

RSN & Associates, Inc. and UNITE HERE Local 49, UNITE HERE!, AFL-CIO. Cases 20-CA-035612, 20-CA-062395, 20-CA-065564, and 20-CA-068636

August 31, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On April 23, 2012, Administrative Law Judge John J. McCarrick issued the attached decision. The Acting General Counsel filed limited exceptions and a supporting 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 exceptions¹ and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full below.²

AMENDED REMEDY

The judge found that the Respondent unlawfully ceased making contributions to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension and Welfare Plans on behalf of unit employees. The judge's remedy fails to specify that the Respondent shall be required to make all delinquent contributions to those funds and to reimburse unit employee Nestor Aguilera for out-of-pocket medical expenses incurred as a result of the Respondent's failure to make those contributions. In addition, the judge's remedy fails to fully articulate the manner in which the required contributions and reimbursements shall be calculated and made. Accordingly, the judge's remedy is amended to also provide that the Respondent shall be required to make whole its unit employees by making all delinquent fund contributions on behalf of unit employees that have not been made since March 2008, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent shall also be required to reimburse Aguilera for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner

¹ No exceptions were filed to the judge's findings on the merits. The Acting General Counsel's exceptions only concern the remedial language for the violations found.

² We shall modify the judge's remedy and recommended Order to conform to the Board's standard remedial language and we shall substitute a new notice to conform to the Order as modified.

set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010).³

ORDER

The National Labor Relations Board orders that the Respondent, RSN & Associates, Inc., Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union, UNITE HERE Local 49, UNITE HERE!, AFL-CIO, as the duly designated representative of its employees in the following bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

All permanent and part-time sales associates, stock persons and trainees employed at Respondent's Sacramento International Airport facility, performing work covered under the collective-bargaining agreement, effective by its terms from January 1, 2009, to December 31, 2010 (herein the Agreement), excluding supervisors, office and administrative employees, and any other classification of employees excluded under any applicable federal law and the individual family members listed Under Appendix A of the Agreement.

(b) Unilaterally implementing terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse.

(c) Laying off employees out of seniority order without notice to or bargaining with the Union.

(d) Ceasing to make contributions to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension and Welfare Plans.

(e) Ceasing its operations and terminating the employment of all of its employees, without notice to or bargaining with the Union.

(f) Failing to pay its unit employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement.

(g) Failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-

³ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

bargaining representative of the Respondent's employees.

(h) In any like or related manner interfering with, restraining, or coercing 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) In the event the Respondent resumes operations, offer Ronald Arterburn reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff of Ronald Arterburn and, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

(c) Make Ronald Arterburn whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff in the amount set forth below.

(d) Reimburse the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension and Welfare Plans for contributions since March 2011.

(e) On request, bargain with the Union over the effects on unit employees of its decision to close its Sacramento facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(f) Pay its unit employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement.

(g) Furnish to the Union in a timely manner the information requested by the Union on May 19, 2011.

(h) Reimburse Nestor Aguilera for his medical expenses that were not paid for by the Welfare Plan as a result of Respondent's failure to make contributions to the Welfare Plan, with interest.

(i) 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.

(j) Make the following backpay payments in the amounts set forth, plus interest computed in the manner set forth in the remedy section of the judge's decision, as amended, on all unpaid balances until paid in full:

1. Ronald Arterburn \$7025.25.

2. Bargaining unit employees, as listed in appendix 2 of General Counsel's Exhibit 1(x), a total of \$9591.60, plus interest, for the cash-out value of their accumulated sick leave.

3. Bargaining unit employees, as listed in appendix 3 of General Counsel's Exhibit 1(x), a total of \$10,947.80, plus interest, for the unpaid value of accrued vacation.

4. Bargaining unit employees, as listed in appendix 4 of General Counsel's Exhibit 1(x), a total of \$14,907.20, plus interest, for the minimum of backpay owing due to its failure to bargain with the Union over the effects of its decision to cease doing business.

5. Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension Plan, as listed in appendix 5 of General Counsel's Exhibit 1(x), \$9553.32, for contributions that it failed to make on behalf of unit employees.

6. Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan, as listed in appendix 6 of General Counsel's Exhibit 1(x), \$42,836.18, for contributions that it failed to make on behalf of unit employees.

7. Nestor Aguilera \$402.16, plus interest, to reimburse him for out-of-pocket medical expenses for which Welfare Plan would have paid but for Respondent's failure to make required contributions to Welfare Plan.

8. TOTAL NET BACKPAY \$95,263.51

(k) Within 14 days after service by the Region, duplicate and mail, at its own expense, and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"⁴ to the Union and to all unit employees who were employed by the Respondent at any time since March 1, 2011.

(l) 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.

⁴ 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."

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 the National Labor Relations Act and has ordered us to post and obey by 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 refuse to bargain in good faith with the Union, UNITE HERE Local 49, UNITE HERE! AFL-CIO, as the duly designated bargaining representative, with respect to benefits for our employees in the bargaining unit:

All permanent and part-time sales associates, stock persons and trainees employed at our Sacramento International Airport facility, performing work covered under the collective-bargaining agreement, effective by its terms from January 1, 2009, to December 31, 2010 (herein the Agreement), excluding supervisors, office and administrative employees, and any other classification of employees excluded under any applicable federal law and the individual family members listed Under Appendix A of the Agreement.

WE WILL NOT unilaterally implement terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse.

WE WILL NOT lay off employees out of seniority order without notice to or bargaining with the Union.

WE WILL NOT cease to make contributions to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension and Welfare Plans.

WE WILL NOT cease operations and terminate the employment of all of our employees, without notice to or bargaining with the Union.

WE WILL NOT fail to pay our unit employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement.

WE WILL NOT fail and refuse to furnish the Union with requested information that is relevant and necessary to

the Union's performance of its functions as the collective-bargaining representative of our employees.

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

WE WILL, in the event we resume operations, offer Ronald Arterburn reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Ronald Arterburn, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

WE WILL make Ronald Arterburn whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff, plus interest.

WE WILL reimburse the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension and Welfare Plans for contributions since March 2011, plus interest.

WE WILL, on request, bargain with the Union over the effects on unit employees of our decision to close the Sacramento facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay our unit employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement, plus interest.

WE WILL furnish to the Union in a timely manner the information requested by the Union on May 19, 2011.

WE WILL reimburse Nestor Aguilera for his medical expenses that were not paid for by the Welfare Plan as a result of our failure to make contributions to the Welfare Plan, plus interest.

RSN & ASSOCIATES, INC.

Cecily Vix, Esq. and *Joseph D. Richardson, Esq.*, for the General Counsel.

Richard Nelson Sr. and *Richard Nelson Jr.*, In pro se, for the Respondent.

Christian Rak, President and *A Amir Deen, Vice President*, of UNITE HERE Local 49, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Sacramento, California, on March 14, 2012, on the consolidated amended complaint and notice of hearing, as amended at the hearing,¹ complaint, issued on December 30, 2011, and the compliance specification and order consolidating compliance specification with consolidated amended com-

¹ GC Exh. 2.

plaint, backpay specification, issued on February 9, 2012, by the Regional Director for Region 20.²

The complaint alleges that RSN & Associates, Inc., Respondent, violated Section 8(a)(1) and (5) of the Act by unilaterally and without notice to or bargaining with the Union, on about March 2011, ceasing to remit payments to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension Plan, (the Pension Plan), by on about June 6, 2011, informing the Welfare Plan and Pension Plan that Respondent would no longer make contributions to the Plans by on about August 9, 2011, laying off employee Ronald Arterburn out of seniority order, by on about October 31, 2011, ceasing its operations and terminating the employment of all of its employees by on about October 31, 2011, ceasing operations and failing to pay its employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement and by on or about May 19, 2011, by failing to furnish the Union the following information for each unit employee: full name, address, phone number, classification, date of hire, date of hire into classification, medical plan selected, whether employee waived medical plan, whether employee selected single, single plus one or family medical coverage, and number of hours worked from May 2010 through April 2011.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing and as an affirmative defense alleges that the parties reached impasse.

FINDINGS OF FACT

On the entire record, I make the following findings of fact.

I. JURISDICTION

Respondent admitted that it is a corporation, with an office and place of business located in Sacramento, California (Respondent's facility), was engaged in the business of retail sales of newspapers and related products. During the 12-month period ending September 30, 2011, Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000. During the period of time described above Respondent, in conducting its business operations purchased and received at its Sacramento, California facility products, goods, and materials valued in excess of \$5000, which originated from points outside the State of California.

Based on the above, I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted and I find that at all material times, UNITE HERE Local 49, UNITE HERE! AFL-CIO, the Union,

has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On February 29, 2012, the parties entered into a stipulation of facts³ in which the parties agreed to most of the facts of this case. The facts, therefore, are essentially uncontested.

In the stipulation of facts the parties agreed:

1. That the Union is labor organization within the meaning of the Act.

2. That the following employees of Respondent (the unit), constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All permanent and part-time sales associates, stock persons and trainees employed at Respondent's Sacramento International Airport facility, performing work covered under the collective-bargaining agreement, effective by its terms from January 1, 2009, to December 31, 2010 (herein the Agreement), excluding supervisors, office and administrative employees, and any other classification of employees excluded under any applicable federal law and the individual family members listed Under Appendix A of the Agreement.

3. At all material times, since at least January 1, 2009, the Union has been the exclusive collective-bargaining representative of the unit, and since that time, the Union has been recognized as the representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from January 1, 2009, to December 31, 2010, herein called the Agreement.

4. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

5. At all material times, Richard A. Nelson Sr. has held the position of general manager, and has been a supervisor for Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

6. At all material times, Richard A. Nelson Jr. has held the position of vice president of operations, and has been a supervisor for Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

7. About March 2011, Respondent ceased remitting payments to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Welfare Plan (the Welfare Plan).

8. About March 2011, Respondent ceased remitting payments to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension Plan (the Pension Plan).

² On March 27, 2012, after the hearing closed, counsel for the Acting General Counsel filed a motion to correct an exhibit to the transcript. In the motion counsel for the Acting General Counsel requests that GC Exh. 15, which contains the social security numbers of an employee of Respondent's and his wife be removed from the transcript and replaced with GC Exh. 15 that has the social security numbers redacted. In the interests of the privacy of those individuals and no prejudice occurring to the parties, the motion is granted.

³ GC Exh. 1(z).

9. About June 6, 2011, Respondent informed the Welfare Plan and Pension Plan described above in paragraphs 7 and 8 that Respondent would no longer make contributions to the Plans.

10. About August 9, 2011, Respondent, by Richard Nelson Jr. laid off employee Ronald Arterburn out of seniority order.

11. The subjects set forth above in paragraphs 7–10 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

12. About October 31, 2011, Respondent ceased its operations and terminated the employment of all of its employees.

13. About October 31, 2011, Respondent, in ceasing operations, failed to pay its employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement.

14. The subjects set forth above in paragraphs 12 and 13 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

15. Respondent engaged in the conduct described above in paragraphs 12 and 13 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent over this conduct or the effects of this conduct.

16. About May 19, 2011, the Union, in writing, requested that Respondent furnish the Union with the following information for each unit employee: full name, address, phone number, classification, date of hire, date of hire into classification, medical plan selected, whether employee waived medical plan, whether employee selected single, single plus one or family medical coverage, and number of hours worked from May 2010 through April 2011.

17. The information requested by the Union, as described above in paragraph 16, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

18. Since about May 19, 2011, Respondent has failed and refused to furnish the Union with the information requested by it as described in paragraph 16.

In addition, the record establishes that the parties had entered into a collective-bargaining agreement that was effective from January 1, 2009, to December 31, 2010.⁴ The agreement at articles 15 and 16 called for the Respondent to make contributions to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Welfare Plan for medical and dental insurance and to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension Plan on behalf of bargaining unit employees. The agreement at article 22 also called for seniority to be followed in the case of layoff and recall.

⁴ GC Exh. 3.

Bargaining for a successor agreement began in January 2011. Three bargaining sessions took place between the parties on January 21, February 22, and May 16, 2011.

During bargaining Respondent indicated it was in financial difficulty and on February 22 proposed that the medical and pension benefits be eliminated.⁵ At this meeting, the Union stated that if Respondent was in financial difficulty it would need to see financial records. Christian Rak (Rak), the Union's president, said that medical and pension benefits were core benefits for its members and felt that they could not be totally eliminated. Rak proposed alternatives to eliminating medical and pension benefits such as allowing employees who had coverage elsewhere to opt out of the Union's plan. Rak indicated that further bargaining would have to wait on the Union seeing Respondent's financial records. The Union received those records in March 2011.

At the next bargaining session on May 16, 2011, Respondent again indicated that it had to eliminate the medical and dental benefits from the agreement. Rak responded that the Union had flexibility in other areas of the contract to give Respondent financial relief. Rak indicated that the Union had great flexibility in negotiations but had to explore all possibilities first. Respondent remained firm that it had to eliminate medical and pension benefits. Rak ended by saying that the Union would be creative and give Respondent ideas for financial relief in other areas at the next bargaining session. Respondent said they would talk about whether to schedule another bargaining session. Rak expressed surprise and told Respondent that there was much to talk about and that it would be preliminary to call off bargaining.

Meanwhile, the Union on May 19, 2011, in writing requested information concerning employee hours in order to help formulate bargaining proposals.

B. The Analysis

1. Trust fund payments

Section 8(a)(5) of the Act provides that "It shall be an unfair labor practice for an employer-(5) to refuse to bargain collectively with the representative of his employees."

It is well established that when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment. This is the so called "status quo" which the employer must maintain. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Jensen Enterprises*, 339 NLRB 877, 877 (2003). It is not a defense that unilateral changes were made pursuant to established company policy, or without antiunion motivation. *Id.* To be found unlawful, the unilaterally imposed change must be "material, substantial, and significant" and impact the employees or their working conditions. *Toledo Blade Co.*, 343 NLRB 385 (2004).

We start with the proposition that after a collective-bargaining agreement expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994); *Kingsbridge Heights Rehabilitation*,

⁵ GC Exh. 4.

353 NLRB 631 (2008). This status quo obligation includes making contributions to fringe benefit funds “specified in the expired collective bargaining agreement.” *N D. Peters & Co.* 321 NLRB 927, 928 (1996).

An employer may not implement its own terms and conditions of employment absent impasse or waiver by the Union. In case of impasse, the employer must implement the exact terms of its final offer. In case of waiver by the union, it must be clear and unequivocal. *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 (1988). *Carpenter Sprinkler Corp.*, 238 NLRB 974 (1978). *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

Whether a bargaining impasse exists is a matter of judgment which relies on factors like bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue(s) as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475 (1969).

During overall negotiations for a new CBA, an employer may not justify the unilateral implementation of a proposal on a particular subject, on the ground that it gave the union notice and an opportunity to bargain. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

The evidence establishes that pursuant to its recently-expired collective-bargaining agreement, Respondent was obligated to make payments into both a medical and pension trust fund on behalf of bargaining unit employees. In March 2011, Respondent ceased remitting payments to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Welfare Plan and to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension Plan. On June 6, 2011, Respondent informed the Welfare Plan and Pension Plan that Respondent would no longer make contributions to the Plans.

Based on the above, counsel for the Acting General Counsel has established a prima facie case that Respondent, in unilaterally ceasing to make trust fund payment in March 2011, violated Section 8(a)(5) and (1) of the Act.

While Respondent in its answer raised an affirmative defense that it was privileged to make certain unilateral changes because the parties had reached impasse, Respondent failed to appear at the hearing, and thus, adduced no evidence in support of its affirmative defense.

Respondent had notice of the hearing date, time, and place from the notice of hearing⁶ that accompanied the compliance specification. In addition Respondent was put on notice of the date time and place of the hearing during a conference call with the parties and me that took place on March 13, 2012. Respondent’s manager, Richard Nelson Jr., was present during the conference call and stated that no one from Respondent would attend the March 14, 2012 hearing. Accordingly at 9:15 a.m. on March 14, 2012, when no representative of Respondent appeared, the hearing commenced.

The burden of proof for affirmatively pled defenses rests with the respondent. See *Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 277 (1994); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). By failing to adduce evidence

concerning its affirmative defense that impasse in bargaining permitted Respondent to unilaterally cease making trust fund payment, Respondent has failed to satisfy its burden of proof and its defense must fail.

Moreover, evidence adduced by counsel for the Acting General Counsel establishes that there was no impasse in negotiations. Only two bargaining sessions had taken place when Respondent ceased making trust fund payments in March 2011. At that time there was no indication that the parties were at impasse. As the Union stated in the May 16 bargaining session, they were willing to be flexible with Respondent and felt they could give financial relief in other parts of the contract. Only three bargaining sessions had taken place when Respondent declared impasse⁷ on May 16, 2011. Further, the Union had not yet received the information regarding employee hours in order to formulate further proposals when Respondent declared impasse. I conclude that the parties were not at impasse at any time herein, and for this additional reason, Respondent’s impasse defense must fail.

2. Layoff of Ronald Arterburn

The stipulation establishes that on about August 9, 2011, Respondent laid off employee Ronald Arterburn out of seniority order. The parties stipulated and I find that the layoff of an employee is a mandatory subject of bargaining. Accordingly, I find that in laying off bargaining unit employee Arterburn out of seniority order without notice to or bargaining with the union, Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

3. Cessation of the business and failure to pay sick and vacation pay

The parties also stipulated that on about October 31, 2011, Respondent ceased its operations and terminated the employment of all of its employees and in ceasing operations, failed to pay its employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement. Respondent ceased operating and failed to pay sick and vacation pay without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent over this conduct or the effects of this conduct. The decision and the effects of the decision to close as well as the payment of sick and vacation leave are mandatory subjects of bargaining. In failing to bargain with the Union over these subjects Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The information request

The parties stipulated and the record reflects that on May 19, 2011, the Union, in writing, requested that Respondent furnish the Union with the following information for each unit employee: full name, address, phone number, classification, date of hire, date of hire into classification, medical plan selected, whether employee waived medical plan, whether employee selected single, single plus one or family medical coverage, and number of hours worked from May 2010 through April 2011. The information requested by the Union is necessary for, and

⁶ GC Exhs. 1(x) and (y).

⁷ GC Exh. 8.

relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. To date, Respondent has failed and refused to furnish the Union with this information.

The Board has compelled employers to disclose names, addresses, phone numbers, hours of work, seniority lists, job classifications, and insurance plans. *River Oak Center for Children*, 345 NLRB 1335 (2005); *Postal Service*, 308 NLRB 358 (1992); *Staff Builders Services*, 289 NLRB 373 (1988); *Millard Processing Services*, 308 NLRB 929 (1992); *B&B Trucking Inc.*, 345 NLRB 1 (2005).

Respondent thus had a duty to furnish this information and its failure to do so violated Section 8(a)(5) and (1) of the Act as alleged.

C. Backpay

The backpay specification provides that Respondent will discharge its obligation to remedy the effects of its unfair labor practices by:

1. Paying Ronald Arterburn \$7025.25, plus interest, for his unlawful layoff.
2. Paying to bargaining unit employees, a total of \$9591.60, plus interest, for the cash-out value of their accumulated sick leave.
3. Paying to bargaining unit employees, a total of \$10,947.80, plus interest, for the unpaid value of accrued vacation.
4. Paying to unit employees total of \$14,907.20, plus interest, for the minimum of backpay owing due to its failure to bargain with the Union over the effects of its decision to cease doing business.
5. Paying to Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension Plan 9553.32, for contributions that it failed to make on behalf of unit employees.
6. Paying to Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan 42,836.18, for contributions that it failed to make on behalf of unit employees.
7. Paying to Nestor Aguilera \$402.16, plus interest, to reimburse him for out-of-pocket medical expenses for which the Welfare Plan would have paid but for Respondent's failure to make required contributions to the Welfare Plan.

Applicable Legal Principals

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed (*NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966), and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct. (*Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943).) Once that has been established, "the burden is upon the employer to establish facts which would . . . mitigate that liability." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). It is further well established that any formula which approximates what

discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. *Iron Workers Local 378 (Judson Steel Corp.)*, 227 NLRB 692 (1977); *NLRB v. Brown & Root, Inc.*, supra at 452; *East Texas Steel & Castings Co.*, 116 NLRB 1336 (1956); *Avon Convalescent Center*, 219 NLRB 1210, 1213 (1975).

By failing to file an answer to the backpay specification, Respondent has not challenged the allegations or amounts contained in the backpay specification. Moreover, the testimony from the compliance officer has established that Respondent failed to cooperate in providing any information necessary to compute gross backpay. In computing gross backpay for employee Arterburn the compliance officer relied upon claimant forms⁸ filled out by Arterburn as well as information he supplied concerning overtime. The Union supplied seniority lists⁹ for bargaining unit employees and also employee pay stubs¹⁰ which the compliance officer used to calculate both accrued sick and vacation leave. In the absence of Respondent's records, the compliance officer reasonably assumed employees had used no sick or vacation time in her calculations. She used the collective-bargaining agreement at articles 12 and 13 for the formula for calculating the amounts owed in sick and vacation leave. In the absence of bargaining over the effects of closing, the compliance officer applied a *Transmarine*¹¹ remedy and assessed 2 weeks' pay with interest.

For pension fund and medical benefits contributions, the compliance officer relied upon records received for bargaining unit employees from the trust funds¹² as well as the provisions of articles 15 and 16 of the expired collective-bargaining agreement. In addition, employee Nestor Aguilera supplied records¹³ of his medical expenses that were not paid for by the welfare trust as a result of Respondent's failure to make contributions. I find that the assumptions made by the compliance officer in the backpay specification were reasonable in the absence of Respondent's cooperation and that the gross backpay amounts are well supported.

I conclude that in order to remedy its unfair labor practices Respondent should be ordered to make the following payments as alleged in the backpay specification:

1. Ronald Arterburn \$7025.25, plus interest, for his unlawful layoff.
2. Bargaining unit employees, a total of \$9,591.60, plus interest, for the cash-out value of their accumulated sick leave.
3. Bargaining unit employees, a total of \$10,947.80, plus interest, for the unpaid value of accrued vacation.
4. Unit employees total of \$14,907.20, plus interest, for the minimum of backpay owing due to its failure to bargain with the Union over the effects of its decision to cease doing business.

⁸ GC Exh. 15

⁹ GC Exh. 16.

¹⁰ GC Exh. 17

¹¹ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

¹² GC Exhs. 18 and 19.

¹³ GC Exh. 19.

5. Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension Plan 9553.32, for contributions that it failed to make on behalf of unit employees.

6. Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan 42,836.18, for contributions that it failed to make on behalf of unit employees.

7. Nestor Aguilera \$402.16, plus interest, to reimburse him for out-of-pocket medical expenses for which the Welfare Plan would have paid but for Respondent's failure to make required contributions to the Welfare Plan.

In sum, Respondent's liability to make whole its employees amounts to \$95,263.51, plus interest for backpay and reimbursement paid in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980); and *Kentucky River Medical Center*, 356 NLRB 6 (2010), on all unpaid balances until paid in full; less withholding required by Federal and State laws from backpay principal only; and plus any additional interest or penalty payments beyond that claimed in appendices 5 and 6 that have accrued against delinquent contributions to the Pension and Welfare Plans until paid in full, assessed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979), as appropriate.

CONCLUSIONS OF LAW

1. The Respondent, RSN & Associates, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. UNITE HERE Local 49, UNITE HERE! AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally and without notice to or bargaining with the union, on about March 2011, ceasing to remit payments to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension and Welfare Plans, by on about June 6, 2011, informing the Welfare Plan and Pension Plan that Respondent would no longer make contributions to the plans by on about August 9, 2011, laying off employee Ronald Arterburn out of seniority order, by on about October 31, 2011, ceasing its operations and terminating the employment of all of its employees by on about October 31, 2011, ceasing operations and failing to pay its employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement and by

on or about May 19, 2011, by failing to furnish the Union the following information for each unit employee: full name, address, phone number, classification, date of hire, date of hire into classification, medical plan selected, whether employee waived medical plan, whether employee selected single, single plus one or family medical coverage, and number of hours worked from May 2010 through April 2011.

4. The unfair labor practices committed by Respondent are unfair labor practices affecting 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.

The Respondent will be ordered to offer reinstatement to Ronald Arterburn who it unlawfully laid off out of seniority on August 9, 2011, and make him whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against him in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010) enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Having unilaterally ceased to remit payments to the Sacramento Independent Hotel, Restaurant, and Tavern Employees Pension and Welfare Plans; by informing the Welfare Plan and Pension Plan that Respondent would no longer make contributions to the Plans; by laying off employee Ronald Arterburn out of seniority order; by on about October 31, 2011, ceasing its operations and terminating the employment of all of its employees; by on about October 31, 2011, ceasing operations and failing to pay its employees the cash value of their sick time and vacation time as called for in the collective-bargaining agreement and, by on or about May 19, 2011, failing to furnish the Union information, Respondent shall be ordered to bargain in good faith with the Union over such terms and conditions of employment and shall furnish the information requested.

[Recommended Order omitted from publication.]