UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACCAR, INC., d/b/a PETERBILT MOTOR COMPANY, Respondent, vs. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND UAW LOCAL 1832, Charging Parties.	)	No. 26-CA-23225

CHARGING PARTIES, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND UAW LOCAL 1832's ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Comes now the Charging Party, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW and UAW Local 1832, pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board, and presents its Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Recommended Decision and Order.

I. INTRODUCTION

On October 30, 2008, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW and UAW Local 1832 filed (the "Union") filed an unfair labor practice charge with Region 26 of the NLRB (Board) against Peterbilt Motor Company ("Respondent"), a division of PACCAR, Inc. (General Counsel's "GC" Ex. 1(a)). The Union alleged that Respondent had failed and/or refused to bargain in good faith in violation of 8(a)(5) of the Act, had failed and/or refused to produce information relevant and necessary on a timely basis to the Union for the purposes of collective bargaining in violation of 8(a)(5) of the Act, and had unlawfully locked out employees in furtherance of its unlawful bargaining position in violation of Sections 8(a)(3) and (5) of the Act. (Id.). The charge was amended by the Union on July 20, 2009 (GC Ex. 1(c)), and a second amended charge was subsequently filed on July 30, 2009 (GC Ex. 1(e)). The charge was docketed by the Region as case number 26-CA-23225.

On February 26, 2010, the Regional Director for Region 26 issued a Complaint alleging Respondent had violated the National Labor Relations Act. (GC Ex. 1(g)). The Complaint found that the Union had made an information request by letter dated June 19, 2008, the information was necessary for and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of the unit, that on July 16, 2008, Respondent refused to furnish the Union

with the information requested and finally that the June 23, 2008 lockout was prolonged by the Respondent's failure to provide information and was converted to an unlawful lockout on July 16, 2008. (GC ex. 1(g), ¶¶ 10, 11). As a result the Respondent was charged with discriminating in regard to the hire or tenure or terms or conditions of employment of its employees thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. (GC Ex. 1(g), ¶ 12 at page 3). The Director also found the Respondent had failed and refused to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act. (GC Ex. 1(g), ¶ 13 at page 4).

The Respondent filed an Answer in which it denied each allegation, including the allegation that the Union had by letter dated June 19, 2008 requested Respondent provide the Union with the information contained in the letter. (GC Ex. 1(i) at pages 4-5). In the alternative, the Respondent maintained that assuming the Union had made the June 19, 2008 information request, the requested information was not relevant to the parties bargaining proposals. (GC Ex. 1(i) at page 6). Finally, the Respondent asserted that assuming the June 19, 2008 request for information was made in response to the Respondent's bargaining proposals or the Union's perceived understanding of the Respondent's bargaining proposals, the Respondent clarified its position and/or retracted any purported reliance upon the subject matter of the information request in connection with it's bargaining proposals. (GC Ex. 1(i) at page 7).

This case was heard in Nashville, Tennessee on June 9 and 10, 2010, by the Honorable Keltner W. Locke. At the close of trial, the parties submitted post-hearing briefs. On October 22, 2010, Judge Locke issued his decision. Judge Locke determined that Respondent negotiators had justified concessionary bargaining proposals by telling Union negotiators that the Madison,

Tennessee facility had the highest operational costs of any of Respondent's facilities and that the statement was made in conjunction with expressed concerns about the future of the Madison facility. Judge Locke also found that in response, the Union had submitted a valid, written request for information regarding labor cost at Respondent's other facilities. Locke concluded that the information about the labor costs at other plants was necessary and relevant to the Union's responsibility to protect jobs of the bargaining unit and to negotiate a satisfactory contract, and that the Respondent had a duty to furnish it. As a result, Judge Locke determined that Respondent's failure to produce the requested information had a substantial adverse impact on negotiations and rendered the subsequent lockout unlawful as of July 16, 2008.

On November 26, 2010, Respondent filed One Hundred and Twenty Seven (127) exceptions to Judge Locke's findings and conclusions.

II. STATEMENT OF FACTS

Respondent Peterbilt Motor Co., a truck manufacturing division of PACCAR, Inc., operated a manufacturing plant in Madison, Tennessee. (Hearing Transcript "Tr." 30). Since 1973, the Madison facility production and maintenance employees had been represented by UAW Local Union No. 1832 (the "Union"). (Tr. 31, 222-223). PACCAR had four (4) other truck assembly plants in the United States; another Peterbilt facility in Denton, Texas and Kenworth plants in Renton, Washington and Chillicothe, Ohio. (Tr. 53, 227-228, 323). Neither the Denton nor the Chillicothe facility was unionized; Renton was unionized but not by the UAW. (Tr. 53).

The Respondent and the Union had a long and often difficult collective bargaining history at the Madison facility, characterized by negotiations that had routinely led to either strikes or lockouts. (Tr. 31, 325). During both the 1998 and 2002 negotiations, employees had been locked

out by the Respondent. (Tr. 31, 224). On April 30, 2008, the parties began negotiating a new contract as the 2003-2008 contract was set to expire on June 20, 2008. (Tr. 32, 33, 144, 224, 324). At the time of these negotiations, there were approximately 300 active employees and approximately 300 employees on layoff status with recall rights. (Tr. 44, 410).

Union negotiators included International Representative Mike Brown, Assistant Director UAW Heavy Truck Department Tim Bressler, Coordinator for UAW Heavy Truck Department Terry Bolte, Local 1832 President Mike Pardue, Local 1832 Vice President Danny Warren and additional bargaining committee persons. (Tr. 30, 33, 34, 143, 266). Mike Brown had participated in every collective bargaining negotiation between the parties since 1979. (Tr. 30). Tim Bressler, the Lead Negotiator for the Union, had been negotiating contracts since 1996, and had been involved in every UAW heavy truck negotiation since 2004, negotiating some 22 or 23 agreements. (Tr. 143, 167). Employed at the Madison facility since 1976, Local Union 1832 President Mike Pardue had been participating in contract negotiations since 1995. (Tr. 222, 223). Terry Bolte's collective bargaining experience began in 1996, and since 2002 he had participated in numerous collective bargaining sessions specifically for the UAW Heavy Truck Department. (Tr. 277, 278).

The Respondent was represented by Karen White, Director of Employee and Labor Relations, Larry Vessels, Madison Plant Manager, Brenda Copeland, HR Manager, Dan Simmons from Human Resources, Bruce Kundart, Plant Controller, and Jennie Doss, Recording Secretary. (Tr. 34, 425). Karen White, who had worked for PACCAR for approximately four and a half years, served as the chief negotiator for the Respondent. (Tr. 36, 323, 432, 482). This was her very first set of contract negotiations for the Peterbilt Madison plant. (Tr. 432). Larry Vessels, the lead company representative during negotiations, had been the Plant Manager for approximately 16 years, but had

never negotiated a contract. (Tr. 482, 500).

In addition to the full bargaining committee meetings, Union and Respondent representatives also met and exchanged proposals in smaller groups known as "sidebars." (Tr. 35, 224, 225). The sidebar meetings were on the record and not considered confidential. (Tr. 35-36, 85, 170, 412, 449-450). It is undisputed that there were no ground rules established for negotiations. (Tr. 36, 144, 224, 266, 502). In total, the Respondent and the Union met to negotiate approximately 20-22 times. (Tr. 36). However prior to the June 20, 2008 expiration date of the contract, the parties met for only a total of approximately 29.4 hours, not including caucuses. (Tr. 37, 86; GC Ex. 3).

During negotiations, the Respondent's positions regarding outsourcing, wages and benefits became core obstacles to the parties reaching an agreement. (Tr. 40). During a sidebar on June 12, 2008, the Respondent gave the Union its tiered wage proposal that provided one level for active employees, another for those employees on lay off with recall rights, and a third level for new hire employees. (Tr. 43, 409, 447, 498; Union "U" Ex. 2). Although the Union was not opposed to having separate rates for new hires and current employees, it opposed any distinction or separation between the current employees and those on lay off, as many of those on lay off had fifteen (15) or more years of service with the Respondent. (Tr. 43). The Union expressed its concern over the division such a distinction would cause among employees. (Tr. 44, 368, 412, 490-491). Such a proposal would destroy the bargaining unit. (Tr. 170). At other facilities the Union had agreed to a tiered wage system where a second tier was put in place for new hires, but the Union had never agreed to a wage system that provided a different rate for employees recalled from layoff. (Tr. 169).

The Respondent was also proposing a controversial change to the existing contract's sourcing provisions. Sourcing had been covered in the contract under Article 2, Memorandum of

Understanding 4 and Memorandum of Understanding Number 10. (Tr. 242). The Respondent was proposing to take the right to source or outsource and put it in the management's right clause, which would have resulted in an unlimited right to source or outsource by management. (Tr. 41, 171). The Union opposed this proposal as it would obviously adversely affect the job security of its membership. (Tr. 42, 242). The issue of outsourcing had been negotiated in the existing contract, had been upheld in arbitration, and the Union was satisfied with the system in place at the time. (Tr. 42, 147, 330). During bargaining this became a significant issue between the parties, with the Respondent refusing to make any significant changes to its proposal. (Tr. 41, 46).

The Respondent also proposed a tiered system of insurance benefits that would have divided the active employees from those on layoff with recall rights and new hires. (Tr. 45). The Union could not agree to such a divisive proposal. As the parties went through the Respondent's proposal point by point, the Union gave its responses. (Tr. 48). The Respondent did not agree and did not accept the Union's positions. (Tr. 48). At that stage the parties were far from reaching an agreement, and Local President, Mike Pardue requested a side bar meeting for June 13, 2008. (Tr. 49, 225). With only a week left before contract expiration, he was very concerned that there were still so many unresolved issues on the table. (Tr. 49). Disappointed negotiations had not progressed further, Pardue worried about not being able to get the membership to ratify what the Respondent was proposing in regards to outsourcing and the three tiered wage proposal. (Tr. 50).

During the June 13, 2008 sidebar the parties were discussing outsourcing when Plant Manager Larry Vessels commented that the Madison facility had to get its costs down because it was the highest cost facility in PACCAR. (Tr. 51, 114, 227, 486). Vessels told the Union that wages at the Madison facility needed to be more in line with what the wage rates were at Respondent's non-

union plant in Denton, Texas and expressed his concern about the long term viability of the Madison Plant. (Tr. 267-268). When Mike Brown questioned whether he meant highest labor cost per hour or highest cost per unit, according to the Union, Respondent confirmed they were talking about the highest cost per hour. (Tr. 52, 227, 268, 467, 487, 466-467).[1] [2] This was actually the second time Mike Brown had heard such a claim, and Brown responded that the Union needed that information.[3] (Tr. 52, 268).

A subsequent sidebar was held on June 16, 2008. (Tr. 145). The main topics of discussion were again, the issues of outsourcing, the tiered healthcare proposal, and the three tiered wage proposal. (Tr. 146-147). Respondent was asking for steep concessions, concessions unlike any the veteran Union negotiators had ever seen before in the heavy truck industry. (Tr. 148). The Union considered outsourcing a "cornerstone piece of language that was negotiated and provided job security." (Tr. 148). Without that language, there was nothing to prevent Respondent from sending work out and laying off employees. (Tr. 148). The issue of Madison having the highest labor costs was brought up again. (Tr. 149, 466; U Ex. 4 at page 263). During the discussions White acknowledged the Union's verbal information request regarding the other facilities, and admitted the Respondent had mentioned other facilities in sidebars. (U. Ex. 4 at page 263). She denied relative costs at other facilities had driven Respondent proposals. (Id.). Larry Vessels expressed his concern

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[1] Although Karen White first testified she did not recall Mr. Brown asking if the Company meant cost per hour or per unit, she later admitted he had made the statement. (Tr. 412, 467).

[2] Larry Vessels alleges he responded both. (Tr. 488).

[3] Brown testified the Karen White had previously made the same claim which he had subsequently discussed with the membership on June 5, 2008. (Tr. 51-52).

about the future of the Madison plant and stated that if the work ever went to the Denton, Texas facility, most likely it would not come back. (Tr. 152, 413).

The parties met for another sidebar session on June 19, 2008. (Tr. 54). In attendance were Tim Bressler, Terry Bolte, Mike Brown, and Mike Pardue for the Union; Karen White and Larry Vessels for the Respondent. (Tr. 54, 228). As the parties began to discuss outsourcing again, the Union voiced it's opposition to an unlimited right to outsource. (Tr. 54). In response to the Respondent's claim that Madison had the highest costs in the PACCAR organization, Tim Bressler handed Karen White a written request for information regarding costs for other PACCAR facilities. (Tr. 55, 153, 229, 272, 377; GC Ex. 4). Bressler explained this was the same type of model request the Union had used at other truck plants it represents. (Tr. 58, 153, 154, 272). Bressler told the Respondent that the Union needed the requested information in order to verify the Respondent's statement in regards to Madison having the highest costs and to properly respond to what the Respondent had put on the table. (Tr. 153, 272). Without the information, the Union would not be able to make an educated proposal back to the Respondent. (Tr. 272). Bressler also explained to the Respondent's representatives that it was vital for the Union to have the information in order to come up with a comprehensive agreement that it could take back to the membership for a vote. (Tr. 229).

In response to the Union's request, Karen White did not dispute the relevance of the information, but rather got upset and stated that she was concerned that the Union was using information that it was told in a sidebar to get unfair leverage against the Respondent. (Tr. 59, 140, 141, 230, 273). She then suggested that having sidebars might not be such a good idea. (Tr. 59, 141, 155, 216, 378, 445). Bressler explained that this information request was the same type they had

given to other truck manufacturers it represented; other employers had complied and had even opened their books to them. Karen White suggested such companies must be in dire straits, like the auto industry. (Tr. 60). The Union reiterated that it needed the information in order to verify that Madison did in fact have the highest costs of all PACCAR facilities as the Respondent was claiming, and to be able to give serious consideration to Respondent's proposals. (Tr. 60, 306). Bressler told them he knew the Union could compete if they had the numbers. (Tr. 60). Bressler acknowledged that it was a complex data request, and might take some time, but asked to have whatever information they could provide immediately. (Tr. 61, 154). Karen White commented, "We'll see." (Tr. 232). At no time did Respondent ever indicate that it did not have the information or would not provide the information. (Tr. 61, 95, 155).

Immediately following that session, Karen White sent an email to various Company officials. (GC Ex. 13). White's email, sent at approximately 11:01 a.m., described the June 19th bargaining session and stated that the Union was positioning itself to file unfair labor practice charges. (GC Ex. 13). As a "heads up" to where the charges would come from, White specifically referred to the Respondent's "***failure to respond to information requests***" on ***"Comparative wage data from other PACCAR facilities."*** (Tr. 415; GC Ex. 13)(emphasis added). White also referred to the "***failure to demonstrate the reason for concessionary bargaining (i.e. the lower rate for recalled workers***)." (Tr. 415; GC Ex. 13)(emphasis added). Respondent's bargaining notes[4] for the June 19th session also reflect that Bressler had requested comparative wage data from other PACCAR facilities and the Respondent's belief that the Union could be preparing for multiple unfair labor practice charges.

[4] Respondent's bargaining notes were produced in response to the General Counsel's subpoena.

(U Ex. 1, at 1546). There is no reference in the Respondent's bargaining notes to the Union's information request being a "sample." (Tr. 442).

The parties met the following day, June 20, 2008, the day the contract was to expire. (Tr. 61). Although the parties exchanged proposals, the Respondent's proposals regarding outsourcing, insurance and the three-tiered wage scale had not changed. (Tr. 62). Tim Bressler told the Respondent that he did not believe the parties were at impasse. (Tr. 156, 232). He stated the Union wanted to continue bargaining and was willing to work without a contract. (Tr. 62, 156, 232). The parties had not even discussed all the contract provisions, and Bressler reminded the Respondent it had not responded to the Union's outstanding information requests. (Tr. 63, 156, 174, 232). At midnight the Respondent presented its last and final offer and told the Union to take it or leave it. (Tr. 157, 274).

The Union bargaining representatives met with the entire membership on June 22, 2008. (Tr. 64). As the meeting began, each member received a letter from the Union which outlined the status of negotiations. (Tr. 64; GC Ex. 5). Tim Bressler told the membership that progress had been made, but that there were still some serious issues left open on the table. (Tr. 157). He also spoke about the outstanding information requests on health and safety as well as the data requests about labor costs. (Tr. 65, 158). Bressler stated the Respondent was claiming that the Madison facility had the highest costs per hour of all of PACCAR facilities, and that the Union had asked for that information but that it had not yet been provided. (Tr. 66). He specifically explained how it was difficult to effectively negotiate without the labor costs data that had been requested. (Tr. 158). He indicated the Union needed the information in order to verify the claim of Madison having the highest costs and to consider the Respondent's proposals and make counterproposals that would put it in a

competitive position. (Tr. 66-67, 158).

The Union discussed the Respondent's final offer and its position regarding unlimited outsourcing rights and the three tiered wage proposal. Bressler explained how the proposals would divide and separate the membership. He also told the membership that the Union had told the Respondent that it was willing to continue working while continuing to negotiate. (Tr. 66). There was a motion by the membership not to vote on the agreement. (Tr. 277). Bressler called Karen White and told her that the membership did not vote on Respondent's offer. (Tr. 159, 394). The parties set up a conference call for June 23, 2008. (Id.).

Employees reporting for work on Monday, June 23, 2008, found the Respondent had locked them out. (Tr. 67, 234, 275; 394). Although in the past the plant had continued to operate with replacements, according to Karen White, it was Respondent's policy not to operate the plant without a labor agreement. (Tr. 326, 435). According to White, this lock out "contingency plan" had been put into place "way before negotiations started." (Tr. 395).

During the June 23, 2008 conference, the parties went through the contract from beginning to end and discussed every open issue. (Tr. 68, 160). At the end of the call Bressler again mentioned the outstanding PACCAR facility data request.[5] (Tr. 160). The Union needed the information related to the competitive status of the Madison facility. (Tr. 161). If the Respondent's statement was validated, the bargaining committee could go to the membership with an educated explanation regarding whatever concessions had to be made. (Tr. 162). In the past the Union had taken drastic measures to reduce cost and remain competitive. (Tr. 213). For example, at other facilities the Union had accepted employee paid monthly healthcare premiums and tiered wage structures. (Id.). The

[5] White denied Bressler made this verbal request. (Tr. 425).

Union understood that if you are not competitive, you're not going to survive in the market. (Tr. 213). But without the requested information the Union could not justify to its membership why it should accept the steep concessions the Respondent was proposing. (Tr. 175).

By letter dated June 24, 2008, the Union emphasized that it did not believe the parties were at impasse and renewed its request for the information regarding the other PACCAR facilities. (Tr. 69; GC Ex. 6). The Union stated that the information was needed in order to evaluate the Respondent's proposals and in order for the bargaining to move forward. (GC Ex. 6). The Union expressed its disappointment over the Respondent's decision to lock out the employees and reiterated that its members were willing to work under the terms of the expired agreement. (Id.). Finally the Union demanded that bargaining resume. (Id.).

On June 28, 2008, Plant Manager Larry Vessels responded by letter. (GC Ex. 7). The Respondent disagreed with the Union's "assessment of the status of bargaining negotiations" and stated that it had responded to all requests for information in a timely manner and had provided the relevant information in its possession. (Id.). The Respondent agreed to resume negotiations, but asked the Union to identify the items to be discussed, the information to be provided, and the items on which the Union was prepared to move. (Id.).

On June 30, 2008, the Union responded to each of the items listed by the Respondent and specifically reminded the Respondent of the Union's outstanding request for information about the labor costs at the other PACCAR facilities which the Respondent had compared to the Madison plant. (GC Ex. 8).

The Respondent once again responded by letter through Larry Vessels on July 3, 2008. (GC Ex. 9). The Respondent stated that it had "provided all the relevant information in our possession."

(Id.). Specifically in response to the Union's request for labor costs at other PACCAR facilities, the Respondent alleged that it had not compared the wages and benefits of the Madison facility with other PACCAR facilities. (Id.). In regards to the written request made at the June 19th sidebar, the Respondent alleged that the Union had stated the document was a "sample" of what was typically requested and "was not requesting the items listed." As a result, the Respondent "marked it as a sample and did not view it as a request for the information listed." (Id.).

When the parties met again on July 8, 2008, the Union presented the Respondent with a letter responding to the Respondent's suggestion that it had not compared Madison labor costs to other PACCAR facilities. (Tr. 74; GC ex. 10). The Union reminded the Respondent of its previous statements that the Madison facility had the highest per hour labor costs, and emphasized that it needed the information in order to confirm the veracity of those statements and to make an informed decision about the proposed concessions. (Id.). According to the Union "the assertion that the Union 'stated that it was not requesting the items listed' is just plain wrong." (Id.). The Union noted that when Tim Bressler had made the request he was very clear that the Union needed the labor cost data in order to evaluate the Respondent's proposals. (Id.). After Respondent's representatives had stated that it would be difficult to get all the information immediately, Bressler responded that although it might take time, the Union would need the information to validate the Respondent's claims. (Id.). The Union outlined all of the outstanding information requests and reminded the Respondent that it expected to receive a response to its June 19th request without further delay. (Id.).

The parties next met for bargaining on July 16, 2008. (Tr. 78). On that day, the Respondent hand delivered a response to the Union's letter of July 8, 2008. (Tr. 401; GC Ex. 12). Once again the Respondent stated that it had not compared the wages and benefits at the Madison facility with

those of other PACCAR facilities. (GC Ex. 12; Tr. 402). According to the letter, Respondent would "clarify the basis for the Nashville wage and benefit proposal at the bargaining table on the 16th so we can resolve any misunderstanding." (GC Ex. 12). Other than stating that its "proposal was not driven with comparison to other facilities," no further "clarification" was provided. (Tr. 466-467). The information outlined in the Union's June 19, 2008 information request was not provided. (Tr. 79, 166).

Following the July 16th session, that same day White sent an intra-corporate email entitled "Bargaining Update." (Tr. 421; GC Ex. 14). In that email White stated, "***We closed the meeting with a statement that we have complied with all the requests for information except the comparative data on the other facilities***." (GC Ex. 14)(emphasis added). According to White, the Union was told that "***any reference to other plants was not the basis for any proposals***." (Id.). White then recalled "***only one reference on our part, which was in a confidential sidebar discussion***." (Id.). White later admitted that this statement was made in reference to the comment Vessels had made on either June 13th or 16th. (Tr. 422). She also testified that she did not consider sidebars to be confidential. (Tr. 444, 445).

The last two bargaining sessions between the Respondent and the Union occurred on August 19 and 20, 2008. (Tr. 79). On August 19th, the Union went through all the open items in the proposal, one by one. (Tr. 477; U Ex. 5). The parties discussed specific obstacles to an agreement, including the need for the information relative to the other facilities and the issues surrounding outsourcing. (Tr. 80). The main focus was still the Respondent's position on an unlimited right to outsource, the three-tiered wage proposal and the two-tiered benefits proposal. (Tr. 90-81). Bressler stated that the information requested would make a difference in how the Union considered the

Respondent's proposals and how it made counterproposals. (Tr. 131).

When the parties met on August 20, 2008, they discussed each outstanding issue, but Respondent's bargaining stance had not changed. (Tr. 131). The Union repeated it needed the comparative labor cost information in order to consider changes to its proposals. (Tr. 129). Karen White confirmed that the Respondent felt it had made its best offer and there wasn't anything else it could do. (Tr. 81). The Union responded that the Respondent's position was unacceptable in light of the issues that were keeping the parties apart. (Tr. 82). If they did not have the authority to settle the issues, the Union demanded the Respondent's representatives get someone from headquarters that did have the authority. (Tr. 82). Even without the requested information, the Union tried to make a comprehensive proposal, but once it became clear that it was not going to get any movement from the Respondent in significant areas, the Union withdrew the proposal. (Tr. 129, 407). The Respondent never provided the information outlined in the Union's June 19, 2008 information request and the parties were never able to come to an agreement. (Tr. 79, 166, 238). PACCAR closed the Madison plant on April 6, 2009. (Tr. 19).

III. ISSUES PRESENTED BY RESPONDENT'S EXCEPTIONS

A. Whether the ALJ's Conclusion that the Requested Information About Labor Cost at Other Facilities Was Relevant to the Parties' Bargaining Is Supported by the Record.

B. Whether the ALJ's Conclusion that the Respondent Failed to Retract Its Statements About Operational Costs at Other Facilities Is Supported by the Record.

C. Whether the ALJ's Conclusion that Respondent's Refusal to Furnish the Requested Labor Cost Information at Other Facilities Prolonged the Lockout and Converted it to an Unlawful Lockout is Supported by the Record.

D. Whether the ALJ Erred in Failing to Find that the Lockout was Prolonged by the Union's Withdrawal of Its Bargaining Proposal on August 20, 2008.

III. ARGUMENT

A. Standard of Review

In all cases that come before the Board, the Board is not bound by the administrative law judge's findings, but instead bases its findings of facts upon a *de novo* review of the entire record. *Standard Dry Wall Prods., Inc.,* 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). However it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless a clear preponderance of all the relevant evidence convinces the Board that those resolutions are incorrect. *Id*. According to the Board, since the administrative law judge "has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight" to the administrative law judge's credibility findings "insofar as they are based on demeanor." *Id.*

In this case the ALJ made significant credibility determinations based upon the demeanor of the witnesses during the trial. Those credibility determinations by the judge led him to make very specific findings of fact, and ultimately conclusions of law.

B. The ALJ's Conclusion that the Union Made A Valid Request for Information Was Fully Supported by the Record

Contrary to Respondent's exceptions, the ALJ correctly concluded that on June 19, 2008, the Union requested Respondent furnish it with certain information pertaining to employees at Respondent's other truck manufacturing plants (ALJD, p. 12, lines 31-33)(See Resp. Exception 122), and that conclusion was fully supported by the evidence in the record.

Section 8(a)(5) of the National Labor Relations Act prohibits an employer from refusing to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). Included in this duty to bargain in good faith is the fact that the employer must, upon request, supply relevant information needed by the union "for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979). Employers have an obligation to furnish relevant information to union representatives during contract negotiations. *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149 (1956). A union cannot be expected to represent employees in an effective manner where they do not possess information that "is necessary to the proper discharge of the duties of the bargaining agent." See *NLRB v. Whitin Mach. Works,* 217 F.2d 593, 594 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955).

In this case, the judge found that during a sidebar meeting of the parties on June 13, 2008, Plant Manager Larry Vessel remarked that the Nashville plant had the highest operational cost in the Company. (ALJD, p. 3, lines 44-45, p. 4, lines 6-7)(See, Tr. 51, 114, 227, 486). Although Respondent attempted to trivialize the statement, characterizing it as a "passing reference," this was obviously more than a "passing reference." Vessels was very specific, the Madison facility had to get its costs down. (Tr. 51). Vessels stated that wages at the plant needed be in line with those of the non-union Denton, Texas facility. (Tr. 267). Contrary to Respondent's position, wages at other Company facilities were specifically discussed. In response to Vessel's comment, the Union stated it needed that information. (Tr. 52, 268).

The ALJ noted that one of Respondent's negotiators subsequently repeated the statement about operating costs during a meeting with the Union on June 16. (ALJD, p. 4, lines 11-12)(See Resp. Exception 22). Specifically crediting Union negotiator Bressler's testimony (Tr. 149) over that

of Karen White, the judge concluded that White also told Union negotiators on June 16, that the Madison plant had the highest operating costs. (ALJD, p. 4, lines 12-14, 35-36) (See, Resp. Exceptions 23, 27, 28). White said the Madison facility needed to be competitive. (Tr. 270). Vessels added that he was concerned about the future of the Madison plant. If the work went to the plant in Denton, Texas, "most likely it wouldn't come back." (Tr. 154). The ominous representations of Vessels clearly indicated that concessions were going to be necessary. Bressler told White the Union needed the information related to the non-Union plants. (Tr. 270). He wanted to determine the accuracy of the claim that Madison was the highest cost because "if we are, we're not so sure that we want to be." (Tr. 153).

When the parties met again on June 19, 2008, the Union gave Respondent a very detailed, written request for information regarding other PACCAR facilities in the United States. (G.C.Ex. 4). Although White testified that Bressler said the information request was a "sample" or "example" of the type of information request the Union had directed to other employers (ALJD, p. 6, lines 6-8), the ALJ concluded that his "observations of the witnesses" led him to "resolve any conflicts in the testimony by crediting that of Union Representatives Bressler and Bolte." (AJJD, p. 6, lines 1-2)(See, Resp. Exception 29). Despite Respondent's exception to the contrary, based upon credibility determinations, the ALJ found that when Bressler gave Respondent's negotiators the information request, he specifically explained that the Union needed the information to make a proposal. (ALJD, p. 6, lines 2-4)(Tr. 153, 272).

Although Respondent takes exception to the ALJ's failure to credit much of the testimony of its witness Karen White (See, Resp. Exceptions 35, 40, 41,), the fact is that the ALJ simply did not believe her statements about the information request being a "sample." White testified that she

considered the terms "sample" and "example" interchangeable, and she maintained they "could sound pretty much the same." (Tr. 469). According to the ALJ, "several reasons, including the credited testimony of Bressler and Bolte, cause[d] [him] to reject White's account." (ALJD, p. 6, lines 8-9). Although White had characterized the information request as a sample, and had even written "sample" on her copy, the judge concluded that "this action was disingenuous and does not enhance her credibility." (ALJD, p. 7, lines 17-19). Regardless of Respondent's exceptions to the ALJ's analysis of the written information request (Resp. Exceptions 40-46), the Union's June 19, 2008 information request was submitted into evidence and speaks for itself. (G.C. Ex. 4). The ALJ outlined the entire information request in his decision, and noted that it did not look like a sample and did it not carry any notation indicating that it was a sample. (ALJD, p. 4-5, p. 6, lines 11-13)(Resp. Exceptions 40, 41). Moreover he found the "specific language at the beginning left little doubt that is was addressed to Respondent and that it pertained to current matters raised during the bargaining" and "reasonably would have put Respondent on notice that the Union representatives were not simply talking about information request but actually making one." (ALJD p. 6, lines 24-27)(Resp. Exception 42-47). The record supports the ALJ's conclusions that the Union made a valid request for information as a review of the document itself would prove that this was far from a "cookie cutter" form passed out as an "sample" as Respondent suggested.

In addition to demeanor, credibility determinations were also made by the judge based upon Respondent's own documents that contradicted White's testimony regarding the "sample" request. (ALJD, p. 6, lines 29-30)(See, GC Ex. 13; Union Ex. 1)(Resp. Exception 47). The ALJ held that Respondent's documents revealed that management understood the Union to be making a legitimate information request. (ALJD, p. 6, lines 29-30)(Resp. Exception 47). The ALJ pointed out that

Respondent's daily chronology (Union Ex. 1 at 1546) which summarized each bargaining session, "clearly and unequivocally states that the union representative *requested* the wage information." (ALJD, p. 6, lines 30-40)(Resp. Exception 48). The summary also contained the observation that the Union could be preparing for multiple unfair labor practice charges, which supported the ALJ's conclusion that management understood the document to be an actual information request rather than a sample. (ALJD, p. 6, lines 41-43)(Resp. Exception 49).

Other correspondence also made it clear that the June 19, 2008 written request was not deemed a "sample" at the time the Union made it. The ALJ referenced a June 19, 2008, email (GC Ex. 13) White had sent to various management officials in which she referred to the information request and wrote that the union officials "are positioning themselves for several ULPs. This is a 'head's up' as to where they will come from." (ALJD, p. 7, lines 1-5). The email listed a failure to respond to information requests, including comparative wage data from other PACCAR facilities. (ALJD, p. 7, lines 6-7)(GC Ex. 13). The ALJ concluded that when White wrote the email she already regarded the Unions' June 19 information request as precisely that, an information request. (ALJD, p. 7, lines 12-14)(Resp. Exceptions 50-51). As a result, the judge found that from the time it received the information request on June 19, 2008, Respondent knew the Union was seriously seeking the information, a conclusion fully supported by Respondent's documents in the record. (ALJD, p. 7, lines 16-17).

Although the ALJ concluded that Respondent knew from the outset that the Union's June 19, 2008 information request was "the real McCoy," he noted that even if he "were to assume management really believed the document was just a sample, such confusion could not have lasted long." (ALJD, p. 7, lines 31-33)(Resp. Exception 63). The parties met the following day, June 20,

2008, the day the contract was to expire. (Tr. 61). At that time the Union specifically reminded the Respondent that it had not responded to the Union's outstanding information requests. (Tr. 62, 156,174, 232). At no time during that meeting did the Respondent indicate that the Union's June 19th request had been deemed a "sample." Instead at midnight the Respondent presented its last and final offer, telling the Union to take it or leave it. (Tr. 157, 274).

The outstanding PACCAR facility data request was mentioned again by the Union during a June 23, 2008 conference call. (Tr. 160). Again there was no mention by the Company that they had considered the information request a mere "sample" of information the Union might request.

By letter dated June 24, 2008, the Union renewed its request for the information regarding the other PACCAR facilities. (Tr. 69; GC Ex. 6). The Company responded on June 28, 2008, that it had responded to all requests for information in a timely manner and had provided the relevant information in its possession. (GC Ex. 7).

As the ALJ pointed out, by letter dated June 30, 2008, the Union again reminded the Company of the Union's outstanding request for information about the labor costs at the non-union truck facilities. (ALJD, p. 7, lines 33-39)(GC Ex. 8). On July 3, 2008, the Company sent a letter stating that it had "provided all the relevant information in our possession." (AJLD, p. 7, lines 41-47, p. 8, lines 1-4)(GC Ex. 9)(Resp. Exception 64). Although for the first time the Company referred to the Union's June 19th information request as a "sample", the judge specifically held that he did not find that Respondent ever considered the information request to be a sample. (ALJD, p. 8, lines 6-7). The ALJ did not credit the testimony of White or Vessels to the extent that it indicated that any union representative or negotiator characterized the document as a "sample", and instead found that neither Bressler nor any other union representative made such a statement. (ALJD, p. 8, lines 9-10).

The ALJ then outlined the Union's July 8, 2008 written response. (ALJD, p. 8, lines 11-36)(GC Ex. 10). The Union stated that"the assertion that the Union 'stated that it was not requesting the items listed' is just plain wrong." (GC Ex. 10). The Union reminded the Respondent of its statements that the Madison facility had the highest per hour labor costs, and emphasized that it needed the information in order to confirm the veracity of those statements and to make an informed decision out the proposed concessions. (Id.). It was also noted that when Tim Bressler had made the request, he was very clear that the Union needed the labor cost data in order to evaluate the Respondent's proposals. (Id.). When the request was made, Respondent's representatives had stated that it would be difficult to get all the information immediately, and Bressler had responded that although it might take time, the Union would need the information to validate the Respondent's claims. (Id.). If the Respondent had legitimately been confused as to the nature of the Union's June 19, 2008 information request as a legitimate request, after the July 8, 2008 letter it could no longer make that claim.

The judge quoted from the Respondent's July 16, 2008 reply, which stated that it had not compared the wages and benefits at Nashville with those of other PACCAR facilities. (ALJD, p. 8, lines 38-44)(GC Ex. 12). The ALJ also noted that during the July 16, 2008, negotiations, the Respondent took the position that the information request regarding comparative wage information was not relevant. (ALJD, p. 8, lines 45-46). He also referenced a July 16th email from White which summarized what management had told the union negotiators. (ALJD, p. 9, lines 1-9)(GC Ex. 14). According to the email, Respondent representatives had closed the meeting with a statement that they had "complied with all the requests for information except the comparative data on other facilities." (GC Ex. 14). The Union was told that any reference to other plants was not the basis for

any proposals. (GC Ex. 14). From the record as a whole, the judge found that the "record does not establish that Respondent, thereafter furnished the Union with the requested information" and he found "that it did not." (ALJD, p. 9, lines 12-14).

The ALJ found and the record in this case supports his finding that the Union made a valid information request regarding comparative labor costs on June 19, 2008, and that the Respondent had deemed it an actual request as of that date. Thereafter, the Union renewed its request numerous times. The Respondent's efforts to later deny its legitimacy some fourteen (14) days later were simply not credible given the Union's repeated requests during that time frame, as well as the internal Company correspondence which clearly referred to the Union's request.

Although Respondent may take exception to the ALJ's credibility determinations in this case (see, Resp. Exceptions 2-14, 17-20, 22-29, 35, 40, 41, 55, 60, 61, 66, 70, 72, 73, 76, 80, 84, 85, 88-91), the Union respectfully submits that upon review of the entire record in this case, there is no basis for reversing the credibility findings of the administrative law judge, his findings of facts based thereon, or his ultimate conclusions that Respondent did in fact violate Section 8(a)(5) and (1) of the Act.

C. The ALJ's Conclusion that the Requested Information About Costs at Other PACCAR Facilities Was Relevant to the Parties' Bargaining Is Supported by the Record

In the alternative, the Respondent argued that assuming the Union had made the June 19, 2008 information request, the requested information was not relevant to the parties bargaining proposals. (GC Ex. 1(i) at page 6).

Information relating to wages, hours, and other terms and conditions of employment is

presumptively relevant and necessary for the union to perform its obligations. *Teleprompter Corp. v. NLRB,* 570 F.2d 4, 8 (1st Cir. 1997). It is undisputed that the preservation or diversification of unit work is a subject of mandatory bargaining under the Act. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 209 (1964).

When an information request concerns issues outside the bargaining unit, the union is only required to demonstrate the probable or potential relevance of the information to its representation of union employees. See, e.g., *NLRB v. U.S. Postal Serv.,* 18 F.3d 1089 (3rd Cir. 1994); *Newspaper Guild Local 95 (San Diego) v. NLRB (Union Tribune Publ'g Co.),* 548 F.2d 863 (9th Cir. 1977). As the ALJ corrected noted, "The burden to establish relevance is 'not exceptionally heavy' *Leland Stanford Junior University,* 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983), and '[t]he Board uses a broad, discovery-type of standard in determining relevance in information requests.' *Shoppers Food Warehouse Corp.,* 315 NLRB 258, 259 (1994)." (ALJD p. 9, lines 27-31). The information must merely bear some relationship to a subject of concern to the Union. *United States Postal Service,* 308 NLRB 547, 550 (1992).

At first the Respondent delayed in providing the Union any response to its June 19, 2008 information request regarding the other PACCAR facilities. Finally, on July 16, 2008, the Company simply stated that it had not compared the wages and benefits at Nashville with those of other PACCAR facilities. (GC Ex. 12). According to the ALJ, the Respondent's argument that the requested information about comparative labor costs lacked relevance because Respondent did not use such information in formulating its proposals "misses the point." (ALJD, p. 9, lines 33-37). The duty to provide the information did not depend on whether Respondent used the information in formulating its proposals, but rather relevance in this case focused on the claim Respondent's

negotiators made a the bargaining table. (ALJD, p. 9, lines 39-41). The law is clear, an employer's statements or bargaining proposals can make nonunit information relevant to negotiations. *Caldwell Mfg. Co.,* 346 NLRB 1159 (2006).

In this case, as the parties were discussing outsourcing, which the Union considered to be a "cornerstone piece of language that was negotiated and provided job security," at least twice Respondent's representatives commented that the Madison facility had the highest costs per hour of any PACCAR facility. In response to these statements, the Union made a valid request for information regarding the other PACCAR facilities, including comparative wage information. Not only has the Board consistently upheld the right of a union to obtain information that it needs to bargain intelligently and "to service and police the contract," *Viewlex, Inc.,* 204 NLRB 1080, 1080 (1973), but the Board has specifically required the disclosure of information on wage rates paid at other plants maintained by the employer. *Leach Corp.,* 312 NLRB 990 (1993), *enforced,* 54 F.3d 802 (D.C. Cir. 1995); *I. Appel Corp.,* 308 NLRB 326 (1992); *Mohenis Servs.,* 308 NLRB 326 (1992); *Hollywood Brands,* 142 NLRB 304, *enforced,* 324 F.2d 956 (5th Cir. 1963), *cert. denied,* 377 U.S. 923 (1964).

> Good- faith bargaining necessarily requires that claims made be honest claims....If such an argument is important enough to present during the give and take of bargaining, it is important enough to require some sort of proof in its accuracy. *Bagel Bakers Council*, 174 NLRB 622, 630 (1969) *, citing, Truitt Mfg.,* 351 U.S. at 152-153.

The Union was entitled to the requested information regarding the other PACCAR facilities in order to verify the Respondent's statement regarding the Madison facility's costs. As the ALJ pointed out, "The Union sought the requested data to determine whether this claim was valid or

invalid. The relevance of the requested information turns on whether the information might substantiate or debunk the claim." (ALJD, lines 41-43).

The ALJ also emphasized that it was "important to take the entire context of negotiations into account." (ALJD p. 9, line 45). He found that Union Negotiator Bressler credibly testified about remarks Vessels had made about the future of the plant. (ALJD p. 9, line 47)(Tr. 152). According to Bressler, Vessels commented that a lockout, strike, or working without a contract would put the plant in potential jeopardy. If the work ever went to the Denton facility, most likely it wouldn't come back. (ALJD p. 10, lines 3-6)(Tr. 152). The ALJ found that the remarks about the Madison facility having the highest operating costs must be considered with Vessels expressed concerns regarding the future of the this factory. (ALJD p. 10, lines 8-10). "More was at stake than merely the final wage or benefit package....the continued existence of this factory...might turn on the concessions made by the Union at the bargaining table." (ALJD p. 10, lines 10-13).

The information was necessary in order for the Union to properly respond to what the Respondent had put on the table. (Tr. 153, 272). The Union specifically explained that it was vital for the Union to have the information in order to come up with a comprehensive agreement that it could take back to the membership for a vote. (Tr. 229). As the judge pointed out, before agreeing to concessions to keep the plant open, the Union reasonably needed to verify whether this facility did, in fact, have the highest operating costs. (ALJD p. 10, lines 17-18). If the Respondent's statement was validated, the bargaining committee could go to the membership with an educated explanation regarding whatever concessions had to be made. The Union knew it could compete, but it had to have the numbers. (Tr. 60). Without the requested information, the Union would be unable to properly perform its duties specified in the collective bargaining agreement and no meaningful

bargaining could take place. *San Diego Newspaper Guild, Etc. v. NLRB,* 548 F. 2d 863, 866-67 (9th Cir. 1977). The ALJ properly concluded that the requested information about labor costs at other facilities was relevant to the Union's responsibilities to protect bargaining unit jobs and to negotiate a satisfactory contract, and that the requested information was necessary for that purpose. (ALJD p. 10, lines 19-22).

D. The ALJ's Conclusion that Respondent Failed to Clarify and/or Retract Its Operational Costs Claims at Other PACCAR Facilities Was Fully Supported by the Record

In its defense, the Respondent also argued that assuming the June 19, 2008 request for information was made in response to Respondent's bargaining proposals or the Union's perceived understanding of the Respondent's bargaining proposals, the Complaint failed to state a claim because Respondent clarified its position and/or retracted any purported reliance upon the subject matter of the information request in connection with the Respondent's bargaining proposals. (GC Ex. 1(i) at page 7). The ALJ found that this second defense was also based upon the "same misapprehension concerning what makes the requested information relevant." (ALJD p. 10, lines 24-25).

Although the ALJ found that the information was relevant to the Respondent's bargaining proposals, including the multitiered wage structure it sought to establish, he noted that the Union's primary reason for requesting the information was related to the claim that the Madison facility had the highest operating costs. (ALJD p. 10, lines 34-38). The Union needed the information to confirm or invalidate the claim. (Id.). The ALJ concluded that whether or not the Respondent had relied on wage and benefit data from its other plants or, as it claimed, used the survey information

from other factories in the Nashville area as a basis for formulating its proposals, did not affect the relevance of the information sought by the Union. (ALJD p. 10, lines 40-42).[6] The requested information is relevant to Respondent's asserted basis for making substantial changes in pay and benefits. (ALJD p. 10, lines 43-44).

The Union would dispute Respondent ever effectively clarified its position and/or retracted any purported reliance upon the subject matter of the information request in connection with the Respondent's bargaining proposals. Other than the testimony of White and Vessels, nothing in the record supported Respondent's argument that it based its contract proposals on a survey of the Nashville area. Respondent did not actually "clarify its position" until the hearing in this case. For the first time at hearing the Respondent produced what was purported to be a wage survey it had conducted in the Nashville area in order to develop its three tiered wage proposal. (Tr. 333; Resp. Ex. 4). The Respondent also allegedly conducted a medical insurance survey for health and welfare benefits. (Tr. 335; Resp. Ex. 5). Karen White testified that she thought Dan Simmons had called local companies regarding their wages and benefits, but White had no personal knowledge regarding these activities and Simmons did not testify. (Tr. 335, 340). Vessels testified he told Brenda Copeland to conduct the surveys, but did not know if she took any action as a result of his instructions, and Copeland also did not testify. (Tr. 491). Karen White stated she received these documents in April, 2008, prior to the negotiations, but the information was never provided to the

[6] Although Respondent took exception to the ALJ's failure to find that it had formulated its wage proposals by conducting a wage survey of companies in the Nashville labor market (Exceptions 7-9), contrary to Respondent's position, the ALJ issued no determination on whether or not Respondent had in fact based its proposals on the wage survey. Instead, the ALJ simply found that Respondent's purported reliance on the wage survey did not render the requested information irrelevant. (ALJD, p. 10, lines 25-27).

Union. (Tr. 336, 340, 498). White simply responded, "They never asked for it." (Tr. 461).

Names of the companies surveyed were redacted, because according to the Respondent the survey was confidential; it was admitted however that none of those surveyed were truck manufacturing plants. (Tr. 336, 457, 459, 492). The Respondent alleged that the wages of the Nashville area were used because that is where the Respondent hires from. (Tr. 334). However none of those surveyed had the three tiered wage scale the Respondent was proposing. (Tr. 459). The Respondent maintained that it did not use the wages of other PACCAR facilities because it does not hire from other facilities, and it wanted to be competitive in the Nashville area in order to attract workers. (Tr. 334, 336).

There is no evidence linking any of Respondent's initial proposals to these wage surveys that had not been mentioned prior to the trial in this matter. If, as the Respondent suggested, it had in fact clarified the basis of its proposals on July16, 2008, the Union submits that it would have provided the Union with a copy of the information showing Respondent was basing its proposals on other facilities in the Nashville area at that time. It did not. If, as the Respondent suggested the goal was to be competitive in the Nashville area, then why was the Union told the Madison plant had the highest cost among all PACCAR facilities?

Once Respondent negotiators made the statements regarding the Madison facility's costs compared to those of other PACCAR facilities, those same negotiators attempted to avoid the obligation they created. Respondent's representatives claimed the statement had been made in a "confidential" sidebar, and that the Union was simply trying to gain leverage against them with the June 19, 2008 information request. Knowing that sidebars were in fact not confidential, for the next few days they simply ignored the Union's repeated requests for the relevant cost information from

the other facilities. Some fourteen days later they explained that the Union's request had actually been deemed a "sample" rather than an actual information request. Finally, on July 16, 2008, the Respondent took the position that the information requested was not relevant, in that it had not based any of its proposals on comparisons to other PACCAR facilities.

An employer cannot make a clear claim regarding the basis for its bargaining position and then say "disingenuously or in bad faith" that it never made such a claim. *Richmond Times-Dispatch,* 345 NLRB 195, 198 (2005). In this case, the Respondent never actually "retracted" the claim that the Madison plant had the highest cost of any PACCAR facility, nor did it dispute that it had told the Union that it had to get its costs down. The Respondent did not dispute that the comments were made, but instead merely attempted to dispute the relevancy of the comments. In the context of discussing one of the Respondent's most contentious proposals, moving the sourcing provisions to the management's rights clause, the Respondent complained that the Madison plant had the highest costs of all PACCAR facilities and it had to get its costs down. Some weeks later the Respondent did not "retract" those statements but merely asserted that cost comparisons to other PACCAR facilities had not actually driven their proposals. No further explanation was provided until the hearing in this matter. This "bare assertion" on the part of the Respondent did not negate its statutory duty to provide the relevant information. The Union submits that ALJ correctly found that the requested information was relevant and necessary and that Respondent had an absolute duty to provide it.

E. The ALJ's Conclusion that Respondent's Refusal to Furnish the Requested Cost Information Prolonged the Lockout and Converted It to an Unlawful Lockout Was Fully Supported by the Record.

Because the Respondent had a duty to disclose the requested cost information to support the claim that the Madison facility had the highest labor costs of all PACCAR facilities, it's refusal to do so "protracted the bargaining negotiations between the parties and substantially 'contributed to a stalemate in negotiations,' evidencing a failure to bargain in good faith, in violation of Section 8(a)(5) of the Act." *Bagel Bakers*, 174 NLRB at 630, *citing, Stanley Building Specialties, Co.,* 166 NLRB 984 (1967).

Karen White testified this lock out "contingency plan" had been put into place "way before negotiations started." As a result, Respondent took exception to the ALJ's failure to acknowledge its policy of not operating the Madison plant without an agreement and its's purported reasoning regarding its purpose of not operating the plant without an agreement in place (Resp. Exceptions 2-4). An exception was also taken in regards to the ALJ's failure to find that Respondents had implemented its previously established contingency plan of not operating the Madison plaint without a contract in place. (Resp. Exception 60).

Such contentions might be relevant if the General Counsel had alleged that the lockout in question was illegal from its inception. That was not the case here. Although the Union is of the position that the lockout was in fact illegal from the beginning, as the ALJ noted, the General Counsel did not dispute the lawfulness of the lockout at its inception, but argued that it became unlawful later when Respondent to provide the information requested by the Union. (ALJD p. 7, lines 27-29).

An employer does not violate the Act by locking out its bargaining unit employees for "legitimate and substantial business reasons, including" in support of legitimate bargaining demands. *Eads Transfer, Inc.,* 304 NLRB 711, 712 (1991), enf'd, 989 F.2d 373 (9th Cir. 2993). A lockout

motivated by an employer's desire to bring economic pressure to bear in support of its legitimate bargaining posture is lawful. *See American Ship Building v. NLRB,* 380 U.S. 300, 312-313 (1965). However, a lockout with a proscribed purpose is illegal. *Id.* at 313. The use of economic weaponry "is subject to one crucial qualification - - the party utilizing it must at the same time be engaged in lawful bargaining." *Daily News of Los Angeles,* 315 NLRB 1236, 1243 (1994). Once an employer has begun a lockout, any subsequent employer action inconsistent with an initially lawful lockout converts the lockout into unlawful conduct. *R.E. Dietz Co.,* 311 NLRB 1259, 1264 (1993). Even in circumstances where the Board has determined a lockout to have a "duality of objectives," one lawful, the other not, it has held that the presence of the lawful objective will "not immunize the lockout from condemnation under the Act." *Movers and Warehousemen's Ass'n of Metroplitan Washington, D.C., Inc., etc.,* 224 NLRB 356 (1976), enf'd. 550 F.2d 962,966 (4th Cir. 1997; *Wire Products Manufacturing Corp.,* 198 NLRB 652 (1972).

The ALJ's concluded that Respondent's failure to provide the requested information had a substantial adverse impact on the negotiating process and place an obstacle in the way of settlement. He held that as of July 16, 2008, Respondent's failure to provide the requested information rendered the lockout unlawful. *Globe Business Furniture,*290 NLRB 841, 841, fn. 2 (1988) (ALJD p. 11, lines 26-30). This conclusion is fully supported by the evidence in the record as well as applicable Board law.

By refusing to provide the requested labor cost information for other PACCAR facilities, the Respondent failed to bargain in good faith, impeded the bargaining process, foreclosed further *meaningful* bargaining between the parties, and ultimately "tainted" this particular lockout. *NLRB General Council Memorandum*, Case No. 3-CA-15922, 1991 NLRB GCM LEXIS 104, (March 25,

1991), citing, *American Stores Packing Co.,* 142 NLRB 711, 720-21 (1963), remanded, 351 F.2d 308 (10th Cir. 1965), on remand, 158 NLRB 620 (1966); *Bagel Bakers Council*, 174 NLRB 622 (1969), enforced in relevant part, 434 F.2d 884 (2d Cir. 1970), cert. denied, 420 U.S. 908 (1971) (lockout tainted where employer's refusal to provide information thereby precluding meaningful discussion on the major issue between the parties, prolonged the lockout).

F. The ALJ Did Not Err in Failing to Consider Whether The Lockout was Prolonged and/or the Accrual of Back Pay Was Ended by the Union's Withdrawal of Its Comprehensive Proposal On August 20, 2008

There is no dispute that Madison facility employees reporting for work on Monday, June 23, 2008, found that the Respondent had locked them out. In this case the Union's ability to end the lock out was contingent upon its ability to effectively and meaningfully bargain with the Respondent towards reaching an agreement. Throughout the entire bargaining process the Union consistently reiterated its need for the requested cost information for other PACCAR facilities, both in its communications with the Respondent in its communications with its own membership. The Union needed the information in order to verify the Respondent's cost claims regarding the Madison facility and to consider Respondent's proposals and make counterproposals. The ALJ determined that the requested information was related to a quite central matter, whether the Union would make wage concessions. (ALJD p. 11, lines 18-19). "Without the requested information, the Union lacked the means to evaluate what concessions it needed to make and what concessions would be unnecessary." (ALJD p. 11, lines 22-24). When the parties met for the last time on August 19 and 20, 2008, Respondent had still not provided the requested information and had not changed its bargaining stance. The Respondent's failure to provide the requested, relevant information regarding the other

PACCAR facilities directly impacted the parties' ability to reach an agreement. "When an employer locks out its employees for the purpose of evading its duty to negotiate with the employees' bargaining representative, the employer violates sections 8(a)(5) and 8(a)(1) of the Act." *Teamsters Local 639 v. NLRB (D.C. Liquor Wholesalers Ass'n)* 924 F.2d 1078, 1085 (D.C. Cir. 1991), enforcing 292 NLRB 1234 (1989).

Under Board precedent, a lockout will retain its illegality until it is terminated and employees are made whole. As the Board held in *Movers and Warehousemen's Ass'n of Metropolitan Washington, D.C., Inc.:*

> In these circumstances, without a cessation of the lockout and a restoration of the *status quo ante*, it is difficult to conclude that any bargaining which ensued was not adversely affected, since the Union was required to negotiate with [the employer] and ratify the contract from a weakened position induced by the unlawful lockout and injection of the lock-out related issues into the bargaining process. *Movers and Warehousemen's Ass'n of Metroplitan Washington, D.C., Inc., etc.,* 224 NLRB 356, 358 (1976), enf'd. 550 F.2d 962,966 (4th Cir. 1997; *Wire Products Manufacturing Corp.,* 198 NLRB 652 (1972).

In this case, because of the unlawful lockout, the Union was relegated to bargaining with Respondent from a weakened position. If the Respondent had simply provided the requested information, the Union might have reinstated its proposal or been able to make an educated counterproposal. Bargaining might have recommenced. But whether or not the Union withdrew its proposal, the law is clear, the burden is on the Respondent to show that its failure to restore the *status quo ante* had no adverse impact on the subsequent collective bargaining. *Id.* citing *NLRB v. Remington Rand, Inc.,* 94 F.2d 862, 872 (C.A. 2, 1938) ("[I]t rest[s] upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it is immune.").

Respondent focused on the number of issues separating the parties upon expiration of the contract. Although there were many unresolved issues on the table, as Tim Bressler, a veteran negotiator who had been involved in every UAW heavy truck negotiation since 2004 testified, "[T]ypically big issues don't get settled until the last hours." (Tr. 156). He stated he had been in numerous negotiations and often times "things get put to bed at the last minute." (Tr. 156). By its failure to provide the requested information for the other PACCAR facilities, the Respondent failed to bargain in good faith and precluded any realistic possibility of a resolving those issues.

IV. CONCLUSION

Administrative Law Judge Keltner W. Locke found that after the Union requested relevant and necessary information, Respondent had a duty to furnish it. According to the judge, by failing to do so, Respondent violated Section 8(a)(5) and (1) of the Act. Moreover, this failure on the part of Respondent had a substantial adverse impact on the negotiating process rendering the lockout unlawful as of July 16, 2008. Contrary to Respondent's exceptions, the evidence in this case demonstrates that Judge Locke's findings and conclusions are fully supported by the record as well as established Board law. The Union respectfully requests that the Board affirm the Administrative Law Judge's findings and conclusion and adopt his recommended order.

Respectfully submitted

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STATEMENT OF SERVICE

I, Deborah Godwin, hereby certify that a copy of the foregoing was filed electronically via the NLRB's E-Filing System on January 10, 2011, and that a copy was also served electronically via electronic mail, on January 10, 2011, upon all interested parties in this case, which include the following:

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