

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

PG PUBLISHING CO., INC. d/b/a)
PITTSBURGH POST-GAZETTE)
)
and)
)
GRAPHIC COMMUNICATIONS)
INTERNATIONAL UNION,)
GCC/INTERNATIONAL)
BROTHERHOOD OF TEAMSTERS)
LOCAL 24M/9N)

Case 06-CA-233676

**BRIEF TO ADMINISTRATIVE LAW JUDGE
ON BEHALF OF PG PUBLISHING CO., INC.
d/b/a PITTSBURGH POST-GAZETTE**

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STATEMENT OF THE CASE

This case was submitted to the Administrative Law Judge (ALJ) upon a Joint Motion and Stipulation of Facts¹ pursuant to Section 102.35(a)(9) of the Board’s Rules and Regulations. Based on an amended charge filed by Graphic Communications International Union, GCC/International Brotherhood of Teamsters Local 24M/9N (hereinafter the Union), which is the bargaining representative of a group of PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette’s (hereinafter the Respondent) employees, the General Counsel issued the Complaint in this case. (SOF ¶¶ 2, 3; Ex. 1(c) and 1(e)). The Complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by eliminating a five shift per week shift guarantee to its paperhandlers David Murrio and

¹ The Stipulation of Facts (SOF ¶ __) includes attached Joint Exhibits (Ex. __), which together with the Joint Motion and the parties’ Briefs, constitute the entire record in this case.

David Jenkins on August 25, 2018 and by laying off paperhandlers David Jenkins and David Murrio on October 6, 2018 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and without first bargaining to an overall good-faith impasse for a successor bargaining agreement. (SOF ¶ 32; Ex. 1(e), para. 9(b), (c), (e)). The Complaint also alleges Respondent failed to furnish the Union with certain information. (Ex. 1(e), para. 7(e)). Respondent filed an Answer denying the essential allegations in the Complaint. (SOF ¶ 4; Ex. 1(g)). The parties were ordered by the ALJ to file briefs in support of their positions.

SUMMARY OF ARGUMENT

Respondent made a business decision to become a digital news organization and to phase out the publication and distribution of its printed newspaper. Its decision fundamentally altered the scope and nature of Respondent's business and is not subject to a duty to bargain. A duty does exist to bargain with the Union over the effects of such a decision. Respondent bargained in good faith to impasse in effects bargaining despite the Union's deliberate efforts to delay, avoid and frustrate good faith effects bargaining. Thereafter, Respondent lawfully implemented its effects bargaining proposals related to the direct effects of its decision. Respondent provided the Union with all relevant and necessary information the Union requested as required under Board precedent.

The General Counsel's theory that *The Finley Hospital* and *Bottom Line Enterprises* Board cases prevents lawful implementation of the effects bargaining proposals have no merit. The guarantee provision the General Counsel relies upon for a purported status quo obligation did not survive contract expiration under its express terms, nor become part of the post-expiration status quo. Any reliance on *Bottom Line Enterprises* is also misplaced as the principle of Board law

announced in that case does not apply to entrepreneurial decisions that involve a change in the scope and direction of an enterprise – as which occurred in the instant case before the ALJ. The Complaint must be dismissed in its entirety.

STATEMENT OF FACTS

Respondent is a newspaper publisher in Pittsburgh, Pennsylvania and publishes The Pittsburgh Post-Gazette. (SOF ¶ 5). The Union represents pressmen and paperhandlers in Respondent’s pressroom. (SOF ¶ 10(a); Ex. 2). The Union and Respondent were parties to a collective bargaining agreement which was effective from November 16, 2014 until March 31, 2017. (SOF ¶ 10(b); Ex. 2).

On October 11, 2016, the Union sent Respondent official notice to open contract negotiations. (SOF ¶ 11; Ex. 3). Respondent acknowledged the Union’s reopening notice by letter on January 13, 2017. (SOF ¶ 12; Ex. 4). Respondent confirmed the collective bargaining agreement expired on March 31, 2017, at which time all contractual obligations of the current collective bargaining agreement would expire. (SOF ¶ 12; Ex. 4). Respondent stated it would continue to observe all established wages, hours and terms and conditions of employment as required by law, except those recognized by law as strictly contractual, after the collective bargaining agreement expired. (SOF ¶ 12; Ex. 4). With respect to arbitration, Respondent would decide its obligation to arbitrate grievances on a case-by-case basis. (SOF ¶ 12; Ex. 4). Negotiations for a successor collective bargaining agreement began on March 21, 2017. (SOF ¶ 13). The parties have not reached a successor collective bargaining agreement. (SOF ¶ 13).

The facts of this case are not in dispute, and are fully set forth below. On June 26, 2018, Respondent notified the Union by letter that Respondent had made the decision to become a digital-only news organization and phase out the publication and distribution of its printed

newspaper. (SOF ¶ 15; Ex. 5). Delivering the news through digital platforms fundamentally altered the scope and nature of Respondent's business. (SOF ¶ 15; Ex. 5). Respondent stated it would begin to reduce its print operations which had been the mainstay of the newspaper since it was founded. (SOF ¶ 15; Ex. 5). The Union was informed Respondent would begin phasing out its print operations by eliminating two (2) days of its printed product on August 25, 2018. (SOF ¶ 15; Ex. 5). Respondent offered to bargain with the Union over the effects of Respondent's decision in the June 26, 2018 letter. (SOF ¶ 15; Ex. 5).

The Union never requested effects bargaining. (SOF ¶¶ 21, 34; Exs. 10, 16). At the beginning of a scheduled contract negotiation on July 25, 2018, several weeks after Respondent first offered to engage in effects bargaining, Respondent asked the Union if it intended to engage in effects bargaining over Respondent's decision. (SOF ¶¶ 21, 34; Exs. 10, 16). Mike Huggins, the Union's chief spokesperson, only then responded that he was willing to discuss the effects of Respondent's decision. (SOF ¶¶ 21, 34; Exs. 10, 16).

In the effects bargaining that followed on July 25, 2018, at Respondent's instigation, Respondent informed the Union it believed three bargaining unit employees would be affected by Respondent's decision to eliminate two print days. (SOF ¶¶ 17, 21; Ex. 6, #3 and Ex. 10). Respondent stated it planned to lay off two paperhandlers, along with one pressman. (SOF ¶ 17; Ex. 6, #3). Respondent explained the reduction of print days of the Post-Gazette eliminated the need for paperhandling functions on a full-time basis. (SOF ¶ 34; Ex. 16). Pressmen who operated the press also performed paperhandling functions as part of their duties. (SOF ¶ 10; Ex. 2, Article V). Both parties agreed on July 25, 2018 to reduce the work force by seniority, with the paperhandlers and pressmen having separate seniority lists. (SOF ¶ 10; Ex. 2, Article 43.5; SOF

¶ 17; Ex. 6, #3). Respondent told the Union it planned to lay off the paperhandlers on August 25, 2018 when the print days were reduced. (SOF ¶¶ 17, 21, 34; Exs. 6, 10 and 16).

The parties also effects bargained on July 25, 2018 over health care and life insurance for the laid off employees, new work schedules to accommodate the reduction of print days and alternatives to the layoff of the one pressman. (SOF ¶ 17; Ex. 6, #2, 4). Near the end of effects bargaining that day, the Union made a severance proposal of one week's pay per year of service, with no cap on the number of years of service for each laid off employee. (SOF ¶ 17; Ex. 6, #6). Respondent told the Union it would consider the Union's severance proposal. (SOF ¶ 17; Ex. 6, #6). There was no provision for severance pay in the parties' expired collective bargaining agreement. (SOF ¶ 10; Exs. 2, 6).

On August 8, 2018, Respondent responded by email to the Union's July 25, 2018 severance proposal by offering a counterproposal on severance. (SOF ¶ 18; Ex. 7). At this time, Respondent offered severance of one week's pay per year of service, with a cap of four (4) weeks' pay. (SOF ¶ 18; Ex. 7). Respondent's severance pay was conditioned upon the employee signing a release. (SOF ¶ 18; Ex. 7). Respondent again asked if the Union wished to further discuss the effects of Respondent's decision. (SOF ¶ 18; Ex. 7). Respondent asked the Union to call or set up another meeting. (SOF ¶ 18; Ex. 7).

On August 16, 2018, Respondent again reached out to the Union because the Union since July 25, 2018 had not responded to Respondent's offers to meet for further effects bargaining. (SOF ¶ 19, Ex. 8). Respondent told the Union that Respondent planned to reach out to the two paperhandlers who Respondent planned to lay off on August 25, 2018. (SOF ¶¶ 19, 21; Exs. 8, 10). Respondent asked the Union if it should discuss Respondent's severance offer with those

employees or did the Union wish to discuss the issue of severance some more in effects bargaining. (SOF ¶ 19; Ex. 8).

The Union emailed Respondent the next day, August 17, 2018. (SOF ¶ 20; Ex. 9). In its email, the Union, without justification, submitted a regressive proposal on health and severance benefits and presented an inaccurate version of the parties' July 25, 2018 effects bargaining meeting. (SOF ¶ 20; Ex. 9). The Union asked to further discuss the effects of Respondent's decision but did not propose any meeting dates. (SOF ¶ 20; Ex. 9).

On August 20, 2018, Respondent responded to the Union's August 17, 2018 email. (SOF ¶ 21; Ex. 10). Respondent offered to meet for effects bargaining on August 22, 23, 24, 25, 27, 28, 29, 30, 31, September 4, 5, 6 and 7, 2018. (SOF ¶ 21; Ex. 10). The Union never responded to Respondent's offer to meet. (SOF ¶ 34; Ex. 16).

On August 25, 2018, Respondent eliminated two days of its print publication. (SOF ¶ 34; Ex. 16). However, Respondent held off on the planned layoff of the two paperhandlers. (SOF ¶ 34; Ex. 16).

On September 5, 2018, more than ten (10) days after Respondent reduced its print operations, it again reached out to the Union by email requesting dates for effects bargaining. (SOF ¶¶ 23, 34; Exs. 11, 16). The Union had failed to respond to any of the effects bargaining dates offered by Respondent on August 20, 2018. (SOF ¶ 34; Ex. 16).

On September 6, 2018, the Union emailed Respondent and stated it was available to meet on September 13, 2018 for effects bargaining. (SOF ¶ 23; Ex. 11). The Union had not met for effects bargaining since July 25, 2018, despite Respondent's repeated requests for meetings.

The parties met for effects bargaining on September 13, 2018. (SOF ¶ 24). The Union continued to propose its regressive health and severance proposal it submitted to Respondent by

email on August 17, 2018. (Ex. 9; SOF ¶ 24; Ex. 12). The Union's regressive proposal increased its original severance proposal from one week per year of service with no cap to three weeks per year of service with no cap, and a minimum of 26 weeks. (SOF ¶ 24; Ex. 12). The Union had also increased its extended healthcare coverage proposal from three to six months. (SOF ¶ 24; Ex. 12). The September 13, 2018 effects bargaining meeting produced no agreement. (SOF ¶ 34; Ex. 16). At the end of the meeting that day, Respondent suggested the parties devote the morning of the next contract negotiations scheduled for September 19, 2018 for effects bargaining. (SOF ¶ 34; Ex. 16). The Union agreed. (SOF ¶ 34; Ex. 16). The parties also agreed to reserve the afternoon of September 19, 2018 for contract negotiations. (SOF ¶ 34; Ex. 16).

In the effects bargaining meeting on the morning of September 19, 2018, the parties discussed the planned layoff of the two paperhandlers. (SOF ¶¶ 25, 26, 34; Exs. 13, 16). Respondent again explained that as print days were eliminated, the need for paperhandling functions on a full-time basis was eliminated. (SOF ¶¶ 26, 34; Exs. 13, 16). The parties agreed the laid off paperhandlers would be placed on the recall list for paperhandlers. (SOF ¶ 26, 34; Exs. 13, 16).

The Union then modified its regressive proposal on severance. (SOF ¶¶ 25, 26; Ex. 13). After a caucus, Respondent rejected the Union's proposal. (SOF ¶¶ 25, 26; Ex. 13). Respondent then restated its effects bargaining offer as follows:

1. Reduction of 2 paperhandlers;
2. Severance pay of 1 week's pay per year of service, cap of 6 weeks;
3. 3 months paid COBRA as per expired contract;
4. No release would be required from paperhandlers laid off. Laid off paperhandlers would be placed on paperhandler recall list;
5. For purposes of severance, the Company would credit service for full year in 2018 (Union's August 17 proposal).

(SOF ¶¶ 25, 26; Ex. 13).

Respondent also stated that Respondent planned October 6, 2018 to be the last day of work for the two (2) paperhandlers. (SOF ¶¶ 25, 26; Ex. 13). The Union then asked if any pressmen would be laid off. Respondent explained that because of a recent retirement, no pressmen would be laid off. (SOF ¶ 26, 34; Exs. 13, 16).

At 11:16 a.m. on September 19, 2018, the Union asked for a caucus. (SOF ¶¶ 26, 34, 36; Exs. 13, 16, 18). Sometime during the Union's caucus, the Union left the building without notifying Respondent and never returned. (SOF ¶¶ 26, 34, 36; Exs. 13, 16, 18).

The next day, September 20, 2018, Respondent memorialized the September 19, 2018 effects bargaining meeting. (SOF ¶ 26; Ex. 13). Respondent informed the Union that Respondent had made its best and final offer. (SOF ¶ 26; Ex. 13). Respondent again stated it planned to lay off the two (2) paperhandlers after their shift on October 6, 2018. (SOF ¶ 26; Ex. 13). The Union never requested any effects bargaining meetings thereafter.

On September 28, 2018, the Union emailed Respondent an information request requesting voluminous information. (SOF ¶¶ 33, 34; Exs. 15, 16). Not surprisingly, none of the information contained in the 17 information requests had been previously requested or even raised as an issue in the effects bargaining. (SOF ¶ 34; Ex. 16). The Company provided the Union the relevant information it requested. (SOF ¶¶ 34, 36; Exs. 16, 18).

On October 3, 2018, Respondent, by letter, notified the two paperhandlers of their impending layoff on October 6, 2018. (SOF ¶ 28; Ex. 14). The Union was copied on the letter. (SOF ¶ 28; Ex. 14). The two paperhandlers were laid off at the end of their shift on October 6, 2018. (SOF ¶ 28; Ex. 14).

ARGUMENT

I. Respondent's Decision to Become a Digital News Organization and to Phase Out its Print Operations is a Nonmandatory Subject of Bargaining under *First National Maintenance* and the First Amendment.

On June 26, 2018, Respondent notified the Union that it had made the decision to become a digital-only news organization and to phase out the publication and distribution of its printed newspaper. (SOF ¶ 15; Ex. 5). The decision to become a digital news organization and eliminate print operations was not a result of labor costs. (SOF ¶ 30). The Union was informed the Respondent would begin phasing out its print operations by eliminating two (2) days of the printed Post-Gazette on August 25, 2018. (SOF ¶ 15; Ex. 5). Respondent offered to bargain over the effects of Respondent's decision in the June 26, 2018 letter. (SOF ¶ 15; Ex. 5).

Respondent's decision to become a digital-only news organization and eliminate its print operations is an entrepreneurial decision under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Decisions which fundamentally alter the scope and nature of a company's business such as a partial closure or choice of product type are not subject to a bargaining obligation. *Id. See also KIRO, Inc.*, 317 NLRB 1325, 1327, n. 8 (1995) (Board unaware of any authority finding an obligation to bargain over decision involving choice of product type or method of distribution).

Respondent's decision to deliver its news products digitally and to eliminate its print operations which had been the mainstay of Respondent's operations since it was founded, is clearly a *First National Maintenance* decision over which it had no obligation to bargain. The Supreme Court has held there is no duty to bargain collectively regarding managerial decisions which lie at the core of entrepreneurial control. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (“[d]ecisions concerning the commitment of investment capital and the basic scope of the

enterprise are not in themselves primarily about conditions of employment”). The Board has also recognized that managerial decisions that may impact employees but concern issues that “lie at the core of entrepreneurial control” are not mandatory subjects of bargaining and fall solely within the employer’s prerogative. *Minteq International, Inc.*, 364 NLRB No. 63, slip op. at 4 (2016), *enf.* 855 F.3d 629 (2017); *see Star Tribune*, 295 NLRB 543, 560 (1989) (differentiating between mandatory subjects that are germane to the working environment, and permissive subjects that are within the realm of managerial or entrepreneurial prerogatives).

A critical factor in determining whether a management “. . . decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs . . .” *Otis Elevator Co.*, 269 NLRB 891, 892 (1984). Respondent, General Counsel and the Union have stipulated that Respondent’s decision to become a digital news organization and eliminate its print operations was not a result of labor costs. (SOF ¶ 30).

First National Maintenance has been held by the Board to apply in numerous situations. *See, e.g., The Memorial Hospital of Salem County*, 363 NLRB No. 56, slip. op. at 7 (2015) (decision to close inpatient obstetrics unit); *Gannett Co., Inc.*, 333 NLRB 355, 357 (2001) (sale of radio station); *BC Industries, Inc.*, 307 NLRB 1275, n. 2 (1992) (decisions to close two plants and to relocate one of those plants); *Reeves Brothers, Inc.*, 306 NLRB 610, 612 (1992) (shutdown of plant); *Paramount Poultry*, 294 NLRB 867, 869 (1989) (decision to reduce product line and to drop certain customers); *Stamping Specialty Co., Inc.*, 294 NLRB 703, 704 (1989) (decision to discontinue product line). In *KIRO, Inc.*, 317 NLRB 1325, one issue in this case was whether the employer was obligated to bargain over its decision to produce at 10:00 p.m. newscast on another television station. The employer’s decision was characterized by the Board as a choice of product

type and method of product distribution, a decision the employer was free to make unilaterally. *Id.* at 1327.

The absence of any bargaining obligation is also buttressed by First Amendment considerations. As stated by the United States Supreme Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the “choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment.” *Id.* at 258. *A fortiori*, the decisions of a newspaper whether to print, and which days to print, is a matter of editorial control and judgment that is protected by the First Amendment. The *First National Maintenance* right of Respondent to deliver its news products digitally is protected by its First Amendment right to decide the size and content of the newspaper.

Respondent’s decision to become a digital-only news organization lies at the core of its entrepreneurial control of its newspaper. Similarly, the decision to phase out its print operations is akin to a choice of product type and method of product distribution and/or a partial closing of Respondent’s newspaper business. Respondent’s decision to become a digital newspaper and eliminate its print operations was not a mandatory subject of bargaining and is protected by the First Amendment.

II. The Five Shift Markup Guarantee and its Exception Did Not Survive Contract Expiration Nor Become Part of the Post-Expiration Status Quo.

Article 10, Section 10.2 of the expired collective bargaining agreement recognized the right of Respondent to lay off employees. (SOF ¶ 10; Ex. 2, Section 10.2). It provided a limitation to that right, insofar as it allowed a five-shift markup guarantee to named employees. (SOF ¶ 10; Ex. 2, Section 10.2). However, the term of the guarantee was limited to a specific duration, with a specific ending date. (SOF ¶ 14; Ex. 2, Section 10.2). The guarantee ended March 31, 2017.

(Emphasis in original). (SOF ¶ 10; Ex. 2, Section 10.2). Section 10.2(a) sets forth an exception to the five shift markup guarantee, by providing procedures to lay off employees during the term of the five shift markup guarantee – all of which expired on March 31, 2017. By the express terms, Section 10.2 did not survive after March 31, 2017 and therefore did not become part of the status quo.

Ordinary principles of contract interpretation make clear that Section 10.2 did not survive the expiration of the pressroom collective bargaining agreement. Parties seeking to create a contractual obligation that continues in effect after the expiration of a collective bargaining agreement must negotiate clear and express language to that effect. *See M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015); *Auto Workers v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999). *See also Des Moines Register and Tribune Co.*, 339 NLRB 1035, 1037 (2003) (failure to establish parties intended job guarantees to survive expiration of contract).

The Union failed to negotiate any contract terms requiring Respondent to maintain the Section 10.2 guarantees after March 31, 2017. In fact, the expired collective bargaining agreement provides directly the opposite: that the Section 10.2 “guarantees” only remained in effect “for the balance of the agreement ending March 31, 2017.” (SOF ¶ 14; Ex. 2, Section 10.2). The intent of the parties is clear and unambiguous that Section 10.2 ended on March 31, 2017. *See CNH Industrial N.V. v. Reese*, 138 S. Ct. 761, 766 (2018), quoting *Tackett*, 574 U.S. 427, 135 S.Ct. 926, 930 (“When the intent of the parties is unambiguously expressed in the contract, that expression controls and the court’s inquiry should proceed no further.”). Therefore, there is no contractual basis for General Counsel’s argument that Section 10.2 survived the 2017 expiration of the collective bargaining agreement.

The General Counsel’s claim the five-shift markup guarantee survived as part of the status quo is also contrary to Board law. The Board has generally adhered to the principle that general durational clauses in a contract do not “sunset” contractual obligations, *See, e.g., The Finley Hospital*, 362 NLRB 915 (2015), *enf. denied* 827 F.3d 720 (8th Cir. 2016). In an Advice memorandum dated June 17, 2019, the General Counsel asserts the Board’s majority opinion in *Finley Hospital* was wrongly decided and should be overturned.²

In *Finley Hospital*, 362 NLRB at 915, the Board applied waiver principles and found that language contained in an initial one-year contract, which limited wage increases to the “duration of this agreement” and “during the term of this Agreement,” did not clearly waive the union’s right to bargain over the employer’s post-expiration cessation of the annual wage increases. *Id.* at 915. The Board majority concluded that such language, while specifically terminating the union’s *contractual* rights to such increases, would not be “a clear and unmistakable waiver of the union’s separate *statutory* right to maintenance of the status quo.” *Id.* (emphasis added).

Member Johnson, dissenting in part, argued that “waiver” was not the proper analysis in that case; “[r]ather, the proper inquiry is to identify the statutory status quo for wages that the [employer] was obligated to maintain pending bargaining for a successor contract,” which is “defined by ‘the contract language itself.’” *Id.* at 926 (Member Johnson, dissenting in part) (quoting *Intermountain Rural Elec. Ass’n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993)). Member Johnson further argued that the parties’ “insert[ion of] the time-bound expiration phrase ‘during the term of this Agreement’ into the midst of the very wage increase provision at issue in this case” was sufficiently clear to establish that the post-expiration status quo did not include

² Respondent agrees with the General Counsel’s position that *Finley Hospital* was wrongly decided and should be overturned, and agrees the proper analysis was set forth by Member Johnson, in dissent.

annual wage increases. *Finley Hospital*, 362 NLRB at 927 n.4 (Member Johnson, dissenting in part) (emphasis in original).

In the present case, there is specific, clear and unambiguous language in the expired collective bargaining agreement expressly sunsetting Section 10.2 on March 31, 2017, in addition to the general duration clause specifying the term of the parties' overall agreement. The Board has recognized that in certain circumstances mandatory subjects of bargaining may be contractually limited to a specific time period and do not become part of the post-expiration status quo. The terms of a collective bargaining agreement may waive employees' rights and the union's right to bargain regarding the employer's cessation at contract expiration of its contractual obligations.

The best example of the Board's acceptance of durational language to eliminate an employer's obligation to maintain a provision of an expired contract as part of the post-expiration status quo is *Cauthorne Trucking*, 256 NLRB 721 (1981). In *Cauthorne*, the pension fund trust agreement provided:

IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any company's obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued.

Id. at 712. That provision was held by the Board to have waived the employees' right to receive the benefit of pension fund contributions and the union's right to bargain regarding the employer's cessation, at the expiration of the contract, of payments into the pension trust fund absent a renewed agreement to continue such payments. As the employer did not agree to make those payments beyond the end of the contract term, it was privileged, under the terms of that agreement to cease payments, and its actions did not violate Section 8(a)(5).

The *Cauthorne* principle has been repeatedly reaffirmed by the Board. *See, e.g., StaffCo of Brooklyn, LLC*, 364 NLRB No. 102, slip op. at 2 (2016) (“this provision constituted a waiver because it expressed a clear intent to relieve the employer of any obligation to make payments after contract expiration.”). *Oak Harbor Freight Lines, Inc.*, 361 NLRB 884, 884 (2014), *reaffirming* 358 NLRB 328, 340-1 (2012) (language in collective-bargaining agreement “clearly and unambiguously privilege[d] the employer to discontinue trust contributions” after contract expiration and written notice to union, which thereby waived union’s right to bargain over cessation of fund payments upon those two events’ occurrence), *enf.*, 855 F.3d 436 (D.C. Cir. 2017).

The five-shift markup guarantee in Article 10, Section 10.2 is not part of any status quo that continues after the expiration of the parties’ collective bargaining agreement. By its terms, Section 10.2 has a clear and explicit durational term. It specifically limits Respondent’s obligation to the period ending March 31, 2017. Respondent submits that notwithstanding a *Finley Hospital* waiver analysis is not appropriate in these circumstances, under *Cauthorne*, Section 10.2 constituted a waiver of the Union’s right to bargain over the continuation of the guarantee because it expressed a clear intent to relieve Respondent of any obligation to guarantee five shifts after March 31, 2017.

More importantly, the clear and unambiguous contract language itself adopted by the parties demonstrates the clear intent that Section 10.2 would cease March 31, 2017. Therefore, Section 10.2 was not part of the post-expiration status quo. If the parties had intended Section 10.2 to survive and become part of the post-expiration status quo, there would have been no reason to attach a specific durational clause to Section 10.2, in addition to the general durational clause

specifying the term of the parties' agreement. Respondent's layoff of the two paperhandlers on October 6, more than 19 months after March 31, 2017, did not violate Section 8(a)(5).

III. Respondent Engaged in Good Faith Effects Bargaining to Impasse Over its *First National Maintenance* Decision.

The Supreme Court held in *First National Maintenance* that, even when an employer's decision to shut down part of its operations is exempt from bargaining, the employer is nevertheless obligated to bargain with the union over the effects of that decision. 452 U.S. at 681-682 and fn. 15. Bargaining over the effects of such a decision "must be conducted in a meaningful manner and at a meaningful time." *Id.* at 682.

Effects bargaining can include such topics as layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer's operations, and reference letters for jobs with other employers. *See Los Angeles Soap Co.*, 300 NLRB 289, 295 (1990). Respondent bargained in good faith to impasse over the effects of Respondent's decision, including the layoff of the two paperhandlers.³

On June 26, 2018, Respondent notified the Union that Respondent had made the decision to become a digital-only news organization and phase out the publication and distribution of its printed newspaper. (SOF ¶ 15; Ex. 5). Delivering the news through digital platforms fundamentally altered the scope and nature of Respondent's business. (SOF ¶ 15; Ex. 5). Respondent stated it would begin to reduce its print operations which had been the mainstay of the

³ Alternatively, and notwithstanding Respondent bargained to a lawful impasse in effects bargaining, it can be argued that Respondent's layoff of pressroom employees due to the reduction in pressroom work was an inevitable consequence of its *First National Maintenance* decision. *McClatchy Newspapers, Inc. d/b/a Fresno Bee*, 339 NLRB 1214 (2003). The Act does not require an employer to retain employees who were not needed to perform work. *Id.* at 1214-1215, *citing Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368 (4th Cir. 1995), *cert. granted on other grounds* 516 U.S. 963 (1995), *affd.*, 517 U.S. 392 (1996). Accordingly, Respondent had no duty to bargain over the effects of its permissible managerial decision because the change, to lay off pressroom employees due to the elimination of pressroom work, resulted directly from the managerial decision, and there was no possibility of an alternative change in terms of employment that would have warranted bargaining.

newspaper since it was founded. (SOF ¶ 15; Ex. 5). The Union was informed Respondent would begin phasing out its print operations by eliminating two (2) days of its printed product on August 25, 2018. (SOF ¶ 15; Ex. 5). Respondent offered to bargain with the Union over the effects of Respondent's decision in the June 26, 2018 letter. (SOF ¶ 15; Ex. 5).

The Union never requested effects bargaining. (SOF ¶¶ 21, 34; Exs. 10, 16). At the beginning of a scheduled contract negotiation on July 25, 2018, several weeks after Respondent first offered to engage in effects bargaining, Respondent asked the Union if it intended to engage in effects bargaining over Respondent's decision. (SOF ¶¶ 17, 21; Ex. 6, #3 and Ex. 10). Mike Huggins, the Union's chief spokesperson, responded that he was willing to discuss the effects of Respondent's decision. (SOF ¶¶ 21, 34; Exs. 10, 16).

In the effects bargaining that followed on July 25, 2018, Respondent informed the Union it believed three bargaining unit employees would be affected by Respondent's decision to eliminate two print days. (SOF ¶ 17; Ex. 6, #3). Respondent planned to lay off two paperhandlers, along with one pressman. (SOF ¶ 17; Ex. 6, #3). Respondent explained the reduction of print days of the Post-Gazette eliminated the need for paperhandling functions on a full-time basis. (SOF ¶ 34; Ex. 16). Pressmen who operated the press also performed paperhandling functions as part of their duties. (SOF ¶ 10; Ex. 2, Article V). Both parties agreed on July 25, 2018 to reduce the work force by seniority, with the paperhandlers and pressmen having separate seniority lists. (SOF ¶ 10; Ex. 2, Article 43.5; SOF ¶ 17; Ex. 6, #3). Respondent told the Union it planned to lay off the paperhandlers on August 25, 2018 when the print days were reduced. (SOF ¶¶ 17, 21, 34; Exs. 6, 10, 16).

The parties also effects bargained on July 25, 2018 over health care and life insurance for the laid off employees, new work schedules to accommodate the reduction of print days and

alternatives to the layoff of the one pressman. (SOF ¶ 17; Ex. 6, #2, 4). Near the end of effects bargaining that day, the Union made a severance proposal of one week's pay per year of service, with no cap on the number of years of service for each laid off employee. (SOF ¶ 17; Ex. 6, #6). Respondent told the Union it would consider the Union's severance proposal. (SOF ¶ 17; Ex. 6, #6). There was no provision for severance pay in the parties' expired collective bargaining agreement. (SOF ¶ 10; Exs. 2 and 6).

On August 8, 2018, Respondent responded by email to the Union's July 25, 2018 severance proposal by offering a counterproposal on severance. (SOF ¶ 18; Ex. 7). Respondent offered severance of one week's pay per year of service, with a cap of four (4) weeks' pay. (SOF ¶ 18; Ex. 7). Respondent's severance pay counterproposal was conditioned upon the employee signing a release. (SOF ¶ 18; Ex. 7). Respondent again asked the Union if it wished to further discuss the effects of Respondent's decision. (SOF ¶ 18; Ex. 7). Respondent asked the Union to call or set up another meeting. (SOF ¶ 18; Ex. 7).

On August 16, 2018, Respondent again reached out to the Union because the Union had not responded since July 25, 2018 to Respondent's offers to meet for further effects bargaining. (SOF ¶ 19; Ex. 8). Respondent told the Union that Respondent planned to reach out to the two paperhandlers who Respondent planned to lay off on August 25, 2018. (SOF ¶¶ 19, 21; Exs. 8, 10). Respondent asked the Union if it should discuss Respondent's severance offer with those employees or did the Union wish to discuss the issue of severance some more in effects bargaining. (SOF ¶ 19; Ex. 8).

The Union emailed Respondent the next day, August 17, 2018. (SOF ¶ 20; Ex. 9). In its email, the Union, without justification, submitted a regressive proposal on health and severance benefits, and presented an inaccurate version of the parties' July 25, 2018 effects bargaining

meeting. (SOF ¶ 20; Ex. 9). The Union asked to further discuss the effects of Respondent's decision but did not propose any meeting dates. (SOF ¶ 20; Ex. 9).

On August 20, 2018, Respondent responded to the Union's August 17, 2018 email. (SOF ¶ 21; Ex. 10). Respondent offered to meet for effects bargaining on August 22, 23, 24, 25, 27, 28, 29, 30, 31, September 4, 5, 6 and 7, 2018. (SOF ¶ 21; Ex. 10). The Union never responded to Respondent's offer to meet. (SOF ¶ 34; Ex. 16).

On August 25, 2018, Respondent eliminated two days of its print publication but held off on the planned layoff of the two paperhandlers. (SOF ¶ 34; Ex. 16). On September 5, 2018, more than ten (10) days after Respondent reduced its print operations, it again reached out to the Union by email requesting dates for effects bargaining. (SOF ¶¶ 23, 34; Exs. 11, 16). The Union had failed to respond to any of the effects bargaining dates offered by Respondent on August 20, 2018. (SOF ¶ 34; Ex. 16).

On September 6, 2018, the Union emailed Respondent it was available to meet on September 13, 2018 for effects bargaining. (SOF ¶ 23; Ex. 11). The Union had not met for effects bargaining since July 25, 2018, despite Respondent's repeated requests for meetings.

The parties met for effects bargaining on September 13, 2018. (SOF ¶ 24). The Union continued to propose its regressive health and severance proposal it submitted to Respondent on August 17, 2018 by email. (Ex. 9; SOF ¶ 24; Ex. 12). The Union's regressive proposal increased its original severance proposal from one week per year of service with no cap to three weeks per year of service with no cap, and a minimum of 26 weeks. (SOF ¶ 24; Ex. 12). The Union had also increased its extended healthcare coverage proposal from three to six months. (SOF ¶ 24; Ex. 12). The September 13, 2018 effects bargaining meeting produced no agreement. (SOF ¶ 34; Ex. 16). At the end of the meeting that day, Respondent suggested the parties devote the morning of the

next contract negotiations scheduled for September 19, 2018 for effects bargaining. (SOF ¶ 34; Ex. 16). The Union agreed. (SOF ¶ 34; Ex. 16). The parties also agreed to reserve the afternoon of September 19, 2018 for contract negotiations. (SOF ¶ 34; Ex. 16).

In the effects bargaining meeting on the morning of September 19, 2018, the parties discussed the planned layoff of the two paperhandlers. (SOF ¶¶ 25, 26, 34; Exs. 13, 16). Respondent again explained that as print days were eliminated, the need for paperhandling functions on a full-time basis was eliminated. (SOF ¶¶ 26, 34; Exs. 13, 16). The parties agreed the laid off paperhandlers would be placed on the recall list for paperhandlers. (SOF ¶ 26, 34; Exs. 13, 16).

The Union then modified its regressive proposal on severance. (SOF ¶¶ 25, 26; Ex. 13). After a caucus, Respondent rejected the Union's proposal. (SOF ¶¶ 25, 26; Ex. 13). Respondent then restated its effects bargaining offer as follows:

1. Reduction of 2 paperhandlers;
2. Severance pay of 1 week's pay per year of service, cap of 6 weeks;
3. 3 months paid COBRA as per expired contract;
4. No release would be required from paperhandlers laid off. Laid off paperhandlers would be placed on paperhandler recall list;
5. For purposes of severance, the Company would credit service for full year in 2018 (Union's August 17 proposal).

(SOF ¶¶ 25, 26; Ex. 13).

Respondent also stated that Respondent planned October 6, 2018 to be the last day of work for the two (2) paperhandlers. (SOF ¶¶ 25, 26; Ex. 13). The Union then asked if any pressmen would be laid off. Respondent explained that because of a recent retirement, no pressmen would be laid off. (SOF ¶ 26, 34; Exs. 13, 16).

At 11:16 a.m. on September 19, 2018, the Union asked for a caucus. (SOF ¶¶ 26, 34, 36; Exs. 13, 16, 18). Sometime during the Union's caucus, the Union left the building without notifying Respondent and never returned. (SOF ¶¶ 26, 34, 36; Exs. 13, 16, 18).

The next day, September 20, 2018, Respondent memorialized the September 19, 2018 effects bargaining meeting. (SOF ¶ 26; Ex. 13). Respondent informed the Union that Respondent had made its best and final offer. (SOF ¶ 26; Ex. 13). Respondent again stated it planned to lay off the two (2) paperhandlers after their shift on October 6, 2018. (SOF ¶ 26; Ex. 13). The Union never requested any effects bargaining meetings thereafter.

On September 28, 2018, the Union emailed Respondent an information request requesting voluminous information. (SOF ¶¶ 33, 34; Exs. 15, 16). Not surprisingly, none of the information contained in the 17 information requests had been previously requested or even raised as an issue in the effects bargaining. (SOF ¶ 34; Ex. 16). The Company provided the Union the relevant information it requested. (SOF ¶¶ 34, 36; Exs. 16 and 18).

On October 3, 2018, Respondent, by letter, notified the two paperhandlers of their impending layoff on October 6, 2018. (SOF ¶ 28; Ex. 14). The Union was copied on the letter. (SOF ¶ 28; Ex. 14). The two paperhandlers were laid off at the end of their shift on October 6, 2018. (SOF ¶ 28; Ex. 14).

Respondent submits the Union did not engage in serious, good faith effects bargaining. Despite giving the Union 60 days' notice of its decision to eliminate print days on August 25, the Union met only once in effects bargaining on July 25. Moreover, the effects of Respondent's decision were only discussed in that single, face-to-face meeting because Respondent asked if the Union was interested in discussing the effects of Respondent's *First National Maintenance* decision.

After July 25, the Union met in effects bargaining only two times, on September 13 and September 19, despite Respondent's repeated requests for meeting dates. At the September 19 effects bargaining meeting, the Union walked out of the effects bargaining meeting, without notice, and did not return. The Union never requested any effects bargaining meetings thereafter.

Respondent, on the other hand, bargained in good faith over the effects of its decision to become a digital news organization and eliminate its print operation. After bargaining to impasse, Respondent lawfully implemented its proposal to reduce two paperhandlers, that workforce reduction being a direct effect of Respondent's *First National Maintenance* decision to eliminate two print days.

There is also a corollary to the rule requiring bargaining to good-faith impasse that clearly applies to this case. As the court noted in *NLRB v. Auto Fast Freight, Inc.*, 793 F.2d 1126, 1129 (1986):

There exists a narrow exception to the bargain to impasse rule: where, upon expiration of a collective-bargaining agreement, the union has avoided or delayed bargaining, and the employer has given notice to the Union of the specific proposals the employer intends to implement, the employer may unilaterally implement the proposals without first bargaining to impasse. *Stone Boatyard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983), *cert denied*, 466 U.S. 937 . . . (1984). *Accord, M & M Building & Electrical Contractors, Inc.*, 262 NLRB 1472, 1476-77 (1982).

Consistent with this exception is the obligation of the parties not to seek to stretch out negotiations by whatever strategy. *Eastern Maine Medical Center*, 253 NLRB 224, 247 (1980). In this case, the Union engaged in dilatory tactics by refusing to meet for effects bargaining despite repeated requests by Respondent, the making of regressive proposals without justification, the submission of a belated, voluminous information request months after Respondent's notice to the

Union of its decision and offer to engage in effects bargaining and finally, walking out of an effects bargaining session without notice and not returning.⁴

Respondent bargained to impasse over its effects bargaining proposals and thereafter lawfully implemented its effects bargaining offer. Notwithstanding Respondent's lawful activity, the Union, through its stalling tactics, clearly invoked the narrow employer privilege to lawfully implement even absent an impasse. *NLRB v. Auto Fast Freight, Inc.*, 793 F.2d at 1129; *Eastern Maine Medical Center*, 253 NLRB at 247.

IV. Respondent Lawfully Implemented its Effects Bargaining Proposals after Bargaining to Impasse Over the Effects of its *First National Maintenance* Decision.

Respondent bargained about the effects of its decision to become a digital news organization and eliminate two days of its print operations as it was obligated to under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666. Once impasse was reached, Respondent lawfully implemented its effects bargaining proposals, including the layoff of two paperhandlers.

General Counsel argues *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) and *RBE Electronics of S.D.*, 320 NLRB 80 (1995) preclude Respondent from implementing its effects bargaining proposals unless and until an overall impasse has been reached on bargaining for a successor agreement as a whole. The General Counsel's reliance on these cases is misplaced. *Bottom Line* and *RBE Electronics* do not apply to entrepreneurial decisions that involve a change in the scope and direction of an enterprise. The nature of these *First National Maintenance* decisions excludes them from the realm of mandatory bargaining. Respondent submits the legal framework established by the Supreme Court in *First National Maintenance* for the implementation of entrepreneurial decisions is an exception to *Bottom Line Enterprises*.

⁴ The Stipulations of Fact and attached Exhibits demonstrate conclusively these dilatory tactics. These tactics would even justify a finding of waiver. (See SOF ¶ 27).

Bottom Line and *RBE Electronics* did not involve *First National Maintenance* non-mandatory subjects of bargaining. They are therefore not dispositive in this case. Moreover, the Board in *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip. op. at 11, n. 47 (2017), stated “We do not pass on whether *Bottom Line Enterprises* and *RBE Electronics* were correctly decided.” Respondent submits the below extant Board authority demonstrates *Bottom Line Enterprises* and *RBE Electronics* do not have any application to *First National Maintenance* decisions and the requirement to engage in effects bargaining over those decisions.

In *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253 (2006), the employer and union were engaged in contract negotiations. During the negotiations, the employer made the decision to close part of its operations. The Board found the employer failed to bargain over the effects of its decision as required under *First National Maintenance*. Even though the employer at one meeting listened to the Union’s proposals and provided a response, the employer did not engage in further effects bargaining thereafter. Because there was no impasse in the effects bargaining or other valid reason to stop effects bargaining, the Board found that the employer violated Section 8(a)(5) by its failure to bargain over the effects of its decision to close part of its operation. As part of its remedy, the Board ordered the conditional backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the Board’s standard remedy in effects bargaining cases. See, e.g., *Liberty Source W, LLC*, 344 NLRB 1127, 1128 (2005); *Kirkwood Fabricators, Inc.*, 285 NLRB 33, 36-37 (1987), *enfd.* 862 F.2d 1303 (8th Cir. 1988). The Board did not rely on *Bottom Line* in its decision despite the fact an overall impasse had not been reached in contract negotiations.

In *Gannett Co., Inc.*, 333 NLRB 355 (2001), the employer had implemented terms and conditions of employment but had not reached a successor agreement in contract negotiations. The

employer subsequently announced it was selling the business, a *First National Maintenance* decision. The Board found the employer failed to timely bargain about the effects of the sale of its business as required by *First National Maintenance*. General Counsel requested, and was granted a *Transmarine Navigation Corp.* remedy, because the union may have been able to secure additional benefits in timely effects bargaining such as severance pay, pension fund payments, letters of reference and health insurance. Once again, the Board did not rely on *Bottom Line* despite the fact an overall impasse had not been reached in contract negotiations.

Similarly, in *Reeves Brothers, Inc.*, 306 NLRB 610 (1992), the parties were negotiating a successor contract. During negotiations, the employer shut down operations. The decision fell under the protection of *First National Maintenance*. The employer failed to timely engage in effects bargaining and a *Transmarine* remedy was imposed. Even though this case arose after *Bottom Line*, there was no discussion about the employer's obligation to refrain from making changes during negotiations until an overall impasse was reached.

In *Rigid Pak Corp.*, 366 NLRB No. 137 (2018), an employer discontinued a part of its business while engaged in contract negotiations. The Board found the decision to abandon part of its business involved a significant change in the scope and direction of its enterprise and was thus not subject to mandatory bargaining. The Board also found, however, that the employer failed to provide the Union with notice and an opportunity to bargain over the effects of its decision. The Board ordered the usual *Transmarine* remedy in effects bargaining cases. Again, the Board did not rely on *Bottom Line* in its decision despite the employer not being at impasse on a successor agreement. It only required good faith effects bargaining over a *First National Maintenance* decision.

In *Oberthur Technologies of America Corp.*, 368 NLRB No. 5, slip. op. at 3 (2019), the union was certified by the Board after dismissing the employer's election challenges. The issue in *Oberthur* was whether the employer had an obligation to bargain before administering pre-existing disciplinary policies. The Board held an employer has no duty to bargain about discharges if it applies its existing standards for discipline that had been in place prior to a union election. An employer does have the duty to bargain with the union after a discharge, upon request. The Board imposed, in essence, an effects bargaining requirement which it held was separate from contract negotiations.

All of these cases illustrate that entrepreneurial decisions which involve a significant change in the scope and direction of the enterprise are non-mandatory subjects of bargaining and do not require bargaining over the decision but do require bargaining over the impact of those decisions prior to implementation. The *First National Maintenance* legal framework is separate from contract negotiations.

All of the challenged actions taken by the employers above occurred in the context of contract negotiations for an initial or successor agreement. Yet, the Board did not apply *Bottom Line* to any of these cases. The reason is clear. *Bottom Line* only applies to contract negotiations. *First National Maintenance* decisions which involve a significant change in the scope and direction of the enterprise only require good faith effects bargaining to impasse or agreement before changes pursuant to entrepreneurial decisions can be implemented. See *Champaign Builders Supply Co.*, 361 NLRB 1382, n. 1 (2014); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB at 257.

The employers' actions in the cases above arguably did not fall within the economic exigencies compelling prompt action exception to *Bottom Line*. Yet, the Supreme Court and the

Board have carved out a *First National Maintenance* defense which is parallel to an exigency defense and another exception to *Bottom Line*.

This approach by the Board is reasonable. Otherwise, a union could intentionally delay or even scuttle a partial closing of a business, the discontinuance of a product line, or a potential sale of a business if the employer was engaged in contract negotiations and could not implement non-mandatory, entrepreneurial decisions and their effects without first bargaining to an overall impasse on an agreement as a whole in contract negotiations. *Bottom Line* and its progeny do not apply to management decisions involving a change in the scope or direction of the enterprise. Respondent's *First National Maintenance* decision to become a digital news organization and eliminate two days of its print operations is another *Bottom Line* exception excusing bargaining to impasse over a successor agreement.

The Board also held in *Bottom Line Enterprises* that when a union engaged in tactics designed to avoid or delay bargaining despite an employer's diligent and earnest efforts to engage in bargaining, an employer is relieved of its obligation to refrain from implementation absent overall impasse. *Bottom Line Enterprises*, 302 NLRB at 374. This additional exception to *Bottom Line* clearly applies to this case. The Union engaged in dilatory tactics by refusing to meet for effects bargaining despite repeated requests by Respondent, the making of regressive proposals without justification, the submission of a belated, voluminous information request months after Respondent's notice of its decision and offer to engage in effects bargaining and walking out of the last effects bargaining session without notice and not returning.

The Union intentionally adopted a strategy of delay in the effects bargaining over Respondent's decision to become a digital news organization and eliminate its print operations. After Respondent offered to meet with the Union in effects bargaining on June 26, the Union did

not express any interest in effects bargaining for several weeks. On July 25, in a contract negotiations session, Respondent asked the Union if it intended to engage in effects bargaining. Only then did the Union agree to discuss the effects of Respondent's decision. After the July 25 meeting, the Union did not agree to meet again for effects bargaining until September 13, almost eight weeks after the July 25 meeting and over two and a half weeks after Respondent reduced its print operations on August 25. During that period, the Union's only effort to engage in effects bargaining was a regressive proposal on severance pay and health care submitted by email to Respondent on August 17.

At Respondent's insistence, the parties met face-to-face one final time on the morning of September 19 for effects bargaining. At that meeting, the Union took a caucus at 11:19 a.m. and literally left the building without notifying Respondent and despite contract negotiations scheduled for later that afternoon. The Union never returned or requested any effects bargaining thereafter.

Under Section 8(d), both unions and employers have an explicit duty to "meet at reasonable times and confer in good faith." See *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780, 784 (1984) ("As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes 'that had been condemned in management' by the previously enacted Section 8(a)(5)"), quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 487 (1960). It is well established that the statutory duty to bargain "surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. *Storer Communications, Inc.*, 294 NLRB 1056, 1095 (1989), quoting *Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949) (finding employer violated Section 8(a)(5) by refusing to meet at reasonable times because it could offer no explanation for being able to meet only three days in more than five months). In determining bad faith, the Board will consider the

entire context of negotiations, including whether a party refused to meet more than once or twice a month and/or refused to respond to a party's repeated request for more frequent bargaining. *TNT Logistics North America, Inc.*, 346 NLRB 1301, 1303 (2006); *Calex Corp.*, 322 NLRB 977, 977 (1997) (employer violated Section 8(a)(5) because it arbitrarily limited the frequency of bargaining sessions to once per month, canceled sessions, and refused repeated requests to bargain more frequently), *enforced*, 144 F.3d 904 (6th Cir. 1998). Respondent submits the Union failed in its duty to bargain in good faith over the effects of Respondent's decision through its dilatory tactics. Respondent's subsequent implementation was lawful under *Bottom Line's* dilatory tactics exception.

V. Respondent Provided the Union with All Relevant and Necessary Information Required under Board Precedent.

General Counsel alleges Respondent failed to furnish information requested by the Union on September 28, 2018. (SOF ¶ 3; Ex. 1(e)). The Union's information request was submitted more than three months after Respondent announced its decision to become an exclusively-digital product to phase out its print operations. Respondent did not unlawfully refuse to provide information to the Union.

The Union was not entitled to any of the information pertaining to Respondent's *First National Maintenance* decision to become an exclusively-digital publication and to phase out its print operations. An employer has no obligation to provide information about a permissive subject of bargaining. Information requested about an employer's *First National Maintenance* entrepreneurial decisions cannot be relevant for bargaining if the union has no right to bargain over those decisions.

Furthermore, to the extent the Union claims it needs the information to determine the “economic necessity” of Respondent’s proposal in effects bargaining to reduce the workforce in the pressroom and to evaluate Respondent’s competitiveness, the Union is not entitled to that information. As demonstrated in Section II of this brief, the Union’s contractual basis for its requests is nonexistent, because the cited contract provision, Section 10.2 in its entirety, expired March 31, 2017 and that provision was not part of any status quo that existed on September 28, 2018. Furthermore, the Union is not entitled to information regarding Respondent’s competitiveness because Respondent has never claimed it needed concessions or that it needed to lay off the two paperhandlers because it needed to be competitive. Therefore, Respondent did not violate Section 8(a)(5) when it refused to provide the information requested by the Union on September 28 for items 1, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 17.

A. Background

On June 26, Respondent advised the Union of its decision to become an exclusively-digital operation and phase out its print operations on August 25. (SOF ¶ 15; Ex. 5). Respondent offered to bargain with the Union of the effects of its decision. (SOF ¶ 15; Ex. 5). It was not until July 25 that the Union agreed to take part in effects bargaining. (SOF ¶¶ 21, 34; Exs. 10, 16). Thereafter, the parties met on only two other occasions to negotiate about the effects of Respondent’s decision. (SOF ¶ 34; Ex. 16). On August 25, Respondent implemented its decision to reduce print operations, but did not lay off any bargaining unit employees. (SOF ¶ 34; Ex. 16).

It was not until late September that the Union made any information requests concerning the effects bargaining. (SOF ¶ 33; Ex. 15). On September 28, the Union requested 17 items of information. (SOF ¶ 33; Ex. 15). Eight requests concerned the “economic necessity” for Respondent’s layoffs. Eight other requests raised questions concerning Respondent’s

competitiveness. (SOF ¶ 33; Ex. 15). The seventeenth request concerned bargaining unit employees who were off work due to injury or illness. (SOF ¶ 33; Ex. 15).

On October 12, Respondent responded to the Union and provided the relevant information the Union had requested. (SOF ¶ 34; Ex. 16). Respondent provided to the Union customer contracts (Request 2); the name of a pressman who returned to work from injury/illness (Request 3); information about employee overtime (Request 4); expense information for unit employees (Request 6); new equipment purchased since the introduction of Clinton pressroom (Request 15); and a list of commercial customers (Request 16). (SOF ¶ 34; Ex. 16).

Respondent asked the Union to explain the relevance of its other requests. (SOF ¶ 34; Ex. 16). Respondent asked the Union to explain their relevance to the effects bargaining. (SOF ¶ 34; Ex. 16). It told the Union the decision to lay off the two paperhandlers was based on the elimination of the need for full-time paperhandling functions. (SOF ¶ 34; Ex. 16 (Response 1)). That had occurred as a result of the elimination of print days which was part of Respondent's transition to an exclusively-digital product. (SOF ¶ 34; Ex. 16). The layoff was not based on any of the financial reasons for which the Union requested information. (SOF ¶ 34; Ex. 16 (Response 1)). Respondent also asked the Union to explain the relevance of its requests for reports concerning Respondent's value insofar as that request appeared to be concerned with Respondent's decision to become an exclusively-digital product. (SOF ¶ 34; Ex. 16). Respondent also pointed out that the list of the customers Respondent believed it may lose in the next year called for speculation. (SOF ¶ 34; Ex. 16).

On November 8, the Union replied to Respondent. (SOF ¶ 35; Ex. 17). The Union disavowed any claim that the requested information was relevant to the effects bargaining. (SOF ¶ 35; Ex. 17). It asserted that "the Union is not involved in 'effects bargaining' when we requested

information. (SOF ¶ 35; Ex. 17). That request centered on the employer’s obligation under Section 10.2 of the Agreement . . .” (SOF ¶ 35; Ex. 17). Now, for the first time, the Union, specifically identified twelve of its requests as being related to its claim under Section 10.2 of the expired contract. (SOF ¶ 35; Ex. 17).

Respondent responded to the Union on November 27. (SOF ¶ 36; Ex. 18). Respondent responded to the Union’s assertion of relevance based on Section 10.2 of the expired contract by pointing out that the five-shift markup guarantee and the exception to the guarantee expired by its express terms March 31, 2017. (SOF ¶ 36; Ex. 18). Respondent again explained the reduction of print days had eliminated the need for paperhandling functions on a full-time basis. (SOF ¶ 36; Ex. 18). Pressmen could perform paperhandling functions as part of their normal duties – as they had done in the past. (SOF ¶ 10; Ex. 2, Article V). The layoffs were not based on labor costs. (SOF ¶ 36; Ex. 18). Simply, the new operational requirements in the pressroom resulting from the reduction in print days, did not require the services of two full-time paperhandlers. (SOF ¶ 36; Ex. 18). It was not efficient to retain them with the remaining amount of work. (SOF ¶ 36; Ex. 18).

B. Respondent Had No Obligation to Provide Any of the Information Requested by the Union.

The Union was not entitled to any of the information concerning Respondent’s *First National Maintenance* decision to become an exclusively-digital publication and to phase out its print operations. An employer has no obligation to provide information about a permissive subject of bargaining. *ADT, LLC d/b/a ADT Security Services*, 369 NLRB No. 31, slip. op. at 1, n. 2 (2020); *FirstEnergy Generation, LLC v. NLRB*, 929 F.3d 321, 334 (6th Cir. 2019) (finding that because the employer did not have a duty to bargain over a particular subcontracting decision, it had no duty to provide the Union with information related to that decision); *Pieper Electric, Inc.*, 339 NLRB 1232, 1235 (2003). Information requested about an employer’s *First National*

Maintenance entrepreneurial decisions cannot be relevant for bargaining if the union has no right to bargain over those decisions. Therefore, Respondent did not violate Section 8(a)(5) when it refused to provide the information requested by the Union on September 28.

To the extent the Union claims it needed the information to determine the “economic necessity” of Respondent’s proposal in effects bargaining to reduce the workforce in the pressroom and to evaluate Respondent’s competitiveness, the Union is not entitled to that information. The Union expressly disavowed any claim that the requested information was relevant to effects bargaining.

Furthermore, under the two bases it cited for its request, the Union cannot establish the relevance of the requested information. The first basis is its claim that Respondent was required under Section 10.2 of the expired contract to show “economic necessity” for the layoffs. (SOF ¶ 35; Ex. 17). However, as set forth above in Section II of this Brief, the Article 2, Section 10.2 guarantee and Respondent’s burden to establish an exception to that guarantee expired March 31, 2017. Therefore, the Union’s information request is not relevant because it pertains to a purported obligation that is no longer in effect.

The second basis for the Union’s requests is that it needs the information to determine if Respondent is “competitive.” (SOF ¶ 35; Ex. 17). The fatal flaw in that claim of relevance is that there is no Company claim of a lack of competitiveness to which the Union was purportedly responding.

Respondent has never claimed in effects bargaining that it needed concessions or to make layoffs to remain competitive. The stipulated record contains no evidence that Respondent made such a claim. The Board has recognized that when an employer makes a claim of being uncompetitive certain specific information related to that claim may become relevant. *See Tegna,*

Inc. d/b/a KGW-TV, 367 NLRB No. 71, slip. op. at 2 (2019); *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006). Here, Respondent never made a claim of being noncompetitive and the stipulated record in this case is devoid of such a claim. Therefore, there is no basis for the Union's requests regarding claims of uncompetitiveness.

The Union's information requests are not presumptively relevant because they do not relate to terms and conditions of employment of bargaining unit employees. Accordingly, the Union must establish the relevance of the requested information. *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip. op. at 2 (2019); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). The Union has failed to meet that burden.

The Union also made its information requests in bad faith. They were not made until almost three months after Respondent first announced its decision, and two months after the parties first engaged in effects bargaining. By its own admission, none of the requests concerned the effects bargaining. (SOF ¶ 35; Ex. 17). Many of them were intended to support a spurious claim based upon a nonexistent right. The Board has recently stated that such information requests may be seen as a dilatory tactic and not as a legitimate demand for information. *See Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip. op. at 4 (2019).

Accordingly, the refusal-to-provide-information for items 1, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 17 in the Union's September 28, 2018 information request as alleged in the Complaint was not unlawful and the Complaint must be dismissed.

Dated: July 23, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief To Administrative Law Judge On Behalf Of PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the following via email on this 23rd day of July, 2020:

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