

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6**

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**PG PUBLISHING CO., INC. d/b/a  
PITTSBURGH POST GAZETTE**

**and**

**Case 06-CA-233676**

**GRAPHIC COMMUNICATIONS  
INTERNATIONAL UNION,  
GCC/INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS LOCAL 24M/9N**

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**BRIEF ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL TO  
ADMINISTRATIVE LAW JUDGE DAVID GOLDMAN**

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## I. PRELIMINARY STATEMENT

This case centers on an employer's statutory duty to abide by the status quo and the terms and conditions of a collective bargaining agreement following its expiration. Specifically, the Respondent, PG Publishing Inc., d/b/a Pittsburgh Post-Gazette, violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act") when it failed and refused to provide relevant information requested on September 27, 2018, and when it unilaterally eliminated the five-shift per week guarantee and laid off unit employees covered by a minimum shift guarantee during successor contract negotiations without bargaining to overall impasse. 29 U.S.C. §§ 158(a)(5).

The facts in the instant case are not in dispute. Rather, this case presents solely issues of law regarding an employer's good faith bargaining obligations under the Act: the obligation to furnish relevant information requested by the exclusive bargaining unit representative of employees, an employer's obligation to bargain over changes to the terms and conditions of employment of unit employees, and an employer's obligation to maintain the status quo during successor contract negotiations.

By stipulation, Counsel for the General Counsel showed that Respondent's and the Union's most recent collective bargaining agreement, which expired in 2017, provided for a five-shift per week guarantee for unit employees. In 2018, while successor contract negotiations were still ongoing, Respondent made the decision to reduce print operations, and announced that it planned to layoff unit employees. The Union requested that Respondent provide information relevant to the Union's policing of the terms of the five-shift guarantee under the expired contract, which Respondent failed and refused to furnish. The record showed that Respondent then unilaterally implemented the layoff of two unit employees covered by the expired contract's minimum shift guarantee while the parties were concurrently engaged in successor contract negotiations. Finally, the record shows that Respondent was not justified in this conduct; the

parties were not at impasse in bargaining, and the Union did not waive its right to bargain over a change to the status quo through any of its conduct or through contractual language.

Respondent's unilateral layoffs of unit employees covered by a minimum shift guarantee violated Section 8(a)(5) for a couple reasons. Respondent violated Section 8(a)(5) of the Act because it was engaged in successor contract negotiations at the time and, pursuant to *Bottom Line Enterprises*, 302 NLRB 373 (1991), could not lawfully unilaterally implement layoffs and thereby eliminate the minimum shift guarantee, mandatory subjects of bargaining, absent overall impasse. Second, Respondent violated Section 8(a)(5) because, under *Finley Hospital*, 362 NLRB 915 (2015), enforcement denied, 827 F.3d 720 (8th Cir. 2016), the layoffs constituted a violation of its statutory duty to maintain the status quo, which included a guarantee that workers would receive a minimum number of shifts per week. Respondent should be found to have violated the Act, as alleged, for the reasons as set forth below.

## **II. PROCEDURAL STATEMENT**

The charge was filed by the Graphic Communications International Union, GCC/International Brotherhood of Teamsters Local 24M/9N ("the Union") on January 7, 2019 and served by regular post-paid mail upon the PG Publishing Inc., d/b/a Pittsburgh Post-Gazette ("Respondent") the next day. (Facts ¶1; Exhs. 1(a) and 1(b)). The first amended charge was filed by the Union on February 14, 2019 and a copy was served by regular post-paid mail upon Respondent the same day. (Facts ¶2; Exhs. 1(c) and 1(d)). A Complaint and Notice of Hearing issued on March 16, 2020 and was served upon Respondent by post-paid certified mail the same day. (Facts ¶3; Exhs. 1(e) and 1(f)).

On June 8, 2020, the Counsel for the General Counsel ("General Counsel"), the Union and Respondent filed a Joint Motion to submit this case to an Administrative Law Judge ("ALJ")

based on a stipulated record.<sup>1</sup> On June 8, 2020, the ALJ issued an Order Granting the Joint Motion to submit this case based on a stipulated record and setting a brief schedule.

### **III. STATEMENT OF FACTS**

Respondent is an Employer under the Act, engaged in publishing a daily newspaper, the Pittsburgh Post-Gazette. (Facts ¶5-7). The Union, a labor organization under the Act, has been recognized by Respondent as the exclusive bargaining representative of a unit of employees consisting of all journeymen pressmen, paperhandlers, paperhandling pressmen and apprentice pressmen who work in Respondent's pressroom and paperhandling departments ("the unit") for many years. (Facts ¶10). Respondent and the Union's relationship has been embodied by a series of collective bargaining agreements, the most recent of which was effective from November 16, 2014 until March 31, 2017 ("the expired CBA"). (Facts ¶10).

#### **A. Relevant Contractual Provisions**

Article 10, Section 10.2 of the expired CBA provides a limitation on Respondent's right to conduct layoffs by listing in an appendix to the contract certain employees who are guaranteed five shifts per week. Specifically, Section 10.2 states:

Effective the first payoff week following the signing of the collective bargaining agreement, all employees listed by name at the time of the signing of this Agreement shall be guaranteed a five (5) shift mark-up each payroll week for the balance of the Agreement, ending March 31, 2017, except under the following circumstances:

- (a) Layoffs to reduce the force shall not be made until the Company notifies the Union ten (10) days in advance of such layoffs. Layoffs to reduce the force may be made if the same are economically necessary and no reasonable alternative exists. In the event the Union contends that reasons other than economy have

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<sup>1</sup> That joint submission contains an agreed-upon list of documentary exhibits, comprising of Exhibits 1 through 19, and a Stipulation of Facts numbered 1 through 39. Citations herein are generally either to the Stipulations of Facts (Facts, ¶\_\_) or Joint Exhibits (Exh. \_\_) contained in the Joint Motion.

entered into the decision to conduct the layoff, it may appeal the layoff to arbitration pursuant to the provisions of this Agreement. If layoffs are to take place, then and in that event a single seniority roster for all employees in the bargaining unit shall be utilized. Those employees with the least amount of seniority shall be first laid off, and when the force again increases the employees are to return to work in the reverse order in which they were laid off.

- (b) Any employee laid off as a result of this provision shall continue to receive health and life insurance benefits for a period of 3 months subsequent to their layoff date.
- (c) In the event of an economic business upturn necessitating the gradual reemployment on a five (5) shift basis of employees previously laid off, the Company shall reinstitute the five (5) shift mark-up guarantee as to those employees recalled as soon as may be possible under the economic conditions prevailing. The Company shall meet with the Union to discuss the orderly return of the five (5) shift guarantee.

(Facts ¶14; Exh. 2). Connected to this provision, Appendix I of the expired CBA contains a list of employees guaranteed a five-shift markup. This Appendix includes twenty-four employees. (Exh. 2).

## **B. The Parties Commence Bargaining**

Prior to the expiration of the CBA on October 11, 2016, the Union wrote to Respondent that pursuant to Article 1-Section 1.2, it was providing Respondent with “official notice to open negotiations” for a successor contract. (Facts ¶11; Exh. 3). On January 13, 2017, Respondent responded to the Union’s letter by stating,

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The Company will 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 Agreement expires...

\*\*\*\*

(Facts ¶12; Exh. 4).

Thereafter, beginning on about March 21, 2017 and continuing to present, Respondent and the Union have been engaged in negotiations for a successor collective-bargaining agreement to the expired CBA. To date, the parties have not reached a successor collective-bargaining agreement, nor have the parties negotiated an extension agreement. (Facts ¶13). Moreover, the expired CBA does not contain an Evergreen Clause. (Exh. 2).

**C. Respondent Announces Decision to Reduce Print Operations**

By letter dated June 26, 2018, during successor contract negotiations, Respondent notified the Union that it planned on focusing its efforts on its online publication and would be reducing print days for its newspaper. Specifically, Respondent wrote that, in order to transition to delivering the news digitally,

...we will begin to reduce our print operations which have been the mainstay of our newspaper since it was founded.

Beginning August 25, 2018, we will eliminate two (2) days of our print operations. As we transition to a digital newspaper, the nature of our operations will change substantially.

We are prepared to discuss the effects our decision will have on your bargaining unit. Please let me know when you are available to meet.

(Facts ¶15; Exh. 5). Importantly, Respondent admits that this decision to become a news organization and eliminate print operations was not a result of labor costs. (Facts ¶30).

**D. The Parties Engage in Bargaining in August and September 2018**

The Union and Respondent then met on about July 25, 2018 for the first time to bargain over the effects of Respondent's decision to eliminate two of its print days. (Facts ¶16).

On August 3, 2018, Respondent sent a letter to the Union summarizing its version of the bargaining that took place on July 25, 2018 in which the parties discussed the effects of

Respondent's decision to become a digital platform. Respondent wrote that the parties discussed the following points:

1. The Company will begin its transition to a digital platform by ceasing the printing of the Post-Gazette on Tuesdays and Saturdays beginning August 25, 2018.
2. The parties discussed the new press schedule reflecting the discontinuance of the Post-Gazette print days. The Union had some helpful suggestions which the Company agreed to incorporate into the new press schedule. The Company plans to begin the new press schedule on August 19.
3. The Company informed the Union that it believed three bargaining unit employees would be affected by the Company's decision. Two paperhandlers would be laid off along with one pressman. The parties agreed to reduce the work force by seniority, with the paperhandlers and pressmen having separate seniority lists.
4. Mike suggested that the Company hold off on laying off the lowest seniority pressman because there may be a pressman who might volunteer to be laid off. The Union was going to reach out to the possible volunteer. The Company is agreeable to the Union's suggestion and agrees to not lay off the low seniority pressman until the earliest of (1) when the Union informs the Company there are no pressmen volunteers for layoff or (2) the close of business on Friday, August 31, 2018. The two paperhandlers would be laid off on August 25, 2018. The Company has the sole right to accept or not accept any pressman who volunteers for layoff.
5. The Company is agreeable to continuing to provide health and life insurance benefits for a period of three (3) months after layoff for the three (3) individuals who are laid off.
6. The Union proposed severance for the three laid off individuals in the amount of one (1) week's pay per year of service, with no cap. The Company is considering your proposal on severance and will respond shortly.

(Facts ¶17; Exh. 6). After this meeting in July, on August 8, 2018, Respondent sent the Union a severance proposal which suggested that the laid-off employees receive one week of severance pay per year of service, with a cap of four weeks' pay conditioned on the employee executing a Full and Complete Release Agreement provided by Respondent. (Facts ¶18; Exh. 7).

About a week later, on August 16, 2018, Respondent sent the Union another email, titled “Pressmen – next steps,” which notified the Union that it intended to layoff two paperhandlers.

Specifically, Respondent wrote:

We plan to reach out to the 2 paperhandlers on Friday who will be laid off on August 25, 2018.

Should we discuss the Company’s severance offer with those employees or does the union want to talk about that further?

I have also reached out to a representative at the PA CareerLink Pittsburgh office for assistance with the employment services offered by the state.

The Company will provide health and life insurance benefits for three (3) months.

(Facts ¶19; Exh. 8). This health insurance provision was consistent with the terms of Section 10.2 in the expired CBA. (Exh. 2).

On August 17, 2018, the Union sent their severance counterproposal to Respondent’s “assumption that there needs to be 3 layoffs in the press department.” The Union’s counterproposal was more aggressive than its July 25 proposal, as it proposed three weeks of pay for every year of service instead of just one week of pay. The Union also continued to question whether any layoffs were necessary, making its offer contingent on Respondent showing the need for the layoffs. Additionally, in this email, the Union attached a letter in which the Union wrote that it wanted to “clarify some of the misstatements” Respondent made in its August 3, 2018 letter regarding its summary of the parties’ July 25<sup>th</sup> meeting. Specifically, the Union wrote its summary of the July 25, 2018 meeting:

As negotiations started the Union specifically asked about the changes which were addressed in a letter dated June 26, 2018 regarding the reduction of print days from seven (7) to five (5).

The company and Union at that point agreed to discuss the effects of this transition. The company stated that they needed to reduce the workforce by two (2) paperhandlers and one (1) pressman. A schedule was supplied to the members of the bargaining committee by the company. After some discussion a break was taken by the parties.

Following the break the Union returned and discussed modifying the schedule and also questioned the need to reduce the workforce. At that point Rich Bogasky suggested that with one of the pressman being on disability it would be premature to reduce the

workforce. In addition Tom Guckert also commented that the Union needed to fall back to assess the effects of the new schedule as there are other publications being run. The need for paperhandlers as well as all pressman was discussed and both parties left with no true vision of the reduction. There was no agreement as to how to reduce the workforce if needed. In fact, Rich Bogaski stated that some senior pressman may want to consider the possibility if needed.

At some point the parties broke and GCC/IBT International Rep. Mike Huggins suggested that we should throw some kind of separation/severance numbers out to start negotiations on the possible reduction. The parties at that point reconvened and the Union proposed 1 weeks' pay for every year of service in addition to healthcare coverage. This is our summation of the initial meeting regarding a possible reduction in the workforce. Future meetings need to be undertaken to discuss the possible effects of the reduction in print days. We are also in receipt of the company's proposal for a buyout which is totally unacceptable.

Please find attached a counter to the company's proposal.

#### PROPOSAL BETWEEN PITTSBURGH POST-GAZETTE AND LOCAL 24M/9N, THE GRAPHIC COMMUNICATIONS CONFERENCE, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Whereas, the Pittsburgh Post-Gazette has made the decision to cut production to five (5) days which may directly impact the pressman and paperhandlers of GCC/IBT Local 24M/9N;

Whereas, the Pittsburgh Post-Gazette and Local 24M/9N, The Graphics Communications Conference, International Brotherhood of Teamsters or ("the Union") have entered into good faith effects bargaining concerning that decision;

GCC/IBT Local 24M/9N is proposing the following buyout/severance provisions for its affected members;

1. No member will be offered a buyout/severance until the effects of transitioning to a five (5) day operation are confirmed by both parties;
2. Each employee will then be given a termination date if it is confirmed by both parties that there is a need to reduce the workforce;
3. In exchange for and in consideration of the terms provided herein, regular full time impacted Employees who are in active service shall receive the following enhanced buyout/severance pay benefit:
  - a. Three weeks of base pay per year of service, with a minimum of twenty-six weeks, paid out at the Impacted Employee's election, either in (1) a lump sum payment or (2) salary continuance currently structured to be paid through 2018, with a lump sum payment of the balance in January 2019; and
  - b. Continuance of health care benefits for a period of 6 months
  - c. For the purpose of calculating years of service for this paragraph, employees who are currently working shall be credited with service as if they have worked all of calendar year 2018, regardless of their actual termination date.

4. All buyout/severance payments are subject to mandatory state and federal withholding and union dues and assessments.
5. Regular full time impacted employees in active service who do not timely return a fully executed release/or who rescind their release shall not receive any buyout/severance payment.

(Facts ¶20; Exh. 9).

On August 20, 2018, Respondent sent the Union a letter stating that the Employer “will agree to meet for effects bargaining,” and provided dates that the Employer would be available. Additionally, Respondent reiterated their version of the initial effects bargaining that took place in July. (Facts ¶21; Exh. 10).

On August 25, 2018, Respondent followed through with its plan to reduce print operations by two days a week. (Facts ¶22). Respondent postponed the layoffs until October of 2018.

The parties met again on September 13 and September 19, 2018, where they exchanged additional severance proposals. (Facts ¶24-25; Exh. 11-12). At both meetings, the Union proposed that the laid off employees receive a minimum of twenty-six weeks of severance pay and six months of healthcare. (Facts ¶24-25; Exh. 12). At both September meetings, Respondent counter proposed that the laid off employees only receive severance pay for up to six weeks, with three months of healthcare and placement on a recall list. (Facts ¶24-25). However, Respondent also told the Union in the September 19<sup>th</sup> meeting that it planned to layoff two paperhandlers on October 6, 2018. (Facts ¶25). Respondent then gave the Union this exact same counterproposal in a letter dated September 20, 2018, in which it also wrote that this severance proposal was Respondent’s “best and final offer” and confirmed that it planned to layoff the two paperhandlers on October 6<sup>th</sup>. (Facts ¶25-26; Exh. 13).

**E. The Union Requests Information and Respondent Lays Off Two Pressmen**

On September 27, 2018, the Union sent Respondent a letter requesting certain information in order to ensure that Respondent is complying with Section 10.2 of the expired contract. Specifically, the Union noted that the information was necessary to determine whether the layoffs are “economically necessary and no reasonable alternative exists,” quoting the requirements of Section 10.2. This letter sought 17 enumerated items of information. This letter contained no deadline for the Employer to provide the information. (Facts ¶33; Exh. 15).

Respondent did not immediately respond to the Union’s request for this information, and on October 3, 2018, Respondent sent letters to two paperhandlers, David Jenkins and David Murrio, notifying them that they would be laid off effective October 6, 2018. (Exh. 14). Then, on October 6, 2018, Respondent laid off these two paperhandlers, both of whom had been protected under Section 10.2. To date, these two paperhandlers have not been offered reinstatement. (Facts ¶28-29; Exh. 14).

On October 12, 2018, Respondent sent the Union a letter entitled “Effects Bargaining,” where it laid out its position with respect to the state of bargaining and provided certain requested information. Respondent provided portions of items 2, 4, 5, and 7, and 16, along with items 3 and 15. Respondent denied item 14 as speculative. Respondent asked for an explanation as to the relevance of the remaining information, arguing that the information is not relevant to the parties’ “effects bargaining.” Importantly, Respondent repeatedly noted that the “decision to lay off the two paper handlers was not based on labor costs. It was based on the elimination of the need for full-time paper handling functions as a result of the reduction of two print days.” (Facts ¶34; Exh. 16).

On November 8, 2018, the Union sent Respondent a letter responding to its requests for relevance. The sum and substance of each of these was that the information was necessary to determine whether the layoffs were “economically necessary and no reasonable alternative existed” pursuant to Section 10.2 of the expired contract. (Exh. 17). On November 27, 2018, Respondent again refused to provide the outstanding requested information. Specifically, Respondent wrote to the Union that the five-shift guarantee under Section 10.2 expired with the contract, and therefore Respondent is not obligated to furnish any information requested pursuant to the Union enforcing this term of the contract. (Exh. 18).

To date, Respondent has not furnished the Union with any of the outstanding information requested by it in items 1, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 17 of its September 27, 2018 letter, which includes:

- Respondent’s 2017 and 2018 budget for the Clinton Pressroom;
- Amounts paid per customer contract;
- Overtime or other payments made to supervisory employees for the purposes of operating the Clinton Pressroom;
- Contract proposals with prospective customers for products produced by the presses;
- Total compensation paid to supervisory personnel;
- Any reports from consultants, supervisors certified public accountants or others concerning the value of the company or any possible restructuring;
- Copies of all correspondence which concern the possibility of restructuring, sale and/or takeover of Respondent, including Minutes of the Board of Directors for the years 2017 and 2018 when the financial status of the Post-Gazette was discussed;
- Complete list of customers that utilize services and products provided by the Clinton pressroom;
- A list of all companies or organizations which Respondent considers to be its competitors;
- A list of all your prices for the goods and services which are attributable to the use of the Clinton pressroom;
- A list of all customers which you lost during the last five years; and
- A copy of all price lists for printing service Respondent has offered to others for the past two years in order to be more competitive and economical in its operations.

(Facts ¶37; Exh. 15).

The parties never reached an agreement over the effects of Respondent's decision to reduce its print days, nor did the Union ever waive its right to bargain over the layoffs through any of its conduct. (Facts ¶27). Further, it is worth noting that Section 10.2 of the expired CBA is silent with respect to severance pay for employees laid off pursuant to that provision. (Exh. 2).

#### IV. ARGUMENT

##### A. Overview

Respondent has repeatedly violated its duty to bargain in good faith with the Union in violation of 8(a)(5) in this case. First, Respondent violated Section 8(a)(5) by eliminating the five shift per week guarantee and laying off two paperhandlers because it was engaged in successor contract negotiations at the time and, pursuant to *Bottom Line Enterprises*, could not unilaterally implement layoffs, a mandatory subject of bargaining, absent overall impasse. 302 NLRB 373 (1991), *enforced mem. sub nom, Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Second, Respondent violated Section 8(a)(5) because, under *Finley Hospital*, the layoffs constituted a violation of its statutory duty to maintain the status quo, which arguably included the minimum-shift guarantee. 362 NLRB 915 (2015), *enforcement denied*, 827 F.3d 720 (8th Cir. 2016). Finally, Respondent failed and refused to furnish the Union with requested information it was obligated to provide in violation of Section 8(a)(5).

While Respondent violated Section 8(a)(5) of the Act under *Finley Hospital*, General Counsel is also seeking the Board to overrule *Finley Hospital* to the extent that it allows contractual provisions to continue post-expiration despite their inclusion of duration language such as that found here. *Id.*

**B. Respondent's Elimination of the Shift Guarantee and Imposition of Layoffs Without Having Reached a Good Faith Impasse Violated Section 8(a)(5)**

It well-established that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). Under this rule, during bargaining for a successor agreement, an employer must refrain from making unilateral changes to employees' terms and conditions of employment until the parties reach agreement or bargain to a lawful impasse. *WKYC-TV, Inc.*, 359 NLRB 286, 287-88 (2012); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). See also *Bottom Line Enterprises*, 302 NLRB at 374. The policy behind this prohibition is to maintain a level playing field during negotiations. As the Supreme Court has noted, "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton*, supra, at 198. The Board has recognized two limited situations in which an employer's unilateral action may be justified absent overall impasse: "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining" and when an economic exigency exists. *Bottom Line Enterprises*, 302 NLRB at 374.

Here, Respondent stipulates and admits that it laid off the two unit employees without first bargaining with the Union to an overall impasse for a successor collective bargaining agreement. (Facts ¶32). The record is devoid of any evidence establishing that the Union engaged in dilatory tactics to avoid reaching a successor agreement. Rather, the record evidence shows that the Union met regularly with Respondent and regularly communicated back-and-forth with bargaining proposals. To be sure, Respondent stipulated that the Union did not waive its right to bargain over the layoffs through any of its conduct. (Facts ¶27). For these reasons, the

Union did not waive its right to bargain through dilatory tactics, inaction or any other conduct in bargaining.

The record similarly fails to establish that Respondent was excused from its obligation to maintain existing terms and conditions of employment during successor contract negotiations due to economic exigency. The Board has limited its definition of exigent economic circumstances to, “extraordinary events which are ‘an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.’” *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987). In *RBE Electronics of S.D., Inc.*, the Board made clear that “[a]bsent a dire financial emergency, economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action.” 320 NLRB 80, 81 (1995); citing *Triple A Fire Protection*, 315 NLRB 409, 414 (1994). The Board has similarly held that under exigent circumstances an employer need not give notice and bargain concerning the effects of closing its operations, but has limited its definition of such exigent circumstances to situations such as where an employer lacked funds to continue operating and paying employees, or lost performance bonds required by law and had the bank end the employer's line of credit. See *Your Host, Inc.*, 315 NLRB 295, 297 (1994); citing *National Terminal Baking Co.*, 190 NLRB 465 (1971) (two trucks stolen in 1 week and no money left with which to continue the business); *M & M Transportation Co.*, 239 NLRB 73, 75 (1978) (company closed when it lacked funds to continue operation and lacked money to pay employees); *Raskin Packing Co.*, 246 NLRB 78 (1979) (company closed immediately when it lost the performance bond required by statute and bank ended company's line of credit).

There is no record evidence in this case demonstrating the existence of compelling economic considerations that would excuse bargaining altogether over Respondent's layoff of the two unit employees. Rather, the record demonstrates that Respondent announced that making their Post-Gazette publication digital was within their future in order to further reach their readers and subscribers. (Exh. 5). Further, Respondent wrote to the Union that the decision to layoff the paperhandlers was not related to any economic reasons. Specifically, Respondent stated, "It was not based on any budget information or labor costs. Moreover, the Company has never claimed that it has taken any action in its pressroom because it is unable to pay any present or future obligation." (Exh. 16). Respondent's reduction of print operations was calculated and forecasted, not the result of "unforeseen" economic emergency justifying unilateral action. For this reason, Respondent's unilateral action cannot be excused under this exception.

Respondent argues in its correspondence with the Union that it had no duty to bargain over the layoffs themselves because they were simply an inevitable consequence of its entrepreneurial decision to reduce print days for its newspaper. (Exh. 16 and 18). But that defense lacks merit. The Board has held that the extent of the effects bargaining over an entrepreneurial decision varies depending on circumstances.

In *Litton Business Systems*, 286 NLRB 817, 819-20 (1987), the employer was not obligated to bargain about an economically motivated decision to change its printing processes, but was obligated to explore alternatives to layoff, including retraining, transferring employees, etc., to reduce the scope of the layoffs. In *First National Maintenance*, [452 U.S. 666, 677 fn. 15 (1981)], the employer's termination of a contract with a customer resulted in the elimination of jobs, and thus the only meaningful effect to bargain was severance pay. In *Holmes & Narver*, 309 NLRB 146, 147 (1992), the Board found that the union could potentially offer many alternatives to downsizing, including wage reduction, modified work rules, nonpaid vacations, work reassignments, etc.

*Racetrack Food Servs., Inc. & Casino Food Servs., Inc., Single Emp'r, & Unite Here, Local 274*, 353 NLRB No. 76, 2008 WL 5427721 at \*26 (Dec. 31, 2008). The instant case is most

factually analogous to *Litton Business Systems*, where the Board held that even where layoffs are the direct result of a decision that is not itself a mandatory subject of bargaining, there is still room for bargaining about the layoffs themselves. 286 NLRB at 820, *enfd.* in pertinent part 893 F.2d 1128 (9th Cir. 1990), reversed in part on other grounds 501 U.S. 190 (1991). Specifically, in *Litton*, the Board held that layoffs were not an inevitable decision of employer's decision to end "cold-type" printing services because employer could have taken other actions, such as transferring workers to other facilities or retrained workers on different printing equipment. *Id.*; see also, *Fast Food Merchandisers*, 291 NLRB 897, 899-900 (1988) (employer that eliminated third shift due to relocation of unit work was required to bargain about the resulting layoffs, including the "possibility of keeping the shift in place" by making layoffs from each shift).

Here, Respondent continues to run a substantial printing operation, including for outside publications, and has to cover paperhandler work by scheduling at least one additional pressman on each shift to perform that work. (See, Facts ¶6(a); Exh. 2). There are alternatives that Respondent and the Union could explore to avoid or reduce the scope of the layoffs without calling into question Respondent's underlying decision to reduce the print operations of the Post-Gazette publication. For these reasons, Respondent was obligated to notify and bargain with the Union over the effects of its decision to reduce its print operations, and explore other options in this bargaining apart from just eliminating the five-shift per week guarantee and laying off unit employees covered by this guarantee.

Based on the foregoing, Respondent violated Section 8(a)(5) of the Act by unilaterally implementing layoffs of the two pressmen and thereby eliminating the minimum shift guarantee during successor contract negotiations absent overall impasse.

### **C. The Durational Language is Not a Clear and Unmistakable Waiver**

Section 10.2 of the parties' expired contract provides in relevant part that all of the bargaining unit employees named in the agreement are guaranteed five-shifts of work per week for the duration of the contract, "ending March 31, 2017". While Respondent admits that the Union has not waived its right to bargain over the layoffs through its conduct, Respondent asserts through its correspondence with the Union that Section 10.2 of the contract expired on March 31, 2017, and therefore the five-shift guarantee and the right to bargain over the guarantee had been waived. (see, Exh. 18). However, the Board has steadfastly refused to find a waiver of statutory protections against post-expiration unilateral changes through the mere inclusion of durational language, without more specific reference to post-expiration conduct.

Where there is no mention as to what shall happen to the parties' obligations following expiration of the contracts, the Board has consistently found the simple inclusion of durational language will not be enough to "clearly and unmistakably" waive the Union's right to post-expiration continuation. For example, in *General Tire & Rubber Co.*, the Board refused to find that the union waived its bargaining rights through language in a contract that stated that the fringe benefits provided "shall be provided for 90 days following termination." 274 NLRB 591 (1985), enforced, 795 F.2d 585 (6th Cir. 1986). The employer there – just like the Respondent here – then unilaterally discontinued the fringe benefits 90 days after the expiration of the contract, during negotiations for a successor contract. The Board found in that case that the contract "provide[d] for an extra 90 days of contract coverage for [fringe] benefits beyond the 3 years [of the expired contract]," and did not clearly and unmistakably waive the union's right to bargain over the continuation of the fringe benefits beyond that 90-day period, because "[n]owhere in this contract provision is there mention of what is to [happen] to these [fringe]

benefits after the 90 days have expired.” *Id.* at 593. Likewise, in *KBMS, Inc.*, 278 NLRB 826, 849 (1986), the Agreement and Declaration of Trust stated: “Effective Date of Contributions. All contributions shall be made effective as of the date specified in the collective bargaining agreements between AFTRA and the Producers and said contributions shall continue to be paid as long as a Producer is so obligated pursuant to said collective bargaining agreements.” There, the Board affirmed the ALJ’s finding that this language is not a clear and unmistakable waiver because the language does not deal with the termination of the employer’s obligation to make fund contributions.

The Board has recognized that certain language can constitute a waiver of the right to bargain over post-expiration changes in benefits. For instance, in *Cauthorne*, 256 NLRB 721 (1981), *enfd.* in part 691 F.2d 1023 (D.C. Cir. 1982), the pension trust fund agreement, under which the employer was providing health and welfare benefits, explicitly provided that the employer’s obligation “shall terminate” at the expiration of the collective bargaining agreement “unless, in a new collective bargaining agreement, such obligation shall be continued.” Such language was found to “expressly [waive] both the employees’ right to receive the benefits of pension fund contributions and the Union’s right to bargain regarding the employer’s cessation, at the expiration of a contract, of payments into the pension ... fund absent a renewed agreement to continue such payments.” *Id.* at 722. Critically, the Board still held that, without such express language in the health and welfare agreement, a similar unilateral cessation of payments would be unlawful. *Id.* Thus, *Cauthorne* was unique in that it involved a “pension agreement that unambiguously provided for termination of benefits upon expiration of [the] collective-bargaining agreement ...” *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1115 (D.C. Cir. 1986).

It is clear that no such language exists here. Section 10.2 in the instant case, in contrast with the language in *Cauthorne*, does not address any post-expiration conduct or obligations of Respondent. It certainly does not “clearly and unambiguously privilege the employer” to take unilateral action of any kind, under any circumstances. *Oak Harbor Freight Lines, Inc.*, 358 NLRB 328, 331 (2012); citing *Cauthorne*, 256 NLRB 721.

Additionally, while certain contractual wages or benefits, by their terms, end with the termination of the contract, extant Board law requires they be maintained even after expiration of that contract. *Finley Hospital*, 362 NLRB 915. It is clear that, absent language evincing any intent to end a particular term of employment or benefit, said term or benefit will typically continue as part of the status quo even after the contract expires. *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 3 (Aug. 15, 2019) (citations omitted). However, the Board in *Finley Hospital* went further than that. In that case, the Board majority concluded that a 3% annual raise in a one-year initial contract was part of the status quo, and, despite contract language stating that the raise would apply only “for the duration of this Agreement,” found that the union had not clearly and unmistakably waived its right to the continuation of the annual raise during the post-contract expiration period. 362 NLRB at 917-19.

Here, the durational language in Section 10.2, which arguably guarantees a minimum number of shifts for named employees (including the laid off paperhandlers) for the duration of the agreement, is similar to that in *Finley Hospital*, where the Board refused to find a waiver. Thus, despite the fact that the agreement here guarantees only “a five (5) shift mark-up each payroll week for the balance of the Agreement, *ending March 31, 2017*” (emphasis added), under current Board law as set forth in *Finley Hospital*, this durational language does not allow Respondent to terminate the guarantee upon contract expiration.

For these reasons, it must be found that the language in Section 10.2 fails to establish anything resembling a waiver of Respondent’s statutory obligation to maintain the status quo established by the expired collective-bargaining agreement. As explained above, current Board law necessitates a finding that Respondent’s layoffs of the two unit employees constituted a violation of the statutory duty to maintain the status quo, which included a guarantee that the unit employees receive a minimum number of shifts per week. Therefore, Respondent’s failure to abide by Section 10.2, even after the contract expired, violates the Act under *Finley Hospital*. Indeed, the minimum shift guarantee under Section 10.2 is a mandatory subject of bargaining and both laid off paperhandlers were subject to its protections.

**D. *Finley Hospital* Should be Overruled**

The Board has found that a union may contractually waive notice, opportunity or other statutory bargaining rights it otherwise might have after contract expiration. *See, e.g., General Tire & Rubber Co.*, 274 NLRB at 592. Instead of extending this rationale to durational language in an expired collective bargaining agreement, *Finley Hospital* and others such cases<sup>2</sup> find the expired terms essentially survive expiration, drawing their conclusion from the flawed rationale that durational limiting language only “limits the effective period of the contractual obligation, but does not address the employer’s post-expiration conduct or obligations or authorize unilateral action of any kind.” *Finley Hospital*, 362 NLRB at 918.

Accordingly, the Board should overrule *Finley Hospital* to the extent that it allows time-bound contractual terms—such as the term at issue here—to constitute the post-expiration status

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<sup>2</sup> *See, e.g., StaffCo of Brooklyn, LLC*, 364 NLRB No. 102, slip op. at 3-4 (Aug. 26, 2016), *enforced*, 888 F.3d 1297 (D.C. Cir. 2018); *Marina Del Rey Hospital*, 363 NLRB No. 22, slip op. at 4 (Oct. 22, 2015).

quo. *Finley Hospital* is flawed because it fails to give effect to the plain meaning of the language used by parties in their labor agreements, resulting in decisions that misconstrue the contracting parties' intent and corrupt the parties' bargained-for deal. *See MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 6, 14 (Sep. 10, 2019) (holding that "contract coverage" standard shall apply when considering whether an employer's unilateral action is permitted by a collective-bargaining agreement, because the "clear and unmistakable waiver" standard "typically results in a refusal to give effect to the plain terms of a collective-bargaining agreement," and the contract coverage standard allows the Board to "ascertain and give effect to the parties' intent" as expressed through an agreement's plain language).

To avoid such pernicious results, the Board should not assess durational language in a contract provision to solely determine whether it waives a union's right to bargain about a change to a mandatory subject post-expiration. Rather, the "proper inquiry is to identify the statutory status quo . . . that the [employer] was obligated to maintain pending bargaining for a successor contract . . . [which] is defined by 'the contract language itself.'" *Finley Hospital*, 362 NLRB at 926 (Member Johnson, dissenting) (citations omitted) (emphasis added). *See also PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (August 22, 2019) (the post-expiration "status quo is . . . defined by reference to the substantive terms of the expired contract") (quoting *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970)) (internal quotation marks omitted). Assessing a contract provision's durational language only to determine whether a waiver occurred incorrectly presumes the benefit is part of the status quo. Indeed, in *Finley Hospital*, the majority concluded without discussion that the benefit at issue—an annual raise—was part of the statutory status quo, and it identified waiver of that statutory duty as the only issue presented. *Finley Hospital*, 362 NLRB at 916. But, as Member Johnson explained in

his dissenting opinion in that case, the majority erred by ignoring the durational language that limited the wage increase “for the duration of this Agreement,” and transformed a “time-bound obligation into a perpetual one.” *Id.* at 926 (Member Johnson, dissenting). In his view, the durational language should have been taken into consideration when defining the post-contract status quo, and the durational language made it clear that wage increases were not part of the status quo. *Id.* Member Johnson went on to explain the many negative ramifications of failing to give plain meaning to the durational language, including an observation that such an approach could “disadvantage unions and employees . . . by holding them captive to any negative changes to terms and conditions of employment, regardless of how the contract language circumscribed the duration of the change.” *Id.* at 927-28.

On review, the Eight Circuit denied enforcement of the Board majority’s decision in *Finley Hospital*, applying reasoning similar to that in Member Johnson’s dissenting opinion. *Finley Hospital v. NLRB*, 827 F.3d 720 (8th Cir. 2016). The court observed the Board majority had “simply assumed that because the CBA authorized a one-time 3% raise, annual 3% raises automatically became part of the status quo that must be maintained during negotiations.” *Id.* at 724. The court rejected that assumption and concluded that because the status quo is defined by reference to the substantive terms of the expired contract, and because the durational language limited the pay raise obligation to the one-year term of the contract, a recurring 3% annual raise did not represent the status quo the employer was required to maintain during successor contract bargaining. *Id.* at 725. In other words, the court respected the intent of the parties by giving plain meaning to the durational language contained in the contract, and it rationally determined that the annual raise did not perpetually continue past the expiration of the contract because it was not intended as such.

The Board should adopt the reasoning from Member Johnson’s dissenting opinion and the Eight Circuit’s decision in *Finley Hospital* so that it respects the intent of the parties, gives effect to the plain meaning of durational language, and does not transform time-bound contractual obligations into perpetual ones. Applying that approach here, Section 10.2’s minimum-shift guarantee should not survive expiration of the contract as the proper status quo. The provision plainly states that the minimum-shift guarantee was limited to “the balance of the Agreement, ending March 31, 2017.” That language shows that the parties did not intend to make the shift guarantee a promise of perpetual full-time employment that would extend beyond the final day of the contract. If the Board were to assume the minimum-shift guarantee was part of the status quo and only assess the durational language through the opaque prism of the clear and unmistakable waiver standard, the Board would be ignoring plain language and denigrating the will of the contracting parties.

As just discussed, and as made clear by the plain language of the expired collective-bargaining agreement, Section 10.2’s minimum-shift guarantee should not continue in effect past expiration of the agreement because that was not the parties’ intent. Accordingly, inasmuch as the post-contract status quo did not include Section 10.2’s minimum shift guarantee, the laid-off paperhandlers were not guaranteed a minimum number of shifts once the contract expired.

#### **E. The Information Request**

An employer's duty to provide information to a union is premised on the union's status as the exclusive representative of the employer's employees and the union's resulting duty to perform as a bargaining agent. Thus, information must be furnished to the union for purposes of representing employees in negotiations and also for policing the administration of an agreement. Indeed, Section 8(d) defines “the obligation to bargain collectively as including the mutual

obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to ... any question arising [under an agreement] ...” 29 U.S.C. §§ 158(d). It is along these lines that it has been well-established that an employer's duty to bargain collectively and in good faith encompasses the duty to furnish, on request, information relevant to and necessary for its employees' exclusive representative to perform its representational functions. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-153 (1956). This includes information from the employer that is needed for the proper performance of the union's duty to police compliance with a collective-bargaining agreement. *Id.* A union's obligation to police the agreement does not necessarily terminate at the expiration of the agreement. *Audio Engineering, Inc.*, 302 NLRB 942 (1991) (finding that a legitimate purpose for an information request is a union's need to police compliance with an expired contract).

Parties to a collective-bargaining relationship are entitled to information that is relevant and reasonably necessary for negotiating or administering and policing a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432; *Curtiss-Wright Corporation v. NLRB*, 347 F.2d 61 (3d Cir.1965), *enfg.* 145 NLRB 152 (1963). The standard for relevance is a “liberal discovery-type standard,” and generally, information that aids the grievance-arbitration process is considered relevant.” *Pfizer, Inc.*, 268 NLRB 916, 919 (1984), *enfd.* 736 F.2d 887 (7th Cir.1985); *Fawcett Printing Corp.*, 201 NLRB 964, 972 (1972). Information requests regarding bargaining unit employees' terms and conditions of employment are “presumptively relevant” and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 649 (2010), *enfd.* 638 F.3d 883 (8th Cir. 2011). There is no burden

on the part of the Union to prove the relevance of or explain the need for this type of presumptively relevant information.

By contrast, where the requested information is not directly related to the bargaining unit, the information is not presumptively relevant, and the requesting party has the burden of establishing the relevance of the requested material. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Earthgrains Co.*, 349 NLRB 389 (2007). Even in those situations where a showing of relevance is required, whether because the presumption has been rebutted or because the information requested concerns non-unit matters, the standard for establishing relevancy is the liberal, “discovery-type standard.” *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). “However, once this logical, or theoretical, relevance has been shown, [actual relevance need not be proven], but [the party seeking the information] may simply demonstrate a probability that the data is useful for the purpose of bargaining intelligently.” *E.I. Dupont de Nemours*, 264 NLRB 48, 51 (1982), *enfd.* 744 F.2d 536 (6th Cir.1984); citing *NLRB v. Acme Industrial Co.*, 385 US 432.

In the instant case, the Union made clear from the initial request that the information was relevant to its ability to police Section 10.2 of the expired collective bargaining agreement, and investigate whether the layoffs were “economically necessary” or were needed because “no reasonable alternative exist[ed].” (Exh. 15). Respondent asked for an additional statement as to how the information was relevant to effects bargaining, and the Union clarified that this information was to be used to police compliance with the expired contract and pointed to the specific clause in question. (Exh. 16 and Exh. 17). Yet, to date, Respondent still has refused and failed to furnish the Union with items 1, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 17 of its September 27, 2018 letter, which specifically entails:

- Respondent’s 2017 and 2018 budget for the Clinton Pressroom;
- Amounts paid per customer contract;
- Overtime or other payments made to supervisory employees for the purposes of operating the Clinton Pressroom;
- Contract proposals with prospective customers for products produced by the presses;
- Total compensation paid to supervisory personnel;
- Any reports from consultants, supervisors certified public accountants or others concerning the value of the company or any possible restructuring;
- Copies of all correspondence which concern the possibility of restructuring, sale and/or takeover of Respondent, including Minutes of the Board of Directors for the years 2017 and 2018 when the financial status of the Post-Gazette was discussed;
- Complete list of customers that utilize services and products provided by the Clinton pressroom;
- A list of all companies or organizations which Respondent considers to be its competitors;
- A list of all your prices for the goods and services which are attributable to the use of the Clinton pressroom;
- A list of all customers which you lost during the last five years; and
- A copy of all price lists for printing service Respondent has offered to others for the past two years in order to be more competitive and economical in its operations.

(Facts ¶37; Exh. 15).

All of these outstanding requested items go to the Union’s ability to determine whether the layoffs were an exception to the minimum shift guarantee under Section 10.2, which permits layoffs only if it is “economically necessary and no reasonable alternative exists.” (Exh. 2). Indeed, as clarified by the Union in its November 8, 2018 letter to Respondent, these items would help the Union determine what Respondent’s budget was for the year of the layoffs and what was actually spent, how much money was coming in, how much Respondent spent on payroll and overtime, whether work still exists for the two laid off individuals, how much Respondent charged its customers, whether the value of the company deteriorated in such a manner that the layoffs were indeed economically necessary, and other information to determine whether it was actually economically feasible for Respondent to maintain the status quo. (Exh.

17). The information is presumptively relevant, and Respondent was obligated to furnish this information to the union in order for the union to police the expired agreement. *Audio Engineering, Inc.*, 302 NLRB at 944.

Respondent seemed to argue in a letter to the Union that the contract expired along with the obligation to furnish information related to Section 10.2. (Exh. 18). However, this argument must fail. Regardless of whether the contract expired, the necessity for Respondent to layoff bargaining unit members clearly relates to terms and conditions of employment and is presumptively relevant information. Moreover, as discussed above, Respondent was still obligated to maintain the terms of Section 10.2 of the expired contract and therefore any information relevant to the Union policing this term is presumptively relevant. Indeed, the Board has held a union has the right to continue its contract compliance function even after the expiration of an agreement. *Audio Engineering, Inc.*, 302 NLRB at 944. For these reasons, Respondent's failure to provide the requested information to the Union, pursuant to the Union's legitimate interest in policing Respondent's compliance with the agreement, violated Section 8(a)(5) of the Act.

## V. CONCLUSION

The foregoing establishes that Respondent violated Sections 8(a)(5) of the Act when it failed and refused to provide relevant information requested on October 3, 2018, and when it unilaterally eliminated the minimum shift guarantee and laid off unit employees covered by a minimum shift guarantee provision in the parties' collective-bargaining agreement during successor contract negotiations without bargaining to overall impasse. General Counsel respectfully requests that the ALJ issue the following appropriate Order.

## **VI. PROPOSED REMEDY AND ORDER**

Respondent, its officers, agents, successors and assigns, shall:

- 1) Cease and desist from:
  - a. Failing or refusing to bargain in good faith with the Union.
  - b. Unilaterally changing the wages, hours and other terms and conditions of employment of our employees in the Unit without first notifying and bargaining with the Union about those changes when we are engaged in negotiations for a collective-bargaining agreement and have not reached an overall impasse.
  - c. To the extent that such decisions are mandatory subjects of bargaining, unilaterally changing the minimum shift guarantee or laying off employees in the Unit without first notifying and, upon request, bargaining with the Union over those decisions and the effects of those decisions.
  - d. Unreasonably delaying or refusing to provide the Union with information that is relevant and necessary to its role as your bargaining representative.
- 2) Take the following affirmative actions:
  - a. Upon request, bargain in good faith with the Union concerning terms and conditions of employment of our employees in the Unit and, if an understanding is reached, embody the understanding in a signed agreement.
  - b. Upon request, bargain with the Union over the decisions to reduce the number of guaranteed minimum shifts and to lay off bargaining unit employees
  - c. Before implementing any changes to your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively with the Union as your exclusive collective bargaining representative.

- d. Restore the minimum number of guaranteed shifts.
- e. Offer immediate reinstatement to David Jenkins and David Murrio to positions as paperhandlers at our Clinton, Pennsylvania facility, or to substantially equivalent positions.
- f. Make whole David Jenkins and David Murrio for all losses they suffered because of our layoff of them, including wages, benefits, seniority and all other rights or privileges.
- g. Provide the Union with the information it requested on September 27, 2018.

**Dated at Pittsburgh, Pennsylvania  
July 23, 2020**

Respectfully submitted,

/s/ Julie Polakoski-Rennie

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S POST-  
HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE DAVID GOLDMAN**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 23, 2020 I served the above-entitled document(s) by **electronic mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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July 23, 2020  
Date

/s/ Julie M. Polakoski-Rennie  
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