

# No. 12-4893

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ROSE FENCE, INC.

Respondent

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ON APPLICATION FOR ENFORCEMENT  
OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**ON APPLICATION FOR ENFORCEMENT  
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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Order issued against Rose Fence, Inc. (“the Company”) on October 22, 2012, and reported at 359 NLRB No. 6. (A.

226-36.)<sup>1</sup> In a decision accompanying the Order, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by laying off certain employees without giving their union, Local 553, International Brotherhood of Teamsters (“the Union”), prior notice and an opportunity to bargain over the layoffs and their effects. (A. 226, 230-33.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in Baldwin, New York, and because the Board’s Order is final with respect to all parties.

The Board filed its application for enforcement on December 17, 2012. This filing was timely, as the Act places no time limit on the institution of proceedings to enforce Board orders.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by laying off employees without giving

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<sup>1</sup> Record references are to the joint appendix (“A.”) filed with the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to Company’s opening brief.

the Union prior notice and an opportunity to bargain over the individual layoff decisions and their effects.

### **STATEMENT OF THE CASE**

Acting on charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by laying off certain bargaining-unit employees without giving the Union prior notice and an opportunity to bargain over the individual layoffs and their effects. (A. 227; 3.) The complaint also alleged that the Company violated Section 8(a)(5) and (1) in other respects: by unilaterally imposing new work rules, changing employee work hours, and subcontracting bargaining-unit work. (*Id.*)

Following a hearing, an administrative law judge issued a decision and recommended order finding merit in the allegation that the Company unlawfully laid off individual employees without giving the Union notice and an opportunity to bargain, but dismissing all of the other Section 8(a)(5) allegations in the complaint. (A. 227-36.) The Company filed exceptions to the judge's findings, and the Acting General Counsel filed cross-exceptions. (A. 226.)

After considering the parties' exceptions, the Board issued a Decision affirming the judge's findings, including her holding that the Company violated the

Act in regard to the layoffs.<sup>2</sup> (*Id.*) The facts supporting the Board's Decision, as well as the Board's Conclusions and Order, are summarized below.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background; the Company's Employees Elect the Union as Their Collective-Bargaining Representative

The Company manufactures, sells, and installs fences, mainly for residential use in Long Island, New York. (A. 227; 31.) For purposes of its installation business, the Company employs drivers, installers, yard workers, carpenters, helpers, and various workers who perform a hybrid of these functions. (A. 227; 41-44.)

On May 21, 2010, the employees in these classifications voted to unionize, selecting the Union as their collective-bargaining representative. (A. 227; 54-55.) Shortly thereafter, on June 3, 2010, the Board issued a certification confirming the Union's status as the employees' exclusive collective-bargaining representative. (*Id.*)

For several years before the Union's election in 2010, the Company laid off a portion of its workforce on a seasonal basis, as the demand for fence installation

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<sup>2</sup> The dismissals of the remaining allegations are not challenged here.

work diminished during the summer months.<sup>3</sup> (A. 227-28; 111-112.) Company owner Scott Rosenzweig left the specific layoff decisions—who would be laid off, when, and based on what criteria—to the discretion of Jerry Leverich, a company official whose role was to “expedite” installation work and manage workflow. (A. 228; 64-67.)

**B. Following the Election, the Company Selects Certain Employees for Layoff and Implements Individual Layoff Decisions Without Notifying the Union, Even While Meeting with the Union to Discuss Other Matters**

In July 2010, about one month after the Union’s election victory and certification as the employees’ bargaining representative, Leverich began laying off employees after Rosenzweig informed him that orders for installation work were falling. (A. 228; 64-67.) Leverich decided how many employees to lay off, and identified specific employees for layoff on various dates, based on a variety of factors including the information received from Rosenzweig, overall company operations, and the employees’ skills and performance. (*Id.*) At no point did Leverich or any other Company official notify the Union of the individual layoffs, or otherwise seek to include the Union in the process of considering the specific layoffs and their effects. (*Id.*)

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<sup>3</sup> The Company would recall at least some of the laid-off employees when installation work-orders picked up again in the spring. (A. 228; 66.)

The following month, Leverich continued to lay off individual employees. (A. 228 & n.11, 231-32; 165-66.) Although Rosenzweig and Company Office Manager Bryan Cinque were meeting with the Union that month<sup>4</sup> to negotiate an initial collective-bargaining agreement, they said nothing to their union counterparts in bargaining about the individual layoff decisions that Leverich had made and continued to make. (A 229; 165-66.)

As fall progressed into winter, the Company continued to lay off individual employees without notice to or any consultation with the Union. (A. 228 & n.11, 231-32; 165-66.) At the same time, the parties continued to discuss proposals for an overall collective-bargaining agreement. (A. 229; 165-66.)

**C. Lacking Notice from the Company about Any Individual Layoffs, the Union Makes Only General Proposals About Layoff Procedures, and the Company Does Not Accept Them**

In the absence of any notice regarding specific layoffs, the Union, for its part, focused its 2010 and 2011 contract proposals on general protections for the bargaining-unit employees. (A. 229-30; 173-202.) Along those lines, the Union presented successive proposals regarding a “Seniority” provision (proposed Section 9 of the collective-bargaining agreement) that would require the Company to “review[] . . . the background, skills, and prior training” of employees when

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<sup>4</sup> The parties met for in-person bargaining sessions on August 3 and 23, 2010. (A. 229; 124.)

considering them for layoff. (*Id.*) The Company did not agree to these proposals, and the parties accordingly had no agreement as to layoff procedures during the relevant time period, in which the Company laid off over half of its workforce. (A. 229-30; 61.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Hayes, Griffin, and Block) found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally laying off individual bargaining-unit employees after its obligation to bargain with the Union arose.<sup>5</sup> (A. 226.) The Board's Order requires the Company to cease and desist from the unfair labor practice found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A. 226, 235.) Affirmatively, the Board's Order requires the Company to: notify and, on request, bargain with the Union over individual layoff decisions and their effects; offer the unilaterally laid off employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; make the unilaterally laid off employees whole for any loss of

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<sup>5</sup> The Company mischaracterizes (Br. 4) Member Hayes' comments in this case (A. 226 n.1) as a dissent from this Section 8(a)(5) and (1) finding. Member Hayes, in fact, noted several considerations *supporting* the Board's finding of the 8(a)(5) and (1) violation here, including the Company's failure to claim that it acted in accord with a past practice of limited discretion, and the Company's failure to claim that it acted based on economic exigency. (A. 226 n.1.)

earnings and other benefits suffered as a result of the unilateral layoff; and post a remedial notice. (*Id.*)

### **SUMMARY OF ARGUMENT**

The undisputed evidence in this case establishes that the Company laid off numerous individual employees without giving the Union notice of the individual layoff decisions, much less an opportunity to bargain over the decisions and their effects as the law requires. Thus, substantial evidence supports the Board's finding (A. 226 n.1, 230-33) that the Company breached its duty to bargain with the Union and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

In finding this unfair labor practice, the Board carefully considered and rejected the Company's argument (Br. 14-20) that it was privileged to act unilaterally because it had made a decision, before the employees voted for union representation, to lay employees off through the summer and fall as it had done for the previous eight to ten years. As the Board properly found (A. 231-32), the Company's prior determination—whether cast as a pre-election decision, or as a past practice that the Company sought to continue—did not address which employees would be laid off, when, and based on what criteria. Rather, those matters were left for the Company to resolve, in its discretion, after the employees chose the Union as their representative. And where, as here, an employer's general decision to engage in layoffs leaves the particulars of each layoff decision to the

employer's discretion, those individual layoff decisions are unquestionably subject to bargaining. The Board therefore reasonably found (A. 231-32) that the Company was not privileged to undertake the individual layoffs here unilaterally, in reliance on an earlier general decision or past practice.

Likewise, the Board reasonably rejected (A. 232-33) the Company's argument (Br. 9-13) that the Union waived bargaining over the individual layoff decisions and their effects. Given the Company's complete and utter failure to give the Union notice of the individual layoff decisions, the Union lacked the basic information necessary to waive its statutory right to bargaining over the individual layoffs at issue.

### **STANDARD OF REVIEW**

Judicial review of Board orders is "quite limited." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). This Court has accordingly stated that it will uphold a Board order "where [the Board's underlying] legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole." *Id.*; *see also* 29 U.S.C. § 160(e) (factual findings of the Board are "conclusive" if supported by substantial evidence). Substantial evidence means "such relevant evidence as a reasonable mind might accept to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *accord NLRB v. Caval Tool Div., Chromalloy*

*Gas Turbine Corp.*, 262 F.3d 184, 188 (2d Cir. 2001). Thus, the Court will enforce a Board order, even “when there appears to be more than one reasonable resolution,” so long as “the Board has adopted one of these.” *Int’l Union, United Automobile, Aerospace & Agricultural Implement Workers of Am., AFL-CIO v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008) (internal quotation marks and citation omitted).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY LAYING OFF EMPLOYEES WITHOUT GIVING THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN OVER THE INDIVIDUAL LAYOFF DECISIONS AND THEIR EFFECTS**

#### **A. It is Unlawful for an Employer to Unilaterally Change Working Conditions Once the Employees Have Selected Union Representation**

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to “bargain collectively” with the representatives of his employees. In turn, Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as “the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .”

It is well settled that an employer breaches the bargaining obligation created by these provisions “if, without bargaining to impasse, it effects a unilateral change

of an existing term or condition of employment.” *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). It is *a fortiori* the case that an employer is in breach of its obligations where it fails to give the union “timely notice and [a] meaningful opportunity to bargain” over a change, “as no genuine bargaining can be conducted where the decision has already been made and implemented.” *Eugene Iovine, Inc.*, 353 NLRB 400, 404 (2008), *enforced*, 371 F. App’x 167 (2d Cir. 2010), *and incorporated by reference in* 356 NLRB No. 134 (2011).

A unilateral change to the status quo is unlawful because it is “a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal” to negotiate. *NLRB v. Katz*, 369 U.S. 736, 742 n.9, 743 (1962). Moreover, it “minimizes the influence of organized bargaining” and “interferes with the right of self organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945); *see also NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (2d Cir. 1987) (noting that where a “company lays [employees] off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement[,] it sends a dramatic signal of the union’s impotence”).

Where the parties are involved in negotiations toward an initial collective-bargaining agreement, unilateral action poses a further problem, for it 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.” *Litton*, 501 U.S. at 198.

Accordingly, when the parties are so involved, the employer is required to maintain the status quo with regard to employees’ wages, hours, and other terms and conditions of employment unless and until the parties reach an agreement or impasse in bargaining for the agreement as a whole. *See id*; *Bottom Line Enters.*, 302 NLRB 373, 374 (1991), *enforced*, 15 F.3d 1087 (9th Cir. 1994).

Consistent with these principles, the Board and the courts have held that an employer must bargain with its employees’ union over a decision to lay off individual employees, and it must do so before implementing any such decision. *See Eugene Iovine, Inc.*, 353 NLRB at 404; *accord Advertisers Mfg.*, 823 F.2d at 1090-91; *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994); *Local 512, Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705, 710-11 (9th Cir. 1986). Moreover, as with any management decision that affects employees’ working conditions, the employer must also bargain over the effects of the decision—for example, the “order of succession of layoffs.” *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981); *see also NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816-18 (5th Cir. 2009) (upholding Board’s finding of unlawful failure to bargain over effects of layoff decision). Where an employer undertakes unilateral layoffs in disregard of these obligations,

it violates Section 8(a)(5) and (1) of the Act.<sup>6</sup> *See Eugene Iovine, Inc.*, 353 NLRB at 404; *accord Advertisers Mfg.*, 823 F.2d at 1090.

**B. The Company Unlawfully Implemented Discretionary Layoffs, Without Notifying or Bargaining With the Employees' New Union**

It is undisputed that, in July 2010, the Company began laying off certain of its newly unionized employees without providing notice of any layoff to the Union, much less bargaining with the Union over the particular layoff decisions and their effects. It is further undisputed that the Company continued to quietly lay off individual bargaining-unit employees for several months, even while meeting with the Union for bargaining over an initial collective-bargaining agreement.

Given these circumstances, there is no doubt that the Company failed to bargain with the Union over, for example, the criteria used to determine which employees would be laid off and when, and the benefits, protections, and potential recall rights individual employees would receive if selected for layoff—all aspects of the “terms and conditions of employment” to which the statutory duty to bargain plainly applies. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210

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<sup>6</sup> An employer’s violation of Section 8(a)(5) of the Act derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the Act (29 U.S.C. § 157), including the right to bargain collectively. *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

(1964) (finding that bargaining obligation defined in Section 8(d) “plainly cover[s] termination of employment”); *Advertisers Mfg. Co.*, 823 F.2d at 1090 (finding that “[l]ayoffs [of unionized workers] are not a management prerogative”; “[t]hey are a mandatory subject of collective bargaining”). Thus, substantial evidence supports the Board’s finding (A. 226 n.1) that the Company unilaterally laid off individual bargaining-unit employees in violation of the Act.

Contrary to the Company’s suggestion (Br. 14-17), moreover, the Board properly found (A. 231-33) that the individual layoffs here were not lawful continuations of any eight-to-ten-year practice that the Company was entitled to continue after the Union became the employees’ representative. Pending negotiations for a collective-bargaining agreement, an employer may unilaterally continue aspects of the status quo that are in some sense “automatic,” but an employer may not continue practices that are “informed by a large measure of discretion” without bargaining. *NLRB v. Katz*, 369 U.S. 736, 746 (1962). Indeed, this Court has upheld the Board’s view that such “discretionary acts are . . . precisely the type of action over which an employer must bargain with a newly certified union.” *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), *enforced*, 1 F. App’x 8 (2d Cir. 2001). Accordingly, once the employees have selected union representation, the employer must bargain with the union before implementing discretionary layoffs, and its failure to do so violates the Act. *See Adair Standish*

*Corp. v. NLRB*, 912 F.2d 854, 863-64 (6th Cir. 1990); *NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 202-04. (10th Cir. 1982).

Accordingly, although the record evidence here establishes that, for the past eight to ten years, the Company has generally laid off a portion of its workforce on a seasonal basis, the evidence fails to show any particularized practice that automatically required the specific layoff decisions that followed the Union's election victory in 2010. Specifically, there is no evidence that the individual post-election layoffs at issue occurred in accordance with a pre-set timeline, or pursuant to any set criteria. Instead, the evidence shows that a single company official (Leverich) made the individual layoff decisions "gradually as work diminished" after the election, considering a multitude of variables in his sole discretion, including the Company's overall financial condition and operations, individual employee skills, and subjective considerations relating to individual employees. (A. 232.) In these circumstances, the Board reasonably found (*id.*) that "each decision to lay off an employee required the Company to exercise substantial discretion," rather than to merely adhere to a set past practice. Accordingly, each individual layoff decision constituted a discrete unilateral and unlawful action.

In a vain effort to avoid this conclusion, the Company insists (Br. 14-20) that its eight-to-ten-year layoff practice was not a mere past practice, but a firm "decision" that pre-dated the employees' choice of union representation and any

obligation to bargain with the Union. However, there is no evidence to support the Company's strained claims that it "made a [pre-election] decision" that embraced "how [the individual layoffs] were to be handled on a go forward basis" (Br. 17), or that "the layoff decisions here challenged . . . were made more than eight (8) to ten (10) years ago" (Br. 16). The evidence only suggests that, at an unspecified time before the election, the Company made a general decision to continue laying off employees as work slowed during the summer months. Moreover, this general decision, as the Board found (A. 231-32), did not dictate any specific layoffs after the election; rather, a great many discretionary decisions, as to who was to be laid off and when, remained to be made. The Union enjoyed the right to bargain—and to reach agreement or impasse—over the criteria for making those decisions and their effects.

Thus, the present case is distinguishable from the cases cited by the Company (Br. 15-20), in which the employers merely implemented, after a representation election, largely self-contained decisions made well before the election. *See Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1230-31 (2006) (employer merely carried out, immediately after election, "firm" pre-election decision to sell business and conduct across-the-board layoff); *SGS Control Servs., Inc.*, 334 NLRB 858, 859, 861 (2001) (employer merely carried out, after election, "firm" pre-election decision to implement across-the-board change in method of

calculating overtime for unit employees); *Consol. Printers, Inc.*, 305 NLRB 1061, 1064-65, 1067 (1992) (employer merely carried out, immediately after election, detailed pre-election decision to lay off an identified portion of its workforce).<sup>7</sup>

Likewise, to the extent that the Company is arguing it merely carried out a general decision to “lay[] off employees in the off season” (Br. 14), that argument, too, misses the point. Where, as here, an employer’s general layoff decision leaves subsidiary layoff decisions to be made based on discretion, after the employees elect a union, those discretionary layoff decisions are unquestionably subject to bargaining. *See* above pp. 14-15. The Board therefore reasonably found (A. 231-32) that the Company was not privileged to undertake the individual layoffs at issue unilaterally, in reliance on its general decision to lay off a portion of its workforce on a seasonal basis.

In any event, as the Board further found (A 226 n.1), even if the Company’s general pre-election decision to lay off a portion of its workforce were construed as

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<sup>7</sup> As the Company indirectly acknowledges (Br. 18), these cases are further distinguishable because they involved clearly established pre-election decisions that triggered “one-time” employer actions after the employees voted for union representation. Here, by contrast, there is no evidence delineating the pre-election decision (Br. 17) or decisions (Br. 16) that assertedly triggered the numerous discrete unilateral layoffs at issue, which occurred at unpredicted times over the course of several months after the employees voted for union representation. *See Consol. Printers*, 305 NLRB at 1067-68 (finding that employer’s pre-election decision privileged unilateral layoff of certain employees immediately after election, but did not privilege subsequent layoffs of individual employees from time to time).

controlling the individual layoffs that followed, that still would not release the Company from all obligations to bargain over the individual layoffs. As the Board explained (*id.*), even under such a construction of the Company’s pre-election decision, the Company still would have an obligation to bargain over the *effects* of that decision—“including the number, timing, and terms of the [resulting individual] layoffs.” For this reason, the Board’s finding of a Section 8(a)(5) and (1) violation is warranted, even if, as the Company claims (Br. 14-20), it made a lawful pre-election decision that governed the ensuing individual layoffs.<sup>8</sup> See *Bridon Cordage, Inc.*, 329 NLRB 258, 258-59 (1999).

**C. The Company’s Claim that the Union Waived Bargaining Over the Layoffs is Meritless**

The Company is entirely mistaken in its claim (Br. 8-13) that the Union “effectively” or “clearly” waived its statutory right to bargain over the individual layoffs here. Preliminarily, as this Court has noted, “national labor policy casts a wary eye on claims of waiver of statutorily protected rights.” *NLRB v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991). Accordingly, where an employer claims that a union has waived its statutory right to bargain over a mandatory

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<sup>8</sup> Contrary to the Company’s suggestion in its brief (Br. 6), the Board’s Order does not require that the Company retain employees when they would have no work to do. Rather, the Board’s Order merely enforces the statutory bargaining obligations set forth above pp. 10-15, by requiring the Company to give the Union notice and an opportunity to bargain over the individual layoffs at issue. (A. 235.)

subject covered by Section 8(d) of the Act (29 U.S.C. § 158(d)), the employer “bears the weighty burden of establishing that a ‘clear and unmistakable’ waiver has occurred.” *Id.* (quoting *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)). Moreover, as this Court has further recognized, “a union cannot be held to have waived its right to bargain over a change in working conditions unless it has received timely notice of the employer’s proposed change.” *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 49 (2d Cir. 1983).

In the present case, the Company admits (A. 67) that it gave the Union no notice of the individual layoffs at issue.<sup>9</sup> Consequently, the Union lacked the basic knowledge necessary to have made any competent waiver of its right to bargain over the individual layoffs. *See also Seaport Printing & Ad Specialties*, 589 F.3d at 817 (employer’s failure to provide adequate notice of proposed changes requiring bargaining made it “impossible” for union to have waived bargaining); *Int’l Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) (“Notice, to be effective, must be given sufficiently in advance of actual

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<sup>9</sup> In addition, there is no evidence as to whether or when the Union may have learned about the Company’s layoffs of individual employees. In any event, as this Court has recognized, “conjecture or rumor is not an adequate substitute for an employer’s formal notice to a union” of a change affecting employees’ terms and conditions of employment. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961); *accord Porta-King Bldg. Sys.*, 14 F.3d at 1262-63 (citing *Rapid Bindery* and other cases similarly establishing that “[m]ere suspicion or conjecture cannot take the place of notice where notice is required, and will not be sufficient to support a finding of waiver” (internal quotation marks and citations omitted)).

implementation of a decision to allow a reasonable scope for bargaining”; therefore “[n]otice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated”).

Thus, the Company cannot seize on the Union’s silence regarding the individual layoffs to establish a waiver of the right to bargain over them. *See also Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 722 (2d Cir. 1966) (clear and unmistakable waiver cannot be inferred from silence); *accord NLRB v. Local One-L, Amalgamated Lithographers of Am.*, 344 F. App’x 663, 664 (2d Cir. 2009) (same). Nor can the Company seize on bargaining proposals that the Union made in ignorance of the Company’s individual layoff decisions, to establish that the Union waived bargaining over the individual layoffs.

In any event, the Union’s proposals were simply that—*proposals*. In the absence of their incorporation into a binding collective-bargaining agreement, they do not restrain the Union in any way.

And even if the Union’s blind proposals in contract negotiations were somehow relevant, it is not true, as the Company claims (Br. 10), that those proposals sought “no limitation on [the Company’s] right to lay off employees” and thus “expressly conceded” the Company’s right to lay off individual employees “in its . . . unfettered discretion.” On the contrary, the Union’s proposed seniority provision (Section 9 of the Union’s contract proposal) sought to

limit the Company's discretion with regard to layoffs by requiring that the Company review employees' "background, skills, and prior training" when considering them for layoff. Further, notwithstanding the Company's claims, the union included no language in the proposals expressly relinquishing the Union's right to participate in layoff decisions, or expressly relinquishing the right to bargain over the effects of those decisions (for example, severance benefits). Accordingly, to the extent that the Union's contract proposals are relevant at all, they do not establish a clear and unmistakable intent to waive bargaining over individual layoffs, and therefore they do not constitute an effective waiver of the Union's statutory bargaining rights. *See Metro. Edison Co.*, 460 U.S. 693, 708 (1983) (citing *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982), for the proposition that "waiver of a protected right must be expressed clearly and unmistakably").

In sum, substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by laying off individual bargaining-unit employees without giving their chosen representative—the Union—notice and an opportunity to bargain over the individual layoff decisions and their effects.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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May 2013

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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	)	
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	)	No. 12-4893
v.	)	
	)	Board Case Nos.
ROSE FENCE, INC.	)	29-CA-030485
	)	29-CA-030537
Respondent	)	
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 4,905 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

**COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS**

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board’s brief, is identical to the hard copy of the Board’s brief filed with the Court and served on the petitioner/cross-respondent.

The Board counsel further certifies that the CD-ROM has been scanned for viruses

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Dated at Washington, D.C.  
this 23rd day of May 23 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are a registered user or, if they are not, by serving a true and correct copy at the address listed below:

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