Alden Leeds, Inc. *and* United Food and Commercial Workers Union Local 1245. Case 22–CA–29188

July 19, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On August 30, 2010, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and Charging Party filed answering briefs, and the Respondent filed reply briefs.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] to modify his remedy, and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alden Leeds, Inc., South Kearny, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(c) Within 14 days after service by the Region, post at its South Kearny, New Jersey facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 email, 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

[1] There are no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by threatening to relocate operations if the Union did not submit to its bargaining demands, and violated Sec. 8(a)(5) and (1) by refusing to furnish financial information. In addition, there are no exceptions to the judge's finding that the lockout implemented on Nov. 3, 2009 did not violate Sec. 8(a)(5). (As indicated below, the Respondent does contest the finding that the lockout violated Sec. 8(a)(3).)

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

The Respondent has also requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] In adopting the judge's finding that the lockout was unlawful at its inception, we do not rely on any implication in the judge's decision that the Respondent failed to timely notify the Union of its bargaining position as to contract duration, or that the Respondent was obligated to inform the Union of concessions the Respondent might have been willing to make beyond those demands whose acceptance would end the lockout.

We agree with the judge, for the reasons he states, that the lockout's initial illegality was not cured when the Respondent provided the Union with a complete contract proposal on November 9, 2009, almost 1 week after the lockout began. The judge specifically so found and the Respondent has not argued in its exceptions or brief in support that the judge erred in so finding. Moreover, it is well established that "a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole." *Movers and Warehousemen's Assn. of Washington DC,* 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977). The Board further held in its decision on the merits in *Movers*, "the burden must be on Respondent to show that its failure to restore the status quo ante had no adverse impact on the subsequent collective bargaining," and that "no such showing has been made." Id. at 358. Here, the judge did not find that the Respondent has carried its burden in this regard and the Respondent did not except to the absence of such a finding. In these circumstances, further litigation of this matter at compliance is unwarranted. We further note that in *Greensburg Coca-Cola Bottling Co*., 311 NLRB 1022, 1029 (1993), enf. denied on other grounds 40 F. 3d 669 (3d Cir. 1994), on which our colleague relies, the judge expressly deferred the issue to compliance, and it does not appear that either party excepted so the matter was not before the Board.

Member Hayes observes that the Respondent's Nov. 9 contract proposal provided the Union with adequate notice of its bargaining position on all issues. As was stated in *Greensburg Coca-Cola Bottling Co.,* supra, 311 NLRB at 1029, an employer can avoid further liability for an unlawful lockout "if it is able to show affirmatively [in compliance proceedings] that a failure to restore the status quo ante did not adversely affect subsequent bargaining." As such, the Respondent had no obligation to raise or litigate the matter at this stage of this proceeding. Member Hayes notes that the Board's decision in *Greensburg* does not state whether exceptions were filed to the judge's remedy in that case. In any event, because it relates to the scope of appropriate backpay, Member Hayes would allow litigation of this matter at compliance despite the absence of a specific exception.

[4] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's remedy by requiring that backpay and any monetary awards shall be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for posting 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. In addition, we shall modify the judge's notice to conform to the Order.

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 November 3, 2009."

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

Dated, Washington, D.C. July 19, 2011

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) 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 on your behalf with your employer.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT lock out our employees without providing said employees with a timely, clear and complete offer, which sets forth the conditions necessary to avoid the lockout.

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

WE WILL, within 14 days from the date of this Order, offer our employees, whom we unlawfully locked out on November 3, 2009, reinstatement to their former jobs or, if these positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all locked out employees for any loss or earnings and other benefits resulting from our unlawful lockout, with interest.

ALDEN LEEDS, INC.

Jeffrey P. Gardner, Esq., for the General Counsel.
Steven S, Glassman, Esq. and *Brian Caulfield, Esq. (Fox Rothschild)*, of Roseland, New Jersey, for the Respondent.
Jessica Drangel Ochs, Esq. (Meyer, Suozzi, English & Klein, PC), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by United Food and Commercial Workers Union, Local 1245 (the Union) or Local 1245, on November 5 and December 9, 2009,[1] and January 11, 2010, the Director for Region 22 issued a complaint and notice of hearing on March 31, 2010, alleging that Alden Leeds, Inc. the Respondent), violated Section 8(a)(1), (3), and (5) of the Act by unlawfully locking out its employees and Section 8(a)(1) and (5) of the Act by failing to provide the Union with financial information following Respondent's assertion of its inability to afford increases in health contributions.

The trial with respect to the allegations in said complaint was held before me in Newark, New Jersey, on May 18 and 21, 2010. At the hearing, I granted General Counsel's motion to amend the complaint.

Briefs have been filed by all parties and have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a corporation with an office and place of business in South Kearny, New Jersey, has been engaged in the business of manufacturing pool cleaning supplies and chemicals. During the preceding 12 months, Respondent derived revenues in excess of $50,000 from the sale and shipment of goods directly from its South Kearny facility to points outside the state of New Jersey.

Respondent admits, and I so find, that it is and has been an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

Respondent manufactures and packages swimming pool cleaning supplies and chemicals at two locations in South Kearny, New Jersey, 100 Hackensack Avenue,[2] where Respondent makes tablets and packs granular products, and 55 Jacobus

[1] All dates referred to are in 2009, unless otherwise indicated.
[2] This facility is referred to as "Kearny East."

Avenue, which consists of the main office and a warehouse, where Respondent does shipping, receiving, labeling, and inventory.

Mark Epstein is the president and chief executive office of Respondent. Epstein is also the president of a company located in Oklahoma, named Mid-Continent Packaging, which is engaged in a similar business. Respondent regularly ships products to and received products from Mid-Continent. Mid-Continent is not unionized.

Respondent has been in operation for over 40 years. Mid-Continent has been operating for 18 years.

Approximately 90 percent of Respondent's customers are located in the Northeast and Mid-Atlantic Region of the country and are serviced from the two Kearny locations.

Respondent employs approximately 50 production and delivery employees at the two Kearny locations, who have been represented by Local 1245 since 2001. Prior to that time, its employees were represented by Local 174 of the UFCW. In 2001, Local 1245 became the representative as a result of some undisclosed union procedure, and Respondent agreed to recognize Local 1245 as the successor union to Local 174.

Respondent and Local 1245 negotiated two prior collective-bargaining agreements. The parties agreed to continue the terms of the prior agreement between Local 174 and Respondent, which expired on October 3, 2002, and executed memoranda of agreement on October 19, 2002, and sometime in 2005, which reflected agreed upon changes to the prior agreement. The 2005 contract was a 4-year agreement with an expiration date of October 3, 2009.

Mark Epstein negotiated both of these contracts on behalf of Respondent, as well as the prior contracts with Local 174. Although Epstein negotiated these contracts by himself and did not have counsel with him at negotiations sessions, he consulted with legal counsel during the negotiations.

Tom Cunningham was and is the union business agent assigned to Respondent, and he negotiated the two prior MOAs with Epstein in 2002 and 2005.

B. The Bargaining Sessions

On July 17, a letter was sent by Vincent DeVito, president of the Union, to Respondent requesting the reopening of the contract and notifying it that Cunningham would contact Epstein to arrange "mutually satisfactory" meeting dates.

In September, Cunningham contacted Epstein and they subsequently agreed upon a meeting on September 30. Epstein requested that Cunningham forward to him the Union's proposals prior to the meeting. Cunningham complied on September 22 by sending the Union's requested modifications, including increases in wages, sick days, vacation, changes in seniority, and a 3-year contract. The document also indicated that there would be increases in health care insurance premiums but no figures were provided. Cunningham stated that he was still waiting for the amounts from the Health Fund Office and would have them prior to the September 30 meeting.

The September 30 meeting was held in Epstein's office. Present were Cunningham and Epstein. Cunningham presented Epstein with an updated version of the Union's proposals, which included the amounts of the health care contributions that were being requested. Cunningham went through the Union's proposals one by one. Epstein made no comments or responses until Cunningham reached the health care contribution rates. Epstein turned to his computer and made some calculations. He then informed Cunningham that these increases were outrageous, the rates were very high and that Respondent was not going to agree to these numbers.

Cunningham asked why. Epstein explained that this year had been a very cold and wet summer with record rainfall in May and record cold weather in June. Thus, pool construction was down 50 percent, its competitors reduced their prices and customers were complaining that they were not selling very many pools. Thus, Respondent's sales were drastically affected.

Epstein further explained that Respondent was involved in a dispute with the Department of Commerce over the government's failure to refund Respondent antidumping fees and several hundred thousand dollars was involved. As a result, Epstein told Cunningham "things were not good" and Respondent was experiencing "financial hardship." Epstein added that he was going to explore alternative health care plans with Respondent's insurance broker.

Cunningham then asked Epstein to sign a 30-day extension of the expiring contract. Cunningham stated that the signing of such a document would give the parties time to search out the additional health plans and give the parties time to negotiate. Epstein replied that he would not sign an extension and added, "I can't do anything."

The next meeting took place on October 5, once again attended by Epstein and Cunningham. Epstein handed Cunningham a spreadsheet consisting of descriptions of several alternative health plans that had been prepared by Respondent's broker. Cunningham looked over the documents and observed that the deductibles and out of pocket costs were very high in all of these plans. He added that Respondent's employees "lived week to week" and if the employees had to come up with a lot of out of pocket money, the plans wouldn't work for them.

Epstein responded that his broker would be looking into other health care plans that might be more affordable for the employees. Cunningham then attempted to discuss the Union's other proposals. Epstein interjected that he "couldn't do anything" with the other proposals, and that Respondent wanted to keep everything the same for 1 year and all he was looking for was "a freeze for one year." Cunningham responded that the Union could not do that because contributions that Respondent was currently paying would not sustain medical coverage for that year.

Cunningham added that although he did not think that an offer of a 1-year freeze would be acceptable, he would take it back to the membership for a vote.

Cunningham then renewed his prior request that Respondent sign an extension agreement, Cunningham reminded Epstein that the contract had already expired and that it was "pretty important" that an extension be signed. Epstein declined to sign and repeated that he would forward to the Union additional health care plans.

After this meeting, Cunningham had a discussion with John Troccoli, the Union's secretary treasurer, concerning the status of negotiations. Cunningham informed Troccoli that Respon-

dent had refused to sign an extension agreement, the contract has expired and asked Troccoli to assist in obtaining an extension. Cunningham also told Troccoli that Respondent was "looking for his own health" plan and that it was having some financial problems because of a dispute with the government about dumping fees. Troccoli instructed Cunningham to set up another meeting and he (Troccoli) would attend.

Immediately after the October 5 meeting, Epstein sent an email to his three brothers, who are also involved in operating the business. The email noted that he had just met with Cunningham and told Cunningham that Respondent offered a "status quo" contract and that Cunningham had stated that he will "bring back the offer of one-year status quo but he doesn't think it will be acceptable."

On October 8, the parties met once again in Epstein's office. Troccoli was present in addition to Cunningham on behalf of the Union. Troccoli began the meeting by explaining to Epstein that it was important to sign an extension agreement to give the parties more time to bargain. Epstein responded that he was still trying to obtain some additional health plan proposals and asked if Troccoli was aware of that. Troccoli replied that yes, Cunningham had made him aware of it. There was no discussion of the health plan that Respondent had given to the Union on October 5. Initially, Epstein refused to sign an extension and told Troccoli that Respondent has this issue with the government about dumping fees. Troccoli answered that Cunningham had explained that to him but he was not sure what the problem was. Epstein discussed the issues involving tariffs, bringing chemicals in from foreign countries, dumping fees, and excise taxes, and that these problems created a hardship for Respondent and could cost Respondent several hundred thousand dollars. Troccoli asked Epstein if he had any documentation that the Union could look at so that the Union could analyze the problems that Respondent was facing. Epstein left the room and returned with two documents that he handed to the Union. The first document, entitled "For Alden Leeds Brief Summary of Customs Issues," is a 1-page summary of the issues apparently prepared by Respondent. The second document consists of 6 pages, plus a 1-page index, prepared by an official of the Department of Commerce, International Division discussing the issues.

After briefly reviewing these documents, Troccoli observed that in the "long run" Respondent may never pay "this kind of money." Epstein replied that Respondent was still fighting the government with respect to these matters.

Epstein also told the union representatives that it was becoming more difficult for Respondent to deal with these issues with the government and with the Union, and he was considering moving the operation to Oklahoma, where he has another facility. Troccoli jokingly responded, "Mark, I can't see you in a cowboy hat."

Epstein repeated the offer that he had made at the previous meeting that Respondent wanted to extend the contract for 1 year and that it wanted a 1-year "freeze." Troccoli responded that with all these problems that Epstein was telling the Union that Respondent has, there is even more reason to sign an extension agreement.

Troccoli continued to push for Epstein to sign an extension agreement. He handed Epstein a copy of an agreement, which the Union had prepared, and asked Epstein to look it over. Epstein did and informed the Union that he would not agree to retroactivity since he was not offering anything more than the current agreement. Troccoli agreed to this revision stating that it would give the parties more time to bargain and to consider Respondent's health plan proposals. Epstein informed Troccoli that he expected to have information on some additional plans by the next week. Epstein also told Troccoli that he would be in Oklahoma the following week.

The parties signed an extension agreement with the retroactivity phrase crossed out. The contract was extended to November 2. The meeting ended without a new meeting scheduled since Epstein was to be in Oklahoma the next week, but with a promise by Epstein to forward additional health plans to the Union.

My findings with respect to the above bargaining sessions are based on a compilation of the credible portions of the testimony of Epstein, Cunningham, and Troccoli. While much of the facts are not in dispute, there are some significant credibility issues, particularly the testimony of Cunningham, supported in part by Troccoli, that at the September 30 and October 8 bargaining sessions, Epstein stated that Respondent "could not afford" the Union's proposals, that the Union requested that Respondent make its financial records available to the Union's auditors and that Epstein refused to agree to do so.

As noted in my summary of the facts detailed above, I did not include these assertions by Cunningham and Troccoli because I credit Epstein's testimony that these alleged statements were not made at either meeting. I make these findings for a number of reasons. Initially, I note that Cunningham failed to include in his bargaining notes of either of these meetings that Epstein told the Union that Respondent could not afford the Union's demands or increases, or that the Union representatives requested that he submit financial records to the Union's auditors. Cunningham did include statements made by Epstein about financial difficulties Respondent was having, such as problems with the government concerning dumping fees and the cold and wet season. I find it highly improbable that Cunningham would omit writing down such an important statement such as a claim that Respondent can't afford the Union's increases and that the Union consequently requested to inspect Respondent's records, if such comments had been made.

Similarly, Cunningham's affidavit did not include an assertion that Epstein stated that Respondent could not afford the Union's increases at the October 8 meeting.

I also rely on a number of subsequent conversations and events, which shed light on this issue. Thus, on October 30, Union President Vincent DeVito discussed the status of negotiations with Troccoli. Troccoli informed DeVito that the extension agreement that had been signed was close to expiring and that he (Troccoli) was going to call Epstein later that day. Troccoli informed DeVito that the key issue during negotiations was the cost of the health care plan and that Respondent was looking for alternative plans. Troccoli asked DeVito what he could offer Respondent to keep things moving. DeVito authorized Troccoli to offer Respondent the option to continuing the same contributions for 1 year but with the possibility that benefits

might be reduced. Nowhere in this conversation did Troccoli inform DeVito that twice during the prior negotiations, Epstein had stated that Respondent "couldn't afford" to pay the increases or that the Union had asked to see Respondent's financial records. Similarly, when DeVito asked Cunningham on November 2 for a summary of developments at negotiations, Cunningham informed him that Respondent has proposed a freeze, but that the health care contributions were the big problem and they could not get past that issue. Again, nowhere in that conversation did Cunningham inform DeVito that the Union had requested to inspect Respondent's financial records or that Respondent has said that it couldn't afford the increases requested by the Union.

I find it highly likely that had these statements been made at either the September 30 or October 8 meetings that Troccoli and Cunningham would have informed DeVito of such developments. Their failure to do so suggests to me that they did not happen.

Further, and in a similar vein, on November 4 at the first meeting that the parties had after the lockout of November 3, DeVito, who had become chief negotiator for the Union, asked to see Respondent's financial records. Both Epstein and Steven Glassman, Respondent's attorney, responded that Respondent had not claimed an inability to pay, and therefore, Respondent had no obligation to show to the Union its financial records. Significantly, neither DeVito, nor Troccoli (who was also present), mentioned anything at the meetings about the alleged facts that Epstein had stated at the September 30 and October 8 meetings that Respondent could not afford the Union's proposed increases or that the Union had asked to have its auditors inspect Respondent's records.

Similarly, on November 9, the parties again met. At this meeting, Respondent submitted a detailed "final offer," which provided for no wage increase. Again, there was no mention at this meeting that the Union had requested to inspect Respondent's records as a result of a claim that Epstein had stated that it "could not afford" the Union's increases.

On November 12, the parties met again. DeVito announced that the employees had turned down Respondent's final offer although the Union had explained to the workers that Respondent was having financial difficulties. Glassman responded that Respondent had never said that it had an inability to pay and that it had no obligation to show its books and records. DeVito replied that Respondent must be suffering from financial difficulties because it did not offer a wage increase. Glassman replied that Respondent never said that it could not afford the Union's proposal or that it was suffering from financial difficulties. Significantly, neither DeVito, Troccoli, nor Cunningham, who was also present at this meeting, contradicted Glassman's assertion that Respondent had not stated that it could not afford the Union's proposal.

Indeed, the first time that the Union mentioned that alleged requests to see Respondent's books were made on September 30 and October 8, as well as the claim that Respondent could not afford the Union's increases, was in a letter from DeVito to Epstein dated January 14, 2010. In that letter, which was admittedly the first time that the Union made a request in writing to inspect Respondent's records, DeVito referred to the two alleged prior requests on September 30 and October 8 by Cunningham and Troccoli, respectively, as well as an assertion that Respondent has claimed "an inability to afford the Union's increases." Glassman responded to this letter by letter of January 15, 2010, stating that contrary to DeVito's letter, Epstein never told Cunningham or Troccoli that it couldn't afford the Union's proposals and that the Union did not request to see Respondent's books until the November 4, 2009 meeting. Glassman reminded DeVito that neither he nor Troccoli had stated at the November 4 meeting, or at any other time, that Epstein had stated previously that Respondent could not "afford the Union's increases."

I therefore find that the failure of any of the union representatives to assert that Epstein had made such assertions on September 30 or October 8, or that the Union had requested to inspect Respondent's records on these dates until mid-January 2010, to be persuasive evidence that these events did not happen. I credit Epstein's testimony that he was an experienced negotiator and that based on this experience he knew that Respondent would be obligated to furnish financial records if it pleaded inability to pay. Thus, he would never state that Respondent "could not afford" the Union's proposals.

Accordingly, based on the above factors, I do not credit the testimony of Cunningham and Troccoli in this respect, and find that Epstein did not say that Respondent "couldn't afford" the Union's proposals or increases, and that no request was made by the Union to inspect Respondent's records on September 30 or October 5.

However, I do credit the mutually corroborative testimony of Troccoli and Cunningham that on October 8 Epstein did mention that in view of the Union's costs and other problems that Respondent was having, he was considering moving his operation to Oklahoma. Although Epstein denied making this statement, I credit Troccoli and Cunningham, particularly in view of their mutually corroborative testimony that Troccoli retorted to Epstein, "I can't see you in a cowboy hat." I find this testimony to have a "ring of truth" to it and that is not the kind of testimony that is likely to be made up.

Finally, I credit Epstein's testimony, over Cunningham's denials, that at the October 5 meeting, Cunningham agreed to take Respondent's offer of a 1-year freeze to the membership, but that he (Cunningham) did not think it will be acceptable. I rely upon Epstein's email to his brothers immediately after that meeting reporting on the meeting and including that agreement by Cunningham.

C. The October 21 and October 22 Emails

On October 21, Epstein emailed Cunningham an additional medical plan for the Union to review accompanied by an assertion he "hoped to have something even better" and that he will advise if anything else comes through. Epstein also suggested, "Let's meet to discuss early next week."

The next day, October 22, Epstein emailed Cunningham an analysis of the program that it provided that day before. It reads as follows:

> Tom,
> We've analyzed the medical coverage program that we forwarded to you yesterday.

> While we are still hopeful of finding a less expensive option, here is an analysis of what we already have been offered.
> The current Union plan is costing Alden Leeds $20,000 per month and the proposed renewal would cost $35,000 per month.
> The plan we forwarded yesterday would cost $27,500 per month or halfway between the existing Union plan and the proposed Union renewal plan.
> The plan from yesterday has $1,150 deductible for single and $2,300 deductible for family.
> If we were to provide single coverage only the cost would drop to $18,500 per month.
> Based upon 46 members we could provide the first $400 deductible to each member which would bring the cost back to the existing $20,000 per month.
> Members with families would have to pay for the differential between single and family coverage and as mentioned above would be subject to higher deductibles.
> One question to ask is: "Why should those who are single support the cost of family coverage for those who have families?"
> I wanted to provide you with this analysis in advance of our next meeting.
> I hope to have something better today and if so we will forward it to you.
> Mark

Later in the day on October 22, Epstein emailed Cunningham still another medical plan, and observed that the cost is similar to "yesterday's plan" but the deductible is higher. However, the "only advantage of this plan is that no medical questions are asked whereas the plan from yesterday has a form to fill out with medical history."

Cunningham showed these plans to Troccoli at some point after the Union received them. They discussed them and Cunningham told Troccoli that he wasn't really sure what Respondent was proposing on health care and that Respondent had made no proposal dealing with any of the Union's issues. Troccoli reviewed the plans and told Cunningham that he thought that the deductibles were too high and he didn't think that any of the plans presented by Respondent would be feasible. He told Cunningham that he would speak to DeVito to see what the Union could propose to Respondent concerning the Union's health plan.

D. The Events of October 30

On October 30, Troccoli spoke with DeVito. Troccoli told DeVito that the parties were nearing the end of the extension and asked DeVito what the Union could offer to Respondent concerning medical coverage in order to "keep this thing moving." DeVito instructed Troccoli that they could offer Respondent the same medical plan with the same contributions for 1 year but with the caveat that the trustees could cut some benefits in the plan.

Later on in the day, Troccoli telephoned Epstein. Troccoli informed Epstein that he had received the plans that Respondent had submitted and that he didn't think any of them were going to work because the deductibles were way too high, medical reviews were required and the cost to employees would be too high. However, Troccoli offered Epstein the continuation of the Union's plan for 1 year at the same contributions levels but added that it may result in a cut in benefits depending upon the trustees' decision. Troccoli requested that the parties go forward and discuss the other issues. Epstein replied, "You don't understand. I just want to keep everything the same. I don't want to pay anything more. . . I want to keep everything the same for one year." Troccoli answered that the Union did that with health care and asked to discuss some other issues. Epstein repeated that he wanted to keep everything the same for 1 year. Epstein then informed Troccoli that Cunningham was supposed to have the people vote on his offer. Troccoli responded that he was unaware of that and asked Epstein, "Vote on what?" I have no idea what we're voting on." Epstein asked Troccoli if he was aware of the Respondent's offer to pay $400 towards the deductible. Troccoli answered that he was unaware of this offer.

Epstein added that if the employees did not vote and agree on Respondent's offer, the employees would be locked out. Troccoli repeated that he did not know what the employees are supposed to be voting on. Epstein replied that the Union would have something by the end of the day.

At 3:32 p.m., Epstein sent an email to the Union. It reads as follows:

> Tom/John,
> During the 30 days since the Agreement between the parties expired we at the Company have tried our best to come up with an alternative medical plan that would cost the same or less than the proposed increase for the Union plan.
> Our best efforts resulted in a plan that 1) requires medical interview for coverage 2) does not include dental 3) does not include optical 4) did not cost less than the expiring plan.
> However if we were to eliminate the family coverage and go to single coverage for all Union members then this plan would cost less than the expiring Union plan. There would be enough of a savings that the Company would provide $400 to each member to go toward their deductibles. John Tracoli stated that he had been unaware of this option but regardless that the Union will keep to the existing plan and would cut benefits to keep the cost to the Company the same as the expiring plan.
> Tom had stated that he would meet with members by today, Friday, October 30. However that meeting did not take place.
> I stated that with all of the above taken into consideration the Company still wants a freeze on wages for a one or two year Agreement.
> If two years is out of the question then a one year Agreement is the only other option.
> If we have no Agreement between the parties by close of business on Monday then the Company will lock out the Union members on Tuesday morning Nov 3, 2009.
>
> Mark Epstein
> President

DeVito and Troccoli were in a staff meeting when the email arrived. They saw it when the meeting ended after 6 p.m.[3] De-

[3] Cunningham was not in the office on October 30.

Vito, and Troccoli briefly discussed the negotiations and decided to discuss the email on Monday when Cunningham would be in the office. DeVito also told Troccoli that he needed to consult with legal counsel with respect to Respondent's threat of a lockout.

My findings with respect to the events of October 30 are based on a compilation of the credible portions of the testimony of Troccoli, Cunningham, DeVito and Epstein. Most of the relevant facts are not in dispute, expect that Epstein testified that his conversation with Troccoli took place a few days prior to October 30.[4] I credit Troccoli and Cunningham that the conversation occurred on October 30 and that it was solely between Troccoli and Epstein.

I find that Troccoli's testimony is supported by DeVito's testimony that Troccoli spoke to Epstein on October 30 and by Cunningham's credited testimony that he did not participate in any joint conversations with Epstein and Troccoli earlier in the week of October 30.

Further, my reading of the October 30 email from Epstein to the Union supports Troccoli's testimony that Epstein was responding to Troccoli's request to notify the Union precisely what contract terms that Respondent was demanding that the employees agree to in order to avoid the threatened lockout.

E. Events of November 2

On Monday, November 2, DeVito, Cunningham, and Troccoli met to discuss the email and what action to take. Both Troccoli and Cunningham were confused about what Respondent was proposing in that email. Troccoli referred to Epstein's discussion of health care as "mentioning dribs and drabs of a health plan," and that Troccoli was uncertain which plan, if any, Respondent was proposing. Troccoli was also confused about Epstein's reference to 1 or 2-year agreement. During the negotiations, Epstein had proposed "keeping everything the same for one year." He had not mentioned a 2-year freeze or a 2-year agreement. Thus, Troccoli did not know whether Respondent was proposing a 1 or 2-year freeze or leaving it up to the Union.

Cunningham was also confused about the meaning of the email. He noted that Epstein's email had proposed a freeze on wages for 1 or 2years, which was different than the 1-year freeze on everything that Epstein had proposed during negotiations.

Despite their confusion about the meaning of the email, the Union made no effort to contact Epstein on November 2 to clarify what precisely Epstein was proposing in order to avoid the lockout.[5]

At 4 p.m., on November 2, Epstein called Shop Steward Simon Hemby into his office. Epstein informed Hemby that "effective immediately" the employees at both locations are locked out. He instructed Hemby to notify the employees at both facilities. Hemby did so and also contacted the Union and notified Cunningham. Cunningham informed Hemby that he would inform DeVito and DeVito would call Hemby with instructions on how to proceed.

The Union decided that all the employees would report to work on November 3 and attempt to punch in accompanied by the union representatives.

F. The November 3 Lockout

As planned, about 40 employees, plus Hemby, Cunningham, DeVito, and Troccoli arrived at Respondent's facilities to punch in at both facilities, but were prevented from doing so by supervisors.

At the main facility, the employees and the Union representatives sought to meet with Epstein. Epstein agreed. However, when Epstein was confronted with the employees in his office, he went into a tirade and said, "Get these 'F'n' people out of my office. What kind of stunt is this?"

DeVito responded that the Union was here to discuss Respondent putting the people back to work. Epstein answered, "I'm not discussing anything until you get these 'F'n' people out of my office." DeVito then instructed Troccoli to bring the employees outside and he, Cunningham, and Hemby would talk with Epstein. Troccoli escorted the employees outside to the parking lot, and Hemby, Epstein, and DeVito had a brief discussion with Epstein.

DeVito began the meeting by asking Epstein to allow the employees to return to work and the parties could sit down and come to some common ground and resolve any issues. Epstein responded that he would not allow the employees to return to work unless there was a signed agreement. There was no discussion at that time about the terms of the agreement that Respondent was seeking the employees to approve. At the end of the meeting, the parties agreed to meet the next day, November 4.

My findings with respect to the events of November 3 are based on a compilation of the credited portions of the testimony of DeVito, Cunningham, Hemby, and Epstein. Most of the facts set forth are not in dispute, except that Hemby testified that at the November 3 meeting, DeVito requested that Epstein show the Union its books to prove that Respondent was having a "so-called bad year." I do not credit Hemby's testimony in this regard since neither Cunningham nor DeVito corroborated this assertion and Epstein denied that DeVito asked to see Respondent's financial records at that meeting.

G. Bargaining Sessions Subsequent to November 3

The parties met on November 4. As noted above, at this and subsequent meetings, Steven Glassman, Respondent's attorney,

[4] Epstein also testified that Cunningham also participated in the conversation.

[5] Epstein testified concerning what he viewed as Respondent's proposal based on his email. He asserted that he was proposing a 1 or 2-year freeze on wages. In his view, there had been a previous agreement on a 1-year freeze on health benefit contributions during his conversation with the union officials. Epstein still preferred a freeze for 2 years but since he didn't think the Union would agree to a 2-year freeze, he would accept a 1-year freeze. He also testified that he was still offering the health plans discussed in his email but they had been rejected by the Union. While Epstein had requested a freeze on wages (and health contributions, which had been agreed to, in Epstein's view), he asserted that "I would have left myself open to discussing the other issues," such as vacations, sick pay, and personal days that the Union was proposing.

was present[6] as was DeVito, who took over as the Union's chief negotiator. At this meeting, DeVito requested to see Respondent's financial records. Both Glassman and Epstein responded that Respondent was not claiming an inability to pay and had no obligation to produce financial records.

On November 6, DeVito sent an email and letter to Epstein. It reads as follows:

> Mr. Epstein:
>
> This is to advise you I received the e-mail that you sent to Union Representative Tom Cunningham. I would ask that any future e-mails be addressed to me (Betty@local1245.com). Tom will be copied on these e-mails internally, and be part of all discussion with regards to Alden Leeds.
>
> So that we may be completely clear, I indicated to you at our meeting on Tuesday, November 3rd, 2009, that my availability is extremely limited for the next two weeks. That **does not mean** that I am not available at all. My team and I are available for negotiations Saturday, November 7th anytime, Sunday, November 8th until Noon time, Monday, November 9th anytime, and Thursday, November 12th anytime.
>
> I am encouraged by your first sentence, which indicates that you're available to **negotiate** anytime until November 13th because at our meeting on Tuesday (November 3rd) all you were prepared to do was **dictate** terms on which you would bring the people back to work, not negotiate!
>
> Please advise (weekend/nights contact # is 973-650-6693).
>
> Sincerely,
>
> Vincent J. DeVito
> President

The parties met again on November 9. At this meeting, Respondent presented (for the first time) a comprehensive document entitled "Final Offer." It reads as follows:

> FINAL OFFER DATED NOVEMBER 9, 2009
>
> TERM - OCTOBER 4, 2009 THROUGH OCTOBER 3, 2010
>
> EFFECTIVE DECEMBER 1, 2009 SECOND TIER BENEFITS FOR ALL EMPLOYEES: DENTAL, VISION, HOSPITALIZATION, MAJOR MEDICAL, LIFE INSURANCE, WELLNESS BENEFITS, PRESCRIPTION, CONTACT LENSES FOR MEMBERS ONLY.
>
> TOTAL CONTRIBUTION RATE TO HEALTH PLAN SHALL BE AS FOLLOWS:
>
> $397 x 21 employees = $8,337
>
> $466 x 25 employees = $11,650
>
> TOTAL PER MONTH = $19,987
>
> 90% PAID BY EMPLOYER / 10% PAID BY EMPLOYEE EMPLOYER SHALL HAVE THE OPTION OF WITHDRAWING FROM THE LOCAL 174 COMMERCIAL PENSION FUND. IN THE EVENT THE EMPLOYER WITHDRAWS THE PARTIES WILL MEET TO DISCUSS ALTERNATIVE RETIREMENT PLANS.
>
> ALL OTHER TERMS OF THE AGREEMENT DATED OCTOBER 3, 2005 NOT MODIFIED HEREIN SHALL REMAIN IN FULL FORCE AND EFFECT.

On November 12, the parties met again. DeVito announced that the employees had rejected Respondent's final offer. He also stated that he had informed the workers that Respondent is having financial difficulties. Glassman replied that Respondent was not having financial difficulties, had never said it had an inability to pay and it had no obligation to show its books. DeVito responded that Respondent must be suffering from financial difficulties because it didn't offer any wage increases. Glassman repeated that Respondent had not said that it could not afford the Union's proposals and Respondent was not suffering from any financial difficulties.

Notably, as I observed above, in none of these bargaining meetings, did any of the union officials present (i.e. DeVito, Cunningham, or Troccoli) ever state that on September 30 or October 8 that Epstein said that Respondent could not afford the Union's increases, or that the union officials (Cunningham and Troccoli) had requested on these two dates, or any other time for that matter, to inspect Respondent's financial records.

As I also noted above, it was not until January 14, 2010, in a letter from DeVito to Epstein did the Union make such an assertion. That letter states:

> January 14, 2010
>
> Sent via Facsimile, E-Mail & USFC Mail
> Mr. Mark Epstein
> President
> Alden Leeds, Inc.
> 55 Jacobus Avenue
> South Kearny, NJ 07032
>
> Mr. Epstein,
>
> At our bargaining session of September 30, 2009, you stated your inability to afford the Union's proposals. Union negotiator Tom Cunningham requested access to your books to verify your claims. On October 8, 2009, John Troccoli, Jr., and Tom Cunningham repeated the request that you make your books available to verify your persistent claims that you could not afford the proposals. At a meeting on November 12, 2009, between you, your team and Local 1245, you were asked a third time if you were prepared to give our accounting firm access to your financial records to verify your claims and your response was "absolutely not."
>
> We renew our request. In addition, we are requesting proof of the dumping fee you stated you had to pay the government and we asked for previously. We believe a re-

[6] Also present were Andrew and Brett Epstein, Mark Epstein's brothers, plus a mediator.

view of documents that support your hardship claims may allow us to be more flexible.

In any event, we would like to meet to discuss these issues. There have been some developments in other contract negotiations that may allow a different perspective by both parties.

Please advise me of your availability.

Respondent responded to this letter by a letter from its attorney to DeVito dated January 15, 2010, as follows:

Dear Mr. DeVito:

This is in response to your letter dated January 14, 2010, which contains numerous misstatements. This is not surprising given Local 1245's behavior during the past four (4) months including lying and misleading bargaining unit employees regarding negotiations and bargaining in bad faith. Let me remind you of what has actually transpired.

Mark Epstein never told Tom Cunningham that Alden was unable to "afford the Union's proposals". Nor did Cunningham request access to the books to repeat his request on October 8, 2009. Local 1245 requested the Company's books for the first time at the initial bargaining session on November 4, 2009. I made it crystal clear that Alden was not claiming an inability to pay and that Alden had no obligation to produce its financial records. At no time did you or John Tracoli (sic) ever state that Mark previously told Cunningham and Tracoli (sic) on September 30, 2009 that Alden could not "afford the Union's proposals."

During the bargaining session on November 12, 2009, you stated that Local 1245 advised bargaining unit employees that Alden was having financial difficulties. I stated that Alden never said it was having financial difficulties and reiterated that the Company was not claiming an inability to pay. You responded that the Company was not offering a wage increase and I told you that did not mean Alden was having financial difficulties. You acknowledged that Alden ever stated it was having financial difficulties. Moreover, you did not request financial records for the "third time" on November 12, 2009 and I never said "absolutely not". When I repeated that Alden was not claiming an inability to pay, I then said that there was no obligation to produce financial records.

Please advise why the information you are requesting regarding the Dumping Fee is relevant. Finally, we are available to meet on January 28, 2010.

My findings with respect to the discussions at the meetings in November 2009 are based on the credible and unrefuted testimony of Epstein. Neither General Counsel nor Charging Party called any union witnesses to deny any of Epstein's testimony concerning these meetings.

H. The December 24 Conversation between Hemby and Steve Belvin

On December 24, Hemby came to the plant to pick up a cheesecake that he had ordered from a clerical employee. He encountered Respondent's plant manager and supervisor Steve Belvin, and they began discussing the lockout and the possibility of some employees coming back to work. In the course of this discussion, Hemby observed that the work at Kearny East was very hard, working with raw chemicals and it would be very hard to replace those workers. Belvin replied that Respondent would send the work to Oklahoma. The record establishes that both before and after the lockout Respondent would receive products from the Oklahoma facility. Additionally, Respondent did hire temporary replacements at both facilities during the lockout. Further, Belvin admitted that he told Hemby that Respondent was getting goods from the Oklahoma plant that would ordinarily be produced by unit employees at its South Kearny facilities.

III. ANALYSIS

A. The Alleged Refusal to Furnish Financial Information

The complaint alleges, and General Counsel and Charging Party contend, that on September 30 and October 8 "following Respondent's assertion of its inability to afford the Union's proposed increase in health care contributions the Union requested that Respondent furnish it with financial information to support Respondent's claimed inability to pay." It further alleged that Respondent failed and refused to furnish such information in violation of Section 8(a)(1) and (5) of the Act.

It is well settled that an employer violates Section 8(a)(5) of the Act when it refuses to supply financial information to support a claim of an "inability to pay." *NLRB v. Truitt*, 351 U.S. 149 (1956); *Richmond Times-Dispatch*, 345 NLRB 195, 196–197 (2005); *Shell Oil Co.*, 313 NLRB 133, 134 (1993). The crucial distinction that needs to be determined is between asserting an inability to pay, which triggers a duty to disclose, and asserting a mere unwillingness to pay, which does not. *Richmond Times-Dispatch*, supra; *Lakeland Bus Lines v. NLRB*, 347 F.3d 955, 957, 960–961 (DC Cir. 2003), denying enf. *Lakeland Bus Lines*, 335 NLRB 322 (2001).

This distinction is not always easy to ascertain and has resulted in numerous Board cases that are difficult to reconcile. Compare *Lakeland Bus*, supra; *Shell Oil*, supra; *Stroehmann Bakeries*, 318 NLRB 1069, 1079–1080 (1995), enf. denied 95 F.3d 218 (2nd Cir. 1996); *ConAgra*, 321 NLRB 944, 945 (1996), enf. denied 117 F.3d 1435 (D.C. Cir. 1997); *Coast Engraving Co.*, 282 NLRB 1236 fn. 1 (1987), finding that employers asserted an inability to pay with *Richmond Times-Dispatch*, supra; *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126–1127 (2004); *Burruss Transfer*, 307 NLRB 226, 227–228 (1992); *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), concluding that the employers did not assert an inability to pay.

However, in view of my credibility finding detailed above, I need not attempt to reconcile the contradictions in these cases since I have concluded that Epstein did not inform the Union on either the September 30 or October 8 meetings (or at any other time) that Respondent "could not afford" the Union's requested increases or demands, and that the Union did not make a request for financial information at either of these meetings.

Since General Counsel and Charging Party rely primarily on Epstein's alleged statement to establish that Respondent has

asserted an inability to pay,[7] and I have not found that Epstein made such an assertion, it is clear that Respondent here has not pleaded an inability to pay. *Richmond Times-Dispatch*, supra; *AMF Trucking*, supra.

Further, and more significantly, I have found that the Union did not request to inspect the Respondent's financial records on September 30, October 8, or at any time prior to November 4. Therefore, no violation can be found concerning the complaint allegations in question, even if other evidence can be construed as pleading an inability to pay.

Accordingly, I recommend dismissal of these complaint allegations.

B. The Lockout

Employer lockouts in support of legitimate bargaining demands (i.e. "offensive lockouts") are lawful. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310–313 (1965); *Boehringer Ingelheim Vetmedica*, 350 NLRB 678-679 (2007). Such lockouts can be lawful even in the absence of an impasse, *Darling & Co.*, 171 NLRB 801, 802–803 (1968), and where the employer uses temporary replacements during the lockout, *Harter Equipment*, 280 NLRB 597, 599–600 (1986).

However, in order for the lockout to be lawful, the union must be informed on a timely basis of the employer's demands so that the union can evaluate whether to accept them and prevent the lockout. *Dayton Newspapers*, 339 NLRB 650, 656 (2003), enfd. in relevant part 402 F. 3d 651 (6th Cir. 2005); *Dietrich Industries*, 353 NLRB 57, 60–61 (2008); *Boehringer Ingelheim*, supra; *Eads Transfer*, 304 NLRB 711, 712–713 (1991), enfd. 989 F.2d 373 (9th Cir. 1993).

Initially, Respondent contends that the principles of *Eads Transfer*, supra and *Dayton Newspapers*, supra are inapplicable here inasmuch as these cases involve situations where employers announced lockouts in response to requests from employees to return to work after a strike. Thus, Respondent argues that there is no requirement in Board law for Respondent to inform employees of the terms to which it could agree in order to avoid the lockout in the absence of a request to reinstate strikers, I disagree.

While it is true, as Respondent correctly observes, that both *Eads Transfer* and *Dayton Newspapers* involved lockouts while denying employees the right to return to work after a strike, there is nothing in the language of either case that limits the requirement of timely notification of the terms of the employer's offer to that factual situation. Indeed, the language in both cases is quite broad and makes clear that these conditions are essential for any lockout to be lawful. In *Eads Transfer*, the Board cited *Harter*, supra, where the Board approved the use of temporary replacements by an employer, who locked out its employees, in support of its bargaining position (not in response to an attempted return to work from a strike.) The Board in *Harter* observed that the fact that the employer there was the protagonist in locking out its employees does not matter. It observed that "in light of *American Ship Building*, there is no longer any meaningful distinction between lawful "offensive" and lawful "defensive" economic weaponry." 280 NLRB at 600.

Thus, since there is no meaningful distinction between offensive and defensive lockouts, there can be no meaningful distinction between lockouts in response to a request to reinstate strikers and lockouts in other situations.

The requirements detailed in *Eads Transfer* and *Dayton Newspapers* are applicable to all lockouts. As the Board cited in *Eads Transfer*, in finding that the failure to inform employees of the terms necessary to end the lockout is violative of the Act, quoted from *Harter*, "The union or its individual members have the ability to relieve their adversity by accepting the employer's less favorable bargaining terms and returning to work." 304 NLRB at 713 fn.17, citing 280 NLRB at 600.

It is obvious that in order to accept an employer's terms and return to work, the employees and the union must have notice of precisely what these terms are so that they can decide whether to accept them and prevent the lockout.

In *Dayton Newspapers*, supra, the Board states clearly without equivocation that "A fundamental principle underlying a lawful lockout is that the union must be informed of the employer's demands so that the union can evaluate whether to accept them." 339 NLRB at 650. It repeats that observation later in the decision. "As the judge recognized, a principle underlying *any* (emphasis supplied) lockout is that the union may end the lockout and return the employees to work by agreeing to the employer's demands." 339 NLRB at 658.

Thus, since the Board declared that this "fundamental principle" applied to *any* lockout, it is clear that the timely notice requirement applies to any lockouts, including lockouts as here, which are not in response to a refusal to reinstate strikers.

Cases subsequent to *Dayton Newspapers* and *Eads Transfer* reinforce this conclusion. In *Dietrich Industries*, supra, the judge's decision, affirmed by the Board, observes that "Although an employer may lockout its employees in support of its bargaining position, it is privileged to do so only if it gives notice that it is doing so and makes the union aware of the employer's bargaining position." 353 NLRB at 60.

Most significantly of all, *Boehringer Ingelheim*, supra involved a lockout not in response to a reinstatement request, and the Board expressly applied the principles of *Dayton Newspapers* to such cases. It began its decision by observing that "Employer lockouts in support of legitimate bargaining demands (i.e. offensive lockouts) are lawful." 350 NLRB at 674. The decision then added that a "fundamental principle underlying a lawful lockout is that the union must be informed of the employer's demands so that the union can evaluate whether to accept them and obtain reinstatement." Id at 679, citing *Dayton Newspapers*, supra.

Respondent recognizes that *Boehringer Ingelheim* is contrary to its position. It attacks the *Boehringer Ingelheim* decision for failing to explain the factual differences between *Dayton Newspapers* and the case at hand, and characterized it as an "unexplained anomaly." However, contrary to Respondent, I find *Boehringer Ingelheim* not to be an "unexplained anomaly" but rather a consistent and accurate application of *Dayton*

[7] Indeed, the Board specifically concluded that a statement that an employer cannot afford to pay the union's demands means that the company could not stay in business if it met the union's demands, and can trigger an obligation to supply financial information. *AMF Trucking*, supra at 1126.

Newspapers, *Eads Transfer,* and *Harter*.

Accordingly, I reject Respondent's arguments to the contrary and conclude that Respondent was obligated to provide the Union with clear and timely notice of the conditions of its offer so that the Union and its employees could evaluate whether to accept Respondent's terms and avoid the lockout.

It is that issue that I now turn. I agree with General Counsel and Charging Party that Respondent's October 30 email purporting to detail the terms of Respondent's offer was confusing, incomplete, and internally inconsistent, and fails to provide the Union and Respondent's employees with the timely and complete notification of the terms that the employees must accept to avert the lockout.

The analysis of this question must begin with the fact that the parties had only three negotiation sessions prior to the lockout and that very little substantive bargaining took place at any of the meetings. Indeed, the parties never even discussed any of the issues in the Union's offer, except for health care contributions, which was obviously the most significant issue. The parties spent most of one meeting discussing an extension of the prior agreement. Respondent never presented the Union with a written proposal, comprehensive or otherwise, at any of the sessions. The only "proposal" discussed from Respondent was its demand for a 1-year freeze, which was repeated at two negotiation meetings. Respondent did provide the Union with a number of written alternative health care plans, but only one of them was discussed at any of the negotiation meetings prior to the lockout.

During a conversation between Troccoli and Epstein on October 30, the Union made a major concession by proposing a 1-year freeze on health care contributions with the caveat that the benefits could be cut, depending on the trustees' decision. Troccoli then asked to go forward and discuss other issues. Epstein repeated his prior demand for a 1-year freeze and asked if Troccoli was aware of Respondent's offer to pay $400 towards the employees' deductible. Troccoli stated that he was unaware of this offer.

Epstein informed Troccoli that if employees did not vote and agree on Respondent's offer, the employees would be locked out. Troccoli twice stated to Epstein that he did not know what employees are supposed to be voting on, and Epstein replied that the Union would have something by the end of the day. It was in this context that Epstein sent the Union an email at 3:32 p.m. on October 30.

It began by discussing the health plan issues and states the Respondent had tried to come up with a plan that would cost the same or less than the proposed increase for the union plan. Significantly, Epstein emphasized that one of the plans suggested by Respondent, a proposal to eliminate family coverage and go to single coverage, would cost less than the expiring Union plan. There would be enough of a savings that the Company would provide $400 to each member to go toward their deductibles. The email added that Troccoli stated that he was unaware of this option, but proposed that the Union retain its plan but would keep the cost the same to Respondent's but could cut benefits.

Thus, Respondent's position on health care cannot be readily determined. Is Respondent still proposing any or all of its various alternative plans? Its reference to the proposal for single coverage and a $400 payment to employees towards a deductible is particularly significant since this proposal represented, according to Respondent, a plan that could cost less than the Union's expiring plan. Thus, this proposal is on its face is clearly different from a 1-year "freeze" offered in prior sessions.[8] Therefore, I find that the Union could not reasonably determine what Respondent was proposing on health care.

Respondent confuses matters further by stating that it wants a "freeze on wages for a one or two-year agreement." Since there is no reference to health care in that assertion, it is again uncertain if Respondent was still proposing any of its alternative plans, particularly the plan for single coverage, which could result in reduced costs for Respondent, thereby less than a total "freeze" previously offered, or if it was accepting the Union's proposal to freeze contributions for 1 year with a possible reduction in benefits.[9]

Epstein's demand for a "freeze on wages" is also confusing and contrary to Respondent's position during negotiations that it wanted a total "freeze" for 1 year. In addition to the confusion of whether Respondent included a "freeze" on health care contributions, as I have discussed above, the demand makes no mention of issues other than wages or health care that had been included in the Union's demands.

Significantly, Epstein conceded in his testimony that he "would have left myself open to discussing the issues" when he demanded a freeze on wages. Yet, Epstein made no mention of this fact in his email, which was contrary to Respondent's position during negotiations that there would be no discussion of any increases and that a "freeze" on all issues for 1 year was being proposed. Thus, Epstein's own testimony conceded the fact that his email of October 30 did not represent an accurate or complete proposal.

Respondent argues that contrary to the testimony of Troccoli and Cunningham, that I found credible, the Union was not confused about the terms of Respondent's offer. It asserts that they were aware of Respondent's demand for a 1-year freeze, made in prior sessions, and that nothing in the October 30 email changed that offer. It further asserts that the parties had agreed on the Union's proposal to "freeze" contributions for 1 year so that essentially only "wages" were left. Finally, although there were other outstanding issues, such as vacations and sick days, Respondent argues that if the Union was confused about whether issues were covered by the "freeze," it should have called to clarify what Respondent meant in its October 30 email.

I have detailed above how the October 30 email differed from Respondent's prior proposal of a 1-year "freeze" with respect to health care,[10] the length of the contract and the issues

[8] Even though this proposal read in conjunction with Epstein's October 22 email suggests that the proposal would result in the same cost to Respondent as in the prior Union plans, it is still different than a "one-year freeze," which contemplated the prior contract's terms, including the Union's plans without increases in premiums.

[9] Contrary to Respondent's contention, there had been no agreement by Epstein to the Union's proposal during the October 30 conversation.

[10] As I related above, I found contrary to Respondent that there was no agreement on the Union's health care proposal during the October

other than wages. Thus, Respondent's position that this email simply reiterated is prior offer of a 1-year freeze and made clear that this offer would avert the lockout is without merit.

While Respondent's contention that if the Union was confused about the terms of Respondent's offer, it should have called to clarify what Respondent meant in its email has some surface appeal in these circumstances, I reject that assertion. Initially, I agree with Charging Party that it is Respondent's obligation to present to the Union and its employees a timely and complete offer so that they can make an informed decision whether to accept it and avoid the lockout. The Union is not obligated to clarify any ambiguities. Here, the ambiguities were substantial, as I have detailed above, and Respondent failed to afford the Union sufficient time to consider its offer.

As I observed above, the notification to the Union of the terms necessary to avert the lockout must be "timely." *Dayton Newspapers*, supra at 650; *Dietrich Industries*, supra at 60; *Eads Transfer*, supra at 712.

Here, I conclude that Respondent's decision to provide the Union with only one working day's notice, in which to evaluate and understand Respondent's uncertain, ambiguous, and confusing offer, vote on it and accept it, is clearly insufficient and not the "timely" notice required by Board precedent. Therefore, any assertion that the Union should call to clarify any ambiguities in Respondent's offer is obviated by the lack of sufficient time afforded the Union to make its decision.[11] Accordingly, based on the foregoing findings, I conclude that Respondent's October 30 email presented the Union and its employees with a "moving target," *Dayton Newspapers* at 650, that does not satisfy Respondent's burden to afford the Union with a clear statement of the conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions. *Dayton Newspapers*, supra; *Dietrich Industries*, supra; *Eads Transfer*, supra.

I also agree with General Counsel that the first complete proposal submitted by Respondent to the Union was at the November 9 meeting and was after the employees had been locked out for nearly a week. This offer cannot cure the Respondent's failure to provide such an offer prior to the lockout. The lockout, here unlawful at its inception, retains its initial taint of illegality until it is terminated and the affected employees are made whole. *Movers Warehousemen's Assn. of Washington*, 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962, 966–967 (4th Cir. 1977); *Horsehead Resource Development Co.*, 321 NLRB 1404, 1415 (1996).

Therefore, I find that Respondent by locking out its employees without providing its employees a timely, clear, and complete set of conditions that the employees must accept in order to avert the lockout, Respondent has violated Section 8(a)(1) and (3) of the Act.[12]

C. The Alleged Threat to Relocate Operations

The complaint alleges that Respondent through its supervisor, Belvin, "threatened its employees that if the Union did not submit to Respondent's bargaining demands, it would move unit work to another plant in Oklahoma."

I agree with Respondent that the evidence did not disclose that Belvin made any such threat during his December 24 conversation with Hemby.

The record discloses that during a discussion about the lockout, Hemby observed that the work at Kearny East was very hard and it would be difficult to replace these workers. Belvin responded that Respondent would send the work to Oklahoma. The facts further establish that Respondent had received products from its related Oklahoma facility, both before and after the lockout, and that Belvin told Hemby that Respondent was getting goods from the Oklahoma plant that would ordinarily be produced by unit employees.

Contrary to General Counsel and Charging Party, I find nothing unlawful in Belvin's comments. Charging Party characterizes Belvin's statements as a threat that Respondent would close its plant and move the work to the facility in Oklahoma. General Counsel asserts that Belvin threatened that Respondent would move its operation to Oklahoma, which is "akin to threat to terminate all of Respondent's employees - a potent reminder that Respondent has a readily available replacement facility, where it could simply move the work if necessary."

I cannot agree with either of the interpretations of Belvin's remarks asserted by General Counsel or Charging Party. Belvin did not threaten to close or to move the facility or to remove the work to Oklahoma. He simply responded to Hemby's observation that workers at Kearny would be hard to replace by commenting that Respondent could, and in fact had, obtained products from the related Oklahoma facility. He was merely explaining to Hemby how Respondent could and would continue to operate during the lockout. There is nothing unlawful about an employer during a lockout or a strike obtaining products from other facilities (related or not) in order to continue to operate despite the absence of its employees. Therefore, Belvin's comments are not unlawful. I shall therefore recommend dismissal of this complaint allegation.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

30 conversation, and Epstein's email gives the impression that Respondent was still proposing various alternative plans. Indeed, Epstein testified that Respondent was still offering their plans, including one plan with reduced costs to Respondent, although Troccoli had rejected them.

[11] I also agree with the Charging Party that the Union acted reasonably by using the one working day that it was provided to consult with counsel and finally deciding on a decision to have the employees report to work on November 3, and to request that Respondent allow the employees to work and to continue negotiations. I emphasize in this regard the fact that the parties had engaged in only three negotiation sessions and the Union had made a major concession in proposing to freeze health care contributions for one year.

[12] Although the complaint alleges that the lockout also violated Sec. 8(a)(5) of the Act, that allegation seems to be premised on the 8(a)(5) refusal to supply financial information, which I have dismissed. The cases finding that the lockout violates the Act, based on failure to timely inform employees of the terms necessary to avoid the lockout, conclude only that Sec.8(a)(3) is violated by such conduct. *Dayton Newspapers*, supra; *Eads Transfer*, supra; *Dietrich Industries*, supra.

3. By locking out its employees on November 3, 2009, without providing its employees with a timely, clear, or complete offer, which sets forth the conditions necessary to avoid the lockout, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. Respondent has not violated the Act in any other manner encompassed by the complaint.

5. The aforesaid violations of the Act affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purpose of the Act.

Having found that Respondent unlawfully locked out is employees on November 3, 2009, I shall recommend that Respondent offer reinstatement to all its employees whom it unlawfully locked out and make them whole for any losses of pay and benefits that they may have suffered by reason of the lockout to be calculated as prescribed in *F .W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based upon the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended.[13]

ORDER

The Respondent, Alden Leeds, Inc., South Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Locking out its employees without providing said employees with a timely, clear, and complete offer, which sets forth the conditions necessary to avoid the lockout.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer each and every employee on Respondent's payroll of November 3, 2009, whom it unlawfully locked out on November 3, 2009, full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, employees hired from other sources to make room for them, and make them whole for any loss of earnings or benefits to be calculated in the manner set forth in the remedy section of this decision.

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

(c) Within 14 days after service by the Region, post at its South Kearny, New Jersey facilities, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 3, 2009.

(d) 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., August 30, 2010.

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 on your behalf with your employer.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT lock out our employees without providing said employees with a timely, clear, and compete offer, which sets forth the conditions necessary to avoid the lockout.

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

[13] 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.

[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."

WE WILL, within 14 days from the date of this Order, offer our employees, whom we unlawfully locked out on November 3, 2009, reinstatement to their former jobs of employment or, if these positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all locked out employees for any loss or earnings and other benefits resulting from our unlawful lockout.

ALDEN LEEDS, INC.