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Thryv, Inc. *and* International Brotherhood of Electrical Workers, Local 1269. Cases 20–CA–250250 and 20–CA–251105

December 13, 2022

DECISION AND ORDER

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

On April 23, 2021, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Charging Party and Acting General Counsel each filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations 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[1] only to the extent consistent with this Decision and Order.[2]

The issue presented before us on the merits is whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). We agree with the judge's determination that the Respondent violated the Act by failing and refusing to respond to information requests advanced by the Charging Party, International Brotherhood of Electrical Workers, Local 1269 (IBEW or the Union). Contrary to the judge, however, we find that the Respondent also violated Section 8(a)(5) and (1) of the Act by unilaterally laying off six employees in violation of the statutory duty to bargain.

We next examine the proper scope of the Board's make-whole relief. Where, as here, our standard remedy would include an order for make-whole relief, we find it necessary to ensure that affected employees are made fully whole for the costs they incur as a result of the respondent's unlawful actions. Accordingly, to best effectuate the purposes of the Act, our make whole-whole remedy shall expressly order respondents to compensate affected employees for all direct or foreseeable pecuniary harms that these employees suffer as a result of the respondent's unfair labor practice.

Background

The Respondent, Thryv, Inc., operates a marketing agency engaged in the business of selling Yellow Pages advertising, as well its eponymous product "Thryv," an application for small businesses. While all parties agree that Yellow Pages advertising has increasingly declined since the advent of the Internet, the Respondent still generates annual revenues in excess of $1.1 billion, with print and electronic advertising accounting for 88 percent of that amount.

The Union represents a unit of employees that includes the Respondent's outside sales force, which in turn consists of three subsets of "premise" representatives, so named because they go to customer premises to solicit advertising sales. These premise representatives consist of Senior Business Advisors (SBAs), who handle high-value clients, Business Advisors (BAs), who handle medium-value clients, and New Business Advisors (NBAs),[3] who solicit new clients for the Respondent. Small accounts are handled by the Respondent's "inside" sales force of non-unit advertising agents. The markets assigned to the Senior Business Advisors, Business Advisors, and New Business Advisors are called "channels," with a Senior Business Advisor channel, a Business Advisor channel, and a New Business Advisor channel, respectively.

Around mid-July of 2019,[4] the Respondent began implementing its proposal to lay off all of its New Business Advisors in the Northern California Region. On July 18, Assistant Vice President of Human Resources Lisa O'Toole, Chief Human Resources Officer Deb Ryan, and Assistant Vice President of Labor Relations Beth Dickson discussed via email whether the Respondent could "keep the good ones," with Dickson cautioning that the Respondent needed to transfer these "good" New Business Advisors into roles as Business Advisors before the layoff, so that the Respondent could "call it a channel elimination." Around this time, the Respondent transferred two

[1] In the absence of exceptions, we adopt the judge's determination that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide the Union with the information it requested on April 12, 2019, regarding quarterly relief to be afforded to sales representatives and by failing and refusing to respond to the Union's October 30 request for information regarding the names and addresses of "twin accounts" that underwent the process of unification. In the absence of exceptions, we also adopt the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to respond to the Union's July 17 and 24 requests for information about the market to which Luis Pantoja was assigned and to the Union's September 11 request for information regarding the market and account assignments for Luis Pantoja and Marlon McConner.

[2] We shall modify the judge's recommended Order to conform to our findings, to the amended remedy, to the Board's standard remedial language, and in accordance with our decision in *Paragon Systems*, 371 NLRB No. 104 (2022). We have substituted a new notice to conform to the Order as modified.

[3] New Business Advisors were alternatively referred to as Digital Sales Executives ("DSEs").

[4] All dates hereafter refer to 2019, unless otherwise specified.

former managerial employees, Luis Pantoja and Marlon McConner, from their positions as New Business Advisors into new positions as Business Advisors.

Shortly thereafter, on August 21, Dickson emailed the Union stating that the Respondent "will administer a force adjustment" and lay off the six New Business Advisors in the Northern California Region effective September 20. The email stated, "[i]f the Union desires to exercise its right to meet and discuss the Company's plan within the 30-day period, please contact [Labor Relations Manager] Ralph Vitales to arrange such discussions."

The Union contacted Vitales the following day, and after proposing various dates, the parties agreed to meet and bargain on September 11 and 12. However, before the scheduled bargaining sessions, the Respondent moved forward with implementing its plan to lay off the six affected employees. On September 5, the Respondent sent union officials notice that the following day it would inform employees of the layoff. Vitales stated in this email that the Respondent would still be available on September 11 and 12 "to *bargain the effects* of this force reduction" (emphasis added). On September 6, the Respondent held a virtual meeting with some of the New Business Advisors. During the meeting, Regional Vice President Terry Henshaw told the assembled employees that the Respondent organized the meeting to "officially notify you that we are eliminating our Northern California DSE [New Business Advisor] Channel," that these "positions will be eliminated effective September 20, 2019," and that the Respondent had already sent severance packages to all six affected employees via overnight mail.

The Union and Respondent first met to discuss the layoff of the New Business Advisors on September 11. During the bargaining, Union Local President Stefen Guthrie asked Vitales for a proposal regarding the layoffs. Vitales responded that Article 30 of the Respondent's Last, Best, and Final Offer (LBFO) served as the Respondent's proposal.[5] Guthrie asked about available jobs with the Respondent into which the affected employees could transition. Guthrie also asked the Respondent to provide an "audit trail" for all the accounts assigned to New Business Advisors, an industry term-of-art understood by the parties to encompass "assignments, customer names, locations, addresses, records, advertising revenue, commissions, items of advertising, and a listing of the sales representative of record." Finally, Guthrie requested the work market location for each of the six employees that the Respondent was proposing to lay off.

Guthrie then proposed that the Respondent absorb all the New Business Advisors into the Business Advisor title, as envisioned by the language of the LBFO.[6] Vitales stated that there was insufficient revenue to transfer all the New Business Advisors into Business Advisor positions, and Guthrie proposed that the layoffs be suspended so that the parties could discuss the issue.[7] Vitales responded that the layoffs would not be rescinded. Guthrie asked how the Union was expected to bargain, and Vitales asked what the Union needed, to which Guthrie responded: "client base." In a subsequent September 11 email, Guthrie told the Respondent it had "an obligation to meet with the Union specifically but not limited to how and when we would absorb New Business Advisor Premise into [the Business Advisor position]" and asked the Respondent to "[e]ffective immediately rescind all Force Adjustment Notification(s) to Bargaining unit employees . . ."

The parties subsequently met on September 12 to bargain the layoff decision. The Respondent's bargaining notes for this session are titled "Bargaining Force Adjustment of DSEs [NBAs] in N.CA . . ." During this meeting, Guthrie asked for the parties to figure out how to integrate the New Business Advisors into another bargaining unit position, to which Beth Dickson replied: "The channel is not performing. Their numbers are too low." Guthrie noted that "[t]he company had information and we didn't have a meeting to see how we could absorb these people into the BA role. We have not had the benefit of this information."

On September 16, Guthrie sent an email stating that under the LBFO the New Business Advisors should be absorbed into the bargaining unit as Business Advisors. Guthrie reiterated his request for information about the work market locations of the six laid-off employees, citing

[5] At the time of the layoff, the parties were operating under the Respondent's Last, Best and Final Offer that it implemented after declaring impasse in September of 2018. Under Art. 30.2 of the LBFO, entitled "Force Adjustments":

> Whenever conditions are considered by the Company such as to warrant layoffs, part-timing, reclassifications or a combination thereof, the Company agrees to give the Union designee IBEW 1269 or his/her authorized representative thirty (30) calendar days' notice of its intended plan, together with a description of work locations, job titles (levels within channels) and work groups so affected as determined by the Company.

[6] The LBFO states, in relevant part, that "[t]he parties agree to review the need for the New Business Advisor-Premise role at six-month intervals to determine whether there has been sufficient change in the client base and staffing levels to absorb New Business Advisor(s)-Premise into the Business Advisor-Premise title."

[7] It appears that the work of the New Business Advisors in Northern California was being "insourced" to sales representatives, who were being encouraged by an agent of the Respondent to take a "power hour" each day to solicit new business. During the September 11 meeting, the Union requested all emails, texts, and communications from that manager related to this "power hour." No charge related to this information request is included in the complaint.

that Article 30 of the LBFO required the Respondent to provide this information. On September 20, the Respondent implemented its decision and formally laid off the six New Business Advisors.

The parties met again on October 3, after the implementation of the layoffs. During the meeting, Guthrie explained that the Union's request for information regarding the employees' work locations was important because although all of the Premise Representatives worked remotely, their base pay was determined by the market to which they were assigned. This information was necessary for the Union "to evaluate what market" was assigned to the New Business Advisors and other employees in that location, and "where it went" after their layoff. Guthrie again asked for audit trails of the accounts so that the parties could determine the share of the market that might be available to the laid-off employees.

On October 16, the parties held a grievance meeting in which the Union submitted a request for information regarding accounts that underwent "unification." When two previous business entities had merged to form Thryv, Inc., some accounts were assigned to a representative from each of the former parent entities, and the "unification" process ensured that the account was reassigned to only one representative. The Union sought a list of all these "twin accounts," as well as the names and addresses of the businesses in these accounts, to ensure that bargaining-unit work was not being assigned to non-bargaining-unit employees in violation of the LBFO.

On October 17, Union Business Representative Mike Waltz sent the Respondent an information request by email. This request sought account and market information for New Business Advisors, Business Advisors and Senior Business Advisors in the Northern California and Nevada market over a period of the last 12 months. The request included accounts assigned to these Premise Representatives as well as accounts that had been moved out of the market or reassigned.

On October 30, the Union reiterated its request for the names and addresses of the "twin accounts," noting that 83 of the accounts had been assigned to the bargaining unit, but seven had been reassigned to non-bargaining unit employees. The Respondent refused to disclose the names and addresses of the customers associated with these accounts unless the Union signed a non-disclosure agreement, a condition precedent that it had never imposed upon previous information requests.

The parties' final bargaining session occurred on October 31, with Guthrie beginning the meeting by noting the numerous outstanding requests for information and saying, "I don't know how to bargain if we have RFI [requests for information] and we need the information to bargain." Guthrie remarked that plenty of Premise Representatives were leaving and that there was "ample market to move at least some of [the laid-off employees] into," noting that the Union simply needed information from the outstanding requests to determine this. To this extent, Guthrie reiterated the Union's request for information regarding the specific market assignments given to former Luis Pantoja and Marlon McConner, two former managers of the Respondent who had been moved from New Business Advisor positions to Business Advisor positions shortly before the layoffs.

To date, the Union has not received the aforementioned information it requested.

I. RESPONDENT'S UNFAIR LABOR PRACTICES

A. Information Requests

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to respond to the requests for information made by the Union on September 11 and 16, and on October 3, 17, and 31. We agree. The judge carefully explained how each item of information requested by the Union was presumptively relevant, as it concerned the wages or working conditions of unit employees, or how the Union demonstrated the relevance of such information as necessary to its role of bargaining representative. The judge correctly rejected the Respondent's claims that the provision of the requested information would be burdensome, voluminous, costly, or confidential. Accordingly, we adopt the judge's determinations that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with the requested information.

B. Unilateral Layoffs

The judge found that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally laying off the six New Business Advisors. Although the judge determined that the Respondent had a duty to bargain over the economic layoff of these employees, the judge found that the layoff was lawful, as it was imposed subsequent to the parties having reached impasse. Although the Respondent unilaterally implemented its layoff decision just nine days after the first bargaining session, the judge found that "because the Union failed to present any reasoned proposals before September 20, the evidence supports a finding that impasse had quickly occurred, and/or by its conduct the Union waived its opportunity to bargain." The judge found that the Respondent's decision was not a *fait accompli*, and that even if it was, "the Respondent cured any such conduct by bargaining with the Union in good faith about the layoff and specifically asking the Union for its counterproposals."

We reverse and find that the Respondent's decision to lay off the six New Business Advisors was presented as a *fait accompli*, and that any subsequent bargaining did not "cure" this conduct because the Respondent's failure to provide the requested information prevented the Union from making reasoned counterproposals. Additionally, we find that the Respondent violated its duty to refrain from making unilateral changes during the pendency of bargaining a successor agreement. We therefore find that the Respondent's unilateral layoff of these six employees violated Section 8(a)(5) and (1) of the Act.

"It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented as a *fait accompli.*" *Intersystems Design & Technology Corp.*, 278 NLRB 759, 759 (1986) (quoting *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983)). Further, "no impasse is possible where an employer presents the union with a 'fait accompli' as to a matter over which bargaining to impasse is required." *Castle Hill Health Care Center*, 355 NLRB 1156, 1189 (2010). Here, it is undisputed that the Respondent was obligated to bargain over the decision to lay off the New Business Advisors. See *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954 (1988) ("[W]e conclude that the decision to lay off employees for economic reasons is a mandatory subject of bargaining."). That decision was presented to the union as a *fait accompli*, an accomplished fact, as the Respondent began to implement the decision well before notifying the Union of the layoff or attending the first bargaining session.

First, the Respondent began taking steps to implement its layoff decision as early as July 2019, when the Respondent transferred former managers Luis Pantoja and Marlon McConner from their positions as New Business Advisors into new positions as Business Advisors in order to "keep the good ones" after the layoff. This was done weeks before the Respondent first informed the Union of the layoff decision on August 21. See *FirstEnergy Generation, LLC*, 366 NLRB No. 87, slip op. at 16–17 (2018) (finding a *fait accompli* where Respondent already began implementing subcontracting decision before providing notice to the Union), enf. denied on other grounds 929 F.3d 321 (6th Cir. 2019).

Second, the Respondent informed employees on September 6, 5 days before its first bargaining session with the Union, that the purpose of its meeting was to "officially notify" the employees that the Respondent "will administer a force adjustment in the Sales Organization in the New Business Advisor title . . ." and that "these positions will be eliminated." The Respondent not only "announced the layoff to employees and told them that their severance packages were forthcoming," as stated by the judge, but also mailed the severance packages to the laid-off employees via overnight delivery on September 6, a full 5 days before the first bargaining session even began. We find that the Respondent's actions established that the layoff decision was presented as a *fait accompli*. See, e.g., *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1024 (2001) (union was presented with a *fait accompli* where the employer posted its unilaterally-imposed policy on its bulletin boards, "an event that ordinarily occurred only when decisions were final," and where this notice stated that the changes "will be implemented," with "such language again showing the Respondent's intent to effect this change without bargaining.").

We also reverse the judge's finding that even if the Respondent presented the decision as a *fait accompli*, the Respondent "cured" its unlawful conduct through subsequently bargaining with the Union and seeking counterproposals. The Respondent is incorrect in asserting that the Union did not make any counterproposals to the announced layoff decision. The judge himself notes that the Union did, in fact, present proposals, repeatedly asserting to the Respondent that the Union sought to work together with the Respondent to incorporate the New Business Advisors into positions as Business Advisors, or to delay the layoffs until agreement could be reached.

Further, the Board has held that "a party's failure to provide requested information that is necessary for the other party to create counterproposals, and, as a result, engage in meaningful bargaining, will preclude a lawful impasse." *E.I. du Pont & Co.*, 346 NLRB 553, 558 (2006), enfd. 489 F.3d 1310 (D.C. Cir. 2007). Here, we find that Respondent's failure and refusal to respond to the Union's requests for relevant and necessary information precluded the Union from formulating substantive counterproposals.

The judge found that as of the September 20 effective date of the layoff, the only extant requests were the request for an audit trail of all New Business Advisor accounts and the request for the market location of these employees. We find, contrary to the judge, that the request for an audit trail of the accounts was made for the purpose of bargaining the layoff decision, and not only to ensure that the employees could be made whole should their positions be restored through the grievance process. As the judge notes in his analysis on the relevance of the request for an audit trail, "the evidence clearly establishes that the Union believed the terminations of the various NBAs, and the impending layoffs, violated Respondent's contractual obligation and/or the Final Offer, and the parties were engaged in wide ranging discussions about the matter, with the Union wanting the NBAs to be reinstated or absorbed into the BA title." This was demonstrated when on September 11, after being asked what the Union needed to formulate

counterproposals, Guthrie replied: "client base," echoing the sentiment that the Union was prevented from making a proposal without information regarding which clients could be assigned to the New Business Advisors. Further, when discussing the feasibility of transferring the laid-off employees into new roles, the Union made clear during bargaining on September 12 that "[t]he company had information and we didn't have a meeting to see how we could absorb these people into the BA role. We have not had the benefit of this information." Thus, it is clear from the record evidence and from the judge's findings that the Union sought information regarding the accounts assigned to New Business Advisors in order to make substantive bargaining proposals about the layoff decision. Without this information, the Union could not determine what accounts were available to create a "bag" or market of accounts to give to the unilaterally laid-off employees in new or restored positions.

We further find that the Union was prevented from formulating counterproposals due to the Respondent's failure and refusal to provide information regarding the market location of the laid-off employees. As held above, we agree with the judge that current, up-to-date information on the market location of the affected employees was necessary and relevant to the Union's status as collective-bargaining representative, and that the Respondent's failure and refusal to respond to the information request violated Section 8(a)(5) and (1) of the Act. We reverse, however, the judge's finding that this information was not relevant to the Union's formulation of counterproposals. Current market location was used to determine the base pay of the New Business Advisors, as well as what accounts might be available to them in that market were they to be transferred to Business Advisor positions. As the judge noted in his summary of Guthrie's testimony, "the Union needed 'the specifics,' including the area location along with how many employees were segmented into those particular locations because the Union 'needed the ability to evaluate what market' the NBAs had, and 'where it went.'" Without these "specifics," we find the Union could not formulate specific and substantive counterproposals to the Respondent's layoff decision.

In these circumstances, we find that the Respondent's failure to respond to these information requests effectively prevented the Union from formulating detailed or substantive proposals, thus precluding a declaration of impasse. See *CP Anchorage Hotel 2, LLC d/b/a Hilton Anchorage*, 370 NLRB No. 83, slip op. at 3 fn. 11, 4 (2021) (finding respondent violated Sec. 8(a)(5) and (1) by declaring impasse and unilaterally implementing proposal, even where union had not made a counterproposal, as "the Respondent's failure to timely provide the information precluded a valid impasse."), enfd. mem. sub nom. *UNITE HERE! Local 878 v. NLRB*, 2022 WL 3010171 (9th Cir. 2022); *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 368 NLRB No. 119, slip op. at 21 (2019) ("It is well-settled that a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties.") (internal quotations omitted), enfd. 845 F. Appx. 181 (3d Cir. 2021); accord *Hendrickson Trucking Co.*, 365 NLRB No. 139, slip op. at 2, 2 fn. 6 (2017), enfd. 770 Fed.Appx. 1, 5 (D.C. Cir. 2019) ("the Board's holding that Hendrickson Trucking could not declare an impasse because it had failed to provide the Union the financial information it needed to evaluate the Company's representations was grounded in settled law."). Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) by unilaterally laying off six New Business Advisors without first bargaining with the Union to impasse, as impasse was precluded by the Respondent's failure and refusal to provide requested information relevant to the layoff decision.

In addition to our aforementioned finding, we also find that the Respondent violated Section 8(a)(5) and (1) by unilaterally laying off six New Business Advisors whilst the Respondent was under a duty to refrain from implementing unilateral changes during the pendency of bargaining a successor collective-bargaining agreement. As we held in *Bottom Line Enterprises,* "when, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Here, the judge found the parties were operating under the Respondent's 2018 Last, Best, and Final Offer, but were in the process of negotiating a new collective-bargaining agreement when the Respondent implemented the unilateral layoffs on September 20. The parties subsequently reached agreement on November 14. Thus, pursuant to *Bottom Line Enterprises*, the Respondent violated Section 8(a)(5) and (1) by implementing unilateral layoffs while the parties were negotiating over the successor agreement, as there is no evidence that overall impasse had been reached on the agreement as a whole. 302 NLRB at 374; accord *Stephens Media Group—Watertown, LLC*, 371 NLRB No. 11 (2021); *Oak Hill*, 360 NLRB 359, 403 (2014); *RBE Electronics*, 320 NLRB 80, 81 (1995).

Further, there is no evidence that either of the two exceptions to the standard established in *Bottom Line Enterprises* apply here. See *Pleasantview Nursing Home*, 335

NLRB 961, 962 (2001) ("In *Bottom Line*, the Board recognized only two exceptions to that general rule: when a union engages in bargaining delay tactics and when economic exigencies compel prompt action.") (internal quotations omitted), enfd. in relevant part 351 F.3d 747, 755-756 (6th Cir. 2003). There is no cognizable claim that the Union "in response to an employer's diligent and earnest efforts to engage in bargaining, insist[ed] on continually avoiding or delaying bargaining." *Bottom Line*, supra, 302 NLRB 373 at 374. The Union attended the scheduled bargaining sessions, and the parties reached prompt agreement between September and November of 2019. Cf. *Oak Hill*, supra, 360 NLRB at 403–404 (*Bottom Line* exception not met even where union stated that there would be no further meetings or additional negotiations until it received a response to its information request).

Next, there is also no legitimate argument that economic exigencies compelled the Respondent to lay off the six New Business Advisors on September 20. Although the Respondent presented evidence that the New Business Advisor positions were not profitable, we have long held that the failure to turn a profit does not constitute a "compelling economic consideration" that would excuse an employer's unilateral layoff. As we explained in *Hankins Lumber Co.*, "[m]ost layoffs are taken as a of result economic considerations. However, business necessity is not the equivalent of compelling considerations which excuse bargaining. Were that the case, a respondent faced with a gloomy economic outlook could take any unilateral action it wished or violate any of the terms of a contract which it had signed simply because it was being squeezed financially." 316 NLRB 837, 838 (1995).

Accordingly, we find that during the time of the September 20 unilateral layoffs, the Respondent and Union were engaged in negotiations over the terms of a successor bargaining agreement, and that the Respondent did not meet any of the exceptions which would privilege it to act unilaterally without bargaining to impasse over the agreement as a whole. Thus, in addition to the *fait accompli* analysis described above, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally laying off six New Business Advisors during the pendency of bargaining without first bargaining the successor agreement to impasse, pursuant to *Bottom Line Enterprises*.

II. REMEDIAL ISSUES

Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally laying off six New Business Advisors, we next turn to the proper remedy.[8] We find, for the reasons discussed at length below, that it is necessary for the Board to revisit and clarify our existing practice of ordering relief that ensures affected employees are made whole for the consequences of a respondent's unlawful conduct. We conclude that in all cases in which our standard remedy would include an order for make-whole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice.[9] As we explain below, any relief must be specifically calculated and requires the General Counsel to present evidence in compliance demonstrating the amount of pecuniary harm, the direct or foreseeable nature of that harm, and why that harm is due to the respondent's unfair labor practice. The respondent, in turn, will have the opportunity to present evidence challenging the amount of money claimed, argue that the harm was not direct or foreseeable, or that it would have occurred regardless of the unfair labor practice.

We find that standardizing this remedy in all cases is necessary to "satisfy the Board's statutory obligation to provide meaningful, make-whole relief for losses incurred . . . as a result of a respondent's unlawful conduct." *King Soopers, Inc.*, 364 NLRB 1153, 1155 (2016), enfd. in relevant part 859 F.3d 23, 26 (D.C. Cir. 2017).

[8] On November 10, 2021, the Board invited all interested parties to file briefs regarding whether the Board should "modify its traditional make-whole remedy in all pending and future cases to include relief for consequential damages, where these damages are a direct and foreseeable result of a respondent's unfair labor practice." In addition to the supplemental and responsive briefs filed by the Respondent, Charging Party and General Counsel, amicus briefs were filed by numerous parties. The amicus briefs filed by the American Federation of Labor and Congress of Industrial Organizations, Carlos Gonzalez-Rivera, Communications Workers of America, International Association of Machinists and Aerospace Workers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, National Association of Government Employees, National Nurses United, Service Employees International Union, International Brotherhood of Teamsters, Local 848, Transport Workers Union of America, United Food and Commercial Workers International Union, and Weinberg, Roger & Rosenfeld support making the proposed modifications to the Board's traditional make-whole relief. Associated Builders and Contractors et al. and the Chamber of Commerce of the United States of America oppose them.

[9] Although no party in this case specifically requested such a remedy before the administrative law judge, the Board may issue remedies even where, as here, they are not originally sought by the Charging Party or in the General Counsel's complaint. *Voorhees Care & Rehabilitation Center*, 371 NLRB No. 22, slip op. at 4 fn. 14 (2021) ("[T]he Board may award a remedy on its own initiative."), citing *J. Picini Flooring*, 356 NLRB 11, 12 fn. 5 (2010) ("[I]t is well settled that the Board has the authority to consider remedial issues sua sponte."); *Danbury Ambulance Service*, Inc., 369 NLRB No. 68, slip op. at 3 fn. 3 (2020) ("[R]emedial matters are traditionally within the Board's province and may be addressed sua sponte."); *HTH Corp.*, 361 NLRB 709, 710 (2014) ("We have broad discretion to exercise our remedial authority under Section 10(c) of the Act even when no party has taken issue with the judge's recommended remedies."), enfd. in rel. part 823 F.3d 668 (D.C. Cir. 2016).

A. The Board's Statutory Authority

Pursuant to Section 10(c) of the Act, where the Board concludes that a party has engaged in an unfair labor practice, it "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." 29 U.S.C. § 160(c). The Supreme Court has held that our authority to fashion such a remedy "is a broad discretionary one." *NLRB v. J. H. Rutter-Rex Manufacturing*, 396 U.S. 258, 262–63 (1969) (quoting *Fiberboard Paper Products. V. NLRB*, 379 U.S. 203, 216 (1964) ("The Board's [remedial] power is a broad discretionary one, subject to limited judicial review.")); see also *Fallbrook Hospital Corp. v. NLRB,* 785 F.3d 729, 738 (D.C. Cir. 2015) (Board acts at the "zenith of its discretion" when fashioning remedies) (internal quotation marks omitted). To give effect to this broad grant of discretion, the Board's remedial authority "will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp.* 379 U.S. at 203 (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943) (internal quotations omitted)).

Upon careful consideration of our remedial authority and our history of addressing the effects of unfair labor practices, we find that standardizing our make-whole relief to expressly include the direct or foreseeable pecuniary harms suffered by affected employees is necessary to more fully effectuate the make-whole purposes of the Act.[10] "The underlying policy of Section 10(c) . . . is 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Trustees of Boston University*, 224 NLRB 1385, 1385 (1976), enfd. 548 F.2d 391 (1st Cir. 1977) (quoting *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941)); see also *Camelot Terrace Inc. v. NLRB*, 824 F.3d 1085, 1092 (D.C. Cir. 2016) ("'The task of the Board in applying § 10(c) is to take measures designed to recreate the conditions and relations that would have been had there been no unfair labor practice.'") (quoting *Franks v. Bowman Transportation Co.*, 424 US. 747, 769 (1976)); *NLRB v. Strong*, 393 U.S. 357, 359 (1969) ("'[M]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.'") (quoting *Phelps Dodge Corp.*, 313 U.S. at 197); *J.H. Rutter-Rex Manufacturing*, 396 U.S. at 263 (purpose of Board orders is "restoring the economic status quo that would have obtained but for the company's wrongful [unfair labor practices].); *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54–55 (1954) ("It is clear that petitioner committed an unfair labor practice and the policy of the Act is to make whole employees thus discriminated against."). To the extent that our prior decisions have not always made clear that we define make-whole relief to include direct or foreseeable pecuniary harms resulting from the respondent's unfair labor practices, we do so now.

We have previously recognized that employees cannot be fully made whole without consideration for these types of losses, and the Board has at times awarded relief for pecuniary harms that were either a direct, or an indirect but foreseeable, consequence of a respondent's unfair labor practice. The philosophy of these cases underpins and informs our decision to clarify our remedies today. For example, only three years after the passage of the Act, the Board recognized that wrongfully-terminated employees may incur "expenses for transportation, room, and board, which they would not have incurred had they continued to work for the respondent," and that these costs should reduce the amount of interim earnings that is subtracted from backpay awards. *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938); accord *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955), enfd. 228 F.2d 871 (6th Cir. 1955); see also *Lou's Transport, Inc. v. NLRB*, 945 F.3d 1012, 1024 (6th Cir. 2019) ("Interim employment expenses have been factored into back pay awards for more than 80 years.").

Subsequently, in *Baptist Memorial Hospital*, the Board found that an employer unlawfully ejected a handbilling employee from its premises, causing him to be arrested and convicted of disorderly conduct. 229 NLRB 45, 45 (1977), enfd. 568 F.2d 1 (6th Cir. 1977). Noting that the "legal expenses and fees which have been or will be incurred by employee Wheeler in connection with this incident are directly the result of Respondent's unlawful policies and conduct," the Board found that "[o]nly by requiring Respondent to reimburse Wheeler for these costs will we succeed in making Wheeler whole and in fulfilling our obligation to remove, insofar as is possible, the effects of Respondent's unfair labor practices." Id. at 46.

In *BRC Injected Rubber Products*, an employee was discriminatorily assigned to a dirtier and more onerous work assignment in retaliation for her union activity, causing her clothes to be ruined. 311 NLRB 66, 66 fn. 3 (1993). Accordingly, the Board ordered "monetary reimburse-

[10] In explaining that we will henceforth expressly include make-whole relief for direct or foreseeable pecuniary harms, we emphasize that we do not conclude that this reflects the limits of the Board's statutory remedial authority or that some other form of make-whole relief might not also be necessary in a future case. Rather, our decision today is meant to make clear that make-whole relief encompasses, at a minimum, these direct or foreseeable pecuniary harms that are a consequence of a respondent's unfair labor practices.

ment for the loss," since the clothes were ruined as "the direct result of the Respondent's illegal conduct of assigning her to clean the pits." Ibid.

Similarly, in *Nortech Waste*, the employer reassigned a union activist to a job pulling nails, an "entirely unnecessary task" that would aggravate her carpal-tunnel syndrome and "cause her to break down." 336 NLRB 554, 567 (2001). There, the Board ordered that the employee be made whole "for any medical expenses she incurred as a result of her unlawful reassignment." Id. at 554 fn. 2. The Board found that these damages are "not speculative. Rather, they are specific and easily ascertained." Ibid., citing *Pilliod of Mississippi*, 275 NLRB 799, 799 fn. 3 (1985).

In *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, the employer unlawfully retaliated against striking employees by removing their toolboxes from its facility and hauling them outside, where they were subsequently damaged by rain and needed to be removed with a tow truck. 367 NLRB No. 6 (2018), enfd. 976 F.3d 30 (D.C. Cir. 2020). Noting that "making the employees whole for those costs is necessary to fully remedy the Respondent's unfair labor practice and effectuate the policies of the Act," the Board ordered the employer to make the employees "whole, with interest, for any expenses they incurred as a result of the Respondent unlawfully removing their toolboxes from its dealership" and "make whole all of the employees, with interest, for the towing expenses they incurred when they were unlawfully required to remove their toolboxes . . . . " Id., slip op. at 4. The Board found that these damages were "specific and easily ascertainable" and that "the determination of those costs does not require the special expertise of the courts." Ibid.

In *King Soopers*, the Board recognized that "incurring search-for-work and interim employment expenses represent a different injury than losing wages. Thus, reimbursement of these expenses compensates discriminatees for a separate injury than lost pay." 364 NLRB 1153, 1159 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). The Board noted that "[w]here the Board has found that its remedial structure fails to fulfill its make-whole objective, '[it] has revised and updated its remedial policies . . . to ensure that victims of unlawful conduct are actually made whole.'" Id., at 1156 (quoting *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101, 102–103 (2014)). Accordingly, the Board modified the treatment of search-for-work and interim employment expenses to award these monetary damages separately from taxable net backpay. Id., slip op. at 8. In enforcing the Board's order, the D.C. Circuit stated, "[i]t is clear here that the Board's action in this case is well within its statutory authority." *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 36–39 (D.C. Cir. 2017).

In *Alameda Center for Rehabilitation and Healthcare, Inc.*, an employer unlawfully withheld employees' 401(k) contributions. 370 NLRB No. 25, slip op. at 1 (2020). There, the Board ordered the employer to not only reimburse the missing contributions, but to compensate employees for "the investment growth the amounts would have experienced during that period," as this relief "restores employees to the status quo with respect to the matching contributions that they would have obtained but for the Respondent's unfair labor practice." Ibid. Accord *Lou's Transport, Inc.*, 366 NLRB No. 140 (2018), enfd. 945 F.3d 1012 (6th Cir. 2019).

Most recently, in *Voorhees Care and Rehabilitation Center*, the employer unlawfully discontinued employee healthcare coverage in violation of Section 8(a)(5). 371 NLRB No. 22 (2021). To "restore the status quo ante and fully remedy the Respondent's unlawful conduct," the Board ordered the employer to "reimburse employees for the costs they incurred . . . including any increases in premiums, copays, coinsurance, deductibles, and other out-of-pocket expenses," as well as to "pay any still-unpaid medical bills directly to the medical providers." Id., slip op. at 3–4. See also *Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (finding discriminatee entitled to reimbursement for medical expenses incurred during the backpay period, noting "[i]t is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost.").

Despite the broad range of factual and legal circumstances encompassed by these cases, they share a common thread: the implicit recognition that making employees whole should include, at least, compensating them for direct or foreseeable pecuniary harms resulting from the respondent's unfair labor practice. Today, we make that explicit and expressly incorporate it into our standard make-whole order.

We recognize that our Notice and Invitation to File Briefs sought briefing on whether the Board should include, as part of its make-whole remedy, "relief for consequential damages," *Thryv, Inc.,* 371 NLRB No. 37, slip op. 1 (2021), and that courts have occasionally applied damages-like concepts like "actual losses" and "mitigation of damages" to the Board's remedial authority. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 198 (1941). After further consideration, however, we recognize that "consequential damages" is a term of art used to refer to a specific type of legal damages awarded in other areas of the law and fails to accurately describe the make-whole remedial policy we espouse here. See *Freeman Decorating*

Co., 288 NLRB 1235, 1235 fn. 2 (1988) ("[W]e observe that the Board does not award tort remedies, but rather remedies unlawful conduct. Any recompense awarded a discriminatee is not for physical injuries suffered, but rather is a necessary remedy to vindicate the purposes of the Act."). Instead, the Board's remedial authority is rooted in its Section 10(c) mandate to "translat[e] into concreteness the purpose of safeguarding and encouraging the right of self-organization," rather than "the correction of private injuries." *Phelps Dodge Corp.*, 313 U.S. at 192–193.[11]

Accordingly, we stress today that the Board is not instituting a policy or practice of awarding consequential damages, a legal term of art more suited for the common law of torts and contracts. Instead, we ground our decision in the make-whole principles of Section 10(c) of the Act,[12] the guidance of the examples in our precedent summarized above, and our affirmative duty to rectify the harms caused by a respondent's unfair labor practice by attempting to restore the employee to the situation they would have been in but for that unlawful conduct. These considerations persuade us that clarifying that our traditional make-whole remedy should also include compensation for direct or foreseeable pecuniary harms in all cases will better effectuate the purpose of the Act.

When exercising our remedial authority, we must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling Co. of Miami,* 344 U.S. 344, 346 (1953); *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) ("The Board has broad discretion to adapt its remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly.'") (quoting *Phelps Dodge Corp.*, 313 U.S. at 194). Therefore, the Board has periodically updated its make-whole relief to better effectuate the purposes of the Act. Compare *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (computing simple interest on backpay awards), enf. den. on other grounds, 322 F.2d 913 (9th Cir. 1963) with *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing make-whole remedy from simple interest to daily compound interest to better effectuate policies of the Act); see generally *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 102 (2014) ("[T]he Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole.").

"Make-whole relief" is more fully realized when it consistently compensates affected employees for all direct or foreseeable pecuniary harms that result from a respondent's unfair labor practice. See *King Soopers,* 364 NLRB 1153, 1156 (2016) (assessing "whether the current remedial framework properly awards make-whole relief, or fails to truly make whole the aggrieved victims of unlawful conduct."). In *The Voorhees Care & Rehabilitation Center*, Chairman McFerran listed "a myriad of other possible examples" of unredressed pecuniary harms suffered by affected employees:

> Following an unlawful discharge, for example, an employee may be faced with interest and late fees on credit cards, or penalties if she must make early withdrawals from her retirement account in order to cover her living expenses. She might even lose her car or her home, if she is unable to make loan or mortgage payments. As a result of an unfair labor practice, discriminatees could also face increased transportation or childcare costs. 371 NLRB No. 22, slip op. at 4 fn. 14 (2021).

Where, as here, employees have been laid off in violation of the Act or been the targets of other unfair labor practices, they may be forced to incur significant financial costs, such as out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet. We cannot fairly say that employees have been made whole until they are fully compensated for these kinds of

[11] The Supreme Court emphasized this distinction in *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943). There, the Court distinguished the Board's affirmative relief from private remedies, stating:

> The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge. Id. at 543.

[12] As explained above, the Supreme Court has emphasized the role of make-whole relief to the effectuation of the purposes of the Act: "'[M]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.'" *NLRB v. Strong,* 393 U.S. at 359 (quoting *Phelps Dodge Corp.,* 313 U.S. at 197). See, e.g., *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011) ("From the earliest days of the Act, a make-whole remedy for employees injured by unlawful conduct has been a fundamental element of the Board's remedial approach . . . In keeping with these principles, the Board has, in cases dating back nearly 40 years, remedied unlawful unilateral changes in benefit plans by ordering the respondent to rescind the benefit plan changes upon the union's request and to make whole any employee who suffered losses as a result of the changes.").

pecuniary harms if the harms were direct or foreseeable consequences of the respondent's unfair labor practice. The Board has a "statutory obligation to provide meaningful, make-whole relief for losses incurred by discriminatees . . . . " *King Soopers,* 364 NLRB at 1153, 1155. To fulfill this statutory purpose, the Board must strive to ensure that employees are more fully restored to the situation they would have inhabited but for a respondent's unfair labor practice. See *Town & Country Manufacturing Co.*, 136 NLRB 1022, 1029 (1962) ("It is axiomatic that remedial action, if it is to afford an effective redress for the commission of a statutory wrong, must be tailored to restore the wronged to the position he would have occupied but for the action of the wrongdoer . . . . Only when such action is taken can it truly be said that the wrong has been righted."), enfd. 316 F.2d 846 (5th Cir. 1963).

Contrary to the arguments of the Respondent in its response to our Notice and Invitation to File Briefs, we find that our grant of such a remedy is firmly rooted within the Board's statutory authority. See *International Brotherhood of Operative Potters v. NLRB*, 320 F.2d 757, 761 (D.C. Cir. 1963) ("We cannot regard changes in remedial mechanisms as beyond the Board's powers so long as they reasonably effectuate the congressional policies underlying the statutory scheme."). The broad remedial language of the Act, permitting the Board to "take such affirmative action including reinstatement with or without backpay," imbues the Board with the power to issue remedies beyond the reinstatement and backpay expressly authorized. 29 U.S.C. § 160(c). To this effect, the operative word in this section is "including," with "reinstatement with or without backpay" serving only as an example of one type of affirmative action permitted. See *Phelps Dodge Corp.*, 313 U.S. at 188-89 ("To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application . . . . The word 'including' does not lend itself to such destructive significance."); *Virginia Electric & Power Co.*, 319 U.S. at 539 ("[T]he Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay."); *Radio Officers' Union of Commercial Telegraphers Union*, 347 U.S. at 54 ("[W]e interpreted the phrase giving the Board power to order 'reinstatement of employees with or without back pay' not to limit, but merely to illustrate the general grant of power to award affirmative relief.").

Because the plain language of the statute clearly allows for remedies beyond reinstatement and backpay, we need not look to legislative history in determining the parameters of Section 10(c). Nevertheless, we find nothing in the legislative history surrounding the passage of the Act that evidences any Congressional intent to limit the Board's authority to remedy employees' direct or foreseeable pecuniary harm. We are also unpersuaded by the argument of some amici that the failure of Congress to expressly authorize consequential damages in the 1947 Taft-Hartley amendments evidences an intent to deprive the Board of such authority. In these amendments, Congress modified the language of Section 10(c) to provide that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." Certain amici advance the argument that Congress acted intentionally when it failed to add these damages at the same time it otherwise modified the Board's remedial authority. Cf. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

As an initial matter, we note that what we clarify today regarding the application of our make-whole remedy is not 'consequential damages' as that term is used in other areas of the law. Supreme Court authority makes clear, moreover, that these arguments are substantively without merit. In *Fibreboard Paper Products Corp. v. NLRB*, the Court held that "the legislative history of [Taft-Hartley] indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct. There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice . . ." 379 U.S. 203, 217 (1964). Accordingly, the legislative history of the Act and its amendments does not serve to preclude us from issuing the make-whole relief discussed herein.

We are also unpersuaded by the assertion, advanced by our dissenting colleagues, that the remedies contemplated herein are akin to those awarded in tort proceedings, and thus implicate Seventh Amendment concerns. Such arguments were handily rejected in the early days of the National Labor Relations Act. In *NLRB v. Jones & Laughlin Steel Corp.,* issued just two years after the Act's passage, the Supreme Court confirmed that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law." 301 U.S. 1, 48 (1937) (internal citations omitted). Finding an NLRB statutory proceeding "is one unknown to the common law," the Court determined that the remedies issued therein "are requirements imposed for violation of the statute and are

remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." Id. at 48-49. In the same vein, while the Board's make-whole remedy may "somewhat resemble compensation for private injury" like that imposed in a tort proceeding, the relief we issue is nevertheless purely statutory in nature and specifically designed to effectuate the purposes of the Act. *Virginia Electric & Power Co.,* 319 U.S. at 543. Accordingly, we find that our amended make-whole remedy is grounded squarely in our statutory authority, and does not implicate the Seventh Amendment.

B. Implementation of the Remedy

We decline to treat today's remedy as "extraordinary relief," to be issued only in the most egregious cases. As described above, our make-whole remedies do not punish bad actors, but rather implement the statutory principles of rectifying the harms actually incurred by the victims of unfair labor practices and restoring them to where they would have been but for the unlawful conduct. Affected employees bear the direct or foreseeable economic burdens of a respondent's unfair labor practice whether or not the Board labels the violation "egregious."

Further, if we were to issue this make-whole relief only to address the most deplorable or flagrant violations of the Act, these remedies run the risk of becoming punitive rather than restorative. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–11 (1940) ("The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees . . . We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures."); *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 235–236 (1938) ("[T]his authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."). Even the Respondent recognizes that "by focusing on so-called egregious violations, the Board strays into this prohibited realm."

By contrast, the remedy we clarify today will make affected employees whole for direct or foreseeable pecuniary harms that result from a respondent's unfair labor practice in every case in which our standard remedy would include make-whole relief, regardless of the egregiousness of the violation or the respondent's past conduct. Issuing a remedial order for such relief in all cases will permit the Board to satisfy its statutory duty to make employees whole, while ensuring that our make-whole remedy, applied equally to all respondents, is not unlawfully punitive. See *Mitchell v. Robert DeMario Jewelry*, *Inc.*, 361 U.S. 288, 293 (1960) ("[T]he public remedy is not thereby rendered punitive, where the measure of reimbursement is compensatory only.")

Further, we decline the Respondent's suggestion that we avoid ordering such a remedy simply because it may be administratively complex. Our dissenting colleagues similarly allege that the standard we adopt today would unduly prolong compliance proceedings and may require the submission of evidence that would intrusively probe into employee's fiscal matters. As a threshold issue, we reject the suggestion that we should sacrifice the goals of the Act for the sake of administrative convenience. The possibility of increased complexity in compliance proceedings should not deter the Board from issuing remedies that best effectuate the policies of the Act. "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application." *Phelps Dodge Corp.*, 313 U.S. at 194. Simplicity of administration will not be given priority when balanced against our overarching duty to make employees whole for violations of the Act.

Further, while we remain unconvinced that the concerns raised by our dissenting colleagues will manifest in practice, we note that much of the alleged delay or intrusiveness may be alleviated through simple measures in compliance proceedings. For example, nothing in today's decision should be read to prevent parties from stipulating to the immediate payment of certain monies in a compliance specification, like calculated backpay, while the respondent continues to challenge other elements of the specification, like the direct or foreseeable damages discussed herein. Similarly, while aggrieved employees will undoubtedly have to submit evidence to substantiate pecuniary harms for which they seek reimbursement, we believe that the compliance hearing can be conducted by Board administrative law judges and personnel in a dignified manner that protects employees from undue intrusion, much less embarrassment. We are confident that any speculative concerns advanced by our dissenting colleagues will be outweighed by the benefits that will accrue to affected employees through the fulfillment of our statutory directive: the issuance of true and complete make-whole relief to redress violations of the Act.

The concerns of our dissenting colleagues may be assuaged by an examination of the numerous cases cited elsewhere in this decision, which establish that in most instances, the Board's make-whole remedies are not significantly more administratively complex than traditional backpay calculations and can be readily handled in compliance proceedings. See, e.g., *Nortech Waste*, 336 NLRB

554, 554 fn. 2 (2001) ("leaving to the compliance stage . . . the question of whether the employees incurred medical expenses attributable to the respondents' unlawful conduct"); *Pilliod of Mississippi*, 275 NLRB 799, 801 fn. 3 (1985) ("leav[ing] to the compliance stage . . . whether Westmoreland incurred medical expenses attributable to the Respondent's conduct."). The Board has also resolved potentially sensitive or "intrusive" issues of fact in compliance proceedings without issue. See *Freeman Decorating Co.*, 288 NLRB 1235, 1235 fn. 2 (1988) ("[W]e leave to compliance determination of [injured employee's] disability, if any, and whether backpay and medical and rehabilitative costs are due . . .); *The Voorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip op. at 3-4 (2021) (contemplating the submission of, *inter alia*, out-of-pocket medical expenses and unpaid medical bills in compliance).

The Board may readily apply its existing evidentiary standards in compliance proceedings to the make-whole relief we are discussing today. For example, the finding of an unfair labor practice creates a rebuttable presumption that compensation is owed, traditionally in the form of backpay. See *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99 (2018), citing *St. George Warehouse*, 351 NLRB 961, 963 (2007); see also *Cobb Mechanical Contractors*, 333 NLRB 1168 (2001), enfd. in relevant part 295 F.3d 1370 (D.C. Cir. 2002); *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), enfd. in relevant part 876 F.2d 678 (8th Cir. 1989).

The procedures that parties now follow when litigating backpay are equally appliable to determining any direct or foreseeable pecuniary harm. If there is evidence that an employee incurred direct or foreseeable pecuniary harms as a result of the respondent's unfair labor practice, the General Counsel may present evidence of the nature and amount of the harm in compliance. We shall require that the General Counsel establish the amount of the pecuniary harm alleged, and that the pecuniary harm in question was either (a) directly caused by the unfair labor practice; or (b) was foreseeable at the time of the unfair labor practice and was incurred as a result of the unfair labor practice. In a matter analogous to the calculation of back pay, "[o]nce the General Counsel has established the gross amount . . . due the discriminatees in question, 'the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.'" *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972) (quoting *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963)). Translating that process to the instant issue, the respondent will have the opportunity to challenge the alleged amount of compensation owed, present evidence demonstrating that the pecuniary harm would have occurred even absent the unfair labor practice, and/or establish that the harm was not foreseeable at the time the unfair labor practice occurred.

As in the past, we will not issue remedial orders for harms which are unquantifiable, speculative, or nonspecific. See *Nortech Waste*, 336 NLRB at 554 fn. 2. Any claimed damages must be supported by evidence; harm will not be presumed compensable, but we will include in our orders standard language requiring the respondent to compensate an employee for any covered harm that meets our standard of proof in compliance. Evidence of pecuniary harm may be established by, *inter alia*, available documentary evidence, including receipts, invoices, medical bills, and credit card and other financial statements. This evidence should establish specific, defined costs which would not have been incurred but for the respondent's unlawful conduct or were the foreseeable consequence of that conduct—and explain how those costs are due to the unfair labor practice. "Uncertainties or ambiguities in the evidence" may be "resolved against the respondent whose unlawful actions created the dispute." NLRB Bench Book: An NLRB Trial Manual § 14–140, Burdens of Proof and Production, citing *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99, slip op. at 2 ("It is well established that where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer."); accord *Lucky Cab Co.*, 366 NLRB No. 56, slip op. at 6 (2018), enfd. mem. 818 Fed.Appx. 638 (9th Cir. 2020); *United Aircraft Corp.*, 204 NLRB 1068 (1973) (uncertainties should be resolved in favor of the "backpay claimant rather than the respondent wrongdoer"); see generally *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564 (1931)* (where plaintiff establishes damages were definitively attributable to the defendant's wrong, "the risk of the uncertainty [as to the amount of damages] should be thrown upon the wrongdoer instead of upon the injured party.").

We will not attempt today to enumerate all the pecuniary harms that may be considered direct or foreseeable in the myriad of unfair labor practice cases that come before us.[13] "With one exception, not implicated today, the Board does not render advisory opinions." *800 River*

[13] The General Counsel requests that the Board modify its make-whole relief to include compensation for "pain and suffering" or emotional distress, arguing that while these nonpecuniary harms may be difficult to quantify, they are nonetheless real, direct, and foreseeable. Various amici additionally request that the Board modify its relief to include front pay, compensation for legal fees, or heightened bargaining remedies. We decline at this time to extend make-whole relief to the nonpecuniary harms requested by the General Counsel as well as the

Road Operating Co., LLC d/b/a Care One at New Milford, 368 NLRB No. 60, slip op. at 3, 3 fn. 4 (2019) (quoting *Snohomish County Headstart*, 254 NLRB 1372, 1372 (1981) (internal quotations omitted)). We will be guided by our own caselaw in making those determinations in future cases.

Specifically, "direct harms" are those in which an employee's "loss was the direct result of the Respondent's illegal conduct." *BRC Injected Rubber Products*, 311 NLRB 66, 66 fn. 3 (1993) (compensating employee for the cost of clothes that were ruined as a result of discriminatory work assignment). In contrast, "foreseeable harms" in our caselaw are those which the respondent knew or should have known would be likely to result from its violation of the Act, regardless of its intentions. For example, where a respondent terminated employees' health insurance without informing the union or its employees while continuing to deduct healthcare premiums, it was entirely foreseeable that the affected employees would incur out-of-pocket expenses in the interim; we accordingly ordered that the respondent "reimburse employees for the costs they incurred . . . including any increases in premiums, copays, coinsurance, deductibles, and other out-of-pocket expenses," as well as to "pay any still-unpaid medical bills directly to the medical providers." *The Voorhees Care & Rehabilitation Center*, 371 NLRB No. 22, slip op. at 3–4 (2021). Similarly, where an employer reassigned a union activist to a job pulling nails, an "entirely unnecessary task" that would aggravate her carpal-tunnel syndrome and "cause her to break down," the Board ordered that the employee be made whole "for any medical expenses she incurred as a result of her unlawful reassignment." *Nortech Waste*, 336 NLRB 554, 554 fn. 2, 567 (2001); see also *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville,* 367 NLRB No. 6, slip op. at 4 (compensating employees not only for the costs of their damaged toolboxes directly damaged by the respondent but also "any expenses they incurred *as a result* of the Respondent unlawfully removing their toolboxes from its dealership") (emphasis added), enfd. 976 F.3d 30 (D.C. Cir. 2020). Likewise, when a union engaged in a symbolic demonstration in violation of Section 8(b)(1)(A) by scattering bags of trash around a lobby, it was responsible for the effects of its action: "Whether they flung the sacks about purposely or inadvertently, Respondents cannot evade responsibility for the foreseeable consequences of their actions, including the harm done to a customer who was struck by a falling sack as she entered a salon on the lower level. Having acknowledged responsibility for the demonstration, the Respondents may not deny liability for its consequences . . . . " *Service Employees Local 252 (General Maintenance Corp.)*, 329 NLRB 638, 685 (1999). Our caselaw thus provides us with sufficient guidance to issue remedies for direct or foreseeable pecuniary harms as they may arise.

Accordingly, for the reasons set forth above, today we clarify that, in all cases in which our standard remedy would include an order for make-whole relief, we shall expressly order that the respondent compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice.[14] We will apply this policy retroactively in this case and in "all pending cases in whatever stage" given the absence of any "manifest injustice" in doing so. See *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)); *Pressroom Cleaners*, 361 NLRB 643, 648 (2014) (finding no manifest injustice in applying a remedial change retroactively). We find no manifest injustice here. This case involves a remedial issue, and thus, reliance on preexisting law is not an issue. *King Soopers, Inc.*, 364 NLRB 1153, 1160 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). Further, any reliance the Respondent placed on the Board's remedial authority is inapposite, as the aforecited cases clearly show that the Board has in the past awarded remedies justified on grounds similar to the ones contemplated herein. Today we clarify the scope of the Board's make-whole remedy by expressly including, in all cases in which our standard remedy would include make-whole relief, an order requiring that the respondent make affected employees whole for direct or foreseeable pecuniary harms that result from the respondent's unfair labor practice.

III. APPLICATION OF THE REMEDY TO THE INSTANT CASE

Here, the Charging Party advances three distinct types of pecuniary harms that were incurred by the New Business Advisors as a result of the Respondent's unlawful

other forms of relief mentioned by the amici. These remedial issues are not implicated in the current case, and we express no opinion as to these remedies at this time. Rather, our decision today is meant to clarify that the Board's make-whole remedy includes, at minimum, direct or foreseeable pecuniary harms, and to expressly include standard remedial language to that effect in our orders.

[14] For the reasons discussed at length in *King Soopers*, we order that these pecuniary harms be calculated without regard to a discriminatee's interim earnings and separate from taxable backpay, with interest. 364 NLRB No. 93, slip. op at 3–8 (2016) ("[R]eimbursement of these expenses compensates discriminatees for a separate injury than lost pay."), enfd. in rel. part 859 F.3d 23 (D.C. Cir. 2017). Our order shall therefore require a respondent to "Make [name(s) or the affected employees] whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of [the unlawful layoff(s) or discrimination or other adverse action against him/her/them], in the manner set forth in the remedy section of the [decision or judge's decision as amended in this decision]."

unilateral layoff. First, the Charging Party seeks a restoration of the book of business that had previously been afforded to each of the laid-off New Business Advisors. Next, the Charging Party seeks compensation for reimbursements the New Business Advisors had previously received for the fixed and variable costs of maintaining a passenger car for use on company business. Finally, the Charging Party seeks out-of-pocket medical expenses incurred by a New Business Advisor who was laid-off while on disability leave for a high-risk pregnancy. In reply, the Respondent argues that the six New Business Advisors would have eventually been laid off even if the parties had engaged in further collective bargaining. The Respondent also argues against the causation and foreseeability of each of the items requested by the Charging Party. Consistent with our past practice in calculating other forms of make-whole relief, we reserve these remedial issues for resolution in the compliance stage of the proceedings, when the General Counsel and the Respondent will each have the chance to present evidence supporting their respective positions.[15]

AMENDED REMEDY

Having found that the Respondent 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, we amend the judge's remedy in the following respects.

Having found that the Respondent unlawfully laid off six New Business Advisors, we shall order the Respondent to offer them reinstatement and make them whole for any loss of earnings and other benefits suffered as a result of the unilateral layoff. Backpay shall be computed in accordance with *F.W Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with today's decision, the Respondent shall also compensate these employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful layoff, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, we shall order the Respondent to compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with our decision in *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent shall also be required to file with the Regional Director for Region 20 a copy of each backpay recipient's corresponding W-2 form reflecting the backpay award. We shall also order the Respondent to remove from its files any reference to these employees' unlawful layoffs and to notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Thryv, Inc., San Francisco, California
, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of its employees in the following appropriate unit:

> All sales and clerical employees in the Northern California Region in the following classifications: Account Executive New Media (New Business Advisor-Premise); Advertising Sales Representative (Business Advisor-Premise); Key Account Executive (Sr. Business Advisor-Premise); Customer Associate; Representative Directory; Sales Representative, Field Sales Collector, Office Assistant, Supervisor's Assistant, Telephone Sales Representative, and Universal Support Associate, excluding all other employees and supervisors as defined in the Act.

[15] See *Nortech Waste*, 336 NLRB at 554 fn. 2 ("leaving to the compliance stage . . . the question of whether the employees incurred medical expenses attributable to the respondents' unlawful conduct"); *Freeman Decorating Co.*, 288 NLRB 1235, 1235 fn. 2 (1988) ("[W]e leave to compliance determination of Pruitt's disability, if any, and whether backpay and medical and rehabilitative costs are due . . .); *Pilliod of Mississippi*, 275 NLRB 799, 801 fn. 3 (1985) ("leav[ing] to the compliance stage . . . whether Westmoreland incurred medical expenses attributable to the Respondent's conduct."). Accordingly, in contrast to our dissenting colleagues, we decline at this point to address whether restoration of the book of business for the laid-off New Business Advisors is to be considered an element of reinstatement or an aspect of the make-whole remedy. We agree with our colleagues that "this issue is not before the Board today," and leave the issue to be determined in compliance.

(b) Unilaterally laying off unit employees without notifying and giving the Union an opportunity to bargain.

(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) Furnish to the Union in a timely manner the information requested by the Union on April 12, September 11 and 16, and on October 3, 17, and 31, 2019.

(b) Before laying off bargaining-unit employees, or 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 employees in the bargaining unit described above.

(c) Rescind the layoffs of unit employees that were unilaterally implemented on September 20, 2019.

(d) Within 14 days from the date of this Order, offer the affected employees reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make the affected employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of their unlawful layoff in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) File with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form reflecting the backpay award.

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

(i) 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.

(j) Within 14 days after service by the Region, post at its Northern California and Nevada facilities copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 12, 2019.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 20 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.

Dated, Washington, D.C. December 13, 2022

Lauren McFerran, Chairman

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

Gwynne A. Wilcox Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN AND RING, concurring in part and dissenting in part.

The national labor policy established by Congress is to safeguard commerce from disruption by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[1] To further that policy, Congress gave workers these rights in Section 7 of the National Labor Relations Act and prohibited employers and unions from engaging in the unfair labor practices specified in Section 8 of the Act. When the Board determines that a respondent has engaged in such an unfair labor practice, Congress has further provided that the Board "shall" order the respondent "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."[2] If an employee has suffered monetary losses as a result of an unfair labor practice, such as an unlawful discharge or reduction in pay or benefits, it is essential that they be made whole for those losses. Otherwise, employees will be deterred from exercising their Section 7 rights, and the Congressional policy will be undermined.

The Board's authority to award backpay to employees who have been suspended, laid off, or discharged in violation of the Act, or who suffer losses as a result of unlawful unilateral changes in their terms and conditions of employment, is expressly recognized in the Act and indisputable. The question presented in this case is the extent to which the Board may include compensation for other monetary losses in a make-whole remedy.

As the majority observes, the Board for many years has ordered that employees be made whole for a variety of monetary losses suffered as a result of an unfair labor practice. We agree with our colleagues that the Board should continue to order respondents to make employees whole for all losses suffered as a direct result of an unfair labor practice. In our view, employees should also be made whole for losses indirectly caused by an unfair labor practice where the causal link between the loss and the unfair labor practice is sufficiently clear. Because the determination of whether an unfair labor practice did indirectly cause an employee's alleged loss is highly fact-dependent and may raise difficult issues, we would resolve that issue on a case-by-case basis.

We therefore disagree with the majority that the Board should invariably "order respondents to compensate affected employees for all direct *or foreseeable* pecuniary harms that these employees suffer as a result of the respondent's unfair labor practice" (emphasis added). On its face, this standard would permit recovery for any losses indirectly caused by an unfair labor practice, regardless of how long the chain of causation may stretch from unfair labor practice to loss, whenever the loss is found to be foreseeable. In our view, this standard opens the door to awards of speculative damages that go beyond the Board's remedial authority. We further observe that the Board faces potential Seventh Amendment issues if it strays into areas more akin to tort remedies. Those concerns also militate against the majority's "direct or foreseeable" standard. Moreover, even if the Board does have the authority to award such remedies, doing so would invite protracted litigation over causation at compliance, including intrusive and potentially humiliating inquiries into employees' personal financial circumstances for the purpose of determining whether and to what extent the employee's own financial decisions contributed to the losses. Compliance with make-whole orders awarding monies to which employees are indisputably entitled will be delayed by such litigation. Accordingly, from the majority's decision to adopt a "direct or foreseeable pecuniary harms" standard, we dissent.

With respect to this case, the majority identifies three losses incurred by employees when the Respondent unlawfully laid them off: loss of the "book of business" that had previously been afforded to each employee, loss of reimbursements the employees had previously received for the fixed and variable costs of maintaining a passenger vehicle for use on company business, and out-of-pocket medical expenses incurred by one employee who was laid off while on disability leave for a high-risk pregnancy. As discussed below, the restoration of an employee's pre-layoff book of business is properly considered an element of reinstatement rather than a make-whole remedy. With respect to the other two types of monetary loss, we believe

[1] National Labor Relations Act (the Act or NLRA), Sec. 1, 29 U.S.C. § 151.

[2] NLRA Sec. 10(c), 29 U.S.C. § 160(c).

that employees should be made whole for those losses if they were caused by the Respondent's unfair labor practices under the standard discussed below and that the question of whether they were so caused should be resolved at the compliance stage of this proceeding. Accordingly, in these respects, we concur in the majority's order.

A. The Respondent Violated the Act by Laying Off Employees

The Respondent laid off six New Business Advisors in 2019. We agree with our colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to respond to numerous information requests submitted by the Union in relation to the layoffs. Contrary to the judge, we also agree with our colleagues that the Respondent violated the Act by unilaterally laying off the New Business Advisors. In so finding, we do not rely on the Respondent's failure to respond to the Union's information requests or its failure to refrain from making unilateral changes during bargaining for a successor contract. Instead, we simply agree that the Respondent's decision to lay off the six New Business Advisors was presented as a *fait accompli*, as evidenced by the Respondent's September 5, 2019 letter notifying the Union that the Respondent would inform the employees of the layoff the following day and its announcement the next day that it was "eliminating our Northern California DSE [New Business Advisor] Channel," that these "positions will be eliminated effective September 20, 2019," and that the Respondent had already sent severance packages to all six affected employees via overnight mail. We also agree that the Respondent did not "cure" its unlawful conduct in subsequent bargaining.

B. The Respondent Is Required to Make Affected Employees Whole

1. The Board's authority to make employees whole is not limited to backpay

The Board "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940) (internal quotation marks omitted). In considering the scope of its authority to give effect to this public policy through the exercise of its remedial powers, the Board must remain mindful of the limits of its authority in this regard. As the Supreme Court made clear shortly after the NLRA was enacted and upheld, the Board's "power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938). Thus, the Board may not inflict upon a respondent "any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Id. at 235–236. In addition, the Seventh Amendment precludes the Board from adjudicating claims that must instead be decided by a court because the parties have a right to have those claims decided by a jury. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937) (recognizing constitutional limitation). Consistent with this principle, the Board has recognized the impropriety of ordering reimbursement for losses that constitute tort damages. *Nortech Waste*, 336 NLRB 554, 554 fn. 2 (2001).

Within these limits, however, the Board possesses broad discretion in exercising its remedial powers, subject to limited judicial review. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Section 10(c) states that the Board's remedial authority "includ[es]" reinstatement with or without backpay; it does not say that its authority is limited to those remedies. As the Supreme Court observed in *Phelps Dodge Corp. v. NLRB*, "[t]o attribute such a [limiting] function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board." 313 U.S. 177, 189 (1941).[3] To the contrary, "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." Id. at 197. Accordingly, we agree with our colleagues that the Board has the authority to order respondents to make employees whole for monetary losses other than backpay. As detailed in the majority opinion, the Board has done so for many years.

[3] The Court made this observation in rejecting the notion that the phrase "including reinstatement" precluded the Board from remedying a discriminatory refusal to hire union supporters by ordering the respondent to hire them, on the theory that hiring was not the same as reinstatement. But the Court's rejection of the argument that the term "including" limited the Board's remedial authority in that manner applies with equal force to the argument that it limits the Board's authority to order make-whole relief to backpay awards.

2. The majority's inclusion of "foreseeable harms" as part of the standard make-whole remedy is overbroad

The Notice and Invitation to File Briefs sought public comment on whether the Board should award consequential damages. We agree with the majority that it should not. As the majority correctly observes, the term *consequential damages* is "a legal term of art more suited for the common law of torts and contracts." Instead, in all cases in which the remedy includes make-whole relief, our colleagues modify the Board's standard make-whole remedy to include a provision "requiring that the respondent make affected employees whole for direct or foreseeable pecuniary harms that result from the respondent's unfair labor practice." As defined by the majority, direct harms are monetary losses that result directly from an unfair labor practice. "Foreseeable harms," in contrast, "are those which the respondent knew or should have known would be likely to result from its violation of the Act, regardless of its intentions." The majority appears to view its "direct or foreseeable" standard as, at least in part, a synthesis of prior Board decisions awarding make-whole relief other than backpay in a variety of circumstances. However, our colleagues make clear that their standard also could encompass non-backpay make-whole awards for other kinds of monetary losses—for example, credit-card debt, interest and late fees on credit-card debt, penalties incurred from making an early withdrawal from a retirement account to defray living expenses, and loss of a car or home if the employee is unable to make loan, rent, or mortgage payments. The Board has not previously included compensation for such losses in its make-whole remedy.

We agree with the majority that employees should be made whole for monetary losses that are a "direct" result of an unfair labor practice. For purposes of this opinion, we define direct losses as those that are the first link in a chain of events beginning with the unfair labor practice.[4] See, e.g., *Nortech Waste*, 336 NLRB at 554 fn. 2 (awarding medical expenses where the employer's unlawful reassignment of an employee to a repetitive-motion job aggravated her carpal-tunnel syndrome); *BRC Injected Rubber Products*, 311 NLRB 66, 66 fn. 3 (1993) (awarding reimbursement for clothing ruined as a result of the employer's unlawful assignment of an employee to a "dirty and messy job"); *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) (awarding legal expenses incurred by employee after employer unlawfully ejected him from the premises, causing him to be arrested and charged with disorderly conduct), enfd. 568 F.2d 1 (6th Cir. 1977). To the extent the majority adopts a definition of "direct pecuniary harms" that is consistent with this precedent, we agree with them that the Board should make employees whole for monetary losses directly caused by unfair labor practices.

We recognize that some losses that are indirectly caused by an unfair labor practice also may be compensable. For example, in *Voorhees Care & Rehabilitation Center*, 371 NLRB No. 22, slip op. at 3–4 (2021), the Board ordered the employer to make employees whole by reimbursing and/or paying for outstanding medical expenses incurred by the employees as a result of its unlawful unilateral failure to pay medical insurance premiums and subsequent implementation of an inferior health insurance plan. Although the employees incurred the medical expenses as a direct result of receiving needed medical care—and unlike in *Nortech Waste*, the need for that care was not caused by the employer's unfair labor practice—these expenses would have been reimbursed by employer-provided health insurance absent the employer's unlawful unilateral changes to the employees' insurance. As such, the causal link between the unfair labor practices and the losses was clear. Similarly, in *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 4 (2018), enfd. in relevant part 976 F.3d 30 (D.C. Cir. 2020), the employer unlawfully moved large and expensive employee-owned toolboxes from an indoor work area to an outdoor location on its premises where they were subsequently damaged by heavy rainfall. While the damage was directly caused by the rain, the toolboxes were damaged by the rain only because the employer unlawfully moved them outside. In both cases, the losses were not only clearly foreseeable but there was a clear causal link between the unfair labor practice and the loss. In our view, employees should be compensated for foreseeable losses in other cases where the chain of causation is similarly clear.[5]

We do not, however, agree with our colleagues that all losses indirectly caused by an unfair labor practice are compensable in a Board proceeding, regardless of how many steps removed the losses are from the unfair labor practice in the chain of causation, so long as the losses are deemed "foreseeable." Of course, "foreseeability" is a central element of tort law.[6] Any attempt to address tort claims in a Board proceeding obviously runs headlong into the Seventh Amendment's guarantee of the right to

[4] In their joint brief, the Charging Party and AFL–CIO define direct losses in this way. We agree with their definition and use it here.

[5] We also agree that this relief should not be categorized as an extraordinary remedy, but instead should be available to any employee entitled to make-whole relief.

[6] See, e.g., *Palsgraf v. Long Island Railroad,* 248 N.Y. 339, 162 N.E. 99 (1928).

have such claims tried before a jury.[7] Moreover, insofar as the majority contemplates compensation for monetary harms indirectly caused by an unfair labor practice regardless of how remote the harms may be from the unfair labor practice in the chain of causation, they go well beyond tort law, which requires proof that the wrongful act was the "proximate cause" of the injury.[8]

The majority also goes well beyond the remedies available under Title VII as amended in 1991, where Congress specifically provided for compensatory damages triable before a jury precisely because the Seventh Amendment requires it.[9] The Equal Employment Opportunity Commission (EEOC) has interpreted this provision to limit compensatory damages to "proximate consequences which can be established with requisite certainty."[10] Consistent with this interpretation, the EEOC excludes from compensatory awards day-to-day living expenses that would have been incurred even absent the discrimination.[11] The majority, in contrast, appears to envision awarding compensation for similar expenses under the standard they announce today. Our colleagues fail to offer a valid justification for interpreting the Act to permit the Board to provide, with no right to a trial by jury, for broader make-whole awards than are available as compensatory damages, with a right to a jury trial, in Title VII cases.

Even assuming that the Board did have the authority to compensate employees for all foreseeable losses indirectly caused by an unfair labor practice, we do not believe that it would be prudent to attempt to do so. Any such effort will inevitably spark a wide-ranging compliance inquiry into a discriminatee's financial circumstances and past financial decisions, made necessary in order to determine the extent to which those circumstances and decisions played a part in the losses suffered. Such proceedings would be intrusive and potentially deeply embarrassing for discriminatees.[12] They would also be time-consuming and would unduly prolong compliance proceedings and thereby delay the day when the backpay claimants would receive any relief.[13] In our view, the possible benefits of this course of action are too remote and the costs too high to make it worth pursuing, even if it were permissible to do so.

The difficulties inherent in expanding Board remedies in this way were recently demonstrated in *United Mineworkers of America (Warrior Met Coal Mining, Inc.)*, Case 10–CB–275094 (June 16, 2022), enfd. No. 22-12227-A (11th Cir. 2022). There, the Board approved a formal settlement stipulation, agreed to by all parties, resolving allegations that the respondent union engaged in unlawful actions in connection with a strike. As relevant here, the settlement provided for the respondent union to pay "make-whole and consequential damages" to the employer and certain named employees.[14] Pursuant to the settlement, regional personnel assessed those damages at $13.3 million.[15] After the respondent vehemently

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[7] The Supreme Court held that the Act's provision for backpay awards did not contravene the Seventh Amendment in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). But the Court's holding was expressly limited to the remedies of backpay and reinstatement. "Reinstatement of the employee and payment for time lost," the Court wrote, "are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." Id. at 48-49. Accordingly, the Court's decision does not foreclose the possibility that application of the "direct or foreseeable" remedial standard the majority adopts today may raise a constitutional issue in particular cases. See also *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943) (finding reimbursement for dues unlawfully deducted from wages effectuated the statutory purpose of the Act without addressing whether it comported with the Seventh Amendment).

[8] Id. The majority asserts that it "will not issue remedial orders for harms which are unquantifiable, speculative, or nonspecific," but this assurance cannot readily be reconciled with their insistence that all foreseeable harms are compensable, which can easily be interpreted to authorize compensation for all foreseeable harms regardless of how remote they may be from an unfair labor practice in the chain of causation.

[9] See *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 796 (5th Cir. 2016) (quoting H.R. Rep. P. No. 102–140 at 29 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 723).

[10] "Enforcement Guidance: Availability of Compensatory and Punitive Damages under Sec. 102 of the Civil Rights 1" (July 7, 1992) (quoting 22 Am. Jur. 2d Damages § 45 (1965)), https://www.eeoc.gov/laws/guidance/enforcement-guidance-compensatory-and-punitive-damages-available-under-sec-102-cra (last visited 10/8/2022).

[11] See *Bustamante v. USPS*, EEOC Doc. 0120120185, 2013 WL 1182271, 2013 EEOPUB LEXIS 726 (EEOC Mar. 14, 2013). There, the EEOC found that mortgage payments were not compensable, even though the complainant ceased making the payments after his discharge and thereafter was forced to deed the house back to the seller to avoid foreclosure. As the EEOC explained, "these expenses were not incurred because of the [Postal Service's] actions. Rather, Complainant made the payments so that he would have a place to live. These are day-to-day living expenses that would have been incurred regardless of the Agency's action and are not compensable."

[12] Our colleagues express confidence that the Board's administrative law judges and other personnel can protect employees from "undue intrusion," but efforts to do so will predictably bump up against employers' due process right to litigate the extent to which an employee's financial decisions contributed to pecuniary harms the General Counsel claims the employer must remedy.

[13] The majority observes that nothing in their decision "should be read to prevent parties from stipulating to the immediate payment of certain monies . . . , like calculated backpay." But of course, nothing compels parties to agree to so stipulate.

[14] Although the settlement involved "consequential damages," the parallels between the settlement and the majority's standard announced today are nonetheless relevant.

[15] See https://umwa.org/news-media/press/nlrb-demand-for-umwa-to-pay-warrior-met-coal-strike-costs-outrageous-threatens-american-workers-right-to-strike/ (last visited 10/8/2022). The respondent

complained, the region reduced its damage assessment to $435,000.[16] We express no view regarding the merits of these changing assessments, which are not before us here. But the wide difference between the initial and final amounts assessed strongly suggest that the majority's foreseeable-loss standard will be difficult to apply and result in bitterly disputed awards.

Finally, the majority places the burden on the General Counsel to show that the employee incurred compensable losses as a result of an unfair labor practice, and on the employer to show that the losses would have occurred even absent the unfair labor practice. To the extent that the majority is simply recognizing a respondent's right to rebut the General Counsel's evidence, we agree with that truism. Insofar as the majority contemplates something else, however, we disagree. When applied, the majority's articulation of the parties' respective burdens of proof could result in an improper shifting of the General Counsel's burden to prove causation to the employer to prove absence of causation. In our view, the Board lacks the authority to require compensation for expenses that would have been incurred even absent the unfair labor practice or to relieve the General Counsel of the burden of proving that an asserted loss was in fact caused by the unfair labor practice. Placing the burden of proof on the employer would be especially unjustified since the evidence relevant to the issue is more likely to be available to the General Counsel than to the employer. We disagree with the majority's standard to the extent that it departs from these principles.

2. In the instant dispute, restoration of the employees' "book of business" is a reinstatement remedy, not a make-whole remedy

As noted above, the Charging Party identifies three losses incurred by the New Business Advisors as a result of being unlawfully laid off, compensation for which should be included in the make-whole remedy: loss of each laid-off employee's "book of business," loss of reimbursement for the fixed and variable costs of maintaining a passenger vehicle for use on company business,[17] and out-of-pocket medical expenses incurred by a pregnant New Business Advisor that allegedly would have been covered by her employer-provided health insurance had she not been laid off.[18]

We agree that the automobile business maintenance costs and medical expenses are compensable as part of a make-whole remedy, provided that the General Counsel establishes that they were either directly caused by the Respondent's unfair labor practices or foreseeably resulted from them and that there was a sufficiently clear causal link between the unfair labor practices and the losses. Indeed, the Board has previously held that medical expenses are compensable under the circumstances alleged to be present here.[19] We would leave to compliance the question of whether such losses were caused by the unfair labor practices in the manner we have described, as well as all other compliance issues.

We do not, however, agree with the Charging Party's argument that the restoration of each employee's book of business is properly categorized as a make-whole remedy. According to the Charging Party, the laid-off employees sold digital advertising, received commissions on their sales, and retained their existing customers from year to year. The Charging Party asserts that "a sales representative reinstated without her book of business has not been made whole because, upon reinstatement, she will not be able to earn a quantity of commissions similar to what she earned before the discharge." We disagree, however, that this is properly considered a make-whole matter.

Restoration of the book of business goes to the conditions under which the employees are to be reinstated, not to the amount of compensation due them for losses suffered prior to their reinstatement during the backpay period. As such, it is outside the scope of the Notice and Invitation to File Briefs, which by its terms solely addresses the scope of the Board's make-whole remedy. Accordingly, this issue is not before the Board today, and we therefore express no view on whether a valid offer of reinstatement must include restoration of each laid-off employee's book of business. Rather, we leave that issue to be resolved at compliance under existing precedent. See *D.L. Baker, Inc.*, 351 NLRB 515, 531–532 (2007) (finding reinstatement offer invalid because it was for nonequivalent employment); NLRB Casehandling Manual Part 3 (Compliance) § 10530.1 (A reinstatement order is meant

asserted that the amount was "outrageous and effectively negates workers' right to strike. It cannot stand." Id.

[16] See https://umwa.org/news-media/press/nlrb-revises-damages-calculations-in-warrior-met-strike/ (last visited 10/8/2022).

[17] According to the Charging Party, the discriminatees were required, as a condition of their employment, to maintain a passenger vehicle and insurance in coverage amounts acceptable to the Respondent for use when calling on customers. Employees were then reimbursed by the Respondent for those expenses. After their unlawful layoff, the discriminatees allegedly maintained those vehicles to remain eligible for reinstatement, but they were no longer reimbursed for those costs of ownership.

[18] The Charging Party also stated its intention to raise at compliance other direct or foreseeable economic harms suffered by the employees. We cannot pass on the merits of any other harms that the Charging Party and General Counsel have failed to raise in their briefs. The parties were given ample opportunity to argue that the Board should award compensation for specific pecuniary harms.

[19] See Voorhees Care & Rehabilitation Center, 371 NLRB No. 22.

to restore the employee "to circumstances that existed prior to the respondent's unlawful action or that would be in effect had there been no unlawful action."). In this regard, we note that the backpay period does not end until a valid offer of reinstatement is made or the backpay period has been tolled for other valid reasons. NLRB Casehandling Manual Part 3 (Compliance) §10536.2. To the extent that the Charging Party contends that the unlawfully laid-off employees are entitled to financial compensation if their book of business is not restored upon their reinstatement, even if a valid offer of reinstatement does not require the Respondent to do so, we disagree. Such an award would be inconsistent with the basic principles on which reinstatement and backpay are based, as discussed above.

Conclusion

Individuals who lose their employment due to an unfair labor practice may well suffer economic losses beyond lost pay. For some employees, these losses may be devastating. It is indefensible that employees should pay such a price for exercising rights that have been guaranteed to American workers since 1935—rights the protection of which Congress has declared essential to the proper functioning of our national economy. We agree wholeheartedly with our colleagues that the Board is duty-bound to remedy those losses to the fullest extent permitted by law. The Constitution, the Act, and Supreme Court precedent place limits on the Board's remedial authority, however, and the Board is duty-bound to respect those limits as well. We agree with our colleagues that some clarification of the Board's make-whole remedy is within our authority. In our view, however, the majority's decision to include compensation for all losses foreseeably resulting from an unfair labor practice is unwise and likely beyond the Board's statutory authority for the reasons we have set forth. Accordingly, while we concur in part with respect to the specific remedial issues this case presents, we cannot join our colleagues in adopting a "direct or foreseeable" standard. To that extent, we respectfully dissent.

Dated, Washington, D.C. December 13, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Electrical Workers, Local 1269, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our employees in the following appropriate bargaining unit:

> All sales and clerical employees in the Northern California Region in the following classifications: Account Executive New Media (New Business Advisor-Premise); Advertising Sales Representative (Business Advisor-Premise); Key Account Executive (Sr. Business Advisor-Premise); Customer Associate; Representative Directory; Sales Representative, Field Sales Collector, Office Assistant, Supervisor's Assistant, Telephone Sales Representative, and Universal Support Associate, excluding all other employees and supervisors as defined in the Act.

WE WILL NOT unilaterally lay of unit employees without notifying and giving the Union an opportunity to bargain.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on April 12, September 11 and 16, and on October 3, 17, and 31, 2019.

WE WILL before laying off bargaining-unit employees, or 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 our employees in the bargaining unit described above.

WE WILL rescind the layoffs of New Business Advisors that we unilaterally implemented on September 20, 2019.

WE WILL, within 14 days from the date of the Board's Order, offer the affected employees full reinstatement to their former jobs or, if these job no longer exist, to substantially-equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the affected employees whole for any loss of earnings and other benefits resulting from their unlawful layoff, less any net interim earnings, plus interest, and WE WILL also make such employees whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful layoffs, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the layoffs will not be used against them in any way.

THRYV, INC.

The Board's decision can be found at https://www.nlrb.gov/case/20-CA-250250 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

Min-Kuk Song, Esq., for the General Counsel.
Arthur G. Telegen, Esq. and *Jason Silver, Esq. (Seyfarth Shaw LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge.[1] "Video killed the radio star. Video killed the radio star. In my mind and in my car. We can't rewind we've gone too far."[2] With these lyrics in August 1981 MTV launched its new music-video television channel with a song by The Buggles about the transformative power of innovation.[3] This case, involving the layoff of employees who sell Yellow Page advertising, speaks to the enduring consequences of innovation in an industry that has struggled to pivot from a dependable, yet aging, business model in the face of new technology. While Google hasn't necessarily killed the Yellow Pages, the industry is certainly wounded; declining demand has resulted in fewer sales, which has resulted in the need for fewer employees. Both the industry and the unions representing their employees have struggled to keep up with the economic consequences of innovation.

This case was tried before me over a 6-day period in September and October 2020. Because of the ongoing Covid-19 pandemic, pursuant to a stipulation by the parties, the trial occurred via videoconference.[4] Based upon charges filed by the International Brotherhood of Electrical Workers, Local 1269 (Union or IBEW Local 1269) an Order consolidating cases, consolidated complaint and notice of hearing (complaint) issued on February 14, 2020, alleging that Thryv, Inc. (Respondent or Thryv) violated Section 8(a)(1) and (5) of the Act by terminating six employees for economic reasons without bargaining with the Union

[1] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Joint exhibits are denoted by "GC," "R.," and "Jt. Exh." respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

[2] The Buggles, Video Killed the Radio Star, on Age of Plastic (Island Records 1980).

[3] See Makan Delrahim, Assistant Attorney General, *Video Killed the Radio Star: Promoting a Culture of Innovation,* Address at the 47th Annual Conference on International Antitrust Law, Policy, and Antitrust Economics Workshops (October 8, 2020), 2020 WL 5969792.

[4] The use of video conference technology has been a necessary temporary adjustment to conducting hearings during the COVID-19 pandemic. I note, however, that it resulted in transmission issues resulting in many instances of audio interference, or difficulty hearing witnesses and attorneys, throughout the hearing. (Tr. 25, 36, 37, 39, 45, 56, 69, 83, 84, 103, 120, 137, 139, 151, 168, 169, 172, 173, 176, 181, 190, 196, 214, 221, 248, 265, 273, 274, 276, 278, 280, 282, 283, 285, 287, 290, 292, 294, 299, 303, 353, 369, 374, 382, 393, 394, 395, 410, 413, 415, 416, 418, 423, 436, 438, 439, 450, 463, 467, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 482, 483, 494, 495, 496, 500, 519, 531, 536, 537, 538, 539, 547, 566, 568, 579, 586, 588, 589, 609, 616, 617, 627, 636, 645, 656, 692, 701, 704, 706, 707, 710, 718, 745, 780, 820, 855, 908, 916, 930).

to agreement or impasse. The complaint further alleges that Thryv also violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with information that was necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of Respondent's employees.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by all the parties, I make the following findings of fact and conclusions of law.[5]

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Texas corporation engaged in the retail sale of print and electronic advertising along with related consulting and software services. Thryv's corporate offices are located in Dallas, Texas, and it has employees who work remotely from virtual sales offices located in California and Nevada. During the 12-month period ending December 31, 2019, Respondent derived gross revenue in excess of $500,000, and its California virtual sales offices purchased and received goods and services valued in excess of $50,000 directly from points outside the State of California. Based upon the foregoing, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act. Respondent also admits, and I find, that the IBEW Local 1269 is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and the National Labor Relations Board has jurisdiction pursuant to Section 10(a) of the Act. (GC 1(e); GC 1(d); Jt. Exh. 102.)

II. FACTS

Respondent is the operating subsidiary of Thryv Holdings, Inc., which is the successor to YP Holdings and Dex Media Holdings, Inc., two former competitors in the Yellow Pages advertising industry.[6] Because Respondent traces its lineage back to the original AT&T/Bell System monopoly—and the halcyon days of guaranteed revenues and assured profits, a short history of the Yellow Pages publishing industry provides both background and context to the layoffs that occurred in this matter.[7]

A. The Yellow Pages

The first Yellow Pages directory in the Unites States was produced in 1886 in Chicago, Illinois, featuring business names and phone numbers categorized by products and services. *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 338 F.Supp. 2d 422, 425 (E.D.N.Y. 2004). Eventually, telephone directory publishing primarily became the domain of the AT&T (and related Bell system) monopoly, with directory publication being carried out as part of the telephone company's regulated operations; the costs and revenues associated with the directories were included when calculating regulated service rates paid by consumers. Id.

Because of its virtual monopoly in controlling, publishing, and distributing directories, the Yellow Pages earned AT&T "supra-competitive profits." See *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131, 193–194 (D.D.C. 1982), affd. sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983). For example, in 1993 AT&T was the world's largest publisher, distributing nearly 300 million copies of its Yellow Pages directories, and generating over $3 billion in annual revenues. See William Warren Lazarus, *The Yellow Pages: A Medium, An Industry*, Ph.D. dissertation at the Massachusetts Institute of Technology, June 1984, p. 16. Indeed, it has been said that at one time "[t]he Yellow Pages were the most widely read book(s) in the country, surpassing even the Bible." Evan D. White & Michael F. Sheehan, *Monopoly, the Holding Company, and Asset Stripping: The Case of Yellow Pages*, Journal of Economic Issues, Vol. 26, No. 1, pp. 159–182 (1992) (internal quotation omitted).

After years of litigation, the AT&T/Bell System monopoly came to an end in 1982. The Department of Justice had alleged that AT&T was monopolizing a broad array of telecommunication services and systems, and in 1982 the United States District Court for the District of Columbia entered a divestiture order, based upon a consent decree which the court modified, requiring AT&T to divest its 22 operating companies (the Bell Operating Companies) that supplied local telephone service. *American Telephone & Telegraph Co.*, 552 F.Supp. at 141, 226–227. In the court's divestiture order, the Yellow Pages were assigned to the various Bell Operating Companies, including all the facilities, personnel, systems, and associated rights involved with the production, printing, and distribution of the directories. Id. at 231. The assets and employees of the newly divested Bell Operating Companies were amalgamated into seven separate regional holding companies: US West, Ameritech, BellSouth, NYNES, Pacific Telesis, Bell Atlantic, and Southwestern Bell. White & Sheehan, at pp. 160–161, fn. 12. After a series of mergers, the seven regional holding companies became: Bell South, QwestDex, SBC, and Verizon. *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 338 F.Supp. 2d 422, 425 (E.D.N.Y. 2004). These entities "generally did not continue to operate their directory publishing business as part of their regulated telephone operations, but instead created separate publishing subsidiaries" that were not under the purview of the various State public services or telephone regulatory commissions. Id.

In June 2000, U.S. West was purchased by Qwest, and its telephone directory business was renamed as QwestDex. *In re Qwest Communications International, Inc. Securities Litigation*, 243 F.Supp. 2d 1179, 1181 (D. Colo. 2003). In 2002 and 2003, Dex Media acquired the directory business from QwestDex,[8] and in 2005 a subsidiary of R.H. Donnely Corp. purchased Dex Media; the name of the new subsidiary became Dex Media, Inc.[9]

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[5] Testimony contrary to my findings has been specifically considered and discredited.

[6] See Thryv Holdings, Inc., Form 10-Q filed with the Securities and Exchange Commission (SEC) as further cited in footnote 12.

[7] For purposes of background information, I take administrative notice of the various forms 10-K and 10-Q filed with the SEC as noted herein. *Pacific Greyhound Lines*, 4 NLRB 520, 522 fn. 2 (1937) (Board takes judicial notice of facts stated in company's annual report filed with the Security and Exchange Commission); Fed. R. Evid. 201(b). All of the various internet links cited were last accessed on April 19, 2021.

[8] See Dex Media Inc. form 10-Q filed with the SEC on March 31, 2008.
https://www.sec.gov/Archives/edgar/data/0001351506/000095014408002491/g12498ke10vk.htm

[9] Id. See also *U.S. Bank National Association v. Verizon Communications Inc.*, No. 3:10-CV-1842-G, 2013 WL 230329, at *13 (N.D. Tex.

Also in 2005, SBC Communications Inc. acquired the outstanding shares AT&T Corp., via a merger, and changed the name of the company from SBC Communications to AT&T Inc.[10] In 2010, R.H. Donnely Corp. emerged from Chapter 11 bankruptcy as Dex One Corp.[11] Two years later Dex One Corp. merged with a company named SuperMedia, which at one time had been the Yellow Pages publishing arm of Verizon, and through bankruptcy reorganization the merged entities revived the name of Dex Media, Inc., using it as the name of the new company. See, In re *Dex Media, Inc.*, 595 B.R. 19, 25–26 (D. Del. 2018); In re *SuperMedia, Inc.*, No. 13-10546(KG), 2014 WL 7403448, at *6 (Bankr. D. Del. 2014) (Tr. 275, 799). Also in 2012, AT&T Inc. sold a 53 percent stake in its Yellow Pages operations to Cerberus Capital Management, LP. and a new entity was formed named YP Holdings LLC (YP), which served as a holding company for the newly spun-off Yellow Pages operations. *Yellowpages Photos, Inc. v. YP, LLC*, 418 F.Supp. 3d 1030, 1036 (M.D. Fla. 2019), reconsideration denied, No. 8:17-CV-764-T-36JSS, 2020 WL 1674329 (M.D. Fla. 2020). In 2016, Dex Media, Inc. filed for Chapter 11 protection and emerged from bankruptcy 3 months later renamed as Dex Media Holdings, Inc. (Dex Holdings). On June 30, 2017, Dex Holdings acquired YP and operated as DexYP, until July 15, 2019, when it changed its name to Thryv Holdings, Inc.[12] (Tr. 552.)

While Respondent can trace its lineage back to the original AT&T/Bell System divestiture, the dynamics of the Yellow Pages industry changed dramatically over the intervening years, as the internet superseded paper directories as the preferred method to search for people and businesses. Before the internet, and the various mergers and bankruptcies outlined above, the Yellow Pages advertising industry was a "unique and generally noncompetitive form of advertising," with the Bell Operating Companies holding near monopoly power in their respective jurisdictions. Sheehan, pp. 163–165. It was a captive market, described as an "institutionalized prisoner's dilemma," where the owner of one business was encouraged to match or exceed the ad placed by a rival, and the next year the rival was encouraged to place an even bigger ad. Id. at p. 166. Customers were "told that a decision to cut back on Yellow Pages advertising may be followed by a disastrous loss of sales." Id.

During this time frame, the Yellow Pages industry was "driven by a disciplined army of sales reps, 12,000 strong, marching relentlessly toward the goal of selling an ad to every business in America." Id. at 165 (internal quotations omitted). This army of sales representatives had a "well deserved reputation for toughness," were trained to be aggressive, and were well compensated accordingly. Id. (internal quotations omitted). And, the industry had one other characteristic that was unique among commissioned sales representatives; the Bell System Yellow Pages sales force was unionized, and these unionized sales representatives generated a majority of the revenues for their respective companies. Lazarus, at p. 42. Everybody was happy; the large army of unionized sales representatives were generously paid and they were generating huge profits for their employers.

With the advent of the internet, and search engines averaging billions of searches a day, the internet "replaced the yellow pages and [other] directories that occupied pre-digital hegemony." Justin Orr, *Digital Marketing in an Analog World*, 29 Geo. J. Legal Ethics 1203, 1203 (2016). By 2005, the internet "was causing a major secular change" in the Yellow Pages business, and revenues were declining. *U.S. Bank National Association v. Verizon Communications, Inc.*, 892 F.Supp.2d. 805, 811 (N.D. Texas 2013) (noting that Verizon's revenues from its Yellow Pages directory decreased $169 million between 2005 and 2006). With industry consolidation, declining revenues, and the internet disrupting the established business model, the various Yellow Pages publishers needed fewer and fewer people for their "army" of sales representatives. (Tr. 270–271.)

The decline in revenues derived from Yellow Pages advertising, its resulting effects on the industry in general, and with Respondent and the Union specifically, was acknowledged at the hearing by all the parties. Federal records show that the Union reported having 1,025 members in 2010; by 2019 it only had 155 members.[13] As for Respondent, since Dex Holdings acquired YP, revenues from its Marketing Services segment, which is responsible for the Yellow Pages print and digital advertising, declined $680 million between 2018 and 2020.[14] Yellow Pages print revenue alone was responsible for over half of this decline. In 2020, print revenues decreased by $162.6 million (or 26%) compared to 2019. In 2019 print revenues had decreased $192.9 million (or 24.1%) compared to 2018. (Tr. 270–271, 622–623, 799–800, 847; R. 5.)

That being said, although revenues were falling steadily, and the industry was no longer producing "supra competitive profits," Respondent is profitable and generates significant revenues. For the year ending December 31, 2020, Respondent had revenues of just over $1.1 billion, with the Marketing Services segment generating $979.6 million, or 88 percent, of the company's revenues. And, Respondent reported a net income of $149.2 million for calendar year 2020.

B. Respondent's Sales Force

The Union represents a unit of Respondent's Northern

Jan. 22, 2013), aff'd, 761 F.3d 409 (5th Cir. 2014), as revised (Sept. 2, 2014).

[10] See AT&T Inc. form 10-K filed with the SEC on March 1, 2006. https://www.sec.gov/Archives/edgar/data/0000732717/000073271706000008/form10k2005.htm

[11] See Dex One Corporation form 10-K filed with the SEC on March 4, 2011. https://www.sec.gov/Archives/edgar/data/30419/000095012311021991/g26201e10vk.htm

[12] See also Thryv Holdings, Inc., form 10-Q filed with the SEC on November 12, 2020. https://www.sec.gov/Archives/edgar/data/0001556739/000162828020016327/dxm-20200930.htm

[13] I take administrative notice of the Union's LM-2 on file with the Department of Labor for 2010. See *J.A. Croson Co.*, 359 NLRB 19, 21 fn. 10 (2012) (Board takes administrative notice of Union's LM-2 report). https://olmsapps.dol.gov/query/orgReport.do?rptId=437247&rptForm=LM2Form

[14] For Respondent's 2018, 2019, and 2020 revenues and income see Thryv Holdings, Inc., form 10-K filed with the SEC on March 25, 2021. https://www.sec.gov/ix?doc=/Archives/edgr/data/1556739/000162828021005660/dxm20201231.htm#i3b39d788a07344f4832787e249b82c1e_16

California and Nevada sales representatives; it has represented them since the 1960s.[15] The bargaining unit is comprised of three active job titles: Senior Business Advisors (SBAs); Business Advisors (BAs), and New Business Advisors (NBAs).[16] The NBAs were also sometimes referred to as Digital Sales Executives (DSEs).[17] (Tr. 57–58, 264, 552; Jt. Exh. 1, 2, 4.)

These bargaining unit positions were referred to as "outside sales" or "Premise" sales representatives because the employees in question visit customers at their place of business or "premises" to sell them advertising. The term "premise" is an industry term that has been used for decades to describe sales representatives who visit customers at their place of business, and differentiates these high-value salespeople from the "inside" salesforce which deals primarily with relatively low value accounts over the telephone. Lazarus, at p. 42. (Tr. 313–314, 746, 900, 924–925.)

Generally, Respondent's SBAs handle accounts with revenues between $2000 to $10,000 per month. BAs work accounts with revenues between $250 to $2000 per month, and the NBAs focus on selling new business (both print and digital) to customers who do not otherwise have accounts with the company. Because Respondent's sales representatives keep the accounts they initially sell, along with accounts sold the previous year, NBAs go into a new sales year with an existing account book, and sometimes the revenue designations between classifications are not always firm. (Tr. 59, 727, 899)

Respondent's "inside" sales force work accounts with revenues below $250 per month, using the telephone or mail, and is not unionized. The company also has other sales representatives in Northern California/Nevada that are not unionized. One group, "Thryv only" representatives, sells new product offerings unrelated to traditional Yellow Pages advertising and another group appears to be former Dex Holdings employees who had other established accounts in the region.[18] (Tr. 581–582, 604, 702, 901; R. 3.)

Along with traditional print Yellow Pages, Respondent also sells internet/digital Yellow Pages advertising, search engine marketing/optimization products, and a "software as a service" or "SAAS" customer relations management product, aptly named "Thryv."[19] Respondent views its SAAS offering as their "product of the future," to address the innovation in the industry and to try and reverse the trend of declining revenues. It consists of a suite of applications designed for small and medium sized enterprises allowing them to run a business from their cell phone. The Thryv SAAS app is a Dex Holdings legacy product, and although Respondent is looking to drive future grown with this product, traditional print and digital Yellow Pages sales still make up the bulk of Respondent's revenues. Respondent's unionized Premise sales representatives sell all of the company's product offerings. (Tr. 30, 59–60, 452, 705–706, 891–892.)

There are approximately 80 Premise sales representatives in the bargaining unit, and each one sells about 128 accounts per year. The sales year for a particular location begins with a "campaign" which is designed around the publication dates of the Yellow Pages directory for that particular area. At the beginning of a campaign, Respondent sends the Union its sales models for that particular market, which is referred to as a market "throw" or "market break." These sales models show the accounts assigned to each Premise sales representative for the upcoming campaign, and the revenues associated with each account. After the market information is reviewed by the Union, the market/account assignments are finalized by Respondent, and the Premise sales representatives proceed with contacting customers and selling Respondent's products. (Tr. 228–229, 264, 599–600, 621–622, 698–700, 892–894, 940–941; Jt. Exh. 2, pp. 88, 90.)

The record shows that parties use the term "channel" in various ways to refer to the structure of Respondent's sales force. For example, the term is used to describe specific job classifications, such as the SBA channel, the BA channel, and the NBA channel. The term is also used to refer to larger classifications within the sales force, the method by which the sales are conducted, or the type of product sold, such as the inside sales channel, the Premise channel, the telephone channel, the mail channel, or the digital sales channel. The term "channel" is also discussed in the various collective-bargaining agreements, contract proposals, and company sales regulations. Given the broad and varied use of the term by the parties, the specific definition of "channel" depends upon the context in which the term is used during any particular conversation or interaction. (Tr. 135, 147–148, 175, 746–750, 770, 782–783, 790, 844, 896, 899–900, 921, 924–925; Jt. Exh. 1–4.)

C. Contract Negotiations

In the summer of 2017, after Dex Holdings acquired YP, Respondent recognized the Union and adopted the existing collective-bargaining agreement between the Union and YP. The YP CBA had an expiration date of February 7, 2017, but through a series of extension agreements it was still in force at the time of the acquisition. (Tr. 52, 284–287, 802–803, 808; Jt. Exh. 1.)

In September 2017 Respondent and the Union started bargaining for a successor agreement. Elizabeth "Beth" Dickson (Dickson), Respondent's Assistant Vice President of Labor Relations, who was a legacy Dex Holdings employee, was responsible for overseeing all of Respondent's collective-bargaining involving

[15] The Union also represents a unit of Respondent's employees who work in various Rocky Mountain states; they are not involved in these proceedings. (Tr. 264.)

[16] The Union represents all of Respondent's Northern California Region sales and clerical employees in eleven specific job classifications. However, during the relevant period employees only worked in the SBA, BA, and NBA classifications. (Jt. Exh. 1, 2, 4.)

[17] Dex Holdings and YP had different names for these job titles, which is why the New Business Advisors were also referred to as "Digital Sales Executives." Also for this reason, Business Advisors were sometimes referred to as "Premise Business Agents" or "Premise Advisors" and Senior Business Advisors were also known as "Key Account Representatives." (Tr. 58–60, 66, 72, 185, 216, 543, 576, 552–53, 750–751, 782, 845, 896, 910; Jt. Exh. 2.)

[18] Transcript page 702, line 22 should read "not in the bargaining unit" instead of "in the bargaining unit."

[19] SAAS or "service as software" generally refers to a cloud-based software solution where customers purchase a service from a provider and rent the use of an application used to connect to the software via the internet. See *Dardashtian v. Gitman*, No. 17CV4327LLSRWL, 2021 WL 746133, at *4, fn. 16 (S.D.N.Y. 2021).

19 separate bargaining units scattered across the country. Ralph Vitales (Vitales), a legacy YP employee, reported to Dickson and served as Respondent's Labor Relations Manager, overseeing grievances, arbitrations, and contract negotiations in the region. Vitales had the primary primarily responsibility for dealing with the Union regarding the bargaining-unit sales representatives. (Tr. 288, 695, 747, 800–803.)

The Union's contract negotiations were led by Stephen Guthrie (Guthrie), who served as the President of the Union's Executive Board. Guthrie had worked for YP, and/or its successor companies, for nearly 25 years as a Premise sales representative. That being said, the Union's collective bargaining agreement contained a clause allowing union representatives to be on a "leave of absence" while working for the Union. Therefore, Guthrie had not actually sold advertising since 2013, when he took over bargaining responsibilities for the Union. At the relevant times set forth in the complaint, Karen Gowdy (Gowdy) served as the Union's Business Manager, Harry Esquivel (Esquivel) worked as the Union's Vice President and Director of Operations, and Mike Waltz (Waltz) was the Union's Business Representative. Waltz also had a long history of working as a Yellow Pages sales representative. (Tr. 42–45, 73, 81, 551.)

At the time the Union started bargaining with Respondent for a successor agreement, it knew that Dex Holdings had a number of CBAs around the country, which were all substantially similar in their terms, covering Yellow Pages sales representative. Guthrie had reviewed most of these agreements, and knew the provisions they contained. Respondent believed that the terms of the Union's YP CBA were too rigid, and it wanted more flexibility to run the business. Therefore, at some point during bargaining, Dickson gave Guthrie a copy of a CBA covering a group of sales representatives in Pennsylvania and told the Union that the company believed the legacy Dex Holdings contracts on the East Coast were fair, gave the company the flexibility needed to run the business, and that the Union should agree to similar terms in negotiations for a successor agreement. (Tr. 288–289, 292, 808, 842–843.)

The parties bargained over a year for a successor contract, but were unable to reach an agreement. On August 6, 2018, Respondent presented the Union with its Last, Best, and Final Offer (LBFO or Final Offer), and in September 2018 declared impasse and implemented the LBFO. The Final Offer contains multiple references to the company's "Sales Policies & Market Assignment Guidelines" (SP-MAG), which the company imposed upon the bargaining unit at the same time it implemented the Final Offer. The SP-MAG was a legacy Dex Holdings document, that was then revised in June 2018, and Respondent applied it to all of its sales representatives throughout the country. The document contains the company's policies and procedures for sales representatives, and touches upon various aspects of employee working conditions, including the types of accounts employees are expected to work, how accounts are reassigned, rules involving sales leads, and how sales commissions are paid in certain situations. (Tr. 56–57, 789, 840–843; Jt. Exh. 2, 3; GC 1(g); R. 1–2.)

For Respondent's legacy YP sales representatives, the SP-MAG replaced a similar document that was in place at YP called the "bluebook." Also, the YP CBA contained certain provisions regarding market assignments, that were not included in the Final Offer. After implementation of the LBFO, the company applied the SP-MAG to those provisions. While the Union was not happy with the terms of the Final Offer, or the SP-MAG, Respondent believed that it now had the flexibility it needed to successfully move forward in the Northern California/Nevada market. (Tr. 56–57, 504, 808–811, 843–844)

The Union filed an unfair labor practice charge alleging, among other things, that Respondent prematurely declared impasse, unlawfully implemented the Final Offer, and refused to bargain in good faith by insisting upon impasse over the terms of the SP-MAG. However, the charge was dismissed, with the NLRB's General Counsel finding that the parties had reached a valid impasse, and that there was no evidence the company had actually used its discretion to change commission rates under the SP-MAG. Ultimately the parties reached agreement on the terms of a new collective-bargaining agreement, but not until November 14, 2019. (Tr. 783–785; R. 1–2; Jt. Exh.. 4.)

D. Respondent Discusses Laying Off the NBAs

In mid-July 2019, Respondent's management team began discussing a proposal to layoff the California based New Business Advisors.[20] On July 15, Thryv's Regional Vice President Terry Henshaw (Henshaw) emailed Executive Vice President and Chief Financial Officer James McCusker (McCusker) asking him whether the company was still considering laying off the NBAs. In the email Henshaw noted that there were a total of 17 NBAs in California, and that he only considered four of them to be good/better employees who could be offered positions as Business Advisors. This would result in a net layoff of 13 NBAs, including three who were on short term disability. Henshaw wrote a layoff would "get us down on heads right away." (Jt. Exh. 16, p. 10.) McCusker forwarded the email to Lisa O'Toole (O'Toole), Respondent's Assistant Vice President of Human Resources. O'Toole replied saying that a layoff would be extremely beneficial to the organization, but it would be "no small thing" as there would be obstacles, the most significant of which were negotiations with the two unions involved, one representing employees in Southern California, and IBEW Local 1269, which represented the NBAs in Northern California. Within the past year, Respondent had already terminated 13 other NBAs represented by the Union in the Northern California/Nevada bargaining unit. The Union had filed grievances over those 13 discharges, which were still were still pending. Henshaw asked O'Toole to run the issue past Dickson, noting that the top four NBAs the company wanted to keep were located in Southern California, as were most of the NBAs who would be affected by a layoff. He also noted that one Northern California NBA had recently transferred into a BA position. (Tr. 349, 516, 719, 767–769, 851; Jt. Exh.. 16, 40, 102.)

The issue was discussed with Michael Connelly (Connelly), Thryv's Assistant Vice President of Finance, who supported the

[20] For the remainder of the decision, all dates are in 2019 unless otherwise noted.

layoffs, and on July 18, O'Toole emailed McCusker, Henshaw, and others a cost-savings estimate based upon laying off of 13 of the remaining 17 NBAs, effective September 1. Under this scenario the company believed it would save $170,000 for the last four months of 2019, but the layoff would cost about $150,000 in severance pay. While Respondent would only save $20,000 for the year, O'Toole noted the company would benefit from an immediate reduction in headcount for the region, and said that Connelly recommended they move forward with the plan. In a subsequent series of emails on July 18, Dickson, O'Toole, and Deb Ryan (Ryan), Respondent's Chief Human Resources Officer, discussed whether the company could keep the "good" NBAs who wanted to stay. Dickson wrote that she had been discussing this with O'Toole, and that the company needed to get the NBAs they wanted to keep to transition into roles as Business Advisors, otherwise they could not "call it a channel elimination." (Tr. 848–851; Jt. Exh. 16.)

E. Respondent Announces the Layoff of the Remaining NBAs

On August 21, Dickson emailed a letter to the Union announcing the NBA layoffs. The letter, signed by Dickson, stated that Respondent "will administer a force adjustment" and the six New Business Advisors in the Northern California/Nevada bargaining unit would be laid off effective September 20. The letter further said that the layoff was due to "the ineffectiveness of a digital only sales force" and identified the six affected NBAs. Dickson ended the letter by saying that "[i]f the Union desires to exercise its right to meet and discuss the Company's plan within the 30-day period, please contact Ralph Vitales to arrange such discussions." (Jt. Exh. 29.)

1. The six Northern California/Nevada NBAs

At the time of the layoff announcement, three of six bargaining-unit NBAs were, or had been, on some type of disability or benefit leave at one time or another during the preceding year, and had not been actually working/selling during that time. And, the record shows that all six NBAs had a minimal or declining book of business. (Tr. 218–219, 731, 769; Jt. Exh. 95; R. 7.)

Vitales described their performance "pretty lackluster" or "terrible." (Tr. 731.) Dickson testified that, broadly speaking, the layoff was due to the fact the NBAs were not bringing in enough revenues to cover the cost of retaining them as employees. (Tr. 731, 847–848.) The below chart shows the monthly revenues produced by the six NBAs scheduled for layoff. (Tr. 729, 732–733, 758, R. 7.)

	January 2018	January 2019	As of 8/12/19
NBA 1	$7,503	$2,680	$503
NBA 2	$33	$217	$416
NBA 3	$4,158	$634	$136
NBA 4	$20,039	$10,782	$4,766
NBA 5	$14,451	$2,254	-$122[21]
NBA 6	$3,103	$1,587	$2,598

The base salary for an NBA ranged between $25,600 and $62,400 per year, depending upon location and average assigned revenue. By August 2019, most of the NBAs slated for layoff were not bringing in sufficient revenues to cover their base salaries. (Jt. Exh. 2, p. 15–21; Tr. 733.)

2. The Union requests bargaining and Respondent meets with the NBAs

On August 22, Gowdy sent an email to Dickson and Vitales saying "[p]lease cnsider this formal notification that the Union would like to schedule bargaining regarding the Company's notification of Force Adjustment. Please reply with your availability." (Jt. Exh.. 31.) Vitales replied to Gowdy the next day saying that he was available to meet on September 4 and September 5 and asking for the Union's availability. He then spoke with Guthrie who initially said the Union's earliest availability to meet was September 6. However, when Vitales offered to meet on September 6 the Union was not available. Instead, the Union said they could not meet until September 11. Accordingly, the parties agreed to meet on September 11 and 12. (Tr, 354–355; Jt. Exh. 31, 32, 35, 37.)

Although it had agreed to meet with the Union on September 11, Respondent believed that it could no longer wait and that it needed to move forward with its plans. Therefore, Respondent scheduled a virtual meeting with the affected NBAs on September 6 to notify them about the layoff. On September 5, Vitales sent Gowdy and Guthrie an email informing the Union of the meeting, saying that individual severance packages had been created for each employee as set forth in the involuntary separation language contained in the Final Offer, and reminding the Union that the layoffs were scheduled to be effective on September 20. In the email Vitales also noted that Respondent was available on September 11 and 12 "to bargain the effects of this force reduction." (Jt. Exh. 34) (Tr. 719–720).)

A virtual meeting was scheduled with the six affected employees on September 6 via conference call. However, only two of the six NBAs attended, along with Guthrie and Waltz for the Union. Vitales, Henshaw, and Monique Love (Love), who works in Respondent's human resources department, were on the call for the company. Henshaw led the meeting, and read from a prepared statement. In his comments, Henshaw said that the company continued to show a decline in revenues and a loss of business. He further said that, while the company had made significant headway with its SAAS product, sales had not been enough to outpace the loss of clients and revenues. Accordingly, Henshaw said that the purpose of the meeting was "to officially notify you that we are eliminating our Northern California DSE

[21] According to Respondent, negative monthly revenues can occur when, during the course of a year, an account stops paying or otherwise becomes delinquent. (Tr. 759–760.)

[New Business Advisor] Channel," that these "positions will be eliminated effective September 20, 2019" and involve all six NBAs. (Jt. Exh. 36.) Henshaw further told the meeting participants that Respondent would provide a severance package, pursuant to the terms set forth in the Final Offer, and that the packages had been overnighted to employees for delivery that day. Finally, Henshaw said that severance benefits were predicated upon each employee signing a release and meeting the specific terms set forth in their severance agreement. After Henshaw had finished speaking, Love said that Henshaw was mistaken, and the severance packages had not already been sent to employees, but would go out that day. During the meeting Guthrie said that the Union wanted copies of both the severance packages and the release agreements sent to employees. He also told Respondent during the meeting that the company should not be engaging in direct dealing with employees. (Tr. 80–81, 712, 719; Jt. Exh. 34; 36, 102; Jt. Exh. 28, p. 26; Jt. Exh. 39, p. 8.)

After the September 6 meeting ended, Guthrie emailed Vitales asking for the prepared script Henshaw read during the meeting, along with all proposed severance packages, agreements, and other information that was being sent to the NBAs. Guthrie also asked that Respondent provide the Union with the names of all employees and management personnel in attendance on September 6. Vitales responded the same day and attached to his email a copy of the severance agreement sent to employees. However, in his email Vitales said the company would not provide Henshaw's script, calling the document proprietary, and further saying that the Union could have taken notes during the call. (Tr. 359, 721; Jt. Exh. 35.)

F. The Bargaining Sessions

After the Union requested bargaining, the parties met to discuss the NBAs five times, meeting on September 11, September 12, October 3, 18, and 31. They also sent multiple emails back and forth both during, and in between, the bargaining sessions.

1. Bargaining on September 11

The parties met for bargaining on September 11, at a hotel in Pleasanton, California; the bargaining started at 10:30 a.m. Participating for the company was Vitales, John Hancheck (Hancheck), and Janice Robinson (Robinson). Hancheck works in Respondent's labor relations department, and Robinson works directly for Dickson. Vitales was physically present that day, while Hancheck and Robinson attended by phone. Guthrie, Waltz, and Esquivel attended for the Union. During the meeting Guthrie was the primary spokesman for the Union; Vitales was the spokesman for the company. (Tr. 80, 94–95, 819.)

The bargaining notes for the Respondent and the Union were introduced into evidence and set forth what was discussed that day.[22] The Union's bargaining notes are titled "Effects Bargaining;" Respondent's notes are untitled.[23] The meeting started with Guthrie saying that the Union had not received all of the information it had requested on September 6; specifically the Union wanted a list of the individuals who attended the call, and the script Henshaw read from when addressing the call's participants. Vitales said that Henshaw's script was proprietary, would not be provided, and that the Union could have taken notes as they were present. Vitales then sent an email to Love asking for a list of the attendees; later that day Vitales told Guthrie that only two of the six employees were actually on the call. The issue of Henshaw's script, and the words he actually said during the meeting, came up continuously throughout the day. Guthrie asked for the script multiple times, and threatened to file an unfair labor practice charge if it was not provided. Respondent would not provide the document. (Jt. Exh.. 38, 39, 44.)

Guthrie asked about the purpose of the September 6 meeting, and Vitales said the purpose of the meeting was to explain to the NBAs that their jobs would terminate on September 20, and that severance packages would be overnighted to their homes. At some point Guthrie complained about the late notice given for the meeting, said human beings were involved, and that the six NBAs needed to be given more time; he asked Vitales how he would feel if his job was eliminated on 2 hours' notice. Vitales said that one of the reasons the company delayed notifying the employees was because they were waiting to bargain with the Union. (Jt. Exh. 38, pp. 13, 15–17; Jt. Exh. 39, pp. 1, 10.)

The parties discussed which of the six NBAs were currently on benefits/disability, and how long they had been on benefits. Guthrie asked who made the decision to layoff the NBAs and whether the layoff was because of the employees' age or disability status. Vitales said the decision was made by the company, and that neither age nor disability played any role in the decision. At various times that day, Guthrie complained about the implemented Final Offer, said the Union did not recognize the Final Offer as an agreement, and stated that because the Final Offer was not ratified by the Union, any part of the document that referenced ratification did not apply. Guthrie asked if there were any temporary workers in the affected locations, and Vitales said there were none. (Jt. Exh. 38, pp. 11, 28; Jt. Exh. 39, pp. 7, 13–15.)

Another reoccurring topic during the meeting was the issue of whether Respondent was eliminating the title/channel of New Business Advisor or just laying off the six specific NBAs working within the channel. Guthrie raised the issue on multiple occasions, citing the words Henshaw used on September 6. Each time Guthrie raised the issue, Vitales said that Respondent was not eliminating the channel, but instead was doing a force reduction and laying off the six NBAs. Notwithstanding, Vitales said the company was not planning to backfill/rehire for those positions; thus, nobody would be working in the NBA channel going forward. Guthrie asserted that this was a de facto elimination of the channel, and said Respondent had an obligation to bargain with the Union over the elimination. Regarding the layoff itself, at different times during the meeting Guthrie asked Vitales for a proposal. Whenever he did so, Vitales replied by saying that

[22] Unless otherwise noted, the facts regarding what occurred during all of the bargaining sessions are taken from the bargaining notes that were introduced into evidence. (Jt. Exh. 38, 39, 44, 59, 60, 81, 82, 92, 93.) To the extent there are any differences between the trial testimony and the notes, I credit the bargaining notes as to what occurred.

[23] Respondent reused an old template for its bargaining notes on September 11 and 12, so the actual notes for the meetings do not begin until approximately 6 lines into the first page. (Tr. 133–134.)

Article 30 in the Final Offer, which discusses force adjustments, constituted Respondent's proposal. (Jt. Exh. 2, Jt. Exh. 38, Jt. Exh. 39, Jt. Exh. 44.)

Regarding layoffs, Article 30 includes a provision that says the company will give the Union "thirty (30) calendar days' notice of its intended plan." (Jt. Exh. 2, p. 45.) Article 30 also allows bargaining-unit employees to bid for job openings within the bargaining unit. Therefore, during the meeting Guthrie asked Vitales whether employees answered postings for any job openings, and if Respondent had offered them any open jobs. He also asked for the layoff "plan" the company developed under Article 30. Vitales said that the company's plan was to eliminate all the "incumbent NBAs." Guthrie then asked Vitales to define the word "incumbent" and Vitales said that he was referring to the individuals in the NBA positions when the Final Offer was implemented. As to whether the company had any job openings the six NBAs could bid for, at one point Vitales said were no "union jobs" available, and later said there were no openings that he was aware of. Guthrie replied to these comments by saying that Respondent had 90 job openings available throughout the company; Vitales said that the NBAs could apply for any open job opportunities. However, Vitales confirmed that Respondent had not notified the six NBAs about any available job openings. During the meeting Guthrie asked Vitales for a listing of all open jobs within the company. (Jt. Exh. 38, p. 29; Jt. Exh. 39, p. 12–15.)

Guthrie inquired about Henshaw's statement during the September 6 meeting that the company was having revenue problems, and asked about the passage in Dickson's letter referring to an ineffective sales force; he asked Vitales whether the company was pleading poverty. Vitales replied that the company was not pleading poverty, but noted that Respondent was having revenue challenges and was losing more in revenues than they were bringing in. Vitales said that the NBAs were not hitting their sales objectives and there was a lack of revenue in that channel. Guthrie asked how much Respondent was losing and requested the revenue information Vitales referenced. However, Vitales would not provide the Union with company's financial statements, saying they were proprietary. Guthrie said the company's position was an unfair labor practice; Vitales told him to do whatever he needed to do. (Jt. Exh. 39, pp. 2–3; Jt. Exh. 38, p. 3.)

Regarding Vitales's statement that the NBAs were not hitting their sales objectives, the parties discussed these expectations, with Vitales asserting that the NBAs were supposed to retain 50 percent of their revenues from the previous year. Guthrie objected, saying that these sales goals were not listed anywhere, and that NBAs were never given any new business objectives; Guthrie said the Union needed this information. Guthrie also said the Union wanted to know when the company informed the NBAs about their sales objectives, and asked when the NBAs were told they were "incumbent." Guthrie further complained that Respondent never gave employees a copy of their plan/objectives, and claimed that, in California, the company was required to have done so. (Jt. Exh. 38, pp. 31–33; Jt. Exh. 39, pp. 12, 16.)

Guthrie asked Vitales to provide the Union with the job responsibilities for both the NBAs and the BAs, the date they were created, and when they were distributed to employees. Regarding this request, Guthrie read various proposals dating back to 2014 concerning the role of the NBAs, stated that the NBAs were covered under the old contract, and that the Union did not recognize the Final Offer as an agreement. Guthrie also said that this issue involved "stuff" going back 3 years that would not be resolved by September 20; Vitales said he understood. Guthrie also asked about the location of one specific NBA, and whether the layoff was being implemented across all of Northern California. Vitales did not know the specific location of the one NBA offhand, but said that all six NBAs were being let go in the region; therefore, all locations belonging to those six individuals were involved. Later in the meeting, Guthrie asked about the locations of all six NBAs. (Jt. Exh. 38, pp. 8, 22; Jt. Exh. 39, pp. 5, 12.)

At multiple times that day Guthrie asked what would happen to the accounts/market belonging to the six NBAs, and requested a proposal from the company. Vitales said the accounts/market would be absorbed. Some would go to the BAs and some would go to inside sales representatives as delineated in the SP-MAG. Guthrie believed that Respondent had to bargain about this topic and said the Union wanted the accounts/market to stay within the channel. Vitales noted that, after the layoff, no NBAs would be left in the channel to perform the work, said that the company was, in fact, bargaining with the Union, and that the parties can bargain over the accounts/market. Vitales stated that he would send Guthrie a proposal. Guthrie then asked what would occur with the market if the positions were filled, and Vitales explained the language in the SP-MAG. Jt. Exh. 39, p. 6; Jt. Exh. 38, p. 10.)

At one point during the meeting Guthrie complained that Respondent did whatever it waned and said the company did not "have a proposal on the table." (Jt. Exh. 39, p. 8.) Vitales said that the Union had Respondent's proposal and Guthrie replied saying the proposal was rejected. (Jt. Exh. 38, p. 15.) Vitales then asked for the Union to present a counterproposal. (Jt. Exh. 38, p. 15; Jt. Exh. 39, p. 8.) Guthrie asked if Vitales wanted the counterproposal now, and Vitales said yes. (Jt. Exh. 39, p. 8.) However, Guthrie then switched to a different topic, asking about the status of a series of outstanding grievances the Union had filed regarding 13 NBAs who had been fired during the preceding 12 months. Guthrie said the Union had requested arbitration for the grievances filed over those discharges, was seeking a make whole remedy, and wanted to schedule arbitration. Guthrie also said that the 13 NBAs would probably get their jobs back, so this was something the Union wanted to deal with; he also asked if the company was eliminating the positions or the titles. Regarding the grievances, Guthrie noted Henshaw's words about eliminating the NBA channel, and said that the Union needed to file an unfair labor practice charge, because if the grievances were successful the 13 NBAs would be returning to their prior jobs within the channel. In reply, Vitales said that the September layoff was a force reduction and the company was not eliminating the channel. (Jt. Exh. 38, pp. 15–19; Jt. Exh. 39, pp. 4, 8–11.)

Guthrie also asked about the waivers provided to the six NBAs and said the Union was not relinquishing any of its rights. He further said that having employees sign waivers before the company bargained with the Union constituted direct dealing and

was an unfair labor practice. (Jt. Exh. 38, p. 28; Jt. Exh. 39, p. 14.)

During the meeting Guthrie asked about the NBAs located in Southern California, whether they had been reclassified into BA positions, and inquired about the revenues in Southern California. Vitales said the situation in Southern California was different, that the bargaining units were different, and reclassification was not an option for the six Northern California NBAs. Vitales also said that the Southern California revenues were not relevant. Guthrie said that the Union was making a verbal request for information, and wanted the revenues associated with Southern California. Vitales asked for the request to be made in writing, and Guthrie protested saying the company would not give him a written proposal regarding the layoff, but wanted information requests to be in writing. Guthrie also asked how the company could determine that the NBAs in Northern California were ineffective, but then keep Southern California employees working in the same classification. Guthrie blamed Respondent for what was happening to employees. (Jt. Exh. 38, p. 30; Jt. Exh. 39, p. 15.)

At one point during the meeting, Guthrie asked where the people would go that came back. Vitales said they would work that issue out if they did, in fact, come back. He also said that was the reason the title was not going away; there was just no more market there. Guthrie then asked for a list of all channels, accounts assigned to New Business Advisors, assignments, customer names, locations, addresses, records, BOTS,[24] commissions, items of advertising, a listing of the sales representative of record. The information Guthrie asked for was referred to at trial as an "audit trail" on all of the accounts. (Tr. 151–153, 166, 175.) During the September 11 meeting, Guthrie said that he wanted the audit trail information "to be able to restore them to make whole when they get their jobs back." (Jt. Exh. 39, p. 11) Regarding this request, during the trial the General Counsel asked Guthrie whether, during the September 11 meeting, the Union requested information as to the book of business that would be available because of the impending layoff of the six NBA's. Guthrie answered saying that the Union "requested an audit trail" which he described as "detailed account level information" used in the industry "to determine the origins of where an account begins, who it's assigned to, and where it ultimately ends up." (Tr. 150–151.) According to Guthrie, the Union had, in the past, routinely requested and received audit trails from the Respondent generally, and from Vitales specifically. When Guthrie asked for the audit trial, Respondent did not protest or say the request was either burdensome or unreasonable. Respondent did not mention anything about the costs associated with the request or say anything about the relevance of the request. (Tr. 153–154.) Indeed, the parties' bargaining notes show that the parties moved on to a new topic after Guthrie requested an audit trail. (Jt. Exh. 38, p. 21–22; Jt. Exh. 39. p. 11.)

Vitales understood the meaning of the term "audit trail," and testified the term came from a predecessor company which had a specific "audit trail" report showing the entire history of a specific customer account. According to Vitales, Respondent did not use this type of report, and creating an audit trail would be a manual process that could take weeks. (Tr. 700)

During the meeting, the Union took the position that Respondent was required, under the terms of the Final Offer, to meet and bargain with the Union at six-month intervals about absorbing the NBAs into the BA title, and complained that these discussions never occurred. Guthrie said the company's failure to meet with the Union constituted an unfair labor practice, that the Union would file a charge that day, and somebody needed to deal with this matter as the people due to be fired on September 20 would be coming back. Vitales took the position that there was insufficient sales revenue to warrant transitioning the six NBAs into BA positions. Guthrie protested that the Final Offer did not say the parties would look at revenues when discussing this issue, and said the layoff should be suspended/rescinded until the parties meet to discuss the issue as was envisioned in the Final Offer. Vitales said that the parties could discuss the matters now, and that the layoffs would not be rescinded. Guthrie asked how Respondent expected the Union to bargain, and Vitales asked what he needed. Guthrie replied, "client base." The Union then caucused. (Jt. Exh. 38, pp. 18–19, 24–25; Jt. Exh. 39, pp. 4, 10, 13.)

Towards the end of the day on September 11, Guthrie asked if he could "switch gears" and he brought up the subject of a Northern California manager named Todd, who was designating an hour out of each day for sales representatives to solicit for new business, calling it the "power hour." The Union insisted the practice was new and that employees were unhappy. Guthrie said the company needed to bargain about this issue and that the Union was going to file a charge. Vitales took the position that management had the right to require sales representatives to prospect for new business, and that the company had done this in the past, referring to it as either "call outs" or the "power hour." The parties also discussed whether Todd was requiring sales representatives to forego reporting losses in business, and they reviewed the company's requirement for reporting losses. It appears the parties discussed this matter for some length, with the Union demanding that Todd stop this practice. Ultimately, the Union requested that Respondent provide all of Todd's emails, texts, etc., regarding employee working conditions, and asked for bargaining relating to any associated disciplines. (Jt. Exh. 38, pp. 33–38; Jt. Exh. 39, pp. 17–22.)

Finally, at different times that day Guthrie asked Vitales about Dickson, why she was not present, if she had retired, and whether she was available. Guthrie tried calling Dickson during the meeting, and sent her multiple emails throughout the day. At times the bargaining paused, so Guthrie and Vitales could read Dickson's responses to Guthrie's emails. The parties ended their meeting on September 11 at about 2:45 p.m. and agreed to meet the next day.

2. September 11 emails between the parties

While the parties were bargaining on September 11, Guthrie and Dickson were exchanging emails; various Union and

[24] BOTS is short for "book on the street revenue," which means the dollar amount currently billed for a customer; in other words, how much advertising a customer is buying. (Tr. 195–196.)

company officials were copied on the correspondence. In one email chain, Guthrie asked whether the company was eliminating the NBA channel and said "[w]e will wait for your response to continue bargaining." Dickson replied saying it was the NBA Premise positions that were being eliminated and there was no reason to hold up bargaining. Guthrie responded, telling Dickson that the "parties" (meaning himself and Vitales) were in control of the bargaining process, and not Dickson. In the same email Guthrie asked whether Henshaw's statement on September 6 that the "channel" was being eliminated was true, and wrote that there were 13 NBAs who the Union believed would be awarded their jobs back, with backpay, and that those NBAs would need accounts/market when they were returned to work. Thus, Guthrie wrote, the company's financial liability would be "significant and scalable." Dickson replied saying, "[t]he channel is being eliminated, and the title in your bargaining unit is New Business Advisor Premise which has 6 incumbents. Is that clear enough?" Guthrie responded that it was not clear and asked "[a]re you referring to the 'management rights language' regarding channel(s) in Article 41.1 of the implemented offer?" Dickson wrote back saying that the company's notice was sent to Gowdy, and was attached in a previous email. Guthrie replied back saying "[n]on-responsive." (Jt. Exh. 40.)

In another email chain on September 11, Guthrie wrote Dickson saying that Respondent did not have any management rights, that Vitales stated the company wanted to move some accounts/market, and the email was the Union's "formal notification to bargain." Guthrie asked when Dickson was available to meet and bargain, or whether the Union should meet with Vitales instead. Dickson replied saying she was willing to meet with the Union to close a deal for the bargaining unit anytime, that she had been waiting for over a year for the Union to "provide a response to the LBFO that meets the Company's needs," and asked whether Guthrie was "prepared to do that." (Jt. Exh. 41.)

The final September 11 email from Guthrie is addressed to both Dickson and Vitales; the subject matter of the email reads "UNFAIR LABOR PRACTICE NORTHERN CALIFORNIA IMPLEMENTED OFFER." In the email Guthrie states that, under the direction of Dickson and Vitales, Respondent had committed unfair labor practices. Specifically, Guthrie wrote that he had notified the company on multiple occasions and demanded bargaining with respect to Respondent's obligation to meet with the Union and discuss how and when they would absorb the New Business Advisors into Business Advisor positions and that the "bargaining record is clear . . . [y]ou have failed to notify or bargain with the Union under the implemented offer." Guthrie ended the email by saying the Union recommended that the company rescind the layoffs. It does not appear that Respondent replied to this email. (Jt. Exh. 42.)

3. Bargaining on September 12

At 10:15 a.m. on September 12, the parties met again for bargaining at the same location, with the same people present. Respondent's bargaining notes were introduced into evidence and describe what occurred that day.[25] The company's bargaining notes are titled "Bargaining Force Adjustment of DSEs in N.CA, ICP, and Todd . . . (working conditions)." (Jt. Exh. 44.)

The meeting started with Guthrie saying that he was sending Respondent an information request because Vitales said the previous day that the titles were being eliminated. Vitales confirmed that the NBA title was being eliminated and all of the Northern California NBAs were being surplussed. Guthrie then said that there were 65 Premise representatives in the Premise channel. Vitales clarified that the job titles, as set forth in the contract, were still intact but that the company would not hire new people to backfill the eliminated positions, thereby reducing the overall headcount. (Jt. Exh. 44, p. 1.)

Guthrie then asked Waltz to discuss a meeting that occurred earlier that day between Respondent and the NBAs. Waltz said that Love held a meeting with the NBAs to review their severance packages, but that only three NBAs were present. According to Waltz, during this meeting Love told the employees they needed to sign their individual severance agreements in order to receive any benefit payments. Love also walked everyone through the severance documents, and in response to a question from one of the NBAs Love said that the company was eliminating the title of DSE/NBA. Finally, Waltz said that Love told the employees that, if they signed their severance agreement, they would be eligible for both severance payments and unemployment, and that they should email the company human resources department if they had any questions. (Jt. Exh. 44, p. 1.)

After Waltz' description of what occurred at the meeting, Guthrie said that questions had been raised that were not answered, and he wanted Love to speak with the Union to describe what exactly she explained to the employees. Vitales said they would schedule something to review benefits and severance. Guthrie then complained that the Union had not received a "presentation on the plan." In reply Vitales said that the company was following Article 30 in the Final Offer. Guthrie said that he had not received a proposal from the company for effects bargaining, and Vitales said that the Union had the company's proposal, and it was in the Final Offer. Guthrie replied saying "you want to do it the hard way? What else you got?" Vitales said he did not have anything else, and it was the Union that had asked for bargaining. The parties then took a break. (Jt. Exh. 44, p. 2.)

After the break, Guthrie stated that, in Dickson's email, she said the channel was being eliminated, and he wanted to make sure he understood what was happening. Vitales said that, as he had stated before, the company was doing a force reduction under Article 30 of the Final Offer. Guthrie then asked if the channel was being eliminated pursuant to Article 30, saying that the word "channel" did not appear anywhere in Article 30, and that the parties were in conflict as to what was being eliminated. Vitales said that he clarified the issue the previous day, and was not going to give Guthrie a different answer. Guthrie replied saying that Vitales' statements conflicted with Dickson's; Vitales said Guthrie was going to get the same answer. (Jt. Exh. 44, p. 2.)

The parties then discussed the Union's information requests, with Vitales saying that the Respondent had asked the Union to

[25] The Union's bargaining notes for September 12 were neither offered, nor admitted, into evidence. (Jt. Exh. 43.)

present its information requests in writing. Guthrie protested, saying he would not do so because the company had refused his request for written proposals. Vitales said the company wanted them in writing to make sure the Union received all the information that it had requested. (Jt. Exh. 44 p. 2.)

Guthrie asked who sets Respondent's sales objectives, complained that the sales representatives had never received any new objectives, and said he was going to bring the sales representatives to the bargaining table. Guthrie further said that they needed to set another day before September 20 to discuss the layoffs, as the company did not have the information the Union had requested. Guthrie then asked Vitales to look at the recognition clause in Article 1 of the Final Offer, and they discussed the various titles listed. The parties discussed the fact the title of DSE was not listed anywhere, with Vitales saying they discussed the DSE's during bargaining with a "take on New Business Advisors." Vitales also said that the DSEs were covered under Article 7. Guthrie said that Vitales did not understand Article 7, saying it was reserved for new job titles and classifications. The parties then took a break. (Jt. Exh. 44, pp. 2–3.)

After the break, referencing Article 30.2 of the Final Offer, which discusses force adjustments, Guthrie claimed that Vitales had said the company did not have a written proposal. Vitales replied saying that the company was using Article 30 as their proposal for the layoffs, and that the Union was notified by the company's August 21 letter to Gowdy. Guthrie then started reading Dickson's letter to Gowdy, saying that he wanted to go through the letter to ensure there was no misunderstanding. Guthrie asked Vitales if the Union "wanted to accept the company's article–are you saying Article 30 is the company's proposal?" Vitales said that the Union could accept the proposal or counter. Guthrie said the Union understood the company's proposal under Article 30, but that the Union wanted a proposal under Article 30.1, which discusses employees bidding for open jobs, that was acceptable and involved all six NBAs. Guthrie further said the Union was requesting a written proposal from the company, and that if Vitales did not have one the Union would seek a remedy. Vitales replied saying that both Article 30, and the company's August 21 letter, were are on paper, and that the Union had these documents. (Jt. Exh. 44, p. 4.)

Guthrie then started reading one of the severance letters, asked which specific claims the employees were waiving, and whether it included lawsuits and claims of discrimination. Vitales said that the severance waiver covered any and all claims. Guthrie replied saying the Union believed that the company engaged in direct dealing by requiring employees to sign a waiver in order to receive separation benefits. Guthrie further said that the company could not ask someone to waive their rights regarding discrimination. Vitales replied that, if an employee signed the severance agreement, the company would enforce the document. Guthrie asked for a copy of the severance package in Word format, but Vitales said they only had a PDF version, and that Guthrie could convert the file. Guthrie asked for an hour break so the Union could covert the document from PDF to Word. (Jt. Exh. 44, p. 4–5.)

After the break, Guthrie asked about the status of the information requests. Vitales said he did not have anything back yet. Guthrie asked how much information the company had gathered, and Respondent said they only had the documents that Vitales had given to Guthrie earlier that morning, regarding items the Union requested the previous day. After some more discussion, Guthrie asked about the sum total amount of severance being offered the individual NBAs, and they discussed the severance benefits for the individual employees. (Jt. Exh. 44, pp. 5–6.)

Guthrie asked about vacation pay for the period of September 20 through October 21, which was the deadline for the NBAs to sign their severance agreements. Vitales said the NBAs would receive whatever they were owed based upon normal commissions for sales up to the last day. (Jt. Exh. 44, p. 6.)

Guthrie started reading the severance agreement and waiver. He said the waiver did not include valuable consideration, protested that Respondent could not do this, and further said the Union was filing a grievance on behalf of the six NBAs along with an information request. Vitales confirmed that employees would not receive severance if they did not sign a waiver, and said the severance payment was the requisite consideration for the NBAs signing the waiver. Vitales also said that employees who did not sign a severance agreement were not entitled to anything other than their base-pay. Guthrie complained that this was something new, but Vitales disagreed, saying it was included in Article 30 of the Final Offer. (Jt. Exh. 44, p. 6.)

During the meeting, Guthrie said that he had sent an information request to Vitales and Dickson for a copy of all agreements, including non-compete agreements, signed by the NBAs. He further said that the Union did not waive any rights on behalf of the bargaining-unit employees. Guthrie then asked if Vitales wanted to call Dickson, since she did not answer his email; Vitales said no. (Jt. Exh. 44, p. 7.)

Guthrie then asserted that the channel had been eliminated, and all of the employees under the job title were being reduced. In reply, Vitales told Guthrie to file a charge. Guthrie then discussed the channel, asked about Article 41 of the Final Offer, which deals with market assignments, and inquired as to which job title/channel the previously terminated employees would return to. Vitales said that they would be placed into a recognized title if Guthrie had concerns. Guthrie said that he did not have any concerns, but that Dickson said they were eliminating the channel, and under Articles 30 and 41 of the Final Offer the channel was different than the position, as a position equates to locations and job titles; when a channel is eliminated it has a different impact. Vitales said that they were bargaining over eliminating the titles. Guthrie asked Waltz if he understood what Vitales was saying, and Waltz referenced removing the sales representatives from the channel and channel elimination. Esquivel then said that the title is there, that everything is there, and the company was eliminating the incumbent. Vitales said that the job title was still recognized in the contract, but Respondent would not hire new employees to backfill the title as the company would not be using that job title any longer as a sales strategy. Guthrie asked whether the company's previous statements about eliminating the channel were improper. Vitales said what Dickson meant was that nobody would be left working in the channel, therefore there is no longer a channel. Guthrie noted that the channel was listed in the Final Offer, and that if Respondent was proposing to eliminate the channel—the company was also proposing to eliminate every person in that bargaining

unit. Vitales replied saying that the company was eliminating all the jobs in the title. Guthrie then announced that he wanted to call Dickson. He did so, but there was no answer and he left a voicemail. Afterwards, Guthrie asked Vitales to "provide in writing what you're doing," because the email said the company was eliminating the channel. Guthrie asked Vitales whether the company was eliminating the channel under Article 41 (which discusses market assignments and the company's right to determine sales channels used to contact customers) or Article 30 (which discusses force reductions), saying "[a]s proposed it does not say you're eliminating the channel." It does not appear that Vitales responded to this question. (Jt. Exh. 44 pp. 7–8.)

Vitales then asked if the parties could discuss something referred to as "ICP" but Guthrie said he was not prepared to discuss the matter. Vitales asked whether Guthrie wanted to move forward with sales prospects for the Union's members, but Guthrie said that he had not received a proposal from the company for Northern California. Vitales replied saying the Northern California proposal was the same as the one for the Rocky Mountain region. Guthrie said that he was not going to "cross-bargain," that Gowdy was interested in knowing the company's offer, and Vitales could email or call Gowdy if he wanted to discuss the matter with her. (Jt. Exh. 44, p. 8.)

At this point Dickson returned Guthrie's call, and Guthrie put her on speaker. Dickson said that the people working in the DSE channel were being eliminated and that the title is listed in the LBFO.[26] Guthrie replied that they were having problems with this issue at the bargaining table, but that the Union understood what the company was proposing; the company was eliminating the six incumbent employees working in this job title. Guthrie then said that the channel meant something different than the title and asked if the company was eliminating the New Business channel as in Article 41 or Article 30. Guthrie stated that he was trying to figure out how to integrate the six NBAs into the bargaining unit and whether the company was meeting the obligations under the Final Offer. Guthrie further said that "[i]f you're eliminating the people–OK. If you're eliminating the channel and not going to have a new business ti[t]le," he was then interrupted by Dickson who said, "all indications NBA title." Vitales interjected, "I've said we're following Article 30—it's written." Dickson then said that the company was eliminating the six people in the channel, as the channel was not performing. Dickson further said that the NBA sales numbers were low in 2019, and according to an August 2019 report the recurring revenue was $8,297/$5,006. Guthrie said the company had information, but did not have a meeting with the Union to see how they could absorb the NBAs into a Business Advisor role, and that the Union did not have the benefit of this information. Dickson said that she would come to Denver the next week with Vitales and Hancheck. Guthrie said that the company and Union could not "afford to be in impasse mode," and that they really had a problem. After this exchange, the meeting ended at about 4:45 p.m. (Jt. Exh. 44, pp. 8–9.)

It appears that the parties met in Denver at some point in September, as the record contains various emails discussing a meeting scheduled in Denver on September 18 and September 19 involving another bargaining unit, and Respondent discussed the scheduling of a grievance during those meetings. (Jt. Exh. 50, pp. 1–2; Jt. Exh. 65, p. 4.) However, nobody testified about what happened during the meetings, and it appears the record is otherwise silent about what was discussed in Denver. The next bargaining session regarding the NBAs did not occur until October 3; the record is also silent as to why there were no other bargaining sessions to discuss the NBAs until that date. On September 20, Respondent laid off the six New Business Advisors. (GC 1(e) ¶7, GC 1(g) ¶7.)

4. September 12 emails between the parties

The record contains several emails that the parties exchanged on September 12. In one email, Guthrie asked Dickson and Vitales "what channel are you now proposing to eliminate" and further said that the company's statements were conflicting with the proposals made directly to bargaining unit members earlier that morning along with the "bargaining record." Guthrie asked that the company provide information identifying the name of the channel, citing Article 41 of the implemented offer, and said that the bargaining committee needed the information immediately and would "resume bargaining once we get our information request." Dickson replied, asking Guthrie "[w]hat proposals made to employees this morning?" In her reply, Dickson also stated that Guthrie knew exactly the positions that were being eliminated—the New Business Advisor Premise positions, which were formerly referred to as Digital Sales Executives. (Jt. Exh. 46.)

Later in the day on September 12, Guthrie sent another email to Respondent titled "RFI DISCLOSURE REQUEST FOR INFORMATION and Notification." In the email Guthrie asked Respondent to verify the correct address to send agreement revocation notices. Guthrie then made an information request, asking the company to provide all agreements signed by the six NBAs, along with any non-compete agreements for California, and any other agreements made directly with bargaining-unit employees. Dickson replied the next day saying that, to date none of the NBAs had returned their severance agreements, and that she had made an inquiry in order to determine whether any of the six NBAs had signed a non-compete agreement. (Jt. Exh. 48.)

5. Emails exchanged between September 12 and October 3

Between September 12 and October 3, the parties exchanged a series of emails involving the NBA layoffs. The morning of September 16, Guthrie sent an email to Dickson and Vitales urging that they reach a tentative agreement on a new collective-bargaining agreement. Regarding the layoffs, Guthrie wrote it was the Union's understanding that Respondent's "notice and subsequent dialogue did not include the elimination of the Premise Advisor Channel." Guthrie then stated that the Final Offer clearly required the NBAs to be absorbed into the bargaining unit as Business Advisors. He referenced Henshaw's September 6

[26] The company's typed bargaining notes state "DSW channel," but this is clearly a typographical error and should read "DSE channel." (Jt. Exh. 44 p. 8.)

statement that the company was eliminating the channel, and claimed that Love said the same thing to employees. Dickson replied to Guthrie's email, saying she had previously told Guthrie that the company was not eliminating the Premise channel. She further wrote that, if "the semantics of our dialogue has gotten in the way of understanding each other, then I hope this puts the issue to rest." As for bargaining a new contract, Dickson said the Union had the company's Final Offer, and that Respondent was trying to determine if there was a potential to get a settlement. (Jt. Exh. 50.)

Guthrie emailed Dickson and Vitales later on September 16 to ask about the Union's information requests, claiming that the Respondent's production regarding settlement agreements and offers made to employees was incomplete. In the email Guthrie asked for settlement offers or agreements sent directly to bargaining-unit employees. Dickson replied that day saying the company had not made any settlement offers to unit employees, other than to those previously made to the NBAs. (Jt. Exh. 51.)

On September 16 Guthrie also sent an email to Vitales asking: (1) for the New Business Advisor "objectives" for 2018 or 2019; (2) whether the company notified the employees or the Union that the growth and revenue objectives had changed; (3) for the date and time the company established objectives for the New Media and DSE designations; (4) for the date and time the company established the objectives for NBAs; (5) for the channel objectives and metrics and the date they were created; (6) for the date, if any, that the company unilaterally changed the employee objectives after 9/25/2019 [sic]; (7) for the NBA channel revenue and growth objectives and the date they were distributed; (8) for the specific growth objectives established under the LBFO; and (9) for the date the company met with the Union to discuss employee objectives along with the documentation given to employees. Guthrie's email also said that the Union still did not have the following information that it had previously requested: published job descriptions and duties for the NBAs and the date they were created; the specific objectives given to the six NBAs; and the locations of those individuals "under ARTICLE 30." On September 23, Vitales replied to Guthrie, answering some of his questions and attaching the objectives. (Jt. Exh. 53.)

On September 24, Guthrie made an information request asking for all disability payments made to unit employees in 2018 and 2019. He also asked for all expanses paid, approved, or denied for each of the six NBAs. On the same date he also sent a separate email asking for dates to continue bargaining and made an information request for all waivers or agreements signed by bargaining unit members. (Jt. Exh. 55, 56.)

On October 1, Guthrie sent an email to Respondent asking for all signed waivers or agreements, along with communications or disbursements made to unit members. And, even though the six NBAs had now been laid off, in his email Guthrie asserted that the company was required to integrate the NBAs into the bargaining unit. On October 1, Dickson emailed Guthrie a template of the severance letters and waivers sent to the NBAs. The next day, Vitales sent Guthrie an email and attached copies of the signed severance agreements/waivers that the company had received from four of the six NBAs. (Jt. Exh. 57, 61.)

6. Bargaining on October 3

The parties met for bargaining on October 3 in California. Vitales, Robinson, and Hancheck were present for Respondent, while Gowdy, Guthrie, Waltz, and Esquivel attended for the Union. The October 3 bargaining notes for both Respondent and the Union are titled "Effects Bargaining." (Tr. 170–171; Jt. Exh. 59, 60.)

The parties discussed many of the same issues they had previously gone over in their September bargaining sessions. Guthrie asked if the company was proposing a layoff under Article 30, and again said the company had an obligation under the implemented LBFO to integrate the NBAs into other positions in the company. Vitales told Guthrie there was not enough market to integrate the NBAs into other positions, let alone keep them in their jobs, as the NBA positions were supposed to be self-sustaining. The parties discussed various other issues, including previous proposals made during contract bargaining. Eventually Vitales said that they were present to discuss the effects of the NBA layoffs, and if the Union wanted to open up general contract bargaining they were done for the day. (Jt. Exh. 59, 60.)

Guthrie again asked for the locations involved in the layoff, and said the company had not given the Union a description of the work locations. Vitales said the layoff involved every location where the six NBAs worked, that they had previously talked about the matter, and the locations were: San Francisco, Oakland, Petaluma, Sacramento, San Jose, San Joaquin, Redding, and Nevada. Guthrie complained that Vitales's explanation was not good enough, and said that in August 2018 the Union had requested locations for the NBAs, but the company did not provide the information and then rejected the Union's proposal on locations. Vitales said he explained the locations, noting there was a record of their bargaining, and said he was there to negotiate the effects of what occurred in Northern California and not to bargain over the locations. (Jt. Exh. 59, pp. 6–11; Jt. Exh. 60, pp. 3–4.)

After a 45-minute caucus, the parties resumed bargaining. Guthrie complained about the language in the recognition clause of the Final Offer, and protested the fact the company did not meet with the Union at 6-month intervals to discuss integrating the NBAs into other Premise positions. Guthrie also asked whether the company had established any objectives, inquired about the waiver provided to the NBAs, and complained that the company had changed the implemented LBFO. (Jt. Exh. 60, p. 4–6.)

Guthrie then asked where the company had moved the accounts/market that was handled by the former NBAs. Vitales said the market had been "right channeled" pursuant to the parties' side-letter agreement, that the work went to BAs in Northern California, and anything under the established revenue threshold went to inside sales representatives working in a call center. Guthrie said that he wanted to talk about how they could move the NBAs into the Premise channel, and brought up the issue of two former managers (Luis Pantoja and Marlon McConner) who had transferred from NBAs to BAs, asking about their qualifications. In reply, Vitales referenced their performance. (Jt. Exh. 59, pp. 18–21; Jt. Exh. 60, pp. 7–8.)

The parties again discussed the issue of sales objectives, and Vitales said that each NBA was supposed to sell $14,167 in new

business. They continued discussing sales objectives for some time, and whether these objectives were improperly changed. Guthrie eventually said the six NBAs were laid off without due process, that the Union would file an unfair labor practice charge, and after the NLRB ruled on the charge the company would have to bargain and put everybody back to where they were. And, because the company violated the implemented Final Offer, Guthrie said that the NBAs would be reinstated and be made whole. (Jt. Exh. 59, p. 25; Jt. Exh. 60, pp. 8–10.)

After discussing what appears to be an unrelated employee suspension, the parties took a break. After the break, they discussed the waivers given to the NBAs. The Union complained about the confidentiality language in the document, and said that some employees had asserted they were not properly reimbursed for their expenses. Vitales asked for the details so he could look into the matter. (Jt. Exh. 59, pp. 26–27; Jt. Exh. 60, p. 10–11.)

The parties then discussed the base pay for sales representatives, and Guthrie said that one of the reasons locations were important was because of the different pay areas, that he did not know what offices they were in, and it could impact the NBAs. Vitales said that the sales representatives report to a specific location and base pay is associated with that location. (Jt. Exh. 59, pp. 28–29; Jt. Exh. 60, p. 11.)

During the meeting the Union said it was concerned about the accounts/market, and inquired as to what happened with the accounts belonging to the Premise representatives who had quit or transferred out of state over the previous 5 years; the Union believed this directly impacted the NBAs being laid-off. Thus, Guthrie asked for an audit trail of the market. (Jt. Exh. 59, pp. 30–31; Jt. Exh. 60, pp. 11–12.)

Gowdy then brought up the fact that the Union had submitted a request for information on unification and had filed a grievance; she asked why the company had not responded to the grievance. The Union gave Vitales the grievance numbers so he could check. Vitales said that he needed to involve someone else from the company on that issue, and they discussed trying to set up a date to discuss the matter. After some discussion about whether a certain person still worked for the company, Guthrie proposed adjourning for the day saying there were a lot of issues they needed to formulate. Guthrie said that he needed to know the market to understand if there might be opportunities available as some of these people really needed their jobs. He also said that the Union was going to send Dickson an information request regarding unification. Gowdy claimed that she heard the company's CEO say that Respondent was not going to carry people who were on benefits, and that those people would lose their jobs. Vitales denied the allegation and said Respondent decided to get rid of the NBAs across the company, not just in Northern California. The meeting ended with the Union saying that they believed there may be an opportunity to have the NBAs move elsewhere in the Premise channel, that they need to talk about market assignments, and had specific questions about the waiver. (Jt. Exh. 59, pp. 32–35; Jt. Exh. 60, pp. 13–14.)

As in the previous bargaining sessions, during the October 3 meeting Guthrie was emailing Dickson and tried calling her during the meeting. In one email, Guthrie complained to Dickson that the company did not provide a description of the locations for the layoff, demanded bargaining over the matter, and brought up issues concerning general contract bargaining. Dickson replied saying that they were only bargaining the effects of the NBA layoffs. Regarding locations, in her reply Dickson said that the August 21 letter to Gowdy included the full list of the six NBAs who were being laid off, which were all of the NBAs in the Union's Northern California bargaining unit. After a series of snippy emails, Dickson wrote saying that the Union demanded effects bargaining for the NBA layoff, and Respondent was doing just that: bargaining the effects. (Jt. Exh. 59, pp. 9, 14, 17; Jt. Exh. 60, p. 6; Jt. Exh. 62.)

7. Meetings and emails between October 3 and October 18

Before the next bargaining session involving the NBAs on October 18, the parties met at least two other times involving other issues. They met on October 10, for what was titled a "market meeting," where they discussed issues surrounding accounts/markets in various locations in California (Jt. Exh. 71). They also met on October 16 for a "unification grievance meeting," where the parties discussed the grievance filed by the Union over unification. (R. 16; Jt. Exh. 75.)

Regarding the issue of unification, the record shows that, after Dex Holdings purchased YP there were a number of customers who had accounts with both of the companies. Therefore, after the merger, some customers had two sales representatives—one a former Dex employee and the other a former YP employee; the company called these accounts "twin accounts." Respondent integrated these accounts, and the related customer tracking systems, so that going forward each account would only have one sales representative; this process was called "unification." The Union was concerned about the process because of the potential for some accounts to be transferred to sales representatives outside of the bargaining unit. In June 2019, the Union filed a grievance over the matter and made an information request for all accounts and revenues that were transferred during unification. Ultimately, of the 83 twin accounts, 92 percent were assigned to bargaining-unit sales representatives. (Tr. 191–192, 465, 474–475, 580–583, 941–945; Jt. Exh. 8, 9, 70, 90(a); R. 16.)

During the October 16 grievance meeting, Respondent told the Union they had a list of the seven twin accounts that were transferred to employees outside of the bargaining unit, along with the Zip Codes associated with those accounts. Guthrie said the Union also wanted the business names connected with the accounts as well as the addresses, as the Union was trying to determine if the company was violating the terms of the implemented Final Offer. Respondent took the position that it did not have to provide the additional information, that it would send Guthrie what they had regarding the seven accounts, and would deliver the following week a list of twin accounts that bargaining unit members retained as a result of unification. (Jt. Exh. 75, p. 2; R. Exh. 16, pp. 3–4.)

The parties traded a number of emails between October 3 and October 18. On October 3, 4, and 7, they exchanged a series of emails regarding unification. On October 16, Guthrie sent an email to Vitales confirming the Union's "commitment and agenda for Effects Bargaining," complaining that the Union had not received any written proposals from the company regarding the force adjustment, and asking Vitales to confirm his statement that the Union "consider Article 30 as your full and complete

proposal." In the email, Guthrie further stated that there were serious issues on the table, including unilateral changes and Respondent's failure to bargain, and asked the company to provide the Union with whatever information they had requested that was still outstanding. On October 17, the Union sent Respondent an information request seeking account/market information for the NBA, BA, and SBA sales representatives for the past 12 months. (Jt. Exh. 65, 66, 68, 76, 77, 86.)

8. Bargaining on October 18

On October 18 Respondent and the Union met at 10:30 a.m. in California for bargaining regarding the NBAs; the parties' bargaining notes for that day are titled "Effects Bargaining." In the meeting Guthrie announced that he had sent an email regarding Article 30; Vitales replied saying the company was following Article 30, had declared a force reduction, and they were bargaining the effects of the layoffs. Guthrie stated that any effects on market assignments needed to be addressed and he again raised the issue of waivers, asking whether the waivers had been changed. He then asked whether Dex had operated as one or multiple companies. Vitales said Respondent had different waivers, probably based on individual State law, and that Dex operated as one company with the same policies for all employees. Guthrie asked why, and when, a new waiver was created, and complained that the Respondent had not discussed the issue with the Union. Guthrie said the Union objected to the company's unilateral waiver and contended that it was coercive to make employees sign the document. Guthrie also said that the Union wanted to have a discussion on how to integrate the NBAs into the bargaining unit. Vitales said they needed clarification from the Union, as there were goals regarding new business and revenues that go hand in hand. The parties discussed various issues related to the SP-MAG that day and the meeting ended at 2 p.m. (Jt. Exh. 81, Jt. Exh. 82.)

9. Emails exchanged between October 18 and October 31

Between October 18 and October 31 the parties exchanged a series of emails, including emails regarding an information request made by the Union on October 17, with Respondent asserting that the Union needed to cover part of the costs for the information request. On October 20 Vitales sent the Union a file explaining how Respondent addressed unification. The file showed the twin accounts which were unified, resulting in bargaining-unit sales representatives being assigned 83 accounts, while 7 accounts involving out of state customers were assigned to employees outside of the bargaining unit. On October 30, Vitales sent Guthrie the paystubs showing the severance payouts for the NBAs, along with the waivers signed by the four NBAs who executed their severance agreements. In the email Vitales also asked for specifics regarding certain expenses which the Union claimed had not been paid to employees. That same day the Union sent Respondent an email about bargaining new discipline and "resellers" selling digital products in Northern California and Nevada. Finally, before the October 31 meeting the parties exchanged emails regarding various other unresolved matters, with Dickson emailing Guthrie saying that the October 31 meeting was the Union's opportunity to address the outstanding issues. (Tr. 237–240; Jt. Exh. 86–91, Jt. Exh. 90(a).)

10. Bargaining on October 31

The final bargaining session involving the NBAs occurred at 12:30 p.m. on October 31 in California. Again, the parties' bargaining notes are titled "Effects" bargaining. The meeting started with the Union asking about information they had requested regarding benefit expenses, auto allowances, employee contracts, market assignments, and the unification of markets. Guthrie said that they needed this information to bargain. Vitales replied by saying the request was voluminous, that the Union had Respondent's proposals, and the Union could make a counter proposal. Guthrie questioned how the request was voluminous in comparison to the company's 60-page sales policy, and the SP-MAG, which was 150 pages. Guthrie also said that the Union was not obligated to pay for blanket costs, and asked whether Vitales was talking about the Union paying for the work hours associated with gathering the information. Vitales said that it takes the company a lot of hours, working across multiple departments, to put together a report for the Union in response to its information requests. Guthrie replied that the Union would take the raw data instead of a report. (Jt. Exh. 92, p. 1; Jt. Exh. 93, pp. 1–2.)

Gowdy discussed reimbursement expenses owed to the NBAs, and Vitales said he would look into the matter. The parties also discussed severance payments, and Vitales said that two of the NBAs had not signed their waivers and would therefore not receive any severance. Guthrie replied by saying they were bargaining that issue, and the Union had not agreed as to who would, or would not, receive severance. Guthrie insisted the waivers were void, and that the Union was still assessing whether to file formal charges. They continued discussing the waivers, the issue of base pay, and the claim that an employee who was on benefits was allegedly told to quit. Gowdy asked for a list of all NBAs who were on benefits, and Vitales said he would send her the information. (Jt. Exh. 92, pp. 2–3; Jt. Exh. 93, pp. 2–6.)

Guthrie raised the issue of unification, complained the Union did not have the customer names, and therefore had no way to compare the information provided. The Union also raised the fact that specific locations were not listed in the Final Offer, asked about an audit trail, said that plenty of sales representatives were leaving and there should therefore be ample market available to move some of the NBAs into those areas. Thus, the Union wanted to see the market information to look at this potential. Guthrie said that the company has the raw data, regarding where the accounts are and where they went, and if Vitales thought the information was voluminous the Union would bargain over it. Guthrie inquired as to whether the company had a cost proposal, and said they would bargain over the matter. (Jt. Exh. 92, pp. 3–4; Jt. Exh. 93, p. 6–9.)

Waltz complained that, when sales representatives left the company their accounts were reassigned, and said the accounts could have instead been given to the NBAs. He also complained that the NBAs were eliminated while the company created Thryv only sales representatives. Vitales replied that the Thryv only representatives were already in existence before the layoffs, and they did not receive any of the Premise accounts/market as they focus only on selling the new Thryv/SAAS product instead. (Jt. Exh. 92, p. 4; Jt. Exh. 93, p. 7.)

Guthrie again asserted that Article 30 required the company to

absorb the NBAs into the bargaining unit, and said the company either did not understand, or ignored, its obligation to sit down with the Union to discuss this issue before terminating the NBAs. Guthrie further said that the Union was holding the company accountable, that Respondent was creating a delay on getting the information the Union had requested, and that the Union would send Respondent the information requests. Later, the parties again discussed the Union's information requests, with Vitales saying that the company believed each of the Union's information requests were voluminous. The Union asserted that it was entitled to the information, asked for specific examples of what was burdensome or voluminous, and said they had offered to bargain over the issue. Notwithstanding its offer to bargain, the Union took the position that it was not obligated to bargain over something just because Dickson did not want to provide the information. Vitales replied saying the company was not trying to hinder the Union's ability to get data. Guthrie said that Respondent had not claimed the information was burdensome or irrelevant, and that the burden was on Respondent to prove any such claims. He further said that the Union had the right to information that was in the company's sales policies, and they were requesting the information again. (Jt. Exh. 92, pp. 4–5; Jt. Exh. 93, pp. 8–10.)

Regarding the information request involving unification, Vitales said that he was asking for clarity in order to gather the correct information. Guthrie replied that the Union clearly requested the names of the customers, but did not receive this information. Guthrie further said that the Union wanted the same data the company had used to make its decision, and this was something they were going to enforce. (Jt. Exh. 92, p. 5; Jt. Exh. 93, p. 9–10.)

Guthrie then asked about the NBAs and said the Union wanted the criteria Respondent used to determine they were ineffective, as the parties had never discussed their objectives. Vitales said the NBAs were not making enough sales. Guthrie referenced the language in the August 21 letter, said the company did not want to bring the NBAs back, and claimed Respondent had an obligation to bargain and prove to the Union their ineffectiveness. Vitales disagreed, and noted that the August 21 letter highlighted the ineffectiveness of the six NBAs. The Union said it wanted the same information the company used to make its determination, and if they received this information they could look at it and decide; Vitales said he already gave the Union information. (Jt. Exh. 92, p. 5; Jt. Exh. 93, pp. 10–12.)

Regarding the six NBAs, Guthrie also said that, while some of them wanted their jobs back and some did not, it was the Union's obligation to ensure the implemented Final Offer was followed. Therefore, the Union asserted that it needed all of the information on market assignments, saying that it used to receive this information in the past. The Union also said that, if a request was burdensome or voluminous then "let's talk about it" and discuss why Respondent believed this to be the case. The Union offered to pare down its information requests, make accommodations, and as an accommodation said that it would accept the raw data, which the Union claimed the company had at its fingertips. (Jt. Exh. 92, p. 6; Jt. Exh. 93, p. 13.)

The parties discussed an eliminated sales channel called the "expansion channel" and what happened to the sales representatives that were working in that channel. Guthrie said the Union was asking for information about the accounts because they want to know who was selling Respondent's products in Northern California and Nevada; Waltz added that the expansion channel was a market that could have been given to the NBAs. The parties then discussed certain other sales titles, and whether the Union had the right to seek information involving non-bargaining unit work. Gowdy insisted that the Union had the right to monitor what was occurring. (Jt. Exh. 92, pp. 6–7; Jt. Exh. 93, pp. 14–17.)

Guthrie asked if the company was eliminating the channel or the just the sales representatives, said the Union wanted to know what happened to the work the NBAs were doing, and that it needed the locations to see what happened to the accounts/market. Guthrie complained that the Union had specific locations in its original contract bargaining proposal, but that Appendix A of the Final Offer did not include any locations. After some more discussions, Vitales said that he was not opening up general contract bargaining. Guthrie then asked what locations were involved, and Vitales said all the locations in Northern California. (Jt. Exh. 92, p. 8; Jt. Exh. 93, pp. 18–19.)

Guthrie complained that, regarding the NBAs, Vitales said one thing, while Dickson said another, and Henshaw stated that the company was eliminating the channel. He asked for clarification as to whether the company was eliminating the channel or just the employees. Vitales said that the company eliminated the people in the title—all of the NBAs in Northern California. The channel was not eliminated, just the employees working in the channel. Vitales also said that the accounts were reassigned based upon the revenue thresholds in the SP-MAG, that he had already explained this previously and that it was frustrating to repeat it again. (Jt. Exh. 92, p. 8; Jt. Exh. 93, p. 19–20.)

After an hour break, the meeting resumed, and the Union requested bargaining over the issue of a sales representative who had been disciplined. After discussing the issue, Guthrie said that the Union was going to request information about the "outside sales media consultant" job title. Gowdy then asked if, at any time, Northern California accounts had been moved to Nevada; Vitales replied that some were right channeled into the telephone sales group. Gowdy said the Union had received reports of accounts being moved, so it was going to send Respondent an information request. The session concluded with the parties agreeing to gather and exchange information. With that, the meeting ended at 2:45 p.m. (Jt. Exh. 92, pp. 8–9 Jt. Exh. 93, pp. 21–22.)

III. ANALYSIS

A. Information Request Allegations[27]

Section 8(a)(5) of the Act requires an employer to bargain collectively, which includes the duty to supply a union with

[27] In his posthearing brief, the General Counsel withdrew the information request allegations contained in Complaint pars. 8(f), 8(g) and 8(o). (GC Br., at 2 fn. 2.)

information that will allow it to "negotiate effectively and perform its duties as bargaining representative." *New York & Presbyterian Hospital v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011), enfg. 355 NLRB 627 (2010). This includes the obligation to furnish a union with information in order for it to properly administer a collective-bargaining agreement, and process or evaluate grievances. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2007), enfd. 902 F.3d 296, 302 (D.C. Cir. 2018).

Information requests concerning bargaining-unit employees are presumptively relevant, as they go to the core of the employer-employee relationship. Id. If the information "request involves nonunit employees or operations, the union has the burden of establishing the relevance of the requested information." Id. To satisfy this burden, the Union needs to show a reasonable belief, supported by objective evidence, that the requested information is relevant. Id. The Board applies a "liberal discovery-type standard" to determine the relevance of an information request. Id; See also *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) ("Board is to apply a liberal discovery-type standard" to information requests).

1. The Union requests information regarding Quarterly Relief (Complaint pars. 8(a) and 8(b))

a. Facts

Respondent has a program in place called "Quarterly Relief" which helps sales representatives, in certain situations, meet their sales quotas. Sales representatives are subject to discipline, including discharge, for poor sales performance. (Tr. 347, 553–554, 557.)

Robert Bickmire (Bickmire), Respondent's Director of Sales Planning testified that, through Quarterly Relief the company aids sales representatives who received accounts that had been reassigned to them from other employees. According to Bickmire, the company sets a sales renewal target, in terms of the percent of revenues that a sales representative is expected to renew each year. If a sales representative has not met his/her expected renewal target on reassigned accounts, then Quarterly Relief is applied to bring the employee's renewal rate back up to the target rate. A similar explanation of Quarterly Relief is also contained in the SP-MAG. An employee's renewal revenues are tracked in real-time, and documented quarterly. Also, every quarter Respondent's managers receive a report showing each employee that has received Quarterly Relief. (Tr. 888, 948–951; Jt. Exh. 3, p. 66.)

On April 11, Tracie Scarborough (Scarborough), one of Respondent's Regional Operations Managers, sent an email to the company's sales directors saying that, while the Quarterly Relief report was generally completed about three weeks after the end of each quarter, because it was a manual procedure, and Respondent was transitioning to the SP-MAG, the report could take up to 4 weeks to complete. In the email Scarborough told the sales directors to share this information with their sales teams as they see fit. Somehow, Waltz received Scarborough's email. And, on April 12, Waltz sent an email to Scarborough, with her April 11 email attached, asking whether employees who had been disciplined or terminated would receive Quarterly Relief retroactively. In the email Waltz also asked Respondent to provide the Union with a list of all accounts processed through Quarterly Relief in Northern California and Nevada, by representative, showing each account and the dollar amount. (Jt. Exh. 6, pp. 1–2.)

Waltz testified that he needed the information on Quarterly Relief because the Union had received calls from employees who had been disciplined for their sales performance but believed that they were entitled to Quarterly Relief. The Union membership wanted to know "what's going on." (Tr. 558.) Also, some representatives had recently been terminated and Waltz believed they were entitled Quarterly Relief; therefore, the Union wanted to know what was happening with this program. (Tr. 558, 632–633.)

Waltz' email and information request triggered a series of discussions within the company. Scarborough forwarded the email chain to various company representatives, questioned how the Union had initially received her April 11 email, and asked for assistance as she generally did not receive the final Quarterly Relief report. On April 12, the entire email chain, including Waltz' information request, was sent to Dickson and Bickmire. (Jt. Exh. 6.)

Lori Prideaux (Prideaux), a Sales Policy & Project Manager, also received the email chain, and on April 12 she replied to Scarborough, Bickmire, Dickson, and Vitales, answering each of Waltz' questions. Prideaux stated that, if a sales representative is disciplined or discharged during a quarter, the company determines how much Quarterly Relief the representative was due, calculating the number based upon the specific date in question. Prideaux noted that the process would take few days to calculate, since it was done manually. Prideaux then explained different items occurring within a quarter that could impact the Quarterly Relief calculations, such as the number of reassigned accounts handled, and the number of days since the last time Quarterly Relief was calculated. As to whether disciplined/discharged employees would receive Quarterly Relief retroactively, Prideaux said that Quarterly Relief did not impact compensation, only performance, and that it applied to the quarter for which the impacted sales occurred. (Jt. Exh. 7, 102.)

Finally, regarding Waltz' information request, Prideaux wrote that her team was finalizing the Quarterly Relief file that day, and that a master file would be ready by April 15. Once the master file was completed, Prideaux's team would calculate the Quarterly Relief due each sales representative and share this information with Respondent's regional officials who would then review the data with the sales representatives. Finally, Prideaux wrote that there would be no problem in getting information for Waltz showing the amount of Quarterly Relief by sales representative and account. As for Waltz' request asking for the specific dollar amount, Prideaux said that she believed Waltz may misunderstand the calculation, and that Respondent calculates Quarterly Relief on a summary level, showing the total reassigned accounts in the quarter, less the renewal target. (Jt. Exh. 7, p. 2; Tr. 561–562.)

Notwithstanding the fact that Prideaux thoroughly explained the Quarterly Relief process in her April 12 email, answered all of the questions Waltz' had asked, and stated that it would be no problem gathering the information he sought, Waltz never received a reply to his April 11 email. Nor did the Union receive

any of the information that it requested. Waltz emailed Respondent again on April 23, July 12, and July 24 seeking the information on Quarterly Relief, but again he did not receive a response to his emails, nor did the Union get the information. (Tr. 557–558, 561–564.)

b. Analysis

Since Quarterly Relief was provided to unit employees to assist them in meeting their sales quotas, it was part of their working conditions and therefore the information requested by the Union was presumptively relevant. *Hofstra University*, 324 NLRB 557, 557 (1997) (information pertaining to the wages, hours, and working conditions of unit employees is considered presumptively relevant). Also, the Union was entitled to the information to determine whether Quarterly Relief was properly distributed among the sales representatives that were entitled to the help. *Southwest Chevrolet Corp.*, 194 NLRB 975, 984 (1972) (union entitled to information to see if sales representatives were properly credited for sales made to customers referred by a buying service). As the sales representatives' exclusive bargaining representative, "the Union has a real interest, and indeed, the statutory duty to see that its members are treated fairly, justly, and without discrimination." Id. at 985.

Because the information was presumptively relevant, Respondent was obligated to either provide the information or give the Union "some timely legitimate explanation for its refusal" to do so. *United States Postal Service*, 332 NLRB 635, 636 (2000). Here, Respondent did nothing. Silence is not an acceptable answer, and itself constitutes a violation. Cf. *Graymont PA, Inc.*, 364 NLRB No. 37, slip op. at 6-7 (2016). Accordingly, by refusing to provide the Union with the information it requested regarding Quarterly Relief, the Respondent violated Section 8(a)(1) and (5) of the Act.

2. July 2019 request for information regarding Luis Pantoja (Complaint par. 8(c))

a. Facts

In mid-July, at about the same time Respondent's management team was discussed laying off the NBAs, but trying to keep the "good ones" and make them BAs, Luis Pantoja (Pantoja) transferred to into Business Advisor position in the San Francisco market area. Pantoja was originally a manager. In the fall of 2018, he transferred into an NBA position, and then became a Business Advisor in mid-July. (Tr. 564, 575–576, 778, 820; Jt. Exh. 22, p. 7.)

On July 17, Waltz sent an email to Scarborough, saying that Pantoja was a new hire in Northern California, and asking, "[w]hich market was he hired for?" Scarborough forwarded the email to Todd Jones (Jones), one of Respondent's sales directors, asking if he could provide an answer as she knew nothing about it. On July 17 Jones replied to Scarborough, with copies to Henshaw, Love, and others, saying that Pantoja's "requisition was for San Francisco" and that Pantoja received San Francisco accounts along with some accounts from the "North Bay" to provide him with a suitable and "appropriate bag size for the new hire, as directed."[28] In his email Jones further stated that Pantoja's position "was arranged based upon a significant amount of available market" due to the loss of two BAs from San Francisco and one from the North Bay. Finally, Jones said that he copied "all the involved parties for their comments/involvement" before Scarborough shared any information with the Union. One of Respondent's employees named Frances Mai Nguyen (Frances Nguyen) was on this email chain, and replied saying that, when Pantoja joined the "San Francisco team" he received accounts from both San Francisco and Petaluma. She further said that the Petaluma accounts were previously handled by another employee who had left in May 2019, and that the approval to hire another BA in San Francisco occurred in May 2019 to replace someone else. (Jt. Exh. 20; Jt. Exh. 21.)

On July 24, Love forwarded the email chain to Vitales and Dickson, asking how Waltz would have Scarborough's email address. Love also questioned why Waltz would ask Scarborough for the information regarding Pantoja, and said she feared "total chaos" answering the Union's information request, as Jones was commenting on the matter and others were now involved. Therefore, Love asked Vitales if they could refuse to accept information requests that were not sent to someone in Respondent's labor group, and whether someone could tell Waltz "that he has to stop doing this." Finally, Love asked who should formally respond to Waltz, noting that Dickson had previously said they needed to have a system in place to avoid fragmented responses which the Union could then "ding us on." (Jt. Exh. 21, p. 2.)

Vitales replied to the email chain the next day, noting that Dickson had been pushing to have all information requests go through her or Robinson. At a minimum, Dickson wanted Respondent's labor relations or human resources office included on all information requests to help monitor them and ensure an appropriate response. Dickson replied to the email chain on July 25 saying that she would reply to Waltz, but noted that she saw no reason to attempt to provide any justification for Pantoja's hiring as a BA. Dickson asked the people on the email chain to comment on her belief that the only thing Respondent needed to tell Waltz was that: (1) the Company had previously asked, and is again asking, that the Union submit all information requests to herself and Robinson, and (2) that Pantoja filled a vacancy that was approved to be staffed in the San Francisco market area. Vitales agreed with Dickson's assessment. (Tr. 819; Jt. Exh. 21, p. 1; Jt. Exh. 94, p. 1.)

While the company email chain was going back and forth, on July 24 Waltz sent the following email to Frances Nguyen: "Mai, which market was Mr. Pantoja hired for and which bag (Catellon or Ramos) is he being assigned?" Waltz admitted that, by July he knew Respondent wanted the Union to direct all information requests to Dickson, and he did not explain why he sent this request to Frances Nguyen. Waltz never received a reply to this email.[29] (Tr. 572, 638; Jt. Exh. 18.)

[28] Respondent's policies called for a sales representative transferring into a new market location/job classification to receive a listing of accounts to work (bag of business) that was at least 70% the size of the average assignments the other representatives in that location were assigned. (Tr. 183, 911.)

[29] A "bag," which was also referred to as a "bag of business," "book of business," "marketing bag," or "sales bag" is a listing of all the various

On July 25 Dickson sent Waltz a response to his July 17 information request. In her email Dickson stated that Respondent had previously requested the Union submit all information requests to herself and Robinson, as the company wanted to ensure it responded to the Union's information requests as efficiently as possible. The email then says "in response to your request, Mr. Pantoja filled a vacancy that was approved to be staffed in the San Francisco market area. Mr. Pantoja is not a new hire." Jt. Exh. 20.)

Regarding Dickson's answer, at trial Waltz testified that Dickson only gave him a general answer, that "it didn't not speak to what market [Pantoja] was assigned to" and that sales representatives would be hired in either the Petaluma office or the San Francisco office. That being said, Waltz admitted that San Francisco is, in fact, considered a "market." (Tr. 64.3.) Apparently, what Waltz was looking for was a listing of specific accounts assigned to Pantoja. However, Waltz never responded to Dickson's email, never said that her response was insufficient, or that he had other questions that needed answering. Instead, Waltz testified that the Union filed a grievance over Pantoja's market assignment. (Tr. 566–567, 643–647)

b. Analysis

As Pantoja was a bargaining unit employee, the Union's information request, asking which market Pantoja was "hired for" is presumptively relevant. See *Pepsi-Cola Bottling Co. of Fayetteville*, Inc., 315 NLRB 882, 902 (1994) (violation where employer failed to provide the union with information including the job assignments of new hires). A week after making his July 17 request, Waltz received Dickson's answer, that Pantoja was hired for the "San Francisco market area."[30] The evidence shows that this response was accurate. Pantoja was hired to fill an opening in the San Francisco market office. He then received accounts that were located in both San Francisco and the North Bay (Petaluma).

Waltz may have wanted Respondent to provide him with more detail, specifically a listing of accounts that were assigned to Pantoja, however his July 17 email only asked which market Pantoja "hired for." And, the parties at times used the term "market" interchangeable to mean both the specific office location were sales representatives were assigned and/or a listing of accounts assigned to an individual representative.[31] Here, Waltz did not clarify his intention when he asked about Pantoja's "market," never stated that he was dissatisfied with Dickson's answer, or that her answer was in some way insufficient. Accordingly, I find that Respondent timely answered Waltz' July 17 information request by informing the Union that Pantoja filled a vacancy for the "San Francisco market area" and recommend that this allegation, as it relates to Waltz' July 17 email, be dismissed.

Regarding Waltz' July 24 email to Frances Nguyen, although she was included on, and replied to, the company's email chain regarding Waltz' July 17 email, the General Counsel has not alleged that Frances Nguyen was an agent or supervisor of Respondent, nor is there any record evidence showing this to be the case. Frances Nguyen is not listed in the complaint or in the detailed stipulation entered into by the parties identifying Respondent's statutory agents and/or supervisors. Instead, Frances Nguyen is listed in a separate stipulation, involving another list of individuals, who the parties agreed were "employees of Respondent." In his brief, the General Counsel has not pointed to any record evidence showing that Frances Nguyen forwarded Waltz' July 24 email to any responsible company official, and my independent review of the record has uncovered no such evidence. Under these circumstances, where the General Counsel has not shown that Frances Nguyen was Respondent's agent or supervisor, and there is no evidence that Waltz' July 24 email was actually forwarded to any responsible company representative, I recommend this allegation be dismissed. (Tr. 572–573; Jt. Exh. 102; GC 1(e).)

3. September 11 info request (Complaint pars. 8(d) and 8(e))

Complaint paragraph 8(d) alleges that during the September 11 bargaining session Guthrie orally requested that Respondent provide the Union with the following information: (1) the market assignment of all Premise Representatives and NBAs/DSEs since the Respondent implemented the Final Offer; (2) the work market location of each NBA/DSE to be terminated; and (3) the market account assignments for Luis Pantoja and Marlon McConner since the implementation of the Final Offer. Complaint paragraph 8(e) alleges that Guthrie again requested the information regarding Pantoja and McConner during the October 31 bargaining session. (GC 1(e).)

a. Request for an audit trail

The credited evidence shows that, at one point during the September 11 bargaining session, Guthrie requested a list of all accounts assigned to New Business Advisors, along with the revenues, commissions, customer names, locations, addresses, and an audit on all the accounts. Guthrie referred to this as an "audit trail." (Tr. 150–151.) At the point in the meeting where Guthrie requested the audit trail, the parties had been discussing would happen to the NBAs if they were returned to work, with Vitales saying they would work the matter out if it happened, but they would not become BAs. (Jt. Exh. 39, p. 11; Jt. Exh. 38, pp. 21–22.) Regarding this exchange, it is unclear whether Guthrie was inquiring about the NBAs who were scheduled for layoff on September 20, or the 13 NBAs who had previously been terminated and which the Union believed would be reinstated through the grievance/arbitration process. That being said, when he requested an audit trail on the accounts assigned to the NBAs, Guthrie said that he wanted the audit "to be able to restore them to make whole when they get their jobs back." (Jt. Exh. 39, p. 11.)

accounts assigned to an individual sales representative. (Tr. 62, 64, 522–521, 881.)

[30] The complaint only alleges a violation concerning Waltz's July 24 email (GC 1(e)), but in his post hearing brief the General Counsel appears to include both emails in his theory of a violation. (GC Br., at 12–14, 25–26). I find that the information request made in Waltz's July 17 email is "closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989).

[31] See Transcript pages: 183, 522, 566–67, 596, 696–699, 753–754, 820.

The evidence further shows that an "audit trail" was an industry term describing material that showed the history of a particular account, including the revenues and commissions associated with the account, all of the sales representatives assigned the account, and the customer information including the market location of the customer. The evidence also shows that Vitales understood the meaning of the term. When Guthrie asked for an audit trail of the NBA accounts, Respondent did not protest the request. Instead, the parties simply moved on to another subject. (Jt. Exh. 38, p. 21-22; Jt. Exh. 39. p. 11; Tr. 152–153, 700, 738–739.)

b. Request for work market location

The General Counsel asserts that during the September 11 meeting Guthrie requested the "location for each NBA being laid off." (GC Br., at 16) The bargaining notes show that, during the September 11 meeting Guthrie asked for the location of one specific NBA and said the company had not told the Union the affected locations. Vitales said that he would have to get the location for the one NBA, as he did not know it offhand. He also said that he could get everyone's location, and that all locations associated with the six NBAs were affected as the entire population of New Business Advisors were being let go. Later in the meeting, the parties' bargaining notes show that the issue of locations came up again, with the Union asking about the locations of the six NBAs. The evidence also shows that Guthrie again asked about the "individual(s) Locations under ARTICLE 30" [sic] in a September 16 email to Vitales and Dickson. (Jt. Exh. 39, p. 7; Jt. Exh. 38, pp. 11, 22; Jt. Exh. 39, pp. 7, 12; Jt. Exh. 53, p. 2.)

According to Guthrie's testimony, the Union also asked about the locations of the six NBAs during the October 3 bargaining session. Guthrie testified that, during the October 3 meeting the parties discussed Dickson's August 20 letter along with Article 30 of the LBFO. Guthrie reviewed Article 30 to see if the Union had all the information that was required. Article 30, Section 30.2, states in part that, in the event of a layoff, the company would provide the Union 30 days' notice "together with a description of the work locations, job titles (levels within channels) and work groups so affected as determined by the Company." The parties' bargaining notes confirm that, during the October 3 meeting, the Union asked for the locations involving the six NBAs, and that in reply Vitales said the layoff involved every location where the six NBAs worked, that they had previously talked about the matter, and the locations were San Francisco, Oakland, Petaluma, Sacramento, San Jose, San Joaquin, Redding, and Nevada. Guthrie complained that Vitales's explanation was not good enough. The bargaining notes also show that, later in the day Guthrie again said that the Union still did not have the locations, and the reason the locations were important was because of the pay area; the base pay was different based upon location and Guthrie said it could have an impact. (Tr. 172; Jt. Exh. 2, p. 45; (Jt. Exh. 59, pp. 6, 8, 9; Jt. Exh. 60, pp. 3, 11.)

Regarding the reason for the request, Guthrie testified that he went through Article 30 with Respondent and was seeking the designated locations, and market information, to be able to identify the individuals in those locations. Guthrie also testified that the designated locations of the six NBAs was relevant, because the sales representatives work virtually, and the locations needed to be articulated somewhere for the Union to track. Moreover, Guthrie said that the NBA pay areas were associate with their designated locations, which was another reason for the request. Finally, explaining the information request, Guthrie said that the Union needed "the specifics," including the area location along with how many employees were segmented into those particular locations because the Union "needed the ability to evaluate what market" the NBAs had, and "where it went. That's the request for information." (Tr. 186) In response to this request, Guthrie testified that Respondent said "all locations" were involved, but never provided the Union with information showing which specific NBA was located in which location. During cross-examination, Guthrie admitted that in about June 2018, during contract negotiations, Respondent gave him a list of all employees, which included their locations. He also admitted that, whenever a market break occurs during the start of a campaign, the Union receives a list of the sales representatives in the market, and from this list the Union can determine which account/market is associated with which specific location in relation to the sales representatives. (Tr. 172–73, 185–186, 381–383.)

c. Request for market assignments for Luis Pantoja and Marlon McConner

In support of the allegation that, during the September 11 meeting Guthrie requested that Respondent provide the market and account assignments for Pantoja and McConner, the General Counsel's brief cites the parties' bargaining notes. (GC Br., at 16) However, it is unclear exactly where the bargaining notes show that Guthrie asked for this information; page 7 of Union's notes, cited by the General Counsel, only show that, at one point, Guthrie said "other employees transferred."[32] (Jt. Exh. 38, p. 7.) During the hearing, the General Counsel stated that Guthrie's request for an audit trail encompassed the information request for Pantoja and McConner. (Tr. 487–488.) However, the credited evidence shows that, during the September 11 bargaining session Guthrie requested an audit trail of accounts assigned to the New Business Advisors. By September 2019, Pantoja and McConner had already become BAs, and were no longer NBAs. Accordingly, because the evidence does not support a finding that the Union asked for this information during the September 11 meeting, I recommend the allegation in Complaint paragraph 8(d)(iii) be dismissed.

Complaint paragraph 8(e) alleges that, during the October 31 bargaining session Guthrie again asked for the market and account assignments for Pantoja and McConner. (GC 1(e).) An email from Vitales confirms that, during the October 31 meeting, the Union did, in fact, ask for the market assignments belonging to Pantoja and McConner. (Jt. Exh. 94.) According to Guthrie, the Union never received this information. (Tr. 183–184)

[32] The other citations set forth in the General Counsel's brief do not mention either Pantoja or McConner. See GC Br., at 16 (citing Jt. Exh. 38, pp. 11, 21, 22; JT. EXH. 39, p. 11; Tr. 152).

d. Analysis

i. Request an audit trail and the work market locations of the six NBAs

The evidence shows that, on September 11, Guthrie asked for an "audit trail" of the customer accounts assigned to the NBAs. The term "audit trail" was an industry term of art, and both Respondent and the Union understood it to mean information that would show the entire history of a particular account, including the revenues and commissions associated with the account, all of the sales representatives who had been assigned to the account, along with the customer information and the market location of the account. The evidence also shows that, on September 11, September 16, and again on October 3, Guthrie asked for the specific locations of the six NBAs scheduled for layoff.[33]

The work assignments for unit employees are presumptively relevant, and must be furnished upon request. See *Superior Protection Inc.*, 341 NLRB 267, 269 (2004) (work assignments of unit employees is presumptively relevant and must be furnished on request); *Pepsi-Cola Bottling Co. of Fayetteville*, 315 NLRB at 902. The same is true with respect to unit employee job locations. *Top Job Building Maintenance Co., Inc.*, 304 NLRB 902, 906, 909 (1991) (Union's information request seeking, among other things, employee job location and address was presumptively relevant and should have been timely provided). As the NBAs were bargaining-unit employees, the Union's request, seeking an audit trail for their accounts, which would show their market/account assignments, was presumptively relevant and should have been produced. The same is true with respect to the Union's request for the work location of the six NBAs slated for layoff.

Respondent asserts that these information requests were made in bad faith. (R. Br., at 39) I disagree. The presumption is that a union's information request is made in good faith until the contrary is shown. *Tegna, Inc.,* 367 NLRB No. 71, slip. op. at 20 (2019). And, if at least one reason for the demand can be justified, the requirement for good faith is met. Id.

Here, at the time of the September/October bargaining sessions, when the Union requested the audit trail for the accounts assigned to the New Business Advisors, along with the market location for the six NBAs scheduled for layoff, the Union had filed grievances over the discharge of 13 NBAs who had been fired months earlier, and was planning to file grievances over the impending layoff of the six remaining NBAs.[34] (Tr. 400; Jt. Exh. 39, pp. 1–2) Also, when Guthrie requested the audit trail information on September 11, he said that he wanted the information "to be able to restore them to make whole when they get their jobs back." (Jt. Exh. 39, p. 11.) And, at the time, the evidence clearly establishes that the Union believed the terminations of the various NBAs, and the impending layoffs, violated Respondent's contractual obligation and/or the Final Offer, and the parties were engaged in wide ranging discussions about the matter, with the Union wanting the NBAs to be reinstated or absorbed into the BA title.

A union is entitled to information that is relevant to its processing of grievances concerning improper layoffs and the proper amount of backpay due to remedy contract violations. *Healthbridge Management, LLC*, 365 NLRB No. 37, slip op. at 2 fn. 6, 71 (2017); see also *United States Postal Services*, 305 NLRB 997, 998 (1991) (A union is entitled to information in order to assess whether to proceed to arbitration on a grievance). A union is also entitled to information to evaluate whether or not to file a grievance. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4. Accordingly, at the time of the request, I find that the Union proffered a legitimate reason for the audit trail information, and therefore the information request was made in good faith.

The same is true with the request concerning the market locations of the six NBAs. Under the implemented LBFO, a sales representative's base pay is established by an employee's specific "designated location." (Jt. Exh. 2 pp. 15–16; Tr. 380.) During the September bargaining, Vitales stated that employees who did not sign their severance agreement would only be entitled to their base pay. (Jt. Exh. 44, p. 6.) And, the severance agreement itself stated that, after their terminations, the NBAs were compelled to cooperate with Respondent involving any investigations or disputes and would be paid an hourly rate for such cooperation, based upon their base pay. (Jt. Exh. 35, p. 9.) Where the base pay varied by designated location, the Union was clearly entitled to information showing the designated location of each of the six NBAs who were scheduled for layoff. Also, the Union was planning to file grievances on behalf of the six NBAs scheduled for layoff and was entitled to this information to evaluate the grievances. The request was not made in bad faith.

The Respondent asserts that the Union's bad faith is shown by the fact Guthrie admitted the Union had already received information regarding the designated work location of the six NBAs in the summer of 2018. (R.Br., at 39 (citing Tr. 380–382)). However, over a year had passed since this information had been provided to the Union, and in the face of the now impending layoffs, I find that it was not unreasonable for the Union to seek to confirm the accuracy of whatever information they had previously received regarding the six NBAs. *Watkins Contracting, Inc.*, 335 NLRB 222, 225 (2001) (violation where employer claimed it had provided the union with answers to the same questions 8 months earlier, as it was "not unreasonable for the union to request updated information from time to time"); *Amerisig Graphics, Inc.*, 334 NLRB 880, 885 (2001) (violation where employer failed to provide union with an updated list of employees); *The Boeing Co.*, 364 NLRB 158, 159 (2016) (employer was required to either provide the information or refer the union specifically to information that the company might have previously provided).

Also without merit is any claim from Respondent that the Union had direct access to this information from the employees themselves. (R. Br., at 39.) "The fact that employees may have

[33] The complaint only alleges that the Union requested this information on September 11, but the evidence shows the requests occurred on September 11, September 16, and on October 3; these requests were all fully litigated. *Burrows Paper Corp.*, 332 NLRB 82, 87 fn. 2 (2000).

[34] During the September 12 bargaining session Guthrie stated that the Union was going to file a grievance on behalf of the six NBAs. (Jt. Exh. 39, p. 29.)

the information and may be or are willing to give it to the union does not relieve an employer of its obligations under Section 8(a)(5) of the Act." *The New York Times Co.*, 265 NLRB 353, 353 (1982); see also *New Jersey Bell Telephone Co.*, 289 NLRB 318, 329 (1988), enfd. 872 F.2d 413 (3d Cir. 1898) ("The simplest, most expeditious, and error free source of such information would normally be the employer's records.").

Finally, while Vitales testified at trial that obtaining audit trail information was a manual process that would take weeks, he made no such claim at the bargaining table when the Union requested the information. "The Respondent's failure to raise, at the time of the request, any issue concerning the possible burden of complying with the Union's request undermines its claim of burdensomeness as a defense." *Mission Foods*, 345 NLRB 788, 789 (2005).

In sum, I find that the information the Union requested in September and October involving the work locations of the six NBAs slated for layoff and an audit trail of the NBA accounts was presumptively relevant and made in good faith. Accordingly, by refusing to provide the information requested Respondent violated Section 8(a)(1) and (5) of the Act.

ii. Request for market assignments for Luis Pantoja and Marlon McConner

"Any information concerning the status or compensation of bargaining-unit employees is presumptively relevant to the union's statutory duty, and hence is producible under the terms of the Act." *Cherokee Culvert Co., Inn*, 262 NLRB 917, 925–926 (1982) (internal quotation omitted). This includes information concerning unit employee job assignments. See *Pepsi-Cola Bottling Co. of Fayetteville*, Inc., 315 NLRB at 902; *Superior Protection Inc.*, 341 NLRB at 269.

Here, it is undisputed that, at the time the Union made its information request both Pantoja and McConner were unit employees, working as Business Agents. Therefore, the information the Union sought was presumptively relevant, and should have been produced. Although the Union had received some information regarding Pantoja in July 2019, regarding the location for which he was hired, 3 months had passed since the July request. And, after multiple bargaining sessions, by October it was clear to the parties that, when the Union asked for the market assignments received by Pantoja and McConner, it was seeking information concerning the specific accounts they were assigned. Accordingly, because the Union did not receive this information after it was requested on October 31, I find that Respondent violate Section 8(a)(1) and (5) of the Act.

4. October 17 information request (Complaint paragraph 8(h))

a. Facts

On October 17, Waltz sent an email to both Vitales and Dickson. (Jt. Exh. 86, pp. 15–16) The email read, in part, as follows:

Provide the Union with the following information:

> [1] A list of all accounts that have been moved into Northern California & Nevada, in the last 12 months for the all premise BA, NBA and SBA market(s).
>
> [2] A list of all accounts that have been moved out of Northern California & Nevada markets from premise BA, NBA and SBA channel(s) include information on the sales representative(s) the account migrated from and the sales representative(s) who received the account(s).
>
> . . .
>
> [3] All 'Market Assist' assignments in the last 12 months . . . [b]roken down by:
>
> Sales Representative(s) name
> The market migrated from and to
> Account name, CID, and subsequent assignment status (after Market Assist Assignment completed)
>
> [4] A list of accounts Market assignment or re-assignment due to sales representatives on benefits, leave or for pacing/workflow reasons. Listed by Name of [the] sales representative whose accounts were moved from and the name of the receiving sales representative.
>
> [5] For all New Hire(s) and Internal sales representative Transfer(s) Initial Assignments or Re-assignments for premise BA, NBA/DSE and SBA in NorCal in the past 12 months.
>
> [6] Disposition of Market from All departed reps for the last 12 months for Northern California & Nevada.
>
> [7] Complete list of all 'twin' accounts identified in 'Unification' including Name of the advertiser, physical address, name of both representative(s) servicing the account, proposed unified account assignment.
>
> [8] A comprehensive schedule of all assignment date(s) Publication date(s) include changes to changes to, if any to Digital renewal and assignment dates in Northern California & Nevada, the previous year date of Assignment, local Campaign name, start date, boost date (Last day to Key), extract date. [sic]

The morning of October 18, Dickson replied to Waltz, by email, saying that the company had "made a request for the Union to pay for its voluminous information requests. To date, we have not had any meaningful response. We await the Union's counter proposal on cost-sharing."[35] (Jt. Exh. 86, pp. 14–15.)

Waltz replied to Dickson on October 22 by email saying that the Union had responded to Respondent's cost sharing proposal. In his email, Waltz forwarded to Dickson a July 2019 email chain between Dickson and Gowdy about cost-sharing for information requests. Waltz further stated that the Union was available to bargain about the issue and that Dickson should contact Guthrie to make arrangements. Waltz ended his email by saying that, if the Union did not get the information it requested, or receive bargaining dates from the company, the Union would "move forward with a formal remedy." (Jt. Exh. 86, pp. 4–5.)

The July 2019 email chain between Gowdy and Dickson that Waltz included in his October 22 email is lengthy. It starts with Dickson sending the Union a proposed Memorandum of Agreement on cost sharing for information requests, and Gowdy objecting to the proposal, in part, because it was a "blanket

[35] Transcript p. 861, line 21 should read "Joint Exhibit 86" instead of "Joint Exhibit 16."

agreement" covering all information requests going forward, as opposed to only those information requests in which the cost of replying was excessive. The two then engaged in a back-and-forth, with both Dickson and Gowdy staking their respective positions, and at one-point Dickson asserting the company's belief that "the Union has weaponized requests for information to punish the Company for lawfully implementing" the Final Offer. (Jt. Exh. 86, pp. 7, 10.)

Dickson replied to Waltz' October 22 email the same date, writing that Waltz was confused about the history of the company's request for cost-sharing. She further stated that the Union had "made an extensive request, and we have asked the Union to participate in the cost of that request." (Jt. Exh. 86, p. 3.) Dickson wrote that bargaining over the issue did not require traveling to California, said the Union possessed the company's proposal on cost sharing and asked the Union for a counterproposal so they could set up a time to discuss the issue. Dickson ended her email by saying the company would wait for the Union's response before starting to gather data. Waltz replied on October 23 saying that Dickson had acknowledged receiving the information request, the employees were located in Northern California/Nevada, the Union had accepted the company's offer to meet and exchange proposals, but the company had refused to provide a date and time to meet. Therefore, Waltz stated that the Union expected all the information would be provided without delay. (Jt. Exh. 86, pp. 2–4.)

Dickson wrote back to Waltz on October 24 saying that, notwithstanding the location of the bargaining unit, a face-to-face meeting to negotiate cost sharing was not necessary, and asked the Union to explain the perceived advantages of meeting in person versus the disadvantage of the Union providing Dickson with a counterproposal in advance. Dickson further asked that Waltz explain the relevancy of the entire list of demands, and claimed the request was greatly expanded from what the parties had discussed during a related grievance meeting. Dickson ended the email saying that the company would "not gather data until we work out who pays." (Jt. Exh. 86, p. 2.)

The email exchange regarding this matter ended on October 25 when Waltz replied to Dickson writing that the Union was investigating a grievance and an unfair labor practice, and that the Union insisted on its right to meet and confer regarding the proposals but the company was refusing to provide bargaining dates. Waltz further said that the relevance of information the Union requested was expanded by the company's proposal the previous week involving accounts, which in turn impacted wages working conditions. In the email, Waltz asserted that the company had not claimed the information request was irrelevant or burdensome, and that the Union objected to Respondent's demand that it forfeit the right to bargain until the Union satisfied the company's travel conditions. Therefore, Waltz wrote that the Union considered the company's response a refusal to bargain and would be filing formal charges. (Jt. Exh. 86, p. 1.)

b. Analysis

Items #1, #3, #4, #5, and part of Item #7, of the Union's October 17 information request relate directly to bargaining unit terms and conditions of employment, including work assignments, and are therefore presumptively and should have been produced.[36] *Superior Protection Inc.*, 341 NLRB at 269 ("it is well established that information concerning unit employees' . . . work assignments, and hours is presumptively relevant . . . and must be furnished on request."); *Public Service Company of New Mexico*, 360 NLRB 573, 600 (2014) (information request about unit employees' work assignments are presumptively relevant). The same is true regarding item #8, which seeks the assignment and publication dates for the print and digital Yellow Pages. The evidence shows that these directory assignment dates serve as the start date for a new sales campaign and, in effect, was a type of sales/work schedule for unit employees. Work schedules are presumptively relevant and must be furnished. *Carry Companies of Illinois, Inc.*, 322 NLRB No. 76, slip op. at 1–2 (1996).

Regarding items #2, #6, and part of item #7, it can be argued that these requests seek information about work that was transferred to non-bargaining unit employees, and therefore was not presumptively relevant. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006) (union has burden to show relevance of information requested involving work performed outside the bargaining unit). Notwithstanding, the Board uses a broad, discovery-type standard in deciding if an information request is relevant, and a showing of possible or potential relevance is sufficient to establish the employer's duty to provide the information. Id.

Here, the implemented Final Offer, which contains a grievance procedure that is substantially similar to the one in the YP CBA, states that Respondent will not outsource unit work if such action would result in the layoff of unit sales representatives. (Jt. Exh. 2, pp. 6, 56.) Also, Article 43 of the YP CBA states that, while the Respondent has the right to determine sales channels and assignments, it would not use this right to negatively impact the earning opportunities of unit employees, and that any such impact on compensation was subject to the grievance procedure. (Jt. Exh. 1, p. 71.) Finally, the evidence shows that, after its implementation, the company was "right channeling" accounts using the revenue limits set forth in the SP-MAG, moving some of these accounts outside of the bargaining unit. Therefore, I find that the Union has shown that it had legitimate concerns about the transfer of accounts/market from bargaining-unit sales representatives to those working outside the unit. Respondent had just laid off the last remaining NBAs and was consistently asserting they could not be transferred into BA positions, as had occurred with Pantoja and McConner, because there was insufficient market and declining sales revenues. Accordingly, the Union's request for information regarding accounts/markets transferred outside of the bargaining unit was relevant to allow the Union to assess whether the company had violated its obligations under

[36] With respect to request #7, regarding "unification" and "twin" accounts, Respondent provided the Union a list of the specific accounts the Union requested, but did not include the name or the address of the customer whose accounts remained with bargaining unit members, or the name of the customer on the accounts transferred outside the unit. This is further addressed in Sec. III(A)(5) below. (Jt. Exh. 90, Jt. Exh. 90(a); Tr. 237–241.)

the Final Offer, the YP CBA, or the SP-MAG.[37] See *Postal Service*, 364 NLRB No. 27, slip op. at 18 (2016) ("Information requested to enable a union to assess whether a respondent has violated a collective-bargaining agreement by contracting out unit work and, accordingly, to assist a union in deciding whether to resort to the contractual grievance procedure, is relevant to a union's representative status and responsibilities.") *Audio Engineering, Inc.*, 302 NLRB 942, 944 (1991) (union has the right to relevant information necessary to police compliance with a labor agreement, including an expired one whose terms and conditions are still relevant); *West Summit Flexible Packaging*, 310 NLRB 45, 45 (1993) (employer violated Section 8(a)(5) by refusing to provide the Union information showing work transferred outside the bargaining unit); *W-L Molding Co.*, 272 NLRB 1239, 1240–1241 (1984) (violation where employer did not provide information concerning the subcontracting of unit work).

Also, because Respondent had consistently stated during bargaining that there was insufficient market to either keep the NBAs working or transfer them to BA positions, it is not relevant whether the Union did, or did not, explicitly explain the relevance of the information it sought regarding accounts being transferred outside the bargaining unit. *Beverly Enterprises*, 310 NLRB 222, 227 (1993) (citing *Brazos Electric Power*, 241 NLRB 1016, 1018 (1979) ("An employer is obligated to furnish requested information where the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out."). Thryv's bargaining position put the company on notice regarding the relevance of the information the Union requested on October 17. And, on October 25 Waltz actually explained the relevance of the information requested when he told Dickson in an email that the Union was investigating a grievance and an unfair labor practice. (Jt. Exh. 86, p. 1.)

Respondent argues that it was somehow privileged to withhold the information because the Union "refused to engage with the legitimate objections of the Company," citing Dickson's demand that the parties have an agreement about costs and a claim that Vitales told the Union that the request was voluminous and would take multiple departments and hours of work to put together a report. (R. Br., at 46. (citing Jt. Exh. 92, p. 1).) However, regarding Vitales's statement in the October 31 bargaining session that the Union's information request was voluminous, other than request #7 involving "unification" or "twin" accounts, it appears that Vitales was discussing another, unrelated, information requests the Union had made, and not the one made on October 17.[38] Also, the Union offered an accommodation, and said that Respondent did not have to produce a report, but could provide the Union with the raw data instead. (Jt. Exh. 92, p. 1.) The "onus is on the employer to show that production of data would be unduly burdensome, and to offer to cooperate with the union in reaching a mutually acceptable accommodation." *Mission Foods*, 345 NLRB 788, 789 (2005) Other than this self-serving statement by Vitales, there is nothing in the record to substantiate Respondent's claim that the October 17 request was so voluminous that it was burdensome. Also, after the Union proposed the accommodation of taking the raw data, there is no evidence that Respondent offered to cooperate with the Union to reach an accommodation. Accordingly, Vitales's assertions do not privilege Respondent's refusal to provide the information.

The same is true regarding Dickson's demand that the parties "work out who pays" before the company gathered the relevant information. (R. Br., at 46 (citing Jt. Exh. 86 p. 2).) There is no evidence that, at any point, Respondent justified its request for cost sharing, involving the October 17 information request, by giving the Union an estimated cost of compliance. By failing to produce evidence of substantial costs it can be inferred that the cost was not burdensome. Cf. *Tower Books*, 273 NLRB 671, 671–672 (1984), enfd. 772 F.2d 313 (1985). Moreover, "the cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data." *Oil, Chemical & Atomic Workers Local 6-418 v. NLRB*, 711 F.2d 348, 363–364 (D.C. Cir. 1983). The Board has long held that, "[i]f there are substantial costs involved in compiling the information in the precise form and at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs, and, if no agreement can be reached, the Union is entitled in any event to access to records from which it can reasonably compile the information." *Food Employee Council, Inc.*, 197 NLRB 651, 651 (1972). Therefore, notwithstanding Respondent's assertions, at a minimum the Union was entitled to access to the records from which it could compile the information itself. And here, unlike *Food Employee Council*, "the Union did not request that the . . . information be provided in any specific form, nor" has Respondent "established that compiling the requested information would entail 'substantial costs.'" *Murray American Energy, Inc.*, 370 NLRB No. 55, slip. op. at 5, fn. 7 (2020). Accordingly, by refusing to provide the Union with the information that it requested on October 17, Respondent violated Section 8(a)(1) and (5) of the Act.

5. October 30 Information Request (Complaint paragraphs 8(i) and 8(j))

a. Unification/twin accounts

In June 2019 the Union filed a grievance claiming that Respondent had moved accounts/market from bargaining unit members to non-unit sales representatives during the unification of twin accounts. As part of the grievance, the Union made an information request asking for all the twin accounts that were transferred during unification, showing the name of the representative assigned to the account, the type of product/advertising sold to the customer, the revenue, the location of the account/market, the customer name, and the customer

[37] I read the Union's request for items #4 and #5 as directed to bargaining unit employees only. To the extent they may involve bargaining unit work assigned/transferred to non-unit employees, the same analysis applies.

[38] Respondent's bargaining notes show that the Union was discussing information requested for "[f]ull accounts of all benefits expenses, auto allowances, contracts all employees signed at initial employment, market assignments given to Arnold and Louis [and the] unification of market" when Vitales replied the request was "voluminous" and would require "multiple departments" and "man hours" to put together a report. (Jt. Exh. 92, p. 1.)

identification number. In July 2019 the Union filed a related grievance, and requested the company provide the Union with all twin accounts combined through unification, along with the products/advertising sold, the revenues associated with the accounts, and the names of the representatives associated with the accounts. (Jt. Exh. 8–11; Tr. 64, 152, 465–66.)

An initial grievance meeting was held in mid-July, and Respondent took the position that the grievances were premature, as the unification process was not yet complete. During the meeting, Respondent told the Union that the unification of twin accounts would probably be completed towards the end of September, and that the company would review the list of twin accounts with the Union before any final decision was made. (Jt. Exh. 9; Tr. 466.)

On October 16, the parties had a grievance meeting to discuss the Union's grievances. Dickson, Vitales, and Bickmire were present for the company; Guthrie, Esquivel, and Waltz were both present for the Union. (Jt. Exh. 75; R. 16.) During the meeting the parties discussed the twin accounts that would be unified, and Respondent said they had a list to give the Union of seven accounts that would be transferred to sales representatives outside of the bargaining unit. Respondent also said that over 80 accounts would stay within the bargaining unit, and that the company could provide the Union with the information on those accounts within a few days. The Union said that it wanted the names and addresses of the actual businesses associated with the accounts, as it was trying to determine if the company had violated the terms of the LBFO.[39] However, Respondent took the position that the company did not have to provide the actual names of the businesses to the Union. During the meeting, Guthrie said the business names were needed, and rhetorically asked Bickmire how they could "identify rules of association" without the business names. (Jt. Exh. 75, p. 2; R. 16, pp. 1, 3–5.)

The SP-MAG notes that there are circumstances where a local telephone company has set up a customer with an alternate name, alternate address, or alternate telephone number. The SP-MAG also has various rules delineating which sales representative can either solicit, or assume responsibility for, dual accounts under various scenarios. And, according to Guthrie, without the business names associated with each account, the Union could not determine the identity of the actual customer. (Tr. 617; Jt. Exh. 3, pp. 46–48, 121.)

At the October 16 meeting, after the Union asked for the names and addresses of the twin accounts, Bickmire asked whether the Union would sign a non-disclosure agreement. Guthrie responded by asking whether the Union had ever shared any information that it had received with anyone, and Dickson said no. The Union did not sign a non-disclosure agreement. The meeting ended that day with Guthrie saying once the Union received the information regarding twin accounts, they would reschedule the meeting. The next day, the Union again asked for the names and addresses of the twin accounts. (Jt. Exh. 16, p. 5; Jt. Exh. 75, p. 2; Jt. Exh. 86; R. 16, p. 17.)

On October 30, Vitales emailed the Union a spreadsheet showing the 90 unified accounts. Through the unification process, 83 accounts remained with bargaining-unit sales representatives, and seven were transferred to nonunit employees. Of the seven accounts being transferred, three were located in Southern Nevada and the remaining customers were in Minnesota, Utah, Oregon, and Arizona. For the 83 accounts that stayed with bargaining-unit sales representatives, the spreadsheet contains the customer ID, City, State, and Zip Code associated with the account, the account revenues, the name of the sales representative originally assigned to the account pre-unification, and he name of the sales representative assigned the account postunification. The spreadsheet for the seven accounts being transferred outside of the bargaining contained this same information, along with the street addresses associated with each account. The next day the parties met for bargaining. During the meeting Guthrie again asked for the names of the customers associated with all of the twin accounts, saying there was no way to compare the information without the customer names. Later that day, Guthrie sent Respondent an email again asking for the customer names. (Jt. Exh. 90(a); Jt. Exh. 92, pp. 3, 5; Jt. Exh. 93, pp. 6, 10; Jt. Exh. 96.)

The evidence shows that, on various occasions in the past, Respondent has provided the Union with the names and addresses of customers without asking for a nondisclosure agreement. The evidence further shows that that, at the beginning of each campaign, during the market break, Respondent sends the Union a listing of every account assigned to bargaining-unit sales representatives which includes the name of the business/customer associated with each account. Respondent has never required the Union sign a nondisclosure agreement for this information. Also, each sales representative has access to all of the information associated with their accounts, and the company has not prohibited the Union from getting this information from bargaining unit members. Nor is there any evidence that Respondent has prohibited employees from sharing this information with the Union. The Union never received the information it requested regarding the business names for all of the twin accounts, or the addresses associated with the twin accounts that remained with bargaining-unit sales representatives. (Tr. 329–330, 479–480, 511, 547–549, 956–958.)

b. Analysis

I previously found that the Union's information request regarding unification/twin accounts is relevant, including information regarding accounts being transferred to non-unit sales representatives. The Union had an outstanding grievance over the unification process involving the twin accounts and could not determine the customer's identity with the account identification number alone. And, the SP-MAG contains certain rules governing dual accounts, specifically noting that sometimes local telephone companies have established a customer with alternate names or alternate addresses. The Union's information request for the customer names and addresses was clearly relevant, including the information involving accounts transferred to

[39] Complaint par. 8(i) alleges that the union asked for the customer names and addresses on October 30, while the evidence shows that it first asked for the information on October 16, and then again asked for it on October 17 and 31. (GC 1(e).) The difference in dates is of no consequence, as the matter was fully litigated.

employees outside the bargaining unit.

Regarding Respondent's claims of confidentiality, such claims, when substantiated by the evidence and made in good faith, can serve as a justification for refusing to provide a union with relevant information. *National Grid USA Service Co.*, 348 NLRB 1235, 1243 (2006); *Colgate-Palmolive Co.*, 261 NLRB 90, 102 (1982). "However, where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged, and the employer is under a duty to furnish the information." *National Grid USA Service Co.*, 348 NLRB at 1243; Cf. *Pennsylvania Power Co.*, 301 NLRB 1104, 1107 fn. 16 (1991) (Board noting that an employer cannot legitimately withhold information from a union, claiming a need to keep the identity of informants secret, if it plans to have the informants testify at arbitration).

Here, I find that Respondent's claim of confidentiality was not substantiated and therefore not made in good faith. The evidence shows that Respondent has provided the Union with the names and addresses of its customers in the past, without requiring a non-disclosure agreement. Indeed, on October 30, the company provided the Union with the addresses of the seven accounts being transferred to non-unit employees. Respondent does not explain how or why the addresses of those seven accounts were not confidential, but the addresses of the 83 accounts remaining with bargaining-unit employees are somehow confidential. Regarding the names of customers, the evidence shows that before each sales campaign begins, during the market break, Respondent sends the Union a listing of every customer account, including the business name associated with each account. At no point has Respondent ever required the Union to sign a nondisclosure agreement before providing the Union with this information, and Respondent has not shown that the situation has somehow changed. *Facet Enterprises*, 290 NLRB 152, 165 (1988).

The evidence also shows that Respondent's sales representatives have ready access to all of the information that the company was withholding from the Union regarding customer accounts. In fact, as all of the bargaining-unit sales representatives are considered "Premise" representatives, their job requires them to visit customers at their place of business. To do so they would clearly need to know the name and address of each customers they are visiting. Respondent does not prohibit the Union from getting customer information directly from its bargaining unit members, and there is no evidence in the record that Respondent precludes employees from sharing this information with the Union. Cf. *Lawson Products, Inc., v. Avnet, Inc.*, 782 F.2d 1429, 1441 (7th Cir. 1986) (trial court properly found that information was not confidential under state law where the company sales force and customers had access to the information; the information supplemented data compiled by the sales representatives for their own use; the information could be acquired by other means such as phone calls or visits to customers or suppliers whose names could be found in the Yellow Pages; the information became outdated rapidly; and no formal confidential arrangements were made).

Finally, the evidence shows that the majority of Respondent's revenues come from its print or internet Yellow Pages. Thus, members of the public can simply pick up the Yellow Pages, or use Respondent's online directory, and find the names and addresses of Respondent's customers. Id; see also, *Gemini Supply Corp. v. Zeitlin*, 590 F.Supp. 153, 159 (E.D.N.Y. 1984) (party to litigation did not show that customer list was confidential where, in part, the list could be recreated out of public documents such as the Yellow Pages). Under the circumstances presented, Respondent has failed to establish any legitimate and substantial confidentiality interests. Accordingly, Respondent was under a duty to furnish the Union with the information it requested, and by not doing so violated Section 8(a)(1) and (5) of the Act.

B. Layoff of the Six New Business Advisors

1. Respondent bargained with the Union and reached impasse

Absent a contractual provision whereby the union has waived its right to bargain, an economic layoff is a mandatory subject of bargaining. *Emcor Group, Inc.*, 330 NLRB 849, 853 (2000). Therefore, an employer is obligated under Section 8(a)(5) of the Act to provide a union with notice and an opportunity to bargain about both the layoff decision along with the effects of the decision.[40] *Taft Coal Sales & Associates, Inc.*, 360 NLRB 96, 100 (2014), enfd. 586 Fed. Appx. 525 (11th Cir. 2014); see also *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) ("Layoffs are not a management prerogative" and until established in a contract, "a company that wants to lay off employees must bargain over the matter with the union."). Working under an implemented final offer does not excuse an employer from its bargaining obligation. *Kinsbury, Inc.*, 355 NLRB 1195, 1195 fn. 1, 1205 (2010). "[A] unilateral implementation does not amount to or equate to a waiver of statutory rights by the Union . . . [as a] final offer is not . . . an implemented contract. It is an implemented proposal, to which the Union has not bound itself, and through which [the employer] cannot unilaterally impose a waiver of statutory rights." Id. at 1205.

After bargaining in good faith, if the parties have reached an impasse, or if the union has subsequently waived its opportunity to bargain, the employer is allowed to implement its proposal. *Aggregate Industries v. NLRB*, 824 F.3d 1095, 1103 (D.C. Cir. 2016). The Board has also held that, "where a union responds to an employer's proposal only on the basis that it 'objects' and . . . does not present a reasoned counterproposal," an employer's subsequent unilateral implementation is lawful because the union has either waived its opportunity to bargain, or the parties have quickly reached an impasse. *Castle-Pierce Printing Co.*, 251 NLRB 1293, 1303 (1980). Such is the case here.

The evidence shows that, after Gowdy requested bargaining on August 22, Respondent attempted, in good faith, to schedule bargaining, but the first opportunity the Union was able to meet was not until September 11. Respondent met with the Union on September 11 and 12, and bargained. However, during the bargaining, the Union never offered any substantive bargaining proposals regarding the NBA layoff. Instead, the Union protested

[40] Respondent has not asserted that the layoff decision here involved a change in the scope and direction of the enterprise, requiring the analysis set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). See *Emcor Group, Inc.*, 330 NLRB 849, 849 fn. 1 (2000). Nor does the evidence support any such finding.

the decision, claimed ignorance as to what was actually occurring, complained that the company never presented a written layoff proposal, and declared that it would file an unfair labor practice charge because Respondent did not meet with the Union at 6-month intervals to discuss absorbing the NBAs into the BA title. The closest the Union came to presenting an actual proposal, was saying that it wanted the NBAs integrated into BA positions. However, even then the Union never presented any type of reasoned plan as to how this would occur; instead it just asserted the NBAs should be absorbed into the BA classification. Even when Vitales reiterated that Respondent was using Article 30 of the Final Offer as its layoff proposal, and that the Union could accept the company's proposal or present a counter offer, the Union did not present any alternative proposal. Instead, Guthrie simply said that the company's proposal was rejected. Under these circumstances, I believe that the company met its obligation to bargain. *Aggregate Industries*, 824 F.3d at 1103. Accordingly, I find that, because the Union failed to present any reasoned proposals before September 20, the evidence supports a finding that the impasse had quickly occurred, and/or by its conduct the Union waived its opportunity to bargain. "Either way, the company tried to bargain and got nowhere. It therefore had a right to implement its plan unilaterally." Id.; see also *Castle-Pierce Printing Co.*, 251 NLRB at 1303 (evidence supports a finding that impasse occurred, and further bargaining was futile, where the union refused to discuss the content of the company's proposal, asserted the proposal was unlawful and could not be implemented, and announced the filing of an unfair labor practice charge); *San Diego Van & Storage Co.*, 236 NLRB 701, 705–706 (1978) (when, instead of offering proposals, the union's "only reaction is negativism; i.e., 'You can't do it, we don't like it and the employees won't let ya,'" the employer may assume that an impasse has been reached and further bargaining is futile).

As for the post-implementation bargaining that occurred on October 3, 18, and 31, the evidence shows that the parties were bargaining the effects of the NBA layoffs. All the bargaining notes for these dates are titled "Effects Bargaining" and while they discussed many of the same issues previously discussed during the September bargaining sessions, they also discussed matters specific to addressing the effects of the September 20 layoffs, including issues like severance payments, waivers, and reassigning the residual accounts that belonged to the laid off NBAs. See e.g., James L. Atkinson, *Automating the Workplace: Mandatory Bargaining Under Otis II*, 1989 U. Ill. L. Rev. 435, 442–443 (1989) (contrasting decisional bargaining with effects bargaining). The Complaint does not allege that Respondent failed to bargain over the effects of the layoff, and the General Counsel was clear at the hearing that the government was not asserting any such claims. (Tr. 174–175.)

2. Respondent did not present the layoff as a fait accompli

The General Counsel asserts that Respondent presented the layoff to the Union as a fait accompli, and had no intention of bargaining with the Union over any aspect of the layoff. (GC Br., at 38–41) If true, this would excuse the Union's failure to offer any proposals during bargaining, and would constitute a violation of Section 8(a)(1) and (5) of the Act. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023–1024 (2001). However, I believe the credited evidence does not support such a claim.

Dickson's August 21 letter, providing 30 days' notice of the layoff, specifically invited the Union to exercise its right to meet and discuss the company's layoff plan. After the Union requested bargaining, Respondent arranged for bargaining at the first opportunity the Union was available. And, during the bargaining sessions, Respondent specifically asked the Union to present its counter offers to Respondent's layoff proposal. These facts do not support a finding that the decision was presented as a fait accompli. *San Diego Van & Storage Co.*, 236 NLRB 701, 705 (1978) (decision was not presented as a fait accompli where the employer met with the union and sought its suggestions for alternatives).

While Dickson's August 21 letter used positive language, saying that Respondent "will administer" a layoff of the NBAs on September 20, the Board has stated that "an employer's use of positive language in presenting its proposal does not constitute an indication that a request for bargaining would be futile." *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Haddon Craftsmen*, 300 NLRB 789, 790 (1990) ("it is not unlawful for an employer to present a proposed change . . . as a fully developed plan or to use positive language to describe it."). This is especially true here, where Respondent scheduled bargaining on the first date the Union was available and then proceeded to meet and bargain with the Union about the layoff.

In support of a finding that the announcement was a fait accompli, the General Counsel also points to the fact that Henshaw announced the layoff to employees and told them that their severance packages were forthcoming. (GC Br., at 39–40) "Although the Board has generally found that announcement of changes to employees *before* notification to the Union is sufficient to establish that an employer's decision is a fait accompli, that did not occur here." *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001) (Employer's proposal was not presented as a fait accompli, even though it was announced to employees almost immediately after notice was provided to the Union, and the employer denied a request by the union to postpone the announcement.) (italics in original). Here, Respondent's teleconference with employees occurred two weeks *after* the Union was given notification of the layoff. "Board law requires an employer, after reaching a decision concerning a mandatory subject, to delay implementation of the decision until after it has consulted with the [union], but does not require that the employer delay the decision-making process itself." *Haddon Craftsmen*, 300 NLRB 789, 790 fn. 9 (1990).

Moreover, after the teleconference with employees, Respondent met with the Union for bargaining, and specifically asked the Union for its counter proposals regarding the layoffs. The Board has found that, even when the General Counsel proves a prima facie case of a fait accompli, the employer can cure the violation by its subsequent conduct. *W.W. Grainger, Inc.*, 286 NLRB 94, 97 fn. 9 (1987), enf. denied 860 F.2d 244 (7th Cir. 1988) (citing *American President Lines*, 229 NLRB 443, 453–454 (1977)). Therefore, even if the General Counsel has made a prima facie showing of a fait accompli, Respondent cured any such conduct by bargaining with the Union in good faith about the layoff and

specifically asking the Union for its counter proposals regarding the issue.

3. Outstanding information requests did not affect bargaining over the layoff decision

In support of its claim that Respondent refused to bargain over the decision to layoff the NBAs, the General Counsel points to the fact that the Respondent was "ignoring the Union's various requests for information." (GC Br., at 38.) Therefore, the General Counsel asserts that the Union "was left without the information it needed to formulate proposals" which precluded a lawful impasse over the layoffs. Id. To be sure, "a party's failure to provide requested information that is necessary for the other party to create counterproposals, and, as a result, engage in meaningful bargaining, will preclude a lawful impasse." *E.I. Du Pont Co.*, 346 NLRB 553, 558 (2006). Here, however, I find that the General Counsel has failed to show that the Union's outstanding information requests affected its ability to formulate proposals or otherwise impeded the progress of negotiations.

Of the various information requests made by the Union, and alleged in the Complaint as violations, when the NBA layoffs were implemented on September 20, Respondent had unlawfully failed to provide information for only two of the Union's requests that were potentially relevant to the issues at hand: (1) the September 11 request for an audit trail; and (2) the request for the location of the NBAs. Regarding the request for an audit trail, the evidence shows that this request was unrelated to the Union's bargaining about the decision to layoff the six NBAs. During the September 11 bargaining session, Guthrie specifically said that he wanted the audit trail information to "make whole" New Business Advisors when they were reinstated, presumably through the grievance process. (Jt. Exh. 39, p. 11) Thus he wanted this information to calculate a make whole, or backpay, remedy for what he believed were unlawful layoffs or discharges. Because the Union was not seeking the audit trail information for purposes of formulating bargaining proposals, I find that Respondent's failure to provide the Union with the audit trail information does not preclude a finding that the parties had reached an impasse regarding the layoffs. *Sierra Bullets, LLC*, 340 NLRB 242, 243–244 (2003) (unfulfilled information request with no relation to core issues does not preclude impasse).

As for the Union's request for the location of the six NBAs, although I have found that it was not unreasonable for the Union to ask for this information to reconfirm what was already in the Union's records, I do not believe that Respondent's failure to provide the information before September 20 precluded impasse; the evidence shows that the Union already possessed this information and knew the location of the six NBAs. Before every market break for a particular campaign, Respondent sends the Union detailed information regarding all the sales representatives in the market. From this information the Union can determine the accounts, markets, and locations associated with each sales representative. Therefore, for all of the campaigns in 2018 and 2019, the Union already had detailed information regarding every account assigned to each of six NBAs for the upcoming campaign; from this information the Union knew their locations. Also, the Union received specific information about the locations of the NBAs during contract negotiations in June 2018. The record shows that the six NBAs were hired between 2012–2015 (R. 7; Jt. Exh. 29), and there is no evidence that there was any material change in their positions or assignments in the 15 months prior to their layoff. The work locations of the six NBAs was no secret to the Union. Instead, it appears that what Guthrie was really upset about was some prior contract bargaining history about work locations, along with the fact that Article 30 of the Final Offer required layoff notices to contain a description of work locations, but this was not provided in Respondent's August 21 letter. (Jt. Exh. 62, p. 4; Jt. Exh. 53, p. 2; Jt. Exh. 92, p. 8; Jt. Exh. 93, pp. 18–19.)

The parties' bargaining notes and emails do not show that, before the September 20 layoff, the Union objected to Respondent's layoff proposal because of its outstanding information request regarding the location of the NBAs. Cf. *United Auto Workers v. NLRB*, 516 F.App'x. 488, 491 (6th Cir. 2013) (the fact the union did not show, during the relevant period, that it objected to proposals on account of its outstanding information request, is evidence that the withheld information did not impede or materially affect the progress of negotiations). Thus, while I have found it was not unreasonable for the Union to ask for the locations, to reconfirm data in its records, the evidence shows that the Union was already in possession of this information, and the fact it did not receive the same information again in mid-September 2019 did not materially affect its ability to make bargaining proposals. At the time of the August 21 notification, the Union already knew the locations of the six NBAs, could formulate meaningful proposals accordingly, but simply chose not to do so.[41] Cf. *Brewery Products, Inc.*, 302 NLRB 98, 98 fn. 2, 101–102 (1991) (delay in providing information did not undercut impasse finding or taint the subsequent lockout, where most of the delayed information was already provided prior to the lockout, was made irrelevant by the withdrawal of proposals, and the union was reluctant to reach an agreement prior to reaching a master agreement with employer association from which it had resigned). Accordingly, I find that the Union's outstanding information requests did not preclude a finding that the parties were at impasse regarding the layoffs. Therefore, I recommend that the allegations in Complaint paragraph 7 be dismissed.

CONCLUSIONS OF LAW

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

2. The International Brotherhood of Electrical Workers, Local 1269 (Union), is a labor organization within the meaning of Section 2(5) of the Act.

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

[41] To the extent any of the union representatives testified at the hearing that they did not know the locations of the six NBAs, I find this to be not credible, as it conflicts with the other record evidence that the Union received this information during the campaigns/market breaks and during negotiations in 2018. Any such testimony was simply "post hoc speculation about the significance of the withheld information and does not prove that it served as a sticking point during . . . negotiations." *United Auto Workers,* 516 F.App'x. at 491.

All sales and clerical employees in the Northern California Region in the following classifications: Account Executive New Media (New Business Advisor-Premise); Advertising Sales Representative (Business Advisor-Premise); Key Account Executive (Sr. Business Advisor-Premise); Customer Associate; Representative Directory; Sales Representative, Field Sales Collector, Office Assistant, Supervisor's Assistant, Telephone Sales Representative, and Universal Support Associate, excluding all other employees and supervisors as defined in the Act.[41]

4. By failing and refusing to provide the Union with the information it requested that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of its employees, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(1) and 8(a)(5) of the Act.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. Respondent is ordered to provide the Union with the information it requested, as outlined herein, that is relevant and necessary to the Union's performance of its duties and responsibilities as the exclusive collective-bargaining representative of Respondent's employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[42]

ORDER

Respondent Thryv, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide the Union with information it requested that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of Respondent's employees.

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

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

(a) Promptly provide the Union with all the relevant information it requested regarding: Quarterly Relief; the locations of the New Business Advisors; and the accounts assigned to, or worked on by, Luis Pantoja and Marlon McConner.

(b) Promptly provide the Union with all the relevant information it requested regarding an audit trail of the New Business Advisor accounts showing: the history of the account; the revenues and commissions associated with the account; the sales representatives assigned to the account; the customer information for the account; and the market location of the account.

(c) Promptly provide the Union with all the relevant information requested in its email dated October 17, 2019, as further set forth herein.

(d) Promptly provide the Union with all the relevant information it requested regarding twin accounts and the unification process, including the customer names and customer addresses associated with the twin accounts.

(e) Within 14 days after service by the Region, post at its Northern California and Nevada area facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, 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.[43] In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 12, 2019.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 20 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 with this order.

Dated, Washington, D.C. April 23, 2021

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[41] The job titles of Customer Associate, Representative Directory, Sales Representative, Field Sales Collector, Office Assistant, Supervisor's Assistant, Telephone Sales Representative, and Universal Support Associate have been "archived" by the parties and are not currently in use.

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

[43] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means, and to the reading of the notice to employees. 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."

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 provide the International Brotherhood of Electrical Workers, Local 1269 (Union) with requested information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of our Northern California Region sales and clerical employees in the following classifications:

> Account Executive New Media (New Business Advisor-Premise); Advertising Sales Representative (Business Advisor-Premise); Key Account Executive (Sr. Business Advisor-Premise); Customer Associate; Representative Directory; Sales Representative, Field Sales Collector, Office Assistant, Supervisor's Assistant, Telephone Sales Representative, and Universal Support Associate, excluding all other employees and supervisors as defined in the Act.

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

WE WILL promptly provide the Union with all the relevant information it requested regarding: Quarterly Relief; the locations of the New Business Advisors; the accounts assigned to, or worked on by, Luis Pantoja and Marlon McConner, and the customer names and addresses associated with twin accounts.

WE WILL promptly provide the Union with all the relevant information requested in its email dated October 17, 2019.

WE WILL promptly provide the Union with all the relevant information it requested regarding an audit trail of the New Business Advisor accounts showing: the history of the account; the revenues and commissions associated with the account; the sales representatives assigned to the account; the customer information for the account; and the market location of the account.

THRYV, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-250250 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.