**McGraw-Hill Broadcasting Company, Inc., d/b/a KGTV *and* National Association of Broadcast Employees and Technicians-Communications Workers of America, AFL–CIO.** Cases 21–CA–38193 and 21–CA–38294

September 30, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

The issues before the Board in this case are whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union over its decision to lay off three part-time bargaining unit employees, and by refusing to bargain over the effects of the layoff decision. The judge recommended dismissal of these allegations, concluding that the Respondent had complied with its bargaining duty concerning both matters.[1]

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, findings, and conclusions only to the extent consistent with this Decision and Order.[2] As to the issue of decision bargaining, our analysis differs from that of the judge, but we nevertheless find no violation of the Act. However, we do find an effects-bargaining violation.

I.

The Respondent operates a television station in San Diego. The Union has represented a unit of technicians and other employees in collective bargaining with the Respondent and its predecessors since 1953. The parties' most recent collective-bargaining agreement expired on January 31, 2006. Following the contract's expiration, the parties continued day to day under the terms of the expired agreement.[3]

In early December 2007, the Respondent decided to terminate a Sunday morning newscast because of low ratings.[4] Later in December, the Respondent determined that the reduced hours of full-time unit employees due to the cancellation of the newscast implicated a provision of the expired collective-bargaining agreement that requires that the working hours of part-time unit employees be limited to a certain percentage of the working hours of full-time unit employees. The Respondent unilaterally decided to lay off three part-time employees to remain in compliance with the terms of the contract.

Article 5.4 of the expired collective-bargaining agreement addresses layoffs of bargaining unit employees. Pursuant to its provisions, by memoranda dated January 9, 2008,[5] the Respondent gave notice to part-time employees Roberto Rios, Ilo Neukam, and Melissa Sass that they would be laid off effective January 31. The Union also received official copies of the layoff notices on January 9. The notices were consistent with the requirements of article 5.4, with the exception that 3 weeks' advance notice was provided instead of the 6 weeks set forth in the contract. The January 9 notices offered the employees 3 weeks of additional severance pay in lieu of an additional 3 weeks' notice.

On January 14, the Union requested in writing that the Respondent bargain over the effects of the announced layoffs. It also requested information in support of the Respondent's contention that the layoffs were necessary. The Respondent replied by email on January 16. In relevant part, it stated that "'effects bargaining' does not apply here," that "[i]n any event, the parties have already bargained about layoffs" (referring to art. 5 of the agreement), and that there was "no duty to bargain further about layoffs." The Respondent did agree to provide information supporting its calculation of the percentage limits on part-time hours required to comply with the contract.

On January 17, the Union filed a grievance alleging that the January 9 layoff notices violated the parties' contract, and requesting that the notices be rescinded. On January 25, the parties met to discuss the grievance. During the meeting, the Union repeated its request to bargain over the effects of the layoffs. The Respondent's reply was negative, consistent in substance with its January 16 email.

[1] On October 10, 2008, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed a brief answering the exceptions, and the General Counsel filed a reply brief. In addition, the Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

[2] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally changing the terms of access to an office in the Respondent's facility used by the Union.

[3] The record is unclear whether the parties extended the contract day to day or simply honored its terms under the statutory duty to maintain the status quo following contract expiration. In finding that the Respondent unlawfully failed to bargain over the effects of the layoffs, we have assumed that there was an extension of the contract—the circumstance most favorable to the Respondent's position here. See generally *E. I. DuPont De Nemours, Louisville Works,* 355 NLRB No. 176, slip op. at 2 (2010). At the time of the unfair labor practice hearing, in July 2008, the parties had yet to reach an agreement on a successor contract.

[4] No party contends that this decision was a mandatory subject of collective bargaining.

[5] All subsequent dates are in 2008.

On January 31, the three part-time employees were laid off. On February 1, the Union filed a second grievance which essentially restated the earlier one. It also requested more information showing why the layoffs were necessary, and it challenged the Respondent's failure to provide the full 6 weeks' notice required by the contract.

The Union did not request bargaining over the layoff decision itself, nor (according to the hearing testimony of Union President Dennis Csillag) did the Respondent state that it would not bargain over the decision. Csillag testified that the reason the Union did not request decision bargaining was because the Respondent had issued the January 9 contractual layoff notice.

II.

The General Counsel alleged that the Respondent unlawfully refused to bargain about the decision to lay off the 3 part-time unit employees and also failed to bargain over the decision's effects. The judge, relying on article 5.4 of the expired collective-bargaining agreement addressing layoffs, concluded that no additional bargaining was required. He recommended dismissal of the allegations. The General Counsel excepts.

In an alternative analysis, the judge addressed the Respondent's separate contention that the Union's failure to request bargaining over the layoff decision relieved the Respondent of any duty to bargain. The judge rejected this argument, reasoning that if (contrary to his finding) the Respondent did have a duty to bargain, it had presented the Union with a "fait accompli," excusing the Union's failure to request decision bargaining. The Respondent cross-excepts.

III.

The questions before us, then, are whether the Respondent violated Section 8(a)(5) either in connection with the layoff decision (over which the Union never requested bargaining) or in connection with the effects of that decision (over which the Union did request bargaining). We address each issue in turn.

*A.*

We conclude that the Respondent did not unlawfully refuse to bargain over the layoff decision, given the Union's failure to request bargaining.

The legal principles governing this issue are well established. See, e.g., *Bell Atlantic Corp.,* 336 NLRB 1076, 1086 (2001). Before implementing a change involving a mandatory bargaining subject, an employer is required to give timely notice to the union and a meaningful opportunity to bargain. Once notice is received, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining right. However, a union may be excused from the bargaining request requirement if the employer's notice provides too little time for negotiation before implementation, or if the employer otherwise has made it clear that it has no intention of bargaining about the issue. In these circumstances, a bargaining request would be futile, because the employer's notice informs the union of nothing more than a "fait accompli." A fait-accompli finding requires objective evidence; a union's subjective impression of its bargaining partner's intention is insufficient.

Here, the Respondent's January 9 layoff notice issued 3 weeks in advance of the implementation date. In the circumstances, this was an adequate period for the parties to negotiate over the layoff decision.[6] The operative question is whether the Respondent's conduct otherwise objectively communicated to the Union that a request to bargain about the decision would have been futile.

The judge found a fait accompli, relying on three factors to establish the futility of a bargaining request. First, the Union's two grievances demonstrated that the Union "did not acquiesce" in the Respondent's layoff decision. Second, the Respondent's simultaneous notice to the Union and the affected employees on January 9 demonstrated an "unyielding position" on its decision. Third, the Respondent had made clear to the Union that bargaining concerning the decision was not required because of the terms of article 5.4. Applying Board precedent, we conclude that the judge erred in relying on these three factors to find a fait accompli.

That the Union filed grievances about the layoff decision does not demonstrate that the Respondent had no intention of bargaining about the decision.[7]

Nor is simultaneous notice, such as the Respondent's January 9 memoranda, necessarily an indication that an employer would refuse a bargaining request.[8] So long as the union has sufficient actual notice of a pending change in employment conditions, as it did here, no particular form of notice is required.[9]

Finally, with respect to the Respondent's invocation of article 5.4 in response to the Union's request to bargain over effects of the layoffs, the evidence shows that by the

[6] Compare *Bell Atlantic,* supra at 1088 (2 weeks sufficient); *Medicenter, Mid-South Hospital,* 221 NLRB 670, 673, 678 (1975) (2 days sufficient).

[7] The filing of the grievances by itself does not satisfy the Union's affirmative duty to request bargaining. Under existing precedent, at most it establishes a protest of the layoff decision. See *W-1 Forest Products Co.,* 304 NLRB 957, 961 (1991); *Haddon Craftsmen,* 297 NLRB 462 (1989) (filing grievance does not constitute bargaining request). See also *Clarkwood Corp.,* 233 NLRB 1172 (1977), enfd. mem. 586 F.2d 835 (3d Cir. 1978); *Medicenter,* supra at 679 (mere protest is not sufficient to satisfy bargaining request requirement).

[8] See *Bell Atlantic,* supra at 1086–1087.

[9] See *Medicenter,* supra at 678, and cases cited there.

time the Union requested effects bargaining, it had already determined not to request bargaining over the layoff decision. According to Union President Csillag, the reason that the Union did not request decision bargaining was because the Respondent had issued the January 9 contractual layoff notice. He testified that, in contrast to the events in January 2008, in 2002 the Union had received informal notice of a prospective layoff a week before the contractual notice, and that the parties had had a meeting about it. In Csillag's view, the Respondent's failure in the present case to provide similar advance notice meant that "the horse left the stable," i.e., the Respondent had already made the layoff decision without consulting the Union. For Csillag, this meant that it was too late to request decision bargaining.[10] Our case law is to the contrary, however. A union is entitled to bargain over a decision even after it has been made, but before it has been implemented. Similarly, an employer is not required to bargain before making its decision, but it is required to delay implementation to allow for good-faith collective bargaining once the decision has been made.[11] The Respondent met that obligation here. Csillag's subjective belief that the January 9 notice foreclosed decision bargaining, unsupported by objective evidence, was insufficient to excuse the Union's failure to request bargaining.[12]

Accordingly, the 8(a)(5) decision bargaining allegation is dismissed.[13]

*B.*

We reach a different result with respect to the effects-bargaining allegation. It is undisputed that the Union requested bargaining over the effects of the layoffs announced on January 9, and that the Respondent refused that request. Our holding that the Respondent was not required to bargain over the layoff decision, in turn, does not preclude finding an effects-bargaining violation.[14]

The judge found that having negotiated article 5.4 of the collective-bargaining agreement, which addressed layoffs, the Respondent was not required to engage in additional bargaining over the effects of the layoff decision. The principal difficulty with this finding—even assuming the contract had been extended and the correctness of the judge's analytical framework—is that at the time it refused to engage in effects bargaining, the Respondent had *not* complied with at least one provision of the expired article 5.4: the requirement that laid-off employees be given 6 weeks' advance notice. Instead, the Respondent gave the employees 3 weeks' notice and offered 3 weeks of additional severance pay in lieu of notice. Even assuming that compliance with the expired contract's provisions governing the effects of layoff would have privileged the Respondent's actions, the Respondent did not comply with those provisions, but unilaterally altered them.[15] Moreover, to the extent that there were effects of the layoffs on the remaining unit employees, such as changes in workload, article 5.4 did not purport to address them, and they would remain subject to bargaining as well.[16]

[10] The General Counsel argues that the Respondent acted inconsistently with the parties' past practice, contributing to a fait-accompli finding. However, Csillag's testimony, concerning a single instance in 2002, is insufficient to support a finding of a past practice. See, e.g., *Philadelphia Coca-Cola Bottling Co.,* 340 NLRB 349, 353 (2003), enfd. 112 Fed.Appx. 65 (D.C. Cir. 2004) (alleged past practice must be shown to have occurred with regularity and frequency over an extended period of time).

[11] See, e.g., *Bell Atlantic,* supra at 1088, and cases cited there.

[12] See *Haddon Craftsmen,* 300 NLRB 789, 790–791 (1990), review denied sub nom. mem. *Graphic Communications Workers Local 97B v. NLRB,* 937 F.2d 597 (3d Cir. 1991).

[13] In light of the dismissal, we need not address the judge's conclusion that art. 5.4 of the expired collective-bargaining agreement relieved the Respondent of any duty to bargain over the layoff decision.

In any event, the three cases cited by the judge to support his view are not controlling here: *Port Printing AD & Specialties,* 351 NLRB 1269 (2007); *Odebrecht Contractors of California,* 324 NLRB 396 (1997); and *Farina Corp.,* 310 NLRB 318 (1993). In *Port Printing,* supra, the Board observed in dicta that "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." 351 NLRB at 1269. The Board proceeded to find that the employer's failure to bargain over a layoff decision was excusable because of "economic exigencies"; it also found that the employer unlawfully failed to bargain concerning the layoff's effects. No particular contract provisions were at issue. Nor did *Odebrecht,* supra, involve the effect of a contractual provision. Rather, the judge observed in passing that where parties have yet to negotiate layoff rules, they are required to bargain over such procedures. 324 NLRB at 403. In *Farina,* supra, dicta in the judge's decision, affirmed by the Board, pointed out there may be unions and employers who have incorporated layoff provisions in their collective-bargaining agreements "in a more mature labor relations context than the one presented in th[at] case." 310 NLRB at 320.

Meanwhile, the Board has found an 8(a)(5) violation involving a layoff decision, notwithstanding a contractual provision addressing layoffs. See *Teamsters Local 71,* 331 NLRB 152 (2000) (applying "clear and unmistakable waiver" standard). Compare *Public Service Co.,* 312 NLRB 459, 460–461 (1993) (subcontracting provision did not waive union's right to bargain).

[14] See, e.g., *Allison Corp.,* 330 NLRB 1363, 1365 (2000) (duty to bargain over effects of subcontracting decision, even where no obligation to bargain over decision itself).

[15] Our dissenting colleague points out that the failure to follow the contract provision requiring 6 weeks advance notice of the layoff was not alleged to be an unlawful, unilateral change. But we do not find that the failure to follow that provision was a separate, unlawful unilateral change, but merely that, even assuming the contract remained in effect, the Respondent's failure to comply with the contract provision prevents the Respondent from relying on it as a defense to the allegation that it refused to bargain over the layoff's effects.

[16] Compare *Mt. Sinai Hospital,* 331 NLRB 895, 911 (2000) (contractual provision requiring employer to provide certain information to

Accordingly, we reverse the judge's dismissal and find that the Respondent's rejection of the Union's request for effects bargaining violated Section 8(a)(5).

## 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 refusal to bargain with the Union about the effects of its decision to lay off three part-time unit employees, we shall order the Respondent to bargain with the Union, on request, about layoff effects, consistent with our 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, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, we deem it necessary to accompany our bargaining order with a limited backpay remedy 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 the 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).[17]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, McGraw-Hill Broadcasting Company, Inc., d/b/a KGTV, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with National Association of Broadcast Employees and Technicians – Communications Workers of America, AFL–CIO, by laying off employees at its San Diego, California facility without affording the Union notice and an opportunity to bargain over the effects of the layoff decision.

(b) Refusing to bargain collectively with the Union by unilaterally changing the parties' past practice in order to prohibit Dennis Csillag, the nonemployee union president, from having access to the union office at the Respondent's facility.

(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 appropriate unit, which is set forth in article 1 of the collective-bargaining agreement referenced above.

union does not constitute waiver of statutory right to other information, unless waiver is expressly stated in agreement).

[17] The General Counsel requests that the Board's current practice of awarding only simple interest on backpay and other monetary awards be replaced with a practice of compounding interest on a quarterly basis. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.

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

(c) Pay the laid-off unit employees Roberto Rios, Ilo Neukam, and Melissa Sass their normal wages for the period set forth in the amended remedy section of this decision.

(d) Restore the parties' past practice of permitting nonemployee Union President Dennis Csillag access to the union office at the Respondent's facility.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in San Diego, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 January 16, 2008.

(g) 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.

MEMBER HAYES, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to bargain about its decision to lay off three part-time employees. Unlike the majority, however, I find no need to rely on the Union's failure to request decisional bargaining. As did the judge, I find that the parties' collective-bargaining demonstrates that they fully bargained about the mandatory subject of layoffs, thus relieving the Respondent of any obligation to engage in further bargaining when undertaking layoffs during the term of the contract, as extended. For the same reason, I disagree with my colleagues that the Respondent violated Section 8(a)(5) by refusing to bargain about the effects of the layoff. The Respondent's failure to follow the contractual procedure providing for 6 weeks' advance notice of the layoff was not alleged to be an unlawful unilateral change. As an apparent contractual breach, the notice issue could have been addressed in discussion of either one of the two grievances filed by the Union, but the Respondent's action did not invalidate the remainder of the contractual agreement permitting the Respondent to act unilaterally in making the layoffs. Consequently, I dissent from the majority's reliance on the notice breach to impose a statutory effects bargaining obligation that has already been satisfied.

## 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 National Association of Broadcast Employees and Technicians – Communications Workers of America, 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 unilaterally changing our past practice in order to prohibit Dennis Csillag, the nonemployee union president, from having access to the union office at our San Diego facility.

[18] 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."

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 appropriate unit, which is set forth in article 1 of the collective-bargaining agreement referenced above.

WE WILL, on request, bargain with the Union with respect to the effects of our decision to lay off employees.

WE WILL pay laid-off employees Roberto Rios, Ilo Neukam, and Melissa Sass their normal wages for the period set forth in the amended remedy for refusing to provide the Union prior notice and an opportunity to bargain with us with respect to the layoff effects referenced above.

WE WILL restore our past practice of permitting nonemployee Union President Dennis Csillag access to the union office at our San Diego facility.

MCGRAW-HILL BROADCASTING COMPANY, INC., D/B/A KGTV

*Robert MacKay, Esq.,* for the General Counsel.
*John D. Collins, Esq.* and *Matthew W. Holder, Esq.,* of San Diego, California, for the Respondent.
*Matthew Harris, Esq.,* of Washington, D.C, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in San Diego, California, on July 29, 2008. National Association of Broadcast Employees and Technicians-Communications Workers of America, AFL–CIO (the Union or the Charging Party) filed an unfair labor practice charge in Case 21–CA–38193 on January 17, 2008, and filed another unfair labor practice charge in Case 21–CA–38294 on April 2, 2008. Based on those charges, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a Consolidated Amended Complaint and Notice of Hearing (the complaint) on June 10, 2008. The complaint alleges that McGraw-Hill Broadcasting Company, Inc. d/b/a KGTV (the Respondent or the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices and raising a number of affirmative defenses.[1]

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observations of the demeanor of the witnesses, I now make the following findings of fact and conclusions of law.[2]

### FINDINGS OF FACT

#### I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a New York corporation with an office and place of business in San Diego, California, where it has been engaged in the business of operating a television broadcasting station located at 4600 Air Way, herein called the San Diego, California facility. Further, I find that annually the Respondent, in the course and conduct of its business operations, derives gross revenues in excess of $100,000, advertises nationally for the sale of products, and purchases and receives at its San Diego, California facility goods valued in excess of $50,000 directly from points outside the State of California.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

#### III. ALLEGED UNFAIR LABOR PRACTICES

##### *A. The Dispute*

The dispute between the parties involves two separate and distinct incidents. 1. The first dispute is whether the Respondent and the Union had an established past practice of allowing nonemployee union officials access to an office at the Respondent's facility, hereinafter referred to as the "union office." It is the contention of the General Counsel and the Union that such a past practice had been established and that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally discontinuing that practice. The Respondent denies that any such practice existed and, further, that even assuming such a past practice, the Respondent was justified in changing the practice and prohibiting access to the office by the Union's president because of his misconduct.

2. The second dispute is whether the Respondent's decision to lay off three unit employees was made unilaterally, without first providing the Union with advance notice and an opportunity to bargain. The General Counsel and the Union contend

[1] All pleadings reflect the complaint and answer as those documents were finally amended.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

that the Respondent did so, in violation of Section 8(a)(1) and (5) of the Act. However, the Respondent contends that it was under no obligation to further bargain with the Union, having previously engaged in collective-bargaining over layoffs, which bargaining resulted in agreement as contained in the parties' most recent contract. Also, the Respondent alleges that the Union waived any right to bargain over the layoff decision, as it never specifically requested such bargaining. Finally, the Respondent contends that its decision to lay off the three employees was the direct result of a managerial decision to discontinue a live weekend news broadcast, which programming decision was a nonmandatory subject of bargaining. According to the Respondent, even assuming it unlawfully refused to bargain with the Union over the "layoff decision," as the decision to lay off the employees was directly "linked" to that non-mandatory subject of bargaining, an appropriate remedy would not include reinstatement and full backpay.

As a collateral issue, the General Counsel and the Union also contend that the Respondent refused to engage in "effects bargaining" over the layoff of the unit employees in violation of Section 8(a)(1) and (5) of the Act. The Respondent continues to argue that the issue of layoffs was covered by the parties' collective-bargaining agreement, which also encompassed the effects of such layoffs, and, thus, it was under no obligation to engage in further bargaining over effects.

A second collateral issue over which the parties disagree is that of remedy. Assuming that the Respondent violated the Act by unilaterally laying off the unit employees and/or by failing to bargain over the effects of the layoff, the General Counsel and the Union contend that the appropriate remedy for the unfair labor practices would be reinstatement, with full backpay to the laid off employees. The Respondent argues that a more limited remedy as set forth in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968), is proper under such circumstances.

### *B. The Facts*

For the most part, the facts in this case are not in dispute. The Respondent operates a television broadcasting station in San Diego, California. The Union has represented a unit of the Respondent's employees at its San Diego, California facility since approximately the 1950s.[3] The Union and the Respondent have been parties to successive collective-bargaining agreements, the most recent of which was effective by its terms from October 1, 2002, through January 31, 2006 (the expired contract). (GC Exh. 2.) The parties have not reached agreement on the terms of a successor contract. Since the expiration of the last contract, the Respondent has, for the most part, maintained the terms and conditions of that contract.[4]

#### 1. Access to the union office

Dennis Csillag was employed by the Respondent from July 1981 until May 30, 2006, when he was terminated. Initially he was employed as an operations technician, and at the time of his discharge he was classified as a director. These were bargaining unit positions. Since 1986, he has served as the union president. Csillag has continued to hold that office following his termination. As president, his duties are, as one would expect, to participate in contract negotiations, administer the collective-bargaining agreement, process grievances, and meet with management and workers to discuss issues of concern or dispute.

The expired contract between the Respondent and the Union does not contain any provision regarding the Union's use of an office at the Respondent's facility. However, the undisputed testimony at the hearing established that in approximately 1990, during contract negotiations, the parties orally agreed that the Union could use an "office" at the Respondent's facility. From the collective testimony of various witnesses, it appears that the Union was given exclusive use of this office, with electricity and telephone provided by the Respondent. The intent was to provide the Union with a place to lock up its files. There was apparently no further discussion between the parties as to the specificity for which the Union would use the office.

It is undisputed that the "union office" is located on the second floor of the Respondent's facility. There is a lock on the door, to which only the union officers have a key. The office is cramped, approximately 10 feet by 10 feet in size. It contains a desk, file cabinet, chairs, computer, printer, telephone, and answering machine. The Union's records are maintained in this office, including previous collective-bargaining agreements, grievances, and correspondence.

Csillag testified that both before and after his termination, he used this office to perform all manner of functions in his capacity as union president, including storing records, reviewing documents, preparing correspondence and grievances, and meeting with unit employees. As all the union officers, who until Csillag's discharge were also all employees of the Respondent, had keys to the office, they were in the habit of using the office to leave records and other documents for review by fellow officers. Regarding those specific uses, the Respondent's witnesses testified that they had no knowledge that union officers were using the space for "meetings."

As noted earlier, the Respondent fired Csillag on May 30, 2006. During the hearing, counsel for the Respondent sought to introduce evidence as to the reasons for Csillag's discharge. Over the objection of counsel for the General Counsel and counsel for the Union, I permitted a limited amount of such testimony.[5] It was the Respondent's contention that the alleged misconduct, which led to Csillag's discharge, as well as other

[3] In its answer to the complaint, the Respondent admits that the unit of employees as set forth in article 1 of the most recent collective-bargaining agreement between the Union and the Respondent constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act. Further, the Respondent admits that based on Sec. 9(a) of the Act, that the Union has been the exclusive collective-bargaining representative of the employees in the Unit since at least October 1, 2002, the effective date of the last contract.

[4] A post-impasse change involving jurisdiction over unit work has no bearing on the issues in this case.

[5] Following my ruling, I did offer the Union and the General Counsel the opportunity, if they chose, to offer some exculpatory evidence as to the alleged misconduct of Csillag. However, for the most part, such evidence was not proffered. In any event, for the purpose of rendering a decision in this case, it is not necessary for me to make any findings as to the truthfulness of the reasons given by management for Csillag's discharge, and I specifically make no such finding.

inappropriate behavior by Csillag, ultimately caused the Respondent to prohibit his access to the union office.

In summary fashion, I will simply indicate that the Respondent takes the position that it fired Csillag for "tampering with, sabotaging and deleting/destroying company property," and also for "[m]aking false statements to company investigators during the course of their investigation." Specifically, he was accused of deleting files from a computer. (Res. Ex. 1.) In any event, Csillag continued to serve as union president. At his termination meeting, Csillag informed the Respondent's director of operations and engineering, Mike Biltucci, and operations manager, Patrick Givans[6] that he would still need access to the union's office at the facility.

It is undisputed that Biltucci gave Csillag permission to continue using the office. According to Csillag, all he was required to do was to call ahead and tell Biltucci that he was coming to the facility at some specific time. He testified that from his termination in May of 2006, until Sept of 2007, he went to the Respondent's facility to use the office on the average of twice a month, where he would remain anywhere from 15 minutes to a couple of hours. During that time period, Csillag was never denied access to the office. Typically, upon arriving at the facility, Csillag would go to the lobby where he would wait for Biltucci to escort him part way to the office. Upon leaving the office, he would alert Biltucci, who might walk him back to the lobby, or perhaps not.

Biltucci's testimony was somewhat different, but not materially so. He testified that following his termination, Csillag was given permission to visit the facility under certain conditions. Those conditions included calling ahead to get permission from either Biltucci or Givans, indicating the time of the visit, the nature of the visit, and how long he would be visiting. According to Biltucci, Csillag was escorted in and out of the facility because the Respondent did not want him "roaming around the facility unfettered." As expressed by the Respondent's witnesses, they did not trust Csillag following his termination.

In any event, until September 2007, there were no particular problems regarding Csillag's access to the union office.[7] However, on September 26, 2007, Csillag received an email from Paul Kaderabek, the Respondent's business director. Kaderabek complained about Csillag's alleged failure to abide by the parties' previous agreement on access to the office, in particular Csillag having allegedly entering the facility without an appointment and then being found in parts of the facility that he had no permission to enter. The message informed Csillag that in the future he would be allowed on the premises only after receiving advance permission from Biltucci or Givans to be so, only in the areas of the facility that he had been given permission to be in, and would have to adhere to a time limit at the facility, which would need to be approved by management. (GC Exh. 4.) Csillag testified that he considered this message as having alerted him to a change in the past practice. Being unhappy with these perceived changes, Csillag responded with an email dated September 27, 2007,[8] in which he proposed his own changes in the past practice. (GC Exh. 5.)

The Respondent apparently takes the position that the September 26 message from Kaderabek was nothing more than a recitation of the conditions, previously agreed upon, that Csillag must comply with in order to seek access to the office following his termination. My review of this document is in line with the Respondent's position. Further, the General Counsel does not allege in his complaint that the September 26 message changed the terms under which access to the office had been permitted Csillag.

There then followed a series of emails between the parties where the issue of access to the office was further discussed. (GC Exh. 7.) In any event, according to Csillag, during a meeting at the Respondent's facility in late October of 2007, the parties agreed that the procedures that had been in place before Kaderabek's September 26 email would remain in place. Accordingly, Csillag continued to use the union office under the conditions that had been imposed immediately following his termination. This remained the situation until December 28, 2007.

On December 28, Csillag received an email from Patrick Givans, which email accused Csillag of misconduct during a disciplinary meeting for an employee that had been attended by Csillag on December 21. Allegedly, Csillag "resisted leaving [the meeting] when asked, threatened to harass the Station with multiple access requests . . . threatened and demeaned managers in front of an employee, and then abused access permission by remaining on the property talking to Station employees." Further, the email accused Csillag of causing "similar problems in September and before." Givans reminded Csillag that he had been "terminated for destroying Company property," and contended that the attempt to allow Csillag "some continued access without jeopardizing Company security or productivity . . . has not worked." The email informed Csillag that effective immediately he "will not be allowed on-site simply to use Company office space or equipment," and that neither he nor any other nonemployee would have access to the union office. (GC Exh. 8.) It is these statements in the email that the General Counsel contends in paragraphs 7(a), (c), (d), and 8 of the complaint constitute a violation of the Act, as a unilateral change in the parties' past practice.

In should be noted that Givans' email attempts to make a distinction between the Respondent's denial of access by Csillag and other nonemployees to the union office, and Csillag's continued access to the Respondent's facility "for specific official meetings under the same guidelines," [as were previously imposed]. Further, the email assures Csillag that if there are personal or union documents in the office that are needed by Csillag, he can make arrangements with those union officers who are employees to deliver them to Csillag. Givans notes that the office will continue to be available for the Respondent's employees, who are also union officers, for storage of union material and for "other purposes as in the past." (GC Exh. 8.)

[6] At the time of the hearing Givans was the Respondent's director of technology.

[7] During this same period of time, Csillag was at the facility without incident on a number of occasions for reasons other than visiting the union office, such as for the purpose of attending grievance meetings or to serve as a *Weingarten* representative.

[8] All dates are in 2007 unless otherwise indicated.

Not surprisingly, the parties disagree as to what transpired at the meeting of December 21, which allegedly precipitated Givans' email of December 28. According to Mike Biltucci, Csillag was at the facility on December 21 to attend a disciplinary action regarding employee John Suarez. Present were Biltucci, Givans, Csillag, and Suarez. Biltucci testified that the meeting needed to end by a specific time because Suarez was scheduled to direct the 5 p.m. newscast. Nevertheless, Csillag allegedly refused to leave until he finished his note-taking. Biltucci informed Csillag that he had 60 seconds to finish, after which Csillag replied that management would "just have to get security to get [him] out of [the facility]." Further, Biltucci alleges that Csillag told the two management officials that they "disgusted him," and that he hoped that they "would get what was coming" to them. Regarding the union office, Biltucci testified that Csillag indicating that because of the end of the year accounting issues for the Union, he would need to make several extended visits to the office to prepare materials for the accountant. Biltucci further testified that once out of the Respondent's building, Csillag remained in the parking lot for 10-15 minutes talking with several employees, one of whom was allegedly on duty.

It is the Respondent's position that Csillag's conduct constituted harassment and necessitated the prohibition against non-employees, specifically Csillag, using the union office, as set forth in Givans' letter of December 28. (GC Exh. 8.) During the hearing, Csillag did not specifically deny Biltucci's account of the December 21 meeting. However, in Csillag's December 29 email to Givans, which is a response to Givans' email of the previous day, Csillag does deny that he "resist[ed] leaving" the facility or that he threatened the two managers, although he does admit telling them that their "actions are disgusting." He acknowledges talking with several off-duty employees in the parking lot, and of telling management that he would need to visit the facility more than usual before the end of the year, but denies that this was intended as harassment.[9] (GC Exh. 9.)

In closing his email of December 29, Csillag states the Union's position that the union office "was the subject of previous negotiations," has been "in daily use [by the Union] for 17 years," and that "to deny access to the Local President is interfering with the Union and is unlawful." (GC Exh. 9.) On January 8, 2008, Givans replied by email, essentially denying Csillag's contentions, and standing on his earlier correspondence. (GC Exh. 10.)

Since December 28, Csillag has had no access to the union office. However, it is undisputed that during this period he has continued to have access to the Respondent's facility for other purposes, including representing the Union at grievance meetings. There is no contention by the General Counsel or the Union that Csillag has been denied access to the Respondent's facility since December 28, for any reason other than to use the union office.

[9] While the parties obviously disagree as to the specific events occurring at the December 21 meeting, for the purpose of deciding the issues before me it is not necessary that I resolve any issues of credibility arising from the respective testimony about this meeting. In order to evaluate the parties' respective legal positions, I will conclude that the testimony of Mike Biltucci was accurate as to the events of December 21.

Csillag testified that prior to his notification on December 28 that he would no longer be permitted to access the union office, management never offered to bargain over access. It is the General Counsel's contention that the Respondent's conduct constituted a unilateral change in the parties' past practice, and, as such, a violation of the Act. The Respondent argues that as this denial of access to the union office by Csillag did not affect unit employees' terms and conditions of employment, and was not material, substantial, and significant, it, therefore, did not constitute a violation of the Act.

2. The layoffs

As noted earlier, the most recent collective-bargaining agreement between the parties expired on January 31, 2006. (GC Exh. 2.) That contract contains a number of provisions relating to the layoff of bargaining unit employees. Certain of those contract provisions are as follows:

> Reduction of Staff: Should it *become necessary* at any time, on account of *reduction in staff*, for the Company to layoff any Employee, the Company shall give such Employee notice in writing at least six (6) weeks in advance, and on the effective date of their layoff grant a service letter. In addition, severance pay shall be given on the following basis: [chart]. . . . (Art. 5.4, p. 12.) [Emphasis added.]
>
> The Company shall notify the Local [Union] President in writing, within (7) days of . . . (c) layoffs of NABET-CWA Employees. (Art.10.3, p. 25.)
>
> [Recall rights for employees during periods of] layoff. (Art. 5.4.1 and 5.4.2, p. 12-13.)
>
> Layoffs on account of reduction of staff shall be made in *inverse order of seniority* within the staff. (Art. 5.4.3, p. 13.) [Emphasis added.]
>
> Reduction in Staff Through Automation: [payment chart]. . . . (Art. 5.5, p. 13.)

The expired contract also contains a comprehensive grievance procedure covering "all complaints, disputes or questions as to the interpretation, application or performance of this Agreement."[10]

In December 2007, the Respondent's management team made a decision to eliminate weekend daytime production, specifically the Sunday morning newscast. The reasons for management's decision were a combination of low ratings for the newscast, and the expectation that it would be replaced by a religious broadcast, which was far more lucrative. The final Sunday morning newscast was aired in early December 2007.

Article 3.1.4 (GC Exh. 2, p. 4) of the expired collective-bargaining agreement provides for a ratio of part-time and temporary employees' hours worked to the regular, full-time employees' hours worked. Said somewhat differently, based on that ratio, there are a maximum number of hours that can be worked

[10] It should be noted that no party has taken the position that either the layoff provisions or the grievance procedure provisions fail to survive the expiration of the contract.

by part-time and temporary employees.[11] In order to maintain this ratio, as the number of hours worked by full-time employees decrease, the maximum number of hours worked by part-time and temporary employees must be reduced.

According to the testimony of Mike Biltucci, the elimination of the weekend morning newscast resulted in fewer hours being worked by the full-time employees. He testified that in mid-December of 2007, he recognized that in order to be in conformity with the ratio provision in the expired contract, he would need to lay off some part-time employees.[12] He contends that there was no other way to stay within the ratio provision in the contract, and, therefore, the decision was made by management to lay off three part-time employees.

By memorandum dated January 9, 2008, Biltucci informed part-time employees Roberto Rios, Ilo Neukam, and Melissa Sass that they were being laid off "in inverse order of seniority as required by the collective bargaining agreement." It was explained in the memo that this reduction in force was necessary in order not to exceed the maximum percentage of part-time hours worked to full time-hours, as provided for in the contract. Further, the employees were informed that the contract calls for 6 weeks advance notice and 4 weeks of severance pay. However, they were told that since the advance notice given was 3 weeks instead of 6, that they would be provided with an additional three weeks of severance pay. The Union was copied on the memo. (GC Exh. 11.)

It is undisputed, that prior to the issuance of the layoff memo, the Union was not consulted about the Respondent's decision to lay off part-time employees in an effort to maintain the hours worked ratio. Further, it is undisputed that the Respondent's managers never specifically offered to bargain with the Union over their decision to lay off the three part-time employees. Also, it appears uncontested that the Union never affirmatively asked to bargain over this decision.

It is the position of the Respondent that bargaining over layoffs had previously taken place, at the time the most recent contract was entered into. As the expired contract contained a number of provisions covering the issue of layoffs, the Respondent contends that no further bargaining was required. Counsel for the Respondent argues that under the terms of that contract, if the Union believed the layoffs in question were not "necessary," a grievance was the appropriate method of resolving this issue. (GC Exh. 2, art. 5.4 and 7.1) Further, the Respondent argues that even if there had been a duty to bargain over the layoff decision, the Union waived its right to engage in such bargaining by failing to specifically request bargaining of the Respondent.

It is the position of the Union and the General Counsel that the Union was not required to specifically request that the Respondent bargain over its decision to lay off, as that decision had been presented to the Union as an accomplished fact. Furthermore, the General Counsel and the Union argue that the Respondent should have understood, based on the Union's subsequent actions, that the Union did not acquiesce in the decision.

By letter dated January 14, 2008, Csillag responded to the Respondent's notice of layoff. Specifically, the Union requested "effects" bargaining over the planned layoffs, and requested certain financial and documentary records so as to consider the Respondent's contentions regarding the necessity of the layoffs. (GC Exh. 12.) In response, Paul Kaderabek, the Respondent's business director, sent Csillag an email. In that message, Kaderabek stated that he had been "advised that 'effects bargaining' does not apply here." Further, the message indicated that "the parties have already bargained about layoffs. See Article 5 of the expired agreement." He repeated that "[t]here is no duty to bargain further about layoffs," and declined to furnish the requested financial records. However, he did agree to "provide information about the projected part-time/full-time hours' ratio." (GC Exh. 13.)

Under cross-examination, Csillag responded affirmatively that he "never, ever asked the company to bargain over the decision to conduct the layoffs." Still, he indicated that no request was proffered "because the decision had already been made." Nevertheless, the Union subsequently filed two grievances, which appeared to challenge the Respondent's layoff action. On January 17, 2008, the Union filed a grievance under the terms of the expired contract, stating as its grievance the claim that the "Company issued layoff notices to 3 Employees in violation of the collective bargaining agreement." As to remedy, the grievance indicated, "[r]escind the layoff notices." (GC Exh. 14.) A second grievance was filed on February 1, 2008, stating as its grievance the claim that the "Company laid-off 3 Employees-Roberto Rios, Ilo Neukam and Melissa Sass-on January 31, 2008, without providing information showing the layoffs were necessary and without providing the required notice." As to remedy, the grievance indicated, "[p]rovide information showing the layoffs were necessary and make these Employees whole for all lost wages and benefits or return them to work." (GC Exh. 15.)

Certainly these two grievances appear to challenge the Respondent's decision to lay off the three employees, with the second grievance specifically questioning whether the layoffs were "necessary" under the terms of the contract. In any event, the parties met to discuss the first grievance on January 25, 2008. Present for the meeting on behalf of the Respondent were Paul Kaderabek and Patrick Givans, with the Union represented by Csillag and Robert Buchanan, union vice president. However, it appears that little was accomplished at the meeting.

While the parties' views as to the tenor of this meeting differ somewhat, for the most part they agree as to which matters were discussed, and which were not discussed. Csillag acknowledged under cross-examination that he did not orally request bargaining over the Respondent's decision to lay off, did not suggest any alternative to the layoffs, and did not make any proposals about the layoff decision. Again, he testified that he did not discuss these matters because the Respondent had already announced its decision. According to Csillag, the Respondent limited the meeting to providing the Union with the Respondent's reasons for the layoff decision, specifically the problem with the ratio between part-time and full-time employees, and the Respondent's justifi-

[11] No party has taken the position that the provision concerning the ratio of part-time and temporary employees' hours worked to the hours worked by regular, full-time employees fails to survive the expiration of the contract.

[12] It is the position of the Union that there may have been ways to reduce the number of hours worked by part-time or temporary employees, so as to stay within the contractual ratio, other than through the layoff of part-time employees.

cation for not complying with a provision in the expired contract regarding the amount of notice that must be given to employees being laid off.

Regarding the Union's request to bargain over the effects of the layoffs, Csillag testified that Paul Kaderabek refused, saying that the Respondent did not need to do so, as the effects of layoffs had already been bargained over and was covered under the terms of the expired collective-bargaining agreement. Csillag claims that Kaderabek read from a "memo" stating the Respondent's position. It appears that Csillag is referring to Kaderabek's email of January 16, 2008, wherein he indicated, "that 'effects bargaining' does not apply here . . . as the parties have already bargained about the layoffs. See Article 5 of the expired agreement." (GC Exh. 13.) Csillag admits that the Respondent's managers never cut the meeting short; it simply ended when it became apparent that further discussion would not be productive.

Csillag acknowledges that the Respondent has been processing grievances filed under the terms of the expired contract, estimating that approximately 30 such grievances have been filed by the Union and entertained by the Respondent.[13] However, the Respondent has taken the position that the arbitration provisions of the contract do not survive the agreement's expiration. Apparently the Respondent has refused to process to arbitration any grievances filed since the expiration of the contract.[14]

The three employees in question were laid off as of January 31, 2008. The Union then filed the second grievance, as discussed above, dated February 1, 2008. (GC Exh. 15.) While Csillag testified on direct examination that the Respondent has never met with the Union to discuss this particular grievance, this is somewhat inconsistent with his testimony on cross-examination that the Respondent has not refused to process grievances filed under the terms of the expired contract.[15] In any event, the second grievance was for the most part simply a repetition of the first grievance, over which the parties had met on January 25, 2008.

Following the meeting of January 25, 2008, there were a series of emails exchanged between Csillag and Kaderabek wherein the parties seem merely to have restated their respective positions. (GC Exh. 17.) Attached to Kaderabek's correspondence was a worksheet the Respondent prepared setting forth the hours worked by various employees, and the difficulty the Respondent faced in attempting not to exceed the maximum hours worked by part-time employees under the ratio as provided for in the expired contract. (GC Exh. 18.) This information had been previously requested by the Union. Thereafter, the parties held no further meetings regarding the layoffs.

### *C. Analysis and Conclusions*

#### 1. Access to the union office

Counsel for the Respondent spends considerable effort in his brief arguing against a finding, under Section 8(a)(1) of the Act, that the Respondent's action in denying access to the union office to union president Csillag interfered with, restrained, or coerced employees in the exercise of their Section 7 rights. However, counsel's efforts are misplaced. The complaint before me does not allege an independent violation of Section 8(a)(1) of the Act. Rather, the alleged violation of the Act is found under Section 8(a)(5), as a failure and refusal to bargain collectively with the Union over access to the union office. The complaint clearly indicates that such is the violation of the Act alleged by the General Counsel. The 8(a)(1) violation referred to in the complaint is merely a derivative of the 8(a)(5) allegation. In these circumstances, the 8(a)(1) allegation can not stand alone, and can only survive if the 8(a)(5) allegation is found to have merit. As there is no independent 8(a)(1) allegation before me, I make no finding regarding any such issue, and I need not address these arguments by counsel.

It is next argued by counsel for the Respondent that the 8(a)(5) allegation has no merit since Csillag's use of the union office was not a mandatory subject of bargaining. Further, counsel contends that even if it was a mandatory subject, the Respondent's change in past practice by denying access to Csillag was not material, substantial, and significant. In any event, counsel argues that the Respondent was justified in denying Csillag access because of his prior misconduct and the Respondent's legitimate property interests.

Of course, it is well established that a unilateral change in terms and conditions of employment involving a mandatory subject of bargaining violates Section 8(a)(5) of the Act. See the seminal cases of *Bethlehem Steel Co. (Shipbuilding Div.),* 136 NLRB 1500, 1503 (1962); and *NLRB v. Katz,* 369 U.S. 736, 743.

In a very recent case, *Alcoa, Inc.,* 352 NLRB 1222 (2008), the Board held that an employer's past practice of allowing employees to leave work early to attend union meetings had become a term and condition of employment and was a mandatory subject of bargaining. The Board reiterated the well established principle that an employer proposing a change in employment conditions must give the union representing its employees advance notice and must allow the union a "reasonable and meaningful opportunity to bargain" before the new policy is implemented. As the employer had done so, the Board found no violation. See also *Intersystems Design & Technology Corp.,* 278 NLRB 759, 760 (1986), and cases cited therein; *Dorsey Trailers, Inc.,* 327 NLRB 835, 858 (1999), enfd. in part 233 F.3d 831 (4th Cir. 2000).

In *Dorsey Trailers, Inc.,* the Board held that good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding the employer's proposed changes, as no genuine bargaining can be conducted where the decision has already been made and implemented, as in a "fait accompli." In determining whether a union has been presented with a "fait accompli," the Board looks for objective evidence. (citing to *Mercy Hospital of Buffalo,* 311 NLRB 869, 873 (1993)).

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[13] Art. 7.1 of the expired contract sets forth the grievance procedure, specifically the establishment of a "Joint Conference Committee," comprised of management and union representatives. (GC Exh. 2, p. 16.)

[14] The General Counsel has not alleged this conduct by the Respondent to constitute a violation of the Act.

[15] While Csillag's testimony regarding the processing of grievances was somewhat unclear, it seems reasonable to assume that the parties never met to discuss the second grievance either because the Union did not request such a meeting; or because the Respondent took the position that such a meeting was unnecessary, as the matters discussed at the January 25, 2008 meeting encompassed the same issues as raised by the second grievance.

Regarding the specific issue at hand, namely Csillag's access to the Union's office, it is well settled that a union's right of access to represent employees is a mandatory subject of bargaining. An employer cannot unilaterally prohibit a union representative from visiting its facility, where the visits are established through past practice, even though not specifically incorporated in the collective-bargaining agreement. Further, even where the employer has accused the agent of misconduct, the employer is required to give the union notice and an opportunity to bargain before making a unilateral change. *Granite City Steel Co.,* 167 NLRB 310, 315–316 (1967); see also *Peerless Food Products,* 236 NLRB 161, 161 (1978).

As was noted above, at Csillag's termination meeting on May 30, 2006, he raised the issue of his continued access to the union office, since he was no longer an employee but remained the union president. It is undisputed that Biltucci orally gave Csillag permission to continue using the office, as long as he called ahead and informed Biltucci that he would be coming to the facility to use the office at some specific time. Although there was subsequently some disagreement between Csillag and the Respondent's managers as to whether Csillag was fully abiding by the conditions that he had agreed to in order to access the office, Csillag's access to the office remained largely unfettered until December 28, 2007. During that period of approximately 19 months, from the end of May 2006 until the end of December 2007, Csillag asked for and received permission to access the union office approximately twice a month, where he would remain for up to several hours. Therefore, I conclude that Csillag's access to the office was well established, first through a negotiated agreement between Csillag and Biltucci on May 30, 2006, and then by a past practice established during 19 months of use. The fact that this agreement covered only one nonemployee, namely Csillag, did not diminish its significance, as it was obviously intended to allow the union president to continue to access the union office, as he had regularly done prior to his termination.[16]

An employer's attempt to restrict a union agent's right to access the employer's facility, in the agent's representative capacity, where such access has been established by negotiations or through past practice, is a mandatory subject of bargaining when the proposed changes are material, substantial, and significant. *Peerless Food Products,* supra. Under the circumstances of this case, I find the Respondent's December 28, 2007 email to Csillag informing him that he would no longer be permitted access to the union office (GC Exh. 8.) to constitute a material, substantial, and significant unilateral change.

Counsel for the Respondent in his posthearing brief refers to this denial of access by the union president to the union office as "a trivial dispute," which "could not rise to the level of 'material, substantial, and significant.'" However, unlike the denial of access in *Peerless*, where the Board found no violation, the denial of access to Csillag limited the ability of the union president to access the Union's files, use the Union's computer, and meet with other union officers, who continued to be employed by the Respondent, as well as with other bargaining unit employees.

Counsel for the Respondent makes much of the fact that other union officers had access to the office, that the Respondent was unaware that the office was being used for meetings, and that such meetings could be held between Csillag and employees off the Respondent's property. Further, counsel points out that Csillag was not denied access to the Respondent's facility for other representational purposes, such as the processing of grievances, but only regarding the union office. Finally, counsel argues that the Union was free to establish an office off the Respondent's property, in which it could keep its files and computer, and hold meetings.

However, in my view, these arguments by counsel for the Respondent miss the point. It is not for the Respondent to decide what use the union president may make of any office used by the Union on the Respondent's property, where access to that office has been furnished to the union president through negotiations and past practice.[17] The "union office" was certainly being used for representational purposes. It was being so used by the local union's president, its highest ranking officer. He used the office to access files, use the computer, and meet with other union officers and bargaining unit members. It is axiomatic that such use was for representational purposes protected by the Act. The denial of this access to Csillag was clearly material, substantial, and significant. It was not ameliorated by the fact that others had access to the office, or because Csillag continued to be allowed on the property for other purposes, or because the Union might have established an office elsewhere.

I conclude that the Respondent's denial of Csillag's access to the union office had a material, substantial, and significant negative impact on the Union's representational activity on behalf of the bargaining unit employees, and, thus, potentially affected their terms and conditions of employment. The Respondent unilaterally implemented this change in the access policy on December 28, 2007, without giving the Union advance notice or an opportunity to bargain over the change. The only remaining issue is the Respondent's contention that it was justified in denying Csillag access to the union office because he had engaged in misconduct, and was not abiding by the access agreement of May 30, 2006.

In his posthearing brief, counsel for the Respondent cites a number of cases to support his position that Csillag's alleged misconduct warranted the Respondent's prohibition of access for Csillag to the union office. However, I believe all these cases are distinguishable. There is no doubt that the Board has repeatedly held that the Act requires a balancing of two conflicting rights, namely those of employees to be represented by a labor organization of their choice, with the right of an employer to control its property and ensure that its operations are not interfered with. *Holyoke Water Power Co.,* 273 NLRB 1369, 1370 (1985). That is particularly true where the access issue applies to nonemployee union agents. Still, the *Holyoke* case is distinguishable as it involved a "request" by the bargaining representative to allow for an industrial hygienist to make an inspection of the employer's facility, rather than the continuation of a well-

[16] There is no evidence that any other union official was actually denied access to the office.

[17] Obviously, this would not apply where the Union was using the office for illegal or immoral purposes, or where the Union's use of the office was disruptive of the Respondent's operation.

established past practice, as in the matter before me. Similarly, in *Houston Coca-Cola Bottling Co.,* 265 NLRB 766, 777–779 (1982), the General Counsel failed to establish the existence of a past practice for access, and the union's attempt to access the employer's facility was made during a decertification campaign. Under these unique circumstances, the employer's offer to have the nonemployee union agents "escorted" while on its property was considered reasonable.

The issue before me is far different, as the parties had a past practice of some 19 months, from May 2006 to December 28, 2007, of allowing Csillag, the nonemployee union president, to have access to the union office. If the Respondent had genuine concerns about Csillag's conduct, it could have raised the issue with the Union and engaged in good faith negotiations in an attempt to reach an agreement on access for Csillag. Instead, the Respondent simply unilaterally promulgated a policy prohibiting Csillag from coming on its property for the purpose of accessing the union office. As counsel for the General Counsel points out in his posthearing brief, the Respondent's reasons and concerns about Csillag's conduct did not relieve the Respondent of its bargaining obligation. *Peerless Food Products,* supra at 161.

The Respondent did not notify and bargain with the Union, it simply unilaterally changed what had become a well established past practice of allowing Csillag access to the Respondent's facility so that he could utilize the union office. As noted earlier, access for the Union to the Employer's property is undoubtedly a mandatory subject of bargaining, which affects the employees' terms and conditions of employment, and the change to that policy was material, substantial, and significant.

The Respondent claims to have genuine concerns about Csillag's alleged destruction of its property, for which he was fired, regarding his alleged untruthfulness during the investigation of that incident, about his alleged failure to abide by the conditions under which he was allowed access to the union office, and regarding his alleged disruption of the Respondent's operation and disrespect toward management. However, regardless of whether these were serious issues over which the Respondent was genuinely concerned, the Respondent was not relieved of its bargaining obligation toward its employees' representative.[18] If the Respondent desired to prevent Csillag from accessing the union office at its facility, it was required to notify the Union and give the Union the opportunity to bargain.[19] This it failed to do.

Accordingly, I conclude that by unilaterally changing the terms and conditions under which Csillag, as union president, had been permitted access to the union office, the Respondent has been failing and refusing to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 7(a), (c), (d), and 8 of the complaint.

[18] In order to address the allegations in the complaint, it is not necessary for me to resolve the Respondent's contention that Csillag engaged in misconduct, both before and after his discharge. I specifically make no such finding.

[19] The Respondent does not contend that Csillag's alleged misconduct was so egregious as to require his immediate exclusion from the Respondent's facility, and, in fact, the Respondent sought only to prohibit Csillag's access from the "union office."

2. The layoffs

Counsel for the Respondent makes a number of arguments in support of his position that the Respondent did not fail and refuse to negotiate with the Union regarding the layoff of three bargaining unit employees. In my view, the strongest of these arguments is the contention that the parties did in fact previously bargain over layoffs, and that said bargaining resulted in contractual language, as contained in the most recent contract. The Respondent acknowledges that the issue of layoffs is a mandatory subject of bargaining, which, therefore, normally requires notification to a collective-bargaining representative and an opportunity to bargain before an employer can lay off employees. This particular argument by counsel does not include any contention that the Union waived its right to bargain, but, rather, that the Union and the Respondent did in fact bargain to agreement over this issue, which is allegedly demonstrated by the various provisions relating to lay offs in the most recent collective-bargaining agreement.

As argued by the Respondent, the Board cases do seem to consistently hold that additional bargaining over layoffs is not required when a union and an employer have already negotiated over layoffs and incorporated the results of those negotiations into a collective-bargaining agreement. See *Port Printing & AD & Specialties,* 351 NLRB 1269 fn. 2 (2007); *Odebrecht Contractors of California, Inc.,* 324 NLRB 396, 403 (1997); *Farina Corp.,* 310 NLRB 318, 320 (1993). Counsel for the Respondent further argues that an employer is simply not required to negotiate all over again each time the layoff provision it already negotiated with the union comes into play. That does appear to be the logical result of the Board's holdings in the three above-cited cases. Of course, in the case at hand, one needs to look at the precise language in the most recent collective-bargaining agreement to determine whether in fact the Respondent and the Union have set forth procedures for the layoff of employees, if necessary.

Looking to the most recent contract between the parties, which expired on January 31, 2006 (GC Exh. 2), there appear to be a number of provisions that involve both the layoff of employees, as well as the effects of such layoffs. Those provisions were enumerated earlier in this decision, where they are cited by specific article and page number. They include a "reduction of staff" provision that indicates if it should "become necessary . . . on account of reduction in staff . . . to layoff any employee, the [Employer] shall give such employee notice in writing at least six (6) weeks in advance, and . . . grant a service letter." Also, it provides that "severance pay shall be given on the following basis. . . . [a chart follows]." Other provisions in the contract provide for layoff notification to the Union in writing; the recall right of laid off employees; and the requirement that "layoffs on account of reduction in staff shall be made in inverse order of seniority within the staff."

I agree with counsel for the Respondent that the existences of these provisions demonstrate that the Respondent and the Union have previously negotiated over these matters and have established rules regarding how layoffs are to be handled. Of particular significance is the comprehensive grievance procedure in the contract covering "all complaints, disputes or questions as to the interpretation, application or performance of this Agreement." (GC Exh. 2; art. 7.1, p. 16.) It is clear that the grievance proce-

dure survives the expiration of the contract, even if the arbitration provision does not.[20] If the Union objected to the Respondent's decision to lay off the three employees in question, it could file a grievance over whether such a layoff was "necessary." In fact, that is precisely what the Union did, filing two such similar grievance on January 17 and February 1, 2008, respectively. (GC Exhs. 14 and 15.) Further, the parties did meet to discuss the first grievance on January 25, 2008, although the matter was obviously not resolved.

What useful purpose could the layoff and grievance provisions in the contract serve if in every instance where a layoff was considered "necessary" by the Respondent, the Respondent was required to bargain anew with the Union? I can determine none. The Board cases hold and logic dictates that once the parties have negotiated over these layoff issues and incorporated the results of their agreement in a contract no further such negotiations are required. Nothing could more clearly demonstrate this conclusion than the requirement in the collective-bargaining agreement that the Union be given written notice within 7 days of the layoffs. It would certainly not foster the interests of collective-bargaining to require the Respondent to give some advance notice to the Union of its decision to lay off different from the contractual requirements, to which the parties had previously agreed.

Accordingly, I conclude that the Respondent's conduct surrounding the layoff of the three employees in question did not constitute an unlawful refusal to notify the Union and to provide the Union with the opportunity to bargain over its decision to lay off the workers. As the layoff provisions in the collective-bargaining agreement are the result of the parties successful bargaining efforts over these matters, no further negotiations were required. Therefore, I shall recommend that complaint paragraphs 7(b), (c), (d), and 8, only as they relate to the layoff decision issue, be dismissed.

Although I have concluded that the Respondent was not under any legal obligation to further negotiate with the Union over its decision to lay off the employees, I will briefly address the Respondent's alternative contention that even if required to so negotiate, the Union waived its right to bargain over the decision by not specifically requesting such bargaining. Essentially, the Respondent is taking the position that the Union waived any right to bargain by its inaction in not requesting bargaining. I disagree.

The facts establish that the Union was first notified of the Respondent's layoff decision on January 9, 2008, at the same time that the employees to be laid off were so notified. The notification memo from management was addressed to the three employees to be laid off, Roberto Rios, Ilo Neukam, and Melissa Sass, with a copy sent to the Union. (GC Exh. 11.) Although the actual layoffs did not occur until January 31, 2008, the decision was presented to the employees and the Union as a "fait accompli." Union President Csillag testified that, thereafter, the Union never specifically requested that the Respondent bargain with it over the "decision" to lay off employees. It is this failure on the part of the Union to specifically request bargaining over the decision that the Respondent claims constituted a waiver of the Union's right to bargain.

However, in my view, it should have been obvious to the Respondent that the Union did not acquiesce in the layoff decision. While the testimony of Csillag was somewhat contradictory, he did testify at one point that no request to bargain over the decision was proffered "because the decision had already been made." Still, the clearest evidence that the Union wanted the layoff decision reversed was the two grievances filed by the Union on January 17 and February 1, 2008, respectively. (GC Exhs. 14 and 15.) In the January 17 grievance, the requested remedy was for the Respondent to "[r]escind the layoff notices." Similarly, in the February 1 grievance, the Union requested as a remedy that the Respondent "[p]rovide information showing the layoffs were necessary and make these employees whole for all lost wages and benefits or return them to work."

It seems to me that the two grievances clearly challenged the Respondent's decision to lay off the three employees, with the second grievance specifically questioning whether the layoffs were "necessary" under the terms of the contract. In any event, the parties met to discuss the first grievance on January 25, 2008. At the hearing, Csillag admitted under cross-examination that he did not orally request bargaining over the decision to lay off, did not suggest any alternative to the layoffs, and did not make any proposals regarding the layoffs. He testified that he did not raise these issues at the meeting because the Respondent had already announced the layoffs and its managers indicated no interest in altering their decision. The meeting was limited to a discussion of the Respondent's reasons for the layoffs, specifically the problem with the ratio between the part-time and full-time employees, the issue of notice to the employees scheduled for layoff, and the Respondent's refusal to bargain over the "effects" of the layoff. The Respondent's managers took the position that the parties had already bargained over "effects," as was allegedly reflected by the language in the expired collective-bargaining agreement.[21]

The Board has held that where an employer gives notice to a union of its intent to change a condition of employment, and where the notice is given too short a time before implementation, or under circumstances where it is clear that the employer has no intention of bargaining about the subject, then a violation will be found even if the union has failed to request bargaining. In such cases, the Board has found that the notice is intended to accomplish nothing more than informing the union of a "fait accompli." *Bell Atlantic Corp.,* 336 NLRB 1076, 1086 (2001). Similarly, the Board has generally found that the announcement of changes given to employees before notification is given to the Union is sufficient to establish that the employer's decision is a "fait accompli." Such late notice to a union precludes the possibility of meaningful bargaining, and, therefore, the union has no reason to request bargaining. *Roll & Hold Warehouse & Distribution Corp.,* 325 NLRB 41 (1997).

In the matter at hand, the Respondent informed the Union of its decision to lay off employees at the same time it so notified

[20] The fact that the arbitration provision of the collective-bargaining agreement did not survive the expiration of the contract is simply one of the consequences of the failure by the parties to reach agreement on the terms of a new contract. It does not detract from the otherwise viable provisions of the surviving grievance procedure.

[21] The issue of whether the Respondent violated the Act by allegedly refusing to bargain over the "effects" of the layoff will be discussed later in this decision.

the very employees scheduled to be laid off. Nothing in the Respondent's subsequent actions appeared to suggest anything other than that its decision to lay off employees constituted an unyielding position. See *Mercy Hospital of Buffalo,* 311 NLRB 869, 873 (1993). In my view, the Union was certainly reasonable in concluding, based on the Respondent's actions, that the Respondent's position on the layoffs was unyielding. Under those circumstances, the Union was not obligated to specifically request bargaining over the decision.

In any event, the Union's subsequent actions were sufficient to put the Respondent on notice that it did not intend to acquiesce in the Respondent's decision. See *Oak Rubber Co.,* 277 NLRB 1322, 1323 (1985), enf. denied mem. 816 F.2d 681 (6th Cir. 1987); *Armour & Co.,* 280 NLRB 824, 828 (1986). As noted above, the Union filed two grievances over the layoffs, both of which sought to have the layoff decision reversed.

It was the Respondent's position that no bargaining was required over its decision to lay off employees, as bargaining had previously occurred and agreement by the parties reflected in the expired contract. The Respondent's conduct demonstrated that any request by the Union to bargain over the decision would be futile, as the decision was a "fait accompli." Under these circumstances, the Union was not required to specifically ask the Respondent to bargain over its decision, and the Union's failure to do so did not constitute a waiver of its right to bargain. *National Car Rental System,* 252 NLRB 159, 163 (1980), enfd. in relevant part 672 F.2d 1182 (3d Cir. 1982); *Intersystems Design Corp.,* 278 NLRB 759 (1986).

Accordingly, I conclude that under the circumstances of this case, the Union's failure to specifically request bargaining over the Respondent's decision to lay off employees did not constitute a waiver of the Union's right to bargain on behalf of the laid off employees. However, I do not find that the Respondent's refusal to bargain with the Union following its decision to lay off employees constituted a violation of Act, as I earlier concluded that the Respondent was privileged to take that position since bargaining over layoffs had previously occurred, and was reflected in the most recent collective-bargaining agreement between the parties.

One final contention by the Respondent must be addressed, namely the question of whether the layoff decision was directly "linked" to an earlier decision to discontinue a live weekend news broadcast. There is no dispute that the decision to discontinue this program was solely a managerial decision and, thus, a non-mandatory subject of bargaining.[22] However, it is the Respondent's contention that the decision to discontinue the program led directly to the decision to lay off the three employees. Accordingly, the Respondent argues that even if it unlawfully failed to bargain with the Union over the layoff decision, any remedy should be limited to that set forth in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968), and should, therefore, not include reinstatement and full backpay. Counsel for the General Counsel disagrees, contending that the decision to discontinue programming was unrelated to the later decision to lay off employees. It then follows, according to counsel, that any failure to bargain over the decision to lay off must be remedied by reinstatement and full backpay.

As was discussed earlier, in December of 2007, the Respondent's management team made a decision to eliminate weekend daytime production, specifically the Sunday morning newscast. The reasons for management's decision were a combination of low ratings for the newscast, and the expectation that it would be replaced by religious broadcasting, which was more lucrative. The final Sunday morning newscast was aired in early December of 2007. There is no dispute that this was solely a managerial decision, and, as such, a nonmandatory subject of bargaining.

Article 3.14 (GC Exh. 2, p. 4.) of the expired collective-bargaining agreement provides for a ratio of part-time and temporary employees' hours worked to the regular, full-time employees' hours worked. Based on that ratio, there are a maximum number of hours that can be worked by part-time and temporary employees. In order to maintain this ratio, as the number of hours worked by full-time employees decreases, the maximum number of hours worked by part-time and temporary employees must also be reduced.

It is undisputed that the elimination of the weekend morning newscast resulted in fewer hours being worked by the full-time employees. Mike Biltucci, the Respondent's director of operations and engineering, testified that in mid-December 2007, the Respondent's managers realized that in order to remain in conformity with the ratio provision in the expired contract, the Respondent would need to lay off some part-time employees. Therefore, a decision was made to lay off three part-time workers. Biltucci contends that there was no other way to stay within the ratio provisions of the contract. Subsequently, on January 9, 2008, the three employees selected for layoff were so notified, with their positions eliminated on January 31, 2008. (GC Exh. 11.)

It is the position of the General Counsel and the Union that there may have been some way, other than a layoff of the three part-time employees, for the Respondent to have remained in conformity with the ratio provision in the expired contract.[23] However, it is the Respondent's position that the layoffs were the only practical way to maintain the ratio.

Although I have already concluded otherwise, for purposes of the remaining discussion, I will assume that the Respondent unlawfully failed and refused to bargain with the Union over the "decision" to lay off employees. Under those circumstances, the General Counsel is seeking a restoration of the status quo ante, i.e. reinstatement and full backpay. However, the case law does not support such a remedy, providing instead for a limited back pay remedy as called for under *Transmarine Navigation Cop.,* 170 NLRB 389 (1986).

The Board has repeatedly held that where a decision to lay off employees is directly linked to a nonbargainable managerial decision, the appropriate remedy for a failure to bargain over the

[22] The Board has long held that an employer's right to direct "the core purpose" or central nature of its business involves managerial decisions, which are nonmandatory subjects of bargaining. *Peerless Publication, Inc.,* 283 NLRB 334 (1987).

[23] It should be noted that between the date it was notified of the layoffs, January 9, 2008, and the date the employees were actually laid off, January 31, 2008, the Union apparently failed to make any alternate suggestions to the Respondent as to how the ratio could be maintained without the layoffs.

layoff decision is found in *Transmarine.* In the fairly recent case of *North Star Steel Co.,* 347 NLRB 1364 (2006), the employer changed its scrap-yard system. This change was a nonmandatory subject of bargaining. Eight months later,[24] the employer laid off employees. The Board found that the employer had unlawfully refused to bargain over the layoff decision. However, the Board held that reinstatement was an inappropriate remedy, relying on *Litton Business Systems,* 286 NLRB 817, 820–822 (1987), and *Fast Food Merchandisers,* 291 NLRB 897, 899–900 (1988). The Board reasoned that the layoffs "flowed from the earlier decision," which was a nonmandatory subject of bargaining, and the earlier decision "produced" the layoffs. *North Star Steel Co.,* supra at 1370–1371.

In *Litton Business Systems,* supra, the Board found an unlawful refusal to bargain over a decision to lay off. However, the Board also concluded that reinstatement was inappropriate since the decision to lay off was "one of a number of responses," which the employer could have selected in response to "changed circumstances" created by the employer's earlier decision to implement a cold-type printing process, which was a nonmandatory subject of bargaining. It is certainly significant that in the case at hand the General Counsel and the Union also contend that the Respondent's decision to lay off, allegedly made without bargaining with the Union, was only one of a number of ways in which the Respondent could have remained in compliance with the ratio provision in the expired contract. However, such a finding would not negate the conclusion that the Respondent's original decision to end a Sunday news broadcast created the changed circumstances that led directly to the decision to lay off employees.

Another very similar case is *Fast Food Merchandisers,* supra, where the employer transferred work from its old facility to a new facility, a nonmandatory subject of bargaining. There then followed the employer's decision to lay off employees, which the Board concluded was unlawful because the employer had failed to negotiate with the union. However, the Board held that reinstatement was an inappropriate remedy since there was a "linkage" between the layoffs and the earlier nonmandatory subject of bargaining. Id. at 899–900; also see *Odebrecht Contractors of California,* 324 NLRB 396–398 (1997) (Board found layoff was "an effect" of earlier nonmandatory bargaining decision, denied reinstatement, and ordered a *Transmarine* remedy). [25]

While counsel for the General Counsel attempts to distinguish the facts in these cases, I find them to be most applicable to the case at hand. In each of these cases, the Board held that while the original decision was a nonmandatory subject of bargaining, and the decision to lay off flowed directly from that original managerial decision, the layoff decision was made unlawfully as the employer failed to negotiate with the union over the layoff. Similarly, in the case before me, the decision to lay off the three part-time workers was "linked" or "directly related" to the earlier managerial decision to discontinue the weekend news broadcast. As I am, for purposes of this discussion, assuming the layoffs were unlawful as taken without negotiating with the Union, some remedy is appropriate. However, in each of the cases cited above, the Board ordered the *Transmarine* remedy, rather, than the more traditional remedy of reinstatement with full backpay. In my view, it is simply not possible to distinguish these cases from the matter before me.

Although I continue to find that the Respondent's decision to lay off the three employees was not unlawful, I have assumed for purposes of this discussion only that the layoff decision was unlawful. Under those circumstances, had I found such a violation of the Act, I would have concluded that the appropriate remedy for the layoffs was the limited backpay remedy found in *Transmarine*.[26]

3. The effects of the layoffs

The remaining issue that must be discussed is the General Counsel's allegation, as found in complaint paragraph 7(d), that apart from the issue of the Respondent's alleged failure to bargain over its decision to lay off employees; that the Respondent committed a separate violation of the Act by failing to bargain over the "effects" of that decision. As noted, I have earlier concluded that the Respondent did not fail and refuse to bargain with the Union over its decision to lay off employees because it had in fact negotiated with the Union over the issue of layoffs, which agreement between the parties was contained in the most recent expired contract. For essentially the same reason, I conclude that the Respondent did not fail and refuse to negotiate with the Union over the effects of the layoff decision.

The most recent collective-bargaining agreement between the parties contains numerous provisions specifically dealing with the "effects" of a layoff. (GC Exh. 2.) Under "Reduction of Staff" (art. 5.4, p. 12) the contract provides for employees to be notified 6 weeks prior to a layoff, to receive a service letter, and, most significantly, to be awarded "severance pay" in accordance with a specific schedule based on length of service. The contract provides for the recall rights of the laid off employees (art. 5.4.1 and 5.4.2, p. 12–13.), for layoffs to be conducted in "inverse order of seniority" (Art. 5.4.3, p. 13.), and for a specific schedule of "notice or pay" based on length of service for employees laid off "due to automation" (art. 5.5, p. 13).

Unlike the issue concerning the "decision" to lay off, there is no dispute that the Union did request an opportunity to bargain over the "effects" of the planned layoffs. In Csillag's letter to Paul Kaderabek, the Respondent's director of business affairs, dated January 14, 2008, Csillag demanded "to immediately engage in effects bargaining with KGTV." (GC Exh. 12.) In Kaderabek's email response, dated January 16, 2008, he stated that he had been "advised that 'effects bargaining' does not apply here." Further, the message indicated that "the parties have already bargained about layoffs. See article 5 of the expired agreement." Kaderabek repeated that "[t]here is no duty to bargain further about layoffs," and declined to furnish certain finan-

[24] It should be noted that in the case at hand, the layoffs occurred only a month or two after the discontinuation of the weekend news broadcast, the nonbargainable managerial decision.

[25] The Board sometimes uses the term "effects bargaining" obligation, when it is describing the process whereby the "decision to lay off" employees was made. By using the term "effects bargaining" in these cases, the Board appears to mean that the "decision to lay off" was the natural *effect* of an earlier managerial decision, which decision was a nonmandatory subject of bargaining.

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

cial records that Csillag had requested. However, he did agree to "provide information about the projected part-time/full-time hours ratio." (GC Ex. 13.)

As noted earlier, the Union filed two grievances over the layoffs. The parties met on January 25, 2008, to discuss the first of these grievances. However, as described in detail above, little was accomplished at this meeting. Still, I credit Csillag's testimony that he requested "effects" bargaining, which request was refused by Kaderabek for the reason that the effects of layoffs had already been bargained over and were covered under the terms of the expired collective-bargaining agreement. Csillag claims that Kaderabek read from a "memo" stating the Respondent's position. It appears that Csillag is referring to Kaderabek's email of January 16, the substance of which is set forth immediately above. To the extend that in Kaderabek's testimony he denied a refusal to bargain over the effects of the layoffs at this meeting, I do not credit him, as it is clear from the Respondent's letter of January 16 exactly what the position of the Respondent was.

The Respondent's position was simply that no further bargaining over "effects" was necessary, as the parties had previously done so, and their agreements were reflected in article 5 of the expired contract. I agree.

As I indicated earlier, the Board has held that additional bargaining over layoffs is not required when a union and an employer have already negotiated over layoffs and incorporated the results of those negotiations into a collective-bargaining agreement. See *Port Printing AD & Specialties Inc.,* supra; *Odebrecht Contractors of California, Inc.,* supra; *Farina Corp.,* supra. By analogy, I believe the holding of those cases would also apply to bargaining over the "effects" of a layoff. It would make no sense to require an employer to negotiate with a union over "effects" every time there was a layoff, when the parties had previously negotiated and placed their agreement in these matters into their contract. In the case before me, this was preciously what the Union and the Respondent had done in article 5 of their contract. Further, the parties provided that any dispute over the "effects" language in the contract could be resolved by way of the comprehensive grievance procedure in the contract. (GC Exh. 2; art. 7.1, p. 16.)

Accordingly, I conclude that the Respondent did not fail and refuse to bargain with the Union over the "effects" of its decision to lay off employees. As the provisions in the collective-bargaining agreement dealing with the "effects" of a layoff were the results of the parties successful bargaining efforts over these matters, no further negotiations were required. Therefore, I shall recommend that complaint paragraphs 7(b), (c), and (d), and 8, only as they relate to the "effect" of the layoff issue, be dismissed.[27]

## CONCLUSIONS OF LAW

1. The Respondent, McGraw-Hill Broadcasting Company, Inc., d/b/a KGTV, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, National Association of Broadcast Employees and Technicians-Communications Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit of employees as set forth in Article 1 of the most recent collective-bargaining agreement between the Union and the Respondent, effective by its terms from October 1, 2002, through January 31, 2006, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of section 9(b) of the Act.

4. Since at least October 1, 2002, the effective date of the last contract between the Union and the Respondent, the Union has been the exclusive collective-bargaining representative of the employees in the above described unit within the meaning of Section 9(a) of the Act.

5. By unilaterally changing the terms and conditions under which Dennis Csillag, the nonemployee union president, had been permitted access to the union office, the Respondent has been failing and refusing to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act.

6. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated the Act except as set forth above.

## 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 polices of the Act.[28]

[Recommended Order omitted from publication.]

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[27] Assuming a violation was to be found over a failure to bargain over the "effects" of the layoffs, then the appropriate remedy would be as provided for in *Transmarine Navigation Corp.,* supra.

[28] Although a monetary award of backpay is not required to remedy the unfair labor practices that I have found the Respondent to have committed, had I found such a remedy to be necessary, I would have denied counsel for the General Counsel's request that interest on the backpay be compounded on a quarterly basis. See *Tech Valley Printing,* 352 NLRB No. 81 fn. 5 (2008) (not reported in Board volumes).