IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAVID BLEDSOE, *et al.*,	:	
Plaintiffs,	:	Case No. 3:02cv069
vs.	:	JUDGE WALTER HERBERT RICE
EMERY WORLDWIDE AIRLINES, INC., *et al.*,	:	
Defendants.	:	

DECISION AND ENTRY SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFFS' CLAIM UNDER THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, 29 U.S.C. § 2101 ET SEQ.; JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS; TERMINATION ENTRY

The Plaintiffs filed a Class Action Complaint seeking to represent "all persons who were employed by Defendant [Emery Worldwide Airlines] as of August 11, 2001; were notified of a layoff between August 11 and 15, 2001; were permanently laid off as of December 5, 2001; and who did not receive 60 days notice or pay in lieu thereof for the mass layoff that occurred in August of 2001 or [the] plant closing that took place in December of 2001." Doc. #79 ¶16. The action is brought under the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101-2109 ("WARN Act").

The Defendants are Emery Worldwide Airlines ("EWA"), an air carrier

certificated[1] by the Federal Aviation Administration ("FAA"), and its parent company, CNF, Inc. ("CNF"). On March 17, 2003, the Court conditionally certified a class of Plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(3), defined as follows:

> All persons, of about 575 in number, who were employed by Emery at its Vandalia, Ohio facility as of August 13, 2001; who were notified by Emery between August 13 and 15, 2001, of their subsequent layoffs; who were notified by Emery on December 5, 2001 that their layoffs were permanent; and who did not receive 60 days notice or 60 days pay in lieu thereof for the mass layoff that began on August 14,2001 and which was deemed permanent on December 5,2001.

Doc. #43. On March 19, 2004, the Court created a subclass for approximately 400 pilots and flight personnel who were members of the Air Line Pilots Association and covered by a collective bargaining agreement. Doc. #78. On March 24, 2008, the Court issued an order excluding from the Class employees who worked at EWA's Webster Street location and the building located at the Dayton Airport described as "Hangar A." Doc. #145.

In their Amended Complaint, the Plaintiffs allege that Defendants EWA and CNF violated the WARN Act by failing to provide either 60-days notice or pay, as a result of the temporary shut down of EWA's facilities in August 2001, and the subsequent permanent cessation of operations, in December 2001. A bench trial was held, in January 2009, and the Court now sets forth its findings of fact and

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[1]A flight certificate allows an airline to fly its aircraft, as long as it is in compliance with FAA regulations. Tr. Vol. I at 42.

conclusions of law, on the same.

I. Findings of Fact[2]

A. Historical Facts

As early as 1999, EWA employees were in communication with EWA/CNF and the FAA about safety and maintenance concerns with the company. PX1 at DEF0048678-79; Tr. Vol. I at 31-33. In February 2000, there was a fatal accident involving an EWA plane, which led to increased oversight of the airline by the FAA. Tr. Vol. I at 47-48; Tr. Vol. III at 441. The FAA conducted periodic safety inspections of EWA. The number of potential violations of FAA regulations increased from 4, in early 2000, to 43 by the end of that year. Tr. Vol. II at 231-32.

In early 2001, EWA's Vice President of Safety wrote a memorandum to its CEO, Jerry Trimarco, stating that EWA had an "above average risk of a maintenance related major or minor mishap and certificate action by the FAA" and strongly recommended that EWA/CNF commit the resources necessary to address the problem. PX2 at page 6-7. By late January 2001, EWA's Assistant Vice

[2]The transcripts from the four days of trial will be referred to as follows: testimony from January 12, 2009, located at Document #197, as "Tr. Vol. I"; testimony from January 13, 2009, located at Document #198, as "Tr. Vol. II"; testimony from January 14, 2009, located at Document #199, as "Tr. Vol. III"; and testimony from January 15, 2009, located at Document #200, as "Tr. Vol. IV".

President of Safety indicated that it was his belief that EWA was in "serious jeopardy" of losing its FAA certificate. PX3.

In February 2001, Trimarco and other EWA management members met with representatives of the FAA to inform the FAA of the steps EWA had taken to comply with FAA regulations and to discuss the status of EWA's flight certificate. Tr. Vol. I at 204-05; Tr. Vol. II at 262-63; JX 1. At that meeting, the FAA indicated that the withdrawal of EWA's certificate was "not off the table". Tr. Vol. I at 204-06. In April 2001, there was an incident involving an EWA plane with landing gear that failed to engage. Tr. Vol. I at 58. This incident generated more employee concerns regarding safety issues, and, on behalf of the company, concerns regarding the FAA taking action on its certificate. Id. at 58-62.

Soon thereafter, members of the pilots' union met with EWA management to discuss safety concerns. Id. at 128. The chairman of the union's safety committee, John Albright, stated that management asked for the union's help, because the company anticipated a shut down by the FAA at any time. Id. at 118, 128-29. Also, at the meeting, one member of the management team commented that he was surprised each day he came to work that there was not a padlock on the front door. Id. at 137. Shortly after this meeting, Albright sent a letter to the FAA, on behalf of the union, wherein he stated that EWA was taking "aggressive" steps to improve and asked the FAA to forego any action to suspend or revoke EWA's certification. PX33 at 3.

Another meeting between Trimarco and the FAA took place, in late May 2001. During this meeting, the FAA informed Trimarco that "all options are open" regarding possible certificate action. Doc. #169 (Doll Dep.) at 46.

In the spring and summer months of 2001, EWA took several steps to attempt to address its safety and maintenance problems, including following through on a Plan of Action and Milestones, developed in accordance with FAA direction, committing to a multimillion dollar project to digitize the airline's maintenance manuals, and initiating a quarantine program in order to revitalize deficient aircraft. Tr. Vol. II at 289-90, 303-05. EWA also hired a team of consultants to oversee operations and to ensure that the airline was making steady progress on resolving its safety issues. Tr. Vol. II at 285-86.

On August 10, 2001, Trimarco received a call from the FAA, advising him of a meeting the following day and that he should have counsel present. Tr. Vol. I at 215. During that meeting, the FAA informed Trimarco that it would take action against EWA's certificate, if EWA did not voluntarily ground its planes, based on EWA's numerous, apparent violations of Federal Aviation Regulations. Id. at 217-18; JX9. Determining that it had no other choice, EWA/CNF management decided to ground EWA's fleet. Tr. Vol. III at 398-401. On August 13, 2001, EWA signed an interim agreement with the FAA, which provided that EWA would temporarily ground its planes, in lieu of the FAA pursuing action on EWA's flight certificate. JX10.

In the time period surrounding August 14, 2001, EMA laid off 575 employees, at its hub in Vandalia, Ohio, as well as numerous flight crew members. JX 13; JX 34. The pertinent text of the letter to flight crew members, informing them of this layoff, read as follows:

> At the present time, it is anticipated that, if we are able to resolve issues with the Federal Aviation Administration, the furlough of all flight crew members should last less than six (6) months, although it is impossible to determine that with any certainty. We will notify you if there is any change in the duration or status of the furlough.

JX 13. At this same time, EMA sent a letter to non-flight crew, laid-off employees which read, in pertinent part, as follows:

> Although it is impossible to determine this with any certainty, at this time we currently anticipate that, if we are able to resolve issues with the Federal Aviation Administration, employees should be recalled to work in less than six (6) months, hopefully even bringing employees back to work within sixty (60) days of their being laid off. Employees will be called back to work as soon as the need for each position arises.

JX 14. At that time, CNF also issued a bulletin indicating that EWA was working with the FAA to resolve the issues that led to the layoffs. JX8. Trimarco also publically commented that the layoffs were anticipated to be temporary. JX 15.

On September 18, 2001, EWA and the FAA signed a final settlement agreement. JX 16. Among other things, the agreement provided that EWA desired to resume its flight operations at the earliest possible date and the parties agreed to use their best efforts to conclude the process on an expedited basis. Id. ¶¶ 4,8. EWA also agreed to pay a $1 million fine. Id. ¶ 10. On September 27, 2001, EWA

met with the FAA, at which point the FAA required EWA to meet numerous additional requirements not identified in the final settlement agreement, before allowing EWA to resume flight operations. Doc. #169 at 67-71; DX 137. The increases in requirements were tantamount to requiring EWA to complete certification as if it were a new carrier entering the market. DX 137 at 3.

On October 8, 2001, Trimarco sent a letter to all employees who had been laid off, advising them of their status and updating them on the company's progress in resolving issues with the FAA. In pertinent part, that letter read as follows:

> As you know, the Company signed an agreement with the FAA in which all parties agreed to work toward resolving the issues which forced us to cease all air operations as of August 13, 2001. It remains impossible to determine with any certainty the timeline for resolving issues with the FAA. Although initially we had hoped to be able to recall employees within the sixty (60) day time frame, unfortunately at this time we have no plans to recall any furloughed employee. Employees will be called back to work as soon as the need for each position arises.
>
> While on layoff status, eligible employees were provided with sixty (60) days of Company-provided health, dental, and vision benefits. Since your health insurance, dental and vision benefits will no longer be paid by the Company after this initial sixty (60) day period, you will soon receive information from the Corporate Benefits Office regarding the Continuation of Benefits (COBRA). Additionally, Human Resources will process any vacation payouts for those of you who chose to be paid out at the end of your layoff period, or for whom we did not receive any election form. If you have not yet received your vacation payout, it will be printed in Portland, Oregon on or about October 19 and will be mailed directly to the home address.

JX 19. At the same time, Trimarco sent a similar letter to flight crew members. PX

19. Laid-off employees were provided COBRA notice, in October 2001, and those eligible to receive pensions began doing so that same month. E.g., DX 143; DX 144; DX 154.[3]

In October 2001, EWA officials expressed their objections to the FAA, regarding the additional requirements that had been imposed. DX 137 ("We are dismayed by the new information that we received on [September 27] and disappointed that the course of action outlined for us . . . is significantly beyond the scope of the project that was outlined to us . . . earlier in September."). The FAA did not relent, however.

On November 5, 2001, Trimarco sent a third letter to laid-off employees, which read, in applicable part, as follows:

> As I indicated to you in my prior correspondence, we initially anticipated that the layoffs would last less than six (6) months and that the company could resume flight operations. While we have made progress toward resolving the issues that resulted in the grounding of the airline, the implementation of the agreement with the FAA and the resumption of flight operations will require a much greater expenditure of time and money than we originally believed[;] therefore, it is now estimated that the layoffs will last longer than six (6) months. It has not yet been determined whether the layoffs will be permanent or temporary. It is now projected that flight operations will not be resumed before April 1, 2002, and then only if the necessary funding can be secured and approved.
>
> For these reasons, your layoff will continue until at least April 1, 2002.

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[3]In part, the letter regarding the vesting of pension benefits provides that "[w]hen you terminated your employment with the company[,] your pension benefits were vested based on the terms of the CNF Retirement Plan." DX 154.

JX 21; see also PX 20 (Ltr, dtd. Nov. 5, 2001, to flight crew members); PX 21 (same).

Throughout the fall of 2001, EWA/CNF officials were in communication with the FAA and met among themselves, to discuss the future of the company. E.g., Doc. #169 (Doll Dep.) at 73-76; JX 17 (EWA Board Mtg. Min., dtd. Sept. 26, 2001); JX 22 (Agenda for EWA/FAA Mtg., dtd. Nov. 7, 2001). As time went by, EWA realized that it was not going to receive the support and cooperation from the FAA necessary to return to operations in a timely fashion. Tr. Vol. II at 296-97. On December 4, 2001, CNF made the decision to permanently shut down EWA, based on the economic considerations of getting the company back in operating status and because of the continuing uncertainty associated with the FAA authorizing EWA's future flight operations. Doc. #184 (Ratnathicam Dep.) at 93-94. The following day, Trimarco advised the laid-off employees that EWA was ceasing its flight operations and that the layoffs would be permanent. JX 28, JX 29, JX 30.

On December 5, 2001, approximately 90 active employees of EWA were notified that they were being laid off, pending their permanent terminations on February 6, 2002. JX 31. Until such time, they continued to receive their pay and benefits. Id.

During the layoff, at least one employee thought he would be called back to work and, thus, did not look for other work, based on the communications from

EWA. Tr. Vol. I at 140. Again, based on the communications from EWA, another employee believed he was on an "extended vacation" and that he would return to work once the problems with the FAA were fixed and, thus, did not start to seriously look for work until December 6, 2001. Tr. Vol. II at 369-71. During the layoff, another employee worked on a realignment of EWA outstations, with the knowledge of EWA's Director of Maintenance, so that when the airline reopened, EWA could "hit the ground running." Tr. Vol. I at 175-76.

B. Whether August Layoff was "Mass Layoff"

As will be explained more fully below, a "mass layoff" (or plant closing) is a necessary component of a WARN Act claim. In accordance with 29 U.S.C. § 2101(a)(3) of the WARN Act, a "mass layoff" means a reduction in force which--

> (A) is not the result of a plant closing; and
>
> (B) results in an employment loss at the single site of employment during any 30-day period for--
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> (I) (I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or
>
> (ii) at least 500 employees (excluding any part-time employees).

29 U.S.C. § 2101(a)(3) (emphasis added). Subject to some exceptions not applicable here, the WARN Act defines an "employment loss" to mean "(A) an employment termination, other than a discharge for cause, voluntary departure, or

retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6) (emphasis added).

In their Amended Complaint, the Plaintiffs asserted that the August layoffs constituted "mass layoffs", as defined in 29 U.S.C. § 2101(a)(3). Doc. #79 (Am. Compl.) ¶ 5. In closing argument and in their post-trial memoranda, however, the Plaintiffs concede that, since the August layoffs were not expected to last more than six months and since there was no employment termination at that time, they did not suffer an "employment loss" and, thus, there was no mass layoff, in August 2001. E.g., Doc. #206 at 6 ("[T]here was not a 'mass layoff' in August of 2001 as defined by the WARN Act."); Doc. #207 ¶¶ 100-01 (conceding Plaintiffs "did not suffer an employment loss in August of 2001" and that "there was no 'employment loss' in August of 2001 as the result of 'an employment termination'"). In conceding there was no "employment loss" or "mass layoff", in August 2001, the Plaintiffs have abandoned their claim with regard to the Defendants' failure to provide WARN Act notice, for the events that transpired in August 2001.

Plaintiffs' concession aside, the Court similarly concludes that the Plaintiffs did not suffer an "employment loss", in August 2001, because the layoffs were not expected to exceed six months. This conclusion flows from the communications between the Defendants and the Plaintiffs, in August 2001,

wherein the Defendants state that the layoffs "should last less than six (6) months" and that the company would "hopefully even bring[] employees back to work within sixty (60) days of their being laid off." Furthermore, nothing in the evidentiary record suggests that the Defendants did not, in good faith, believe that this estimate was realistic, at that point in time. See 29 U.S.C. § 2101(c).[4]

In sum, then, the Plaintiffs have conceded that they did not suffer an "employment loss" (and a corresponding "mass layoff"), in August 2001, and the Court independently arrives at the same conclusion. The Court, therefore, finds it unnecessary to address the Plaintiffs' alternative argument that Defendants should not be entitled to the "unforeseen business circumstances" exception to the WARN

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[4]The parties do not argue this point, but the Court finds the language in paragraph (c) of 29 U.S.C. § 2102 to be instructive. That paragraph addresses extensions of layoff periods and provides that layoffs originally announced to be 6 months or less, which turn out to exceed 6 months, will be treated as employment losses unless–

> (1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and
>
> (2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

29 U.S.C. § 2102(c). The Court is satisfied that both of these criteria are present, in the instant case. In August 2001, the Defendants could not have foreseen the manner in which the FAA would continually elevate the standards to which it demanded EWA adhere, in order to re-attain its flight certificate status. Furthermore, the Defendants gave notice to the employees, in both October and November 2001, when it became reasonably foreseeable that an extension beyond 6 months might be required.

Act's notice requirements, provided in 29 U.S.C. § 2102(b)(2)(A), if the Court finds that there was a mass layoff, in August 2001.[5]

C. Whether Laidoff Employees Had "Reasonable Expectation of Recall," in December 2001

The WARN Act provides that an employer shall not commence a mass layoff or plant closing without giving "affected employees" sixty days notice. 29 U.S.C. § 2102(a)(1). The statute goes on to define "affected employees" as "employees

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[5]As noted, the Defendants have argued that, if the Plaintiffs suffered an employment loss, in August 2001, they (the Defendants) are entitled to rely on the unforeseen business exception to providing WARN Act notice, as provided in 29 U.S.C. § 2102(b)(2)(A). In response to the Plaintiffs' concession on the point of not having suffered the requisite employment loss, the Defendants state that "[i]t is Defendants' position that Plaintiffs suffered an employment loss in August of 2001, because the layoff of nearly all EWA employees and cessation of operations meets the statutory definition of a 'mass layoff' or 'plant closing.'" Doc. #209 at 3. In support thereof, the Defendants merely cite "29 U.S.C. § 2101", without further explanation. The Defendants go on to state that "if Plaintiffs now insist that they are entitled to no compensation whatsoever as a result of the August 2001 FAA-mandated shutdown, Defendants concur." Id.

It is unclear to the Court why the Defendants first took the position that the Plaintiffs suffered an employment loss, in August 2001, in the face of the Plaintiffs' concession, on this point. Courts have recognized that "[t]he WARN Act clearly contemplates that an employee may suffer multiple employment losses, necessitating separate notices." Graphic Communs. Int'l Union, Local 31-N v. Quebecor Printing Corp., 252 F.3d 296, 299 (4th Cir. 2001); see also Acevedo v. Heinemann's Bakeries, Inc., 619 F. Supp. 2d 529, 533 (N.D. Ill. 2008). Therefore, asserting that the Plaintiffs suffered an employment loss in August 2001 (thus, necessitating WARN Act notice, unless excused), does not shift the focus away from any potential requirement to provide WARN Act notice, in December 2001. Nevertheless, the Defendants' argument on this point is irrelevant, given that the Plaintiffs have abandoned their claim, as to the incidents of August 2001, and they are the masters of their Complaint. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987).

who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5) (emphasis added).

The question arises as to whether laidoff employees are "employees" for purposes of the WARN Act's "affected employees" definition. The Sixth Circuit has relied on a regulation promulgated under the WARN Act (which actually defines the word "employer", but contains an ancillary explanation of what it means to be an "employee") to answer that question. Kildea v. Electro-Wire Prods., Inc., 144 F.3d 400, 405 (6th Cir. 1998). Specifically, the Appellate Court points to 20 C.F.R. § 639.3(a)(1), which reads as follows:

> Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job.

20 C.F.R. § 639.3(a)(1). According to the Sixth Circuit, from this definition it follows that "laidoff employees (who are considered 'employees' under the Act) would also be 'affected employees' when they will suffer an employment loss as a result of a plant closing." Kildea, 144 F.3d at 405. "In other words, when it is shown that they have a 'reasonable expectation of recall,' a laidoff employee is an 'affected employee.'" Id. Importantly, the Sixth Circuit emphasizes that "the question is not whether the employees in the case at hand believed they had a fairly good chance of being recalled," but rather "the standard is whether a

'reasonable employee,' in the same or similar circumstances as the employees involved in the case at hand, would be expected to be recalled." Id. at 406.

In this case, the Court must determine whether a reasonable employee, in the same or similar circumstances as the Plaintiffs, had a "reasonable expectation of recall", in December 2001. If so, the Plaintiffs were entitled to WARN Act notice; if not, they were entitled to none. In making such a determination, courts look to both the text of the Regulation section cited above and also at certain factors identified colloquially as the "NLRB factors".

As noted above, 20 C.F.R. § 639.3(a)(1) provides that an employee has a "reasonable expectation of recall" when the employee understands, "through notification or through industry practice," that the employee's employment has been temporarily interrupted and that the employee will be recalled to the same or to a similar job. In determining whether employees have a reasonable expectation of recall, the Sixth Circuit has noted that the "reasonable expectation of recall" language, in 29 C.F.R. § 639.3(a)(1), is similar to that used in the National Labor Relations Act, in considering whether persons on layoff are "employees". Damron v. Rob Fork Mining Corp., 945 F.2d 121, 123-24 (6th Cir. 1991). Therefore, the Appellate Court has adopted the criteria used by the National Labor Relations Board ("NLRB"), in making such determinations, to wit:

(1) past experience of the employer

(2) the employer's future plans

(3) the circumstances of the layoff

(4) expected length of the layoff

(5) industry practice

Id. at 124. With this standard in mind, the Court will now turn to a consideration of the parties' arguments.

1. Plaintiffs' Arguments

The Plaintiffs contend that it is clear that they had a reasonable expectation of recall, given the text of 20 C.F.R. § 639.3(a)(1) (specifically due to the "notifications" received by the Plaintiffs, in the form of the three letters from Trimarco). Also, although there is no "past experience of the employer" or "industry practice" to consider in this case, the Plaintiffs argue that they had a reasonable expectation of recall based on the other three NLRB factors (EWA's future plans, the circumstances of the layoff and the expected length of the layoff), as indicated by the following facts: the bulletin issued by CNF, in August 2001, indicating that EWA was working with the FAA to resolve the issues that led to the layoffs; Trimarco's public comment, in August 2001, indicating that the layoffs were anticipated to be temporary; Trimarco's three letters to the Plaintiffs, all of which indicated the layoffs would be temporary and that EWA was continuing to work to resolve the issues with the FAA; and EWA's continuing efforts to resolve issues with the FAA (as evidenced by the final settlement

agreement and the various meetings between and among EWA/CNF officials and the FAA).[6] In support of their position, the Plaintiffs point to Kildea v. Electro-Wire Products, Inc., 144 F.3d 400 (6th Cir. 1998) and Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276 (E.D. Tenn. 1990). The Court will now turn to a consideration of those cases.

In Kildea, the plaintiffs were employed by Electro-Wire, a manufacturer of electrical wiring harnesses for the automotive industry. Due to declining production needs, in the late 1980s, the employer lost business, prompting layoffs. Kildea, 144 F.3d at 403. As to the employer's past experiences with layoffs, the Court noted the following:

> [L]ayoffs had been a part of life at the Owosso plant throughout the years due to the nature of its business. In fact, because of volatile production needs, Electro-Wire had implemented a seniority policy which determined who would be laid off and who would be recalled. This policy allowed employees to retain their seniority status even when laid off. Such seniority was only lost if the employee quit, was discharged, or was laid off for a period of time equal to the lesser of one year or length of service since the employee's most recent date of

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[6]The Plaintiffs also attempt to argue that EWA had a policy wherein employees who were reemployed within a year would be entitled to have their prior service dates restored for benefit purposes. Doc. #210 at 25. In support thereof, they point to JX 12, which is an EWA Question and Answer document regarding layoffs. The Plaintiffs have nullified their own argument, on this point, however, in also arguing (in the context of whether such document provided "notice" to the laidoff employees) that the Question and Answer document should not be relied upon by the Court, since not every laidoff employee was given a copy of the same. Doc. #206 at 10. Because the subject document was not made available to all of the Plaintiffs, the Court will not consider such when making its determination as to whether a reasonable employee, in the same or similar circumstances as the Plaintiffs, would expect to be recalled.

hire.

Id. Due to the above-described declining production needs, the employer laid off the plaintiffs. Id. According to the Court, "[t]he plaintiffs were put on indefinite leave, which meant that their fringe benefits were taken away."[7] Id. Eventually, the employer terminated the plaintiffs, without providing them WARN Act notice. Id.

In determining whether the employees had a reasonable expectation of recall and were, therefore, entitled to 60-day notice of their terminations, the Sixth Circuit considered the District Court's application of the NLRB factors to the circumstances of that case.

> The district court found that the past practice of Electro-Wire, and the industry as a whole, was to employ individuals permanently, but lay them off temporarily when production levels were low. Such individuals regularly were recalled and retained their seniority status throughout their layoff. Additionally, the Court found that even the Owosso plant management assumed that the more recent layoffs, which involved the plaintiffs, were routine and would eventually lead to recall when production levels increased.

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[7]At this point in its opinion, the Appellate Court inserted the following footnote:

> Electro-Wire makes much ado about whether the plaintiffs were laid off "temporarily" or "indefinitely." While the terminology does connote a difference in time, the bottom line is that the plaintiffs, because of industry practice and Electro-Wire's history of layoffs and recalls, were not considered terminated, but instead had an expectation of being recalled in the future.

Kildea, 144 F.3d at 403 n.2.

Id. at 406. The Court also considered the fact that the plant manager advised the employees that the company would be replacing lost business with new business and that "while some of them would be laid off as each line went down, they should not worry because there would be enough work for everyone to get back to work." Id. at 406 n.8. Testimony also showed that neither management nor the employees thought that the plant would close, given that it had "gone through rough times during the eighteen years the plant had been open." Id. at 406. In sum, the Court looked at "the history of layoffs, the past practice of recalling laidoff employees and the acknowledgment by management that they considered the layoffs in the fall/winter of 1989 to be routine and expected the laidoff employees to be recalled before losing their seniority status," in affirming the district court's finding that the plaintiffs had a reasonable expectation of recall. Id.

In Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276 (E.D. Tenn. 1990), the employer, KR, manufactured women's hosiery products. Due to quality problems with its products, KR lost a major part of its customer base. Id. at 1279-83. As a result of the loss of business, a number of employees were laid off, to include a group of approximately 270 employees. Id. at 1282. Of that group, 111 were recalled within six weeks, leaving 159 employees on layoff status. Id. Eventually the plant was closed and the question arose as to whether the 159 laidoff employees had been entitled to WARN Act notice of the plant closing. Id. at 1283.

In deciding whether the employees were entitled to such notice, the Magistrate Judge considered whether the employees had a reasonable expectation of recall, under 29 C.F.R. § 639.3(a)(1). Id. at 1284-85. That judicial officer did not apply the NLRB factors, but found the following facts instructive in making that determination:

> that the 159 employees at issue here were temporarily laid off on May 18, 1989, for an indefinite time[8]; that KR intended to recall these individuals to work; . . . that KR simply did not know, at the time, exactly when these employees would be recalled[; . . . and] that 111 of the other employees placed on indefinite temporary layoff were recalled . . . .

Id. at 1284 (emphasis in original).[9] Based on these facts, the Magistrate Judge concluded that the laidoff employees had a reasonable expectation of recall and, thus, were "affected employees" with a right to receive notice under the WARN Act. Id. at 1284-85.

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[8]It is unclear why the Magistrate Judge came to the conclusion that the employees were "temporarily laid off . . . for an indefinite time." The facts, as set forth in the case, merely provide that "270 [employees] were laid off for an indefinite period of time; however, 111 of the 270 were recalled before June 26, 1989." Id. at 1282.

[9]After setting forth these facts and concluding that the individuals were "employees" and, thus, "affected employees" entitled to WARN Act notice, the Magistrate Judge went on to opine that "a finding to the contrary would be inconsistent with the meaning and purpose of the Act in light of the fact that the defendant led these 159 people to believe that they were going to be recalled to work at some point in the near future . . . ." Jones, 748 F. Supp. at 1284-85. Because the Magistrate Judge did not note any additional facts in support of his opinion that "the defendant led these 159 people to believe . . .," this Court reasons that the Magistrate Judge inferred such a conclusion based on the facts as set forth above.

2. Defendants' Arguments

In contrast to the Plaintiffs, the Defendants assert that the laidoff employees did not have a reasonable expectation of employment and, therefore, were not entitled to WARN Act notice, in December 2001. Just as the Plaintiffs, the Defendants note that there is no "past experience of the employer" or "industry practice" to consider in this case, yet they argue that the Plaintiffs did not have a reasonable expectation of recall based on the other three NLRB factors (EWA's future plans, the circumstances of the layoff and the expected length of the layoff), as indicated by the following facts: the continuing uncertainty of EWA's status with the FAA, as most prominently evidenced by the FAA's unexpected increase in the requirements EWA had to satisfy in order to regain its certificate, even after the parties entered into a final settlement agreement pertaining thereto; and the change in the letters to the employees, from August to November, specifically as relating to the progressive stretching out of the expected length of the layoff period, the expressed uncertainty about whether the issues with the FAA would ever be resolved and the uncertainty as to whether the employees would ever be recalled.[10] In support of their position, the Defendants cite Sol-Jack Co.,

[10]The Defendants also argue, in support of this point, that EWA provided COBRA notification to employees, as well as paying of pension benefits to eligible employees. In response, the Plaintiffs point out that, in Kildea, the Sixth Circuit determined that the employees had a reasonable expectation of recall despite the fact that their benefits had ceased. Kildea v. Electro-Wire Prods., Inc., 144 F.3d 400 (6th Cir. 1998). The Plaintiffs further point out that courts have found a layoff to be a qualifying event under COBRA, thus indicating that the COBRA

286 N.L.R.B. 1173, 1987 NLRB LEXIS 116 (1987), NLRB v. Ideal Macaroni Co., 989 F.2d 880 (6th Cir. 1993) and NLRB v. Seawin, Inc., 248 F.3d 551 (6th Cir. 2001).

The employer, in Sol-Jack Co., 286 N.L.R.B. 1173, had experienced a decline in sales due to losing five of its six outside customers. An employee was informed by the company that he was being laid off "because of the company's lack of business and poor financial condition." Id. at 1173. At the time of his layoff, one of the owners of the company told the employee that "he might be back to work in 1 or 2 weeks," although the company later told him that the layoff was permanent. Id. In determining that the employee did not have a reasonable expectation of recall, the NLRB focused on the deteriorating financial condition of the company and the employee's testimony regarding his own lack of work, while employed, and found that these factors outweighed the owner's statement indicating he might be back to work in 1 or 2 weeks (which it determined was a "vague statement" meant to "lend hope to the laid-off employee [rather] than to

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payments were mandated as a result of COBRA rules. Local 217, Hotel & Restaurant Employees Union v. MHM, 976 F.2d 805, 809 (2d Cir. 1992). Because the Court concludes that the Defendants have demonstrated sufficient facts to indicate that the Plaintiffs did not have a reasonable expectation of recall, without considering the COBRA or retirement payment issues, the Court need not resolve whether those additional facts are properly considered in this analysis.

In their post-trial memoranda, the Defendants also attempt to argue that the terrorist attacks, on September 11, 2001, impacted their future plans because they "threw the entire industry into turmoil." Doc #202 at 28. The Court does not find support in the trial testimony for this argument, however, so will not consider the same when ruling herein. See Tr. Vol. I at 101; Tr. Vol. III at 448-49.

give a realistic assessment of his being recalled to work"). Id. at 1173-74. "When the objective factors involved indicate a laid-off employee had no reasonable expectancy of recall, vague statements by the employer about the chance or possibility of the employee being hired will not overcome the totality of the evidence to the contrary." Id.

In NLRB v. Ideal Macaroni Co., 989 F.2d 880, there was a declining need for employees, due to a resolution of previous manufacturing problems, which caused Ideal to lay off three employees, in March 1986. Id. at 880. The facts pertinent to the layoff and the employees' expectation of recall, in May of that year, follow:

> Ideal told the employees to return their uniforms and clean out their lockers. Ideal paid the employees for one week of vacation, even though the employees were not yet entitled to that vacation.
>
> According to testimony before the NLRB, one employee, upon being told that she would get paid for vacation, told her supervisor: "That sure tells me that we aren't coming back." In response, her superior stated that the layoff was supposed to be temporary. In addition, that employee and another testified before the NLRB that they were told that they would be called back to work in July to help with the annual cleaning of the plant.

Id. The Sixth Circuit concluded that the employees did not have a reasonable expectation of recall. Id. at 882. It based its decision on the company's business reason for the layoffs, the fact that no one was hired to replace the laidoff employees, and that all of the employees were recent hires in a work place that required fewer and fewer employees. Id. As to the employees' testimony that their supervisors indicated they would be called back to work, the Court concluded that

the statements were "certainly inconsistent with the actual employment facts, and were, at best, vague and ambiguous . . . ." Id. at 883.

In NLRB v. Seawin, Inc., 248 F.3d 551, the last case relied upon by the Defendants, Seawin suffered financial consequences, as a result of its inefficient evaluation of inventory and loss of key customers, which necessitated laying off seventeen production workers, in January 1998. As to communications between Charles Gaitros, a management official, and the laidoff employees, the Sixth Circuit notes the following:

> Gail Winter . . . asked Gaitros when they would be called back. Winter testified that Gaitros said "hopefully by the end of February." On cross-examination, Winter testified that she specifically recalled Gaitros using the word "hopefully." Diane Jackson . . . testified that when Gail Winter asked when they would be called back, Gaitros said "probably" around two weeks to a month. Tammy Ruffing . . . testified that Gaitros said it "could" be a week, two weeks, or a month. Rose Priddy . . . testified that she asked Gaitros over the phone if she would be recalled. Priddy stated that "from what I can remember" he said yes. Gaitros told the laid-off employees that they should contact the office and keep their applications updated.

Id. at 553-54. Six of the seventeen laid-off employees were eventually recalled to replace employees who quit or were terminated. Id. at 553-54.

In applying the NLRB factors to that case, the Sixth Circuit initially noted that the company had no past experience of recalls, but went on to a consideration of the remaining factors. Id. at 555. As to the circumstances surrounding the layoff, the Court noted that shortly after the layoff, Seawin modernized its production processes, which led to a decreased need for the type of services the

laidoff workers previously provided, and concluded that "[t]his change in the nature of Seawin's business deprives the laid-off employees of a reasonable expectancy of recall." Id. at 556. The Appellate Court then went on to consider what the employees were told about the likelihood of recall. Noting the statements set forth above that were attributed to Seawin management, the Court concluded that "the objective circumstances surrounding the layoffs, i.e., the declining sales, building inventory, eroding customer base, and increasing automation do not support a reasonable expectation of recall" and, accordingly, "equivocal statements by the vice-president of Seawin suggesting the possibility of recall do not 'provide an adequate basis for concluding that an employee had a reasonable expectancy of recall.'" Id. at 558 (quoting Sol-Jack, 286 N.L.R.B. 1173, 1987 NLRB LEXIS 116, *4). Finally, the Court looked at the future plans of the employer. In so doing, the Court considered it significant that Seawin had consistently maintained the number of employees with which it operated, since the time it laid off the plaintiffs, while at the same time improving its efficiency, thus indicating that the need for the laidoff workers had not increased in the months after the layoffs. Id. at 558-59. In conclusion, the Court found that the plaintiffs did not have a reasonable expectation of recall.

3. Analysis of Present Case

Based upon a review of the facts outlined above and the relevant case law,

as appropriately pointed to by the parties, the Court concludes that a reasonable employee, in the same or similar circumstances as the Plaintiffs, would not have expected to be recalled, in December 2001. In coming to this conclusion, the Court considers the NLRB factors that are relevant to the present facts, to wit: EWA's future plans, the circumstances of the layoff and the expected length of the layoff. Central to the Court's decision is the changing dynamics with regard to EWA and the FAA, in the months between the initial layoff, in August 2001, and the plant closing, in December 2001, and the extent to which the Defendants relayed their impressions of the same to the Plaintiffs.

As to the "circumstances of the layoff," the FAA forced the same (albeit, as a result of EWA's continuing maintenance and safety problems) and within a few days of the FAA's action, EWA and the FAA signed an interim agreement wherein the parties outlined a tentative plan to make EWA operational. EWA then announced the layoffs to its employees, indicating that it anticipated employees should be recalled in less than six months and hopefully within sixty days, "if [EWA is] able to resolve issues with the Federal Aviation Administration." JX 14.

With regard to "EWA's future plans", the Court finds it significant that the FAA was in control of EWA's destiny and continued to increase the standards to which it required EWA to adhere, most notably after the parties had come to an agreement regarding the same, as memorialized in the final settlement agreement, in September 2001. From that point on, the Defendants continued to work with

the FAA, in attempting to resolve the outstanding issues. However, it became progressively more apparent to the Defendants that the economics of complying with the heightened FAA standards did not make sense from a business perspective and began relaying its concerns about how this impacted the layoffs to the Plaintiffs, in letter form.

As to the "expected length of the layoff" and the extent to which the Plaintiffs were notified of the same, a study of the differences in tone between the letters in August, October and November 2001, indicates an increase in the expected length of the layoff period, an increasing wariness about EWA's ability to resolve the issues with the FAA, and a magnified expression of the uncertainty about whether the employees would ever be recalled, to the point where the reasonable reader (the reasonable employee) is left with no expectation of recall, by the end of the November letter. JX 19 (Ltr. to employees, dtd. Oct. 8, 2001) (indicating "unfortunately at this time we have no plans to recall any furloughed employee"); JX 21 (Ltr. to employees, dtd. Nov. 5, 2001) (stating that "the implementation of the agreement with the FAA and the resumption of flight operations will require a much greater expenditure of time and money than we originally believed" and that "[i]t is now projected that flight operations will not be resumed before April 1, 2002, and then only if the necessary funding can be secured and approved").

Returning to the case law cited by the Plaintiffs, the Court concludes that

the facts of those cases are distinguishable from the facts of the present case, in relevant part. Specifically, neither case contains facts wherein the employer's understanding of what it would take to recall its laidoff employees changed significantly in the time period between the initial layoff and the decision to close the plant, with the employer relaying such understanding to the employees along the way. The most important facts, in Kildea, included "the history of layoffs, the past practice of recalling laidoff employees and the acknowledgment by management that they considered the layoffs in the fall/winter of 1989 to be routine and expected the laidoff employees to be recalled before losing their seniority status," none of which is present in this case. Kildea v. Electro-Wire Products, Inc., 144 F.3d 400, 406 (6th Cir. 1998). Similarly, there are no facts in Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276 (E.D. Tenn. 1990), to indicate that significant circumstances changed, between the time the employer laid off the employees and the plant closing, or that the employer kept the employees apprised of the same.

Although not precisely on point, the Court finds the facts of NLRB v. Seawin, Inc., 248 F.3d 551 (6th Cir. 2001), to be most similar to the facts of the present case, in relevant part. Specifically, the Sixth Circuit noted, in Seawin, that after the layoffs, the company modernized its production processes, which led to a decreased need for the type of services the laidoff workers had previously provided, while discounting the statements made by management that suggested

the possibility of a recall. Id. at 556, 558-59. The Court finds that, as explained above, the facts of the present case far more clearly demonstrate, than those in Seawin, that a reasonable employee, in the same or similar circumstances as the employees in question, would not have expected to be recalled (given the FAA's continually escalating requirements and the manner in which EWA attempted to communicate to the Plaintiffs how the same impacted their likelihood of recall). In conclusion, therefore, the Court finds that the Plaintiffs did not have a reasonable expectation of recall, in December 2001.

II. Conclusions of Law[11]

Plaintiffs claim that the cessation of Defendant EWA's operations on December 5, 2001, constituted a plant closing as defined in 29 U.S.C. § 2101(a)(2), of the WARN Act, and that the Defendants failed to give them notice of the same, as required by those same statutory provisions. Doc. #79 (Am. Compl.) ¶¶ 12,13. The Defendants do not dispute that their actions constituted a "plant closing", as defined by the WARN Act. The Court must discern, then, whether the Plaintiffs were entitled to WARN Act notice, as a result of the plant closing.

The WARN Act provides that an employer must give "affected employees"

[11]This Court has federal question jurisdiction over this case, under 28 U.S.C. § 1331.

sixty days notice prior to closing a plant (or a "mass layoff", which is no longer at issue, in this case).[12] 29 U.S.C. § 2102(a)(1). The Act defines "affected employees" to mean "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5). As further explained by the Sixth Circuit,

> It is clear that the purpose of the WARN Act is to ensure that "workers receive advance notice of plant closures and mass layoffs that affect their jobs." This Court has already determined that temporarily laidoff employees with a "reasonable expectation of recall" are considered "employees" under the WARN Act. It makes sense, then, that such "employees," who have a reasonable expectation of recall, would experience a job loss when a plant is shutdown and thus would be considered "affected employees" under the WARN Act.

Kildea v. Electro-Wire Prods., Inc., 144 F.3d 400, 405 (6th Cir. 1998) (quoting Marques v. Telles Ranch, Inc., 131 F.3d 1331, 1333 (9th Cir. 1997) and citing Damron v. Rob Fork Mining Corp., 945 F.2d 121, 123 (6th Cir. 1991)).

As previously noted, in this Opinion, the Sixth Circuit instructs that, in order to be an "affected employee", a person must be an "employee", as that term is defined by 20 C.F.R. § 639.3(a)(1). Id. at 405 n.6. In order to be considered an "employee" under 20 C.F.R. § 639.3, a laidoff worker must have a "reasonable

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[12]As noted above, the Plaintiffs asserted, in their Amended Complaint, that the August layoffs constituted "mass layoffs", as defined in 29 U.S.C. § 2101(a)(3), triggering the notice required by the WARN Act, at that point in time. Doc. #79 (Am. Compl.) ¶ 5. The Plaintiffs have subsequently abandoned that claim, however, leaving only the claim pertaining to the plant closing in December 2001.

expectation of recall," as provided by 20 C.F.R. § 639.3(a)(1), and as further amplified by application of the NLRB factors noted above. As previously concluded by this Court, in the Findings of Fact, the Plaintiffs did not have a reasonable expectation of recall, in December 2001. Therefore, they were not "affected employees" who were entitled to WARN Act notice, at the time of the plant closing. In sum, therefore, the Defendants did not violate the WARN Act, in December 2001, given that the Plaintiffs were not entitled to notice thereunder.

III. Evidentiary Issues

At the conclusion of trial, the Court left open the question of the admissibility of Plaintiffs' Exhibits 24 and 27. Tr. Vol. IV at 48-53. Plaintiffs' Exhibit 24 is the transcription of a telephone conference call with regard to the establishment of Menlo Worldwide. The Plaintiffs rely on the contents of this document in making their argument that CNF should be held liable for the claims against the Defendants. Doc. #210 at 40, 44. Because the Court has not reached the issue of CNF's liability, having found that neither Defendant is liable for violations of the WARN Act,[13] the Court OVERRULES the Defendants' objections to

[13]As explained above, the Plaintiffs were not "affected employees" who were entitled to WARN Act notification, in December 2001. Therefore, EWA is not liable for violating that Act when it did not provide 60-days notice to the Plaintiffs, as to the plant closing. Furthermore, the Plaintiffs have demonstrated no facts that would make CNF (EWA's parent company) independently liable for the failure to provide notice. Thus, neither Defendant is liable for the same.

the admission of Plaintiffs' Exhibit 24, as moot.

Plaintiffs' Exhibit 27 is the decision of the chairman of a union arbitration panel, regarding whether EWA was excused from providing its pilots two weeks notice of the furlough, in August 2001, because of the unanticipated nature of the FAA grounding. The Plaintiffs rely on this document in support of their argument that the Defendants should not be excused from providing WARN Act notice, in August 2001, due to the "unforeseen business circumstances. Doc. #210 at 15. The Court has not reached the question of whether the Defendants are entitled to the "unforseen business circumstances" exception to providing WARN Act notice, however, given that the Plaintiffs have abandoned the claim associated with the events of August 2001 (and based on the Court's independent determination that those events did not trigger WARN Act protection). Therefore, the Court OVERRULES the Defendants' objections to the admission of Plaintiffs' Exhibit 27, as moot.

IV. Conclusion

The Plaintiffs have abandoned their claim, alleging violation of the WARN Act, in August 2001. Furthermore, the Court concludes that there was no "mass layoff", in August 2001, which would have triggered the notice requirements of the WARN Act, at that time. As to the events of December 2001, the Court concludes that the Plaintiffs were not "employees" and, thus, not "affected

employees" entitled to WARN Act notice of the plant closing.

Judgment is, therefore, to be entered in favor of the Defendants and against Plaintiffs, as to all claims set forth in the Plaintiffs' Amended Complaint. Doc. #79.

Having disposed of all issues raised in this litigation, the Court directs that judgment be entered in favor of Defendants and against Plaintiffs on all claims, dismissing this litigation with prejudice.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

September 28, 2009

/s/ Walter Herbert Rice
WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:
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