Allen Storage and Moving Company, Inc. *and* Local 332, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–44395 and 7–CA–44993

July 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On February 14, 2003, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

For the reasons stated in the judge's decision, we agree that the Respondent violated Section 8(a)(5) and (1) by unilaterally canceling whole life insurance policies that the Respondent maintained for unit employees,[2] and that the Respondent violated Section 8(a)(1) by threatening to discharge employees if they did not comply with the terms of the Respondent's March 2002 recall notification. For the reasons set forth in section 1 below, we also agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by locking out employees in September 2001 and March 2002.

We do not agree, however, with the judge's finding that the Respondent violated the Act by failing to provide certain information to the Union. As we explain in section 2 below, we find that the Respondent met its burden of showing that the information the Union requested was confidential and that the Respondent offered a reasonable alternative to the Union to obtain the information it sought, which the Union rejected without discussion or explanation. The Respondent, therefore, was not obligated to provide the requested information to the Union.

1. The judge found that the Respondent locked out its employees in violation of Section 8(a)(3) and (1) for periods in September 2001 and March 2002. In adopting this finding, we particularly agree with the judge that the Respondent's discriminatory motivation for the lockouts is demonstrated by the manner in which it implemented them.[3] Thus, the Respondent, without explanation or justification, allowed Steven Jennings, the only unit employee who had not participated in the strike, to continue working during both periods of the lockouts, while it barred each former striker from work. Such disparate treatment of former strikers is, as the judge found, evidence of discriminatory motive in the circumstances of this case.[4] See *McGwier Co.*, 204 NLRB 492, 496 (1973); *O'Daniel Oldsmobile*, 179 NLRB 398, 401 (1969).

We further agree with the judge that for a lockout to be permissible under *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), it must be for the "sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position." Here, the Respondent's lockouts were in support, at least in part, of a bargaining proposal to "provide each employee with a $30,000.00 group term life insurance plan" "in lieu of the current death benefit." While this proposal on its face might have been legitimate, it was advanced in the face of the Respondent's unlawful termination of the employees' current death benefit—an unfair labor practice, which was unremedied at the time of the lockouts. The Respondent's proposal would, therefore, have required the employees to accept the Respondent's unlawful conduct in order to end the lockouts. In this context, the Respondent's lockouts cannot be found lawful under *American Ship Building Co.*[5]

2. The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union

[1] The General Counsel in his answering brief and the Charging Party in a separate motion, urge the Board to reject the Respondent's exceptions on the ground that they do not conform to the requirements of Sec. 102.46(b)(1) of the Board's Rules and Regulations. We find, however, that the pro se exceptions, which were filed by the Respondent's president, substantially comply with the requirements of Sec. 102.46(b)(1). Accordingly, we shall consider them on their merits.

Submissions from both the Respondent and the Charging Party indicate that the Respondent may have ceased operations. The effect of the alleged cessation of operations on the remedy in this case is a matter best left to the compliance stage of this proceeding.

[2] The judge correctly provided the standard remedy for this unfair labor practice, i.e., the Respondent shall restore all the individual whole life policies that it unlawfully canceled and make employees whole for their losses. Any issue concerning the feasibility of restoring the canceled policies may be resolved at the compliance stage of this proceeding.

[3] Members Schaumber and Walsh also rely on the facts that the Respondent required unit employees to turn in their company-issued credit cards, pagers, and security/access cards and did not pay employees who were recalled for the entire March 22, 2002 orientation meeting or for the Good Friday holiday, although the Respondent paid replacement employees for the holiday.

[4] In finding that there was a discriminatory motive for the lockouts, Chairman Battista and Member Schaumber do not rely on the statements of the Respondent's president, David Jackson, that he had "hard feelings" about the employees' strike and that he would "beat this," i.e., the strike, as he had beaten cancer.

[5] See *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (employers violated Sec. 8(a)(3) by locking out employees in an attempt to coerce the union to accept the unlawfully implemented final offer).

with information concerning the names of the Respondent's customers because the information was relevant to the Union's statutory duties and the Respondent had not shown that it had a "legitimate and substantial confidentiality interest that outweighs the Union's need for the requested information." The judge further found that the Respondent had not sought an accommodation with the Union on the requested information. We disagree.

The pertinent facts show that the Union engaged in a 5-week strike against the Respondent, during which the Union picketed a number of the Respondent's locations, contacted several of the Respondent's customers, and appeared at the Respondent's jobsites. On September 17, 2001,[6] the Union made an unconditional offer to return to work on behalf of the striking employees. The Respondent accepted the offer with the caveat that there was not enough work available for all striking employees to return to work immediately. The Respondent asserted that some employees could return on September 24. On September 21, however, the Respondent decided to lock out the striking employees.

On September 25, the Union asked the Respondent for "information . . . for all work performed [by the Respondent] . . . from September 17, 2001 forward." The request was for estimate sheets, local work order invoices, intrastate and interstate bills of lading, and records of work referred to the Respondent by other moving companies. The Union asserted that it needed the information to evaluate the Respondent's claim concerning the diminished availability of work.

In a letter dated October 1, 2001, the Respondent refused to provide the information, noting that it was "highly confidential, proprietary business information concerning [the Respondent's] customer base." In the same letter, the Respondent offered "to permit a post-strike review of the company financials," which should show "that the company's financial picture has deteriorated even further as a result of the strike, therefore, providing further justification for its change in bargaining position."

In its October 11 response, the Union stated that it would use the requested information to evaluate only the Respondent's claim concerning work availability and that it had "no intention of using that information for any other purpose." The Union repeated this promise at the parties' October 30 negotiating session. The Union, without discussion or explanation, did not accept the Respondent's offer to review the company's financial records. The Respondent did not release the requested information.

[6] All subsequent dates are in 2001 unless indicated otherwise.

Between November 13 and December 1, the Union sent letters to approximately 20 customers of the Respondent stating that the Respondent "had bargained in bad faith for a new contract and locked out all of its Union employees." The Union requested that the letters' recipients "remain *neutral* during this dispute by suspending any business with [the Respondent] until it ends its unlawful lockout of [Union] employees." (Emphasis in original.) The Union further stated that if the recipient of the letter "choose[es] to support [the Respondent] during this dispute, the [Union] will have no choice except to target your organization for boycott actions."[7]

The relevant principles are as follows. An employer has a statutory obligation to provide a union, upon request, with information which is relevant and necessary to the union for the proper performance of its duties as a collective-bargaining representative. *Norris Sucker Rods*, 340 NLRB 195, 197 (2003), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Even assuming that the requested information is relevant, an employer may have a valid reason for not furnishing the information. The Supreme Court in *Detroit Edison*, supra, found that, in certain situations, a substantial claim of confidentiality may justify a refusal to provide relevant information. The Board has held:

> [I]n dealing with union requests for relevant but assertedly confidential information, we are required to balance a union's need for such information against any "legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information.

Minnesota Mining & Mfg. Co., 261 NLRB 27, 30 (1982), enfd. sub nom. *Oil Chemical & Atomic Workers Local 6418, v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). See also *Good Life Beverage Co.*, 312 NLRB 1060, 1061 (1993). The Board has further held that "when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests."

[7] During the same time period, the Union handbilled students at a local community college which was a customer of the Respondent. The Union's handbill stated that it had asked the college "to suspend doing business with [the Respondent] until [the Respondent] ends its anti-union lockout." The handbill further asked the students to support its dispute with the Respondent by asking the college administration to stop doing business with the Respondent.

Pennsylvania Power & Light Co., 301 NLRB 1104, 1105–1106 (1991).[8]

For the purposes of this decision, we will assume, without deciding, that the information the Union requested was relevant and necessary to the Union for the proper performance of its duties as the collective-bargaining representative. The Respondent declined to provide the information, asserting that it was highly confidential because it included the names of existing and potential customers. We find that the Respondent established that its claim of confidentiality was legitimate and substantial.

Gregory Tuscher, a member of the Respondent's management team responsible for labor relations, testified that he was concerned about the possible misuse of the information the Union requested and that it might "be used to continue picketing us where we were doing our jobs." Tuscher's concerns were based on activities the Union engaged in during the strike, which included not only picketing at various of the Respondent's locations, but also included contacting several clients and showing up at jobsites. Subsequent events, of course, confirm the legitimacy of the Respondent's concerns, because the Union, despite its promise not to do so and even without getting the information from the Respondent, contacted at least 20 of the Respondent's customers to urge those customers not to do any business with the Respondent. The Union threatened to "target" these neutrals with "boycott actions." We recognize that, at the time of the original refusal to give information, the Union had not yet threatened neutrals. Further, as to the threat to neutrals, although it had not yet occurred, the Respondent's fears were prescient. Shortly after the refusal, the Union threatened the neutrals. Finally, quite apart from the threat, the Respondent had a legitimate interest in protecting proprietary information concerning its customers.[9] On these facts, we find that the Respondent has timely raised and established a legitimate confidentiality concern about the release of its customers' names to the Union.[10]

We further find that the Respondent fulfilled its obligation to bargain towards an accommodation between the Union's need for the information and the Respondent's confidentiality concerns. *Pennsylvania Power & Light Co.*, supra, 301 NLRB at 1105–1106. The Respondent sought to accommodate the Union's need for information about the amount of work available by offering the Union the opportunity to examine the Respondent's books. In a letter to Union Business Agent Rodney Eaton dated October 1, the Respondent stated: "The union was provided the opportunity to review the company's finances prior to the strike. Please consider this correspondence as the company's offer to permit a post-strike review of company financials. . . . I am confident that you will find that the company's financial picture has deteriorated even further as a result of the strike . . ." The Union, without discussion or explanation, did not accept the Respondent's offer, even though the "financials" could have given the Union the information it said it needed. Indeed, at the hearing, Eaton admitted that he had no reason for not accepting the Respondent's offer to review its financial statements.

[8] Member Walsh agrees with this statement of the law. However, he disagrees with the majority's application of law to the facts in this case. For the reasons stated by the judge, Member Walsh finds that the Respondent violated Sec. 8(a)(5) of the Act by refusing to provide the Union with the requested information.

First, the judge properly found that the requested information was relevant to the Union's statutory duties because, inter alia, the credited testimony showed that the information was necessary to assess the Respondent's claim that there was not enough work available for all striking employees to return.

Second, the judge correctly found that the Respondent did not show that it had a legitimate and substantial confidentiality interest. The Respondent contended that it feared the Union would use the information to urge potential customers to boycott the Respondent. However, the Union met that concern by pledging that it would not use the information for any other purpose than to determine availability of work for returning strikers. That the Union began contacting the Respondent's customers some 2 months *after* the Respondent refused to provide the information does not establish the Respondent's case. As the judge emphasized, there is no evidence that the Respondent knew the Union had such plans when it denied the request for information. Nor was there evidence that the Union intended to violate its pledge.

Finally, even assuming that the Respondent had established a legitimate and substantial confidentiality claim, the judge properly found that the Respondent did not attempt to negotiate with the Union to provide the information in a manner that would meet the Union's needs without compromising the Respondent's confidentiality concerns. The majority thinks otherwise because the Respondent offered to allow the Union to conduct "a review of the company financials." However, as the judge found, the Respondent "did not suggest that this would substitute for the information sought by the Union about upcoming work, but rather that it would support the Respondent's position that the company's regressive proposals were justified by the deterioration of its business."

[9] Chairman Battista also notes that, to the extent that the information was said to be relevant to the lockout, the need for the information has been mooted, as a practical matter, by the instant decision, which finds the lockout to be unlawful.

[10] Compare with *Custom Excavating, Inc.*, 228 NLRB 285, 287–288 (1977), enfd. as modified in other respects 575 F.2d 102 (7th Cir. 1978), where the respondent's claim that the union would subject its customers to harassment and lose business was found to be speculative because the union's business representative testified that the union had not contacted any of the respondent's customers. Compare also *Island Creek Coal Co.*, 289 NLRB 851 fn. 1 (1988), enfd. 879 F.2d 939 (D.C. Cir. 1989). (Absent proof that the Union was unreliable in respecting confidentiality agreements, the Respondent's failure to test its willingness to treat the information confidentially weighs heavily against its defense.)

In conclusion, we find that the Respondent has established its confidentiality claim and has met its duty to bargain towards an accommodation with the Union. We therefore conclude that the Respondent did not violate Section 8(a)(5) of the Act by not providing the Union with the information it requested.

ORDER

The National Labor Relations Board orders that the Respondent, Allen Storage and Moving Company, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the duly designated representative of its employees in the appropriate bargaining unit by making certain unilateral changes in terms and conditions of employment.

(b) Discriminating in regard to hire, tenure, or terms or conditions of employment of its employees by locking out employees because they have engaged in protected or union activity, and in order to discourage such activities.

(c) Interfering with, restraining, or coercing employees in the exercise of their Section 7 rights by threatening to terminate employees who do not appear in response to an unreasonably short deadline in a recall notice.

(d) 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) Restore all the individual whole life insurance policies that it unilaterally canceled in March 2000 and make employees and/or their estates whole for all losses suffered as a result of the unlawful cancellation of those policies.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time drivers, helper drivers, helpers, and warehousemen employed by the Respondent at its Flint, Michigan, facility; but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(c) Within 14 days from the date of this Order, offer all locked out employees full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make all locked out employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

(f) Within 14 days after service by the Region, post at its Flint, Michigan, facility, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2001.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[11] 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of our employees by unilaterally changing terms and conditions of employment.

WE WILL NOT discriminate against you by locking out employees because they have engaged in protected or union activity or in order to discourage such activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by threatening to terminate employees who do not appear in response to an unreasonably short deadline in a recall notice.

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

WE WILL restore all the individual whole life insurance policies that we unlawfully canceled in March 2000 and WE WILL make employees and/or their estates whole for all losses suffered as a result of the unlawful cancellation of those policies.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time drivers, helper drivers, helpers, and warehousemen employed by us at our Flint, Michigan, facility; but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer all locked out employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make all locked out employees whole for any loss of earnings and other benefits resulting from their lockout, less any net interim earnings, plus interest.

ALLEN STORAGE AND MOVING COMPANY, INC.

Amy J. Roemer, Esq., for the General Counsel.
David John Masud, Esq. (Masud, Patterson & Shutter), Saginaw, Michigan, for the Respondent.
Samuel C. McKnight, Esq. (Klimist, McKnight, Sale, McClow & Canzano), of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Flint, Michigan, on August 6–8, and September 23–26, 2002. Local 332, International Brotherhood of Teamsters, AFL–CIO (the Union) filed the original charges on September 25, 2001, and April 4, 2002, and the amended charges on November 30, 2001, and May 8, 2002. The Regional Director for Region 7 of the National Labor Relations Board (the Board) issued the original complaint on December 27, 2001, and the consolidated complaint (the complaint) on June 28, 2002. The complaint alleges that Allen Storage and Moving Company, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by locking out former strikers who made an unconditional offer to return to work. The complaint also alleges that the Respondent violated Section 8(a)(1) by threatening the locked out workers with termination if they failed to return to work at the specific date and time the Respondent set. In addition, the complaint alleges that the Respondent failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act by unilaterally terminating the individual whole life insurance policies that it previously maintained for employees, and by refusing to supply information requested by the Union. The Respondent filed a timely answer in which it denied all the substantive allegations in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Flint, Michigan, is engaged in the storage and the intrastate and interstate transportation of goods and materials. In conducting these operations, the Respondent annually transports goods in excess of $50,000 directly to customers outside the State of Michigan from facilities within the State of Michigan.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a moving and storage company based in Flint, Michigan, that performs local and long-distance work.[2]

[1] The General Counsel's unopposed motion to correct the transcript, which was included in its brief, is granted. See GC Br. at fn. 2.

[2] The collective-bargaining agreement (CBA or Agreement) between the Respondent and the Union defines "local" work as that performed entirely within a 75-mile radius of the center of the city of Flint. "Long

Before 2001, the Respondent worked primarily for commercial clients, with services for a single customer—General Motors—accounting for approximately 65 percent of its business. General Motors stopped using the Respondent for these services as of January 1, 2001, and since then most of the Respondent's work has been moving and storing household goods for noncommercial customers. David Jackson is the Respondent's owner and has been its president since 1984. Gregory Tuscher, the Respondent's controller, was responsible for the day-to-day operations of the company when the violations are alleged to have occurred.

The Respondent and the Union have had a collective-bargaining relationship for over 20 years. As of May 2001, there were approximately 26 persons in the bargaining unit, which includes drivers, helper drivers,[3] helpers, and warehouse workers. The Respondent pays bargaining unit employees an hourly wage. Some of the Respondent's work is performed by a small number of "owner-operators" who generally use their own trucks and hire their own helpers. Unlike the bargaining unit employees, the owner-operators are compensated based on a percentage of the revenue from the particular job, regardless of how long the job takes. The owner-operators are not represented by a union.

The most recent collective-bargaining agreement (Agreement or CBA) between the parties was effective from July 1, 1997, to June 30, 2001. The parties held a total of 16 bargaining sessions between the first meeting for a successor agreement, on May 24, 2001, and the last such meeting, on November 20, 2001. The Union's bargaining team consisted of Rodney Eaton (the Union's secretary-treasurer, principal officer, and business agent), Richard Sheremet (a helper with the Respondent), Don Wilcox (a warehouse worker with the Respondent), and, as of September 25, 2001, Samuel McKnight (legal counsel).[4] The Union also included Roger McClow on its bargaining team at four of the meetings, because of McClow's knowledge regarding pension plans. The Respondent's bargaining team consisted of, Norman Freeman (vice president), John Gilligan (sales manager), David Masud (legal counsel),[5] Laury Oslun (operations manager), and Tuscher. A federal mediator participated in six bargaining sessions held from July 31, to November 20, 2001. A successor agreement had not been reached as of the time of trial.

B. The Canceled Whole Life Insurance Policies

Starting in about 1988 the Respondent had a practice of obtaining whole life policies for unit employees.[6] The policies named the individual employee as the insured, but any costs associated with the plans were paid entirely by the Respondent. Each of the policies started with a death benefit of $70,000, but over time, the amount of the death benefit for an individual's policy increased. For example, the whole life policy for employee Sheremet attained a death benefit of $84,963.49, and the policy for employee Joseph Staub attained a death benefit of $84,608.63. The whole life policies were also "portable," meaning that when an employee stopped working for the Respondent, he or she could retain the policy by paying the cash value of the policy back to the pension fund and taking over responsibility for ongoing premiums, if any. Depending on the age of the employee and the number of years the particular employee's policy had to accumulate cash value, those policies could provide considerably better terms to an individual who was leaving his or her job with the Respondent than the same individual would be able to obtain by purchasing a new whole life insurance policy at his or her current age. Policies that were sufficiently mature would be "self-funding," meaning that any premiums could be paid entirely out of dividends generated by the policy itself. As a practical matter, no unit employee has ever chosen to take advantage of the portability feature when he or she ceased to work for the Respondent. The CBA does not state that the Respondent is required to provide these individual whole life insurance policies; however, it does state that all active participants in the Respondent's pension plan are eligible for a $70,000 preretirement death benefit. The pension plan document also does not require the Respondent to provide the individual whole life insurance policies.[7]

Since 1988, the whole life policies have intermittently been a subject of discussion between the Respondent and the Union. On more than one occasion, the Respondent told employees that the whole life policies were a "great benefit." In 1993, in response to a union information request for information about the collectively bargaining pension plan, the Respondent provided the Union with a written explanation of the portability feature of the whole life insurance plans. During contract negotiations in 1997, the Union proposed an enhancement of the whole life insurance benefit, but the proposal was not agreed to by the Respondent and was withdrawn by the Union. Sometime in late 2000, Wilcox, a union steward, had a conversation with Tuscher regarding the fact that the whole life policies had been eliminated for nonbargaining-unit employees. Tuscher said that his plan for negotiations with the Union would involve doing the same thing with the whole life policies of unit employees. Wilcox stated that "he wasn't going to let that happen."

In March 2001, 4–6 months after the conversation with Wilcox, Tuscher canceled the whole life policies that the Respondent had maintained for bargaining unit employees. Jackson approved this action based on Tuscher's recommendation. In exchange for the policies, the Respondent received $176,070.10 that it deposited into the pension fund's investment account.

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distance" work is described in the Agreement as jobs originating at, and/or destined for, locations outside that 75-mile radius.

[3] To qualify as a driver, the employee must be certified by Allied Van Lines, with which the Respondent is affiliated. Drivers with this certification are authorized to drive for the Respondent both in Michigan and out-of-state. Helper drivers are also authorized to drive for the Respondent, but only within Michigan.

[4] McKnight also represents the Union in this litigation.

[5] Masud also represents the Respondent in this litigation.

[6] Until 1994, some or all of the whole life policies were with Confederation Life. In 1994, the Respondent terminated the Confederation Life policies and purchased substitute whole life policies with another insurance company. The record does not show whether the Union was aware of the change in insurance companies, whether the change affected the benefit in a substantial way, or whether the Union was given an opportunity to bargain over the change.

[7] The pension plan document gives the Respondent the power to establish "funding policy and method" for the plan.

Prior to canceling the policies, the Respondent did not notify the Union of its intention or give the Union an opportunity to bargain. Even after taking the action, the Respondent initially avoided revealing what it had done. At a bargaining session on May 31, 2001, McClow asked the Respondent to provide copies of the whole life policies.[8] Tuscher, who was present, knew that the Respondent no longer had copies of the policies because they had been surrendered. However, Tuscher did not share that information with McClow and the Union. Indeed, he allowed Masud, who was unaware that the policies had been canceled, to assure the Union that copies would be provided. On June 14, 2001, the Respondent provided some of the information requested on May 31, but not the whole life policies. McClow observed that the policies had not been provided as requested. Tuscher again failed to disclose that the Respondent no longer had whole life policies to provide to McClow, but rather stated that he had "forgotten" to bring the policies and would make sure McClow received them. It was not until July 2001 that the Respondent admitted to the Union that it had canceled the policies in March. At a bargaining session on July 12, the cancellation of the whole life policies was the first subject discussed between the parties. Eaton stated that the Union was "not happy" that the Respondent had canceled the policies "without even talking" to the Union, and he threatened to file unfair labor practices charges about the action.[9]

The Respondent's bargaining team asked what the Union wanted done about the cancellation of the whole life policies, and Eaton answered that the employees "wanted to be made whole." The Respondent suggested that it might "just reinstate the policies." Eaton said that if the Respondent did that without first bargaining over the remedy, the Union would file an unfair labor practice charge. However, Eaton indicated that the Union was willing to consider the Respondent's proposal to reinstate the policies. The Union's bargaining committee later rejected the proposal because it understood the Respondent to be offering to purchase new $70,000 whole life policies, and such policies would not have provided benefits equivalent to the more mature policies that had been canceled. Masud told the Union that the original policies could not be revived because "once they were cashed in, . . . it was done."

In March 2002, the Respondent obtained new policies for the employees at a cost of $39,171, considerably less than the $176,070.10 cash value of the policies it had canceled. Although these policies provided a minimum death benefit of $70,000, they did not provide benefits equivalent to those under the canceled policies. As noted above, a number of the original policies had death benefit levels well in excess of the $70,000 minimum, and the new policies would not reach those levels for many years. For example, the canceled policy in Sheremet's name had reached a death benefit of $84,963.49, but the replacement policy would not reach that level for 50 years. Moreover, since the new policies were purchased when some of the employees were quite a bit older, and since the policies had not had as much of an opportunity to accumulate cash value, the premium payments would generally be higher for any employees who took advantage of the portability aspect of the new policies. Tuscher told employees that the new policies were "as close as we can do right now" to replacing the policies canceled in March.[10]

C. Prestrike Bargaining

With the current contract set to expire on June 30, 2001, the parties began negotiations for a new contract on May 24, 2001. The Union stated that the most important change it was seeking was an increase in the monthly pension payments that employees would receive when they retired. The formal proposal that the Union gave the Respondent regarding this in June or July of 2001 called for an increase of approximately 80 percent over what was provided by the existing pension plan. The Union took the position that the Respondent could afford this by switching to a union health and welfare plan that would save money. The Respondent stated that the most important change from its point of view was the substitution of a "percentage pay plan" for the hourly wage system. According to the Respondent, the incentives created for employees by a percentage pay plan were necessary given that the company's workload was increasingly comprised of labor-intensive household goods jobs rather than commercial jobs.[11] The Respondent had also made a proposal regarding the grievance and arbitration process, and this was an important issue at the bargaining table. On one or more occasions during the negotiations the parties discussed the canceled whole life insurance policies.

[8] I credit Sheremet's testimony that McClow requested the whole life insurance policies at the May 31, 2001 bargaining session. (Tr. 348.) Tuscher testified that he recalled McClow asking for a number of documents at that time, but not for the whole life policies. Tuscher's testimony is inconsistent not only with Sheremet's testimony, but also with Tuscher's own notes from the meeting. (Trs. 855–857.)

[9] On November 30, 2001, the Union filed an unfair labor practices charge against the Respondent and included an allegation that the Respondent had unilaterally changed conditions of employment in violation of the Act.

[10] I do not credit Tuscher's testimony that Lawrence Raymond, of Equitable Insurance Company, informed him that the canceled whole life policies could not be reinstated. For reasons discussed infra, I did not find Tuscher a credible witness based on his demeanor and testimony. Moreover, although the Respondent's counsel stated that Raymond would be called as a witness to corroborate Tuscher's claim that Raymond said the plans could not be reinstated (Tr. 755), the Respondent never called Raymond. The Respondent did not claim that Raymond had become unavailable or otherwise explain its failure to present Raymond as promised. Moreover, Tuscher's claim that the whole life policies could not be reinstated was undercut by the testimony of Jerome Kanter, a life insurance expert. He stated that, in his experience, canceled policies could be reinstated when the risk had not changed and the client was willing to restore the surrender value and pay intervening premiums plus interest. (Tr. 234.) Tuscher's claim that reinstatement of the policies was impossible is also cast into doubt by his own testimony that the Respondent actually offered to reinstate the policies during discussions with the Union. (Tr. 1232.) I consider it telling that the Respondent was unable to produce any letters or other documentary evidence corroborating Tuscher's claim that Raymond told him the canceled policies could not be reinstated.

[11] In the 1997–2001 CBA, the Union and the Respondent had agreed to offer unit employees the option of being compensated on a percentage pay, rather than an hourly, basis. No unit employees ever volunteered for the percentage pay plan.

Little progress was made regarding the key proposals between the start of negotiations on May 24, and the beginning of August. The Union did not modify its request for an increase in the monthly pension payment, and the record suggests that the Respondent did not make a counter proposal regarding that subject. As far as the Respondent's percentage pay plan proposal, the Union told the Respondent that it was not interested in such a change. Nevertheless, during bargaining sessions, union officials posed questions regarding the specifics of how the Respondent's percentage pay plan would work, and the Respondent was unable or unwilling to answer a number of those questions. On July 10, the Respondent gave the Union a written proposal describing the percentage pay proposal. At the July 30 bargaining session, Masud stated that the Union's questions about the Respondent's percentage pay proposal had "caused the Company to look in on itself." On August 2, the Union told the Respondent that if the company agreed to a number of its demands on pension and other issues, then the Union would agree to "consider" switching to a percentage pay plan.

D. Strike, Offer to Return, Lockout

On June 14, 2001, about 3 weeks after the negotiations for a new contract started, the Union held a meeting at which the bargaining unit granted it authority to strike against the Respondent if necessary. By August 7, Eaton had become dissatisfied with the way in which bargaining was proceeding and notified the Respondent that the Union intended to go on strike in 72 hours.[12] The strike commenced on August 11. All members of the bargaining unit participated in the strike with the exception of Steven Jennings, a driver who continued to work. During the strike, the Union picketed a number of the Respondent's locations. The Union displayed signs containing statements such as "local 332 on strike" "Teamsters local 332 on strike against Allen Storage, unfair labor practice," "bargaining in bad faith," and "unfair labor practice strike."

The strike lasted for approximately 5 weeks. Then, on September 17, the Union made an unconditional offer to return to work on September 19. The record does not suggest, and the Respondent has not claimed, that any permanent replacement workers had been hired as of September 17. Indeed the Respondent's position is that it continued operations during the strike using owner-operators and temporary replacement workers. Respondent's Brief at 11. On the day after the Respondent received the Union's unconditional offer to return to work, Masud informed Eaton that the Respondent accepted the offer. Masud stated that there was not enough work for all the unit employees to return right away, but that some of them would be able to go back to work on September 24. Masud confirmed this conversation with a letter, dated September 18, 2001, informing Eaton that it "is not practical for all the strikers to return to work" immediately, but that the Respondent would "phase[ ]-in" the returning strikers "to work on an as-needed basis" beginning on September 24. Masud, McKnight, and Eaton participated in a conference call on September 19, during which they discussed the logistics of recalling the workers. McKnight said that the Union would cooperate with the Respondent's plan to call back employees out of seniority order and planned to do what it could to make the return to work orderly. Masud stated that the Respondent's owner/president, Jackson, had hard feelings about the striking and picketing.

The parties scheduled a followup conference call for September 21, to further discuss how the return to work would be implemented. Before the September 21 conference call took place, Masud informed Eaton that the Respondent had decided to lock out the unit employees. Masud explained that the Respondent felt it would not "be conducive to a stable labor relationship to have the employees come back and go back out again." Masud followed this conversation with a letter dated September 21, 2001, in which he stated that the lockout was necessitated by "the uncertainty of the present circumstances." The letter also stated that the Union had "not expressed any change to their current bargaining positions from that which existed prior to the strike," and that "any unnecessary continuation of the status quo is unacceptable." "As soon as agreement can be reached on all outstanding issues, including reasonable assurances of future labor stability," the letter stated, "the lockout will be immediately terminated." During the afternoon of September 21, after Masud informed Eaton about the lockout, McKnight telephoned Masud and asked why the Union's offer to return had first been accepted and then rejected. Masud stated that he could not answer. At the time the lockout was announced the parties had not reached an impasse and, in fact, engaged in four subsequent bargaining sessions, three of them with a mediator.

The Respondent permitted Jennings to continue working during the lockout. Jennings was the only bargaining unit employee who did not participate in the strike and the only bargaining unit employee whom the Respondent did not include in the lockout. During the strike and lockout, Jennings was working under the preexisting compensation system and the record provides no evidence that Jennings favored acceptance of the Respondent's percentage pay plan or other bargaining proposals.

After the Union was informed about the lockout, it picketed the Respondent, displaying signs with statements such as "locked out unfairly" and "bad faith bargaining." Starting in mid-November, Eaton sent letters to approximately 20 of the Respondent's customers alleging that the Respondent was bargaining in bad faith and warning the customers that they would be the subject of a boycott if they continued to do business with the Respondent during the lockout. The Respondent also distributed handbills, one of which gave the name and address of the Respondent's vice president and urged his neighbors to confront him about the Respondent's treatment of its employees. Union members occasionally followed Tuscher as he drove away from the Respondent's facilities.

The parties held four bargaining sessions after the lockout began. During these sessions the Union offered the Respondent a written guarantee that it would not engage in any strike, slow down, or sabotage if the Respondent ended the lockout. The guarantee at first had a term of 30 days, but the Union eventually increased this to 6 months. The Respondent declined to

[12] The Union and the Respondent had a written agreement that neither party would "take any unilateral economic action against the other without providing 72 hours advance written notice."

return the unit employees to work. Masud stated that regardless of the Union's assurances, the lockout would not end until the Union accepted the Respondent's bargaining proposals. During these sessions, the Respondent answered some of the Union's questions regarding the percentage pay proposal, and provided the Union with studies comparing what employees would be paid for certain jobs under the percentage pay plan as opposed to the hourly wage system. However, the information provided by the Respondent left unanswered a number of questions that the Union had raised. For example, the Respondent did not answer, at least not in a manner reasonably comprehensible to the Union, questions about how damage claims, down time, and drive time would be treated under the percentage pay proposal. The answers to one important question changed; at first the Respondent stated that unit employees would be paid a percentage of the job's "gross," but later the Respondent stated that employees would be paid a percentage of "net." The Respondent stated that its percentage pay proposal was not "set in stone" and that it would consider other types of incentive pay programs. It took the position, however, that the company could not afford to continue compensating employees using the hourly wage system.

As of the time of trial, the bargaining session on November 20, was the last one between the parties. McKnight took the position that the Union would not resume bargaining until employees were returned to work and could bargain as equals.

In December 2001, Lance Russom, one of the locked-out drivers, initiated a conversation with Jackson away from the Respondent's premises. Russom told Jackson that he was "hurting financially and . . . needed to get back to work." Jackson responded that there were two options for coming back to work, one of which was to become an owner-operator. Jackson did not explain what the other option for returning to work was. Jackson told Russom that he could talk to Oslun about returning to work. Jackson also said that he had "beaten cancer" and would "beat this." Subsequently, Russom telephoned Oslun, who told him that he could return to work as an owner-operator. The owner-operators were not represented by a union, and if Russom had returned to work under the terms suggested by Jackson and Oslun he would have forfeited his union representation. Russom decided not to become an owner-operator and was not returned to work.

E. Recall and Resumption of Lockout

In a letter to Eaton dated March 15, 2002, Jackson gave the Union "notice of termination of lock out and unconditional reinstatement to employment." Jackson's letter directed the bargaining unit employees to attend a work orientation scheduled for noon on March 22, and stated that failure to report "would result in [the Respondent] considering your employment as having been voluntarily and irrevocably terminated." At the time this letter was sent, the Respondent had no information indicating that there would soon be a large influx of work.[13]

A number of employees were unable to appear at the designated time, but Eaton informed the Respondent of this and no employee was actually disciplined, or otherwise disciplined, for failing to attend the March 22 orientation. The Respondent also agreed to the Union's request that the Respondent schedule work for unit employees who urgently needed income before assigning work to other unit employees whose need was less acute. In a letter to Jackson dated March 21, Eaton stated that the Union "pledge[d] to cooperate with the Company in the resumption of operations," and offered to encourage potential customers to engage in business with the company. Prior to the termination of the lockout, the Respondent was employing approximately 10 replacement workers. In a letter dated March 19, Jackson stated that the replacement workers would be permanently laid off as of March 22. Jackson's letter informed the replacement workers that they were being laid off because the lockout of the unit employees was ending.

Before the employees actually returned to work, Masud demanded that the Union agree to bargain on dates the Respondent had selected. In a letter dated March 18, 2002, Masud told Eaton that the mediator was available for negotiating sessions on March 26, 27, and 28 and that the Respondent was available to bargain on those days. In the letter, Masud acknowledged that he had been told that McKnight, the Union's attorney, was not available for negotiations until April 8 or 9. However, Masud stated that waiting till then to resume bargaining was "unacceptable," and urged Eaton to agree to bargain on the dates identified by the Respondent, which ranged from 11 to 14 days earlier than the dates proposed by Eaton. Masud did not approach McKnight about the earlier dates prior to writing to Eaton; nor was McKnight among those to whom Masud provided a copy of the letter. Masud's letter did not claim that he, or any other member of the Respondent's bargaining committee, would be unavailable on April 8 or 9. By letter dated March 20, McKnight informed the mediator that the Union would be available to bargain on April 9 and 10, 2002, but not before. After receiving a copy of this letter, Masud wrote to Eaton on March 22, complaining that "Mr. McKnight knows full well that I am not available either of those dates, as I am scheduled for surgery on April 9, 2002."[14] Masud stated that it was "imperative" that negotiations take place on one or more of the dates proposed by the Respondent, despite what he referred to as McKnight's "alleged" unavailability. If McKnight could not attend, Masud said that he himself was willing to refrain

[13] Tuscher testified that the lockout was ended at a time when the Respondent had to "start revving up" for the busy season. (Tr. 790.) However, Tuscher earlier testified that Respondent's busy season began on Memorial Day, (Tr. 776), which was more than 2 months after Jackson notified the Union that the Respondent was ending the lockout.

[14] The record provides no credible basis for believing that when McKnight proposed that bargaining take place on April 9 and 10, he was aware that Masud would be unavailable on those dates due to a medical procedure or other reason. The only witness who testified that Masud informed McKnight about his unavailability was Tuscher, and Tuscher admitted that he had no firsthand knowledge of any such conversation. Not only was Tuscher's belief that McKnight was aware of Masud's upcoming surgery based on unreliable hearsay, but his testimony on the subject was incoherent and contradicted by documentary evidence. (Tr. 1047 ff.) At any rate, Craig Schutter, another attorney from Masud's firm, had previously attended a bargaining session as the Respondent's legal representative in Masud's absence.

from attending. Masud took the position that since the Respondent had agreed to end the lockout, "it is only reasonable for the company to now expect good faith and immediate attention to the open bargaining issues."[15] Masud did not state any basis for doubting that McKnight's schedule prevented him from participating in bargaining sessions on the dates proposed by the Respondent; nor did he say that the lockout would be reinstated if bargaining did not take place on those dates. In a letter dated March 21, McKnight chastised Masud for communicating directly with union officials, rather than through counsel, regarding bargaining.

At about the same time as these prickly communications were occurring, the Respondent held the orientation meeting for the returning bargaining unit employees. Between 20 and 25 employees reported for the meeting. The Respondent's operations manager began the meeting by directing the attendees to turn in their security/access cards, their pagers, and the credit cards that employees used to purchase fuel on long distance jobs.[16] The employees completed forms relating to life insurance and health insurance policies.[17] Tuscher told the employees that the new life insurance policies were "as close as we can do right now," to the canceled whole life policies. The Respondent informed the returning employees that business was slow and that all of them would not be able to start immediately. During the lockout the Respondent had positioned the trucks at its main facility in such a way as to restrict the views that the picketing employees had into the facility. During the recall period the trucks were not moved back to their usual locations.

After a 7-month absence from work, about half of the locked-out bargaining unit employees resumed job duties for at least part of the 4-day period from March 25 to 28.[18] Then, on the first day that the unit employees were recalled to their job duties, Masud informed Eaton that they would all be locked out again on March 28. When Eaton complained, "this is cruel," Masud responded that "if you want to end this . . . accept . . . the company's proposals." In a letter dated that day, the Respondent stated that the lockout would be reinstituted on March 28, at 11:59 p.m., unless the Union agreed to "all company proposals dated September 25, 2001." One of those proposals was that "in lieu of the current death benefit, [the Respondent would] provide each employee with a $30,000.00 group term life insurance plan." The proposals also included the Respondent's percentage payment plan. The Union did not agree to the company proposals by the deadline and the bargaining unit employees, with the exception of Jennings, were locked out again. The Respondent invited the replacement workers to return to work. In a letter to Masud dated March 27, 2001, McKnight called the Respondent's decision to reinstitute the lockout so soon after recalling the workers a "bait and switch," and "cruel." He characterized as "delusional" the "contention that the Union offered April 9, 2002 for negotiations to intentionally conflict with [Masud's] scheduled surgery." Throughout, the period of the lockout the Union's position has been that the employees were willing to return to work unconditionally.

During the brief recall period, bargaining unit workers performed types of work that they did prior to the strike; however, they apparently did not do the full range of such work. For example, none of the returning drivers were given long distance assignments. Oslun told Russom that there was no out-of-town work, but owner-operators did have some such assignments during the recall period.

Unit employees who attended the March 22 meeting were paid for 1-1/2 hours of that day, although the Agreement provided that employees who reported for work as scheduled would be paid for a minimum of 4 hours. Tuscher testified that the attendees were not entitled to the 4-hour minimum payment because they were reporting for orientation on March 22, not work. The Respondent did not pay the recalled bargaining unit employees for the Good Friday holiday, which fell on March 29, 2002, the first day of the resumed lockout. The Respondent did, however, pay the replacement workers for Good Friday, even though their entitlement to such pay was no greater than that of the bargaining unit employees.[19]

F. Information Request

On September 25, 2001, the Union made a written information request to the Respondent. The request was sent to Masud by facsimile that morning. The Union asked that the information be brought to "the meeting," which was scheduled for later that day. This request was made several days after the Respondent announced that it would be locking out the unit employees,

[15] Since April 3, 2002, the Respondent has not offered any new bargaining dates to the Union.

[16] Tuscher testified that the returning employees did not need fuel cards because they were performing local work, and therefore would be able to obtain fuel at the Respondent's facility. (Trs. 819–820.) However, Tuscher did not explain why he believed that the employees would not need the fuel cards for long distance jobs in future weeks. Tuscher also testified that the security/access cards were taken from the returning employees because the cards had been deactivated at the beginning of the strike and because the alarm system was not fully functional. Id.; (Tr. 823). Tuscher also stated that the Respondent had deactivated the company pagers in the possession of the locked-out employees. Id. The record did not show that the Respondent was unable to reactivate the pagers and, at least for limited purposes, the security/access cards.

[17] The Respondent discontinued the employees' health insurance on September 5, 2001, during the strike. The health insurance was reinstated during the recall period.

[18] Jennings, the bargaining unit employee who had worked throughout the strike and the lockout, apparently worked during this period as well.

[19] The CBA provides that employees are entitled to pay for Good Friday "if they work the Company's last regularly scheduled work day prior to the holiday and the Company's first regularly scheduled work day following the holiday." (Jt. Exh. 1 p. A-12.) In this case, some of the recalled unit employees worked on the last regularly scheduled workday prior to Good Friday, but not on the one following Good Friday because the Respondent locked them out again. Some of the replacement employees worked on the first regularly scheduled workday following the holiday, but none did on the workday prior to the holiday since they were all laid off at that time. Thus, the replacement employees were paid for Good Friday even though technically they did not meet the requirements for receiving holiday pay for essentially the same reason that the returning unit employees did not meet those requirements. At least one replacement employee, Brian Hallock, was paid for Good Friday even though he did not work on the day prior to the holiday or the day following the holiday.

after first accepting the Union's unconditional offer to return from the strike. The request stated:

> In order to evaluate the Company's refusal to reinstate member (sic), we need the information below for all work performed by Allen Storage & Moving from September 17, 2001 forward
>
> - All estimate sheets
> - All local work order invoices
> - All intra-state bills of lading
> - All inter-state bills of lading
> - All records which reflect Local work and intra-state work, which was referred by Allen to other movers
> - We are requesting a copy of any written correspondence with Blue Cross that has affected or will affect bargaining unit employees. We are additionally requesting the names, phone numbers, address (sic) of any Blue Cross representatives.

(Jt. Exh. 3(v).)

At the September 25 meeting, the Respondent did not produce any of the information sought in the Union's request. McKnight stated that the Union wanted the information in order to evaluate the Respondent's claim, in response to the Union's unconditional offer to return, that there was not enough work for the Respondent to immediately recall all of the unit employees. Masud responded, "we are not giving [the information] to you and if you have got a problem with that, you can file an unfair labor practice charge."

A few days later, on about October 1, Masud supplied the Union with some of the information regarding Blue Cross membership that was sought in the Union's September 25 information request. He did not supply any information responsive to five of the six categories listed in the request even though such information existed. In a letter accompanying the information, Masud stated that "[w]ith regard to the balance of the information requested, it will be necessary for you to provide additional explanation as to the relevance and need for same." Masud went on to state that the Respondent was offering "to permit a post-strike review of the company financials," which he said would show "that the company's financial picture has deteriorated even further as a result of the strike, therefore, providing further justification for its change in bargaining position." Eaton responded in a letter dated October 11, reiterating that the Union wanted the information because it was relevant to the Respondent's claim that there was not enough work for all the strikers to return immediately.

The Union again raised the issue of the outstanding items from the information request during a bargaining session on October 30. In response to the company's concerns that the Union would use the information sought in order to picket at jobsites, McKnight pledged that the Union would only use the information to evaluate the Respondent's claim that there was not enough work available for all the strikers. Eaton's letter dated October 11, also stated that the Union "had no intention of using th[e] information for any other purpose." Craig Schutter, an attorney with the same law firm as Masud, attended the October 30 meeting for the Respondent in Masud's absence. Schutter stated that the Respondent would not provide the information. At trial, Eaton expanded on the Union's explanation for seeking the information. He explained that the information was relevant to bargaining because the Union might have been willing to change its position if there was an abundance of work that created a "window of opportunity" during which many union members could work. Obviously, if the information showed that the Respondent would have very little work for union members even if the lockout ended, that might diminish the Union's incentive to make concessions in order to end the lockout. Eaton also indicated that given the Respondent's claim, just days before the lockout, that there was a lack of work for many of the returning strikers, the Union was concerned that the lockout was actually a disguised layoff. This was a significant difference, according to Eaton, because laid-off employees would be entitled to collect unemployment compensation, but locked-out employees would not be.

On April 15, 2002, over 7 months after the September 25 information request was made, the Respondent supplied additional information to the Union. Although the request was for information "from September 17, 2000 forward," the Respondent did not supply current information. Rather, it supplied information that covered only the 8-day period from September 17 to 25, 2001, and which, therefore, was approximately 7 months old. Tuscher testified that the Respondent did this because it interpreted "from September 17, 2000 forward" to mean that the Union wanted the information only for the period up till the date the request was made. Even for that limited time period, the Respondent did not fully respond to the request. For example, the Respondent did not provide the estimate sheets sought. Tuscher testified that the Respondent chose to supply the information when it did because the information was 7 to 8 months old and therefore would not help the Union to picket or discourage customers.

G. Tuscher's Testimony Regarding Lockouts

At trial, Tuscher testified that the Respondent decided to initiate the lockout in September 2001 in order to put pressure on the Union to accept the company's proposals. He explained the curious timing of the lockout—3 days after the Respondent accepted the Union's unconditional offer to return from the strike—by stating that Jackson, the company's owner and president, had accepted the Union's offer without consulting the bargaining committee. According to Tuscher, once the bargaining committee found out about this, it approached Jackson and convinced him to institute the lockout in order to pressure the Union to accept the Respondent's bargaining proposals. Tuscher also testified that the lockout was resumed in March 2002 because the Union responded to the company's request for immediate bargaining by stating that its counsel would not be available for several weeks and by proposing bargaining dates when the Respondent's counsel was known to be unavailable. Regarding the fact that on the very first day that the unit employees returned to their job duties the Respondent informed the Union that it would be locking the employees out again, Tuscher stated that the Respondent agreed to recall the workers so that the Union would resume bargaining and decided to reinstitute the lockout when it did because the Union was "jerking us around" about bargaining dates.

Based on my assessment of Tuscher's credibility, and the record as a whole, I do not credit either his testimony regarding the Respondent's decisions to initiate and resume the lockout, or his explanation for the timing of those events. I was struck by the extent to which Tuscher's testimony regarding these key matters lacked corroboration from any source, most notably from other officials of the company who would have participated in these decisions. Jackson, according to Tuscher's account, was the final decision maker regarding initiation of the lockout in September 2001 and the Respondent's initial acceptance of the Union's unconditional offer to return to work. Jackson is also the individual who signed the letter ending the lockout, and, as president and owner of the Respondent, likely would have been involved in the decision to reinstitute the lockout in March 2002. However, although Jackson testified at trial and was present for most of the Respondent's case,[20] he did not corroborate Tuscher's explanation for the lockout, the resumption of the lockout, or the timing of those actions. Similarly, the Respondent did not present the testimony of any of the four other members of its bargaining committee (Freeman, Gilligan, Masud, Oslun) to corroborate Tuscher's account of the committee's motivations or actions.[21]

As a general matter, I found Tuscher to be lacking in credibility based on his demeanor and testimony. He was quite suggestible during questioning by the Respondent's counsel, see, e.g., (Trs. 815–816) (Tuscher testifies that there were 15 replacement workers at the time of the recall notice, but when Respondent's counsel expresses doubt, Tuscher states there were only 11 "tops"), however, he was inclined to deny even uncontroversial propositions forwarded by counsel for the General Counsel or the Union, see, e.g., (Trs. 855–857) (Tuscher denies that the Union asked for the insurance policies at the May 31 meeting, even though his own bargaining notes indicate that the policies were requested), (Tr. 985) (Tuscher refuses to agree that the $176,070.10 deposited to pension fund was "a large amount of cash," but then concedes that it was the largest cash deposit to the pension fund since he started with the Respondent in 1995). Tuscher also had a proclivity to make self-serving and exaggerated pronouncements during his testimony, and in some instances was forced to retreat from these statements in the face of contradictory evidence. See, e.g., (Trs. 756–757, 1109–1115, 1124, 1130) (Tuscher states that the Union threatened to strike over its pension proposal "every time" the proposal was discussed and that he recorded some of these threats in his bargaining notes, but his review of bargaining notes does not substantiate a single such threat); (Trs. 927, 936) (Tuscher denies that he gave laid-off replacement workers better treatment than the locked out employees with respect to holiday pay for Good Friday, but later concedes that such pay was a little something extra that he gave to the laid-off replacement workers, but did not give to the locked out employees).

The record also establishes that Tuscher dissembled during the bargaining process. For example, at one session he explained his failure to respond to a union information request by stating that "only Mr. Clark" could obtain those records. However, at trial he admitted that he could have gotten those records himself and used the "Mr. Clark" excuse because he had decided to be "a little slow" about responding to the request. (Trs. 1016–1019.) When the Union requested the whole life policies, Tuscher stated that he had forgotten to bring the policies, but would make sure to provide copies of them to the Union in the future. However, Tuscher knew that the Respondent had canceled the policies and had no copies of them to provide. In another instance, Tuscher stood silent as Masud promised to provide the policies, even though Tuscher knew that Masud was unaware that the Respondent no longer possessed the policies. (Trs. 349, 752, 855–857, 1067–1068, 1071–1072, 1225–1226.) Although this behavior did not occur while Tuscher was under oath, it does indicate a willingness to resort to dishonesty in a somewhat formal setting.[22]

H. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by locking out unit employees on September 21, 2001, and reinstituting the lockout on March 28, 2002. The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by, on March 15, 2002, directing the locked-out employees to report to the Respondent's facility on March 22, 2002, and threatening the employees with termination if they failed to report as instructed.[23] In addition, the complaint alleges that the Respondent failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act by unilaterally terminating employees' whole life

[20] Jackson was called by the General Counsel and testified pursuant to Rule 611(c) of the Federal Rules of Evidence. The Respondent did not call Jackson during the presentation of its own case.

[21] As discussed above, some of Tuscher's other assertions lacked corroboration. To cite one example, Tuscher testified that Lawrence Raymond, of Equitable Insurance, informed him that the canceled whole life insurance policies could not be reinstated and Respondent's counsel stated that Raymond would corroborate this, but Raymond was never called. See also supra, notes 8, 10, 13, 14, and 16.

[22] Despite my conclusion that Tuscher was not generally a very credible witness, I have in some instances credited his uncorroborated testimony regarding discussions that took place between officials of the Respondent and the Union, where such testimony was not contradicted by union officials who were present. See *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) (A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says.), enf. granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Container, Inc*., 325 NLRB 17 fn. 1 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony).

[23] At the start of trial, and before the presentation of any evidence, the General Counsel moved to amend the complaint to include the allegation regarding the Respondent's March 15, 2002, direction that employees report to work. The Respondent opposed the motion to amend. I permitted the amendment because the new allegation was sufficiently related to the existing allegations in the complaint regarding the lockout and recall, and because granting the motion prior to the presentation of any evidence resulted in no undue prejudice to the Respondent. See *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994), and *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993); see also Board's Rules and Regulations, Sec. 102.17 (complaint may be amended upon such terms as may be deemed just.).

insurance policies, and refusing to supply information requested by the Union on September 25, 2001.

ANALYSIS

Whole Life Policies

Life insurance benefits are a mandatory subject of collective bargaining that an employer may not alter without bargaining to mutual agreement or a good-faith impasse. *S. Bent & Brothers*, 336 NLRB 788, 791 (2001); *Wyndham International, Inc.*, 330 NLRB 691 (2000); *Lakeside Community Hospital, Inc.*, 307 NLRB No. 189 (1992) (not reported in Board volumes), enfd. mem. 8 F.3d 71 (D.C. Cir. 1993); *Titmus Optical Co.*, 205 NLRB 974, 981 (1973). For approximately 12 years the Respondent maintained individual whole life policies for unit employees. In March 2001, the Respondent canceled the individual whole life insurance policies without first affording the Union notice or an opportunity to bargain. Indeed, the Respondent did not inform the Union of this unilateral change until approximately 4 months after the change was made, even though the Union had been seeking information about the whole life policies for some time. Following the termination of the policies, employees continued to have an in-service death benefit pursuant to the CBA, but the death benefit for long-time employees was lower than what the whole life policies provided. Moreover, the change meant that the employees' benefit had been stripped of the portability feature that gave unit members the option of maintaining coverage when their employment with the Respondent ended. I conclude that when the Respondent canceled the whole life policies it made a unilateral change regarding a mandatory subject of bargaining, in violation of Section 8(a)(1) and (5) of the Act.

The Respondent argues that it had no obligation to bargain over these changes because neither the CBA nor the pension document promised that unit employees would have the whole life policies. This argument misses the point. The proscription against unilateral action applies not only to mandatory bargaining subjects that are specifically covered in a contract, but also to changes in benefits that have "been 'satisfactorily established' by practice or custom." *Golden State Warriors*, 334 NLRB 651, 652 (2001); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988). Thus, when an employer unilaterally changes its established past practice regarding life insurance it violates Section 8(a)(5), even if the established practice was not covered by a contract. *Wyndham International*, 330 NLRB at 693. In the instant case, the Respondent's practice of maintaining portable whole life insurance policies for unit employees had been followed for approximately 12 years. Moreover, the favorable nature of this practice had been publicized to unit employees during that time. I conclude that the Respondent's maintenance of the portable whole life insurance policies was an established past practice and that the Respondent had a duty to bargain before canceling those policies.

The Respondent also contends that the cancellation of the whole life policies "concerned only the employer's method of funding the death benefit" not the benefit itself. This might be a persuasive argument if it was true, but it is not. Cancellation of the policies in this case did not merely affect the method in which a death benefit was funded, but substantially reduced the amount of the death benefit for some employees and eliminated the portability feature. The Respondent cites decisions for the proposition that an employer's decision to change insurance carriers, or switch to self insurance, does not trigger a duty to bargain if the change does not materially affect the benefits to unit employees. See Respondent's Brief at 71–72 (citing *Bastian-Blessing v. NLRB*, 474 F.2d 49 (6th Cir. 1973), *Connecticut Light & Power Co. v. NLRB*, 476 F.2d 1079 (2d Cir. 1973), *Los Alamitos Medical Center*, 287 NLRB 415 (1987)). None of these decisions suggest that an employer does not have an obligation to bargain over a change, such as the one at issue here, which substantially alters the employees' benefits.

I find that the Respondent violated Section 8(a)(1) and (5) by canceling the individual whole life insurance policies without giving the Union notice or an opportunity to bargain.

The Lockout

In the complaint, the General Counsel alleges that the Respondent locked out unit employees on September 21, 2001, and reinstated the lockout on March 28, 2002, because the employees had engaged in protected activity and in order to discourage such activities. The General Counsel states that, by doing this, the Respondent discriminated in violation of Section 8(a)(1) and (3) of the Act. The Respondent counters that the lockout was lawful under *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), in which the Court approved lockouts implemented for the sole purpose of pressuring employees to accept legitimate bargaining proposals. The record in this case leads me to agree with the General Counsel that the Respondent's decision to lock out employees during both periods was unlawfully motivated in violation of the Act.[24]

"[A] careful evaluation of all the surrounding circumstances must be made to determine whether there was an unlawful motivation in [a] lockout." *Darling & Co.*, 171 NLRB 801, 802–803 (1968). Evaluation of all the surrounding circumstances established by the record in this case leads me to conclude that the Respondent had an unlawful, discriminatory, motivation for locking out the former strikers. Just 2 days before the lockout was announced, during discussions about the return of the strikers, a member of the Respondent's bargaining team an-

[24] In their briefs, the parties engage in lengthy argument regarding the question of whether the unit members were unfair labor practice strikers or economic strikers. However, these arguments lack any reasoning that makes the resolution of that question relevant to a determination regarding any of the alleged violations. If the Respondent was contending that the strikers had been permanently replaced at the time they made their unconditional offer to return to work, the nature of the strike might bear on the lawfulness of the Respondent's actions or the proper remedy. However, in this case, the Respondent's position is that it used temporary replacements during the period of the strike, and that position is consistent with the record evidence. Moreover, once the Union made its unconditional offer, the Respondent was not permitted to permanently replace the employees during the lockout. *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999). At any rate, the Respondent accepted the Union's unconditional offer prior to locking out the unit employees. For these reasons, I do not reach the question of whether the employees were unfair labor practice strikers.

nounced to union officials that Jackson had "hard feelings" about the strike. During a subsequent conversation with an employee during the lockout, Jackson likened the union activities to cancer. A nexus between Jackson's hard feelings over the protected strike and his decision to lock out the employees can be inferred here given the timing of the lockout and the fact that the Respondent has not shown, or even asserted, that it contemplated a lockout during negotiations until after the employers angered Jackson by striking. The Respondent also demonstrated its antiunion animus by denying holiday pay to the unit employees while granting such pay to similarly situated replacement workers, and by failing to pay employees who attended the orientation for the full 4 hours mandated under the CBA.

The Respondent's discriminatory motivation is also revealed by the manner in which it implemented the lockout. Most notably, the Respondent allowed Steven Jennings, the only unit employee who had not participated in the strike, to continue working during both periods of the lockout, while it banned every one of the strikers. Even after strikers were recalled and worked for several days in March 2002 under the same terms as Jennings, the Respondent permitted Jennings to continue working when it reinstated the lockout as to the other unit members. The Board has found evidence of the disparate treatment of former strikers during a lockout sufficient to show that the lockout was motivated by an unlawful discriminatory purpose. In *McGwier Co*, 204 NLRB 492, 496 (1973), the Board affirmed the judge's conclusion that an employer had discriminated against employees for striking in violation of Section 8(a)(1) and (3) where the employer locked out only those employees who engaged in a strike while allowing employees who had not joined the strike to continue working. Similarly, in *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 401 (1969), the Board affirmed the judge's conclusion that the Respondent discriminated in violation of Section 8(a)(1) and (3) "when it selected for lockout only those employees who had participated in a protected strike." See also *Field Bridge Assoc.*, 306 NLRB 322, 334 (1992) (lockout became unlawful when the employer offered reinstatement to only some of the strikers who had offered to return, thereby undermining its claim that the lockout was in support of its legitimate bargaining position), enfd. 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). Under Board precedent, even where a lockout is motivated in part by a desire to soften the Union's bargaining position, the lockout violates Section 8(a)(1) and (3) if it also has an additional discriminatory purpose as demonstrated by the employer's decision to exclude only those employees who participated in a strike. *O'Daniel*, 179 NLRB at 402.[25]

The Respondent also revealed its antiunion motivation when Jackson and Oslun offered to allow Russom, a bargaining unit employee, to return to work during the lockout on condition that Russom agree to become an owner-operator. As Jackson and Oslun surely knew, if Russom became an owner-operator he would exit the bargaining unit and forgo union representation. In *Schenk Packing Co.*, 301 NLRB 487, 489–490 (1991), the Board found that a lockout violated the Act when the employer notified union members that they could return to work if they resigned from the union. The disparate treatment, and the offer to Russom, support an inference that a purpose of the lockout was to "undermine adherence to the Union by demonstrating to the employees . . . the advantages from the standpoint of job security of rejecting the Union or refraining from concerted activity in support of the Union." *O'Daniel Oldsmobile*, 179 NLRB at 402. Such a purpose renders a lockout unlawful. Id.

The Respondent relies on *Tidewater Construction Corp.*, 333 NLRB 1264 (2001), revd. 294 F.3d 186 (D.C. Cir. 2002), and *General Portland, Inc.*, 283 NLRB 826 (1987), for the proposition that an employer's decision to lock out former strikers, while permitting an employee who did not strike to continue working, does not show that the lockout was discriminatory and unlawful. My conclusion that the lockout was motivated by unlawful discrimination is based on the totality of the circumstances, not exclusively on the disparate treatment of the strikers as compared to Jennings. The facts relevant to the alleged discrimination in this case are more closely analogous to those in *O'Daniel Oldsmobile*, *McGwier*, and *Field Bridge Associates*, than to those in either *Tidewater Construction Corp*. or *General Portland*. In *Tidewater Construction Corp.*, the em-

[25] The Respondent argues that the General Counsel's "allegation" regarding the disparate treatment of the strikers as compared to Jennings is "procedurally flawed," because "the complaint does not contain any allegations of discrimination based on disparate treatment." This contention is wholly without merit. The complaint alleges that the Respondent "has been discriminating . . . in violation of section 8(a)(1) and (3)" by locking out employees because they "joined or assisted the Charging Union and engaged in concerted activities, and to discourage employees from engaging in these and other protected activities." (GC Exh. 1) (complaint pars. 22 and 23). Evidence that the Respondent locked out those who engaged in the strike, but did not lock out the one unit employee who chose not to strike, is obviously relevant to the allegations in the complaint. There is no requirement that the complaint list all the specific evidence that the General Counsel intends to introduce at trial. See *American Newspaper Publishers Assn.* v. *NLRB*, 193 F.2d 782, 800 (7th Cir. 1951) (The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.), affd. 345 U.S. 100 (1953), and Board's Rules and Regulations, Rule 102.15 (Complaint "shall contain . . . (b) a clear description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives by whom committed."). Moreover, during opening statements, the General Counsel revealed that it intended to show that Jennings was allowed to continue to work while the former strikers were locked out. (Tr. 29.) Thus the Respondent was aware that the General Counsel intended to use the specific evidence at issue even before the presentation of evidence began. The *Center for United Labor Action*, 209 NLRB 814 (1974) (mention in the General Counsel's opening statement sufficient to put the Respondent on notice of the General Counsel's theory of the case). Finally, after the General Counsel presented evidence regarding Jennings' treatment in support of the allegation of discrimination, the trial was adjourned for approximately 6 weeks before the Respondent was required to present its case-in-chief. Under these circumstances, the Respondent's claim that it was somehow left with an inadequate opportunity to respond to the evidence has no merit.

ployer denied employment to former strikers and other union members, but not to a nonstriker who "apparently" did not oppose the Respondent's contract demands, and "was willing to abandon the Union's demands." 333 NLRB at 1269. The judge, in a decision affirmed by the Board, stated that since the rationale for the lockout was to put pressure on the Union to accept the Respondent's bargaining demands, it was proper to distinguish between that individual and the strikers. The judge also noted that the employer had not induced the employee to resign from the union. In the instant case, however, Jennings was not shown to be any more likely to support the Respondent's bargaining proposals than were the strikers. Indeed, although the expired CBA permitted Jennings to volunteer for a percentage pay plan, such as the one advocated in the Respondent's "number one" bargaining proposal, Jennings chose to continue working under the hourly wage system favored by the Union. Jennings worked pursuant to the same terms and conditions as were in effect for the entire unit prior to the strike and during the recall period. There is no basis under these facts for concluding that Jennings did not participate in the strike because he was more favorably disposed towards the Respondent's bargaining position than were the other unit members, rather than because he wished to avoid the hardships associated with striking, or for some other reason. Moreover, unlike the employer in Tidewater, the Respondent in this case did try to use the lockout in an effort to induce employees to abandon the Union, as evidenced by the statements that Jackson and Oslun made to Russom about returning to work as an owner-operator. Based on the record in this case, it is clear that the disparate implementation of the lockout was motivated by a desire to punish the strikers and undermine adherence to the Union, not solely by a desire to pressure the employees to accept the company's bargaining position.

In *General Portland*, the Respondent permitted five employees who had returned to work during a strike to continue working during a lockout, but refused to allow employees who had persisted in the strike to return unless the union agreed to give notice before calling any future work stoppages. The judge, in a decision affirmed by the Board, concluded that when an employer has "reasonable cause to fear . . . a series of 'quickie' strikes" it "may lawfully lock out its employees until it receives assurance that there will be no future work stoppage without adequate notice." 283 NLRB at 838. At the most obvious level, this case is unlike *General Portland* because the Union here has not only given assurances that the returning strikers would not strike again without adequate notice, but actually promised in writing that they would not strike at all for 6 months. Therefore, the defensive justifications that existed for the lockout in *General Portland* are not present here. Regarding the disparate treatment specifically, the employer in *General Portland* could reasonably believe that employees who were already working in contravention of a strike would continue to work during the future "quickie" strikes the company was concerned about. The employer's decision to distinguish between strikers and nonstrikers when demanding the assurances regarding notice about future strikes was, therefore, plausibly explained by some motivation other than a desire to punish the strikers and undermine adherence to the Union. As discussed above, the Respondent's asserted nondiscriminatory motivation here—i.e., a desire to pressure employees to accept its bargaining proposals—does not explain its decision to distinguish between Jennings and the other unit members, since the company has not shown a basis for believing that Jennings was any more amenable to its bargaining proposals than the other unit members were. Moreover, the decision in *General Portland* explicitly recognized that the result could have been different if the Respondent "suggested to employees during the lockout that Respondent would return them to work if they canceled their membership in [the union]." 283 NLRB at 837. In this case, Jackson and Oslun offered to allow Rossum to return to work if he left the bargaining unit and became an owner-operator. For these reasons, I am not persuaded by the Respondent's arguments based on the decisions in *Tidewater Construction* and *General Portland*.[26]

Even had I concluded that the record did not show that the Respondent had a discriminatory motivation for the lockout, I would conclude that the lockout was unlawful because it was not solely in support of a legitimate bargaining position, as required by *American Ship Building*, 380 U.S. at 318. In *Tomco Communications, Inc.*, 220 NLRB 636 (1975), enf. denied 567 F.2d 871 (9th Cir. 1978), the Board held that a lockout implemented to pressure employees to accept the employer's bargaining position was not lawful under American Ship Building, because the bargaining position itself was not legitimate. In the instant case, the Respondent told the Union that in order for the lockout to end, the Union had to accept all of the company's existing proposals.[27] Those proposals included one to convert to a percentage pay system for compensating unit employees. The Respondent, however, was unable or unwilling to answer a number of specific and significant questions posed by the Union regarding that proposal. The percentage pay plan represented a profound departure from the unit employees' existing pay system and it was unreasonable for the Respondent to expect employees to accept such a proposal until all its significant details had been defined and communicated to them. See *I.T.T. Rayonier, Inc.*, 305 NLRB 445, 446 (1991) (Board finds that employer bargained in bad faith when it declared impasse with-

[26] The Respondent argues that *American Ship Building*, supra, imposes a requirement on the General Counsel to prove that the lockout was used to frustrate bargaining. However, the *American Ship Building* decision itself makes clear that a violation could also be found based on evidence of discrimination and disparate treatment. 380 U.S. at 312–313. Board decisions issued after *American Ship Building*, confirm that a desire to frustrate bargaining is by no means the only motivation capable of rendering a lockout unlawful. See, e.g., *McGwier*, supra, *O'Daniel Oldsmobile*, supra, *Field Bridge*, supra, and *Schenk*, supra.

[27] The September 21, 2001 letter from the Respondent's attorney to Eaton puts the requirement more mildly, stating that the lockout would be terminated "[a]s soon as agreement can be reached on all outstanding issues." (Jt. Exh. 3(s)). However, during subsequent discussions the Respondent's officials made clear that its position was that the unit employees had to accept the Respondent's existing bargaining proposals in order to end the lockout. (Trs. 117–118, 374, 381, 383–384, 395–396, 1217.) Similarly, the letter from Respondent's counsel notifying the Union that the company intended to reinstitute the lockout in March 2002, stated that the lockout would occur unless the employees agreed to "all company proposals dated September 25, 2001." (Jt. Exh. 3(aaa).)

out supplying the Union with information regarding details of the employer's incentive pay proposal.) The Respondent's proposals also included one to "provide each employee with a $30,000.00 group term life insurance plan" "in lieu of the current death benefit." As found above, the Respondent had unilaterally and unlawfully terminated the whole life policies that provided unit members with a portable death benefit of at least $70,000 and in some cases more than $80,000. The Respondent has not remedied that unfair labor practice.[28] In other words, the Respondent's insistence that the employees accept its proposal for a replacement death benefit amounted to a demand that the employees acquiesce in the unlawful termination of their whole life policies as a condition for ending the lockout. Such a demand renders a lockout unlawful. See *Royal Motor Sales*, 329 NLRB 760, 777 (1999) (lockout unlawful when it had the purpose of pressuring employees to accept unfair labor practice), and *Liquor Wholesalers*, 292 NLRB 1234 fn. 3 (1989) (lockout is not in support of a "legitimate bargaining position," when it is being used to pressure employees to accept unlawfully implemented last offer), enfd. 924 F.2d 1078 (D.C. Cir. 1991). These conclusions are equally applicable to both the initial lockout period, and the period since that lockout resumed on March 28, 2002, after a brief period of work for a number of the locked out employees.[29]

I find that the Respondent discriminated in violation of Section 8(a)(1) and (3) of the Act when it locked out unit employees starting on September 21, 2001, and reinstated the lockout on March 28, 2001, because the employees had engaged in protected activity and in order to discourage such activities.[30]

Recall Notification

The General Counsel alleges that the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and therefore violated Section 8(a)(1) when, in the March 15 notice of termination of the lockout, the Respondent directed employees to attend a work orientation at noon on March 22, and stated that failure to appear would result in the Respondent "considering your employment as having been voluntarily and irrevocably terminated." The record shows that a small number of employees failed to attend the scheduled orientation, but that the Respondent did not terminate or discipline any of those employees.

In *Toledo (5) Auto-Truck Plaza*, 300 NLRB 676 (1990), enfd. mem. 986 F.2d 1422 (6th Cir. 1993), the Board found that an employer violated Section 8(a)(1) and (3) by unlawfully terminating the recall rights of two former strikers who failed to appear in response to a recall notice stating that they had to report by a specific date or their recall rights would be termi-

[28] The Respondent argues that it quickly remedied any unfair labor practice stemming from its termination of the whole life policies, and that the Union did not cooperate in its efforts to determine what more the employees required. These contentions are not persuasive. As discussed above, it was in March 2002 (a full year after the whole life policies were unlawfully terminated) that the Respondent obtained new policies for the employees. The cash value of these policies was less than a quarter that of the policies the Respondent had unlawfully canceled. Furthermore, the new policies would not only provide a substantially lower death benefit in some cases, but also require higher premium payments from employees who availed themselves of the portability feature. Union officials told the Respondent's bargaining team that the Union believed the cancellation of the whole life policies was an unfair labor practice and that the employees wanted to be "made whole." The Respondent's officials at first stated that the company might simply reinstate the canceled policies, but then told union officials that it was impossible to reinstate policies once they had been canceled. Expert testimony adduced at trial indicated that canceled whole life insurance policies can generally be reinstated.

[29] The Respondent argues that it decided to reinstate the lockout when it did because the Union did not cooperate about scheduling immediate negotiating sessions after the company announced the recall on March 15. The record shows that on March 18 the Respondent proposed bargaining sessions on March 26, 27, and/or 28. The Union responded that its attorney, who had participated in the last four sessions, was unavailable on those days and would not be available until April 8 and 9. The Respondent pressed the Union to bargain without its attorney present, and when the Union refused, the Respondent, on March 25, notified the Union that it would reinstate the lockout unless the Union agreed to all of the company's existing proposals. The Respondent introduced no evidence that the Union's attorney was actually available prior to April 8 and 9. To the extent that the second period of the lockout could be seen as having the additional purpose of pressuring the Union to agree to bargain without its legal representative, I conclude that such a purpose is also not "legitimate" within the meaning of *American Ship Building*.

[30] In its brief the General Counsel requests a finding that the March 2002 recall was a sham, but does not appear to claim that this was an independent violation of the Act. I find that there was no meaningful recall. The record provides ample basis for inferring that the "recall" was a tactic designed to ratchet up the pressure from its unlawful lockout by lifting the hopes of unit employees, and causing them to sacrifice whatever interim employment they had found. This is suggested by a variety of factors, including that on the very first day when employees returned to their duties the Respondent informed them that the lockout would resume unless the Union accepted all of the company's existing proposals. The lack of substance to the recall is also indicated by the fact that at the orientation the Respondent told employees to turn in the credit cards that they used to purchase fuel on long-distance jobs. The Respondent argues that the employees did not need those cards during the week of the recall because all their jobs were local. However, if the recall were legitimate the Respondent would not have known that the employment of the returning employees would only last 1 week or would end before those employees again began to receive long-distance assignments for which they required the fuel cards. Likewise, the Respondent's demand at the orientation that the returning employees surrender their company pagers and security/access cards were not adequately explained by the Respondent and also suggest that the Respondent did not really intend to resume operations with the unit employees at that time. Tuscher's explanation for terminating the recall so soon after it began lacks credibility. He essentially testified that the lockout was reinstated because in the first few days following the notice of recall, the Union did not cooperate in the scheduling of bargaining sessions. However, the evidence indicates that the relatively brief delays in setting up new sessions was the Respondent's fault as well as the Union's. Moreover, if concern over the delay in the scheduling of new bargaining sessions was the reason that the Respondent reinstituted the lockout, one would expect the notice to employees to state that the lockout would resume unless bargaining resumed within a certain timeframe. However, that was not the ultimatum that the Respondent gave. Instead, the Respondent stated that the lockout would resume unless the unit employees accepted all of the company's existing proposals. For these reasons I believe that there was not a meaningful recall.

nated. The Board stated that an offer of reinstatement is invalid if the time period in which to report is "unreasonably short" and the offer "[m]akes it clear that reinstatement is conditioned on the employee's returning to work by the specified date." 300 NLRB at 676 fn. 2. One of the employees in *Toledo (5)*, received notification 3 days before the reporting deadline, and in the other instance the employee actually received the letter after the reporting deadline. The Board stated that such an offer is invalid "on its face," and that the employee is not even required to respond. Id. Similarly, in *Esterline Electronics Corp.*, 290 NLRB 834 (1988), the Board stated that an offer of reinstatement is invalid if it imposes an unreasonably short reporting deadline and indicates that the company will terminate the recall rights of employees who fail to return by the deadline.

Pursuant to *Toledo (5)* and *Esterline*, I conclude that the March 15 notice of recall was invalid on its face because it imposed an unreasonably short deadline for reporting and stated that employees who failed to comply would be terminated. At the time the Union was notified of the recall, the former strikers had not performed work for the company in over 7 months and many of those employees would be expected to have found interim employment, to be difficult for the Union to contact, or to be otherwise unavailable on what was, at most, 7 days notice. Although none of the Respondent's employees who failed to comply with the invalid recall notice actually were terminated, I conclude that the Respondent interfered with, restrained, and coerced employees in the exercise of Section 7 rights by threatening to unlawfully deprive the employees of their rights to recall from the strike and lockout.

Therefore, I conclude that the Respondent's March 15, 2002, recall notice violated Section 8(a)(1) of the Act.

Union's Information Request Dated September 25, 2001

It is well-settled that an employer's duty to bargain in good faith with the bargaining representative of its employees encompasses the duty to provide information needed by the bargaining representative to perform its functions, including accessing claims made by the employer relevant to contract negotiations, administering and policing a collective-bargaining agreement, and deciding whether to proceed with grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998); *Saginaw General Hospital*, 320 NLRB 748, 750 (1996); *National Broadcasting Co.*, 318 NLRB 1166, 1168–1169 (1995). "The Board uses a broad, discovery-type of standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994); see also *NLRB v. Acme Industrial*, 385 U.S. at 437 fn. 6. The question is whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial*, 385 U.S. at 437 (emphasis added). The burden to show relevance is "not exceptionally heavy." *Leland Standford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). An employer violates the Act not only when it refuses to supply information in response to a valid request, but also which it unnecessarily delays providing the information. *Britt Metal Processing*, 322 NLRB 421, 425 (1996), enfd. mem. 134 F.3d 385 (11th Cir. 1997); *Tennessee Steel Processor*, 287 NLRB 1132 (1988).

When the Union made its unconditional offer to return to work in September 2001, the Respondent stated that there was not enough work for all the unit members to return, but that they would be "phased-in" starting on September 24. Then, before any of the former strikers actually returned to work, the Respondent informed the Union that the company was locking out the unit employees effective immediately. A few days later, on September 25, the Union made its request for information—including, estimate sheets and bills of lading—regarding work that the Respondent either had secured, was attempting to secure, or had referred to other movers.[31] The Union stated that it needed this information in order to assess the Respondent's claim that there was not enough work for all the unit members. The Respondent's counsel said that the company would not provide the information. On April 15, 2002, the Respondent provided some of the types of information sought, but only for the period from September 17 to 25—i.e., for approximately 1 week out of the period of about 7 months that had elapsed since the month when the request was made.[32] The bulk of the information sought had still not been provided at the time of trial.

I conclude that the Respondent violated Section 8(a)(1) and (5) both by failing to supply information sought in the September 25 request and by its unreasonable delay before supplying the limited information it did provide. The Union was entitled to information that would allow it to assess the Respondent's claim that there was not enough work for all the bargaining unit members. There is a probability that the types of information sought in the information request would be of use to the Union in doing this. As Eaton indicated during his testimony at trial, information regarding the amount of available work was relevant to the Union's decision about whether to make concessions during contract negotiations in order to return from the lockout. Obviously, if the Respondent was likely to have little or no work for most of the unit employees even if the Union met the Respondent's demands for ending the lockout, there would be less incentive for the Union to meet those demands. This is sufficient to show a probability that the information sought was relevant and would be of use to the Union in carrying out its statutory duties.[33] Therefore, the Respondent had a duty to supply the information.

[31] The relevant portions of the request are excerpted above.

[32] The Union's September 25 request, sought the information for the period from "September 17, 2001, forward." (Jt. Exh. 3(v)) (emphasis supplied). Tuscher explained his decision to confine the company's response to the 1-week period by claiming that he assumed the request only sought information for the period up until the date of the information request. However, the request language asking for the information from September 17 "forward," clearly seeks information for a period continuing at least up until the information is provided. Indeed, I consider it implausible that Tuscher really believed it meant anything else.

[33] The Respondent contends that the "argument that the information requested is 'relevant' because it was needed to determine the amount

Eaton also testified that evaluating the Respondent's claim about the lack of work was relevant to the Union's concern that the Respondent was really laying off employees for whom it did not have sufficient work, not locking out employees. The Union had a reasonable basis for concern about this given that immediately before the Respondent locked out the returning strikers the Respondent stated that the company did not have enough work for all of them. If the exclusion of the unit employees was shown to be a layoff, rather than a lockout, that would be relevant to contract administration inasmuch as the contract makes certain procedures applicable to layoffs. See (Jt. Exh. 1.) Moreover, Eaton testified that he was concerned because laid-off employees are entitled to unemployment insurance, whereas locked-out employees are not. If the Respondent intentionally misclassified a layoff as a lockout in order to deny employees unemployment compensation, and thus, place unfair pressure on them to agree to its illegitimate contract proposals, that arguably would be a basis for an unfair labor practice allegation.

The Respondent contends that it was concerned that the Union would use the information to picket jobsite locations and to urge potential customers to boycott the company. This argument does not negate the Respondent's duty to supply the information sought. First, the Respondent did not demonstrate that it has a legitimate and substantial confidentiality interest that outweighs the Union's need for the requested information. See *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 fn. 2 (1994). Indeed, the Union pledged not to use the information for any purpose other than to assess the Respondent's claim that there was not enough work for all the unit members.[34] The Respondent might have a better argument if it had attempted to negotiate with the Union to provide the information in a manner that would meet the Union's needs without unnecessarily compromising any confidentiality concerns that could be demonstrated. However, the Respondent did not do that,[35] but rather simply refused to supply the information and invited the Union to file an unfair labor practices charge.

Second, the Board has stated that the requirement that an information request be made in good faith is met if even one reason for the demand can be justified. *Land Rover Redwood City*, 330 NLRB 331, 332 fn. 3 (1999); *Country Ford Trucks*, 330 NLRB 328 fn. 6. (1999); *Island Creek Coal Co.*, 292 NLRB 480, 489 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990); *A-Plus Roofing, Inc.*, 295 NLRB 967, 972 (1989).[36] Therefore, even if the Respondent could show that it reasonably believed that the Union harbored an ulterior motive, that would not alter the Respondent's duty to supply the information. Where an employer contends that an information request is in bad faith, it must overcome a presumption that the union acted in good faith in making the request. *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988). In this case, the Respondent has not introduced evidence that rebuts the presumption of the Union's good faith.

Most of the information sought by the Union in its September 25, 2001, request had still not been supplied by the employer at the time of trial. The limited information presented on April 15, 2002, was supplied only after a delay of about 7 months. The Respondent admits this lengthy delay was not caused by difficulties in collecting the information, but rather by a desire to wait until the information supplied would be out-of-date and useless to the Union. Such a purposeful delay is obviously unreasonable.

For the reasons discussed, I conclude that the Respondent violated Section 8(a)(1) and (5) by refusing to supply the information requested by the Union in its September 25, 2001, written request, and by delaying unreasonably before supplying the limited information it provided on April 15, 2002.

CONCLUSIONS OF LAW

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

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

3. The Respondent violated Section 8(a)(1) and (5) of the Act by canceling the individual whole life insurance policies it maintained for unit employees without giving the Union notice or an opportunity to bargain.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by locking out unit employees starting on September 21, 2001, and reinstating the lockout on March 28, 2001, because the employees had engaged in protected activity and in order to discourage such activities.

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of work available for unit members is nonsensical" because the employees were locked out when the request was made and therefore the work was "not available to unit members" regardless of how much there was. (R Br. 109–110, 116.) However, the work, according to the Respondent's representations, would have been available to unit members if the Union had accepted the Respondent's bargaining proposals. Therefore, information about such work would likely bear on the Union's decision about whether to accept those proposals.

[34] It was not for almost 2 months that the Union began contacting the Respondent's customers, and there was no evidence either that the Respondent knew the Union had such plans when it denied the information request, or that the Union intended to violate its pledge and use the information for such purposes.

[35] Masud did offer to allow the Union to conduct a "review of company financials," but Masud did not suggest that this would substitute for the information sought by the Union about upcoming work, but rather that it would support the Respondent's position that the company's regressive proposals were justified by the deterioration of its business. (Jt. Exh. 3(w).)

[36] The Respondent argues that *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), stands for the proposition that a union's need for proprietary information does not predominate over all other interests. In that case, the Supreme Court held that an employer was not required to supply a union with the actual questions it used for statistically validated psychological aptitude testing of its employees, or the answer sheets of employees, where it had offered to supply the test scores of employees who were willing to waive confidentiality. The Court noted that the employer's interest in test secrecy had been abundantly demonstrated, and that it was not "automatically oblige [d] . . . to supply all of the information in the manner requested." 440 U.S. at 314 (emphasis added). However, Detroit Edison does not permit an employer to refuse to comply with a valid information request in any manner, especially not when, as here, the Respondent failed to demonstrate a substantial interest in secrecy, see *Geiger Ready Mix Co.*, 315 NLRB at 1021 fn. 2 (burden is on the employer to show a substantial confidentiality interest that outweighs the need for the information).

5. The Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and therefore violated Section 8(a)(1) of the Act when, in the March 15, 2001, notice of termination of the lockout, the Respondent directed employees to attend a work orientation at noon on March 22, 2001, and stated that an employee's failure to appear as directed would result in his or her termination.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by refusing to supply the information requested by the Union in its September 25, 2001, written request, and by delaying unreasonably before supplying the limited information it provided in response to that request on April 15, 2002.

7. Except as found herein, the Respondent has otherwise not been shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

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

The Respondent unlawfully locked out unit employees, and therefore must offer them recall and make them whole for any loss of earnings and other benefits, computed on a quarterly basis for the entire lockout period continuing until the date of a proper offer of recall, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent has unlawfully failed to supply information sought by the Union's written request of September 25, 2001. That request sought information for the period from September 17 forward, and therefore the Respondent must provide all the requested information not already provided for the entire period from September 17, 2001, until the date the Respondent supplies the information.

[Recommended Order omitted from publication.]