JD-48-25
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BA-TAMPTE PICKLE PRODUCTS, INC.

and **Case No. 29-CA-322438**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 342

Matthew A. Jackson, Esq.
for the General Counsel.
Aaron C. Schlesinger, Esq.,
(Peckar & Abramson, P.C., River Edge, NJ)
for the Respondent.
Eric M. Milner, Esq.,
for the Charging Party Union.

DECISION

Statement of the Case

BENJAMIN W. GREEN, Administrative Law Judge. The complaint in this case alleges that Ba-Tampte Pickle Products, Inc. ("Respondent") violated Section 8(a)(5) and (1) of the National Labor Relations Act ("Act") by failing and refusing to bargain with the United Food and Commercial Workers Union, Local No. 342 ("Union") regarding the effects of the sale of the assets of the Respondent's retail business and the layoff of 13 unit employees. The Respondent contends that the parties bargained in advance over the effects of those decisions as reflected in their collective-bargaining agreement (i.e., the payment to laid off unit employees of unused sick leave and vacation). For reasons discussed below, I recommend the finding of a violation as alleged in the complaint.

The charge in this case was filed on July 19, 2023.[1] (G.C. Exh. 1(A)) The Regional Director for Region 29 issued the complaint on November 21, 2024 and the Respondent filed an answer thereto on December 5, 2024. (G.C. Exh. 1(D) & 1(F)) By agreement of the parties, a virtual Zoom hearing was held before me on February 26, 2025. No witnesses were called and no testimony was taken at hearing. Rather, the parties introduced into evidence a Joint Stipulation of Facts (Jt. Exh. 1) with attached exhibits (Jt. Exhs. 2-14).

On the entire record, after considering the post-hearing briefs filed by the General Counsel, the Respondent, and the Union, I render these

Findings of Fact

Jurisdiction

The Respondent admits it satisfies the commerce requirements for jurisdiction and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, the Board has jurisdiction over this case pursuant to Section 10(a) of the Act.

[1] All dates herein refer to 2023, unless stated otherwise.

Alleged Unfair Labor Practices

The Respondent is located at 77 Brooklyn Terminal Market, Brooklyn, New York and specializes in the production and distribution of refrigerated pickles and other condiments in both wholesale and retail packaging. Its products are sold directly to supermarkets, delicatessens, and higher-end restaurants in the New York Metropolitan area, as well as to supermarkets nationwide. (Jt. Exh. 1 ¶ 1)

At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in the following bargaining unit (Jt. Exh. 1 ¶ 2 & Jt. Exh. 2):

> All production shipping, receiving, chauffeur, helper, office and maintenance employees, and such other employees performing work incidental thereto, employed by the Employer in its establishment or any and all other establishments now operated, or thereinafter acquired and operated during the term hereof, by the Employer, located in the State of New York and/or State of New Jersey, excluding non-working supervisors and such other categories as are excluded by the Labor Management Relations Act of 1947, as amended.

The Respondent and the Union were parties to a collective-bargaining agreement, which was effective from November 1, 2013 to October 31, 2018. (Jt. Exh. 1 ¶ 2 & Jt. Exh. 2) In October 2020, the Respondent and Union extended the collective-bargaining agreement to April 30, 2021, with certain modifications. (Jt. Exh. 1 ¶ 3 & Jt. Exh. 3) On about July 20, 2022, the Respondent and Union entered into a Memorandum of Agreement ("MOA") which extended the collective-bargaining agreement to October 31, 2026, with certain modifications.[2] (Jt. Exh. 1 ¶ 3 & Jt. Exh. 4) CBA Articles 9, 10, and 13 were not modified by the extension agreement or MOA. (Jt. Exhs. 2-4)

CBA Article 9 – Vacation, Section (A), provides for vacation with pay of 1 week upon employment for 1 year, 2 weeks upon employment for 2 years but less than 10 years, 3 weeks upon employment for 10 years but less than 20 years, and 4 weeks upon employment for 20 years. (Jt. Exh. 2 p. 7) CBA Article 9(A) further provides that "[e]mployees who have worked more than sixty (60) days but less than one (1) year shall receive a vacation proportionate to the part of the year worked retroactive to the date of hiring." (Jt. Exh. 2 p. 7)

CBA Article 10 – Sick Leave states, in part, as follows (Jt. Exh. 2 p. 8):

> (A) Each employee with more than sixty (60) days continuous service with the Employer shall receive six (6) days sick leave with pay during each calendar year.
>
> . . .
>
> (C) Any employee who has worked only part of the calendar year [ ]but for more than sixty (60) days shall receive paid sick leave on a pro-rata basis.
>
> (D) Any employee quitting without a least forty-eight (48) hours written notice to the Employer shall not be entitled to any unused sick leave.

[2] The current collective-bargaining agreement as modified and extended is referred to herein as the "CBA."

CBA Article 13 – Layoff, Seniority and Recall, states, in part, as follows (Jt. Exh. 2 p. 10):

> (A) Employees may be laid off as a result of lack of work and on condition that one week's written notice be sent by the Employer to the Union by certified mail, return receipt requested, wherein the Employer sets forth the reason for the layoff. An employee who is laid off shall receive paid sick leave and vacation on a pro-rated basis computed to the day of the layoff.

By letter dated May 19, the Respondent's Chief Operating Officer Howard Silberstein notified the Union that the Respondent planned to sell the assets of its retail business, consisting of its equipment, machinery and intellectual property, that the sale was anticipated to take place on or about June 12, and that the Respondent would permanently discontinue its packaging operations at or around that time, resulting in the layoff of the 13 bargaining unit employees listed below (Jt. Exh. 1 ¶ 7 & Jt. Exh. 5):

Matthew H. Bryant	Ines Martinez Lopez
Silvana Bustamante	Ivan Meza Canales
Mariana Castillo	Carmen Ortega Soliz
Araceli Gomez	Yolanda Ortiz
Marie Denise Lamour	Jesula Prevost
Maria Loj an Arevalo	Marie St. Jean
Yolette Louis Jeune	

Silberstein's May 19 letter also stated as follows (Jt. Exh. 5):

> Please be advised that we will comply with our obligations as set forth in Article 13 of our Collective Bargaining Agreement as it relates to those bargaining unit employees who are laid off. We will of course, continue to comply with our Collective Bargaining Agreement Obligations for our remaining 6 bargaining unit employees who have not been subjected to layoff.

By letter dated May 25, Union President Deana Abondolo requested information and demanded that Respondent engage in bargaining with the Union concerning the effects of its decision to sell its retail business and the effects of the resultant layoffs. (Jt. Exh. 1 ¶ 8 & Jt. Exh. 6) Abondolo's May 25 letter stated, in part, as follows (Jt. Exh. 6):

> The Union would be available tomorrow, May 26th, May 29 thru June 2nd and the rest of the month of June to commence bargaining over the effects of your decision to sell the business including to the extent applicable your decision to lay off bargaining unit employees, including:
>
> 1. Your obligations under the successor and assigns clause of the Collective Bargaining Agreement.
> 2. Issues of severance and unpaid entitlements in the event the bargaining unit employee layoffs should be effectuated after negotiations of the same.

Via letters dated May 31, sent via FedEx and Regular Mail, Respondent CEO Silberstein separately notified each of the 13 bargaining unit employees listed above that the Respondent planned to sell the assets of its retail business, consisting of its equipment, machinery and intellectual property, on or about June 12, which would result in the closing of the Respondent's

packing operation and each employee's layoff, effective June 9. A copy of all of the May 31 letters were also sent to, and received by, the Union. (Jt. Exh. 1 ¶ 9 & Jt. Exh. 7)

By letter dated June 2, Respondent attorney Aaron C. Schlesinger responded to the Union's May 25 letter by producing the requested information and accepting the Union's request to meet and bargain over the effects of the forthcoming expected layoffs of unit employees. (Jt. Exh. 1 ¶ 10 & Jt. Exh 8) Schlesinger's June 2 letter stated, in part, as follows (Jt. Exh. 8):

> Finally, please be advised that it is Ba Tampte's position that the effects of the upcoming layoffs have already been negotiated and agreed upon pursuant to Article 13 of the parties' collective bargaining agreement. However, notwithstanding the foregoing, and without waiving same, in the interest of good faith we will agree to meet with Local 342 UFCW. Please let us know your dates of availability.

Schlesinger's June 2 letter attached a list of all 19 bargaining unit employees, their hire dates, whether they were being laid off or retained, and their positions. (Jt. Exh. 8) This list indicated that the hire date of unit employee Yolanda Ortiz was January 9. (Jt. Exh. 8)

On about June 9, the Respondent laid off each of the unit employees named in Respondent CEO Silberstein's May 19 letter. (Jt. Exh. 1 ¶ 11 & Jt. Exh. 5)

On about June 9, the Respondent also issued payment to each laid off employee in an amount calculated to equal the monetary value of each employee's unused sick leave and vacation benefits that the employee would have accrued as of December 31, had the employee remained employed by the Respondent until that date. (Jt. Exh. 1 ¶ 12 & Jt. Exh. 9) Paragraph 12 of the parties' joint stipulation of facts further states as follows (Jt. Exh. 1 ¶ 12):

> Respondent made no postemployment payment to laid off employee Yolanda Ortiz because Ortiz was a new employee who had insufficient length of tenure with the Respondent to qualify for post-employment layoff pay under the terms of the Parties' collective-bargaining agreement.[3]

On June 12, the Respondent completed the sale of certain assets of its retail business consisting of its equipment, machinery and intellectual property to E.W. Grobbel Sons, Inc. (Jt. Exh. 1 ¶ 13)

Via e-mails dated from June 9 through June 14, the Respondent and the Union mutually agreed to meet for the purpose of bargaining over the effects of the Respondent's sale of its retail business assets and its layoff of unit employees by Zoom videoconference on June 19, at 11:00 a.m., with the videoconference web link, to be provided by the Union. (Jt. Exh. 1 ¶ 14 & Jt. Exh. 10)

On June 19, at 9:50 a.m., Respondent attorney Schlesinger sent an email to Union representative Carolina Martinez which stated, "Are we on for today at 11? I did not receive a zoom link." (Jt. Exh. 1 ¶ 14 & Jt. Exh. 10) The Union failed to provide the Respondent with a videoconference link for the parties' scheduled meeting and failed to appear for the meeting at the agreed upon time. (Jt. Exh. 1 ¶ 15) Later that day, on June 19, at 2:10 p.m., Martinez sent

[3] Despite this stipulation, in his posthearing brief, the General Counsel asserted that Ortiz "had sufficient tenure with Respondent to qualify to receive payout for her unused vacation and sick leave benefits upon her layoff[.]" (G.C. Brf. p. 3)

an email reply to Schlesinger which stated, "I didn't have the information of the call on my calendar, what is your availability this week?" (Jt. Exh. 1 ¶ 14 & Jt. Exh. 10)

On June 20, Schlesinger sent Martinez an email asking the Union if it was available to meet that day at 3 p.m. The Union agreed and subsequently sent a Zoom link to the Respondent. (Jt. Exh. 1 ¶ 16 & Jt. Exh. 10)

That same day, on June 20, the parties met via Zoom. The Union was represented by Martinez. The Respondent was represented by Schlesinger, Respondent CEO Silberstein, Respondent Secretary Seth Silberstein, and Respondent Vice President Scott Silberstein. During the bargaining session, the Union requested information showing that the laid off bargaining unit employees in fact received the sick leave and vacation payout as required by the CBA. The Respondent requested that the Union should memorialize its request for information in writing, and the Union agreed to memorialize its request in writing. The Union further stated that it would email the Respondent a bargaining proposal. (Jt. Exh. 1 ¶ 17) The parties scheduled a second Zoom bargaining session for June 27. The Union subsequently sent the Respondent a Zoom link for the meeting scheduled for June 27. (Jt. Exh. 1 ¶ 18 & Jt. Exh. 11)

The Union did not send the Respondent a written set of bargaining proposals before the agreed upon meeting time on June 27. (Jt. Exh. 1 ¶ 19)

On June 27, at 10 a.m., the Respondent's representatives, including Respondent attorney Schlesinger, appeared for the parties' scheduled meeting at the designated Zoom virtual meeting space. However, the Union did not appear for the meeting. (Jt. Exh. 1 ¶ 20) On June 27, at 10:14 a.m., Union representative Martinez sent an email to Schlesinger which stated, "Is it possible to push the meeting back to 12 pm? Please advise." (Jt. Exh. 12) At 10:33 a.m., Schlesinger emailed Martinez a reply which stated, "We waited for you and you never got on. I am not available at that time and will get back to you with the dates and times." (Jt. Exh. 12)

On June 28, 12:52 p.m., Martinez emailed Schlesinger, "My apologies for yesterday, I was in the hospital. Are you available today or tomorrow? Also, what days next week are you available? Please send me the company's counterproposal." (Jt. Exh. 1 ¶ 21 & Jt. Exh. 12) On June 28, at 12:55 p.m., Schlesinger replied, "I hope you are feeling better. I am not available. However, you were supposed to send me in writing your proposal. If you have [n]ot done so, please do so as promised. I can then draft a response." (Jt. Exh. 1 ¶ 21 & Jt. Exh. 12) On June 28, at 4:45 p.m., Martinez emailed Schlesinger the Union's effects bargaining proposal. (Jt. Exh. 1 ¶ 21 & Jt. Exhs. 12-13)

The Union's proposed effects agreement contains erroneous language asserting that the Respondent permanently ceased its entire operations and closed all of its facilities. (Jt. Exh. 1 ¶ 22 & Jt. Exh. 13)

On July 7, Martinez sent an e-mail to Schlesinger in which she requested that the Respondent provide its availability to meet again with the Union to continue bargaining over the effects of the Respondent's layoff of unit employees and further requested that the Respondent send the Union a counterproposal in response to the proposals Martinez submitted on June 28. (Jt. Exh. 1 ¶ 23)

By letter dated July 7, Schlesinger notified Martinez that the Respondent rejected the Union's proposals in their entirety, that the Respondent would not offer any counterproposal, and provided the basis for its decision. Schlesinger attached to his July 7 letter documents

setting forth the Respondent's calculations of what laid off unit employees were entitled to receive under the CBA and what the Respondent had paid each named employee following their layoff. The documents attached to Schlesinger's July 7 letter accurately reflect the amounts that each laid off employee was entitled to receive under the terms of the CBA and the amount that Respondent paid each of them on June 9. (Jt. Exh. 1 ¶ 24 & Jt. Exh. 14)

ANALYSIS

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain over the effects of the sale of the assets of its retail business and the layoff of 13 unit employees. The Respondent defends against this allegation by contending that the parties bargained over the effects of layoffs in advance of those actions and incorporated an agreement on such effects in the CBA. That is, according to the Respondent, upon the layoff of employees, it was only required to provide employees with advance notice of the layoff and payment of unused sick leave and vacation (but was not required to bargain over other effects).

The proper standard to be used when a party to a collective-bargaining agreement contends that the contract eliminates or waives its obligation to engage in negotiations over a mandatory subject of bargaining has been something of a moving target. Most recently, in *Endurance Environmental Solutions*, 373 NLRB No. 141, slip op. at *1 (2024), the Board abandoned the "contract coverage standard" applied under *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) and reinstated a "clear and unmistakable" waiver analysis. Under *MV Transportation*, 373 NLRB No. 141, slip. op. at 2, the Board used a two part test to determine (1) whether the plain language of a collective-bargaining agreement covered and granted the employer the right to act unilaterally[4] or, if not, (2) whether the employer can otherwise prove that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. In *Endurance Environmental Solutions*, the Board eliminated the first part of the *MV Transportation* test.

Without citing *MV Transportation*, which has been overruled, the Respondent seeks to resuscitate the reasoning of *MV Transportation* in asserting that it was not required to bargain over effects the parties already agreed upon and incorporated in the CBA. The Respondent has asserted as follows (R. Brf. p. 12):

> [T]he Board has consistently held that additional bargaining over the effects of layoffs is not required when a union and an employer have already negotiated over layoffs and incorporated the results of those negotiations into a collective

[4] The Board emphasized, as follows, that the first part of this test reflects the absence of a continuous duty to bargain over a subject incorporated in the collective-bargaining agreement:

> As the D.C. Circuit has explained, a union's statutory right to bargain does not prevent the union from exercising that right "by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject." *Postal Service*, 8 F.3d [832,] 836 [(D.C. Cir. 1993)] (internal quotations omitted). Accordingly, when parties "bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations," and "[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract." Id. at 11.

> bargaining agreement. Port Printing & AD & Specialties, 351 NLRB 1269 fn. 2 (2007); Odebrecht Contractors of California, Inc., 324 NLRB 396, 403 (1997); Farina Corp., 310 NLRB 318, 320 (1993); see also McGraw-Hill Broadcasting Company, Inc. [d/b/a KGTV], 355 NLRB No. 213 (2010) (holding that had the employer followed the notice and payout of the layoff provision of parties' collective bargaining agreement, it would not have violated Section 8(a)(5) of the Act by failing to bargain over the effects of the layoff).

I reject this defense for three reasons. First, the Board does not currently apply the type of contract coverage analysis urged by the Respondent.

Second, as recognized in *Endurance Environmental Solutions*, the Board in "*MV Transportation*, did not extend the 'contract coverage' standard to the effects-bargaining context or otherwise disturb extant Board precedent applying the clear and unmistakable waiver standard to alleged effects-bargaining allegations." 373 NLRB No. 141, slip op. at 21 (2024). The Board may certainly reinstate *MV Transportation* and extend the contract coverage analysis to effects bargaining. However, I am not empowered to ignore existing law in anticipation that a previously overruled decision will be reinstated, much less speculate as to whether that overruled decision will be extended in a manner not previously applied. The Respondent must make those arguments upon exceptions to the Board.

Third, the cases cited by the Respondent do not support the finding of a violation under the "clear and unmistakable" standard. In *Port Printing AD and Specialties*, 351 NLRB 1269 (2007) ("*Port Printing*"), the Board held that bargaining over certain layoff decisions was excused by an exigency (i.e., a hurricane), but bargaining over the effects of those layoffs was not. Like here, the employer in *Port Printing* had an obligation under a collective-bargaining agreement to provide laid off employees with accrued sick leave and vacation pay, and that contractual provision did not relieve the employer of the duty to bargain over other effects. Id. at 1272. In *Odebrecht Contractors of California, Inc.*, 324 NLRB 396, 403 (1997), the Board held that bargaining over layoff decisions was excused as it was the effect of another decision (i.e., change in its rotating shift system) which was not a mandatory subject of bargaining, but did not find the employer to be excused from bargaining over the effects of those layoffs. In *Farina Corp.*, 310 NLRB 318 (1993), the Board found that the Respondent failed to bargain over layoff decisions and did not address the issue of effects bargaining. Finally, in *KGTV*, 355 NLRB 1283, 1285-1286 (2010), the Board found that the employer unlawfully failed to bargain over the effects of layoffs even though Article 5.4 of the parties' collective-bargaining agreement provided for severance to be paid to laid off employees. In so finding, the Board wrote:

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

> article 5.4 did not purport to address them, and they would remain subject to bargaining as well. [Footnote omitted.]

Id. at 1285.

Under current law, the question here boils down to whether the Union "clearly and unmistakably" waived its right to bargain over any and all effects of the asset sale and layoffs by, as reflected in the CBA, negotiating certain effect benefits in advance of the layoffs (i.e., pay for sick leave and vacation). Setting aside whether the Respondent fully complied with its contractual obligation to pay all leave owed to laid off employees, including Ortiz, the cases cited by the Respondent do not establish a waiver. In *Port Printing*, the employer's contractual obligation to provide laid off employees with pay for sick leave and vacation did not function as a union waiver of the employer's duty to bargain over other effects. 351 NLRB at 1270. In *KGTV*, the employer's contractual obligation to pay severance did not function as a union waiver of the employer's obligation to bargain over other effects, including the impact of the layoffs on employees who were not laid off. 355 NLRB at 1285.

Board decisions not relied upon by the Respondent further support the conclusion that including certain effect benefits in a collective-bargaining agreement does not impliedly function as a clear and unmistakable waiver of the right to bargain over other effect benefits. Thus, in *Armour And Co.*, 280 NLRB 824, 824 fn. 2 & 827 (1986), the parties' collective-bargaining agreement required the employer to pay severance to laid off employees upon the closure of the facility, but that severance pay and other plant closure contractual provisions did not clearly and unmistakably waive the union's right to bargain over the allocation of severance pay to weeks following the layoffs. And although the case did not deal with effects bargaining, in *Twinbrook OpCo, LLC*, 373 NLRB No. 6 (2003), extensive wage provisions in the parties' collective-bargaining agreement did not clearly and unmistakably waive the union's right to bargain over shift differentials which were not referenced in those contractual wage provisions.

The absence of a clear and unmistakable bargaining waiver is further supported by the absence in the CBA of a zipper clause purporting to waive the parties' right to bargain over subjects which could have been or were raised during negotiations. See *Armour And Co.*, 280 NLRB 824, 824 fn. 2 & 827 (1986) (absence of a zipper clause purporting to preclude further bargaining is a factor in finding that severance and other plant closure provisions did not "clearly and unmistakably" waive the union's request to bargain over severance pay allocation to weeks following the layoffs).

The Respondent, "assuming arguendo" that it had an obligation to bargain over effects, nevertheless contends it "made good faith attempts to engage in bargaining with the Union over the effects of the asset sale" and "the Union failed to participate in such negotiations on the dates and times agreed upon by the parties." (R. Brf. p. 14) The Respondent also contends it was entitled to reject and terminate negotiations following receipt of what it deemed to be the Union's "outrageous" effects proposal. (R. Brf. p. 14) The Respondent cites no legal authority in support of these alternative defenses.

I do not recommend that the case be dismissed on the basis of the Respondent's alternative defenses. Although the Union did not appear as scheduled for Zoom negotiations scheduled for June 19, at 11 a.m., and June 27, at 10 a.m., the Union's conduct in this regard can hardly be considered an attempt to frustrate bargaining. On June 19, at 2:10, the same day negotiations were scheduled, Union representative Martinez emailed Respondent attorney Schlesinger to explain that she did not have the Zoom call on her calendar and asked that the meeting be scheduled for the following week. On June 27, at 10: 14 a.m., while apparently in

the hospital and just 14 minutes after the meeting was scheduled, Martinez emailed Schlesinger to ask that the meeting be moved to 12 p.m. The Board has not found such union delays sufficient to eliminate an employer's bargaining obligation. See *Ingredion, Inc. d/b/a Penford Products Co.*, 366 NLRB No. 74, slip op. at 31 (2018) (employer not relieved of bargaining obligation even though the union cancelled four bargaining sessions).

Finally, I am not in a position to characterize the Union's effects proposal as improper since the Respondent has not explained why it believed the proposal was "outrageous." Regardless, the Union's proposal was merely a starting point for bargaining and the Respondent did not assert that the parties reached impasse. Indeed, the Respondent refused to make a counterproposal and, therefore, we do not know how the Union would have responded to the same. See *Stephenson-Yost Steel*, 294 NLRB 395, 396 fn. 5 (1989) (although parties may believe an exchange of certain proposals will be futile, the purpose of bargaining is to give the process a chance to operate regardless of the possibility of success and parties cannot "skip the bargaining stage altogether based upon their perceptions regarding the low probability of reaching an agreement.") Accordingly, the Respondent was not relieved of its obligation to bargain because the Union presented an initial effects proposal the Respondent found "outrageous" and rejected.

Based upon the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union over the effects of the sale of the assets of its retail business and the effects of the layoff of 13 unit employees.

Conclusions of Law

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

2. The following employees of the Respondent have been exclusively represented by the Union, and constitute a unit appropriate for the purposes of collective bargaining:

> All production shipping, receiving, chauffeur, helper, office and maintenance employees, and such other employees performing work incidental thereto, employed by the Employer in its establishment or any and all other establishments now operated, or thereinafter acquired and operated during the term hereof located in the State of New York and/or State of New Jersey, excluding non-working supervisors and such other categories as are excluded by the Labor Management Relations Act of 1947, as amended.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union regarding the effects of the sale of the assets of its retail business and the effects of the layoff of 13 unit employees.

The Remedy

Having found that the Respondent engaged in unfair labor practices, my recommended order directs the Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union over the effects of the sale of the assets of its retail business and the layoff of unit employees, my recommended order will require the Respondent to bargain with the Union, on request, about the effects of those decisions.

Because of the Respondent's conduct, the laid off unit employees have been denied an opportunity to bargain through their collective-bargaining representative and meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed. Accordingly, to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, my recommended bargaining order is accompanied by the recommendation of a limited backpay requirement designed to make whole the employees for losses suffered as a result of the Respondent's failure to bargain with the Union about the effects of the sale of the assets of its retail business and lay off unit employees, and to recreate in some practicable manner a situation in which the parties' bargaining positions are not entirely devoid of economic consequences for the Respondent. My recommended order shall do so by requiring the Respondent to pay backpay to the laid off employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) ("*Transmarine*"), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, pursuant to my recommended order, the Respondent shall pay its laid off employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the asset sale and layoffs; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith. In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which they were laid off to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings that the laid off employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In recommending a *Transmarine* remedy, I decline, at this stage of the proceeding, the General Counsel's request that unit employee Yolanda Ortiz be made whole for the Respondent's failure to compensate her for sick leave and vacation. The parties stipulated that the "Respondent made no postemployment payment to laid off employee Yolanda Ortiz because Ortiz was a new employee who had insufficient length of tenure with the Respondent to qualify for post-employment layoff pay under the terms of the Parties' collective-bargaining agreement." (Jt. Exh. 1 ¶ 12) The parties further stipulated that the documents attached to Respondent attorney Schlesinger's July 7 letter to the Union accurately reflected the amounts that each laid off employee was entitled to receive under the terms of the CBA. (Jt. Exh. 1 ¶ 24 & Jt. Exh. 14) Nevertheless, the General Counsel notes that, on June 2, the Respondent provided the Union with a document which indicated that Ortiz was hired on January 9 and, therefore, she apparently worked more than the 60 days which would entitle her to sick leave and vacation pay under CBA Articles 9, 10, and 13. (Jt. Exh. 8) The apparent discrepancy between the parties' stipulation and Ortiz's term of employment was not fully litigated or resolved. Thus, if the General Counsel's requested remedy vis-à-vis is going to be considered, the more appropriate time to do so would be at the compliance stage of this proceeding. See *Lewis Mittman, Inc.*, 245 NLRB 450, 453 fn. 1 (1979) (dispute regarding the date an employee began working as a "helper" within the meaning of the applicable bargaining agreement was not fully litigated and left

to the compliance stage); *Hooker Chemical Corp.*, 186 NLRB 304 (1970) (whether employees were entitled to a Christmas bonus was not fully litigated and left to the compliance stage).

My recommended order will also direct the Respondent to post the notice attached hereto as "Appendix."

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[5]

Order

The Respondent, Ba-Tampte Pickle Products, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain collectively in good-faith with the Union, United Food and Commercial Workers Union, Local No. 342, by selling the assets of its retail business and laying off employees without bargaining with the Union to agreement or a good-faith impasse over the effects of the sale and layoff decisions on unit employees.

(b) In any like or related manner interfering, 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) On request, bargain with the Union with respect to the effects of its decisions to sell the assets of its retail business and lay off employees in the following appropriate unit:

> All production shipping, receiving, chauffeur, helper, office and maintenance employees, and such other employees performing work incidental thereto, employed by the Employer in its establishment or any and all other establishments now operated, or thereinafter acquired and operated during the term hereof, by the Employer, located in the State of New York and/or State of New Jersey, excluding non-working supervisors and such other categories as are excluded by the Labor Management Relations Act of 1947, as amended.

(b) Pay to the following laid off unit employees, their normal wages for the period set forth in the remedy section of this decision:

Matthew H. Bryant	Ines Martinez Lopez
Silvana Bustamante	Ivan Meza Canales
Mariana Castillo	Carmen Ortega Soliz
Araceli Gomez	Yolanda Ortiz
Marie Denise Lamour	Jesula Prevost
Maria Loj an Arevalo	Marie St. Jean
Yolette Louis Jeune	

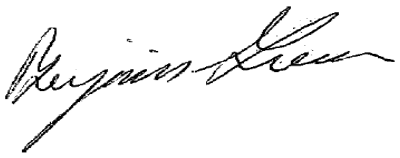
[5] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) 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.

(d) Post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 the 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 July 7, 2023.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 29 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., May 30, 2025.



Benjamin W. Green
Administrative Law Judge

[6] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 fail or refuse to bargain collectively in good-faith with the United Food and Commercial Workers Union, Local No. 342 ("Union") by selling the assets of our retail business and laying off unit employees without bargaining with the Union to agreement or a good-faith impasse over the effects of the sale and layoff decisions on employees in the following unit:

> All production shipping, receiving, chauffeur, helper, office and maintenance employees, and such other employees performing work incidental thereto, employed by the Employer in its establishment or any and all other establishments now operated, or thereinafter acquired and operated during the term hereof, by the Employer, located in the State of New York and/or State of New Jersey, excluding non-working supervisors and such other categories as are excluded by the Labor Management Relations Act of 1947, as amended.

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

WE WILL, on request, bargain with the Union with respect to the effects of the decisions to sell the assets of our retail business and lay off unit employees.

WE WILL pay the following laid off employees their normal wages for a period in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998), for failing to bargain with the Union to agreement or a good-faith impasse over the effects of our decision to sell the assets of our retail business and lay off unit employees:

Matthew H. Bryant	Ines Martinez Lopez
Silvana Bustamante	Ivan Meza Canales
Mariana Castillo	Carmen Ortega Soliz
Araceli Gomez	Yolanda Ortiz
Marie Denise Lamour	Jesula Prevost
Maria Loj an Arevalo	Marie St. Jean
Yolette Louis Jeune	

BA-TAMPTE PICKLE PRODUCTS, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

One Metrotech Center, 20th Floor, Suite 2000, Brooklyn, NY 11201-3948
(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-322438 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (718) 330-7713.