

No. 12-1455

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, UAW AND UAW LOCAL 1832**

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

PACCAR, INC., d/b/a PETERBILT MOTOR COMPANY

Intervenor

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of International Union, United
Automobile, Aerospace and Agricultural Implement Workers of America, UAW

and UAW Local 1832 (“the Union”), to review a Decision and Order issued by the National Labor Relations Board (“the Board”) on July 15, 2011 and reported at 357 NLRB No. 13. (A. 320.)¹ The Board found that Paccar, Inc. d/b/a Peterbilt Motors Company (“the Company”), which formerly employed members of the Union, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§151, 158(a)(5) and (1)) (“the Act”) by failing and refusing, since July 16, 2008, to furnish the Union with requested relevant information. (D&O 1, A. 320.) However, the Board dismissed the allegation that the Company’s ongoing lockout of the employees was unlawful because of its failure to provide the requested information. (*Id.*) Before this Court, the only issue is the Board’s partial dismissal of the complaint. The Company has intervened on the side of the Board.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)). This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), because the events giving rise to the unfair labor practice

¹ “A.” refers to the Appendix filed by the Union and “S.A.” refers to the Supplemental Appendix filed by the Board. Each appendix reference is preceded by a reference to the corresponding portion of the original record: “D&O” refers to the Board’s Decision and Order; “Tr.” refers to the transcript of the hearing below; “GCX” refers to the Acting General Counsel’s exhibits; “UX” refers to the Union’s exhibits; and “CX” refers to the Company’s exhibits. “Br.” references are to the Union’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

complaint occurred in Madison, Tennessee. The Board's Order is final with respect to all parties under Section 10(f) of the Act (29 U.S.C. § 160(f)).

The petition for review was filed on April 16, 2012. This filing was timely, as the Act places no time limit on the institution of proceedings to review Board orders.

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that its brief fully articulates the applicable principles and facts in this case and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board had a rational basis for concluding that the Company's lockout, which was undisputedly lawful at its inception, did not convert to an unlawful lockout when the Company unlawfully failed to provide requested information where the withheld information did not "materially affect" the progress of negotiations.

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish relevant

information. The Acting General Counsel further alleged that the Company's initially-lawful lockout became unlawful once the Company failed to provide the requested information, in violation of Section 8(a)(3) and (1) (29 U.S.C. § 158(a)(3) and (1)). (D&O 6, A. 325.) Following a hearing, an administrative law judge issued a decision and recommended order finding that the Company violated the Act, as alleged. (D&O 6-12, A. 325-31.)

On July 15, 2011, after considering the exceptions filed by the parties, the Board issued a decision adopting the judge's finding that the Company violated the Act by failing to provide requested relevant information. (D&O 1-3, A. 320-22.) However, the Board reversed the judge's finding that the lockout was unlawful because there was no evidence that the Company's withholding of the requested information "materially affected" the progress of bargaining and thereby converted the admittedly-lawful lockout into an unlawful one. (D&O 4-5, A. 323-24.) The Board issued an amended remedy and order. (D&O 5-6, A. 324-25.)

On August 24, 2011, the Union filed a motion for reconsideration of the Board's Decision and Order. The Union pointed to selected testimony from two of its witnesses that it claimed constituted sufficient evidence to warrant reconsideration of the Board's findings. On December 20, 2011, the Board denied the Union's motion for reconsideration. (Order Denying MFR 3, A. 334.) The Board reiterated its decision that there was an insufficient link between the

Company's failure to supply the requested information and the continuation of the lockout. (Order Denying MFR 1-3, A. 332-34.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Parties Bargain for a Successor Collective Bargaining Agreement

Since 1973, the Union continuously represented employees at the Company's truck assembly facility in Madison, Tennessee, sometimes referred to as the "Nashville plant." (D&O 1-2, 7, A. 320-21, 326; Tr. 31, 223, A. 12, 114.) The most recent collective bargaining agreement between the parties was effective from June 22, 2003 to June 20, 2008, and, on April 30, 2008,² the parties began negotiating for a successor agreement. (D&O 1, 6-7, A. 320, 325-26; Tr. 32-33, A. 13-14.) At that time, the Company operated three additional assembly plants in the United States. (D&O 1, 7, A. 320, 326; Tr. 322, S.A. 398.)

In the initial bargaining sessions, the Company made a series of noneconomic restructuring proposals to give the Company greater operational flexibility in the face of an aging workforce. (D&O 1, 7, A. 320, 326; Tr. 189-91, 248-49, 328-29, 353, 357-58, 364-65, 473, 487, UX 1, UX 5 p.6, CX 10, S.A. 362-64, 370-71, 400-01, 409, 411-12, A. 164, S.A. 413, 438, A. 206, S.A. 529-40, 546, 459-64.) The Company proposed changing the structure of the workforce by

² All dates are 2008 unless otherwise noted.

creating teams of employees and designating certain employees as “key operators.” (D&O 1, 7, A. 320, 326; Tr. 248-49, 256, 329, 357, UX 1 p.1536-38, CX 10, S.A. 370-71, 375, 401, 411, 529-31, 459-64.) Contrary to the existing agreement, where employees were divided into many different job classifications, the Company sought to reduce the number of classifications and divide employees among only a few “areas.” (Tr. 329, CX 10, CX 12 p.10-11, 16-17, S.A. 401, 459-64, 474-75, 480-81.) These proposals would upset the current seniority system because employees would be competing within a larger pool for shift preference and job assignments. Moreover, under the Company’s proposal, employees would have plant-wide seniority protection from layoffs but would not retain seniority in a particular job. (D&O 1, 7, A. 320, 326; Tr. 329, 357, CX 10, CX 12 p.5-13, S.A. 401, 459-64, 469-77.) The new key operators would be granted superseniority and protection from layoff. (Tr. 328-29, 357, 390-91, UX 1 p.1536-38, CX 10, CX 12 p.5, S.A. 400-01, 411, 421-22, 529-31, 459-64, 469.)

The Union adamantly opposed what it considered to be a radical restricting of the current seniority system. (D&O 1, 7, A. 320, 326; Tr. 189-90, 249, 253, 256-57, 365-67, 393, UX 1 p.1537-39, 1541, 1543, S.A. 362-63, 371, 374, 375-76, 413-15, 424, 530-32, 534, 536.) Under the Company’s proposal, management would have complete control over selecting and removing key operators. (Tr. 253, 288-89, 390-93, UX 5 p.1, CX 12 p.5, S.A. 374, 382-83, 421-24, 541, 469.) The

new larger work areas would disrupt the current job bidding system. (Tr. 329, CX 12 p.5-7, S.A. 401, 469-71.) The Union soundly rejected superseniority for key operators and stated they were unwilling to accept any changes that would “gut” seniority. (D&O 1, 7, A. 320, 326; Tr. 189-90, 249, 256-57, 365, 393, UX 1 p.1537-39, S.A. 362-63, 371, 375-76, 413, 424, 530-32.)

In order to further its flexibility objectives, the Company also proposed changes to the agreement’s existing outsourcing language. (D&O 1, 7, A. 320, 326; Tr. 41-42, 329-30, GCX 5, S.A. 339-40, 401-02, 444-48.) This proposal, which would place outsourcing under management rights, was vehemently opposed by the Union. The Union saw the existing outsourcing protection, which had been upheld in an arbitration decision, as a cornerstone of its agreement because it provided job security to its members. (Tr. 148, 197, 329-30, UX 5 p.6, A. 85, S.A. 367, 401-02, 546.) The Union believed the new proposal would give the Company an unlimited right to outsource unit work and would strip job security from the contract. (D&O 1, 7, A. 320, 326; Tr. 41-42, 148, GCX 5, UX 5 p.6, UX 1 p.1545, S.A. 339-40, A. 85, S.A. 444-48, 546, 538.)

The Union made its own noneconomic counterproposals, which were in turn rejected by the Company. (D&O 1, A. 320; Tr. 249, 356-58, 393, CX 9, UX 1 p.1537, S.A. 371, 410-12, 424, 552-60, 530.) The Union’s initial noneconomic proposal worked largely off the existing contract and sought changes such as

allowing employees to bid on jobs every 3 months, instead of every 6 months as permitted under the current agreement. (CX 9 p.2, CX 12 p.8, S.A. 553, 472.) The Union also made some additions to the existing agreement, such as providing for an independent medical examiner to resolve medical disputes. (Tr. 357, CX 9 p.7, S.A. 411, 560.) Karen White, the Company's lead negotiator, believed the Union's proposals were not forward looking and would put more operational constraints on the Company. (Tr. 357, S.A. 411.)

On June 11, the Company presented its economic proposals, proposing a new three-tiered wage and benefit system, distinguishing between existing employees, new hires, and employees recalled from layoff. (D&O 1, 7, A. 320, 326; Tr. 42-43, S.A. 340-41.) Although the Company offered a lump sum and wage increases for current employees, it proposed lower wage rates for recall employees and new hires. (Tr. 42-43, 472, GCX 5, CX 12 p.41, S.A. 340-41, 437, 444-48, 512.) The Company also proposed increased health insurance contributions for all unit members and even higher contribution rates for recalls and new hires. (Tr. 44-45, GCX 5 p.1, CX 12 p.47, S.A. 342-43, 444, 512.) The Company proposed further cuts to benefits for recalls and new hires such as fewer sick and personal days, lower disability payments, and less generous life insurance. (Tr. 330-33; CX 12 p.23-24, 42-43, S.A. 402-05, 487-88, 507-09.) The Union vigorously rejected these proposals, believing it would "destroy the bargaining

unit” by creating an unhealthy division between current employees and those with recall rights. (D&O 1, 7, A. 320, 326; Tr. 43-46, GCX 5, UX 1 p.1543-45, S.A. 341-44, 444-48, 536-38.) Tim Bressler, Assistant Director of the UAW Heavy Truck Department and the Union’s chief negotiator, initially told the Company a tiered wage system was probably illegal. (Tr. 371, UX1 p.1545, S.A. 417, 529.)

On June 13, a week before the contract was set to expire, local union president Mike Pardue requested a sidebar meeting with the parties’ principal representatives away from the bargaining table. (D&O 7, A. 326; Tr. 49-52, 226, A. 26-29, 117.) Pardue was very concerned that there were still significant unresolved issues on the table. (Tr. 49, A. 26.) The parties discussed their significant disagreements over tiered wages and outsourcing. (Tr. 51, 226, UX 1 p.1544, A. 28, 117, S.A. 537.) During the course of the conversation, union representative Mike Brown stated that the Union’s proposals were a package deal and the Company could take it or leave it. (D&O 7, A. 326; Tr. 486, A. 205.) Plant Manager Larry Vessels responded, in frustration, that the Madison plant had the highest operational costs in the Company. (D&O 7, A. 326; Tr. 49-52, 226, 416-18, 486-87, A. 26-29, 117, S.A. 433-35, A. 205-06.)

During the next bargaining session on June 16, White repeated the same claim about the plant’s high operational costs. (D&O 7, A. 326; Tr. 149, A. 86.) At this meeting, Vessels stated that if work was ever transferred to the Company’s

facility in Denton, Texas, it likely would not come back to Madison. (D&O 7, A. 326; Tr. 152, UX 1 p.1544-45, A. 89, S.A. 537-38.)

On June 19, during another sidebar discussion, the principal negotiators discussed some of the most contentious issues remaining between the parties, including outsourcing and tiered wages and benefits. (D&O 1, 8, A. 320, 327; Tr. 54, 228, 293-98, UX 1 p.46, A. 31, 119, S.A. 384-89, 539.) The Union raised the Company's prior statements that the Madison plant had the highest operational costs, and Bressler stated that the Union was having people check on the Denton, Texas plant. (Tr. 295, CX 3 p.1, S.A. 386, 453.) White responded, "[w]e are staying away from comparisons." (CX 3 p.1, Tr. 295-96, S.A. 453, 386-87.) Bressler countered that the Company had opened the door through its own statements. He handed White a written request for information on wages and benefits at the three other company facilities. The requested information included hourly wage rates by job classification, the number of employees working within each classification, the total number of hours and overtime worked in 2007 and 2008, and the total cost of all benefit programs. (D&O 1, 7-8, A. 320, 326-27; Tr. 55-58, 152-55, 228-29, 272, 304, GCX 4, A. 32-35, 89-92, 119-20, 141, S.A. 390, A. 231.) The request was based on the Company's assertions that the Madison facility had the highest operational costs of the company's four domestic facilities. (GCX 4, A. 231.) At the time, Bressler said the Union needed the information to

make a proposal. (D&O 1, A. 320; Tr. 60, 229-31, 272, 304-10, A. 37, 120-22, 141, S.A. 390-96.)

On June 20, in the last bargaining session before the agreement expired, the parties remained far apart on fundamental issues. (D&O 1-2, A. 320-21; Tr. 40-41, 105-07, 111, 155, 185, 248-49, 253, 387-88, 393, S.A. 338-39, A. 66, S.A. 351-52, 355, A. 92, S.A. 360, 370-71, 374, 419-20, 424.) The Company continued to advocate for a team structure, including the creation of key operators. (Tr. 392-93, S.A. 423-24.) Union negotiator Brown stated there was “no way in hell” the Union would allow the company to implement its key operator proposal. (Tr. 369, S.A. 416.) According to Pardue, this was a “deal breaker,” and he told the Company that the Union would never vote on a proposal that had a key operator. (Tr. 256, 393, S.A. 375, 424.) The Company also insisted on its outsourcing proposal, which the Union continued to reject. (Tr. 40-41, 61-62, 107-09, 148, 196-98, 387, S.A. 338-39, A. 38-39, S.A. 352-54, A. 85, S.A. 366-68, 419.) Further, the parties were nowhere close to agreement on compensation or health insurance. The Company did not retract its proposal to provide different levels of wages and benefits, and the Union remained fundamentally opposed to this idea. (Tr. 40-41, 51, 65, 198, 369, 387, S.A. 338-39, A. 28, 42, S.A. 368, 416, 419.) Additionally, there were other proposals on which the parties had not reached agreement, such as the Union’s proposal for an independent medical examiner and a company

proposal to require all employees to wear work boots. (CX 9 p.7, CX 12 p.23, S.A. 560, 487.)

Despite having met 22 times, the parties did not reach agreement before the contract expired on June 20. (Tr. 36, 368, A. 17, 165.) At that time, the Company made its last, best and final offer. (D&O 1, 7, A. 320, 326; Tr. 51, 61-63, 65, 388, CX 12, A. 28, 38-40, 42, S.A. 420, 465-528.)

B. The Union Holds a Membership Meeting After the Agreement Expires

On June 22, the Union held a meeting with its members to discuss the status of the negotiations and the Company's proposal. Bressler told the members that there were still many unresolved serious issues, that the Company insisted on unlimited outsourcing rights and was proposing to divide and separate the membership with the tiered wage and benefit proposals. (D&O 1, 7, A. 320, 326; Tr. 63-67, 157-58, 187, A. 40-44, 94-95, S.A. 361.) Bressler complained about short negotiating sessions and the Company's failure to provide the Union with all the information it was requesting, including information about wages and benefits at other company facilities. (D&O 1, 7, A. 320, 326; Tr. 63-66, 157-59, 232-34, A. 40-43, 94-96, 123-25.)

At this membership meeting, the Union distributed a letter stating there were 150 open issues remaining. (D&O 1, A. 320; Tr. 64-65, 101, 187, 250-51, 286-87, A. 41-42, S.A. 350, 361, 372-73, 380-81.) In particular, the letter highlighted:

- “Job Security, which is always the Union’s Priority, has been stripped,”
- “[The Company] has dictated that if Health Care Cost [sic] increase, those increases will be shifted to the members,” and
- “The [C]ompany has dictated when our Brothers and Sisters with recall rights are recalled, they will be subjected to lower wages and benefits, as well as gutting new hires [sic] wages and benefits...This is simply immoral and unacceptable!”

The letter stated that the Union could not accept the Company’s offer but did not make any mention of the outstanding request for information. (D&O 2, A. 321; GCX 5, S.A. 444-48.)

The meeting adjourned without a vote on the Company’s offer. (Tr. 67, 159, 234, A. 44, 96, 125.)

C. The Company Locks Out the Employees and the Parties Continue Bargaining

On June 23, 2008, after the Union declined to vote on the Company’s last, best and final offer, the Company locked out the employees. (D&O 2, 9, A. 321, 328; Tr. 31, 325-27, 394-95, 434-45, A. 12, 160-61, S.A. 399, A. 168-69, 189-90.)

The parties held a conference call that day and went through every article of the proposed agreement but could not reach a compromise. (Tr. 48, 160, 234, 395-96, 478, UX 1 p.1546-47, A. 25, 97, 125, 169-70, S.A. 443, 539-40.)

In the three weeks following the lockout, the Union and the Company exchanged correspondence. (D&O 2-3, 9, A. 321-22, 328; GCX 6-10, 12, Tr. 69-74, 162-64, 396-401, A. 238-48, 46, S.A. 345-48, A. 47, 99-100, S.A. 359, A. 170, S.A. 425-28, A. 171.) The Union reiterated its prior request for comparative wage and benefit information, as well as other information. The Union's correspondence stated that, "[t]his data would help us to evaluate the Company's proposals, and develop our own, on issues such as the second-tier, health and safety and health care." (GCX 6 p.2, A. 239.) The Union also stated that it wanted to verify the Company's claims about comparative costs "to make an informed decision about the concessions [the Company] proposed." (GCX 10 p.1, A. 245.) In response, the Company wrote that it did not compare the wages and benefits at the plant with any other company facilities and that it would clarify the basis for its wage and benefit proposal at the bargaining table. (GCX 12 p.1, A. 249.)

During this same period, on July 8 and 16, the Union and the Company held additional bargaining sessions. (D&O 2, 4, A. 321, 323; Tr. 77, 79-80, S.A. 349, A. 50-51.) On July 16, the majority of the session was spent discussing the health insurance proposals and workplace safety. (UX 4, Tr. 403, A. 270-92, 173.) At that same meeting, the Company formally denied the Union's request for information on comparative wages and benefits at other Company facilities, asserting that it was not relevant. (D&O 2-3, 9, A. 321-22, 328; UX 4 p.263, Tr.

79-80, 401-02, A. 292, 50-51, 171-72.) White explained that the Company based its economic proposals on wages and benefits of other employers in the Nashville area, not on other company facilities. (D&O 2-3, 9, A. 321-22, 328; Tr. 333-36, CX 4, UX 4 p.263, S.A. 405-08, S.A. 456-58, A. 292.) Union representative Brown responded that the Company had mentioned other facilities more than once. There was no further discussion, and the Union did not claim that its ability to bargain was impeded by the lack of information. (UX 4 p.263, Tr. 335, 402, 407-08, S.A. 407, A. 292, 172, S.A. 431-32.)

On July 29, White and Bressler met at the Minneapolis airport in an effort to reach some agreement. (Tr. 403-05, 452, A. 173-74, S.A. 429, 436.) They discussed the major open issues, including the Company's teaming and key operator proposals, outsourcing, and tiered wages and benefits but did not reach agreement on any of these areas. (Tr. 403-05, A. 173-74, S.A. 429.)

In August, the parties held two additional bargaining sessions. (D&O 2, A. 321; Tr. 79-82, 405-07, A. 50-53, S.A. 429-31.) The Company's proposals on outsourcing, key operators, and tiered wages and benefits continued to be major obstacles to agreement. (UX 5 p.1-7, Tr. 80-81, S.A. 541-47, A. 51-52.) On August 19, the Union identified every open issue and reiterated its positions. (D&O 2, A. 321; UX 5 p.1-5, Tr. 474-77, S.A. 541-45, 439-42.) Bressler expressed the Union's continued opposition to tiered wages and benefits, key

operators, outsourcing, as well as other proposals related to health and safety, extending the probationary period, and altering the pension plan. (Tr. 405-07, 476-78, UX 5 p.1-5, S.A. 429-31, 441-43, 541-45.) Bressler reminded the Company that it still had proposals on the table for an independent medical examiner and a retiree bonus. (UX 5 p.5, S.A. 545.) White responded that the Company was unwilling to change its proposals on key operators, outsourcing, and tiered wages and benefits, and expressed concern that Union members had not been given a chance to vote on the proposed three-tier structure. (Tr. 405-07, UX 5 p.5-8, S.A. 429-31, 545-48.)

D. The Parties Fail To Reach Agreement during the Final Bargaining Session

On August 20, at the final bargaining session, White told the Union that the cost for the retirees' Medicare supplement could be used to offset the proposed wage cuts for recall employees but if that was unacceptable, there was nothing else the Company could do to adjust its wage proposal. Bressler responded that this was unacceptable. (Tr. 81-82, 405-06, A. 52-53, S.A. 429-30.)

At the conclusion of the August 20 session, the Union withdrew its comprehensive proposal. (D&O 2, A. 321; Tr. 128-29, 407, A. 73, S.A. 356, 431.) Bressler told the Company, "for all they cared, [the Company] could grow fucking hay in the plant." (Tr. 407, S.A. 431.) The lockout continued, and, in April 2009, the Company permanently closed the Madison facility. (D&O 2, A. 321.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Becker, Member Hayes dissenting in part) found (D&O 1, A. 320) that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide requested relevant information.³ The Board found that the Union's request for labor costs at other Company facilities was relevant based on the Company's statements during bargaining. (D&O 1-3, A. 320-22.) However, the Board found there was an insufficient link between the Company's July 16 refusal to turn over the requested information and the continuation of the lockout. Accordingly, it concluded that the lockout did not become unlawful. (D&O 1, 4-5, A. 320, 323-24.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found, and from, in any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (D&O 5, A. 324.) Affirmatively, the Order requires the Company to post a notice. Given the closure of the facility and the lack of a continuing relationship between the Union and the Company, the Board did not order the Company to furnish the information that it had unlawfully refused to

³ Member Hayes would not have found the information relevant to the Company's economic proposals and therefore would not have found a violation for failing to provide the information. (D&O 3 n.12, A.322 n.12.)

provide. (D&O 5, A. 324.) The Company has complied with the Board's Order, and the Board is therefore not seeking enforcement.

III. THE BOARD'S ORDER ON RECONSIDERATION

On August 24, 2011, the Union filed a motion for reconsideration and asked the Board to consider testimony showing that the Union had pressed the outstanding information request to the Company following the lockout. The Board rejected the motion for reconsideration, first finding that the judge did not discuss or explicitly credit any of the testimony referred to by the Union. (Order Denying MFR 2, A. 333.) The Board then found that, even if it were to consider the testimony, “[a]t best, the Union has shown that it made a few passing references” to the information request and, viewing the record as a whole, the parties were far apart on many economic and noneconomic issues. (Order Denying MFR 2-3, A. 333-34.) Accordingly, because the withheld information “was not central to resolving the parties’ differences,” the Board reaffirmed its finding that the requested wage and benefit information “did not *materially* affect the progress of bargaining.” (Order Denying MFR 3, A. 334 (emphasis in original).)

STANDARD OF REVIEW

Where, as here, “ the Board has found no violation and dismissed the unfair labor practices complaint, that finding ‘must be upheld unless it has no rational basis’ or is ‘irrational or unsupported by substantial evidence.’” *Williamson v.*

NLRB, 643 F.3d 481, 485 (6th Cir. 2011) (internal citations omitted). In short, to sustain the Board’s decision, the reviewing court need not agree that the Board reached the best outcome. *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). Moreover, the standard of review is not modified in any way where, as here, the Board disagrees with the administrative law judge as to legal issues or inferences derived from the evidence. *Id.*; *accord Exum v. NLRB*, 546 F.3d 719, 724-25 (6th Cir. 2008).

The Board’s factual findings are “conclusive” if they are supported by substantial evidence on the record considered as a whole, even if the Court would have reached a different conclusion had the issue been before it *de novo*. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488, 493 (1951); *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 752 (6th Cir. 2003). The Board’s application of the law to the facts is also reviewed under the substantial evidence standard. *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 484 (6th Cir. 2003); *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 899 (6th Cir. 1996). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477; *Pleasantview Nursing Home*, 351 F.3d at 752; *NLRB v. St. Francis Health Care Ctr.*, 212 F.3d 945, 952 (6th Cir. 2000).

Finally, as this Court has recognized, given the “facts and complexities of the bargaining process[,]...few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems.” *NLRB v. Plainview Ready Mix Concrete Co.*, 44 F.3d 1320, 1326 (6th Cir. 1995) (citations omitted).

SUMMARY OF ARGUMENT

It is settled that an employer may lockout its employees to bring economic pressure to bear in support of a legitimate bargaining position. Here, it is undisputed that the lockout was lawful at its inception. Likewise, it is undisputed that the Company unlawfully failed to provide the Union with information about comparative wage and benefit data that the Union requested during negotiations. Applying its established, and uncontested, test to the atypical facts of this case, the Board determined that the Company’s failure to provide the information did not materially affect the parties’ inability to reach agreement, and therefore the lockout remained lawful.

The Board found that the record amply demonstrated that the parties were far apart on many issues fundamentally important to each side, not only related to wages and benefits, but also matters involving changes to job classifications that would drastically affect unit members’ seniority rights, health and safety matters, and a management rights clause. The outstanding information did not relate to the

Company's proposals on these other matters, and the information was not central to resolving the parties' differences. The Board found that there was an insufficient link between the Company's failure to supply the requested information and the continuation of the lockout. Because the unlawfully withheld information did not materially affect the parties' ability to reach agreement, the lawful lockout was not converted to an unlawful one.

The Union challenges the Board's conclusion, pointing to select testimony in the record that it wanted the information to develop proposals. However, the Union's arguments ignore the uncontested fact that the parties had several key issues separating them. These matters, dealing with such fundamental issues as management rights and seniority, were unaffected by the outstanding information request. As such, the Company's failure to provide the information did not materially affect the parties' ability to reach agreement, and the Company was entitled to maintain a lockout to support its legitimate bargaining positions.

ARGUMENT**THE BOARD RATIONALLY FOUND THAT THE COMPANY'S LOCKOUT, WHICH WAS UNDISPUTEDLY LAWFUL AT ITS INCEPTION, DID NOT CONVERT TO AN UNLAWFUL LOCKOUT WHEN THE COMPANY UNLAWFULLY FAILED TO PROVIDE REQUESTED INFORMATION BECAUSE THE WITHHELD INFORMATION DID NOT MATERIALLY AFFECT THE PARTIES' ABILITY TO REACH AN AGREEMENT**

This case analyzes the effect of an outstanding, and unlawfully withheld, information request on the continuing legality of a lockout. Before the Court, there is no dispute that the Company's initial lockout of its employees on June 23, 2008 was lawful⁴ and that its post-lockout failure to provide relevant information about labor costs at other plants was unlawful.⁵ The Board recognized that this created an unusual fact pattern, but determined that it would apply the same standard that it used for determining whether an unlawful failure to furnish information renders a lockout unlawful from its inception. Under this standard, "where the unlawful withholding of information did not materially affect the progress of negotiations, the ensuing lockout is lawful notwithstanding the unremedied violation." (D&O 4, A. 323.) The Union does not contest the Board's standard, only its application.

⁴ In the complaint, the General Counsel did not allege that the lockout was unlawful at its inception. (D&O 6, A. 325; Complaint 3, A. 219.)

⁵ (D&O 2-3, A. 321-22.) *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956) (employer has obligation to provide financial information as part of its duty to bargain in good faith, explaining that "if . . . [a cost] 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").

Therefore, the sole issue presented is whether substantial evidence supports the Board's determination that the information unlawfully withheld by the Company, while relevant, did not materially affect the progress of the negotiations between the parties to the extent that the lawful lockout was converted to an unlawful one.

A. Applicable Principles Regarding Lockouts

Here, it is uncontested that the Company lawfully locked out its employees after several unsuccessful negotiating sessions and the expiration of the collective bargaining agreement. It is settled that an employer may lawfully lock out its employees if it is done "for the sole purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); accord *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991). In *American Ship Building*, the Court emphasized that the Act "[does] not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." 380 U.S. at 317. As this Court has stated, where "there [is] no finding that that the employer was actuated by a desire to discourage membership in the union," the employer may lockout employees to affect the outcome of negotiations. *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159, 1161 (6th Cir. 1968) (quoting *American Ship Bldg.*, 380 U.S. at 313).

Conversely, a lockout is unlawful “where the Board has concluded on the basis of substantial evidence that the employer has used a lockout as a means to injure a labor organization or to evade [its] duty to bargain collectively.”

American Ship Bldg., 380 U.S. at 308. If an employer’s bargaining position is tainted by an unremedied unfair labor practice, a lockout in support of that position violates Section 8(a)(3) and (1) of the Act because the employees are effectively forced to accept the unlawful conduct to end the lockout. *Teamsters Local Union No. 639*, 924 F.2d at 1085. Likewise, by locking out employees “for the purpose of evading its duty to negotiate with the employer’s bargaining representative,” an employer also violates Section 8(a)(5) and (1). *Id.*

However, the existence of an unremedied unfair labor practice by an employer does not *require* a finding that a lockout is unlawful, if there is no evidence that the employer’s unlawful act served to frustrate collective bargaining. For example, where an employer unlawfully insisted on excluding certain employees from the unit in violation of the Act, but the parties’ failure to reach agreement turned on other issues between the parties, not the employer’s position regarding the unit, the lockout was not unlawful. *See Delhi-Taylor Refining Div.*, 167 NLRB 115, 116-17 (1967), *enforced sub nom.*, *Hess Oil and Chem. Corp. v. NLRB*, 415 F.2d 440, 446-47 (5th Cir. 1969).

In circumstances involving an employer's failure to provide information during negotiations, the Board examines the nature of the information withheld and the key issues between the parties to determine if there is a causal connection. Where an employer unlawfully fails to provide information, an ensuing lockout is lawful if there is no evidence that negotiations were adversely affected. *Central Ill. Public Serv. Co.*, 326 NLRB 928, 936 (1998) (information withheld was admittedly related to a relatively minor issue and was "no obstacle to a contractual agreement"), *enforced on other grounds sub nom., Local 702, Int'l Bhd. of Electrical Wkrs. v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000). Likewise, where the parties' bargaining positions were so polarized at the time of the lockout that the employer's failure to provide information did not preclude meaningful bargaining, the lockout will not be found unlawful. *See Brewery Prods., Inc.*, 302 NLRB 98, 98 n.2 (1991). Conversely, where an employer's unlawful withholding of information materially affects the bargaining, the lockout has been found unlawful. *See Clemson Bros.*, 290 NLRB 944, 944-45 (1988) (lockout unlawful where employer refused to substantiate its claim of inability to pay because such information "likely would have furthered the bargaining process"); *Globe Bus. Furniture, Inc.*, 290 NLRB 841, 841 n.2 (1988) (lockout unlawful where employer repeatedly refused to provide the union with "crucial information central to bargaining"), *enforced*, 889 F.2d 1087 (6th Cir. 1989) (table).

B. The Company's Failure to Provide Information Did Not Materially Affect the Progress of Negotiations and Render the Lockout Unlawful

Here, as the Board found, the parties “were far apart in bargaining on issues both parties deemed fundamentally important,” not only including wages and benefits, but also workplace changes involving designation and superseniority for key operators, a management rights clause, and health and safety issues. (D&O 4, A. 323, Order Denying MFR 3, A. 334.) Specifically, the Company proposed changes to its structure that it deemed crucial to operational flexibility. It presented a plan to restructure the workforce, proposing to organize employees into teams, dramatically changing employees’ opportunities to bid for new jobs, and create key operators who would be granted superseniority. The Union was, and remained, vehemently opposed to this proposal. The Union negotiators stated there was “no way in hell” the Union would allow the Company to implement its key operator proposal, and considered the proposal a “deal breaker.” (Tr. 393, 256, S.A. 424, 375.) Local union president Pardue told the Company that the Union would never vote on a proposal that included key operators. (Tr. 369, S.A. 416.) Likewise, the Company’s proposal to move outsourcing into a management rights clause was met with stringent opposition by the Union’s negotiators, who believed that the proposal would strip its members of job security. (D&O 1, 7, A. 320, 326; Tr. 42, 65, 196-98, GCX 5, S.A. 340, A. 42, S.A. 366-68, 444-48.)

According to union representative Brown, his co-negotiator Bressler termed the Company's outsourcing proposal "bull" and stated that it was "ridiculous to . . . just give an unlimited right to the Company to [outsource] without any recourse." (Tr. 54, CX 2 p.1, A. 31, S.A. 451.)

The Company's economic proposals also were met with intense and passionate resistance from the Union. The Company proposed a three-tiered wage and benefit proposal, distinguishing between existing employees, new hires and employees recalled from layoff. The Union vigorously opposed this proposal, believing it would "destroy the bargaining unit," (Tr. 170, A. 105), by dividing its members and "put brother against brother" (Tr. 369, S.A. 416). (D&O 1, 7, A. 320, 326; Tr. 43-46, 199, GCX 5 p.1, S.A. 341-44, 369, 444.) Union negotiator Bressler told the Company that the Union had struck other employers over proposals to treat recall employees differently from current employees and that this issue would be with the parties until the end. (Tr. 297-98, CX 2 p.1, CX 3 p.1, S.A. 388-89, 451, 453.) Indeed, the Union described the tiered wage and benefit proposal to its members as "immoral and unacceptable!" (GCX 5, p.1, S.A. 444.)

Notwithstanding the Company's unlawful refusal to provide the information to the Union, the parties continued to meet several times but were unable to make progress on the same contentious issues that previously divided them. Although, as the Board found (D&O 2, A. 321), the comparative wage information might

have had potential to help the Union shape some bargaining proposals, the record is replete with references to ongoing and significant differences between the parties – superseniority for key operators, teaming and its effect on seniority, health and safety issues and management rights – for which the requested information was not needed. (D&O 4-5, A. 323-24; Tr. 41-42, 54, 65-66, 80, 105-09, 146, 148, 189, 248-49, 253, 256-57, 288, 312, 357, 365, 393, GCX 5, UX 1, UX 5 p.1-9, S.A. 339-40, A. 31, 42-43, 50, 66, S.A. 351-54, A. 83, 85, S.A. 362, 370-71, 374-76, 382, 411, 413, 424, 444-48, 529-40, 541-49.) The Company’s detailed bargaining notes from post-lockout negotiating sessions in July and August 2008 show that the parties discussed a range of topics, but the information request was not a prominent one. (UX 4, S.A. 270-92, UX 5, S.A. 541-51.) Rather, the Union was unwilling to compromise because it had fundamental objections to the Company’s key proposals. (D&O 1, 4, 7, A. 320, 323, 326; Tr. 170, 197-99, 256-57, 298, 393, A. 105, S.A. 367-69, 375-76, 389, 424.)

In the face of evidence that neither party was willing to compromise on the key issues, the Board reasonably found that the information withheld by the Company did not materially affect the parties’ ability to progress in their negotiations. Indeed, there was no evidence that “the outstanding information request was a stumbling block to bargaining.” (D&O 4, A. 323.) In its notice to its members about the status of negotiations after the agreement expired, the Union

claimed that there were 150 issues that remained to be resolved, but it did not mention in this communication that the Company had failed to provide information that precluded the Union from formulating a proposal. (D&O 2, A. 321; GCX 5, A. 232, 444-48.) Where, as here, the parties' positions are so polarized, the employer's failure to provide information does not serve as the stumbling block to negotiations that "preclude[s] meaningful bargaining." *Brewery Prods.*, 302 NLRB at 98 n.2, 101 (finding lockout lawful where there was unlawful delay in providing information but it was the "absolute lack of movement" on key proposals that caused the parties not to reach agreement). In its decision, the Board expressly stated (D&O 5, A. 324) that it did "not foreclose the possibility that an employer's unlawful failure to provide information may cause an ongoing, lawful lockout to become unlawful," but found this was not that case.

C. The Union's Arguments Are Factually and Legally Unsupported

The crux of the Union's claim, repeated throughout its brief (Br. 14-15, 30-32, 35-36), is that the Company "linked" its concessionary proposals on outsourcing and wages to the labor costs at other plants. Therefore, the Union argues (Br. 31, 32), it was unable to formulate a proposal to counter different wage policies or other "intertwined" issues. Quite simply, the record does not support the Union's claims. There is scant evidence that the Union considered the requested information to be a major part of its bargaining strategy, without which it

was unable to engage in meaningful bargaining. As the Board found (D&O 4, A. 323), the Union did not claim to the Company that the Company's failure to provide the information precluded it from evaluating the Company's proposals or formulating its own counterproposals. Indeed, even accepting the Union's assertions that Bressler told the Company negotiators that the information would "make a difference" in responding to the wage and benefits proposals, the Board found these "passing references" to the information request did not change the fact that the parties were, on principle, far apart on several substantive proposals, including the key operators, management rights, and health and safety. (Order Denying MFR 2-3, A. 333-34.) Notably, the "outstanding information did not form the basis of [the Company's] proposals on any of those ... matters and was not central to resolving the parties' differences." (Order Denying MFR 3, A. 334.)

As the Board recognized (D&O 4 n.14, A. 323 n.14), this case stands in marked contrast to those cases where the employer's failure to provide information materially affects the progress of negotiations so that the ensuing lockout is unlawful. For example, in *Globe Bus. Furniture*, 290 NLRB at 841 n.2, 844, 851, the union repeatedly sought information related to the cost of employee insurance and other benefits, explaining that it needed the information to formulate a competitive bid from the union's trust fund. In the face of the employer's repeated refusal to provide the union with "crucial information central to bargaining," as

well as other unlawful conduct, the Board found the employer's subsequent lockout a violation of the Act. The Union's reliance on *Globe Business* (Br. 30), is unavailing because, in marked contrast to the union's conduct there, here the Union did not tell the Company that it was unable to formulate counterproposals until it had the requested information.⁶ Equally as distinguishing, here, the parties were unable to progress with negotiations because the Union was vehemently opposed to company proposals that would cleave the Union's membership into favored and unfavored classes and potentially decimate the unit through subcontracting—not just because the Union was purportedly unable to respond to some of the Company's economic proposals.

Likewise, this case stands in contrast to *Clemson Brothers*, 290 NLRB at 944-45, where the Board found an employer's lockout of its employees unlawful where it had withheld information substantiating its claimed inability to pay because such information "likely would have furthered the bargaining process." *See also Bagel Bakers Council*, 174 NLRB 622, 630 (1969) (finding unlawful lockout in part because failure to support claim that economic conditions

⁶ Contrary to its assertions (Br. 33), union representative Bressler's comments in post-lockout bargaining sessions do not stand as evidence that the Union "claimed it was precluded from evaluating [the Company's] proposals or formulating its own counterproposals." At most, as noted, Bressler "made a few passing references" to the information requests in post-lockout bargaining sessions (Order denying MFR 2), hardly enough to let the Company know that the requested information was purportedly make-or-break for the Union to formulate a counterproposal.

necessitated a 40 percent reduction in labor costs substantially contributed to a stalemate in negotiations), *enforced*, 434 F.2d 884 (2d Cir. 1970).

Contrary to the Union's assertions (Br. 31), union representative Bolte's testimony does not prove that the outstanding information materially affected the progress of negotiations. Although Bolte testified that the information "could have changed" the proposals that the Union offered, there is little evidence of discussion of the information request at the bargaining table and no evidence that Bolte even expressed these sentiments to the Company. This *post hoc* explanation about the potential significance of the information does not serve as a substitute for evidence that the Union was prepared to make concession on the contentious proposals that divided the parties if it received the requested information or that the Union even suggested to the Company that the requested information precluded it from crafting counterproposals. On the record here, it is unclear how the information would have allowed the parties to reach agreement given the fundamental differences between them on not only economic but noneconomic proposals. *Compare NLRB v. Jarm Enters., Inc.*, 785 F.2d 195, 204 (7th Cir. 1986) (converting economic strike into unfair labor practice strike where evidence that union was prepared to make meaningful concessions and employer's refusal to reveal financial data about its alleged inability to pay precluded evaluation of employer's position and resulted in the cessation of all bargaining).

There is no merit to the Union's argument (Br. 37-38), that the Board's decision in *KLB Industries, Inc.*, 357 NLRB No. 8, 2011 WL 3860607 (Jul. 26, 2011), is inconsistent with the Board's analysis here. Contrary to the Union's claims, the facts in *KLB* are not "almost identical" to the facts here. In *KLB*, the employer made specific and repeated claims of competitive disadvantage, and its asserted need for wage concessions based on increased competition from Asian companies, and the union sought information seeking to verify this assertion. 2011 WL 3860607 at *1-*4, *6, *64. The Board found that the wage concessions "were the central point of disagreement during negotiations" and "a key stumbling block to an agreement...." *Id.* at *6. Thus, *KLB* falls squarely within the line of cases where an employer's unlawful withholding of requested information materially affects bargaining, and therefore the lockout is unlawful. *See* discussion at p. 30-32, above.

In contrast, here, the major areas of disagreement between the parties were the Company's restructuring of its teams, including key operators positions with superseniority and outsourcing as a management right, in addition to the three-tiered structure of its compensation proposal. The parties were both deeply entrenched in their own positions: the Company sought flexibility in its management structure and the Union sought to maintain its seniority system and outsourcing gains from its previous collective bargaining agreement, and to protect

its members from being pitted against each other. Thus unlike *KLB*, there were numerous areas of disagreement – apart from areas relevant to the information request – where the parties were far apart.

The comparative labor cost information sought by the Union, had little if any connection to these substantial disagreements between the parties. (Tr. 189-91, 196-99, 330, 335, S.A. 362-64, 66-69, 402, 407.) Although the Union may have wanted the information in order to evaluate economic concessions, the Union had a strong philosophical opposition to a tiered structure, regardless of the amount of compensation offered, believing that it pitted members against one another. (D&O 1, 7, A. 320, 326; Tr. 42-44, 198-99, 297-98, 312, 369, GCX 5 p.1, GCX 10 p.1, UX 1 p.1541, 1544-45, S.A. 340-42, 368-69, 388-89, 397, 416, 444, 245, 534, 536-37.) Moreover, the Company repeatedly told the Union that the proposed wage rates were based on the Nashville area employers, not other Paccar facilities. (D&O 2-3, 9, A. 321-22, 328; Tr. 333-36, GCX 12 p.1, UX 4 p.12, CX 4, S.A. 405-08, 249, 292, 456-58.)

Finally, in claiming that the Board ignored union witnesses' testimony that the Union raised the information request to the Company during the post-lockout bargaining sessions, the Union argues (Br. 39-42) that the judge's credibility resolution must be read as a "wholesale crediting" (Br. 40) of the testimony of the Union's witnesses. As the Board found, however, testimony about post-lockout

bargaining the Union cites was not explicitly credited by the judge. (Order Denying MFR at 2, A. 333.) Simply because the judge credited union witnesses' testimony showing that the Union actually made a relevant information request does not mean that the judge necessarily credited (or even considered) the same witnesses' testimony about the frequency, timing, or vehemence of the information request, as the Union suggests (Br. 40-42). Indeed, the judge "did not discuss" those factors. (Order Denying MFR at 2, A. 333.) And, in any event, the Board held (Order Denying MFR at 2, A. 333) that, even if credited, the Union's testimony about mere "passing references" to the information request during post-lockout bargaining would not change the result. In sum, on this record, the Board reasonably found that the Company's failure to provide the information did not convert the lawful lockout into an unlawful one.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review.

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October 2012

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE &)	
ARGICULTURAL IMPLEMENT WORKERS)	
OF AMERICA, UAW AND UAW LOCAL 1832)	
)	
Petitioners)	
)	No. 12-1455
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,)	26-CA-23225
)	
Respondent)	
)	
And)	
)	
PACCAR, INC., d/b/a PETERBILT MOTOR)	
COMPANY)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,292 words of proportionally-spaced, 14-point type, and the word-processing system used was Microsoft Word 2007.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 15th day of October, 2012

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COMPANY)	
)	
Intervenor)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, D.C.
this 15th day of October, 2012