

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

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

Case 06-CA-233676

**RESPONDENT PG PUBLISHING CO., INC.'S RESPONSE
TO BRIEF IN SUPPORT OF COUNSEL FOR GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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STATEMENT OF THE CASE

This case was submitted to the Administrative Law Judge (ALJ) upon a Joint Motion and Stipulation of Facts with attached Joint Exhibits¹ pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. Based on an amended charge filed by Graphic Communications International Union, GCC/International Brotherhood of Teamsters Local 24M/9N (hereinafter the Union), which is the bargaining representative of a group of PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette's (hereinafter the Respondent) employees, the General Counsel issued the Complaint in this case. (SOF ¶¶ 2, 3; Ex. 1(c) and 1(e)). The Complaint alleged that Respondent violated Section 8(a)(5) and (1) of the Act by eliminating a five shift per week shift guarantee to

¹ Citations herein to the ALJD are as follows: (ALJD p. ____, lines ____), to the Stipulation of Facts (SOF ¶ ____), and attached Joint Exhibits (Ex. ____). Citations to Counsel for the General Counsel's Brief to the Board herein will be (GC p. ____). The Stipulation of Facts and attached Joint Exhibits, together with the Joint Motion and the parties' Briefs to the Administrative Law Judge, constitute the entire record in this case. (Joint Motion, p. 2, first sentence).

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

On September 14, 2020, the ALJ issued a decision and recommended Order in the above-referenced case dismissing all Complaint allegations. On November 9, 2020, Counsel for General Counsel filed Exceptions and a Brief in Support of Exceptions. On November 13, 2020, Respondent filed this Response to Brief in Support of Counsel for General Counsel's Exceptions to the Administrative Law Judge's Decision as required under Section 102.46(h) of the Board's Rules and Regulations. Also, on November 13, 2020, Respondent filed in a separate filing, as required by the Board's Rules, Respondent PG Publishing Co., Inc.'s Cross-Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Respondent PG Publishing Co., Inc.'s Cross-Exceptions to the Decision of the Administrative Law Judge.

SUMMARY OF ARGUMENT

Respondent made a business decision to become a digital news organization and to phase out the publication and distribution of its printed newspaper. Its decision fundamentally altered the scope and nature of Respondent's business and is not subject to a duty to bargain. A duty does exist to bargain with the Union over the effects of such a decision. Respondent bargained in good faith to impasse in effects bargaining despite the Union's deliberate efforts to delay, avoid and

frustrate good faith effects bargaining. Thereafter, Respondent lawfully implemented its effects bargaining proposals related to the direct effects of its decision. Respondent provided the Union with all relevant and necessary information the Union requested as required under Board precedent.

The Administrative Law Judge was correct in dismissing General Counsel's Complaint. This case, however, presents the Board with the opportunity to overturn or clarify *The Finley Hospital* and *Bottom Line Enterprises*. The issues ripe for review in this case are as follows:

- I. Respondent's decision to become a digital news organization and to phase out its print operations is a nonmandatory subject of bargaining under *First National Maintenance* and the First Amendment.
- II. *Bottom Line Enterprises* and *RBE Electronics of San Diego* do not apply to *First National Maintenance* decisions.
- III. Respondent lawfully implemented its effects bargaining proposals after bargaining to impasse over the effects of its *First National Maintenance* decision.
- IV. Respondent lawfully implemented its effects bargaining proposals because of the Union's dilatory tactics in effects bargaining.
- V. The five shift markup guarantee and its exception did not survive contract expiration nor become part of the post-expiration status quo. The Board's decision in *Finley Hospital* should be overruled.

STATEMENT OF FACTS

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

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

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

The Union never requested effects bargaining. (SOF ¶¶ 21, 34; Exs. 10, 16). At the beginning of a scheduled contract negotiation on July 25, 2018, several weeks after Respondent

first offered to engage in effects bargaining, Respondent asked the Union if it intended to engage in effects bargaining over Respondent's decision. (SOF ¶¶ 21, 34; Exs. 10, 16). Mike Huggins, the Union's chief spokesperson, only then responded that he was willing to discuss the effects of Respondent's decision. (SOF ¶¶ 21, 34; Exs. 10, 16).

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

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

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

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

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

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

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

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

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

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

In the effects bargaining meeting on the morning of September 19, 2018, the parties discussed the planned layoff of the two paperhandlers. (SOF ¶¶ 25, 26, 34; Exs. 13, 16).

Respondent again explained that as print days were eliminated, the need for paperhandling functions on a full-time basis was eliminated. (SOF ¶¶ 26, 34; Exs. 13, 16). The parties agreed the laid off paperhandlers would be placed on the recall list for paperhandlers. (SOF ¶ 26, 34; Exs. 13, 16).

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

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

(SOF ¶¶ 25, 26; Ex. 13).

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

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

The next day, September 20, 2018, Respondent memorialized the September 19, 2018 effects bargaining meeting. (SOF ¶ 26; Ex. 13). Respondent informed the Union that Respondent had made its best and final offer. (SOF ¶ 26; Ex. 13). Respondent again stated it planned to lay

off the two (2) paperhandlers after their shift on October 6, 2018. (SOF ¶ 26; Ex. 13). The Union never requested any effects bargaining meetings thereafter.

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

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

ARGUMENT

I. Respondent's Decision To Become A Digital News Organization And To Phase Out Its Print Operations Is A Nonmandatory Subject Of Bargaining Under *First National Maintenance* And The First Amendment.

Response to General Counsel's Exceptions 2, 3, 4 and 5

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

Respondent's decision to become a digital-only news organization and eliminate its print operations is an entrepreneurial decision under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The ALJ assumed for the purposes of this case that the decision was of a "nonbargainable nature" based on the General Counsel's failure to dispute this contention. (ALJD p. 19, lines 6-20). In its Brief, the General Counsel does not dispute Respondent's decision to move towards a digital news organization and reduce print operations by two days a week is a nonbargainable entrepreneurial decision under *First National Maintenance*. The record also establishes conclusively that Respondent's decision to become a digital newspaper and eliminate its print operations was not a mandatory subject of bargaining and is protected by the First Amendment. The Board should so find.

II. *Bottom Line Enterprises And RBE Electronics Of San Diego Do Not Apply To First National Maintenance Decisions.*

Response to General Counsel's Exceptions 2, 3, 4 and 5

General Counsel argues *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) and *RBE Electronics of S.D.*, 320 NLRB 80 (1995) preclude Respondent from implementing its effects bargaining proposals of a *First National Maintenance* decision unless and until an overall impasse has been reached on bargaining for a successor agreement as a whole. (GC p. 10). The General Counsel's reliance on these cases is misplaced for several reasons.

First, Respondent joins the General Counsel's invitation to the Board to revisit *Bottom Line* and *RBE Electronics* as this case appears ripe for the Board to do so. (GC p. 10). Indeed, the Board has in the recent past questioned whether these cases should continue as applicable law. In *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip. op. at 11, n. 47 (2017), the Board stated "We do not pass on whether *Bottom Line Enterprises* and *RBE Electronics* were correctly

decided.” Even if the Board declines to revisit the continued viability of these cases, Respondent agrees with the General Counsel that the Board should clarify the law in this area. (GC p. 10). However, Respondent believes once the Board reviews the extant case law below, the Board will find that the overall impasse principle of law recognized in *Bottom Line* and *RBE Electronics* does not apply to entrepreneurial decisions that involve a change in the scope and direction of an enterprise.

The ALJ, in the Introduction to his decision stated that “[w]hile 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 agreement.” (ALJD, p. 1, 2nd paragraph). The ALJ also concluded 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. (ALJD p. 20, Lines 8-11). The ALJ also appropriately dismissed the Complaint based on readily apparent remedy inconsistencies in the Board’s prior decisions.

Respondent believes the ALJ erred in stating that neither party cited a single case directly treating whether the duty to bargain over layoffs resulting from a nonbargainable management decision required bargaining to an overall impasse in contract negotiations before the Respondent could implement its effects bargaining layoff proposal. (ALJD p. 20, line 8). Also, contrary to General Counsel’s argument “that there is no case law exactly on point establishing what an employer’s obligations are in this situation: where an employer decides to implement a nonbargainable, entrepreneurial decision while negotiating a successor contract” (GC p. 12), the applicable case law set forth below does indeed provide guidance on those obligations. The Board

decisions below show that there is no applicability of *Bottom Line* and *RBE Electronics* to these circumstances, or that there is an exception to these cases for effects bargaining following nonbargainable business decisions.

Respondent submits the legal framework established by the Supreme Court in *First National Maintenance* for the implementation of entrepreneurial decisions is an exception to *Bottom Line* and *RBE Electronics*. These cases did not involve *First National Maintenance* non-mandatory subjects of bargaining. They are therefore not dispositive in this case. Respondent submits the below extant Board authority, all of which was provided in Respondent's Brief to the ALJ, demonstrates *Bottom Line* and *RBE Electronics* do not have any application to *First National Maintenance* decisions and the requirement to engage in effects bargaining over those decisions. Neither the General Counsel nor the Board in the decisions below raised the issue of whether *Bottom Line* and *RBE Electronics* impacted the effects bargaining for good reason – these decisions have no applicability to a *First National Maintenance* decision.

In *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253 (2006), the employer and union were engaged in contract negotiations. During the negotiations, the employer made the decision to close part of its operations. The Board found the employer failed to bargain over the effects of its decision as required under *First National Maintenance*. Even though the employer at one meeting listened to the Union's proposals and provided a response, the employer did not engage in further effects bargaining thereafter. Because there was no impasse in the effects bargaining or other valid reason to stop effects bargaining, the Board found that the employer violated Section 8(a)(5) by its failure to bargain over the effects of its decision to close part of its operation. As part of its remedy, the Board ordered the conditional backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the Board's standard remedy in effects bargaining cases.

See, e.g., *Liberty Source W, LLC*, 344 NLRB 1127, 1128 (2005); *Kirkwood Fabricators, Inc.*, 285 NLRB 33, 36-37 (1987), *enfd.* 862 F.2d 1303 (8th Cir. 1988). The Board did not rely on *Bottom Line* in its decision despite the fact an overall impasse had not been reached in contract negotiations.

In *Gannett Co., Inc.*, 333 NLRB 355 (2001), the employer had implemented terms and conditions of employment but had not reached a successor agreement in contract negotiations. The employer subsequently announced it was selling the business, a *First National Maintenance* decision. The Board found the employer failed to timely bargain about the effects of the sale of its business as required by *First National Maintenance*. General Counsel requested, and was granted a *Transmarine Navigation Corp.* remedy, because the union may have been able to secure additional benefits in timely effects bargaining such as severance pay, pension fund payments, letters of reference and health insurance. Once again, the Board did not rely on *Bottom Line* despite the fact an overall impasse had not been reached in contract negotiations.

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

In *Rigid Pak Corp.*, 366 NLRB No. 137 (2018), an employer discontinued a part of its business while engaged in contract negotiations. The Board found the decision to abandon part of its business involved a significant change in the scope and direction of its enterprise and was thus not subject to mandatory bargaining. The Board also found, however, that the employer failed to

provide the Union with notice and an opportunity to bargain over the effects of its decision. The Board ordered the usual *Transmarine* remedy in effects bargaining cases. Again, the Board did not rely on *Bottom Line* in its decision despite the employer not being at impasse on a successor agreement. It only required good faith effects bargaining over a *First National Maintenance* decision.

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

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

All of the challenged actions taken by the employers above occurred in the context of contract negotiations for an initial or successor agreement. Yet, the Board did not apply *Bottom Line* to any of these cases. The reason is clear. *Bottom Line* only applies to contract negotiations. *First National Maintenance* decisions which involve a significant change in the scope and direction of the enterprise only require good faith effects bargaining to impasse or agreement

before changes pursuant to entrepreneurial decisions can be implemented. *See Champaign Builders Supply Co.*, 361 NLRB 1382, n. 1 (2014); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB at 257.

The employers' actions in the cases above arguably did not fall within the economic exigencies compelling prompt action exception to *Bottom Line*. Yet, the Supreme Court and the Board have carved out a *First National Maintenance* defense which is parallel to an exigency defense and another exception to *Bottom Line*.

The Board's approach in these prior decisions is reasonable and should be formally recognized in its decision in this case. It is clear the Board's prior decisions noted above recognized what Respondent contends here – there is no applicability or there is an exception in place when it involves effects bargaining resulting from a nonbargainable decision. Otherwise, a union could intentionally delay or even scuttle a partial closing of a business, the discontinuance of a product line, or a potential sale of a business if the employer was engaged in contract negotiations and could not implement non-mandatory, entrepreneurial decisions and their effects without first bargaining to an overall impasse on an agreement as a whole in contract negotiations. *Bottom Line* and its progeny do not apply to management decisions involving a change in the scope or direction of the enterprise. The Board should find Respondent's *First National Maintenance* decision to become a digital news organization and eliminate two days of its print operations is another *Bottom Line* exception excusing bargaining to impasse over a successor agreement.

III. Respondent Lawfully Implemented Its Effects Bargaining Proposals After Bargaining To Impasse Over The Effects Of Its *First National Maintenance* Decision.

Response to General Counsel's Exceptions 2, 3, 4 and 5

The Supreme Court held in *First National Maintenance* that, even when an employer's decision to shut down part of its operations is exempt from bargaining, the employer is nevertheless obligated to bargain with the union over the effects of that decision. 452 U.S. at 681-682 and fn. 15. Bargaining over the effects of such a decision "must be conducted in a meaningful manner and at a meaningful time." *Id.* at 682. The ALJ correctly found Respondent provided notice - over three months in advance - and that there was "significant bargaining over the layoffs" of the two paperhandlers during effects bargaining. (ALJD p. 19, note 9; ALJD p. 20, lines 2-4).

General Counsel's claim the parties did not bargain to impasse over the effects of Respondent's effects bargaining proposals is factually incorrect. (GC p. 14). General Counsel's claim that neither party declared impasse or that an impasse occurred is also incorrect. (GC p. 14). Respondent in its Answer to the Complaint set out this contention as an affirmative defense. (SOF ¶ 4; Ex. 1(g), Aff. Def. #3). Indeed, Respondent in its letter to the Union on September 20, 2018, informed the Union that Respondent had made its best and final offer. (SOF ¶ 26; Ex. 13). Respondent again stated at that time it planned to lay off the two (2) paperhandlers after their shift on October 6, 2018. (SOF ¶ 26; Ex. 13). The Union never requested any effects bargaining meetings thereafter. The Union never contended the parties were not at impasse but rather inexplicably contended that it was not, or had not been, engaged in effects bargaining. (SOF ¶¶ 33, 34, 35, 36; Ex.16, 17, 18).

The record is clear Respondent bargained to impasse over the effects of its *First National Maintenance* decision. On June 26, 2018, Respondent notified the Union that Respondent had made the decision to become a digital-only news organization and phase out the publication and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(SOF ¶¶ 25, 26; Ex. 13).

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

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

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

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

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

The record conclusively establishes Respondent bargained in good faith to impasse over the effects of Respondent's decision, including the layoff of the two paperhandlers. The ALJ erred by not finding based on the stipulated facts and attached exhibits that Respondent lawfully implemented its layoff effects proposal upon reaching impasse in the effects bargaining.

IV. Respondent Lawfully Implemented Its Effects Bargaining Proposals Because Of The Union's Dilatory Tactics In Effects Bargaining.

Response to General Counsel's Exceptions 2, 3, 4 and 5

The record is clear the parties engaged in effects bargaining over the layoffs and other effects of the Company's *First National Maintenance* decision. General Counsel contends Respondent stipulated the Union did not waive its right to bargain over the layoffs during effects bargaining, citing SOF ¶27 (GC p. 14). Surprisingly, General Counsel failed to include the remainder of that stipulation which stated that any arguments of waiver will be based on the documentary evidence submitted in the record. (SOF ¶ 27). Respondent submits the Union did not engage in serious, good faith effects bargaining. To the contrary, the Union appears to claim it did not consciously engage in effects bargaining, but that claim is nonsensical. (SOF ¶ 36; Ex, 18).

Nevertheless, despite giving the Union 60 days' notice of its decision to eliminate print days on August 25, the Union never requested effects bargaining. (SOF ¶¶21, 34; Exs. 10, 16). At the beginning of a scheduled contract negotiation on July 25, 2018, several weeks after Respondent first offered to engage in effects bargaining, Respondent asked the Union if it intended to engage in effects bargaining over Respondent's decision. (SOF ¶¶ 17, 21; Exs. 6, #3 and Ex. 10). The Union then agreed to discuss the effects of Respondent's decision. (SOF ¶¶ 21, 34; Exs. 10, 16). After July 25, the Union met in effects bargaining only two times, on September 13 and September 19, despite Respondent's repeated requests for meeting dates. At the September 19 effects bargaining meeting, the Union walked out of the effects bargaining meeting, without notice, and did not return. The Union never requested any effects bargaining meetings thereafter.

Respondent, on the other hand, bargained in good faith over the effects of its decision to become a digital news organization and eliminate its print operation. After bargaining to impasse,

Respondent lawfully implemented its proposal to reduce two paperhandlers, that workforce reduction being a direct effect of Respondent's *First National Maintenance* decision to eliminate two print days.

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

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

Consistent with this exception is the obligation of the parties not to seek to stretch out negotiations by whatever strategy. *Eastern Maine Medical Center*, 253 NLRB 224, 247 (1980). In this case, the Union engaged in dilatory tactics by refusing to meet for effects bargaining despite repeated requests by Respondent, the making of regressive proposals without justification, the submission of a belated, voluminous information request months after Respondent's notice to the Union of its decision and offer to engage in effects bargaining and finally, walking out of an effects bargaining session without notice and not returning.²

Respondent bargained to impasse over its effects bargaining proposals and thereafter lawfully implemented its effects bargaining offer. Notwithstanding Respondent lawfully bargained to impasse, the Union, through its stalling tactics, clearly invoked the narrow employer privilege to lawfully implement even absent an impasse. *NLRB v. Auto Fast Freight, Inc.*, 793

² The Stipulations of Fact and attached Exhibits demonstrate conclusively these dilatory tactics. These tactics would even justify a finding of waiver. (See SOF ¶ 27).

F.2d at 1129; *Eastern Maine Medical Center*, 253 NLRB at 247. The ALJ erred by failing to address this additional Respondent defense to the Complaint allegations.

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

The Union intentionally adopted a strategy of delay in the effects bargaining over Respondent's decision to become a digital news organization and eliminate its print operations. After Respondent offered to meet with the Union in effects bargaining on June 26, the Union did not express any interest in effects bargaining for several weeks. On July 25, in a contract negotiations session, Respondent asked the Union if it intended to engage in effects bargaining. Only then did the Union agree to discuss the effects of Respondent's decision. After the July 25 meeting, the Union did not agree to meet again for effects bargaining until September 13, almost eight weeks after the July 25 meeting and over two and a half weeks after Respondent reduced its print operations on August 25. During that period, the Union's only effort to engage in effects bargaining was a regressive proposal on severance pay and health care submitted by email to Respondent on August 17.

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

Under Section 8(d), both unions and employers have an explicit duty to "meet at reasonable times and confer in good faith." See *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780, 784 (1984) ("As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes 'that had been condemned in management' by the previously enacted Section 8(a)(5)"), quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 487 (1960). It is well established that the statutory duty to bargain "surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. *Storer Communications, Inc.*, 294 NLRB 1056, 1095 (1989), quoting *Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949) (finding employer violated Section 8(a)(5) by refusing to meet at reasonable times because it could offer no explanation for being able to meet only three days in more than five months). In determining bad faith, the Board will consider the entire context of negotiations, including whether a party refused to meet more than once or twice a month and/or refused to respond to a party's repeated request for more frequent bargaining. *TNT Logistics North America, Inc.*, 346 NLRB 1301, 1303 (2006); *Calex Corp.*, 322 NLRB 977, 977 (1997) (employer violated Section 8(a)(5) because it arbitrarily limited the frequency of bargaining sessions to once per month, canceled sessions, and refused repeated requests to bargain more frequently), enforced, 144 F.3d 904 (6th Cir. 1998). Respondent submits the record demonstrates the Union failed in its duty to bargain in good faith over the effects of Respondent's decision through its dilatory tactics. The Board should find Respondent's subsequent implementation was

lawful under *Bottom Line*'s dilatory tactics exception, even in the absence of impasse in the effects bargaining.

The General Counsel posits a complete red-herring argument about "alternatives that Respondent should have negotiated with the Union to avoid or reduce the layoff." (GC p. 15). This contention not only shows a complete lack of understanding of the mechanics of effects bargaining but also disregards the record. This "would have...could have...should have..." argument does not change the record that the Union simply proposed severance for laid off employees, continued health care for a laid off employee, or took the position that Respondent could not layoff. It was the obligation of the Union to propose alternatives to layoff for Respondent's consideration – the Union made no such alternative proposals. General Counsel's contention here fails to prove a violation of the Act.

V. The Five Shift Markup Guarantee And Its Exception Did Not Survive Contract Expiration Nor Become Part Of The Post-Expiration Status Quo. The Board's Decision In *Finley Hospital* Should Be Overruled.

Response to General Counsel's Exception 1

General Counsel appears to argue in the alternative, albeit in contradictory fashion, in addressing the ALJ's appropriate dismissal of Complaint Paragraph 9 (b). It is clear, however, that General Counsel has requested the Board to overrule *Finley Hospital*. (GC p. 7). General Counsel's request follows an Advice memorandum dated June 17, 2019, in which the General Counsel asserted the Board's majority opinion in *Finley Hospital* was wrongly decided and should be overturned. Respondent agrees with the General Counsel that *Finley Hospital* was wrongly decided and should be overruled. Respondent further agrees with General Counsel that the proper analysis was set forth by Member Johnson, in dissent. However, even if *Finley Hospital* is not overruled, as demonstrated below, Respondent did not violate the Act as alleged.

Article 10, Section 10.2 of the expired collective bargaining agreement recognized the right of Respondent to lay off employees. (SOF ¶ 10; Ex. 2, Section 10.2). It provided a limitation to that right, insofar as it allowed a five-shift markup guarantee to named employees. (SOF ¶ 10; Ex. 2, Section 10.2). However, the term of the guarantee was limited to a specific duration, with a specific ending date. (SOF ¶ 14; Ex. 2, Section 10.2). The guarantee ended March 31, 2017. (Emphasis in original). (SOF ¶ 10; Ex. 2, Section 10.2). Section 10.2(a) sets forth an exception to the five shift markup guarantee, by providing procedures to lay off employees during the term of the five shift markup guarantee – all of which expired on March 31, 2017. By the express terms, Section 10.2 did not survive after March 31, 2017 and therefore did not become part of the status quo.

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

The Union failed to negotiate any contract terms requiring Respondent to maintain the Section 10.2 guarantees after March 31, 2017. In fact, the expired collective bargaining agreement provides directly the opposite: that the Section 10.2 “guarantees” only remained in effect “for the balance of the agreement ending March 31, 2017.” (SOF ¶ 14; Ex. 2, Section 10.2). The intent of the parties is clear and unambiguous that Section 10.2 ended on March 31, 2017. *See CNH Industrial N.V. v. Reese*, 138 S. Ct. 761, 766 (2018), quoting *Tackett*, 574 U.S. 427, 135 S.Ct. 926,

930 (“When the intent of the parties is unambiguously expressed in the contract, that expression controls and the court’s inquiry should proceed no further.”). Therefore, there is no contractual basis for General Counsel’s argument that Section 10.2 survived the 2017 expiration of the collective bargaining agreement.

The General Counsel’s claim the five-shift markup guarantee survived as part of the status quo is also contrary to Board law. The Board has generally adhered to the principle that general durational clauses in a contract do not “sunset” contractual obligations, *See, e.g., The Finley Hospital*, 362 NLRB 915 (2015), *enf. denied* 827 F.3d 720 (8th Cir. 2016).

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

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

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

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

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

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

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

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

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

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

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

VI. Respondent Provided The Union With All Relevant And Necessary Information Required Under Board Precedent.

Response to General Counsel's Exceptions 6, 7 And 8

General Counsel alleges Respondent failed to furnish information requested by the Union on September 28, 2018. (SOF ¶ 3; Ex. 1(e)). Respondent believes the ALJ correctly determined the Union failed to show the relevancy of the nonunit information. (ALJD p. 24-25, lines 10-52).

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

Furthermore, to the extent the Union claims it needs the information to determine the "economic necessity" of Respondent's proposal in effects bargaining to reduce the workforce in the pressroom and to evaluate Respondent's competitiveness, the Union is not entitled to that information. As demonstrated above, the Union's contractual basis for its requests is nonexistent, because the cited contract provision, Section 10.2 in its entirety, expired March 31, 2017 and that provision was not part of any status quo that existed on September 28, 2018. Furthermore, the Union is not entitled to information regarding Respondent's competitiveness because Respondent has never claimed it needed concessions or that it needed to lay off the two paperhandlers because it needed to be competitive. Therefore, Respondent did not violate Section 8(a)(5) when it refused

to provide the information requested by the Union on September 28 for items 1, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 17.

It was not until late September that the Union made any information requests concerning the effects bargaining. (SOF ¶ 33; Ex. 15). On September 28, the Union requested 17 items of information. (SOF ¶ 33; Ex. 15). Eight requests concerned the “economic necessity” for Respondent’s layoffs. Eight other requests raised questions concerning Respondent’s competitiveness. (SOF ¶ 33; Ex. 15). The seventeenth request concerned bargaining unit employees who were off work due to injury or illness. (SOF ¶ 33; Ex. 15).

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

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

to become an exclusively-digital product. (SOF ¶ 34; Ex. 16). Respondent also pointed out that the list of the customers Respondent believed it may lose in the next year called for speculation. (SOF ¶ 34; Ex. 16).

On November 8, the Union replied to Respondent. (SOF ¶ 35; Ex. 17). The Union disavowed any claim that the requested information was relevant to the effects bargaining. (SOF ¶ 35; Ex. 17). It asserted that “the Union is not involved in ‘effects bargaining’ when we requested information. (SOF ¶ 35; Ex. 17). That request centered on the employer’s obligation under Section 10.2 of the Agreement . . .” (SOF ¶ 35; Ex. 17). Now, for the first time, the Union, specifically identified twelve of its requests as being related to its claim under Section 10.2 of the expired contract. (SOF ¶ 35; Ex. 17).

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

A. Respondent Had No Obligation To Provide Any Of The Information Requested By The Union In Items 1, 5, 7, 8, 9, 10, 11, 12, 13, 14 And 17 In The Union's September 28, 2018 Information Request.

The Union was not entitled to any of the information concerning Respondent's *First National Maintenance* decision to become an exclusively-digital publication and to phase out its print operations. An employer has no obligation to provide information about a permissive subject of bargaining. *ADT, LLC d/b/a ADT Security Services*, 369 NLRB No. 31, slip. op. at 1, n. 2 (2020); *FirstEnergy Generation, LLC v. NLRB*, 929 F.3d 321, 334 (6th Cir. 2019) (finding that because the employer did not have a duty to bargain over a particular subcontracting decision, it had no duty to provide the Union with information related to that decision); *Pieper Electric, Inc.*, 339 NLRB 1232, 1235 (2003). Information requested about an employer's *First National Maintenance* entrepreneurial decisions cannot be relevant for bargaining if the union has no right to bargain over those decisions. Therefore, Respondent did not violate Section 8(a)(5) when it refused to provide the information requested by the Union on September 28.

To the extent the Union claims it needed the information to determine the "economic necessity" of Respondent's proposal in effects bargaining to reduce the workforce in the pressroom and to evaluate Respondent's competitiveness, the Union is not entitled to that information. The Union expressly disavowed any claim that the requested information was relevant to effects bargaining. (SOF ¶ 35; Ex. 17).

Furthermore, under the two bases the Union cited for its request, the Union cannot establish the relevance of the requested information. The first basis is its claim that Respondent was required under Section 10.2 of the expired contract to show "economic necessity" for the layoffs. (SOF ¶ 35; Ex. 17). However, as set forth above in this Brief, the Article 10, Section 10.2 guarantee and Respondent's burden to establish an exception to that guarantee expired March 31,

2017. Therefore, the Union's information request is not relevant because it pertains to a purported obligation that is no longer in effect. General Counsel's argument that relevancy was established through a claimed desire to perform a "policing compliance" function on Section 10.2 likewise fails – an alleged policing of a nonexistent term does not establish relevance.

The second basis for the Union's requests is that it needs the information to determine if Respondent is "competitive." (SOF ¶ 35; Ex. 17). The fatal flaw in that claim of relevance is that there is no Company claim of a lack of competitiveness to which the Union was purportedly responding. The ALJ properly concluded so. (ALJD p. 26, lines 16-18).

Respondent has never claimed in effects bargaining that it needed concessions or to make layoffs to remain competitive. The stipulated record contains no evidence that Respondent made such a claim. The Board has recognized that when an employer makes a claim of being uncompetitive certain specific information related to that claim may become relevant. *See Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip. op. at 2 (2019); *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006). Here, Respondent never made a claim of being non-competitive and the stipulated record in this case is devoid of such a claim. Therefore, there is no basis for the Union's requests regarding claims of non-competitiveness. The ALJ correctly found that the Union did not show the requests were justified based on positions Respondent took during effects bargaining. (ALJD p. 26, lines 6-14).

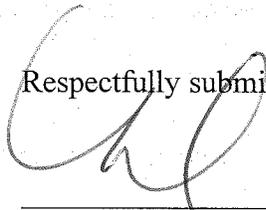
The Union's information requests are not presumptively relevant because they do not relate to terms and conditions of employment of bargaining unit employees. Accordingly, the Union must establish the relevance of the requested information. *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip. op. at 2 (2019); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). The Union has failed to meet that burden. The ALJ correctly concluded so. (ALJD p. 26, lines 29-33).

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

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

Dated: November 13, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing Respondent PG Publishing Co., Inc.'s Response To Brief In Support Of Counsel for General Counsel's Exceptions To The Administrative Law Judge's Decision was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the following via email on this 13th day of November, 2020:

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