newman explained in his testimony, the Union needed to know the basis for the decision so that it could determine whether the Union could offer anything that could "save the jobs" of the cashiers. The September 11 powerpoint presentation, placed into evidence by the Respondent, constitutes a document upon which the Respondent based its decision. Financial information was redacted from the document placed in evidence. The unredacted document as well as any other information that has come to the attention of the Respondent in the course of this proceeding is clearly relevant and must be produced to the Union. The information remains relevant, notwithstanding my findings herein regarding the unlawfulness of the elimination of the retail cashier position, insofar as compliance with my decision may have an impact upon future decisions of the Respondent relative to the utilization of personnel.	P. 13:2-12
39	Documents establishing the net line loss or gain is relevant.	P. 13:19
40	Insofar as retail cashiers balance their cash drawers and records are obviously kept showing who paid their bill, it would appear that the number of payments made, whether to a person or machine, is a number that should be able to be obtained. This information is relevant.	P. 13:29-31

41	The Respondent, by failing and refusing to provide the Union with requested relevant information, violated Section 8(a)(5) of the Act.	P. 13:33-34
42	Respondent excepts to all of the Conclusions of Law set forth in the Decision.	P. 13:36-51
43	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.	P. 14:3-5
44	The Respondent having eliminated the unit classification of retail cashier without bargaining with the Union and without the consent of the Union, it must restore that classification and offer reinstatement to Jacqueline Brownlee, Kathryn Dawkins, Pamela DePalma, Thomas England, Debra Mercer, Peggy Mills, Rebecca Ribaud, Joyce Smith, and Lynn Taylor and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from December 4, 2009, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in <i>F. W. Woolworth Co.</i> , 90 NLRB 289 (1950), plus interest as computed in <i>New Horizons for the Retarded</i> , 283 NLRB 1173 (1987).	P. 14:7-14
45	The Respondent must provide the Union with all documents requested in its information request dated December 15, 2009.	P. 14:16-17
46	The Respondent must also post an appropriate notice.	P. 14:22
47	Respondent excepts to all of the recommended Order set forth from page 14, line 27 through page 15, line 34.	P. 14:27 through P. 15:34
48	Respondent excepts to the entire Notice to Employees set forth in the Appendix to the Decision	Appendix

<u>Exception No.</u>	<u>Exception to Failure of Judge to Find</u>
49	Respondent excepts to the failure of the Judge to dismiss all allegations of the Complaint.
50	Respondent excepts to the failure of the Judge to apply the contract coverage standard to determine if Respondent violated Section 8(a)(5).

Dated: October 4, 2010



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On October 4, 2010, I served the within document(s):

**EXCEPTIONS OF RESPONDENT TO DECISION OF
ADMINISTRATIVE LAW JUDGE**

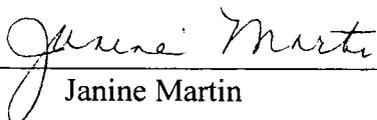
- By Overnight Delivery – by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

Jesse Newman
International Brotherhood of Electrical Workers
Local #396
3520 Boulder Highway
Las Vegas, Nevada 89121

Darlene Hass Awada, Esq.
Counsel for General Counsel
National Relations Labor Board
477 Michigan Avenue
Detroit, Michigan 48226

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 4, 2010 at Las Vegas, Nevada.



Janine Martin

RECEIVED

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NLRB
ORDER SECTION