

Teamsters Local Union No. 71 a/w International Brotherhood of Teamsters, AFL-CIO and Communications Workers of America, AFL-CIO. Case 11-CA-17290

May 18, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 5, 1997, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified,¹ and to adopt the recommended Order as modified.²

The judge found, inter alia, that the Respondent's failure to bargain over the layoff of employee Betty Smith violated Section 8(a)(5) and (1) of the Act. The Respondent contends that it was privileged to lay off Smith unilaterally under the terms of the contract, specifically article 6, section 2.³ Contrary to our dissenting colleague, we find no merit in this contention.

¹ We note that on January 15, 1999, subsequent to the judge's decision in the instant case, the parties entered into an informal settlement agreement in Case 11-CA-16927, whereby the Respondent agreed to recognize the CWA as the collective-bargaining representative of its clerical and maintenance employees, and the parties agreed to be bound by the collective-bargaining agreement executed on January 12, 1996. On March 18, 1999, the Board granted the Respondent's request to withdraw Case 11-CA-16927, and the complaint was dismissed. In light of the fact that the Respondent agreed to recognize the CWA as the collective-bargaining representative and be bound by the collective-bargaining agreement, we agree with the judge that the Respondent's failure to process the Smith grievance and respond to the CWA's information request constituted violations of Sec. 8(a)(5) of the Act.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.*, 325 NLRB 17 (1997).

³ The provision reads:

*Article 6 Seniority
Section 2-Layoff and Recall*

Where there is a reduction in the work force, the junior most employee(s) in the office clerical classification will be laid off first.

Any employee being laid off due to slack business shall be laid off at 2400 hours on Friday and shall be given notice in writing with a copy to the Union.

Employees must be laid off at the end of their workweek.

All regular employees called to work shall receive a minimum guarantee of eight (8) hours' pay at the regular rate of pay.

Any recall from layoff, including extra work, shall be in reverse order of the layoff. When an employee is recalled to regular work, the Employer shall notify the employee by certified mail sent to the last address given to the Employer by the employee, with a copy to the Union. If the employee fails to report within fourteen (14) days from the receipt of such recall notice, the employee shall forfeit all seniority rights under the Agreement, unless additional time to report is granted, in writing by the Employer.

Employees shall not be laid off or recalled while respecting an authorized picket line; however, upon removal of the picket line;

The record establishes that on October 4, 1996, the Respondent presented Smith, its junior clerical employee, with a letter advising her that she was being laid off effective close of business that day. According to the letter, Smith's layoff was necessitated by a reduction in work and a need to reduce operating costs. A copy of the letter was sent to the CWA.

The judge found, and we agree, that the contract does not grant the Respondent the privilege of unilaterally deciding to lay off employees. In this regard, the judge found that the contract clause on which the Respondent relied for its claim of a right to act unilaterally addressed "only the order of succession of layoffs, i.e., employees are to be laid off by seniority, not by qualifications, attendance, or management discretion." It did not, he found, give the Respondent the right to decide unilaterally that any economic problems should be dealt with by laying off employees rather than taking other measures.

The judge's finding is a correct application of the Board's rule that contract language will not privilege an employer to make unilateral changes in terms and conditions of employment unless a "clear and unmistakable" waiver of the Union's right to bargain over such matters is manifested in that language. Contrary to our dissenting colleague, we adhere to that standard, which has been upheld by the Supreme Court. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). See *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996). To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored, and that the waiving party consciously relinquished its interest in the matter. *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989).

Applying the clear and unmistakable waiver standard here, we find, like the judge, that the contractual language at issue does not expressly give the Respondent the right to lay off employees unilaterally. Rather, the contract language merely provides for the succession of layoffs and the manner in which those layoffs will be implemented should they become necessary. As noted by the judge, the issue of who would be laid off, and in what order, is separate from the issue of whether an employer must resort to layoffs in the face of alleged economic problems. Consequently, the Respondent has an obligation to bargain with the Union over that subject.

Moreover, we find that even under the "contract coverage" theory as elucidated by the court of appeals in *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993),⁴ the Respondent was not privileged by the contract to act uni-

the weekly guarantee shall not apply during the current workweek.

⁴ In his dissent in *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999), on which Member Hurtgen relies here, he endorsed the analysis of the D.C. Circuit in *Postal Service*.

laterally with respect to the layoff decision. The court merely held that if there was contract language that “resolves” an “issue,” then the parties’ bargain reflected in that language would govern. *Id.* at 838, quoting *UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 479 (D.C. Cir. 1993), cert. denied 509 U.S. 924 (1993). The court found that the issue whether the postal service was free unilaterally to reduce retail window service hours and certain Sunday work (reductions which essentially affected only “part-time flexible” (PTF) employees) was resolved by the combination of a number of contract clauses, including clauses that gave the postal service the “exclusive right” to “transfer and assign employees,” that guaranteed only a specified minimum of hours per week for PTF employees (minimum standards which were not breached by the service reductions), and provided that, when staffing was reduced, the postal service would “to the extent possible minimize the effect on full-time positions by reducing part-time flexible hours.” *Id.* at 837–838. By contrast, as explained above, all that the language resolved here was the manner in which employees would be laid off if there were to be layoffs. It did not resolve the issue whether the problems that induced the layoffs should have been met by layoffs in the first instance.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally laying off Smith without bargaining with the CWA.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Teamsters Local Union No. 71 a/w International Brotherhood of Teamsters, AFL–CIO, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(d).

“(d) Within 14 days after service by the Region, post at its union office in Charlotte, North Carolina, copies of the attached notice marked “Appendix.”²¹ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

ered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1996.”

MEMBER HURTGEN, dissenting in part.

My colleagues find that the layoff of Smith was done unilaterally and thus in violation of Section 8(a)(5). The Respondent defends that it is privileged to accomplish such a layoff.

I agree with the Respondent. The contract covers the dispute in this case. The dispute is about the *layoff* of an employee. article 6, section 2 is a provision expressly dealing with “*Layoff and Recall.*” (Emphasis added.)¹ Since the contract covers the instant dispute, our task is to interpret that contract.

The contract provides that where there is to be a layoff, the Respondent has three obligations: (1) to lay off by seniority; (2) to lay off at 2400 hours on Friday; and (3) to give written notice to the employee and to the Union.

Thus, the parties have set forth the obligations of the Respondent in a layoff situation. These obligations were clear and specific. The issue is whether the parties intended yet another obligation, viz, to bargain about the layoff before it occurred. I would not find such an intention by omission. The parties explicitly dealt with the subject matter of layoffs. In my view, it is reasonable to conclude that they would list *all* of the obligations attendant to that topic, not just some of them. In the circumstances of this case, I would not supply an obligation that is missing.

My colleagues start from the premise that there is a statutory right to bargain, and they then reason that contractual silence means that the right has not been waived. I disagree. Where, as here, the contract covers the subject matter (here, layoffs), the parties *have bargained* about the subject.² Our task is simply to ascertain their mutual intentions. That is what I have done here.

I do not agree that *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), requires a different result. *Metropolitan Edison* dealt with the issue of whether a union had waived an employee’s statutory right to be free from individual discrimination. The Court held that any such waiver had to be clear and unmistakable. By contrast, the instant case involves a union and an employer who

¹ The provision reads:

Article 6 Seniority
Section 2–Layoff and Recall

Where there is a reduction in the work force, the junior most employee(s) in the office clerical classification will be laid off first.

Any employee being laid off due to slack business shall be laid off at 2400 hours on Friday and shall be given notice in writing with a copy to the Union.

² See my dissent in *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999).

⁵ In reaching this conclusion, the judge cited, inter alia, *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). To the extent that *Lapeer* relies on *Otis Elevator Co.*, 269 NLRB 891 (1984), which the Board overruled in *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. in pertinent part 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), cert. dismissed 511 U.S. 1138 (1994), enfd. mem. 38 F.3d 609 (D.C. Cir. 1994), we disavow the judge’s reliance on *Lapeer*. See *Holmes & Narver*, 309 NLRB 146, 147 fn. 3 (1992).

have bargained to an agreement about terms and conditions of employment. The task is simply to interpret that agreement.

I also note that the approach taken by my colleagues can lead to inconsistent results as between the Board under Section 8(a)(5) and courts/arbitrators under Section 301. In my view, where there is a contract covering the subject matter, all tribunals should seek to interpret and carry out that agreement.

Accordingly, I find that the Respondent was acting lawfully in deciding to lay off Smith.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off employees without first giving notice and affording the opportunity to bargain in good faith over the decision and its effects to the Communications Workers of America, AFL-CIO as your exclusive bargaining representative in the following unit:

All clerical and maintenance employees employed by us at our Charlotte, North Carolina, facility; but excluding business agents, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Communications Workers of America, AFL-CIO as your exclusive bargaining representative by refusing to process grievances and by refusing to furnish the Union with relevant and necessary information.

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

WE WILL, within 14 days from the date of the Board's Order, offer Betty Smith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Betty Smith whole for any loss of earnings and other benefits resulting from her unilateral layoff, less any net interim earnings, plus interest.

TEAMSTERS LOCAL UNION NO. 71 A/W
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Jasper C. Brown Jr., Esq., for the General Counsel.
James F. Wallington, Esq., for the Respondent.
Robert N. McNeely, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Charlotte, North Carolina, on October 9 and 10, 1997. The charge was filed December 5, 1996,¹ and amended on March 10, 1997. The complaint was issued on March 1, 1997. The complaint alleges violation of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act) as a result of the layoff of an employee, and violations of Section 8(a)(5) of the Act as a result of the refusal to process a grievance and to provide requested information. Respondent's timely answer denies all violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the oral argument made by the General Counsel and the brief filed by the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a labor organization, is an unincorporated association engaged in the business of representing employees in bargaining with employers with respect to wages, hours, and other terms and conditions of employment of the employees that it represents from its offices in Charlotte, North Carolina, where it annually collects and receives dues and initiation fees in excess of \$50,000, and annually remits from its Charlotte, North Carolina office to its international headquarters, located outside the State of North Carolina, dues and initiation fees in excess of \$50,000. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Communications Workers of America, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Prior Case and Preliminary Observations*

The Respondent, Teamsters Local 71 is the employer of several business agents, clerical employees, and a maintenance employee at its Charlotte, North Carolina, office. In October 1995 the members of Teamsters Local 71 elected Tony Ford as president of the Local. Ford and his slate of officers assumed their positions on January 13, 1996. On December 15, 1995, Sam Carter, who was then president of Local 71, on a showing of interest as reflected by signed authorization cards, recognized the Union as a collective-bargaining representative of Local 71's clerical and maintenance employees. On January 12 the Union and Local 71, by Carter, executed a collective-bargaining agreement.

After Ford assumed office, he repudiated the collective-bargaining agreement that Carter had executed on behalf of Local 71. The Union filed a charge with the Board. On August 14, Administrative Law Judge William N. Cates issued his recommended Order in Teamsters Local Union No. 71 a/w International Brotherhood of Teamsters, AFL-CIO, Case 11-CA-16927, which directs Respondent to cease repudiating its collective-bargaining agreement and to honor the terms and conditions of the agreement. Respondent filed exceptions to

¹ All dates are 1996 unless otherwise indicated.

that decision and recommended Order. That case is presently pending before the Board. Judge Cates found, contrary to the arguments of Respondent, that the Union “presented a valid showing of interest” on December 15 and that Carter “had actual authority to negotiate, negotiated, and on January 12, 1996, executed a collective-bargaining agreement” covering the unit employees.

Betty Smith, one of Respondent’s clerical employees, was instrumental in obtaining the signed authorization cards that were the predicate to Respondent’s recognition of the Union on December 15, 1995. She had also obtained a copy of a clerical collective-bargaining agreement from Teamsters Local 61, where she had previously been employed, and, thereafter, was involved in the negotiation of the contract that Carter executed. Smith testified at the hearing before Judge Cates on July 25. She was the only unit employee to do so. Smith was laid off on October 4.

The complaint alleges that Smith’s layoff violated Section 8(a)(1), (3), (4), and (5) of the Act. The complaint contains no independent 8(a)(1) allegations. Critical to any finding of discrimination against Smith in violation of Section 8(a)(3) of the Act, is a finding of animus towards employees who engage in Section 7 activity because of their involvement in that activity. In the instant case, the General Counsel sought to establish animus through two witnesses, Ted Mulles and Ted Russell, both of whom had supported Ford in his election campaign, and both of whom now are disaffected. Mulles filed charges against Ford after he learned in July 1996 that Ford was working relatives, rather than members, in a movie produced by the Teamsters. In June 1997 Russell was dismissed as a business agent after it was discovered that he intended to run for election against Ford. Respondent argues that my credibility determination take their current bias into account, and I have done so. Although their testimony tended to be self-serving regarding their personal situations, I found their testimony generally credible with regard to the issues before me. I note that both witnesses had difficulty recalling specific dates and whether certain remarks were made by Ford or Office Manager Paul Norris. Mulles testified to several discussions regarding “getting rid of Betty Smith,” but never testified to a conversation in which the reason for this intention was stated. Russell testified that “it was a priority to get rid of Betty Smith.” Several times he asserted that Ford and Norris “felt bitter” towards Smith, but he did not attribute a specific statement to either Ford or Norris to support his conclusion as to why they felt bitter. As discussed, I do not credit certain aspects of the testimony of Norris. Ford did not deny that certain remarks were made in conversations in which Mulles and Russell had participated.

B. Facts

Smith, as noted above, was instrumental in obtaining the authorization cards and was involved in the negotiation of the contract with Carter. Additionally, Smith had “made no secret” of her support for incumbent President Carter and her opposition to Ford in the internal union election. Carter hired Jimmy Wright, who retired as secretary-treasurer of Local 71 in 1990 to prepare various campaign materials. Wright, in the prior proceeding, denied that he was Carter’s campaign manager, but acknowledged the preparation and mailing of campaign materials on behalf of Carter. Smith acknowledges, on one occasion, assisting Wright by stuffing Carter campaign materials into envelopes that were to be mailed to prospective voters.

Ford and Norris began discussing getting rid of Smith “the minute . . . [the Ford administration] took office.” In a conversation at which newly appointed Business Agent Russell was present, Ford or Norris stated that “Betty [Smith] was the eyes and the ears inside the office for Sam Carter.”² In referring to the contract, Norris stated, “[T]his is Sam Carter’s writing and he’s the one that did it.” In a conversation among Mulles, Ford, and Norris, there was discussion regarding who had been involved with writing the contract, and the names of Smith, Wright, and Carter were all mentioned. Ford expressed his opinion that the contract was not legal, that Carter did not have the authority to sign it. In a later conversation, at which Mulles, Norris, and Ford were present, Ford stated that he did not feel that he could terminate Smith because of the contract, which requires just cause for termination. Despite this, Ford continued to express his desire to “get rid of” Smith. When Smith discovered that dues for the Union were not being deducted by Respondent, she confronted Ford. Ford told her that he had no problem with the contract, “we had the right to a contract, and that the problem was with who signed it.”³ Smith suggested that, if the problem was Carter’s signature that Ford could sign a new contract. Ford advised that the matter had been turned over to Respondent’s attorneys.⁴

Following the election in October 1995 Carter had assigned Smith additional duties, directing that recording secretary and bookkeeper Linda Green train Smith in all aspects of the TITAN computer and bookkeeping.⁵ Carter instructed Smith to change the password on TITAN so Green “could not run a mailing list to take out of the office.”⁶ Green had supported Ford in the campaign.

Ford’s election victory was challenged by Carter. The international union directed that a rerun election be held. This was conducted on February 25.⁷ Ford again won. Carter again filed internal charges; Ford filed countercharges.

On March 15, officials of Respondent, including Ford and Green, who was a member of the executive board, were scheduled to attend a joint council meeting which would take them out of the office. On the evening of March 14, Ford called member Mulles and requested that he “keep an eye on Smith to make sure she did not . . . take anything from Green’s desk.”⁸

In April or May, in his office, Ford stated to Russell that he intended to lay off Smith “on Friday.” A few minutes later, Norris came into Ford’s office and stated to Ford that Respondent’s attorney had cautioned against laying off Smith. Norris reported, “[I]t’s too early . . . it would look political if we laid her off this soon.”⁹ Smith was not laid off at that time. About a month before Smith was laid off, Ford asked Norris, “Can we support the numbers to lay her off?” Norris said “Yes.”

² Neither Norris nor Ford was asked about this comment. There is no denial that it was made.

³ Counsel for Respondent represented that Respondent was following the contract regarding employee economic benefits.

⁴ Smith testified to this conversation in the prior case. The parties agreed that I take notice of the record in that proceeding.

⁵ The TITAN is the International union’s computer system for bookkeeping.

⁶ The foregoing is reflected in an affidavit prepared by Smith, R. Exh. 3 in the prior proceeding.

⁷ The foregoing is established by testimony at the prior hearing.

⁸ Ford did not deny giving this direction to Mulles.

⁹ Although Norris denied making this report, Ford was not asked about it, and did not deny receiving it. I credit Russell who testified that this report was made in his presence.

Although Ford had assumed office on January 13, his election was, as noted above, challenged by Carter. It was not until October 2 that he was finally assured that there would be no further challenge to his election. On October 4, 2 days after this, he presented Smith with a letter that states:

Due to the reduction in work in the office to the level where we can no longer justify maintaining the current staff level and consistent with our continuing efforts to reduce the Union's operating costs, we regret to advise you that you will be laid off effective at the close of business today. We will contact you when these circumstances improve or if we need assistance on a temporary or fill in basis.

Although Smith had heard rumors that she had been targeted for layoff, this was her only communication from management. Norris had not alerted her to the possibility of a layoff and the need to begin making any personal arrangements that might be necessary. There was no notice to, or bargaining with the Union, regarding the decision to conduct a layoff.

On October 11 Dean Haskett, president of the Union's Local 3695, hand carried a letter grieving Smith's layoff to Ford. It states:

This letter is to formally grieve the layoff of Betty Smith on October 4, 1996. In your letter to Ms. Smith you state but do not justify "reduction in work." What work left the office and when did it occur? You also claim of "reducing operating costs." How can you justify the layoff of an office support employee when you have added an additional business agent since taking office as President of Local 71?

The Union demands that Ms. Smith be reinstated from layoff status and be made whole.

On receiving the letter, Ford read it and advised Haskett that he would respond. By letter dated October 16 Ford advised the Union as follows:

Local 71 has not breached any obligations it may have to Ms. Smith. The internal operations of this Local are not a matter of your union's concern.

As we advised Ms. Smith on October 4, 1996, when office work becomes available we will advise her. I trust this responds to your letter of October 11, 1996.

Respondent provided the Union with no other information. There was no communication regarding the identity of any work that left the office.

There is no probative evidence that the workload of the clerical employees in 1996 was any different than it had been in 1995. Respondent had employed four clerical employees since 1985. In late 1993 and early 1994, one of these clericals had been assigned to an organizational campaign. Throughout all of 1995, there were four clerical employees, and this continued in 1996 until Smith was laid off on October 4. Respondent's members began receiving service from a health maintenance organization (HMO) in 1991 or 1992, and this reduced the number of insurance forms being processed in the office; however, this reduction began in 1994. Contrary to Ford's reference to a reduction in work, no documentary or other probative evidence reflects any decrease in clerical work in 1996 as opposed to 1995.

Respondent did experience financial difficulties in 1996. Revenue from dues in 1996, as reflected on form LM-2, was \$31,482 less than in 1995. This resulted from a reduction in the

number of dues paying members. During the last quarter of 1995 Respondent had received dues from an average of just over 3000 members. In the first quarter of 1996, dues were received from an average of 2950 members, and this fell to 2809 members during the second quarter of 1996. This number increased to an average of 2877 members in the third quarter of 1996, but fell slightly to 2861 during the last quarter of 1996. Thus, the record establishes an overall average loss of over 100 dues paying members.

This evidence is not inconsistent with figures compiled by former Business Agent Russell who, from documents he obtained to assist him in presenting his case protesting his dismissal in June 1997, prepared an exhibit for his case that shows a net increase of some 392 members. The documents presented by Respondent reflect dues receipts. Members who are on layoff or who have obtained a withdrawal card do not pay dues. Thus, although the membership total may have increased, dues paying membership did decrease in 1996.

In early June, Norris requested that Green provide a list reflecting the number of members for whom dues were remitted from January through May. The list reflects a decrease from 3069 to 2767. That list, however, is subject to misinterpretation. Employers who check off dues and then remit them to the Respondent do not always do so in a timely manner. Thus, although the May figure shows that dues for only 2767 were remitted, the April figure of 2860 suggests that the 2767 is not an accurate reflection of dues paying members. This conclusion is confirmed by the June and July figures which reflect dues remitted for 2802 and 2992 members, respectively. The record does not reflect any request by Norris to obtain updated figures from Green for the months following May.

Carter, as president of Respondent, had used a rough formula of one business agent for every 700 members. During his administration there had been five business agents, including himself. He had, on various occasions, spoken to the membership of the need for Local 71 to continue organizing efforts in order to grow. He had also cautioned that if Local 71 lost membership it might become necessary to lay off an office clerical and one of the five business agents.

When Ford became president, all of the individuals serving as business agents under Carter, except for Norris, ceased their service. Ford replaced them and hired a sixth business agent. Notwithstanding the decrease in dues receipts and the records reflecting a dues paying membership of less than 3000, Norris and Ford did not discuss laying off a business agent. Rather, Norris told Ford that, "We had to get the facts and figures as to prove the decline in membership, the financial status before laying off Smith." Although Ford may well have been "constantly watching the financial report . . . to see what we could do to cut the costs," there is no evidence that this accounted for the timing of the decision to lay off Smith. He had been given figures in June reflecting a decrease in dues paying members, but he did not resort to reducing staff at that time. He took no layoff action until after he was advised that his election victory was not in jeopardy.

C. Analysis and Concluding Findings

1. The 8(a)(5) allegations

The complaint alleges that Respondent violated Section 8(a)(5) of the Act by laying off Smith without notice to, or bargaining with, the Union. This allegation is, of course, dependent on Case 11-CA-16927, which is presently pending

before the Board. Respondent's obligation to bargain in the instant case is predicated on the finding in Case 11-CA-16927 that the Union "presented a valid showing of interest" on December 15 and was recognized by Respondent. If the Board adopts this finding, the Union was, at all times relevant, the lawfully recognized Section 9(a) representative of the unit employees. Insofar as Respondent desired to take any action that would affect the wages, hours, or working conditions of those employees, it had an obligation to take into account the representation of these employees by the Union.

Respondent, in 1996, experienced a decrease of \$31,482 in revenue from dues, as compared to 1995. Internal documents reflect that the revenue from dues was most markedly decreased during the first 5 months of 1996. Ford, in his testimony and in his letter to Smith, cites a reduction in work and the need to cut costs; however, there is no probative evidence of any decrease in the clerical workload in 1996 as opposed to 1995. There was no notice to, or bargaining with the Union prior to Smith's layoff. The Union was notified by receipt of a copy of the letter given to Smith.

The Board, in *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), discussed economically motivated layoffs and held that, under either of the analyses set out in *Otis*,¹⁰ an economically motivated decision to conduct a layoff was a mandatory subject of bargaining. Thus, as the Board observed, when management confronts an economic problem with a decision to lay off, "the decision to lay off turns on labor costs and must be bargained." Id. at 953. Regarding the alternative analysis, the Board stated that the cost savings resulting from a layoff were "[l]abor related considerations" that were "amenable to resolution" through bargaining, and noted that the Union "can offer alternatives to the layoff, such as wage reductions, modified work rules, or part-time schedules." Id. at 953-954.

Despite the statement regarding a reduction in work in Ford's letter to Smith, there is no probative evidence of any change in the workload of the clerical employees. The only documentary evidence Ford relied on in deciding on a layoff were financial reports that reflected decreased dues receipts. I find that whatever justification may have existed for a layoff, that justification was economic. Consistent with applicable Board precedent, I find that Respondent was obligated to bargain about its economic decision as well as the implementation of that decision.¹¹ I find that Respondent's unilateral layoff of Smith violated Section 8(a)(5) of the Act. Accordingly, and consistent with *Lapeer Foundry* and the more recent case of *East Coast Steel*, 317 NLRB 842 (1995), I will recommend that she be reinstated with backpay.

Respondent, although it continues to maintain that the collective-bargaining agreement signed by Carter is not valid, ingeniously argues that, if the Board finds the collective-bargaining agreement is binding, it was privileged to lay off Smith under the terms of that agreement because Smith was the junior employee. I disagree. The contract provides that "[w]here there is a reduction in the work force the junior most employee(s) . . . will be laid off first." Thus, the contract addresses only the order of succession of layoffs, i.e., employees are to be laid off by seniority, not by qualifications, attendance, or management dis-

cretion. The decision to conduct a layoff is a separate issue. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Court discusses management decisions in three categories: management decisions over which there is no duty to bargain; management decisions, including "the order of succession of layoffs," over which there is a duty to bargain; and management decisions that involve the elimination of jobs where bargaining over the decision is required when "the benefit . . . [from bargaining] outweighs the burden placed on the conduct of the business." Id. at 677. Thus, the issue of who will be laid off, and in what order, is clearly separate from the issue of whether a respondent must resort to a layoff in the face of alleged economic problems.¹² I have found that, insofar as there was any justification for the layoff, the justification was economic. There is no evidence or assertion that Respondent was engaged in a change in "the scope and direction" of its enterprise. Id. Respondent does not cite, nor has my review disclosed, any management-rights clause or other provision in the contract that grants Respondent the privilege of unilaterally deciding to lay off employees. Thus, I reject Respondent's assertion that its action was permitted by the contract it has repudiated.¹³

In addition to the unilateral layoff of Smith, the complaint alleges two additional 8(a)(5) violations: (1) the failure to process the grievance the Union attempted to file on Smith's behalf and (2) the failure to provide information relating to reduction of work. The decision in Case 11-CA-16927 finds that the Union and Respondent entered into a valid collective-bargaining agreement which the Respondent, under the Ford administration, unlawfully repudiated. When the Union attempted to file a grievance immediately following Smith's layoff and requested information relating to the alleged reduction of work, Respondent advised the Union that "[t]he internal operations of this Local are not a matter of your union's concern." I find that Respondent's denial of any obligation to accept grievances and its failure to respond in any way to the request for information constituted a continued repudiation of the collective-bargaining agreement.¹⁴ The failure to process grievances and provide relevant information pursuant to a "wholesale repudiation of a contractual commitment" constitute violations of Section 8 (a)(5) of the Act. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987).

¹² See *Sheraton Hotel Waterbury*, 312 NLRB 304, 309 (1993), a case involving a hotel's layoff of employees following a decline in occupancy. Member Raudabaugh, in his concurring opinion, agreed that this economically motivated decision was a mandatory subject of bargaining. He specifically noted that the issue of the layoff itself was separate from the issue of the order of succession of the layoff.

¹³ *Ador Corp.*, 150 NLRB 1658 (1965), and the other cases cited by Respondent in support of this contention, all involved interpretation of management-rights clauses. There is no management-rights clause in the collective-bargaining agreement in this case. Even if there were such a clause, I would find that Respondent cannot be permitted to assert that its actions were privileged by a contract that it has repudiated.

¹⁴ Respondent's brief does not address Ford's response to the Union's attempt to file a grievance. It asserts that the information request was "a rhetorical assertion against Local 71's actions." I find nothing rhetorical in the information request. The request seeks information regarding the identity of the reduction in work to which the letter laying off Smith refers, and the date of the alleged reduction.

¹⁰ *Otis Elevator Co.*, 269 NLRB 891 (1984).

¹¹ I note that, despite records reflecting a decrease in dues paying membership and his stated concern about controlling costs, Ford continued to keep a sixth business agent on the payroll.

2. The 8(a)(3) and (4) allegations

The complaint, in addition to the 8(a)(5) allegations discussed above, also alleges the layoff of Smith as a violation of Section 8(a)(3) and (4) of the Act. I have found that the Respondent did suffer a reduction in dues receipts and that, prior to addressing this economic problem by laying off a clerical employee, Respondent was obligated to bargain with the Union in regard to its decision. Insofar as Respondent did not do so, but decided unilaterally to lay off Smith, it violated Section 8(a)(5). If the evidence establishes that Respondent selected Smith for layoff because of her union activity and testimony in a Board proceeding, Respondent will have also violated Section 8(a)(3) and (4).

Under the analytical framework of *Wright Line*,¹⁵ in order to establish a violation of Section 8(a)(3) of the Act, the General Counsel must establish employee union activity, employer knowledge of that activity, animus towards such activity, and adverse action taken against those involved in, or suspected of involvement in, that activity. There is no question that Smith engaged in union activity and that Respondent was aware of that activity.

The record establishes that Respondent was determined to rid itself of Betty Smith. The issue is whether that determination resulted from animus towards employee Section 7 activity and whether Respondent's selection of Smith for layoff was motivated by that animus. The General Counsel has not established, by a preponderance of the evidence, that animus towards employee Section 7 activity motivated Respondent. The complaint contains no 8(a)(1) allegation, and the testimony does not reflect animus towards Section 7 activity. Respondent's legal position in Case 11-CA-16927, in which it contends that Carter's recognition of the Union was improper and that the contract is not valid, does not constitute animus.

Ford and Norris discussed getting rid of Smith from the minute the Ford administration took office; however, there is no evidence that this intention was in retaliation for Section 7 activity. The General Counsel argues that animus is established by the testimony of Mulles and Russell who testified that comments relating to getting rid of Smith were made in the same conversation as discussion of the collective-bargaining agreement, an agreement that followed negotiations in which Smith had been involved. Mulles recalled one conversation in which there had been speculation about Smith, Wright, and Carter all being involved with the contract; however, getting rid of Smith had been mentioned before this conversation turned to the contract. After the contract was mentioned, Mulles recalled only that Ford stated that he believed the contract was not legal. In April or May, and again in June, Ford was seeking to lay off Smith, rather than terminate her because he believed termination would violate the collective-bargaining agreement. I find that this strategy reflects Ford's desire to avoid unnecessary legal repercussions if Respondent was not successful in its challenge to the contract. It does not reveal animus towards union activity. Indeed, it appears that Ford's initial plan to terminate Smith immediately on assuming office was foiled by her union activity.

Contrary to the General Counsel's contention that Respondent's animus was towards Section 7 activity, I find that Respondent's animus was towards Smith's intraunion activity, specifically her support of, and activities on behalf of Carter.

Russell testified that Ford and Norris began discussing getting rid of Smith "the minute we [the Ford administration] took office."¹⁶ Ford's conversation with Mulles reveals that Ford was not concerned about the contract because he believed that Carter did not have the authority to sign it. What did concern him was that Smith "was the eyes and the ears inside the office for Sam Carter." Ford had Mulles monitor Smith to assure that she did not disturb Green's desk on March 15, an action that reveals no concern about Section 7 activity, but significant concern about intraunion activity. In a later conversation, Norris reported, in the presence of Russell, that Ford should not lay off Smith at that time, "[I]t's too early . . . it would look political if we laid her off this soon." Retaliation for engaging in Section 7 activity was not mentioned. I find that the "political" reference refers to intraunion activity. This finding is confirmed by the evidence that Ford did not proceed with a layoff, despite the financial reports he had seen, until October 4, the first Friday after he learned that Carter's challenge to his election had been finally rejected by Teamster's president, Carey.

Intraunion activity is not Section 7 activity. Thus, it is not protected by the Act. *Retail Clerks Local 770*, 208 NLRB 356, 357 (1974). In *Hoytuck Corp.*, 285 NLRB 904 (1987), the Board specifically noted the distinction between cases in which employees engage in concerted activity on behalf of a supervisor who has an impact on employee working conditions and "cases in which employee concerted activity is designed solely to effect or influence changes in the management hierarchy." *Id.* at fn. 3. Although the Board's language in both those cases relates to activities on behalf of challengers, I perceive no difference in intraunion activity engaged in on behalf of incumbents rather than challengers. My reading of *Retail Clerks* and *Hoytuck* is that the Board does not consider intraunion activity, whether it be engaged in on behalf of a challenger or incumbent, to be protected or union activity within the meaning of the Act. In these circumstances, I cannot find a violation of Section 8(a)(3) of the Act.

Regarding the 8(a)(4) allegation, the credited evidence establishes that Respondent wanted to get rid of Smith because of her intraunion activities on behalf of Carter in January when the Ford administration took office. The charge in Case 11-CA-16927 was not filed until March 12. Smith testified on July 25. No statement was made to her relating to her having testified. In considering the record in accordance with *Wright Line*,¹⁷ I find no evidence that Respondent bore animus towards employees who participated in Board proceedings, nor is there any evidence that Smith's participation in Case 11-CA-16927 had any effect on Respondent's treatment of her. There is no evidence that Respondent discriminated against Smith in violation of Section 8(a)(4) of the Act.

CONCLUSION OF LAW

By laying off an employee without notice to, or bargaining with the Union, and by failing and refusing to process grievances and provide relevant information, Respondent has engaged in unfair labor practices affecting commerce within the

¹⁶ There was no mention of Smith's Sec. 7 activity in regard to this stated intention. Accepting this testimony as literal, rather than figurative, Ford was not aware of Carter's execution of the contract the minute he assumed office.

¹⁷ The Board utilizes the *Wright Line* analysis in 8(a)(4) cases. *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985).

¹⁵ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully laid off an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁸

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Respondent, Teamsters Local Union No. 71 a/w International Brotherhood of Teamsters, AFL-CIO, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees without first giving notice and affording the opportunity to bargain in good faith over the decision and its effects to the Communications Workers of America, AFL-CIO as the exclusive bargaining representative of employees in the following unit:

All clerical and maintenance employees employed by Respondent at its Charlotte, North Carolina facility, but excluding business agents, guards, and supervisors as defined in the Act.

(b) Refusing to bargain with the Communications Workers of America, AFL-CIO, by refusing to process grievances and by refusing to furnish the Union with information that is relevant

¹⁸ In Case 11-CA-16927, Respondent excepted to the findings that the Union represents the unit employees and that Respondent and the Union executed a valid and binding collective-bargaining agreement. Insofar as the Union is the exclusive bargaining representative of the unit employees, the remedy I have recommended, in accordance with *Lapeer Foundry*, will not be affected by whatever finding the Board makes regarding the validity of the contract since, contrary to Respondent's argument, the contract does not give Respondent the unilateral right to lay off employees. As discussed above, the decision to lay off employees is separate from the determination of the order in which a layoff is to be conducted.

¹⁹ 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.

and necessary to its function as the exclusive bargaining representative of the employees in the foregoing appropriate unit.²⁰

(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) Within 14 days from the date of this Order, offer Betty Smith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Betty Smith whole for any loss of earnings and other benefits suffered as a result of her unilateral layoff in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its union office in Charlotte, North Carolina, copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 1996.

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

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

²⁰ Testimony at the hearing included discussion of the work performed by the clerical employees. It appears that no documentary evidence that would be responsive to the Union's information request exists. Thus, consistent with Respondent's argument in its brief, the Union has obtained the information that is available, and there is no need for an affirmative order. *International Paper Co.*, 319 NLRB 1253, 1264 (1995).

²¹ 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."