

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of

CAREER SYSTEMS DEVELOPMENT
CORPORATION

and

MAINE EDUCATION ASSOCIATION

Case 1-CA-46727

CHARGING PARTY'S REPLY TO
RESPONDENT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Pursuant to Sections 102.42 and 102.50 of the Rules and Regulations¹ of the National Labor Relations Board (hereinafter "the Board"), the Charging Party in the above matter, Maine Education Association (hereinafter "Union"), replies to Respondent's 11/2/11 Opposition to the Motion for Summary Judgment with respect to the allegations in the Complaint and Notice of Hearing (hereinafter "the Complaint") in the above matter.

In support thereof, the Union asserts:

¹ The Charging Party notes that the Rules and Regulations do not specifically provide for this Reply, but nor do they forbid it. The Rules are somewhat unclear, in that Section 102.24, relating to motions for summary judgment, indicates that the filings are to be made with the Board "pursuant to the provisions of Section 102.50." Section 102.50 merely indicates that proceedings which have been transferred to the Board shall be governed by the "provisions of this subpart [B]" as they relate to "the powers granted to administrative law judges." Administrative law judges, under subpart B, conduct proceedings and allow for briefs and other filings, to be filed "a reasonable time...but not in excess of 35 days from the close of the hearing." There is no specific provision for oppositions to motions before an ALJ, but the Federal Rules of Civil Procedure provide, in summary judgment proceedings under F.R.Civ.P. 56, for a motion, an opposition, and a reply. Therefore, by analogy, a reply may be allowed in this circumstance, particularly where, as here, Respondent's Opposition contains new factual assertions and documents, placed before the Board in opposition.

A. Respondent argues that the allegations in the Complaint do not mean what they say.

- 1) In essence, Respondent asserts that it understands the Regional Director's Complaint, at paragraphs 10 and 14, to allege that "the Respondent merely violated its duty to bargain over the implementation and effects of its otherwise lawful layoff decision" as opposed to failing to bargain over the layoff itself, as well as its effects.

- 2) It explains, at pages 1-2 of the opposition, that while it admitted laying off the four bargaining unit employees on or about March 11, 2011 as alleged in paragraph 10 of the Complaint, and making other unilateral changes, and, while further admitting that these unilateral changes were made with respect to wages, hours and conditions of employment, and that they were made after the Union was certified as collective bargaining representative and without notice or an opportunity for the Union to bargain, that, nonetheless, the Regional Director has only asserted a failure to bargain with respect to the effects of the layoffs and transfer. It thus argues that the Board may only consider imposing a *Transmarine* remedy.

It bases its argument solely on the contention that it argued to the Regional Director, "and submitted extensive evidence" in support of their argument, that its decision to reduce the bargaining unit by four employees was in response to some sort of "mandate" from the U.S. Department of Labor, and that the decision was therefore not a mandatory subject for bargaining.

The Respondent claims that, in a personal communication² between Respondent's counsel and Region One Field Examiner Hilary Bede, the investigating Board agent, on June 14, 2011, the Board agent advised him that the Regional Director's authorization of Complaint related to "failure to bargain over the implementation and effects of the layoff of four Unit employees. The layoff itself was unavoidable and settled with the Department of Labor prior to the Union certification; the implementation was not. The Region will seek the reinstatement of the laid off employees as a remedy."

² Unauthenticated and unsupported by an affidavit, as required when a party is opposing summary judgment.

Based on this communication, Respondent contends that the Regional Director's Complaint, at paragraphs 10, 15 and 16, does not in fact allege that the layoff of the four Unit employees was a mandatory subject for bargaining, and that Respondent engaged in that layoff without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the layoffs. Rather, Respondent contends that the Complaint should be interpreted to allege only that Respondent's [freely admitted] failure to bargain over the effects of the layoff was unlawful.

With all due respect, that is not what the Complaint states. The Complaint states, as clearly as possible, that the layoff itself was a mandatory subject of bargaining, and that it was done without the mandatory notice and opportunity to bargain.

Whatever events may have preceded the March 11 layoff, the Regional Director alleged at paragraph 10 of the Complaint that "on about March 11, 2011 Respondent laid off the following four Unit employees" and, at paragraph 15, that the subject set forth in paragraph 10 relates to wages, hours and other terms and conditions of employment and is a mandatory subject for collective bargaining. The Regional Director did **not** limit the allegation to bargaining over the effects of the layoff, nor even the effects of the decision to reduce or to restructure its workforce [see Section ___ below]

B. Whatever the extrinsic evidence, the Respondent's legal obligation was to respond to the actual allegations in the Complaint.

At the time it filed its answer, the Respondent was aware of the specific allegations in the Complaint, and of the Regional Director's position with respect to remedy. The Regional Director had rejected the analysis of the proper remedy, argued by Respondent. Nonetheless, the Respondent admitted paragraph 10 and paragraph 15 in all material aspects, except that it denied the legal conclusion that the unilateral changes in paragraphs 10, 11, 12, 13 and 14 of the Complaint were all "mandatory subjects for the purposes of collective bargaining."

The Respondent's position herein is a *non sequitur*. If it had meant to admit only that it failed to bargain over effects, it was obligated to so answer. If Respondent meant to deny that it had an obligation to bargain over the decision to have engaged in a layoff on March 11, its decision as to how many employees to layoff, and how to select employees for layoff, it was obligated to so answer. Rather, it admitted that it laid the employees off (answer paragraph 10), that the layoff related to their terms and conditions of unemployment (paragraph 15), and that it engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the layoffs (answer paragraph 16).

Every respondent would like to be able to respond to a Regional Director's Complaint by re-interpreting that Complaint in accordance with its own assertions. However, the unambiguous allegations in the Regional Director's Complaint cannot be varied by reference to email communications, over two weeks prior to the issuance of the Complaint, between Respondent's counsel and the Regional investigator.

The motion for summary judgment should be granted, and reinstatement and backpay ordered.

C. Respondent's interpretation of Board law, to the effect that only a Transmarine remedy may be imposed, is incorrect.

The "well established" Board law with respect to the remedy for the alleged violation, cited by the Respondent, is based solely on a 1988 Board decision which, the Union contends, it has misinterpreted.

At pages 3-4 of the opposition, Respondent cites Lapeer Foundry and Machine Inc., 289 NLRB 952 (1988) for the proposition that "requiring bargaining over the decision and reinstatement with full backpay does not constitute an appropriate remedy for an effects-bargaining violation."

First, as noted above, the Regional Director has not alleged only an “effects” bargaining violation. She has alleged multiple occasions of failure to bargain over terms and conditions of employment, including (paragraph 10 of the Complaint) the layoff of four named bargaining unit employees.

Second, the footnote highlighted by Respondent in *Lapeer*, footnote 11, clearly relates only to a decision to lay off or terminate employees which is based on an employer’s core entrepreneurial decisions [as in *First National Maintenance*, 452 U.S. 666 (1981)], and where the decision turns on a change in the nature or direction of the business. In situations not involving *First National Maintenance [FNM]* considerations, the *Lapeer* Board concluded, “Respondent’s decision to lay off employees for economic reasons is a mandatory subject of bargaining and that the Respondent violated the Act by failing to bargain over its layoff decision and the effects of that decision.”

“When a business is confronted with an economic problem such as declining sales, excessive inventory, or an unprofitable department, it may have several options to address this problem. Management may decide, for example, to lay off employees, to shut down the unprofitable department, or to consolidate operations and transfer work to a more efficient plant. Although job losses may result whether the decision is to lay off, shut down, or consolidate, the focus of the decision to lay off differs from the focus of the other two decisions in a critical manner. In deciding to lay off employees, management directly alters employees’ terms of employment. This decision, like the decision to reduce workers’ wages, necessarily turns on labor costs because the decision itself is to modify terms of employment in order to save money during economic downturns. By contrast, the decisions in FNM to shut down and in Otis to consolidate part of the business involved a direct modification of the business structure. Those decisions had only a secondary effect of altering employees’ terms of employment. Accordingly, pursuant to the Otis plurality two-factor test, the decision to shut down part of the business or consolidate operations affects the scope, direction, or nature of the business and need not be bargained. n9 On the other hand, the decision to lay off turns on labor costs and must be bargained.

n9 An Respondent may still be required to bargain over a layoff as an effect of these nonbargainable decisions, however. See *Litton Business Systems*, 286 NLRB No. 79 (Nov. 6, 1987).

“...In light of the above analysis, we conclude that the decision to lay off employees for economic reasons is a mandatory subject of bargaining. Consequently, an Respondent must provide notice to and bargain with the union concerning the decision to lay off bargaining unit employees and the effects of that decision. Our conclusion is consistent with those of several circuit courts of appeal that have addressed this issue. See, e.g., *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987); *Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986); *NLRB v. Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982). As the Seventh Circuit emphasized in *NLRB v. Advertisers Mfg. Co.*, supra at 1090:

“Laying off workers works a dramatic change in their working conditions (to say the

least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence. [Citations omitted.]

"Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining. Until the modalities of layoff are established in the agreement, a company that wants to lay off employees must bargain over the matter with the union. [Citation omitted.] This requirement will ensure that the employees' bargaining representative will have the opportunity to propose less drastic alternatives to the proposed layoff. Moreover, the Respondent's duty to bargain will require meaningful negotiations concerning the decision to lay off, and not merely the notification to the union of a decision that is a *fait accompli*. To ensure meaningful negotiations, we will continue to scrutinize the "totality of the [parties'] conduct throughout the course of bargaining. . . ." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). In light of the economic circumstances motivating a company's decision to lay off employees, however, we will require that negotiations concerning this decision occur in a timely and speedy fashion. Thus, should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation. See, e.g., *Paramount Liquor Co.*, 270 NLRB 339, 343 (1984); *Smyth Mfg. Co.*, 247 NLRB 1139, 1168 (1980). Furthermore, the establishment of compelling economic circumstances may excuse a company's failure to bargain over the layoff decision. See, e.g., *Aquaslide 'N' Dive Corp.*, 281 NLRB No. 34, slip op. at 2 fn. 2 (Aug. 29, 1986); *Advertisers Mfg. Co.*, 280 NLRB No. 128, JD slip op. at 19 (June 30, 1986). We emphasize, however, that only in extraordinary situations will this exception apply. See *Angelica Healthcare Services Group*, 284 NLRB No. 92, JD slip op. at 14-15 (June 30, 1987).—

"In order to illustrate the limits of our holding, we stress that our analysis today applies only to an economically motivated decision to lay off employees. We recognize that a managerial decision is often not easily categorized under a label such as layoff or consolidation. For example, the permanent contraction of a company's work force which might be viewed as a mass layoff, may be part of a change in the scope and direction of the business enterprise and, therefore, not bargainable under FNM, *supra*. In this regard, we reaffirm the caveat that "the appellation of the decision is not important" to a determination of whether the decision requires bargaining. *Otis*, 269 NLRB at 893. Nothing in today's decision concerns an Respondent that shuts down a part of its business for economic reasons; the Court has made clear that bargaining over that decision is not required. FNM, *supra*. Nor does this decision affect in any way the Board's *Otis* rationale concerning an Respondent's decision to consolidate its operations and transfer work to another facility. ...

"Applying our analysis to the present situation, we find that the Respondent violated Section 8(a)(5) and (1) through its unilateral layoff of the seven employees... [T]he record establishes that the layoffs resulted from a lack of orders. In order to address this economic problem, the Respondent decided to lay off seven employees without notifying the Union or bargaining over the decision. The layoff was not the result of the Respondent's decision to change the nature of scope of the business. Rather, the decision was to effect changes in these employees' terms of employment in order to reduce labor costs during a period of economic difficulty. The Respondent was thus obligated to bargain over this decision. ...

"III. The Remedy

"Having determined that an Respondent violates the Act by failing to bargain over its decision to lay off employees, we must formulate a remedy that redresses the wrong committed. As the Supreme Court has observed, our "task in applying § 10(c) is to take measures designed to recreate the relationships that would have been had there been no

unfair labor practice." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1975). With this responsibility in mind, we conclude that ordering the Respondent to bargain with the union concerning the layoff decision, as well as the effects of that decision, and to reinstate the laid-off employees with backpay constitutes the appropriate remedy for this decision-bargaining violation. n11

"n11 By contrast, requiring bargaining over the decision and reinstatement with full backpay does not constitute an appropriate remedy for an effects-bargaining violation. In that situation, the propriety of the Respondent's decision is not in question. ...".

This footnote 11 is the keystone of Respondent's argument. However, "effects-only" bargaining only applies when, as in *First National Maintenance*, the layoff decision is not based on labor factors, but lies at the core of entrepreneurial control. Such is not the case here.

Even if, as Respondent contends, it had agreed with the U.S. Department of Labor to "restructure" its workforce,³ such an agreement does not excuse the obligation to bargain.

Although neither Respondent nor the Board agent raises the issue of exigency, that appears to be the only possible excuse for the Respondent to have laid off the employees without bargaining: in *Alpha Associates*, 344 NLRB 782 (2005), that issue is discussed:

"Finally, with respect to the alleged unilateral layoff of unit employees, the Respondent contends that its decision was the result of "extreme economic pressures brought on by a flood of imports on the market" and, accordingly, did not violate the Act. It is axiomatic that an Respondent's decision to lay off employees is a mandatory subject of bargaining; thus, in the absence of an agreed-upon contractual provision on the subject, an Respondent is obligated to bargain with an incumbent union with respect to both the decision to conduct a layoff and the effects of any such decision. See *Farina Corp.*, 310 NLRB 318, 320 (1993). That an Respondent's determination to lay off employees is motivated by economic considerations does not relieve an Respondent of its bargaining obligation. *Id.* However, if an Respondent can demonstrate that "economic exigencies" compelled prompt action, the Board will excuse the Respondent's failure to notify and bargain with the union prior to implementing its decision. See *Bottom Line Enterprises*, 302 NLRB 373 (1991). The Board has characterized the economic exigency exception as a heavy burden, however; thus, the Board has limited its application of the exception to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)(quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-53 (1987)). "Absent a dire financial emergency, the Board has held that economic events such as the loss of significant accounts or contracts, operation at a

³ See Exhibit 1: a March 11, 2011 letter from Respondent to one of the laid-off employees, which specifically states that her job had been "selected to be eliminated" due to a "restructuring of [Respondent's] organizational chart." This stated reason for her layoff is a far different circumstance than an alleged agreement with the U.S. Department of Labor to lay off employees.

competitive disadvantage, or supply shortages do not justify unilateral action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).

Thus, it is black letter Board law that Respondents have a statutory bargaining obligation regarding management decisions such as layoffs which do not come within the terms of *First National Maintenance*, 45 U.S. 666, 676-677 (1981). Layoffs after a union certification are not a management prerogative and are a mandatory subject of collective bargaining. *N.L.R.B. v. Advertising Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987); *Farina Corp.*, 310 N.L.R.B. 318 (1993); *Porta-King Building Systems*, 310 N.L.R.B. 539 (1993). Here, it appears that Respondent claims that its decision to lay off employees was the result of a "restructuring" allegedly imposed on it by the U. S. Department of Labor. Such a reason does not excuse an employer from bargaining over how to go about restructuring its workforce, including whether layoffs, as opposed to other steps, should be made, whom to include in the layoffs and what if any benefits should be given to laid-off employees. These are mandatory subjects of collective bargaining. *Dickerson-Chapman, Inc.*, 313 N.L.R.B. 907, 942 (1994).

The Union urges that the Board:

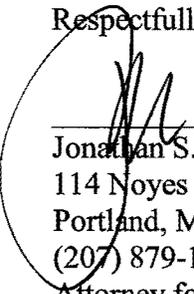
Grant the Motion for Summary Judgment, as Respondent's attempts to re-characterize the Complaint's allegations may not be countenanced, and

Affirm the assertion in the Regional Director's Complaint with respect to the appropriate procedures for fully implementing the backpay aspects, and adopt the backpay and reinstatement remedy sought to remedy the unlawful layoffs, in accordance with the presumptively-valid remedies for the unfair labor practices, as set forth on Page 3 of the Complaint, and

Issue an appropriate order granting the Union relief upon the unfair labor charges as amended.

Date: November 15, 2011

Respectfully submitted,



Jonathan S. R. Beal
114 Noyes St | PO Box 1400
Portland, ME 04104
(207) 879-1556
Attorney for Union
Maine Education Association

CERTIFICATE OF SERVICE

I, Jonathan S. R. Beal, hereby certify that on November 15, 2011, I caused to be served electronically, and placed an original and 8 copies of the attached Reply to Respondent's Opposition to Motion for Summary Judgment in the mail, postage prepaid, to the Executive Secretary of the National Labor Relations Board at the following address:

1099 14th St NW # 7500
Washington D.C., DC 20005

I simultaneously sent copies by first class mail, postage pre-paid, to:

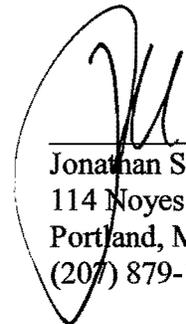
Jeffrey L. Braff, Esq.
Cozen O'Connor
The Atrium 3rd Floor
1900 Market Street
Philadelphia, PA 19102-2066

With a courtesy copy by first class mail to:

Rosemary Pye, Regional Director, Region One, Boston

Dan Allen, Maine Education Association, Caribou, ME

Date: November 15, 2011



Jonathan S. R. Beal
114 Noyes St | PO Box 1400
Portland, ME 04104
(207) 879-1556

LORING JOB CORPS CENTER

36 Montana Road
Limestone, ME 04750
(207) 328-4212



March 11, 2011

Carole Belang r-Bittle
234 Main Street
Stockholm, ME 04783

Dear Carole:

In response to cost reductions for the upcoming year, we are faced with restructuring our organizational chart and these circumstances will result in the elimination of a number of positions within our center. I regret to inform you that your position has been selected to be eliminated with Career Systems Development at the Loring Job Corps Center effective, today, Friday, March 11, 2011.

Your benefit information is as follows:

- You will receive two (2) weeks severance pay for your years with CSD
- You will be paid the balance of 114 hours of your accrued but unused vacation
- Any insurance coverage that you have through CSD will cease effective today, March 11, 2011.
- You will be mailed portability rights offering you the opportunity to convert your life insurance to an individual policy early next week.

We regret the circumstances that have led to this action and appreciate the contribution you have made to CSD/LJCC. We wish you the best of luck in your future endeavors.

Sincerely

Kristie Moir
Center Director

759 of 140
20



Operated by Career Systems Development Corporation

EXHIBIT 1
(4/15/11)