

Times Union, Capital Newspapers Division of The Hearst Corp. and The Newspaper Guild of Albany, TNG-CWA Local 31034. Cases 3–CA–27347 and 3–CA–27367

May 31, 2011

DECISION AND ORDER

CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On August 18, 2010, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply 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 briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions, to modify his remedy,³ and to adopt the recommended Order as modified.⁴

¹ The Respondent excepts to the judge's admission into evidence of a newspaper article entitled, "Times Union cuts workers," asserting that the content of the article is inadmissible hearsay. We disagree. The article, which was written by the Respondent's business writer and was published by the Respondent, includes an admission against interest in the form of a quote from the Respondent's publisher, George R. Hearst III. Such an admission falls within an exception to the hearsay rule pursuant to Federal Rules of Evidence, Rule 801(d)(2)(D). See *U.S. Ecology Corp.*, 331 NLRB 223, 225 fn. 12 (2000), *enfd.* 26 Fed.Appx. 435 (6th Cir. 2001). In any event, it is well established that the Board is not bound to apply strictly the Federal Rules of Evidence. See, e.g., *United Rubber Workers Local 878 (Goodyear Tire & Rubber Co.)*, 255 NLRB 251, 251 fn. 1 (1981) (citing *Alvin J. Bart and Co.*, 236 NLRB 242 (1978)).

² Some of the Respondent's exceptions implicate the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by permanently laying off 11 employees without first bargaining to a lawful impasse, we agree that the Respondent's unilateral application of its criteria for selecting employees for permanent layoff and its unilateral placement of the selected employees on paid leave presented the Union with a fait accompli, tainting the parties' subsequent bargaining over the layoffs.

³ Consistent with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

⁴ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Times Union, Capital Newspapers Division of the Hearst Corp., Colonie, New York, its officers, agents, successors, and assigns, shall take the action set forth in the judge's recommended Order as modified below.

1. Substitute the following for paragraph 2(d).

"(d) Make Alan Abair, William Blais, Brian Ettkin, David Filkens, Greg Montgomery, Joyce Peterson, John Pierkarski, Linda Pinkans, Robert Shea, Maria Stoodley, and Alan Wechsler whole for any loss of earnings and other benefits suffered as a result of the unilateral action taken against them, in the manner set forth in the remedy section of the judge's decision, with daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010)."

2. Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its facility in Colonie, New York, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 3, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 and former employees employed by the Respondent at any time since July 6, 2009."

Alfred Norek, Esq., for the General Counsel.

Mark Batten, Esq. (Proskauer Rose LLP), of Boston, Massachusetts, for the Respondent.

Quinn Philbin, Esq. (Barr & Camens), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Albany, New York, on May 17–18, 2010. The charge in 3–CA–27347 was filed on September 17, 2009, the charge in

3-CA-27367 was filed on October 1, 2009,¹ and the order consolidating cases and consolidated complaint (the complaint) was issued on March 29, 2010. An amendment to the consolidated complaint issued April 21, 2010. After the hearing, on June 15, 2010, counsel for the General Counsel filed a motion to amend the consolidated complaint.

As finally amended, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) unilaterally selecting and placing 11 employees on paid administrative leave on various dates in July 2009 and (2) permanently laying off the same individuals on September 11, 2009, without first bargaining to a good-faith impasse with the Union.²

On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the briefs filed by the General Counsel, Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the publication and distribution of a daily newspaper and related media at its facility in Colonie, New York, where it annually derives gross revenues in excess of \$200,000, holds membership in or subscribes to various interstate news services, including the Associated Press, publishes various nationally syndicated features and advertises various nationally sold products. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent and the Union have a 76 year history of collective bargaining. The collective-bargaining agreement between the parties effective from August 1, 2004, to August 1, 2008, describes the unit as including all full-time employees and part-time employees averaging more than 15 hours a week in the editorial, advertising, business office, maintenance, circulation, and new ventures departments (GC Exh. 4).

In April 2009 there were approximately 200 employees in the bargaining unit. As a result of attrition the number of unit employees had declined since 1999, when approximately 275

¹ All dates are in 2009 unless otherwise indicated.

² I grant counsel for the General Counsel's motion to amend the complaint filed on June 15, 2010, to withdraw the allegations regarding employee Daniel Higgins, as it is in accord with the evidence. As amended the employees named in the complaint are Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin.

³ Many of the material facts in this case are not in dispute. Both the Respondent (R. Exh. 1) and the Union (U. Exh. 1) took extensive and detailed notes during the negotiation sessions. There is little variance in these notes on critical matters and I have relied on them in reaching my decision. Where necessary I have resolved disputed testimony and have indicated my reasons for crediting certain testimony.

employees were employed in the unit. From September 1992, until the layoffs in September 2009, that are the subject of the complaint there had been no layoffs in the unit.⁴

The 2004-2008 collective-bargaining agreement contained the following provisions:

SECTION 1. AGREEMENT COVERAGE AND EXEMPTIONS

D. Agreement Non-Application: Temporary & Part Time Employees: Limitation

Part-time employees and independent contractors shall not be used in editorial, advertising, business office, circulation (except for the transportation sub department), audiotext, new ventures and maintenance departments where such work would eliminate or displace a present staff position. Part-time employees and independent contractors shall not be used in the transportation sub-department where such work would eliminate a current employee.

SECTION 3. JOB SECURITY

C. Staff Size: Company Prerogative

The prerogative of the Company to determine the size of the staff shall be maintained and shall not be subject to grievance or arbitration. At least forty five (45) work days in advance of the effective date of such discharges, the Company will notify the Guild so that, if requested by the Guild, there may be consultation for the purpose of considering possible means by which the hardship of such discharges may be alleviated. In lieu off such notice to the employee, forty five (45) days pay shall be given.

D. Staff Size: Company Prerogative: Determinative Procedure

However, in determining the size of staff, the Company will give sole consideration to seniority as a basis for determining who is to be laid off economy. Layoffs shall be in reverse seniority basis by department (last hired shall be the first dismissed). Whenever the Guild disputes the Company's application of this paragraph, the Guild shall have the right to invoke grievance and arbitration machinery of Section 10.

The contractual limitations on outsourcing and the use of seniority with respect to layoffs had been in successive contracts between the parties for approximately 20 years.

The parties began negotiations for a successor agreement on June 24, 2008. During these negotiations local union president, Tim O'Brien, served as the union's chief spokesperson. O'Brien has been a reporter with the newspaper for approximately 22 years and had been the Union's president since 1999. International union representatives Jim Schaufenbil, Tim Schick, and Melissa Nelson attended various meetings as did a number of unit employees. At the beginning of negotiations the Respondent's then editor, George Hearst, was the Respondent's chief spokesperson, along with Peter Rahbar, an in-house counsel with the Hearst Corp. When Hearst became the Respond-

⁴ The 1992 layoff involved two employees and was subject of an arbitration award ordering their reinstatement.

ent's publisher, he relinquished his role as one of the chief spokespersons and was replaced by Mark Batten, the Respondent's counsel in this case.⁵

The Respondent's proposal at the first meeting contained the following provisions:

2. Eliminate Section 1. D. (Agreement Non-Application: Temporary & Part-Time Employees: limitation).
3. Modify Section 3. D. to make seniority one factor, but not the sole factor, for determining list to be laid off for economy. Further modify Section 3. D. to allow layoffs by department, sub-Department, job title, classification, and/or job function.

The Union's initial proposal included removing the exception to Section 1. B., which permitted the outsourcing of driver positions, and sought changes to Section 3. C. to require the Respondent to establish that an economic layoff was necessary to "insure survival."

The Respondent's proposal to eliminate Section 1. D. (herein 1 D) and modify Section 3. D. (herein 3 D) proved to be a point of contention between the parties. Between the beginning of negotiations on June 24, 2008, and May 13, 2009, the parties at approximately 40 bargaining sessions. They were able to reach tentative agreements on many subjects, but were not able to reach agreement on these provisions. On May 15, 2009, the Respondent gave the Union its final proposal. On June 14 and 15, 2009, the union membership voted to reject the Respondent's final offer. On June 16, 2009, the Respondent announced its intention to implement its final proposal, with the exception of the provisions regarding arbitration, dues checkoff, and wage bonuses.⁶ I will address herein only certain negotiation sessions where Section 1 D and Section 3 D were discussed.

The Negotiations Prior to June 24, 2009⁷

At the first bargaining session on June 24, 2008, Hearst indicated that the Respondent's proposals regarding 1D and 3D were based upon challenges facing the newspaper industry and the Respondent's need for flexibility. O'Brien indicated that the resolution of the negotiations involving 1 D took 2 years to complete. He further indicated that the use of seniority as the determining factor in layoffs had been achieved after the Union's difficult experience with layoffs that had been made out of seniority before the present contractual language had been included in 1991. At this first meeting the parties agreed to

⁵ The Respondent's answer admits that Batten and Rahbar are agents of the Respondent within the meaning of Sec. 2(13) of the Act and further admits that the following individuals were supervisors within the meaning of Sec. 2(11) and agents within the meaning of Sec. 2(13): Hearst; Charles Hug; Rex Smith; Carole Hess; Jeff Scherer; and Allison Laurenstein.

⁶ On March 16, 2010, the Regional Director for Region 3 dismissed the portion of the charge in Case 3-CA-27347 alleging that the Respondent unlawfully declared an impasse in negotiations on June 23, 2009. The General Counsel affirmed the Regional Director's dismissal of this portion of the charge.

⁷ My findings regarding the bargaining meetings are based on the bargaining notes of both parties and the credited testimony of O'Brien, who testified with aid of the Union's bargaining notes. As I noted above, the Respondent's bargaining notes do not materially vary from the Union's.

extend the collective-bargaining agreement until September 30, 2008. The extension was effective beyond September 30, 2008, until either party gave 30 days notice of its desire to terminate the agreement. (GC Exh. 5)

At the meeting held on June 25, 2008, Hearst again spoke about the difficult economic straits that newspapers were generally in and repeated the Respondent's need for flexibility in its contract. Schaufenbil responded by indicating that the Respondent's proposals would allow it to lay off the entire unit and have the work performed by independent contractors. Rahbar responded that was an extreme interpretation of the Respondent's proposal. Schaufenbil replied that the exception regarding the transportation department in 1D resulted in the reduction of drivers employed by the Respondent from 49 to 7.

At meetings held on September 9 and 10, and October 14, 2008, the parties again discussed their proposals with respect to 1D and 3D without a change in position. At the September 10, 2008 meeting International Union Representative Melissa Nelson, a former employee of the Times Union, indicated that the language of 3D was proposed by the Respondent's former editor in exchange for the Union agreeing, for the first time, for employees to contribute toward health insurance costs.

On February 26, 2009, the Union presented a "Comprehensive Package Proposal" which would modify 1D to permit outsourcing up to 2 percent of the unit in "areas of the newspaper business that are in sharp decline" (GC Exh. 11). Hearst indicated that he appreciated the Union's movement, but that the Respondent desired to have discretion to reduce staff size without regard to seniority. (U. Exh. 47, R. Exh. 1, Tab 29, p. 6) Rahbar indicated that the layoff issue had an urgency that did not exist at the beginning of negotiations and Hearst added that this issue had highest priority. Near the end of the meeting, Hearst confirmed that layoffs would be made at the newspaper (R. Exh. 1, Tab 29, p. 9). Schaufenbil asked what would happen to the existing recall and bumping rights that were contained in the present contract under the Respondent's proposal. This question was not answered at the meeting.

Consistent with its proposal to lay off employees without regard to seniority, Rahbar testified that in February and March, 2009 the Respondent began to develop criteria to evaluate the unit employees in order to determine who it wished to lay off. (Tr. 293-294) In a letter dated March 6, 2009, O'Brien proposed to Hearst that the Respondent offer a buyout in lieu of a layoff of unit employees (GC Exh. 12).

At the meeting held on March 10, 2009, the Union presented a proposal for a 5 percent across-the-board salary reduction and other economic concessions which would expire in 18 months in order to reduce or eliminate the need for layoffs (GC Exh. 13). The Union also presented a proposal which would modify 3 D to provide for reverse seniority layoffs by job title rather than by department (GC Exh. 14). The Respondent, for the first time, proposed deleting existing present contract Sections 3. E, H, I and J that involve bumping and recall rights. (GC Exh. 15). Hearst stated at this meeting that the Respondent needed to achieve an overall reduction of 20 percent in operating costs, no later by the end of the 3rd quarter, and that this could involve eliminating approximately 20 percent of the bargaining unit. Hearst indicated that the first wave of reductions

could be made within the next 3 weeks. (R. Exh. 1, Tab 30, pgs. 1–2.) Hearst stated that he would be withdrawing from the Respondent’s negotiating team and that Batten would be replacing him. Near the end of the meeting Hearst stated that he was encouraged by the Union’s movement but that the Respondent was going to provide written notice of termination of the contract.

At the March 25, 2009 meeting the parties executed an agreement regarding buyouts for unit employees (GC Exh. 3). There were no new proposals advanced regarding 1D or 3D by either party.

On March 26, 2009, the Respondent made a new proposal regarding 1D. Its proposal provided for 4 weeks advance notice of the transfer of work in order to permit the Union an opportunity to make an offer to retain the work and engage in discussions to move the affected employees to other jobs. Under its proposal, the Respondent retained the authority to make a final decision on such an offer by the Union (GC Exh. 20). The Respondent also modified its proposal regarding 3D to provide 45 days notice of any plan to layoff employees out of reverse seniority order and further provided that it would discuss the factors used for selection with the Union. The proposal also provided for review and approval by the publisher of any layoff outside of reverse seniority. (GC Exh. 21)

In an email dated April 3, 2009, the Respondent modified its 3 D proposal to provide health insurance coverage equal to dismissal pay, with a cap of 52 weeks, for employees laid off out of seniority (GC Exh. 23.)

At the April 7, 2009 bargaining session the Union modified its 3D proposal to permit out of seniority layoffs in order to retain a person with demonstrable special skills or outstanding ability. In addition the proposal raised the cap on employees laid off out of seniority to 10 percent (GC Exh. 24). The Respondent modified its 3D proposal by increasing the cap for severance pay for employees laid off out of seniority to 52 weeks or the amount of dismissal pay, whichever was greater. When Schaufenbil asked whether the Respondent would be giving employees 45 days notice if they were laid off, Rahbar replied “yes” and that employees would get 45 days pay if notice is not given. (Tr. 68; U. Exh., 1, p. 78).

On April 9, 2009, the Respondent submitted a letter to the Union terminating the collective-bargaining agreement. By letter dated May 6, 2009, Batten submitted the Respondents “final and best” offer. This offer contains, in relevant part, the following provision:

Seniority

Replace Section 3 D. with the following:

Before conducting any layoffs Company shall provide forty five (45) days’ notice and will attempt to negotiate a buyout agreement with the Guild as outlined in Section 6 G. of this Agreement. Such negotiations shall not operate to delay the planned reduction in force. If the Company and the Guild cannot agree on a buyout, or insufficient number of employees applied for a buyout, then the Company shall conduct a layoff in accordance with the terms set forth below.

In determining the size of the staff, the Company shall give consideration to seniority as one, but not the only, basis for determining who is to be laid off economy. In the event the Company elects to lay off employees out of reverse seniority order, any such layoff must be reviewed and approved by the Publisher individually. The Company shall also discuss the factors used for selection with the Guild. Such discussion shall not operate to delay the planned reduction in force. Union activity, age, salary level and prior merit pay shall not be a factor in these determinations.

Batten’s letter modified the Respondent’s proposal with the following:

Further proposals:

In the event the parties reach a bargaining impasse rather than agreement on the terms of the new collective bargaining agreement, then in that case

1. The Company would bargain with the Union during the 4-week notice period concerning items listed in proposed article 1. D. 1. above, rather than merely notifying a Guild of those items; and
2. The Company would bargain with the Union during the 45-day notice period concerning the layoffs that will involve reductions out of seniority order under the Company’s proposed Article 3. D., rather than merely discussing the factors to be used in the selection.

Neither of these modifications to the Company’s proposals shall apply in the event the parties reach agreement on a new collective bargaining agreement. (GC Exh. 39)

At a bargaining session held on May 13, 2009, the Union made a new “Comprehensive Package Proposal” which raised the cap on out of seniority layoffs to 10 percent and removed some of the limitations in its last outsourcing proposal. (GC Exh. 42). The Respondent did not agree with the Union’s new proposal and maintained its position as expressed in its final offer. On May 15, 2009, the Respondent resubmitted its final offer to the Union, including the tentative agreements reached by the parties (GC Exh. 42).

At the hearing, Rahbar, one of the Respondent’s chief negotiators, testified regarding the reasons for the Respondent’s position with respect to layoffs. Rahbar indicated that the Times Union was experiencing a loss of readers and advertising revenue, as were many newspapers nationwide. The Respondent determined that if it laid off employees by seniority, as the prior contract had dictated, it would lose some of its most talented employees. The Respondent determined that the ability to decide which employees were necessary to retain because of the skills they possessed, was of critical importance to it, given the economic circumstances. (Tr. 289–290.)

In a ratification vote conducted on June 14 and 15, 2009, the Union’s membership rejected the Respondent’s final offer. On June 16, 2009, in a letter from Hearst to O’Brien the Respondent indicated that it intended to implement its final proposal on June 24, 2009, with the exception of arbitration, dues checkoff and wage bonuses (GC Exh. 49).

Concurrent with the above events, the Respondent began to apply to unit employees the criteria it had unilaterally begun to develop in February 2009 regarding layoffs out of seniority. In this connection, the Respondent supervisors reviewed the performance of 81 editorial employees in June 2009. Most of these reviews were conducted on June 9, 2009, while 2 were conducted on June 19, 2009 (GC Exh. 63). The Respondent also prepared a summary entitled "Editorial Department Performance Scores 6-09" dated June 19, 2009, which assigned a composite score regarding each employee, with comments (GC Exh. 64).

Post-Impasse Bargaining until July 1, 2009

At the meeting held on June 24, 2009, Rahbar stated that the parties were at an impasse and that the Respondent was planning to conduct layoffs. He said that this meeting would start the 45 day notice period. Rahbar then indicated that the Respondent would be using layoff criteria that is beyond seniority in some departments and that the Respondent would present at the meeting the criteria for layoffs that were to be done out of seniority. (R. Exh. 1, Sess. 41, p.1). The parties then discussed that 19 unit employees had accepted buyouts and Rahbar asked if there was any additional interest in buyouts. O'Brien replied that he did not know but would inquire. The Union was informed that there were 3 departments in which there would be layoffs out of seniority: editorial; advertising art; and marketing.

The first department that the parties discussed was advertising art. The Union was given a copy of a document entitled "Proposed Criteria-Advertising Art." This document listed the following criteria: (1) quality, (2) versatility, (3) skill, (4) accuracy, (5) attitude, (6) quantity, (7) creativity, and (8) seniority (GC Exh. 51). Charles Hug, the art department manager, came into the meeting and discussed the listed criteria. O'Brien inquired as to who would be making layoff decisions. Hugh responded that both he and Jeff Scherer, another manager reporting to him, would have the responsibility, and that their decision would be reviewed by Hearst. When O'Brien asked if employees had been reviewed, Hug responded that a "test run" had been performed for all the employees in the department. Hug stated that they had given everyone a score for each criterion from 1 to 3, with 3 being the highest, and added up the score.

At the meeting the Union was also given a document entitled "Proposed Criteria-Marketing Media Specialist" which consisted of the same criteria used for advertising art (GC Exh. 52). Marketing Manager Allison Laurenstein was asked by O'Brien if the criteria had been applied in her department. She replied that a "test run" had been performed and a score had been assigned for everyone in the department. She said that if there was a tie in the numbers, the Respondent would look to seniority as a tiebreaker. (Tr. 91-92)

The Union was given two documents at that meeting applicable to proposed layoffs in the editorial department. The first document entitled "Proposed Criteria Editorial" consisted of the following: (1) seniority, (2) skills and capacity, (3) versatility, (4) and adaptability/flexibility to meet changing demands, (5) job relevance, and (6) market demands (GC Exh. 53). The

second document consisted of 18 pages and contained questions under the heading entitled "Quantitative performance Measure" for various positions. The newspapers editor, Rex Smith, discussed these documents with the Union at the meeting. Smith indicated that he and other managers had utilized both documents in coming up with a layoff list. (Tr. 94-95.) O'Brien asked if the Respondent knew how many it employees wished to lay off and the breakdown by department. Rahbar responded "we have ideas but nothing is final" and added "we need to go through this process with you." O'Brien stated that Rahbar had indicated that 45-day clock started today but that "it is our understanding that the clocks starts when you give us the names." Rahbar replied that it was impossible to give the names without first knowing the factors. He noted that 45 days from the date of the meeting would be August 10, 2009. When asked if the Respondent was going to give 45 day notice to employees, Rahbar replied that we cannot give notice to employees until we know who they are. (R. Exh. 1, Session 1, p.1.). Hearst, who had rejoined the bargaining for this session, stated that the parties "needed to get moving" in this process and "match it up" with "our ultimate decision making" (Tr. 96).

In an email dated July 1, 2009, O'Brien sent a request for information to the Respondent requesting the "test runs" for the 11 job titles in which the Respondent proposed to use criteria other than reverse the order of seniority in the editorial, marketing and art departments (GC Exh. 56). In a separate email on the same date, the Union made another information request regarding the criteria used for each job title, and asked whether the criteria had been negotiated with the Union or had been communicated to employees (GC Exh. 57, Tr. 96-97). At a bargaining meeting held on that date, Rahbar told the Union that it was seeking a lot of information but that the Respondent would provide as quickly as they could. At this meeting the Union asked about the "45-day clock" regarding notice of layoffs. Rahbar replied that he believed that there were "two 45 day clocks" in that there was a 45 day notice to the Union and to the employee. Rahbar indicated that 3D involved the bargaining period with the Union and that 3C involves notice to the employees.⁸ Rahbar indicated that the Respondent would provide 45 day notice to employees. He further indicated that 45-day bargaining period with the Union started last week. When Union Representative Shick stated that the Union did not believe that the law permitted the Respondent to limit bargaining for only 45 days, Rahbar stated that he disagreed with that position. (R. Exh. 1, Tab 42, p. 3.) At the hearing Rahbar admitted that he expressed disagreement with the Union's position but testified that he never stated that bargaining would be

⁸ Sec. 3. C. of the expired contract indicates:
SECTION 3. JOB SECURITY

C. Staff Size: Company Prerogative

The prerogative of the Company to determine the size of the staff shall be maintained and shall not be subject to grievance or arbitration. At least forty five (45) work days in advance of the effective date of such discharges, the Company will notify the Guild so that, if requested by the Guild, there may be consultation for the purpose of considering possible means by which the hardship of such discharges shall be alleviated. In lieu of such notice to the employee, forty five (45) days pay shall be given.

limited to 45 days (Tr. 305). The Union did not present a counterproposal at this meeting.

Employees are Placed on Paid Leave

On the evening of the July 6, 2009, O'Brien received until a phone call from unit employee Alan Abair who informed him that he had been placed on 45-day leave pending layoff. O'Brien called Hearst but, unable to reach him by telephone, sent an email protesting the Respondent's action (GC Exh. 58). During the course of the day on July 7, O'Brien learned that other unit employees had similarly been placed on leave. When O'Brien met with Hearst in the afternoon on July 7, Hearst indicated that these are the employees whose jobs had been targeted for elimination. Hearst referred to Section 3C and 3D and said this was the 45-day notice to the employees that they were being laid off. He said that the Respondent was removing them from the building in order to "get them out of the operation." Hearst indicated that 9 employees had been notified and that there were additional four who had not yet been notified. Hearst indicated that these four would be notified by the end of the week and that the total would be 13. O'Brien responded that this was inappropriate in that they had just begun negotiating criteria for the layoff. Hearst responded that he disagreed with O'Brien's position (Tr. 104-105).

The record establishes that employees were personally notified by their supervisor that they had been proposed for layoff and were being placed on paid leave. Carol Hess, the Respondent human resources director, also attended most of these meetings. Employees David Filkins, Linda Pinkans, Maria Stoodley, Joyce Peterson, John Piekarski, William Blais, and Alan Wechsler testified about their individual meetings on behalf of the General Counsel. Hess testified for the Respondent regarding the meetings she attended. While there are the some variances in the testimony regarding the meetings, there are some undisputed facts. Each employee was given a document entitled "Miscellaneous Information" which informed them that they would remain on the payroll for 45 work days. This document also details the amount of dismissal pay and the length of health insurance coverage if the individual is "selected for layoff by the end of the 45-day period." The document also provides information regarding applying for a pension and 401(k) options. It makes reference to the information regarding applying for unemployment benefits that was included in the packet of information given to each employee. This document also contains materials from McKenna and Associates, an outplacement firm that the Respondent retained to assist employees. (GC Exh. 6.7)

In addition, Rahbar had drafted a script that each supervisor and Hess was to use in the meetings with employees (GC Exh. 66). The script for the manager is as follows:

Several months ago, we announced that there is a need or the Times Union reduces its overall expenses by 20 percent. Unfortunately, the majority of the Times Union's expenses are in payroll. As a result, your position was tentatively selected for elimination. We do not yet know for certain whether you will be laid off, because the final decision is still subject of bargaining with the Guild, but we wanted to give you as much notice as possible of our tentative conclusion.

Carole will review additional details with you.

Clearly, this is difficult news to process. Personally, I would like to thank you for the contributions you have made, and I wish you all the best.

The script Rehbar drafted for Hess indicated:

Effective today, you will be on paid leave for the next 45 work days, with all benefits intact. During this time, the Company will meet with the Guild bargaining committee to review each of the positions that were selected for layoff. By the end of this time. If you are selected for layoff, you will receive the following:

Any employee laid off out of seniority order shall receive an enhanced severance package consisting of the greater of the dismissal pay under Section 6 of the Guild Contract, or 3 weeks pay for every year of employment, up to a maximum of fifty-two (52) weeks' pay and health insurance coverage, paid for by the Company, for the same period of time as the dismissal pay that the employee will receive pursuant to Section 6 of the Guild Contract, up to a maximum of (52) weeks' coverage.

Hess testified that she met with a number of employees including Abair, Filkins, Piekarski, Montgomery, Peterson, Pinkans, and Etkin. Hess testified that she read her portion of the script to employees (Tr. 388). She also testified that the various managers who were present at the meeting as the direct supervisor of the employees involved held closely to the script (Tr. 386) she did not recall Rex Smith telling employees in these meetings that they were laid off transfer 37. She did recall that Smith made comments other than what was in the manager's script. She recalls him telling employees that it was not their performance but rather "it was his position that would be eliminated, and kind of ad lib there." (Tr. 387-388.)

Employees Filkins, Pinkans, Stoodley, Peterson, Piekarski, Blais, and Wechsler testified about the individual meetings they had their supervisor and a representative from human resources. Filkins testified on direct examination that during his meeting with Smith and Hess, Smith "let me know I was being laid off" (Tr. 206). On cross-examination, however, Filkins testified that Smith made it "clear in the meeting that I was going to be laid off after the 45 days" (Tr. 214). To the extent that Filkins' testimony conflicts with that of Hess, I credit Hess. Understandably, as the affected employee, Filkins could reasonably have understood Smith to say he was being laid off, but I find, based on the testimony of Hess and the script, that he was informed that he was notified that he was proposed for layoff. There is no dispute, however regarding the fact that at the meeting, Smith informed Filkins that he could use Smith as a job reference and that Smith mentioned a possible opening at a local public relations firm.

There is no material dispute in the testimony of the other employees and that of Hess about what occurred at their individual meetings. In this connection, I credit the testimony of Maria Stoodley that Smith told her that if she needed a reference Smith would give her a "glowing referral" (Tr. 225). Smith also mentioned to Wechsler that a position might be

open in a local public relations firm and he would be happy to provide a recommendation.

At the individual meetings, employees were asked to clear out their desks and go home. Their security passes for access to the building were disabled. They were also barred from access to the email accounts, computers, voicemail, and internal mailboxes. After their July meetings, the affected employees did not receive work assignments or perform their regular duties for the Respondent.⁹ They continued to receive their normal pay and benefits.

On the same day, July 7, that Respondent began to notify unit employees who were proposed for layoff that they were being placed on paid leave, the Respondent actually laid off nonunion employees and supervisors. According to O'Brien's uncontroverted testimony, on July 7, Smith assembled employees in the newsroom at approximately 5 p.m. and "made reference to the people we lost today, the people who were laid off today" (Tr. 106). He went through each individual by name and made reference to a contribution the person had made to the newspaper. On July 8, 2009, an article appeared in the Times Union regarding the events of July 7. The article stated, in relevant part:

The Times Union has announced the layoff of 15 full-time than 3 part-time employees, including 11 full-time employees in the newsroom. . . . The layoffs were effective immediately, although the company said members of the Albany Newspaper Guild technically were placed on paid leave as the newspaper continues ongoing negotiations with the union. . . . "Reductions in staff are never pleasant" George R. Hearst III, the Newspaper's publisher said Tuesday. "Many of the employees have served with distinction, and our very best wishes are with them as they continue with their professional and personal lives." [(GC Exh. 85.)]

At the hearing, Rahbar testified that in early July 2009, the Respondent decided to place the employees it wished to lay off on paid leave beginning on July 7. He indicated the reason is for this decision was that because of the lack of progress in the negotiations regarding the layoff issue, the Respondent thought that placing the employees it had selected for layoff on paid leave would focus the negotiations on "specific criteria, specific positions and specific individuals." (Tr. 305, 354) Rahbar also stated that an additional factor was that the negotiations were stalled in information requests and the fact that Respondent was not getting any proposals from the Union on this issue. He also indicated that this action was taken in order to "calm down" some of the "noise" that was surrounding the negotiations (Tr. 307, 357). In this connection, Rahbar noted that because of blog postings on the Union's website regarding the Respondent's layoff proposal, employees had approached supervisors with questions of whether they would be laid off. He also noted that at the time the Union was picketing the newspaper once a week in order to publicize the dispute on this issue. Rahbar

⁹ The only exception was that Wechsler reviewed a concert in August 2009, that he had planned to do before he was placed on paid leave. He was paid \$100 for his review. He performed no other work for the Respondent.

added that the employees were placed on paid leave because the Respondent's concerns about how they would react when they learned they had been proposed for layoff (Tr. 311)

Bargaining after Employees were Placed on Paid Leave

At the beginning of the July 8, 2009 meeting, Schaufenbil stated that the Respondent had taken unilateral action by laying people off without bargaining over the criteria. He said that the negotiations were a "sham" and that the technicality of placing people on paid leave was a "farce." (R. Exh. 1, Tab 43, p. 1). Schaufenbil objected to be Union's lack of notice regarding this issue. Hearst indicated that he did not think the Union would have been responsible with the information and would have likely "jump ahead of the situation." (Id. at p.3)

Batten indicated at the meeting that, with regard to statements that Smith had reportedly made in the newsroom made the day before, the employees had not been laid off but were told they were placed on paid leave because there was a potential that they could be laid off. He explained that the Respondent felt an obligation to the employees to inform them that they were on the list. The Respondent did not think that was fair to talk to the Union about the specific employees to be laid off without first notifying the employee. The Respondent's position was that when an employee was informed that they were on the potential layoff list that they should not continue to be "in the building" while the negotiations were ongoing. Batten further expressed that the Respondent intended to bargain in good faith about why these employees were selected. (Id. pgs. 2-3).

The Respondent also provided a list of the names of the nine unit employees with whom the Respondent had met on July 7, only one of which had been laid off in accordance with seniority. (GC Exh. 59) Batten indicated that none of the standards mentioned in the employee evaluations were in writing and that the standards were not bargained with the Union nor were they communicated to employees. He said that the rating sheet used to determine which employees were to be laid off was based on the manager's assessment. (Tr. 115; R. Exh. 1, Sess. 43, p. 8.)

The Respondent presented to be Union those rankings of the employees the Respondent proposed to lay off in advertising art that had been prepared by managers Hug and Scherer. (GC Exh. 60-61). Batten indicated that employee Linda Pinkans was proposed for layoff in that department but had not yet been notified. The Respondent also presented a three-page document of reviews prepared by managers for employees in the advertising department (GC Exh. 62). Hearst stated that a decision had been made to lay off Joyce Peterson and she would be informed the next day. Batten also presented the reviews conducted in June 2009 of the 81 editorial employees noted above.

In email dated July 13, 2009, the Union requested additional information, including the reviews for a three unit employees who were not included in the reviews provided at the July 8 bargaining session, and renewed its request for all "test runs"(GC Exh. 69).

In an email also dated July 13, 2009, Smith informed O'Brien

Our new newsroom management structure, which involves shifting leadership to a lower level of management, requires

the addition of new team leaders to replace senior editors who had been laid off, as well as shifting some exact managers' different exempt positions that are currently filled. While not all of these involve the Guild, some do, so I want to make sure you were aware of the change. These appointments will be effective July 27, 2009. (GC Exh. 70)

In response to the Union's email of July 13, 2009, Batten reiterated that "the standards applied in the editorial assessments were not written, or bargained with The Guild." (GC Exh. 71.) In an email dated July 20, 2009, sent to reporters, city editor Theresa Buckley announced a meeting, noting in part:

We should talk about a lot of issues now that we are reorganized following the layoffs. That includes beats, teams, night and weekend shifts, and expectations for the future. (GC Exh. 72)

The parties next bargaining session occurred on July 22, 2009. O'Brien asked the Respondent for the names of the other employees who had been placed on paid leave. Batten indicated that the additional employees placed on paid leave included Peterson, Blais, Pinkans, and Greg Montgomery. At this meeting the Respondent produced Supervisors Hallion, Hug, Shearer, and Smith so that the Union could ask them questions in order to better understand the manner in which the Respondent had identified employees for layoff. During the Union's questioning of Hug it became apparent that he had little or no contact with Joyce Peterson.¹⁰ While Smith was explaining how he had made the determination as to who he proposed for layoff based upon the evaluations, he asked the Union representatives if they had any different ideas about how layoffs should be conducted. Schaufenbil replied "seniority." (R. Exh. 1, Tab 44, p. 25; Tr. 318.) O'Brien pointed out discrepancies between the performance evaluation of employees Pinkans and Peterson and the criteria rankings for the 2 employees. Scherer indicated, as did the other managers, that they had not utilized employees' personnel records in conducting their evaluations. O'Brien asked Smith why Respondent chose to retain reporter James Allen over Wechsler, who had a higher score under the rankings. Smith responded that Allen covered high school sports and appeared on TV and radio, while Wechsler covered the outdoors and thus market factors were considered in making this determination. (Tr. 131-132) Hearst, who attended part of the negotiation session, was asked when the reviews of the employees had been performed. Hearst replied that in February 2009 he looked at the criteria and by mid-March he started to look at payroll. The managers provided names to him in early May and the list was finalized in the June 2009. The list was later modified as employees accepted buyouts. Hearst indicated that he also did not look at personnel files in reviewing the managers' decisions. He indicated that managers knew their employees and their performance well. (R. Exh. 1 Sess. 44, pp. 33-35.)

On July 30, 2009, James Magnusson, a federal mediator, was present at the bargaining session. He attended all of the remaining bargaining sessions through September 30, 2009. The record reveals that Magnusson had attended several of the bargain-

ing sessions prior to the declaration of impasse in May 2009. At the July 30, 2009 meeting the Union was informed that reporter Bryan Etkin had been informed of his proposed layoff on July 28, 2009. Smith discussed his evaluation of Etkin that resulted in his placement on the removal list. Batten asked the union representatives if they had any response to the Respondent's proposal on layoffs. O'Brien indicated that the Union had not received a proposal from the Respondent but rather had rather received information. The Respondent's representatives indicated that proposal was to lay off the individuals whose names had been provided, using the written criteria and evaluations that have been provided. When O'Brien indicated that the Union would need more specific language to take to ratification vote. Batten offered to prepare such language and asked where the Union stood on the Respondent's proposal. O'Brien indicated that the Union did not have a response to the Respondent's proposal, because it needed more information. Specifically, Schaufenbil indicated that the Union wanted to speak to Michael Spain, a senior editor, about a comment that appeared in the rankings of Maria Stoodley, one of the employees proposed for layoff, that she was occasionally abrupt with colleagues. Schaufenbil declined to tell Batten the specific questions they wanted to ask Spain. (R. Exh. 1, Tab 45, pp.7-8.)

In a letter dated August 3, 2009, Batten complained to the Union about its tactics which, in his opinion, amounted to a refusal to bargain. He asked that the Union respond to the Respondent's layoff proposal at the next bargaining session (GC Exh. 74). O'Brien replied to Batten in a letter dated August 11. O'Brien stated that receiving relevant information was a precondition to knowledgeable bargaining. He also indicated that he did not agree that the documents submitted by the Respondent, regarding the employees to be laid off, constituted a proposal (GC Exh. 75).

At the meeting held on August 13, 2009, O'Brien questioned Spain as to why Stoodley received a zero rating for abruptness. Spain said he had based his rating on reports from managers. When pressed for the Union's response to the Respondent's proposal, O'Brien stated that the Union's counterproposal on layoffs was that the Respondent should remove the June 2009 declaration of impasse, restore the employees on paid leave to work and "destroy" all the completed devaluations sheet and start over with a new proposal. (U. Exh. 1, p.176; R. Exh. 1 Tab 46, p.10.) Later in the meeting, Schick indicated that the Union believed that bargaining over the layoffs appear to be a *fait accompli* and asked what would the company be willing to consider from the Union. Batten responded by saying "we are open to talking to you about all aspects of this... If you want to suggest other criteria, or suggest that this person instead of that person should be laid off... this whole process is open to discussion. (R. Exh. 1, Sess. 46, p. 15; U Exh. 1, 178) When Batten asked why couldn't the Union give the Respondent a reaction on the criteria, Schaufenbil made reference to the Union's May 2009 proposal proposed that layoffs be done by seniority, with exceptions up to 10 percent. When Batten asked if that was the Union's present position, Schaufenbil responded that he

¹⁰ The Respondent later withdrew Hug's evaluation of Peterson.

could not give him and answer today. [U. Exh. 1, 178; R. Exh. 1, Tab, 46, p. 16.]

At the next meeting, held on August 19, 2009, the Union submitted a “Comprehensive Package Proposal” to the Respondent. This proposal modified the Union’s proposal in several respects. With respect to outsourcing, which was still unresolved at this point in the negotiations, the proposal eliminated the need for outsourced services to remain in the Albany area. With respect to layoffs, it eliminated the 10 percent cap on layoffs out of seniority. Batten indicated that the Respondent appreciated the Union’s movement, but on the two key issues that are the “stumbling blocks” (outsourcing and layoffs) the Union’s proposal did not prompt any movement in the Respondent’s position. Batten stated the prospect of having to prove special skills in arbitrations regarding layoffs was not in the Respondent’s interest. Batten indicated that the Respondent was adhering to its position with regard to layoffs and would not make a counterproposal. (U. Exh. 1, 182; R. Exh., Sess. 47, p.13.) The parties met again on August 27, without either party changing their position on the issue of layoffs.

On September 10, 2009, the Union presented a proposal limited to layoffs alone. The proposal permitted the layoffs of employees out of seniority under certain circumstances. The proposal indicated that seniority need not be followed if an employee “demonstrated a consistent failure to attain expectations in overall performance or lacks an ability to do his or her job” and that the Respondent had “documented the employees performance problems and given the employee at least three months to meet the stated goals” (GC Exh. 80) Batten indicated that he appreciated the movement but his initial reaction was that the Union’s proposal was still too restrictive to meet the Respondent’s needs. He indicated that the Respondent did not feel that any of the employees proposed for layoff would meet the criteria proposed by the Union. Batten indicated that the Respondent did not have a counterproposal to present at that time, but that the Respondent would give further consideration to the Union’s proposal. The parties agreed to hold another meeting on September 17. (R. Exh. 1 Tab 49, pp. 2–3; U. Exh. 1, 192–193.)

In a letter dated September 11, 2009, Batten informed the Union that the Respondent believed the parties were at an impasse in the layoff criteria bargaining and that it intended to implement the terms of its proposal (GC Exh. 81). In letters dated the same date, the Respondent informed 10 of the 11 employees named in the complaint that their positions were eliminated.¹¹ The letters were accompanied with a check for dismissal pay (calculated at 3 weeks pay for each year of service) and a second check for days worked during the week of July 6 to July 12, 2009 (GC Exh. 83).

At the bargaining session held on September 17, 2009, the Union expressed disagreement with the company’s position that the parties were at an impasse regarding the layoff criteria bargaining. At a meeting held on September 30, 2009, the parties did reach agreement regarding the outsourcing unit work. The parties came to an agreement that permitted the Respondent to

subcontract housekeeping work, while the Respondent withdrew its proposal to subcontract print shop work. (Tr. 190; R. Exh.1, Tab 51) There have been no negotiation sessions between the parties since September 30, 2009, and there have been no further layoffs since the layoff of the employees involved in this dispute.

Analysis and Conclusions

In the instant case, the General Counsel does not contest the fact that the parties had reached a valid impasse on June 24, 2009, when the Respondent implemented the terms of its final offer dated May 15, 2009. The General Counsel contends, however, that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) unilaterally selecting and placing on paid leave 11 employees on various dates in July 2009, and (2) permanently laying off the same employees on September 11, 2009, without first bargaining to a good-faith impasse with the Union.

Normally, when a valid impasse in collective-bargaining negotiations is reached, the employer may make unilateral changes consistent with its proposals during negotiations. *Lars dale, Inc.*, 310 NLRB 1317 (1993); *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977). However, in *McClatchy Newspapers*, 321 NLRB 1386 (1996) (*McClatchy II*), enfd. 131 F.2d. 1026 (D.C. Cir. 1997) the Board recognized an exception to the implementation upon impasse rules. In *McClatchy* the employer had insisted to impasse on, and subsequently implemented, a proposal giving it unfettered discretion regarding merit wage increases. The Board noted that wages are mandatory subject of bargaining and that generally an employer may implement a proposal on mandatory subjects after impasse is reached. The Board found, however, that the collective-bargaining process would be undermined if the employer was granted “carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild’s agreement).” 1321 NLRB at 1390–1391. The Board further found that “The Respondent’s ongoing ability to exercise its economic force setting wage increases and the Guild’s ongoing exclusion from negotiating them would not only directly impact on a key term and condition of employment and primary basis for negotiations, but it would simultaneously disparage the Guild by showing, despite its resistance to this proposal, its incapacity to act as the employees’ representative in setting terms and conditions of employment. Id. at 1391. Accordingly, the Board found that the employer is implementation of its merit a proposal, which had excluded the union from any meaningful bargaining as to the procedures and criteria governing such a plan, violated Section 8(a)(5) and (1) of the Act. In so finding the Board made clear, however, that absent success in achieving an agreement giving an employer discretion over wage increases “nothing in our decision precludes an employer from making merit wage determinations if definable objective procedures and criteria have been negotiated to agreement or impasse.” Id at 1391.

The General Counsel’s brief points out that the Board has applied *McClatchy* in finding violations of Section 8(a)(5) and (1) of the Act when an employer’s implemented proposals granted it unfettered discretion over health insurance, *KSM*

¹¹ The letter sent to Etkins is dated September 29, 2009 (GC Exh. 84).

Industries, Inc., 336 NLRB 133 (2001); driver relay points, *Mail Contractors of America*, 347 NLRB 1158 (2006), and slotting employees into various wage classifications, *Royal Motor Sales*, 329 NLRB 760, 780 (1999). The parties have not cited any cases, and my own research has disclosed none, where the Board has applied the *McClatchy* decision to layoffs. It is clear, however, that the decision to lay off employees and the effects of such a decision are mandatory subjects of bargaining. *Bob Townsend/Colerain Ford*, 351 NLRB 1079, 1083 (2007); *Alpha Associates*, 344 NLRB 782, 785 (2005); *Tri-Tech Services, Inc.*, 340 NLRB 894 (2003).

In the instant case, unlike *McClatchy* and its progeny noted above, the Respondent did not implement its final proposal of May 15, 2009, without further bargaining. As the Respondent's brief indicates "It was precisely with *McClatchy* in mind that the Times-Union modified its position in its May 15, 2009 proposal, GC Exh. 43, to provide that in the event of an impasse, it would not implement a broad discretionary layoff, but to the contrary would bargain with the Guild with over layoff criteria and selections." (R. Br., p. 38) The parties did engage in further bargaining regarding the criteria for layoffs after June 24, 2009, when the Respondent implemented its final proposal, which included the ability to lay off employees in its discretion. The issue in this case is whether the Respondent's conduct in the bargaining that occurred after June 24, 2009, until its second declaration of impasse and the implementation of its layoff proposal on September 11, 2009, complies with the obligation to bargain in good faith under the Act.

The General Counsel and the Charging Party contend that the Respondent did not bargain in good faith after June 24, 2009, and thus the parties were not at a lawful impasse when the Respondent unilaterally implemented its layoff proposal on September 11, 2009. In this connection, they contend that by initially placing the 11 employees on paid leave on July 7, 2009, which the General Counsel alleges as a separate unfair labor practice, the Union was presented with a *fait accompli*. The General Counsel and the Charging Party further contend that such conduct affected the bargaining process to the degree that precludes a finding that the parties reached a valid impasse regarding the layoff criteria. The Respondent argues that it engaged in good-faith bargaining regarding the criteria to be used for the layoffs after June 24, 2009, and that it had reached a valid impasse with the Union, before it implemented its layoff proposal on September 11, 2009. The Respondent contends that placing the employees on paid leave, prior to their layoff, was privileged under the expired contract and also did not constitute a material change in conditions of employment which required bargaining. Thus, according to the Respondent, this action had no detrimental effect on the bargaining process.

In *EAD Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1063 (2006), the Board succinctly summarized the major factors in determining whether a valid impasse has occurred as follows:

In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub. nom. Television Artists, AFTRA v. NLRB*, 395 F. 2d 622, (D.C. Cir. 1968), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects

of concluding an agreement." See also *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005). This principle was restated by the Board in *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), *enf. denied* on other grounds, 500 F.2d 181 (5th Cir. 1974, as follows:

A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. [Footnote omitted]

The burden of demonstrating the existence of impasse rests on the party claiming impasse. *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995), *enfd. in part* 86 F.3d 227 (D.C. Cir. 1996). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, *supra* at 478.

The Board has also recognized that the commission of serious, unremedied unfair labor practices precludes a finding of a valid impasse. *Royal Motor Sales*, 329 NLRB 760, 762 (1999); *Noel Corp.*, 315 NLRB 905, 911 *enf. denied* on other grounds 82 F. 3rd 1113 (D.C. Cir. 1996); *Great Southern Fire Protection*, 325 NLRB 9 (1997).

After careful consideration of the entire record, I find that the Respondent's action in unilaterally selecting for layoff, and placing on paid leave 11 employees on various dates July 2009, violated Section 8(a)(5) and (1) of the Act. I further find that the parties were not at a valid impasse regarding the bargaining over the criteria for layoffs and therefore the Respondent additionally violated Section 8(a)(5) and (1) of the Act by implementing the permanent layoff of the same 11 employees on September 11, 2009.

The Unilateral Placement of Employees on the Paid Leave in July 2009

The Respondent unilaterally placed the 11 employees who were ultimately permanently laid off on paid leave beginning on July 7, 2009, after only two bargaining sessions regarding Respondent's proposed criteria for layoffs. The parties' initial bargaining session after the Respondent's first declaration of impasse in June 2009 occurred on June 24, 2009. At this meeting, Rahbar indicated it planned to conduct layoffs and would be using criteria other than seniority in three departments, editorial, advertising, and marketing. For the first time, the Respondent gave the Union a list of identical criteria for both advertising art and the marketing media specialist position. The criteria were: (1) quality, (2) versatility, (3) skill, (4) accuracy, (5) attitude, (6) quantity, (7) creativity, (8) seniority.

Charles Hug, the art department manager, and Allison Lauenstein, the marketing manager, were present at the meeting and both indicated that each employee and their department had been reviewed and that "test runs" had been performed for each employee in their respective departments. Each employee had been given a score for each of the listed criteria from 1 to 3, and

the scores were added up. Both managers indicated that if there was a tie in the numbers, they would look to seniority as a tie breaker.

The Respondent also presented to the Union for the first time two documents that were applicable to the proposed layoffs in editorial department. One document was entitled "Proposed Criteria Editorial" and contained the following (1) seniority, (2) skills and capacity, (3) versatility, (4) adaptability/flexibility to meet changing demands, (5) job relevance, and (6) market demands. The second document consists of 18 pages and contains questions under the heading "Quantitative Performance Measure" for the various positions in its editorial department. Smith, the newspaper's editor, indicated that he and other managers had utilized both of these documents in coming up with a layoff list. When O'Brien asked if the Respondent knew how many employees it wished to lay off and the breakdown by department, Rahbar indicated that the Respondent had ideas but that "nothing is final." O'Brien indicated that Rahbar stated that the 45 day clock (the time period for bargaining referred to in Batten's May 15 final proposal) started on June 24, the date of the meeting, but that the Union's position was that 45 day period started when the Respondent gave the Union the names of employees proposed for layoff. Rahbar replied that it was impossible to give the names of employees to the Union without first agreeing on the factors to be applied. Rahbar noted that 45 days from the date of this meeting would be August 10, 2009. When Rahbar was asked if the Respondent was going to give 45 day notice to employees, he replied that the Respondent could not give notice to employees until it knew who they were. At that point, Hearst, reflecting impatience with the bargaining process, stated that the parties needed to get moving with this process in order to match it up with the Respondent's "ultimate decision-making."

In emails dated July 1, 2009, O'Brien requested information from the Respondent regarding the "test runs" for the job titles stated Respondent proposed to use criteria other than seniority. He also requested information regarding the criteria for each job title at issue and asked whether the criteria had been negotiated with the Union or had been communicated to employees. At the meeting held on July 1, 2009, Rahbar indicated that the Respondent would respond to the information requests as quickly as possible. During a discussion of the 45 day notice provision contained in the Respondent's final offer, when Union representative Shick stated that the Union did not believe that the law limited the Respondent to bargaining for only 45 days for implementing a layoff, Rahbar stated that he disagreed with that position.

In early July 2009, the Respondent decided to place the employees it wished to lay off on paid leave beginning on July 7. Although pressed repeatedly at the hearing as to when he became aware of the names of the employees to be placed on paid leave, Rahbar testified he could not be more specific as to the date this decision was made. It is undisputed, however, that the Union was not notified the names of employees who the Respondent proposed to layoff under its criteria, before the Respondent began to notify the employees on July 6, 2009.

The Respondent's decision was based on the application of the criteria to unit employees in so-called "test runs" in June

2009. These criteria had not been the subject of bargaining with the Union before they were applied. While Rahbar had indicated to the Union on June 24, 2009, that was impossible to give it the names of employees proposed for layoff until the parties had agreed to the criteria, by early July the Respondent determined it could unilaterally or see to inform unit employees of their proposed layoff and placed them on paid leave.

A reason advanced by Rahbar for decision was that the Respondent's representatives perceived a lack of progress in negotiations regarding the layoff issue, and believed that placing the employees they were proposing for layoff on paid leave would focus the negotiations on "specific criteria, specific positions and specific individuals." In this connection, the Respondent's representatives viewed the negotiations as "stalled in information requests" and were distressed that Union had not given them a proposal on the issue of layoffs. He also indicated that the Respondent's action was taken to "calm the atmosphere" surrounding the negotiations. In this regard, Rahbar pointed to the fact that employees were asking questions of supervisors regarding whether they would be laid off pursuant to the Respondent's proposal and that Union was picketing the Respondent in order to publicize its dispute on this issue. In further explaining his reference to calming the atmosphere, Rahbar testified on cross-examination:

I know that may be a difficult concept to understand because ultimately you are telling a number of people that their jobs may no longer exist. But you're also telling a far greater number of people that they are not subject to this right now, save whatever sort of negotiations happened with the Guild [Tr. 358].

He indicated the vehicle of paid leave was chosen because of the Respondent's "concerns" about how the employees would react when they learned they had been proposed for layoff. There is no evidence that the Respondent had ever placed employees on paid leave for any reason prior to this occasion.

When Hearst met with O'Brien on July 7, Hearst confirmed that the employees being placed on paid leave were those targeted for elimination and that such action served as the 45 day notice to employees that they would be laid off. The only explanation given by Hearst for placing employees on paid leave was to "get them out of the operation."

At the bargaining meeting held on July 8, when Schaufenbil objected to the Union's lack of notice regarding individuals who were laid off, Hearst indicated he did not think that the Union would have been responsible with the information. At this meeting, Batten attempted to minimize the effect of statements made on July 7 by Smith regarding employees in the editorial Department being laid off, by explaining that the employees were told they were being placed on paid leave because there was a "potential" that they could be laid off. Batten stated that the Respondent felt an obligation to the employees to inform them that they were on the proposed layoff list. He further indicated that the Respondent did not think it was fair to talk to the Union about specific employees to be laid off without first informing the employee.

At the hearing, O'Brien explained the difficulty caused for the Union by virtue of the Respondent's unilateral action by

placing on paid leave the employees it was proposing for layoff. He testified that some unit employees felt that since they were not on the list, they had “ducked the bullet, now the Union is going in and talking criteria. If that criteria changes, suddenly I might be at risk when I’m not on this layoff list.” (Tr. 152.)

The first issue to be addressed is whether the placement of employees proposed for layoff on paid leave is a mandatory subject of bargaining over which the Respondent was obligated to give the Union notice and an opportunity to bargain.

Generally, an employer is precluded from changing wages, hours, or terms and conditions of employment without giving the employees’ bargaining representative notice and a meaningful opportunity to bargain about the proposed change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Board has held that a change in assignment that is “material, substantial and significant” is a mandatory subject of bargaining. *Millard Processing Services*, 310 NLRB 421, 425 (1993); *Engineered Controlled Systems, Inc.*, 274 NLRB 1308, 1313–1314 (1985). *California Edison Co.*, 284 NLRB 1205 (1987), is instructive regarding what constitutes a “material, substantial and significant” change in conditions of employment. In that case, the Board found that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a temporary or assignment policy for injured employees. The temporary work assignment departed from past practice in that it provided that disabled employees were to be assigned appropriate temporary work without regard to classification and would be ineligible for benefits and subject to discipline if they refused such an assignment. The existing contractual disability plan provided that employees unable to perform their regular work were eligible for disability benefits. The Board determined that the temporary work assignment policy was a “material, substantial and significant” change in working conditions and was therefore a mandatory subject of bargaining. In so finding the Board stated “A change is measured by the extent to which it departs from the existing terms and conditions affecting employees.” *Id.* at fn. 1.

In the instant case, the conditions of employment with the employees proposed for layoff placed on paid leave were substantially different than they were before. While these employees continued to receive their salary and benefits, they were notified that their positions were “tentatively selected for elimination,” and were asked to clean out their desks and go home. From the day that they were notified of their proposed selection for layoff, they received no work assignments. Their security passes for entrance into the building were disabled, and they were denied access to email accounts, voicemail, and internal mailboxes. In addition they were given information regarding their pension benefits and the application process for unemployment benefits. The change in conditions of employment for the employees proposed for layoff and placed on paid leave was material, substantial, and significant when viewed under the standard enunciated in *California Edison*. Previously, they were engaged in full-time work for the newspaper, but after being targeted for layoff and placed on leave, they were not given any work assignments and were, in fact, severed from all aspects of employment relationship, except for their salary and benefits.

I find *Alamo Cement Co.*, 277 NLRB 1031 (1985), relied on by the Respondent, to be distinguishable. In that case, the Board found that the employer’s change of the classification of an employee from a mixed chemist to an assistant chief chemist was not a material, substantial, and significant change. In that case the employee’s duties were essentially identical after the change, except for sporadically substituting for the chief chemist, rendering some assistance with a monthly report and a slight increase in his hourly wage. In the instant case the changes in conditions of employment where the employees placed on paid leave were material, substantial, and significant. The only thing that was unchanged for the employees proposed for layoff and placed on paid leave was that they continue to receive their wages and benefits. While this is obviously an important condition of employment, standing alone, I find that it is an insufficient basis to privilege the Respondent’s unilateral action. I do not agree with the Respondent that no employee “was materially disadvantaged by, in essence being asked to take to fully paid vacation for several weeks.” (Respondent’s brief, p. 34.) In my view, being told your position will be eliminated unless later bargaining reverses the decision, and having all normal working contact with your employer cease, is not the equivalent of a paid vacation.

I also do not agree with the Respondent that Section 9 of the parties expired contract gave it the right to place employees on paid leave under the circumstances of this case. The Respondent argues that Section 9. B. gives it the prerogative to make temporary transfers without the employee’s consent and that temporary transfers do not require notice to the Union. The rights of the Respondent under Section 9. B. include the following limiting language:

The term “temporary transfer” as used in this article includes only: (a) any transfer not exceeding three (3) months duration; (b) a transfer induced by illness absence, disability absence, assess on leave or vacation absence of another employee, and (c) transfer induced by any personnel shortage.

Without prejudice to the Company’s prerogative to transfer any employees from one position, classification or territory to another, the Company agrees that such transfer shall not be used to effect discipline or dismissals.

Clearly, placing the employees proposed for layoff on paid leave is not a “temporary transfer” as defined in Section 9. B. In addition, the Respondent’s action was, in fact, the first step in effecting the dismissal of the employees placed on paid leave. Moreover, it is clear that a contractual reservation of management rights, such as that expressed in Section 9. B., does not extend beyond the expiration of the contract, absent evidence of a contrary intention by the parties. *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005); *Ironton Publications, Inc.*, 321 NLRB 1048 (1996). There is no evidence to indicate that the Union acquiesced in the management rights expressed in Section 9. B. as surviving the expiration of the contract.

In determining whether the Respondent violated Section 8(a)(5) and (1) of the Act by placing the employees it was proposing for layoff on paid leave, I have considered this conduct in the context of the bargaining over the criteria for the layoffs

that parties were in the midst of. In this connection, the parties had their first bargaining meeting regarding the layoff criteria on June 24, 2009. At this meeting the Respondent presented, for the first time, the criteria it proposed for laying off employees out of seniority. When asked how many employees the Respondent wished to lay off and in what departments, Rahbar said that the Respondent had some ideas that that nothing was final as “we need to go through this process” with you. On July 1, the Union, attempting to more completely understand Respondent’s proposal, requested information regarding the criteria in the three departments that the Respondent had identified as being subject to out of seniority in layoffs, and the “test runs” in which the Respondent had applied that criteria. At the meeting held on July 1, Rahbar indicated that the Respondent would comply with the information requested as soon as possible. However, before the Union even received the requested information, on July 6 and 7, 2009, the Respondent notified 9 employees that they were being placed on paid leave because he Respondent had “tentatively selected their position for layoff,” subject to further bargaining with the Union.¹²

In my view, the sudden change in the Respondent’s position is indicative of its desire to effectuate layoffs as soon as possible regardless of the state of negotiations. In this regard, at the meeting held on February 26, 2009, the Respondent’s representatives informed the Union that layoffs would be made at the newspaper, that this issue had the highest priority and that there was a sense of urgency about it. On March 10, 2009, Hearst informed the Union that by no later than the third quarter of 2009, possibly 20 percent of the bargaining unit could be eliminated. To that end, the Respondent had begun to develop criteria to select employees for layoffs out of seniority in late February and early March 2009. At the July 22, 2009 bargaining meeting, Hearst told the Union that managers had given him the names of employees proposed for layoff in early May 2009. Applying the criteria it had developed, the Respondent had finalized the names of employees it wished to lay off in June 2009.

It is clear that the Respondent had devoted a substantial amount of time over the course of several months to develop criteria to lay off employees and the manner in which to apply the criteria. After only two meetings with the Union to bargain about the criteria, the Respondent applied unilaterally develop criteria to identify employees to be laid off, placed them on paid leave and severed all aspects of their employment relationship except for paying their salary and benefits. The Respondent’s precipitous action in applying its proposed criteria to unit employees appears to be based on its representatives’ view of the 45-day notice provisions of Section 3. C. of its May 16, 2009 implemented proposal.¹³ As noted above, Section 3. C. provides that the 45-day notice be given to the Union of reductions in staff and provides that “in lieu of such notice to the employee forty five (45) days pay shall be given.” Section 3. D. of the Respondent’s May 16, 2009 implemented proposal states

¹² The 3 other employees who are named in the complaint were placed on paid leave on later dates in July 2009.

¹³ The Respondent’s final proposal did not reflect any change in Sec. 3. C. of the parties expired agreement (GC Exh. 37).

that “The Company would bargain with the Union during the 45-day notice period concerning the layoffs that will involve reductions out of seniority order under the Company’s proposed Article 3. D.” At the bargaining meeting held on June 24, 2009, Rahbar advised the Union that the 45-day notice period for bargaining started on that day. When O’Brien asked if the Respondent was going to give 45-day notice to employees, Rahbar replied that the Respondent could not give notice to the employees until it knew what they were. He added, however, “They will all be within the 45 days. There will not be an additional 45 days.” At this meeting, Hearst also chided the union that the process needed to get moving and match up with “our ultimate decision-making process.”¹⁴

At a meeting held on July 1, 2009, Rahbar indicated that he believed that there were “two 45 day clocks.” In his view, 3. D. involves a 45 day notice period to the Union that had started on June 24. He further indicated that 3. C. involves 45 day notice to the employees and that the Respondent would provide such notice. Consistent with Rahbar’s statement, when the Respondent began to notify employees on July 6 that “their position was tentatively selected for layoff” they were informed that they would remain on the payroll for 45 work days and were further informed of the amount of dismissal pay they would receive if they were “selected for layoff by the end of the 45 day period.” In my view, the Respondent’s representatives determined in early July 2009, that to comply with what they believed was required under Section 3. C. and still meet their stated goal of completing layoffs by the end of the 3rd quarter of 2009, the employees proposed for layoff had to be notified immediately. However, by informing employees of their proposed layoff and removing them from active employment, without giving notice and an opportunity to bargain to the Union over this issue, the Respondent ran afoul of its bargaining obligations under the Act. Accordingly, I find that the Respondent’s unlawful conduct in unilaterally placing on paid leave the employees it proposed for layoff, adversely impacted the bargaining over the layoff criteria. Accordingly, after considering all of the circumstances, I find that Respondent violated Section 8(a)(5) and (1) of the Act by placing employees on paid leave, who it was proposing for layoff, without giving notice to the Union or an opportunity to bargain.

The Layoff of Employees on September 11, 2009

I next consider the effect of this unlawful conduct in determining whether the Respondent violated Section 8(a)(5) and (1) of the Act by laying off the same 11 employees in September 2009, without reaching a valid impasse. As noted above, the General Counsel and Charging Party contend that by placing these employees on paid leave, the Union was presented with a fait accompli that serves to preclude a finding of a valid impasse. The Respondent contends that identifying the employees it proposed to lay off and placing them on paid leave had no adverse effect on the bargaining process. The Respondent argues that it identified the employees it proposed to lay off to

¹⁴ At the March 30, 2009 meeting, Hearst and indicated that the Respondent needed to achieve a 20 percent reduction in operating costs by the end of the 3rd quarter of 2009 and that perhaps 20 percent of the bargaining unit would be eliminated.

make the specifics of its proposal more concrete. Finally, it contends that after this action, all the criteria “remained on the table to be negotiated.” (R. Br. p. 32.)

Although the Respondent took pains in attempt to ensure that employees placed on paid leave in July 2009 were informed that they were “tentatively selected for layoff” there is evidence that suggests that the employees placed on leave would not be coming back. In this regard, Smith made a passing reference on July 7 the employees who were “laid off” in the news room and spoke about the accomplishments of the affected employees. The July 8 and article in the Times Union regarding the events of July 7 stated:

The Times Union has announced the layoff of 15 full-time and 3 part-time employees, including 11 full-time employees in the news room. . . . The layoffs were effective immediately, although the company said members of the Albany Newspaper Guild technically were placed on paid leave as the newspaper continues ongoing negotiations with the union.

The article also quoted publisher Hearst as stating “Many of the employees have served with distinction, and our very best wishes are with them as they continued their professional and personal lives.”

In addition, an email sent to reporters dated July 26, 2009, by city editor Theresa Buckley scheduled a meeting to discuss issues arising from the reorganization following the “layoffs.” While not dispositive, these comments are indicative of a certain finality that appeared to be associated with the status of the employees placed on leave.

More important was the effect on the bargaining process by the Respondent’s utilization of its unilaterally developed criteria, early in the bargaining process regarding layoff criteria, to place employees on paid leave and remove them from all other working contract with other bargaining unit members.

The Respondent spent 4 months developing and applying the criteria for determining how it would conduct out of seniority layoffs. After only two bargaining meetings, the Respondent applied the criteria to unilaterally select the employees it wished to lay off and removed them from active employment. This action, in my view, seriously disadvantaged the Union’s position in effectively bargaining regarding the criteria to be employed for out of seniority layoffs. The Board has long held that an employer must give notice of a change in conditions of employment sufficiently in advance of actual implementation to allow a reasonable opportunity to bargain. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982). In that case, an employer had extensively studied instituting a new attendance policy for several months. It announced the policy to employees without giving prior notice and an opportunity to bargain to the union. Under these circumstances, the Board found that the union was presented with a *fait accompli* and found a violation of Section 8(a)(5) and (1) of the Act.

In *Bob Townsend/Colerain Ford*, 351 NLRB 1079, 1082 (2007), the Board recognized that the failure to bargain over layoff decisions causes damage to the union’s status as the bargaining representative. In *UAW-Daimler Chrysler National Training Center*, 343 NLRB 431 (2004) the Board found that the employer violated Section 8(a)(5) and (1) by presenting the

union with a *fait accompli* regarding the layoff of an employee. In so finding, the Board noted that “An employer must at least inform the union of its proposed actions under circumstances that afford a reasonable opportunity for counterarguments or proposals.” *Id.* at 433.

In the instant case, while the Respondent bargained over the layoffs it desired to make, it did not bargain over the decision to place employees on paid leave, and this action had an integral impact on the bargaining regarding the layoff criteria. In deciding this issue, I find persuasive the analysis contained in the Board’s decision in *Champion International Corp.*, 339 NLRB 672, 687 (2003), quoting *NLRB v. Roll & Hold Warehouse & Distribution Corp.*, 162 F.3d 513 (7th Cir. 1998), *enfg.* 325 NLRB 41 (1997). In enforcing the Board’s decision that employer unilaterally implemented an attendance policy in violation of Section 8(a)(5) and (1) of the Act, the court noted at pages 519–520:

One of the purposes of early notification is to allow a union the opportunity to discuss a new policy with unit employees so that it can determine whether to support, oppose, or modify the proposed change. When an employer first presents a policy to its employees without going through the Union, the Union’s role as the exclusive bargaining agent of the employees is undermined. See *Inland Tugs v. NLRB*, 918 F.2d 1299, (7th Cir. 1990). Under these circumstances it is more difficult for the Union to present a united front during negotiations. See *Friederich Truck Service*, 259 NLRB 1294, 1299 (1982).

In the instant case, O’Brien’s testimony established the divisive effect on the unit that emanated from the Respondent’s unilateral action of placing on paid leave the employees it wished to lay off out of seniority. In this regard, O’Brien testified that the employees who were not proposed for layoff by the Respondent and placed on paid leave were concerned that further bargaining over the criteria applied by the Respondent could result in their layoff. Rahbar’s testimony regarding the Respondent’s action as an attempt to calm the atmosphere confirms that the Respondent intended this action to serve as a message to the employees who were not proposed for the layoff that their jobs were safe, unless further negotiations with the union resulted in their inclusion on the layoff list.

By placing the employees on paid leave and removing them from the unit, the Union was disadvantaged by having to bargain about the status of employees who no longer actively worked for the Respondent. In *Metropolitan Teletronics*, 279 NLRB 957 (1986), *enfd. mem.* 819. F.2d 1130 (2d Cir. 1987), the Board found that an employer failed to give timely notice of its decision to close and relocate its operations. After closing its facility the employer offered to bargain about the effects of its decision to close the facility and relocate its operations. In finding that the employer violated Section 8(a)(5) and (1) of the Act, the Board noted that the Union “suffered a disadvantage to its bargaining position by being denied an opportunity to bargain at a time when it still represented employees upon whom the Company relied for services.” 279 NLRB at 959. See also *Komatsu America Corp.*, 342 NLRB 649 (2004).

I do not agree with the Respondent’s contention that its action in unilaterally placing the employees it selected for layoff

on paid leave had no impact on the ongoing bargaining regarding layoff criteria. As the Respondent correctly notes, it continued to negotiate with the Union regarding its proposed criteria for layoff until September 11, 2009, when it declared an impasse. However, in my view, those negotiations were tainted by the Respondent's unilateral action in using its proposed criteria to place the employees it sought to layoff on paid leave and remove them from active employment. Rather than the benign effect ascribed to it by the Respondent, this action did present a Union with a *fait accompli*. From July 7, 2009, onward the Union was bargaining with the Respondent about layoff criteria that the Respondent had already applied to unit employees.

Applying the factors summarized in *EAD Motors Eastern Air Devices*, supra, I conclude that a valid impasse was not reached between the parties in this case on September 11, 2009, and consequently the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its final proposal and laid off the 11 employees who had been on paid leave. As EAD notes, the burden of demonstrating the existence of an impasse rests on the party claiming it. I find that the Respondent has not met his burden in this case. In the first instance, as noted above, the unlawful unilateral change of placing the employees it was proposing for layoff on paid leave establishes a lack of good faith on the part of the Respondent. As noted above, the Board has held that "finding of impasse is foreclosed if that outcome is reached in the context of serious unremedied unfair labor practices that affect the negotiations." *Royal Motor Sales*, 329 NLRB 760, 762 (1999), and cases cited therein. For the reasons expressed above, I find that the unfair labor practice of unilaterally placing its designees for layoff on paid leave during the midst of bargaining over the criteria for layoff did indeed have a detrimental effect on those negotiations.

Another factor that I have considered is that although the Respondent sought substantial changes in the existing contract with regard to layoffs, it established an arbitrary deadline by indicating that it needed to reduce costs, primarily labor costs, by the end of the third quarter of 2009. In this regard, on March 10, 2009, Hearst first indicated that an overall reduction of 20 percent in operating costs had to be achieved by no later than the end of the third quarter and that could involve eliminating 20 percent of the unit. This deadline was formalized by the Respondent's final proposal of May 6, 2009, which indicated that the Respondent would bargain with the Union "during the 45-day period concerning the layoffs that will involve reductions out of seniority order under the Company's proposed Article 3. D." On June 24, 2009, at the first bargaining session regarding the layoff criteria, Hearst indicated the parties needed to get moving with the process so that it would "match up" with the Respondent's "ultimate decision making." On July 1, when Union representative Schick stated that he did not believe that the Respondent could legally limit bargaining to 45 days, Rahbar disagreed with the Union's position.

I find the imposition of such a time period to finalize negotiations to be arbitrary because there is no evidence in this record establish that the Respondent had the type of economic justification that would privilege at the time limits on bargaining.

The only evidence contained in the record on this issue is generalized testimony by Rahbar regarding the difficult state of the newspaper industry and that the Respondent had suffered a decline in revenues and readers. There is no evidence of the showing of the type of compelling economic necessity that would establish legitimacy in designating a certain period of time for bargaining on the issue of layoffs. See *RBE Electronics*, 320 NLRB 80, 81-82 (1995). Rather, I find the establishment of a time period for layoff criteria bargaining is akin to the deadlines established by the employers in *Newcor Bay City Division*, 345 NLRB 1229 (2005). In *Newcor* the employer set an artificial and relatively short deadline for concluding a new agreement and then declared an impasse when that deadline could not be met. I recognize that, in the instant case, the Respondent continued to negotiate for approximately a month beyond the 45-day period announced at the June 24, 2009 bargaining meeting. I find, however, that containing such a deadline in its final offer of May 16, 2009, and reiterating that deadline at the first bargaining meeting regarding layoff criteria, suggests that the Respondent was establishing a finite time for negotiations regardless of the progress being made. I also note that the Respondent declared an impasse regarding layoff criteria bargaining on September 11, 2009. This was shortly after the expiration of the 45 day notice period for layoffs contained in Section 3. C. as it was applied to the last employee selected for layoff, Brian Ettkins, who was placed on paid leave on July 27, 2009. I find that these factors support the conclusion that the Respondent intended to either have an agreement with the Union or proceed to make layoffs unilaterally in order to comply self imposed deadline of effectuating layoffs by the end of the third quarter (or September) 2009.

The Respondent contends that the bargaining regarding layoffs and outsourcing that began on June 24, 2009, was an extension of the bargaining for new agreement that began in June 2008 and continued until the first declaration of impasse in June 2009. There were 40 bargaining sessions from the beginning of negotiations in June 2008 until May 13, 2009. After the Respondent's first declaration of impasse on May 18, 2009, there were 8 bargaining sessions involving the criteria for layoffs beginning on June 24, 2009, and ending on September 10, 2009. The Respondent declared an impasse regarding the layoff bargaining on September 11, 2009. The Respondent argues that throughout the entire period of bargaining the Union maintained that seniority must be the overriding criterion for layoff selection while the Respondent consistently stated it needed discretion in conducting layoffs. The Respondent contends that by September 10, 2009, neither party had moved from its position and that further bargaining was futile and a lawful impasse had been reached.

I agree with Respondent's contention that the entire bargaining history must be considered in reaching a decision in this case. The 40 bargaining sessions between the parties from June 2008, to May 13, 2009, resulted in tentative agreements in many areas. However, the parties were still apart on layoffs and outsourcing, and a valid impasse was reached. Of necessity, the primary focus of this decision is on the bargaining regarding the layoff criteria that began on June 24, 2009, and ended on September 11, 2009, with the Respondent's second

declaration of an impasse. Briefly, at the first meeting on June 24, 2009, the Respondent presented to the Union criteria it proposed to be used for layoffs in 3 departments. This was, of course, the first that the Union learned of the criteria that the Respondent had begun to develop in February 2009 and had actually apply to unit employees in June 2009 in "test runs" it used to rank employees in order to determine who it wished to layoff. Understandably, the Union asked for relevant information regarding the criteria and the "test runs" prior to the July 1 meeting. Because the Union was still attempting to understand the criteria and how the Respondent had applied it, the Union did not make a counterproposal at this meeting.

The July 8 meeting was held immediately after the Respondent had placed nine unit employees on paid leave on July 6 and 7 and informed them they were tentatively selected for layoff, subject to further bargaining with the Union. A substantial part of this meeting was devoted to the Union's objection to that action and the Respondent's defense and the parties also discussed the outsourcing issue. At the meeting of July 22, the Respondent willingly provided several managers so that the Union could ask them questions in order to better understand the criteria and how it had been employed in ranking employees for layoff. At the meeting held on July 30, Batten asked the union had a counterproposal. O'Brien responded that the Union did not have a proposal and sought more information.

At the meeting held on August 13 O'Brien stated that the Union's position on layoffs was that the Respondent should remove the June 2009 declaration of impasse, restore the employees on paid leave to work, and "destroy" all the completed evaluation sheets and start over with a new proposal. At this meeting, Schick indicated that the Union believed bargaining over the layoffs appear to be a fait accompli. Batten indicated that the Respondent was open to talking about all aspects of its proposal with the Union. When Batten asked why the Union couldn't give the Respondent a reaction to the criteria, Schaufenbil made reference to the Union's May 2009 proposal that layoffs be done in order of seniority with exceptions up to ten percent of the unit. When Batten pressed him on whether that was the Union's proposal, Schaufenbil responded he did not have an answer.

At the meeting held on August 19, the Union submitted a "Comprehensive Package Proposal" in an attempt to reach an overall settlement on a contract. This proposal included provisions regarding both major disputed issues, layoffs, and outsourcing. With respect to layoffs, the union proposal eliminated the 10 percent cap on layoffs out of seniority if the Respondent could demonstrate that the employees retained had necessary skills. Batten indicated that the Respondent appreciated the Union's movement but that having to prove special skills in arbitration hearings was not in the Respondent's interest. The parties met again on August 27, but there was no movement from either party.

On September 10, they Union presented a proposal limited to the layoff issue alone. Its proposal permitted the layoff of employees out of seniority under certain circumstances. The proposal indicated that seniority need not be followed if an employee "demonstrated a consistent failure to obtain expectations in overall performance or lacks an ability necessary to do his or

her job." In addition, the proposal required that they Respondent had "documented the employee's performance problems and given the employees at least 3 months to meet the stated goals." Batten indicated that the Respondent's initial reaction was that proposal did not accomplish what it needs, although he appreciated the movement. He stated that the Respondent would give further consideration as to the Union's proposal and the parties agreed to another meeting on September 17, 2009. In a letter dated September 11, 2009, the Respondent informed the Union that the Respondent believed the parties were at an impasse on the layoff criteria bargaining and that it intended to implement the terms of its proposal. It is so in letters dated September 11, 2009, to the affected employees informing them that they were laid off.

A review of the bargaining over layoff criteria reveals that, even though the Union correctly believed that the Respondent had presented it with a fait accompli on July 6 and 7, 2009, when the Respondent began to advise employees that they were tentatively selected for layoff and placed them on paid leave, the Union ultimately made proposals which reflected movement in its position in an attempt to reach an agreement with the Respondent. First, on August 19, the union made a comprehensive proposal in an attempt to resolve all remaining issues that were precluding an agreement. After the Respondent rejected that proposal, on September 10, they Union made a proposal on layoffs alone that the Respondents' representatives viewed as "movement" in the Union's position. At this meeting, Batten also indicated that Respondent would determine whether a counterproposal was possible and other bargaining session was scheduled. At this juncture, even though the Respondent had presented the Union with a fait accompli regarding the issue of layoffs, the Union was exhibiting signs of addressing the Respondents stated need for flexibility in conducting layoffs. The next day, however, the Respondent declared an impasse regarding the bargaining on layoffs. Under the circumstances, the ultimate movement in the Union's position is another factor I have considered in determining that the Respondent has not established that the parties were at a valid impasse when implemented its proposal on layoffs. See *Newcor Bay City Division*, 345 NLRB 1229, at 1238-1239 (2005). The record convinces me that, rather than exploring whether the Union's change in position could serve as a basis to move the parties closer to an agreement on this issue, the Respondent declared impasse on September 11, 2009, because of its determination that layoffs were to be conducted by the end of that month regardless of the state of negotiations. On the basis of all the foregoing, I conclude that the parties had not reached a valid impasse on September 11, 2009, and accordingly the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally laid off 11 employees on that date.

CONCLUSIONS OF LAW

1. The Newspaper Guild of Albany, TNG-CWA Local 31034 is, and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

All employees referred to in Article 1 ("Agreement Coverage and Exemptions") of the collective-bargaining agreement in effect from August 1, 2004 to August 1, 2008.

2. By placing unit employees it proposed for layoff on paid leave without providing the Union with timely notice and an opportunity to bargain, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By unilaterally imposing the terms of its final offer of September 11, 2009, and thereafter laying off 11 unit employees, in the absence of a lawful impasse, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of 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.

Since the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees without reaching a lawful impasse, the respondent must offer Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights. The Respondent shall also make whole these employees for any loss of earnings and other benefits they may have suffered by reason of its unilateral action. Backpay shall be computed in a manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) provided that such amounts shall be offset by the amounts of the severance payments that these employees received, to the extent that such backpay amounts exceed the severance payments. *Sheller-Globe Corp.*, 296 NLRB 116 (1989), and *J.R.R. Realty Co.*, 273 NLRB 1523 (1985), *enfd.* 785 F.2d 46 (2d Cir. 1986).

I deny the General Counsel's request for compound interest computed on a quarterly basis for any backpay. The Board has indicated that it is not repaired to deviate from its current practice of assessing simple interest. *Rogers Corp.*, 344 NLRB 504 (2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Times Union, Capital Newspapers Division of the Hearst Corporation, Colonie, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Placing unit employees proposed for layoff on paid leave without providing the Union with timely notice and an opportunity to bargain.

(b) Unilaterally laying off employees in the bargaining unit without first bargaining to a lawful impasse with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union, as the exclusive bargaining representative, over the decision to place bargaining unit members, proposed for layoff, on paid leave. The appropriate unit is:

All employees referred to in Article 1 ("Agreement Coverage and Exemptions") of the collective-bargaining agreement in effect from August 1, 2004, to August 1, 2008.

(b) On request, bargain in good faith with the Union, as the exclusive bargaining representative, regarding the decision to lay off Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin, who were laid off on September 11, 2009.

(c) Within 14 days from the date of the Board's Order, offer Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin 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 or privileges previously enjoyed.

(d) Make Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin whole for any loss of earnings and other benefits suffered as a result of the unilateral action against them, in the manner set forth in the remedy section of the decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, 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 facility in Colonie, New York, the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 3 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

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁶ 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."

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 and former employees employed by the Respondent at any time since July 6, 2009.

(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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT place unit employees proposed for layoff on paid leave without providing the Union timely notice and an opportunity to bargain.

WE WILL NOT unilaterally lay off employees in the bargaining unit without first bargaining to a lawful impasse with the Union.

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

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative over the decision to place bargaining unit members, proposed for layoff, on paid leave. The appropriate unit is:

All employees referred to in Article 1 ("Agreement Coverage and Exemptions") of the collective-bargaining agreement in effect from August 1, 2004, to August 1, 2008.

WE WILL, on request, bargain in good faith with the Union, as the exclusive bargaining representative over the decision to layoff Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin on September 11, 2009.

WE WILL, within 14 days from the date of this Order, offer employees Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin immediate and 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 or privileges previously enjoyed.

WE WILL make Alan Abair, William Blais, David Filkins, Greg Montgomery, Joyce Peterson, John Piekarski, Robert Shea, Alan Wechsler, Maria Stoodley, Linda Pinkans, and Brian Etkin whole for any loss of earnings and other benefits suffered as a result of our unlawful action against them, less any net interim earnings and severance payments, with interest.

TIMES UNION, CAPITAL NEWSPAPERS DIVISION OF THE
HEARST CORP.