Seaport Printing & AD Specialties, Inc., d/b/a Port Printing AD and Specialties *and* Lake Charles Printing and Graphics Union, Local 260 affiliated with Graphic Communications International Union, AFL–CIO. Case 15–CA–17976

December 28, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On February 7, 2007, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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,[1] findings, and conclusions only to the extent consistent with this Decision and Order.[2]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off several employees and by thereafter using nonbargaining unit employees and at least one supervisor to perform bargaining unit work without giving the Union notice and an opportunity to bargain over those decisions or their effects on the unit employees.

For the reasons set forth below, we reverse the judge's finding that the Respondent violated the Act by not providing the Union with notice and an opportunity to bargain over its decision to lay off the employees, but we adopt his other findings of violations for the reasons described below.

Facts

The Respondent is a commercial printer located in Lake Charles, Louisiana. On September 22, 2005,[3] the mayor of Lake Charles ordered a mandatory evacuation of the city due to the impending arrival of Hurricane Rita. The Respondent was thus forced to close the printing facility. As of that date, all of the employees were out of work.

On September 29, the Respondent's owners returned to the facility to survey the damage caused by the hurricane. The facility did not have electricity, it had mold damage, the roof was leaking, and the main printing press was not operational. On October 8, power was restored to the facility and the Respondent began the cleanup process, as well as limited operations with a skeleton crew, although the building still had significant damage. The Respondent tried to salvage the work previously in progress at the facility, and it contacted customers to determine whether they still needed jobs that they had ordered prior to the hurricane. To perform those tasks, the Respondent used a few unit employees, as well as some nonbargaining unit employees and at least one supervisor.

On October 17, the Respondent sent a letter to its employees, confirming the layoff decision and settling pay issues.[4] The Respondent at no point engaged in bargaining with the Union over the decisions to lay off employees and to use nonunit personnel to perform unit work, or the effects of those decisions. In fact, the Respondent had withdrawn recognition from the Union 2 years earlier, and it was still asserting the legality of that action at the time of these events. See *Port Printing Ad & Specialties*, 344 NLRB 354 (2005), enfd. 192 Fed.Appx. 290 (5th Cir. 2006).

Analysis

An employer's decision to lay off employees is a mandatory subject of bargaining. Thus, in the absence of an agreed-upon contractual provision on the subject, an employer is generally obligated to bargain with an incumbent union with respect to both the decision to conduct a layoff and the effects of that decision. See *Farina Corp.*, 310 NLRB 318, 320 (1993), reconsideration denied 311 NLRB 1186 (1993). An exception to that rule exists if an employer can demonstrate that "economic exigencies compel[led] prompt action." See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnotes omitted), enfd. 15 F.3d 1087 (9th Cir. 1994). If an employer can satisfy that burden, the Board will excuse the employer's failure to bargain with the union prior to implementing its decision. Id.

The Board has consistently maintained a narrow view of the economic exigency exception. It has limited "eco-

[1] The Respondent asserts that the judge erred by granting the General Counsel's motion to strike a portion of Gloria Robinson's testimony. The Respondent, however, advances no legal argument to support its assertion. Moreover, the judge's findings establish that the disputed testimony concerned potential settlement of outstanding claims against the Respondent. Such evidence is generally inadmissible in Board proceedings. See *Chariot Marine Fabricators*, 335 NLRB 339 fn. 1 (2001), citing Fed.R.Evid. 408. In these circumstances, we find that the judge did not err in granting the motion.

[2] We shall amend the judge's conclusions of law and remedy to conform to our findings. We shall also substitute a new Order and notice for that of the judge.

[3] Unless otherwise noted, all dates are 2005.

[4] Relying on the October 17 letter, the judge characterizes the layoffs as occurring on that date. We disagree and find that the layoffs actually occurred on September 22, when the Respondent closed the facility and ceased operations. Although the October 17 letter addresses the layoffs, we find that it merely served to confirm what had already taken place.

nomic exigencies" to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (citations omitted). In that regard, "[a]bsent a dire financial emergency, . . . economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." Id. (footnotes omitted).

Applying the foregoing analysis, we find that the hurricane was an unforeseen event, having drastic economic effects on the Respondent. The impending hurricane caused the mayor to order an immediate, mandatory, citywide evacuation. The Respondent was thus compelled to take "prompt action" to respond to the hurricane and the evacuation order, necessitating the closure of its facility. At that time, all employees were out of work and it was not clear if or when they would return. The unexpected shutdown of the facility, precipitated by the impending hurricane, resulted in the forced layoff. This was an economic exigency like that described in *RBE Electronics of S.D.*, supra. Accordingly, without regard to its prior withdrawal of recognition from the Union, the Respondent's failure to bargain over the layoff decision was not unlawful.

Unlike our dissenting colleague, however, we do not find that the economic exigency created by the hurricane excused the Respondent from bargaining with the Union over the decision to use nonunit personnel to perform unit work. The need for immediate decisionmaking created by the hurricane was over by the time the Respondent made this decision. The Respondent thus had sufficient time to bargain over the decision, but failed to do so. Accordingly, we agree with the judge and find that the Respondent violated Section 8(a)(5) by assigning nonunit personnel to perform unit work without giving the Union timely notice and an opportunity to bargain over the decision.

As stated above, Section 8(a)(5) also requires an employer to bargain over the effects of a layoff. We agree with the judge that the Respondent unlawfully failed to do so here. As with the Respondent's decision to assign nonunit personnel to perform unit work when it resumed limited operations, the exigency created by the hurricane did not excuse the Respondent from thereafter bargaining over the effects of the decisions and the related personnel decisions.

Our dissenting colleague contends that the Respondent was excused from bargaining over the effects of its decisions to lay off employees and to use nonunit personnel to perform unit work because the Union had notice of those decisions but failed to request bargaining over their effects. We disagree. As stated above, the Respondent withdrew recognition from the Union in 2003 and continued to defend its withdrawal in court at the time of these events. That stance foreclosed any reasonable possibility that the Respondent would engage in bargaining.[5] In the circumstances, we find that any request to bargain by the Union over the effects of the Respondent's post-Rita decisions would have been futile. See *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997) (no obligation to request bargaining where such a request would be futile). Contrary to our dissenting colleague, the Respondent's informal adherence to its prior contractual obligations with the Union does not undercut that finding. We therefore agree with the judge and find that the Respondent violated Section 8(a)(5) by failing to engage in effects bargaining over the decisions to lay off employees and to use nonunit personnel to perform unit work.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 5(a).

"(a) Respondent laid off Vince Mott, Gail Courtney, Randy Soileau, Renee Ellis, and Joel Williams without affording the Union notice and an opportunity to bargain with the Respondent over the effects of the layoff on the employees."

AMENDED 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, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's decision to lay off its unit employees, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. Because of the Respondent's unlawful conduct, however, the laid-off unit employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the

[5] Had the Respondent bargained over the effects of its decisions, it would have waived its right to contest the Union's status as the collective-bargaining representative of the employees. See *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326–327 (8th Cir. 1984), and cases cited. In other words, the Respondent had to choose, and it made the choice not to bargain.

policies of the Act, to accompany our bargaining order with a limited backpay requirement designed to make whole the employees for losses suffered as a result of the Respondent's failure to bargain with the Union about the effects of its layoff decision and to recreate in some practicable manner a situation in which the parties' bargaining positions are not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the laid-off employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay its laid-off employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the layoffs; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which they were laid off to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings that the laid-off employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, having found that the Respondent violated the Act by unilaterally assigning bargaining unit work to nonunit employees and at least one supervisor without bargaining with the Union, we shall order the Respondent to make unit employees whole for any loss of earnings and other benefits attributable to this unlawful conduct, in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Seaport Printing & Ad Specialties, Inc., d/b/a Port Printing Ad and Specialties, Lake Charles, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Lake Charles Printing and Graphics Union, Local 260 affiliated with Graphic Communications International Union, AFL–CIO by laying off employees at its Lake Charles, Louisiana facility without affording the Union notice and an opportunity to bargain over the effects of the layoff decision on the employees.

(b) Refusing to bargain collectively with the Union by using nonbargaining unit employees and supervisors to perform bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

(c) 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 the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All journeymen, assistants, apprentices, and other employees of the Publisher operating or assisting in the operation of the Employer's printing presses, including gravure, offset and letterpress printing presses and all other printing presses of whatsoever type or process of printing operated by such Publisher. The Publisher further recognizes the Union as the sole and exclusive bargaining agent for its offset preparatory employees, including employees engaged in the operation of cameras; employees engaged in the making of offset plates; stripping, etching, opaquing and any and all functions prepatory to the making and/or manufacture of offset printing plates.

(b) On request, bargain with the Union with respect to the effects of its decision to lay off employees at the Lake Charles, Louisiana facility.

(c) Discontinue using nonbargaining unit employees and supervisors to perform bargaining unit work and notify and, on request, bargain with the Union over any decision to use nonbargaining unit employees and/or supervisors to perform bargaining unit work, and the effects of this conduct.

(d) Pay the laid-off unit employees, Vince Mott, Randy Soileau, Gail Courtney, Renee Ellis, and Joel Wil-

liams, their normal wages for the period set forth in the amended remedy section of this decision.

(e) Make whole unit employees for any loss of earnings and other benefits incurred as a result of the Respondent's assignment of nonbargaining unit employees and at least one supervisor to perform bargaining unit work, in the manner specified in the amended remedy section of this Decision.

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Lake Charles, Louisiana, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 15, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 2005.

(h) Within 21 days after service by the Region, file with the Regional Director 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 not specifically found.

MEMBER SCHAUMBER, dissenting in part.

I agree with the majority that the Respondent was excused from bargaining with the Union over the layoff decision. Unlike the majority, however, I would find that the Respondent was also excused from bargaining with the Union over the posthurricane decision to use nonunit employees and at least one supervisor, in addition to certain unit employees, to perform unit work. The Respondent's decision in this regard was part and parcel of its response to the economic exigency created by the hurricane. After the hurricane, the building and printing equipment had sustained significant damage and a number of employees had not yet returned to the city. Telecommunications, public transportation, and other services had been seriously disrupted. As the Respondent had to act quickly to salvage any existing printing orders, it put to work family members, who also happened to be supervisors or nonunit employees. In my view, the Respondent's decision to use these individuals, instead of unit employees, to perform unit work was merely an extension of its response to the exigency created by the hurricane. I would thus find that the Respondent was excused from bargaining with the Union over this decision as well.

Further, I would find that the Respondent's failure to bargain with the Union over the effects of the layoff decision or the effects of the decision to use certain nonunit personnel to perform unit work was not unlawful. The Union's president was present at the Respondent's facility on a weekly basis after the hurricane. He testified that he knew the Respondent commenced limited operations after the hurricane, using nonunit, as well as unit, personnel to perform the work. He did not, however, challenge the Respondent's actions or request that the Respondent bargain over the effects of the layoff decision or the effects of the decision to use these nonunit personnel to perform unit work. In these circumstances, I would find that the Union waived its right to bargain over these matters. See, e.g., *Lenz & Riecker*, 340 NLRB 143, 145 (2003) (no failure-to-bargain violation where union had notice of respondent's proposed change, but failed to request bargaining).

In finding waiver by the Union, I disagree with the majority that any request to bargain by the Union would have been futile. It is true that the Respondent was contesting its bargaining relationship with the Union. But, after the hurricane, the Respondent discussed various contractual matters with the Union and complied with the parties' expired agreement. Specifically, the Respondent and the Union's president discussed the employees' contractual right to vacation pay and the Respondent paid accrued sick and vacation pay pursuant to the parties' agreement. In addition, the Respondent's owner testified that she complied with the parties' agreement in bringing some unit employees back to work after the hurricane and in calculating the employees' benefits. In these circumstances, I would find that the Respondent's adher-

[6] 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."

ence to the expired contract undermines any claim that the Union's bargaining request would have been futile.

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 refuse to bargain collectively with Lake Charles Printing and Graphics Union, Local 260 affiliated with Graphic Communications International Union, AFL–CIO (the Union) by laying off employees without affording the Union notice and an opportunity to bargain with us over the effects of the layoff decision.

WE WILL NOT refuse to bargain collectively with the Union by using nonbargaining unit employees and supervisors to perform bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain with us with respect to this decision and the effects of this decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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 the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All journeymen, assistants, apprentices, and other employees of the Publisher operating or assisting in the operation of the Employer's printing presses, including gravure, offset and letterpress printing presses and all other printing presses of whatsoever type or process of printing operated by such Publisher. The Publisher further recognizes the Union as the sole and exclusive bargaining agent for its offset preparatory employees, including employees engaged in the operation of cameras; employees engaged in the making of offset plates; stripping, etching, opaquing and any and all functions prepatory to the making and/or manufacture of offset printing plates.

WE WILL, on request, bargain with the Union with respect to the effects of the decision to lay off employees at our Lake Charles, Louisiana facility.

WE WILL discontinue the use of nonbargaining unit employees and supervisors to perform bargaining unit work, and WE WILL notify and, on request, bargain with the Union over any decision to use nonbargaining unit employees and/or supervisors to perform bargaining unit work, and the effects of this unlawful conduct.

WE WILL pay laid-off employees Vince Mott, Randy Soileau, Gail Courtney, Renee Ellis, and Joel Williams their normal wages for the period set forth in the amended remedy for failing to provide the Union prior notice and an opportunity to bargain with us with respect to the effects of the layoff decision on unit employees.

WE WILL make whole the unit employees for any loss of earnings and other benefits incurred as a result of the fact that we did not give the Union prior notice and an opportunity to bargain with us with respect to the decision to use nonbargaining unit employees and at least one supervisor to perform bargaining unit work, and the effects of this conduct, less any net interim earnings, plus interest.

SEAPORT PRINTING & AD SPECIALTIES, INC. D/B/A PORT PRINTING AD AND SPECIALTIES

Charles R. Rogers, Esq., for the General Counsel.
Edward J. Fonti, Esq. (Jones, Tete, Fonti & Belfour, L.L.P.), of Lake Charles, Louisiana, for the Respondent.
Mr. Vince Mott, of Lake Charles, Louisiana, for the Charging Party.

DECISION

JOHN H. WEST, Administrative Law Judge. The charge was filed by Lake Charles Printing and Graphics Union, Local 260 affiliated with Graphic Communications International Union, AFL-CIO (the Union) against Seaport Printing & Ad Specialties, Inc., d/b/a Port Printing Ad and Specialties (Respondent) on March 31, 2006. It was amended on May 5, 2006. A complaint issued on September 28, 2006, alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), by on October 17, 2005, laying off four of its employees[1] and by, beginning on or about October 2005, and con-

[1] Vince Mott, Randy Soileau, Gail Courtney, and Renee Ellis. At the trial herein, the complaint was amended to add the name of Joel Williams. The complaint alleges that the following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Sec. 9(b) of the Act:

> All journeymen, assistants, apprentices, and other employees of the Publisher operating or assisting in the operation of the Employer's printing presses, including gravure, offset and letterpress printing presses and all other printing presses of whatsoever type or process of printing operated by such Publisher. The Publisher further recognizes the Union as the sole and exclusive bargaining agent for its offset pre-

tinuing thereafter, using nonbargaining unit employees and supervisors to perform bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. Respondent denies violating the Act as alleged.[2]

A trial was held in this matter on December 4 and 5, 2006, in Lake Charles, Louisiana. On the entire record, including my observation of the witnesses, and after considering the briefs filed by counsel for General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Lake Charles, Louisiana, has been engaged in furnishing printing and typesetting services. The Respondent admits that annually in conducting its operations it purchases and receives at its Lake Charles facility goods and materials valued in excess of $50,000 directly from points outside the State of Louisiana. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, at all material times, has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In *Port Printing Ad & Specialties*, 344 NLRB 354 (2005), the National Labor Relations Board (the Board) concluded that Respondent, by its conduct in 2003 and 2004, unlawfully withdrew recognition from the Union.

Mott, who has worked for the Respondent for about 24 years and has been president of the Union for about 10 years "off and on" (on for the last 5 years), testified that his last day working at Respondent was a couple of days prior to Hurricane Rita or about September 22, 2005; that Respondent is a commercial printer of brochures, business cards, letterheads, and envelopes; that at Respondent he operated and maintained the four offset presses[3] and the one letter press; that his main job was to work the big press and otherwise Joseph Soileau Jr., who was the production supervisor, would tell him what job to work; that he and Randy Soileau held the position of pressman, and Joel Williams worked at this position on a part-time basis; that the job classification position prepress includes camera stripping (strip up negatives to make offset plates), typesetting (set the forms by computer to do the layout of the job), and composing; that the camera stripping position was held by Gail Courtney; that the classification of typesetter was held by Jutta Zienow; that the classification of bindery involves the finishing of print jobs with perforating, padding, folding, numbering, etc.; that Jane (Meche) Soileau and Ellis held the classification of bindery employees, with Ellis holding less seniority than Jane (Meche) Soileau; that he is the most senior full-time employee at Respondent, with (in terms of seniority) Courtney, Jane (Meche) Soileau, Randy Soileau, Jutta Zienow, and Ellis following him;[4] that when Hurricane Rita hit he evacuated to Pensacola, Florida, returning, as here pertinent, to Lake Charles a couple of weeks after the Hurricane; that when he could not contact Joseph Soileau Jr., who is the production manager, vice president, and co-owner of the Respondent, or Gloria Robinson, who is co-owner and president of the Respondent, while he was in Florida, he telephoned Lannis Soileau and gave him his cell number and the name of the hotel in Florida where he was staying; that Lannis Soileau told him that the facility leased by Respondent sustained some damage and Joseph Soileau Jr. and Robinson had a $1000 check for each employee; that a couple of days after he returned to Lake Charles he telephoned Joseph Soileau Jr., who told him that the building leased by the Respondent had some damage and it did not have electricity yet; and that he told Joseph Soileau Jr. that if there was anything he, Mott, could do to let him know.

On cross-examination, Mott testified that his separation from employment with Port Printing began on or about September 22, 2005, when Mayor Roach ordered the evacuation of Lake Charles; that before the hurricane he worked primarily on the

paratory employees, including employees engaged in the operation of cameras; employees engaged in the making of offset plates; stripping, etching, opaquing and any and all functions prepatory to the making and/or manufacture of offset printing plates.

And the complaint alleges that since at least February 1997 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the above-described unit, the Union has been recognized as the representative by the Respondent, and this recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from February 28, 2003, to February 28, 2004.

[2] In its answer, filed October 6, 2006, to the complaint, Respondent asserts that on October 17, 2005, it notified all employees that the destruction occasioned by Hurricane Rita to the Respondent's building and equipment and the resulting loss of business would not allow Respondent to immediately recall employees to their jobs; that employees were separated from employment because of the aforementioned effects of Hurricane Rita and the separation was not the result of a unilateral decision by Respondent; that for short periods of time, sporadic in nature, Respondent did utilize nonbargaining unit employees and supervisors to perform a small amount of bargaining unit work for a brief time because conditions did not allow Respondent to recall to work bargaining unit employees; that on October 17, 2005, Respondent provided notice to the Union in a letter to Union President Mott, indicating that Respondent did not know how long employees would be separated from employment and provided the reasons why the separation would be for an unknown length of time; and that notwithstanding that the notice provided an opportunity for the Union to request bargaining over the temporary separation from employment, the Union did not request bargaining nor did it protest the notice. Additionally, Respondent argues that the complaint allegation that Respondent did not provide the Union the opportunity to bargain over the effects of the alleged misconduct should be dismissed since it was not alleged in either the original charge or the amended charge. The original charge does refer to Respondent laying off bargaining unit employees without notifying and/or bargaining with the Union regarding the decision to layoff the employees "*and the effects of the layoff.*" (Emphasis added.)

[3] Mott testified that Respondent has two smaller presses, namely two Ryobi 2800s which handle up to 11- by 17-inch sheets, a Heidelberg offset press which handles up to 18- by 25-inch sheets, a two-color Komori that handles up to 26-inch sheets and can run two colors at a time, and a letter press used for cutting holes in or perforating jobs.

[4] As noted above, Joel Williams is a part-time employee.

Heidelberg core, the Komori two-color, and the Heidelberg letter press; and that the press that Randy Soileau usually operated produced smaller jobs like envelopes and business cards.

Courtney testified that she worked at Port Printing for 29 years before Hurricane Rita; that she worked in prepress as a camera and press room stripper; that she evacuated Lake Charles when Hurricane Rita hit, and she returned to Lake Charles the Tuesday after the storm; that after she returned she went to Port Printing and she spoke with Robinson, asking Robinson about her job status; that Robinson "said that she didn't know. We'd have to wait and see. There was mold in the building, and they didn't want anybody there" (Tr. 86); that at that time she saw people working there; that she saw (1) Jane (Meche) Soileau working in bindery, pulling jackets off the shelf, and going through them, (2) Lannis Soileau working in her area and the press area, and (3) Jutta Zienow doing typesetting, in addition to some people working in the office; that she went back to Port Printing two or three times more to check on her job status; that each time Robinson told her that she did not know anything and Robinson could not give her any answers; that the second time she went to Port Printing she saw Lannis Soileau operating two presses, going back and forth between the two, Zienow was doing the typesetting, and Jane (Meche) Soileau was still cleaning up the bindery area; that subsequently Joseph Soileau Jr. telephoned her, asking her questions about how to get the camera working; that she went to Port Printing and remedied the problem, and while she was at Port Printing she saw Lannis and Jane (Meche) Soileau and Zienow working; that Zienow was doing the typesetting, Jane was in the bindery and Lannis was in the camera room and the stripping area where she normally worked; that when she was there to get the camera running, she again asked Robinson about "our job status" (Tr. 89) and Robinson said that she did not know anything, "they would have to wait and see" (Id.); and that she has been a member of the Union ever since she started employment at Port Printing.

On cross-examination, Courtney testified that 2 or 3 years before she testified herein she stopped paying union dues for about 2 or 3 months and then she signed back on and became a union member again; that she was sure that she visited Port Printing in October or November 2005 but "after the storm was a big blur. I was still . . . [living] in my driveway, dealing with the death of my dad." (Tr. 90.)

When called by Respondent, Robinson testified that after Hurricane Rita she did not see Courtney until January 2006; that Courtney came to Port Printing in October 2005 to pay for her COBRA for November 2005 but Courtney did that with Respondent's bookkeeper; that in November 2005 when the COBRA payment for December 2005 was due Courtney did not come to Port Printing so Respondent's bookkeeper unsuccessfully telephoned Courtney; that she tried to telephone Courtney for a couple of weeks but she never could get Courtney; that she did not see Courtney in December 2005; that in January 2006 Courtney did come to Port Printing; that she did not recall seeing Courtney on a number of occasions coming to Port Printing and asking her about when she, Courtney, could return to work; and that while she did not want to take Courtney off COBRA if Courtney wanted it, Respondent could not get in touch with her and Courtney was eventually taken off insurance.

When called by Respondent Joseph Soileau Jr. testified that he never had a conversation with Courtney between October 17, 2005, and when he testified at the trial herein on December 6, 2006.

When called by counsel for the General Counsel, Joseph Soileau Jr. testified that he evacuated Lake Charles when Hurricane Rita hit in September 2005; that when he returned to Lake Charles on September 28, 2005, he inspected the facility which Respondent leased and found that it was damaged.

When called by Port Printing, Joseph Soileau Jr. testified that Port Printing closed on September 22, 2005, when a mandatory evacuation was declared by the mayor of Lake Charles on that morning; that employees were advised that if they were out of town the following Monday they should telephone and tell management where they were if they could not get back to work; that Hurricane Rita was a category 3 when it hit Lake Charles; that he returned to Lake Charles on September 28; that he went to Port Printing the next day to check the condition of the facility; that Port Printing has a two-color Komori printing press, a one-color Heidelberg press, two Ryobi presses, and a Heidelberg windmill, which is a die cutting press; that Mott operated the two-color Komori, the one-color Heidelberg, and the letter press; that the Ryobi presses were mainly operated by Randy Soileau and sometimes by Joel Williams, who retired and works on a part-time basis; that he, along with Jane (Meche) Soileau, took photographs which show the condition of the facility (R. Exh. 2); that after the hurricane he contacted employees and told them that Port Printing did not have electricity, Respondent was not sure when it would get power, there was some damage but until Respondent got electricity it would not be able to get back online, and they just needed to stay in contact until further notice; that Mott contacted him from Florida to let Respondent know where he was; that Randy Soileau, who is his nephew, is the son of Lannis Soileau and is Mott's cousin; that Mott is his first cousin; that Randy Soileau received the October 17, 2005 notice; that Randy Soileau resigned from employment with Port Printing (see R. Exh. 6); that Joel Williams, who was working part-time and full-time before Hurricane Rita hit Lake Charles, was not asked to work at Port Printing after Hurricane Rita because Respondent did not have any work for him; that Williams mostly did deliveries and sometimes he would run the small or large press (Heidelberg); that delivery work was not bargaining unit work but the press work was; that Williams did contact Port Printing after Hurricane Rita; that he, Joseph Soileau Jr., did not do any work on the big press after Hurricane Rita, he did work beginning in 2006 on the small press a couple of times a week, and he did not keep any records of how much work he did on the small press; that there were times when he operated one small press and Lannis Soileau operated the other small press; that he worked on the small press because "at the time we didn't have anybody to do it" (Tr. 162); that Mott was not brought back to do the work that Lannis Soileau was doing because Mott "indicated that he wasn't going to work under these conditions," (Id.) which referred to mainly the mold; and that eventually

Mott indicated that he would be interested in returning to work at Port Printing even though conditions had not really changed.

On cross-examination, Joseph Soileau Jr. testified that the mold affected the majority of the press room; that a lot of the small press plates which were kept in stock for repeat jobs were damaged with mold and had to be redone; that it was Courtney's job to do the plates for the small press; and that Respondent had about 5000 plates from previous jobs, a small portion of the plates were damaged, and it was not a great deal to redo the plates that were still needed.

On rebuttal, Mott testified that he might have telephoned Joseph Soileau Jr. from Florida to find out the condition of the building Port Printing leased.

Robinson handles the financial area, maintains a client list, and supervises the sales people, the customer service department, the receptionist and the bookkeeping department.

When called by Respondent, Joseph Soileau Jr. testified that he and Robinson decided to provide a $1000 check to employees because Respondent was within a few days of payroll and they knew that they would not be doing payroll for a while; that it took a few weeks to get the checks to the employees since mail was not delivered yet and he and Robinson delivered them to the employees; and that he thought that he delivered the check to Mott right before the electric power was restored to Port Printing.

When called by Respondent, Robinson testified that the $1000 checks were written on September 28, 2005; that Joseph Soileau Jr. delivered the checks to the employees in the northern part of the city and she delivered the checks to the three employees in the south because that is where she lives; that she was not able to get to Courtney's house, and later when she could get to Courtney's house no one was there; that later Courtney refused the $1000 check when she was at Port Printing speaking with Respondent's bookkeeper after the electrical power was restored to Port Printing; and that she did not actually see Courtney during this visit to Port Printing.

On October 8, 2005, electrical power was restored to the facility Respondent leased. When called by Respondent, Joseph Soileau Jr. testified that once Respondent got power it started the clean up, tried to salvage any of the work it had in the facility, and contacted customers to determine if they still needed the jobs which were being worked on at the time of the hurricane; that on jobs which had already been printed all that was left was bindery work, which would include either folding, numbering, padding, cutting, putting it in books with a staple and cover, or binding with a spiral binding; that before the hurricane hit Jane (Meche) Soileau and Ellis performed the binding work in the bargaining unit; that Jane (Meche) Soileau is married to Lannis Soileau; that Jane (Meche) Soileau was called back to do the bindery work right after the power was restored because she had worked for Port Printing for 15 years and had more seniority than Ellis; that actually Jane (Meche) Soileau volunteered to help do some cleanup; that Jutta Zienow was recalled pretty quickly to do graphic work or layouts on the computer; that Port Printing needed the art or graphic work files to be able to send as much work out as possible; that the art work department was not damaged; that the production area suffered a lot of damage and the bindery area had to be moved back into the stock room area; that within a short period after the power was restored both Jane (Meche) Soileau and Zienow were working full time or 40 hours a week; that Loc and David Huddle owned the building which Port Printing leased; that David Huddle agreed to have Service Masters work on the mold in the building; that this work began a couple of weeks after the power was restored to the building; that the Huddles put tarps on the roof but they leaked; that tarps had to be placed inside of the building under the rafters to direct the flow of the water, and the printers had to be covered with visqueen; that the roof leaked until August 2006 when it was replaced; that Courtney often performed prepress work for the Komori, one of the big presses which was destroyed; that the majority of Courtney's prepress work involved work that was going to move through the two big presses that Mott operated; that the operation of the two little presses did not require as much of Courtney's prepress work because a lot of the small press work is repeat work so Port Printing already has the plates and everything already made and they can be reused which means that they do not have to go to prepress; that on the small press jobs which do have to go to prepress they require minimal time to get ready for the press; that if it is a full-color job, there will be a lot more time involved in stripping; that the Heidelberg press which Mott operated before the hurricane is operable; that since the hurricane Port Printing has contracted out work that it previously performed; that after the hurricane Port Printing had Zienow do the art work at its facility so that its customers could see the proofs, and then Port Printing sends the art work to a factory to have the printing work done; that the fact that Port Printing sent out production work pretty much eliminated the work that Courtney would be doing; that the contracting out of work after Hurricane Rita eliminated about 90 percent of the work that Mott produced before Hurricane Rita; that after October 8, 2005, when power was restored the Heidelberg press was not operated; that he did not operate the Heidelberg; that Lannis Soileau did operate the Heidelberg after Hurricane Rita because Port Printing still had a few jobs that it was not able to contract out; and that the jobs were one or two color jobs which could be done under the conditions which existed at the time.

On cross-examination, Joseph Soileau Jr. testified that after Hurricane Rita he did the camera stripping work at Port Printing starting in November 2005, doing about 8 hours a week; that after the electric power was restored he called Jane (Meche) Soileau, who with her husband—Lannis—had helped with the clean up before the power was restored, and told her to come into Port Printing to do bindery work; and that he telephoned Zienow to let her know that he wanted her to come back to work.

Mott testified that after the electrical power was restored to the facility Respondent was leasing, he went by the facility about once a week; that Joseph Soileau Jr. told him that he did not know how long it would be before the building would be fixed and the employees could all get back in there to go to work; that in the beginning of October 2005 he had a conversation with Randy Soileau (not offered for the truth of the matter asserted but rather to show the basis of Mott's subsequent action) in which Randy told him that he was not working at Port Printing but his, Randy's, father, Lannis Soileau, was in there

running the small presses, doing some work, getting jobs out for customers; that the next day when he went to Port Printing to see for himself, he saw Lannis Soileau operating the small press; that Lannis Soileau said the he was getting some work out for the customers; that he then went and spoke with Joseph Soileau Jr. and asked him what was going on; that Joseph Soileau Jr. told him that (a) they were just trying to complete orders they already had for customers that needed the product, and (b) they were probably going to be contracting out jobs since apparently they would not be able to do any more work; that he told Joseph Soileau Jr. that if there was anything he, Mott, could do to just let him know; that during every one of his weekly visits to the Port Printing facility from the beginning of October 2005 until December 2005 he saw Lannis Soileau working the presses; that on one of his visits he saw Lannis Soileau running the Heidelberg press; that not too long after the electricity was restored to the Port Printing facility, Joseph Soileau Jr. asked him, during one of his visits to the Port Printing facility, if he would check the two-color Komori; that he turned the power on to that press, realized that it was not working properly, and shut the power off; and that when he turned the power on to the Heidelberg press he realized that the three phase was hooked up backwards and the press was running in reverse, which had to be fixed.

On cross-examination, Mott testified that one Sunday after the electric power was restored to the building Port City leased, he and his wife went to the building; that the bookkeeper was in the building; that he told the bookkeeper that if they wanted him to work in the building, they were going to have to get him a respirator, a mask to wear; that he said this because when he turned on the light he could see all the mold and he could smell it in the air; that a couple of weeks later he told Lannis Soileau the same thing because there still was a lot of mold and an odor; that he believed that it would have been unsafe to work under those conditions; and that he told Lannis Soileau that running the little press would not be his favorite thing to do but he would do it.

When called by Respondent, Joseph Soileau Jr. testified that he did not see Mott at Port Printing in the production area once a week after power was restored; and that Mott never asked him about Lannis Soileau operating the small presses.

On about October 10, 2005, according to the testimony of Joseph Soileau Jr. when called by counsel for the General Counsel, the employee who did the binding work, Jane (Meche) Soileau, was brought back to work. Joseph Soileau Jr. testified that Respondent completed work which was not damaged and which customers needed, and that most of the work was sent to another printing shop to have done; that Jane (Meche) Soileau is his sister-in-law; that while the collective-bargaining agreement refers to seniority governing layoffs and rehires, seniority is determined on the basis of job classification seniority and there was no one other than Jane (Meche) Soileau who was in the same job classification who could have done this work; that employee Vince Mott, who was the most senior employee at Respondent, had done very little bindery work; that Courtney, who was the second most senior employee at Respondent, had done bindery work before; that section 18 of the collective-bargaining agreement (GC Exh. 5), indicates that layoffs and recalls should be done by seniority; that section 15 of the collective-bargaining agreement refers to change in the work force and this section specifies that employees should be recalled and laid off in order of seniority; that before Hurricane Rita, Lannis Soileau, his brother, worked in sales and was not part of the bargaining unit; that sometime in October Lannis Soileau began to run the presses, and he was still running the presses at the time of the trial herein in December 2006,[5] that prior to Hurricane Rita Lannis Soileau did not fill out timecards; that Lannis Soileau started filling out timecards in October 2005, because he was doing press work; and that Lannis Soileau's time cards show the amount of time that Lannis Soileau was doing bargaining unit work after October 2005.

On cross-examination, Mott testified that based on the collective bargaining agreement, Jane (Meche) Soileau was not the person Respondent should have first called back after Hurricane Rita; that since he had the most seniority with the Respondent, he should have been recalled before Jane (Meche) Soileau to do the bindery work; that he never told Joseph Soileau Jr. or Robinson that he expected to be called back to do the binding work instead of Jane (Meche) Sioleau; and that the one job at Respondent that he could not do was typesetting and he did not tell Joseph Soileau Jr. or Robinson that he should have been recalled to do the typesetting work before Zienow was recalled.

When called by counsel for the General Counsel, Robinson testified that Lannis Soileau, who is a salesman with Respondent, offered to work the presses in October 2005 because sales were down and he had nothing else to do; that since October 2005 Lannis Soileau ran the presses, cleaned up, checked jobs to see how much was damaged, and worked on parts of the presses that were not working at the time; and that when Joseph Soileau Jr. could do the press work he did it and when Joseph Soileau Jr. could not do the press work Lannis Soileau did it.

General Counsel's Exhibit 4 is a 1-page document on Respondent's letterhead, which is dated October 17, 2005. It reads as follows:

> Joe [Soileau] and I [Gloria Robinson] tried very hard to be fair and generous in dealing with the aftermath of Hurricane Rita. For pay period September 16th–30th, we actually worked 4 of the 11 days. You were paid for the hours you actually worked and then we paid the balance at 100% of what your pay would have been had you worked those 7 days. This equaled 86 hours for production and 88 hours for the office. For pay period October 1st–15th, we paid one-half of what your hours would have been had you been working for those 10 days. You were paid for 80 hours @ 1/2 pay or 40 hours @ full pay, whichever way

[5] His timecards were received as GC Exh. 6. They begin with the 2-week pay period ending on October 31, 2005, and cover up to the pay period ending June 15, 2006. During this period, according to the timecards, Lannis Soileau's bimonthly hours went from the low 40s to as high as 101.75 hours. His total hours worked during this period is 1,186.25. In other words, in this 35-week period Lannis Soileau worked an average of 33.86 hours per week. The bimonthly pay periods end on the 15th and the 30th or 31st. GC Exhs. 14 and 15 are the daily job logs which reflect the jobs worked by Lannis Soileau on printing presses collectively from January 16 to November 15, 2006.

> you prefer to look at it. We are fortunate to be able to pay you. Those of you who received the $1000 advance will have it deducted from your wages at a rate of $250 over 4 pay periods for semi-monthly employees and $500 over 2 pay periods for monthly employees. The payback time is equal for both.
>
> It was a hard decision for Joe and I to lay-off employees, but we felt it was the fair thing to do as the company cannot continue to pay you while we are waiting for this building to be repaired and for inspectors to tell us it is safe for you to come back to work in [sic]. That being said, we are just waiting, and have no idea as to a time frame for this to be completed. The best we can do is to allow you the opportunity to be paid something with unemployment benefits. We also understand that some of you may find employment elsewhere and we know you have to do what is best for you and your families.
>
> Of course we will do our best to keep everyone informed. Please call at anytime if you have questions.

Joseph Soileau Jr. testified that he and Robinson decided that this was the best thing that they could do; and that neither of the pressmen, Mott and Randy Soileau, were ever recalled from layoff. Robinson testified that she was involved in the decision to lay off employees in October 2005; that she discussed the decision with Joseph Soileau Jr.; that the decision was based on the condition, after Hurricane Rita, of the building Respondent leased and the fact that they were unsure the amount of work that they would have; that she never contacted the Union prior to making the decision to lay off employees "because I wasn't aware that I needed to" (Tr. 35); that she never contacted the Union to discuss with them the process that would be used in the layoff; and that Respondent never initiated any sort of bargaining with the Union about this decision.

Mott testified that he received the above-described layoff notice (GC Exh. 4), when he was at Port Printing picking up his last paycheck; that at the time he told Robinson that she did not have to lay the employees off in order for them to be able to draw unemployment because they would be able to draw unemployment under the emergency disaster unemployment; that Robinson said that she did not know but it did not matter in that she was still laying off the employees; that he had signed up for disaster assistance which included disaster unemployment, and he was about to receive his first check under that program when he received the layoff notice from Port Printing; that he then spoke with Joseph Soileau Jr. telling him that the employees could draw unemployment without getting laid off; that Joseph Soileau Jr. said that he did not know when the building was going to be fixed up; that $500 was taken out of this paycheck by Port Printing and he was told that a total of $500 would be taken out of future paychecks to pay back the $1000 loan that Port Printing made to the employees; that Port Printing never contacted him about bargaining about the layoff in any way; and that he is qualified to do every job at Port Printing except typesetting.

On cross-examination, Mott testified that the Union did not file a grievance under its collective-bargaining agreement with Port Printing with respect to whether or not the company should have followed section 18[6] or 15[7] in regard to the layoff and recall of bargaining unit employees because Port Printing was not recognizing the Union, Port Printing was not willing to bargain with the Union.

When called by Respondent, Joseph Soileau Jr. testified that on the day Mott maintains that he received the October 17, 2005 notice Mott did not approach him in the production area and tell him that he told Robinson that Port Printing did not have to lay people off because they could draw their unemployment compensation without being laid off.

When called by Respondent, Robinson testified that she did not have a conversation with Mott on the day that the October 17, 2005 letters (notice of layoff) were provided to employees; that she heard Mott's testimony about him coming to her and telling her that there was no reason to put people on layoff because they were already receiving unemployment compensation, but it did not happen; and that with respect to the layoff:

> Joe and I met several times during then, trying to figure out what we were going to do and who we could bring back and who we couldn't bring back, and we just—it was a very hard decision for us, because we'd never had a layoff in the whole time that I had been at Port Printing, and we realized finally that we would need to lay some people off, because we didn't have the work. [Tr. 193.]

Robinson further testified that at that point in time they did not know when the work might return; that they did not know when the building was going to be fixed; that they were not sure about the safety of the building and asking people to work in that environment; that none of the employees telephoned her about the October 17, 2005 letter notice; that she helped answer the telephone at Port Printing after Hurricane Rita; and that

> Before we wrote the letter up, we checked the union contract, an in Section 18, I believe it is—Sections 15 and 18 talked about layoffs, and it said that—Section , I think, 18 says seniority is based on—is deemed to be based on job classification.
>
> . . . .
>
> That whoever works in that job classification and has the longest time with the present employer shall be given preference and choice first, and that seniority shall govern in layoffs and rehires. And so that's what the basis of the

[6] Sec. 18 of GC Exh. 5 reads, as here pertinent, as follows:

> A. It is agreed that seniority shall be determined on the basis of job classification seniority, i.e. employee with the greatest seniority within his present job classification will first be offered a choice or be given preference and other employees will follow in the order of their length of service in such job classification, with their present Employer.

[7] Sec. 15 of GC Exh. 5 reads as follows:

> 1. In the event of a reduction in the size of the working force the last to be employed shall be the first to be laid off.
>
> 2. In the event of a subsequent increase in the size of the working force employees shall be re-employed in the reverse order.
>
> 3. Except in cases of discharge for cause, the employer shall give one week's notice of intention to discharge or lay off employees. When any employee intends to leave the employ of the employer he shall give one week's notice.

> [October 17, 2005] letter was, but he [Mott] never asked me about any of that. [Tr. 212, 213.]

Further Robinson testified that Jane (Meche) Soileau had the most seniority in the job classification of bindery and so she was the first to be called back to work.

On rebuttal Mott testified that the day he received the layoff letter notice was the day he was getting his last check from Robinson and he went into her office and sat down across from her while she was at her desk and he told her "[l]ook Gloria, you didn't need to lay us off, because we could still draw disaster unemployment without being laid off" (Tr. 229); and that Robinson "wasn't too concerned" (Id.).

When called by Respondent, Joseph Soileau Jr. testified that Mott came to Port Printing in the latter part of October 2005, after the electric power was restored to the facility; that Mott asked him what was being done to fix the damage; that he told Mott that the owners were waiting on the insurance adjuster to assess the damage, they were in the process of getting someone to remove the mold, and there would have to be an air quality test to make sure that it was safe for everyone to come back; that Mott told him that he could not work under those conditions until it was all cleared, and the first time he came through the shop, about one week earlier, he had problems with his breathing from all the mold.

On cross-examination, Joseph Soileau Jr. testified that when he had his conversation with Mott in late October 2005 about, among other things, waiting to have the mold removed, there were people already working in the facility.

On rebuttal, Mott testified that he was sure that after he received the layoff letter he basically went to Port Printing about every week.

Mott testified that at the end of November 2005, he spoke with Robinson alone in her office about Lannis Soileau operating the machinery; that he told Robinson that he did not think it was right for Lannis Soileau to be doing his, Mott's, job; that Robinson said that there was not enough work to be full time; that he told Robinson that every time he comes into Port Printing "there's always work back there . . . a table full of jobs . . . he's [Lannis Soileau] always running the press, and everything that I seen showed that there'd be enough work, more than just a day or two a week" (Tr. 53, 54); that Robinson did not respond; that he told Joseph Soileau Jr. the same thing; that Joseph Soileau Jr. told him that the building was not safe for people to work in; and that he told Joseph Soileau Jr. that the building must be safe for some people but not everybody.

On cross-examination, Mott testified that at some point he was told by Respondent's management something to the effect that they did have some press work but it was sporadic and to call him back for 1 day at a time might interfere with his collecting unemployment; and that at that time he was receiving unemployment compensation.

On redirect, Mott testified that before Hurricane Rita, Respondent paid the whole premium for his medical insurance; that while he was on unemployment compensation he had to pay the medical insurance premium; and that if Respondent would have paid his medical insurance "and stuff like that," (Tr. 84), it would have benefited him to work part-time with the Respondent.

When called by Respondent, Joseph Soileau Jr. testified that Mott came to his office in Port Printing in November 2005 to get an update on the progress of the building; that Service Master had taken as much of the mold out as they could get and they took the moisture out; that they were still waiting on the air quality test; that Mott said that he had a problem with the mold, and the only way he would come back at that time was with a respirator; that he mentioned that Port Printing was sending a lot of work out but it was also doing some small press work in the shop; and that he told Mott that Port Printing still had to get a service person out to check the equipment.

On rebuttal, Mott testified that he did not say anything about needing a respirator to come to work to Joseph Soileau Jr. during their November 2005 conversation; that Joseph Soileau Jr. asked him if he would mind working in the building and he told Joseph Soileau Jr. that he would not have a problem with it; and that Joseph Soileau Jr. said that it did not look like they were going to be fixing the building or he hadn't heard anything about them fixing the building.

When called by Respondent, Robinson testified that her first post Rita meeting with Mott occurred in the latter part of October 2005; that Mott had come in about his COBRA insurance; that Mott asked her why Joseph and Lannis Soileau had been running his press or running the presses; that she told Mott that Respondent had some work before the storm that they were trying to complete, and Respondent did not think that it could bring in someone on a permanent basis; that Respondent felt that it would be harder for an employee if Respondent brought the employee in for a couple of days, laid them off, brought them in for another couple of days and again laid them off; that Respondent felt that the employees could sign up for unemployment and receive a steady source of income; that this meeting alone with Mott took place in her office at Port Printing; that her next meeting with Mott occurred in the middle to late November 2005; and that at the November 2005 meeting Mott spoke about his 401(k) and he asked her about the condition of the building (which he also asked about in the earlier meeting with her) and she told Mott that they were still waiting on the air quality control test results and David Huddle had yet to indicate whether he was going to repair the building.

On rebuttal, Mott testified that Robinson's testimony that he never talked to her about the getting his job back is not accurate; that in November 2005, he walked into Port Printing and asked Robinson why Lannis Soileau was doing his, Mott's, job; that Robinson told him that she could bring him back but it would only be for a day or two; that he told Robinson that it looked like there was enough work to keep somebody busy because every time he came in there was work; that Robinson did not offer to bring him back; and that several years back he served as foreman, running the production department, handing out work assignments, and scheduling jobs, which is now part of the duties of Joseph Soileau Jr.; that part of his job was to repair equipment, and he "probably worked on every piece of equipment that . . . [Port Printing] had in that place at one time or another, except computers" (Tr. 233); that on big press jobs Joseph Soileau Jr. would follow his recommendation on which

machine to use; and that the Komori press had electrical and roller problems before Hurricane Rita and was used only when Port Printing had to use it.

When called by the Respondent, Joseph Soileau Jr. testified that Respondent's Exhibit 4 is an invoice from Saunders Graphics for checking the Komori press on December 5, 6, and 7, 2005. The invoice lists the problems with the press and ends with "Conclusion: Condemn machine to scrap." Joseph Soileau Jr. testified that this was one of the presses operated by Mott; that a comparable operating machine would cost about $85,000 and a new machine of this type would cost $300,000; and that Port Printing has not replaced this machine, which is still inoperative.

On cross-examination, Joseph Soileau Jr. testified that the Komori press was a 1981 model; and that the Heidelberg press was almost 50 years old and they last a long time.

According to the testimony of Joseph Soileau Jr. when he was called by counsel for the General Counsel, in December 2005 he did offer to recall Mott. Joseph Soileau Jr. testified that he asked Mott if he wanted to come back part time;[8] that Mott told him that he would be interested in coming back; that he, Joseph Soileau Jr., has done some printing work running the printing presses, and he has done some bindery work, which is the finishing work once a job is printed, namely folding, padding, and numbering; that he has done prepress work and he has made deliveries; that before Hurricane Rita Respondent had a part-time worker, Williams, who did delivery; and that prepress work involves stripping up negatives and making plates to be printed on the press, and before Hurricane Rita, Courtney did this work.

On cross-examination, when he was called by Respondent Joseph Soileau Jr. testified that he did work on the small presses a couple times a week, sometimes more, sometimes less; that in 2005 he worked on the small presses maybe 4 hours a week; that for the last 3 months in 2006 before the trial herein he worked on the small presses 8 to 10 hours a week; that when he had his conversation with Mott in December 2005 all of the work regarding mold had been completed by then; and that he explained to Mott that all of the work had been done and all of the mold had been taken care of.

Mott testified that he had a conversation with Joseph Soileau Jr. at Port Printing on about December 10, 2005 on one of his visits to the facility; that Joseph Soileau Jr. told him that he would like to have him return to work, it did not look like the owners of the building Port Printing leased were going to fix the building, and would he mind working in the building like it was; that he told Joseph Soileau Jr. that he would be willing to work in the building; that Joseph Soileau Jr. told him that maybe Port Printing would get him back working in the building after the holidays; and that he told Joseph Soileau Jr. that would be good because he really needed to go back to work.

On cross-examination, Mott testified that when Joseph Soileau Jr. asked him if he would be interested in coming back to work Joseph Soileau Jr. did not limit it to part-time work; and that Joseph Soileau Jr. told him that Respondent's management was going to look at other places to move because the owner of the building which Respondent leased may not repair the building.

On redirect, Mott testified that Joseph Soileau Jr. did not give him a specific date that he would come back to work; and that Joseph Soileau Jr. said probably after the holidays.

When called by Respondent, Joseph Soileau Jr. testified that Respondent's business records, specifically Respondent's Exhibit 5, shows that Ellis, who was a bindery helper, was called back to work on December 15, 2005; that Ellis was called back when Port Printing had some extra work in the bindery area; that Ellis had another job and she wanted to supplement that income; that March 6, 2006, was the last day Ellis worked for Port Printing; and that Ellis was supposed to come to work at Port Printing on March 7, 2006, but she never came in, and while Respondent tried to contact her at the telephone number Ellis provided Respondent, she never called back.

On cross-examination, Joseph Soileau Jr. testified that he had Robinson telephone Ellis to come back to work because they were friends; and that Ellis was paid the same amount when she was recalled ($7 an hour) as she was paid before Hurricane Rita.

When called by Respondent, Robinson testified that Ellis had just become permanent with Port Printing in 2005, she had not worked a full year as a permanent employee, and she would have had to work a year before she received vacation and sick pay; and that Ellis did not claim that she had accrued vacation and sick leave coming to her.

When called by Respondent Joseph Soileau Jr. testified that in the latter part of December 2005, before the holidays, Mott came to his office at Port Printing; that Mott came in to do some insurance paperwork and they discussed the building; that he told Mott that Respondent was still waiting on the air quality test; that he told Mott that work was picking up, Port Printing was having to do more and more because it was having trouble sending everything out; that Port Printing was printing more jobs on the small presses and really needed to get someone in there even though conditions were like they were; that Mott told him that he was interested but because he was still working on getting his home fixed, he would prefer to wait until after the holidays, the first of the year, before he did anything; that he told Mott "I could guarantee part-time. I just couldn't guarantee that it would stay busy enough to stay full-time, but for sure we had definitely part-time work" (Tr. 141); that the work would have been on the small presses because at that point Port Printing was not doing anything on the large presses, "[e]verything was still being contracted out" (Id.); and that while Mott told him that he might let him know on the part-time work after the first of the year, Mott never let him know that he wanted to come in.

[8] It is noted that Lannis Soileau's timecards, GC Exh. 6, show that Lannis Soileau worked 88.75 hours for the 2-week pay period ending "12/15/05," he worked 67.75 hours for the pay period ending "12/31/05," he worked 75 hours for the pay period ending "1/15/06," and he worked 101.75 hours for the pay period ending "1/31/06." Lannis Soileau's hours had reached full-time status and it is not clear why Joseph Soileau Jr. would be speaking to Mott about part time if Respondent was going to cease using a nonbargaining unit employee, Lannis Soileau, and give those hours back to a bargaining unit employee, Mott.

On rebuttal, Mott testified that in December 2005 Joseph Soileau Jr. told him that work was picking up and he really needed somebody else in there; that Joseph Soileau Jr. asked him again if he did not mind working in the building and he told Joseph Soileau Jr., "No, I need to get back to work" (Tr. 228); and that he asked Joseph Soileau Jr. when, and Joseph Soileau Jr. said "probably after the holiday, and he told Joseph Soileau Jr. "Fine." (Id.)

When called by Respondent, Robinson testified that in mid- to late December Mott met with her and told her that he had received a cancellation notice on his COBRA; that she told Mott Respondent had paid it and she would check into it; that Mott told her that he had been offered a job elsewhere but he told the person offering the job to contact Randy Soileau; that Mott told her "that Joe had offered him to come back to Port, but he had a lot going on at his house. He was putting—having to put a new roof on his house. . . ." (Tr. 203); and that Mott may have said that Joseph Soileau Jr. had offered him part-time work but she was not sure.

Mott testified that when he did not receive a telephone call from Port Printing by a few days after New Years day, he went to Port Printing and spoke with Joseph Soileau Jr.; that he told Joseph Soileau Jr. that he thought that he was going to be coming back to work after the holidays; that Joseph Soileau Jr. told him that "[w]ork had slowed down [and] [t]here wasn't much going on" (Tr. 56); that after this he never had any other conversations about his going to work for Port Printing; and that Port Printing never called him back to work.

On cross-examination, Mott testified that he had a meeting with Robinson in late January 2006 at the facility that Respondent leased; that he asked her for his vacation and sick leave because Randy Soileau told him that he had receive his vacation pay; that funds were getting a bit low and he needed to collect the "time . . . [he] had on the books" (Tr. 70); and that he discussed with Robinson the amount of sick leave and vacation pay that he had accrued.

When called by Respondent, Robinson testified that she met with Mott in mid- to late January 2006; that Mott told her that he had paid the COBRA in December 2005 for January 2006 and since he had gone on his wife's insurance in early January 2006, he wanted to be reimbursed; that Mott requested his vacation and sick pay and he told her that he was working for Chuck Ehlers at KMI; that Mott told her that Port Printing had not paid Randy Soileau enough sick leave when he resigned from Port Printing in December 2005 to take another job; and that she told Mott that she would get back to Randy Soileau about the sick leave pay.

On rebuttal, Mott testified that the week prior to his birthday on January 29, 2006, he started working for Ehlers at Knight Media; that earlier Ehlers telephoned him asking him for the telephone number of Randy Soileau because Ehlers wanted to offer him a job; that he gave Ehlers the telephone number and told him that if Randy, who had another job, was not interested, maybe he could help Ehlers out since he was not working; that he told Ehlers that all he could commit to would be temporary since he may be called back to Port Printing; that Ehlers told him that he just needed somebody, that would be fine, and he would work with him; that he spoke with Randy Soileau who told him that (a) Robinson made him sign a paper "saying that he resigned before he could get [his vacation pay]" (Tr. 237) and (b) Robinson told him that Port Printing quit paying sick leave;[9] that as a result of his conversation with Randy Soileau he went to Port Printing, spoke with Robinson, and requested his vacation and sick leave pay; that Robinson asked him if he was resigning to which he answered "[n]o; you already laid us off" (Tr. 238); that Robinson told him that she would give him vacation but Port Printing no longer gave sick leave for some time, which set precedent; that he told Robinson that if there was no way for the Union to find out about it then there was no precedent set and the collective-bargaining agreement specifies that when an employee leaves the employee is entitled to all vacation and sick leave that has accrued; that he told Robinson that if the collective-bargaining agreement is enforceable, there is no dispute and he wanted his vacation and sick leave; that he told Robinson that she should give Courtney and Randy Soileau their vacation and sick leave when they request it; that Robinson acknowledged that she had to give him his vacation and sick leave and that she would go back and give Randy Soileau his; and that he then mentioned severance pay to Robinson as part of his attempt to settle pending litigation over Port Printing's withdrawal of recognition of the Union.[10]

When called by Respondent, Joseph Soileau Jr. testified that in late January 2006 Robinson came to him in production and asked him to meet with her and Mott; that he and Robinson met with Mott who said he was not there as president of the Union and he wanted to discuss his sick leave and vacation benefits; that the following week, about February 3, 2006, he met with Mott and Robinson in Robinson's office to go over the paperwork regarding Mott's sick leave and vacation; that he and Robinson asked Mott to take the paperwork home over the weekend and make sure that it was correct; that the following Monday Mott returned to Port Printing and he said that the figures were correct; that Mott accepted his vacation check; that

[9] This testimony was offered with respect to what Mott did after speaking with Randy Soileau.

[10] As here pertinent, p. 5 of the involved collective-bargaining agreement reads as follows:

SECTION 11

SEVERANCE PAY

> In the event of merger, consolidation, or suspension of the employee's pressroom operations, covered by this agreement, effective 1/1/97 all regular employees shall be given five days severance pay for each year of employment with maximum severance pay equaling ten (10) weeks of pay. No existing severance will be lost by present employees. Vince - 30 weeks, Gail 24 weeks, Rhonda 12 weeks.

On brief counsel for the General Counsel renews his motion to strike that portion of Robinson's testimony on Tr. 205–208 which refers to Mott's statements to her about severance. Counsel for General Counsel contends that Mott was attempting to settle all potential and outstanding claims. In view of Mott's rebuttal testimony that he was attempting to resolve the pending litigation regarding Respondent's withdrawal of recognition of the Union, counsel for the General Counsel's motion to strike will be granted. More specifically, counsel for the General Counsel's motion to strike the following portions of the transcript is hereby granted: p. 205, L. 24; p. 206, LL. 1 and 13–17; p. 207, LL. 21–25; and p. 208, LL. 1–4.

he did not have any contact with Mott after this; that from October 17, 2005, through the last time he saw Mott in February 2006, Mott never objected to the October 17, 2005 notice of layoff; and that Mott was upset that Jane (Meche) Soileau and Zienow were called back before him and he said that he should have been called back before them at the January 2006 meeting.

On cross-examination, Joseph Soileau Jr. testified that it is possible that Mott told him earlier than January 2006 that he was upset that Jane (Meche) Soileau and Zienow were called back before him; and that while Mott complained about Jane (Meche) Soileau and Zienow, he never complained that Lannis Soileau, a nonbargaining unit salesman, was doing press work—was doing his, Mott's, job.

Respondent's Exhibit 8 reads as follows: "Consider this my request to receive vacation and sick leave that is due to me." The note is signed Courtney and is dated "01/26/06." When called by Respondent Robinson testified that Courtney came to Port Printing on this date and gave her this document; that Courtney came into her office and asked her about the condition of the building and when it was going to be fixed; that Courtney said that she had enjoyed working at Port Printing, it was the perfect job for her; that Courtney then asked about her vacation and sick leave; and that Courtney received her accrued vacation.

On cross-examination, Robinson testified that she asked Courtney to provide the handwritten note "[b]ecause I didn't want it to be her word against mine if there . . . [were] any problems as to when it was asked for or whatever. I like things in writing. You know, if you're asking me to do something, put it in writing so that we both have [a] record of it." (Tr. 217, 218.)

When called by Respondent, Robinson testified that around the first of February 2006 Respondent reviewed its vacation and sick leave records and determined that there were mistakes; that Respondent ended up owing more money to Randy Soileau and Courtney, which Respondent paid; that Respondent's records were not in agreement with Mott's records; that Respondent got Mott to come to Port Printing, gave him the information Respondent had and told him to take it home over the weekend and review it; that subsequently Mott came back in, he indicated that Respondent's records were correct, and Mott was paid what he was owed; and that she did not have any other conversations with Mott after this, except for contract negotiations just before she testified at the trial herein.

On cross-examination, Robinson testified that at the time of the trial herein Mott was on temporary layoff from Port Printing. And on redirect Robinson testified that in the meetings she had with Mott after January 20, 2007, he told her that he had gone to work with KMI.

When called by Respondent, Robinson testified that Abby Masterson, who works in customer service and is not in the bargaining unit, did not come back to work at Port Printing until January 2006. On cross-examination, Robinson testified that Masterson telephoned her in December 2005, saying the she was unhappy in her current job and she would consider coming back to Port Printing; and that in January 2006 she telephoned Masterson and asked her to return to Port Printing.

Counsel for the General Counsel and the Respondent stipulated to the receipt in evidence of General Counsel's Exhibits 7 through 12. Counsel for the General Counsel indicated that the exhibits are time records from pay periods beginning September 16, 2005, and ending December 15, 2005; that the General Counsel's Exhibit 7 indicates that employees were paid through September 30, 2005, but because of Hurricane Rita they did not actually work the entire pay period ending September 30, 2005; and that regarding General Counsel's Exhibit 8, which is pay period ending October 15, 2005, the records will indicate that some employees were paid for 40 hours of work but they did not actually work during that period of time, the Respondent paid the employees because of Hurricane Rita, and the employees were Randy Soileau, Jane (Meche) Soileau, Masterson, Ellis, Courtney, and Mott. Counsel for Respondent indicated that all employees were paid in full through September 30, 2005. General Counsel's Exhibit 13 is copies of timecards for employee Ellis for pay periods December 30, 2005, January 15, 2006, February 15, 2006, and March 15, 2006. And General Counsel's Exhibit 16 is a computer printout which shows hours worked by Respondent's employees from January 4, 2006, to December 1, 2006. Counsel for the General Counsel and the Respondent stipulated that the following individuals held the following positions: Masterson, customer service; Gloria Robinson, management; Joseph Soileau Jr., management; Jane (Meche) Soileau, bindery employee; Lannis Soileau, salesman; Betty Jean Verret, customer service; Zienow, typesetting; Jenelle Beam, bookkeeping; Cathy Chapman, sales; Courtney, prepress employee, Ellis, bindery employee; Mott, pressman; and Randy Soileau, pressman. Additionally, Williams, who retired in 1996, would occasionally do part-time work for the Respondent through Hurricane Rita. And Barbara Young worked as a bookkeeper for the Respondent until November 18, 2005. And finally, counsel for the General Counsel and the Respondent stipulated that the following employees are in the bargaining unit: Jane (Meche) Soileau, Courtney, Ellis, Mott, Randy Soileau, Williams, and Zienow.

By letter dated March 3, 2006 (GC Exh. 3), David Huddle advised Robinson that he paid for the electrical work, for Service Master, he owed First General Service for tarping the roof and taking air samples, and he did not 'intend to put another cent into this building and plan[ed] to sell it "as is"; and that he was willing to sell the building to Port Printing.

General Counsel's Exhibit 3 is the unpublished decision of the United States Court of Appeals for the Fifth Circuit filed July 27, 2006, on application for the enforcement of the Board order in the above-described March 7, 2005 decision of the Board.[11] The court affirmed the judgment of the Board.

When called by the Respondent, Joseph Soileau Jr. testified that Robinson purchased the involved building in August 2006 and at that time she had the roof replaced.

[11] Counsel for the General Counsel indicated in his opening statement at the trial herein that he believed that as of September 2005 when Hurricane Rita hit Lake Charles, the Board's March 7, 2005 decision was before the Fifth Circuit on an appeal by the employer. Counsel for Respondent did not challenge this assertion.

When called by Respondent, Robinson testified that she purchased the involved building in August 2006, and had the roof replaced, to the extent necessary, toward the end of August and the first of September 2006; that Port Printing did not receive a copy from David Huddle of the report (GC Exh. 9), about the outcome of the mold situation, the treatment of the mold; that David Huddle had been asked on several occasions prior to that about the mold in the building because there was an air quality test done; that she did not receive any information before August 2006 in regard to the extent of mold and the mold problem inside the building; that First General Services, the addressee on the report, is the contractor which David Huddle spoke to about the repairs to the involved building; that she received Respondent's Exhibit 9, which is dated November 10, 2005, when she was buying the building in August 2006; and that while she underlined the part of the report which reads "[t]he only exception to these (spores present) are the Aspergillus and Penicillium which are well above outside background," she did not pursue this.

During cross-examination, Robinson testified that before she received the report in August 2006 she did not receive a verbal assurance from someone who was in a position to know that it was alright to work in the involved facility; that she worked in the involved facility from October 2005 until August 2006 without knowing whether it was dangerous or not; that the employees who worked in the involved facility during this period never specifically asked if it was okay to be working there; and that when Service Master was in the involved facility treating the mold she asked them questions and she was told that once the mold was treated, if it was not reactivated again, it became dormant; that she had discussions with the mold abatement personnel of Service Master as they were doing the work at the involved facility but they did not specifically advise her that with the work they were doing, that it was safe for people who worked in that area; and that the press room had the most damage.

Respondent's Exhibit 7 consists of numerous invoices for work that was sent out by Respondent to other printers after Hurricane Rita up to the time of the trial herein. When called by the Respondent, Joseph Soileau Jr. testified that the small press jobs were contracted out because Respondent's envelope feeder was damaged and until it was fixed Respondent could only do small quantities of envelopes; that "with one person doing small press work, we just weren't capable of being able to handle everything in-house, [a]nd . . . there were days when it was raining that eliminated us from being able to print . . . so . . . part of the problem was the condition of the building" (Tr. 166); that all of the presses had to be covered with visqueen and when it rained Respondent would essentially shut down the printing department completely; that initially this work was subcontracted out because until Port Printing had all of the equipment checked and repaired, it was not able to do any of this work; that until the roof was fixed in August 2006 Port Printing was not able to do this work because of the amount of rain and the "conditions just didn't allow us to" (Tr. 170); and that after the roof was repaired some of this work which was contracted out could have been done in house at Port Printing if it replaced some of its equipment but at the time of the trial herein it still had not been able to replace the equipment.

On cross-examination, Joseph Soileau Jr. testified that his conclusion that there was not enough work to recall Mott was based on the fact that Port Printing was not able to produce any of that work—the work previously produced on the Komori press; that the time Mott used the Komori press before Hurricane Rita varied in that sometimes he worked the full week on the Komori and at other times maybe he would work 1 day a week on the Komori; that he usually left it up to Mott to decide which large press he would use; that most of the work Port Printing had could be run on either the Komori or the Heidelberg; and that he did not recall if prior to Hurricane Rita Port Printing had tried to sell the Komori press.

On rebuttal, Mott testified that about 2 years before Hurricane Rita Joseph Soileau Jr. had him show the Komori press to some people as part of an attempt to sell this press; that he set the machine up and ran it for the prospective purchaser; that subsequently Joseph Soileau Jr. told him that Respondent would lose money on the sale because even if this press was sold Respondent would have to pay the principal and interest on the outstanding loan on the machine for the full term of the loan.

Analysis

Paragraphs 10, 12, and 13 of the complaint collectively allege that on or about October 17, 2005, Respondent laid off Vince Mott, Gail Courtney, Randy Soileau, Renee Ellis, and Joel Williams without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct; and that the layoffs relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The General Counsel on brief contends that Respondent did not contact the Union to discuss its decision to lay off employees without pay as of October 17, 2005; that the involved collective-bargaining agreement does not waive the Union's right to notification and to bargain about the decision to lay off employees and the effects of the layoff; that Respondent does not dispute the fact that it did not contact the Union to provide the Union an opportunity to bargain about the lay off or the effects of the lay off; that it is not surprising that Respondent did not notify the Union since Respondent had unlawfully ceased recognizing the Union, but Respondent acted at its peril; and that Respondent's failure to notify the Union and to afford the Union an opportunity bargain with Respondent with respect to this conduct and the effects of this conduct violated Section 8(a)(1) and (5) of the Act.

Respondent on brief argues that

> *The conflicts in the testimony between Mott and Robinson and Mott and Soileau are unimportant to a resolution of the Complaint allegations* because Mott . . . never protested the . . . [October 17, 2005 layoff notice] and never requested that the company bargain with the Union over the effects of the letter. [Emphasis added.] [R. Br. at p. 18.]

Respondent further argues that the Union cannot remain idle and wait 5-1/2 months before challenging, with the March 31, 2006 unfair labor practice charge, alleged unlawful actions by the employer, *Haddon Craftsmen,* 300 NLRB 789 (1990), and *AT&T Corp*, 337 NLRB 689 (2002); that "[c]ertainly this letter [the October 17, 2005 layoff notice] did not constitute or announce a 'fait accompli' which excused the Union from requesting bargaining or excused it from informing the Company it was protesting the announcement and wished to bargain over the effects of the announcements" (R. Br., p. 19); that the employees were placed "in 'layoff' status *to assist in their application for and receipt of unemployment compensation benefits*" (Id. with emphasis in original); and that in the event that it is decided that the October 17, 2005 letter did violate Section 8(a)(1) and (5) of the Act still the General Counsel's request of a make-whole remedy should be denied since the Union was notified and knew since October 17, 2005, that the separation from employment might continue for an indefinite time, the Union did not timely protest or request bargaining and, therefore, waived any claim for back wages.

Respondent failed to notify the Union in a timely manner of the October 17, 2005 layoffs and Respondent failed to accord the Union an opportunity bargain with Respondent with respect to this conduct and the effects of this conduct. Why? Simply put, Respondent was not going to change course in midstream. Respondent unlawfully ceased recognizing the Union and that matter was still the subject of litigation at the time of the October 17, 2005 layoffs. As Joseph Soileau Jr. testified, he and Robinson decided that the October 17, 2005 layoffs were the best thing that they could do. And as Robinson testified, while she and Joseph Soileau Jr. discussed the decision to layoff employees, the Union was not contacted prior to the time this decision was made because she was not aware that she needed to contact the Union.[12] The Respondent had earlier unlawfully withdrawn recognition from the Union and, therefore, from the Respondent's viewpoint, the Union was not even in the picture. Contrary to Respondent's assertion on brief, the October 17, 2005 layoff notice was a "fait accompli." The October 17, 2005 notice reads, in part, as follows: "It was a hard decision for Joe and . . . [me] to lay-off employees. . . ." In other words, the decision had already been made. This was not notification to the Union of the contemplation of a decision which might be made some time in the future. On brief Respondent argues that, after the employees were made aware of the Respondent's decision which had already been reached without timely notification to the Union and without according the Union an opportunity to engage in meaningful bargaining, the Union should have requested bargaining, the Union should have protested the announced layoffs, and the Union should have requested bargaining over the effects of the announced layoffs. This is the same Union that Respondent unlawfully refused to recognize. Now Respondent's attorney, in effect, is arguing that the victim should have shouted out in protest, and the victim should have demanded to be treated lawfully. To what end? Such protestations would have fallen on deaf ears. A request to be treated lawfully would have been met with the figurative back of the hand which had already been shown with the unlawful withdrawal of recognition and the unlawful October 17, 2005 layoff notification. No real purpose would be served by requiring one to engage in an exercise in futility. Respondent presented the Union with a "fait accompli." Respondent created the situation when it decided to unlawfully withdraw recognition from the Union. Respondent continued to act accordingly. Respondent has been hoisted on its own petard. And now Respondent is trying to find some way to avoid suffering the consequences of its actions. In the aforementioned cases cited by the Respondent on brief, the employers did not withdraw recognition from the involved unions before the involved employment action, the employers did not present the unions with a "fait accompli," the employers gave the unions timely notification, and the employers accorded the unions a meaningful opportunity to bargain. That is not the situation in the instant proceeding. Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraphs 10, 12, and 13 of the complaint.

Paragraphs 11, 12, and 13 of the complaint collectively allege that since about October 2005, and continuing thereafter, Respondent began using nonbargaining unit employees and supervisors to perform bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct; and that this conduct relates to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The General Counsel on brief contends that Respondent did not introduce any evidence that the Union waived its right to bargain with respect to who performed unit work after Hurricane Rita; that according to his timecards Lannis Soileau, who is Joseph Soileau Jr.'s brother and not a member of the bargaining unit, worked a total of "1,185.5" hours as a pressman for Respondent during the pay periods beginning with "10/31/05" and ending with "6/15/06"; that according to Respondent's daily job logs Lannis Soileau worked as a pressman on a constant basis from January 26 to November 15, 2006; that Joseph Soileau Jr. also worked as a pressman since October 2005, he worked in the bindery area, and he performed delivery work and cameras stripping work; that an employer violates the Act when it transfers work to nonbargaining personnel, *Citizens Publishing Co.*, 331 NLRB 1622 (2000), enfd. 263 F.3d 224 (3d Cir. 2001); that the transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work, *Regal Cinemas,* 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003); that neither Mott, nor Randy Soileau, nor Courtney, nor pressman/deliveryman Williams were ever recalled to work at Port Printing notwithstanding the fact that there was work for these

[12] The fact that I am citing the testimony of Joseph Soileau Jr. and Robinson about their decision does not mean that I view them as credible witnesses. As pointed out by Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1949) "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." The testimony of Joseph Soileau Jr. and Robinson regarding them making the decision on the October 17, 2005 layoffs, and not contacting the Union before the decision was made is not contradicted by any other evidence of record.

individuals and this work was done by nonbargaining unit employees and at least one supervisor; that before December 27, 2005 Ellis' work was assigned to nonbargaining unit employees and supervisors; and that by using nonbargaining personnel and supervisors to perform the bargaining unit work begun in October 2005, Respondent violated Section 8(a)(1) and (5) of the Act.

Respondent on brief argues that in the event that it is decided that the performance of bargaining unit work by a supervisor and a nonbargaining unit employee did violate Section 8(a)(1) and (5) still the General Counsel's request of a make whole remedy should be denied since Respondent "had no idea that at some point in the distant future Mr. Mott would contend that Lannis Soileau performing work on the small presses would be alleged to be a violation of Section 8(a)(1) and (5) of the Act" (R. Br., p. 20); and that the closest Mott came to protesting Lannis Soileau performing bargaining unit work is when he allegedly told Robinson that it was not right for Lannis Soileau to be performing that work.

As noted above, in Respondent's answer, filed October 6, 2006, to the complaint, Respondent's attorney asserts, as here pertinent, that "[f]or short periods of time, sporadic in nature, Respondent did utilize non-bargaining unit employees and supervisors to perform a small amount of bargaining unit work. Bargaining unit work was performed by non-bargaining unit employees for a brief time because conditions did not allow Respondent to recall to work bargaining unit employees" (par. 11 of p. 3 of the "ANSWER TO COMPLAINT"). Respondent could have simply denied the allegation in the complaint. Instead Respondent's attorney chose to make the above-described statement. As here pertinent, when Respondent's answer was filed, nonbargaining unit employee Lannis Soileau, as demonstrated by evidence of record (timecards and log sheets), had been doing bargaining unit work constantly for about one year. Lannis Soileau continued to do bargaining unit work at the time of the trial herein. Respondent did not call Lannis Soileau as a witness. Just before rebuttal the following occurred:

> MR. FONTI: Your Honor, I have one more witness. He would have to come over from where he is right now. He's over at the company. I'd like to put him on right after lunch if it pleases Your Honor.
>
> . . . .
>
> AFTERNOON SESSION
>
> JUDGE WEST: On the record. Proceed.
>
> MR. FONTI: Your Honor, the Respondent is not calling any further witnesses. Respondent rests. [Tr. 225, 226.]

It is a violation of Section 8(a)(1) and (5) of the Act when an employer layoffs bargaining unit employees and replaces them with nonunit employees without giving timely notice to the union and without according the union an opportunity to bargain about the decision and the effects of the decision on unit employees. *Torrington Industries*, 307 NLRB 809 (1992). It is also a violation of Section 8(a)(1) and (5) of the Act when an employer transfers bargaining unit work to a supervisor without giving timely notice to the union and without according the union an opportunity to bargain about the decision and the effects of the decision on unit employees. *Land* O' *Lakes,* 299 NLRB 982 (1990). Both situations negatively impacted bargaining unit work. Both situations are mandatory subjects of bargaining. But as noted above, when Respondent took these actions it had unlawfully withdrawn recognition from the Union, and that matter was the subject of pending litigation at that time. Respondent acted at its peril and it now must face the consequences of its actions. Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraphs 11, 12, and 13 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All journeymen, assistants, apprentices, and other employees of the Publisher operating or assisting in the operation of the Employer's printing presses, including gravure, offset and letterpress printing presses and all other printing presses of whatsoever type or process of printing operated by such Publisher. The Publisher further recognizes the Union as the sole and exclusive bargaining agent for its offset preparatory employees, including employees engaged in the operation of cameras; employees engaged in the making of offset plates; stripping, etching, opaquing and any and all functions preparatory to the making and/or manufacture of offset printing plates.

4. Since at least February 1997, and at all material times thereafter, the Charging Party has been the exclusive collective-bargaining representative of the unit described in paragraph 3 above, based on Section 9(a) of the Act.

5. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act:

(a) On or about October 17, 2005, Respondent laid off Vince Mott, Gail Courtney, Randy Soileau, Renee Ellis, and Joel Williams without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

(b) Since about October 2005, and continuing thereafter, Respondent began using nonbargaining unit employees and at least one supervisor to perform bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent (a) laid off Vince Mott, Gail Courtney, Randy Soileau, Renee Ellis, and Joel Williams without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, (b) since about October 2005, and continuing thereafter, began using nonbargaining unit employees and at least one supervisor to perform bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, and since the subjects described above in (a) and (b) in this paragraph relate to wages, hours, and other terms and conditions of employment and are mandatory subjects for the purposes of collective bargaining, it is recommended that Respondent bargain with the Union regarding the conduct and the effects of the conduct described above in (a) and (b) in this paragraph and make whole Vince Mott, Gail Courtney, Randy Soileau, Renee Ellis, and Joel Williams for any loss of earnings and other benefits they suffered because of Respondent's above-described unlawful conduct, computed on a quarterly basis from date of layoff to date of recall, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]