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September 4, 2018

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Farah Z. Qureshi  
Associate Executive Secretary  
National Labor Relations Board

Re: Tramont Manufacturing, LLC v. NLRB  
Case 18-CA-155608

Dear Ms. Qureshi:

This Position Statement is submitted on behalf of Tramont Manufacturing, LLC (hereinafter “Tramont”) in response to notice from the National Labor Relations Board (hereinafter the “Board”) that the Board accepted remand from the Court of Appeals (890 F.3d 1114 (D.C. Cir. (May 29, 2018)) remanding 365 NLRB No. 59 (April 7, 2017)) and that Tramont may, if it so desires, file a Position Statement with respect to the issues raised by the remand.

The issue on remand is the legal standard the Board is to apply when determining which subjects of mandatory bargaining are displaced by a Burns successor’s unilaterally imposed employment terms. Tramont contends that the DC Circuit Court of Appeals appropriately concluded that the “waiver” standard (utilized by the Board) is inappropriate in that said standard can never apply to a Burns successor’s unilaterally imposed initial employment terms. Tramont also contends that the DC Circuit Court of Appeals appropriately concluded that should the Board elect to abandon the “waiver” standard in this context and, decide instead, that unilaterally imposed employment terms should be narrowly construed (so that liability exists), doing so would run counter to established Board precedent (Monterrey Newspapers, Inc., 334 NLRB 1019 (2001)). Finally, Tramont contends that should the Board depart from established Board precedent and establish a new standard, the new standard should apply prospectively only (not in this context).

Accordingly, Tramont respectfully requests that the Board take no further action on remand. However, should the Board elect to take further action and establish a new standard, the new standard should apply prospectively only (not in this context).

## STATEMENT OF FACTS AND THE CASE

### I. Procedural History

Prior to filing the charge at issue in this case, the Union filed a charge against Tramont arising out of the same facts and circumstances, alleging a failure to bargain over the decision to lay off. More specifically, after the Board, through its Regional Director, issued a decision to dismiss the Union's first charge because the initial terms and conditions of employment governed layoff, and, therefore, there was no failure to bargain over the decision to lay off, the Union filed a second charge arising out of the exact same facts and circumstances, alleging a failure to bargain over the effects of the layoff.

On April 9, 2015, the Union filed an unfair labor practice charge against Tramont in Case 18-CA-149832. In Case 18-CA-149832, the charge alleged that Tramont violated the Act as follows: "On or about February 10, 2015, the above named employer, through its officers, agents and representatives, laid off twelve members of the bargaining unit without bargaining with the Union, in violation of Sections 8(a)(1) and (5) of the Act." The charge further alleged as follows: "On or about February 10, 2015, the above named employer, through its officers, agents and representatives, laid off UE Local 1103 President Lauro Bonillo in violation of the Employee Handbook, without bargaining with the Union, and with animus against President Bonilla because of his Union activities, in violation of Sections 8(a)(1), (3) and (5) of the Act."

The Board, through its Regional Director, investigated the charge, and on May 28, 2015, issued a decision to dismiss. Specifically, the Regional Director stated, "[t]he region has carefully investigated and considered the charge against Tramont Manufacturing, LLC (Employer) alleging violations under Section 8 of the National Labor Relations Act." The Regional Director further stated:

**Decision to Dismiss:** Based on that investigation, I have concluded that further proceedings are not warranted inasmuch as the evidence was insufficient to establish a violation under the Act.

The deadline to appeal the Regional Director's decision was set for June 11, 2015, unless an extension of time was granted for good reason.

Thereafter, on July 8, 2015, the Union filed the charge at issue in this case, based on the exact same facts and circumstances. Specifically, the second charge alleged that Tramont violated the Act as follows: "On or about February 9, 2015, the above-named employer, through its officers, agents and representatives unlawfully laid off twelve members of the bargaining unit, including Local 1103 President Lauro Bonillo, without notifying the Union and providing it with an opportunity to bargain over the effects of the layoffs, in violation of Sections 8(a)(1) and (5) of the Act."

In addition to filing a second charge against Tramont, the Union also filed an appeal of the Regional Director's decision to dismiss the charge in 18-CA-149832. The General Counsel, through the Acting Director of the Office of Appeals, denied the appeal on August 21, 2015. Specifically, the decision denying the appeal stated, in pertinent part, as follows:

This office has carefully considered the appeal from the Regional Director's refusal to issue complaint. We agree with the Regional Director's decision and deny the appeal. The unfair labor practice charge alleged that the Employer failed to bargain with the Union before laying off 12 members of the bargaining unit in violation of Section 8(a)(5) of the National Labor Relations Act (Act). The charge also alleged that the Employer discriminatorily laid off the Union President without bargaining with the Union in violation of Sections 8(a)(3) and (5) of the Act.

**The evidence established that the Employer was a successor employer under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), that set initial terms and conditions of employment at the time it hired the predecessor company's employees. Those initial terms and conditions of employment included a layoff procedure. Contrary to your assertions on appeal, the evidence supports that the Employer followed this established procedure in selecting employees for layoff. Thus, its failure to bargain with the Union regarding the layoff, including that of the Union President, was not unlawful. See, *Monterey Newspapers, Inc.*, 334 NLRB 1019, 1021 (2001).**

With respect to the layoff of the Union President, it was determined that the Employer established a legitimate, non-discriminatory reason for his layoff and demonstrated that it would have selected him for layoff even absent his status as a Union official. Thus, the evidence established that the Union President was not able to operate all of the machines in his department, a critical element in the decision-making process regarding which employees to retain. There was insufficient probative evidence to show that the Employer's asserted reason for laying off the Union President was pre-textual. Therefore, it was concluded that notwithstanding his union activities, the Employer met its burden under *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) enf'd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

With respect to your assertion that the Employer unlawfully failed to provide a requested list of laid off employees, this allegation was not included in the charge and as such it is outside of the scope of this appeal. Finally, on appeal you argue that the Employer violated Section 8(a)(5) of the National Labor Relations Act by failing to provide the Union notice and an opportunity to bargain over the effects of the layoff. We note that this allegation is the subject of Case 18-CA-155608, which is currently pending in the Regional Office.

(Emphasis added in bold).

Subsequently, the Board, through its Regional Director, issued a complaint in the instant case on September 30, 2015, alleging that Tramont violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5), by refusing to bargain over the effects of its decision to lay off employees. Tramont filed a timely answer and affirmative defenses on October 12, 2015, and an amended answer and affirmative defenses on November 24, 2015.

A hearing was held before ALJ Steckler on December 10, 2015, and on January 28, 2016, ALJ Steckler issued a proposed decision and order recommending that the Board find that Tramont violated the Act as alleged. Tramont timely filed exceptions to ALJ Steckler's decision. On May 23, 2016, a panel of the Board issued a Decision and Order finding that Tramont violated Sections 8(a)(1) and (5) by refusing to bargain over the effects of its decision to lay off employees. Tramont subsequently filed a Petition for Review of the Board's Decision and Order and the Board filed a Cross-Application for Enforcement.

On December 21, 2016, the Board filed a Motion Requesting Remand of the Case. The Board contended that it "overlooked that the Company argued to the Board that 'the question of 'waiver' normally does not come into play with respect to subjects already addressed by the terms and conditions governing employment. Instead, the proper inquiry is simply whether the subject that is the focus of the dispute is covered by the terms and conditions governing employment.'" The Board stated that, "[h]aving been alerted to this issue, the Board now seeks a remand in order that it may respond to that point."

Tramont opposed the motion on the grounds that it was made in bad faith and was nothing but a veiled attempt to avoid judicial review on the heels of the DC Circuit Court of Appeal's decision in *Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, 838 F.3d 16 (D.C. Cir. 2016). (JA 379). Tramont further asserted that there was no indication that the Board was genuinely willing to revisit its decision regarding the proper legal standard.

On February 21, 2017, the Court ordered "that the record be remanded to Respondent for a period not to exceed 60 days so that it may consider the issue Respondent now acknowledges it overlooked."

On April 7, 2017, the Board issued an Order Vacating, and Decision and Order on Remand, adopting the ALJ's rulings, findings, and conclusions that Tramont violated Sections 8(a)(1) and (5) of the Act by refusing to bargain over the effects of its decision to lay off employees. The Board also amended the remedy in light of an interim Board decision and ordered Tramont to "compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings."

The parties jointly moved to lift the abeyance order and dismiss the case as moot. On May 15, 2017, following the Board's consideration of the overlooked issue as well as the issuing of its Order Vacating, and Decision and Order on Remand, the DC Circuit Court of Appeals issued the following Order: "Upon consideration of the joint motion to lift the abeyance order and to dismiss the consolidated cases as moot, it is ORDERED that the motion be granted and these cases be dismissed. The Clerk is directed to issue the mandate forthwith."

Tramont filed a Petition for Review with the DC Circuit Court of Appeals on May 22, 2017. The Board subsequently filed a Cross-Application for Enforcement.

The DC Circuit Court of Appeals heard oral argument on March 5, 2018. On May 29, 2018 the DC Circuit Court of Appeals issued its Opinion, granting Tramont's Petition for Review in part, remanding to the Board to provide an explanation of the legal standards it applies when determining which subjects of mandatory bargaining are displaced by a Burns successor's unilaterally imposed employment terms and, in all other respects, denying the Petition for Review.

On August 7, 2018, the Board accepted remand from the DC Circuit Court of Appeals.

## II. Evidentiary Facts

### **A. Tramont is a Successor Employer.**

Tramont is a limited liability company located in Milwaukee, Wisconsin. Tramont is engaged in the business of manufacturing diesel tanks and enclosures. It is a successor employer, having purchased the assets of Tramont Corporation out of receivership on or about May 7, 2014.

The Union was the exclusive bargaining representative with respect to wages, hours and working conditions for all production, maintenance and inspection employees of Tramont Corporation. Prior to Tramont purchasing the assets of Tramont Corporation, there was a Collective Bargaining Agreement between Tramont Corporation and the Union covering the time period of April 7, 2010 to April 6, 2013. The Collective Bargaining Agreement was later extended for one year, and expired on April 6, 2014.

Pursuant to the Asset Purchase Agreement between Tramont and the Receiver, Tramont agreed to offer employment to substantially all of the employees of Tramont Corporation and to recognize and bargain with the Union in good faith, but did not agree to assume the Collective Bargaining Agreement dated April 7, 2010, as extended by the Receiver. Instead, Tramont expressly reserved its right to set the initial terms and conditions of employment. The Asset Purchase Agreement specified, in pertinent part, as follows: "Purchaser shall make any such employment offers, as provided in this subsection, on Purchaser's own terms and conditions of employment."

### **B. Terms and Conditions of Employment.**

After Tramont purchased the assets of Tramont Corporation on May 7, 2014, Tramont did not assume the Collective Bargaining Agreement between Tramont Corporation and the Union. In May of 2014, Tramont presented the Union with the initial terms and conditions of employment as outlined in Tramont's Employee Handbook. Tramont offered employment to approximately sixty (60) to sixty-five (65) employees, who ultimately accepted employment subject to the terms and conditions of employment set forth in Tramont's Employee Handbook.

Section 5.5 of the Employee Handbook governs Workforce Reductions (Layoffs):

From time to time, management may decide to implement a reduction in force (“RIF”). We are quick to acknowledge that RIFs can be a trying experience for management and employees alike. The Company will make its best effort to make sound business decisions while acknowledging the needs of its workforce. Unless specified otherwise in connection with a particular reduction in force, the following procedures will be used.

### *1. Selection Criteria*

In the event of a “RIF”, employees will be retained based on skills, experience, and job performance. Depending on the reason for the reduction in force, the nature of the jobs within the affected work unit(s), and the anticipated needs of the Company following the reduction in force, one of the two methods described in sections two (2) and three (3) will be used to select employees to be retained. RIF decisions will not be based on an individual's salary.

### *2. Ranking of Employees*

Department and/or division heads will rank employees based on the employee's overall ability to contribute to the Company's ongoing needs. Specific factors to be considered should include, but are not limited to, demonstrated past job performance, resourcefulness, adaptability, teamwork, skill level, ability to perform tasks the Company anticipates will be necessary following the reduction in force, and dedication and commitment to the Company and its goals. The weight given to various factors will depend on the specific work unit and the needs of the Company. For example, it is possible for an employee with unique skills that are critical to the work unit to be ranked higher than an employee with better performance in a different skill area. Seniority will generally be considered only where other relevant factors do not allow for differentiation between employees.

The decision on which employees will be grouped together for purposes of rankings will be subject to the discretion of the corporate officer with responsibility for the affected work unit. Groupings can change depending on the nature and goals of the reduction in force.

Where the employee ranking method of employee selection for reductions in force is used, employees will be selected as candidates for inclusion in the reduction in force in inverse order of their ranking.

### *3. Placement in Available Jobs*

Depending on the reason for and nature of a reduction in force, and the jobs included in the work unit, selection of candidate for a reduction in force may be based on an assessment of the positions that will exist in a work unit

following the reduction in force, and which employees are best suited to fill those remaining positions.

When this method is used, the manager responsible for the affected work unit will identify the skills and abilities necessary for each job remaining after the reduction in force. Employees within the work unit will be evaluated based on their ability to perform the available jobs. In addition to the employee's skills and ability to perform the remaining job duties, other factors to be considered include, but are not limited to, resourcefulness, adaptability, teamwork, and dedication and commitment to the Company and its goals. While it will often be the case that an employee who has performed well in a particular job will be determined to be the best suited to fill that position following the reduction in force, this may not always be the case.

Section 7.22 of the Employee Handbook governs Severance Pay:

Any severance pay offered is at Company discretion and requires the employee to sign a Release of Claims Agreement as a condition of payment.

The Union remains the exclusive bargaining representative with respect to wages, hours and working conditions for all production, maintenance and inspection employees of Tramont. Although Tramont and the Union have engaged in negotiations for a collective bargaining agreement, the parties have not reached agreement.

### **C. Layoffs.**

On or about January 29, 2015, Tramont held a meeting to discuss the lack of work it was experiencing and possible reduction in hours. Despite its prior efforts to avoid layoffs, Tramont determined that it was necessary to reduce the workforce by twelve (12) employees due to lack of work. On or about February 9, 2015, Tramont advised twelve (12) employees of their immediate layoff, including Local Union President Lauro Bonilla (hereinafter "Bonilla").

At the time that Bonilla was notified of his layoff, he inquired as to whether he was the only employee subject to layoff, and was informed by Tramont that there were others as well. Bonilla then immediately contacted Timothy Curtin (hereinafter "Curtin"), who was the National Representative for the Union, and advised Curtin that he and other employees had been laid off. Bonilla told Curtin that he had asked for the names of the others because he represented the Union, and Curtin confirmed that Bonilla had a right to do that. Bonilla returned to Tramont the next day and told Tramont that because he was the Local President for the Union, he had the right to ask for the names of who was laid off. Later that day, Stephanie Pagan, Human Resources, contacted Bonilla and asked that he submit his request in writing.

Bonilla then contacted Curtin and asked for Curtin's assistance in preparing a letter because Bonilla was unable to prepare one himself. Curtin provided Bonilla with a letter, and Bonilla delivered it to Tramont the next day, February 11, 2015. The letter from Bonilla, President, UE Local 1103, as prepared by Curtin, stated as follows: "As the certified representative of all Tramont hourly employees, please provide to the Union, in writing, all of the names of who has been laid off, how long the company expects the layoff to last, and whether the company considered any alternatives to the layoff." There was no request to bargain with the Union as to the decision to layoff or the effects of the layoffs.

Tramont subsequently provided Bonilla with a list of employees who had been laid off by mail addressed to Bonilla's Union office. Although dated February 25, 2015, Bonilla testified that he did not receive the list until a few days prior to a meeting with Tramont that was scheduled for March 30, 2015.

Although Bonilla, as Local Union President, participated in negotiations between Tramont and the Union as well as other labor-management meetings, Bonilla never requested to bargain over Tramont's decision to lay off the twelve (12) Union members or the effects of the layoffs.

On February 18, 2015 and March 3, 2015, Curtin forwarded correspondence on behalf of the Union challenging only Tramont's decision to lay off Bonilla and asked to meet with Tramont only concerning Bonilla's layoff. Curtin did not request to bargain over Tramont's decision to lay off the other Union members or the effects of the layoffs until March 30, 2015, even though he had notice on February 10, 2015, of the layoffs of Bonilla and "quite a few other people" who were members of the bargaining unit.

Tramont's Executive Vice President (Finance and Human Resources) Vijay Raichura (hereinafter "Raichura") responded to Curtin by letter dated March 10, 2015 (indicating that Raichura received Curtin's correspondence of February 18, 2015 on March 2, 2015). Therein, Raichura indicated that Bonilla and the other Union members had been laid off pursuant to the layoff provision set forth in the Employee Handbook.

On March 12, 2015, Curtin responded to Raichura again requesting only to meet to discuss Bonilla's layoff. Curtin's letter stated, in pertinent part, as follows: "I am in receipt of your letter from March 10<sup>th</sup> concerning the layoff of UE Local President Lauro Bonilla. We do not believe that the Company has followed the Employee Handbook in regards to the layoff. We must insist on a meeting for Mr. Bonilla and a Union Representative to discuss this matter with management." Id. Curtin did not request to bargain over Tramont's decision to lay off the other Union members nor to bargain over the effects of the layoffs.

On March 30, 2015, Raichura met with the Union (Curtin and Bonilla). During the course of this meeting, for the first time, the Union objected to Tramont's failure to bargain with the Union over the decision to lay off the other Union members and the effects of the layoffs. Curtin demanded that Bonilla be reinstated, that Tramont return to the "status quo ante" with respect to the other Union members subject to the layoff (meaning they all be reinstated with back pay), and that

Tramont bargain its decision to lay off the twelve (12) Union members and the effects of the layoffs.

Curtin's handwritten notes from this meeting indicate, in pertinent part, as follows: "Next demand 'status quo ante,' which means those on layoff be immediately reinstated w/backpay - - then we can bargain over the decision & the effects of the layoff - - if not you get a charge!" Curtin sent a follow-up e-mail to Tramont's legal counsel on April 1, 2015, stating, in pertinent part, that "the Union was denied the right to bargain over both the decision to have a layoff and the effects of the layoff on those twelve employees." Tramont did not agree to the Union's demands.

Eight (8) days later, the Union followed through with filing a charge against Tramont in Case 18-CA-149832. However, after the Board, through its Regional Director, issued a decision to dismiss the charge, the Union filed a second charge based upon the same facts and circumstances. Although the first charge was filed just over a week after the Union memorialized its intent to file a charge related to Tramont's failure to bargain over the layoff decision and the effects of the layoff, the ALJ concluded in the instant case that the Union's first charge did not actually allege a failure to bargain the effects of the layoff decision, but the Union's second charge, at issue in this case, did.

## ARGUMENT

### I. As The DC Circuit Court of Appeals Concluded, The Waiver Standard Cannot Sensibly Apply To A Burns Successors Unilaterally Imposed Initial Employment Terms.

The Board, acting through the Regional Director (and affirmed by the Office of Appeals), previously decided that Tramont's decision to lay off employees was lawful. It reasoned that the initial terms and conditions of employment governing bargaining unit employees (albeit contained in its Employee Handbook) included a layoff procedure, and held that Tramont followed this "established procedure" when selecting employees for layoff.

However, the Board has continued to adhere to its "clear and unmistakable waiver" standard as to the effects of the layoff. Under this standard, "[a] union may contractually relinquish a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms." United Technology Corp., 274 NLRB 504, 507 (1985).

Employers generally have an obligation to engage in effects bargaining unless: (1) where, as here, the terms and conditions of employment already address the effects of the management decision to lay off; (2) where, as here, the terms and conditions of employment clearly waive effects bargaining altogether; or (3) where, as here, some entrepreneurial or financial reason makes effects bargaining futile. Here, the Handbook, which contains the initial terms and conditions governing employment, specifically addresses Workforce Reductions (Layoffs).

The Board's analysis as to effects bargaining provides that even where, as here, a collective bargaining agreement gives the employer the right to make a decision on a particular issue (e.g., layoff), if the agreement is silent as to the effects of that decision, the employer must agree to

bargain with its union over those effects. Natomi Hospitals of California, Inc., 335 NLRB 901 (2001). The Board maintains that a union must have “waived” its right to bargain over the effects in the same clear and unmistakable terms it requires for a waiver to bargain over the decision itself. Id.

The courts, however, have held otherwise. The DC Circuit Court of Appeals has repeatedly held that “the question of ‘waiver’ normally does not come into play with respect to subjects already covered by a collective bargaining agreement. Instead, the proper inquiry is simply whether the subject that is the focus of the dispute is ‘covered by’ the agreement.” NLRB v. U.S. Postal Service, 8 F.3d 832 (D.C. Cir. 1993); Regal Cinemas, Inc. v. NLRB, 317 F.3d 300 (D.C. Cir. 2003); Enloe Medical Center v. NLRB, 433 F.3d 834, 838 (D.C. Cir. 2005).

Here, there is no dichotomy between the rights granted Tramont to lay off and the effects of those rights. The collective bargaining context is different from the statutory analysis. Moreover, the terms and conditions governing employment justifies Tramont’s failure to bargain over effects because the terms and conditions of employment authorize Tramont to implement a Workforce Reduction (Layoff). Again, the DC Circuit Court of Appeals agrees:

Whether the parties contemplated that the collective bargaining agreement would treat the effects of a decision separately from the decision itself is just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether. It would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union’s right to bargain over the effects of that decision.

Id. at 838-839.

Similarly, unless the parties agree otherwise, there is no continuous duty to bargain (the decision or the effects) during the term of an agreement with respect to a matter that is already covered (e.g., layoff). NLRB v U.S. Postal Service, 8 F.3d 832 (D.C. Cir. 1993); BP Amoco Corporation v. NLRB, 217 F.3d 869 (D.C. Cir. 2000); Southern Nuclear Operating Company v. NLRB, 524 F.3d 1350 (D.C. Cir. 2008). Where, as here, there are existing terms and conditions of employment governing the layoff, there is no duty on the part of Tramont to bargain over the effects.

Accordingly, where, as here, there is nothing to support the proposition that the parties intended to treat the issues (the right to lay off and the effects of layoff) differently, there is no basis to require Tramont to bargain about the effects. The fact that the parties in this case never contemplated a dichotomy between the rights granted to Tramont to lay off employees and the effects of those rights is amply demonstrated by the Union’s behavior when Tramont announced the layoffs. The Board’s factual and legal conclusions regarding Tramont’s decision to lay off and the effects of the layoff cannot be reconciled based on the “clear and unmistakable waiver” standard – The Union cannot waive the right to bargain over the decision but not the effects.

The Board decided the instant case based on its “waiver standard.” However, DC Circuit Court of Appeals appropriately concluded:

Put simply, we do not see how employment terms unilaterally imposed by an employer could ever effect a waiver of bargaining rights by the union. Whatever standard the Board decides should govern the question of how far a Burns successor's initial employment terms displace the duty to bargain, framing that standard in terms of waiver is far from intuitive. . . .”

Tramont Manufacturing, LLC v. NLRB, 890 F.3d 1114 (May 29, 2018).

Accordingly, the Board should abandon the “waiver” standard in this context.

II. If The Board Appropriately Abandons The “Waiver” Standard And, Instead, Decides That Unilaterally Imposed Employment Terms Should Be Narrowly Construed, The Decision To Do So Would Run Counter To Controlling Board Precedent.

A Board decision to depart from established precedent regarding successor employers without reasoned justification is inconsistent with its own precedent regarding successor employers. More specifically, to find that Tramont could, as a lawful Burns successor, establish a layoff procedure as part of its initial terms and conditions of employment, but could not implement its procedure without bargaining with the Union regarding the *effects* of its layoff decision, the Board deprived Tramont of the rights to which it was entitled under Burns. In addition, under Monterey Papers, Inc., 334 NLRB 1019 (2001), Tramont lawfully established its layoff procedure as its initial terms and conditions of employment under the Burns doctrine, and Tramont lawfully exercised its discretion under the layoff procedure in selecting employees for layoff. There is no evidence that Tramont made subsequent changes to its initial terms and conditions of employment, and, consequently, it had no duty to bargain.

The DC Circuit Court of Appeals appropriately concluded:

To be sure, even if the Board chooses to abandon its waiver standard in this context, it might, in its discretion, nonetheless decide that unilaterally imposed employment terms should be narrowly construed and that liability remains appropriate here. Should it do so, however, it must respond to Tramont's argument that such an outcome would run counter to Monterey Newspapers, Inc., 334 NLRB 1019 (2001), in which the Board held that the Act imposed no obligation on a Burns successor to bargain over ‘the rate of pay it proposed in each job offer it made to each prospective new employee’ where the employer's initial employment terms established that new employees would be offered pay rates within specified bands.”

Tramont Manufacturing, LLC v. NLRB, 890 F.3d 1114 (May 29, 2018).

As the DC Circuit Court of Appeals concluded (and as Tramont has argued), should the Board decide that unilaterally imposed employment terms should be narrowly construed, the Board's decision to do so would be inconsistent with Monterey Newspapers, Inc., which is directly applicable to this case. In that case, the Respondent acquired Monterey Newspapers, Inc. (MNI)

from E.W. Scripps on August 24, 1997. During Scripps' ownership, MNI's employees were represented by a union, and, at the time of purchase, were covered by a collective bargaining agreement. The Respondent hired a majority of the employees, and, on August 28, 1997, recognized the union as the exclusive bargaining representative.

Prior to acquiring MNI, the Respondent established a separate pay system for new employees as part of its initial terms and conditions of employment. Under its pay system, the Respondent "created a pay band for each job classification," and the pay bands were used in determining wage rates for new hires. More specifically, a new employee was offered a wage rate within the pay band applicable to the particular job classification, and the Respondent would determine the specific wage rate within the pay band based upon the applicant's qualifications and local market conditions. In addition, the Respondent "might raise its initial offer but would keep the offer within the pay band for the job classification."

The ALJ found that the Respondent "lawfully established its pay system for new hires as part and parcel of its initial terms and conditions of employment under the Burns doctrine." However, "[t]he judge, nevertheless, found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with prior notice and an opportunity to bargain concerning the rate of pay it proposed in each job offer it made to each prospective new employee." Specifically, the ALJ concluded that the Respondent created a "dual compensation system" and that "all aspects of the dual compensation system directly and vitally affected the unit employees." The ALJ also found that the "discretion exercised by the Respondent's local managers in determining application pay rates was analogous to decisions frequently made in merit pay situations." The Board disagreed and reversed the ALJ's decision.

The Board held that the ALJ's analysis "fails to accord the Respondent its proper rights as a lawful *Burns* successor." The Board reasoned as follows:

In finding a violation in the present case, the judge relied heavily on his finding that the wage rates that the Respondent offered to applicants "**vitally affected**" current unit employees. **We agree with the judge that the wage rates that job applicants were offered (and, thus, that newly hired employees were paid) are mandatory subjects of bargaining. That finding, however, is not sufficient to support the judge's conclusion that the Respondent's failure to provide the Union with notice and an opportunity to bargain concerning the rates of pay to be offered job applicants under the Respondent's new pay system violated Section 8(a)(5) and (1) of the Act.** Indeed, as noted above, the Supreme Court held in *Burns* that a successor employer, such as the Respondent, is ordinarily free to set initial terms on mandatory subjects of bargaining, including such subjects as wages. Thus, **the fact that wage rates to be offered job applicants were mandatory subjects of bargaining does not take them outside of *Burns*.**

Id. at 1020 (emphasis added).

The Board further reasoned that the Respondent “lawfully established its pay system for new hires as part and parcel of its initial terms and conditions of employment under the Burns doctrine.” The Board explained:

The pay system, as described above, set a pay band for each job classification. Under the pay system, the Respondent was to determine a starting wage rate within the appropriate pay band to offer each new job applicant whom the Respondent wished to hire. The Respondent’s setting of a starting wage in this manner was an integral part of the pay system. **Thus, to find, as the judge did, that the Respondent, as a lawful Burns successor, could establish the pay system for new hires as part of its initial terms of employment but could not offer a starting wage to any job applicant under that system without bargaining with the Union, deprived the Respondent of the rights to which it was entitled under Burns.**

Id. at 1020-21 (emphasis added). Furthermore, the Board acknowledged that the Respondent would be obligated to bargain with the union regarding any subsequent raises or changes in compensation.

The Board held that “[t]he present case concerns a successor employer’s setting of its initial terms of employment under which it agrees to take over operation of the enterprise from the predecessor. As provided in Burns, a successor employer has a right to establish unilaterally its own initial terms of employment. Thus, the setting of initial employment terms by a lawful Burns successor stands on different footing than decisions made by an incumbent employer.” The Board further held:

In sum, where a union becomes the representative of a unit of employees, the employer must bargain about all terms and conditions of employment. **However, in a successorship situation (where the union continues to be the representative), the Supreme Court expressly gave the new employer a unilateral right to set initial terms and conditions, even if they differed from those prevailing under the predecessor. There is nothing in Burns to suggest that such initial terms cannot include flexibility, i.e., discretion within bounds.** That is what occurred here.

Id. at 1021, Fn. 11 (emphasis added).

This case is analogous to Monterey Newspapers, Inc. Like the facts of Monterey Newspapers, Inc., the instant case “concerns a successor employer’s setting of its initial terms of employment under which it agrees to take over operation of the enterprise from the predecessor.” Like the Respondent in Monterey Newspapers, Inc., Tramont lawfully established its layoff procedure “as part and parcel of its initial terms and conditions of employment under the Burns doctrine.” After establishing the initial terms and conditions of employment, Tramont was precluded from making any unilateral changes – certainly, the Union would object, and have every basis to do so, if Tramont unilaterally modified the terms and conditions of employment (e.g., layoff, holidays, vacation, compensation, benefits, etc.) – but Tramont never made any changes to the terms and conditions upon which it hired employees.

Moreover, like the wage rates in Monterey Newspapers, Inc., which were a mandatory subject of bargaining, the Board found in the instant case that a layoff for economic reasons was a mandatory subject of bargaining. In addition, as in Monterey Newspapers, Inc., where, “[i]n finding a violation..., the judge relied heavily on his finding that the wage rates that the Respondent offered to applicants ‘vitally affected’ current unit employees,” in finding a violation in the instant case, the Board concluded that the layoff provision did not address the effects of a layoff, and, specifically, “did not address what were the effects of the layoff upon the remaining employees.” However, as in Monterey Newspapers, Inc., the fact that layoff is a mandatory subject of bargaining does not take it outside of Burns.

Rather, to find, as the Board did, that Tramont, as a lawful Burns successor, could establish a layoff procedure as part of its initial terms and conditions of employment but could not *implement* a layoff under that procedure without bargaining with the Union, would deprive Tramont of the rights to which it was entitled under Burns. Tramont simply implemented a layoff under the established layoff procedure, and selected employees for layoff within the bounds set forth in the layoff procedure. The contract (Employee Handbook) specifically provides that “[f]rom time to time, management may decide to implement a reduction in force (“RIF”).” Therefore, the instant case stands on different footing than a situation where an incumbent employer makes a unilateral change involving a mandatory subject of bargaining.

Because the Board’s decision departs from the precedent set forth in Burns and is inconsistent with directly applicable Board authority as set forth in Monterey Papers, Inc., the Board has no justification for departing from these decisions.

Finally, even if Tramont had an obligation to bargain with the Union regarding the *effects* of its layoff decision, despite precedent to the contrary, the evidence supports the conclusion that the Union was notified of the layoffs but did not request to bargain over the effects of the layoff. Instead, the Union challenged only Tramont’s decision to lay off Bonilla and asked to meet with Tramont only concerning Bonilla’s layoff. When the Union finally requested to bargain over the effects of the layoffs (a month and a half after the layoffs), Tramont met with the Union, but, ultimately rejected the Union’s demands. Therefore, the Board’s factual determinations are not supported by substantial evidence.

### III. Should The Board Exercise Its Discretion And Adopt A New Standard In This Context, Its Application Should Be Prospective Only.

The “waiver” standard cannot be sensibly applied to a Burns successor’s unilaterally imposed initial employment terms. Similarly, should the Board decide that unilaterally imposed employment terms should be narrowly construed, such an outcome runs counter to Board precedent. If the Board finds itself unable to use either of these standards in this context but elects to adopt a new standard, its application should be prospective only so as to avoid any liability for Tramont – Tramont followed the rules in play at the time it made the decisions it did. To retroactively apply a new standard to Tramont would run counter to the law and Board precedent.

**CONCLUSION**

1. The Board should abandon its “waiver” standard in this context.
2. Should the Board decide that unilaterally imposed employment terms should be narrowly construed such an outcome would run counter to Board precedent.
3. Should the Board adopt a new standard in this context, its application should be prospective only.

Very truly yours,

Strang, Patteson, Renning, Lewis & Lacy, s.c.

A handwritten signature in black ink, appearing to read 'Tony J. Renning', written over a horizontal line.

Tony J. Renning

cc: Tramont  
Ben Mandelman, NLRB Region 30  
Peter Knowlton, United Electrical, Radio and Machine Workers of America, Local 120  
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September 4, 2018  
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bcc: Vijay Raichura (Personal and Confidential)