

Merchant Fast Motor Lines, Inc. and Union of Transportation Employees. Case 16-CA-17950

September 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue presented in this case¹ is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with requested financial information in connection with the Respondent's cessation of contributions to a contractual employee retirement plan. The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, as further explained in this decision, and to adopt the recommended Order as modified below.

The Respondent is one of several subsidiaries of a holding company known as Merchants, Inc. The Union has represented a bargaining unit of the Respondent's drivers and mechanics for many years. The parties have had a series of bargaining agreements, including one that was in effect from April 1994 to April 1997. Since approximately 1986, each contract has provided for an employee retirement plan established in accord with Section 401(k) of the Federal Internal Revenue Code. Pursuant to the plan, employees have deferred a percentage of their wages to an individual retirement account. The Respondent has matched the employee contribution, up to 4 percent of wages, for each calendar quarter. In addition, the Respondent has deposited in each employee's account a year-end "basic" contribution equal to 2.5 percent of the employee's wages.

The Respondent is one of approximately seven subsidiaries of Merchants that participate in the 401(k) plan. According to the Respondent, IRS regulations require that all employer contributions to the plan be made from "net profits"—a figure which is determined based on the combined performance of all Merchant subsidiaries. As stated by Jerry Armstrong, CEO of Merchants, "if money is allocated to the plan when there are no profits, the plan says this is against the

rules and the company can get in deep trouble with the IRS."

On November 3, 1995, the Respondent informed the Union that the participating 401(k) subsidiaries of Merchants, including itself, had failed collectively to produce a profit for the third quarter of 1995 and that it was prohibited by IRS regulations governing 401(k) plans from making the third quarter matching contributions that were due on October 1. The Respondent further informed the Union that because the financial outlook was not expected to brighten, no fourth quarter matching or year-end basic contributions would be made.

The parties thereafter engaged in midterm bargaining over substantive changes to the 401(k) plan. They also exchanged proposals regarding the financial information to be furnished to the Union to enable it to verify whether the Respondent's failure to contribute to the plan was because of the failure to earn a profit. It is undisputed that the Respondent and the Union agreed to amend the plan so that contributions made to employee accounts during the first two quarters of 1995 would not have to be refunded. In a finding which the Respondent disputes, the judge found that the Respondent also agreed to the Union's proposal that the Respondent must provide certain supporting financial information.

Although the Respondent did provide some general information regarding its profitability, it did not provide the specific information covered by the Union's proposal. Consequently, by letter dated March 27, 1996, the Union requested that the Respondent provide 15 specific items of information "fully document[ing] the legal and financial necessity for suspending contributions to the 401(k) Plan." The Union stated a need for this information in order to evaluate the Respondent's claims of nonprofitability and to formulate bargaining proposals. A May 13 union letter to the Respondent repeated the information request and stated that the information was also needed to prepare for arbitration of a pending grievance contesting the Respondent's failure to make third quarter contributions to the 401(k) plan. The Respondent failed to provide 7 of the 15 listed items of requested information.

The judge found that the Respondent violated Section 8(a)(5) by failing to provide all the requested information. In its exceptions, the Respondent protests that the Union failed to prove the relevance of this information, particularly as it related to other Merchants subsidiaries, that it has not made any claim of financial inability to pay that would trigger a statutory obligation to provide it, that neither did it contractually agree to the Union's proposal to provide financial information, and that, in any event, the conclusion of midterm bargaining about changes to the 401(k) plan has

¹ On February 28, 1997, Administrative Law Judge Philip P. McLeod issued the attached bench decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, which the Charging Party joined. The Respondent filed a reply brief.

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

mooted the Union's need for information. We find no merit in these exceptions.

As a general rule, a union as bargaining representative is presumptively entitled to information concerning terms and conditions of employment of unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Employee fringe benefits, including retirement plans, constitute mandatory terms of employment about which parties must bargain, *Elizabeth-town Water Co.*, 234 NLRB 318, 320 (1978), and the Board has held that information concerning the financing of retirement plans is presumptively relevant and reasonably necessary to a union in carrying out its collective-bargaining functions, particularly during ongoing negotiations. *Circuit-Wise, Inc.*, 306 NLRB 766, 768-769 (1992); *Borden, Inc.*, 235 NLRB 982, 983 (1978), enfd. in relevant part 600 F.2d 313 (1st Cir. 1979).

Applying these principles here, we agree with the judge that the information requested by the Union was relevant to fulfilling its responsibilities as an exclusive bargaining representative and, therefore, should have been provided. The Union's information request was in direct response to the Respondent's assertion that a corporatewide lack of profits was the reason for the cessation of employer contributions to the plan. The Union was not required to accept the Respondent's declaration that there were no profits to fund the plan; nor was it required to accept only the summary financial information offered by the Respondent during limited negotiations to amend the plan.

Regardless of whether the parties had concluded these negotiations and contemplated no further bargaining, the Union was entitled, for the purposes of administering and ensuring the Respondent's compliance with the contractual 401(k) plan, to have its own accountants examine the requested specific financial information to determine for itself whether the failure to make 401(k) contributions was due to the lack of profits. The requested information was relevant and necessary to make that determination. *Circuit-Wise*, 306 NLRB at 768. The information was also specifically relevant and necessary to the Union's processing of the pending grievance contesting the failure to make the 1995 third-quarter matching contributions. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (information which aids the arbitral process, whether at the grievance stage or after the parties have agreed to arbitration, is relevant and must be provided).

We disagree with the Respondent that it had no obligation to provide the disputed financial information because it had made no claim of inability to pay or because the Union had failed to prove the relevance of financial information about other Merchants subsidiaries that did not employ unit employees. We repeat that the information sought here concerned contractual

retirement benefits of unit employees. Such information is presumptively relevant. The Union was not required to prove a need for it. *Lamar Outdoor Advertising*, 257 NLRB 90, 93 (1981). Furthermore, the Respondent's own interpretation of the terms of the 401(k) plan, making its contributions contingent on corporatewide profitability, clearly demonstrates the relevance of financial information about both the Respondent and other participating Merchants companies at any time the Respondent suspends its 401(k) contributions based on a claim of nonprofitability. This was precisely the event that led to the Union's information request.

We also reject the Respondent's contention that it properly withheld the information, because the request became moot when the parties concluded their midterm negotiations to amend the 401(k) plan. As previously stated, the financial information requested here was relevant to the Union's ongoing concern about the Respondent's compliance with the 401(k) plan and its specific concern, expressed in a grievance, about the Respondent's failure to make contributions for the third quarter of 1995 and thereafter. Even if the parties contemplated no further midterm bargaining about the plan, these legitimate concerns of the Union continue to justify its need for the requested information. Furthermore, it does not matter whether the Respondent and Union agreed or failed to agree during their limited midterm negotiations to impose additional *contractual* obligations on the Respondent to provide certain financial information. The finding of an unfair labor practice here turns on the Respondent's statutory obligation to provide information,³ regardless of whether it contractually agreed to provide it.⁴

In sum, for the foregoing reasons, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with the financial information that it requested in its letter dated March 27, 1996. Accordingly, except as noted below, we shall adopt his Order recommending that the information be furnished.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Merchant Fast Motor Lines, Inc., Abilene, Texas, its offi-

³ *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

⁴ Breach of such a contractual agreement may, of course, provide a separate basis for finding an 8(a)(5) violation.

⁵ Item 11 of the Union's information request was excluded from the complaint and, therefore, we do not find that the Respondent unlawfully refused to furnish the information set forth therein. We shall modify the judge's Order accordingly.

cers, agents, successors, and assigns, shall take the action set forth in the Order as modified.⁶

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

“(a) Except for item 11, provide the Union with information requested by it by letter dated March 27, 1996, so that the Union may determine whether the Respondent is complying with the collective-bargaining agreement between the parties.”

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

⁶To the extent that the Respondent has already furnished any of the requested information, that information need not be refurnished.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to provide the Union of Transportation Employees with relevant requested information necessary for it to determine whether we are complying with the collective-bargaining agreement.

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

WE WILL provide the Union with information requested by it by letter dated March 27, 1996, except as set forth in item 11, so that the Union may determine whether we are complying with the collective-bargaining agreement.

MERCHANT FAST MOTOR LINES, INC.

Elizabeth Ramirez, Esq. and *Edward Valverde, Esq.* for the General Counsel.

Ben F. Foster Jr., Esq. (*Foster, Heller & Kilgore*), of San Antonio, Texas, for the Respondent.

James L. Hicks Jr., Esq., of Dallas, Texas, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Fort Worth, Texas, on January 15 and 16, 1997. The case originated from charges filed by Union of Transportation Employees (the Union) against Merchant Fast Motor Lines, Inc. (Respondent). On July 10, 1996, a complaint and notice of hearing issued. The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by failing to provide the Union with certain requested information as more fully described in the attached pages of the bench decision issued on January 16, 1997.

In its answer to the consolidated complaint, Respondent admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and that the Union is the exclusive collective-bargaining representative of Respondent's driver and maintenance employees. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial here, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following oral argument on January 15, I delivered a bench decision on January 16 pursuant to Section 102.35 of the Board's Rules and Regulations. In accordance with Section 102.45 thereof, I certify the accuracy of, and attach hereto as "Appendix A," the pertinent portion of the trial transcript, specifically page 201, line 1 through page 227, line 12 with the following corrections: Page 202, line 1 "allegation" should be "answer." Other minor errors may occur, but are obvious and insignificant. Errors may also occur in quoted portions of Board and court decisions, but those errors are obvious by reference to original decisions as printed.

I have found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that the Union is a labor organization within the meaning of the Act; and that Respondent violated the Act in the particulars and for the reasons stated in my oral bench decision. The unfair labor practices which Respondent has been found to have engaged in have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Accordingly, I issue the following recommended¹

¹If 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.

ORDER

The Respondent, Merchant Fast Motor Lines, Inc., Abilene, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union with relevant requested information necessary for it to determine whether Respondent is complying with the collective-bargaining agreement between the parties.

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

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

(a) Provide the Union with information requested by it by letter dated March 27, 1996, so that the Union may determine whether Respondent is complying with the collective-bargaining agreement between the parties.

(b) Post at all of its facilities where bargaining unit members perform services on a regular basis copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

²If 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."

APPENDIX A

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PROCEEDINGS

JUDGE MCLEOD: This bench decision is made and filed pursuant to Section 102.35(10) and Section 102.45 of the Board's rules and regulations.

The complaint herein alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with relevant requested information including (a), copies of all IRS letter rulings or other IRS determinations; (b), an itemization of all expenses incurred by and/or reimbursements made to the plan committee or its individual members since 1993; (c), the names and principal place of business of all employers participating in the plan since January 1993; (d), copies of all audited financial statements prepared for Merchants owners, investors, lenders, and/or regulators for each fiscal year since the inception of the present 401K plan; (e), copies of federal income tax returns for each of the individual Merchants control entities and the consolidated federal return for the last three fiscal years; (f), copies of documents reflecting a breakdown of compensation packages for all officers of Merchants and its controlled companies, and, (g),

copies of all narrative documents that have been prepared for MFML's owners, investors, lenders, or regulators that depict or describe MFML's financial condition.

What I have done just now really is quote from paragraph 10 of the complaint.

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Respondent in its allegation admitted certain allegations, including the filing and serving of the charges, its status as an employer within the meaning of the Act, the status of the Union as a labor organization within the meaning of the Act, and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 211 of the Act.

Respondent also admitted certain other factual and legal allegations, including the appropriate collective-bargaining unit described in paragraph 7 of the complaint, the background of the collective-bargaining relationship between the union and Respondent described in paragraph 8 of the complaint, and the legal conclusion that the Union has been and is the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit.

Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act. At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

I have carefully listened to and considered the testimony of the witnesses, the closing arguments of counsel, and the case authority for each side given to me during this proceeding. Upon the entire record in this case and from my observation of the witnesses I find as follows: First, as a preliminary matter, that Respondent is and has been at all times material

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herein an Employer engaged in commerce within the meaning of Section 22.6 and 7 of the Act.

Secondly also as a preliminary matter that the Union is and has been at all times material herein a labor organization within the meaning of Section 25 of the Act.

Now, with respect to the substantive allegations of the complaint, I think it's best to discuss them—oh, I meant to mention and forgot. Let me add here that Respondent in its answer to the complaint in addition to having denied having engaged in any conduct which would constitute an unfair labor practice also alleges three affirmative defenses: one, that the Union made its request for information in bad faith and for the purpose of harassing Respondent; and, two, that the information requested was effectively moot; and, three, that Respondent has provided the Union with the relevant information.

Now, moving onto the substantive issues: Joint Exhibit 37 is the existing collective-bargaining agreement between Respondent and the Union, and that document shows in article 30 on pages 44 and 45 that a retirement plan is called for, referred to therein as the retirement security plan. There are four relatively short subsections of article 30. I need not quote them here; they speak for themselves.

The record reflects that in November 1995, Respondent requested the Union to meet and discuss with it certain

changes to or modifications of the existing retirement plan.
A meeting

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was held on or about November 3, 1995, at the offices of Respondent's counsel, Ben Foster.

As testified to by Paul Bohelski at that meeting, Respondent advised the Union that it had been trying to seek modifications to the existing 401K plan, and that certain "plan improvements" which the Union—which the Respondent wanted to make needed to be made by December 31, 1995.

Addressing Mr. Bohelski's other testimony regarding this issue, I note Mr. Bohelski testified that the Union understood as of the time of that meeting that if any one subsidiary of Merchants, Inc., made a profit, that a 401 contribution—401K contribution would be made.

I specifically note Mr. Bohelski did not testify and no other evidence was presented showing that, in fact, Respondent has a legal obligation to make contributions to the 401K plan on the basis of a single subsidiary having made a profit. I make that finding only because I believe that was raised in counsel for General Counsel's opening statement and, in fact, no evidence was presented to that effect.

Mr. Bohelski testified credibly that at the meeting on November 3, 1995, the Union was informed by the Respondent that the Respondent wanted two agreements in addition to the proposed substantive modification of the retirement plan, those two agreements being, one, an agreement that there would be no lawsuits filed by the Union with regard to the proposed change;

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and, two, an agreement as to the type of information which would be provided to the Union with regard to the 401K plan. That is really not in dispute, and his testimony with regard to that is entirely credible.

Nothing was agreed to at the November 3 meeting other than the Union agreeing to consider Respondent's proposed changes. The record reflects in Joint Exhibit 1 that on or about November 6, 1995, James L. Hicks, Jr., counsel for the Union, wrote to Ben F. Foster, Jr., counsel for the Respondent, a letter which contains certain language which would best be quoted here.

In the first paragraph, Mr. Hicks states in part, "Especially given the fact that Merchants wanted an immediate answer, I am curious about, but not surprised, that the Union was not advised to bring its counsel."

I quote that paragraph only because I think it is later relevant to the Respondent's affirmative defense with regard to supposed bad faith. The letter also contains the next-to-last and last paragraphs, which read as follows: "Please provide me with an immediate letter setting forth precisely that which Merchants wants from the Union including, but not limited to, references to the retirement plan documents and the collective bargaining agreement. The thoroughness of your response will impact the Union's ability to promptly respond."

The last paragraph of the letter reads, "Assuming that a thorough response is forthcoming from you on behalf of

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Merchants, you, by this letter, have my pledge that what is contained in your response will in every respect be maintained in confidence between only myself and my client (the executive board of UTE)."

I find that the last two paragraphs of this letter are not a request for information. They are a request for—they are a request that Respondent define and delineate what changes it wants to make to the 401K plan. If we recall the testimony of Mr. Chandler yesterday, he testified that what is in exhibit as Joint Exhibit 32 was in the hands of Respondent at the meeting on November 3 and was not supplied to the Union until later.

So at the time Mr. Hicks wrote his letter on November 6, he was not so much requesting information as he was advising Respondent that he would like a thorough description of what changes were being proposed by the Respondent as changes to the retirement plan.

Sometime after that letter of November 6 and within approximately a week of the meeting on November 3, Respondent supplied what is in evidence as Joint Exhibit 32 to the Union. Joint Exhibit 32 is Respondent's proposed modification to the retirement plan.

I think it's important that we pay attention to what is contained on page 2 of that document. There are six numbered paragraphs. The first numbered paragraph defines the Union's—excuse me—the Company's desire to make changes which would

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allow for the monies of the first and second quarters of 1995 to remain in individual accounts. Paragraphs 2, 3, 4, and 5 relate to information which the Company is proposing to supply to the Union with regard to the retirement plan, and I take specific note of these four paragraphs because I think they relate very much to Respondent's position that there was bad faith on the part of the Union in making its request for information.

In particular, I find the language of these paragraphs 2, 3, 4, and 5 to be apparently, if not in fact, self-contradictory on their face, at least to the point of raising good questions in the minds of the Union what the Company was willing to provide and what it was not.

And in particular, I note that in paragraph 2, Respondent purports to be willing to make available to the Union certain information with regard to Merchants, Inc. But in paragraph 3, the language suggests that the Union will have access to the Interstate Commerce Commission to certain financial reports of Merchants Fast Motor Lines, Inc., and "to no other information."

The record reflects that by letter November 8, 1995, in evidence as Joint Exhibit 2, the Union wrote to Mr. Chandler as follows—and the letter's two pages long. The actual relevant language as far as I'm concerned is in the first sentence of the last paragraph of the letter. That sentence reads as follows "This Union will agree to make an amendment to the plan to avoid

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the return of the first and second quarter matching contributions."

The record reflects that by letter dated November 14, 1995, Mr. Foster wrote to Mr. Hicks a letter in evidence as Joint Exhibit 4. This letter is important largely in response to the affirmative defense of alleged bad faith.

The letter states in part, "It is my understanding, however, that Joe Chandler of Merchants has spoken with you in regard to the 401K issues and has forwarded to you the materials you requested"—referring to the letter of November 6.

The letter goes on to say, "The Union responded to the Company's request through a letter from Mr. Bohelski to Joe Chandler dated November 8, 1995, indicating that the Union is unwilling to agree to the suggested changes. Accordingly, I am uncertain that the information you received was of any benefit—it obviously had no effect on your client's decision."

I note that this letter misconstrues the Union's position in this matter, and I take this into account in ultimately drawing the conclusion that to the extent there's any bad faith or to the extent that's even relevant, the bad faith here is on the part of Respondent and not on the part of the Union.

The record reflects that by letter dated November 16, 1995, in evidence as Joint Exhibit 5, Jerry T. Armstrong, President and CEO of Merchants, Inc., wrote to 401K

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participants, including employees, a three-page letter, which will not be quoted at length, except to the extent that there is language in the second full paragraph on page 2 which reads as follows: "This 401K plan is a Merchants, Inc., plan. Merchants Fast Motor Lines has been unprofitable in past quarters; however, the other companies made up for the losses and we could fund.

"This year, the other companies were unable to make enough profits to place Merchants, Inc., into a profitable position; therefore, no funding could take place. Funding the third quarter is not permissible under the rules of our 401K plan. Now—we must get the UTE to sit and negotiate a solution to the first- and second-quarter match. A simple yes answer will not work. We have the obligation to discuss changes to make these improvements and need meetings and cooperation."

I take this as a recognition on the part of Mr. Armstrong that indeed both parties had a willingness, if not an obligation, to sit down and discuss proposed changes to the 401K plan.

The letter—the record reflects that by letter dated November 20, 1995, in evidence as Joint Exhibit 6, Mr. Chandler, who was then senior vice president of administration, wrote to Mr. Bohelski a three-page letter, which definitely will not be quoted in its entirety but does need to be quoted at some length in order to understand exactly what has taken place here.

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First of all, in the second full paragraph of this letter, Mr. Chandler states as follows: "I anticipated"—this is referring to the November 3 meeting—"I anticipated that you would want legal assistance, and was extremely surprised that you didn't call and discuss the issue with an attorney during the meeting."

I take this as the Company's attempt to answer the point made by Mr. Hicks in Joint Exhibit 1, his letter dated No-

vember 6, 1995, and find it significance only with respect to the alleged affirmative defense of bad faith. However, there are certain other portions of the letter which are relevant to the matter of the Union's request for information.

Specifically on page 2 of this letter, Mr. Chandler acknowledges that it is anticipated various financial information will be supplied to the Union. In my view, it is an attempt to clarify and further delineate the kind of information which the company has proposed making available to the Union and is a modification or a clarification of Joint Exhibit 32, page 2, where the Company proposes providing certain information.

The record reflects that a meeting was scheduled between the parties for December 8, 1995, to discuss the Company's proposed changes to the 401K plan. That letter was held and as testified to by Mr. Chandler and Mr. Bohelski—was the meeting at which Mr. Bohelski, Mr. Tyler, Mr. Pritchett, Mr. Goode and Mr. —strike that; I'm wrong. That's the November 3 meeting.

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The December 8 meeting is the meeting at which the representatives of the—at which attorneys from Jones, Day, Reavis and Pogue attended to try to clarify certain matters related to the 401K plan. The importance of that meeting is the fact that it was held, that it was for the purpose of discussing the proposed changes to the 401K plan. No final agreement was reached at that meeting.

The record reflects that in a memorandum dated December 15, 1995, entitled "UTE News," Mr. Bohelski wrote to what I presume are the members of the UTE and members of the bargaining unit represented here a five-page memorandum which starts out, "To protect your retirement security interests, UTE will be represented by legal counsel who is an expert on ERISA law and 401K issues. As of this date, nothing has been resolved with is the Company."

The next two paragraphs are the paragraphs to which Respondent points as evidence of the Union's bad faith in requesting information here. And the two paragraphs in question refer in part to a "pea under the shell game," which the Union accuses the Respondent of not in fact, but perhaps being engaged in and suggests in part that Respondent should, even if it means using profits from Merchants of California, fund the plan.

Now, Respondent points to these two paragraphs as evidence of harassment by the Union making its request for information. I frankly have to say that I don't see these paragraphs as in

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any way, shape, or form suggesting harassment on the part of the Union, nor as being evidence of bad faith by the Union in making its request for information. These are simply examples of partisan rhetoric which is used all the time by Unions in communicating to members certain positions than a company is taking in bargaining. And frankly, that's the only significance I find in these, is that there had come a point as of December 15 where there was at least a certain amount of mistrust between the parties about what it was Respondent was trying to accomplish in making these changes and certain misunderstandings on the part of the Union about

what was, in fact—what were, in fact, the mechanics of funding a 401K plan.

The record reflects that on or about December 27, 1995, the Union made a—what would best be described as a counterproposal to Respondent's proposed changes to the 401K retirement plan. This counterproposal on the part of the Union is in evidence as Joint Exhibit 17, and I find it very significant in this case that Mr. Chandler testified yesterday that all of the first five paragraphs of this counterproposal were agreed to.

In particular, the first paragraph is the paragraph describing the actual change. Paragraphs 2, 3, 4, and 5 are paragraphs which describe certain information which the Company will make available to the Union.

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The second paragraph reads as follows: "Until such time as Merchants, Inc., becomes profitable and resumes contributions to its retirement security plan, the Union will be provided with financial information of Merchants, Inc., including a balance sheet, income statement, and statement of changes in accumulated and/or retained earnings."

The third paragraph reads, "That the Union shall continue to have access to the Interstate Commerce Commission, or equivalent regulatory government agency, to the financial reports submitted on behalf of Merchants Fast Motor Lines, Inc."

The fourth paragraph reads, "That the information on behalf of Merchants Fast Motor Lines, Inc., to be provided to the Union as quoted in 3 above will be provided to the Union quarterly and certified by the corporate comptroller of Merchants, Inc."

And last but not least, the fifth paragraph reads, "That should contributions not be made at the end of any calendar year, the Union will be provided the same financial information as noted in 2 above, certified by the public accounting firm performing the annual audit for Merchants, Inc., and that the same is made pursuant to GAAP."

As I have said, Mr. Chandler admits to having agreed to supply that information to the Union. Now, I purposely said that counterproposal was made on or about December 27, because Mr. Chandler testified to events which occurred on December 27,

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late in the afternoon of December 27, December 28, the fact that he was going hunting and the fact that a secretary was then informed to put out letters which are in evidence as Joint Exhibits 18 and 19. It's not clear exactly when Joint Exhibit 17 was received by Mr. Chandler, but it is clear that it was received on or before he dictated the letter of December 28, 1995.

Now, the record reflects that by letter dated March 25, 1996, the Union wrote to Respondent requesting certain information. It is important to note that this request for information was made in or related to negotiations between Gypsum Transport, Inc., and the Union.

As Mr. Foster points out in his closing argument—oh, incidentally, that request for information was directed to Gypsum Transport, Inc., not to the Respondent. As Mr. Foster points out, within a few days of that and specifically by letter dated March 27, 1996, the Union requested certain spe-

cific information of the Respondent, Merchants Fast Motor Lines, Inc.

That request for information is the operative request for information which brings us here today and that is in evidence as Joint Exhibit 23.

Now, the credible testimony of Mr. Bohelski shows, as does Joint Exhibit 24, which is Respondent's reply, that Respondent did, in fact, refuse to supply certain of the requested information, specifically items 3, 9, 11, 12, 13, 14, and 15,

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and those are, for all practical purposes, the items which are addressed in paragraph 10 of the complaint. I find that Respondent did refuse to supply the items in those requested paragraphs.

Mr. Foster's reply to that request is a letter dated April 12, 1996, in evidence as Joint Exhibit 24, and I find that Mr. Foster's letter, both as a factual matter, and I draw the legal conclusion that by it, Respondent did refuse to supply the requested items that I've just identified.

I also note certain relevant language in Mr. Foster's letter. In it, Mr. Foster accuses the Union of requesting the information for purposes of harassing Respondent. He then goes on to state, "I do not believe we are currently engaged in a 'negotiating' process over the contents of any portion of that agreement, much less Article 30, dealing with the retirement provisions to which your request for information is allegedly addressed.

"Additionally, may I remind you that the parties' agreement, particularly Section 3 of Article 30 provides, "Any changes will be discussed with the UTE board of directors prior to being placed into effect."

In my view, Mr. Foster by this letter has engaged in what could best be described as a classic bait and switch, which one might expect to find from a used-car salesman, but not from an attorney representing the Respondent here who has just attempted

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to negotiate certain changes in the retirement plan. He has for all practical purposes said now that you've agreed to the one substantive change we asked for, and even though we have agreed to supply you with information which Mr. Chandler testified to yesterday, we are not only not supplying you with that, but we're not going to supply you with the other information that you have asked in lieu of us supplying you with the information we agreed to but aren't.

To the extent that there is any bad faith in this case and to the extent that that's even a relevant issue, the bad faith is on the part of the Respondent, not on the part of the Union. Now, what I have not discussed in great detail but will allude to in passing is the fact that Union filed certain grievances with regard to Respondent's failure to contribute funds to the 401K plan. Those are relevant almost as a secondary proposition to the Respondent's other obligation to supply the requested information.

But just for the record, the grievance and the Company's response to that are in evidence as Joint Exhibit 3, Joint Exhibit 7, Joint Exhibit 8, Joint Exhibit 9, Joint Exhibit 9-A, Joint Exhibit 11, Joint Exhibit 13, Joint Exhibit 14, Joint Exhibit 15, Joint Exhibit 20, Joint Exhibit 21, Joint Exhibit 27,

and Joint Exhibit 29. Those are the items of correspondence both by the Union and Respondent with regard to the grievances. Now, turning to the applicable case law, it is the clear

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that the duty to bargain collectively imposed upon an Employer by Section 8(a)(5) of the Act includes a duty to provide relevant information needed by a labor Union for the proper performance of its duties as the employees, bargaining representative. I cite *NLRB versus Truitt Manufacturing Company*, 351 U.S. 149 [1956], as the seminal case.

I note in *National Broadcasting Company, Inc.*, 318 NLRB, Number 124 at page 1166, and specifically at page 1169 [1995], in the administrative law judge's decision, the administrative law judge makes a statement of law which has been widely accepted as the general statement of law in this area: "The Union's right to relevant information is not limited to the period during that the Employer and the Union are engaged in negotiations for a collective-bargaining agreement.

"The Union is equally entitled to relevant information during the contract's term. In order to evaluate or process grievances and to take whatever other bona fide actions are necessary to administer the collective-bargaining agreement." And then certain cases are cited.

Ultimately, I am basing my decision in this case on what is essentially that statement of law as recited by the administrative law judge, that the Union is equally entitled to relevant information during the term of a contract for one purpose, in order to evaluate or process grievances, but for another purpose, and equally important, to take whatever other

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bona fide actions are necessary to administer the collective bargaining agreement.

As pointed out by Mr. Foster in his closing statement, information sought that does not directly relate to bargaining unit employees is deemed not to be presumptively relevant. We have that quote from *NLRB versus Wachter Construction*, reported at [23 F.3d 1378] (8th Cir. 1994), copies of which were given to me by both Respondent and counsel for General Counsel.

The defense here seems to suggest that if it's not presumptively relevant, then it's irrelevant, and that is not what this holding means, nor is that how it's applied. Information sought that does not relate to bargaining unit employees is not necessarily irrelevant; it is just not presumptively relevant. Relevance must be shown before such information is rightfully available to the Union by request.

I would also note language from that same decision on page 2198, in which the Court notes, "The Supreme Court stated that 'collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in a contract and other working rules and the resolution of new problems covered by existing agreements.'"

I note that in the Union's request for information here, the request went to both unit employees who it represents; that is, employees of Merchants Fast Motor Lines, Inc., but also to non-unit employees, namely employees of all the other

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corporations under the umbrella of Merchants, Inc., who we know from the testimony of Mr. Chandler and the exhibits which are in evidence, make up the pool of individuals who participate in the 401K plan and, who pooled collectively, determine whether or not there are profits available or retained earnings available from which payments can be made to the 401K plan.

As Administrative Law Judge Will Pinner [phonetic] stated in *Holiday Inns, Inc., DBA Holiday Inn on the Bay*, 317 NLRB, Number 76 at page—beginning—reported at page 479, but as he stated on page 481 [1995], "It is well settled that with respect to nonunit personnel, a bargaining representative does not enjoy the relevancy presumption that exists concerning information pertaining to unit employees.

"When a union seeks non-unit information, however, the burden— is upon the union, and in this case upon the General Counsel, to establish the relevance without the benefit of any presumption."

There's then certain language which I will skip over, and then the last sentence of this paragraph reads, "That is, information pertaining to non-unit employees must be produced whenever shown to be 'related to the union's function as bargaining representative and reasonably necessary to performance of that function.'" And there's a citation there which I will omit.

Last but not least—probably not last, for that matter,

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but turning now to, I should say, a case called *Stroehmann Bakeries, Inc.*,—S-T-R-O-E-H-M-A-N-N—Bakeries, Inc., 318 NLRB, Number 110, reported at page 1069 [1995], the Board has an opportunity there to decide a case which is remarkably like the one before us now, at least in part.

The parties were engaged in collective bargaining over various things, including increased contribution to the Company's 401K plan, as cited on page 1071. The decision was made somewhere along the line to close one of more of the Respondent's facilities. The union responded with a request for information.

Before we get to that, the Company's response to some of the Union's requests were an "inability to pay." The Union, then requested certain information from the Respondent which is described on page 1072 of the Board's decision. And in that request for information in addition to requesting various other information, the Union specifically requested a listing of all Company employees, "including non-bargaining unit and management personnel with the following information": some of which included, "hourly wage or salary" and "salary or wage increases for the past three years."

The request for information also included "a copy of any and all annual reports, auditors,' or accountants' annual and quarterly statements or business summary reports produced by the Company for the past three years."

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The relevant language in the administrative law judge's decision insofar as a statement of case law is concerned is found on page 1079 and reads as follows: "The Board has repeatedly held that there, as here, an employer predicates its bargaining position as a matter of necessity by reason of cur-

rent alleged financial losses, the bargaining union is entitled, on request, to information pertaining to the alleged losses and the impact on the Employer's business."

Skipping certain portions and then continuing, the language reads, "The present case is also similar in critical respects to Steelworkers Local 5571"—and I'll leave-out the quote itself, but it continues, "The Union involved requested information concerning the Employer's financial condition, including financial statements."

And then on page 1080, the administrative law judge specifically deals with a portion of the request for information of non-unit employees including management personnel, and it states, "I find that the requested information was relevant and necessary to the Union's performance of its duties as employee bargaining representative."

"Such information was pertinent to the Company's bargaining position" and the Union's response to that position. The information was pertinent; e.g.—meaning for example—"to enable the Union to evaluate whether the unit employees were being asked to shoulder a disproportionate share of the

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sacrifices proposed by the Company, and whether the Company's proposals were, in fact, necessary or even likely to improve either the Company's financial situation or competitive posture."

"In this regard, it is significant that on termination of the Syracuse shipping unit, the Company found it necessary to hire additional shipping employees"—and so forth I rely in significant part on this language and on another case which I will cite momentarily in finding that the Union's request for information as to nonbargaining-unit employees, including specifically managerial employees, was appropriate.

That other case which I alluded to a moment ago is *Circuit-Wise, Inc.*, reported at 306 NLRB 766 [1992]. That case is even more like the case at hand than any of the others, because in that case the Respondent was proposing to the Union a retirement plan which was to be funded from pretax profits. The profit-based plan was offered in response to a Union's demand for a pension plan with a fixed level of contributions.

In response to the proposal from the Respondent, the Union requested various information of the Company, including "total labor, overhead, selling and general administrative expense, and interest and other expense." It also asked for "the salaries of executives, personnel department employees, and sales staff."

Now, what's interesting is that the administrative law judge in that case found that the information need not be

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provided, and he based his decision in part on a conclusion that the Union wasn't seriously prepared to consider or accept the Company's proposal anyway, and therefore the Company need not respond to the request for information.

The Board overturned the administrative law judge. What I find particularly interesting is the way both the administrative law judge and the Board addressed this issue. The administrative law judge states in a footnote, footnote 6 on page 777, "My opinion would be completely different had the Union actually agreed to a pension plan where contributions were based on profits. In such a circumstance and for

purposes of enforcing such a contract, the Union would clearly be entitled to detailed financial information because the issue then would be the extent to which the Company had profits upon which contributions would be due and owing."

Moreover, in such a circumstance, I think that the Union would be entitled to have its own accountants examine the Company's original books and records." Now, the administrative law judge provides no citation for his opinion in that regard on page 6.

But what's fascinating to me is how the Board addresses the issue. On page 769 in overturning the administrative law judge, the Board says, "The judge conceded that, if the Union had accepted the Respondent's proposal, the Respondent would have been obligated to furnish the requested information."

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Going on with the quote, "Given the proposition that the information would be relevant once the proposal is accepted, it is difficult to escape the conclusion that it is relevant to the union's evaluation of the proposal before acceptance. We find no logical or legal basis for requiring a party to accept a proposal before being given a chance to view information that is relevant and necessary to its evaluation."

There is absolutely no doubt in my mind that in phrasing its decision as it did, the Board has agreed with the administrative law judge's statement of law in footnote 6 on page 777 even though the judge offers no citation of authority.

So it's clear to me from *Circuit-Wise* that both the Board—that Board, rather, would order Respondent to provide information from which the Union can determine whether or not the Respondent has a contractual obligation to make payments pursuant to the 401K plan, including information addressed to nonbargaining-unit employees, and even managerial and executive employees, where the costs associated with those employees will be a determining factor in whether or not Respondent is either obligated to or can make payments pursuant to the 401K plan.

So in summary, my ultimate finding in this case is that the Union had a right to request information of Respondent either to evaluate or process grievances or to take action or to decide whether or not to take action to administer the collective-bargaining agreement between the parties.

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And the information requested by the Union in this case, including information with regard to nonunit employees and managerial employees, is as the administrative law judge stated in footnote 6 of the *Circuit-Wise* decision clearly relevant because "the issue then would be the extent to which the Company had profits upon which contributions would be due and owing."

Now, I'm going to go back and address momentarily the alleged affirmative defenses of the Respondent in its answer to the complaint. I think I've made enough comments already about the first alleged affirmative defense of bad faith, except that one of the factors which Mr. Foster specifically pointed to in his closing remarks as evidence of bad faith was the delay between January 1 and the Union's request for

information on March 27, 1996, what he calls a 3-month hiatus.

For the Respondent to suggest that that delay somehow evidences bad faith is, in my view, absolutely ludicrous. Mr. Chandler took the stand and testified that the Company agreed to supply the Union with certain information, some of which was to be supplied on a quarterly basis.

The clear implication to be drawn from that was that the Union was expecting to receive information sometime shortly after March 1, and for the Union to then simply confirm that request for information in writing is not evidence of bad faith at all, but simply an intelligent business practice to follow up and confirm the expectation of receiving information.

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With regard to the second alleged affirmative defense that this request for information was effectively moot is equally ludicrous, given the fact that by agreement of Mr. Chandler, the Company had agreed to provide information to the Union on an ongoing basis.

Now, with regard to the third alleged affirmative defense in this case that the Respondent has provided the Charging Party with the relevant information, the facts simply do not support that affirmative defense.

If, in fact, the information that was requested here was ever supplied to the Union, Respondent had it within its power to put in evidence as exhibits precisely what was supplied to the Union, and it did not do so.

What we do have in evidence is Mr. Foster's response to the Union's request for information, namely Joint Exhibit 24, in which he accuses the Union of harassing Respondent by making the request, and in which he delineates various reasons for not supplying the information.

So I have no evidence that I find reliable on which I could possibly draw a conclusion that the relevant requested information was supplied by the Respondent.

In conclusion, therefore, I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to supply the Union with the requested information.

Having found that the Respondent has engaged in certain

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unfair labor practices in violation of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

After I receive a copy of the transcript, I will issue a brief written decision certifying the correctness of the appropriate transcript pages. That brief decision will also contain the appropriate recommended order defining the remedy herein. When you receive that decision, your time will begin to run for the filing of exceptions to the Board. That ends my bench decision in this matter. The hearing is now closed. Off the record. (Whereupon, at 11:05 a.m., the hearing in the above-entitled bench decision was concluded.)