UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CLARKE MANUFACTURING, INC.

and Case 30-CA-72046

UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION

Andrew Gollin, Esq.,
for the General Counsel.
Russ Mueller, Esq .,
for the Respondent.
Marianne Goldstein Robbins, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on May 14 and 15, 2012. The United Steel, Paper & Forestry, Rubber, Manufacturing Energy, Allied Industrial & Service Workers International Union (the Union) filed the charge on January 9, 2012, and the Acting General Counsel issued the complaint on February 29, 2012.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) in several respects. In this connection, paragraph 6 of the complaint alleges that the Respondent failed to bargain in good faith by its overall conduct and by bargaining with no intention of reaching an agreement other than on its own terms.

Paragraph 7 of the complaint alleges that the Respondent insisted as a condition of reaching a collective-bargaining agreement that the Union agree to waive its right to information concerning payroll records and agree to provisions stating that any communication the Respondent may have with unit employees regarding the union security clause in the parties' collective-bargaining agreement does not constitute a violation of that agreement or "restraint and coercion." Paragraph 7 further alleges that these issues are not mandatory subjects for the purposes of collective bargaining and that in support of those conditions the Respondent declared the parties had bargained to impasse.

Paragraph 8 of the complaint alleges that the Respondent refused to bargain about the Union's proposal regarding health, safety and environment, which the complaint alleges to be a mandatory subject of bargaining.

Paragraph 9 alleges that on or about December 15, 2011, the Respondent declared that the parties were at an impasse and made a final proposal and that on January 1, 2012, the Respondent implemented certain portions of its final proposal regarding the parties' health insurance cost sharing plan. Paragraph 9 further alleges that the Respondent implemented its final offer without first bargaining to a good-faith impasse.

Paragraphs 10 and 11 allege that the Union made multiple requests for information beginning on July 26, 2011, and that the Respondent in some instances has refused to provide requested information and in other instances has not provided information in a timely fashion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the operation of a machine shop at its facility in Milwaukee, Wisconsin, where it annually sells and ships goods and materials valued in excess of $50,000 directly to customers located outside the State of Wisconsin. The Respondent admits, and I find, that it 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

Background

The Respondent produces custom screws to customers' specifications using a process called "swiss turning." The Respondent and the Union have had a collective-bargaining history of approximately 25 years in the following appropriate unit:

> Production and maintenance employees of the Employer, excluding office clerical, management and professional employees and guards and supervisors.

At the time of the hearing in this matter there were approximately 17 unit employees. The Respondent's management is composed of President Thomas Nelson; Plant Manager Steve Detrie, and Ed Kress.

During the parties' bargaining for a successor agreement in 2006, a dispute arose which culminated in the issuance of a Board decision in *Clarke Mfg, Inc*. 352 NLRB 141 (2008).[1] In

[1] The Board's decision was issued by a two Member panel. Apparently, the Respondent complied with the Board's decision as the decision was not affirmed by a three Member panel or the full Board. In *New Process Steel, L. P. v. NLRB*, 130 S. Ct. 2635 (2010) the Supreme Court held that the two Member Board lacked the authority to issue its decision in that case. Accordingly, I have not accorded precedential

summary, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by regressively proposing the elimination of the longstanding union security provision from the contract without a tenable explanation. In June 2009, the parties ultimately executed a collective-bargaining agreement, which included the union-security provision, which was effective by its terms from March 1, 2006 to February 28, 2011.

The 2006-2011 contract (Jt. Exh.1) contains a provision, article IV, section 6, which refers to the contractual health benefits. This provision provided that effective October 1, 2008, and continuing for 12 months thereafter the available health benefits would be provided by Anthem. The Respondent paid 74 percent of the premium and the individual employee paid the remaining 26 percent. The amount of the premium paid by each employee could vary substantially. There are two types of deductibles: the employee deductible and the plan deductible. The record establishes that the parties referred to the payments made between the employee deductible and the plan deductible as the interim deductibles. The contractual benefits indicated that the single employee deductible was $600 and the family deductible was $1250. According to the contract, after the employee deductible was paid, "the company pays 100% of the medical expenses to the single plan deductible of $3000 and the family deductible of $6000." When the Respondent changed providers from Anthem to Trilogy in October 2010, it changed the deductible applicable to the insurance policy from $3000 for a single employee and $6000 for a family to $5000 for a single employee and $10,000 for a family. The Respondent also reduced the Respondent's payment for health care expenses above the employee deductible up to the insurance deductible (the interim deductible) from 100 percent to 92 percent, with the employee paying the remaining 8 percent. Nelson's uncontroverted testimony established that this change was discussed with employee Ray Gnadt, a member of the employee bargaining committee, but there is no evidence of a written agreement reflecting the Union's acquiescence in this change.

In October 2010, Breahn Quigley-Nackert became the union staff representative responsible for representing the Respondent's unit employees. On October 15, 2010, the Union sent a letter to Nelson regarding changes in the manner in which the Union was going to calculate dues as of January 1, 2011. In mid-October Quigley-Nackert called Nelson to introduce herself and asked him if he received the dues information. Nelson replied that he received it but he was not going to implement the new procedure. On November 16, 2010, Nelson sent a letter to the Union confirming that he was not going to implement the Union's new dues structure. Approximately a week after receiving the letter, Quigley-Nackert called Nelson and told him that she had an Excel spread sheet that could be used to calculate the amount of dues owed by each employee under the new dues structure. Nelson again responded that he was not going to change to the new dues structure. On January 4, 2011, Quigley-Nackert sent Nelson an email with the dues calculator attached and offered to come to the Respondent's facility to help him with it. Nelson did not respond.

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value to the Board's decision in *Clarke Mfg.*, supra, and have only considered it in this proceeding as providing the background for the instant dispute.

The 2011 Negotiations

In December 2010, both the Respondent in the Union sent letters indicating their intention to begin negotiations over a successor agreement. In early January 2011, [2] the Respondent's attorney, Russ Mueller, and Quigley-Nackert spoke by phone to discuss scheduling of negotiations. Mueller indicated he would not be meeting with Nelson until later in January and that the Respondent would be ready to meet in early February. On January 25, Mueller and Quigley-Nackert spoke again and Mueller indicated that the Respondent would be available on February 3 to begin negotiations. Mueller also indicated that, consistent with the parties' past practice, the negotiations would occur at the Respondent's facility and that the time for negotiations would have to revolve around Nelson's schedule so that meetings would begin at 3:30 p.m. or later. Quigley-Nackert agreed to the date and the conditions for the meeting.

On January 27, Mueller sent the Union the Respondent's proposal along with several attachments to the proposal (Jt. Exhs. 6 and 7). The Respondent's proposal indicated it sought a 1-year agreement; the elimination of union security; and the elimination of any obligation the Respondent had in calculating union dues, including providing the Union with any payroll information. That proposal also required that employees pay a substantially larger portion of their health insurance premium and the amount of deductibles. In this connection, the proposal sought a single employee deductible of $2000 and a family deductible of $4000. After the employee deductible was paid, the proposal indicated that the Respondent would pay 70 percent of the medical expenses to up to the single employee deductible of $5000 and the family deductible of $10,000. The proposal also sought to eliminate any reference to the Union pension fund from the contract.[3] Attachment A to the proposal indicates that Nelson is "morally opposed to compelling an employee to join and maintain membership in the Union in order to work for the company and that he "believes that membership in the Union should be a personal choice made by the employee."

On February 3, the parties met for the first bargaining session. Quigley-Nackert and employees Ray Gnadt and Dennis Sokolow comprised the Union's bargaining committee.[4] Nelson and Mueller represented the Respondent. At the meeting Mueller stated that the Respondent did not want to spend a lot of time in negotiations and identified the key issues as wages and health care costs. He stated that the Respondent needed relief in health care costs and intended to put increases into wages. Mueller also stated the health care issue was a major factor in the Respondent's proposal for a 1-year agreement.[5]

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[2] All dates are in 2011, unless otherwise indicated.

[3] The parties' 2006-2011 contract permitted the Respondent to withdraw from making further contributions to the PACE Industry Union-Management Pension Fund (the Union pension fund) after February 28, 2009. Thereafter, the Union pension fund filed a lawsuit against the Respondent to recover the Respondent's withdrawal liability to the fund.

[4] Sokolow left the Respondent prior to the March 2, 2011 meeting. Quigley-Nackert and Gnadt were present for all the remaining bargaining meetings as were Mueller and Nelson.

[5] In making my findings regarding what occurred at the bargaining sessions I have relied principally on the testimony of Quigley-Nackert and the detailed and complete contemporaneous notes she made of the bargaining sessions. (GC Exhs. 5 through 11.) Quigley-Nackert's testimony was also detailed and consistent on both direct and cross-examination. Importantly, her testimony was consistent with her notes. I also rely on the fact that her demeanor while testifying exhibited certainty with respect to the events she

The Union presented its proposal which included a joint quality review process, improvements in the 401(k) plan, increased disability insurance and shift premiums with specific wages to be negotiated (Jt. Exh. 8). The Union's proposal provided for a safety shoe allowance of $25 to accrue if not used in one year up to $75 over a period of 3 years. Quigley-Knackert also indicated that the Union would be submitting a health and safety proposal and stated that the safety shoe provision could possibly be tucked into that proposal. Mueller stated that the Respondent would not negotiate with the Union over a joint quality review system

The parties discussed the Respondent's proposal to eliminate the union security provision. Quigley-Nackert stated that the Union wanted the present contract language to remain as it had been in the contract between the parties for many years. With respect to the Respondent's proposal regarding dues checkoff, Quigley-Nackert indicated that the Union would be submitting a proposal that would make it easier to calculate the dues but that the Union would not agree to any language limiting its right to information. The parties also discussed the Respondent's proposal to eliminate all references to the Union pension fund from the contract. Quigley-Nackert stated that the Union wished to keep the reference to the pension fund in any agreement in order to ensure that the Respondent paid in its withdrawal liability. Mueller responded that by deleting the language, the Union was not foregoing any obligation that the Respondent may have regarding that liability.

Near the end of the meeting, Nelson stated he had "a really serious hangover from the last round of negotiations and its [sic] set the stage for this one." (GC Ex. 5.) Nelson indicated that the last negotiation had cost him a lot in legal fees, and that he was still paying those fees as well as the cost of the resulting litigation. Mueller then stated to the Union that if it would pull its quality review proposal "we can get through this fairly quickly." When Quigley-Knackert offered to withdraw the quality proposal if the Respondent withdrew its proposal to eliminate union security, Mueller stated "You won't get off that easy." The parties scheduled the next meeting for February 9.

At the meeting held on February 9, the Union made two proposals to address concerns raised by the Respondent. The Union submitted a memorandum of understanding which established a flat dues structure. Quigley-Nackert explained that the Union would need payroll information from the Respondent in order to calculate the flat amount. Mueller indicated that the Respondent would review the proposal and respond later. The Union also provided a term of agreement proposal which provided for a multiyear agreement with an annual reopener for the purpose of negotiating health care costs. Quigley-Nackert stated that the proposal addressed the Respondent's statement that it wanted a one-year agreement because of the uncertainty regarding health insurance costs. Mueller replied that the Respondent would review the proposal and respond later. The Union also made its initial wage proposal of a 5 percent annual increase.

The parties spent a substantial amount of time at this meeting discussing the Respondent's health care proposal. Quigley-Nackert proposed that the employee deductibles increase to $700 for single coverage and $1350 for family coverage. For the interim deductible

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testified about. The only other witness in this proceeding was Nelson. To the extent his testimony conflicts with that of Quigley-Nackert I do not credit it. Nelson's recall of events was not distinct in several respects and his demeanor while testifying often reflected uncertainty.

(the amounts between the employee deductible and the insurance deductible) Quigley-Nackert proposed that the employees pay 10 percent as opposed to the current 8 percent. With regard to the plan premiums, the Union proposed maintaining the current 74 percent (employer)/26 percent (employee) cost split. Nelson responded by saying that the Union needed to move more than 2 percent on the cost-sharing of the interim deductible. Nelson stated that insurance was getting more expensive and the coverage was going down and that in order to have the same level of coverage, he had to take out a separate policy to cover the costs of the interim deductible.

The Respondent agreed to the Union's proposal on employee deductibles but sought a cost sharing of 75 percent for the employer and 25 percent for the employee for health costs above the employee deductible (the interim deductible), rather than the 90 percent/10 percent the Union had proposed. The Union then proposed an 87/13 split for the interim deductible, but maintained its position on the amounts paid for the premium to 74/26. The Respondent did not counter the Union's proposal.

The Union also responded to the Respondent's proposal to remove paid time for bargaining, which was established at 40 hours in the contract, by stating that if that language was removed the Union would propose that the parties negotiate at a neutral site. After discussion, the Respondent agreed to the Union's proposal for 35 hours of paid negotiating time in exchange for a withdrawal of the safety shoe and quality review proposals.

At the end of the meeting, Quigley-Nackert stated there was not much time before the contract expired and that she wanted to schedule a meeting for the following week. Mueller indicated he was not available and the parties agreed to meet again on February 23.

On February 19, the Respondent mailed to the Union a second proposal for a one-year agreement. (Jt. Exh 14.) This proposal sought the addition of the following language to the contractual nondiscrimination clause:

> The Company's indication and/or explanation of ARTICLE 1, SECTION 2 to employees is not a violation of this Labor Agreement; nor is it considered a restraint or coercion of an employee' s ARTICLE 1, SECTION 2 rights.[6]

At the meeting held on February 23, the parties discussed the length of an agreement. Quigley-Knackert stated that the Union had proposed an agreement for longer than one year with a reopener for health benefit costs to address the Respondent's reason for wanting a one-year agreement. Mueller replied that the Respondent was not interested in discussing an agreement for longer than one year and from that point on its proposals would be made on the assumption that it was a one-year agreement. Gnadt indicated that the Union wanted a longer-term agreement.

[6] Article 1, section 2 of the parties' 2006-2011 collective-bargaining agreement contained a union security clause providing that all employees were required to become and remain members of the union within 84 calendar days after being hired as a condition of employment. Article 1, section 2 of the Respondent's 2011 proposal indicates that "membership in the Union is a matter of personal choice for each individual employee" and that employees do not have to be a member of the union as a condition of employment.

The parties also discussed the union-security clause provision. Quigley-Knackert stated that the Respondent should withdraw its proposal to eliminate the union-security provision because it does not affect its business or the Respondent's main objectives, which were stated at the first session as wages and health insurance. She also stated with respect to the Respondent's new proposal seeking to modify the nondiscrimination clause, the Union would not give up any rights that employees have.

Quigley-Knackert stated that the Union had provided the Respondent with a proposal regarding calculating a flat rate amount for union dues but that the Union would need payroll information to calculate the flat amount. Mueller indicated that the Respondent still adhered to its original proposal without offering a further explanation.

Quigley-Nackert indicated that the Respondent's second proposal contained a 10-cent-an-hour wage increase, which was less than 1 percent.[7] Quigley-Nackert also stated that the Respondent had expressed that it would put money into wages if it could obtain some relief on health care costs. She indicated that the Union had made movement in health care costs but had not seen any real movement by the Respondent. She also indicated, however, that the Union could move on its proposed wage increase if there was agreement in other areas.

The parties also discussed health care costs. Mueller again stated this was a major cost issue for the Respondent. Nelson stated that in order to maintain the cost of the health insurance premium at an acceptable level he had purchased policies with higher deductibles. Quigley-Knackert asked to see what employees were currently paying on an individual basis for health insurance. She asked to see the cost per employee as well as a summary plan description. Mueller and Nelson both said it would be difficult to gather this information. Quigley-Knackert responded that the Union needed this information in order to appropriately bargain over this issue.

Mueller again raised the issue of union-security, stating that Nelson felt very strongly about it and he was not going to move on that issue. Quigley-Nackert replied that the Union also felt strongly about it and would like to keep it in the current agreement. She added, however, that the Union had been reasonable in its proposals and could be reasonable on this issue as well. Quigley-Nackert asked Mueller whether the Respondent was saying that because of its position on union security, it believed would be futile to continue negotiations, because she believed they should continue to negotiate. Mueller responded that the parties should continue to negotiate. Nelson added that he is morally opposed to union security. The Union asked about extending the contract, which would expire in 5 days, but Mueller stated that Respondent was not interested in doing so. The parties agreed to meet again on March 2.

Prior to the next meeting, the Respondent provided to the Union a report from its health care administrator, Averill Anderson, reflecting certain costs for the period 2008 to 2010. (GC Exh. 16.) The document provided cost information in the aggregate for employees and the

[7] The average wage of unit employees is approximately $14.50 an hour.

Respondent, but did not include the individual breakdown per employee as Quigley-Nackert had requested.[8]

On March 2, the parties met for their fourth bargaining session. At the beginning of the meeting Quigley-Nackert submitted a lengthy information request. (Jt. Exh 19.) The request asked that the information be provided within a week. In its request, the Union, inter alia, sought the plan document and summary plan description for the Respondent's current health care plan and asked the following questions concerning the Averill Anderson report:

> a) Does the report include employees outside the bargaining unit? How many of the employees are in the bargaining unit, how many are outside the unit?
> b) How many total employees are covered?
> c) How many total individuals, including family members are covered?

The request also sought information regarding the cost and usage of the participants in the Respondent's United Healthcare plan referred to in the parties' prior contract and a substantial amount of information regarding its sickness and accident insurance policy. The request for information also sought safety data sheets for all substances with which bargaining unit employees work; OSHA logs from January 1, 2010 to the present, and information regarding any safety programs the Respondent had in effect.

Before the parties discussed the information request, Mueller said he wanted to "firm up" his notes concerning the union security. Mueller claimed that Quigley-Knackert had said previously that she would not take a contract to the membership without union security. Quigley-Knackert responded that she did not recall making such a statement. Quigley-Nackert stated that she previously said that she would not like to take a contract without union security to the membership, but that anything is possible.[9] Quigley-Nackert stated there were other areas of the contract to negotiate and that she would like to do that. Nelson stated that he felt very strongly about union security and he would not budge on it.

At this meeting, Quigley-Nackert gave the Respondent the health and safety proposal which she had mentioned at the first meeting.[10] Mueller indicated the Union had withdrawn the proposal. Quigley-Knackert pointed out that the quality review proposal had been withdrawn, not the health and safety proposal.

During the parties' discussion of the Union's information request, Mueller said the Union did not need the information it had requested and that it would take a long time to gather it. Quigley-Nackert said that it was necessary to have the information in order to move forward with negotiations. Nelson asked Quigley-Nackert if the Union was going to pay for the cost of

[8] At the hearing, Nelson indicated that the Averill Anderson report did not include the cost of the insurance premiums (Tr. 338-339).

[9] At the hearing, Nelson admitted that Quigley-Nackert stated that the Union would not like to take a contract to the members without union security but that she would be willing to do so (Tr. 320-321).

[10] Quigley-Nackert testified that she had not made the proposal earlier because the parties had been focused on health care and wages. In addition she had revised the language typically used by the Union to make it more applicable to a small bargaining unit.

these negotiations. She responded both parties had costs relating to the negotiations. At that point Nelson angrily stated that he knew what the Union was doing with the information request. Using crude language, Nelson claimed that this is what the Union does when it does not get what it wants. Again using crude language and Nelson asked Quigley-Nackert if that is what she was doing here. Quigley-Nackert replied that from the beginning of negotiations her intention was to reach an agreement.

Gnadt replied to Mueller's claim that it would take a long time to get the information to the Union by saying that the last negotiations took 2-1/2 years and asked whether this bargaining was going to take 4 years to get an agreement. Nelson responded that it was going to take 4 years to get the information to the Union. Quigley-Nackert asked if the Respondent wanted to continue the meeting or provide the information first. Mueller stated that the Respondent would either send the information or have it for the Union at the next meeting. The parties did not schedule another meeting because it was uncertain as to how long it would take the Respondent to provide the requested information.

On March 4, Mueller sent a letter to Quigley-Nackert questioning her request for insurance information regarding the United Healthcare plan since that plan had expired on September 30, 2008. Mueller's letter also asked if the Union's request for information was related to the union's dues calculation. Mueller claimed that the Union's request for health and safety information was not related to open proposals that existed on February 23, 2011, but offered to provide the information for the Union's review at the Respondent's facility. (Jt. Exh. 20.)

In a letter dated March 11, Quigley-Nackert responded to Mueller by first noting that the Union was disappointed that the Respondent wasted time at the last meeting by seeking to discuss minutes of a prior meeting. She indicated that that kind of a discussion was not bargaining. Quigley-Nackert indicated that she would come to the Respondent's facility to review the health and safety information. She also explained the Union's right to the information she had requested. (Jt. Exh. 21.) On the same date, Quigley-Nackert also submitted a separate and revised request for information regarding the cost and usage of the Anthem health care plan which had been inadvertently omitted from her March 2 request (Jt. Exh. 22).

On March 17, Mueller provided some of the information the Union had requested. Mueller did not provide the cost and usage information for health benefits, claiming this information was meaningless since past usage does not predict and/or determine what medical care usage will occur or can be anticipated. However, Mueller indicated that the Respondent would attempt to get such information from the insurance companies. Mueller's letter also contained a response to the assertion made in the Union's March 11 letter that the Respondent was not bargaining. Mueller stated that the last session he merely sought clarification from the Union as to whether it would bring to its members for ratification a contract without a union-security provision and that the Union's response was that it 'would not like to but anything is possible."(Jt. Exh. 23, p. 2.)

On March 24, Quigley-Nackert and Bill Reik, a union representative with health and safety training, met with Nelson to review the Respondent's safety and training materials.

On April 1, Mueller provided the requested information regarding costs and usage for the sickness and accident plans and the requested summary plan descriptions. (Jt. Exh. 26.) With regard to the request for cost and usage for the Anthem and United Healthcare insurance plans, Mueller's response included an email from a customer service representative to Nelson indicating that United Healthcare had forwarded the information request to its processing department and that the Respondent would be charged $100 for providing the information. Mueller also submitted an email from the Respondent's benefits administrator indicating that Anthem does not release any type of reports for groups of less than 50. (Jt. Exh. 26, p. 8.)

On April 10, Quigley-Nackert sent a letter to Mueller indicating that the Union would need to obtain copies of available health and safety reports and the Union was available to resume negotiations on April 27, May 5, and May 12 (Jt. Exh. 27). On April 18, Mueller sent a response to the Union indicating that the Respondent was available for a meeting on May 12. Mueller's letter also attached a series of e-mails reflecting Nelson's unsuccessful attempts to obtain additional cost and usage information from United Healthcare. (Jt. Exh. 28.)

On May 5, Mueller sent a letter to the Union claiming that the Respondent had completely responded to the Union's March 2 and March 11 information requests. Attached to Mueller's letter was a response to the Union's March 2 safety and health proposal. (Jt. Exhs. 29 and 30.) The response was entitled "Clarke Mfg. statement of rationale for the rejection of the Union's March 2, 2011 art. XIV-health, safety and environment." The statement indicated, in relevant part, the following:

> The Company is answerable to laws as made and provided establishing workplace safety and health standards, responsibilities, requirements and obligations, which includes remedies and corrective measures for any shortcomings that may occur in the Company's efforts to comply with the same.
>
> The Company will not agree to include in the LABOR AGREEMENT any safety and health matters, such as are set forth in the Union's HEALTH, SAFETY AND ENVIRONMENT" proposal, in order to avoid also being answerable to these matters by the arbitration of unresolved grievances
>
> However, as previously noted, that Company recognizes the obligation to "meet with the Union upon request to discuss any Union asserted issues regarding Plant health and safety, such as deficiencies, shortcomings, problems, inadequacies and/or violation of the laws as made and provided on the subject". Such discourse may informally result in resolving such issues.
>
> In summary, the legal responsibility for any shortcomings that may occur in the Company's efforts provide safe and healthful conditions of work for its employees, which are not resolved through informal discussions with the union, will not be expanded beyond that which is established by the laws and made and provided on the subject.

On June 9, the parties met for their fifth bargaining session. Mueller stated that the Respondent believed it had satisfied the Union's outstanding information requests. Quigley-Nackert mentioned her request for the safety data sheets and, after further discussion, the Union agreed to pay for copies of that information. Mueller stated that the Respondent had satisfied all of the requests at that point and Quigley-Nackert responded "Yes as far as I can tell. I'm still in the process of reviewing." (Tr. 113-114.)

The Union then submitted another written proposal (Jt. Exh. 42). In its proposal, the Union reduced its wage increase demand to a 4 percent increase. Mueller commented that the Union's health and safety proposal was not on the list and Quigley-Nackert responded that was a mistake on her part and that the Union was intent on continuing to negotiate a proposal on health and safety. The parties then discussed the health care benefits. The Union made a further concession agreeing to an 85 percent (employer)/15 percent (employee) cost split on the interim deductible amounts paid between the employee deductible and the insurance deductible. The Union maintained its position on keeping the health care premium cost sharing split at 74/26. The parties then caucused.

After returning from the caucus, Mueller presented to the Union three handwritten "scenarios" based on a 1-year agreement and the removal of the union-security provision. Under one scenario, the Respondent would declare impasse and the Union could challenge that conduct with an unfair labor practice charge or not. (Jt. Exh. 33.) Mueller stated he believed that the parties were close to an impasse and referred to a conversation that Nelson had with Gnadt on the shop floor on approximately April 19, 2011. At that point, Mueller gave to the Union a typewritten note (R. Exh. 4). This typewritten note indicated that "On April 19, 2011, when giving Ray copies of the April 18 letter from Mueller to Knackert, Tom stated he was looking forward to reaching an agreement to a new labor contract. Ray replied that they would never be an agreement so long as Tom holds to his position on union membership." Quigley-Nackert testified that after reading Nelson's note, Gnadt denied that he told Nelson that the parties would never reach an agreement. According to Quigley-Nackert, Gnadt stated that he did not want an agreement without union security and that the Union would "fight it tooth and nail." Mueller then added to Nelson's typewritten note "Ray -never said never be an agreement but would fight him tooth and nail." Quigley-Knackert asked why Nelson and Gnadt were having this discussion on the shop floor rather than the bargaining table. Mueller did not respond and said that the union- security clause was the only thing holding the parties from reaching an agreement. He also stated that the parties needed to deal with it. Quigley-Knackert replied by saying that there were other areas to negotiate and there was movement to be made in other areas. The meeting ended shortly thereafter. The parties agreed to meet again on June 27.

At the meeting on June 27, the Respondent gave to the Union an updated list of proposals and tentative agreements. (Jt. Exh. 34.) This document stated on the last page that the Union had withdrawn its health and safety proposal. Quigley-Knackert again stated that the Union was not withdrawing that proposal and meant to negotiate about it. There was no response to her statement.

The parties then began to discuss other issues on the Respondent's updated list of proposals. Mueller stated that the key issues were labor costs, including wages and health insurance. He said that the Respondent was prepared to put increases into wages but that they

were still looking for relief and more movement from the Union on health insurance. Mueller stated the constantly rising cost of health care insurance made it difficult for the company to stay competitive.

Mueller also stated that he did not see a way around the issues of union security and the term of the agreement and that he thought the parties were at a deadlock. Gnadt stated that the Respondent had not made any movement on either of those issues. Nelson responded by saying that the Respondent stated at three or four meetings it would not go over a 1-year term of an agreement. Gnadt replied that the Union had been proposing a multiyear agreement since the beginning of negotiations and that he wanted to see some movement from the Respondent on that issue. Quigley-Knackert indicated that there was a major lack of movement in different areas. She stated that the Union had made some moves on health care but she saw a lack of movement from the Respondent. She stated that she saw a major lack of movement from the Respondent on wages. Quiqley-Nackert said that the Union had room to move on both issues. Nelson responded by saying he felt the Respondent's wage proposal was reasonable and fair and that the Respondent had made a counterproposal on health insurance.

At this meeting, the Respondent gave the Union a counterproposal regarding health insurance (Jt. Exh. 35) and cost calculations regarding this proposal. (Jt Exh. 36.) The proposal included a 68 percent (employer)/32 percent (employee) split on insurance premiums. After a brief discussion of the Respondent's proposal, Mueller again indicated that he did not think the parties would get a resolution on the union-security and the term of the agreement issues. He also indicated that the Respondent would not make any substantial movement on wages as the Respondent did not have the money. He also stated that the Respondent needed relief from the employees on health care costs because it did not have the money to continue paying large amounts for health care. Quigley-Knackert asked if the Respondent was going to make a counterproposal and wages and Mueller replied "no." Quigley-Nackert indicated that the Respondent had stated that they did not understand why the Union had proposals on the 401(k) plan and sickness and accident insurance premiums because the Respondent thought that money would be better allocated to wages. Quigley-Nackert stated that since the Respondent was now indicating that it would not make any substantial change in wages she was reluctant to withdraw the Union's proposals on those subjects. The parties then caucused.

After the caucus, the parties discussed the Respondent's proposal on health care premiums. Mueller indicated that the 68/32 percent split for the payment of premiums was what the Respondent was proposing for cost sharing. The Union responded that because there was no movement by the Respondent on any of the other economic issues, the Union was maintaining its current position of a 74/26 split on premium payments.

The parties then discussed the issue of cost sharing regarding the interim deductible. The Respondent proposed splitting the interim deductibles in two tiers. The Respondent proposed a cost sharing split as follows:

> After the employee Single Portion deductible is paid, the Company and the employee will share the cost for the co-insurance amount of $4300.00 on a two-tier split of $2150.00 co-insurance. The Company and the employee will respectively share the cost seventy five (75%) and twenty five (25%)

> percentage basis for the first tier $2150.00 co-insurance, and eighty (80%-twenty (20%) percentage basis for the following second-tier $2150 .00 of the medical expenses up to the Single Plan deductible of $5000.
>
> After the employee Family Portion deductible is paid, the Company and the employee will share the cost for the co-insurance balance of $8650.00 on a two tier split of 4325.00 co-insurance. The Company and employee will respectively share the cost seventy five (75%) and twenty five (25%) percentage basis for the first tier $4325.00 co-insurance, and eighty (80%)-twenty (20%) percentage basis for the following second-tier $4325.00 of the medical expenses up to the Family Plan deductible of $10,000.

The Union made a counterproposal to the Respondent. For the single plan, the Union proposed the first tier as the first $2800 and the second-tier as the remaining $1500. With respect to the family plan, the Union proposed the first tier as the first $5600 and the second tier as the remaining $3050. The Union proposed t the cost sharing split as 85 percent for the Respondent and 15 percent for the employee in the first tier, and a cost sharing split of 80/20 for the second-tier.

Nelson responded to the Union's proposal by saying he did not see the logic in it and asked why employees would pay more in the second-tier than in the first. Nelson stated that he wanted the employees to pay more up front. Quigley-Knackert replied that the Union was trying to address the Respondent's concern by having those employees who actually use the insurance more share more of the cost.

Mueller indicated that if the Respondent agreed to the tiers the Union had proposed, the Respondent would then want a different cost sharing split. The Respondent proposed a cost sharing split of 82/18 for the first tier and 80/20 for the second-tier. Mueller added that if the parties could get through the insurance, then they could schedule a date for the rest of the contract issues. He added, however, that the Respondent was not going to move much on the other issues.

Quigley-Nackert observed that given the discussions on health insurance, the Union was already looking at a concessionary contract. Nelson replied that it was only concessionary if employees used health care benefits. Gnadt responded that if the employees did not use health care benefits, the Respondent would not be concerned about it. He added that given the Respondent's wage proposal, the Respondent's proposals were concessionary.

After a caucus, the Union made another proposal on the cost sharing plan on the interim deductible of 84/16 for tier 1, but it was contingent on the insurance premium cost-sharing staying at the current split of 74/26. She added that the Union's proposal was also contingent on the Respondent making movement on its wage proposal. Mueller replied that the Respondent would respond to the Union's proposal at the next meeting. Mueller added that he believed that the parties should be able to finish negotiating by the next meeting as there was not that much more to talk about and that Nelson was steadfast on the union-security issue. Gnadt indicated there was "plenty to negotiate." Quigley-Nackert added that there were still "plenty of open

items" that the Union had not withdrawn and the Union hoped that the Respondent would come closer on their proposal for wages.

On July 7, Mueller sent the Union a letter in which he indicated the parties were deadlocked on the issue of union security and had been deadlocked on that issue since the first meeting. The letter also indicated that the term of the agreement and the amount of the wage increase 'have emerged as impasse subjects" and that the Respondent intended to submit a final offer for the complete terms of an agreement at the next meeting. (Jt. Exh. 37.)

On July 20, Quigley-Nackert sent the following response to Mueller:

> Your letter of July 7, 2011, only demonstrates what is becoming more clear with each bargaining session: that the Company is not bargaining in good faith but is trying to avoid reaching agreement. As I explained at the last meeting, there are many issues which have hardly been addressed much less resolved.
>
> On the health insurance issue please bring to the next meeting or provide beforehand all documents on which you based the figures for the Company's June 27, 2011 health insurance proposal and its costing.

On July 25, Nelson sent an email to Quigley-Knackert in response to her July 20 letter (Jt. Exh. 40). Attached to the email were monthly statements for June and July 2011 from Trilogy, the Respondent's then current health care provider. The statements reflected a wide variance in the premium amounts that were paid by employees. While some employees monthly insurance premiums were as low as $58.72, the cost ranged up to a high of $804.26 for one employee.

On July 26, the parties met for their seventh bargaining session. Pursuant to the Union's request, a mediator from the Federal Mediation and Conciliation Service was also present. The parties summarized their positions up to that point. Mueller stated that Quigley-Knackert was not credible when she wrote in her March 4 letter that there were many items left to negotiate. Mueller stated that there were not many items left to discuss. Quigley-Knackert disagreed.

Quigley-Knackert asked the following questions from a list that she had prepared prior to the meeting relating to the issue of the duration of the contract. (GC Exh. 11, p. 9);

> Per your July 7 letter as it relates to "uncertainties that existing business conditions"; what business conditions are being considered?
>
> What was the customer base and duration of orders sent a last contract?
> Can we see the orders to verify [any] claimed change?
> Does the Company plan ahead with budgets, over what time [frame]?
> Does the company have loans; over what period of time are those loans paid back? How is the company able to project it will be able to pay those loans off?

Mueller responded generally by stating that the Union did not need to know these things. When Quigley-Knackert asked about a budget cycle, Mueller responded that she was making

things too complicated and there was no reason for the Respondent to be locked into a long-term agreement and that her questions were "way too technical." Gnadt stated that the Union had proposed a longer agreement and that would save money regarding the expense of negotiations. Nelson responded by saying "I'm not claiming poverty." Gnadt stated that while the Union wanted a multiyear contract it would be willing to change its position depending upon other areas of agreement.

Quigley-Nackert then asked questions about comments the Respondent had made regarding its financial condition and its ability to compete. The first question involved what business conditions were considered in Mueller's letter of July 7 when he referred to "uncertainties in existing business conditions" as a basis for its one-year term of an agreement proposal. In response Nelson replied, "the bombing in Norway." Mueller intervened and responded that those conditions involve taxes, the cost of steel, the uncertainties in the current economic conditions, and competition. Quigley-Knackert asked if there been a decrease in orders placed with the Respondent and Mueller responded by saying "a company doesn't operate this thin unless they have to"

Mueller then indicated again there was a deadlock on union security. He also referred to the Union's 11-page health and safety proposal and said the Respondent was not willing to include such a proposal in a contract. He indicated that if there was anything that the Respondent was remiss on regarding health and safety, it would answer to OSHA. He also indicated that employees could bring health and safety issues to Nelson and they would be addressed informally. At that point the parties then caucus separately with the mediator.

After the caucus, the Union presented a revised health and safety proposal which was much shorter than its previous proposal. Mueller quickly reviewed the Union's proposal and indicated that it struck him that the Respondent would have the same response to it as it had before, but that they would look at it. He also commented again that both the parties were deadlocked on the union-security issue and that they were at the same point as they were at the start of negotiations. The parties then caucused.

When they returned, Mueller indicated that the Respondent was rejecting the Union's revised health and safety proposal for the same reasons it rejected the original proposal. He then indicated that due to the deadlock on union security and, without any foreseeable change the Respondent was presenting its final proposal. The Respondent then presented its final offer, with some attached information regarding health care costs. (Jt. Exhs. 42 and 43.) Mueller summarized the offer. The proposal increased the Respondent's wage offer to 18 cents-an-hour. The proposal indicated that the individual employee deductible was increased to $700 and the family deductible was increased to $1350. The health care proposal included the Respondent's prior proposal for cost sharing for the interim deductible (the amount between the employee deductible and the insurance deductible) of 82/18 for the first-tier and 80/20 for the second-tier. There was also an increase in the employee portion of the insurance premiums paid from 24 to 30 percent. The final proposal was for a 1-year agreement and included the deletion of the union-security clause, and a dues checkoff clause that indicated that the Respondent did not need to provide payroll information to the Union to calculate the dues. The proposal also included an addition to the nondiscrimination clause indicating that the Respondent's communication to employees concerning union membership would not be considered "restraint or coercion" of

employees rights under that provision. Finally, the proposal deleted any reference to the Union pension plan. The Union asked to set up a meeting to discuss the offer after it was fully reviewed. Mueller told Quigley-Knackert to call him after the offer was reviewed.

On July 27, Mueller sent a letter to the Union confirming that the Respondent had presented a final proposal to the Union after reaching a "deadlock" on the Respondent's proposal regarding the union-security provision (Jt. Exh. 44).

After meeting in late August with Gnadt to review the Respondent's final offer, Quigley-Nackert sent another lengthy information request to Mueller on September 6. (Jt. Exh. 45.) In this request, the Union asked the Respondent to provide the following: when and to what extent was the Respondent self-insured for any portion of the health benefit programs, beyond the deductibles at any time since 2006; if it was not self-insured for any portion of the health benefits beyond the deductibles, to confirm whether the Averill Anderson study previously provided was limited to analysis for deductibles which were paid; to identify the plan years covered by the Averell Anderson study, including whether the plan started or ended on October 1, 2010 or some other date; all premium quotations for the then current Trilogy insurance policy for 2010, 2011, and 2012; the complete formula for the health insurance premiums charged for each employee for the period 2010 to 2012, and the monthly health insurance premium paid for each bargaining unit employee from October 2006 to the present.

The Union's September 6 letter also asked the Respondent for financial information. It sought financial information showing that the Respondent is running "thin" including, but not limited to, all budgets and income and expense statements; all information, including all relevant financial data identifying the Respondent's competitors and the information that the Respondent had concerning the cost structure of its competitors which impacted its ability to compete and the extent of the impact; information concerning the cost of purchasing steel and any other supplies which impacted the Respondent's contract proposals. It also asked for information the Respondent had as to whether it was at a competitive disadvantage to its competitors with respect to the cost of steel and any other supplies; and all contracts between the Respondent and its customers, redacted if necessary, showing the volume sold and whether the product was sold on a time materials or flat cost of finished product basis. Finally, the Union asked that the Respondent furnish the Union with a list from the Respondent's workers compensation carrier of all work-related injuries since January 1, 2009; and to identify when the Respondent last tested air quality in noise levels at the plant and to provide copies of the last air quality and noise level tests.

On September 15, Mueller replied and indicated that the Union could contact Nelson concerning the requested safety information. With respect to the remainder of the information request, Mueller asserted that the parties were at an impasse and requested a written reply as to what purpose would be served by providing the information. (Jt. Exh. 46.)

In October 2011, Gnadt contacted Quigley-Knackert and informed her that Nelson had informed him of the Respondent's intention to change insurance carriers effective November 1, 2011. Gnadt indicated that the proposed coverage by the new carrier, Assurant, appeared comparable to that provided by Trilogy and that Assurant's rates would be below what Trilogy

was seeking. Quigley-Knackert agreed with the change and communicated her agreement to Nelson.

On December 15, Mueller sent a Union a letter which included the following:

> In view of the impasse in negotiations for terms of a new labor Agreement and because the deductibles and percentage cost-sharing for the "health benefit" are on a calendar year basis, this is to advise that the Company will implement, effective January 1, 2012, the deductibles and percentage cost-sharing as stated for the "health benefit" in the Company's July 26, 2011 FINAL OFFER.

On December 20, Quigley-Knackert replied to Mueller's letter. (Jt. Exh. 49.) In her response, Quigley-Knackert stated there was no impasse and demanded that the Respondent cease and desist from implementing any change in employees' health benefits. Her letter demanded that the Respondent bargain over any such change and provide the Union with the information it had requested. The letter contains a detailed explanation as to why the Union needed the requested information. With respect to the financial information, the letter stated that at the July meeting, the Respondent had claimed the reason for its economic proposal was business conditions including the cost of steel as well as competition. The letter noted that "The Union must probe the Company's reasons for its economic proposal to determine whether the economic conditions cited warrant the proposal from the Union's perspective." On the same date, the Union sent a separate letter requesting information, most of which is repetitious of the information the Union had requested in its September 6 letter (Jt. Exh. 50). On December 23, Mueller sent a letter to the Union again asserting that the parties were at an impasse and that the Respondent would reply to the Union's request for information after the holidays.

Effective January 1, 2012, the Respondent implemented its proposal for increasing the amounts employees paid for the employee and family deductible, the cost-sharing split on the interim deductible and insurance premiums as set forth in its final offer. The Respondent did not, however, implement its proposed wage increase.

On January 6, 2012 the Union sent Mueller an information request regarding the implemented proposal on the cost sharing for the interim deductible and also requesting updated information of unit employees. (Jt. Exh. 52.) On the same date, the Union sent the Respondent another letter reiterating its earlier request for information from the Respondent's workers compensation carrier regarding all work-related injuries since January 1, 2009 and information as to when the Respondent last performed air quality and noise level tests at the shop, including copies of the last test (Jt. Exh. 53). On January 9, 2012, Mueller sent a letter to the Union (Jt. Exh. 54). With respect to the requested financial information, Mueller noted that it is "sensitive and confidential." His letter lists what he claimed were the factors relied on by the Union seeking this information and asking if there are additional reasons.

Quigley-Knackert replied by letter dated January 16, 2012, reiterating that the Union needed the requested information for bargaining. The letter stated, in part:

> The company has made justification for its proposal based on the need to run thin, competition, and business conditions and the cost of steel, without really

> explaining anything about how these matters figured into your proposal for example whether you have reduced orders or reduced profit or no profit. The union wants to know specifics of every one of your justifications so that we can see to what extent your proposal is warranted by these factors. My letters have been very clear and your repeated request for clarification is just stalling.

On January 24, 2012, Mueller responded in a letter indicating that the Respondent was privileged in refusing to provide financial information because the Union's request was made after the Respondent's July 26 final offer. He also indicated that statements that the Respondent had made such as "running thin" was not a plea of poverty and that the financial information was confidential and privileged. (Jt. Exh. 60.) However, in an attempt to resolve the information request for financial information, Mueller attached to his letter a letter dated May 20, 2011, from Attorney Alan Levy, who represented the Respondent in the litigation regarding its withdrawal from the Union pension fund, to the attorney representing the Union pension fund. Mueller noted that a settlement of the lawsuit regarding the Union pension fund was effectuated subsequent to Levy's letter. Levy's letter stated that as of May 20, 2011, "the employer's financial position has deteriorated, the market for its products as almost evaporated and the ability to pay the principal of these claims has become more tenuous." Levy's letter reflects that he attached the Respondent's financial statements from 2006 through 2011, income tax returns from 2006 through 2010, and bank statements from 2006 to 2011. None of these underlying financial documents were included with Mueller's letter to the Union.

On February 1, 2012, Mueller sent the Union a letter asserting that it complied with the portion of the Union's December 20, 2011 information request relating to health insurance. In fact, the Respondent partially complied with the Union's request but did not provide the following information sought by the Union: the complete formula for the premiums charged for each employee by Trilogy for 2010 and 2011; the complete formula for the premiums charged for each employee by Assurance in 2012; and the monthly health insurance premiums paid for each bargaining unit employee from October 2006 to the present.

On February 2, 2012, Quigley-Knackert requested by letter the underlying financial information which had been referred to in Levy's letter to the attorney representing the Union pension fund. She also requested documents confirming any payments which had been made to the Union pension fund. Finally, she renewed her request for current financial information. (Jt. Exh. 62.)

On February 13, 2012, Mueller sent a letter to the Union indicating that the documents referred to in Levy's letter would be available for review at the Respondent's premises after they were retrieved from Levy, as well as updated financial and bank statements. Mueller indicated, however, that the other financial information sought by the Union was not relevant and would not be provided. This letter gave no further specifics, however, regarding what information the Respondent would not furnish. (Jt. Exh. 63.)

On February 23, 2012, Mueller sent a letter to the Union indicating he had received the financial documents from Levy and would schedule a date for them to be reviewed. He also enclosed a copy of the settlement agreement of the lawsuit regarding the Union pension fund and indicated that the Respondent is in compliance with the conditions set forth in the settlement. (Jt.

Exh. 4.) On March 16, 2012, Quigley-Knackert requested that the Union and its accountants have an opportunity to review the financial documents that the Respondent was providing prior to a scheduled meeting (Jt. Exh. 65). On March 21, 2012, Mueller indicated that the documents would be available for review on April 3, 2012, but did not respond to the Union's request that they be made available prior to the meeting (Jt. Exh. 67).

On March 20, 2012, Mueller sent a letter to the Union advising that the Respondent had removed from its final proposal its proposed amendment to the nondiscrimination clause regarding communication to employees with respect to the union membership. (Jt. Exh. 67.)

On March 29, 2012, Quigley-Knackert sent a letter to Mueller canceling the scheduled meeting to review the financial documents referred to in Levy's letter because the Respondent had not provided the financial statements in advance as requested. She also renewed her request for documents confirming payments were made pursuant to the pension fund settlement. (Jt. Exh. 68). On March 31, 2012, Mueller indicated that the Respondent would not provide copies of the financial documents prior to the meeting and that the Respondent would not provide evidence of compliance with the pension fund settlement as those matters are governed by the settlement agreement in the pension fund litigation.

Analysis

Whether the Respondent Refused to Bargain over the Union's Proposal Regarding Health, Safety and Environment in Violation of Section 8 (a) (5) and (1)

At the first bargaining meeting, Quigley-Knackert stated that the Union intended to submit a health, safety and environment proposal. On March 2, the Union submitted its original 11-page proposal addressing health, safety, and environmental issues. As noted above, on May 5, 2011, the Respondent flatly refused considering the Union's proposal as part of a collective-bargaining agreement. While the Respondent indicated it would agree to discuss health and safety concerns, it would do so only informally with unit employees.

At the parties July 26 meeting, Quigley-Knackert indicated that the Union had a revised health and safety proposal to present. Mueller replied that the Respondent was not going to put any language in the contract addressing health and safety and that the Respondent was not going to take up negotiation time to discuss those issues. He reiterated that the Respondent would handle health and safety issues informally. When Quickley-Nackert gave Mueller the Union's new and substantially revised 2-page proposal on health, safety, and environment, Mueller glanced at it briefly and indicated that the Respondent would most likely have the same response as it had previously, but that he and Nelson would look at. After a caucus, Mueller stated that the Union's second health and safety proposal was rejected for the same reasons that the first proposal was rejected. The Respondent has never changed its position on refusing to include a health and safety proposal in a collective-bargaining agreement.

Section 8(d) of the Act requires that an employer bargain with the union representing its employees with respect to "wages, hours, and other terms and conditions of employment" and execute a "written contract incorporating any agreement reached if requested by either party." It is eminently clear that an employer has a duty to bargain with a union over

the mandatory subjects of wages, hours and other terms and conditions of employment and that its failure to do so violates Section 8(a)(5) and (1). *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-682 (1981); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Board has long held that health and safety matters are mandatory subjects of bargaining. *Minnesota Mining & Mfg, Co.,* 261 NLRB 27, 29 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983); *NLRB v. Gulf Power Co.*, 156 NLRB 622 (1966), enfd. 384 F.2d 822 (5th Cir. 1967).

In the instant case, the Respondent expressly refused to include the Union's proposed health, safety, and environment proposal in any collective-bargaining agreement that may be reached between the parties. The Respondent also refused to discuss the Union's revised proposal during the parties' last meeting held on July 26, 2011. As indicated above, Section 8(d) of the Act requires that parties are obligated to bargain over wages, hours and working conditions and include in a written contract any agreement that may be reached on those subjects. Because the Board has long held that health and safety proposals are mandatory subjects of bargaining the Respondent's refusal to consider the Union's desire to negotiate over such a proposal is violative of Section 8(a)(5) and (1) of the Act. It is not sufficient for the Respondent to indicate that it was willing to discuss health and safety informally. Such willingness does not relieve the Respondent from the obligation to bargain collectively over such a proposal and to include any agreement that may be reached in a written contract, if so desired by the Union. The fact that the Respondent has an obligation under other laws to operate a safe workplace does not negate its obligation to bargain over such issues. The Board has expressly held that OSHA's authority to regulate health and safety in the workplace does not preempt the field and negate the Board's authority to consider whether an employer's refusal to bargain over workplace safety issues violates Section 8(a)(5) and (1) of the Act. *Hercules Inc*., 281 NLRB 961, 964 (1986). On the basis of the foregoing, I find that the Respondent's refusal to bargain over the Union's proposed health, safety, and environment proposal violates Section 8(a)(5) and (1) of the Act.

Whether the Respondent Insisted that Permissive Subjects of Bargaining be Included in any Agreement in Violation of Section 8(a)(5) and (1)

In its original contract proposal submitted to the Union on January 27, 2011, the Respondent included a proposal regarding dues checkoff that would not require "the Company to participate in any way with the Union in the determination of the amount of dues to be deducted from the employee's paycheck, such as providing payroll." (Jt. Exh. 7, p.1.) At the first bargaining session held on February 3, 2011, the parties discussed the Respondent's proposal on dues checkoff. Quigley-Knackert indicated that the Union would be submitting a proposal that would alleviate the Respondent's need for the language it sought on dues checkoff, but that the Union would not agree to any language limiting its right to information.

On February 9, the Union submitted to the Respondent a memo of understanding regarding dues checkoff that indicated that the Respondent would deduct a uniform amount of dues on a monthly basis from each employee's check and that the Union would inform the Respondent annually of any change to this monthly deduction amount. Quigley-Knackert indicated, however, that the Union would need payroll information to calculate the flat amount. Mueller indicated that the Respondent would review the proposal and respond at a later meeting.

On February 19, the Respondent sent a second entire contract proposal to the Union. This proposal included an addition to the contractual nondiscrimination clause indicating that the Respondent's communication and/or explanation of article 1, section 2 (the union-security provision) is not a violation of the contract nor is it considered "restraint or coercion" of an employee' s rights under that section.

At the meeting held on February 23, Quigley-Knackert raised the proposal submitted by the Union regarding the flat amount for dues. Once again, she indicated that the Union needed payroll information to calculate the amount. Mueller replied that the Respondent was adhering to its original proposal but offered no further explanation. Quigley-Knackert also indicated that with respect to the Respondents new proposal, seeking to modify the nondiscrimination clause in the contract, the Union would not give up any rights that employees had.

At the meeting held on July 26, Mueller indicated that because of the "deadlock" on the Respondent's proposal to eliminate the union-security provision of the contract, he was presenting the Respondent's final proposal. The Respondent's final offer to the Union included its proposed addition to the dues-checkoff clause reflecting that it did not have to provide payroll information. The Respondent also included the language it was seeking to add to the nondiscrimination clause. On July 27, Mueller sent a letter to the Union confirming that the Respondent had presented a final proposal to the Union after reaching a deadlock on union security.

On September 15, in his response to a request for information from the Union, Mueller asserted that the parties were at an impasse. On December 15, Mueller sent a letter to the Union which indicated that "in view of the impasse in negotiations for the terms of the new labor agreement" the Respondent was going to implement on January 1, 2012, the interim deductible amounts and the percentage of cost sharing for health benefits set forth in its July 26, 2011 final offer.

On March 20, 2012, Mueller sent a letter to the Union advising that the Respondent had removed from its final proposal its proposed amendment to the nondiscrimination clause[11]

In *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958), the Supreme Court adopted the Board's analysis and held that parties are obligated to bargain with respect to wages, hours, and other conditions of employment, which are mandatory subjects under Section 8(d) and may bargain about other matters, permissive subjects of bargaining, but may not insist on permissive subjects to impasse. If an impasse has been created, even in part, by insistence on bargaining about a nonmandatory subject, such an impasse is not valid. *Retlaw Broadcasting Co*., 324 NLRB 138, 143 (1997), enfd. 172 F.3d 660 (9th Cir. 1999).

I first address the Respondent's proposal seeking to obtain the Union's waiver of its right to obtain wage information regarding unit employees for the purpose of calculating dues. The duty to bargain in good faith requires an employer to furnish information necessary and relevant for a union to properly represent unit employees. This obligation exists not only for the purpose of contract negotiations but also for the purpose of administering a collective-bargaining

[11] This action was taken after the complaint issued in the instant matter on February 20, 2012.

agreement. Relevancy is determined by a broad discovery type standard and it is necessary only to establish the probability that the information would be useful to the union in carrying out its statutory duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1965); *North Star Steel Co*., 347 NLRB 1364, 1368 (2006); and *American Broadcasting Co*., 290 NLRB 86 (1988). The Board has long held that information concerning unit employees' terms and conditions of employment, including wages, is deemed to be presumptively relevant to the union's duty to represent the employees. *Jano Graphics, Inc.* 339 NLRB 251, 259-260 (2003); *Pavilion & Forrestal Nursing & Rehabilitation*, 346 NLRB 458, 463 (2006). In *Acme Industrial*, supra, the Supreme Court indicated a union's right to information is directly related to the obligation to bargain in good faith in is thus a statutory right. Id. at 437.

In *Farmer Bros. Co*. 342 NLRB 592 (2004), the Board found that the union had a right to obtain wage information in order to verify the dues obligation of unit employees. The Union needed to obtain information in order to properly verify the amount of dues owed and aid it in enforcing the union-security provision of the contract. Thus, the Board has specifically affirmed a union's right to obtain wage information in order to calculate dues.

In the instant case, the Respondent proposed removing the union-security clause, but regardless of whether the parties ultimately agree to continue the union-security provision, payroll information will be needed by the Union in order to calculate the amount of dues under the checkoff provision. The Respondent did not seek to eliminate the dues-checkoff provision, but only to absolve itself from any role in the dues calculation process, including providing payroll information.[12]

In effect, the Respondent's proposal seeks a waiver of the Union's statutory right to obtain wage information in order to assist it in calculating the appropriate amount of dues owed by employees. While the Respondent may propose that the Union waive its right to such information, such a proposal is a permissive subject of bargaining in that it does not itself constitute a proposal involving "wages, hours and working conditions" within the meaning of Section 8(d). Rather, it involves the proposed restriction of the Union's statutory right to obtain relevant information and would thus limit the Union's role in the collective-bargaining process.

The Board has held that, although an employer may make a proposal on a nonmandatory subject of bargaining and link it to a mandatory subject as part of a package, such linkage does not privilege an employer to continue to insist upon acceptance of the nonmandatory proposal to the point of impasse. *Pleasantville Nursing Home, Inc*., 335 NLRB 961, 964 (2001).

The Board has found that an employer's proposal which would allow direct dealing with employees over mandatory subjects of bargaining, including a merit pay system and personal service contracts, was a nonmandatory subject of bargaining. *Retlaw Broadcasting Co*., 344 NLRB 138 (1997), enfd. 172 F.3d 660 (9th Cir. 1999). The Board has also found that a proposal that would allow the employer to bypass the union and negotiate directly with unit employees

[12] It is well established that dues checkoff is a mandatory subject of bargaining. *Taylor-Dunn Mfg Co*., 252 NLRB 799 fn. 2 (1980); *H.K. Porter Co.,* 153 NLRB 1370, 1372 (1965), enfd. 363 F.2d 272 (D.C. Cir. 1966).

over a health plan was a nonmandatory subject of bargaining. *Service Net, Inc*., 340 NLRB 1245, 1246-1247 (2003). In both *Retlaw* and *Service Net*, the Board found that the proposals involved would diminish the Union's role as the bargaining representative in matters which directly affected terms and conditions of employment of unit employees. In both cases, the Board found that insistence on such a clause to impasse violated Section 8(a)(5) and (1) of the Act.

In *Service Net*, supra, the Board also found that an employer's proposal (article 37) that required adherence to the contract, including any no-strike or no-lockout provisions, after the contract expired and while negotiations for a new agreement were ongoing, was a nonmandatory subject of bargaining. The Board concluded that a party cannot be compelled to relinquish its right to exercise its economic weapons in perpetuity and that is what the employer's proposal would accomplish. Accordingly, the Board found the proposal to be a nonmandatory subject of bargaining and that the employer's insistence that any agreement contain article 37 violated Section 8(a)(5) and (1).

After considering the foregoing, I find that the Respondent, by insisting on its proposal seeking the Union's waiver of its right to obtain payroll information in order to calculate dues to its declaration that the parties were at an impasse on July 26 and thereafter, violated Section 8(a)(5) and (1) of the Act.

As noted above, the Respondent made an additional proposal to amend the nondiscrimination clause of the contract to provide that any explanation by it to employees regarding article 1, section 2 would not be a violation of the contract nor would it be considered as restraint or coercion of employee rights under that section of the agreement. Since article 1, section 2 concerns union membership, reduced to its essence, the Respondent's proposal seeks to privilege it to say whatever it wishes to employees regarding membership in the union without it being considered "restraint and coercion" of an employee's rights to join the Union. The Union refused to agree to this provision stating that it would not waive employees' rights. The Respondent included this provision in its final offer and maintained it from its declaration of impasse on July 26 until it withdrew the proposal on March 20, 2011. I find that the proposed language seeks a waiver from the Union of its right to file a grievance under the contract. I also find that the proposal seeks a waiver of the Union's right to file a charge under the Act for statements made by the Respondent to employees regarding membership in the Union. In this regard the reference to "restraint and coercion" is directly related to the language used in Section 8(a)(1) of the Act.

In *Reichold Chemicals, Inc*. 288 NLRB 69, 71 1988), enfd.in pertinent part 906 F.2d 719 (D.C. Cir. 1990), the Board found that a proposal seeking to have employees waive their right to file a charge with the Board for discipline imposed under the no-strike clause of an agreement was not a mandatory subject of bargaining. In so finding the Board found that a waiver of the right to Board access was "contrary to the fundamental policy of the Act and is unrelated to terms and conditions of employment." Accordingly, I find that in the instant case the Respondent's insistence to impasse on its proposal seeking to waive the right to file a charge over statements made by the Respondent to employees regarding membership in the Union violates Section 8(a)(5) and (1) of the Act.

Whether the Respondent Delayed in Providing the Union with Information Regarding that Cost of Health Insurance for Each Employee in Violation of Section 8(a)(5) and (1)

There are several allegations in the complaint regarding the Respondent's unreasonable delay or its refusal to provide information in violation of Section 8(a)(5) and (1). Because of its importance in assessing whether the Respondent had bargained to a valid impasse on July 26, 2011, I will address the alleged delay in providing requested health insurance cost information set forth in paragraph 10(b), (d), and (e) of the complaint at this point and will address the later information requests in another section of this decision.

The above-noted complaint allegations allege that on July 20, 2011, the Union, by letter, renewed and emphasized its prior verbal and written requests from February 23, March 2 and March11, in which the Union requested that the Respondent furnish it with the following information: all documents relating to health insurance on which the Respondent was basing its figures for health insurance bargaining proposal and its costing, and that the Respondent failed to timely furnish the Union with the information requested.

At the bargaining session held on February 23, 2011, Quigley-Nackert made a verbal request for the Respondent to provide the Union with the cost breakdown as to what each unit employee paid for health insurance. When both Nelson and Mueller indicated that it would be difficult to obtain this information, Quigley-Nackert responded that the Union needed the information in order to appropriately bargain regarding health care insurance.

Prior to the parties' March 2 meeting, the Respondent provided to the Union a report from its health care administrator, Averill Anderson, reflecting certain health care costs for the period from 2008 to 2010. This document provided cost information in the aggregate but not the individual cost per employee as Quigley-Nackert had requested. On March 2, the Union submitted a written information request that sought, inter alia, the summary plan description of the Respondent's current health care benefit plan and any "terms of plans, policies and/or contracts" for the insurance benefits referred to in the parties' 2006-2011 collective-bargaining agreement. It also sought cost and usage information for the United Healthcare plan referred to in the parties 2006-2011 collective-bargaining agreement.(Jt. Exh. 19.) At the meeting held on March 2, Nelson reacted angrily to the Union's request for information, crudely suggesting that it was not made in good faith.[13]

On March 4, Mueller sent a letter to the Union questioning its request for insurance information regarding the United Healthcare plan since that plan had expired on September 30, 2008. Mueller's letter indicated that United Healthcare plan was "twice removed

[13] The Board has held " [T]he presumption is that the union acts in good faith when it requests information from the employer until the contrary is shown." *Hawkins Construction Co*., 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988); *International Paper Co*., 319 NLRB 1253, 1266 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997). In the instant case, there is no record evidence establishing that the Union's requests for information were made in bad faith. In this connection, the requested information involved issues that were clearly germane to bargaining. It is apparent that the Union carefully reviewed the information that was supplied, as follow-up requests were made in some instances.

from the current plan underwritten by Trilogy Healthcare." On March 11, Quigley-Nackert sent a letter to Mueller specifically requesting the cost, usage, and number of participants in the Anthem plan that followed the United Healthcare plan under the 2006-2011 collective-bargaining agreement. On April 1, Mueller submitted evidence to the Union of the fact that Anthem would not provide reports for groups of less than 50. On April 18, Mueller sent to the Union series of e-mails reflecting Nelson's attempts to obtain cost and usage information from United Healthcare, but no actual information was provided.

At a bargaining meeting held on June 9, Mueller stated that he believed that the Respondent has satisfied all of the information requests at that point and Quigley-Nackert replied that it had, as far as she could tell, but that she was still in the process of reviewing the responses.

At the meeting held on June 27, the Respondent presented the calculation of the cost related to its proposal to increase the employees' share of insurance premiums. On July 20, the Union sent a letter to the Respondent requesting "all documents on which you based the figures for the Company's June 27, 2011 health insurance proposal and its costing." On July 25 the Union received from Nelson statements from Trilogy, the then current health care provider, reflecting a breakdown on individual costs for insurance premiums for each unit employee for the months of June and July 2011. After receiving this information, Quigley-Nackert realized there was a discrepancy between the information contained in the Averill Anderson report which indicated a total expense for 2010 of $32,712.07 for employees, but that the premium cost reflected on the information given to the Union on July 25, 2011, reflected that the premium costs for 1-month for bargaining unit employees exceeded $7000. In light of that, at the last bargaining session held on July 26, Quigley-Nackert asked why the current rates were so high, given the information contained in the Averill Anderson report. She also asked whether the premiums charged employees were based on age and, if so, how long that had been the case. No meaningful response was given to these questions and, as noted above, the Respondent declared the parties were at an impasse on July 26.

On September 6, the Union submitted another request for information to the Respondent asking whether the Averill Anderson study was limited to an analysis for deductibles which were paid. The request also asked for the formula of how premiums were calculated from 2008 through 2011. The Union also requested historical information on premium costs once again.[14] The Union reiterated its request in writing on December 20. Finally on February 1, 2012, the Respondent provided a substantial amount of the information sought by the Union however it did not provide historical information on health benefits premiums for each bargaining unit employee or the formula for how premium costs are determined for each employee.

In its answer to the complaint, the Respondent contends that Section 10(b) of the Act bars consideration of whether it refused to timely provide the requested cost information for health care benefits from February 23 to July 25, 2011. The charge in this case was filed on January 9, 2012, and was served on the Respondent on the same date. Thus, the applicable 10(b) period in this case is July 9, 2011.The Acting General Counsel and the Charging Party contend that the

[14] Quigley-Nackert testified that the September 6 request was necessitated by the information supplied on July 26 indicating the diversion between the premiums paid by employees ranged from $58 to $800 a month.

delay in providing the requested cost information regarding health insurance from February 23 to July 25 is not barred by Section 10(b) because the Union did not have clear and unequivocal notice of the Respondent's refusal to provide the cost information outside of the 10(b) period.

In agreement with the Acting General Counsel and the Charging Party I find that the Union could not have reasonably known that it had not received cost information for the amounts paid by each unit employee for health insurance premiums in the Averill Anderson report until it received the premium amounts paid by employees for June and July 2011 on July 25, 2011. Thus, the Union did not have clear and unequivocal notice that it had not received all the information it had requested until July 25, 2011, which is within the 10(b) period. Accordingly, I find that this complaint allegation is not barred by Section 10(b) of the Act. *Regency Service Carts Inc.* 345 NLRB 671, 673 fn. 5 (2005); *Public Service Electric & Gas Co*., 323 NLRB 1182, 1188-1189 (1997).

With respect to the merits of this allegation, the Board has held that information regarding health insurance for unit employees is presumptively relevant. *Honda of Hayward*, 314 NLRB 443 (1994); *Ideal Corrugated Box Corp*., 291 NLRB 247, 248 (1988). In the instant case, the premium cost information sought by the Union is the type of information that the Board has determined must be furnished upon request.

The Board has also held that an employer's unreasonable delay in furnishing information "is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Woodland Clinic*, 331 NLRB 735, 736 (2000), citing *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). See also *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1129, 1134 (2007).

As noted above, since February 23, 2011, the Union had requested a total cost breakdown for each employee regarding their health benefits including the amount paid for insurance premiums. On July 25, the Respondent provided the Union with a breakdown of how much each employee paid in health insurance premiums in June and July 2011. The information that was finally provided on July 25 showed a wide disparity regarding what individual employees pay toward their health insurance premium. This information was important to the Union in evaluating the Respondent's efforts to have employees pay a substantially larger portion of their insurance premiums and deductible amounts.

The cost information regarding what individual employees paid for insurance premiums was not provided for a period of approximately 5 months after the initial request. While the Respondent furnished information to the Union in April reflecting difficulty in obtaining cost information from United Healthcare and Anthem, there is no explanation for the delay in providing individual cost information for each employee from its then current provider Trilogy until July 25. Trilogy had been the Respondent's health care provider since October 2010. I note that the information from Trilogy was not provided until the day prior to the parties' final bargaining session, at which the Respondent declared the parties were deadlocked and submitted a final offer.

The Board has consistently found that delays in providing relevant information, without a legitimate explanation, is violative of Section 8(a)(5) of the Act. *Pan American Grain*, 343

NLRB 318 (2004), enfd. in relevant part 432 F.3d 69 (1st Cir. 2005), (3 month delay); *Bundy Corp*., 292 NLRB 671 (1989) (2-1/2 month delay); *Woodland Clinic*, supra at 737 (seven-week delay). Accordingly, I find on the basis of the foregoing, that the Respondent violated Section 8 (a)(5) and (1) of the Act by unreasonably delaying in providing information regarding the amounts that employees pay toward health insurance premiums to Trilogy from February 23, 2011 until July 25, 2011.

Whether the Respondent Failed to Bargain in Good Faith by its Overall Conduct in Violation of Section 8(a)(5) and (1)

Before addressing the merits of this complaint allegation, I must determine whether Section 10(b) bars my consideration of it. As noted earlier, the 10(b) period in this case began on July 9, 2011. Accordingly, only the parties July 26 bargaining session was held during the 10(b) period. A bargaining meeting held on that date, however, was obviously a continuation of the bargaining that began in February 2011. At the last bargaining session held on July 26, the Respondent presented its final offer and declared that the parties were at an impasse. Included in its final proposal, were nonmandatory subjects of bargaining that the Respondent was demanding be included in any collective-bargaining agreement. In addition, the Respondent was still refusing to bargain over the inclusion of the Union's health and safety proposal in a collective-bargaining agreement. Finally, the Respondent provided information on July 25 regarding the employee cost of health insurance premiums that made it clear that it had delayed in providing such requested information. Under these circumstances, it is appropriate to consider the bargaining that occurred at prior sessions in order to fully consider the nature of the Respondent's conduct at the bargaining table on July 26. *Tennessee Construction Co.*, 308 NLRB 763 fn. 2 (1992); *Regency Service Carts*, *Inc*., 345 NLRB 671, 672 fn. 3 (2005).

In addressing the merits of this complaint allegation, I note that Section 8(d) of the Act requires that an employer and a union representing its employees are required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." In construing Section 8(d) the Board has found that an employer must bargain with a "sincere purpose to find a basis of agreement" including making reasonable efforts to compromise its differences with the union representing its employees. *Regency Service Carts, Inc*., supra at 671; *Atlanta Hilton, Hotel & Tower*, 271 NLRB 1600, 1603 (1984).

The Board in *Regency Service Carts, Inc*. supra at 671 further explained an employer's obligation to bargain in good faith as follows:

> [M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom *NLRB v. Hardesty Co*., 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co*., 344 F.2d 210 (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. Id.; *Pease Co*., 237 NLRB 1069, 1070 (1978).

In determining whether a party has violated its obligation to bargain in good faith, the Board examines the totality of a party's conduct in order to determine whether it engaged in hard but lawful bargaining or is attempting to frustrate the possibility of arriving at any agreement. *Regency Service Carts*, *Inc*., supra at 671.

Applying these principles in the instant case, I find that the Respondent's overall conduct in bargaining violated Section 8(a)(5) and (1) of the Act. In reaching this conclusion, I recognize that the parties reached agreement on some issues and that the Respondent made some compromises regarding its original proposal on health care. However, when I examine the totality of the Respondent's conduct, I do not find that it had a sincere purpose to find the basis for an agreement and thus crossed the line from hard bargaining to bargaining without the intention of reaching an agreement. In the first instance, I note the Respondent's refusal to bargain with the Union over its proposal to have a contract clause regarding employee health and safety is, in of itself, a violation of Section 8(a)(5) and (1). It is also indicative of the Respondent's lack of desire to find a basis for an agreement with the Union. From the time that the Union first proposed the health and safety proposal in February, 2011 until the Respondent made a final offer and declared an impasse on July 26, the Respondent steadfastly refused to bargain over this issue and expressly refused to include a health and safety clause in the collective bargaining agreement. The Respondent was only willing to discuss dealing with health and safety matters with unit employees informally, indicating that it did not want to have such matters be the subject of grievances or arbitration. The Respondent also claimed it was subject to other laws that required it to operate a safe workplace. This refusal to bargain over an important mandatory subject of bargaining is a strong indication of the Respondent's overall failure to bargain in good faith.

The Respondent's insistence that its proposed waiver of the Union's right to obtain payroll information to calculate dues be included in any agreement reached is also indicative of an overall lack of good faith. Even before the negotiations started, Nelson adamantly indicated the Respondent would not participate in implementing the Union's new, and somewhat complex, policy regarding the amount of dues each employee pays. The Respondent's initial bargaining proposals indicated it was refusing to participate in the calculation of dues and sought a waiver of the obligation to even provide payroll information for the calculations to be made by the Union. When the Union proposed a flat rate regarding dues, in an effort to simplify the matter for the Respondent, it maintained its position that it would not be involved in the calculation of dues and that it would not provide payroll information in order to assist the Union with regard to the proper calculation of the amount of dues. In *H. K. Porter Co*., 153 NLRB 1370, 1373 (1965) the employer refused to agree to any of the union's proposals for the collection of dues because it 'did not wish to give aid and comfort to the union by assisting in collecting dues.' The Board found that by such conduct the employer evinced an attitude that was inconsistent with the obligation imposed upon it by the Act and ordered the employer to bargain in good faith with the union regarding the issue of dues checkoff.

In the instant case, the Union offered a compromise from its original, complex proposal for the calculation of dues that would allow the Respondent to simply deduct a flat rate of dues for each employee on a monthly basis. The Union, however, stated it would need payroll information to determine what the rate for each employee would be. The Respondent maintained its position that it would not cooperate at all with the calculation of dues, including providing

payroll information to the Union. It gave no explanation as to why it would not consider the Union's compromise proposal. While the insistence on a waiver of the right to wage information for this purpose is in itself a violation of Section 8(a)(5), the Respondent' s inflexible position on the dues-checkoff clause is indicative of a refusal to even consider reasonable offers of compromise on this issue. It is a significant manifestation of bad-faith bargaining for an employer to refuse to budge from an initial bargaining position, refuse to offer explanations for a proposal and refuse to make any efforts to compromise in order to reach common ground. *Altofer Machinery Co*., 332 NLRB 130, 150 (2000); *John Asuaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part 968 F. 2d 991 (9th Cir. 1992). See also *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002).

I have also considered the Respondent's insistence on a 1-year agreement in assessing whether the Respondent violated its obligation to bargain with the Union in good faith. Historically, the parties had entered into multiyear agreements. The previous agreement, which was negotiated in 2008, had an effective date from 2006 to 2011. During the 2011 negotiations, the only explanation offered by the Respondent for its desire for a contract of such relatively short duration was the uncertainty regarding health care. The Union addressed that concern by proposing an annual reopener to a multiyear contract that would allow either party to request to bargain over health care. Without any explanation, the Respondent rejected the Union's proposal and continued to insist on a 1-year agreement in its final offer. As discussed above, the refusal to change a position without explanation and the rejection of a reasonable counterproposal without any effort to effectuate compromise is reflective of bad-faith bargaining.[15]

I have also considered the arguments of the Acting General Counsel and the Charging Party that the Respondent's insistence on the removal of the union-security clause was predictably unacceptable to the Union and thus indicative of bargaining without the intention of reaching an agreement. In the circumstances of this case, I do not agree and find that the Respondent's insistence on the removal of the union-security clause was not done in order to frustrate bargaining. The Board has held that insistence on the removal of the union-security clause from a successor agreement does not, in and of itself, establish bad-faith bargaining. *Phelps Dodge Specialty Copper Products Co*., 337 NLRB 455 (2002); *A.M.F. Bowling Co*. 314 NLRB 969, 974 (1994); *Logemann Bros. Co*., 298 NLRB 1018, 1020 (1990); *Challenge-Cook Bros*., 288 NLRB 387, 388 (1988).

While acknowledging this point, the Acting General Counsel and the Charging Party argue that the Respondent's conduct regarding the union-security clause in the negotiations that preceded the execution of the 2006-2011 agreement is important in determining whether it bargained about this issue in good faith during the instant negotiations. In the 2006 negotiations, the Respondent proposed to eliminate the union-security clause after the parties' sixth meeting and did not give an explanation for its position. In *Clarke Mfg, Inc*. 352 NLRB 141 (2008) which I referred to earlier, a two Member panel of the Board found that the submission of this proposal without a plausible explanation constituted regressive, bad faith bargaining in violation of Section 8(a)(5) and (1).

[15] I note that the Board has found that a fixed position regarding a contract for less than 1 year, without giving a reasonable explanation, violates Section 8(a)(5) and (1) of the Act. *Cleveland Sales Co.,* 292 NLRB 1151, 1155-1156 (1989).

In the instant case, however, when the Respondent submitted its initial proposal before the start of negotiations, it indicated in a lengthy written statement its reasons for seeking the elimination of the union-security clause. (Jt. Exh. 7, p.6.) The statement indicates that Nelson is morally opposed to compelling an employee to be a member of the union in order to work for the Respondent. The statement also indicated that Nelson believed that union membership should be a personal choice made by the employee and that in previous negotiations he compromised his belief and withdrew a proposal to eliminate compulsory union membership in order to achieve an agreement. The Acting General Counsel and Charging Party claim that Nelson's statement that he withdrew his proposal to eliminate union security in the prior negotiations in order to achieve a new agreement, establishes that he again proposed the elimination of such a clause in the current negotiations in order to frustrate reaching an agreement. I do not agree with this contention. In the instant negotiations the Respondent's proposal to eliminate the union-security clause was contained in the initial proposal and the reasons for seeking its removal were set forth in substantial detail. In my view, the fact that the Respondent withdrew its proposal regarding the union security in the prior negotiations has little bearing in resolving this case. I note that in the prior case the Respondent's proposal to eliminate the union-security clause under the conditions set forth above, was found to be unlawful by an administrative law judge and a two Member panel of the Board. When bargaining resumed in 2008 after the issuance of the Board's order, the Respondent withdrew its proposal seeking to eliminate the union-security clause and a new agreement was ultimately reached between the parties. In the instant case, the Respondent made its proposal to eliminate the union-security clause at the outset of negotiations and offered a detailed explanation as to its reasons for doing so. Under the circumstances present in this case, I do not find that the Respondent's insistence on the removal of the union-security clause to be evidence of bad faith bargaining.

The Acting General Counsel and the Charging Party also contend that Nelson's statement that he had a "hangover" from the prior negotiations and litigation and that it "set the stage" for the instant negotiations demonstrates that the Respondent intended to engage in bad faith bargaining in the instant case. Although statements made during negotiations can demonstrate intent not to bargain in good faith, the Board is careful in determining that comments made during negotiations are evidence of bad-faith bargaining in order to foster the policy that allows for free and open communication between the parties during bargaining. *Logemann Bros*., supra,at 1021. I find that Nelson's remarks do not reflect an intention to bargain without reaching an agreement.

I also do not agree with the Acting General Counsel and the Charging Party that the Respondent placed unreasonable limitations on the time spent bargaining. Quigley-Nackert called Mueller in early January 2011 to discuss scheduling negotiations she proposed meeting in January. Mueller indicated, however, that he would not be meeting with Nelson until later in January. On January 25, Quigley-Nackert and Mueller agreed to begin negotiations on February 3. Mueller also indicated that, consistent with the parties past practice, the negotiations would occur at the Respondent's facility and meetings would begin at 3: 30 p.m. or later so that Nelson could attend to his other duties. The Union agreed to the date for the commencement of negotiations and also the conditions for meeting. During negotiations the Union did not object to the number of meetings or claim that the Respondent was not devoting sufficient time to negotiations. Under these circumstances, I do not find that the Respondent placed unreasonable limitations on bargaining.

In conclusion, I find that the Respondent's refusal to bargain about employee health and safety, a mandatory subject of bargaining; its insistence that nonmandatory subjects of bargaining be included in any agreement; its refusal to provide relevant and necessary information regarding health insurance; and its insistence on a 1-year agreement without an explanation demonstrated that the Respondent had no real intention of reaching a collective bargaining agreement with the Union and accordingly its overall conduct violated Section 8(a)(5) and (1) of the Act. In reaching this conclusion, I have considered the fact that the parties reached agreement on some issues and that the Respondent made some compromises in its position with respect to the cost of health care. However, when I consider the totality of the Respondent's conduct, it convinces me that the Respondent did not bargain in good faith with the intention of reaching an agreement.

Whether the Parties Reached a Valid Impasse on July 26, 2011, or Thereafter

In *EAD Motors Eastern Air Devices, Inc*., 346 NLRB 1060, 1063 (2006), the Board summarized the major factors in determining whether a valid impasse has occurred as follows:

> In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." See also *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005). This principle was restated by the Board in *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973) enf. denied on other grounds, 500 F.2d 181 (5th Cir. 1974), as follows:
>
> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. [Footnote omitted.]
>
> The burden of demonstrating the existence of impasse rests on the party claiming impasse. *Serramonte Oldsmobile, Inc*., 318 NLRB 80, 97 (1995), enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.,* supra at 478.

I note that the Board has also recognized that the commission of serious, unremedied unfair labor practices precludes a finding of a valid impasse. *Royal Motor Sales*, 329 NLRB 760, 762 (1999*)*; *Great Southern Fire Protection*, 325 NLRB 9 (1997); *Noel Corp*., 315 NLRB 905, 911 (1994), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996).

In the instant case, the evidence establishes that the Respondent, through Mueller, told the Union on July 26, 2011, that because of the "deadlock" on union security the Respondent was presenting a final offer and did so on that date. The next day Mueller sent a letter to the

Union reiterating that the parties were deadlocked regarding the union-security provision. In a letter to the Union dated September 15, Mueller reiterated that the parties were at an impasse. On December 23, Mueller again wrote to the Union explaining in some detail the Respondent's position that the parties were at an impasse over the union-security issue (Jt. Exh. 51). Mueller also stated the parties were at an impasse in letters dated January 20, 2012 and February 13, 2012. Thus, it is clear that the Respondent declared an impasse over the issue of union security on July 26, 2011 and has consistently maintained that position.

Applying the principles set forth above, I find that the parties were not at a valid impasse on July 26, 2011, or at any time thereafter and that the Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring an impasse.

In the instant case, as set forth above, I found that the Respondent's overall conduct demonstrated a lack of good faith in negotiations. This factor alone would be sufficient to find the parties were not at a valid impasse on July 26, 2011, or any time thereafter. There are other factors, however, that additionally support my conclusion that the parties were not at a valid impasse. The Respondent asserted during the negotiations, and continues to assert in its arguments advanced in this case, and that the parties were at an impasse on the issue of union security. The Respondent argues therefore that this impasse privileged it to implement part of its final offer involving an increase in the employee and family deductible amounts, the percentage allocation of cost sharing for the interim deductibles and an increase in the percentage amount paid by unit employees for health insurance premiums on January 1, 2012.

In *Erie Brush & Mfg. Corp*., 357 NLRB No. 46, at sl.op. p. 2 (2011) the Board indicated that while impasse in bargaining typically requires an overall deadlock, an impasse on a single critical issue can cause such complete breakdown in negotiations that it is sufficient to justify a suspension in bargaining. In *Erie Brush,* the Board noted that its decision in *Cal Mat Co*., 331 NLRB 1084, 1098 (2000), indicated that a party asserting a single issue impasse must establish:

> First, the actual existence of a good faith impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue lead to break down in the overall negotiations -in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.

In the instant case, while the Union expressed its desire to maintain the existing union-security clause, it demonstrated flexibility on this issue dependent on progress in other areas. At the meeting held on February 23, Mueller raised the issue of union security and indicated that Nelson felt strongly about it and that the Respondent was not going to change its position on that issue. Quigley-Nackert replied that the Union also felt strongly about it and would like to keep it in the agreement. She added, however, that the Union had been reasonable in its proposals and could be on this issue as well.Quigley-Nackert asked Mueller whether the Respondent was saying that because of its position on union security it would be futile to continue negotiations, because she believed the parties should continue to negotiate. Mueller agreed that the parties should continue their negotiations.

At the meeting held on March 2, Nelson again stated that he felt very strongly about the union-security provision and would not budge on it. Quigley-Nackert stated that she would not like to take a proposed contract without union security to the members but that anything was possible. In a letter dated March 17, Mueller acknowledged that Quigley-Nackert stated on March 2 that it was possible for the Union to present a contract without union security to its membership.

At the meeting held on June 9, Mueller presented a typewritten note from Nelson indicating that on April 9, Gnadt had told Nelson that there would never be an agreement as long as the Respondent held to its position on union security. According to Mueller's handwritten addition to Nelson's typewritten note, after being confronted with Nelson's note on June 9, Gnadt denied that he had ever said that there would not be an agreement because of the Respondent's desire to eliminate union security but that he "would fight him (Nelson) tooth and nail" on it. At this meeting, Mueller said that the only thing holding the parties apart from reaching an agreement was union security and that they needed to deal with it. Quigley-Nackert replied by saying that there were other items to negotiate and movement to be made in other areas.

At the meeting held on June 27 after a lengthy discussion of the health insurance issue Mueller stated that the parties should be able to finish negotiations at the next meeting as there was not much more to talk about and that Nelson was steadfast on the issue of union security. Gnadt and Quigley-Nackert both said there were "plenty" of items to negotiate and that they hoped that the Respondent would come closer to the union's position on wages. At the final meeting held on July 27, Mueller once again stated that the parties were deadlocked on union security and presented the Respondent's final offer based upon that position.

I find that the parties did not, in fact, reach a good-faith impasse over the issue of union security. The Union wanted to retain a union-security clause in a new agreement but never indicated that it would be totally unwilling to concede on this issue. Throughout the seven bargaining sessions that were held the Union made substantial movement in other areas, particularly with regard to health insurance. Despite the Respondent's constant assertion from the early negotiation sessions that the parties were deadlocked on the issue of union security, the Union never agreed with that assertion. In fact, Nelson's testimony and Mueller's letter of March 17 admitted that the Union indicated that, while it did not want to, it was possible it would take a tentative agreement without a union-security clause to the membership for ratification. Nelson also testified at the hearing that he thought it was possible that the Union and the Respondent could reach an agreement that eliminated the union-security clause (Tr. 311-312). Throughout the negotiations the Union consistently maintained that there were several open issues for the parties to negotiate, demonstrating that the Union's focus was to seek agreement wherever possible in order to hopefully reach an overall agreement. As the Board cogently observed in *Erie Brush* at sl. op. p. 3:

> Impasse and deadlock are not the natural and inevitable end of every significant disagreement in negotiations, and an attempt to work around such a disagreement is not a ruse or a resort to magical thinking. Adding to subjects on the bargaining table, instead of focusing on a single issue, can permit the trade-offs and compromises that produce an overall agreement.

In the instant case, the Union's approach was to consider the bargaining subjects as a whole and seek a compromise on contested issues. If agreement could be reached on other matters, the Union left open the possibility of agreeing to the elimination of the union-security clause. After considering all the evidence, I do not believe that the Respondent has established that there was a good-faith impasse on the issue of union security. While the issue of union security was a critical issue in negotiations, the fact that the parties did not reach a good-faith impasse on this issue establishes that the Respondent did not meet its burden of establishing that there was a valid impasse on July 26 or thereafter.

. I have also considered the fact that the parties had only seven meetings before the Respondent's declaration of impasse. Considering that the parties had made progress on the critical issue of health insurance and that further discussions could have presented a set of circumstances that would serve as the basis for an overall agreement, I conclude that there was a realistic possibility that a continuation of the negotiations would have been fruitful. With respect to the contemporaneous understanding of the parties as to the state of negotiations, I note that the Union never indicated that it considered the parties to be at an impasse. Nelson's testimony that he believed that it was possible that the parties could reach an agreement that eliminated the union-security provision casts substantial doubt on the Respondent's declaration of impasse.

As I have discussed above, as of the date of its declaration of impasse on July 26, 2011, that Respondent had committed several unfair labor practices. Specifically, the Respondent had insisted on the inclusion of nonmandatory subjects of bargaining in any agreement reached, had refused to bargain over the mandatory subject of health and safety, and had failed to provide relevant cost information regarding health insurance premiums. The presence of these unremedied unfair labor practices also precludes the existence of a valid impasse. Accordingly, after considering all of the evidence, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring an impasse on July 26, 2011.

Whether the Respondent's Unilateral Implementation of the Cost Sharing Structure for Health Insurance Violated Section 8(a)(5) and (1)

On December 15, 2011, the Respondent notified the Union, consistent with its view that the parties were at an impasse, that it was implementing the deductible amounts and the percentage cost-sharing as stated in its July 26, 2011 final offer. On December 20, the Union replied by a letter stating that there was no impasse and demanding that the Respondent not implement the change. The letter further demanded that the Respondent bargain over the proposed changes. It is undisputed that on January 1, 2012, the Respondent implemented the change in health insurance costs. The effect of the change is substantial as it increased the employee deductible from $600 to $750 and the family deductible from $1250 to $1350 and increased the percentage cost of the interim deductible paid by an employee from 8 percent to 18 percent in the first tier and 20 percent in the second tier. It also increased the employee portion of premium payments from 24 percent to 30 percent.

It is axiomatic that the implementation of a unilateral change in a mandatory subject of bargaining, such as health insurance benefits, without reaching a valid impasse violates Section

8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *Mid-Continent Concrete,* 336 NLRB 258, 259 (2001),enfd. 308 F.3d 859 (8th Cir. 2002); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

Since I have concluded that the parties did not reach a valid impasse in this case, the Respondent's unilateral implementation of a material change to the amount of the deductibles, the cost sharing structure of the interim deductible amounts and the percentage amount employees paid toward insurance premiums on January 1, 2012, violated Section 8(a)(5) and (1) of the Act.

The Remaining Delay in Providing Information Allegations

As discussed above, I found that the Respondent violated Section 8(a)(5) and (1) by its delay in providing requested information regarding the employee cost of health insurance premiums. The complaint also alleges two other instances of delay in providing requested information in violation of Section 8(a)(5) and (1).

Paragraphs 10(c), (d), and (e) of the complaint alleges that the Respondent failed to timely furnish the Union with information related to health care costs in a letter from the Union dated September 6, 2011. In its September 6 letter, the Union requested that the Respondent furnish the following information: when and for what expenses Respondent was self-insured for any portion of the health benefit programs, beyond the deductibles, at any time since 2006; if not self-insured for any portion of the health benefits beyond the deductibles, to confirm whether the Averill Anderson study previously provided by Respondent was limited to an analysis for deductibles which were paid; to identify the plain years covered by the Averill Anderson study, including whether the plan started or ended on October 1, 2010 or some other date; and to provide all the premium quotations for the then-current Trilogy insurance policy for 2010, 2011, and 2012.

On September 15, Mueller replied to this request in a letter asking what purpose would be served by the requested information in view of the impasse that existed in negotiations. On December 20 the Union wrote to the Respondent, asserting that the parties were not at an impasse and indicating that the information requested above was necessary to bargain about health care. On the same date the Union sent another letter reiterating its request for much of the information sought in its September 6 request.

On February 1, 2012, the Respondent finally furnished the Union with the above-noted information requested in its September 6 letter. This response came approximately 5 months after the request was made and after the Respondent had prematurely declared impasse and unilaterally implemented the changes to the cost-sharing structure regarding the interim deductible amounts.

As I have indicated earlier in this decision, information requesting health insurance for unit employees is presumptively relevant. *Honda of Hayward*, supra; *Ideal Corrugated Box Corp*., supra. The Respondent initially claimed that it was not obligated to provide the requested information because of its assertion that the parties were at an impasse. I have found, however, that the parties were not have a valid impasse on July 26 or any time thereafter. Moreover, I note

that the Board has held that even after a valid impasse an employer has an obligation to provide relevant information. *Raven Government Services*, 331 NLRB 651, 658-659 (2000). Accordingly, I find that the delay in furnishing this information for approximately 5 months without a valid reason violated Section 8(a)(5) and (1) of the Act. *Woodland Clinic*, supra.

Paragraphs 10(a), (d), and (e) of the complaint alleges that the Respondent failed to timely furnish the Union with information it requested on July 26, 2011 regarding whether the Respondent was up to date on pension liabilities.

As noted earlier, the Respondent's initial proposal eliminated any reference to the Union pension plan that was contained in the previous agreement. The Union indicated concern about eliminating any reference to the Union pension fund from a new agreement because it wished to insure that unit employees had a right to their accrued pension benefits. The Respondent replied that the Union did not need to have language in the contract to enforce any withdrawal liability which was then the subject of concurrent litigation. On July 26, when the Union noted that there was no reference to the Union pension fund in the final offer, Quigley-Nackert requested information on whether the Respondent had satisfied its obligation for its withdrawal liability. The Respondent did not provide any information regarding the satisfaction of its withdrawal liability at that time. Mueller merely responded that he appreciated that the Union wanted to know that but that language regarding the previous pension plan was being taken out of the agreement. On February 2, 2012, after the Respondent claimed it settled its pension fund litigation, the Union submitted a letter to the Respondent asking it to provide evidence regarding the settlement and establish that the Respondent had in fact paid the amount provided in a settlement. On February 23, 2012, the Respondent provided a signed copy of the settlement agreement with the Union pension fund and stated that it was "in compliance" with the settlement.

Information regarding the pension plan of unit employees is presumptively relevant and the Respondent's failure to respond to the Union's July, 2011 request for information regarding the Respondent's satisfaction of its liability to the Union pension fund until February, 2012, without any valid explanation violates Section 8(a)(5) and (1) of the Act. *A.M.F. Bowling Co.,*. 314 NLRB 969, 979-980 fn. 34 (1994). In *A.M.F.Bowling*, the Board found that an unexplained 2-month delay in providing pension information violated Section 8(a)(5).

The Refusal to Provide Information Allegations

Paragraphs 11(a), (b), (h), and (i) of the complaint allege that the Respondent refused provided information regarding employee health insurance in violation of Section 8(a)(5) and (1) of the Act. In its September 6, 2011 letter, the Union requested that the Respondent furnish the Union with the following information: the complete formula for the health insurance premiums charged for each employee for each year [2010, 2011, and 2012]; and the monthly health insurance premiums paid for each bargaining unit employee from 2006 to the present.

On September 15, the Respondent replied by letter asking what purpose was to be served by the requested information in view of the asserted impasse. On December 20, the Union replied by letter denying that the parties were at an impasse and explaining that the information was relevant to bargaining over health care. On the same date the Union reiterated the September

6 request and also requested that the Respondent furnish the following information: the cost and coverage provided as well as the contract or insurance policy Respondent has entered [into] for costs of the employee deductible up to the insurance deductible for 2012; and the complete formula for the premiums charged for each employee by Assurant [Insurance] in 2012.

On January 9, 2012, Mueller responded that it would take the Respondent a substantial amount of time to gather information but that it would be provided (Jt. Exh. 54). On February 1, 2012, the Respondent submitted some information regarding the Union's request but it did not provide the formula used to determine the health insurance premiums or the monthly premiums paid by each employee over the requested time. The response also did not provide the information requested in the December 20 letter from the Union referred to above.

Since information regarding health insurance for unit employees is presumptively relevant, the Respondent's failure to provide the requested information set forth above violates Section 8(a)(5) and (1) of the Act.

Paragraphs 11 (c), (d), (e), (f), (h), and (i) of the complaint alleged that the Respondent has refused to provide certain requested financial information in violation of Section 8(a)(5) and (1) of the Act.

At the first bargaining meeting held on February 3, 2011, the Respondent indicated that it needed relief in health care costs and intended to put any increases in to wages. On February 9, the Union proposed a 5-percent annual wage increase. In its second proposal submitted on February 19, the Respondent proposed a 10-cent-an-hour wage increase.

By the time of the meeting held on June 27, the Union had made substantial movement regarding increased cost sharing by employees for health care benefits. At that meeting, however, Mueller indicated that the Respondent was still looking for more movement from the Union regarding the cost of health insurance. Mueller further indicated the cost of health insurance was making it very difficult for the Respondent to stay competitive. Later in the same meeting, Mueller stated that the Respondent would not make any substantial movement on wages and needed relief on health care costs because it did not have the money to continue to pay large amounts for health care.

At the meeting held on July 26, Quigley-Nackert requested information in response to the Respondent's statement at the last meeting that its proposals were based on its remaining competitive. Reading from a list that she had prepared beforehand, Quigley-Nackert requested the following information regarding the Respondent's position on the duration of a contract: 'what the customer base was and the duration of orders under the last contract; whether the customer base and/or duration of the orders had changed; whether the Union can see the orders to verify any claimed change; and whether the company has loans, and if so over what period of time the loans would be paid back and how the company is able to project it will be able to pay off the loans."

Mueller responded that the Union did not need that information. Quigley-Knackert explained that the Union needed the information to verify the Respondent's rationale for its proposals. When Quigley-Nackert asked if the Respondent was experiencing a decrease in

orders, Nelson replied that he was not pleading poverty in any way. Mueller added, however, that "a company doesn't operate this thin unless they have to." With respect to the question about the Respondent's budgeting for the long term, Mueller replied that the Union was making it way too technical. With regard to the business conditions the Respondent was considering in making its proposals, Nelson sarcastically replied "the bombing in Norway." Mueller intervened at that point and stated it was taxes, the cost of steel, competition, and the current economic conditions.

On September 6, the Union sent a letter requesting that the Respondent furnish the Union with the following information: financial information showing the company is running "thin," including but not limited to all budgets and income and expense statements; all information, including all relevant financial data identifying the company's competitors and the information the company has concerning the cost structure of the competitors which impacts the Respondent's ability to compete and the extent of that impact; information concerning the cost to the company of purchasing steel and any other supplies which impact the Respondent's proposal to the union and information the company has as to whether it is a competitive disadvantage to its competitors with respect to the cost of steel and any other supplies; and all contracts between the company and its customers, redacted if necessary, but showing the volume sold and whether the product was sold on a time and materials or flat rate cost of finished product basis.

On September 15, Mueller replied by letter asking what purpose would be served by the requested information in view of the impasse that existed between the parties. On December 20, the Union sent a letter to the Respondent denying that the parties were at an impasse and stated that the information was necessary for the Union to verify the Respondent's stated reasons for its proposals (Jt.Exh. 49). On the same date, the Union sent another letter reiterating its earlier requests and adding a request that the Respondent furnish the union with the following information: "whether orders picked up recently; and by how much the volume of orders has increased."

On January 24, 2012, Mueller sent the Union a letter stating that the Union had not established a sufficient basis for disclosure of the information sought in its September 6, 2011 letter for the following reasons: the request was made after the Respondent's final proposal and an impasse in negotiations had occurred; the Respondent had not pled poverty or an inability to pay or demonstrated an unwillingness to increase compensation; a statement of "running thin" or stating an unfavorable financial condition is not a plea of poverty or an inability to pay; and that the financial information was confidential and privileged. This letter also stated that the information sought regarding competitors and customers was confidential and the request did not establish specific need or relevance. The letter also indicated that producing information regarding the cost of steel would be unduly time consuming, burdensome, and expensive but the purchase prices for reasonable period of time would be made available to the Union for inspection at the Respondent's premises. The letter concluded by indicating that with regard to information regarding "business conditions," the general state of the economy spoke for itself. (Jt. Exh. 60.)

However, in an effort to support the "running thin" claim, Mueller attached a letter from an attorney, Alan Levy, who had represented the Respondent in its lawsuit with the Union pension fund regarding its withdrawal liability, dated May 21 2011. In this letter Levy stated, inter alia, that the Respondent's "financial position has deteriorated, the market for its products

has almost evaporated and the ability to pay the principal of these claims has become even more tenuous." Levy's letter indicated that in order to support the claims set forth in the letter, he was submitting the Respondent' s financial statements and bank statements for the period from 2006 through 2011 and the 2006 through 2010 tax returns.

On February 2, 2012, the Union submitted a letter to the Respondent asking it to furnish the Union with the 2006 through 2011 financial documents referred to in Levy's letter supporting the claims regarding the dire nature of the Respondent's financial condition. The letter also asked that the Respondent provide those documents through the end of 2011 in order to support Levy's assertion or to provide information that those assertions are no longer the case. (Jt. Exh. 62.) On February 13, 2012 Mueller sent the Union a letter indicating that the Respondent would make available for the Union's review the specific information that Levy had provided to the pension fund. The letter also asserted that "Atty. Levy statements in his letter are not relevant to negotiations for terms of renewal labor agreement; therefore your request for information regarding the same will not be made." (Jt. Exh. 63.)

While the Respondent had offered to provide access to the 2006 through 2011 financial records referred to in Levy's letter at the Respondent's facility, it refused requests from the Union that the documents be provided before a meeting between the parties occurred so that the Union's CPA could review them beforehand. Because of this dispute the Union has not reviewed the documents.

I turn first to the information requested by the Union in order to test the Respondent's claims that it was "running thin"and the increased costs of health care was making it difficult to be competitive. In *Caldwell Mfg Co*., 346 NLRB 1159-1160 (2006), the Board noted that under *NLRB v. Truitt Mfg Co*., 351 U.S. 149 (1956) an employer has a general duty to provide information to a union that is necessary and relevant to assess claims made by the employer in contract negotiations. Such information is not presumptively relevant but the burden to establish relevance is not "exceptionally heavy" and the Board uses a "broad discovery-types of standard in determining relevance in information requests." In *Caldwell*, the Board noted that "When there has been a showing of relevance, the Board has consistently found the duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for non-unit employees."Id at 1160. (Citations omitted.) Applying that standard, in *Caldwell* the Board found that a union's request for detailed information involving costs, productivity, and competitor performance were relevant where the employer asserted that concessions were necessary in order to make a less competitive facility more competitive in the industry. In *A-1 Door Building Solutions*, 356 NLRB No. 76 (2011) an employer explained its bargaining position in seeking a substantial reduction in profit sharing and a reduction in wages by claiming that its wages and benefits affected its ability to be competitive. The employer specifically discussed competitiveness in its ability to obtain jobs it had bid on. The union requested specific information regarding job bidding which the employer refused to provide. Relying on *Caldwell* the Board found that the employer violated Section 8(a)(5) and (1) by refusing to provide the requested information.

In the instant case, the Respondent's claims that its proposals, particularly those seeking a substantial increase in the amount paid by employees for health insurance, were based on the need to be competitive and that the Respondent was operating "thin." Mueller stated on June 27

that the constantly rising cost of health care was making it difficult for the Respondent to be competitive. Mueller also stated at the July 26 meeting that the Respondent did not have the money to pay for a substantial wage increase or to continue paying the increased costs in health insurance. Under these circumstances the information sought in the Union's September 6 letter regarding the Respondent's income and expense statements, costs, and competitor data is relevant in order for the Union to assess and respond to the Respondent's contact proposals. While the Respondent has asserted that the financial information regarding its competitors is confidential, it has not met its burden of establishing that such an interest exists and that it outweighs the Union's need for the information. I note that the Union's request for information regarding contracts between the Respondent and its customers indicates they could contain redactions if necessary. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by not providing the financial information requested in the Union's September 6, 2011 letter.

I also find that the Respondent was obligated to provide the Union with the information it requested on December 20, 2011, regarding whether orders had "picked up" and if so by how much. Again, since the Respondent claimed that its proposals were based on the need to be competitive, that was operating "thin" and it did not have the money to pay for a substantial work wage increase and increased health care costs, such information is necessary and relevant for the Union to assess the Respondent's bargaining position. I find that the Respondent's failure to provide this information violated Section 8(a)(5) and (1) of the Act.

With respect to the Union's request for information made on July 26, 2011, however, I find that the Union has not demonstrated that it needs to know about any loans that the Respondent may have. With respect to the remainder of the information request which principally involves the customer base and the duration of orders, I find that the relevance of the information was not firmly established as of the date the request was made. After a further discussion of the Respondent's grounds for its proposals at the July 26 meeting, the Union had a firm basis to make its more specific request for the information contained in its September 6 letter. Accordingly, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by not furnishing the information sought by the Union in its request made on July 26, and I shall dismiss paragraph 11(c) of the complaint.

As noted above, on February 2, 2012, the Union submitted a letter requesting that the Respondent furnished the Union with the underlying financial information that Attorney Levy provided to the Union pension fund on May 20, 2011, and an update of such information through the end of 2011.

In *NLRB v. Truitt Mfg Co*., 351 U.S. 149 (1956), the Supreme Court held that an employer that specifically claimed they could not afford to pay increased wages violated Section 8(a)(5) and (1) of the Act by refusing to provide the union with requested financial information. The Court noted:

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

of bargaining, it is important enough to require some sort of proof of accuracy. Id at 152-153

At the meeting held between the parties on July 27, 2011, Mueller stated that the Respondent did not have the money to pay for a substantial wage increase or to continue to pay large health care costs. Nelson, however, specifically claimed that he was not pleading poverty in the negotiations. Thus, the Respondent's principal negotiators made conflicting claims regarding the economic basis for its bargaining proposals. On May 20, 2011, Attorney Levy stated in a letter to the Union pension fund that its financial position had deteriorated and the market for its products had almost evaporated. Thus, while Nelson claimed in negotiations that he was not pleading poverty, the Respondent's attorney in the litigation with the Union pension fund was claiming there was an inability to pay the full amount owed for the Respondent's withdrawal liability. In addition, as noted above, Mueller also claimed that the Respondent did not have the money to pay for a substantial wage increase or to continue to pay large health care costs. Under these circumstances, I find that the Union has established that the economic basis for the Respondent's bargaining proposals is relevant and it is necessary for the Union to obtain all of the financial information requested in its February 2, 2012 letter, including the updates of such information through the end of 2011, in order to properly assess the basis for the Respondent's bargaining proposals. I find that the Respondent's failure to provide this information violated Section 8(a)(5) and (1) of the Act.

The complaint alleges in paragraphs 11(g), (h), and (i) that the Respondent violated Section 8(a)(5) and (1) by failing to provide Union certain health and safety information which had been requested by letter dated September 6, 2011.

On September 6, 2011, the Union submitted a letter to the Respondent requesting the following information: a list from the Respondent's workers compensation carrier of all work-related injuries since January 1, 2009; and to identify when Respondent last tested air-quality and noise levels at the plant and to provide copies of the last air-quality and noise level tests.

The Respondent has failed to provide the requested information from the workers' compensation carrier regarding employee injuries. It has provided one air-quality study from 1994, and indicated that it has no records of another study.

As noted earlier, information regarding unit employees' health and safety is presumptively relevant matter. The Respondent's failure to provide the requested information regarding records of employee injuries violates Section 8(a)(5) and (1) of the Act. The Respondent has provided, however, the one air-quality study that it has in its possession. Therefore, I shall dismiss the allegation in the complaint that the Respondent has failed to provide information regarding air quality studies or noise level tests.

CONCLUSIONS OF LAW

1. The Union is now and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

Production and maintenance employees of the Employer, excluding office clerical, management and professional employees and guards and supervisors.

2. By refusing to bargain over the Union's proposal regarding health, safety, and environment, a mandatory subject of bargaining, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By insisting on a waiver of the Union's right to obtain payroll information for a calculation of dues and a waiver of the right to file an unfair labor practice charge over communications to employees regarding union membership, nonmandatory subjects of bargaining, in any agreement the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By failing to bargain in good faith with the Union by its overall conduct the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By prematurely declaring an impasse in bargaining the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By unilaterally implementing a portion of its final contract offer to the Union regarding employee contributions for health care coverage without the agreement of the Union and at a time when the parties were not at a valid impasse in bargaining, the Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By delaying the provision of and failing to provide relevant and necessary information requested by the Union the Respondent has violated Section 8(a)(5) and (1) of the Act.

8. The above violations are unfair labor practices within the meaning of the Act.

REMEDY

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

I shall order the Respondent to post a notice to employees in both English and Russian. The record reflects that all except two of the unit employees are Russian speaking. While oral communications to unit employees are normally conducted in English, one employee requires a translator. At times, written instructions to employees have been translated into Russian. In such circumstances, the Board's policy is to post the notice in multiple languages in order to fully communicate to employees their rights under the Act. *Alstyle Apparel*, 351 NLRB 1287 (2007).

Since the Respondent violated Section 8(a)(5) and (1) of the act by unilaterally implementing on January 1, 2012, the employee deductible amounts, the cost-sharing structure of the interim deductibles and the percentage cost sharing for premiums as set forth in its July 26, 2011 final offer, the Respondent is required to restore the status quo ante by, upon request by the Union, returning to the health care benefits as they existed before the unilateral implementation. *Larry Geweke Ford*, 344 NLRB 628, 629 (2005); *Mid-Continent Concrete*, 336 NLRB 258, 262

(2001). In addition the Respondent shall reimburse unit employees for any expenses ensuing from the unilateral implementation of the health care benefits on January 1, 2012. The reimbursement to employees shall be computed as described in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Clarke Manufacturing Inc. Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain over the Union's proposal regarding health, safety and environment.

(b) Insisting on the inclusion of a waiver of the right to obtain payroll information for the calculation of the dues and a waiver of the right to file an unfair labor practice charge over communications to employees regarding union membership, nonmandatory subjects of bargaining, in any agreement reached with the Union.

(c) Failing to bargain in good faith with the Union by its overall conduct.

(d) Prematurely declaring impasse in bargaining.

(e) Unilaterally implementing the portion of its final contract offer to the Union regarding employee contributions for health care coverage without the agreement of the Union at a time when the parties were not at a valid impasse in bargaining.

(f) Delaying the provision of and failing to provide relevant and necessary information requested by the Union.

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

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

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

(a) Upon request, bargain in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> Production and maintenance employees of the Employer, excluding office clerical, management and professional employees and guards and supervisors.

(b) Upon request, rescind the changes to the employee contribution level for health care coverage unilaterally implemented on January 1, 2012, and restore the employee contribution level for health care coverage as it existed prior to the unlawful unilateral change.

(c) Make whole employees for all increased costs to them for health insurance benefits in excess of their cost under the health insurance plan as it existed prior to January 1, 2012, including the cost of the health insurance premiums and any expenses incurred as a result of the change in employee deductible amounts and the cost sharing for the interim deductibles.

(d) Provide the Union with the information it requested on July 20, 2011; September 6, 2011; December 20, 2000; and February 2, 2012, to the extent it has not already done so.

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

(f) Within 14 days after service by the Region, post at its facility in Milwaukee, Wisconsin copies of the attached notice marked "Appendix"[17] in both English and Russian. Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has 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 July 20, 2011.

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17 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."

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

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

Dated, Washington, D.C., September 21, 2012.

_____
Mark Carissimi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain over the Union's proposal regarding health, safety, and environment, a mandatory subject of bargaining.

WE WILL NOT insist on the inclusion in any collective-bargaining agreement of a waiver of the Union's right to obtain payroll information for the calculation of dues and a waiver of the right to file an unfair labor practice charge over communications to employees regarding union membership.

WE WILL NOT refuse to bargain in good faith with the Union by our overall conduct.

WE WILL NOT prematurely declare an impasse in bargaining.

WE WILL NOT unilaterally implement a portion of our final contract offer to the Union regarding employee contributions for health care coverage without the agreement of the Union and at a time when the parties were not at a valid impasse in bargaining.

WE WILL NOT delay the provision of and fail to provide relevant and necessary information requested by the Union.

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

WE WILL, on request, bargain collectively in good faith with the Union as the exclusive bargaining representative of our employees in the following appropriate unit:

Production and maintenance employees of the Employer, excluding office clerical, management and professional employees and guards and supervisors.

WE WILL, at the Union's request, rescind the changes that we implemented on January 12, 2012, regarding the employee level of contribution to health care coverage and restore the employee level of contribution to health care coverage as it existed prior to our unlawful unilateral change on January 1, 2012.

WE WILL make employees whole for any increased cost to them for health insurance benefits in excess of their cost under the plan as it existed prior to January 1, 2012, including the cost of health insurance premiums and the expenses incurred as a result of the change in the employee deductible amounts and the employee portion of the interim deductible amounts, with interest.

WE WILL provide to the Union the information it requested on July 20, 2011, September 6, 2011, December 20, 2011, and February 2, 2012, to the extent we have not already done so.

CLARKE MANUFACTURING, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

310 West Wisconsin Avenue, Suite 700, Milwaukee, WI 53203-2211

(414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-2862.