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Tramont Manufacturing, LLC and United Electrical, Radio and Machine Workers of America, Local 1103. Case 18–CA–155608

April 7, 2017

ORDER VACATING, AND DECISION AND ORDER
ON REMAND

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

On May 23, 2016, the National Labor Relations Board issued a Decision and Order in this case. 364 NLRB No. 5. The Respondent subsequently filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. The Board then recognized that it had overlooked an issue raised by the Respondent on exceptions to the Board (whether the administrative law judge applied the correct legal standard), and so failed to decide the issue. Accordingly, the Board moved the District of Columbia Circuit to remand the case. The court, in turn, remanded the case so that the Board could consider the overlooked issue.

The Board hereby vacates its original Decision and Order in this case, reported at 364 NLRB No. 5. As explained below, we now take up the case anew, including consideration of the overlooked issue pursuant to the court’s remand.

On January 28, 2016, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

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,¹ and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.²

¹ Although the Respondent excepts to the judge’s finding that it failed to provide the Union with timely notice about its decision to lay off 12 unit employees, it has presented no argument in support of this exception. Accordingly, the Respondent’s exception may be disregarded pursuant to Sec. 102.46(b)(2) of the Board’s Rules and Regulations, and we find it appropriate to do so here. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enf. 456 F.3d 265 (1st Cir. 2006).

² In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge’s recommended tax compensation and Social Security reporting remedy. We shall modify the judge’s recommended Order and substitute a new notice to reflect this remedial change and to conform to the Board’s standard remedial language.

The Respondent is a *Burns* successor³ that unilaterally implemented terms and conditions of employment by circulating an employee handbook. The handbook established procedures for how the Respondent would select employees for layoffs. When the Respondent decided to lay off employees, it did not bargain with the Union over the decision or effects of the layoffs. The judge found that the Respondent violated the Act by failing to afford the Union an opportunity to bargain over the effects of the layoffs. The judge first rejected the Respondent’s argument that, under a “contract coverage” theory (adopted by certain courts, but not the Board), the Union had no right to notification or effects bargaining. In so finding, she reasoned that (1) “contract coverage” could not apply because the parties never bargained over the terms of the handbook, and (2) the Board has rejected the “contract coverage” analysis in favor of the “clear and unmistakable” waiver standard. Next, the judge held that, pursuant to the “clear and unmistakable” waiver analysis, the Union did not waive its right to bargain over the effects of the layoffs. She explained that although the handbook addressed how the Respondent could decide who to lay off, it did not explicitly speak to the effects of any layoffs. Accordingly, she held that “[n]othing reflects that the Union waived its right to be notified or bargain effects before Respondent laid-off employees.” The Respondent has excepted, arguing, among other things, that the judge should have applied a

We also amend the judge’s remedy to provide that backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), rather than with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies in cases such as this one that involve the limited make-whole remedy established in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). See *Memorial Hospital of Salem County*, 363 NLRB No. 56 (2015); *Champaign Builders Supply*, 361 NLRB No. 153 (2014).

The General Counsel has excepted to the judge’s refusal to order the Respondent to reimburse affected employees for search-for-work and work-related expenses regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter or during the overall backpay period. In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, 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). For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 12–16, Acting Chairman Miscimarra would adhere to the Board’s former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

³ *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

“contract coverage” analysis instead of a “clear and unmistakable” waiver analysis.

We agree with the judge that the Respondent violated Section 8(a)(5) of the Act. That result follows from application of either the “clear and unmistakable waiver” standard, to which the Board adheres,⁴ or the “contract coverage” standard, which has been adopted by certain courts, including the District of Columbia Circuit,⁵ and which the Respondent contends should be applied here.

The crucial fact in this case is that the Union and the Respondent had not entered into a collective-bargaining agreement that addressed the subject of layoffs in any manner. Rather, the Respondent’s position that it was entitled to act unilaterally is predicated on a handbook provision that (as the judge correctly found) was itself unilaterally implemented by the Respondent when it assumed operations and to which the Union had never agreed.

Applying the waiver standard, we find, for the reasons stated by the judge, that the Union has not waived effects bargaining.

Alternatively, adopting the judge’s factual findings and analyzing the case under the “contract coverage” standard, we find that the Respondent was not privileged to act unilaterally. The District of Columbia Circuit has explained the “contract coverage” standard this way:

[T]he duty to bargain under the [National Labor Relations Act] does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment. “The union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties’ rights and forecloses further mandatory bargaining as to that subject.” *Local Union No. 47, IBEW v. NLRB*, [927 F.2d 635, 640 \(D.C.Cir.1991\)](#) (citing *UMW Dist. 31 v. NLRB*, [879 F.2d 939, 944 \(D.C.Cir.1989\)](#); *IBEW Local 1466 v. NLRB*, [795 F.2d 150, 155 \(D.C.Cir.1986\)](#)). “[T]o the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining.” *Connors v. Link Coal Co.*, [970 F.2d 902, 905 \(D.C.Cir.1992\)](#). This court has referred to this inquiry as an analysis of whether an issue is “covered by” a collective bargaining agreement. See *id.* at 906; *Dep’t of Navy v. FLRA*, [962 F.2d 48, 57 \(D.C.Cir.1992\)](#).

⁴ See, e.g., *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007).

⁵ See, e.g., *NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).

U.S. Postal Service, supra, 8 F.3d at 836. Here, no provision in a collective-bargaining agreement between the Respondent and the Union covered the subject of layoffs. As explained, the Union never agreed to the layoff provision in the Respondent’s handbook. We see no judicial authority for the proposition that the “contract coverage” standard could apply in the absence of a negotiated contract. Second, even if the layoff provision in the handbook could somehow be treated as a contract, it simply addresses how employees are selected for layoff. As the District of Columbia Circuit has explained, under the “contract coverage” standard, “where the employer acts pursuant to a claim of right under the parties’ agreement, the resolution of the refusal to bargain charge rests on an interpretation of the contract at issue,” and “whether there is a duty to bargain depends solely upon what the contract means.” *U.S. Postal Service*, supra, 8 F.3d at 836. We conclude, as a matter of contract interpretation, that the handbook provision addressing the selection of employees for layoff cannot be read to authorize the Respondent to refuse to bargain with the Union over the effects of such layoffs on the employees who are selected.⁶

ORDER

The National Labor Relations Board orders that Respondent, Tramont Manufacturing, LLC, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely notify the Union and afford it an opportunity to bargain over the effects of its decision to lay off 12 unit 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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning the effects of its decision to lay off 12 unit employees and, if an understanding is reached, embody the understanding in a signed agreement:

⁶ Acting Chairman Miscimarra agrees with his colleagues that the Respondent violated Sec. 8(a)(5) by failing to provide the Union with notice and an opportunity to engage in effects bargaining over the layoff of 12 employees under either the clear and unmistakable waiver standard or a contract coverage analysis. In rejecting the Respondent’s contract coverage argument, however, the Acting Chairman relies solely on the undisputed fact that the handbook provisions dealing with layoffs were not collectively bargained. In these circumstances, he does not reach the question of whether, if the handbook provisions had been collectively bargained, they could be read to cover bargaining over the effects of layoffs.

All full-time and regular part-time production, maintenance, and inspection employees at [Respondent's] facility located at 3701 N. Humboldt Boulevard, Milwaukee, Wisconsin, but excluding office clerical and technical employees, guards, professional employees and supervisors as defined by the National Labor Relations Act.

(b) Pay its former employees in the unit described above their normal wages when in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union about the effects of the decision to lay off 12 unit employees; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date the employee was laid off to the time he or she secured equivalent employment elsewhere or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the affected employees would have earned for a 2-week period at the rate of their normal wages, with interest, as set forth in the remedy section of the judge's decision as modified herein.

(c) Compensate affected employees for search-for-work and work-related expenses in the manner set forth in the remedy section of the Board's decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 18, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 9, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 18 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.

Dated, Washington, D.C. April 7, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁷ 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 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 to timely notify the Union and afford it an opportunity to bargain over the effects of our decision to lay off 12 unit 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, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning the effects of our decision to lay off 12 unit employees, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining:

All full-time and regular part-time production, maintenance, and inspection employees at [Respondent's] facility located at 3701 N. Humboldt Boulevard, Milwaukee, Wisconsin, but excluding office clerical and technical employees, guards, professional employees and supervisors as defined by the National Labor Relations Act.

WE WILL pay former unit employees their normal wages for a period of time set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL compensate affected employees for search-for-work and work-related expenses in the manner set forth in the Decision and Order of the National Labor Relations Board.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or

Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

TRAMONT MANUFACTURING, LLC

The Board's decision can be found at <http://www.nlrb.gov/case/18-CA-155608> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Tabitha Boerschinger, Esq., for the General Counsel.
Tony J. Renning, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on December 10, 2015. The United Electrical, Radio and Machine Workers of America, Local 1103 (Local 1103)¹ filed the charge on July 8, 2015² and the General Counsel issued the complaint on September 30, 2015. Respondent Tramont Manufacturing, LLC (Respondent) filed its answer on October 12 and an amended answer on November 24.

The complaint alleges that Respondent violated Section 8(a)(5) of the Act when it failed to notify the Union about laying off 12 employees and failed to give the Union an opportunity to bargain over the effects of the layoff. Respondent admits that it laid off the employees and that layoffs are a mandatory subject of bargaining, but denies any wrongdoing.

The parties were given a full opportunity to participate in the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my observation of the demeanor of the witnesses,³

¹ At hearing, General Counsel moved to amend the complaint to reflect that the United Electrical, Radio and Machine Workers of America (the Union), instead of Local 1103, was the certified and recognized bargaining agent. Respondent had no objection and the amendment was granted.

² All dates are in 2015 unless otherwise indicated.

³ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences.

and after considering the briefs filed by General Counsel and Respondent Tramont LLC, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a limited liability corporation, manufactures diesel engines and parts at its facility in Milwaukee, Wisconsin. Respondent admits, and I find, that Respondent sold and shipped from its Milwaukee, Wisconsin facility goods valued in excess of \$50,000 directly to points outside the State of Wisconsin. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that Local 1103 and the Union are labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS⁴

A. Organization of Respondent and Implementation of the Handbook as Terms and Conditions of Employment

Respondent Tramont Manufacturing, LLC (Respondent) manufactures diesel engines and parts. The Company is run by President Nand. The Company has two executive vice presidents, Vijay Raichura and Frank Langenecker. Raichura is responsible for accounting, finance, purchasing, and human resources.

Respondent made an asset purchase from the predecessor company, Tramont Corporation, in May 2014. The Union had been certified as the bargaining agent for the production and maintenance employees at the facility in 2003. As a condition of the asset purchase, Respondent agreed to recognize and bargain in good faith with the International Union. Respondent, however, would not agree to extend the collective-bargaining agreement. (GC Exh. 2, p. 5.) Respondent admits that it has continued as the employing entity and is a successor to Tramont Corporation.⁵

Instead of applying the collective-bargaining agreement that the predecessor and Union maintained, Respondent announced that the terms and conditions of employment were controlled by a handbook and distributed handbooks to the employees. In 2014, the Union and Respondent met for one bargaining session for a new collective-bargaining agreement. The parties mentioned layoffs but did not reach any agreements.

The handbook included a provision regarding layoffs. The

provision explained how employees would be selected for a layoff, but mentioned nothing about what might be the effects of a layoff. (GC Exh. 10, pp. 19–20.)

B. Respondent Lays Off 12 Employees on February 9, 2015

On January 29, Respondent began to plan for a reduction in hours due to economic concerns and select employees for a layoff. (Tr. 41; GC Exh. 7.) Before the 12 employees were laid off on February 9, Respondent did not notify the Union about the pending layoff. (Tr. 43, 96–97.)

On February 9, Human Resources Administrator Stephanie Pagan distributed layoff notices to 12 employees. The notices advised the employees that the layoff was effective immediately. Each notice advised employees that February 9 was their last day and provided information on filing unemployment benefits, continuing health care coverage under COBRA, and determining how paid time off (PTO) could be handled. (GC Exh. 3.)

C. The Union Makes an Information Request and Meets with Respondent

One of the laid-off employees was Lauro Bonilla, the president of Local 1103. Bonilla worked for the predecessor for 21 years and for Respondent since its takeover in May 2014. He testified that, on February 9, Pagan told him to go clean out everything and go to her office. She told him that he was laid off. He asked if he was the only employee laid off. She told him there were others. He asked for a list of those laid off. Pagan said she could not respond but would talk to the owner. (Tr. 89.)

About February 10, Bonilla notified the Union's national representative, Timothy Curtin, of the layoff. Curtin instructed Bonilla to make an information request for the names of the laid-off employees. (Tr. 90–91.) Within a day or two after his layoff, Bonilla returned to the facility and requested HR Administrator Pagan provide him with a list of laid-off employees. (Tr. 35.) Pagan called Executive Vice President Raichura, who came to the office. Raichura asked Bonilla whether he was there for personal business or union business; Bonilla testified that he said, "Both." Raichura testified that he was there on personal business but did request a list of employees. (Tr. 91–92, 100.) Bonilla testified that Raichura told him to talk to the lawyer. (Tr. 92.) During the 611(c) examination, Raichura initially maintained that he agreed to provide the list to him within a day or two, but not at that time. On recall after Bonilla's testimony and for Respondent's case in chief, Raichura stated that he would talk to the lawyer and then provide the list. (Tr. 35–36, 100.) I credit Bonilla's version regarding the information request as his explanation of events did not shift.

On February 11, 2 days after the layoff, Bonilla hand-delivered a written information request to Human Resources Administrator Pagan. The requested information included all the names of employees who were laid off, the length of the layoff and whether any alternatives to layoffs were considered. (Tr. 36; GC Exh. 5.) A letter dated February 26, 2015, from Executive Vice President Raichura to Bonilla, admittedly identified only 11 employees as laid off for an unknown period of time. (GC Exh. 6.)

⁴ Most of the facts within this decision are based upon undisputed documentary evidence. Where necessary, I make credibility determinations within this section. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

⁵ The parties do not dispute that Respondent is a successor pursuant to *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

The date that Bonilla received the February 26 list is at issue: Executive Vice President Raichura testified the list was mailed on the same day the letter was dated. However, further examination revealed that he instructed someone to mail it. Bonilla stated he did not receive the list at the Union office until few days before the parties met on March 30. (Tr. 39–40, 94.) Bonilla testified that he checked the mail at the union hall at least every other day while he was waiting for the information request. (Tr. 95.)

On February 18, per letter sent by certified mail, Curtin demanded a grievance meeting to discuss Bonilla's layoff. (GC Exh. 11.) About the end of February, Curtin had not heard from Respondent and called Respondent's attorney, Tony Renning. (Tr. 55–56.) Curtin left a voice mail message that he needed the layoff list, that Respondent did not reply to his February 18 letter regarding the meeting, and that he wanted an immediate response. (Tr. 56.) Curtin received no response.

On March 3, Curtin sent to Renning an email requesting an immediate grievance meeting regarding Bonilla's layoff. (Tr. 56; GC Exh. 12.) On March 4, Renning responded by e-mail, stating Respondent only received the letter on March 2 and that he would discuss the matter with President Nand and Executive Vice President Raichura on Thursday of that week. (GC Exh. 12.)

On Friday, March 6, Renning emailed Curtin that he spoke with Respondent, but Respondent was "perplexed" by the request for a grievance meeting and that Respondent complied with the handbook's layoff provisions in laying off Bonilla and the other employees. Renning also advised that Respondent would provide a statement of position to the Union. (GC Exh. 13.)

On March 10, Executive Vice President Raichura responded to Curtin by letter. Raichura stated that Bonilla was one of the employees laid off pursuant to the handbook provision. He then discussed the difficulties in giving 24 hours of work each week to the employees since they were hired. He said he did not know how long the layoffs would last. Regarding the request for a grievance meeting, Raichura again referred to the handbook:

The Employee Handbook does allow for a meeting with [Bonilla]'s immediate supervisor and/or Human Resources. The discussion will result in the sharing of the same information but, ultimately, little chance for a change in the current situation. Accordingly, please permit us to focus on growing the business as opposed to take the time to meet.

(GC Exh. 14.)

Curtin, responding on March 12, demanded to meet with management no later than March 18. (Tr. 62; GC Exh. 15.) The parties discussed dates on which to meet and agreed to meet on March 30.

The March 30 meeting was held at Renning's office and lasted approximately 1 hour. Curtin and Bonilla represented the Union. Respondent was represented by Raichura and Renning. Curtin testified that Raichura stated he had met with the individual supervisors at least 1 week before the layoff and requested a list of employees to lay off; Raichura said that he followed the handbook provisions regarding the layoff. (Tr.

65.) Raichura testified that the parties did not discuss the effects of the layoff. (Tr. 43). However, Curtin testified that he demanded "status quo ante" and bargaining over the decision and the effects of the layoff. (Tr. 68; GC Exh. 16.) I credit Curtin's statement that he requested to bargain over effects in addition to the layoff itself because Curtin was certain and specific about the events.

After the meeting, by an April 1 email to Renning, National Representative Curtin stated that the Union was denied its right to bargain over the layoff decision and the effects of the layoff for the 12 employees. He demanded reinstatement with back-pay for the laid off employees and bargaining. (GC Exh. 17.) Curtin received no response to the April 1 email. (Tr. 70.)

D. The Union Files Unfair Labor Practice Charges

On April 9, 2 months after the layoff, Local 1103 filed unfair labor practice charge 18-CA-149832, which alleged violations of Section 8(a)(5) and (3). The Section 8(a)(5) portion of the charge alleged that Tramont laid off 12 members of the bargaining unit without bargaining with the Union. (R. Exh. 1.) On May 28, the Regional Director issued a dismissal letter. (R. Exh. 2.)

Local 1103 appealed the dismissal to General Counsel's Office of Appeals. By letter dated August 21, the Acting Director of the Office of Appeals upheld the Regional Director's determination that Respondent had followed the established procedures for layoff. The letter also stated that, although the Union's appeal raised the failure to bargain over effects of the layoff, that issue was "the subject of Case 18-CA-155608, which is currently pending in the Regional Office." (R. Exh. 3.) Case 18-CA-155608 is the charge that forms the basis for this litigation.

Analysis

The main issue before me is whether Respondent provided the Union with sufficient notice and an opportunity to bargain about the effects of laying off 12 employees. I will discuss the unfair labor practice and Respondent's defenses.⁶

Respondent Violated Section 8(a)(5) Regarding Effects Bargaining

Respondent was required to notify and bargain with the Union regarding the effects of layoffs. The notification on the same day as the layoffs was insufficient and presented the Union with a fait accompli.

An employer is required to bargain with its employees' exclusive collective-bargaining representative when making a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining under Section 8(a)(5) of the Act. An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing the mandatory subjects of bargaining without first providing their bargaining representative with notice and a meaningful opportunity to

⁶ Respondent admitted, and I find, that Executive Vice Presidents Raichura and Longenecker are supervisors and agents within the meaning of Sec. 2(11) and 2(13) of the Act. Respondent denied that Pagan was a supervisor or an agent. I do not make any finding regarding Pagan's status as Respondent does not deny that it laid off the 12 employees.

bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962). Mandatory subjects of bargaining include those matters that are “plainly germane to the ‘working environment’” and “not among those ‘managerial decisions, which lie at the core of entrepreneurial control.’” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). The decision to lay off employees for economic reasons is clearly a mandatory subject of bargaining. Thus, absent extraordinary situations involving “compelling economic circumstances,” an employer must provide notice to and bargain with the union representing its employees concerning both the layoff decision and the effects of that decision. *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954–955 (1988), citing numerous authorities, including *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987). See also: *Pan American Grain Co.*, 351 NLRB 1412 (2007); *Tri-Tech Services*, 340 NLRB 894, 895 (2003).

This obligation includes a duty to bargain about the “effects” on employees of a management decision that is not itself subject to the bargaining obligation. See *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Good Samaritan Hospital*, 335 NLRB 901, 902 (2001); see also *Heartland Health Care Center*, 359 NLRB No. 155, slip op. at 6 (2013), reaffid. 362 NLRB No. 3 (2015). As the Board has noted, in most such situations, alternatives involving the effects of the employer’s underlying decision may exist that the employer and union can explore to avoid or reduce the impact of the change without calling into question the decision itself. *Good Samaritan Hospital*, 335 NLRB at 903–904; see also *Fresno Bee*, 339 NLRB 1214 (2003).

“An employer has an obligation to give a union notice and opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself.” *Good Samaritan Hospital*, 335 NLRB at 902. Bargaining over the effects of a layoff must occur in a meaningful time and meaningful manner. *Miami Rivet of Puerto Rico*, 318 NLRB 769, 772 (1995). An employer provides sufficient time to bargain effects of a layoff if it notifies the Union when it determined to lay off employees. *Allison Corp.*, 330 NLRB at 1366. Failure to notify the Union before it implements the layoff does not provide the Union with an opportunity to bargain over the effects of the layoff. *Geiger Ready Mix*, 315 NLRB 1021 (1994) and *Chrissy Sportswear*, 304 NLRB 988, 989 at fn. 6 (1991) (if union does not receive pre-implementation notice, it does not have sufficient notice for effects bargaining and is presented with a fait accompli). Same day notice does not give a meaningful opportunity to bargain. *Willamette Tug & Barge Co.*, 300 NLRB 282, 282–283 (1990).

The Union was presented with a fait accompli when Respondent failed to notify the Union of its decision to lay off 12 employees. The letter to Bonilla on February 9 was only a layoff notice to him; it said nothing about other laid-off employees. HR Administrator Pagan would not even divulge the names of the other laid-off employees to Bonilla when he asked. Even presuming this letter could be construed as notice to the Union,⁷ Respondent provided the letter on the same day

as the layoffs and therefore insufficient time to provide a meaningful opportunity to bargain. Id.

B. Respondent’s Affirmative Defenses Do Not Cure the Violations

Respondent contends that a contract coverage analysis demonstrates the Union had no rights for notification or bargaining effects of the layoff. It also contends that the Union waived its rights to bargain effects. The handbook waived the Union’s rights to bargain over the effects of layoffs. In addition, Respondent contends that it could not have committed any violations when it provided the Union information and held a bargaining session. Respondent also argues that the matter is collaterally estopped and/or res judicata because the Union had a prior charge that was dismissed. None of these defenses are availing.

1. The Union did not waive its rights to bargain effects of a layoff

Respondent argues that a contract coverage analysis is warranted instead of the traditional waiver analysis. The basis of the argument is that the handbook included layoff language, so the Union had no rights to be notified or bargain the layoff or the effects of the layoff. Respondent cites, inter alia: *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350 (D.C. Cir. 2008); *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005); *Regal Cinemas v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003); *BP Amoco v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000); and *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). These cases contend that even nonexplicit contract language makes any further effects negotiations unnecessary because the parties already bargained the subject. See, e.g., *Postal Service*, 8 F.3d at 836.⁸

The first step in such an analysis is to determine whether the parties bargained over the mandatory subject. *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14, 25–26 (1st Cir. 2007), affg. 345 NLRB 499 (2005). Here, no bargaining took place. The handbook was implemented without negotiations when Respondent assumed operations. Respondent’s brief reiterated that, as a *Burns* successor, it had the right to set the terms and conditions of employment. The parties only held one bargaining session after the implementation of the handbook and before the layoffs were implemented. The Union never agreed to the layoff provision. As the parties did not bargain over the layoff section and the handbook is not a contract, the Union cannot be held to a contract coverage analysis.

In addition, the Board reviewed the contract coverage analysis and reasoned that a waiver analysis is the correct approach. *Provena St. Joseph Medical Center*, 350 NLRB 808, 812–814 (2007). The Board reaffirmed its commitment to the clear and unmistakable waiver standard, following a long-standing policy

should have determined whether Bonilla could be responsible for receiving a notification of an employer’s change in terms and conditions of employment, not at the time an employee was notified of the layoff and certainly not almost ten months after it failed to notify the Union.

⁸ Other courts have declined to adopt the “contract coverage” standard. See, e.g., *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, fn. 11 (9th Cir. 2008).

⁷ At hearing, Respondent attempted to adduce testimony about Local Union President Bonilla’s duties. General Counsel objected and I sustained the objection. Before Respondent laid off employees, it

of refusing to acquiesce in decisions of Courts of Appeals that are contrary to Board law. See *Heartland Health Care Center*, 359 NLRB No. 155, slip op. at 1 fn. 1 and at 6 (2013), reaffid. 362 NLRB No. 3 (2015). See also *Pathmark Stores, Inc.*, 342 NLRB 378, fn. 1 (2004). I am bound to “apply established Board precedent which the Supreme Court has not reversed.” *Id.*

Pursuant to the waiver analysis, the Union did not waive its rights to bargain the effects of layoff. The Union did not waive its rights to bargain over the effects of layoffs because the handbook includes the layoff provision. Waiver must be “clear and unmistakable” and will not be inferred lightly. *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983). To meet this standard, any contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp.*, 330 NLRB at 1365. The Board looks to the exact wording of the contract provision at issue to determine whether waiver exists. *Id.* at 1364.

The handbook provisions do not address the effects on employees when a layoff occurs. The handbook provisions only identify how employees are selected for layoff. It is silent about notification regarding layoffs and the effects of the layoffs. For example, the layoff provisions did not address what were the effects of the layoff upon the remaining employees. See generally *KGTV*, 355 NLRB 1283, 1286–1287 (2010). Nothing reflects that the Union waived its right to be notified or bargain effects before Respondent laid off employees.

2. Events after the layoffs do not relieve Respondent’s obligations to notify and bargain over the effects of the layoffs

Respondent argues that the Union failed to request bargaining in a timely manner after the Union was notified of the layoffs. The Union did not ask to bargain effects until March 30, the day of the meeting and approximately 6 weeks after the layoff. The violation occurred when Respondent failed to notify the Union before the layoff occurred, and the Union therefore did not waive its right to request to bargain.

Respondent cannot rely upon subsequent events, such as the information request or a belated meeting about the layoffs, to cure its earlier refusal to bargain over effects. *Bluefield Regional Medical Center*, 361 NLRB No. 154, slip op. at 2 (2014). Under these circumstances, Respondent’s failure to provide advance notice of its layoff creates a situation where the Union could not have given up its bargaining rights by asking to bargain effects after the layoffs took place. *Chrissy Sportswear*, 304 NLRB at 989, fn. 6.

3. The General Counsel’s dismissal of an earlier unfair labor practice charge is not res judicata or collateral estoppel

Respondent contends that the letter from General Counsel’s Office of Appeals precludes any case regarding effects bargaining. Respondent’s cases generally discuss the doctrines of res judicata and collateral estoppel; none particularly address Board law. Respondent’s arguments are incorrect: Beyond the differences in the charges, a determination from the Office of Appeals does not have any preclusive effect.

The two charges have different 8(a)(5) allegations: The first

charge, which was dismissed, alleged failure to bargain over the layoffs; the current charge, which forms the basis for this litigation, alleges a failure to bargain the effects of the layoffs. Respondent’s brief sees no distinction between the two charges. The language Respondent cites from the letter demonstrates that Appeals dismissed a charge regarding bargaining over the layoffs and selection of employees; it further reflects that the Union filed a new charge, pending in the Regional Office, regarding the effects of the layoffs. (R. Exh. 3.) Appeals made no determination regarding the validity of charge involving bargaining the layoff’s effects.

Respondent strenuously argues that the determination by Appeals is preclusive by res judicata and/or collateral estoppel. Respondent widely misses the mark on whether the first charge was fully and fairly litigated before the Office of Appeals. To demonstrate res judicata or collateral estoppel, a right, question or fact must be in issue and “directly determined by a court of competent jurisdiction” *Montana v. United States*, 440 U.S. 147, 153 (1979), citing *Southern Pacific R. Co. v. United States*, 168 U.S. 1 (1897) (emphasis added). The Office of Appeals cannot be considered a “court.” The Office of Appeals is part of the General Counsel’s determination whether to prosecute a case and is not part of the adjudicatory portion of the NLRB, which would be the Board and the Division of Judges.

Plainly, dismissal of a prior charge is not an adjudication on the merits. *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, fn. 2 (1983), citing *Walter B. Cooke, Inc.*, 262 NLRB 626 (1982).⁹ Because the first charge was dismissed and not adjudicated on the merits, res judicata and collateral estoppel do not apply to the present case.

CONCLUSIONS OF LAW

1. Respondent Tramont LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Electrical, Radio and Machine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Tramont LLC has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by failing to provide prior notice to the Union of its intent to lay off 12 employees and without affording the Union an opportunity to bargain with Tramont LLC about the effects of the layoff.

4. The unfair labor practices committed by Respondent Tramont LLC affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, I shall order it to cease and desist from its unlawful conduct and to take certain affirmative actions designed to

⁹ Respondent also contends that the Union exhausted its administrative remedies by pursuing the initial charge through the Office of Appeals. It cites §101.6 of the Board’s Rules and Regulations. However, this section does not state that the dismissal on one matter is final on a different matter, much less constitutes an adjudication with full and fair litigation.

effectuate the policies of the Act.

Having found that Respondent unlawfully failed to give notice and refused to bargain with the Union about the effects of its layoff, I recommend an order of a limited backpay requirement designed to both make employees whole for losses, if any, suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for Respondent. *Print Fulfillment Services, LLC*, 361 NLRB No. 144, slip op. at 6 (2014). Respondent is required to pay backpay to its employees in a manner analogous to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), and as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Respondent shall pay its laid-off employees backpay at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the layoffs; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith. In no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. Backpay shall be based on earnings that the laid-off employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall also file a report with the Social Security Administration, which allocates backpay to the appropriate calendar quarters. Respondent shall also compensate affected employees for any adverse tax consequences associated with receiving one or more lump-sum backpay awards covering periods longer than one year.

General Counsel recommends a change in methods for reimbursing employees' expenses related to job searches. General Counsel argues that the current methods are insufficient to make an employee whole for losses incurred while searching for alternative employment. I am bound by current Board precedent and will not order the requested change.

I shall order that an appropriate notice be posted. General Counsel requests that notices should also be posted in Spanish. However, the record does not reflect that any of the employees speak Spanish exclusively. I therefore will recommend that the notice may be posted in English and any other languages that the Regional Director decides are appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted

ORDER

Respondent Tramont LLC, Milwaukee, Wisconsin, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Failing to bargain in good faith with United Electrical, Radio and Machine Workers of America by failing to laying off employees without prior notice of the layoff to the Union and an opportunity to bargain over the effects of its decision to lay off employees;

(b) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including inspection employees, employed by the Employer at its Milwaukee, Wisconsin location, but excluding office clerical employees, professional employees, guards and supervisors as defined the Act.

(b) Upon request, bargain in good faith with the Union concerning the effects of its decision to lay off employees on February 9, 2015;

(c) Make whole the following employees for any loss of earnings and other benefits suffered as a result of the unlawful failure to bargain with the Union over the effects of the layoff, in the manner set forth in the remedy section of this decision:

Lauro Bonilla	Keota Phouthakhio
John Carter	John Sims
George Cook, Jr.	Marlon Shumpert
Juan Hernandez	Isaac Vasquez
Thomas Jaworski	James Williams
Jesus Martinez	Jack Wingo

(d) Compensate any employee who receives backpay under this Order for adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including any electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Milwaukee, Wisconsin, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided

by the Board and all objections to them shall be deemed waived for all purposes.

by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The notice will also be posted in English and any other languages that the Regional Director finds appropriate. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. Respondent shall also duplicate and mail, at its own expense, a copy of notice to employees who were employed on February 8, 2015, the day before the layoff, but no longer employed. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 8, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, Washington, DC, January 28, 2016

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 LABOR 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 to bargain in good faith with your collective-bargaining representative.

WE WILL NOT fail to notify the Union when we intend to lay off employees.

WE WILL NOT fail to provide the Union with a meaningful opportunity to bargain over the effects of layoffs.

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

WE WILL bargain in good faith with the Union, which represents the following employees in an appropriate bargaining unit:

All full-time and regular part-time production and maintenance employees, including inspection employees, employed by the Employer at its Milwaukee, Wisconsin location, but excluding office clerical employees, professional employees, guards and supervisors as defined the Act.

WE WILL, upon request, bargain in good faith with the Union regarding the effects of the February 9, 2015 layoffs.

WE WILL make whole, according to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), and as clarified by *Melody Toyota*, 325 NLRB 846 (1998), the following employees for their losses:

Lauro Bonilla	Keota Phouthakhio
John Carter	John Sims
George Cook, Jr.	Marlon Shumpert
Juan Hernandez	Isaac Vasquez
Thomas Jaworski	James Williams
Jesus Martinez	Jack Wingo

WE WILL compensate those employees for the adverse tax consequences, if any of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

TRAMONT MANUFACTURING, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-155608 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273-1940.

