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

September 21, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

The principal issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally laying off two employees—who were guaranteed 5 shifts per week under the terms of an expired collective-bargaining agreement—prior to reaching an impasse in negotiations for a new collective-bargaining agreement.[1] A long series of Board decisions applying the clear and unmistakable waiver doctrine and culminating in *Finley Hospital*[2] have held that general durational language in a collective-bargaining agreement does not terminate an employer's statutory duty under Section 8(a)(5) of the Act to maintain the status quo with respect to established terms and conditions of employment after the agreement expires and pending negotiations for a new agreement. Implicitly conceding that well-settled law supports finding a violation here, our dissenting colleagues join with the Respondent in arguing that the Board should instead overrule *Finley Hospital* and the wealth of precedent it draws on. However, we see no good reason to overrule that precedent. Accordingly, as explained below, we find that the unilateral elimination of the five-shift guarantee and the resulting layoffs violated the Act. We first provide a brief overview of the case before setting forth the facts and detailing the reasons for our conclusion.

I. OVERVIEW

The Respondent publishes *The Pittsburgh Post-Gazette* newspaper. The Union is the exclusive collective-bargaining representative of a unit of the Respondent's employees consisting of pressmen, paperhandlers, paper handling pressmen, and apprentice pressmen. The parties' most recent collective-bargaining agreement, which expired prior to the events at issue, guaranteed certain unit employees, including the two employees whose layoffs are at issue, five shifts per week.

This case arises out of changes made by the Respondent as part of its planned transition to an all-digital, online publication. As a step in that transition, the Respondent decided to begin printing its newspaper 5 days a week and thus to eliminate 2 days of printing operations. After eliminating 2 days of print operations, the Respondent laid off two unit employees, without the agreement of the Union and prior to reaching an overall impasse in negotiations for the new collective-bargaining agreement.

The judge dismissed the complaint's allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) unilaterally laying off two unit employees without first bargaining to overall impasse for a successor collective-bargaining agreement, (2) unilaterally eliminating the 5-shift per week guarantee to the two employees without first bargaining to overall impasse for a successor collective-bargaining agreement, and (3) failing and refusing to provide the Union with requested information that is relevant and necessary to collective bargaining.

The judge found that the layoffs were lawful, rejecting the first theory of liability on the merits and the second theory on procedural grounds. As to the first theory, the judge noted that the Respondent laid off the two employees after reducing the number of days it published a print edition of its newspaper by two as part of its decision to transition to an all-digital operation. The judge further noted that former General Counsel Robb did not contend that the Respondent had a duty to bargain over its decision to transition to a digital operation.[3] While the judge found that the Respondent still had a duty to bargain over the layoffs as part of bargaining over the effects of its decision to convert to a digital operation, the judge concluded that effects bargaining is not subject to the overall impasse

[1] On September 14, 2020, Administrative Law Judge David I. Goldman issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. After the briefing period closed, the Acting General Counsel moved for leave to file a supplemental brief. The Board denied that motion by unpublished order.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

While the case was pending before the Board, Judge Goldman was appointed as chief counsel for Member Prouty and served in the role of chief counsel at the time that this case was decided by the Board. Given his involvement in the case before it reached the Board, Chief Counsel-Goldman was recused from, and took no part in, assisting the Board in its consideration of this case.

[2] 362 NLRB 915 (2015), enf. denied 827 F.3d 720 (8th Cir. 2016).

[3] All further references to "the General Counsel" are to former General Counsel Robb, unless otherwise indicated.

rule.[4] Accordingly, the judge rejected the General Counsel's first theory for finding the layoffs unlawful.[5]

As for the complaint's separate allegation that the Respondent violated Section 8(a)(5) of the Act by unilaterally "eliminat[ing] its five shift per week guarantee to [its] paperhandlers David Murrio and David Jenkins," without first bargaining to overall impasse for a successor contract, the judge found that "the allegation of the unlawful elimination of the five-shift guarantee [was] not argued independently in the General Counsel's brief." The judge found that the General Counsel offered no argument or evidence that the five-shift guarantee was eliminated in any way other than by the layoffs of Murrio and Jenkins. Having already found that the layoffs were lawful, the judge dismissed the allegation that the Respondent violated the Act by unilaterally eliminating the five-shift guarantee.

The General Counsel excepted to the judge's failure to analyze the "five-shift guarantee" allegation under *Finley Hospital*, 362 NLRB 915 (2015), enf. denied 827 F.3d 720 (8th Cir. 2016). At the same time, however, the General Counsel also urged the Board to overrule *Finley Hospital*, to find that the five-shift guarantee was not part of the post-expiration status quo, and to dismiss this allegation. While the Respondent agrees that the Board should overrule *Finley Hospital*, the Respondent also argues that, under extant Board law, the five-shift guarantee's durational language waived the Union's statutory right to maintenance of the status quo upon expiration of the collective-bargaining agreement pending agreement on a new contract or overall impasse.

As explained below, we find, contrary to the judge, that the General Counsel's brief to the judge confirmed that the General Counsel had raised two theories of liability under Section 8(a)(5) of the Act, one of which was that the layoffs were unlawful because they constituted a violation of the Respondent's statutory duty to maintain the status quo, which included a guarantee that workers would receive a minimum number of shifts per week. Applicable Board precedent, which we reaffirm today, compels the finding of a violation. Because we find the layoffs unlawful on that basis, we find it unnecessary to address the judge's (and dissent's) conclusion that effects bargaining is not subject to the "overall impasse" rule.[6]

II. FACTS[7]

The relevant facts, set forth more fully in the judge's decision, are as follows. The Union and the Respondent were parties to a collective-bargaining agreement that expired on March 31, 2017. The agreement guaranteed certain named employees five shifts per week. The guarantee did not take effect immediately upon execution of the collective-bargaining agreement; instead, the parties' collective-bargaining agreement provided that the guarantee took effect the first payroll week following the signing of the agreement. The agreement did not explicitly state that the five-shift guarantee would terminate with the expiration of the collective-bargaining agreement. The five-shift guarantee section of the contract provided as follows:

> 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:
>
> 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 . . . .

In an appendix, the collective-bargaining agreement listed 24 unit employees, including paperhandlers David Murrio and David Jenkins, as employees entitled to the five-shift guarantee.

The parties were engaged in negotiations for a successor agreement when, on June 26, 2018,[8] the Respondent

[4] Under the "overall impasse" rule, when parties are engaged in negotiations for a collective-bargaining agreement, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain [about a particular subject]; 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), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[5] As the Respondent notes, despite concluding that the Respondent did not violate the Act, the judge inadvertently indicated at one point that the Respondent had committed an effects-bargaining violation.

[6] For the reasons stated in the judge's decision, we affirm the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) of the Act by failing and refusing to furnish the Union with requested information.

[7] The parties submitted this case to the judge on a stipulated record.

[8] All dates are in 2018 unless otherwise noted.

notified the Union by letter that it was planning to transition to an all-digital format, the first phase of which would entail reducing print publication from 7 days to 5 days per week. The Respondent stated that it planned to implement the reduction in print days beginning August 25. The Respondent offered to discuss the effects of the reduction on the bargaining unit, including layoffs. The parties bargained about the layoffs at their July 25 negotiating session. At the end of the effects-bargaining meeting on July 25, the Union made a severance proposal for laid-off employees. The Respondent told the Union it would consider its proposal. After that meeting, the parties traded communications several times, with the Respondent offering a layoff proposal on August 3 and the Union providing a counter on August 17.

About August 25, the Respondent reduced print days for its newspaper from 7 to 5 days a week as planned, but it refrained from laying off any employees. The parties met again on September 13 and 19 and bargained over the effects of the Respondent's decision to eliminate 2 days per week of print publication. They again exchanged layoff proposals, but they did not reach agreement. The Respondent notified the Union that it intended to lay off paperhandlers Murrio and Jenkins on October 6, and it did so. The parties had not bargained to overall impasse on a successor collective-bargaining agreement before the Respondent laid off Murrio and Jenkins. No extrinsic evidence was offered regarding what the parties intended with respect to the five-shift guarantee after the parties' collective-bargaining agreement expired.

III. ANALYSIS

The administrative law judge did not address the merits of the theory that the layoffs of the two employees covered by the five-shift guarantee were unlawful as a violation of the Respondent's statutory duty to maintain the status quo, which included the guarantee. Rather, the judge dismissed this allegation on the basis that "the allegation of the unlawful elimination of the five-shift guarantee is not argued independently in the General Counsel's brief," and that the General Counsel offered no evidence or argument that the Respondent eliminated the guarantee apart from the layoffs.

A.

We disagree with the judge's basis for dismissing the complaint allegation that the Respondent unilaterally eliminated its five-shift guarantee to the two employees. It is immaterial that the General Counsel's brief to the judge did not argue that the Respondent eliminated the five-shift guarantee apart from the layoffs. What matters, rather, is that the General Counsel did explicitly argue that the layoffs were unlawful because they violated the Respondent's statutory duty to maintain the status quo, which included a guarantee that workers would receive a minimum number of shifts per week. On page 7, the General Counsel's brief to the judge stated (emphasis added):

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

In turn, on page 25, the General Counsel's brief to the judge argued:

> As explained above, current Board law necessitates a finding that Respondent's layoffs of the two unit employees constituted a violation of the statutory duty to maintain the status quo, which included a guarantee that the unit employees receive a minimum number of shifts per week. Therefore, Respondent's failure to abide by Section 10.2, even after the contract expired, violates the Act under *Finley Hospital*. Indeed, the minimum shift guarantee under Section 10.2 is a mandatory subject of bargaining and both laid off paperhandlers were subject to its protections.

Finally, on page 6, the General Counsel's brief to the judge made clear the General Counsel's view that "[t]his case centers on an employer's statutory duty to abide by the status quo and the terms and conditions of a collective bargaining agreement following its expiration."

B.

Having found that the General Counsel preserved the argument that the layoffs constituted a violation of the Respondent's statutory duty to maintain the status quo, which included a guarantee that workers would receive a minimum number of shifts per week, we now turn to the merits of that argument. And consistent with well-settled law, we find a violation of Section 8(a)(5).

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." A fundamental corollary of this rule, established for over 50

years, is that an employer violates Section 8(a)(5) if it unilaterally changes existing terms and conditions of employment under negotiation, "for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

Terms and conditions of employment can continue in effect after the expiration of a collective-bargaining agreement in two ways. First, a contractual term and condition of employment can survive expiration of the collective-bargaining agreement, if the agreement so provides, under normal principles of contract interpretation, as the Supreme Court has held.[9] Thus, the parties can expressly provide in their agreement that a term and condition of employment will continue as a contractual matter, for some period, even after the expiration of rest of the contract.[10]

Second, it has long been black-letter law under the National Labor Relations Act that most terms and conditions of employment that are mandatory subjects of bargaining under Section 8(a)(5) continue in effect after the expiration of a collective-bargaining agreement by operation of law, *even if they do not continue in effect as a matter of contract*. Thus, as the Supreme Court has explained:

> Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract. . . . Under *Katz*, terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them.

Litton, supra, 501 U.S. at 206 (internal citations omitted).[11]

Of course, as the *Finley Hospital* Board explained, a union may waive its statutory right to compel the employer's maintenance of the status quo as to a particular term or condition. 362 NLRB at 916. "However such a waiver, like any waiver of a statutory right, must be 'clear and unmistakable.'" Id., citing *Provena St. Joseph Medical Center,* 350 NLRB 808, 810–812 (2007).[12] Because "'[n]ational labor policy casts a wary eye on claims of waiver of statutorily protected rights' . . . courts may 'not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" *Gannett Rochester Newspapers, v. NLRB*, 988 F.2d 198, 203 (D.C. Cir. 1993) (internal citations omitted). Accordingly, as the Ninth Circuit has pointed out, a waiver of the statutory right to maintenance of the status quo, like a waiver of any other statutory right, must be "clear and unmistakable." *Local Joint Executive Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1079 (9th Cir. 2008). Although, after *Finley Hospital* was decided, the Board decided that it would no longer apply the waiver standard in cases involving employers' unilateral changes *during the term* of a collective-bargaining agreement,[13] the Board has since reaffirmed application of the waiver standard in cases, like this one, involving a unilateral change *after expiration* of the agreement.[14]

[9] *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 203, 206 (1991).

[10] See, e.g., *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585, 586–588 (6th Cir. 1986) (parties agreed that benefits would be paid for 90 days after supplemental agreement's termination).

[11] See also *Honeywell International, Inc. v. NLRB*, 253 F.3d 125, 127 (D.C. Cir. 2001) ("Pursuant to *Katz*, it is generally held that, absent impasse or waiver, 'an employer's unilateral change during the course of a collective bargaining relationship of a matter that is a mandatory subject of bargaining is a *per se* violation of the [NLRA].' . . . 'The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.'") (internal citations omitted); *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994) ("When a collective-bargaining agreement (CBA) expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations."), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999).

[12] In *Provena*, supra, the Board explained that the "clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." 350 NLRB at 811.

[13] In *MV Transportation*, *Inc*., 368 NLRB No. 66 (2019), decided after *Finley Hospital*, a Board majority (with then-Member McFerran dissenting), rejected the Board's 70-year-old waiver standard and replaced it with the "contract coverage" standard. The *MV Transportation* Board explained that, instead of asking whether a contract provision, by its terms, clearly and unmistakably authorized the employer to unilaterally change terms and conditions of employment, the Board will now begin by determining whether the contract "covered" unilateral action, and only if it did not, will the Board proceed to a waiver analysis. Id., slip op. at 2.

[14] In *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 1–4 & fns. 5, 7, 8 (2020), enfd. 4 F.4th 801 (9th Cir. 2021), the Board held that the "contract coverage" standard does *not* apply where, as here, the unilateral changes are made after a collective-bargaining agreement has expired, if the expired agreement did not provide that the employer would retain a relevant right of unilateral action post-expiration. The Board found that the "contract coverage" analysis was inapplicable because the provisions of the parties' expired collective-bargaining agreement did not mention postexpiration conduct at all. Id. The Board further agreed with the judge that the "clear and unmistakable" waiver standard was not satisfied because the employer failed to show that the union knowingly relinquished its bargaining rights. Id. Decisions of the courts are in accord, as a decision of the District of Columbia Circuit illustrates. See *Wilkes-Barre Hospital Co., LLC v. NLRB*, 857 F.3d 364, 377–378 (D.C. Cir. 2017) (noting that "when a particular subject is not 'covered by' a collective bargaining agreement, that agreement generally will not 'clearly and unmistakably waive bargaining over that matter,'" and holding that language in appendix providing that wage

Application of well-settled principles leads to the finding of a violation here. The five-shift guarantee is a mandatory subject of bargaining;[15] it was an established term of employment under the parties' collective-bargaining agreement; and it is not among the categorical exceptions to the *Katz* rule noted in *Litton*.[16] It is therefore clear that the Respondent was barred from unilaterally terminating the five-shift guarantee at the expiration of the collective-bargaining agreement (and thereby laying off employees covered by the five-shift guarantee), absent either an impasse in bargaining with the Union or a waiver by the Union of the right to demand compliance with the guarantee on behalf of bargaining unit employees.[17] Here, the parties stipulated that they were not at an overall impasse. And, as we will explain, the parties' collective-bargaining agreement contains no language clearly and unmistakably waiving the Union's statutory right to maintenance of the five-shift guarantee (unless and until the parties reached an impasse in bargaining or a new collective-bargaining agreement). Accordingly, the Respondent violated the Act by unilaterally failing to abide by the 5-shift guarantee with respect to the two employees.[18]

The Respondent and dissent argue, however, that because the contractual provision setting forth the five-shift guarantee provides that employees were guaranteed five shifts "for the balance of the Agreement, ending March 31, 2017," the guarantee did not survive expiration of the collective-bargaining agreement. But this claim glosses over the fundamental difference between postexpiration *contractual* obligations and postexpiration *statutory* obligations, as imposed by operation of the Act. And it fails to recognize that the contractual language here (1) does not explicitly address the status of the five-shift guarantee after expiration of the collective-bargaining agreement and (2) does not authorize unilateral employer action regarding the guarantee, pending a bargaining impasse or agreement on a new contract.

As we have seen, the core of the contractual provision at issue here reads:

> 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: . . . .

The key language here is the phrase "for the balance of the Agreement, ending March 31, 2017, except. . . ." It is clear that the guarantee, as a contractual matter, was intended by the parties to be in place "for the balance of the Agreement." But the language does not, by its terms, clearly and unmistakably address what happens *after* the "balance of the Agreement" is over—the point at which the Respondent's statutory obligation to maintain the status quo, and the Union's statutory right to insist on maintenance of the status quo, come into play. We read the phrase "ending March 31, 2017" as referring only to "the Agreement" (from which it is set off by commas) and not to the status of the five-shift guarantee itself after expiration of the collective-bargaining agreement pending negotiations for a new agreement (which is dictated by the Act, unless the agreement clearly and unmistakably provides otherwise). Had the latter reference been the parties' intent, different language would surely have been

---

increases "applied '[d]uring the term of th[e] Agreement'" did not clearly and unmistakably waive the nurses' right to postexpiration longevity-based increases and the union's *statutory* bargaining rights, even though the contractual right to longevity-based increases ended with the expiration of the agreement) (citation omitted). Here, the relevant contract section does not provide that the Respondent would retain a relevant right of unilateral action regarding layoffs postexpiration, and so even under *MV Transportation* and *Nexstar*, the clear and unmistakable waiver standard applies.

Members Wilcox and Prouty did not participate in *MV Transportation* and express no view regarding whether it was correctly decided. They agree with Chairman McFerran that the Respondent was not privileged to unilaterally terminate the five-shift guarantee under either the traditional waiver standard or the contract-coverage standard.

[15] See *Des Moines Register and Tribune Co.*, 339 NLRB 1035, 1037 fn. 4 (2003) ("It is well settled that issues relating to unit employees' hours and work schedules are mandatory subjects."), rev. denied 381 F.3d 767 (8th Cir. 2004).

[16] See id. at 1037 fn. 6 ("The employment guarantee here, like most terms and conditions of employment, survived the expiration of the contract in the sense that the [r]espondent was required to maintain the status quo until the parties negotiated a new agreement or bargained in good faith to impasse.").

[17] See *Honeywell International, Inc. v. NLRB*, supra, 253 F.3d at 127–128.

[18] See *United Stockyards Corp.,* 293 NLRB 1, 1–4 & fns. 5 and 9, 6, 8 & fn. 10 (1989) (employer violated the Act by unilaterally implementing, prior to lawful impasse, its proposal to eliminate guaranteed workweek), enfd. 901 F.2d 669 (8th Cir. 1990).

It is undisputed that the Respondent's decision to transition to an all-digital format and eliminate 2 days of print publication per week was a core entrepreneurial decision over which the Respondent had no duty to bargain. This entrepreneurial decision, however, did not alter the terms of its preexisting collective-bargaining agreement with the Union or the resulting postexpiration status quo that it had a statutory obligation to maintain, including the five-shift guarantee, independent of any effects-bargaining obligation.

Because we do not find the Respondent committed an effects-bargaining violation, we need not address the Respondent's contention that the Union engaged in dilatory tactics regarding bargaining over the effects of the Respondent's decision to reduce the number of print days by two. In any case, however, the Respondent has not established, on this record, that union dilatory tactics with respect to bargaining over a successor contract or exigent economic circumstances that compelled prompt action on its part privileged the Respondent to unilaterally alter the established terms and conditions pending agreement on a new contract or overall impasse.

used—and different language certainly is necessary to satisfy the waiver standard that governs here. Contrary to the suggestion of the Respondent and our dissenting colleagues, the agreement did not state that the five-shift guarantee "only remained in effect" until March 31, 2017. Nor did the contract state that the five-shift guarantee "end[s]" or "terminate[s]" on March 31, 2017.[19] Thus, while the language refers to the end date of the contract, it does not clearly and unmistakably speak to the treatment of the guarantee after the contract expires. Notably, the Respondent has offered no extrinsic evidence establishing that the parties agreed that the guarantee terminated—for all purposes, contractual *and* statutory—when the agreement expired. In short, the provision at issue here is properly viewed as language referring to the duration of a collective-bargaining agreement, but not addressing the postexpiration period.

Where, as here, a collective-bargaining agreement is silent regarding the survival of a term and condition of employment upon expiration of the contract, and where, as here, there is no extrinsic evidence of the parties' intent on that issue, the Board has long held (with judicial approval) that general durational language (i.e., language that does not specifically address the postexpiration period) does not suffice to eliminate the duty to maintain the status quo that is imposed by operation of the Act when a contract expires (and does not waive the Union's statutory right to maintenance of the status quo). See *Wilkes-Barre Hospital Co.*, supra, 857 F.3d at 375 (holding that contract language explaining that wage scale and subsequent wage increases set forth in agreement applied "[d]uring the term of th[e] Agreement" addressed only contractual rights, not statutory rights, and that "[w]ithout more, such a general durational clause cannot defeat the unilateral change doctrine."); *NLRB v. General Tire & Rubber Co.*, supra, 795 F.2d at 587–588 (agreeing with the Board that, because agreement providing that benefits would continue for 90 days after supplemental agreement's termination did not address what would happen after that 90-day period, employer violated the Act by unilaterally terminating the benefits after the 90-day period); *KBMS, Inc.*, 278 NLRB 826, 849 (1986) (language providing that pension and welfare fund contributions "shall be made effective as of the date specified in the collective bargaining agreements . . . and said contributions shall continue to be paid as long as a Producer is so obligated pursuant to said collective bargaining agreements" was insufficient to terminate the statutory obligation to continue making payments postexpiration because this language did not deal with the termination of the employer's obligation to contribute to the funds). See also fn. 25, infra.

And, contrary to the additional contention of the Respondent and our dissenting colleagues, the fact that the general durational language here is contained in the specific section of the contract containing the guarantee—instead of just in a separate section specifying the term of the parties' agreement—does *not* establish a waiver and so privilege the employer's unilateral conduct. See id. As the Ninth Circuit has explained, "Although a general durational clause, without more, does not defeat the unilateral change doctrine, . . . *such language within a specific contractual provision does not necessarily establish that the Union bargained away its rights*." *Local Joint Executive Bd. of Las Vegas v. NLRB*, supra, 540 F.3d at 1080 (internal citation omitted) (emphasis added). As the Ninth Circuit further recognized, for purposes of determining whether there is a clear and unmistakable waiver, "[t]he Board's precedent has plainly and consistently distinguished between language that states a particular provision applies 'during' the contract term, and language that states the relevant benefit will 'terminate' at the end of the contract term." Id.[20] Applying that settled precedent, the Ninth Circuit rejected the claim that the parties intended that a particular term (dues checkoff) would not survive expiration of the agreement as a statutory matter pending negotiations, even though there was no contractual language indicating that the term was to continue after expiration of the contract and even though in two different places in the contract specifically dealing with the term in question, there was language expressly providing that it applied during the term of the agreement. See id. at 1075–1082.

In suggesting that extant Board law precludes the finding of a violation here, the Respondent fails to address this authority. Instead, it relies on cases that are distinguishable based on the specific contractual language at issue there. To be sure, in *Cauthorne Trucking*,[21] the Board

[19] The dissent argues, in effect, that the clear meaning of the disputed contractual phrase turns on comma placement: i.e., that "ending March 31, 2017" cannot modify "Agreement" because those words are separated by a comma from "Agreement." Our reading could be correct, the dissent suggests, only if the phrase read "the Agreement ending March 31, 2017." We do not believe that the comma placement in this case is sufficient to establish the Union's clear and unequivocal waiver of its statutory right.

[20] Accordingly, contrary to the dissent, we have not erred in concluding that sec. 10.2 contains "general durational language." In using that phrase, we, like the Ninth Circuit, refer not to the location of the durational language in the contract, but rather to the nature of the durational language, i.e., to language that does not suffice to terminate the *statutory* obligation to maintain the term(s) after expiration of the contract until the parties either agree on a new contract or reach a good-faith impasse in negotiations.

[21] 256 NLRB 721, 722 (1981), enf. granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982).

found that the employer's unilateral refusal to continue payments into the union's pension fund did *not* violate Section 8(a)(5) because the employer was privileged, under the terms of the pension trust fund agreement, to cease payments into that fund after the collective-bargaining agreement expired, notwithstanding the status-quo requirement. However, the Board reasoned that the union had waived both the employees' right to receive the benefits of pension fund contributions and the union's right to bargain regarding an employer's cessation, at the expiration of a contract, of payments into the pension trust fund—absent a renewed agreement to continue such payment—because the pension trust agreement provided that "at the expiration of any particular collective bargaining agreement . . . any Company's obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued." Id. As shown, however, there is no comparable language here establishing that the Respondent's obligation to maintain the five-shift guarantee "terminate[s] unless, in a new collective-bargaining agreement, such obligation shall be continued." Id.[22]

For much the same reason, the Respondent and dissent fare no better in claiming that there would have been no reason to include durational language in the specific section of the contract containing the five-shift guarantee if the parties had intended for the guarantee to survive expiration of the contract as a statutory matter pending agreement on a new contact or overall impasse. Put simply, the same could be said in the Board and circuit cases we have cited, where a waiver claim was rejected notwithstanding that the parties had inserted general durational language in the specific section of the contact dealing with the benefit in question. Here, again, we must keep in mind the difference between the Respondent's contractual obligation and its statutory duty. Contrary to the Respondent and the dissent, our finding that the contractual language does not waive the union's statutory right does not render the durational language superfluous and is consistent with ordinary principles of contract interpretation. We give meaning to the language by finding that for purposes of the Respondent's contractual obligations, the guarantee ended with the collective-bargaining agreement.[23] However, as noted, while the "for the balance of the Agreement, ending March 31, 2017," language fails to create a *contractual* obligation to continue the guarantee after the expiration of the 2014 to 2017 collective-bargaining agreement, the language did not, by its terms, address the separate issue of the Respondent's *statutory* obligations, postexpiration, nor has the Respondent cited any extrinsic evidence on this point.

Indeed, it is the Respondent and the dissent that ignore ordinary principles of contract interpretation in concluding that the parties must have intended for the five-shift guarantee to terminate for statutory (as well as contractual) purposes when the agreement expired. It is long established, in the context of collective-bargaining agreements, as elsewhere, that a contract must be read "in light of the law relating to it when made."[24] In 2014, when the Respondent and the Union entered into the agreement containing the five-shift guarantee, it was well settled that general durational language was *insufficient* to terminate the statutory obligation to maintain established terms upon expiration of the contract.[25] Yet the parties here used only such general language—and not the sort of language that was necessary, under established law, for the Union to waive its statutory right to require the Respondent to maintain the status quo. That language matters, as the Board's cases make clear.[26]

---

[22] Id. The Respondent's reliance on *StaffCo of Brooklyn, LLC*, 364 NLRB 1500, 1501 (2016), enfd. 888 F.3d 1297 (D.C. Cir. 2018), is misplaced. Noting that it "has applied *Cauthorne* narrowly," the *StaffCo* Board found there that the employer *was statutorily* obligated to continue providing pension fund payments upon the expiration of the parties' contract because the pension plan did not expressly authorize unilateral action by the employer upon expiration of the contract. Id. at 1501–1502.

The Respondent's reliance on *Oak Harbor Freight Lines, Inc.*, 361 NLRB 884, 884 (2014) (reaffirming 358 NLRB 328, 340–341 (2012)), enfd. 855 F.3d 436 (D.C. Cir. 2017), is likewise misplaced. As the *StaffCo* Board noted, while the Board found a waiver in *Oak Harbor*—because the union had agreed to language providing that the employer could cancel its pension obligations upon the expiration of the collective-bargaining agreement—the *Oak Harbor* Board affirmed in relevant part the judge's analysis that "the Board will only find a clear and unmistakable waiver of the obligation to continue providing trust payments where there is explicit contract language authorizing an employer to terminate its obligations." 364 NLRB at 1502 (quoting *Oak Harbor*, 358 NLRB at 328 & fn. 2, 340). Such language is lacking here in sec. 10.2 of the parties' collective-bargaining agreement.

[23] Moreover, having specified in the five-shift section of the collective-bargaining agreement that the guarantee took effect the first payroll week after execution of the collective-bargaining agreement, perhaps the parties felt the need to specify that the guarantee nevertheless remained in effect "for the balance of the Agreement, ending March 31, 2017, except under" certain specified circumstances.

[24] *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); accord *Engelhard Corp.,* 342 NLRB 46, 48 (2004), enfd. 437 F.3d 374 (3d Cir. 2006).

[25] See, e.g., *Honeywell International, Inc. v. NLRB*, supra, 253 F.3d at 127–128; *NLRB v. General Tire and Rubber Co.*, supra, 795 F.2d at 587–588; see also *Finley Hospital*, 362 NLRB at 917–918 & fns. 5–6 (collecting cases).

[26] See *Allied Signal, Inc.*, 330 NLRB 1216, 1216–1217, 1229 (2000), review denied sub nom. *Honeywell International, Inc. v. NLRB*, supra, 253 F.3d 125 (D.C. Cir. 2001). There, the Board, noting that negotiators were surely aware of governing law under Sec. 8(a)(5), rejected the claim that the durational clause in an effects-bargaining agreement (which provided that the agreement "shall remain in effect until midnight on June

C.

None of the reasons advanced by the General Counsel, the Respondent, and the dissent for abandoning established law is persuasive. Moreover, reversing precedent would threaten real harm to the process of collective bargaining.

The General Counsel, the Respondent, and the dissent argue that established law is inconsistent with honoring the parties' intent, freedom-of-contract principles, and ordinary principles of contract interpretation. Thus, they contend that established law fails to recognize that when parties specify that a particular provision in a collective-bargaining-agreement applies during the agreement's term, they have *intentionally* precluded the provision from having any force after expiration of the contract.[27]

As already explained, we reject this contention. Under established law, parties are free to agree that particular terms and conditions of employment will not survive expiration of a collective-bargaining agreement, even as a statutory matter. In other words, parties are free to contract around the *Katz*/*Litton* unilateral-change doctrine. Of course, the language of the agreement must clearly convey the parties' intent. When it does, the Board will honor their intent. Indeed, as explained above, two of the cases (*Cauthorne Trucking* & *Oak Harbor*) cited by the Respondent demonstrate that very point.

In contrast, as the *Finley Hospital* Board explained, given the employer's statutory duty to maintain the status quo post-expiration, language that precludes a provision from having any *contractual* force after contract expiration "will not permit a unilateral change of a term established by the same contract unless it *also* amounts to a clear and unmistakable waiver of the union's separate statutory right to maintenance of the status quo."[28] In short, established law simply requires the Board to examine the facts of each case to determine whether parties have, in fact, contracted around their statutory rights and duties. If they have—if the employer has won the union's agreement to a waiver—then the parties' intent is honored.

Indeed, waiver is the proper mode of analysis precisely because the legal issue posed is whether the union has actually agreed to relinquish its *statutory* right to the employer's maintenance of established terms and conditions until bargaining impasse or agreement on a successor contract. In arguing otherwise, the Respondent and our dissenting colleagues fail to acknowledge what makes a collective-bargaining relationship governed by the Act different from other kinds of contractual relationships. Unlike parties to ordinary contracts, who are free to go their separate ways once their contracts expire, parties whose relationship is governed by the Act, and who have entered into a collective-bargaining agreement, are statutorily obligated to bargain in good faith with each other over the terms of a successor agreement and ordinarily are required by operation of law to maintain the status quo after their labor contract expires until overall impasse or agreement, even though they are released from any *contractual* obligations.

Accordingly, the Respondent and the dissenters have the default rule backwards when they suggest that unless the parties' agreement states in explicit terms that a particular provision survives the contract's expiration, it cannot be deemed to survive the agreement's expiration as a statutorily based status quo obligation. Cases under the Act make clear, rather, that a particular provision is deemed to survive—as a statutory matter—unless the agreement explicitly provides otherwise.[29] Similarly, the Respondent's invocation of "[o]rdinary principles of contract interpretation" to support its claim in its cross-exceptions brief that "[p]arties 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" is simply beside the point. It ignores that most terms and conditions of employment do survive expiration of the collective-bargaining agreement by operation of law, the National Labor Relations Act, even if they do not continue as a contractual matter.[30]

6, 1997, but not thereafter unless renewed or extended in writing by the parties") entitled the employer to unilaterally cease providing benefits when the agreement expired.

[27] As noted, the parties' collective-bargaining agreement did not state that the five-shift guarantee *terminates* upon expiration of the collective-bargaining agreement or applied *only* during the term of the agreement.

[28] *Finley Hospital*, 362 NLRB at 917 (emphasis added).

[29] See *Wilkes-Barre Hospital Company, LLC v. NLRB*, supra, 857 F.3d at 378 ("[The] CBA's silence on the [employer's] statutory obligation to continue paying longevity-based increases after the agreement's expiration as part of the status quo is insufficient to establish waiver . . . . While a contract duration clause that expressly authorizes the employer to terminate its statutory obligations upon expiration is sufficient to establish waiver, . . . [the] CBA does not contain such a clause. The durational clause in Appendix A 'makes it clear that the Union's *contractual* right' to longevity-based increases ended on April 30, 2013, but it 'is silent on the Union's [postexpiration] *statutory* rights.'") (internal citations omitted). As a general matter, moreover, it is black-letter law that unions do not forfeit their statutory rights merely by failing to negotiate contractual language that would "redundantly guarantee [them] what the NLRA already provides." *Resorts Intern. Hotel Casino v. NLRB*, 996 F.2d 1553, 1559–1560 (3d Cir. 1993) (union's failure to insist on contractual language entitling it to certain information from employer was not waiver of union's statutory right to same information).

[30] The three cases cited by the Respondent are not to the contrary. In *M & G Polymers USA, LLC v. Tackett*, a case also repeatedly cited by the dissent, the Supreme Court solely addressed whether the parties' expired agreements created a vested right to lifetime, contribution-free health care benefits (for retirees, their surviving spouses, and their

Contrary to the dissent, the Eighth Circuit's divided decision in *Finley Hospital* does not provide compelling reasons to overrule *Finley Hospital* and the precedent on which it is based. To be sure, the Eighth Circuit panel, over a dissent, rejected the Board's conclusion in *Finley Hospital* that the employer was statutorily required to raise wages after the contract's expiration because the contract provided for annual, compounded wage increases on employees' anniversary dates.[31] However, the court did not take issue with the fundamental principle that under the Act, most terms and conditions of employment survive expiration of a collective-bargaining agreement by operation of law, even if they do not survive as a contractual matter.[32] Instead, the court's decision was focused on the facts before it, criticizing the Board for "simply assum[ing] that because the CBA authorized a one-time . . . pay raise, annual . . . raises automatically became part of the status quo that must be maintained during negotiations."[33] In the court's view, "'[t]he critical inquiry [was] whether there existed an established practice or status quo' that created a statutory obligation of compounded, annual raises,"[34] and the court found no such status quo.[35]

The Eighth Circuit's decision does not compel dismissal of the unilateral change allegation here. The record shows that the five-shift guarantee was a sufficiently established practice or status quo term that the Respondent was statutorily required to maintain. The five-shift guarantee was contained in a contract that ran by its terms from November 16, 2014, to March 31, 2017, and, as the judge found, the Respondent maintained the 5-shift guarantee for 18 months *after* the contract expired.[36] No court has interpreted the Eight Circuit's decision as the General Counsel and the dissent do, as standing for the broad proposition that general durational language is sufficient to eliminate an employer's statutory obligation to maintain practices that *are* sufficiently established to constitute terms and conditions of employment. This is not

dependents) as a *contractual* matter. 574 U.S. 427, 430–432, 441–442 (2015) ("*Tackett*"). The *Tackett* Court in no way addressed whether the right to full employer contribution towards the cost of health care benefits continued by *operation of the Act*, much less whether the language of the parties' agreement(s) sufficed to terminate the statutory obligation to maintain the status quo pending impasse or agreement on a successor contract. Put simply, no language in *Tackett* casts doubt on Litton's teaching (501 U.S. at 198–199, 206) that most terms and conditions of employment continue, by operation of law, pending impasse or agreement over a successor contract. The Respondent's reliance on *Auto Workers v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999), is unavailing for precisely the same reason; the *Skinner* court simply did not address whether the language of the parties' agreement(s) sufficed to terminate the statutory obligation to maintain the status quo pending impasse or agreement on a successor contract. The third and final case cited by the Respondent actually undermines the Respondent's position. In *Des Moines Register and Tribune Co.*, the Board found that the employer had a statutory obligation to maintain the status quo even though the General Counsel failed to show that the respondent was contractually obligated to do so. See 339 NLRB at 1037–1038 & fn.6 (2003).

[31] *Finley Hospital v. NLRB*, supra, 827 F.3d at 722, 724.

[32] Id. at 724.

[33] Id.

[34] Id. (citation omitted).

[35] In concluding that there was no such status quo, the *Finley* court did not just rely on the contractual duration language in the pay raise article, which provided that the employer would adjust the pay of employees on their anniversary dates "[f]or the duration of th[e] Agreement," id. at 722, but also stressed that the contract in question had only been in effect for 1 year, and that there had only been a 1-year history of granting raises to employees on their anniversary dates. Id. at 725–726. And the court specifically concluded that 1 year's worth of raises was insufficient to create an established practice of granting employees a pay raise on their anniversary dates. Id. at 725–726. The court therefore held the employer could not be deemed to have changed any established term by declining to grant wage increases on the employees' anniversary dates after expiration of the contract.

[36] See *Prime Healthcare Services–Encino, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB 1791, 1791 & fn. 2, 1799–1780 (2016) (rejecting claim that contractual language entitled employer to unilaterally cease granting anniversary step wage increases at contract's expiration, prior to impasse, in part because employer continued granting those anniversary step wage increases for 7 months after expiration of contract), enfd. 890 F.3d 286 (D.C. Cir. 2018). Although the dissent appears to take issue with the judge's finding that the Respondent maintained the same shifts and work for the paperhandlers for some 18 months after the contract's expiration, the dissent ignores that the Respondent did not except to that finding by the judge, and that the Respondent conceded in its cross-exceptions brief that it did not lay off the two employees (thereby reducing their shifts) until October 6 even though it previously had "eliminated two days of its print publication" back on August 25, and that the reduction of print days eliminated the need for paperhandling functions on a full-time basis. In claiming, in effect, that the Respondent had decided that it had to refrain from laying off employees until it reached impasse over the effects of its decision to eliminate 2 days of print publication on August 25, the dissent simply ignores the unexcepted-to finding that the Respondent had also maintained the same shifts and work for the employees between the time the contract expired on March 31, 2017, and June 26, 2018, when the Respondent first informed the Union that it had decided to eliminate two days of print publication effective August 25, 2018.

Nor do our colleagues advance their cause by pointing to the Respondent's communication to the Union that the five-shift guarantee had expired when the contract expired. That self-serving contention—uttered years after the parties entered into the contract containing five-shift guarantee—falls far short of constituting persuasive evidence of the parties' intent behind the clause when they agreed to it. See *Delaware Coca-Cola Bottling Co v. General Teamsters Local Union 326*, 624 F.2d 1182, 1189 (3d Cir. 1980) (recognizing the danger of relying on post-negotiation evidence "because it may not reflect the parties' intention of the time of the execution of the contract."). Indeed, the Union promptly disputed the Respondent's contention and claimed that the five-shift guarantee continued by operation of law even after expiration of the agreement. In short, the 2018 extrinsic evidence is conflicting, which hardly suffices to establish a clear and unmistakable waiver. See *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524, 530–531 (7th Cir. 1990) (Board reasonably concluded that extrinsic evidence regarding bargaining history and past practices was insufficient to demonstrate a waiver of a statutory right because the evidence was conflicting).

surprising, because such an interpretation would be contrary to precedent.

IV. RESPONSE TO THE DISSENT

We have addressed many of the arguments made by our dissenting colleagues already. We now turn to addressing, first of all, the dissent's arguments that: (1) by requiring the Respondent to maintain the five-shift guarantee status quo pending negotiations on a successor collective-bargaining agreement we have imposed on the Respondent an obligation to which it never agreed, in contravention of national labor policy; and (2) our finding of a violation rests on an unreasonable interpretation of section 10.2, given the language of certain other provisions in the expired contract.

The dissent's arguments flow from mistaken premises. Contrary to the dissent, we have *not* concluded that the layoffs were unlawful based on any finding that the wording of section 10.2 demonstrates that the parties affirmatively agreed that the five-shift guarantee would remain in effect after the contract's expiration. Rather, as discussed at length above, our conclusion—that the elimination of the five-shift guarantee and the resulting layoffs violated Section 8(a)(5) of the National Labor Relations Act—is instead based on the Respondent's breach of the *statutory* duty to maintain the status quo upon expiration of the collective-bargaining agreement, unless and until a bargaining impasse or agreement is reached. The dissent's complaint—that we have unfairly "impos[ed] on the Respondent an obligation to which it never agreed" and "contravened national labor law policy"—ignores the express teaching of the *Litton* Supreme Court that "terms and conditions continue in effect [postexpiration] *by operation of the NLRA [even though t]hey are no longer agreed-upon terms*," to promote the national labor law policy in favor of protecting the right to bargain collectively. *Litton,* supra, 501 U.S. at 206 (emphasis added). It is immaterial that the parties' expired contract does not contain express language affirmatively stating that the five-shift guarantee remains in effect after the contract's expiration. Rather, settled Board and judicial precedent, left undisturbed by the Eighth Circuit's decision in *Finley Hospital*, makes clear that an established term and condition of employment is deemed to survive as a statutory matter unless the agreement explicitly provides otherwise.[37] And, as we have shown, the parties' agreement does not explicitly provide otherwise.

Our dissenting colleagues' remaining arguments are similarly flawed. The dissent makes much of the fact that, unlike the five-shift guarantee section of the collective-bargaining agreement, certain other sections do not reference the end date of the collective-bargaining agreement in linking particular provisions to the duration of the collective-bargaining agreement. Those provisions involve terms that, as a matter of labor law, could not survive expiration of the agreement and so, according to the dissent, a reference to the end date would have been superfluous. Thus, reasons the dissent, by including the contractual end date in the five-shift guarantee provision (where it was not superfluous), the parties can only have intended to terminate the statutory obligation to maintain the five-shift guarantee.

The dissent's argument is unpersuasive. The notion that a waiver can be found solely by applying an interpretive preference against superfluity runs counter to the labor-law principle that "[t]he standard for waiving statutory rights . . . is high" and that "it is the employer's burden to show that the contractual waiver is 'explicitly stated, clear and unmistakable.'" *Local Joint Executive Bd. of Las Vegas v. NLRB*, supra, 540 F.3d at 1079. In addition, our colleagues cite no extrinsic evidence of the parties' intent to terminate the statutory obligation to maintain the status quo.

In turn, the dissent's implicit premise—that the distinction between the language of the five-shift guarantee and other provisions reflects a careful, deliberate, and meaningful choice to avoid superfluity—is refuted by the agreement itself. Based on the dissenters' own reasoning, the parties *did* include "superfluous language" in the very clauses they cite. As the dissent notes, no-strike/no-lockout clauses cannot survive expiration of the contract as a contractual matter absent express language to the contrary. Such provisions are also excluded from the status-quo doctrine (except to the extent other dispute-resolution methods survive contract expiration). Thus, under the dissent's own reasoning, there is superfluous language in article 46 (italicized): "No strike, slowdown, work stoppage or any other interference with or interruption of work shall be permitted *during the term of this Agreement*. Nor shall the Company lock out its employees *during the term of this agreement.*" Under the Act, these mutual promises cannot bind the parties after the agreement expires, and so there is no need to specify that the promises apply during the agreement's term. To borrow the dissent's own question, "when else" would the Union agree to forego the statutory right to strike and when else would the Respondent agree that there would be no lockouts? To the extent that the reference to the agreement's end date in the five-shift

[37] And, contrary to the dissent's related complaint, we have not saddled the Respondent with an obligation to maintain the five-shift guarantee indefinitely. Consistent with settled law, the Respondent's obligation continues only until the parties reach agreement on a new contract or reach a good-faith impasse on a new contract.

guarantee provision is superfluous, it is no more superfluous than the language of article 46. In neither instance does the use of superfluous contract language have any bearing on the underlying statutory rights and duties of the parties under federal labor law. [38]

Finally, we address a series of contentions made solely by Member Kaplan in dissent that are contrary to the judge's findings and the parties' litigating positions. Member Kaplan takes the position that there would be no 8(a)(5) violation here even if the five-shift guarantee remained in effect after the contract expired. He first mistakenly claims that the judge found that "the General Counsel failed to meet his burden of proof to establish that the Respondent reduced any employees' number of shifts prior to the layoffs, let alone that any employees fell below the 5-shift guarantee." Obviously, laying off the two employees did deprive them of the five shifts they had worked up until their layoffs, and the judge did not conclude otherwise. Rather, he found that the shift guarantee ended in a tangible way as result of the layoffs. Member Kaplan's related contention—that it is "nonsensical" to contend that the Respondent was not permitted to unilaterally lay off employees if they were covered by the five-shift guarantee—neglects the Respondent's concession to the contrary.[39] Finally, Member Kaplan asserts that the layoffs were the "direct effect of the Respondent's lawful decision" to reduce the number of print publication days. Insofar as this is a contention that the layoffs were the inevitable consequence of that decision, and that therefore the Respondent had no duty to bargain over the layoffs, we necessarily reject it, as did the judge, given the Respondent's failure to except.

V. CONCLUSION

Overruling *Finley Hospital* and the wealth of other precedent that requires finding a violation here would do real harm to the National Labor Relations Act's policy of encouraging the practice and procedure of collective bargaining. It is hard to bargain over terms and conditions of employment if, during negotiations for a new agreement, an employer is free to change the very terms and conditions that are being discussed.[40] That is why the status quo doctrine is part of an employer's duty to bargain under Section 8(a)(5). Yet, under the regime sought by the former General Counsel, the Respondent, and the dissent, after a contract expires, employers would be free to unilaterally change their employees' terms and conditions of employment during negotiations over those very terms and conditions, based on contract language that does not specifically address the postexpiration period and that cannot fairly be read as a waiver of the union's right to insist that the employer maintain the status quo during negotiations for a successor agreement. Because the former General Counsel, the Respondent, and the dissent have offered no good reason for making such a deleterious seachange in the law, we decline to do so.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally terminating the five-shift guarantee as described in section 10.2 of the expired 2014–2017 collective-bargaining agreement, we shall order it to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, we shall order the Respondent to rescind the unlawful change and reinstate the five-shift guarantee until an agreement has been reached with the Union or a lawful impasse in negotiations for a new collective-bargaining agreement occurs. As the Respondent unilaterally laid off employees David Murrio and David Jenkins who were covered by the five-shift guarantee, we shall further order the Respondent to offer David Murrio and David Jenkins immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights. The Respondent shall also make whole these employees for any loss of earnings and other benefits they may have suffered by reason of its unilateral action. Backpay shall be computed in a manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New*

[38] The dissent claims that the inclusion of clause-specific durational language in Article 46 is not superfluous because the language can serve a useful purpose. Thus, the dissent notes that no-strike/no-lockout clauses can survive contract expiration and form part of the status quo under certain limited circumstances (namely when, to quote the dissent, "other dispute resolution methods survive contract expiration"). But the dissent ignores its concession just one paragraph earlier that those limited circumstances were not present in this case. Thus, art. 46 does contain superfluous language based on the dissent's own reasoning. In any event, the dissent cites no extrinsic evidence to support its claim that the parties drafted art. 46 and sec.10.2 in the manner they did for the reason the dissent suggests. At bottom, our colleagues are left with nothing but speculation about what the parties intended the general durational language in sec. 10.2 to mean with respect to the statutory duty to maintain the status quo post-expiration, which falls far short of satisfying the clear and unmistakable waiver standard.

[39] Thus, the Respondent acknowledged in its cross-exceptions brief (p. 27) that sec. 10.2 "limit[ed]" the Respondent's ability to lay off employees "insofar as it allowed a five-shift markup guarantee to named employees," and simply contended that the five-shift markup guarantee did not survive expiration of the contract.

[40] *Litton*, supra, 501 U.S. at 198.

Horizons , 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB 1153 (2016), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. In accordance with our recent decision in *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), we shall also order the Respondent to file with the Regional Director a copy of each backpay recipient's W-2 forms reflecting the backpay award. The Respondent shall also be ordered to expunge from its files any reference to employees' loss of employment and to notify the affected employees in writing that this has been done and that the loss of employment will not be used against them in any way. We shall also order the Respondent to post an appropriate notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010) and *Paragon Systems*, *Inc.,* 371 NLRB No. 104 (2022).

ORDER

The National Labor Relations Board orders that the Respondent, PG Publishing Co., Inc., d/b/a Pittsburgh Post-Gazette, Clinton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Graphic Communications International Union, GCC/International Brotherhood of Teamsters Local 24M/9N (the Union) as the exclusive collective-bargaining representative of employees in the following bargaining unit:

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

(b) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on October 6, 2018, and maintain it in effect until an agreement has been reached with the Union or a lawful impasse in negotiations for a new collective-bargaining agreement occurs.

(c) Within 14 days from the date of this Order, offer David Murrio and David Jenkins full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make David Murrio and David Jenkins whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral elimination of the five-shift guarantee, in the manner set forth in the remedy section of this decision.

(e) Compensate David Murrio and David Jenkins for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) File with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter, notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its facility in Clinton, Pennsylvania, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 2018.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 21, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN and RING, dissenting in part.

As a step in its plan to become an exclusively digital news organization, the Respondent made an entrepreneurial decision to stop publishing print editions of *The Pittsburgh Post-Gazette* on Tuesdays and Saturdays. Many newspapers have made similar decisions in recent years in response to the changing realities of the news business.[1] No party contends that the Respondent had a duty to bargain over this decision, as a result of which there would be less work for its pressroom employees to do. The Respondent notified the Union representing its pressroom employees of its entrepreneurial decision, bargained in good faith over the effects of the decision, including by making a layoff proposal, and, after lengthy negotiations failed to result in an agreement, implemented that proposal by laying off two pressroom employees.[2] All this happened in 2018, after the parties' most recent collective-bargaining agreement had expired.

By any reasonable measure, the Respondent satisfied its duty to bargain under the Act, and this is so even though the Union repeatedly rejected the Respondent's effects-bargaining proposals. The majority, however, sees things differently. They point to section 10.2 of the parties' expired 2014–2017 collective-bargaining agreement (Agreement), which relevantly stated: "Effective the first payroll week following the signing of the collective bargaining

[41] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See, e.g., Don Seiffert, "Gannett to Stop Saturday Print Editions at 136 Newspapers Nationwide," *Boston Business Journal* (Jan 12, 2022; updated Jan. 13, 2022), https://www.bizjournals.com/boston/news/2022/01/12/gannett-to-stop-saturday-print-editions-at-136-new.html; Jim Friedlich, "A Newspaper Renaissance Reached by Stopping the Presses," *NeimanLab*, https://www.niemanlab.org/2020/12/a-newspaper-renaissance-reached-by-stopping-the-presses/ (last visited May 10, 2022).

[2] The complaint does not allege that the Respondent implemented the layoff without first bargaining to lawful impasse in effects bargaining. On exceptions, the General Counsel argues for the first time that the parties were not at impasse in effects bargaining. But the complaint does not so allege, and the General Counsel did not argue to the judge that the Respondent had acted without first reaching impasse in effects bargaining or that a violation should be found on that basis. Consequently, the General Counsel's argument is untimely and, as such, deemed waived. See, e.g., *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 fn. 2 (2017).

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."[3] They start from a premise that the five-shift guarantee was part of the post-expiration status quo (despite sec. 10.2's statement that the guarantee was effective "for the balance of the Agreement, ending March 31, 2017"). The majority then examines that clause-specific durational limitation and finds that it does not "clearly and unmistakably" waive the Union's "*statutory* right to the employer's maintenance of" the five-shift guarantee (emphasis in original). Therefore, they conclude that the guarantee remains in effect until the parties reach "bargaining impasse or agreement on a successor contract." As a result, they order the Respondent to reinstate the two laid-off pressmen, pay them years of backpay, and retain them on its payroll until the parties reach impasse in bargaining for a successor agreement.

This unreasonable result is based on a flawed analytic approach and on an equally unreasonable interpretation of the Agreement, for all the reasons explained below. Indeed, the majority's decision is strikingly similar to *Finley Hospital*,[4] where the Board disregarded similar durational language in an expired contract. There, a Board majority held that the employer was required to continue, indefinitely, granting unit employees annual 3-percent wage increases based on language in an expired agreement providing for such increases "[f]or the duration of this Agreement. . . ." In reaching this result, the majority in *Finley Hospital* relied on precisely the same reasoning employed by the majority here by asking whether the union expressly waived a statutory right. The Eighth Circuit rejected this overreach, persuasively explaining that the issue was one of contract interpretation and that the Board had failed to properly interpret the relevant contract language.[5]

In our view, the Board should overrule *Finley Hospital* and adopt the analysis used by the Eighth Circuit. That analysis neither ignores clause-specific durational language nor finds that such language necessarily means that the provision ceases to apply as part of the postexpiration status quo. Instead, it requires the Board to analyze such language using the same tools of contract interpretation that apply in other settings. Under that standard, the Respondent's implementation of the layoffs was lawful.

The majority, however, reaffirms *Finley Hospital*, unreasonably interprets section 10.2 of the expired contract, and saddles the Respondent with an obligation to employ pressmen who have no work to perform. This result undermines collective bargaining by giving employees a right the Union did not negotiate for them, and by imposing on the Respondent an obligation to which it never agreed. And it contravenes the national labor policy established by Congress, which provides for a system of "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Accordingly, we respectfully dissent.[6]

Background

The Respondent's pressmen have been represented by the Union for many years. The parties' most recent agreement, which was effective by its terms from November 16,

[3] The two pressroom employees selected for layoff were both "listed by name" in an appendix to the Agreement.

[4] 362 NLRB 915 (2015), enf. denied in relevant part 827 F.3d 720 (8th Cir. 2016).

[5] *Finley Hospital v. NLRB*, 827 F.3d 720 (8th Cir. 2016). Our colleagues repeatedly assert that we have conceded, implicitly or otherwise, that "well-settled law" compels finding a violation here. That is not the case. We have neither made any such concession nor do we agree that their decision is compelled by "well-settled law." Currently, no court of appeals has enforced a decision relying on the *Finley Hospital* rationale. Given that, the law is hardly "well-settled."

[6] We join our colleagues in adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to provide information requested by the Union.

In dissenting from the majority's finding of a violation here, Member Kaplan agrees with the judge's finding that the General Counsel failed to meet his burden of proof to establish that the Respondent reduced any employees' number of shifts prior to the layoffs, let alone that any employees fell below the five-shift guarantee. This case was decided on a stipulated record. Although the General Counsel cites ¶ 22 of the parties' stipulation for the assertion that the Respondent reduced the two laid-off employees' shifts on August 25, that fact is not set forth in the stipulation. Rather, ¶ 22 states that "About August 25, 2018, Respondent reduced print days for its newspaper by two days a week." Member Kaplan agrees with the judge that the parties' stipulation of facts is silent on whether Respondent reduced any employees' shifts, at any time, prior to the layoffs. In fact, the only mentions of the shift guarantee in the submitted documents are instances in which representatives of the Union asserted that the Respondent was not permitted to lay off any pressmen who were entitled to a five-shift guarantee. That, of course, is nonsensical. The fact that an employee enjoys certain terms and conditions of employment while employed, such as sick leave or health insurance or a guaranteed number of shifts, does not mean that they cannot be laid off, nor does the cessation of any such terms and conditions of employment as a result of that employee being laid off constitute an unlawful unilateral change. Accordingly, Member Kaplan would find that the General Counsel failed to establish that the Respondent made any unlawful unilateral change with respect to the five-shift guarantee, even assuming that the guarantee did survive contract expiration.

In the alternative, Member Kaplan agrees with the reasoning set forth in this dissenting opinion.

Member Kaplan also notes that to the extent that his colleagues base their decision on conclusions that the layoffs at issue resulted from an alleged reduction in shifts, rather than being a direct effect of the Respondent's lawful decision to reduce its operations, and therefore assert that the layoffs were subject to decisional rather than effects bargaining, he does not believe those conclusions can be reconciled with common sense.

2014, until March 31, 2017, included the following provision:

> 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 markup each payroll week for the balance of the Agreement, ending March 31, 2017, except under the following circumstances:
>
> a. Layoffs to reduce the force shall not be made until the Company notifies the Union ten (10) days in advance of such layoffs. Layoffs to reduce the force may be made if the same are economically necessary and no reasonable alternative exists. In the event the Union contends that reasons other than economy have 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. . . .

Appendix 1 to the Agreement lists by name 24 employees who were guaranteed a five-shift markup pursuant to Section 10.2.

After the Agreement expired on March 31, 2017, the parties engaged in negotiations for a successor collective-bargaining agreement. No successor agreement had been reached as of June 26, 2018, when the Respondent notified the Union that it "ha[d] decided that becoming a digital news organization is our future." The letter described the growth of digital and social media platforms and stated that the Respondent was going to "begin to reduce our print operations," starting with the elimination of two days of print operations beginning August 25, 2018. The Respondent offered to meet to "discuss the effects our decision will have on your bargaining unit." As more fully described in the judge's decision, the parties thereafter engaged in months-long effects bargaining about the necessity of a layoff, how many employees would be laid off and when, selection criteria, the formula for calculating severance pay, and the duration of continuing healthcare coverage. Significant concessions were made by both parties before their positions eventually hardened, and the Respondent made a best and final offer on September 20, 2018. The Union tacitly rejected that offer and declined to make any further counterproposal. On October 6, 2018—6 weeks after August 25, when the Respondent stopped publishing a print newspaper on Tuesdays and Saturdays—the Respondent laid off paperhandlers David Jenkins and David Murrio consistent with its best and final offer. At that time, the parties had not reached overall impasse in their negotiations for a new collective-bargaining agreement.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off Jenkins and Murrio on about October 6, and by eliminating the five-shift guarantee—allegedly part of the postexpiration status quo—as to those two employees on about August 25. The General Counsel argued to the judge that the Respondent had a duty to bargain to overall impasse in negotiations for a new collective-bargaining agreement (rather than merely overall impasse in the effects bargaining) before it lawfully could take those actions.

The judge dismissed the complaint in its entirety. Relying on longstanding Board law,[7] he reasoned that because the layoff was an effect of a nonbargainable decision, the Act required the Respondent to bargain to impasse or agreement in the effects bargaining, not the successor-contract negotiations, before it could lay off the two paper handlers. The judge correctly explained that "the General Counsel's theory of violation does not survive the rejection of the argument that [the Respondent] had to bargain to overall impasse in contract negotiations" because "the General Counsel attributes no other infirmity to [the Respondent's] bargaining or implementation." In other words, the General Counsel had not argued that the Respondent had implemented the layoff without first reaching impasse in the effects bargaining. Accordingly, the judge dismissed the allegation that the Respondent violated the Act by laying off Jenkins and Murrio on October 6.[8]

The judge also dismissed the complaint's separate-but-related allegation that the Respondent had violated Section 8(a)(5) by eliminating its five-shift guarantee to Jenkins and Murrio on or about August 25, 2018. The judge noted that August 25 was the date the Respondent reduced its print publication days, but the reduction had no effect on unit employees until the October 6 layoff. Because that layoff was the only conduct alleged to have eliminated the five-shift guarantee and because he had found the layoff was not unlawful, the judge dismissed the allegation that

[7] *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

[8] The majority finds it unnecessary to pass on this portion of the judge's decision.

the Respondent had violated the Act by eliminating the five-shift guarantee.[9]

Discussion

During the term of a collective-bargaining agreement, the parties have a contractual obligation to adhere to its terms. When the contract expires, this contractual obligation normally terminates. *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 441–442 (2015) (*Tackett*) ("[C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.") (quoting *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207 (1991) (internal quotation marks omitted)); *Finley Hospital v. NLRB*, 827 F.3d at 725. As the Board has explained, "this principle applies with equal force to contractual *rights*, including provisions granting the employer the right to act unilaterally." *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 3 (2020) (*Nexstar*), enfd. 4 F.4th 801 (9th Cir. 2021). And "[d]uration is an important limit to any contractual right or obligation, as the Supreme Court clearly held in *Litton* and *Tackett.*" Id. Although the parties may agree that a particular provision survives the contract's expiration, any such agreement must be stated in "explicit terms." Id.

After a collective-bargaining agreement expires, the parties have a statutory duty to maintain existing terms and conditions of employment, typically until they reach agreement on a successor contract or arrive at an overall impasse in negotiations. *NLRB v. Katz*, 369 U.S. 736 (1962). Unilaterally changing the status quo while negotiations are ongoing is an unfair labor practice unless an exception to the overall-impasse rule applies. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). As with contractual obligations during the term of a collective-bargaining agreement, the substantive terms an employer must maintain, on statutory grounds, after the agreement expires are determined by "ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *Finley Hospital v. NLRB*, 827 F.3d at 725 (quoting *Tackett*, 574 U.S. at 435) (internal quotation marks omitted); accord *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364, 374 (D.C. Cir. 2017) (explaining that "the terms of the expired agreement define the post-expiration status quo").

I. THE FIVE-SHIFT GUARANTEE DID NOT SURVIVE THE EXPIRATION OF THE AGREEMENT

When the principles set forth above are applied to the facts of this case, obvious conclusions follow. During the term of the Agreement, the Respondent was contractually obligated to guarantee the employees listed in Appendix 1 to the Agreement five shifts per week. That contractual obligation ended when the Agreement expired because contractual obligations terminate when the agreement that contains them expires absent language stating otherwise in "explicit terms." *Nexstar*, 369 NLRB No. 61, slip op. at 3. The Agreement contained no such language. The majority does not dispute this point.

After the Agreement expired, the Respondent was statutorily obligated to maintain the status quo during negotiations for a new agreement. But that status quo obligation did not include the five-shift guarantee. This is so because section 10.2 explicitly stated that the employees identified in Appendix 1 "shall be guaranteed a five (5) shift markup each payroll week *for the balance of the Agreement, ending March 31, 2017* . . . " (emphasis added). This language doubly reinforces the durational limitation of the five-shift guarantee: not only did the guarantee apply only "for the balance of the Agreement," but section 10.2 also set a specific end date for the five-shift guarantee, "March 31, 2017." This durational language is properly interpreted to terminate the five-shift guarantee for statutory purposes, for two reasons. First, that is the only interpretation of article 10.2 that avoids making its specific durational language superfluous. The *contractual* obligation to maintain the five-shift guarantee terminated March 31, 2017, pursuant to the Agreement's *general* duration clause providing that the Agreement was effective from November 16, 2014, until March 31, 2017. If the separate and specific durational language of Article 10.2 were not intended to bear upon the postexpiration status quo, then it does nothing—and failing to give it effect in determining whether the five-shift guarantee is part of that status quo would contravene the principle that an "interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable."[10] Second, interpreting the separate durational language in Section 10.2 to reflect that the five-shift guarantee did not constitute the postexpiration status quo renders section 10.2 consistent with all

[9] This was not a dismissal on "procedural grounds," as the majority contends. The judge dismissed the allegation on the merits after finding that the Respondent did not unilaterally eliminate the five-shift guarantee by laying off Jenkins and Murrio.

[10] 11 *Williston on Contracts* § 32:5 (4th ed.); accord *Restatement (Second) of Contracts* § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (It is a "cardinal principle of contract construction[ ] that a document should be read to give effect to all its provisions and to render them consistent with each other."); *Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 370 NLRB No. 71, slip op. at 3 (2021) (*Asociacion de Empleados*) (quoting *Mastrobuono*).

other provisions in the Agreement that contained separate durational language. None of those other provisions with clause-specific durational language survived expiration of the Agreement for any purpose, contractual or statutory.[11]

This interpretation is also consistent with the Eighth Circuit's decision in *Finley Hospital v. NLRB*, supra. The issue there was whether an employer had unilaterally altered the status quo established by an expired collective-bargaining agreement when it kept the unit employees' wages right where they were when the agreement expired. The parties' 1-year agreement contained the following provision:

> [Article] 20.3 Base Rate Increases During Term of Agreement.
>
> For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement, will be three (3) percent.
>
> If a Nurse's base rate is at the top of the range for his/her position, and the Nurse is not on probation, such Nurse will receive a lump sum payment of three (3) percent of his/her current base rate.

Finley Hospital, 362 NLRB at 915–916 (brackets and ellipsis omitted). Applying "ordinary principles of contract law," the court held that "the plain language of the CBA d[id] not . . . provide for periodic wage increases or annual raises; rather, the language set[] forth a straight forward [sic], singular pay increase on a particular day during the one-year contract."[12] *Finley Hospital v. NLRB*, 827 F.3d at 725. As the court further explained, the employer's postexpiration obligation to maintain the status quo was defined by the substantive terms of the expired agreement, including article 20.3's limiting durational language. "One cannot separate the one-year term limit from the pay raise obligation," the court explained. Id. Therefore, the nurses' rate of pay at the time the agreement expired, not continued 3-percent annual pay raises, was the status quo.

In reaching this decision, the court squarely rejected a decision by a divided Board finding that the employer had unilaterally changed the status quo. The Board majority held that article 20.3 of the expired agreement made ongoing, annual 3-percent raises the status quo. The Board reasoned that the language in that article limiting such raises to the term of the contract applied to the parties' *contractual* rights, but it failed to clearly and unmistakably waive the union's *statutory* right to the continuation of annual increases under the postexpiration status quo.[13] As

[11] There were three such provisions: art. 2, art. 4, and art.46. Art. 2 relevantly provided that "[i]t is agreed that as a condition of employment all employees within the unit who are presently members of the Union shall maintain membership in the Union in good standing during the term of this Contract." Art. 4 repeated that clause verbatim. Art. 46 provided that "[n]o strike . . . shall be permitted during the term of this Agreement," and "[n]or shall the Company lock out its employees during the term of this agreement." No-strike and no-lockout clauses are excluded from the unilateral-change doctrine, except to the extent other dispute-resolution methods survive contract expiration. *Litton*, 501 U.S. at 199. Here, the Agreement's arbitration clause did not provide that it would survive expiration, and art.46's specific durational limitation made clear that its no-strike and no-lockout provisions would not constitute part of the postexpiration status quo. As for arts.2 and 4, union-security clauses terminate for all purposes with the expiration of the contract. Id.

Our colleagues argue that "[t]o the extent that the reference to the agreement's end date in the 5-shift guarantee is superfluous, it is no more superfluous than the language of Article 46 [the no-strike/no-lockout provision]." But, as just explained, no-strike/no-lockout clauses can survive contract expiration and form part of the status quo under certain limited circumstances. Accordingly, the inclusion of clause-specific durational language in art. 46 can serve a useful purpose. In any event, using the canon against surplusage in analyzing how sec. 10.2 limits the effective period of the five-shift guarantee and thereby defines the status quo is proper even accepting that the expired agreement contains some superfluity elsewhere. See *Brazil v. Auto-Owners Insurance Co.*, 3 F.4th 1040, 1043 (8th Cir. 2021) ("The canon against surplusage does not require [a tribunal] to read a contract in a way that contains no surplusage."); *Restatement (Second) of Contracts* § 203 cmt. B ("The preference for an interpretation which gives meaning to every part of an agreement does not mean that every part is assumed to have legal consequences. . . . Stipulations against particular legal consequences are not uncommon.").

What is relevant, however, is that in every other instance where the parties used clause-specific durational language similar to that in sec. 10.2, the language was intended to convey that the clause ceased to apply as a contractual matter *and* for purposes of the postexpiration status quo. See *Farmers Group, Inc. v. Geter*, 620 S.W.3d 702, 709 (Tex. 2021) ("Words used in one sense in one part of a contract are, as a general rule, deemed to have been used in the same sense in another part of the instrument, where there is nothing in the context to indicate otherwise." (internal quotation marks omitted) (cited favorably in 11 *Williston on Contracts* § 32:6)).

[12] As the court noted, resolution of that issue turned on the proper interpretation of the contract, an issue on which the Board's findings are owed no deference. See *Litton*, 501 U.S. at 202–203 ("Section 301 of the Labor Management Relations Act 'authorizes *federal courts* to fashion a body of federal law for the enforcement of . . . collective bargaining agreements.' We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract . . . . We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under § 301." (quoting *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957) (emphasis and first omission in original) (internal citation omitted))).

[13] *Finley Hospital*, 362 NLRB at 916–917. Dissenting, Member Johnson explained that the issue was not one of waiver but of properly defining the status quo the employer "was obligated to maintain pending bargaining for a successor contract," and that the post-expiration status quo "is defined by 'the contract language itself,'" including its durational language. Id. at 926 (quoting *Intermountain Rural Electric Assn. v. NLRB*,

noted, the Eighth Circuit rejected this analysis and the conclusion drawn by the Board based on that analysis.

The Board should learn from this experience. Instead, the majority doubles down. Tracking the Board's decision in *Finley Hospital* at every point, the majority asserts that section 10.2 guarantees employees five shifts per week for the balance of the Agreement as a contractual matter but does not address what happens after the Agreement expires. They contend that durational language in section 10.2 served only to modify the term *Agreement*—that is, to identify the agreement referenced there as the one that ends on "March 31, 2017." They further assert that their interpretation of section 10.2 gives meaning to its separate durational provision "by finding that for purposes of the Respondent's contractual obligations, the guarantee ended with the collective-bargaining agreement." But, they claim, the durational clause does not affect the Respondent's status-quo obligation because it was not sufficiently clear and express to pass muster under a waiver standard. Finally, they assert that overruling the Board's decision in *Finley Hospital* would threaten harm to the collective-bargaining process by making it too easy for contractual provisions to limit the parties' postcontract status-quo obligations. The majority concludes by claiming that nothing in the Eighth Circuit's decision in *Finley Hospital* "compel[s] dismissal of the unilateral change allegation," even though the court expressly rejected the very analysis they apply here. As shown below, the majority's position is unsupportable.

To begin with, the majority's interpretation of section 10.2 is simply unreasonable. It is absurd to read the durational clause in that provision as identifying the agreement that is being referred to. There *were* no other agreements—and certainly no other capital-A Agreements—that "the Agreement" could possibly reference. The majority provides no satisfying answer to the question of why, out of at least a dozen references to "the Agreement" appearing throughout the contract, the parties would feel the need to insert here, and only here, the termination date of March 31, 2017, to clarify that "the Agreement" means the Agreement. Moreover, to reach their nonsensical interpretation, the majority silently omits the comma that precedes the phrase "ending March 31, 2017."[14] That is, the majority reads section 10.2 as providing the five-shift guarantee "for the balance of the Agreement[] ending March 31, 2017." Only by omitting the comma would the phrase "ending March 31, 2017" modify "the Agreement." That is not what it says; as written, "ending March 31, 2017" refers *to the five-shift guarantee*.[15]

This interpretation is reinforced by the Ninth Circuit's decision in *Local Joint Executive Bd. of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008), a case on which the majority relies. There, the court observed that the Board has "distinguished between language that states a particular provision applies 'during' the contract term, and language that states the relevant benefit will 'terminate' at the end of the contract term. . . . [W]here the provision states that the benefit will 'terminate' . . . the Board [has] found a clear and unmistakable waiver." Id. at 1080. Section 10.2 does not state that the five-shift guarantee applies during the contract term; rather, it provides that the five-shift guarantee was to "end[]"—i.e., terminate—on March 31, 2017. Hence, the guarantee did not carry forward as part of the postexpiration status quo.[16]

984 F.2d 1562, 1567 (10th Cir. 1993)). Observing that the durational language contained in Article 20.3 of the expired agreement clearly limited the employer's obligation to grant annual 3-percent wage increases to the term of the agreement, Member Johnson charged that the majority had "effectively delet[ed]" that durational language and improperly made "a time-bound obligation into a perpetual one." Id.

[14] Member Ring notes that, ironically, this case arises in an industry known for shunning unnecessary commas. See June Casagrande, "A Word, Please: Commas Come Under Scrutiny," *Los Angeles Times* (March 30, 2017) available at https://www.latimes.com/socal/glendale-news-press/opinion/tn-blr-me-aword-20170330-story.html ("Newspaper editors, conscious of the cost of ink and paper, have traditionally leaned toward fewer characters. . . . So it's not surprising the Associated Press Stylebook tells newspaper editors not to use serial commas . . . .").

[15] To the extent that our colleagues suggest that punctuation should be disregarded, we note that it is well established that consideration of the punctuation used in an agreement is essential to interpreting parties' intent. See Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 162 (2012) ("As is the case with other indications of meaning, the body of a legal instrument cannot be found to have a 'clear meaning' without taking account of its punctuation."); accord *O'Connor v. Oakhurst Dairy*, 851 F.3d 69, 69 (1st Cir. 2017) (finding the interpretation of a statutory provision to determine whether drivers fell within scope of exemption from Maine overtime law turned on the absence of an Oxford comma); *Criswell v. European Crossroads Shopping Center, Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990) ("Although it is well settled that the words contained in the instrument, and not the punctuation, should be the controlling guide in construing the instrument, there is no rule which requires courts to disregard all punctuation and look solely to the language of the instrument. Punctuation aids in construing the words used in the instrument.") (internal citation omitted).

[16] *Wilkes-Barre Hospital v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017), cited by the majority, is not to the contrary. There, the provisions in an expired collective-bargaining agreement required the employer to pay across-the-board wage increases on three specific dates and longevity-based wage increases as employees advanced from one experience level to the next. There was no durational limitation in either of the contract clauses creating those obligations. An appendix to the collective-bargaining agreement contained a chart illustrating the wage rates on various dates for each experience level. The chart stated that it set forth employees' wage rates "[d]uring the term of this Agreement." In that context, the court found that the longevity-based increases constituted the post-expiration status quo despite the appendix's durational language. In doing so, the court found that "[t]he longevity-based increases, unlike the across-the-board raises, were tied to an individual nurse's anniversary date, not to the term of the agreement." 857 F.3d at 375. Unlike in *Wilkes-Barre Hospital*, here sec. 10.2 of the expired agreement contained

Nor is there any merit to the majority's claim that their interpretation gives meaning to the separate durational provision in Section 10.2 by finding that it terminates the Respondent's contractual obligation to guarantee certain employees five shifts a week.[17] The Agreement's general durational clause in article 1 and the absence of express language providing that the five-shift guarantee would survive the Agreement's expiration extinguished any contractual obligation under well-settled Supreme Court and Board precedent. See *Tackett*, 574 U.S. at 441–442; *Litton*, 501 U.S. at 207; *Nexstar*, 369 NLRB No. 61, slip op. at 3.[18] The majority's implicit finding that the contractual obligation would have continued postexpiration absent the additional durational provision of section 10.2 cannot be reconciled with this longstanding precedent.

The majority's treatment of the Eighth Circuit's decision in *Finley Hospital v. NLRB* fares no better. Contrary to the majority, the court's decision did not merely "criticiz[e] the Board for 'simply assum[ing] that because the CBA authorized a one-time . . . pay raise, annual . . . raises automatically became part of the status quo that must be maintained during negotiations.'" Rather, the court squarely held that *whether* continuing wage increases were part of the postexpiration status quo was to be determined by applying "ordinary principles of contract law," 827 F.3d at 725—*not* the waiver analysis the majority prefers. Id. And under those "ordinary principles of contract law," the provision in the expired agreement stating that the nurses would receive a 3-percent raise "[f]or the duration of this Agreement" meant what it said: "each nurse gets one 3% raise on one date during the year that the CBA is in effect." Id. To be sure, the court also found that the parties' past practice did not independently support a finding that continued increases were part of the status quo, and our colleagues would have us believe that this finding was the primary basis of the court's decision. To the contrary, the court primarily focused on the issue of contract interpretation, and its interpretation of the parties' agreement for the purpose of defining the post-expiration status quo is irreconcilable with the Board's analysis in *Finley Hospital* and the majority's analysis here.[19]

Finally, we strongly disagree with the majority's position that its preferred waiver standard is necessary to protect the collective-bargaining process. To be sure, if a particular term in an expired contract is part of the status quo, the Board properly requires evidence sufficient to establish that a party has waived its statutory right to the continuation of that term. But the issue here requires the Board to determine *whether* a particular term *is* part of the status quo.[20] In our view, making that determination by applying ordinary principles of contract law best serves the collective-bargaining process because applying those

specific durational language that did tie the five-shift guarantee to the term of the agreement. Furthermore, sec. 10.2 did not state that the guarantee shall last for the duration of the agreement, but affirmatively stated that the guarantee shall "end[]" on a date certain. See *Local Joint Executive Bd. of Las Vegas v. NLRB*, 540 F.3d at 1080 ("[W]here the provision states that the benefit will 'terminate' . . . the Board [has] found a clear and unmistakable waiver.").

[17] The majority also errs in suggesting that the parties may have felt the need to specify that the five-shift guarantee remained in effect for the Agreement's duration because it came into force the first payroll week after the Agreement's effective date. Our colleagues are really reaching here, which itself confesses the implausibility of their analysis. The five-shift guarantee could not take effect immediately. Section 10.2 was intertwined with art. 13, which provided that markups—i.e., the preparation of the work schedule identifying which employees were assigned to each shift—were to take place on Friday for the following payroll week. Thus, the guarantee could not take effect until the week that followed the first Friday after the Agreement's effective date. In any event, *when else could the guarantee end?* If speculation that language may have been added to assuage vague concerns that a contract might otherwise be misinterpreted in some unspecified manner suffices, then the rule against interpretations that create surplusage would be effectively nullified.

[18] See also *Gallo v. Moen Inc.*, 813 F.3d 265, 269 (6th Cir. 2016) ("When a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination. Absent a longer time limit in the context of a specific provision, the general durational clause supplies a final phrase to every term in the CBA: 'until this agreement ends.'" (internal citation omitted)), cited favorably in *CNH Indus. N.V. v. Reese*, 138 S.Ct. 761, 765 fn. 2 (2018) (per curiam).

Gallo also demonstrates that our colleagues err in their assertion that sec. 10.2 contains "general durational language." The Agreement's general durational language is set forth in art. 1: "This Agreement shall continue in force from its effective date until and including the shift starting March 31, 2017 . . . ." Accord *Tackett*, 574 U.S. at 437 ("[T]he contract included a general durational clause—meaning that the contract itself would expire at a set time.").

[19] The majority also reaches toward a finding that past practice supports their status quo determination, but the record does not support this finding. As the Board recently explained, "a past practice is generally noncontractual and becomes a term or condition of employment through continued adherence over time *apart from* and even in contradiction to the parties' contract." *Asociacion de Empleados*, 370 NLRB No. 71, slip op. at 3 (citing *Intermountain Rural Electric Assn.*, 305 NLRB 783, 787–788 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993)). As for the majority's suggestion that the Respondent "maintained the 5-shift guarantee for 18 months *after* the contract expired," the record does not support it. To be sure, the Respondent employed Jenkins and Murrio for 6 weeks after August 25, when it eliminated 2 days per week of print publication. But that fact doesn't reflect, much less establish, that the Respondent was maintaining expired Section 10.2's 5-shift guarantee during that 6-week period. The Respondent had a statutory duty to refrain from laying off Jenkins and Murrio until it satisfied its effects-bargaining obligation without regard to expired Section 10.2, as we explain below. Further, when Union President Lang invoked the guarantee, about 18 months after the Agreement expired, in a letter to the Respondent dated September 27, 2018, the Respondent promptly replied that the five-shift guarantee "has long expired."

[20] The majority repeatedly mischaracterizes our position in two respects. First, contrary to the majority, we do not "suggest that unless the

principles leads to a reliable determination of what the parties actually agreed to in collective bargaining. The Board and the courts look to those principles in determining parties' contractual obligations during the contract's term, and it is unreasonable to give a contract provision one interpretation during the agreement's term, for the purpose of determining the parties' contractual obligations, but a different interpretation after the agreement expires for the purpose of determining a status quo obligation based on *the very same provision*. Yet that is precisely what the *Finley Hospital* waiver standard does. That standard undermines rather than promotes collective bargaining because it saddles parties with obligations to which they never agreed. Our colleagues may prefer that result, but that is not the system of collective bargaining Congress has established. See, e.g., *H. K. Porter Co. v. NLRB,* 397 U.S. at 103 ("The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions."). The Board should strive to promote *that* system of collective bargaining. Today's decision undermines it.

II. UNDER THE SUPREME COURT'S DECISION IN FIRST NATIONAL MAINTENANCE, THE RESPONDENT WAS PERMITTED TO IMPLEMENT ITS LAYOFF PROPOSAL AFTER BARGAINING TO IMPASSE OVER THE EFFECTS OF ITS DECISION TO REDUCE THE NUMBER OF PRINT DAYS

Layoffs are a mandatory subject of bargaining. Hence, even though we would find that the five-shift guarantee was not part of the postexpiration status quo, it is still necessary for us to determine whether the Respondent violated Section 8(a)(5) by unilaterally changing the employment status of employees Murrio and Jenkins. Because the General Counsel did not allege that the Respondent was obligated to bargain over its decision to reduce the number of print days from 7 to 5 and forfeited any argument that the Respondent failed to bargain to impasse over the effects of that decision, the only question before the judge in this regard was whether an employer engaged in negotiations for a successor collective-bargaining agreement must refrain from implementing layoffs necessitated by a nonbargainable decision in the absence of an overall impasse in negotiations.[21] The judge concluded that there was no such duty, reasoning that the Board's traditional *Transmarine* remedy for a failure to bargain over the job-loss effects of a core entrepreneurial decision[22] is inconsistent with the existence of an obligation to refrain from implementation prior to overall impasse.

We agree with the judge's reasoning, but we also believe that Supreme Court precedent compels such a conclusion. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court held that a cleaning and maintenance provider had no obligation to bargain over its decision to cancel a contract even though the decision resulted in the layoff of the employees who serviced the contract. Although the Court agreed that the employer had an obligation to bargain "over the effects of [the] decision . . . in a meaningful manner and at a meaningful time,"[23] it reasoned that "[a] decision[] involving a change in the scope and direction of the enterprise[] is akin to the decision whether to be in business at all, 'not in itself primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'"[24] Further, the Court was particularly concerned that requiring decisional bargaining over partial closures would give unions "a powerful tool" that might be used "to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."[25] By subjecting effects bargaining to the overall-impasse rule, the Board would provide even more opportunity for delay, over issues entirely unrelated to the managerial decision in question.

Accordingly, we would affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain to overall impasse on a successor collective-bargaining agreement before laying off unit employees Murrio and Jenkins, which layoffs were an effect of its entrepreneurial decision to eliminate 2 days of printed publication while transitioning to an all-online format.

Conclusion

The system of collective bargaining that Congress has established "is designed to promote industrial peace by encouraging the making of voluntary agreements governing

parties' agreement states in explicit terms that a particular provision survives the contract's expiration, it cannot be deemed to survive the agreement's expiration as a statutorily based status quo obligation." Rather, we conclude here that the 5-shift guarantee did not continue as part of the status quo because Sec. 10.2 included a specific temporal *limitation*. Second, we do not "gloss[] over the fundamental difference between post-expiration *contractual* obligations and post-expiration *statutory* obligations." An employer has a statutory obligation to maintain the status quo after expiration. Here, the majority simply errs in concluding that a five-shift guarantee is part of the status quo given sec. 10.2's specific temporal limitation.

[21] See *Bottom Line Enterprises*, 302 NLRB at 374 (where parties are engaged in negotiations for a collective-bargaining agreement, employer must generally refrain from making any unilateral changes to terms and conditions of employment prior to reaching overall impasse in negotiations).

[22] See *Transmarine Navigation Corp.*, 170 NLRB at 389–390.

[23] *First National Maintenance*, 452 U.S. at 681–682.

[24] Id. at 677 (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (brackets omitted)).

[25] Id. at 683.

relations between unions and employers. . . . And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401–404 (1952) (internal footnotes omitted). There is nothing voluntary about the indefinite five-shift guarantee that the majority imposes on the Respondent. Nor will it promote industrial peace to obstruct the Respondent's lawful entrepreneurial changes to its business by requiring it to employ pressmen who have no print edition to produce when it never agreed to do so. Today's decision will surely give the Union, and unions generally, greater leverage in successor-contract negotiations, but the National Labor Relations Act does not "contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 490 (1960). Accordingly, for all of the foregoing reasons, we respectfully dissent.

Dated, Washington, D.C. September 21, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

Notice to Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Graphic Communications International Union, GCC/International Brotherhood of Teamsters Local 24M/9N (the Union) as the exclusive collective-bargaining representative of employees in the following bargaining unit:

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

WE WILL rescind the change in the terms and conditions of employment for our unit employees that was unilaterally implemented on October 6, 2018, and WE WILL maintain it in effect until an agreement has been reached with the Union or a lawful impasse in negotiations for a new collective-bargaining agreement occurs.

WE WILL, within 14 days from the date of the Board's Order, offer David Murrio and David Jenkins full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make David Murrio and David Jenkins whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate David Murrio and David Jenkins for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of David Murrio and David Jenkins, and WE WILL,

within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

PG PUBLISHING CO., INC. D/B/A PITTSBURGH POST–GAZETTE

The Board's decision can be found at https://www.nlrb.gov/case/06-CA-233676 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Julie Polakoski-Rennie, Esq., 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 $5000 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 Section 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.

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.

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

> 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:
>
> 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. . . .

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

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.

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

> 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.
>
> 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.

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.

> 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

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:

> 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.
>
> 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.

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,

> 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:

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

Lowe concluded his letter by stating,

> 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:

> 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.
>
> 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:

> We plan to reach out to the 2 paperhandlers on Friday who will be laid off on August 25, 2018.
>
> Should we discuss the Company's severance offer with those employees or does the union want to talk about that further.
>
> I have also reached out to a representative at the PA CareerLink Pittsburgh office for assistance with employment services offered by the state.
>
> 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."

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 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." 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:

> 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.

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

Graphics Communications Conference, International Brotherhood of Teamsters or ("the Union") have entered into good faith effects bargaining concerning that decision GCC/IBT Local 24M/9N is proposing the following buyout/severance provisions for its affected members;

1. No member will be offered a buyout/severance until the effects of transitioning to a five (5) day operation are confirmed by both parties;

2. Each employee will then be given a termination date if it is confirmed by both parties that there is a need to reduce the workforce;

3. In exchange for and in consideration of the terms provided herein, regular full-time impacted Employees who are in active service shall receive the following enhanced buyout/severance pay benefit:

a. Three weeks of base pay per year of service, with a minimum of twenty-six weeks, paid out at the Impacted Employee's election, either in (1) a lump sum payment or (2) salary continuance currently structured to be paid through 2018, with a lump sum payment of the balance in January 2019; and

b. Continuance of health care benefits for a period of 6 months

c. For the purpose of calculating years of service for this paragraph, employees who are currently working shall be credited with service as if they have worked all of calendar year 2018, regardless of their actual termination date.

4. All buyout/severance payments are subject to mandatory state and federal withholding and union dues and assessments.

5. Regular full time impacted employees in active service who do not timely return a fully executed release/or who rescind their release shall not receive any buyout/severance payment.

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

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.

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 1 week per year of service with a cap of 6 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 6 weeks severance pay, 3 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 paper handlers 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."[1]

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 . . . ."[2]

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

[1] 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).

[2] The specifics of the information request are discussed below.

> 10.2 of the expired Agreement specifically states, in pertinent part, " . . . all employees listed by name at the time of the signing of this 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.

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:

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

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 paper handlers 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 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 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.),

> 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 remaining amount of work. The Company bargained over the effects of that decision.

The Union's request for information

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 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 theamount 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 exits." 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 fulltime 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."

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.

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."

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."

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.

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.

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!

Union Request 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

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

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

Union Request 6

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

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.

Union Response to PG Response 6

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 201 7, 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."[3]

Union Request 7

7. Please provide all invoices and payments for any products including, but not limited to paper and other items needed in

[3] 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 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.

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.

PG Response 7

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

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

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.

PG Response 8

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

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

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.

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.

Union Response to PG Response 9

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

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.

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.

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."

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.

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 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

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.

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.

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.

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".

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.

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.

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.

PG Response 14

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

Union Response to PG Response

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

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.

PG Response 15

Response 15—The Company purchased the following:

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

No Union Response to PG Response 15

Union Request 16

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.

PG Response 16

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

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.

Union Request 17

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.
Union Response to PG Response 17

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

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."

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

1. 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.

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).[4]

With regard to layoffs, it is long-settled that the decision to lay off unit employees is a mandatory subject of bargaining.[5] This includes layoffs that are the effect of a nonbargainable business decision.[6] 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.[7]

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

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.[9]

---

[4] 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).

[5] *Bemis Co.*, 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).

[6] *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 [S]ection 8(a)(5)"), reversed in part on other grounds 501 U.S. 190 (1991).

[7] 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 those 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).

[8] *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).

[9] 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

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 3 months in advance—and there was significant bargaining over the layoffs.

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.

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

> 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.

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").

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.

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,

> 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.

Fast Food Merchandisers, 291 NLRB at 901.

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 wage rate for a 2-week period.[10] 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

---

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.

[10] *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).

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 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.[11]

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.[12]

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 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.

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).

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.

Accordingly, I dismiss the allegation that the PG unlawfully implemented the layoffs of Jenkins and Murrio October 6, 2018.[13]

b. The elimination of the five-shift guarantee (complaint

[11] 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).

[12] *T-Mobile USA, Inc.*, 365 NLRB No. 23, slip op. at 3 fn. 4 (2017), enfd. 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").

[13] 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.

¶¶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).)

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:

> 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.

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.

II. THE INFORMATION REQUEST ALLEGATIONS

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.[14]

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).[15]

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,

> 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.)

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 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 "[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

[14] 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).

[15] 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).

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—I 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.

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").

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 paper handlers—hence, its proposal for layoffs.

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 paper handler 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.

CONCLUSION OF LAW

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[16]

ORDER

The complaint is dismissed.

[16] 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.