

United States Testing Company and Local Union 1936, International Brotherhood of Electrical Workers. Case 22-CA-21101

October 29, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On October 21, 1996, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

The Respondent argues that its refusal to provide the claims information that the Union requested was based on privacy concerns, citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). However, *Detroit Edison* is distinguishable. In that case, the employer made ef-

¹ In its exceptions, the Respondent contends that improper ex parte communications occurred between counsel for the General Counsel and Administrative Law Judge Davis. We have reviewed the relevant correspondence concerning this claim and are satisfied that Associate Chief Administrative Law Judge Biblowitz appropriately disposed of it. No improper communications were shown to have occurred and, accordingly, the relief requested by the Respondent was unwarranted. The Respondent's exceptions on this issue are, therefore, denied.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's failure to find that a successor collective-bargaining agreement had been reached. Any issues concerning such an agreement may be addressed in the compliance phase.

³ The Respondent has excepted, inter alia, to the judge's Order that it provide the Union with certain information. As the judge set out in his opinion, the Union met the relevancy test for information concerning employees outside the unit, except with respect to claimants' names. The judge carefully crafted his Order to reflect this analysis. Thus, while the Order requires the Respondent to provide the names of plan participants, it does not require the Respondent to provide claimants' names with the claims data to which the Union is entitled.

To clarify that the Union need not renew its information requests, the Order is modified by replacing par. 2(b) with the following:

(b) Furnish to the Union in a timely manner the information requested by the Union, both orally and in writing, on October 12, 14, 17, and 18, 1995, as follows:

(1) The names of each of Respondent's employees and dependents covered by Respondent's medical and dental plans.

(2) The claims submitted and paid by Respondent for each and every benefit provided for the cumulative policy year through August, 1995.

orts to accommodate the Union's interest in seeing the relevant information, while not compromising confidentiality. In the instant case, the Respondent simply rejected the Union's request. Indeed, the Respondent took it on itself to tell the Union what information it needed, based on the Respondent's narrow view of the Union's role in negotiating health care benefits. Health care costs are clearly a mandatory subject of bargaining and, as they have increased, negotiations over health care benefits and costs have become an increasingly important agenda item in bargaining. As health care concessions continue to be sought at the bargaining table, union attention is turning toward new and innovative cost containment strategies in contract negotiations.

Thus the Respondent should not have been surprised that the Union was seeking more than to juggle premium formulas, the role to which the Respondent wished to confine it, but rather sought to participate meaningfully in structuring the benefits for which the Respondent wanted the bargaining unit to pay. In seeking to play a role in the solution, rather than simply making a substantial concession on the Respondent's say-so, the Union was fulfilling its role as the employees' statutory bargaining representative.

With respect to the Respondent's allegation that the Union had engaged in dilatory tactics, on the one occasion when the Union postponed a meeting, the meeting was rescheduled for 2 days later and the Respondent did not seek additional dates. On a subsequent occasion, the Respondent itself rejected one of the Union's proffered dates. These facts present no basis for finding that the Union engaged in a pattern or practice designed to avoid bargaining.

Finally, with respect to the issue of impasse, the Respondent failed to offer evidence that its financial situation was so dire that it either had to implement its final offer when it did or suffer financial ruin. See *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified, and orders that the Respondent, United States Testing Company, Fairfield, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the order.

Marguerite Greenfield, Esq., for the General Counsel.
Joseph Paranac, Esq. (Jasinski & Paranac, P.C.), of Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by Local Union 1936, International Brotherhood

of Electrical Workers (the Union) on January 11, 1996, a complaint was issued by the National Labor Relations Board for Region 22 on March 28, 1996, against United States Testing Company (Respondent).

The complaint, as amended at the hearing, alleges that during collective-bargaining negotiations for a renewal agreement, the Union requested certain information which Respondent refused to supply. The complaint further alleges that Respondent unlawfully implemented the terms of its final collective-bargaining proposal without a valid impasse having been reached, employees engaged in an unfair labor practice strike, and Respondent unlawfully failed and refused to reinstate them.

Respondent denied the material allegations of the complaint, and on May 13 and June 13, 1996, a hearing was held before me in Newark, New Jersey.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, having its office and place of business in Fairfield, New Jersey, has been engaged in the business of providing consumer products testing. During the past year, Respondent in the conduct of its business operations purchased and received at its Fairfield facility goods valued in excess of \$50,000, directly from points outside New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Union represents a unit of approximately 11 technicians employed in Respondent's engineering department. There are between 85 and 100 other employees employed by Respondent.

The parties have had collective-bargaining agreements for many years. The last agreement was due to expire on October 18, 1995.¹

On August 1, Respondent's attorney, David Jasinski, wrote to the Union, advising it of Respondent's desire to begin negotiations, and of its availability in August to do so. On August 15, the Union responded that it sought negotiations.

Six sessions were held. Spokesmen were Union International Representative Anthony Makris and Respondent's attorney, Jasinski.

The first session was held on August 31, where the parties agreed to present and discuss noneconomic proposals at the next session.

Jasinski testified that at the August 31 meeting he told the Union that the Respondent was experiencing financial difficulties, was "bleeding," and sought to obtain cost reductions in negotiations, specifically, that the unit employees pay for part of their health insurance. Jasinski stated that he

mentioned that the nonunit employees had been paying 20 percent of their health care costs, and that their contribution had been recently increased to 30 percent. Jasinski further stated that Union Financial Secretary Frank Razzuoli said that the Union had not agreed to a 20-percent contribution in the past, and it would not agree to any contribution now.

Union Officials Makris and Razzuoli could not recall whether Jasinski asked that unit employees pay for part of their health insurance.

At the next meeting, held on September 20, the parties exchanged their written noneconomic proposals, and provided explanations for their demands. A new date was set for October 10. Thereafter, Makris called and advised Jasinski that he was unavailable on October 10, and they agreed to meet on October 12.

At the October 12 session, agreement was reached on probationary period and a streamlining of the grievance procedure, and the parties exchanged their economic proposals. Jasinski testified that at this session, he stated that due to Respondent's financial situation, and inasmuch as the nonunit employees contributed 30 percent of their health insurance costs, Respondent sought to have the unit employees contribute the same amount to the health plan which covered both groups. Makris requested a copy of the costs of the health care plan and the experience rating for the unit employees.

Respondent also proposed a 10-percent wage reduction and a reduction in the number of paid holidays from 11 to 8.

The parties reviewed the Union's economic proposals, which included a 25-percent wage raise and three additional paid holidays, and the same 401(k) plan that was offered to nonunit employees.

Respondent provided the Union with a copy of its vacation policy for nonunion employees and a copy of the names of the unit employees and the departments in which they worked. Both documents had been requested by the Union at the prior meeting.

The Union requested that a Federal mediator attend the negotiations and Respondent agreed, and they agreed to meet on October 14.

At the October 14 session, Makris responded to each of Respondent's economic proposals, and explained why the Union either rejected each or how it would affect the unit employees.

Makris rejected Respondent's proposal that the unit members pay 30 percent of their health insurance premium. He testified that he told Jasinski that before he could make any counterproposals concerning the health plan, he needed certain information, including the names of the employees and their dependents who participate in the plan—both unit and nonunit employees; the claims submitted by each of the members in the plan, and the benefits paid by Respondent for each claim submitted for 1995, up to August 1995.²

Makris testified that Jasinski asked why he wanted information about the nonunit employees, adding that he did not need such information. Makris replied that he needed it in

¹ All dates hereafter are in 1995, unless otherwise stated.

² Following the close of the hearing, pursuant to a procedure I authorized, Respondent submitted the affidavit of Frank Palavido, which I have considered, and received in evidence with General Counsel's statement in opposition, as R. Exh. 10. Palavido's statement does not affect the findings I make here.

order to offer counterproposals which could satisfy Respondent's needs to reduce the health plan cost 30 percent. Jasinski responded that the Union does not need, and is not entitled to, the information concerning nonbargaining unit employees.

Makris stated that Respondent may have raised the issue of whether the nonbargaining unit was entitled to privacy or confidentiality with respect to the medical claims submitted by those workers. Makris noted that the Union did not seek the diagnosis of the patient, but only the amount of the bill, and the sum that was paid.

At that meeting, Respondent gave the Union certain information it requested at the prior meeting. The data turned over consisted of (a) the premium rate and premium paid for the unit employees, who were not identified by name issued by U.S. Healthcare, (b) a "benefit and service analysis" consisting of the coverage rates, charges, and adjustments for medical and dental benefits for all employees, issued by Aetna's administrative system, and (c) a benefits' cost analysis prepared by Respondent, for single and family coverage under Aetna and U.S. Healthcare, showing the premium per month, employee cost per month, and the percentage of the premium paid by employee at 30 percent—in other words, what employees would pay under Respondent's proposal.

Makris responded that none of the material furnished satisfied the Union's requests, and such information did not help the Union. Makris told Jasinski that the Union needed the names of the employees and their dependents, the claims submitted by each of them, and the claims paid by the insurance company, and that such information was needed in order to make a counterproposal. Makris also asked for the experience rating, which is the ratio of the premiums paid and the claims paid.

Specifically, Makris told Jasinski that he needed information concerning nonbargaining unit employees, because he sought to determine what types of claims generated the highest costs, and from such information make counterproposals, which might include a higher deductible or higher out-of-pocket payments for the employees.

At the hearing, Makris stated that he needed individual claims information in order to determine the type of claims submitted and to ascertain which claims resulted in the most payments. Thus, if most of the large claims were for surgeries as opposed to physicians' visits and X-rays, he would then examine the plan documents, determine what type of coverage was provided for surgeries, and recommend changes in the plan in order to reduce the costs to the employer. Thus, Makris might propose managed care treatment, preadmission testing, and out-patient surgery. He might also propose that employees pay a higher deductible, or be subject to a copayment requirement.

At the negotiation session, Jasinski responded that the Union did not need such information, and is not entitled to such data concerning nonbargaining unit employees. Makris then rejected the Respondent's health care proposal, because of Jasinski's refusal to provide any further information.

Jasinski asked Makris to make a written request for the information. The request stated, in material part, as follows:

The names of each company employee and dependent covered by the company's medical and dental plan; the names and claims submitted and paid by the company for each and every benefit provided for the cumulative

policy year up to August, 1995. I request the above mentioned information in order for the negotiating committee to intelligently and fairly respond to your health insurance proposal.

Respondent made concessions concerning its proposals, as follows: Although Respondent had proposed a 3-year collective-bargaining agreement, it agreed to the Union's request for a 1-year contract. It also offered to increase its offer of the number of holidays from eight to nine; and agreed to the Union's proposal that overtime be paid after 35 hours, and not after 40, as Respondent had originally proposed.

Jasinski testified that the session concluded when, less than 3 hours after it began, Makris announced that the Union "had enough for today" and that it would return on October 17. Jasinski replied that he was ready to stay all day if necessary.

A Federal mediator was present at the final two sessions, those of October 17 and 18, at the Union's request and Respondent's agreement.

At the October 17 meeting, Respondent provided a document entitled, "Aetna experience monitoring—1995–96, cumulative policy year as of August, 1995." The document shows for all the employees, unit and nonunit, for the period March through August 1995, the total claims paid, the premiums paid, and the ratio of the two numbers. In each month, the claims paid exceeded the premiums paid. This constitutes the experience rating.

On receiving this information, Makris informed Jasinski that this was not what the Union sought. He said that the document omits the name of the claimant and the nature of the claim, and the individual claims for all employees, union and nonunion, covered under the plan. According to Makris, Jasinski became angry, and announced that this document was all that the Union was entitled to, and that was all that it would receive. Makris then rejected Respondent's health insurance proposal.

Jasinski testified that he again stated that he was concerned about violating the privacy of those nonunion claimants whom the Union did not represent. He further stated that this was the first time that the Union requested the claims by category. In this respect, it should be noted that Makris testified that certain matters were discussed at the previous, October 14 meeting, which Jasinski attributed to this meeting.

Also at this session, the Union made counterproposals concerning its economic demands, by decreasing its holiday proposal. Respondent also provided the Union with a copy of the health and welfare plan and pension plan.

The next meeting was held on October 18. On midnight of that day, the contract was due to expire. The unit employees worked that day, and certain employees removed their personal belongings from their work stations during the workday.

At the meeting, Respondent presented further information to the Union. It consisted of a listing, by name, of all unit employees, and the premiums paid by them, and the claims paid, from January 1994 through August 1995. It shows that in 1994, premiums paid were \$55,122, and claims paid were \$27,116. In 1995, premiums paid were \$37,659, and claims paid were \$22,441.

Another document given to the Union at that time set forth total amounts of premiums paid and claims paid for union employees, nonunion employees, and the total for the entire Company for the same period of time as the first document.

These documents showed that in 1994, the premiums paid for union and nonunion personnel exceeded the claims paid by 55 percent. However, in 1995, the claims paid for nonunion employees exceeded the premiums paid by 39 percent, while the premiums paid for union workers exceeded the claims paid in their behalf by 60 percent. The figure for the entire Company in 1995 was that the claims paid exceeded the premiums paid by 30 percent.

Makris informed Jasinski that these documents were not what he had asked for. Makris stated that he was not seeking total numbers, rather the Union sought individual claims by each member and their dependents. Makris further noted that the information provided was of no help, because it did not identify the costs of the benefits, although he conceded that his request was somewhat satisfied with respect to the first document which listed the union employee name.

At the meeting, the Union withdrew about nine of its proposals, modified one or two others, and refused to alter a couple of others.

Makris testified that there was no other movement on any other proposals that day. He asked Jasinski to continue the negotiations since the Union had not been given an opportunity to "go into depth" in the negotiations. Jasinski replied that Respondent's final proposal was on the table. Makris asked that Jasinski put the final proposal in writing. Jasinski did so and Makris said that the Union's committee rejected it, but that he would present it to the union membership, and advise Respondent.

Jasinski testified that following his presentation of the experience rating information to the Union, Makris asked for the individual claims for the nonunit employees. Jasinski replied that he could not provide it because of privacy concerns. It should be noted that in his pretrial affidavit, Jasinski said that he did not furnish the information about the claims history of the nonunit employees, because the Union did not explain why such information was relevant. The affidavit was silent about privacy concerns. However, Jasinski's bargaining notes record that he did raise that issue, and I find that he did. It should be noted that Makris testified, as noted above, that Jasinski may have raised that issue at the October 14 session.

Jasinski further stated that at the last session, Respondent increased its offer of holidays, from 9 to 10, and also proposed a 401(k) plan for unit employees. The Union proposed (a) a 3-year collective-bargaining agreement, notwithstanding that a agreement on a 1-year term had been reached in the prior session, (b) wage raises of 6 percent in each of the 3 years, and (c) no contributions to the health and welfare fund. The Union rejected Respondent's wage and health insurance proposal.

Jasinski stated that after Respondent made its proposal for a 401(k) plan, Makris said that there was no movement. Jasinski then said that "we are at an impasse." Makris replied that Respondent should make its final offer and he would have the membership vote on it. Jasinski denied that Makris told him that the parties should continue to negotiate, because they did not have an opportunity to go into depth with the negotiations.

Before the workday began the following morning, October 19, the Union's negotiating team met with the unit employees. Respondent's final offer was explained in detail to the membership. The employees asked questions such as whether the Employer modified certain of its proposals, and whether the Union responded to certain proposals. Makris told the employees that the Union had "no opportunity to respond." The employees voted to reject Respondent's final proposal.

Union Official and Respondent employee Razuoli testified that at that meeting, no one liked Respondent's final offer, and no one wanted to work under those conditions. The employees believed that the contract was not fair in that it would mean a 30-percent cut overall in their pay and benefits. The negotiating committee members told the union members that they recommended rejection of the proposal, because it was "general knowledge" that Respondent was "taking us on" and wanted to "get rid of them."

Makris stated that it has been the parties' practice, for the past 20 years, that Respondent would not present its complete offer in its final package, but that the membership would vote, and reject its final offer as presented, then work for 2 to 3 days under the expired agreement, and then agreement on a new contract would be reached. The employees also voted that a letter be given to Respondent.

The letter, signed by Union President Tom Fuller, was presented to Respondent on October 19. It stated that the union membership rejected the Respondent's "most recent proposal," but that the Union wishes to continue to negotiate. The letter advised that the employees are willing to continue to work under the existing terms and conditions of the expired agreement "for a reasonable period of time while we continue to negotiate."

Respondent replied the same day with the following letter. It states in material part:

Your conditional offer to return to work under the terms and conditions of the expired collective-bargaining agreement . . . is rejected.

We have reached an impasse in the negotiations and this is to advise you that [Respondent] hereby implements the terms and conditions set forth in its final offer.

The members of Local 1936 may return to work only under the implemented terms and conditions of the Company's final offer.

Makris testified that prior to that letter, Respondent had not mentioned the word "impasse." The employees picketed with signs that said that they were locked out.

Respondent Manager Pepe testified that in the first days of the strike, supervisors and managers performed the work of the striking employees. However, the workload was too great and, on October 22, an advertisement was placed in a newspaper.

On October 25, Union President Fuller addressed a letter to one of Respondent's customers, which advised it that the Union has been involved in a labor dispute with Respondent concerning its technical employees who test the customer's product. Fuller stated that in his opinion "there are no experienced or qualified technicians performing testing procedures at this time," and advised the customer to "check all test reports for accuracy . . . and visit the plant to observe for yourself why jobs are late and how the tests are being

performed. Our technicians have been performing these tests on your products for well over 20 years and, in my opinion, have been the only people qualified to perform such tests. Those doing the testing now haven't used the equipment in years, or in some cases, may never have used the equipment."

In early November, Pepe interviewed applicants, and in mid-November, hired permanent replacements. He stated that he believed that it was necessary to hire permanent replacements, because the technical expertise required by the job was at a fairly high skill level.

Razzuoli stated that on one day in December, he and others distributed leaflets at Respondent's Hoboken headquarters. The leaflet stated as follows:

Informational Notice
U.S. Testing President, Ken Elkin locks out Local Union 1936 at Fairfield branch with unreasonable proposals
10% reduction in wages
No paid absences (sick days)
Reduce holidays by one
35 hr. work week
Mandatory overtime—paid only after 40 hrs. work
No company contributions to existing pension plan
Over 275 years of dedicated service lost for no good reason
What next for U.S. Testing employees?

On December 11, the union membership voted to accept Respondent's final offer. Makris informed Respondent of this, and said that the employees wished to return to work. In response, a letter was addressed that day from Jasinski to the Union, which states in material part:

In response to Local 1936's offer to return to work under [Respondent's] implemented terms and conditions of employment, this is to advise you that four positions have been eliminated and nine permanent replacements have been hired to fill the remaining positions. There are no vacant positions available at this time.

Any striking employee who makes or has made an unconditional offer to return to work will be placed on a preferential recall list on the basis of seniority. In the event that a position becomes available, those employees on that list will be recalled.

As of the date of the hearing, Respondent has not reinstated any employees. However, additional bargaining sessions were held in January and February 1996, resulting in the parties entering into a successor collective-bargaining agreement.³

William Mulcahy, a health insurance underwriter, testified in behalf of Respondent that premiums paid by an employer may be reduced by transferring the costs to the employees by (a) having them pay part of the premium, and (b) a change of the plan design so that employees pay more of the out-of-pocket costs, such as deductible expenses and coinsurance.

³The fact that a successor agreement was executed is relevant in view of other evidence received concerning events occurring after the commission of the alleged unfair labor practices.

Mulcahy offered the opinion that a change in a plan to shift costs through a higher deductible or copayment requires no information from the insurance company. Nor would the insurance carrier need the names of the employees covered by the plan, or require the individual claims history for each employee covered by the plan. He noted that the insurance company would be able to advise how much of a cost saving would be achieved if the deductible or coinsurance payment was raised.

A. Positions of the Parties

The General Counsel argues that the information requested by the Union was relevant and necessary to the performance of its duties as the collective-bargaining representative of the unit employees, and that Respondent's failure to produce the data violated the Act.

The General Counsel contends further that Respondent's failure to produce the information prevented a valid impasse from occurring since, if the Union had that information, it could have made proposals which may have resulted in agreement being reached, thereby avoiding impasse. Thus, it is argued, that Respondent's failure to provide the information precluded the Union from making a counterproposal, thereby preventing a valid impasse from occurring. It is argued, in the alternative, that aside from the information issue, the evidence does not establish that a valid impasse had been reached.

The General Counsel asserts that the strike constituted an unfair labor practice strike, because Respondent's unfair labor practices in refusing to provide the information or, alternatively, implementing its final offer without a valid impasse having been reached, "inherently tainted and prolonged negotiations."

Finally, the General Counsel argues that, as unfair labor practice strikers, the employees could not validly be permanently replaced, and on their offer to return to work, should have been immediately reinstated.

Respondent argues that the information sought was irrelevant, confidential, and unduly burdensome, and that it had no obligation to furnish the Union with such information. It contends that a valid impasse was reached in view of the Union's "bad faith" during negotiations, and that it was justified in implementing its final proposal.

Respondent further contends that there is no causal nexus between its alleged failure to provide the information requested and the strike. Accordingly, it is argued that the strike was an economic strike which permitted Respondent to employ permanent replacements for the strikers.

B. Analysis and Discussion

1. The refusal to furnish information

The complaint alleges that Respondent has failed and refused to furnish the Union with the following information: (a) the names of each of Respondent's employees and dependents covered by Respondent's medical and dental plans, and (b) the names and claims submitted and paid by Respondent for each and every benefit provided for the cumulative policy year through August 1995.

It is well settled that an employer must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees.

NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). This duty to provide information includes information relevant to negotiations. *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987).

Respondent supplied some of the information sought, specifically the names of the bargaining unit members, the premiums paid on their behalf, and the claims paid, and the experience rating. Further information furnished included the total amounts of premiums paid and claims paid for all employees, unit and nonunit.

The information sought by the Union, which was not turned over, concerns matters outside the bargaining unit, specifically data concerning nonunit employees' and their dependents' names and their claims.

Where, as here, the information sought concerns matters outside the bargaining unit, the Union bears the burden of establishing the relevance of the requested information. *Reiss Viking*, 312 NLRB 622, 625 (1993); *Duquesne Light Co.*, 306 NLRB 1042 (92). A union has satisfied its burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. *Knapton Maritime Corp.*, 292 NLRB 236, 238-239 (1988).

The Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. [*Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).]

I find that the Union has satisfied its burden of establishing the relevance of the requested information. In seeking the information, the Union set forth its reason in writing at the October 14 session—to intelligently and fairly respond to Respondent's health insurance proposal. Notwithstanding Jasinski's testimony that no reason was given by the Union for seeking such information, I find that the reason set forth was sufficient.

Respondent's proposal, to require employees to pay part of their insurance premium, represented a drastic departure from the employees' experience. For as long as the employees have enjoyed health insurance, the Respondent paid the entire premium. Accordingly, Respondent's request that the workers pay 30 percent of the premium constituted an extreme measure.

The information requested was clearly relevant to the Union's ability to "properly assess the employer's proposals and, concomitantly, to properly formulate bargaining proposals of its own." *Decker Coal Co.*, 301 NLRB 729, 740 (1991).

First, it must be observed that according to the information furnished the Union, it appears that one reason for Respondent's demand that the unit employees contribute to the health insurance premiums was that the benefits paid exceeded the premiums paid, and that Respondent was thereby "bleeding," as Jasinski mentioned in his initial statement to the Union.

Further, as set forth in the documents presented on October 18, in 1995, the nonunit employees' benefits paid exceeded their premiums paid, while the unit employees' premiums exceeded their benefits paid. Simply stated, the unit

employees' health care experience was profitable for Respondent, while Respondent was losing money due to the poor claims experience of its nonunit employees.

Thus, inasmuch as both groups are members of the same plan, the unit employees were apparently being asked to contribute to the health plan because of the unprofitable claims experience of the unit employees. Accordingly, information sought regarding the nonunit employees which caused the unprofitable claims experience for the company as a whole was properly sought. See *Langston Cos.*, 304 NLRB 1022, 1071 (1991), where the Board upheld a union's request for information concerning a "corporatewide policy" which relates to unit and nonunit employees.

Based on the documents turned over by Respondent, the Union's obvious concern was with the difference in claims experience between the unit and nonunit employees, and it was entitled to examine such an issue, and thereby justify its position that the unit employees not contribute toward the health insurance premium. See *Martin Marietta Energy Systems*, 316 NLRB 868, 874 (1995), where the Board required the employer to furnish information concerning health care costs on the ground that the information sought "was relevant to proposals being explored by the union for presentation to the respondent . . . [and] was relevant to the union's collective-bargaining responsibilities."

It must be noted that although the information sought, strictly speaking, concerns the nonunit employees, such information directly relates to, and has an unequivocal effect on, the unit employees. Thus, both groups are members of one health plan. The poor claims experience of the nonunit employees was apparently being used by Respondent to improve its experience rating, by shifting to its unit employees the obligation to pay part of their premiums.

Thus, as Makris testified, in preparing its counteroffer, the Union sought such information as the category of the claims in order to determine in which medical areas the claims predominated. With such information, the Union expected to examine the plan and determine what counteroffer could be proposed, such as increasing the deductible for surgeries if that medical specialty was frequently utilized. In addition, as set forth above, such proposals might include higher deductible and out of pocket payments for the employees, or changes in the plan, such as managed care treatment, preadmission testing, and outpatient surgery, or a copayment requirement.

The Union has clearly satisfied its obligation to prove that the information requested has potential or probable relevance to the negotiations, and specifically to Respondent's proposal, and the Union's formulation of its counteroffer.

I cannot find, however, that the Union's request for the names of the claimants is relevant. The Union was concerned, foremost, with obtaining information concerning the nature of the claims, their frequency, and the premiums and payments made for each claim. As set forth above, I find that Jasinski raised the issue of the confidentiality of the claimants' names during bargaining. I do not find that there is any proper purpose for the Union's receipt of the names of the claimants which, when connected with the claim itself, may reveal the private nature of the medical claim. However, I find that all other information requested by the Union, as set forth in the complaint, is relevant. The claims information which I shall direct to be furnished to the Union shall not

contain the names of the claimants, but shall specify whether the claim was submitted by a unit employee or a nonunit employee.

I have considered Respondent's argument, and the testimony of William Mulcahy, an independent health insurance underwriter, that no information was needed from the insurance carrier in order to change an existing health plan in order to shift the cost of premiums to employees. He testified that such a change could be brought about by providing for a higher deductible or copayment, and that, on request, a carrier could advise as to the amount of reduction of the premium if the deductible or coinsurance payment was raised by a certain amount.

I accept Mulcahy's testimony that the information requested by the Union, such as the names of the claimants and the experience rating, was irrelevant to the impact on the costs of the health insurance plan, because it had no bearing on the amount of reduction the insurance company would assign given a request to increase the deductible or coinsurance. However, such information was quite relevant to the Union's appraisal of the claims experience of the employees, both unit and nonunit, and its appreciation of Respondent's demands that employees contribute to the plans, and the formulation of its own proposals and counteroffers to meet the Respondent's asserted needs to reduce its costs with respect to the health insurance plan.⁴

2. The alleged impasse and Respondent's implementation of its final offer

The complaint alleges that Respondent unlawfully implemented the terms of its final proposal without a valid impasse having been reached.

The General Counsel argues that Respondent's failure to furnish the information to the Union which it requested precluded a lawful impasse. I agree.

A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations. A failure to supply information relevant and necessary to bargain constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances. [*Decker Coal Co.*, 301 NLRB 729, 740 (1991).]

Genstar Stone Products Co., 317 NLRB 1293, 1294 (1995), involved a situation, similar to the instant case, where employees had not contributed toward health insurance premiums during their 16-year coverage by the health plan. The employer sought "substantial concessions" from the union, including employee contributions to the health plan, which "became a major dividing point in negotia-

⁴ *Bohemia, Inc.*, 272 NLRB 1128 (1984), relied on by Respondent, is distinguishable. The information requested by the union there was found not to be relevant, because the request was based solely on the suspicion, without any objective factual basis, that work had been transferred to another location, and because the union did not raise the subject matter of the information request during the collective-bargaining negotiations. In contrast, here the Union had an objective basis for making the request and the matter was discussed during bargaining.

tions." The union's requests for information for health care cost financial records were not complied with, such information being needed by the union to evaluate the employer's proposal. The Board held that the employer's "unlawful refusal to provide information precluded a lawful impasse," and that it was, therefore, not privileged to unilaterally implement its final offer.

I, accordingly, find that Respondent's refusal to furnish such requested information which I have found relevant precluded a lawful impasse from being declared. Such information was needed by the Union in order to engage in meaningful negotiations about major concessions being demanded concerning the health plan. This was the first time that employees had been requested to contribute to the cost of the health plan, and the demanded 30-percent contribution represented a substantial concession.

On receiving the information, the Union would then be in a better position to make an informed assessment of Respondent's proposal, focus its inquiry into those areas of the health plan suffering the worst experience rating, and make an accurate, pointed proposal toward remedying the poor experience rating borne by Respondent. The process of collective bargaining would thereby be enhanced and speeded if the Union had such information, and it could reasonably be expected that impasse could have been avoided.

Apart from my finding that the declaration of impasse was unlawful because of Respondent's refusal to furnish certain information to the Union, I further find that no impasse had occurred on October 19, 1995, when Respondent implemented the terms of its final proposal.

The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. Both parties must believe that they are at the end of their rope. [*Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993).]

It was only at the fourth of six sessions that the parties exchanged their economic proposals, and at the fifth session that the proposals were responded to and discussed in detail. Minor agreements on certain, few noneconomic terms were reached by the end of the bargaining, but the few actual bargaining sessions did not leave sufficient time for substantial discussion on the major issues of concern to the parties. In addition, since most of the discussion that did occur centered around the Respondent's health care proposal, not much time was left for negotiation of other matters, particularly Respondent's demand for a 10-percent wage reduction.

The Union demonstrated its ability to be flexible by reducing its demand for additional holidays, and agreeing to Respondent's proposals for probationary period and a streamlining of the grievance procedure. I have considered Respondent's arguments that the Union was predisposed to refusing to reach agreement by its cancellation of one meeting, refusing to stay for a longer time at another meeting, and the employees' removal of their personal belongings on their last day of work. However, these minor impediments to the bargaining process did not excuse the premature declaration of impasse.

"Respondent was required to give the bargaining process a chance to work. The purpose of the duty to bargain is to give the collective-bargaining process a chance to operate re-

ardless of the possibility of success.” *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994).

Given the relatively few bargaining sessions, the substantial concessions sought by Respondent, including a 30-percent contribution to the health plan and a 10-percent wage reduction, there simply was insufficient time to bargain. When one considers that the full economic proposals were exchanged at the fourth session, discussed at the fifth session, and the contract expired at midnight of the sixth session, it is obvious that impasse was declared prematurely.

In addition, at the last session, the Union withdrew nine of its proposals. Although it is disputed whether Makris, at the last session, said that he wanted to negotiate further because the Union did not have an opportunity to go into “depth” in the bargaining, nevertheless, after the vote to reject Respondent’s final offer, the Union presented its letter on October 19 advising Respondent that it wished to negotiate further.

Based on all the above, I find and conclude that there was no genuine impasse on October 18, and that by subsequently implementing its proposals, Respondent violated Section 8(a)(5) and (1) of the Act.

3. The unfair labor practice strike

The complaint alleges that the strike was an unfair labor practice strike from its inception, and was caused by Respondent’s unfair labor practices. Respondent argues that the strike was an economic strike.

Just prior to the vote to reject Respondent’s final offer, the Union’s negotiating team explained to the employees in detail Respondent’s final offer. Questions were asked whether Respondent modified its proposals and whether the Union responded to Respondent’s proposals. Makris testified that the Union had “no opportunity” to respond to certain proposals. Although Makris’ testimony is not clear, a proper finding may be made that his statement to the employees that the Union had no opportunity to respond, was in answer to a question concerning health benefits. Thus, Makris’ October 14 letter requesting information stated that he needed the information in order to respond to Respondent’s health insurance proposal. It may be inferred that Makris’ statement to the employees that he could not respond to certain Respondent’s proposals referred to the fact that the Union did not receive the information it requested in order to properly respond.

As testified by Razzuoli, the employees rejected the offer, in part because of the drastic, 30-percent cut in their pay and benefits which they believed would be the result of the offer.

In view of the above limited testimony given by Makris and Razzuoli, I cannot make a definite finding that employees decided to strike because of Respondent’s refusal to furnish information to the Union.

However, such a finding is not necessary in view of the facts here. Thus, as set forth above, on October 19, after rejecting Respondent’s final offer, the Union told Respondent that it wished to negotiate further, and that the employees would “continue to work” under the terms of the expired contract. The employees had not yet struck. Respondent rejected this offer, and required that they continue to work “only under the implemented terms and conditions of the Company’s final offer.”

Thus, Respondent caused the strike by refusing to permit the employees to continue to work unless they agreed to accept the unlawfully implemented terms of its final offer. As I have found above, Respondent’s final offer was implemented unlawfully because there was no genuine impasse and, if there was an impasse, it was tainted by Respondent’s unlawful refusal to supply the requested information to the Union. Indeed, in the absence of a lawful impasse, Respondent’s conduct in refusing to permit the employees to continue to work because they would not accept the implemented terms and conditions of employment, and Respondent’s hire of replacement employees to perform unit work, appears to constitute an unlawful lockout. *Branch International Services*, 310 NLRB 1092, 1105 (1993). However, the complaint does not allege that Respondent locked out its employees, and I make no such finding.

Thus, it was Respondent which caused the strike. The union members did not vote to strike. They only voted to reject the Respondent’s final offer, and in fact requested permission to continue to work while negotiations continued. In response, Respondent refused to permit them to continue to work unless they agreed to accept its unlawfully implemented proposal. As discussed above, it cannot be found that the Union had determined to strike before its vote to reject the Respondent’s final offer. Thus, the facts that certain employees had removed their personal belongings from the premises, and that employees had asked an employer representative if he wanted their keys, do not mean that employees were predisposed to strike, or that such actions justified Respondent’s conduct in not permitting them to work unless they agreed to accept its implemented terms.

In *Henry Miller Spring Co.*, 273 NLRB 472, 477 (1984), a very similar situation, the Board held that the union’s strike was an unfair labor practice strike:

Respondent . . . committed the unfair labor practice of announcing that, as to the contract items still open, it would implement its most recent contract proposals. While work was available on June 6, it was available only under those conditions. The Union suggested continuing to work under the terms of the existing contract, but Respondent refused. . . . The Union, unwilling to work under those reduced conditions, went on strike. Clearly the reason for the Union’s refusal to work was Respondent’s unfair labor practices. The cause-and-effect relationship between the Respondent’s unfair labor practices and the Union’s refusal to work is manifest, and I conclude that Respondent’s unfair labor practices caused the strike

Accordingly, the Respondent caused the Union to strike. The employees were refused entry to Respondent’s facility, and denied permission to work unless they agreed to Respondent’s unlawfully implemented final proposal. The cause of the strike was thus a direct result of Respondent’s refusal to allow the employees to work.

I, accordingly, find that the strike which began on October 19 was an unfair labor practice strike from its inception.

4. The rights of the strikers

On December 11, the striking employees voted to accept the Respondent’s final offer and return to work. Makris in-

formed Respondent that the employees were willing to return to work. This constitutes an unconditional offer to return to work, as noted in Respondent's written response, which refers to the [Union's] "offer to return to work under [Respondent's] implemented terms and conditions of employment"

Thus, the Union in behalf of the striking employees made an unconditional offer to return to work, and was told that four positions had been eliminated and nine permanent replacements had been hired to fill the remaining positions, and that there were no vacant positions available. The Union was further told that the employees would be placed on a preferential recall list. The letter added that the strikers could not return to work since they were permanently replaced.

Unfair labor practice strikers cannot be permanently replaced, but must be offered immediate and full reinstatement on their unconditional offer to return to work. *Walnut Creek Honda*, 316 NLRB 139, 142 (1995). By permanently replacing the striking employees and refusing to reinstate them, and instead placing them on a preferential recall list, Respondent violated Section 8(a)(3) and (1) of the Act. *Walnut Creek*, supra.

CONCLUSIONS OF LAW

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

2. The Union, Local Union 1936, International Brotherhood of Electrical Workers, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union with the following requested information, Respondent has violated Section 8(a)(5) and (1) of the Act:

(a) The names of each of Respondent's employees and dependents covered by Respondent's medical and dental plans.

(b) The claims submitted and paid by Respondent for each and every benefit provided for the cumulative policy year through August 1995.

4. By implementing changes in its employees terms and conditions on or about October 19, 1995, at which time no valid bargaining impasse existed, Respondent refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

5. The strike which began on October 19, 1995, was an unfair labor practice strike from its inception, and the striking employees were unfair labor practice strikers.

6. By permanently replacing the unfair labor practice strikers and failing and refusing to reinstate them immediately on their unconditional offer to return to work, Respondent violated Section 8(a)(3) and (1) of the Act.

7. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

Inasmuch as the strike, which began on October 19, 1995, was an unfair labor practice strike, it is recommended that

the strikers as to all of whom an unconditional offer to return to work was made on December 11, 1995, be reinstated to their former jobs or a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed. Respondent shall also be ordered to make all of those employees whole for any loss of pay or benefits they may have suffered, less interim earnings, because they were not immediately reinstated on the Union's offer to return to work, and because of the implementation of unilateral changes in employment terms on October 19, 1995. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 233 NLRB 1173 (1987).

It shall be further directed that Respondent be directed to bargain in good faith with the Union until agreement has been reached or a valid impasse has been reached. In addition, it shall be ordered to restore terms and conditions prevailing in the collective-bargaining agreement which expired on October 18, 1995, and to make whole employees for any lost wages or benefits incurred as a result of the unilateral changes made in those terms and conditions of employment on October 19, 1995. It shall be ordered to maintain those terms and conditions of employment in effect until the parties have bargaining to agreement or to impasse.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, United States Testing Company, Fairfield, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Local Union 1936, International Brotherhood of Electrical Workers as the exclusive representative of employees in the appropriate unit of employees at its Fairfield, New Jersey facility, by failing and refusing to furnish information to the Union, and by declaring impasse prematurely, and by implementing its final contract offer without having reached a valid impasse.

(b) Permanently replacing the unfair labor practice strikers and failing and refusing to reinstate them immediately on their unconditional offer to return to work.

(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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

⁵If 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.

Employees in the classifications specified in Section 5.1 of the most recently-expired collective bargaining agreement between the Union and Respondent and casuals employed in the Engineering Services Department of the Testing Division of the Respondent.

(b) On request furnish the Union with the following information:

(1) The names of each of Respondent's employees and dependents covered by Respondent's medical and dental plans.

(2) The claims submitted and paid by Respondent for each and every benefit provided for the cumulative policy year through August 1995.

(c) Restore employment terms to the levels set forth in the collective-bargaining agreement which expired on October 18, 1995, and maintain them until such time as the parties have bargained in good faith and reached agreement or, alternatively, until a valid impasse is reached.

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

(e) Make whole all unfair labor practice strikers for any losses they may have suffered as a result of discrimination against them, and the implementation of unilateral changes in employment terms on October 19, 1995, in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discrimination against the unfair labor practice strikers and notify them in writing that this has been done and that the discrimination will not be used against them in any way.

(g) 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, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Fairfield, New Jersey facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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 January 11, 1996.

⁶If 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."

(i) 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.

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 fail and refuse to bargain in good faith with Local Union 1936, International Brotherhood of Electrical Workers as the exclusive representative of employees in the appropriate unit of employees at our Fairfield, New Jersey facility, by failing and refusing to furnish information to the Union, by declaring impasse prematurely, or by implementing our final contract offer without having reached a valid impasse.

WE WILL NOT permanently replace unfair labor practice strikers and failing and refusing to reinstate them immediately on their unconditional offer to return to work.

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

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Employees in the classifications specified in Section 5.1 of the most recently-expired collective bargaining agreement between the Union and Respondent and casuals employed in our Engineering Services Department of the Testing Division.

WE WILL, on request, furnish the Union with the following information:

(a) The names of each of the Employer's employees and dependents covered by Employer's medical and dental plans.

(b) The claims submitted and paid by Respondent for each and every benefit provided for the cumulative policy year through August 1995.

WE WILL restore employment terms to the levels set forth in the collective-bargaining agreement which expired on October 18, 1995, and maintain them until such time as the parties have bargained in good faith and reached agreement, or alternatively, until a valid impasse is reached.

WE WILL within 14 days from the date of this Order, offer full reinstatement to the unfair labor practice strikers to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all unfair labor practice strikers for any losses they may have suffered as a result of discrimination against them, and the implementation of unilateral changes in employment terms on October 19, 1995.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discrimination against the unfair labor practice strikers and notify

them in writing that this has been done and that the discrimination will not be used against them in any way.

UNITED STATES TESTING COMPANY