KLB Industries, Inc. d/b/a National Extrusion & Manufacturing Company *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America. Cases 8–CA–37672 and 8–CA–37835

July 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

The issues in this case turn on whether the Respondent was obligated to provide information requested by the Union during the parties' negotiations for a successor collective-bargaining agreement at the Respondent's facility in Bellefontaine, Ohio.[1] The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information relevant to the Respondent's asserted need for wage concessions. He further found that the Respondent, having unlawfully failed to provide that information, violated Section 8(a)(5), (3), and (1) by locking out its employees, temporarily replacing them, and canceling their health insurance coverage, including their COBRA rights.[2]

The Respondent argues principally that it was not required to furnish the requested information relevant to its asserted need for wage concessions, and thus that its lockout and related conduct were not unlawful. But even if it was required to provide that information, the Respondent further argues, the judge still erred by finding the lockout unlawful. In support of that latter argument, the Respondent first contends that the General Counsel did not allege that the lockout was tainted by the Respondent's refusal to provide the information, and thus that the finding violated its due process rights. Second, the Respondent argues that its refusal to provide that information did not taint the lockout in any event. After consideration of the judge's decision and the record in light of the exceptions and the briefs, we reject those arguments and adopt in full the reasoning and findings of the judge.[3]

The Refusal to Furnish Information

The Respondent entered negotiations seeking significant wage and benefit concessions. On October 3, 2007,[4] about 2 weeks after bargaining began, the Respondent proposed a 12-percent reduction in wages over 3 years. Both before and after that date, the Respondent repeatedly sought to justify its demands by stating that concessions were necessary to make its facility more competitive. In particular, the Respondent asserted that it faced competition from Asia and that its production costs had increased while its production had diminished.

On October 4, the Union requested the following information that it stated was necessary to evaluate the truth of the Respondent's repeated assertion that it needed wage concessions to improve its competitive position:

> 1. A list of all current customers so that the Union may contact the customers to determine if any of them is contemplating purchasing products from other sources.
>
> 2. A copy of any and all quotes that the Company has provided, and whom these quotes have been issued to. Also, how many quotes have been awarded (or not awarded) in the past five (5) years.
>
> 3. Identify any and all outsourced work: (in the past 5 years) that had previously been done at this facility by the bargaining unit employees.
>
> 4. A list of all customers who have ceased buying from this facility during the last 5 years. The union needs

[1] On January 30, 2009, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed a cross-exception and a supporting brief. The General Counsel, Charging Party, and Respondent filed answering briefs, and the Charging Party filed a reply brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), the judge's recommended remedy is modified to require that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Additionally, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. Finally, we shall modify the judge's proposed notice to conform to the Board's standard remedial language.

[2] There are no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(5) and (1) by engaging in overall bad-faith bargaining or by failing to provide requested information regarding bonuses, and violated Sec. 8(d) by failing to give proper notice for terminating its contract with the Union. Nor are there exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by calling the police to its facility in response to lawful picketing activity, or to the judge's denial of the General Counsel's motion to amend the complaint to allege additional violations of the Act.

In adopting the judge's findings, we do not rely on his citations to *Walgreen Co.*, 352 NLRB 1188 (2008); *Metropolitan Home Health Care*, 353 NLRB 25 (2008); and *Wilshire Plaza Hotel*, 353 NLRB 304 (2008).

[3] For the reasons stated by the judge, we adopt his finding that the Respondent did not violate the Act by failing to comply with the Union's October 4, 2007 request for information regarding the Respondent's proposed health insurance plan.

[4] All dates herein are in 2007, unless otherwise stated.

> this information to test the Company's assertion that they are not competitive. The union intends on contacting the former customers to learn the reasons why they stopped purchasing.
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> 5. A complete list of prices for products so that the union can compare the prices of competitors.
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> 6. In order for the Union to determine whether the company's assertion of uncompetitiveness is based on price or other factors. Please provide market studies and/or marketing plans that would impact sales of products produced at of [sic] the KLB Industries, Bellefontaine, Ohio facility.
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> 7. With the current Company proposal to reduce wages, please provide a complete calculation of the projected company savings over the next three years, including any projected overtime.

In response to that request, the Respondent refused to provide any of the information except for the amount of its anticipated wage savings, which it provided without the underlying calculations that the Union had also requested. In denying the remainder of the Union's request, the Respondent stated that the information was neither necessary nor relevant to the Union's representation of bargaining-unit employees, and that disclosure of information about customers would compromise the confidentiality of its contracts and jeopardize ongoing customer relationships.

We agree with the judge that the Respondent violated the Act by failing to supply the Union with nearly all of the requested information relevant to the claim of uncompetitiveness. As the judge emphasized, an employer's duty to bargain includes a duty to provide information that would enable the bargaining representative to assess the validity of claims the employer has made in contract negotiations. The General Counsel's burden to show the relevance of the requested information to subjects of bargaining is "not exceptionally heavy"; "the Board uses a broad, discovery-type of standard in determining relevance in information requests." *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006) (citations omitted).

In *Caldwell*, for example, the employer consistently maintained during negotiations that certain bargaining concessions were necessary to improve the competitiveness of its facility. Id. at 1160. In response to those specific assertions, the union requested information regarding material costs, labor costs, manufacturing overhead, productivity calculations, and competitor data. Id. The Board found that the union was entitled to that information, explaining that the employer, "in the course of bargaining, made the information relevant and created the obligation to provide the requested data." Id. As the judge here pointed out, the holding in *Caldwell* is consistent with the Supreme Court's observation in *NLRB v. Truitt Mfg. Co.*, that, "if . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. 149, 152–153 (1956); see also *A-1 Door & Building Solutions*, 356 NLRB No. 76 (2011).[5]

That observation applies with equal force in this case. As in *Caldwell*, the Respondent premised its demand for substantial wage concessions on its asserted competitive disadvantage in the marketplace. Not surprisingly, the Union responded by requesting information needed to evaluate the accuracy of the Respondent's claims and to assist the Union in developing appropriate counterproposals. The Union sought information concerning the Respondent's current and former customers, job quotes, outsourcing, pricing structure, market studies, and competitors. In light of the bargaining preceding that request, we agree with the judge that the Respondent violated its obligation to bargain in good faith by categorically denying the request.[6]

Our dissenting colleague disagrees with the judge's finding for several reasons. None withstands scrutiny.

The dissent mistakenly asserts that our decision "subverts" the Board's established policy that an employer may not be required to open its financial books unless it has asserted an inability to pay the union's demands. In particular, the dissent argues that, in *Truitt*, the "Court's observation ["If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy"] was specific to an undisputed claim of inability to pay, and . . . should not be so expansively interpreted as to apply to any general statement made about a bargaining proposal." In fact, our decision is entirely consistent with both the letter and spirit of *Truitt*.

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[5] The relevant passage of the Supreme Court's decision in *Truitt*, supra, reads:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

351 U.S. at 152–153.

[6] We also agree with the judge that the Respondent's provision of projected wage savings, without any information about how the numbers were calculated, was not an adequate response to the Union's request for "a complete calculation."

This is not an inability-to-pay case,[7] but nothing in the Court's opinion limits its observation to such cases, as our colleague concedes. Indeed, the Board has applied the *Truitt* principle in a wide range of information request cases, including those not involving inability-to-pay claims. E.g., *Caldwell*, supra; *A.M.F. Bowling Co.*, 303 NLRB 167 (1991), enf. denied on other grounds 977 F.2d 141 (4th Cir. 1992). The courts have taken a similar approach. See, e.g., *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 90–91 (9th Cir. 1966) (the "principle announced in *Truitt* is not confined to cases where the employer's claim is that he is unable to pay the wages demanded by the union").

Contrary to our colleague's suggestion, our decision is not inconsistent with the Board's subsequent application of *Truitt* in *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), review denied 977 F.2d 1168 (7th Cir. 1992). In *Nielsen*, the Board found that the employer's claim of economic disadvantage did not equate to a claim of inability to pay, and thus the employer lawfully refused to "open its books" to the union. The same situation was presented in *NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570 (7th Cir. 1986), also cited by our colleague. Neither of those cases, however, holds that a union faced with something less than an inability-to-pay claim is not entitled to *any* information. In such circumstances, the Board will deny a union's request for financial statements but will still enforce its request for more information about the employer's operations and competitiveness.[8] Thus, an information request in this context is not an all-or-nothing proposition.

Nor does applying the *Truitt* principle here risk expanding it to "any general statement made about a bargaining proposal." We agree with our colleague that, as the Supreme Court observed in *Truitt*, "[e]ach case must turn on its particular facts." 351 U.S. at 153. On the particular facts of this case, however, we reject our colleague's view that the Respondent's competitiveness claims amounted to nothing more than "routine negotiating verbiage" and that its generalized concerns about Asian markets did not make the requested information relevant. The Respondent did not invoke competitive pressure loosely, as an abstract proposition, or as an ever present factor. It was seeking substantial wage cuts and its justification for those cuts centered entirely on a present and pressing lack of competitiveness in specific markets. Its representations encompassed not only the source of competitive difficulties (rising production costs and falling production), but the day-to-day impact of those constraints on the company's business, including its difficulty in retaining customers and in paying employees in line with previous contracts. Faced with these grave, specific, and recurring assertions of the Respondent's lack of competitiveness, the Union had a legitimate claim to information that it could use to understand, evaluate, and possibly rebut the Respondent's assertions.[9]

Tellingly, at the hearing, the Respondent introduced into evidence some of the very information requested by the Union, including detailed customer lists and information about lost customers, to support the legitimacy of its demands for concessions. In particular, as noted by the judge, the Respondent cited its loss of a "huge" customer in 2006, demonstrating the concrete foundation for the Respondent's assertions. The judge found, and we agree, that the Respondent itself thereby confirmed the relevance of the requested information.

We also disagree with the dissent's policy claim: that our holding "undermines labor relations stability by discouraging an employer . . . from making any reference to the factor of business competition when asking for wage concessions." We see no conflict between honesty in collective bargaining and "labor relations stability." Indeed, permitting parties to make unsubstantiated claims at the bargaining table while blocking attempts to verify them is likely to provoke disputes, not avoid them.[10]

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[7] As the judge found, the Respondent did not plead an inability to pay, and the Union never asked the Respondent to open its books. The Union did not ask for balance sheets, revenue, profits or the other types of information typically at issue in inability-to-pay cases. Rather, as shown, the Union asked for specific information related to the Respondent's repeated assertion that it needed significant wage cuts to be competitive.

[8] See, e.g., *E. I. du Pont de Nemours & Co.*, 276 NLRB 335 (1985) (finding that a union was not entitled to income statements because employer did not assert inability to pay, but was entitled to data on production costs at the employer's other plants and those of its competitors, among other things, to respond to specific employer proposal). Accord: *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 4 fn. 13 (2011) (union entitled to requested job bidding information even though employer not claiming an inability to pay).

[9] In singling out quotations from the hearing transcript to dispute our characterization of the Respondent's claims about competitiveness during negotiations, our dissenting colleague misses the bigger picture. As the judge found—and neither the Respondent nor the dissent disputes—the Respondent's rationale for wage cuts "centered around competitiveness." This included explicit concerns about retaining customers and keeping pace with Asian competitors. The Respondent does not except to these findings, nor does it deny that competitiveness was the stated basis for its demands for concessions. Thus, contrary to our colleague's suggestion, the record makes clear that the Respondent communicated these concerns not only at the hearing, but during negotiations as well. Our colleague's reading of the evidence mistakenly downplays the centrality of competitiveness to all of the Respondent's bargaining demands.

[10] Not only does information sharing help to foster honest and constructive collective bargaining, but, as many management practitioners and scholars have argued, sharing key competitive information with

Nor are we persuaded by our colleague's expressed concern over "the potential for abuse and disruption of the collective bargaining process." To the extent that an employer truly is faced with abuse or harassment, longstanding Board precedent already provides a defense.[11] In this case, however, the Respondent clearly has not established such a defense. The Respondent argued that the Union's request was a bad-faith attempt to forestall a bargaining impasse, but the judge thoroughly examined and rejected that argument. Further, our colleague suggests that it is "possible, if not probable," that a union would "divulge to the employer's competitors critical information about bidding and practicing practices. . . ." There is no claim (much less evidence) that the Respondent held such a concern here, as the judge noted.

Last, we agree with the judge that there is no merit to the Respondent's confidentiality defense. The Respondent contends that it was not required to comply with the Union's requests for customer and pricing information because that information was confidential. But, as the judge observed, the Respondent never advanced that argument during bargaining, when the Union could have offered appropriate assurances or proposed a confidentiality agreement. Its attempt to do so now is suspect. See *Earthgrains Co.*, 349 NLRB 389, 397 (2007), enf. denied on other grounds 514 F.3d 422 (5th Cir. 2008) (failure to raise confidentiality defense in a timely fashion undermines its legitimacy). Moreover, the Respondent did not establish that the names of past or present customers implicated confidentiality concerns. It did not produce any evidence to show that any of its customers' identities were kept confidential pursuant to agreements with the Respondent or otherwise. In sum, we agree with the judge that the Respondent failed to establish a legitimate and substantial confidentiality interest in the requested information. See *AGA Gas, Inc.*, 307 NLRB 1327 fn. 2 (1992).

In sum, for the reasons stated by the judge and as further explained above, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's October 4 information request.

The Lockout And Related Conduct

The Respondent locked out its employees on October 22. Shortly after the lockout began, the Respondent temporarily replaced the locked out employees and terminated their health insurance coverage and associated COBRA rights. Again, we agree with the judge's findings that those actions violated the Act.

As stated above, the Respondent argues that the judge improperly found the lockout unlawful based on its failure to provide information because the General Counsel did not pursue that theory. The record does not support that argument. In fact, the complaint specifically alleged that the lockout was tainted by the Respondent's failure to provide requested relevant information, and the General Counsel never abandoned that theory. Cf. *Sierra Bullets, LLC*, 340 NLRB 242 (2003). Indeed, at the hearing, the Respondent's counsel demonstrated the Respondent's awareness that the issue was in dispute. For example, in his opening statement, counsel for the Respondent stated that "there is absolutely no nexus between any failure to provide information and the lockout."[12] Accordingly, we reject the Respondent's argument that it was denied due process.

We also reject the Respondent's argument that its failure to provide the requested information did not taint the lockout. A bargaining lockout is lawful only if its sole purpose is to bring economic pressure to bear in support of a legitimate bargaining position. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Where the employer's bargaining position is "tainted" by unremedied unfair labor practices, however, a lockout in support of that position will be found unlawful, on the ground that employees are effectively forced to accept that unlawful conduct to end the lockout. See *Allen Storage & Moving Co.,* 342 NLRB 501 (2004).

Here, the Respondent was not entitled to lock out unit employees for refusing to accept proposed wage and benefit concessions while at the same time failing to ful-

employees benefits the employer's business. See, e.g., Case, Open-Book Management: The Coming Business Revolution (1995); Krattenmaker, *Compensation: What's the Big Secret?*, Harv. Mgmt. Comm. Letter, Oct. 2002 (citing study indicating that more and better communication about compensation, including information about how pay is tied to the company's fortunes, can improve employee satisfaction and commitment to the organization); Lorber, *An Open Book*, Wall St. J., Feb. 23, 2009, at R8 (citing managers' experiences that sharing information with employees "make[s] companies more profitable and easier to manage."). See generally McGregor, The Human Side of Enterprise (1960).

[11] See *Farmer Bros. Co.*, 342 NLRB 592, 594 (2004) (recognizing "bad-faith" defense); *Industrial Welding Co.*, 175 NLRB 477, 480 (1969) (same). See also *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988) ("[T]he presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown").

[12] The Respondent moved to include the parties' posthearing briefs in the record. Sec. 102.45 of the Board's Rules and Regulations defines the record, and it does not include posthearing briefs to the administrative law judge. Moreover, the Respondent does not contend that the General Counsel disclaimed this theory in his posthearing brief, and the critical question is whether the Respondent had sufficient notice of the General Counsel's theory to permit it to present relevant evidence at the hearing. As explained above, we find that it did, and we therefore deny the motion.

fill its statutory duty to respond to the Union's October 4 information request relating to that proposal. As found by the judge, the Respondent's proposed concessions were *the* central point of disagreement during negotiations and remained a key stumbling block to an agreement after October 4. The Union's information request was designed to enable the Union to evaluate and respond to that proposal. Absent the Union's willingness to buy "a pig in a poke," that information was therefore critical to the bargaining and the possibility of the parties' reaching an agreement, yet the Respondent categorically refused to provide the requested information. In those circumstances, the Respondent was foreclosed from locking out its employees. By proceeding nonetheless, it violated Section 8(a)(5), (3), and (1) of the Act, as alleged. See *Clemson Bros., Inc.*, 290 NLRB 944, 945 (1988) (finding employer's lockout to be unlawful where it was implemented following employer's unlawful refusal to provide union with information it requested for bargaining); *Globe Business Furniture, Inc.*, 290 NLRB 841 fn. 2 (1988), enfd. 889 F.2d 1087 (6th Cir. 1989) (same).[13]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, KLB Industries, Inc. d/b/a National Extrusion & Manufacturing Company, Bellefontaine, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its Bellefontaine, Ohio facility, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 2007."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 26, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I disagree with my colleagues that an employer's general negotiating claim that it needs wage concessions in order to remain or become more competitive triggers a statutory obligation to provide a broad array of nonunit information about its customers, job bidding process, and pricing practices. Their holding represents an unwarranted extension of precedent which effectively subverts Board policy established in *Nielsen Lithographing*.[1] Consequently, I would dismiss the complaint allegations that the Respondent unlawfully refused to provide requested information about its wage concession proposal and that it unlawfully implemented a lockout and temporarily replaced employees in support of its bargaining position.[2]

Neither *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006), nor the recently decided *A-1 Door & Building Solutions*, 356 NLRB No. 76 (2011), dictates the result reached by my colleagues. In each of those cases, the negotiating union "requested *specific* information to evaluate the

[13] Having found the lockout unlawful, we further agree with the judge that the Respondent's cancellation of employees' health insurance coverage, which was occasioned by the unlawful lockout, was also unlawful and must be redressed. For the reasons stated by the judge, we also agree that the Respondent's cancellation of employees' health insurance coverage without giving the Union notice and a meaningful opportunity to bargain would have violated Sec. 8(a)(5) and (1) even if the lockout had been lawful. See *Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1023–1024 (2001).

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

[1] *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), affd. sub nom. *Graphic Communications Workers v. NLRB*, 977 F.2d 1168 (1992) (*Nielsen II*).

[2] Based solely on the Respondent's failure to give the Union advance notice and an opportunity to bargain, I agree with my colleagues that it violated Sec. 8(a)(5) when cancelling employees' health insurance coverage.

accuracy of the Respondent's *specific* claims and to respond appropriately with counterproposals, and . . . the information requested was relevant to those purposes." *Caldwell*, supra at 1160. The Board emphasized that the Union's requests "were narrowly tailored in response to the Respondent's own claims." Id. Further, the fact that some information categories requested by the unions in those cases are the same as those requested in this case is of no consequence. To suggest otherwise is to obviate the well-established requirement that the requesting union bears the burden of proving the relevance of requested nonbargaining unit information in the circumstances of a particular case. To meet this burden, the requesting union has to do more than show a generic identity between the information sought and that which the Board held an employer was required to produce in distinguishable circumstances.

In the present case, the Respondent made a general claim about a need to maintain or improve its competitive position in the global and domestic markets in support of its proposal for wage concessions. The only competitors specifically identified were those in the Asian markets. This is routine negotiating verbiage (or at least it will have been until the present decision issues) about a routine aspect of any employer's business concerns. For that matter, there is no record evidence that the Respondent's negotiators ever claimed an *inability* to compete or said that it had lost or was losing customers, that competitors were undercutting its prices, and that it had to outsource bargaining unit work in order to meet competition. It simply expressed a desire to cut wages in order to remain competitive or become more competitive.[3] Quite clearly this claim would not trigger an obligation to open the Respondent's financial books to the Union or to produce a list of competitors,[4] and it should no more trigger an obligation to produce copious nonunit information about present and past customers, job quotes, product pricing, outsourcing, and marketing plans. For that matter, a copy of the business section of a daily newspaper would be more relevant to the issue of foreign competition than any of the information the Union sought in the guise of seeking to understand and respond to the Respondent's proposal for wage concessions.

The majority relies heavily on language from the Supreme Court's decision in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), to justify the view that the Respondent's statement triggered an obligation to provide supporting information. The Court did indeed state that "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." Id. at 152–153. The Court's observation was specific to an undisputed claim of inability to pay, and, while it need not be limited to the facts of that case, it should not be so expansively interpreted as to apply to any general statement made about a bargaining proposal. Notably, the *Truitt* Court also stated "We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." Id. at 153–154.

In years subsequent to *Truitt*, the Board failed to undertake the required case-by-case examination of information requests triggered by an employer's claim of any

[3] The majority is factually mistaken in stating that the Union's negotiators were faced with "grave, specific, and recurring assertions of the Respondent's lack of competitiveness." The entirety of record testimony about negotiators' discussion of this matter is as follows:

From the testimony of Respondent negotiator Bryan Hastings.

> Q. (on direct examination) Did KLB say anything to the Union regarding why it wanted to achieve cost savings in this Collective Bargaining Agreement in 2007?
>
> A. We indicated to them that we, you know, wanted to be—stay competitive and that we were competing with the Asian firms.

From the testimony of Union negotiator Konrad Young.

> Q. (on direct examination) Do—do you—did the Employer offer any explanation at this point why they needed all these wage cuts?
>
> A. They always referred to competitiveness.
>
> Q. Okay. And—and who is that, that you say that's speaking.
>
> A. I would say Bryan.
>
> Q. So when you say referred to competitiveness so that the Employer could be competitive.
>
> A. Yes.
>
> Q. (on cross-examination) With respect to explaining why the Company wanted concessions, isn't it true that Mr. Hastings said more that just they needed to be competitive?
>
> A. I don't recollect anything other than competition with other Companies without them naming the Companies and it all centered around competitiveness.

To address the obvious lack of record support for what the Respondent said about competitiveness at the bargaining table, my colleagues rely on what the Respondent's witnesses said about competitiveness *at the hearing*! These statements could not have been the basis for the Union's request, and it is irrelevant whether they indicate that the Respondent had specific evidence in its possession if it had no legal obligation to produce it.

[4] See, e.g., *North Star Steel Co.,* 347 NLRB 1364, 1369–1370 (2006).

form of financial hardship, including competitive disadvantage claims. It found that most such claims were tantamount to a claim of inability to pay and therefore required disclosure of requested financial records. This led to judicial criticism, most notably from the Seventh Circuit,[5] which emphasized a critical distinction between claims of present inability to pay and claims of competitive disadvantage. For instance, in *Harvstone*, the court rejected the Board's rationale that three employers made inability to pay claims by contending throughout their contract negotiations that they needed wage concessions to be competitive. Referring to a statement by one negotiator that if the respondents "don't make a reasonable profit so they can be a viable competitive business, they won't stay in business, and no one will have jobs," the court characterized statements such as this as "nothing more than truisms," which do "not preclude a finding that, at least for the term of the new collective bargaining agreement, the employer operating at a competitive disadvantage is financially able, although perhaps unwilling, to pay increased wages. In such a case, we think that the employer's claim of competitive disadvantage is not a plea of inability to pay."[6]

The Board ultimately adopted the rationale of the Seventh Circuit on remand in *Nielsen*, concluding "that an employer's obligation under *Truitt* to provide a union with information by which it may fulfill its representative function in bargaining does not extend to information concerning the employer's projections of its future ability to compete. We consider that obligation to arise only when the employer has signified that it is at present unable to pay proposed wages and benefits. We do not equate ''inability to compete,'' whether or not linked to job loss, with a present ''inability to pay.''[7]

I believe that the finding of a violation here represents an unwarranted expansion of the fact-specific holdings in *Caldwell* and *A-1 Door* in order to offset *Nielsen's* narrowing of an employer's obligation to provide information. The gist of my colleagues' opinion is that the union in *Nielsen* simply asked for the wrong information. Had it asked for the same information as requested by the Union here, the employer would have a statutory obligation to provide it. In other words, my colleagues hold that—in marked contrast to the analysis of inability to pay claims—there need not even be a specific negotiating claim of present inability to compete in order to trigger an employer's obligation to provide a broad range of nonunit information to a requesting union. This holding cannot be reconciled either with *Nielsen* or with the *Truitt* requirement that, *even in inability to pay cases*, there must be a case-by-case factual examination of whether a union is entitled to evidence substantiating a bargaining claim.

In addition, my colleagues' decision undermines labor relations stability by discouraging an employer, even one in a well-established good-faith bargaining relationship, from making any reference to the factor of business competition when asking for wage concessions. Apart from practical considerations as to whether the information requested in response to such references could objectively verify an employer's present or future competitive status,[8] their decision poses the potential for abuse and disruption of the collective-bargaining process. I do not contend that in this case the Union was motivated to make its request by anything other than a genuine desire to understand better the Respondent's wage demands. However, as the *Nielsen II* court observed in affirming the Board's new policy, such a request can also be designed to harass.

> The union may want the information because it is embarrassing to the company, in which event either the company may make bargaining concessions to avoid having to reveal it or the workers' support for the union may increase because the revelations make the workers angry at the company. The union may want the information in the hope that the company will refuse its demand, thereby handing the union a legal issue that may enable it to convert an economic strike into an unfair labor practice strike and thus get its members reinstated when the strike is over. Or the union may want the information simply in order to delay the evil day on which the company cuts the workers' wages and fringe benefits; and the threat of delay may cause the company to moderate its demands.[9]

My colleagues' holding that even a general bargaining claim about competitiveness triggers an obligation to produce substantiating information greatly increases the potential for such mischief in the future. It is even possible, if not probable, that a requesting union could also divulge to an employer's competitors critical information about bidding and pricing practices, or that the union could use informa-

[5] See *NLRB v. Harvstone Mfg. Corp.,* 785 F.2d 570 (7th Cir.1986), denying enf. of *Harvstone Mfg. Corp.,* 272 NLRB 939 (1984), and *Nielsen Lithographing Co. v. NLRB,* 854 F.2d 1063, 1066 (7th Cir. 1988), denying enf. of *Nielsen Lithographing Co.,* 279 NLRB 877 (1986) (*Nielsen I*).

[6] *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d at 576–577.

[7] *Nielsen Lithographing Co.*, 305 NLRB at 701.

[8] *Nielsen Lithographing Co.*, 305 NLRB at 701–703 (concurring opinion of Member Oviatt).

[9] *Graphic Communications Workers v. NLRB*, 977 F.2d at 1169–1170.

tion about current customers to target them for secondary handbilling and bannering as a means of leveraging its bargaining position.

To make matters worse, the majority relies on the Respondent's refusal to provide information as the basis, per se, for finding that the lockout of unit employees and the hiring of temporary employees was unlawful. Even assuming, arguendo, that there is no procedural bar to this finding, the General Counsel has failed to show that the refusal of information had any impact on the parties' subsequent negotiations, as must be shown in analogous cases to determine whether unfair labor practices have precluded the possibility of reaching a good-faith bargaining impasse. The Respondent's proposals for wage concessions were not themselves unlawful, and the parties had bargained about them to the point of entrenched positions verging on impasse before the Union even made its information request. The subsequent lockout was for the legitimate purpose of pressuring the Union to agree to the Respondent's lawful bargaining proposals. The refusal to provide the requested information had nothing to do with it. I therefore dissent.

Dated, Washington, D.C. July 26, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish the Union with requested information necessary for the Union's performance of its collective-bargaining duties.

WE WILL NOT lock out or replace our employees in support of our bad-faith bargaining conduct or to discriminate against employees for refusing to accept our bad-faith bargaining conduct.

WE WILL NOT terminate employees' health insurance coverage without notifying the Union and providing an opportunity to bargain and we will not terminate employees' health insurance coverage as a means of discriminating against employees for refusing to accept our bad-faith bargaining conduct.

WE WILL NOT call the police to the facility for the purpose of taking action against legal picketing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide the Union with requested information which is relevant and necessary to carry out its collective-bargaining responsibilities, including fulfilling all outstanding requests from the Union's October 4, 2007 information request, to the extent required by the NLRB decision.

WE WILL, within 14 days from the date of the Board's Order, offer all locked out employees full reinstatement 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, discharging, if necessary, employees hired from other sources to make room for them.

WE WILL make all locked out employees whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest compounded on a daily basis.

WE WILL restore the employees' group health insurance coverage, including the COBRA policies, that we unilaterally terminated in October 2007 and make employees whole for all losses suffered as a result of the termination of the coverage, also with interest compounded on a daily basis.

KLB INDUSTRIES INC. D/B/A NATIONAL EXTRUSION AND MANUFACTURING COMPANY

Karen N. Neilsen (Region 9, NLRB), of Cleveland, Ohio, appeared for the General Counsel.

Kerry P. Hastings (Taft Stettinius & Hollister LLP), of Cincinnati, Ohio, appeared for the Respondent.

William Karges (UAW Legal Department), of Detroit, Michigan, filed a posthearing brief on behalf of the Charging Party.

DECISION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve an employer that locked out its employees and cancelled their group health insurance coverage in an effort to pressure the employees' union to accept its bargaining position. The Government contends that the employer engaged in unlaw-

ful overall bad faith bargaining throughout the parties' one month of negotiations before the lockout. As part of the bad-faith bargaining, the Government alleges that the employer unlawfully failed to provide the union with relevant and requested information. The Government alleges that because of the bad-faith bargaining, the lockout of the employees and cancellation of employee health insurance benefits was unlawful. The Government further alleges that, in an incident occurring eight months after the lockout began, the employer unlawfully called the police to its facility in response to lawful picketing activity. Finally, at trial the Government sought to amend the complaint to add additional alleged violations involving a range of conduct, on a range of theories, including a discharge, comments by management regarding discussion of negotiations and potential strikes, and surveillance.

STATEMENT OF THE CASE

On March 12, 2008, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (Union or UAW) filed an unfair labor practice charge with Region 8 of NLRB (Board) against the KLB d/b/a National Extrusion & Manufacturing Co. (Company or KLB). The charge was docketed by the Region as case number 8–CA–37672. An amended charge was filed April 11, 2008, and a second amended charge was filed April 28, 2008. On April 30, 2008, the Board's General Counsel, acting through Region 8's Regional Director, issued a complaint in the case alleging KLB violated the National Labor Relations Act (Act). KLB filed a timely answer denying all alleged violations. On June 30, 2008, the Union filed an additional unfair labor practice charge against KLB, docketed as case number 8–CA–37835. On July 8, 2008, the General Counsel issued an order consolidating both cases and issued a consolidated complaint alleging violations of the Act by KLB. KLB filed an answer to the consolidated complaint on July 16, 2008.[1]

These cases were heard in Bellefontaine, Ohio, on five days between July 22 and 29, 2008. At the close of her case-in-chief, counsel for the General Counsel moved to file extensive amendments to the complaint, each of which was opposed by the Respondent, on, among other grounds, that the amendments were offered outside the applicable statute of limitations. I took the General Counsel's motion under advisement and it is discussed herein. Counsel for the General Counsel, the Union, and the Respondent filed briefs in support of their positions on September 22, 2008. On the entire record, I make the following findings of fact, conclusions of law, and recommendations.

JURISDICTION

The complaint alleges, the Respondent admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the Respondent admits, and I find that the UAW is a labor organization within the meaning of Section 2(5) of the Act.

[1] I note that throughout this decision references to the complaint are to the extant consolidated complaint and not to the original superseded version.

FACTS

A. Background

KLB produces aluminum extrusion products under the name National Extrusion & Manufacturing Co. at a facility in Bellefontaine, Ohio. KLB was formed and assumed ownership of the facility in 1997. For many years, both before and after KLB's assumption of the facility, the UAW and its local union Local 1224A (collectively referred to as the Union or the UAW) represented the facility's production and maintenance employees.[2] Upon assuming ownership of the facility in 1997, KLB negotiated and entered into a collective-bargaining agreement with the Union. A successor agreement was negotiated in 2000, and then again in 2004. The 2004 agreement was scheduled to terminate no earlier than September 30, 2007. As of September 2007, KLB employed 16 bargaining unit employees.

Konrad Young is the Union representative assigned to service the KLB bargaining unit. He has serviced this unit since 1999 and in that capacity negotiated the 2000 and 2004 agreements with KLB. Young was the Union's chief negotiator for the 2007 negotiations. He was assisted by KLB employees Jack Conway, Ellen Potter, and Roger Leugers.

KLB's chief negotiator was Attorney Brian Wakefield, an attorney with the law firm hired to represent KLB in negotiations and in this unfair labor practice proceeding. Also on the negotiating team for KLB was Craig Johnson, who served as the controller, treasurer, and Human Resources manager for KLB. He was also one of KLB's owners. Johnson had been involved in the 1997, 2000, and 2004 negotiations with the Union. Wakefield was new to the KLB-Union negotiations.

A federal mediator, Don Ellenberger, was present at most of the bargaining sessions but not at the initial sessions.

On February 26, 2007,[3] with the labor agreement set to expire October 30, the law firm representing KLB in negotiations sent Young a letter notifying the Union that it intended to terminate the agreement at expiration. The letter concluded by stating that "[w]e will be in touch in the coming months to discuss the scheduling of collective bargaining negotiations."[4]

[2] The bargaining unit (which is admitted to be appropriate for purposes of collective bargaining) is composed of:

> All hourly-paid production and maintenance employees in the Company's Bellefontaine, Ohio, plant but excluding all office and clerical employees, guards, professional employees and all supervisors as defined in the Labor Management Relations Act of 1947, as amended.

[3] All subsequent dates are in 2007 unless otherwise indicated.

[4] Like many collective-bargaining agreements, the agreement between KLB and the Union provided a definite expiration date, but also provided that the contract would automatically renew for an additional year unless either party notified the other of an intent to terminate the agreement at least 60 days prior to the expiration date. In 2003, neither party sent such notice of intent to terminate the 2000 Agreement, and the agreement automatically renewed for another year. Feeling "caught off guard" by the automatic renewal in 2003, and determined to avoid a recurrence in 2007, KLB sent the required notice seven months in advance of the scheduled contract termination date.

In fact, the parties did not speak again regarding negotiations until September 6. On that date Young called Johnson and told him that although he had received a contract-termination notice in February, no one had contacted him to schedule negotiations. Young told Johnson that he had set aside the last two weeks of September for negotiations with KLB. Young indicated that "if we did not get an agreement by the 30th that . . . as long as we were negotiating and still talking, he was willing to extend the agreement." Johnson told Young that he would have KLB's law firm contact Young to schedule negotiations. Within the next few days Attorney Wakefield spoke with Young and the parties set September 20 for the first bargaining session.

B. Some evidentiary and credibility considerations

At the hearing in this case, multiple witnesses recounted events from multiple bargaining sessions. Not surprisingly, there were many discrepancies between witnesses, and even some within the testimony of individual witnesses. My findings, set forth below, reflect my determination of the most likely narrative of events at the bargaining table. In addition to oral testimony at the hearing, in reconstructing events at the bargaining table I have relied upon contemporaneous notes of bargaining taken by some of the witnesses and intended to record discussion and events at the bargaining table. I accept these as evidence of what was stated at the bargaining table and of what transpired in bargaining.[5]

In terms of the witnesses, the three union bargaining committee witnesses (Young, Potter, and Conway) relied heavily on leading questions and on the reading of proposals or notes presented to them. It was clear that they had limited independent memory of events. In terms of events occurring at the negotiating table, for the most part I have relied upon (and credited) the testimony of KLB witnesses Wakefield and Johnson over that of the union bargaining committee witnesses. Both Johnson and Wakefield testified in a straightforward manner, recounting events with a demeanor that inspired confidence that they were accurately recalling what transpired in bargaining.

One evidentiary issue that arose in conjunction with Wakefield's testimony warrants comment. On cross examination Wakefield testified that in preparation for testimony he reviewed bargaining proposals, materials in the "client file," and emails exchanged between himself and Johnson. In these files were certain documents that the Respondent did not produce in response to the General Counsel's subpoena duces tecum on grounds that they were protected by the attorney client privilege and work product doctrine. A privilege log was produced in their stead. When Wakefield testified that he had reviewed these documents the General Counsel moved to have the documents produced pursuant to Federal Rule of Evidence 612. The Respondent opposed this demand.

After permitting the parties to argue the issue I declined to order production of these documents, the privileged nature of which, the General Counsel did not dispute. I referenced the fact that the General Counsel had not articulated any need for the documents and that I would exercise my discretion not to order disclosure of the documents. I did not cite, but note here that the Board's recent decision in *CNN America*, 352 NLRB 265, 266 (2008) endorses the extent of my discretion in that regard. Moreover, there was no assertion, much less showing, that Wakefield reviewed the documents in question for the purpose of refreshing his recollection, or that his review of the privileged documents affected his testimony. As the Board explained in *CNN America*, supra,

> For Rule 612 to apply, the document(s) at issue must have been reviewed for the purpose of refreshing a witness' recollection. "[E]ven where a witness reviewed a writing before or while testifying, if the witness did not rely on the writing to refresh memory, Rule 612 confers no rights on the adverse party."
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> * * * * * * * * *
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> In addition to Rule 612's requirement regarding refreshing a witness' memory, the Rule requires that such refreshing was undertaken "for the purpose of testifying." As the advisory committee notes explain, the writing(s) must have had an impact on the witness' testimony. In other words, merely looking at or reviewing a document during the course of preparation for trial does not automatically trigger Rule 612. The advisory committee stated that, by limiting disclosable documents to those that have an impact on the witness' testimony, the committee intended to safeguard against "fishing expeditions" and "wholesale exploration" of the many files and papers that a witness may have used in preparation for trial.

In this case, the preconditions for application of Rule 612 were not met. Indeed, the request for the attorney client communications in question appeared to me to be precisely the "fishing expedition" and "wholesale exploration" warned against by the Board. The fact that the witness was an attorney and the review included documents that the attorney would reasonably expect to be privileged communications does not undermine but rather bolsters the inapplicability of Rule 612 as a basis to require production. See, "Report of House Committee on the Judiciary" regarding FRE 612 ("The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory").

C. The bargaining

1. September 20 bargaining

The parties met for negotiations on September 20 at the Bellefontaine VFW hall located across the street about a quarter block away from KLB's facility.

As reflected in their opening proposals, the parties entered negotiations with vastly different goals. The Union felt that employees' wages were low, and anticipated and sought wage increases over the life of the new contract with additional economic and noneconomic changes that would benefit employees. Although I attribute it to posturing, at one or more times in negotiations Young indicated to KLB that the union employees would not agree to a concessionary contract. KLB, on the other hand, came to the table determined to cut labor costs. Its goal

[5] *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 (1969); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 483 (5th Cir. 1963).

was to save $100,000 annually. According to Johnson, KLB was determined to reduce costs through bargaining in order to remain "competitive." Johnson testified that KLB never told the Union it could not afford the Union's demands, but limited its expression of financial concern to the need to stay "competitive." As Johnson stated, "We did not want to open ourselves up to being able to have our books examined."

The Union's opening proposal sought wage increases of $2 the first year, and $1 in the second and again in the third year of the new contract. It sought monthly cost of living adjustments (COLA) to wages, an additional paid holiday, three paid "personal days," an increase in paid leave for bereavement leaves requiring significant travel, the reduction of probationary and waiting period for benefits from 90 to 60 days employment, and a week's vacation pay in lieu of the performance bonus. The Union also proposed that disciplinary actions were to be maintained for 6 months in an employee's file (rather than the existing 18 months), and that the Company would furnish prescription safety glasses, pay $150 annually for boots, add a janitor classification, and change the attendance policy so that absences excused with a doctor's note would not count against the attendance bonus calculations. The Union also proposed that anyone (not just employees) entering the plant abide by all health and safety rules and that there be no outsourcing while any employee was laid off.

KLB's opening proposal was in the form of a copy of the current 2004 Agreement with text to be eliminated struck-out and proposed additions in bold. Most prominently, the proposal sought an across-the-board 20 percent reduction in wages the first year of the new contract.[6] It proposed reducing the employer's matching 401(k) contribution from 6 percent to 3 percent of an employee's wages. It cut the shift differential provided for the agreement from 30 cents to 15 cents. It proposed eliminating double pay for Sunday work and work in excess of 12 hours in a day.

Also of central interest to the parties, and to this case, was KLB's proposal on "Group Insurance," which included major medical, disability benefits, life insurance, as well as general health insurance. In its September 20 proposal KLB struck extensive language governing the major medical insurance coverage, the disability income benefits, life insurance, and language setting forth the deductibles, co-pays and payroll deductions that applied to the plan. KLB also struck language in the 2004 Agreement that limited the Company's right to change insurance carriers or to become self insured to instances where "the benefits accorded are substantially similar." In place of this struck language, the Company proposed language stating: "The Company will pay seventy-five percent (75%) and the employee will pay twenty-five percent (25%) of the cost of group health insurance."

[6] Under this proposal the minimum straight time wage rate for the lowest paid positions, such as fab operator, maintenance helper, and shipping associate, would be $8.20 per hour, and the maximum straight time rate for the highest paid job in the unit, NEM Technician, would be $12.27 an hour. Under KLB's proposal newly hired employees could receive less and their wages would increase by 10 percent every 6 months until they equaled the standard base rate.

KLB also proposed language reducing the right to medical leaves of absence from 24 months to 12 weeks, with questions on the subject left to the discretion of the Company, and excluded from the grievance procedure.

The Company proposed maintaining disciplinary actions of record in employees' files for 7 years, whereas under the current contract such matters were maintained for 18 months.

KLB proposed eliminating the three performance bonuses currently in existence (the quality returns bonus, the safety incentive bonus, and the attendance bonus).

Another significant change proposed by KLB involved adding the word "not" in the contract language describing the effect of an arbitrator's award, so that the language read: "The arbitrator's award shall not be final and binding on both parties for the term of this Agreement." KLB's proposal maintained the prohibition on strikes and lockouts for the term of the Agreement.

KLB indicated an intention to offer a proposal to change the vacation article of the contract but that proposal was not made on September 20.

As the parties "walked through" KLB's proposal, Young asked numerous questions or offered comments. Generally, he reacted angrily to what he considered "one of the most extreme documents for take-aways that I had ever participated in."

Many of Young's questions constituted requests for information from KLB relating to the proposals, and particularly to the anticipated cost savings to be realized from the proposals as well as the number of employees the particular proposal would affect. Wakefield noted the questions in the margins of the proposal, and Johnson recorded the questions in notes he took during bargaining.

Questioned by Young about the group insurance proposal, the KLB negotiators said they had not meant to delete everything, and indicated that no change was proposed in subsections B and C, which were the weekly disability and life insurance benefits. With regard to the medical insurance, the deletions left Young unclear about the nature of the proposal. Young pressed the KLB bargainers to explain "what is [the] proposal," because the language left in the proposal—"The Company will pay seventy-five percent (75%) and the employee will pay twenty-five percent (25%) of the cost of group health insurance"—didn't state whether it was the current or some new plan to which this cost sharing would apply. Wakefield testified that KLB's proposal referred to continuation of the current plan (with a change in cost sharing). He explained, "it couldn't be anything else. I mean, it was talking about this particular plan." He suggested the Union understood this. Young testified that the Company indicated it would get back to Young on this and he described the Company's proposal as "incoherent." He denied that the Company explained that this proposal was based on maintaining the current plan and its coverages. Potter also testified that she did not understand this to be the case. However, Conway testified that he understood that what was being proposed was "the old plan" with a change in cost to the employees. Young also expressed opposition to the language that would permit the Company to unilaterally change health insurance—without guaranteeing substantially similar coverage for employees—during the term of the contract.

As to the proposal to eliminate language requiring that changes to insurance during the contract retain "substantially similar" benefits, Wakefield indicated to the Union that this language was subject to negotiation, telling the Union "that this was the first day of negotiations, that all of the things that were here not things that necessarily would be at the end."

2. September 21 bargaining

The parties met again the next day, September 21. Prior to the meeting, Wakefield had sent a letter to Young, referencing the multiple oral requests for information that were made the day before. Wakefield requested that Young's information requests be in writing "[t]o facilitate timely and appropriate responses, and to minimize misunderstandings as to the nature of your requests." Young rejected Wakefield's request, telling him that "I can't be limited to putting everything in writing, because there's such a short duration for the negotiations." After this the Company provided much of the information requested the previous day, including information on insurance costs, projected insurance savings using the 75/25 percent cost sharing, 401(k) participation and proposed savings, and bonus, shift differential, and double overtime costs and proposed savings.

The parties reviewed their proposals from the day before and went through and discussed them. The parties discussed KLB's proposal to extend the period to maintain records of discipline in employee files. The Company explained that the purpose of the proposal was to maintain records for a period just beyond the statute of limitations for state law employment claims in Ohio, and not so the Company could rely upon 6-year old disciplines in the progressive discipline process. The Company agreed that its intent was not reflected in the language they proposed and agreed to develop language to reflect that the reliance on past discipline for determining future discipline would remain limited to 18 months. The Union indicated it would withdraw its proposal on requiring everyone who entered the facility to obey all rules and regulations. Stating that it was seeking to bridge the (huge) gap between the parties on wage and pay proposals, the Union also withdrew its COLA proposal during this bargaining session. It also made a counterproposal on health insurance, proposing that the employee contribution (then at $35 a week) be increased to $155 monthly the first year, $160 the second, and $165 monthly the third year of the contract.[7]

During this session, the Company provided the Union with its promised proposal on vacation. The proposal provided for the elimination of the fifth week of vacation that was available to those employees (10 of the 16 bargaining unit employees) with 20 or more years of service. The Company also proposed limiting to one (as opposed to the current language providing for two) the number of employees that could "call in" on a particular day and take vacation for that day.

Also on September 21, the Company proposed an "alternative" health insurance proposal. This was offered as an alternative to the 75/25 percent cost sharing split proposed on September 20. This proposal was a one page summary of a "high deductible" plan. The Company felt that with this high deductible plan, it could offer to keep the weekly premium cost to employees at the $35 a week that it had been under with the old plan then in effect. From the Company's perspective, staying with the current plan (with a 75/25 split) would have required employees to contribute more to the premium. According to the Company, the alternative "high deductible" plan would drop the Company's monthly premium back to close to what it had been paying in 2005. As Johnson explained it at the table, adoption of this new plan would save $47,000 in premiums. When proposing this plan the Company provided the Union with a summary sheet describing the plan and listing, albeit in summary form, the medical and drug prescription benefits under the plan (GC 8). Wakefield explained that there was not detailed discussion (or information provided) about the coverage details of the new plan, but that "[t]he discussion kind of went like this, you know, if you broke your arm under this plan and it was covered, it would be covered under that one. You know, if you got your big toenail cut off and it was covered under this plan, that would be covered."[8]

3. September 25 bargaining

The parties met again on September 25. At this meeting the Company offered a second proposal that was in the form of a draft of the collective-bargaining agreement with strikeouts and additions. This proposal incorporated the vacation proposal from September 21 and removed the inadvertent strikeout of disability and life insurance that had been in the September 20 proposal. The medical insurance proposal was changed to state: "The Company will pay eighty percent (80%) of the cost and the employee will pay twenty percent (20%) of the cost for the current plan's premium."[9] This change was significant, not only because of the change in the cost sharing allocation but because of the explicit reference to the "current plan." Young testified that with this language he understood that the Company was referring to continuing the current health care plan, something that was not clear to him based on the language in the Company's initial September 20 proposal.

The medical leave-of-absence proposal was now limited to 12 months (unless otherwise approved by the Company) as opposed to the 12-weeks limit of the Company's initial proposal. (The current 2004 Agreement provided for a 24-month limit.) In accordance with the discussion at the bargaining table, the Company's proposal on maintaining discipline re-

[7] This represents an increase in employee premiums of 77 cents per week the first year, $1.92 per week the second year, and $3.07 per week during the third year of the contract.

[8] In testimony that was the product of highly leading questioning, union witnesses Young and Potter, and to a more mixed extent Conway, testified—actually they confirmed counsel's assertions—that the alternative high deductible plan proposed *was* the current plan, but only with higher deductibles. This is incorrect, and I do not believe the Union thought this. It was a new plan.

[9] When this proposal was presented the text stated that Company would pay 80 percent (and the employee 20 percent of the cost for the current plan's "benefits." Through discussion it became clear that the Company intended for the 80/20 split to be for the plan's "premium" and that word was inserted in place of the word "benefits" by the parties.

cords was changed to provide that while records of discipline could be maintained for up to seven years, after 18 months they would not be considered in "subsequent discipline." The Union still wanted the word "subsequent" removed from this language.

At this meeting, the Company also withdrew its proposal to make arbitration awards "not be final and binding," returning to the "final and binding" language contained in the existing contract.

The Union also offered a proposal at the September 25 meeting. The Union offered a counterproposal on the issue of health care. It offered to accept the "2nd insurance plan given to the union on 9/21/07 by the company,"—i.e., the "alternative" high deductible plan. As part of this proposal the Union proposed that the Company establish a health reimbursement account to assist employees in paying the high deductibles. Specifically, the Union proposed that such an account be established by the company into which the Company would pay $1,500 per year for each individual or $3,500 per year for each family covered by the health insurance. Any money not used by an employee (or the family) would go back to the company. In addition the employees would be able to set aside pretax income to meet the deductibles. The Union's proposal had another condition: it explicitly required "the understanding that the coverages are the same as the present insurance as referenced in the documents dated May 1, 2007[,] and also to be referenced in the contract." In other words, under the Union's proposal, the medical insurance coverage for employees under the high deductible alternative plan would have to be the same as under the current insurance.

4. September 28 bargaining

On September 28, the parties discussed the Union's September 25 proposal to accept the Company's alternative high deductible plan with an accompanying health savings plan to defray the high deductibles. Wakefield suggested that this was "doable." Wakefield mentioned that Johnson had looked into the health savings account and received documents showing that this could be established. The Company counterproposed a subsidy of $1,000 per individual and $2,000 per family with a yearly deductible of $1,500/$3,500. The Company proposed that with this plan the employees' weekly premium payment would remain $35. Further heading down the path to the high deductible plan, the Company formally withdrew its original health insurance proposal (which had been the continuation of the current plan with cost sharing at 80 percent/20 percent).

The Union's response on insurance (as recorded in Johnson's contemporaneous bargaining notes) was to resubmit its proposal to pay more per month with the current insurance or "move to new plan as originally proposed by union."

Later on September 28, the Company offered a "package" proposal in which it withdrew its proposal to eliminate the shift differential, withdrew its proposal to eliminate Sunday double pay, and overtime after 12 hours in a day, and withdrew its proposal to remove questions concerning leave of absence from the ambit of the grievance procedure. The Company also agreed to remove the word "subsequent" from the retention-of-records provision (discussed above). This movement was conditioned on the Union agreeing to the Company's proposal to limit medical leaves to 12 months, as proposed in the previous bargaining session, and the Union agreeing to the Company's proposal to limit vacation day call-ins to one person per day.

Subsequently the parties agreed that medical insurance would end after 12 months on leave, at which time employees would have to pay for insurance through COBRA.[10] However, the parties also agreed that employees could remain on medical leave for 24 months, and the Company abandoned its proposal to limit that to 12 months. The Company also accepted a union counterproposal on the issue of vacation call in. The parties agreed to limit vacation call in to one individual per day until employment went above 20 employees, at which time two vacation call ins per day would be permitted.

The Union then offered a package proposal under which it would withdraw its proposal to reduce the probationary periods, its proposal for three paid personal days, and in exchange keep the 401(k) match and bonuses at current levels. The Company did not accept this but countered by offering to up the health insurance subsidy on the high deductible plan to $1000 single/ $3000 family, with a $2000/$4000 deductible, and keep the 401(k) match at 6 percent.

This meeting, on Friday, September 28, took place in the shadow of a contract expiration on Sunday, September 30. Before leaving, the parties made arrangements to meet again Sunday morning. They discussed the possibility of an extension of the contract and Young indicated that "[w]e will do this extension day by day."

5. September 30 bargaining

The parties met again the morning of September 30. At the outset Wakefield mentioned that the collective-bargaining agreement was expiring at midnight. Wakefield provided an extension agreement that he (or someone on the Company's side) had drafted. This document (R. Exh. 10) stated that the parties "hereby agree to extend their collective bargaining agreement (currently effective October 1, 2004 through September 30, 2007), through midnight October 14, 2007." Young objected to use of this extension agreement. Conway recalled that while Wakefield wanted a two-week agreement, Young wanted a "day-to-day extension." As Young explained, the Union "wanted a day to day so we would be in negotiations on day to day because I didn't want to stretch it out two weeks and only have a minimal amount of negotiations. . . . I [ ] actually asked them about the two weeks. Why do you want two weeks because we need to be in negotiations every day. And I don't want it stretched out that we aren't in negotiations."

Young produced his own draft of an extension agreement, a "form extension agreement that the UAW uses," preprinted

[10] The reference is to the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1161 et seq. COBRA provides for the extension of medical care coverage to employees, their spouses and dependent children who would lose such coverage because of termination or a reduction of work hours. COBRA requires employers to give such employees, spouses and dependent children written notice of their rights under the law to continue at their own expense to participate in the employer's group medical plan for a period of 18 months subject to obtaining similar coverage through re-employment prior to that time.

with spaces to fill in dates and the names of the parties. KLB agreed to use, and the parties signed, the Union's extension agreement. It stated, in relevant part:

> The termination date of the Agreement (including all supplements thereto, if any) between KLB Industries and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America[ ], and its Local 1224 is hereby extended from Oct[ober] – 1 – 2 007 to 12:00 AM Oct[ober 14 2007, and thereafter on a day-to-day basis. Should either party desire to terminate the Agreement, said party shall give written notice to the other party at least twenty-four (24) hours in advance, and the Agreement shall be terminated on the date and hour specified in the twenty-four (24) hour notice.

At the September 30 meeting KLB provided a revised "global" proposal that was actually an updated version of its re-draft of the current collective-bargaining agreement. The proposal reflected the changes and movement agreed to by the Company since it provided the last re-draft (i.e., the agreements on retention of records, medical leave, and vacation call-in, withdrawal of 80/20 proposal on current plan and substitution of high deductible proposal). Its proposal on medical insurance now included the following, stated in bold in the group insurance section of the draft contract:

> The Company has provided the Union with a proposal that will keep the majority of the Group Health Insurance benefits the same, however, the deductible would change. As part of the proposal currently being discussed, the Company would create a health Reimbursement Account (Company funded) at the level of the first $1000.00 per individual ($2000.00 deductible) and the first $3000.00 per family ($4000.00 deductible). There is also a relationship with the deductibles and [maximum out of pocket] expenses. NOTE: the parties are still trying to reach agreement regarding this alternative to the current contract language.

Wakefield explained this language as follows:

> "We were still having some discussions, and we still needed to reach—to talk about specifics of contract language. It wasn't—this wasn't really the contract language, it was just a way of addressing the fact that this was the proposal on the table. . . .
>
> Mr. Young wanted the language to read the same. He—he wasn't happy with the statement that the majority of the group health insurance benefits were the same. Again, as far as—as far—and—and—and this—this was another point where we were using the word "benefits," but we were probably talking about—there's no probably, we were talking about coverages. The benefits were laid out in that sheet. They were going to be different than the [ ] benefits as they were laid out before. . . . General Counsel Exhibit 8 . . . that we gave on September 2[1]. And so I think the real question was about the coverage. And I'm not sure what example Craig used, but we made it clear that it was our understanding that if you broke your leg and it was covered under the current plan, that it would be covered under the new plan. . . . The benefits were laid out in General Counsel Exhibit 8.

At this meeting, the Union offered a counterproposal to the Company's September 30 global offer. Young called it a "complete proposal for the whole contract together" that would "resolve all the items that were open." The proposal involved significant movement toward the Company by the Union. On wages, the Union was now proposing 0 increase the first year, a 20 cent-per-hour increase the second year, and a 10 cent-per-hour increase the third year.

As to medical insurance, the Union's proposal states: "INS – accept co. last offer."

The Union withdrew the following proposals: to reduce the probationary period in multiple portions of the contract, to add a holiday, to add pay for lengthy bereavement travel expenses, for paid personal days, for pay in lieu of a quality bonus, the quality returns portion of the performance bonus, to have a $150 payment for boots, and to eliminate outsourcing. The Union's proposal on doctor-excused absences was modified to propose that a doctor-excused absence could still count against an employee's attendance record but not against the calculation of the attendance bonus.

The Union's proposal added that "everything else to stay as in present contract" and finally, added, "plus everything that as been agreed to already." The Union indicated that it would encourage ratification of the agreement that day.[11]

The Company did not accept the Union's proposal but, cognizant of the Union's substantial movement on wages, and acceptance of the Company's high health insurance proposal, considered it "a pretty important moment in the negotiations." As Johnson explained, "[t]hat was a very big deal for the Company to be able to go that higher deductible insurance plan. It would have been a [ ] good savings for the Company."

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[11] Young asserted at trial that this was a "package proposal," meaning that if not accepted in full the Union would return to the prior bargaining positions. This claim was, unfortunately, another product of the pervasive leading testimony that marked his, and indeed, the other union witness's testimony, and therefore, difficult, when disputed, to put much credence in:

> Q. When you presented this is this, when you say complete, is this they could accept one item or were they all, you know, some how tied together?
> A. It was all, all.
> Q. All tied together?
> A. Yeah.
> Q. I think sometimes the term is package?
> A. Package proposal.
> Q. So this was a package proposal?
> A. Correct.

The characterization of this proposal as a "package" proposal was sharply disputed by the employer's witnesses, who claimed that, unlike the other explicit package proposals offered by the Union at various times in negotiations, there was no such qualification on this proposal. I need not resolve this dispute. It does not make a difference, although the parties' different perspectives is of some significance in explaining their subsequent reactions to events.

The Union met with its members the afternoon of September 30 and determined that it would not accept the Company's last proposal made that morning.[12]

6. October 2 bargaining

With the contract extended, the parties met again on October 2. With the Union's September 30 acceptance of the Company's high deductible plan, KLB believed that the parties were close to an agreement. As noted above, KLB did not view the Union's September 30 offer as a "package," subject to withdrawal if not accepted in full, so it viewed the insurance proposal as tentatively agreed to and the only issues remaining between the parties being wages, bonuses, and the vacation issue. KLB responded to the Union's movement with a proposal that reduced the wage concession demands from 20 percent to 12 percent over three years and left the 401(k) match at 6 percent as set forth in the expiring contract. The Company's proposal stated:

> 3 yr agreement
>
> Insurance proposal as it was last proposed in our Sept. 30 proposal.
>
> Leave 401(k) as it currently is in contract 6% match.
>
> Eliminate bonuses entirely as it was in our last proposal dated Sep 30, 2007.
>
> Wages 1st year 8% reduction
> 2nd year 2% reduction
> 3rd year 2% reduction.[13]

The Union also made a proposal on October 2. Consistent with its position that its September 30 proposal was a "package," the Union returned to many of its pre-September 30 positions on any issue not agreed to with the Company. It reasserted its proposals for reducing the probationary period in multiple portions of the contract, reasserted the proposal for an additional holiday the day after Christmas, reasserted the proposal on added pay for bereavement travel expenses; for paid personal days, for pay in lieu of the quality bonus; reasserted the proposal for the $150 boot payment; reasserted the prohibition on outsourcing. It maintained its September 30 position on attendance records. The Union's wage demand was less than its opening demand on September 20, but considerably more than its September 30 proposal: on October 2 it asked for $1.50 the first year, $0.80 the second, and $.080 the third year. The proposal also stated that it was also proposing everything previously agreed to by the parties and everything else was to remain in the present contract. The October 2 proposal specifically mentions group insurance only with regard to the reasserted proposal to reduce the probationary period. On September 30, the union "accept[ed] co. last offer" on health insurance, so, presumably, its October 2 commitment to "everything that has been agreed to by the company and the union" encompassed that. It was, in fact, the Company's understanding that the parties remained in accord on health insurance.[14]

The meeting ended shortly after the Union presented its offer.

7. October 3 bargaining and notice of contract termination

The parties met the next day October 3. On the same day the Company sent a letter to the Union providing notification that "[c]onsistent with the terms of the extension agreement . . . please accept this letter as the Company's notice that it intends to terminate the agreement now in effect between the parties on Sunday, October 7, 2007." According to Wakefield, KLB thought that, in light of the turn in bargaining the day before, this might increase the pressure to obtain an agreement.

Young was unhappy about the Company's letter of intent to terminate the extension agreement. Based on the discussion around the extension agreement he had thought the Company wanted a two-week agreement and the Union did not understand why the Company would terminate it a week later. Young characterized Wakefield's response to him on this as "dismissive." Wakefield told Young "that was just how it is, that's our position."

At this meeting the Company gave what it termed its last and final offer:

> 3 yr agreement
>
> Insurance proposal—Go to new plan@ 35/wk Company will put $1000 single\$3000 family into HRA. Will set up an MSA for employees to put into if they wish.
>
> Leave 401(K) match at 6% as it currently is.
>
> Bonuses—Leave language as it is currently: Quality, Attendance, Safety Change bonus amounts as out lined below.
>
> 1st yr $100 per quarter per bonus as it currently is.
> 2nd yr $65 per quarter bonus
> 3rd yr $35 per quarter bonus

[12] Union witnesses were divided over whether or not a ratification vote was undertaken that afternoon.

[13] This proposal was originally written with reductions of 7 percent the first year, 10 percent the second year, and 12 percent the third, which would have been a larger reduction than the 20 percent originally sought. The correction was made when Wakefield, realizing he had written and explained it wrong, returned to the VFW to explain the correct proposal.

I note that there was conflicting testimony as to when this proposal was provided to the Union. I find that it was provided on October 2, or at least, after the completion of the September 30 meeting. Young may have received this document before the October 2 meeting, but the "October 30 12:30 PM" date of receipt added by Young seems unlikely to be accurate. The proposal references the September 30 proposals, which seems an awkward reference if this proposal was also made on September 30 proposal. Moreover, the discussion around the correction to the wage reduction suggests that this, at least, occurred at the October 2 meeting, which, unlike the September 30 meeting, ended angrily and abruptly.

[14] Notwithstanding this, union witnesses explained the Union's October 2 proposal as a return to their original demand that the expiring agreement's health care remain unchanged, other than the reduction in the probationary period for new employees to be covered. At the same time, Young maintained that the deductibles and the health savings account from the Company's September 30 proposal remained a tentative agreement between the parties.

Company withdraws the Vacation change proposal

Wages	1st year 8% reduction from current wage rates. 2nd year 2% reduction for a total of 10% from current contract 3rd year 2% reduction for a total of 12% from current contract
	See wage table exhibit B attached
	All items which have already been agreed upon between the union and company

The Union responded to the Company's proposal with a proposal of its own. The Union resubmitted its October 2 proposal but this time withdrew the demand for one week pay instead of the performance quality bonus. It limited its demand for boot payment to $100. On wages it modified its offer to $1.25 the first year, $0.80 the second and $0.80 the third. On health insurance, according to Potter's notes, the Union proposed: "will agree with the new Ins. Plan at $15.00/wk."

The Company responded by reasserting its proposal of earlier that day.

At this meeting the Federal mediator, Ellenberger handed the Union the Company's proposal and then asked Wakefield if this was the Company's last, best and final offer. Wakefield said it was. Ellenberger turned to Young and said, I guess we're at impasse then." Young denied that the parties were at impasse.[15]

The parties agreed to meet again October 5.

8. October 4 information request

The next day, October 4, Young submitted an information request to Wakefield in the form of a 3-page letter. In pertinent part the letter stated:

> For purposes of bargaining, the union is requesting KLB Industries, provide the following information:
>
> **Health Care Insurance**
>
> With respect to bargaining over health care benefits, the union is willing to consider KLB Industries proposal regarding health insurance. Although the Company verbally stated during negotiations that the proposed health care plan was the same plan document as the present contract, the written language in the Company's proposal is very broad and vague. Specifically, the statement "a proposal that will keep the MAJORITY of the Group Health Insurance benefits the same, however, the deductible would change." The union would prefer the current health care plan, coverage and language as detailed in Article VII of the current agreement. However, in order to consider the Company's proposal, the union needs additional information.
>
> 1. The minimal amount of information that you have provided on the UnitedHealthcare Choice Plus plan does not give details on the application of the benefits. Therefore, the Union requests a copy of the summary plan description as well as a copy of the complete plan that the Company is proposing.
> 2. A copy of the Latest Annual Report: Form 5500 or equivalent.
> 3. A copy of any roles, regulations, procedures, administrative manual or procedures or policies which affect or relate to the plan.
> 4. A complete cost breakdown of the plan to the employer. (for the next three (3) years, provide the monthly rates being quoted by the carrier, what (if any discounts are being offered by the carrier, and cost comparisons of three (3) other carriers). In addition, the Union requests the exact calculations used by the Company in determining the $47,000 savings in premiums.
> 5. The name, address and principal contact of the office which administers the plan.
> 6. Copies of all claims for coverage under the plan made by employees during the last five years as well as copies of any correspondence or other documents with respect to the processing of those claims and the payments of those claims.
> 7. For both the current and proposed plan, a copy of any contracts with health care providers, insurers or health care plans.
> 8. In regard to the proposed Health Reimbursement Account, please provide the rules, regulations, procedures, and policies that would affect this plan and details on the establishment of this plan.
>
> **Bonuses**
>
> 1. Due to the Company relaxing the importance of Quality, Attendance, and Safety, by reducing the performance bonus maximums in the second and third years, please provide the calculations used in projecting the Company savings in each the second and third year. Additionally, please estimate the impact to quality, attendance, and safety this bonus reduction will create.
>
> **Wage Reductions:**
>
> During the Course of these negotiations, the Company has continually asserted that they must improve the competitive position of the Bellefontaine, Ohio facility. Based on this assertion, the Company has made numerous contract proposals that reduce the wages and benefits. In order for the Union to determine the veracity of these claims, please provide the following information:
>
> 1. A list of all current customers so that the Union may contact the customers to determine if any of them is contemplating purchasing products from other sources.

[15] Young did not recall this exchange, but did not deny it. He added that "I would not be surprised if I said that because I never want to be at impasse."

2. A copy of any and all quotes that the Company has provided, and whom these quotes have been issued to. Also, how many quotes have been awarded (or not awarded) in the past five (5) years.

3. Identify any and all outsourced work: (in the past 5 years) that had previously been done at this facility by the bargaining unit employees.

4. A list of all customers who have ceased buying from this facility during the last 5 years. The union needs this information to test the Company's assertion that they are not competitive. The union intends on contacting the former customers to learn the reasons why they stopped purchasing.

5. A complete list of prices for products so that the union can compare the prices of competitors.

6. In order for the Union to determine whether the company's assertion of uncompetitivness is based on price or other factors. Please provide market studies and/or marketing plans that would impact sales of products produced at of the KLB Industries, Bellefontaine, Ohio facility.

7. With the current Company proposal to reduce wages, please provide a complete calculation of the projected company savings over the next three years, including any projected overtime.

This request is made without prejudice to the Union' s right to file subsequent requests. If any part of this letter is denied or if any material is unavailable, please provide the remaining items as soon as possible, which the Union will accept without prejudice to its position that it is entitled to all documents and information called for in this request.

9. October 5 bargaining and the October 8 "timed" proposal

On October 5 the parties met again, initially meeting together at the VFW hall.

The parties discussed the information requests and the Company indicated it would work on responding to the request made by the Union the day before. Wakefield testified that he told the Union that some of the documents asked for regarding the new health insurance plan would not be available. Young became upset with Wakefield, and Wakefield suggested that the parties should caucus with the mediator moving between the parties. The Union agreed and the Company left the VFW and went to the KLB facility just down the street.

According to Union committee member Potter's notes, Young pressed the Company for the requested health insurance plan documents so that these documents could be put on the table as part of the contract negotiations. According to Potter, "I believe [Young] felt like we still had documents coming showing us what health insurance benefits were . . . and what the plan entailed. We didn't have an idea of actually what the health insurance plan was at that point."

Johnson and Wakefield and the mediator discussed negotiations. Wakefield described some hesitance to move off the Company's "last best and final" proposal and in the end the Company decided to make a new proposal in the form of a "timed" offer that would expire if not accepted. The proposal would consist of most of the items already offered, or agreed to, but with a significant reduction in the level of wage concessions sought by the Company. The new "timed" offer would involve a four year contract with initial wage reduction that would be raised back to current levels over the course of the contract. The timed nature of the offer would enable the Company to retain, or return to, the October 3 offer if this timed offer did not work to achieve agreement. At some point Young was invited into the meeting, without the rest of the union committee, and Young and the Company and the mediator discussed this move on the Company's part. Wakefield asked Young what it would take to get a ratified contract. In this regard, Young raised the issue of providing a signing bonus to employees "if you want something to pass." Wakefield asked him, "how much"? Young suggested $500 per employee. Young told Wakefield and Johnson that if a new proposal was developed by the Company, the Union could consider and vote on it the evening of October 8.

Based on the discussions with Young, the Company developed a "timed" offer. The terms of this offer were communicated to Young on October 5, and written copies provided to him on October 8.

On its cover the October 8 offer stated that the proposal was valid "only until 11:59 p.m., Monday, October 8, 2007. . . . After this proposal expires, it is void and the Company <u>will automatically reinstate the</u> offer it made at the end of negotiations on October 3, 2007." (emphasis in original).

The 4-year offer provided for a decrease in wages of $1 per hour for each employee, effective on the date of the agreement, with increases of 2.75 percent on each subsequent anniversary date of the agreement. It provided for a $500 signing bonus on the first scheduled pay period after ratification. A chart, created at the suggestion of Young so that bargaining unit employees could see the wages (not just percentages) for each year, was attached and showed the hourly wage rate for each position for each year of the agreement.

A holiday for an employee's birthday was suspended for 2 of the 4 years of the contract.

The medical leave-of-absence provision was changed in accordance with the parties' earlier tentative agreement on that subject. It provided that employer paid health insurance (which still required the $35 weekly employee premium) would continue for only the first 12 of the 24 months maximum medical leave.

The parties' tentative agreement on disciplinary records retention was included in the proposal.

The performance bonus provision of the contract was changed so that after the first year of the contract, the quarterly bonus potential went from $100 to $75 for each of the three bonuses (quality returns, safety incentive, and attendance).

The vacation call in language was altered, as the parties had tentatively agreed: one vacation call in per day was allowed when the Company had less than 20 employees, two were allowed when the Company had 20 or more employees.

The fifth week of vacation for employees with more than 20 years seniority remained in the contract.

As to health insurance, the Company's right to change insurance carriers was again (as in the expiring agreement) limited to changes that left the benefits "substantially similar."

In terms of the proposed health insurance, the October 8 proposal initially given to Young provided that

> The Company will implement a new Group Health Insurance Plan. This new plan will have substantially similar medical coverage as identified in the [old plan's] Summary Plan Description.

The proposal went on to set forth the deductibles and the health savings programs to offset the deductibles as agreed to by the parties in the September 30 proposals. The plan also included the provision that the employees would continue to pay $35 a week as their portion of the health insurance premium.

When Young saw this health insurance language on October 8, he called Johnson and expressed concern about the "substantially similar medical coverage" language. Johnson discussed it with Wakefield, and made a change in accordance with his discussions with Young. He faxed the new amended page to Young. As a result of their discussions, the original October 8 proposal was amended, as follows. The final version (the first sentence of which was inadvertently dropped and had to be handwritten in) now stated:

> The company will implement a new Group Health Plan. This new plan will have the same medical coverage as identified in the [old plan's] Summary Plan Description.

The membership met and discussed the October 8 (and the October 3 offer) on October 8. Based on the meeting and vote taken at the meeting, Young called Johnson the evening of October 8 and told him that the Union rejected the October 8 proposal.

10. October 10 and 16 bargaining

The parties' bargaining session on October 10 was conducted through the mediator. The parties met separately. The Company reinstated their offer of October 3. The Union made a proposal that maintained its October 2 proposal in most respects but provided for a reduced demand: the Union proposed increases of $.080 per hour in each year of the contract. Johnson's undisputed (and credited) testimony, confirmed by his bargaining notes, is that the Union conveyed that the Company's wage offer was "unacceptable, but that the insurance seemed to be okay." Wakefield testified that the Union raised the issue of wages as a problem but did not mention health insurance.

The parties met again on Tuesday, October 16. The meeting lasted just a few minutes and neither party made a proposal or offered movement. The Company reiterated that the October 3 proposal was its final proposal. Probably at this meeting, but perhaps by phone thereafter (the record is unclear), Wakefield indicated to Young that he would be providing him with a new proposal. On Wednesday, October 17, Young and Wakefield spoke by telephone and Wakefield told Young that he had misspoken, and would not be providing a proposal, but would be providing a response to the Union on Friday. Wakefield would not explain further.

11. The Company's Response to the Union's Information Request

By letter dated Thursday, October 18, the Company provided its response to the Union's October 4 information request. The letter stated:

> On October 4, 2007, [ ] you gave KLB Industries, Inc. an information request. Please accept the information below as the Company's response to this request.
>
> **Health Care Insurance**
>
> One of the issues that you raised in your letter was a concern with the phrase in the Company's proposal that read: "the majority of the Group Health Insurance benefits." After you made the information request, the Company changed its proposal from reading "the majority of the Group Health Insurance benefits" to "the same Group Health Insurance benefits." The Company commits to providing substantially the same medical coverage in its proposed plan as it does under the current plan.
>
> While the Company commits to providing the same medical coverage in its proposal as it currently does, KLB cannot provide the same positive result with much of the information that you requested about the its proposal. The Company is unable to provide you with the following information about its proposal to change the group health insurance plan: (1) a summary plan description; (2) a Form 5500; (3) a copy of any rules, regulations, procedures, administrative manual or procedures or policies which affect or relate to the plan; (4) a complete cost breakdown of the plan; (5) the name, address. and principal contact of the office which administers the plan; (6) copies of claims for coverage made under the plan; (7) copies of any contracts with healthcare providers, insurers, or healthcare plans; and (8) any rules regulations, procedures, and policies that affect the Health Reimbursement Account. As we have expressed during negotiations, KLB has not actually purchased a plan like the one proposed. So, the information that you are asking for does not yet exist.
>
> In addition, we cannot provide you with copies of contracts with healthcare providers, insurers, or healthcare plans. The Company does not have contracts with health care providers, insurers, or healthcare plans. And, although our current plan is administered by United Healthcare, a United Health Group Company, the current plan type does not allow for KLB to have a principal contact.
>
> **Bonuses**
>
> The Company has attached to this letter as Exhibit A the information that you requested on its bonus proposal.
>
> **Wage Reductions**
>
> The Company disagrees that information you requested about its current customers is necessary and relevant to the UAW's representation of the bargaining-unit members. The Company's desire to remain competitive in

both global and domestic markets is no different from the desire of any business conducting operations similar to those of KLB. In addition, KLB has contractual obligations with each of its customers to maintain the confidentiality of the customer's information. Disclosing this information to a third party would not only subject KLB to lawsuits, but could also destroy the Company's relationships with its customers. Accordingly, the UAW's bare assertion that it needs to test the veracity of KLB's "claim" of competitiveness is insufficient to make customer information necessary and relevant to the Union's role as the exclusive representative of the bargaining unit.

The Company also disagrees that information about outsourced work is necessary and relevant to the UAW's representation of the bargaining unit. The UAW is well aware that KLB has, and continues to, outsource work. To KLB's knowledge, the Union has never complained about or grieved outsourcing. Further, the Company and the Union have not had any bargaining discussions related to outsourcing. The Company fails to understand how its broad statement of remaining competitive in global and domestic markets triggers the necessity and relevancy of outsourcing information.

The Company, however, agrees that the wage cost saving is necessary and relevant. The first year saving is $36,177.00. The second year savings is $44,498.00. The third year savings $62,652.00. And the overall cost savings of the proposed wage decrease is $133,327.00.

In addition to this written response, at the hearing Johnson provided testimony regarding the Union's request for information. Johnson explained that upon receipt of the Union's October 4 information request, he had contacted Ray Ernst, an independent, self-employed insurance broker. Johnson had worked with Ernst for many years and since 1997 when KLB was formed, Ernst had helped the Company with all its purchases of healthcare. In fact, KLB had never worked directly with an insurance company, but always through the broker in purchasing health insurance plans.

Johnson called Ernst to ask if it was possible to obtain the requested information about the high deductible alternative plan, before actually purchasing the plan from United Healthcare. Specifically, Johnson asked Ernst if a copy of the master contract would be available for the plan that KLB was proposing to the Union. Ernst told Johnson that the master plan document would not be provided until KLB actually purchased the coverage. Johnson testified (as did Young) that Johnson told Young at the bargaining table that this document could not be provided. This was consistent with Johnson's past experience: in prior collective bargaining negotiations KLB did not receive a master plan document until the insurance policy had actually been purchased. Indeed, the Union had never before made such a request.

In his testimony, Young described a process in his previous negotiations where the Union and an employer negotiate the benefits and coverages of importance to them and then, after the completion of negotiations, the plan document received from the insurance company would be reviewed either locally or sent to the Union's Insurance Department in Detroit. The document would be reviewed to make sure it was consistent in all respects with what had been negotiated. Union witness, and local unit chairman Conway explained a similar procedure at KLB when insurance carriers changed during the term of the contract. Prior contracts allowed the Company, in the middle of a collective bargaining term, to change insurance carriers and/or self-insure all or any portion of the benefits "provided the benefits accorded are substantially similar." Conway described that in the past when Johnson acted on this right and changed carriers, the carrier would send a book of "what the plan is" i.e., "the whole thing of coverages," and "I would compare it with the old one to see if there's any changes in it." If there were inconsistencies between the prior plan coverages and the new one, Conway would raise it with Johnson and Johnson would see that it was corrected.

As to the request for the Form 5500 or equivalent, Johnson testified that due to the small size of KLB's insurance plan, and the limited nature of the employee premium, the IRS did not require the filing of such a form and therefore none existed.

As to the Union's request for the proposed plans "rules, regulations, procedures, [etc.]," Johnson testified that KLB did not possess such information, and that it would be the type of information contained in the plan document that KLB would not receive until purchasing the plan.

As to the "complete cost breakdown of the plan to the employer" requested by the Union, Johnson testified that he only had the cost of the first year premiums and that information had been provided to the Union. Johnson explained that "the insurance is on a year-to-year annual basis, and I'm only provided a quote for the year, the first year that I'm going to purchase it." Johnson had not sought quotes from other carriers.

The Union's request also asked for the name, address, and contact of the office that administers the plan. That information, testified Johnson, was well known to the Union and was in the current plan document.

The Union also requested copies of all claims for coverage under the plan made by employees and papers related to the processing of such claims. Once more, Johnson testified that KLB did not possess such information and was not routinely provided with it. In the past, an attempt by Johnson to obtain claims information on a particular employee was rejected by the insurance carrier, essentially on grounds of confidentiality. As Johnson explained, he has no regular or ongoing contact with United Healthcare. On one occasion, in approximately 2005, the quoted renewal rates were higher than expected and he called United Healthcare to request a summary of KLB's claims experience. Johnson was told that this would not be provided for a company of his KLB's size, and that United Healthcare only provided that to contracting companies with approximately 100 or more employees.

The Union also requested, for both the current and proposed plan, a copy of any contracts with insurers or health care plans. Johnson testified that he had no contracts with health care providers.

As to the rules, regulations, procedures, and details on the proposed Health Reimbursement Account, Johnson also testified that this information would be included in the health plan

document that would be provided only upon purchase of the plan from United Healthcare.

12. The Company's October 19 lockout letter and the Union's October 21 response; the lockout begins

On Friday, October 19, Wakefield faxed a letter to Young announcing the Company's intent to commence a lockout of bargaining unit employees on Monday morning, October 22. On the same day, letters went to bargaining unit employees from the President and CEO of KLB, Christopher Kerns, informing the employees of the lockout. The 2004 Agreement provides that "[a]ll insurance benefits terminate no later than the end of the month following the month in which an employee is laid off or is off work for any reason other than circumstances which expressly give rise to insurance benefits hereunder." Nevertheless, in his letter to employees, Kerns wrote that "consistent with the law, your health insurance coverage will end effective October 23, 2007. Therefore, in order to continue insurance benefits past that date, you will need to apply for COBRA coverage."

On Sunday evening, October 21, Young faxed a letter to Kerns, Wakefield, and Johnson, stating the following:

> This letter is in response to the Company's October 18, 2007 attempt to respond to the Union's October 4, 2007 information request and to the Company's October 19, 2007 letter regarding "Lockout of the Bargaining Unit."
>
> **Health Care Insurance**
>
> Although I appreciate that the Company is willing to change their proposal to read "the same Group Health Insurance benefits," your next statement still maintains your original proposal of committing to provide "substantially the same" medical coverage. With that said, the Union must have the information that has been requested to better understand the Company's proposal and for the Union to form a proper response to the Company's proposal. Prior to submitting any proposal that ultimately alters original contract language, the Company must have sufficient information to support their proposal. In the case of the Company's proposal to amend the Group Health Insurance benefits, plan, and/or providers, the Company has failed miserably to supply essential information to the Union and your October 18, 2007, letter supports that the Company has not obtained quotes and/or information on the health insurance plan they are proposing. Quite frankly, this is unacceptable.
>
> **Bonuses**
>
> The Union acknowledges that the Company did provide for the information requested in regard to "Bonuses."
>
> **Wage Reductions**
>
> Although the Company made an attempt to answer item 7 of this section (calculation of the projected company savings), the answer does not include the "complete calculations" for the Union to assess the validity of these figures. The Union maintains that it is entitled to all documents and information called for in our October 4, 2007 letter and, again, the Company has failed miserabl[ly] to supply essential information regarding the Company's proposals [for] wage reductions to the Union.
>
> Therefore, let it be clearly understood that the Union expects the Company to bargain in good faith and to provide the requested information so the Union can prepare appropriate responses to the Company's proposals.
>
> **Lockout of the Bargaining Unit**
>
> The Company has committed an unfair labor practice by implementing a "Lockout of the Bargaining Unit." Throughout the entire bargaining process, the Company has failed to be prepared for negotiation sessions; has failed to provide information on proposals; has failed to make complete proposals in regard to health insurance; has failed to support the Company' s position in regard to wage reductions; and has failed to present a promised proposal to the Union. In fact, you purposely strung the Union along a path of deceit by stating that the Company was working on a proposal and ultimately faxed a "Lockout" letter on Friday; October 19, 2007 at 16:09 (or 4:09 p.m.).
>
> Until the Union has received and has had an opportunity to review the requested information to support the Company's proposals, it is an unfair labor practice for the Company to implement a "Lockout of The Bargaining Unit" and demand that the Union accept a proposal that is impossible for the Union to evaluate without the information requested. If the Company insists on and implements a "Lockout of the Bargaining Unit" on Monday, October 22, 2007, at 7:00 a.m. as your letter suggests, the Union will file unfair labor practice charges against the Company.

As promised, the Company locked out the bargaining unit employees commencing Monday morning, October 22. As of the time of the hearing in this case, late July 2008, the lockout remained in effect. After the lockout began, the Company advertised for and ultimately hired temporary replacements to assist it with production during the lockout.

Immediately after the lockout began, on October 24, the Company wrote to United Healthcare and asked the insurance company to "[p]lease cancel the entire group's coverage under this policy effective 10/22/07." According to Johnson, three employees sought COBRA coverage, but Johnson was told by United Healthcare that the cancellation of the entire group health care policy left the employees ineligible for COBRA coverage.

13. Subsequent bargaining

The bargaining since the lockout has been extremely limited. On October 29, the parties met for approximately five minutes. Young became angry, asserting that Wakefield had promised a new proposal from the Company but then, instead of a proposal, sent notification that the employees would be locked out. The Company left and the rest of the session, conducted through the mediator, resulted in no proposal or changes in position.

The parties met again on January 30, 2008. The Union reduced its wage demand to $0.38/$0.40/$0.45, and for insurance

proposed continuation of the prior insurance. The Company rejected the proposal and the meeting was over in less than an hour and a half.

The parties met again on March 28, with the mediator shuttling between the parties. This time the Union proposed a $0.50 decrease the first year, and increases for the following three years of $0.35/$0.40/$0.40. For insurance the Union proposed the old plan with an 80 percent/20 percent split. The Company indicated that it would consider the offer.

D. Pre-lockout events away from the bargaining table

In addition to the events related to bargaining, the General Counsel relies on the following six incidents as part of the case in support of overall bad-faith bargaining by the Company.

1. Sometime in the summer of 2007, the Company replaced some overhead doors that had been broken for some time. In August, the Company also installed 3 video cameras that looked outside the facility. Johnson testified that the cameras were installed because of some vandalism that occurred at night in KLB's parking lot. It is undisputed that the cameras were in use during the lockout, during which the Company has continued to operate the facility with replacement workers.

2. In August, Company President Kerns received an audio birthday card that played snippets of a song. Using that audio card and others he purchased, Kerns began playing the snippets of music over the loudspeaker. The snippets lasted less than a minute at a time. The snippets included the theme music from the Good, the Bad and the Ugly, Bad to the Bone, and Who Let the Dogs Out. Some other snippets were played as well. At first he played them several times a day, in the morning when he got there, at lunch, and at quitting time, although the frequency diminished over time.

3. On September 26, union steward Mark Miranda was terminated after an angry encounter with Plant Manager Kevin McKnight. Miranda worked at KLB as the lead man in fabrication, setting up punch and drill presses. On September 26, before lunch break, Miranda was stopped by Roger Leugers and another employee and asked to fix the punch press on which they had been working. He began working on the press, hitting the buttons to readjust the die. McKnight had been working on another piece of equipment and passed by the fabrication department on his way to the restroom. He saw the employees not working and told them it was too early to stop and that they should get back to work. McKnight testified that the employees had no explanation for not working. However, Miranda testified that he told McKnight that they were not stopping but that he was fixing the press and they could not run the machine while he fixed it. McKnight testified that he started to leave and Miranda began "cycling the press" without product in it in a way that could damage the press and cause injury, and that Miranda stared at McKnight while he did it. Miranda claims he said, "you know, why should you fix any of the machines, because no one's going to be here anyways, we're going to strike."[16] Miranda testified that after he said this McKnight became angry, said something about "I don't fucking need this right now" and told him to go home for the rest of the day. McKnight went to the restroom. Miranda followed him into the restroom.[17] A couple of other employees were in the restroom already, including Conway. Miranda was angry and admits to using the word "fuck" in speaking to McKnight. McKnight testified that Miranda came up behind him and said "fuck you." To which McKnight said, "Now you can go home. You're fired."[18] Conway and McKnight testified that Miranda replied, "Fuck you. I will go home." According to Miranda, both he and McKnight were swearing. Miranda got mad, claims he said nothing, punched out, and left the shop. He was mad when he left and he admits he hit the accelerator hard as he drove from the gravel parking lot. McKnight saw him "peel out" of the parking lot, spraying gravel on the car of KLB co-owner John Bishop. Upon approaching the car McKnight could see where powder from the gravel had damaged the door. Miranda admits that the gravel could have sprayed and damaged another car. Conway testified that at lunchtime he went to his car and saw in the gravel that someone had spun out. It was noticeable enough that it caused him to check his own car for damage. That afternoon, McKnight told Craig Johnson about the incident and told him that he had terminated Miranda.[19] The next day a disciplinary form documenting Miranda's termination was filled out and signed by McKnight, listing the reasons for termination as insubordination, violation of safety rules, and violation of company rules.

4. On the morning of September 26, plant manager McKnight approached Conway at work and told him that Company president Kerns wanted to have a meeting with the local union bargaining committee after lunch. McKnight told Conway that some people had been talking about going on strike and he asked if they should be doing that. Conway told him that he had not been doing that.

5. Sometime after lunch that day, Conway met with Kerns, Johnson, and Roger Leugers in McKnight's office. There was discussion of Miranda's firing and then Kerns said "there's some people out there talking strike." Kerns said to Conway, "I think its illegal for the committee to be telling their members about negotiations." Conway replied, "[d]on't they have a right to know?" Kerns replied, "[w]ell just try to calm things down a little bit." Conway told Kerns that "I'd see what I could do."

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[16] On cross-examination, after examining his pretrial affidavit, Miranda changed his story slightly. He stated that McKnight was working to fix the extrusion punch just before he confronted Miranda. In the affidavit Miranda recalled telling McKnight, "why worry about fixing the extrusion press when we are not going to be here anyways on Friday, because we are going to vote to strike." McKnight testified that when he confronted Miranda he was headed to the restroom and had "been working on a piece of equipment and had grease and stuff on me" but he did not identify the piece of equipment.

[17] One employee, Edward Huffman, testified that he saw McKnight follow Miranda into the restroom. However, McKnight and Miranda both agreed that Miranda followed McKnight into the restroom, and I do not credit Huffman on this point.

[18] According to Miranda, McKnight turned around and said, "you're fucking fired, Mark."

[19] Johnson's retelling of McKnight's account of the incident was consistent with McKnight's testimonial account of events. Johnson testified that McKnight did not relate that Miranda raised the issue of a potential strike in his interactions with McKnight.

6. On September 28, Conway was at the VFW hall across the street from KLB in conjunction with negotiations when he received a phone call from an employee at work. The employee told Conway that Kerns had called a meeting at the time clock and there was no one from the Union there to represent the employees. (Union steward Miranda had been fired and the union committee members were at the VFW.) Leugers and Conway went over to the plant. McKnight met them at the front office and asked why they were there. They told him about the call and McKnight went into his office and reported it to Kerns. Kerns said, "Ok" and came out to the time clock where the employees had assembled. Kerns seemed angry and told employees he had gotten a call from a customer asking if the employees were going on strike. Kerns told employees something to the effect of "[w]e don't need this kind of stuff. Just do your job and everything will work out in the end."

E. Incidents after the lockout begins

1. Immediately after the lockout KLB hired three security guards. One, Jose Morales, used a handheld video camera during the first few days of the lockout, pointing it at picketers as they walked past the gate to a truck entrance for the facility. Johnson testified that this was prompted by a report from a truckdriver that some picketers had blocked his way. Morales' videotaping was not confined to instances when trucks were leaving or entering the facility. There is no record evidence of any violence or other misconduct at this time that would serve as a basis for the videotaping.[20] In the second week of the lockout, Young approached Morales and told him, "You can't be videotaping these guys, that's against the rules." After that, the videotaping stopped.

2. A public right-of-way traverses the KLB property around the facility. In the Fall, probably just after lockout began, KLB paid a surveying company, Lee's Surveying, to mark with paint marks where KLB's property began and ended. Kerns told Conway that he had this done to "keep everybody safe." Within two weeks of the lockout's commencement the Union placed picket signs in the ground across the road from the KLB facility in areas the Union believed, based on the surveying marks, to be within the public right-of-way. Those signs have remained in the ground, for the most part, without incident since October 2007. In June 2008 someone removed some of the signs. The Union replaced them and by that evening someone had "broken" them. The Union waited approximately one week, until June 24, 2008, and replaced the signs again. Johnson testified that KLB security guard Morales observed the signs being put back in the ground and believed they were being placed on Company property, and believed that this constituted trespassing. Morales called the police. The Bellefontaine Police Department received a call to meet at KLB with Morales regarding a trespassing complaint. Officer Blake Kenner of the Bellefontaine police took the call and met with Morales. Morales expressed concern that the Union had placed picket signs on ground that was KLB property, and that this would constitute trespassing. Kerns told Kenner about the survey Lee's Surveying had done the previous Fall. By the time of this incident, the paint marks laid down by Lee's to identify KLB property had mostly washed away. Kenner had his dispatcher contact Lee's Surveying and have them come out and meet him at KLB. Someone from Lee's came over to the facility and Kenner asked if they could review their records and tell him whether the Union was infringing on Company property. Lee's was concerned about who would pay the bill for this additional work. Kenner made clear that he (or the city) would not. The Company said "they'd already paid 600 and some odd dollars for this expense and they weren't going to either." So Kenner told Lee's that he wasn't going to use their services. Kenner went inside and told the Company he had no way to determine if the Union signs were on Company property. Once inside, Morales showed Kenner on the video monitors that a union member was approaching near a Company dock. Kenner went outside to address the situation. Once outside, the representative of Lee's Surveying opined to Kenner that the union member had not been on Company property and further that he believed that the signs were on the public right-of-way and not on property exclusively controlled by the Company. He told Kenner this based on a pink mark he found from the last survey and he explained that–apparently estimating it from where he stood—"you go . . . 50 feet from this mark and that's all public right-of-way."[21] The signs remained undisturbed thereafter and were in place at the time of the hearing in July 2008.

ANALYSIS

A. Overall Bad-Faith Bargaining

The complaint in this case alleges that based on its overall conduct KLB has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Good-faith bargaining "does not compel either party to agree to a proposal or require the making of a concession" (29 U.S.C. § 158(d)), but "[g]ood-faith bargaining 'presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract.'" *Public Service Co. of Oklahoma,* 334 NLRB 487 (2001) (quoting *NLRB v. Insurance Agents' Union,* 361 U.S. 477, 485 (1960)), enfd. 318 F.3d 1173 (10th Cir. 2003)). "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete,* 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002).

[20] The truth of the report from the truckdriver cited by Johnson was not proven.

[21] Kenner's testimony on this score was hearsay, as was Conway's similar testimony. Officer's Kenner and Conway's accounts of what the Lee's Surveying employee told them cannot prove that the signs were on the public right-of-way.

"In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Public Service Co.,* supra at 487 (internal citations omitted). From a party's total conduct both at and away from the bargaining table, the Board determines whether the party is "engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." Id.

As discussed herein, a review of the Respondent's conduct leads me to conclude that the Respondent did not fulfill its obligations with regard to the Union's October 4 request for information. This is a serious matter, particularly given the divisions between the parties and the Union's belief that wage increases were in order while the Respondent pushed for wage cuts. I will examine that issue in depth, below. However, I do not agree that the Respondent's bargaining conduct constituted overall bad-faith bargaining. The record does not support the conclusion that the Respondent's bargaining was intended to frustrate the possibility of agreement. Nor did it approach negotiations with a completely closed mind and without a spirit of cooperation. As to this prominent allegation of the complaint, it is not a close case.

Negotiations began when the union representative's schedule permitted. The Respondent met, made movement and attempted to reconcile differences. KLB's approach to negotiations involved, most saliently, a determination to bargain concessions from the Union. Its justification offered at the table and at trial, related chiefly to competitive pressures, as well as lowered productivity and rising health care costs. At least initially, the Union sought, and anticipated, that economic gains would be made in this round of negotiations. This did not happen. Essentially, the Union found itself in a position where its proposals for gains were not being accepted. The productive bargaining involved negotiations to ameliorate the severity of the Company's opening proposals. Within this ambit, the Respondent discussed proposals. It tried different proposals. It made movement, and reacted to union acceptance of certain proposals (i.e., health care) by moving toward the Union on other proposals (i.e., wages). However, nothing in the Act requires that KLB agree to some of the Union's initial proposals in order to justify pressing its own proposals. To the contrary, the Act is clear that good-faith bargaining "does not compel either party to agree to a proposal or require the making of a concession" (29 U.S.C. § 158(d)).

In terms of the substance of the Respondent's proposals, I think it was not difficult for the General Counsel to show that the Respondent's economic proposals were harsh. From the standpoint of an employee, wage reductions over the life of the contract of first 20 percent, even bargained down to 12 percent, are hard to characterize otherwise. But a first principle of the Act is its indifference to the content of proposals as long as the content of the proposals, or the manner in which they are proposed and bargained, do not evince an effort to thwart agreement or bar discussion. As to the Respondent's proposals, the "criticism" mounted by the General Counsel is that the proposals were harsh, and this, standing alone, at least under the circumstances here, is not compelling.

It is notable that if the Respondent's proposals were harsh, the harshness was primarily limited to harsh economic demands. The Respondent points out, with some force, that none of its proposals challenged the Union's status or undermined the Union's standing with or as a representative of the workforce. Thus, the bargaining was free of proposals to limit union access to the workforce, weaken the union security or dues checkoff provisions that prevailed in prior contracts, or to undermine or curb employee or union solicitation rights. No hint of an effort to remove the union from the workplace is found in its conduct. The Respondent did initially propose to make arbitration nonbinding, while retaining the contract's no-strike clause, a proposal that strikes at a core function and power of a union in the workplace and must, at the least, raise the eyebrows of an ALJ or Board seeking to assess underlying motives of an employer's bargaining strategy. But this initial proposal was abandoned on September 25, and did not resurface at any time. Similarly, the Company's initial proposal to exclude decisions on leaves of absence from the grievance and arbitration procedure was also abandoned by KLB in its September 30 proposal. These proposals, involving as they do the final decision in the hands of the employer, might suggest an effort to displace or undermine the Union. But such proposals were discarded by KLB during the bargaining process.

The Respondent presented, bargained, and pursued its objectives to seek concessions without evincing hostility to the process or to the Union. It is certainly not required in order to find bad-faith bargaining, but it is notable that the record is devoid of even a single statement or comment by any agent of KLB at the bargaining table, or about the bargaining process that suggests a design to thwart agreement or an unwillingness to engage in meaningful bargaining.[22]

One sophisticated ruse to avoid condemnation for fixed "take-it-or-leave-it" bargaining—but with the same illicit mindset and achieving the same affect—is for an employer to start bargaining with drastically harsh demands and then, making movement towards the union, bargain back to a merely harsh bargaining position, predetermined and from which no compromise is possible. *Mid-Continent Concrete,* 336 NLRB at 260–61 (condemning "Respondent's negotiating style" which "was to put forward a harsh bargaining proposal, stand by the proposal, then as the negotiations dragged on, concede no more than the status quo, and stall the negotiations by refusing or delaying its response to any additional proposals").

If seeking to condemn KLB, this would be the angle from which to view KLB's bargaining tactics, but in this case even this is unsatisfactory. Most all bargainers—collective bargainers and consumers bargaining for a new car—start low, and allow themselves to be bargained back to something they were

[22] Of course, this may be attributable to an employer's (or its advisor's) sophistication. Again, such comments are not required if a party's bargaining conduct otherwise demonstrates bad faith, but I note that such evidence does not form any part of the General Counsel's case here. Compare, *Regency Service Carts, Inc.*, 345 NLRB 671, 714–715 (2005) (employer bargainer told union "you want a contract, we don't."; "I'll meet, but I'm just going to say no to everything"; "I won't change my mind").

originally hoping for, all the while pointing out how far they have moved from their original offer. Such tactics are not condemnable in their own right unless they appear to veil a closed mind, an unwillingness compromise, listen to the other side, and adjust proposals in an effort to reach agreement. The evidence is sorely lacking here. The bargaining was not marked by delaying tactics or a refusal of the Respondent to respond to issues raised by the Union.

In its brief, the Government focuses on a number of areas in which it sees support for its allegation of overall bad-faith bargaining. I consider each below.

1. The Respondent's health care proposals

The General Counsel, joined by the Union, focuses much criticism of the Respondent on the Company's health care proposals and the bargaining surrounding it. The General Counsel attacks the Respondent's health care proposals as "vague and confusing." The Union calls them "undefined." These arguments misrepresent what occurred at the bargaining table.

The medical care provision contained in the expiring 2004 Agreement provides helpful background to the 2007 bargaining. In that agreement, the Company agreed that it "will provide for employees and their eligible dependents a comprehensive plan of group insurance." However, the 2004 Agreement recognized the right of the Company to change insurance carriers and/or insurance plans during the term of the agreement. Thus, the 2004 Agreement provided that the Company reserved the right to change insurance carriers and/or go to self insurance "provided the benefits accorded are substantially similar," and reserved the right "to substitute a health maintenance program for the existing medical plan." The agreement also provided for a change in the Company's costs if it changed insurance carriers or if the insurance carrier changed rates.

In terms of benefits for employees, the 2004 agreement specified benefits (of no less than): co-pays that applied to out of pocket maximums, doctor office visit co-pays of $10, no in network deductibles, out of network deductibles of $500 individual/$1000 family, 80 percent/20 percent in network co-insurance and maximum out of pocket expenses of $1000 individual/$3000 family for in network or $1750 individual/$3500 out of network utilization, and a formula for determining the maximum weekly payroll deduction up to $35 per week per employee. In terms of level of benefits or coverages, that is all that the 2004 Agreement provided.

This constituted the entire collectively-bargained agreement regarding health insurance. More information, such as that found in the plan document or in a summary plan description, was not part of the collective bargaining agreement. This reflected the practice of the parties. As Young testified,

> every negotiations that I've ever negotiated, in my whole career the Summary Plan Description comes afterwards. And then it's reviewed by us locally or sent to the International Union's Insurance Department for the review to see if it matches what we negotiated in the contract or at the bargaining table.[23]

Indeed, as referenced above, the 2004 Agreement provided the Company with the right to change insurance plans, or carriers, or even to terminate the plan and self-insure, as long as the benefits provided were "substantially similar." Unit Chairman Conway's testimony made clear that this practiced predated the 2004 Agreement. In other words, the key issues and benefits were negotiated at the bargaining table, made part of the collective-bargaining agreement, and then the Company purchased a plan from an insurance company. During the term of the collective-bargaining agreement there might be changes in the plan or indeed, in the insurance company. The plan document would be sent to the Union after-the-fact for review. As long as the benefits stayed "substantially the same" and nothing in the document contradicted or undercut what had been negotiated, there was no problem. If it did, the Union would demand that the Company fix it, and, in the instance recalled by Conway, it did. Here is Conway's explanation of how the employees went from being covered by insurance from a company called Anthem, to the current insurer, United Healthcare:

> Q. Is there a point where the insurance changed to become United Healthcare?
>
> A. Yes. We've had it for, I don't know, four or five years.
>
> Q. Okay. And do you recall how the United Healthcare insurance, the provider was changed? Was it changed at the bargaining table?
>
> A. No. If it was similar, he'd have the right to change it. It's in a book every year and I compare it with the old one.
>
> Q. Okay, you said "he" and "they send", so who are you referring to?
>
> A. The insurance company would send a book every year and I would compare it with the old one to see if there's any changes in it.
>
> Q. Okay, now when you say "send a book", is that a book of what the plan is that you have? Is that what you're referring to?
>
> A. Yeah, it was the whole thing of coverages.
>
> Q. Okay, and then you would compare it to the one the previous year?
>
> A. Right.
>
> Q. Okay. And you said "he would change it", who were you referring to?
>
> A. If Craig changed insurance carriers.
>
> Q. And that would be Craig Johnson?
>
> A. Right.
>
> Q. And you said you compared it every year. You compared it to what?
>
> A. I compared it to the old one.
>
> Q. Okay, and do you recall any problems over the years when there would have been changes?
>
> A. There was a few times with co-pays and things like that.

[23] In his testimony, when Young referred to the "summary plan description" he was, in fact, referring to the master plan document provided by the insurance company to KLB. The master plan document for the health insurance plan in effect after May 1, 2007, was entered into evidence as Respondent Exhibit 2.

Q. Okay, and what did you do?

A. Well, I remember a couple years ago we had—got new insurance card[s] and the co-pay were completely different on it. Konrad [Young] and me talked to Craig Johnson and he fixed it.

Q. Okay. When you say "fixed it", what did he do?

A. Well, they issued new cards and they were correct this time.

Q. And so when you say "correct", what do you mean "correct"?

A. It had the old co-pays that we had on there before.

Thus, the standard practice, with which the Company and the Union were familiar, was for the parties to negotiate—and put in the collective-bargaining agreement—only the basic benefits information. Subsequently, the Company would provide a plan document that the Union would review and make sure was in accord with what the parties had negotiated. A variant of this process was repeated during the term of the collective-bargaining agreement, as insurance companies updated and changed their plan and as KLB's Johnson searched for better insurance packages, with the condition that the Company provide the employees with substantially similar benefits.

This history and standard practice—which I believe to be not atypical for employers and unions negotiating health insurance benefits—does not mean that the Union was required to follow this practice in 2007 negotiations. In my view, should the Union have desired, it was free to seek negotiations over each word and line of the plan that the Company intended to apply to employees.[24] But that is not, in fact, what happened here, and I think the historical practices of the Company and the Union inform the events that transpired at the bargaining table in important ways.

While the Company's gutting of the existing contract language (some of it described as inadvertent) in its opening proposal legitimately engendered some confusion as to what the Company was proposing, in subsequent negotiations the Company's proposal was not unclear. The Union's professed mystification at trial cannot be credited. The Company's "alternative proposal" (GC Exh. 8) provided a new high deductible plan in summary form. Notably, while the parties focused on the level of deductibles, and premium costs, the suggestion that the proposed alternative plan did not include benefits is false. They are stated plainly on the page:

<u>Plan</u>

Plan Codes	Rt-B/Rx H9
Plan Type	Choice Plus
Calendar Plan/Policy Plan/Both	C
Deductible (Ind/Fam)	$ 2,000/ $ 4,000
Non-Network Deductible (Ind/Fam)	$ 4,000/ $ 8000
Copays/coinsurance:	100%
Office visit	100%
Specialist	100%
Hospital—Inpatient	100%
Outpatient Surgery	100%
Urgent Care	100%
Emergency Room	100%
In-Network Coins[urance]	100%
Non-Network Coins[urance]	80%
Out-Of-Pocket (Ind/Fam)	$ 2,000/ $4,000
Non-Net Out-Of-Pocket (Ind/Fam)	$ 8,000/ $16,000
Med/Rx Ded. Combined	Y
Med/Rx Out-Of-Pocket Combined	Y
Prescription Drugs:	
Member Co-Pay	$10 Copay Tier 1 $30 Copay Tier 2 $50 Copay Tier 3
Member Home Delivery	2.5 X Copay Home Deliv[ery]

* * * * * * * *

Non –Notification Fee 50%
Lifetime Maximum—Network
Lifetime Maximum—Non-Network
Lifetime Maximum—Combined$5,000,000

This level of detail is easily equal to the level of detail negotiated by the Union in the 2004 Agreement. The suggestion at trial by union witnesses, sometimes endorsed, sometimes contradicted, that the Company's proposal did not list any benefits or coverages cannot be taken seriously. Equally without force is the claim by union witnesses that when they agreed to the Company's health care proposal on September 30, that they were only agreeing to the deductibles and health savings plan information—by themselves important areas of discussion—and not to the benefits plainly set forth on the Company's proposal. Indeed, when, on September 30 the Union made what Young described as a "complete proposal for the whole contract together" that would "resolve all the items that were open," it is not credible that the proposal—which states as to medical insurance: "INS – accept co. last offer"—is anything but acceptance of the Company's offer, benefits and all. This acceptance of the Company's health insurance proposal was orally repeated on October 3. As the Respondent is quick to point out: the fact that the Union's own proposals to settle the contract included acceptance of the Company's health insurance decisively undercuts both the logic and credibility of claims that the Company's health care proposal was "incoherent," overly "vague" or "confusing." Similarly, the fact that the Union brought the Company's October 3 offer to its membership for consideration decisively undermines the contention that the proposal was incapable of being accepted. See, *Timber Products,* 277 NLRB 769, 770 (1985) (union's acceptance of pension proposal, with detailed plan to be provided at later date, created enforceable contract between the parties: "It is clear that, once the Union accepted its stated final offer, the

[24] At least, to the extent the details involved mandatory subjects of bargaining. Of course, there are probably fine points of the plan (which is a contract between the Company and the insurance company) that are not mandatory subjects of bargaining but that is beside the point.

Respondent was obligated to provide a pension plan containing the enumerated benefits under the terms specified in Appendix B. Any additional details could be resolved by the parties later").

Young and the Union did have a legitimate concern about the health care insurance. In its initial proposals, the Company had struck language contained in the 2004 Agreement that limited the Company's right to change insurance plans and/or carriers to arrangements that provided "substantially similar" benefits. That proposed deletion was a red flag for Young and the Union, and understandably so. With that deletion the Company might be free during the term of the contract to change plans or carriers and gut the health insurance benefits provided to employees. Discussion of whether the insistence on such a proposal would be permissible under *McClatchy Newspapers,* 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), is not necessary: by September 30 the Company had abandoned this proposal and was promising the Union that the new health care plan would have "the majority of the Group Health Insurance benefits" and ultimately promised "substantially the same medical coverage" as in the current plan. This did not satisfy the Union, which wanted assurance that the new plan would provide coverages exactly like the existing plan. That is the Union's right to propose, but it does not render unlawful the Company's proposal to provide a new plan that was substantially similar in details to the current plan. Of course, as discussed, supra, when confronted with the Company's proposal the Union would have been within its rights to demand bargaining over each and every detail of the plan. But it did not do that.

Stripped of the incredible contention that the Company's health insurance proposal contained no coverage or benefits information—it contained no less than the insurance bargained in the 2004 Agreement—the Union's contention boils down to the proposition that the Company's health insurance proposal was unlawfully "vague" or "confusing" because it proposed that additional coverage details of the plan would be "substantially similar" to the current plan but did not set forth all of those items. At least in the present circumstances, this argument is not compelling. First, it is telling that the Company's offer was consistent with its right under the 2004 Agreement—fully accepted by the Union—to change during the contract term to insurance that was "substantially similar." This was also part of the proposal in 2007 bargaining, and provoked no controversy or comment. That the Union could accept substantially similar coverage during the term of a contract, while claiming it was unlawful to propose substantially similar coverage from one contract to the next, is remarkable. Second, the Company's proposal appears to be consistent with the manner of bargaining health insurance to which the parties were accustomed. The novelty of the dispute makes one question whether the Company's proposal was as outrageous as the Union contends. Third, as discussed, infra, the Company explained to the Union why it believed it was unable to provide further details of the plan. This is not a case where an employer refuses to justify or explain its bargaining conduct, which is often a key factor in determining bad faith bargaining. Fourth, the Union did not demand, and the Company did not refuse to bargain over additional coverage and benefits items that the proposed labor agreement lacked. The Union wanted the Company to agree that the coverages would be exactly the same under the old and new plans. But, faced with the Company's reluctance to agree to that, the Union did not seek to bargain each issue at the table. Thus, this was not a situation where an employer refuses to negotiate over mandatory subjects. Rather, its proposal to adopt "substantially similar" coverages was met with the Union's demand that it guarantee the same coverages.[25]

Under the particular circumstances in this case, I find that the Company's health care proposals were not unlawfully vague, confusing, or incomplete, and were not incapable of being accepted by the Union. Indeed, on September 30 and again on October 2, the Union's proposal included acceptance of the Company's health care proposal.

2. The Timed offer

The complaint alleges that the Respondent's October 8 "timed" offer was indicative of overall bad-faith bargaining and considerable evidence about it was presented at trial. Accordingly, I review the issue here. I start, however, by pointing out that the contention that the timed offer was indicative of overall bad-faith bargaining is not advanced in the General Counsel's brief. I assume the contention was abandoned because of the evidence. The evidence at trial showed that the timed offer was an attempt to move toward the Union for the purpose of achieving a collective-bargaining agreement. Union representative Young's view was solicited as to what would be acceptable to the bargaining unit and included in the timed offer. Rather than showing bad faith, the timed offer was an effort to achieve agreement. Moreover, the process of a "timed" proposal was not materially different from the Union's repeated resort to "package" proposals. Upon rejection of any part of the Union's package proposal the Union returned to its previous position (less favorable to the Company) on each component of the package. The only difference between the Union's package proposal process and the Company's timed offer process was that the Company set a date and time for the Union to accept or reject. But the uncontradicted evidence is that this date and time was set in consultation with Young to ensure that the Union would have a chance to accept or reject before the expiration of the offer. None of the concepts and proposals in the

[25] The Union is correct that, in its October 18 letter to the Union, the Company inconsistently phrased its offer on this issue. It committed "to providing the same medical coverage in its proposal as it currently does," but also, in nearly the same breath, stated that it was committed "to providing substantially the same medical coverage in its proposed plan as it does under the current plan." The Company concedes that the October 18 letter was "inartfully worded," and contends that the intent of the letter was to tell the Union that the Company was agreeing to guarantee the same medical coverage. In my analysis I have assumed that the Company's proposal remained, at least after withdrawal of the October 8 timed offer, a willingness to promise "substantially similar" coverage. In other words, I have analyzed the matter, and resolved the inconsistency, from the best case scenario for the General Counsel and Union's legal argument. However, if the Company sticks to its word, then there will be no issue when the parties return to productive bargaining: the Company says it was proposing to guarantee the same medical coverage the employees received under the 2004 Agreement.

timed offer were new. There is no suggestion that the Union needed or wanted more time to consider it. Particularly, in the context where the Union has relied in negotiation on the process of regressing to previous positions upon the reject of a proposal, one would be hard pressed find the Company's use of the practice evidence of unlawful motive. In other words, this is not a case where the Company's tactic was foreign to the process established by the parties. There are circumstances (see, e.g., *White Cap, Inc.,* 325 NLRB 1166 (1998), where the Board has permitted such tactics even where unilaterally imposed by the Company. And circumstances where the Board has found such tactics indicative of bad faith. See, e.g., *Toyota of San Francisco,* 280 NLRB 784, 801 (1986). But where the Union has utilized the tactic in the negotiations, it is understandable that the General Counsel does not argue that the employer's utilization of the tactic—in an effort to secure not thwart agreement—is evidence of bad faith.

3. 8(d) Notice issues

The General Counsel contends (not in the complaint, but for the first time on brief) that KLB violated Section 8(d) of the Act by failing to give proper notice required by that subsection of the Act.[26] There is no basis for the claim. The Respondent complied with Section 8(d)(1) when it sent a notice of an intent to terminate the contract on February 26, 2007. This is unusually early—the contract was not set to expire until October 1—but nothing more can be made of it than the explanation offered by Johnson: in 2003 the Company forgot to give the notice, the Union failed to do so, and the parties ended up with the agreement renewing automatically. In 2007, the Company gave an early notice as a precaution to avoid a recurrence of that scenario. It is true that the Company's February notice promised "be in touch in the coming months to discuss the scheduling of collective bargaining negotiations." Instead, Young contacted the Company in early September. But this is hardly indicative of bad faith.

Young was not ready to bargain until mid-September and the Company's failure to contact the Union before the Union contacted the Company in early September was of no moment for the bargaining. The General Counsel also claims (GC Br. at 14) that the "Respondent failed to notify the FMCS as required by Section 8(d)(3)." The claim is baseless. Indeed, in the next breath the General Counsel concedes (GC Br. at 15) that "the Union's notice was sufficient to notify the FMCS of the parties' dispute." It was, and the suggestion that the Company violated the notice provisions of 8(d), or that its failure to provide a second notification to the FMCS was indicative of bad faith, evaporates with the concession.

4. The termination of the extension agreement

The General Counsel contends that the Respondent's termination of the extension agreement after one week is suggestive of bad faith.

I accept that the text of the extension agreement signed by the parties provided for a firm two week extension before either party could terminate.[27]

However, notwithstanding the text of the agreement, the overwhelming evidence clearly and convincingly demonstrates that the agreement reached at the table between the parties—at the Union's insistence—was that the contract could be terminated day to day. This is an unusual situation, but in these peculiar circumstances the record evidence of the parties' real agreement serves to blunt the force of this as evidence of overall bad-faith bargaining. Notwithstanding the language of the extension agreement, the Company's decision to terminate was in accordance with the agreement urged by the Union and acceded to by the Company. The parties adopted this agreement precisely because the Union did not want an extension agreement that kept the contract in place for a firm period of two weeks. The evidence is undisputed and endorsed by both union and company negotiators: Wakefield proposed a firm two week extension agreement and Young rejected it precisely because he "wanted a day to day so we would be in negotiations on day to day because I didn't want to stretch it out two weeks." To avoid this, Young supplied his own version of an

[26] Section 8(d) states, in relevant part, that

> the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

[27] The Respondent takes the view that the extension agreement permitted termination upon notice anytime, even within the first two weeks. The text of the extension agreement does not support that conclusion. The agreement states that the expiring agreement "is hereby extended . . . to Oct[ober] 14, 2007, and *thereafter* on a day-to-day basis." (emphasis added). It then states: "Should either party desire to terminate the Agreement, said party shall give written notice to the other party at least twenty-four (24) hours in advance, and the Agreement shall be terminated on the date and hour specified in the twenty-four (24) hour notice." If, as the Company contends, the 24-hour termination language applies to the period of time between September 30 and October 14, and not just "day-to-day" "thereafter," then we would have a day-to-day contract, even before October 14, and the language extending the contract to October 14, is superfluous, indeed, inoperative. It is, of course, "a cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). In this case, consistency is achieved by interpreting the 24 hour termination provision to apply only to the "day to day" period after October 14.

extension agreement. Asked his understanding of the length of the extension agreement, union negotiator Conway mightily resisted efforts of counsel to suggest to him that the answer was two weeks, and stated that "[s]ince Konrad [Young] came out with this, I think it was probably day-to-day." (See, Tr. 751–752).

Young testified to puzzlement and unhappiness with the Company's termination of the agreement. He wondered, "[i]f . . . the Company was so insistent upon having a two week extension that was signed as of September 30th, why they were terminating the contract . . . [I]t didn't make any sense to the Union what the strategy was to ask for a two week extension and then to cancel it a week later." However, Young stopped short of contending that the Company had breached the extension agreement, and, notably, there is no contemporaneous letter or note, or indication of a discussion showing that the Union viewed the Company's actions as a violation of the parties' extension agreement.

Thus, we have the unusual situation where the evidence of the parties' intended agreement is at odds with a reasonable reading of the agreement they signed. It represents a classic mutual mistake. September 30 was a busy time at the bargaining table. The parties were trying to obtain a contract. They were not focused on the terms of the extension agreement. Young did not write the language he proposed, it was a "form extension agreement that the UAW uses." Apparently no one at the table read it very carefully and they just assumed (as Conway explained) that the language served the purpose for which it was proposed and adopted. And that purpose was to enable the parties to terminate the contract at any time on 24 hours notice.

Thus, the Company's termination of the agreement did not indicate subjective bad faith. In terminating the agreement it acted in accordance with the agreement reached with the Union. Notably, the desire to terminate an agreement, and reach a point where the employees are working on a day to day basis, is not, by itself, to be frowned upon. It is a common tactic of unions and employers to increase pressure for settlement by the prospect it creates for a strike or lockout. In these unique circumstances, the claim of bad faith falters because the Company acted in accordance with agreement intended by the parties.

Given this, the most that can be said is that the Company—relying on the common understanding of both parties—itself a product of acceding to the Union's demands for a day-to-day contract, did not read (or did but misread) the text. The circumstances effectively puncture efforts to transform this incident into evidence of an intent by the Company to thwart the collective bargaining process.

The General Counsel also contends that the breach of the agreement is an independent violation of the Act, regardless of motive. It is clear that repudiation of an extension agreement constitutes a per se breach of the act. But this is a classic case of a mutual mistake. Neither Board precedent nor the law of contracts is so unforgiving as to find a violation in such circumstances.[28] I decline to find a violation of Section 8(a)(5) in these circumstances based on the termination of the extension agreement.

5. Lack of authority of bargainers

In support of its contention that KLB bargained in bad faith, the General Counsel asserts that KLB bargainers lacked adequate authority to negotiate a contract. In mounting this argument, the General Counsel cites Johnson's testimony that he had to talk over union offers with the owners before agreeing to a particular offer. However, Johnson also testified—and the General Counsel concedes (GC Br. at 17) that this testimony is not necessarily contradictory—that he had "outside limits" beyond which he could not go without discussing it with the owners, but that he made offers at the table without checking with the owners. Wakefield described he and Johnson's authority as falling within "parameters" laid down by the principals. All of this struck me as prosaic. The salient point is that there is no evidence that Wakefield or Johnson's authority (or lack thereof) hindered the collective bargaining process. The limits on Johnson and Wakefield's authority did not delay, stall, or contribute in any discernible way to the failure of the negotiations.

6. Requests for information

The complaint alleges that the Respondent failed and refused to provide the Union with health care insurance, bonus, and wage information requested in the Union's October 4 information-request letter. The complaint also alleges that these requests were verbally renewed on October 10, 16, and 21.

On brief, the General Counsel confines argument regarding the Respondent's failure to provide requested information to the Respondent's response to the Union's October 4 information-request letter. There is no argument, and no evidence was offered, to support the allegations regarding verbally renewed requests on October 10, 16, or 21. Accordingly, those allegations must be dismissed.

As to the allegations involving the October 4 information request, the General Counsel generally challenges the Company's failure to provide the information on the newly proposed alternative health insurance plan, bonuses, and the Union's requests related to the Company's proposal to reduce wages.

a. Health Care Information

For the most part, the Company's response (as set forth in detail, above) was that it did not possess the requested information on the new plan, that it made an effort to obtain the infor-

[28] *Cook County School Bus, Inc.*, 333 NLRB 647, 653 (2001) ("the parties conduct should be governed by what they agreed to and not by what was mistakenly put in the contract"); enfd. sub nom. *NLRB v. Cook County School Bus, Inc.*, 283 F.3d 888, 893 (7th Cir. 2002) (citing § 155 of the Restatement 2nd of Contracts: "Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement").

I note, again, that while Young expressed surprise that the Company would terminate the extension agreement after a week, there is no evidence that the Union viewed the Company's termination as breach of the extension agreement. It is not even alleged in a charge. Thus, the text notwithstanding, neither party to the agreement maintains that the Company breached the parties' agreement.

mation, but could not obtain the information until it actually purchased the new plan. As to other items, such as the Form 5500 or equivalent, copies of contracts, quotes from other carriers, and quotes for cost beyond the first year, Johnson testified, essentially, that such items did not exist. Board precedent requires an employer in this situation to make a good faith effort to obtain requested documentation held by a third party. However, the extent of the effort and the credibility of the failure is related to the nature of the relationship between the employer and the third party. *Pittston Coal Group, Inc.,* 334 NLRB 690, 692–693 (2001).

In his testimony, Johnson painted a picture of a small employer that purchased its health insurance through an independent insurance broker. The Company itself has no relationship with the insurer and, in Johnson's telling of it, is too small to get attention from the insurance company. His efforts to obtain the requested information were undertaken through the insurance broker who told him that the information was not available.

Contrary to the assertions of the General Counsel, there was nothing inherently unbelievable about Johnson's testimony. As mentioned, above, I found Johnson a straightforward witness. I did not have reason to believe he was dissembling or evasive. I credit his testimony on this issue, particularly given that his testimony on the issue is undisputed. The most obvious avenue for the General Counsel to pursue would have been to subpoena the insurance broker in an effort to rebut Johnson's claims. Or, subpoena a representative of the insurance company to testify about what kind of materials and documents it makes available for employers in KLB's situation. Instead, the General Counsel called an employee of the UAW benefits department who had no involvement in the facts surrounding this case, but who attempted to testify as an expert witness based on her familiarity with the health insurance industry, which expressly did not include familiarity with the practices of United Healthcare "specific to the timeframe." I sustained objections to her testimony that went to the issue of whether the requested information would have been the "type of documents . . . readily available if an inquiry is made into an insurance company." I sustained objections to this testimony because I do not believe that the Company's access to the requested information can be proven in this manner.[29]

I do not believe a violation has been proven as to the requested health insurance information.

b. Bonus information

As to the information on bonuses, notwithstanding the General Counsel's reference to it on brief, the evidence suggests that the Union felt it that its request was satisfied. The Company's October 18 letter to the Union attached information related to bonuses. The Union's October 21 letter, which discussed the Company's response to the Union's October 4 information request, stated that "[t]he Union acknowledges that the Company did provide for the information requested in regard to bonuses." There is no evidence to support the General Counsel's suggestion that bonus information was not provided to the Union. Accordingly, with regard to the bonus information, no violation has been proven.

c. Wage reduction information

The Union's October 4 information request also sought seven items listed under the heading of "wage reductions." In the letter, the Union stated that it was asking for this information in order to determine the "veracity" of the "continually asserted" claims by the Company during negotiations that it must "improve its competitive position." The Union contended that "[b]ased on this assertion, the Company has made numerous contract proposals that reduce the wages and benefits."

The specific requests, set out above, are of certain types: a list of current and past customers and information on quotes provided to customers (and prospective customers); marketing plans, information on pricing of products, information on outsourcing of work previously performed by bargaining unit employees, and "complete calculation" of the anticipated savings from the proposed wage cuts. In its response, the Company refused to provide most of this information, although it did provide the amount of anticipated wage savings, without any calculation or information that would show how the figures were reached. The Union's October 21 follow-up letter "maintain[ed] that it is entitled to all documents and information called for in our October 4, 2007 letter," and with regard to the wage figures, specifically pointed out that the Company did not provide "'complete calculations' for the Union to assess the validity of these figures."

In *Caldwell Mfg. Co.,* 346 NLRB 1159, 1159–1160 (2006), the Board summarized its precedent on the duty to provide requested information:

[29] In light of my rulings, the General Counsel made several offers of proof regarding the testimony the witness would have given. In sum the offers of proof stated that the witness would have testified that "every insurance company" or "other insurance companies similar to United Healthcare" usually have actual plan documents and extensive information on various plans offered by the insurance company that are available to prospective purchasers prior to purchasing an actual plan. My view is that the issue does not lend itself to generalized testimony about the practices of insurance companies. I continue to believe that such testimony would not assist me "to understand the evidence or to determine a fact in issue" (Federal Rule of Evidence 702) and I reject it on that basis. I also believe that the use of an expert witness without advance notice to the opposing party is in most instances going to be unfair. The premise of allowing an expert witness to testify is that he or she can provide "scientific, technical, or other specialized knowledge" on a relevant subject. Given that, it is unlikely that an attorney can, with no advance notice, effectively cross examine the witness or even line up a rebuttal expert witness without significant delay and disruption to the trial schedule. The failure to provide notice is not conclusive, but it was a factor in my decision to bar much of this witness' testimony. Finally, I would note that even if I permitted testimony to this effect (and, in fact, notwithstanding my ruling, I ended up allowing some specific testimony that probably ran afoul of my general ruling prohibiting "expert" opinion on what insurance companies make available to prospective purchasers), I would not give it much weight. More persuasive is the creditable testimony of Johnson regarding his actual experience in this instance seeking information sought by the Union.

> an employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations. Generally, information pertaining to employees within the bargaining unit is presumptively relevant. *CalMat Co.,* 331 NLRB 331 1084, 1095 (2000). However, when the representative requests information that does not concern the terms and conditions of employment for the bargaining unit employees--such as data or information pertaining to nonunit employees--there is no such presumption of relevance, and the potential relevance must be shown. *Shoppers Food Warehouse Corp.,* 315 258, 258–259 (1994). The burden to show relevance is "not exceptionally heavy," *Leland Stanford Junior University,* 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983) and "the Board uses a broad, discovery-type of standard in determining relevance in information requests." *Shoppers Food Warehouse,* 315 NLRB at 259. When there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for nonunit employees. *E.I. du Pont & Co.,* 276 NLRB 335 (1985), enfd. 744 F.2d 536 (6th Cir. 1984); see also *CalMat Co.,* supra at 1096–1097; *Litton Systems,* 283 NLRB 973, 974–975 (1987), enf't. denied on other grounds 868 F.2d 854 (6th Cir. 1989).

An employer is required to provide information pertaining to nonunit employees when the Union has shown a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Allison Co.,* 330 NLRB 1363, 1367 (2000). However, even in the absence of such a showing by the Union, the Board holds "that an employer is obligated to furnish requested information where the circumstances should put the employer on notice of a relevant purpose which the union has not specifically spelled out." *Allison Co.,* 330 NLRB at 1367 fn. 23.

In *Caldwell Mfg.,* supra, the Board rejected the argument "that an employer has no duty to disclose information requested by a union where the information is financial in nature and the employer has not pleaded an inability to pay." In *Caldwell,* the Board recognized that "generally, an employer is not obligated to open its financial records to a union unless the employer has claimed an inability to pay, and that broad statements of 'competitive disadvantage' do not amount to a claim of an inability to pay." 346 NLRB at 1160 (citations omitted). However, while the claim that bargaining positions are motivated by competitive concerns does not trigger general access to an employer's financial records, a union is entitled to request information "to evaluate and verify the Respondent's assertions and develop its own bargaining positions." A union is entitled to request and receive financial records when the request is based on specific assertions on which the employer premised its bargaining positions, and the employer violates Section 8(a)(5) and (1) by failing to provide the requested information. *Caldwell,* supra. Accord, *Metropolitan Home Health Care,* 353 NLRB 25 fn. 2 (2008).

The right to request and receive necessary and relevant information in bargaining is an important and central feature of the Act. The holding in *Caldwell* follows from long-settled Supreme Court-approved understanding of the Act: "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152–153 (1956). As the Supreme Court explained in Truitt, supra, relying on principles adhered to since the earliest years of the Act, for a party to assert its positions without permitting proof or independent verification, "[t]his is not collective bargaining." 351 U.S. at 153 (quoting *Pioneer Pearl Button Co.,* 1 NLRB 837, 842–843 (1936)).

Collective bargaining is often described as a struggle of brute economic power between an employer and union. It is, but at the same time the Act regulates the process of that struggle by requiring good-faith bargaining that encourages reasoning, problem solving, and honest discussion. This reasoned side of the Act is essential if the Act's goal of industrial peace is to be furthered. There is a right to engage in knowledge-based bargaining where parties can verify each other's statements, and just as importantly, have information necessary to creatively search for solutions to the problems and differences that arise in collective bargaining.

In this case, the Company took care to avoid statements that could be construed as suggesting an inability to pay and thus be grounds to trigger a duty to disclose general financial records. As Wakefield explained, "we weren't pleading poverty, we didn't say we couldn't pay, so [Young] didn't -- he didn't have any right to access the books." As Johnson stated, "We did not want to open ourselves up to being able to have our books examined." That is all well and good. I agree that the Company did not "plead poverty." It had no duty to respond to a general request that it open its financial records to the Union. But the Union did not request "generalized financial information, such as the Respondent's profits, net income, tax returns, salary information, or administrative expenses." *Caldwell,* supra at 1160. The teaching of *Caldwell,* supra, reaffirmed in *Metropolitan Home Health Care,* supra, is that the failure to plead an inability to pay does not sanction the refusal of an employer to provide requested information that is relevant to the positions it has taken in bargaining. The point of *Caldwell* is that the duty to provide relevant requested information cannot be evaded just because inability to pay is not the rationale for bargaining positions. Other rationales also make relevant certain information that would—absent the bargaining positions taken by an employer—not necessarily be relevant or required to be disclosed. An employer's claim of "competitive" problems as a rationale for bargaining positions is not a refuge from the Act's requirement that if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *NLRB v. Truitt Mfg. Co.,* 351 U.S. at 152–153. And KLB's insistence that its reliance on "competitiveness" was articulated "broadly" or "generally" does not immunize the claim from union scrutiny. The claim was the key rationale for its demand for wage concessions. As the record reveals generally, and as union negotiator Young specifically, and credibly testified, when it came to the Com-

pany's rationale for its position, "it all centered around competitiveness." The Union has a right in the knowledge-based bargaining system provided for by the Act to delve into this claim and seek information to understand, evaluate, and rebut it.

Case law cited by KLB is not to the contrary. For instance, KLB cites *Nielson Lithographing,* 305 NLRB 697 (1991), where the Board adopted the view that complaints of "competitive disadvantage" did not equate to a claim of inability to pay that triggered a Union's right to financial information such as banking records, financial statements, and analyses of working capital. However, in support of its claims of competitive disadvantage, the employer in *Nielson Lithographing did* provide the union with data that supported the employer's assertions that it had been losing business to competitors. 305 NLRB at 697.[30]

With these principles in mind, it is necessary to review the information requested by the Union that it contended was relevant to the Company's demand for wage concessions. First, is the list of current customers. The Union explained in its letter that this information was sought to verify the Company's repeated claims about the need to improve its competitive position. The Union stated that it wanted to contact customers to see if any were contemplating buying from sources other than KLB.

In its letter to the Union, the Company asserted that the information was not "necessary and relevant to the UAW's representation of the bargaining unit members." In the letter, KLB essentially dismisses its own claims about competitiveness being the basis for the wage concessions it sought as "no different from the desire of any business conducting operations similar to those of KLB." But KLB cannot so quickly dismiss its own claims, that it made central to the bargaining.

As the Company maintains in its brief and maintained at trial (correctly in my view), the central issue in these negotiations, and the chief stumbling block to agreement, was the significant wage concessions that the Company sought in negotiations. As I have indicated, above, in my view, up to October 4, it advanced this position lawfully. Its asserted basis for the sharp wage concessions was the need to be more competitive, which it defined or explained in a variety of ways, but as noted, the Company's rationale for the wage cuts "centered around competitiveness."

At the hearing, the Company made clear that its wage concession demands were driven by concerns with competitors, and this, obviously, but also explicitly included concerns about customers—a huge one was lost in 2006 according to Company testimony. Maintaining customers and keeping them from going to other sources is a core function of competitiveness. It made sense for the Union, faced with demands for huge wage concessions, and apparently not a lot of bargaining power, to seek information to verify the Company's concerns or, better yet from the Union's perspective, to undercut or mollify the Company's concerns. To paraphrase Truitt, supra, "this is collective bargaining." Seeking more information about a potential loss of customers, a key element of competitiveness concerns raised by the Respondent, is a legitimate response for a Union facing demands for significant wage cuts. Its relevance was explained in the Union's letter and it is clear from the record developed at the hearing that the relevance was apparent to the Company.

In this regard it is highly significant that at trial the Company provided additional information—specifically the names and sales volume of customers—precisely to justify the claims of competitive pressures as the motivation for its wage proposals. In order to bolster its case of its rationale for wage concessions, the Respondent introduced into evidence a list of its top 20 customers for 2005, 2006, and 2007, including sales figures for each (which is not something the Union requested). Thus, at trial the Company produced the same information that would have been responsive to the Union's information request on customers. This is a glaring if implicit admission of the relevance of the Union's pursuit of customer information to test the Company's alleged competitiveness problems.

The Company also maintained that this information was confidential. In its letter to the Union it maintained that it had confidentiality agreements with each of its customers. The Company claimed that "KLB has contractual obligations with each of its customers to maintain the confidentiality of the customer's information" and disclosing such information "would not only subject KLB to lawsuits, but could also destroy the Company's relationships with its customers." However, at trial, Johnson scaled back this claim to the statement that the Company had confidentiality agreements only with "some" of its customers. Notably, neither in its letter nor in Johnson's testimony was any claim made that the confidentiality agreements covered disclosure of the mere name of the customer (which is what the Union sought), as opposed to sales or other financial information.

While the Board recognizes the Supreme Court admonition in *Detroit Edison v. NLRB,* 440 U.S. 301 (1979) that a "[r]espondent's claim of confidentiality and privilege must be balanced against the Union's need for relevant information in pursuit of its role as a representative of the employees" (*Howard University,* 290 NLRB 1006, 1007 (1988)), the Board also holds that "[a]n employer bears the burden of demonstrating that its refusal to provide relevant and necessary information to a labor organization is excusable because the requested data is privileged information." *Washington Beef, Inc.,* 328 NLRB 612, 621 fn.11 (1999); *McDonnell Douglas Corp.,* 224 NLRB 881 (1976). Moreover, blanket claims of confidentiality as

[30] Also wholly inapposite is *Gilberton Coal Co.*, 291 NLRB 344 (1988), enfd. w/o op. 888 F.3d 1381 (3d Cir. 1989), a case the Respondent relies upon in which customer information was not required to be provided to the Union. However, in *Gilberton Coal*, the requested customer's names bore no relevance to the purpose for which they were sought: the union's effort to determine whether it could picket the purchaser of a culm bank as an ally of the respondent. The employer reasonably satisfied the union's doubts about the sale by directing the union the court clerk's office where the documents describing the sale were on record. Although the Board declined to pass on the finding, the judge found the employer had grounds to suspect that the union would use the customer names for illegal secondary activity (a complaint already having been issued in that regard). No such concerns and no such irrelevance attaches to the Union's request for customer names in this case.

grounds for refusing to provide any information of the type requested are not adequate. *Pennsylvania Power Co.,* 301 NLRB 1104, 1105–1106 (1991) ("Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not"); *Washington Gas Light Company,* 273 NLRB 116–117 (1984) (general blanket policy of refusing disclosure violates Act).

Here, KLB has not proven that the names of its customers present or past is a matter of confidentiality. Notably, the Union's request does not seek sales or other financial information regarding these customers. It seeks a list of their names. KLB produced no contracts or evidence, redacted or otherwise, to support an assertion that the mere name of a customer is subject to a confidentiality agreement between KLB and the customer. Moreover, as discussed, at trial, in order to bolster its case of its rationale for wage concessions, the Respondent introduced into evidence a list of its top 20 customers for 2005, 2006, and 2007, including sales figures for each (which is not something the Union requested). Thus, exactly the type of information requested by the Union has now been placed in a public record by the Respondent, and therefore provided to the Union and anyone else interested in it, without any effort to shield, redact, or hide the allegedly confidential information. On this record, the claim that the identity of its customers is confidential has not been proven.[31]

Moreover, even assuming the legitimacy of KLB's confidentiality concerns, under Board precedent KLB bears the burden of proposing alternatives or seeking to bargain a resolution to its confidentiality concerns. As the Board explained in *National Steel, Corp.,* 335 NLRB 747, 748 (2001), enfd. 324 F.2d 928 (7th Cir. 2003):

> With respect to the confidentiality claim, it is well established that an employer may not avoid its obligation to provide a union with requested information that is relevant to bargaining simply by asserting a confidentiality interest in the information. Rather, the employer has the burden to seek an accommodation that will meet the needs of both parties. Thus, upon informing the Unions of its confidentiality concerns, the Respondent had an obligation to come forward with an offer of accommodation. (citations omitted).

Accord, *Tritac Corp.,* 286 NLRB 522 (1987) (a respondent "cannot simply raise its confidentiality concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation"); *GTE Southwest Inc.,* 329 NLRB 563, 564 fn. 6 (1999) ("We find no merit in the Respondent's argument that the Union made no attempt to accommodate or to guarantee confidentiality. The Respondent, not the Union, was the party that was required to seek accommodation").

KLB did not do this. Instead, KLB contends that it was "prepared to discuss potential accommodations of its confidentiality concerns with the Union," and complains that the Union failed to pursue such discussions. But the truth is, KLB did not raise the subject or make any effort to bargain an accommodation of its alleged confidentiality concerns. As can be seen in its letter, it raised confidentiality concerns as a reason to say no, not as concern that it sought to accommodate.[32]

The second item requested by the Union was a copy of "any and all quotes" provided by the Company. The request also asks for the number of quotes awarded or not awarded in the past five years. The record discloses no response to this request. However, at trial, Johnson indicated that being outbid by competitors, which he assumed had happened when the Company provided a customer with a quote but did not receive the job, was a source of concern that prompted the demand for steep wage cuts in negotiations. Johnson's testimony demonstrates that the relevance of the quote information was apparent to the Respondent under the circumstances. To the extent the request raised confidentiality issues the response should have included them and a proposal to accommodate them.

The Union also requested a list of former customers that had ceased buying from the Company within the last five years. Again, KLB did not respond to this request. At trial, KLB featured its concerns about customers and, specifically, its 2007 loss of its second largest customer as a basis for its need for labor cost reductions. By placing into evidence information about customers that it withheld from the Union, for the purpose of demonstrating to the Board the legitimacy of its desire for wage reductions, the Company effectively admits the relevance of the information sought by the Union, and demonstrates that it understood the relevance of the request.

The Union's information request also requested that KLB identify outsourced work (over last five years) that had previously been performed by the bargaining unit. In response, the Company disputed that this information was necessary or rele-

[31] I note that there is no evidence the Company feared the Union would misuse the customer information, for example to picket customers. See, e.g., *Allen Storage & Moving Co.*, 342 NLRB 501, 503 (2004) (employer established confidentiality interest in names of customers based on concern that union would use customer information to picket at customers). The Company did not mention such a concern to the Union, did not mention such a concern at trial, and does not argue it on brief.

[32] This decisively distinguishes the instant situation from that in *Allen Storage & Moving Co.*, 342 NLRB at 503, a case relied upon by the Respondent. In that case the Union wrote to the employer asking for customer information in order to evaluate the employer's claim concerning limited work available for employees after a strike. The employer wrote to the union denying the request on grounds of confidentiality, but in the same letter sought to accommodate the union's concern by

> "offer[ing] to permit a post-strike review of the company financials [which will show] that the company's financial picture has deteriorated even further as a result of the strike. . .' The Union, without discussion or explanation, did not accept the Respondent's offer, even though the 'financials" could have given the Union the information it said it needed. Indeed, at the hearing, [the union representative] admitted that he had no reason for not accepting the Respondent's offer to review its financial statements."

The Board held that this effort by the employer to accommodate the union's concern satisfied its duty to bargain towards an accommodation with the Union regarding information (that the Board also found to the employer) established as confidential. Id. at 504. Here, in sharp contrast, KLB made no effort to accommodate the Union's concern.

vant and maintained that the "UAW is well aware that KLB has, and continues to, outsource work." The letter went on to say that "the Union has never complained about or grieved outsourcing," that there had not been "any bargaining discussions relating to outsourcing," and that the Company did not understand how its statements about remaining competitive rendered the information necessary or relevant.

The Board views such requests to require a showing of relevance by the Union. However, as noted, this requires only a showing of a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Public Service Electric & Gas Co.,* 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998). The request was limited to work "that had previously been done at this facility by bargaining unit employees." The request was made at a time when, it is undisputed, bargaining unit employees were and had been on layoff for a couple of years. The information explicitly was requested in conjunction with KLB's demands for wage reductions to remain competitive and thus the question of whether the bargaining unit employees, some of whom were now on layoff, used to perform any of the work more efficiently than outsourcing was probably relevant and would be of use to the Union in attempting to evaluate and verify the Company's wage reduction proposals.[33] Moreover, although withdrawn by October 4, the Union had maintained a proposal in negotiations to eliminate all outsourcing. The fact that the issue was not on the bargaining table at the time of the request does not undercut the relevancy of the request. The right to information is not so limited. To the contrary, the Union might have further pursued the issue if the request yielded information that made a further outsourcing proposal expedient. Alternatively, the information might have confirmed to the Union the appropriateness of its decision to withdraw the proposal. There is no basis for the Company's contention that the right to information is limited to proposals currently being proposed.[34]

The Union also requested "a complete list of prices for products so that the union can compare the prices of competitors." In addition, the Union's request stated: "[i]n order for the Union to determine whether the company's assertion of uncompetitiveness is based on price or other factors . . . . [p]lease provide market studies and/or marketing plans that would impact sales of products produced at . . . KLB Industries, Bellefontaine, Ohio facility." The Company did not respond to these requests. The Union explained each of these requests in relation to the Company's claims that competitive concerns were driving its demand for wage concessions. Prices are obviously relevant to a claim of competitiveness. Indeed, at trial Johnson made clear that when the Company bid on a job and did not get it, it assumed that the reason was that "our quotes were too high." Similarly, a market study, if the company possessed one, would probably help to evaluate the role of competitors in limiting the Company's sales. I note that as the Company did not respond to this response no claim of confidentiality was raised.

Finally, in its October 4 letter, the Union requested that "[w]ith the current Company proposal to reduce wages, please provide a complete calculation of the projected company savings over the next three years, including any projected overtime." The Company responded by conceding that "wage cost saving is necessary and relevant," then stating:

> The first year saving is $36,177.00. The second year savings is $44,498.00. The third year savings $62,652.00. And the overall cost savings of the proposed wage decrease is $133,327.00.

As the Union pointed out in reply, the Company's response on this item

> does not include the "complete calculations" for the Union to assess the validity of these figures. The Union maintains that it is entitled to all documents and information called for in our October 4, 2007 letter and, again, the Company has failed miserabl[ly] to supply essential information regarding the Company's proposals [for] wage reductions to the Union.

In response, no further information was supplied to the Union.

The Company had a duty to supply more detail regarding the projected savings of its wage concession proposal. The schoolteacher's admonition "show your work" is called to mind. While the sum of each year's savings would be of use to the Union, it left no way to see the basis of the Company's conclusion, no way to evaluate the accuracy of the claim, or what the impact of alternative proposals would be. See e.g., *Wilshire Plaza Hotel,* 353 NLRB No. 29, slip op. at 22–23 (2008) (unfair labor practice for respondent to respond to union's request for "detailed" calculations of respondent's concessionary economic proposals by providing only "flat amounts" to union).[35] Second, quite apart from what information was and was not available to the Union and what calculations the Union reasonably could and could not make, in a case such as this one,

[33] The fact of the current layoffs, alone, distinguishes the instant circumstances from those in *Disneyland Park,* 350 NLRB 1257 (2007). In that case, the Board found that the relevance of a union's request for subcontracting had not been adequately supported where there was no claim that an employee was on layoff or had not been recalled from layoff. Here, the fact that there were such layoffs was undisputed, and, the record establishes, known to the employer. Thus, the relevance of the request "should have been apparent to the Respondent under the circumstances" which is adequate to support the required showing of relevance. *Disneyland Park*, supra at 1258.

[34] See, *Dodger Theatrical Holdings Inc.*, 347 NLRB 953, 972 (2006) ("it is not up to Respondent to decide what information [the Union] needed or should have requested. As long as the Union has demonstrated a plausible relevant reason for the request, which it has done, the Union is entitled to receive the information from Respondent. The fact that the Union may have withdrawn its proposal does not render the issue irrelevant to negotiations").

[35] The ALJ's finding on this point was adopted by the Board in the absence of exceptions, which, of course, robs the case of precedential force on this issue. However, the ALJ's reasoning, and his finding, is, indeed, unexceptional. I cite the case because of that, and because the facts are so similar to the issue presented here. I further note that the seriousness with which the Board viewed this unfair labor practice may be gleaned from the fact that it served as a basis for the Board's precedential finding that a lawful impasse was precluded by the failure to supply this information. *Wilshire Plaza Hotel*, supra, slip op. at 2.

which involves a request for a calculation with many opportunities for error, and varying assumptions, a union is entitled to have a calculation from the employer so that it can verify the validity of its own calculation. KLB's contention on brief that the Union could calculate the savings itself is unsatisfactory. See, *Mary Thompson Hosp. v. NLRB,* 943 F.2d 741, 744 (7th Cir. 1991) ("need for verification makes it immaterial that union can secure desired information" through alternative means); *Albertson's Inc.,* 310 NLRB 1176, 1187 (1993) (employer's claim that union could determine amount of contributions to trust fund from plan documents did not excuse the employer's failure to provide its own information on the actual contributions made where this information would allow the union to verify the information found in the plan).

The Company's response to this final information request is representative of its generally dismissive and niggardly response to the Union's October 4 information request. The Company made short shrift of the Union's right to receive information. The Company might agree with this, as it contends that the Union's "entire information request was a sham designed to prevent KLB from implementing its final offer after reaching impasse." The Company points out that the request followed, by a day, the Company's declaration that it was providing its last, best, and final offer, its notice that it planned to terminate the extension of the labor agreement, and the mediator's suggestion that the parties were at impasse.

I reject the Company's argument that the Union's information request was a "sham" or otherwise offered in bad faith. "[T]he presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown." *Hawkins Construction Co.,* 285 NLRB 1313, 1314 (1987), enf. denied on other grounds, 857 F.2d 1224 (8th Cir. 1988); *International Paper Co.,* 319 NLRB 1253, 1266 (1995) enf. denied on other grounds, 115 F.3d 1045 (D.C. Cir. 1997). The Company has failed to prove that the request was made in bad faith. It has certainly failed to prove that the Union had no valid motive, which is necessary in order for the request to be invalid. *Hawkins,* supra at 1314 (requirement of good faith "is met if at least one reason for the demand can be justified"). Significantly, the parties were still engaged in bargaining when the Union made its request and, in fact, the Company, contrary to its assertion that the October 3 proposal was its final proposal, had not yet formulated its timed offer which made significant movement on a number of subjects, including wages. The contention that the Union's right to information had expired, or can be presumed illegitimate once the prospect of impasse is raised—by the mediator no less, not by the Company—significantly denigrates and diminishes the Union's right to seek and obtain information under the Act, as well as the ongoing bargaining process. The timing of the Union's information request could well mean that the information request would not have tainted a bargaining impasse that existed at the time of the request (although it's worth pointing out that the information request came just two weeks after bargaining commenced, not after months of protracted, fruitless negotiations). That is not at issue. There was no claim of impasse, no threat to implement the Company's bargaining proposal, and no reason for me to decide whether or not the parties were at impasse on October 4 or any other date.

Even assuming, arguendo, that the Union's information request was motivated, in part, by concerns about impasse, this would not demonstrate the illegitimacy of the Union's request. For a weak union facing a severely concessionary proposal, impasse is a gateway to bad things. That is the way it works. And if the Company's surprise declaration that it was terminating the contract and providing its final offer—just two weeks after bargaining began—jarred the Union into getting more aggressive that is not a sanctionable act. An air of hostility to union rights unavoidably garbs the argument that a union acts in bad faith—indeed, only in bad faith—when it reacts to the possibility of impasse by redoubling its efforts. In this case, the Union not only sought new information, the Union's chief negotiator worked closely with the Company to prepare a new timed offer that was very clearly aimed—by both the Company negotiators and Young—as an effort to broker an agreement. This effort well could have been aided by the receipt of information from the Company. Just as important, the employees' receptivity toward the timed offer, or the renewed October 3 offer might have been affected by the Union's receipt and analysis of this information. KLB's contention of union bad faith would wear better if it could show that the Union was not serious about trying to bargain an agreement, or did not need or want the information. It has not shown that. As stated, the Company did not declare impasse, and did not implement its final proposal. It did not lock out its employees for 2-1/2 weeks after the Union's information request. On this record, accusing the Union of making the information request for purposes of delay is a hollow claim. Compliance with the Union's information request could likely have been accomplished without causing any delay in KLB's subsequent actions. Any derailing of KLB's legal prerogatives caused by the Union's October 4 information request is the result of KLB's failure to timely comply with the request.[36]

I find that the Respondent's response to the Union's October 4 information request did not satisfy the Act. "The refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *The Brooklyn Union Gas Co.,* 220

[36] KLB relies on *ACF Industries*, 347 NLRB 1040 (2006), where a Board majority found that an employer did not violate the Act by delaying the furnishing of information requested by a union. *ACF* is inapposite. In the first place, in *ACF* the Board did not pass on whether the employer would have violated the Act by failing to furnish requested information, which is the issue presented in the instant case. In finding no violation in the employer's delay in providing information, the Board agreed with the factual findings of the ALJ that "the Union's information request was purely tactical and was submitted solely for purposes of delay," explaining: "This finding is warranted by the fact that the Union requested the information after months of extensive bargaining, after the contract's expiration, after the Union's rejection of the Respondent's final offer, and after the Respondent declared that it had nothing left to offer." In the instant case, the information was requested after two weeks of bargaining, prior to the extension agreement's expiration, and before KLB submitted its October 8 offer. The possibility of meaningful bargaining had not run its course at the time of the Union's information request.

NLRB 189, 191 (1975); *The Procter & Gamble Mfg. Co.,* 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979). KLB has failed and refused to bargain in good faith with the Union by failing and refusing to furnish the Union with the "wage reduction" information requested.

Still, by itself, this violation does not vindicate the General Counsel's claim of overall bad-faith bargaining. While I must consider this violation, I believe it represents a stark change in the Respondent's bargaining conduct, but only as of October 4, and even then the misconduct is limited to the failure to provide information. That is not to say, however, that the effects and implications of this violation on the Respondent's overall bargaining position are insignificant. I will turn to that issue below in consideration of the relationship of this violation to the lockout.

7. Incidents away from the bargaining table

The General Counsel argues that six incidents provide evidence of "away-from-the table conduct" supporting the overall bad-faith bargaining claim. The six incidents are: (1) the alleged preparations for a work stoppage in the form of fixing garage doors and mounting cameras on the outside of the facility; (2) the playing of music over loudspeakers; (3) the discharge of Miranda; (4) the September 26 incident in which McKnight discouraged employees from discussing strike activity; (5) the September 26 incident in which Kerns asked Conway to discourage employees from discussing negotiations; and (6) the September 28 incident in which Kerns discouraged employees from discussing the possibility of a strike.[37]

Unlike the complaint allegations regarding the Respondent's bargaining conduct, none of these incidents were set forth in the complaint. Rather, the complaint generally alleged that the Respondent "[c]onsistently engaged in conduct both at and away from the table which otherwise demonstrated a fixed intent not to engage in meaningful bargaining." Complaint at ¶7(b)(11).

On the assertion that it supported the surface bargaining case, and that the complaint generally gave notice that "away-from-the-table" conduct would be at issue in the case, at the trial I permitted (over the objection of the Respondent) the introduction of evidence regarding the September 26 discharge of employee Miranda, an issue discussed and disclosed at a pretrial conference the week before the hearing.[38] Subsequently, evidence of the five additional incidents were introduced on the same grounds—as evidence of away-from-the-table conduct supporting the overall bad faith bargaining allegations of the complaint.

In each instance I took the evidence, but as the exception to the norm of litigating pled allegations began to turn into the rule, my concern with this tactic grew. The question boils down to whether the allegation in a complaint that an employer "engaged in conduct . . . away from the table which otherwise demonstrated a fixed intent not to engage in meaningful bargaining" can become the portal for the introduction of an unlimited number of discrete incidents, all of which appear to have been known to the General Counsel prior to trial, but none of which were alleged or alluded to in the complaint, and only one of which the Respondent was told about prior to trial.

In this case, it is not necessary for me to rule on the propriety of this tactic, although I do think it raises some hard issues. It is not necessary for me to rule on the propriety of the tactic because, when these incidents are considered they add little to nothing to the overall bad-faith bargaining contention. In other words, as "away from the table conduct," the incidents, even if true, do not advance the claim that the Company "demonstrated a fixed intent not to engage in meaningful bargaining." Even considering these incidents, it does not alter my view that the bargaining did not evidence an intent not to reach agreement or otherwise evidence overall bad-faith bargaining.

The first incident concerned the Respondent's replacing of broken garage doors in the summer of 2007. The new doors had less windows. The General Counsel suggests that this, along with the mounting of video cameras in August, shows that the Respondent was preparing for a work stoppage. The Respondent offered less calculating explanations for each of these developments, but it hardly matters. Even if they were preparations for upcoming negotiations, such preparations are wholly lawful, and cannot add to a showing of overall bad-faith bargaining where the bargaining itself appeared to be directed toward reaching an agreement. Such preparation do not evidence an intent not to reach agreement.

The Government also cites what it calls the "odd but demeaning" practice adopted by Kerns of playing snippets of music over the loudspeakers to employees. The Respondent mocks this contention, and points out that there were no complaints about this registered by any employees or the Union. I suppose one could take offense at a snippet of "Who Let the Dogs Out" being played at quitting time, with its less than flattering implication.[39] But as evidence supporting bad-faith bargaining it is not compelling. The evidence suggests it was just Kerns' idea of humor, and whatever one thinks of that, a bad-faith bargaining case cannot be built on it.

The discharge of union steward Miranda is a more serious matter. Assuming arguendo the version of events pressed by the General Counsel, Miranda's suspension (which spiraled into an argument that resulted in his discharge) was the product of a prediction by Miranda of a strike. The suspension, and the initial decision to discharge Miranda was, indisputably carried out on the spot, in anger, by McKnight. Neither McKnight nor Miranda had any role in the 2007 collective-bargaining negotia-

[37] A seventh incident—the videotaping of picketers in the first week or so of the lockout—is alleged to have undermined the union's status as collective-bargaining representative. At trial, I presumed this was being introduced as more "away-from-the-table" evidence of overall bad faith bargaining, but this argument is not part of the General Counsel's brief.

[38] The intent to rely on the Miranda incident as away-from-the-table bad faith bargaining conduct was disclosed when, in pretrial discussions, the Counsel for the General Counsel was called upon to provide an explanation for a subpoena request that did not appear to relate to anything expressly alleged in the complaint.

[39] And who cannot sympathize with employees having to suffer through that song, ranked third in a poll of all-time most annoying songs. See, http://www.rollingstone.com/rockdaily/index.php/2007/07/02/the-20-most-annoying-songs/.

tions. Certainly an effort by an employer to target and discharge a union activist could be seen as part of an effort to undermine the union in collective bargaining and therefore be an integral part of a case of overall bad-faith bargaining. But not in this case. In this case, even assuming, arguendo, the discriminatory nature of Miranda's discharge, no relationship to the Respondent's bargaining conduct has been demonstrated, directly or inferentially. Rather, even assuming, that the suspension was discriminatory, it was a spontaneous reaction by McKnight, and events spiraled from there. There is no evidence that the Company's discharge of Miranda, including the final decision by upper management to allow McKnight's decision to stand, bore any relationship to events at the bargaining table. Notably, there is no evidence that the matter was discussed at the bargaining table at anytime.

The final incidents relied upon by the General Counsel as "away-from-the-table" support for the overall bad-faith bargaining theory involve statements by Kerns (and McKnight in one instance) on separate dates. On September 26, McKnight told Conway that Company president Kerns wanted to meet with the union bargaining committee after lunch. McKnight mentioned to Conway that some people (presumably employees) had been talking about going on strike and McKnight questioned whether they should be talking about that. Later, at the meeting arranged by Kerns with the local union bargaining committee, Kerns also complained about "people out there talking strike," and Kerns added that he thought it "illegal for the committee to be telling their members about negotiations." Conway challenged that: [d]on't they have a right to know?" And Kerns said, "[w]ell just try to calm things down a little bit." Two days later, on September 28, Kerns called a meeting of employees to complain that a customer had called asking if employees were going on strike. Kerns was upset about it and told employees something to the effect of "[w]e don't need this kind of stuff. Just do your job and everything will work out in the end."

These comments, even if unlawful, as ultimately alleged by the General Counsel, do not taint the Respondent's bargaining tactics and did not contribute in anyway to the failure to reach agreement. The most that can be said is that on September 26, Kerns and McKnight wrongly attempted to persuade union committee members that employees should not talk about striking and the committee should not contribute to talk about striking by discussing with employees how negotiations were going. By all evidence these comments to the union bargainers had no effect on negotiations, and do not suggest an unwillingness to bargain in good faith. As to the September 28 incident, while customers wondering aloud about a strike is uncomfortable for management, and perhaps intended to be so, it does not give Kerns the right to tell employees, in effect, to knock off the strike talk because "everything will work out in the end." That said, as evidence of bad-faith bargaining or intent not to reach agreement it is awfully thin. Indeed, it might suggest the belief that agreement will be reached.

In sum, I find that, even considering the Respondent's away-from-the-table conduct, the General Counsel has not demonstrated that there was overall bad-faith bargaining.[40]

B. The General Counsel's Motion to Amend the Complaint

As discussed, counsel for the General Counsel introduced evidence of the incidents described above on grounds that they supported the overall bad faith bargaining allegations.

At the close of her case, counsel for the General Counsel moved to amend the complaint to allege as independent unfair labor practices four of the six previously unalleged incidents that had been introduced into evidence as evidence of "away from the table" conduct supporting the surface bargaining claims. (The incidents relating to replacing of the doors and playing of the music in alleged preparation for the labor dispute were not alleged as independent unfair labor practices.) The General Counsel also moved to amend the complaint to add an allegation that videotaping by a security guard early in the lockout constituted an independent violation of the Act.

Specifically, the motion to amend the complaint proposed the addition of a new paragraph 17 to the complaint alleging that the following incidents "undermined the Union as the exclusive collective bargaining representative of the employees":

> Kerns' and McKnight September 26 discussions with Conway and the bargaining committee discouraging discussion of a strike and suggesting that it was illegal to tell employees what was happening in negotiations;
>
> the discharge of Miranda;
>
> the September 28 incident in which Kerns discouraged employees from discussing strike activity;
>
> and discouraging employees from picketing by engaging in surveillance.

Counsel for the General Counsel then moved that the new paragraph 17, with its four (really five, as the September 26 incidents are pled together) allegations of misconduct, be included as a part of the conduct described in paragraph 15 of the complaint, which lists the conduct alleged to violate Section 8(d) and 8(a)(5) of the Act. Counsel then moved that the new paragraph 17 be included as part of the conduct described in paragraph 14 of the complaint, which lists the conduct alleged to violate Section 8(a)(3) of the Act. Finally, on brief the General Counsel stated (GC Br. at 4 fn. 3), that "to the extent necessary, the General Counsel moves that paragraph 17 be included in the conclusory paragraph 13, violations of Section 8(a)(1)." In summary, counsel for the General Counsel has moved to amend the complaint to contend that the newly al-

[40] I give no weight to two other items the General Counsel appears to rely upon, if obliquely, in support of the bad-faith bargaining case. GC Exh. 2 is a May 30, 2000 letter from Kerns to an employee calling for cooperation and avoidance of conflict between employees and management. GC Exh. 3 is a 2001 NLRB informal settlement agreement, with a nonadmissions clause, settling unfair labor practice charges filed against KLB by the Union. Among other things, these documents are far too remote in time to be of any relevance in the instant cases.

leged incidents were each independently violative of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

At trial, the Respondent opposed the motion to amend on grounds, among others, that the new allegations were each time-barred.

I deferred ruling on the motion and asked the parties to argue the motion in their briefs. After consideration, I deny the motion to amend on the grounds that granting it would be futile, as each of the new allegations is time barred.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." 29 U.S.C. § 160. In this case, no charge was filed regarding any of the allegations that the General Counsel proposes to add to the complaint. Still, under longstanding Board precedent, if sufficiently related to a timely filed allegation, the new allegations may be added:

> In determining whether an otherwise untimely allegation is sufficiently related to a timely allegation to allow it to be added to the complaint, the Board applies the three-prong test set forth in *Redd-I, Inc.,* 290 NLRB 1115 (1988). Under that test, the Board (1) considers whether the timely and the untimely allegations involve the same legal theory; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to both the timely and untimely allegations. *Carney Hospital,* 350 NLRB No. 56, slip op. at 2 [627, 628] (2007); *Nickles Bakery of Indiana,* 296 NLRB 927, 928 (1989).

The Earthgrains Co., 351 NLRB 733, 734 (2007).[41]

In this case the required factual relationship between the proposed allegations and the allegations in any charge filed in these cases is lacking.

The charge, filed March 12, alleged unfair labor practices, involving bargaining violations, an unlawful lockout, and a unilateral change in terms and conditions related to the cessation of health benefits after the lockout commenced. There is also a boilerplate 8(a)(1) allegation that the employer "restrained and coerced" employees in the exercise of their Section 7 rights. There is no evidence that it was intended to allege any of the allegations the General Counsel seeks to add to the complaint by amendment. Amended charges filed April 11, and again on April 28, did not expand the reach of the allegations. A new charge filed June 30, 2008, involved the June 24 incident in which the police were called to KLB by security guard Morales.

As discussed above, as "away from the table" evidence of bargaining violations, the proposed allegations are lacking in probative value. For similar reasons, their factual relationship to the bargaining violations is also remote. Even granting the assumption that Miranda's discharge was provoked by a comment about a potential strike, it was the result of an incident between McKnight and Miranda, neither of whom was involved in bargaining. There is no basis to conclude that upper management's upholding of McKnight's decision was related to their bargaining conduct or objectives. Kerns and McKnights' comments related to the concerns over a strike and employee discussions about how bargaining was going, but the factual situation and sequence of events at issue are completely distinct from the charge's allegations about "take-it-or-leave-it" bargaining, failure to supply requested information, or locking out employees and halting health benefits. None if these comments (there are three in sum) reflect, reveal, or meaningfully relate to bad-faith bargaining or an intent not to reach an agreement with the Union.

Similarly, the post-lockout videotaping by Morales took place during the first week of the lockout. Although the allegation is serious, there is no factual nexus between it and the Respondent's bargaining conduct. Indeed, the issue is factually independent of the allegation that the lockout constituted unlawful discrimination, or any other allegation of the complaint or charge.

The General Counsel attempts to avoid the factual dissimilarity between the new and timely allegations with the claim (GC Br. at 6) that the new allegations constitute part of a "chain of events" related to the "Respondent's overall plan to avoid reaching a contract with the Union." If so, this would satisfy the second prong, as explained by the Board in *Carney Hospital,* 350 NLRB 627, 630 (2007). The problem is they are not. As I found, these "away from the table," incidents are essentially unrelated to the alleged bargaining violations. Merely alleging their relationship to the bad-faith bargaining cannot transform factually unrelated incidents into allegations related to the very different allegations in the extant complaint.

Having found that the second prong of *Redd-I* is not met, I do not believe, in this case, the claim of common legal theory can serve to protect the new allegations from a 10(b) defense. *Carney,* supra at 631.[42]

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[41] The *Redd-I* "closely related" test did not initially apply to complaint allegations of 8(a)(1) violations, which were deemed covered by any timely charge by virtue of the inclusion of general "catch-all" language in the Board's preprinted charge form. In *Nickles Bakery*, supra, the Board overruled this practice and held that the *Redd-I* test should also apply to 8(a)(1) allegations.

[42] Nor do I believe that the new claims call on the Respondent to raise the same or similar defenses as required for the pled allegations, which is the 3rd prong of *Redd-I*. They require entirely different defenses, factually and legally. The General Counsel's contention that the 3rd prong is met is based on the claim that the Respondent would already have to defend (most) all of the new allegations, as these allegations constituted "away from the table" conduct supporting the overall bad faith bargaining alleged in the complaint. This returns us to the problem (referenced above) of relying on the pled allegation of unspecified "away from the table" conduct as grounds to adduce evidence at trial on an unlimited number of unpled incidents. The General Counsel's argument boils down to the contention that since he is claiming that these unpled incidents are "away from the table" evidence of the timely alleged bad-faith bargaining, the Respondent has to defend against them whether or not they are alleged as independent violations, and therefore, adding the incidents as independent violations adds nothing to the Respondent's burden. Of course, adoption of this argument eviscerates the 3rd prong in surface bargaining cases if, as the General Counsel seems to believe, any number of allegations can be advanced on grounds that they "support" the surface bargaining allega-

The General Counsel's motion to amend the complaint is denied, as the allegations he seeks to add are time barred.

C. The Respondent's call to the police on June 24 regarding the Union's picket signs

This incident occurred when security guard Morales called the police on June 24 to report the union picketers for trespassing. Shortly after the lockout, the Union had placed picket signs across the street from the facility within the area marked by surveyors as a public right-of-way. The picket signs stayed there without incident until June when they were removed and later destroyed by persons unknown. When the Union replaced the signs on June 24, Morales called the police. Morales was allegedly motivated to do this by his belief that the picket signs the Union had replaced were on Company property, and that this constituted trespassing.

It is a violation of Section 8(a)(1) of the Act for an employer to call in the police for the purpose of taking action against legal picketing. *Sprain Brook Manor Nursing Home,* 351 NLRB 1190, 1191 (2007); *Walgreen Co.,* 352 NLRB 1188, 1192–1193 (2008). However, Section 8(a)(1) is not violated if the employer acts out of a "reasonable concern." As the Board explained in *Nations Rent, Inc.,* 342 NLRB 179, 181 (2004):

> It is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests. See *Great American,* 322 NLRB 17, 21 (1996). So long as the employer is acting on the basis of a reasonable concern, Section 8(a)(1) is not violated merely because the police decide that, under all the circumstances, taking action against the pickets is unwarranted.

The question, then, is whether Morales' call to the police was "motivated by a reasonable concern."[43] Notably, in undertaking this analysis we must assume that the Union signs were not on property under the private control of KLB. KLB correctly points out that the General Counsel failed to prove that the signs were, as suggested, on the public right-of-way.[44] However, Board precedent places the burden on the Respondent to prove that the signs were on its private property if it wants to assert a property interest as the basis for summoning the police. *Great American,* 322 NLRB 17, 21–22 (1996). This was not proved, and accordingly, the analysis assumes that the signs were on the public right-of-way. *Great American,* supra.

Morales did not testify. According to Johnson, Morales believed that the Union's picket signs, that the Union had recently found destroyed, were being replaced in the ground in areas that Morales believed was Company property. No reason for this belief was offered. These signs had been in the ground around the building since late October 2007, after the lockout began, and had stood since then without incident until being tampered with in June. After Officer Kenner left, the signs remained in place through the date of the hearing in this matter. The record reveals no reasonable basis for Morales' view—a mistaken view under the assumptions of this analysis—that the signs were on Company property. Nor was there any other disturbance, event or incident that would justify an effort to have the police take action against the union picketers.

The purpose of Morales' call to the police was to attempt to take action against the picketers for trespassing.[45] Morales' unexplained, unjustified (at least in the record) reason for suddenly believing that the signs—that had been in place for months—were on company property—does not constitute a reasonable basis for calling the police. *Sprain Brook Manor Nursing Home,* 351 NLRB 1190, 1191 (2007) (respondent's burden to show that it was motivated by reasonable concern of union or employee misconduct as basis for calling police to interfere with picketing activity). Accordingly, KLB violated section 8(a)(1) of the Act when it called the Bellefontaine police and reported a trespassing incident by picketers based on the resetting of picket signs in the ground.[46]

The General Counsel also maintains (GC Br. at 2, 54) that this incident constituted an independent violation of Section 8(a)(5), as it allegedly was an attempt to "undermine the status

tions. Acceptance of this argument would stretch due process past its breaking point.

[43] I note that the Respondent does not dispute Morales' agency status under Section 2(13) of the Act. In any event, I am satisfied that Morales, described by Kenner being "in charge of security," was an agent of the Respondent under Section 2(13) of the Act. "The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *GM Electrics*, 323 NLRB 125 (1997) (quoting *Southern Bag Corp.*, 315 NLRB 725 (1994)). The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was speaking and acting for management. *GM Electrics*, supra. As set forth in Section 2(13), when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Here, employees would reasonably believe that from the earliest days of the lockout, that a security guard such as Morales was acting at the behest of KLB. The security guards monitored the gates during the lockout. Morales wielded a videocamera on the picket line and talked with the police on behalf of KLB on June 24. Accordingly, I find that Morales was an agent of the Respondent within the meaning of Section 2(13) of the Act.

[44] As discussed above, the hearsay evidence that the Lee's Surveying employee called to the scene announced his view that the signs were on the public right-of-way cannot be relied upon to prove the matter.

[45] KLB argues that there is no evidence that anyone from KLB attempted to have the picketers arrested or evicted. This is incorrect. The intent of calling the police was to have action taken against the picketers for trespass. Johnson, Kenner, and the police report confirm that. If the police had been willing, Morales' call would have resulted in the removal (of the signs) and, perhaps, the arrest or citation of picketers responsible for placing the signs. Officer Kenner's good sense not to let a mountain be created out of a molehill is not a defense for KLB.

[46] KLB contends (R. Br. at 55 fn. 33) that if the picket signs were on the public right-of-way they were in violation of Bellefontaine city ordinances requiring a permit for such signs, and that "KLB could lawfully challenge the placement of these signs." The short answer is that this was not the reason for calling the police. The (unreasonable) concern that the picketers were trespassing was the reason. That is what was announced to Office Kenner and under the circumstances it would tend to interfere and restrain with employees' section 7 rights.

of the Union as the employees' exclusive bargaining representative." Neither precedent nor argument is offered to support this proposition, which, to me at least, is not intuitively logical and is not supported by any evidence. I reject it.

D. The Lockout (including the cancellation of health insurance, COBRA rights, and the hiring of replacements)

The Respondent contends that it locked out the employees in support of its bargaining position. (Tr. 1228; See, R. Br. at 69; Answer at ¶8(b)(10)). The General Counsel agrees. (Complaint at ¶8(b)(10)). The evidence supports their view.[47]

This kind of lockout is usefully called a bargaining lockout. Prior to the Supreme Court's 1965 decision in *American Shipbuilding Co. v. NLRB,* 380 U.S. 300 (1965), the Board consistently held that bargaining lockouts violated the Act. 380 U.S. at 306. However, in American Shipbuilding Co., supra, the Supreme Court analyzed the Act and found that "the employer's use of a lockout solely in support of a legitimate bargaining position" is not inconsistent with any requirement of the Act. *American Shipbuilding Co.,* supra at 310.

However, for a bargaining lockout to be permissible its purpose must be to bring economic pressure to bear in support of a legitimate bargaining position. If the lockout is implemented to compel acceptance of unlawful bargaining conduct, then the lockout is not permissible—it has become a weapon to enforce unlawful bargaining and a means of evading a duty to negotiate in good faith. As such, it is a violation of Section 8(a)(5) and (1) of the Act. *Teamsters Local 369 v. NLRB,* 942 F.2d 1078, 1085 (D.C. Cir. 1991) (enforcing *Association of D.C. Liquor Wholesalers,* 292 NLRB 1234, 1237, 1258 (1989)).; *Royal Motor Sales,* 329 NLRB 760, 765 (1999), 2 Fed. Appx. 1 (D.C. Cir. 2001). Moreover, locking out employees for the purpose of enforcing an illegitimate bargaining position also violates Section 8(a)(3) and (1). *Teamsters Local 369,* supra at 1085; *Globe Business Furniture, Inc.,* 290 NLRB 841 fn. 2 (1988) ("In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by locking out its employees, we note that the lockout was implemented following the Respondent's repeated, unlawful refusals to provide the Union with information it had requested for bargaining. Within the context of these preexisting unfair labor practices, the Respondent's subsequent lockout of its employees may not be found legitimate"), enfd. in unpublished decision, 889 F.2d 1087 (6th Cir. 1989). See, *R.E. Dietz Co.,* 311 NLRB 1259, 1267 (1993) (unlawful insistence on nonmandatory subject converts lawful lockout to unlawful lockout, and employees "became discriminatees as of that date and the refusal of the Respondent to reinstate them became, at that point, another unfair labor practice which violated Section 8(a)(1) and (3) of the Act").

In this case, as discussed, I have rejected the General Counsel's contention that the Company engaged in "overall" or surface bargaining throughout these negotiations. However, as also discussed, the Company's dismissive and unlawful response to the Union's October 4 bargaining request was no small matter. Without serious effort to engage the Union's right to request and seek answers to its questions, the Company moved forward as if the request did not matter, as if the end of further meaningful bargaining was a foregone conclusion, as if, having reached the end of its rope with the Union's rejection of the October 8 timed offer, only the force of a lockout of the union workforce and replacement with new employees could compel a successful end to these negotiations.

Throughout trial and throughout its brief, the Respondent insists that the General Counsel and Union's emphasis on health insurance proposals as the source of the failed bargaining is a mischaracterization of the situation. I am in significant agreement with the Respondent on this point. While I think it clear there was lingering concern over how to assure itself that the new proposed health care plan would not have any surprises, the Union was prepared to accept the new plan and indeed, did accept it or indicate willingness to accept it at various points. On the other hand, the severe wage cuts sought by the Respondent were the key stumbling block; the issue, as the Respondent stresses, above all others, that was outstanding at the time of the Union's information request on October 4 and at all times since. It is for precisely this reason that it was unsatisfactory for the Company to move forward to lock out the bargaining unit while unlawfully flouting its statutory duty to respond to information requests that expressly sought information relating to the Company's wage proposal and expressly sought to verify and substantiate the rationale for the wage cuts it insisted upon.

This unlawful response to information requests related to the central point of contention in negotiations. For that reason, that illegality rendered unlawful the lockout commenced in its support and in response to the employees' refusal to accept the Company's offer. As the Board stated in *Clemson Brothers,* 290 NLRB 944, 945 (1988), a case involving an employer's failure to provide requested information regarding an employer's inability to meet the union's demands:

> We concur in the judge's finding that the Respondent failed to bargain in good faith because it refused to allow the Union to verify its asserted inability to pay for the Union's demands. We, therefore, conclude that there can be no impasse because the cause of the alleged deadlock was the Respondent's own failure to bargain in good faith. Thus the Respondent was engaged in bad-faith bargaining at the point when it initiated the lockout and it maintained the lockout while continuing to refuse to bargain in good faith with the Union. And it is the Respondent's avoidance of its bargaining obligation in instituting the lockout, rather than the absence of a lawful impasse, which renders the lockout violative of Section 8(a)(3) and (1).

(footnotes omitted). See also, *Royal Motor Sales,* 329 NLRB 760 (lockout unlawful violation of 8(a)(3) and (5) where lockout was effort to compel acceptance of final proposal unlawfully implemented because no impasse had been reached in part because union was not provided time adequate time to review

[47] I note that KLB's October 19 letter to the Union announcing its intent to lock out employees suggests that a reason for the lockout was the Company's desire to "protect its business interest from disruption." However, there is no evidence of any looming disruption (e.g., an intent to strike or otherwise disrupt business), and this rationale for the lockout is not repeated in the evidence or in argument. I accept KLB and the General Counsel's contentions, and credit Johnson's uncontradicted testimony, that the true motive for the lockout was to compel the Union's acceptance KLB's bargaining position.

requested information); *Globe Business Furniture, Inc.,* 290 NLRB 841 fn. 2 (1988) ("In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by locking out its employees, we note that the lockout was implemented following the Respondent's repeated, unlawful refusals to provide the Union with information it had requested for bargaining. Within the context of these preexisting unfair labor practices, the Respondent's subsequent lockout of its employees may not be found legitimate"), enfd. 889 F.2d 1087 (6th Cir. 1989).

Further, in a significantly related line of cases, the failure to provide information on a subject that is important to ongoing bargaining will preclude a valid bargaining impasse, and therefore, unilateral implementation. *E.I. du Pont de Nemours & Co.,* 346 NLRB 553, 558 (2006) ("It is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse"), enfd. 489 F.3d 1310 (D.C. Cir. 2007) ("Board and court precedents reflect the principle that a denial of 'information relevant to the core issues separating the parties' can preclude a lawful impasse'" (quoting, *Caldwell Mfg.,* 346 NLRB 1159, 1170 (2006) ("Under consistent Board precedent, a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties"); *Wilshire Plaza Hotel,* 353 NLRB No. 29, slip op. at 2 (2008) ("the Respondent failed to provide to the Union admittedly relevant detailed calculations for the cost savings that the Respondent expected from its proposed wage and benefit concessions that were 'core' issues in the negotiations"); *Decker Coal Co.,* 301 NLRB 729, 740 (1991) ("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").

The Respondent points out, and cites cases to the effect, that the Board will not find that an employer's unfair labor practice taints a lockout simply because the unremedied unfair labor practice coincides with the lockout. Similarly, the Respondent cites cases in which the Board has held that the failure to provide information will not preclude a finding of a bargaining impasse where the information is not sought for a purpose relevant to the issues the parties are deadlocked upon. This is absolutely correct: there is no per se rule. The centrality of the unfair labor practice to the bargaining must be examined to determine if it renders the lockout illegitimate. In the cases cited by the Respondent, the Board found that the information requests were directed towards subjects peripheral or unrelated to the bargaining dispute.

Thus, in *Central Illinois Public Service Co.,* 326 NLRB 928 (1998), cited by the Respondent, the Board found 8(a)(5) violations based on the employer's failure to provide requested subcontracting grievance information and its failure to provide the names of outside companies supplying power to the employer. However, relying on the union's asserted reason for seeking the information, the Board pointed out that the Union "made clear that regarded subcontracting as a relatively minor issue, and no obstacle to contractual agreement." The request for information of outside companies, which was made months after the lockout began, "had an even less attenuated nexus to the issues under discussion in collective bargaining." According to the union, it sought the information "'to see if any other power companies were performing struck work' so that it could further determine 'who it could picket/handbill under the ally doctrine.'" 326 NLRB at 936. Accordingly, these section 8(a)(5) allegations did not render the lockout in support of the Company's bargaining proposal unlawful.[48]

By contrast, here, the Union's requested information was made by the Union for the express purpose of evaluating the Company's position on the admittedly central issue in negotiations—the wage dispute. As the Company has stressed (R. Br. at 48), "[t]he wage impasse independently explains why the parties have not reached agreement."

The Respondent's response, then, in October 2007, and now, in litigation, is to disparage the information request. The Union's motives are questioned, the right to obtain the information is questioned, the need and relevance for the information is questioned. The Respondent relies on Young's posturing at the table to conclude that the Union never would have agreed to wage cuts. Essentially, the Company says, there would have been no point in the answering the information request.

The Company's view is untenable. Notwithstanding Young's posturing at the bargaining table, the story of these negotiations is one of the Union inexorably giving more and more ground to Company demands. I disagree with the General Counsel's suggestion, that, under the circumstances, this evidences bad-faith bargaining. However, I also reject the Company's effort to rely on Young's bargaining rhetoric to justify the Company's failure to take seriously the Union's information request. The Company is quick to point out that the Board should be reluctant to adjudge bad faith motive from the concessionary substance of employer proposals. There is much to be said for that view. At the same time, the Company cannot arrogate to itself the determination that it would not have been useful to answer the Union's information requests—i.e., it would not have been useful to bargain in good faith—because, in the Company's view, it would have been unlikely to help matters. I certainly do not believe the record supports this self-serving speculation.[49]

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[48] See also, *Sierra Bullets*, 340 NLRB 242, 244 (2003) (rejecting contention that there was no impasse where unsatisfied information request on overtime was unrelated to parties 8 month deadlock over "four pack" of issues that the union considered necessary to reach agreement: union security, attendance, dues check-off, and management rights clause). Accord, *Brewery Products Inc.*, 302 NLRB 98, 98 fn. 2 (1991), where the Board adopted the ALJ's finding that a delay in providing information did not undercut a finding of an impasse or taint the subsequent lockout. The ALJ reasoned that the information was not significant for bargaining, most of the delayed information was provided prior to the lockout or made irrelevant by the withdrawal of proposals, and the ALJ found that the information requests did not affect bargaining because the union was reluctant to reach agreement with the employer prior to reaching agreement with the employer-association from which the employer had recently resigned. None of these factors are present in the instant case.

[49] *Royal Motor Sales*, 329 NLRB 760, 762 fn. 10 ("negotiators' tough statements suggesting 'unyielding opposition' . . . did not show

At the end of the day, as the Company itself stresses, wages were the central stumbling block in negotiations, and good-faith bargaining required that the Respondent attempt to answer the Union's questions and address its concerns on the Company's wage proposal. "The objective of the disclosure obligation is to enable the parties to perform their statutory function responsibly and 'to promote an intelligent resolution of issues at an early stage and without industrial strife.'" *Clemson Brothers,* 290 NLRB 944, 944 fn. 5 (1988) (quoting *Monarch Machine Tool Co.,* 227 NLRB 1265, 1268 (1977)). One certainly cannot be sure that if the Company had responded in good faith to the Union's information request that it would have led to settlement and the avoidance of industrial strife. But answering that speculative question is not the test. The Act regulates and governs the process of collective bargaining, not the outcome.[50] Central to this process is the mandatory exchange of requested relevant information necessary to explain, justify, and substantiate the proposals and explanations made at the bargaining table. Instead of doing that, as required by the Act, the Company essentially ignored its duty to treat with the Union's information request. Instead it gave one last shot at putting together a timed proposal in order to reach agreement and when that did not work it decided to lock out the employees in order to compel acceptance with the October 3 offer. It was not satisfying the statutory duty to bargain in good faith when it did so. It was unlawful to lock out its workforce—primarily it says, over the workforce's unwillingness to accept its wage proposal—while for over two weeks before the lockout (and continuously since the lockout) ignoring its statutory obligation to respond to requests for information explicitly aimed at gaining information to verify, substantiate and understand the Company's wage proposal and demand for wage cuts.

Accordingly, the lockout was implemented to compel acceptance of unlawful bargaining conduct. It thereby became a weapon to enforce unlawful bargaining and a means of evading a duty to negotiate in good faith. As such, it violated Section 8(a)(5) and (1) of the Act. *Teamsters Local 369 (D.C. Liquor Wholesalers) v. NLRB,* 942 F.2d at 1085; *Royal Motor Sales,* 329 NLRB at 765 (1999). It also violated Section 8(a)(3) and (1) of the Act. *Teamsters Local 369,* supra at 1085; *Globe Business Furniture, Inc.,* 290 NLRB 841 fn. 2; See, *R.E. Dietz Co.,* 311 NLRB at 1267.

Having found that the lockout was unlawful, it follows that the temporary replacement of the employees was "part and parcel" of the unlawful conduct and also a violation of Section 8(a)(1) and (3) and (5). *Association of D.C. Liquor Wholesalers,* 292 NLRB at 1237, 1258 (1989); *Clemson Brothers,* 290 NLRB at 945, 951.

The General Counsel also alleges that KLB violated the Act by cancelling the locked out employees' health care coverage and denying the locked out employees COBRA eligibility. For purposes of this analysis, I will assume that, had the employees been lawfully locked out, their insurance benefits would have terminated as a consequence, within a little over a month's time. The expiring labor agreement stated that:

> "[a]ll insurance benefits terminate no later than the end of the month following the month in which an employee is laid off or is off work for any reason other than circumstances which expressly give rise to insurance benefits hereunder."

Notwithstanding the above, just prior to the lockout, on October 19, KLB wrote to each bargaining unit employee informing them of the upcoming lockout and stating:

> In addition, please understand that, consistent with the law, your health insurance coverage will end effective October 23, 2007. Therefore, in order to continue insurance benefits past that date, you will need to apply for COBRA coverage. A notice regarding your benefit rights will be mailed to you.

On October 24, Johnson wrote to United Healthcare requesting that United Healthcare "cancel the entire group's coverage under this policy effective 10/22/2007."

The Respondent has offered no legitimate reason for canceling the employees' health care coverage effective October 22. It was not required by the lockout, by the existing health insurance plan, or by the existing terms and conditions of employment. The cancellation did not represent the implementation of a bargaining proposal upon reaching a valid bargaining impasse. Putting aside the issue of impasse, the cancellation of health insurance coverage was not part of KLB's bargaining proposal. The Respondent took it upon itself to write to United Healthcare and cancel the group coverage.

The intended result was to immediately eliminate health insurance for all locked out employees. Another result, perhaps unintended, was the elimination of employees' eligibility for COBRA coverage, for which the Respondent had encouraged employee to apply when their insurance coverage ended.[51]

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that they would never yield, but merely that they would not yield quickly without a fight"); *Allbritton Communications, Inc.,* 271 NLRB 201, 206 (1984) ("the Board must be especially wary of throwing back in a party's face nonsubstantive remarks he makes in the give-and-take atmosphere of collective bargaining. To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties"), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986). Moreover, as to Young's temper, the Board also explained in *Royal Motor Sales*, 329 NLRB at 776 fn. 49: "As to [the union representative's] use of profanity in this and other meetings, we note that '[a]ngry outbursts . . . made in the heat of bargaining are realities of negotiations.' *American Packaging Corp.*, 311 NLRB 482 fn. 5 (1993). We know of no case in which the use of profanity at the negotiating table was relied on for a finding that a party had engaged in dilatory tactics or that the parties were at impasse." (Board's ellipses).

[50] See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . [T]he fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract").

[51] Johnson's testimony would suggest that the loss of COBRA eligibility was an unintended consequence of the Respondent's cancellation of the group health insurance. Indeed, the Company's October 19 letter to employees had directed them to apply for COBRA coverage when their health insurance coverage lapsed. However, Johnson later learned that "no individuals under that policy were eligible for COBRA be-

Having found the lockout unlawful, any loss of health coverage derivative of the lockout would be, at a minimum, redressed as part of the remedy for the unlawful lockout. However, even in the absence of the unlawful lockout, the unilateral cancellation of the group health insurance plan—a change for which the evidence shows no notice was provided to the Union—is violative of Section 8(a)(5) and (1) of the Act. The fact that it occurred contemporaneously as part of the unlawful lockout suggests very strongly that it was motivated by the same discriminatory motivations that rendered the lockout a violation of 8(a)(3) and(1) as well: just like the lockout, it was intended to add to the pressure on the employees to accept the unlawfully maintained bargaining position of the employer. Again, no legitimate or substantial justification is proffered by the Respondent for acting to cancel the health insurance and the attendant elimination of COBRA. Accordingly, this is also a violation of Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. The Respondent KLB Industries, Inc., d/b/a National Extrusion and Manufacturing Company, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All hourly-paid production and maintenance employees in the Company's Bellefontaine, Ohio, plant but excluding all office and clerical employees, guards, professional employees and all supervisors as defined in the Labor Management Relations Act of 1947, as amended.

4. Beginning on or about October 4, 2007, and continuing thereafter, the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information necessary for the Union's performance of its collective-bargaining duties, including, information requested by the Union relating to current customers, quotes, outsourced work, past costumers, prices, market studies and/or marketing plans, and a complete calculation of projected savings from the Respondent's wage proposal.

5. Beginning on or about October 22, 2007, and continuing thereafter, the Respondent violated Section 8(a)(5), (3), and (1) of the Act by locking out and replacing its bargaining unit employees and cancelling their health insurance coverage.

6. On or about June 24, 2008, the Respondent violated Section 8(a)(1) of the Act by calling the police to the facility for the purpose of taking action against legal picketing.

7. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent shall provide the Union with the information requested in the Union's October 4, letter, consistent with the decision in this matter. The Respondent shall end the lockout of its employees instituted October 22, offer each locked out employee reinstatement 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, discharging, if necessary employees hired from other sources to make room for them. The Respondent shall reinstate the health insurance coverage for employees that it terminated at the commencement of the lockout including its COBRA policies. The locked out employees shall be made whole for any loss of earnings or other benefits incurred by them as a result of being unlawfully locked out, including but not limited to losses suffered on account of the termination of their health insurance coverage.[52] The amounts due shall be computed on quarterly basis for the entire lockout period continuing until the date of a proper offer of recall, less net interim earnings, with the amounts owed to be determined in the manner prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest on such amounts to be computed in accordance with *New Horizons for the Retarded, Inc.,* 283 NLRB 1173 (1987).[53]

The Respondent shall post an appropriate informational notice, as described in the Appendix, attached. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Re-

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cause we had canceled the entire policy." At trial, Johnson testified that when he learned that the employees' were ineligible for COBRA benefits he attempted to repurchase the plan but was told he could not because the employees were now considered "non-active" and therefore not eligible for the group insurance offered by United Healthcare. Johnston testified that he tried to put the employees on the office plan, but was told he could not, and that ultimately he asked his insurance broker to work directly with the individuals to help them obtain personal insurance policies and that he had Wakefield inform Young that the Company would pay any difference between the cost of insurance under COBRA and the amount an individual had to pay for a personal insurance plan.

[52] I have also found that the Respondent's cancellation of group health insurance coverage resulted in the employees' ineligibility for COBRA benefits. However, a separate make whole remedy for this violation is not appropriate, as any losses suffered as a result of the ineligibility for COBRA coverage caused by the Respondent's violation would be subsumed by make whole remedy for employee losses attributable to their loss of health insurance coverage during the lockout.

[53] The General Counsel requests that compound interest be awarded on backpay owed to employees. The Board has repeatedly considered this proposition in recent months and repeatedly declared, as recently as two weeks ago, that "we are not prepared at this time to deviate from our current practice of assessing simple interest." *Cadence Innovation*, 353 NLRB No. 77 fn. 1 (2009); *Acme Press*, 353 NLRB No. 73 fn. 3 (2008); *BSC Development Buf, LLC*, 353 NLRB No. 63, slip op. at 5 fn. 4 (2008). Given these pronouncements, I am not inclined to depart from the Board's traditional interest formula at this juncture.

gion 8 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[54]

ORDER

The Respondent, KLB Industries, Inc., d/b/a National Extrusion and Manufacturing Company, Bellefontaine, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith with the Union by failing and refusing to furnish the Union with information which is relevant and necessary to the Union's performance of its collective-bargaining duties, including outstanding union requests for information concerning current customers, quotes, outsourced work, past customers, prices, market studies and/or marketing plans, and a complete calculation of the projected savings from the Respondent's wage proposal.

(b) Bargaining in bad faith with the Union by locking out and replacing its employees in support of its bad-faith bargaining.

(c) Bargaining in bad faith with the Union by unilaterally terminating the employees' group health insurance coverage without notifying the Union and providing an opportunity to bargain.

(d) Discriminating in regard to hire, tenure, or terms of conditions of employment of its employees by locking out and replacing employees in support of its bad-faith bargaining.

(e) Discriminating in regard to hire, tenure, or terms of conditions of employment of its employees by terminating the employees' group health insurance coverage.

(f) Calling the police to the facility for the purpose of taking action against legal picketing.

(g) 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) Furnish the Union with requested information which is relevant and necessary to carrying out its collective-bargaining responsibilities, including fulfilling the outstanding union requests for information concerning current customers, quotes, outsourced work, customers, prices, market studies and/or marketing plans, and a complete calculation of the projected savings from the Respondent's wage proposal.

(b) Within 14 days from the date of this Order, offer all locked out employees full reinstatement 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, discharging, if necessary employees hired from other sources to make room for them.

(c) Make all locked out employees whole for any loss of earnings and other benefits suffered as a result of the employer's lockout, in the manner set forth in the remedy section of this decision.

(d) Restore the employees group health insurance coverage, including the COBRA policies, that it unilaterally terminated in October 2007 and make employees whole for all losses suffered as a result of the unlawful termination of the group health insurance coverage.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bellefontaine, Ohio, copies of the attached notice marked "Appendix."[55] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 October 4, 2007.

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

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

Dated, Washington, D.C. January 30, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish the Union with requested information necessary for the Union's performance of its collective-bargaining duties.

WE WILL NOT lock out or replace our employees in support of our bad faith bargaining conduct or to discriminate against employees for refusing to accept our bad-faith bargaining conduct.

WE WILL NOT unilaterally terminate employees' health insurance coverage without notifying the Union and providing an opportunity to bargain and we will not terminate employees' health insurance coverage as a means of discriminating against employees for refusing to accept our bad-faith bargaining conduct.

WE WILL NOT call the police to the facility for the purpose of taking action against legal picketing.

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

WE WILL provide the Union with requested information which is relevant and necessary to carry out its collective-bargaining responsibilities, including fulfilling all outstanding requests from the Union's October 4, 2007 information request, to the extent required by the NLRB decision.

WE WILL offer all locked out employees full reinstatement 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, discharging, if necessary employees hired from other sources to make room for them.

WE WILL make all locked out employees whole for any loss of earnings and other benefits suffered as a result of the lockout.

WE WILL restore the employees' group health insurance coverage, including the COBRA policies, that we unilaterally terminated in October 2007 and make employees whole for all losses suffered as a result of the termination of the coverage.

KLB INDUSTRIES INC. D/B/A NATIONAL EXTRUSION AND MANUFACTURING COMPANY