

**Lawrence Livermore National Security, LLC and Society of Professionals, Scientists, and Engineers Local 11–University Professional and Technical Employees (UPTE), Communications Workers of America (CWA) Local 9119, AFL–CIO.** Case 32–CA–023902

July 28, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On November 9, 2009, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Union filed exceptions and a supporting brief, and the Respondent filed an answering 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, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge ruled that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it laid off nine employees represented by the Union on May 19, 2008. The judge concluded that the parties were not yet engaged in negotiations for a collective-bargaining agreement at the time of the layoff, and that the Respondent accordingly did not have to bargain to an agreement or good-faith impasse before implementing the layoffs. Contrary to the judge, we find that the parties were in fact engaged in contract negotiations at the time of the layoff. Therefore, we reverse.

Lawrence Livermore Laboratory (the Laboratory) is a multiprogram national security facility owned by the Federal Government, and operated by the Respondent as the government’s contractor. From the time it was established in 1952 until October 1, 2007, it was operated and managed by the University of California. In September 2007, the Laboratory advised its employees that in 2008 there would be work force restructuring due to increased costs and reduced funding by the Department of Energy.

On September 26, 2007, pursuant to a card check, the California Public Relations Board certified the Union as the collective-bargaining representative of the Laboratory’s skilled crafts employees.<sup>1</sup> Six days later, on October

1, the Respondent became the successor employer of the unit employees and, on October 7, the Union requested recognition based on the state certification. The Respondent declined on the ground that the Union’s certification was not based on a secret-ballot election, and because there had been no hearing on the appropriateness of the unit. In response, the Union filed unfair labor practice charges with the Board.

Between October 1, 2007, and May 26, 2008,<sup>2</sup> the Respondent implemented a three-phase reduction in force (RIF), including both voluntary and involuntary layoffs. During the first phase, in January, the Respondent laid off 19 unit employees without bargaining with the Union. The Union responded with additional unfair labor practice charges.

On February 28, the Respondent and the Union entered into a non-Board settlement agreement resolving the charges. The Respondent agreed to recognize and bargain with the Union for an initial contract and to bargain about the effects of the January layoffs. The Respondent also agreed to bargain about both the decision and effects of any future layoffs.

The parties first met to negotiate on March 4. At that meeting, the Union presented a letter from Union Chief Negotiator James Wolford to Respondent Chief Negotiator Robert Perko requesting information needed to formulate wage, benefit and other contract proposals, as well as information concerning plans and projections for future layoffs. At the Union’s suggestion, the parties agreed to bargain over the effects of the January layoffs before turning to the initial contract terms. Wolford testified that the Union wanted to address the layoffs first because of the “immediate harm to the 19 bargaining unit employees who were laid off in January,” to strengthen its image with employees who would be asked to ratify a contract, and to gain negotiating experience.

Between March 4 and April 24, the Union made several additional requests for information relating to effects of the January layoff. Several times during the course of bargaining, the Union, anticipating future layoffs, asked the Respondent to provide it with the names of and pertinent information about all unit employees designated for layoffs. Perko replied that reducing the work force was a complex process and that the Respondent had no specific information to give. Meanwhile, the Respondent continued with its RIF plan. In a March 21 letter to the employees, the Respondent stated that voluntary separations had fallen short of the Respondent’s goal and that the

<sup>1</sup> The unit, which consisted of about 140 employees, is defined as:

All full-time and regular part-time skilled crafts employees, including: air conditioning, mechanics, boiler & pressure systems workers, carpenters, electricians, heavy equipment mechanics, locksmiths, maintenance mechanics, painters, plumbers/fitters, riggers, sheet metal workers, trades helpers, and welders; excluding Laborer I, Laborer II, Machinists classifications, all other 900 Series classifications, all other

classifications, including all management, supervisory and confidential employees.

<sup>2</sup> All dates hereafter are in 2008, unless otherwise indicated.

Respondent was investigating the possibility of another involuntary layoff.<sup>3</sup>

On April 24, Perko wrote Wolford announcing the need to lay off 10 to 15 more unit employees, “strictly in accordance with the inverse order of seniority.” The letter further provided that the laid-off employees would receive at least 30 calendar days’ notice of layoff or pay in lieu of notice; the layoff notices would be issued the week of May 19; and any preferential transfers and recalls would be according to the Respondent’s policies. Perko offered to meet to discuss the anticipated staff reduction and stated that the Respondent would consider “any suggestions or concerns you wish to express or propose.”

During this period of ongoing negotiations, both sides made proposals addressing, among other things, health and safety issues, relevant to both the effects of the January layoffs and initial contract bargaining. No agreement was reached. Wolford argued that the reduction in the unit created an unsafe environment for the remaining unit employees and for the general work force, including an increase in the likelihood of exposure to hazards. In a May 1 letter to Perko, Wolford urged the Respondent to cancel the additional layoffs and agree to bargain about the health and safety effects of the layoffs that had already occurred.

In a May 6 petition, 73 unit employees repeated Wolford’s safety concerns and urged the Respondent to cancel the extra layoffs and bargain over the health and safety effects of the January layoff. Perko replied that the Union’s health and safety proposals “could be advanced and considered anew when we bargain for a new contract.” Ultimately, one of the Union’s health and safety proposals was included in the collective-bargaining agreement.

In a May 12 letter, Wolford requested, for the next bargaining session, a list of unit employees selected to be laid off, including the name, job title, current assignment, final rate of pay, date of hire, date of separation, home address, and phone number of each employee. Wolford testified that the Union requested this information to develop its bargaining position, specifically to determine whether the employees identified for layoff might be qualified for other unit or nonunit positions. Wolford also testified that he needed the names to determine who among the laid-off employees would be willing to job-share with willing employees who had not been laid off. On May 13, Perko replied that the Respondent was still

in the process of identifying the crafts to be reduced and the employees involved, and that as soon as the final review was complete he would provide the information.

On May 19, Perko provided a list of nine unit employees selected for layoff. Perko told Wolford that the employees were being notified that day and “because he had concerns about safety and security that they were also being escorted off the site that day.” Wolford testified that he received the list about the same time the employees were escorted off the premises.

In a letter that same day, Wolford protested that the layoffs were occurring without the Union having an opportunity to bargain about the decision or its implementation. Wolford asked the Respondent to restore the status quo pending bargaining about alternatives to layoff, such as reduced hours and job sharing. Wolford also asked that one of the Respondent’s financial officers be present at the bargaining to explain the budget considerations that led to the Respondent’s decision to proceed with the layoff.

On May 22, Perko replied that the Respondent did not have its final list of employees to be laid off until shortly before it gave the list to the Union on May 19. Perko stated that because he had previously told Wolford that the employees would be laid off in inverse order of seniority within classifications, “the only uncertainty concerned the number to be laid off and the classifications affected.” Perko repeated that the Respondent was willing to bargain about the layoff and its effects, but noted that the Union had not previously proposed alternatives and that any current proposal would “seem[] entirely tactical” and inconsistent with the Union’s duty of good faith. He rejected the Union’s request to reinstate the nine unit employees laid off on May 19.

On July 10, the parties signed an agreement resolving effects bargaining over the January layoff. This agreement stated that it was a “complete settlement of all issues related to the effects bargaining over the release of flexible-term employees from the Skilled Crafts bargaining unit in January 2008.”

The complaint alleged that “since March 4, 2008, Respondent and the Union have been engaged in negotiations for an initial collective bargaining agreement,” and that the Respondent unlawfully laid off employees on May 19, 2008, “without first bargaining with the Union to an overall good faith impasse.” Contrary to the complaint, the judge concluded that the parties had not commenced bargaining for an initial collective-bargaining agreement at the time of this layoff, and therefore the Respondent did not have to bargain to an overall impasse prior to implementing the layoffs.

<sup>3</sup> The Department of Energy approved that layoff plan on April 15, well after the February 28 settlement agreement in which the Respondent agreed to bargain for an initial contract and about the decision and effects of any future layoffs.

The judge based his analysis on his finding that the parties did not begin bargaining for an initial agreement until after July 10, the date that the effects bargaining was completed, and well after the May 19 layoff. The judge found that at the outset of bargaining, the Union had requested, and the Respondent had agreed, to bifurcate the bargaining process by negotiating an agreement on the effects of the January layoffs before beginning initial contract bargaining. The judge rejected the General Counsel's theory that, from the beginning, the parties' bargaining encompassed matters related to the initial agreement as well as the effects of the January layoff, and that the Union did not unequivocally agree to bifurcated negotiations. The judge reasoned that, although the health and safety concerns the parties discussed might be relevant to both sets of bargaining, this overlap did not alter the parties' clear understanding that they would bargain about the effects of the January layoff and, only after that was completed, the contract. Nor did the judge find that the Union's information requests, which encompassed matters relevant to contract bargaining, demonstrated that the parties were engaged in initial contract bargaining as well as effects bargaining. Because the judge concluded that the parties were not engaged in initial contract negotiations at the time of the May layoff, he found that *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994), and *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), were inapposite, and dismissed the complaint.

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.<sup>4</sup> During negotiations for a collective-bargaining agreement, more specifically, an employer may not unilaterally change any term or condition of employment without having bargained to impasse for the agreement as a whole.<sup>5</sup> The definitive statement of the modern rule appears in *Bottom Line Enterprises*:

[W]hen, as here, the parties are engaged in negotiations [for a collective-bargaining agreement], an employer's obligation to refrain from unilateral changes extends

beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.<sup>6</sup>

It is undisputed that the parties in this case had not bargained to impasse concerning a collective-bargaining agreement as of the date of the layoff, and that the layoff constituted a unilateral change of terms and conditions of employment. The only issue in dispute is thus whether the parties were engaged in contract negotiations at the time of the layoff.

The facts pertinent to that question are also undisputed: On February 28, the parties signed a settlement agreement pursuant to which the Respondent agreed to bargain in good faith with the Union over the terms of a new collective-bargaining agreement as well as the effects of prior layoffs and any decisions on future layoffs. On March 4, the parties held their first bargaining session. At that initial session, they agreed to focus first on the effects of the January layoffs, and then to move to the initial contract terms. Also at the initial session, the union presented a written request for information that it needed to formulate contract proposals. The first stage of bargaining, concerning the January layoffs, was still ongoing at the time that the Respondent announced the new layoffs on May 19.

It is clear from these undisputed facts that the Respondent and the Union were engaged in negotiations for an initial collective-bargaining agreement on May 19, the date of the layoff. The negotiations had started on March 4 with the discussion and agreement on ground rules and the Union's request for information, and there is no contention that they had concluded or reached impasse as of May 19. That the ground rules provided for certain topics to be discussed before others, does not alter the fact that contract negotiations had begun and had not concluded. Such a procedural agreement, without more, simply sets "the format for negotiations" and does not effectuate a waiver of any of the Union's rights.<sup>7</sup> For example, in *Central Maine Morning Sentinel*, the parties had "agreed on ground rules under which bargaining over economic issues would be postponed until after noneconomic issues were resolved."<sup>8</sup> Before the parties had completed their discussions of noneconomic issues and started to discuss economic issues, the employer

<sup>4</sup> *NLRB v. Katz*, 369 U.S. 736, 743-747 (1962).

<sup>5</sup> *E.I. Dupont de Nemours*, 355 NLRB 1098, 1098 (2010); *Register-Guard*, 339 NLRB 353, 354 (2003); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); see *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) ("[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations.").

<sup>6</sup> 302 NLRB at 374. In *Bottom Line*, the Board recognized "two limited exceptions to this general rule." *Id.* There is no contention that either exception applies in this case.

<sup>7</sup> *Vico Products Co.*, 336 NLRB 583, 598-599 (2001), enfd. 333 F.3d 198 (D.C. Cir. 2003).

<sup>8</sup> 295 NLRB 376, 376 (1980).

unilaterally modified its established practice concerning annual wage increases. In finding a violation, the Board explained that “the burden was on [the] Respondent to maintain the status quo and bargain about wage adjustments at a time when that issue properly was on the table.”<sup>9</sup>

Also significant in this regard is the detailed request that the Union submitted to the Respondent at the March 4 meeting for information needed to formulate initial contract proposals. The request sought financial and budget documents as well as salary and benefit surveys, personnel policies and pension information. It is well settled that “a request for information is tantamount to a demand for bargaining,”<sup>10</sup> thus triggering an employer’s duty to refrain from unilaterally changing terms and conditions of employment. For example, in *Crittenton Hospital*, the union’s December 10 request for information commenced the bargaining process and the employer’s January 1 benefit plan changes were therefore unlawful.<sup>11</sup> “The fact that the parties did not actually schedule dates for negotiations until [the following] May [did] not alter the Respondent’s duty to maintain the status quo until negotiations commenced and resulted in final agreement or impasse.”<sup>12</sup> Thus, in the present case, even if the parties had not actually started negotiations on March 4, the Union’s request for information relating to initial contract terms would have served to initiate the bargaining process for purposes of the Respondent’s obligation to refrain from modifying any terms or conditions of employment until a complete agreement was reached or impasse was reached on the complete agreement.<sup>13</sup>

It is clear under *Crittenton Hospital* that if the Union had done nothing after serving the information requests, the layoffs would have been an unlawful unilateral change absent overall impasse. The proper question then is whether by agreeing to bifurcate the negotiations the Union clearly and unmistakably waived its then ongoing right to negotiate to overall impasse before the Respondent was at liberty to make unilateral changes. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983). We think the answer to that question is no. There is absolutely no evidence of such a knowing waiver in the agreement to discuss the prior layoffs before the

terms of a first contract. The Union’s agreement to defer discussions cannot constitute such a waiver when the Board has held that a failure to demand bargaining at all does not waive the union’s right to agree to any changes absent overall impasse.

The Respondent was thus not free to make any unilateral changes absent overall impasse on the agreement as a whole. As there is no evidence, or even contention, that such an impasse existed, we find that the Respondent violated Section 8(a)(5) and (1) by laying off nine employees on May 19, 2008, without the Union’s agreement or first bargaining with the Union to a overall good-faith impasse.<sup>14</sup>

To hold otherwise would be detrimental to collective bargaining. As it now stands, employers and unions are free to order their bargaining in a manner they jointly believe will be most productive. Were we to adopt the judge’s decision, a union finding itself in this position would be well advised to insist upon bargaining about everything at once or risk being understood to have waived its right to bargain about deferred subjects and permitted the employer to act unilaterally in those areas.

#### AMENDED CONCLUSIONS OF LAW

1. Lawrence Livermore National Security, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Society of Professionals, Scientists, and Engineers Local 11–University Professional and Technical employees (UPTE), Communications Workers of America (CWA) Local 9119, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive bargaining representative of the following appropriate unit:

All full-time and regular part-time skilled crafts employees, including: air conditioning mechanics, boiler & pressure systems workers, carpenters, electricians,

<sup>14</sup> During the hearing, the judge denied the General Counsel’s motion to amend the complaint to include an alternative theory of the violation, i.e., that the “Respondent engaged in the layoff without affording the Union an adequate opportunity to bargain . . . with respect to the layoff and the effects of the layoff.” The General Counsel did not except to the judge’s failure to allow the amendment, only the Union did so. It is well settled, however, that “the management of the prosecution before the Board is entrusted to the sole discretion of the General Counsel.” *Sailor’s Union of the Pacific, AFL (Moore Dry Dock Co.)*, 92 NLRB 547 fn. 1 (1950). Another party “cannot enlarge upon or change the [General Counsel’s] theory of the case.” *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. 325 Fed.Appx. 577 (9th Cir. 2009). See also *Desert Aggregates*, 340 NLRB 289 fn. 2 (2003), modified on other grounds 340 NLRB 1389 (2003). The General Counsel’s failure to except on this issue is consistent with the view that he did not intend to proceed on that theory. *Smoke House Restaurant*, supra. Accordingly, the alternative theory is not before us, and we do not pass on the judge’s discussion of it.

<sup>9</sup> Id. at 379.

<sup>10</sup> *Sterling-Salem Corp.*, 231 NLRB 336, 337 fn. 6 (1977); see *Eldorado, Inc.*, 335 NLRB 952, 953–954 (2001).

<sup>11</sup> 343 NLRB 717, 740 (2004).

<sup>12</sup> Ibid.

<sup>13</sup> Thus, the judge’s finding, quoted in the dissent, that it is “crystal clear . . . that the parties did not begin negotiations for an initial collective bargaining agreement until after July 10,” rests on a legally erroneous definition of when negotiations commence for this purpose.

heavy equipment mechanics, locksmiths, maintenance mechanics, painters, plumbers/fitters, riggers, sheet metal workers, trades helpers, and welders; excluding Laborer I, Laborer II, Machinists classifications, all other 900 Series classifications, all other classifications, including all management, supervisory and confidential employees.

4. By unilaterally laying off unit employees on about May 19, 2008, without the agreement of the Union or without first bargaining with the Union to an overall good faith impasse, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practice committed by Lawrence Livermore National Security, LLC affects 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, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees on May 19, 2008, when the parties were engaged in negotiations for a collective-bargaining agreement and had not reached an overall good-faith impasse, we shall order it to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, we shall order the Respondent to offer the affected employees reinstatement and to make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the layoff to date of proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

#### ORDER<sup>15</sup>

The National Labor Relations Board orders that the Respondent, Lawrence Livermore National Security, LLC, Livermore, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>15</sup> Consistent with our recently issued decision in *J. Picini Flooring*, 356 NLRB 11 (2010), we have ordered the Respondent to distribute the notice electronically if it is customarily communicating with employees by such means. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, supra, Member Hayes would not require electronic distribution of the notice.

(a) Failing and refusing to bargain collectively with Society of Professionals, Scientists, and Engineers Local 11–University Professional and Technical Employees (UPTe), Communications Workers of America (CWA) Local 9119, AFL–CIO (the Union), as the exclusive collective-bargaining representative in the following appropriate unit, by unilaterally laying off unit employees when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached an overall good-faith impasse:

All full-time and regular part-time skilled crafts employees, including: air conditioning mechanics, boiler & pressure systems workers, carpenters, electricians, heavy equipment mechanics, locksmiths, maintenance mechanics, painters, plumbers/fitters, riggers, sheet metal workers, trades helpers, and welders; excluding Laborer I, Laborer II, Machinists classifications, all other 900 Series classifications, all other classifications, including all management, supervisory and confidential employees.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit.

(b) Within 14 days from the date of this Order, offer those employees who were laid off on May 19, 2008, 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.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful layoffs in the manner set forth in the remedy section of this decision.

(d) 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.

(e) Within 14 days from the date of this Order, remove from its files any reference to the above unlawful May 19

layoffs, and within 3 days thereafter, notify the nine laid off employees in writing that this has been done and that the layoffs will not be used against them in any way.

(f) Within 14 days after service by the Region, post at its facility in Livermore, California, copies of the attached notice marked “Appendix.”<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, 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. If 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 May 19, 2008.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 32 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.

MEMBER HAYES, dissenting.

For the reasons set forth in the judge’s decision, and now only contested by the Union, I would adopt his recommendation to dismiss the complaint allegation that the Respondent unlawfully laid off employees on May 19, 2008, because the parties had not reached overall good-faith impasse in bargaining for an initial collective-bargaining agreement. Contrary to the majority, I agree with the judge’s dispositive factual findings that it is “*crystal clear* (my emphasis) . . . that the parties did not begin negotiations for an initial collective bargaining agreement until after July 10, the date negotiations for effects bargaining over the January layoff had been completed and an agreement had been reached. It was at the request of the Union . . . that the Union and the Respondent, at the outset of bargaining, unequivocally agreed to bifurcate the bargaining process by first negotiating an agreement over the January layoffs,” which inevitably

<sup>16</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

and necessarily included bargaining over the decision and effects of the May layoffs as the next phase of the Respondent’s overall reduction in force plan<sup>1</sup>

Based on these unequivocal factual findings, the judge correctly concluded that precedent holding that an employer may generally not insist on piecemeal bargaining is not applicable to the bargaining situation at hand. The Union agreed prior to any bargaining to separate initial bargaining about the layoffs and the reduction in force plan. By reversing the judge, my colleagues have effectively imposed their own bargaining terms—a single overall agreement—on the Respondent, rather than the separate agreement it negotiated in good faith with the Union. I would instead affirm the judge and dismiss the complaint.

## 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 fail and refuse to bargain collectively with Society of Professional, Scientists, and Engineers Local 11–University Professional and Technical Employees (UPTE), Communications Workers of America (CWA) Local 9119, AFL–CIO (the Union), as your exclusive representative by unilaterally laying off employees in the following appropriate unit when we are engaged in negotiations for a collective-bargaining agreement and have not reached an overall good-faith impasse:

<sup>1</sup> My colleagues state that the judge’s finding rests on a legally erroneous definition of when negotiations for an initial bargaining agreement commence. To the contrary, the judge’s finding rests on a correct and practical view that, when parties to a new bargaining relationship first meet, they can and in many instances obviously must agree to resolve transitional matters of immediate concern first, independent of bargaining for an initial contract. It is my colleagues’ view, not the judge’s, that impedes the voluntary effective ordering of bargaining in this context.

All full-time and regular part-time skilled crafts employees, including: air conditioning mechanics, boiler & pressure systems workers, carpenters, electricians, heavy equipment mechanics, locksmiths, maintenance mechanics, painters, plumbers/fitters, riggers, sheet metal workers, trades helpers, and welders; excluding Laborer I, Laborer II, Machinists classifications, all other 900 Series classifications, all other classifications, including all management, supervisory and confidential employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively with the Union as your exclusive representative.

WE WILL, within 14 days from the date of the Board's Order, offer those employees who were laid off on May 19, 2008, 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 our unit employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful layoffs.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful May 19, 2008 layoffs, and WE WILL, within 3 days thereafter, notify those laid off employees in writing that this has been done and that the layoffs will not be used against them in anyway.

LAWRENCE LIVERMORE NATIONAL SECURITY,  
LLC

*Jeffrey L. Henze, Esq.*, for the General Counsel.  
*Douglas Barton, Esq. (Hanson Bridgett, LLP)*, of San Francisco, California, for the Respondent.  
*Kate Hallward, Esq. (Leonard Carder, LLP)*, of Oakland, California, for the Union.

## DECISION

### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Oakland, California, on July 27 and 28, 2009. The captioned charge was filed on May 21, 2008, by Society of Professionals, Scientists, and Engineers Local 11—University Professional and Technical Employees (UPTE), Communications Workers of America (CWA) Local 9119, AFL—CIO (Union). On March 31, 2009, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a complaint and

notice of hearing alleging violations by Lawrence Livermore National Security, LLC, (Respondent) of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has have violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel), counsel for the Union, and counsel for the Respondent. Upon the entire record,<sup>1</sup> and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

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

### II. THE LABOR ORGANIZATIONS INVOLVED

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

### III. ALLEGED UNFAIR LABOR PRACTICES

#### A. Issues

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

#### B. Facts

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

In about September, 2007, prior to the Respondent becoming the Laboratory's successor employer, the Laboratory advised its employees that in 2008 the Laboratory could anticipate a 20 percent decrease in its 2008 budget and a concomitant serious impact upon its work force largely due to a reduction in funding by the Department of Energy, together with increased costs due to the change from the publicly run entity to private management by the Respondent. Between October 1, 2007, and May

<sup>1</sup> The Respondent's unopposed motion to correct the transcript is hereby granted.

26, 2008,<sup>2</sup> the Respondent proceeded with a three-phase reduction in force totaling some 1100 employees. The three phases were, first, the involuntary layoff of supplemental or flex term employees, second, the voluntary separation of employees who opted to leave the Respondent's employ, and third, the involuntary layoff of additional employees so that, in total, the goal of reducing the total employee complement by some 1100 employees would be realized. This reduction in force plan was authorized by the Department of Energy upon the application of the Respondent. Michael C. Kane, associate administrator for management and administration, a representative of the Department of Energy, notes in his recommendation for approval to the administrator of the Department of Energy, under the heading of "URGENCY," that "Reductions are required as quickly as possible to minimize budget impacts."

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

As noted above, the Respondent became the successor employer some 6 days later. Thereupon, the Union requested that the Respondent recognize the Union. The Respondent declined, noting that the Union had been certified on the basis of a card check and without a hearing to resolve a dispute regarding the appropriateness of the unit. The Union filed unfair labor practice charges with the Board regarding this matter. Then, in January, during the implementation of phase 1 of the reduction in force, the Respondent laid off 19 bargaining unit employees without bargaining with the Union. As a result, the Union filed additional charges with the Board. On February 28, the parties entered into a private settlement agreement, not under the auspices of the Board, resolving their differences. The Respondent agreed to recognize and bargain with the Union for an initial contract and, in addition, to bargain over the effects of the aforementioned layoffs.

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

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

The letter then goes on to list some 16 items, including "All

<sup>2</sup> All dates or time periods are within 2008 unless otherwise specified.

plans and projections for additional layoffs.

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

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

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

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

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

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

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

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

As you know, the Laboratory Director recently announced and explained the need to proceed with an involuntary separation program that will have the effect of reducing up to 535 career indefinite positions at the Laboratory. This significant reduction in staff results from several factors, including the reduced federal budget and higher operating costs. While the Laboratory has been able to streamline some of its operating costs, the Laboratory management has nonetheless concluded it must reduce staff to meet its cost reduction goal and hold the Laboratory's cost of doing business in fiscal year 2009 to the same level as in fiscal year 2007.

We presently anticipate that these necessary staff reductions will result in the elimination of 10 to 15 positions in the

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

Skilled Crafts Unit that your Union represents.

....

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

....

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

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

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

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

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

By letter dated May 7, Perko reviewed the discussions that had taken place during bargaining negotiations, and reiterated the Respondent's reasons for concluding that the January layoffs of bargaining unit employees did not adversely affect the health and safety of the remaining employees "because the Respondent believes it has appropriate staffing protocols in

place at the present time and will continue to have appropriate staffing after the anticipated layoffs are implemented." Further, Perko stated that the Respondent respected the Union's right to bargain about the effects of the January 2008 layoffs as well as the anticipated layoff of additional bargaining unit employees as described in his April 24 letter, and Perko reiterated what he had previously told the Union during bargaining negotiations, namely, that the Union's proposals regarding health and safety matters "could be advanced and considered anew when we bargain for a new contract."

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

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

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

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

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

On May 19, Perko handed Wolford a letter stating, "Pursuant to your request for information dated May 12, 2008, attached is a list of bargaining unit employees proposed for layoff." Attached to the letter was a list of 9 unit employees along with their job titles, addresses and phone numbers.<sup>4</sup> Perko advised Wolford that the employees were receiving notice that day

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

“because he had concerns about safety and security that they were also being escorted off the site that day.” According to Wolford’s testimony, the employees were being escorted off the premises that morning at about the same time he received the list.

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

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

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

The letter goes on as follows:

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

....

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

### C. Analysis and Conclusions

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

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

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

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

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

During the course of the hearing the General Counsel moved to amend the complaint to include an alternative allegation, namely, “that Respondent engaged in the layoff without afford-

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

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

As noted above, Perko’s April 24 letter advised the Union that layoff notices would be issued during the week of May 19, and that applicable policies provided for pay in lieu of 30 days notice. Perko furnished the names of the selected employees to Wolford on the morning of May 19, at about the time the named employees were being escorted off the premises. The Union, in various information requests, had previously asked for the names of the employees who were to be laid off, and Perko, who was not involved in the selection process, replied that he did not have this information. Wolford did not advise Perko why the Union could not make further proposals without this information. Further, neither the General Counsel nor the Union have demonstrated that the Union needed the names of the laid off employees in order to make additional bargaining proposals. The Union’s May 19 letter, following the layoff, suggests that it wanted “a meaningful opportunity to bargain constructive alternatives to a layoff, such as reduced hours and

job sharing.” However, these “constructive alternatives” do not appear to be dependent upon the identity of the employees who were to be laid off, as the Union could have proposed the concepts of reduced hours and job sharing without knowing which employees would be affected. Wolford also testified that he needed the names of the laid off employees in order to ascertain whether specific laid off employees would be willing to job share with other specific willing employees who had not been laid off. Again, this was something that Wolford could have articulated but did not articulate to the Respondent during the negotiations prior to the layoffs.<sup>6</sup>

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

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

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged.  
[Recommended Order omitted from publication.]

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<sup>6</sup> The Union pursued none of these matters following the layoff despite Perko’s invitation to do so. Thus, in his May 22 letter, Perko advised Wolford, “You have not previously proposed ‘alternatives to layoffs, such as reduced hours and job sharing.’ We’ll certainly meet with you to bargain about these topics if you wish. But your reference to them for the first time now again seems entirely tactical and not consistent with the Union’s duty of good faith.” Although the laid off employees were not physically at work, having been escorted off the site for safety and security reasons, they were on paid leave status for over thirty days thereafter. Moreover they remained on a preferential hiring list. Further, there is no showing that the Respondent had failed to timely respond to all the Union’s information requests, or that it had not engaged in good-faith negotiations with the Union regarding all matters the Union wanted to discuss. Under these circumstances, I question Wolford’s testimony that, in his estimation, further meaningful discussions could not occur until after the laid off employees were back at work.

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