

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

**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.**

*Julie Polakoski-Rennie, Esq. (NLRB Region 6)*  
of Pittsburgh, Pennsylvania, for the General Counsel

*Michael D. Oesterle, Esq. and Richard C. Lowe, Esq. (King & Ballow)*  
of Nashville, Tennessee, for the Respondent

*Joseph J. Pass, Esq. (Jubelirer, Pass & Intrieri P.C.)*  
of Pittsburgh, Pennsylvania, for the Charging Party

**DECISION**

**INTRODUCTION**

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. In this case, the government challenges a newspaper employer's layoff of two employees after bargaining between the employer and the employees' union over the proposed layoffs failed to result in an agreement. The government alleges that because the layoffs occurred in the middle of the parties' negotiations for a new labor agreement the employer's obligation under the National Labor Relations Act (Act) was not only to give the union notice and an opportunity to bargain over the layoffs—which it did—but also to bargain to an overall impasse in negotiations for a new labor agreement before implementing the layoffs.

The government does not dispute the employer's contention that the layoffs were an effect of the employer's nonbargainable decision to move toward a digital format for the newspaper and away from a printed newspaper format. While no party cites a definitive case as precedent, I conclude, for reasons discussed herein, that the Board's approach to effects bargaining is most faithfully rendered by finding that effects bargaining over layoffs resulting from a nonbargainable management decision is not subject to the overall-impasse rule applicable to negotiations for a new labor agreement. I therefore recommend dismissal of the unlawful layoff allegation.

The government also challenges the failure of the employer to provide portions of the union's request for information directed to the employer. As discussed herein, I reject and dismiss the government's contention that the employer violated the Act by failing to furnish the disputed portions of the information request.

## STATEMENT OF THE CASE

On January 7, 2019, the Graphic Communications International Union GCC/International Brotherhood of Teamsters Local 24M/9N (Union) filed an unfair labor practice charge alleging violations of the Act by the Pittsburgh Post-Gazette, docketed by Region 6 of the National Labor Relations Board (Board) as Case 06-CA-233676. A first amended charge was filed by the Union on February 14, 2019.

Based on an investigation into this charge, on March 16, 2020, the Board's General Counsel, by the Regional Director for Region 6 of the Board, issued a complaint and notice of hearing for June 9, 2020, in this case. The complaint and notice of hearing were served by certified mail on the Respondent and the Respondent acknowledges receipt. On March 26, 2020, the PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette (PG or Respondent) filed an answer denying all alleged violations of the Act.

On June 8, 2020, the parties filed a joint motion submitting stipulated facts for approval, joint exhibits for admission, and seeking to waive the hearing and have this case decided based upon the motion, stipulated facts, and exhibits. That motion was granted June 8, 2020.

Counsel for the General Counsel and the Respondent filed briefs in support of their positions on or before July 23, 2020.

On the entire record, I make the following findings, conclusions of law, and recommendations.

### JURISDICTION

At all material times, the PG has been a Pennsylvania corporation with an office and place of business in Clinton, Pennsylvania, and has been engaged in publishing the Pittsburgh Post-Gazette, a daily newspaper. Annually, in conducting its operations, the PG derives gross revenues in excess of \$200,000 and publishes various nationally syndicated features, advertises nationally sold products, and holds membership in, and subscribes to, various interstate news services, including the Associated Press. Annually, the PG purchased and received at its Clinton, Pennsylvania facility products, goods, and materials valued in excess of \$5,000 directly from points outside the Commonwealth of Pennsylvania. At all material times, the PG has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

### UNFAIR LABOR PRACTICES

#### Findings of Fact

#### Background

The PG publishes the Pittsburgh Post-Gazette newspaper. For many years, the PG has recognized the Union as the exclusive collective-bargaining representative of a bargaining unit composed of the following employees:

All journeymen pressmen, paperhandlers, paperhandling pressmen, and apprentice pressmen who work in Company’s pressroom and paperhandling departments.

5 This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from November 16, 2014, until March 31, 2017.

10 This collective-bargaining agreement, which I refer to as the 2014 Agreement, included an article 10, section 10.2, that provided, in pertinent part:

15 **Section 10.2** Effective the first payroll 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:

20 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 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. . . .

30 Appendix 1 to the 2014 Agreement sets forth by name a list of 24 employees “Guaranteed 5-Shift Mark-Up in Section 10.2.”

**Bargaining for a successor collective-bargaining agreement**

35 By letter dated October 11, 2016, Union President Christopher V. Lang III wrote to PG Senior Human Resources Manager Linda Guest providing notice of the Union’s desire to “open negotiations” between the Union and PG for a successor agreement to the 2014 Agreement, set to expire March 31, 2017.

40 By letter dated January 13, 2017, PG VP and General Manager Lisa Hurm wrote to Union President Lang stating that:

45 We have completed our assessment of our current pressroom operations in anticipation of the upcoming negotiations. The current collective bargaining agreement (Agreement) expires on March 31, 2017. At that time, all contractual obligations of the current Agreement shall expire.

50 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. With respect to arbitration, the Company will decide its obligation to arbitrate grievances on a case-by-case basis.

Hurm's letter went on to discuss the PG's position on negotiating ground rules and informed Lang that the PG would be represented in negotiations by Attorney Richard C. Lowe of the law firm King & Ballow.

5 Since about March 21, 2017, the PG and the Union have been engaged in negotiations for a successor collective-bargaining agreement to replace the 2014 Agreement. To date, the parties have not reached a successor collective-bargaining agreement, nor negotiated an extension agreement. Instead, the employees have continued working without a contract while the PG and the Union continue to negotiate for a successor agreement.

10 **The PG's June 26, 2018 announcement of the decision to eliminate two days of print operations beginning August 25, 2018, as part of a transition to becoming a digital news organization**

15 By letter dated June 26, 2018, from the PG's Guest to Union President Lang, the PG announced that "[w]e have decided that becoming a digital news organization is our future." The letter described the growth of digital and social media platforms for the PG and stated the paper was going to "begin to reduce our print operations," including the elimination of two days of print operations beginning August 25, 2018. The PG offered to meet to "discuss the effects our decision will have on your bargaining unit." The letter stated:

25 Delivering the news through digital platforms will fundamentally alter the scope and nature of our business. For starters, we will begin to reduce our print operations which have been the mainstay of our newspaper since it was founded.

30 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.

35 The parties met for scheduled collective-bargaining negotiations on July 25, 2018. Jt. Exh. 9 at 2; Jt. Exh. 16 at 1. Once there, the subject of the PG's June 26 announcement of the plan to reduce print operations came up. According to Union President Lang, the Union asked about the changes announced in the PG's June 26 letter. According to PG Attorney Lowe (Jt. Exh. 10 at 1), the PG had not heard back from the Union about its request in its June 26 letter for effects bargaining, and at the July 25 meeting "I asked the Union if it desired to engage in effects bargaining over the Company's decision to become a digital platform." See also, Jt. Exh. 16 at 1. Both parties agree that at this July 25 meeting they agreed to and did engage in effects bargaining over the PG's decision to "transition to a digital newspaper." Attorney Lowe stated in his letter that the GCC/IBT International Rep. Mike Huggins agreed that he was willing to discuss the effects of the Company's decision. Attorney Lowe wrote (Jt. Exh. 16 at 1) that,

45 In the effects bargaining that followed, the parties discussed the planned layoff of the two paperhandlers. Rob explained that the reduction of print days of the Company's product eliminated the need for paperhandling functions on a full-time basis. Rob pointed out that the pressmen perform paperhandling functions as part of their duties. At the end of the effects bargaining meeting on July 25, the Union made a severance proposal for laid off employees. The Company told the Union it would consider its proposal.

On August 3, 2018, Attorney Lowe wrote to Union President Lang and summarized the parties' July 25, 2018 discussion of "the effects of the Company's decision to become a digital platform" as follows:

- 5           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.
- 10          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.
- 15          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.
- 20          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 25           25           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.
- 30          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.
- 35          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.

Lowe concluded his letter by stating,

40           Please let me know if you wish to further discuss the effects of the Company's decision. Please call me or we can set up a meeting.

On August 8, 2018, Human Resources Manager Guest emailed Union President Lang, stating:

45           The Company has considered your July 25, 2018 severance proposal. We would propose that the three (3) laid off individuals each receive one week's pay per year of service, with a cap of four (4) weeks pay. Any severance pay is conditioned upon the employee executing a Full and Complete Release Agreement provided by the Company.

50           Please let me know if you wish to further discuss the effects of the Company's decision. Please call me or we can set up a meeting.

Guest followed up with an August 16, 2018 email to Lang, with the subject line "Pressmen—next steps," stating, in relevant part:

5 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.

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

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

On August 17, 2018, Lang sent Guest and Attorney Lowe an email with an attached letter (dated August 16) to Lowe, that, according to Lang, constituted the Union's "response to your assumption that there needs to be 3 layoffs in the press department."

20 The attached letter stated that it was "in regards to your [Lowe's] letter dated August 3, 2018," and that Lang "would like to clarify some of the misstatements in that letter." The letter began by setting forth the Union's account of the July 25 meeting, which asserted that at the meeting the Union had not accepted the need for reductions in the workforce. Lang wrote that, at the July 25 meeting, one union representative, Rich Bogaski, had "suggested that with one of the  
25 pressman being on disability it would be premature to reduce the workforce." Union Representative Tom Guckert "also commented that the Union needed to fall back to assess the effects of the new schedule." Lang wrote that "[t]he need for paperhand[le]rs as well as all pressman was discussed and both parties left with no true vision of the reduction." Lang asserted that at the meeting "[t]here was no agreement as to how to reduce the workforce if needed."  
30 Lang wrote that "[a]t that 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." When the parties "reconvened . . . the Union proposed 1 weeks' pay for every year of service in addition to healthcare coverage." Lang continued:

35 This is the 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.

40 Lang's letter then set forth "a counter to the company's proposal":

PROPOSAL BETWEEN PITTSBURGH POST-GAZETTE AND LOCAL24M/9N,  
THE GRAPHIC COMMUNICATIONS CONFERENCE, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

45 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;

50 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;

- 5 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;
- 10 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:
  - 15 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
  - 20 b. Continuance of health care benefits for a period of 6 months
  - 25 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.
- 30 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.

35 Lang's letter concluded by asking Lowe to "Please let me know when you will be available to discuss this issue further."

40 Lowe responded by letter dated August 20. In this letter Lowe provided his account of the July 25 meeting, including his recollection that the union's representative had stated that "he was willing to discuss the effects of the Company's decision [to move toward a digital platform]," and that the parties then engaged in effects bargaining at the July 25 meeting. Lowe's letter distinguished the effects bargaining discussions of July 25 from the overall contract negotiations, and asserted that the PG had offered to continue with contract negotiations on July 25, after the effects bargaining was done for that day. However, according to Lowe's letter, Union suggested it "would be better to start fresh with" contract negotiations at their next meeting, which was then scheduled. Lowe's August 20 letter concluded by stating that "[t]he Company welcomes your August 16 counterproposal. We will agree to meet for effects bargaining." The letter then suggested dates for further effects bargaining.

50 On or about August 25, the PG reduced print days for its newspaper by two days a week. However, the paperhandlers were not laid off at this time.

On or about September 13, and again on September 19, the Union and the PG met and bargained over the effects of the PG's decision to become a digital news organization and eliminate two days of its print operation. The parties exchanged proposals at these meetings. The PG stated that it was planning to lay off two paperhandlers and proposed that laid-off employees would receive severance pay of one week per year of service with a cap of six weeks severance pay (with service credit for a full year in 2018), three months of healthcare, and placement on a recall list. The Union proposed one week of severance pay per year of service with a cap of 26 weeks of severance pay, six months of paid health insurance benefits, and recall rights for three years. The PG rejected the Union's proposal. The PG restated its proposal of up to six weeks severance pay, three months of paid health insurance benefits, and placement of laid-off paperhandlers on a recall list. The PG indicated that it intended to lay off two paperhandlers after their shift on October 6. The PG reiterated its offer in a September 20 letter to the Union, in which it described the offer as its "best and final offer."<sup>1</sup>

On September 27, Union President Lang wrote to the PG's Guest, referencing section 10.2 of the 2014 Agreement. Lang wrote:

You have indicated that the company intends to layoff two bargaining unit employees effective October 6, 2018. Certainly you recognize that the two employees you intend to layoff are guaranteed a five-shift markup during the life of the collective-bargaining agreement. (Section 10.2) An exception may be possible if the layoffs "are economically necessary and no reasonable alternative exists."

(Original emphasis.)

In the letter, the Union then requested various information from the PG "[i]n order to effectively determine whether the exception in Section 10.2 exists . . . ."<sup>2</sup>

In response to the information request, PG Attorney Lowe sent Union President Lang a letter dated October 12, in which he provided responses to the various information requests, as discussed below. The October 12 letter also contained a summary account of the effects bargaining that had occurred and the letter closed with a paragraph disputing the Union's claim of the applicability of section 10.2 to the layoff issues. Lowe wrote:

Finally, you state the two paperhandlers were guaranteed five shifts of work during the life of the Agreement. As you are aware, the Agreement has long expired. Section 10.2 of the expired Agreement specifically states, in pertinent part, ". . . all employees listed by name at the time of the signing of this

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<sup>1</sup>The September 19 effects bargaining session ended under disputed circumstances. According to the PG, the plan had been "to devote the morning to effects bargaining and then use the afternoon to get back to contract negotiations." Jt. Exh. 13 at 1; see also Jt. Exh. 16 at 2. In subsequent correspondence, the PG accused the Union of leaving the meeting site during a caucus, and thereby terminating the meeting. See, September 20 correspondence from PG Attorney Lowe to Union Representative Huggins (Jt. Exh. 13 at 2), October 12, 2018 correspondence from PG Attorney Lowe to Union Attorney Pass (Exh. 16 at 2), and November 27, 2018 correspondence from PG Attorney Lowe to Union Attorney Pass (Exh. 18 at 1). The Union maintained the opposite had happened. See, November 8, 2018 correspondence from Attorney Pass to Attorney Lowe (Jt. Exh.17 at 1).

<sup>2</sup>The specifics of the information request are discussed below.

Agreement shall be guaranteed a five (5) shift markup each payroll week for the balance of the Agreement, ending March 31, 2017." The five (5) shift markup guarantee has expired.

5 In response to the PG's letter, Union Attorney Pass wrote back to Attorney Lowe by letter dated November 8, 2018. In it, Pass took issue with the PG's characterization of the import of the contractual expiration of the 2014 Agreement, specifically as to section 10.2. Pass wrote in reference to the obligation stated in section 10.2:

10 That obligation under the status quo requirements of the law continues after the contract expires regardless of the ending date of the contract. . . .

\* \* \* \* \*

15 Section 10.2 is a part of the collective bargaining agreement. What's contained therein are mandatory obligations that must continue after the contract expires, unless the employer can show that the parties have agreed and waived the employer's statutory duty to maintain the status quo. Clearly the Union has not waived any statutory right and will not waive any statutory right.

20 The effects bargaining described above did not result in an agreement between the Union and the PG. Nor was an agreement reached for a new collective-bargaining agreement. Two paperhandlers from the five-shift guarantee list (Appendix 1 to the 2014 Agreement), David Jenkins and David Murrio, were laid off, with their last day work being October 6. They were offered the severance package proposed by the PG, as described above. The parties stipulate  
 25 that these layoffs were carried out without the PG first bargaining with the Union to an overall impasse for a successor collective-bargaining agreement.

In correspondence with the Union, the PG took the position that "[t]he layoff of the two  
 30 paperhandlers was the result of bargaining over the effects of the Company's decision to begin the transition to a digital newspaper by eliminating two (2) days of its print operations." (Jt. Exh. 18; November 27, 2018.) According to the PG (Id.),

35 In effects bargaining, the Company explained that the reduction of print days by the Company eliminated the need for paperhandling functions on a full-time basis. Pressmen could perform paperhandling functions as part of their normal duties as they have in the past. The layoff of the two paperhandlers was not based on labor costs or budget considerations. The operational requirements in the pressroom resulting from the reduction in print days did not require the services of two full-time paperhandlers. It was not efficient to retain them with the  
 40 remaining amount of work. The Company bargained over the effects of that decision.

**The Union's request for information**

45 As reference above, by letter dated September 27, 2018 (Jt. Exh. 15), the Union submitted a wide-ranging information request to the PG comprised of 17 numbered paragraphs. The PG responded by letter dated October 12, 2018 (Jt. Exh. 16). The Union replied to the PG's response on the requests in a November 8, 2018 letter (Jt. Exh. 17) from Attorney Pass to Attorney Lowe. The Union's numbered requests (from the September 27 letter), the PG's  
 50 responses (from the October 12 letter), and the Union's (November 8) response to the PG's responses are set forth here:

**Union Request 1**

1. Please provide the budget the Post-Gazette adopted for the years 2017 and 2018 to cover the entire expenses and costs for the operation of the Clinton pressroom. Please provide all information that was gathered and/or used in order to obtain the amount budgeted. Please provide the amount expended to date to maintain the Clinton pressroom for 2017 through today's date. In doing so, please indicate the expenditure for each item by identifying the item and the amount spent on each item.

**PG Response 1**

Response 1—Please explain the relevance for your requested budget information. The decision to lay off the two paperhandlers was based on the elimination of the need for full-time paperhandling functions as a result of the reduction of two print days. 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.

**Union Response to PG Response 1**

Response 1—It is important that we see the budget of how much was going to be spent in order to determine whether the action of laying off two people was "economically necessary and no reasonable alternative exists." There is no way we can make that determination until we see how much was actually budgeted and what is actually spent. For example, if the PG budgeted \$2 million dollars for the press room and only spent \$1 million, then laying off the two pressman is not economically necessary.

**Union Request 2**

2. Please provide any and all contracts the Post-Gazette has with any customers for the purpose of printing products for the years 2017 and 2018. Please identify each product and the amount paid by that customer each month during 2017 and 2018.

**PG Response 2**

Response 2—Please find attached the contracts you are requesting. Please provide the relevance of your request for the amount paid by that customer each month during 2017 and 2018 to our effects bargaining. The elimination of full-time paperhandling functions were the result of the reduction of print days. Payments received from commercial clients had no impact on the decision to eliminate full-time paperhandling functions due to the reduction of two print days.

**Union Response to PG Response 2**

Response 2—You allege the layoffs were a result of reduction of print days. Obviously that is not a reason allowed under 10.2(a). Therefore, it is necessary to find out what the customers paid each month during 2017 and 2018 to determine whether there was sufficient money coming in in 2017, to maintain the two

individuals yet laid off in 2018. Again, if for example, the same amount of money was received from customers in 2017 as 2018, then obviously the layoffs are not "economically necessary and a reasonable alternative does exist."

5 **Union Request 3**

3. Please provide the number of pressman currently off as a result of injury or illness and the length of time that individual has been off work. As for these employees, please state the amount the PG saved as a result of their being off work.

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**PG Response 3**

Response 3—Don McCleary recently returned to work on October 9, 2018. He had been off work since January 8, 2017. The Company does not compile information regarding "the amount the PG saved as a result of their being off work."

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**Union Response to PG Response 3**

Response 3—Please provide the amount Mr. McCleary would have earned including any costs for his benefit for the period he was off work until he returned. It is relevant that we know the amount the PG saved as a result of Mr. McCleary's absence and when we get the other information requested we can compare the cost of doing business in 2017 to 2018 and determine whether the layoffs were "economically necessary and no reasonable alternative existed."

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**Union Request 4**

4. Please provide the number of overtime hours worked to maintain and operate the Clinton pressroom for each month during 2017 and 2018. Also include any extra costs including overtime or other payments made to supervisory employees for the purposes of maintaining and operating the Clinton pressroom.

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**PG Response 4**

Response 4—Please find attached the information you requested. Please provide the relevance for overtime or other payments made to supervisory employees to our effects bargaining.

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**Union Response to PG Response 4**

Response 4—The relevance of requesting the overtime of supervisory personnel is simply because what is being spent on supervisors overtime may significantly impact whether layoffs of two individuals who are guaranteed work is "economically necessary and no reasonable alternative existed." Clearly if the overtime being paid to supervisors is so significant that it would have justified keeping the individuals in place by reducing the amount of overtime being paid or in the alternative reducing supervisors pay then the layoff may not be "economically necessary" to lay off these individuals, as a "reasonable alternative" may exist. Finally the information provided shows at least 3,595 of overtime hours for 7 months. That is proof positive that work is available for the two individuals laid off!

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**Union Request 5**

- 5 5. Please provide any proposed contract with potential customers for products produced by the presses that have not yet been acted upon but has been submitted to a customer for consideration.

**PG Response 5**

10 Response 5—Please provide the relevance of any contract proposal submitted to any potential commercial clients to our effects bargaining.

**Union Response to PG Response 5**

15 Response 5—I would refer you to the reasons set forth in Response Nos. 1 and 2 above.

**Union Request 6**

- 20 6. Please provide the amount of expenses attributable and spent on each pressman for the years 2017 and 2018, as well as the total compensation provided to any supervisory personnel who is directly responsible for the operation of the Clinton pressroom.

**PG Response 6**

25 Response 6—Please find attached the information you requested on the amount of expenses attributable to each pressman for 2017 and 2018. Please explain the relevance for total compensation paid to supervisory personnel to our effects bargaining.

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**Union Response to PG Response 6**

35 Response 6—You again ask why supervisor personnel compensation is relevant and we would once again refer you to Response No. 4. It may also demonstrate that it is not "economically necessary" to lay off the individuals as your response to number 6 clearly indicates. For example, from the information submitted for the entire year of 2017, the total payroll for pressman was \$1,522,225.00. Through the end of September, the payroll cost was \$1,146,164.00. On average that equated to \$47,756.00 per person per month. When you extrapolate that out for the remainder of 2018, it is patently obvious that the total expenses for pressman would be \$1,289,432.00 which is \$233,061.00 less than was spent in 2017. That in and of itself demonstrates clearly and unequivocally that these layoffs are not "economically necessary."<sup>3</sup>

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<sup>3</sup>Specifically, as to this Request 6, the PG further responded in Attorney Lowe's November 27, 2017 letter to Attorney Pass (Jt. Exh. 18). In that letter, Lowe stated that the attachment to the PG's previous response (i.e., the October 12 letter):

shows Mr. McCleary's compensation and benefit costs for 2017 and 2018. Your request to provide the amount Mr. McCleary would have earned calls for speculation. The Company would not know how much Mr. McCleary would have worked had he not been off on workers compensation.

**Union Request 7**

- 5 7. Please provide all invoices and payments for any products including, but not limited to paper and other items needed in order to maintain and produce any and all of the products that were created by the printing press located at Clinton for the years 2017 and 2018. In providing this information please detail each expenditure, what it was for and to whom it was paid.

**10 PG Response 7**

15 Response 7—Please provide the relevance for this cost information to our effects bargaining. Again, the decision to lay off the two paperhandlers was not based on labor costs. It was based on the elimination of the need for full-time paperhandling functions as a result of the reduction of two print days.

**Union Response to PG Response 7**

20 Response 7—Your response establishes the layoffs are not as a result of labor cost. You again reference print days. Those reasons are not consist[ent] with Section 10.2. The information requested in number 7 has nothing to do with either. Rather, it has to deal with your obligations under the contract to demonstrate that the layoffs are "economically necessary and no reasonable alternative existed." We want to know if the costs were the same or nearly the same then why were the two employees able to work in 2017 but not in 2018? Please provide the information requested.

**Union Request 8**

- 30 8. Please provide copies of any reports from consultants, supervisors certified public accountants or others concerning the value of the company or any possible restructuring.

**35 PG Response 8**

40 Response 8—This request does not appear to be relevant to our effects bargaining. It appears to be concerned with the Post-Gazette's decision to become a digital news operation. Please explain the relevance of this request to our effects bargaining.

**Union Response to PG Response 8**

45 Response 8—Again you mischaracterize it as "effects bargaining." The reason the information requested is necessary is to determine whether the value of the company has deteriorated in such a manner that it is "economically necessary and no reasonable alternative exists" to laying off two people.

**Union Request 9**

- 50 9. Please provide copies of all correspondence which concern the possibility of restructuring, sale and/or takeover of the company. Please provide copies of any Minutes of the Board of Directors for the years 2017 and 2018 when the financial

status of the PG was discussed. Please provide a copy of all Minutes of all shareholder meetings for 2017 and 2018, including any tape recordings or transcriptions of those meetings when the financial status of the PG was discussed.

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### **PG Response 9**

Response 9—This request does not appear to be relevant to our effects bargaining. It appears to be concerned with the Post-Gazette's decision to become a digital news operation. Please explain the relevance of this request to our effects bargaining.

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### **Union Response to PG Response 9**

Response 9—For the same reasons set forth in Response 8, this information is relevant.

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### **Union Request 10**

10. Please provide a complete list of your customers that utilize services and products provided by the Clinton pressroom so we may check to determine if your prices might be too high.

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### **PG Response 10**

Response 10—Please provide the relevance of your request for cost information relating to our customers to our effects bargaining. The prices charged to our commercial customers have no bearing on the Company's decision to become a digital news operation and the reduction of print days. That decision was not based on labor costs.

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### **Union Response to PG Response 10**

Response 10—As a result of your previous answers we understand your position that prices charged to commercial customers has no bearing on the company's decision. However, it does have relevance with regard to the company's ability to maintain these two individuals because they can only be laid off only if it is "economically necessary and no reasonable alternative exists."

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### **Union Request 11**

11. Please provide a list of all companies or organizations which you consider to be your competitors. We intend to check with them to compare their prices to see whether or not there can be adjustments in prices in order to avoid the issue of economy.

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### **PG Response 11**

Response 11—Please provide the relevance of this request to our effects bargaining. The reduction of two paperhandlers was not related in any way to our competitors or their pricing practices. The reduction of paperhandlers was based on the Company's decision to become a digital news organization and phasing out

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print days. Notwithstanding the above, anyone providing digital content to our readers from anywhere in the world could be a potential competitor.

**Union Response to PG Response 11**

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Response 11—The reason this information is necessary is as we stated in our request. We intend to check with your competitors to determine if there can be any adjustments in order to avoid the issue of making it "economically necessary" to layoff two paper handlers.

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**Union Request 12**

12. Please provide a list of all your prices for the goods and services which are attributable to the use of the Clinton pressroom.

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**PG Response 12**

Response 12—Please provide the relevance of this request to our effects bargaining. The decision to layoff the two paperhandlers is not related to the price of goods and services attributed to the use of the Clinton pressroom.

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**Union Response to PG Response 12**

Response 12—Again, see our response to number 11. We may be able to find places where prices, goods and services are much less and as a result avoid any "economically unnecessary expenses".

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**Union Request 13**

13. Please provide a list of all customers which you lost during the last five years. If that loss was due to competitiveness or service, or some other factor, it is important for us to know in order to determine whether the layoffs are appropriate under our CBA.

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**PG Response 13**

Response 13—Please provide the relevance of your request to our effects bargaining. The layoffs are not related to the loss of customers in the last five years.

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**No Union Response to PG Response 13**

**Union Request 14**

14. Please provide a list of the customers you believe you may lose in the next year.

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**PG Response 14**

Response 14—This request calls for speculation by the Company. We have no obligation to provide any such speculative information.

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**Union Response to PG Response**

5 Response 14—Certainly if the company has a business plan they must have an idea as to what their customer base will look like or more importantly what it looks like today in seeking to justify the layoffs of two paper handlers. This will aid us in determining if the layoffs were "economically necessary."

**Union Request 15**

10 15. Since the introduction of the new pressroom at the Clinton facility, please provide a list of all equipment that was purchased subsequent to the initial operation and installation of the new presses at the Clinton facility. We are particularly interested in any new equipment that was purchased to improve the efficiency of the pressroom.

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**PG Response 15**

Response 15—The Company purchased the following:

- 20 a. Harland Simon Press Console P6000  
b. Techno Trans Fountain Solution Mixing System

**No Union Response to PG Response 15****Union Request 16**

25 16. Please provide a list of all actions which the company has taken in the past five years to be more competitive and/or to increase their circulation in order to keep the pressroom operating at capacity and profitability.

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**PG Response 16**

35 Response 16—Attached is a list of commercial customers the Company has obtained in the past five years. Please explain the relevance of your request to the bargaining over the effects of the Company's decision to become a digital news organization.

**Union Response to PG Response 16**

40 Request 16—Relevance of our request is obvious. In order to determine whether the layoffs of two pressman were "economically necessary and no alternative existed", we would like to see what action the company has taken in order to remediate any such reductions in personnel. It is important to have this information to make that evaluation. Obviously, if the employer has done little or nothing to increase circulation it has not exhausted any "reasonable alternative" to eliminate the need to reduce the individuals.

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**Union Request 17**

50 17. Please provide a copy of all price lists for printing service the PG has offered to others for the past two years in order to be more competitive and economical in its operations.

**PG Response 17**

Response 17—Please provide the relevance of your request to our effects bargaining.

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**Union Response to PG Response 17**

Response 17—Again, the relevance of the question is outlined in Response 16 and other responses previously made.

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In a November 27, 2018 letter from Attorney Lowe to Attorney Pass, the PG responded to the Union’s latest discussion of the information requests by telling the Union that “[i]f the Union has another ground for claiming relevance of the information you requested, the Company will consider your request.”

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The parties agree that since about September 27, 2018, the PG has not furnished the Union with the information requested in items 1, 5, 7—14, and 17, of the Union’s request.

**Analysis**

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**I. The unilateral change allegations**  
**a. The October 6, 2018 layoffs**

The General Counsel alleges (complaint ¶¶ 9(c), 10) that the PG’s October 6, 2018 layoff of paperhandlers Jenkins and Murrio violated Section 8(a)(5) and (1) of the Act.

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The General Counsel’s argument is rooted in the Supreme Court’s recognition in *NLRB v. Katz*, 369 U.S. 736, 743 (1962), that unilateral changes made during contract negotiations injure the very process of collective bargaining and “must of necessity obstruct bargaining, contrary to the congressional policy.” 369 U.S. at 747. “[I]t 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 Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). The detriment of unilateral changes to the collective-bargaining process is such that while negotiations for a new agreement are in progress, “an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), *enfd. mem.* 15 F.3d 1087 (9th Cir. 1994); *RBE Electronics of South Dakota, Inc.*, 320 NLRB 80, 81–82 (1995); *Wendt Corp.*, 369 NLRB No. 135, slip op. at 5–6 (2020).<sup>4</sup>

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<sup>4</sup>See, *Oberthur Technologies of America Corp.*, 368 NLRB No. 5, slip op. at 2–3 fn. 7 (2019) (“To say that *Katz* requires an employer to give the union notice and opportunity to bargain before changing a term or condition of employment is an accurate but incomplete statement of the law. Where the employer and union are engaged in negotiations for a collective-bargaining agreement, the employer’s ‘obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole,’ subject to certain exceptions”) (quoting *Bottom Line*, *supra*).

With regard to layoffs, it is long-settled that the decision to lay off unit employees is a mandatory subject of bargaining.<sup>5</sup> This includes layoffs that are the effect of a nonbargainable business decision.<sup>6</sup> Here, as in the cases cited in the foregoing footnote, “although the layoffs were induced by a decision about which no one contended the employer was obligated to bargain, there was still clearly room for bargaining over the layoffs themselves.” *Fast Food Merchandisers*, 291 NLRB at 900 (describing similar latitude for bargaining over layoffs in *Litton*, supra). Indeed, quite apart from the parties’ arguments about whether the section 10.2 guarantees continued as part of the statutory status quo after the contract expired, I have no trouble concluding that the October 6, 2018 layoffs constituted a unilateral change in terms and conditions of employment.<sup>7</sup>

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<sup>5</sup>*Bemis Co., Inc.*, 370 NLRB No. 7, slip op. at 32 (2020); *Tri-Tech Services*, 340 NLRB 894, 895 (2003) (“It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain”); *Ebenezer Rail Car Services*, 333 NLRB 167 (2001).

<sup>6</sup>*Bridon Cordage, Inc.*, 329 NLRB 258, 258–259 (1999) (layoffs caused by nonbargainable business decision to reduce inventory were bargainable effects); *Fast Food Merchandisers*, 291 NLRB 897, 900 (1988) (“for even if [the layoffs] are the result of the opening of the Florida facility and the transfer of work there, the Respondent is still obligated to bargain over the layoffs as effects of those decisions”); *Litton Business Systems*, 286 NLRB 817, 820 (1987) (reversing judge and finding that although decision to convert plant’s machinery was not a mandatory subject of bargaining, the decision to lay off employees as result of the conversion was an effect of that decision and subject to mandatory bargaining), enfd. in pertinent part 893 F.2d 1128, 1133 (9th Cir. 1990) (“In particular, layoffs have consistently been held to be a mandatory subject of bargaining, and unilateral layoffs by employers violate section 8(a)(5)”), reversed in part on other grounds 501 U.S. 190 (1991).

<sup>7</sup>Even granting, arguendo, the PG’s premise that the section 10.2 guarantee did not continue as part of the postexpiration status quo, this would not give the PG the right to impose layoffs without bargaining during collective-bargaining negotiations for a new agreement. To have such a right would require an “explicit agreement” to “extend contractual rights of unilateral action beyond the contract’s agreed-upon expiration date.” *KOIN-TV*, 369 NLRB No. 61, slip op. 3 & 4 fn. 9 (2020). Accord, *Skylawn Funeral Home*, 369 NLRB No. 145, slip op. at 2 (2020). The 2014 Agreement lacks any “explicit agreement” to extend a unilateral right to lay off employees under the 2014 Agreement beyond the contract’s expiration date. Certainly, section 10.2 does not grant such a right—indeed, it is not even an agreement to permit unilateral action, but rather, an agreement to restrict it. Contrary to the suggestion of the PG, an agreement by the parties to “end” the section 10.2 guarantees at contract expiration, even understood as an agreement to eliminate the guarantees as part of the postexpiration status quo, is not a specific expression of mutual intent to permit the PG unilateral discretion to engage in layoffs postexpiration. In any event, 18 months after contract expiration, after maintaining the same shifts and work for paperhandlers throughout that 18 months, the PG generally would not be free to announce and unilaterally implement layoffs based on shift reductions. *KOIN-TV*, supra, slip op. at 4 (the fact that employer maintained scheduling practice for five months after parties’ contract expired before changing to scheduling allegedly permitted by wording of expired contract contradicts claim that it made no unilateral change).

Obviously, as a general matter, layoffs proposed during contract negotiations are subject to the *Bottom Line* overall-impasse rule.<sup>8</sup>

The difficulty—the difficult issue—in this case, is that while the PG’s layoff proposals arose during contract negotiations, they arose as a result and effect of the PG’s decision to become a digital news organization and reduce print operations. The PG contends that the decision to move to a digital instead of print platform was a nonbargainable entrepreneurial decision under *First Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The General Counsel does not dispute this. Indeed, counsel for the General Counsel appears to agree (GC Br. at 20–21) and relies on the undisputed relationship between this “underlying decision” and the layoffs to argue that the PG had a mandatory duty to bargain over the layoffs as an effect of the underlying nonbargainable decision.

The General Counsel’s failure to dispute the nonbargainable nature of the decision to transform the paper into a digital news product settles that matter for our purposes. See, *Fast Food Merchandisers*, 291 NLRB 897, 901 (1988) (where General Counsel does not dispute that an “arguably entrepreneurial” management decision was a nonmandatory subject of bargaining, it is treated by the Board as a lawfully implemented nonbargainable decision). And I agree with the General Counsel that on this record it is clear that the layoff proposal was very much related to the PG’s decision to move to a digital platform and reduce its printed product. The point is not open to dispute on this record: due to its decision to move toward the digital format, the PG cut print days, leaving less print-related work for the bargaining unit, resulting in the proposed layoff of the two paperhandlers. Thus, the decision about and effects of the layoff are a mandatory subject of bargaining as an effect of the nonbargainable decision to move to a digital format.<sup>9</sup>

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<sup>8</sup>*Wendt Corp.*, 369 NLRB No. 135, slip op. at 5–6 (applying *Bottom Line* overall-impasse rule to find unilateral layoffs unlawful); *Skylawn Funeral Home*, supra; *RBE*, 320 NLRB at 81–82 (applying *Bottom Line* overall-impasse rule to find violation for refusal to bargain over layoffs, recalls, reduction in hours of work); *Lawrence Livermore National Security*, 357 NLRB 203 (2011) (bargaining over decision and effects of layoffs subject to overall impasse rule *because* the layoffs were implemented after commencement of bargaining for a new agreement).

<sup>9</sup>I reject the PG’s “alternative” argument (R. Br. at 16 fn. 3) that the layoffs were a nonbargainable “inevitable consequence” of the decision to move toward a digital platform. The reduction in printing might be an inevitable consequence of a nonbargainable decision to move to a digital platform but the layoffs were not. The Board recognizes that in “most such situations [t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [change at issue] without calling into question the employer’s underlying decision.” *The Fresno Bee*, 339 NLRB 1214, 1214 (2003), quoting *Bridon Cordage*, 329 NLRB at 259. See, *Litton Business Systems*, 286 NLRB at 820 fn. 8. Even if the layoffs were directly caused by a nonbargainable decision, they are still bargainable. *Litton Business Systems*, 286 NLRB at 820; *The Fresno Bee*, 339 NLRB at 1215 fn. 3. In order to avoid an effects bargaining obligation, “the employer must show not only that the change resulted directly from that decision, but also that there was no possibility of an alternative change in terms of employment that would have warranted bargaining.” *The Fresno Bee*, 339 NLRB at 1214–1215. The PG has failed to satisfy this burden. In any event, notwithstanding its “alternative” argument, the record demonstrates that the PG understood and accepted the need to bargain over the layoffs, and it did so.

But the bare duty to bargain over the layoffs is not really at issue. The PG provided notice to the Union about the layoff proposal in advance—over three months in advance—and there was significant bargaining over the layoffs.

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What is at issue is whether the duty to bargain over the layoffs required bargaining to an overall impasse in contract negotiations before the PG could implement its effects bargaining layoff proposal. Neither party cites a single case directly treating with this point. However, I conclude that application of the *Bottom Line* overall-impasse rule to bargaining over layoffs that are the effect of a non-bargainable decision is inconsistent with the Board's approach to effects bargaining. Specifically, the Board's designated remedy for effects bargaining violations involving unilateral layoffs is inconsistent with application of the overall-impasse rule.

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Typically, the Board remedies an employer's unlawful unilateral change by restoring the status quo ante—ordering reinstatement of employees laid off by the employer's unlawful action, backpay for their lost period of work, and an order to bargain to impasse or agreement before making unilateral changes. Thus, where

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a decision that culminated in layoffs was unlawful either because the decision was discriminatorily motivated or because the employer was obligated to bargain over it and failed to do so then a full backpay remedy for the layoffs is in order and further relief to restore the status quo ante may also be directed.

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*Fast Food Merchandisers*, 291 NLRB at 901. See, *East Coast Steel, Inc.*, 317 NLRB 842, 842 fn. 1 (1995) (upholding reinstatement and full backpay remedy for layoffs because “layoffs were not primarily an outgrowth or effect of a permanent management decision that was entrepreneurial in character”).

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Such a remedy is consistent with and appropriate for a unilateral change made in violation of the overall-impasse rule. The status quo is restored, backpay is owed until it is, and the parties return to the bargaining table.

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However, Board precedent is also clear that where, as here, the employer has committed an effects bargaining violation—unlawfully laying off employees as an effect of a nonbargainable management decision—the Board will not order reinstatement and backpay for the affected employees. As the Board has explained,

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when as here the General Counsel fails to make any claim at all concerning the lawfulness or unlawfulness of the clearly defined management decision that produced the layoffs and it is at least arguable that the decision was not a mandatory subject of bargaining then surely the remedy commonly granted for layoffs produced by decisions proven to be unlawful is not appropriate.

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*Fast Food Merchandisers*, 291 NLRB at 901.

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Thus, in cases where effects bargaining violations involve layoffs that were the effect of a nonbargainable decision, the Board will not order restoration of the status quo, and will not order reinstatement of the unlawfully laid off employees. Instead, the Board will order only the limited backpay and bargaining remedy, analogous to that set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). In accordance with *Transmarine*, the Board orders the employer, at the union's request, to bargain to impasse or agreement over the effects (e.g., the layoffs) of the nonbargainable management decision, with backpay in no event less than the employees' normal

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wage rate for a 2-week period.<sup>10</sup> And I note that this limited remedy is ordered by the Board even where the *decision* to order the layoffs was bargainable as an *effect* of a nonbargainable decision, such as a relocation of work (*Fast Food Merchandisers*), the conversion of the production process (*Litton*), a preelection decision to reduce inventory (*Bridon Cordage*), a change in rotating shift system (*Odebrecht Contractors*), or a decision to close (*Buffalo Weaving and Belting*).

There is no getting around the fact that the Board's choice of remedy for effects bargaining violations involving layoffs has implications for the General Counsel's theory of a violation in this case. The Board's remedy for effects bargaining cases involving layoffs was not arbitrarily developed. In the absence of on-point precedent—and none is offered by the General Counsel—the Board's effects bargaining remedy calls into question whether the failure to bargain to an overall impasse over an *effects* bargaining obligation is a violation of the Act.

Thus, if, as alleged by the General Counsel, the PG is found to have violated its duty to bargain over the layoffs as an effect of the nonbargainable decision to move to digital production, precedent requires that the remedy not be reinstatement and backpay, but rather, a limited backpay remedy, no reinstatement, and no return to the status quo ante. The order to bargain and the limited backpay remedy would require the employer to bargain to impasse or agreement over the effects of the nonbargainable management decision, at which time the backpay would cease to accrue.

In other words, the *Transmarine* remedial scheme mandated for effects bargaining violations would not fit an effects bargaining violation premised on a failure to bargain to an overall impasse in collective-bargaining negotiations. The Board's remedy for the effects bargaining violation would require bargaining only over the layoffs and other effects of the underlying decision. If the gist of the effects bargaining violation here was the implementation of the layoffs without reaching overall impasse, the Board's effects bargaining remedy would perpetuate the alleged violation. On the other hand, if the *Transmarine* remedy was adapted to accommodate an "overall impasse" violation, the employer would be required to bargain to overall

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<sup>10</sup>*Fast Food Merchandisers*, supra (reversing judge's remedy of reinstatement and full backpay and imposing *Transmarine* remedy); *Litton Business Systems*, 286 NLRB at 822 (*Transmarine* remedy); *Bridon Cordage, Inc.*, 329 NLRB at 259 fn. 11 ("Where, as here, the evidence establishes that a layoff was the direct result of a decision over which an employer has no bargaining obligation, the Board has provided the more limited *Transmarine* 'effects' remedy"); *Odebrecht Contractors of California, Inc.*, 324 NLRB 396-397 (1997) (reversing judge's imposition of reinstatement and full backpay remedy and substituting *Transmarine* remedy because unlawful failure to bargain was over layoffs that were "effect of a decision that was not itself alleged to be subject to bargaining, i.e., its decision to change its rotating shift system"); *Buffalo Weaving and Belting*, 340 NLRB 684, 685 fn. 2 (2003) ("We are providing a *Transmarine* 'effects' remedy for the Respondent's unlawful failure to bargain over the subcontracting of unit work, because the given facts indicate that the Respondent's subcontracting decision was the direct result of its decision to close its Buffalo facility. Although the General Counsel has not alleged that the decision to close was itself a bargainable subject, he has alleged that the failure to bargain over its effects was unlawful. The subcontracting hence was a bargainable effect of the closing. This more limited remedy is distinguishable from cases where subcontracting decisions are separate and independent employer decisions and are not the direct result of an earlier nonbargainable decision. In such cases involving separate and independent subcontracting decisions, a full backpay and reinstatement remedy is ordered, as well as restoration of the subcontracted operations, unless it is shown that restoration would be unduly burdensome") (citations omitted).

impasse or agreement, with no way to toll backpay until it did, absent reinstatement and restoration of the status quo ante. That “surely” is not the remedy envisioned by the Board for failing to bargain over the effects of a lawful nonbargainable decision. *Fast Food Franchisers*, supra. The fact is, the only remedy that makes sense for a unilateral implementation violation premised on a failure to reach an overall impasse is the traditional one of returning to the status quo ante, reinstatement and backpay, coupled with an order to bargain. However, as noted, Board precedent appears to preclude that remedy for an effects bargaining violation involving layoffs.<sup>11</sup>

Perhaps, if confronted with this case, the Board will find a violation and make an exception to its effects bargaining remedial scheme. Perhaps it will order reinstatement and backpay for an effects bargaining violation that is premised on failing to reach an overall impasse in contract negotiations. After all, it is the Board’s remedial aim is to restore “the situation, as nearly as possible, to that which would have been obtained but for” the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). And there is no doubt but that “the Board’s longstanding policy disfavoring the practice of ‘piecemeal bargaining’ during contract negotiations” is undercut by permitting implementation of effects bargaining proposals without reaching an overall impasse in ongoing negotiations.<sup>12</sup>

However, based on the extant precedent, I must conclude that the Board’s choice of remedy in effects bargaining cases—at least, those, as here, involving layoffs—reflects a judgement that effects bargaining is indeed, different and—as the PG contends—“separate” from bargaining (and bargaining violations) otherwise arising during collective-bargaining negotiations for a new agreement. As the Board obliquely commented in *Fast Food Merchandisers*, “surely the [reinstatement and backpay] remedy commonly granted for layoffs produced by decisions proven to be unlawful is not appropriate” in cases where the underlying decision was lawful. 291

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<sup>11</sup>I note that the Board orders a full backpay and restoration remedy in effects bargaining cases only where the effects of a nonbargainable decision do not result in job loss. See, e.g., *The Fresno Bee*, 339 NLRB 1214, 1216 (eschewing *Transmarine* remedy and ordering rescission (at request of union) of unilateral changes that were effects of nonbargainable decision and backpay for affected employees); *KIRO, Inc.*, 317 NLRB 1325, 1329 (1995) (ordering full backpay for effects bargaining violation that resulted in increased hours, workloads, and productivity demands, shift changes, and other unilateral changes—but not job loss); *Good Samaritan Hospital*, 335 NLRB 901, (2001) (ordering rescission of unlawful changes in job duties and responsibilities that were effect of nonbargainable decision to implement new staffing matrices).

<sup>12</sup>*T-Mobile USA, Inc.*, 365 NLRB No. 23, slip op. at 3 fn. 4 (2017), enf. 717 FedAppx. 1 (D.C. Cir. 2018). See, *800 River Road Operating Co.*, 369 NLRB No.109, slip op. at 7 (2020) (“Section 8(d) and its interpretation in judicial and Board precedent strongly disfavor such piecemeal bargaining”); *Wendt Corp.*, 369 NLRB No. 135, slip op. at 6 (“piecemeal bargaining” must be justified under *RBE Electronics*). Piecemeal bargaining is not simply disfavored. It can be unlawful under the Act. *E. I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn. 1 (1991) (“What we find unlawful in the Respondent’s conduct was its adamant insistence throughout the entire course of negotiations that its site service operator and technical assistant proposals were not part of the overall contract negotiations and, therefore, had to be bargained about totally separately not only from each other but from all the other collective-bargaining agreement proposals”); *E. I. Dupont*, supra (“It is well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining”); *Patrick & Co.*, 248 NLRB 390, 393 (1980) (“Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas”).

NLRB at 901. The word “surely” carries a lot of weight in that formulation. Whatever policy choices it reflects, my best judgement is that they preclude the requirement that employers engaged in effects bargaining reach an overall impasse in ongoing collective-bargaining negotiations before they can implement an effects bargaining proposal.

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Accordingly, I find that because the layoffs were an effect of a decision that was arguably nonbargainable, and which the General Counsel does not claim is a bargainable decision (i.e., the decision to move to a digital product), the PG’s duty to bargain over the layoffs was limited to a duty to bargain to impasse or agreement over its layoff proposal. *Champaign Builders Supply Co.*, 361 NLRB 1382, 1382 fn. 1 (2014); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 257 (2006).

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That is the end of the matter because the General Counsel’s theory of violation does not survive the rejection of the argument that the PG had to bargain to an overall impasse in contract negotiations. The General Counsel attributes no other infirmity to the PG’s bargaining or implementation.

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Accordingly, I dismiss the allegation that the PG unlawfully implemented the layoffs of Jenkins and Murrio October 6, 2018.<sup>13</sup>

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**b. The elimination of the five-shift guarantee  
(complaint ¶¶9(b), 10)**

The complaint alleges that the Respondent violated the Act not only by the October 6 layoffs, but also, separately, by, “[a]bout August 25, 2018, . . . “eliminat[ing] its five shift per week guarantee to i[t’s] paperhandlers David Murrio and David Jenkins.” (Complaint ¶¶9(b), 10.)

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Clearly, employee work schedules are a mandatory subject of bargaining. *Bemis Co.*, 370 NLRB No. 7, slip op. at 37 (2020) (see also cases cited therein). However, the allegation of the unlawful elimination of the five-shift guarantee is not argued independently in the General Counsel’s brief. Rather, on brief, the General Counsel argues only that the elimination of the five-shift guarantee occurred on October 6, and then, only as a derivative of the layoffs. (GC Br. at 21.) As the General Counsel puts it:

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

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The record contains no evidence, and there is no argument offered, that the shift guarantee ended in any tangible way other than as a result of the October 6 layoffs. The parties stipulated that the Respondent reduced print days for its newspaper by two days a week on August 25, but no evidence shows that this had any material effect on the employees—until the layoffs. Given all of this, I do not find that the unilateral elimination of the shift guarantee was an independent violation of the Act, or argued as such, and I dismiss paragraph 9(b) of the complaint.

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<sup>13</sup>Given my resolution of this dispute, to the extent I have not already done so above, I do not reach any of the PG’s other contentions and defenses.

## II. The information request allegations

5 In response to the Union's September 27, 2018 information request, the PG supplied information, at least in part, to Union Requests 2-4, 6, 15-16. The responses to these requests are not alleged to violate the Act.<sup>14</sup>

However, the General Counsel alleges that the PG violated the Act by failing and refusing to furnish the information requested in items 1, 5, 7-14, and 17 (complaint ¶¶7, 10).<sup>15</sup>

10 Because each of the outstanding requests seeks nonunit information, the relevance of the requests are not presumed, but must be shown. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). As to nonunit information for which relevance must be demonstrated,

15 the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances.

Id. (footnote omitted.)

20 In assessing relevance, a "discovery-type standard" governs information-request cases under Section 8(a)(5) of the Act (*NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)), even where the relevance of the information must be established, and is not presumed. *Disneyland Park*, 350 NLRB at 1258; *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). At the same time, for information that is not presumptively relevant, the union must demonstrate that it had "a  
25 reasonable belief supported by objective evidence for requesting the information." *Shoppers Food Warehouse*, 315 NLRB at 259. "The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, 350 NLRB at 1258 fn. 5. The Board has held that a "hypothetical theory" is insufficient (*Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1985)), and

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<sup>14</sup>The Union requested and the Respondent provided, at least in in part: contracts the PG has with customers for printing products for the years 2017 and 2018 (Union Request 2), information regarding pressmen off work as a result of injury or illness (Union Request 3), the monthly overtime hours worked in the pressroom for 2017 and 2018 (Union Request 4), expenses attributable and spent on each pressman for the years 2017 and 2018 (Union Request 6), equipment purchased for the new pressroom at the Clinton facility (Union Request 15), and list of new commercial customers obtained by the PG in the previous five years (Union Request 16).

<sup>15</sup>The requested information at issue is: the PG's pressroom budget for 2017 and 2018 (Union Request 1), proposed customer contracts for potential customers for press products (Union Request 5), invoices and payments for all products including paper needed to produce press products for 2017 and 2018 (Union Request 7), any reports concerning the value of the company or any possible restructuring (Union Request 8), copies of all correspondence concerning possibility of restructuring, sale, or "takeover" and board of directors and shareholder meeting minutes, transcripts, recordings from 2017, and 2018, that discuss PG financial status (Union Request 9), a complete list of customers who utilize services and products from the pressroom so the Union can check—presumably with the customers—to determine if PG's prices are too high (Union Request 10), a list of all entities that the PG considers to be its competitors so Union can check with them and compare their prices (Union Request 11), a list of all prices for goods and services "attributable" to the use of the pressroom (Union Request 12), a list of all customers lost in last five years, list of customers "you believe you may lose," in next year, (Union Requests 13 and 14), and all price lists for printing services for last two years (Union Request 17).

“[s]uspicion alone is not enough.” *G4S Secure Solutions (USA), Inc.*, 369 NLRB No. 7, slip op. at 2 (2020). In these nonunit information request situations, “a special showing of pertinence” is required. *Brown Newspaper Publishing Co., Inc.*, 238 NLRB 1334, 1337 (1978). Actual relevance is not required, but the union must demonstrate a probability that the data is useful for the purpose of bargaining intelligently. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Brown Newspaper*, supra.

Notwithstanding this settled precedent, the General Counsel contends (GC Br. at 32) that

[t]he information [at issue here] is presumptively relevant, and Respondent was obligated to furnish this information to the union to police the expired agreement.

The General Counsel is clearly right that a union has a right to relevant information necessary to police compliance with a labor agreement, including an expired one whose terms and conditions are still relevant. *Audio Engineering, Inc.*, 302 NLRB 942, 944 (1991). However, the General Counsel is wrong to contend that requested nonunit information is presumptively relevant simply by virtue of it being requested to “police the agreement.” The burden of demonstrating relevance or rebutting a presumption of relevance turns on whether the requested information seeks information about the unit or not. Nonunit information is not presumptively relevant just because the union points to a provision of the contract that it is seeking to enforce. *Disneyland Park*, 350 NLRB at 1258 (“In order to show the relevance of an information request, a union must do more than cite a provision of the collective-bargaining agreement”).

Here, none of the requested information remaining at issue is the type that is presumptively relevant. It is all “nonunit” information—that is, information concerning things other than the terms and conditions of employment of the unit employees. As such, relevance is not presumed, it must be shown.

The only effort by the General Counsel to show relevance is the claim that the Union supplied the necessary relevance for these requests by referencing section 10.2 of the expired 2014 Agreement, and its desire to investigate whether, as required by section 10.2, the layoffs were “economically necessary and no reasonable alternative exists.” The General Counsel does not treat with the specifics of the individual requests. The General Counsel does not offer a more specific reason justifying any of the requests. Rather, from the fact that section 10.2 restricts layoffs to those that are economically necessary and without reasonable alternative, the General Counsel appears to advance the position that the Union has established the necessary relevance for all requests regarding the PG’s business and operations on grounds that the information might possibly allow the union to challenge the economic necessity of the layoffs and determine whether reasonable alternatives exist.

This argument fails. Without more, reliance on contractual language requiring that the layoffs be “economically necessary” and have “no reasonable alternative” does not, by itself, throw the door open for the Union to be entitled to a full range of operations and business information. As to nonunit information, the “union must do more than cite a provision of the collective-bargaining agreement” in order to show relevance. *Disneyland Park*, 350 NLRB at 1258. The General Counsel’s theory really would justify the bromidic “fishing expedition” as there is almost no limit to the scope of economic, operations, or financial information that might—stress might—inform a determination of “economic necessity” and “reasonable alternatives.” However, the Board requires more than “hypothetical” theories, “suspicion” and “generalized conclusory explanation [in order] to trigger an obligation to supply [nonunit] information.” *Disneyland Park*, 350 NLRB at 1258 fn. 5; *Sheraton Hartford Hotel*, 289 NLRB at 464; *G4S Secure Solutions (USA), Inc.*, 369 NLRB No. 7, slip op. at 2.

5 A review of the record reveals that the Union offered nothing more to specifically justify its requests. Indeed, to the contrary, the Union took the position that the PG's stated reasons for the layoffs—the reduction in print operations—did not satisfy the layoff conditions set forth in section 10.2. On the Union's logic, in order to police compliance with section 10.2 no more information was required or was specifically relevant to the layoffs. Thus, this is not a case where the Union's requests are justified—i.e., their relevance shown—based on the positions taken by the Respondent in the bargaining. See, *National Extrusion & Manufacturing*, 357 NLRB 127, 127–129 (2011), enfd. 700 F.3d 551, (D.C. Cir. 2012) (union entitled to a wide range of requested information necessary to assess the specific claims made by the employer in the negotiations as justification for its bargaining demands); *Taylor Hospital*, 317 NLRB 991, 994 (union entitled to budgetary information where employer “gave the Union a very specific reason” for layoffs, claiming it was “necessary in order to permit Respondent to continue to meet its budget and remain financially healthy”).

15 In this case, the PG did not claim that lack of competitiveness resulted in the layoff proposal. The PG did not claim that competitors, budget benchmarks, customers, possible sales or takeovers drove the layoff proposal. Rather, the PG, at all times, has taken the straightforward position that the reduction in print operations—part of a transition to a digital newspaper—was the motivation for the layoff proposal. The employer's position is that less printing means less work of the type performed by the paperhandlers—hence, its proposal for layoffs.

20 In this case, the General Counsel seems to agree—or at least, does not dispute—that the PG's decision to move toward a digital product is outside the ambit of collective bargaining. Therefore, as the PG argues, the Union was not entitled to information regarding that decision. *ADT Security Services*, 369 NLRB No. 31, slip. op. at 1 fn. 2 (2020). The layoffs, on the other hand, as I have found, were a mandatory subject of bargaining, and as to that decision, the Union was entitled to request and the PG required to supply nonunit information shown to be relevant. However, the Union's requests that are at issue in this dispute, at least as explained by the Union and the General Counsel, are far removed from the concrete questions surrounding the proposal to lay off the paperhandler employees due to reduced printing, and unsupported under the Board's standards for requiring receipt of nonunit information. Accordingly, I dismiss the information request allegations.

### 35 CONCLUSIONS OF LAW

40 The Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>16</sup>

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<sup>16</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

**ORDER**

The complaint is dismissed.

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Dated, Washington, D.C. September 14, 2020



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David I. Goldman  
U.S. Administrative Law Judge