

AT&T Corp. and Communications Workers of America, Local 7026, AFL-CIO. Case 28-CA-14967

June 24, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND BARTLETT

On October 29, 1999, Administrative Law Judge Gerald A. Wachnov issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The Respondent filed an answering brief, and the General Counsel filed a reply brief.¹

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Introduction

This case presents the key issues of whether AT&T Corp. (the Respondent) violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Communications Workers of America (CWA) or its designee, Charging Party Local 7026, or by failing to provide CWA or Local 7026 with information necessary for the purposes of collective bargaining. This dispute centers around AT&T's decision, in late 1997, to close its Toll Free Directory Assistance (TFDA) facility in Tucson, Arizona, lay off bargaining unit employees, and reassign the work performed in Tucson to its other seven TFDA facilities nationwide. The judge found that AT&T fulfilled its obligation to provide information regarding its plan for Tucson to the CWA or its designee, and therefore did not violate Section 8(a)(5) on this ground. Further, the judge found that Local 7026's own inaction in seeking bargaining over AT&T's plan for Tucson prior to its implementation led to the absence of bargaining, and therefore AT&T did not violate Section 8(a)(5) in this regard either. We agree with the judge for the reasons he gave and for the additional reasons set forth below.

Relevant Events

AT&T and CWA have been parties to successive collective-bargaining agreements over an extended period of time. CWA represents a single, nationwide unit of approximately 55,000 AT&T employees. In the mid- to late-1990s, AT&T became interested in introducing voice recognition technology (VRT), which would per-

mit the most frequently requested 1-800 numbers to be handled by computers rather than human operators. If introduced in its TFDA facilities, VRT would reduce AT&T's human-handled calls by some 12 percent, which in turn would permit AT&T to reduce its TFDA work force by just over 100 operators. According to AT&T, it selected Tucson for closure because the Tucson facility employed a correspondingly equivalent number of TFDA operators to those it anticipated would be laid off by the introduction of VRT, and because the Tucson facility had other operational shortcomings that rendered it among the lowest performers of all of AT&T's TFDA facilities nationwide.

In autumn of 1997, Michael McGrath, president of Local 7026, and Catherine Berry, AT&T's then-manager of the Tucson TFDA facility, became aware that AT&T was considering closing that facility, laying off the bargaining unit employees, and reassigning the work elsewhere. McGrath and Berry closely collaborated in an effort to suggest a plan to AT&T's upper management that would keep the Tucson facility open and improve its performance among the other TFDA facilities. In November 1997, McGrath proposed such a plan to Robert Stuart, AT&T's division manager for TFDA, and Berry wrote a letter to Stuart supporting McGrath's ideas. However, Stuart did not respond. Instead, in mid-December 1997, AT&T announced that it would close the Tucson facility, and provided formal WARN Act² announcements to various State and local officials later that month. On January 5, 1998,³ AT&T formally notified CWA that 106 Tucson TFDA employees would be laid off, and indicated that the last day of work at the Tucson facility would be March 7.

Approximately a week later, McGrath advised Stuart that McGrath wanted to talk about the decision to close Tucson. McGrath and Stuart agreed to discuss the matter by teleconference call on January 22, at which time McGrath brought in Catherine Berry to assist him and Stuart brought in Diane Haynes, then a budget analyst for AT&T, to assist him. During this telephone conversation, Stuart explained the various reasons that AT&T selected the Tucson facility for closure, and Haynes took copious notes. McGrath requested that Stuart provide the "decision charts" supporting the closure, an apparent reference to any studies, data, or documentation on

² The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, et seq., requires an employer to provide 60-day written notice to employees or their representatives and to designated State and local officials prior to implementing a "plant closing or mass layoff." 29 U.S.C. § 2102.

³ All dates to which we refer hereinafter occurred in 1998, unless otherwise specified.

¹ The Charging Party filed neither exceptions nor a brief.

which AT&T relied in its decision to close the Tucson facility. Haynes' notes and recollection, which the judge fully credits, reflect that during the conference call Stuart orally provided the requested information in substantial detail. At the end of the conversation, McGrath told Stuart that he disagreed with the decision to close Tucson, and that he would take the matter up with Stuart's superiors at AT&T. Haynes testified that during the call no one broached the subject of the parties bargaining over the decision to close the Tucson facility.

Following the January 22 conference call, McGrath sought advice from CWA International Vice President James Irvine on how to contest the Tucson closure, but did not take the matter up with any other AT&T officials. Instead, on January 26, McGrath filed the unfair labor practice charge at the core of this case, which alleges that AT&T violated Section 8(a)(5) on January 6 by unilaterally "announc[ing] its intention to close the Tucson" facility. On April 23, McGrath filed an amended charge, alleging that "[s]ince on or about January 22, 1998, the Employer has refused to supply the International Union information relevant and necessary for the handling of its representational duties." The complaint issued 6 days later, alleging, in substance, that AT&T violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the Tucson decision and refusing to provide necessary information.

The Judge's Decision

The judge decided this case by interpreting the parties' rights and responsibilities as set out in article 24 of their collective-bargaining agreement. Article 24 of the agreement is entitled "Force Adjustment—Layoff, Part-timing, and Recall."⁴ It requires that any layoffs or

other "force adjustments as the Company may deem necessary" be subject to the bargaining procedures set out in section 1(b) of the article. Pursuant to these procedures, AT&T must notify CWA of its plan to lay off employees 60 days before the layoffs become effective. During the first 45 days of that 60-day period, CWA may offer AT&T an alternative plan that would meet the Company's operational goals but presumably minimize any negative impact on the represented employees. If CWA fails to offer such an alternative within 45 days of the notice to layoff, AT&T may implement its unilaterally developed layoff plan.

The judge found that article 24 established a contractually based right in AT&T to unilaterally declare prospective layoffs without consulting with CWA. The judge further concluded that the responsibility then shifted to CWA to propose, if it so chose, an alternative to AT&T's layoff plans within 45 days of the announced plan. The judge opined that the benefits of such a negotiated procedure would be abundant. In his view, article 24 eliminates any dispute the parties may have over whether the "force reduction" at issue was a mandatory subject of bargaining, the established timeframes permit the parties to exchange proposals expeditiously, and neither party is left with uncertainty resulting from misunderstanding of rights and responsibilities during any necessary force reductions.

The judge also concluded that the parties, on numerous occasions in the past, had relied on the mechanisms and procedures set out in article 24 when dealing with previous "force adjustment" issues. Thus, for instance, AT&T Employee Relations Vice President Thomas Burk testified that the provisions of article 24 had been used to declare some 75,000 employees surplus in the previous 5-year period, and CWA Vice President James Irvine testified that article 24 notices "pass through our office like popcorn through a popper." Thus, the parties were clearly familiar with the use of article 24 as a mechanism by which to deal with disputes that may arise over "force adjustments."

Given this contractual framework, the judge concluded that McGrath and CWA failed to pursue their opportunities under article 24.⁵ Once AT&T announced on January 5 the prospective layoffs of over 100 Tucson employees, the judge found, CWA or its designee could have demanded bargaining over the decision within 45 days, as the article contemplates. The judge concluded

⁴ Art. 24 states, in pertinent part:

1 LAYOFFS AND PART-TIMING

Whenever force conditions are considered by the company to warrant part-timing or layoff of regular employees, such force adjustments as the Company may deem necessary, shall be . . . subject to the following conditions:

(a) [requires the company to first layoff temporary and term employees before laying off any regular employees]

(b) In the event that further force adjustments by means of layoff are deemed by the Company to be necessary, the Union shall be advised by the Company as to its proposed plan for accomplishing such further force adjustments sixty (60) days before the adjustment is to become effective. During the first forty-five (45) calendar days of the sixty (60) day period, the Union may offer the Company, in writing, a plan to accomplish the force adjustments deemed by the Company to be required. If the Union's plan meets to foregoing requirements, the Company agrees to consider the plan proposed by the Union. If no such written plan is received by the Company from the Union within said forty-five (45) days, or if the parties are unable to agree upon a plan,

the Company will proceed with the force adjustments according to the plan the Company proposed.

⁵ In his decision, the judge assumed arguendo that McGrath was an authorized designee of CWA. The General Counsel argued that he was an agent. The Respondent disagreed.

that McGrath never requested article 24 bargaining. Moreover, even if McGrath was engaged in article 24 bargaining during the January 22 conference call with Stuart, McGrath “dropped the ball” by failing to follow up on his expressed intention to pursue the matter with higher level officials. Similarly, the judge concluded that it was reasonable for AT&T’s Stuart to believe that he had adequately responded to McGrath’s request for information during the January 22 conference call, and, absent some renewed and more specific request from McGrath, Stuart was not obligated to provide any further information. Accordingly, the judge recommended dismissal of both 8(a)(5) allegations in the complaint.

Positions of the Parties

In his exceptions, the General Counsel argues that AT&T’s decision to lay off the Tucson employees, close that facility, and relocate its work was a mandatory subject of bargaining under the multistep burden-shifting analysis set out by the Board in *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enfd.* 1 F.3d 24 (D.C. Cir. 1993). Designating the Tucson decision as a mandatory subject of bargaining thereby gives rise to a statutory duty to bargain on AT&T’s part, and conveys to CWA a corresponding statutory right to bargain over the subject. The General Counsel argues that CWA’s statutory right to bargain over the decision cannot be waived absent a clear and unmistakable relinquishment of that right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 706 (1983). Article 24, the General Counsel contends, does not clearly and unmistakably waive CWA’s right to bargain about AT&T’s decision to close the Tucson facility. Rather, the General Counsel asserts, article 24 addresses the parties’ responsibilities when engaged in bargaining over the *effects* of any decision to lay off employees, but is otherwise silent on the parties’ obligation to bargain over the decision itself, thus leaving intact AT&T’s statutory duty to bargain. Under this analysis, the General Counsel argues that AT&T was well aware that CWA wanted to discuss and potentially reverse its plans for Tucson, but failed and refused to bargain about the decision, thus violating Section 8(a)(5) of the Act.

AT&T contends that the General Counsel’s argument regarding waiver of statutory rights is irrelevant.⁶ AT&T concedes that under article 24, CWA has the right to bargain about both the decision to lay off employees and the effects of the layoffs, and that “[t]here are, frankly, no limitations under article 24 as to the scope of the bargain-

⁶ As AT&T states in its brief, “[t]he issue is not that the National Union has waived any statutory right to bargain as . . . asserted by the General Counsel. . . . Under Article 24, the National Union has the right to bargain about the decision and the implementation of the decision.” (Internal quotation marks removed.)

ing that may take place.” AT&T argues, and the judge agreed, that the only limitations present in article 24 are the time periods established within which such bargaining must take place. Under this view, because CWA failed to demand bargaining after the announcement that layoffs would occur 60 days hence, AT&T did not fail or refuse to bargain about the decision, and therefore did not violate Section 8(a)(5) of the Act. Similarly, AT&T contends that the judge correctly concluded that Stuart satisfied McGrath’s request for information during the January 22 conference call, and that absent a renewed and more specified request, AT&T had no further obligation to provide additional information.

Analysis and Conclusion

1. The alleged failure to provide information

We first address the issue of whether AT&T complied with McGrath’s information request.⁷ In addressing this issue, we assume *arguendo* that the information was relevant to a mandatory subject. The judge found that, so far as the record shows, during the January 22 conference call, Stuart orally provided McGrath with “all the information he requested, and was willing to discuss the matter for as long as McGrath wanted to continue the meeting.” The judge further found that at the end of the call Stuart could have reasonably concluded that McGrath was satisfied with the information provided. No renewed request for information was made. Nor was the January 26 unfair labor practice charge sufficient to put AT&T on notice that CWA demanded further information, because the charge was silent with respect to any refusal to furnish information until its amendment some 3 months later. Under these circumstances, and given McGrath’s failure to subsequently contact higher-level management as he said he would, we agree with the judge that AT&T did not violate Section 8(a)(5) by failing to provide additional information.

2. The alleged failure to bargain about the Tucson decision

We next address the issue of whether AT&T failed to bargain with the Union over the Tucson decision. In resolving this question, we need not decide whether the Respondent had a duty to bargain over its decision to close the Tucson facility, layoff bargaining unit employees, and reassign their work to other unit employees. Nor need we decide whether any such bargaining obligation arose from the Act (as the General Counsel would have it) or solely from article 24 of the collective-bargaining agreement (as AT&T contends). For even if

⁷ For purposes of our decision, we shall assume, as did the judge, that McGrath was an authorized designee of CWA.

AT&T had a duty to bargain over its Tucson decision, and irrespective of the source of any such duty, we would nevertheless conclude, in agreement with the judge and for the additional reasons set out below, that CWA “dropped the ball” by failing to pursue the matter, and thus there never was a failure to bargain by AT&T.⁸

As explained, on January 5, AT&T formally notified CWA of its intention to close the Tucson facility on March 7 and to lay off the Tucson TFDA employees. The Union may well have believed that it was unlikely that AT&T, having failed previously to respond to McGrath’s November 1997 plan to preserve the Tucson facility, could be persuaded to change its mind. But the January notification—made more than 2 months ahead of the anticipated closure—cannot fairly be described as announcing a *fait accompli* that would have made a bargaining demand futile, not least because article 24 of the parties’ agreement created a recognized framework for addressing the Tucson decision.⁹ As a result, if CWA wanted to prevent closure of the Tucson facility, and to preserve whatever bargaining rights the Union had under the Act, it was required to pursue its own efforts to dissuade AT&T. Indeed, the facts of this case show that McGrath did not believe that he had been presented with a *fait accompli* because he promptly contacted Stuart and arranged for a conference call on January 22. During this telephone conversation, the parties had a detailed discussion of the reasons why Tucson was selected for closure. There was no indication by AT&T that it would refuse any CWA request to pursue the matter further.

It is well settled that when a union is given notice of an employer’s intent to change a term or condition of employment, the union must act with due diligence in re-

questing bargaining in order to enforce the employer’s bargaining obligation. *Clarkwood Corp.*, 233 NLRB 1172 (1977), *enfd.* 586 F.2d 835 (3d Cir. 1978). Due diligence includes an obligation on the part of a union to ensure that its demand to bargain is continuous, just as the employer’s reciprocal obligation to respond to the demand is continuous. *Reynolds Metal Co.*, 310 NLRB 995, 1000 (1993). Indeed, “[f]ailure of the union to bargain continuously, particularly in the absence of any reason for the failure, constitutes inaction on the part of the union and results in abandonment of its right to bargain.” *Id.* See also *Goodyear Tire & Rubber Co.*, 312 NLRB 674 fn. 1 (1993) (union “must act with due diligence to preserve its request to bargain”; where there was discussion but no agreement on future date for negotiations, “prudence dictates that the Union follow up on its demand”); *Bell Atlantic Corp.*, 336 NLRB 1076 (2001) (union failed to act with due diligence; while the union filed grievances and requested information about a decision to transfer unit work, it waited 4 months to broach the possibility of bargaining about the decision).

Given this legal framework, we find that McGrath’s entire course of conduct demonstrates a lack of due diligence in pursuing bargaining about the Tucson decision. After AT&T went forward with the layoff announcement in early January 1998, McGrath spoke at length with Stuart by telephone on January 22 and was provided detailed information about the reasons why Tucson was selected for closure. Significantly, at the conclusion of the call, no request for further information or bargaining was made. Instead, McGrath informed Stuart that he disagreed with AT&T’s decision regarding Tucson and that he intended to “push this issue up the line” by contacting two of Stuart’s superiors. And, as stated above, Stuart gave no indication that AT&T would refuse another CWA request to pursue the matter further.

As the judge recognized, in determining whether McGrath acted with due diligence, “it is important to focus on what McGrath did and did not do following this conversation.” What McGrath did was to file an unfair labor practice charge on January 26 alleging that AT&T violated Section 8(a)(5) on January 6 by unilaterally “announc[ing] its intention to close” the Tucson facility. On its face, this charge constituted nothing more than a simple protest of the January 5 announcement, which (as we have held) did not present the Union with an unlawful *fait accompli*. Although, in other cases, the Board has found that the filing of a refusal-to-bargain charge served as a renewal of a union’s request to bargain,¹⁰ we do not

⁸ As noted above, the judge found that both AT&T and CWA “clearly agree that Article 24 of the contract initially permits [AT&T] to make a decision that results in a determination to surplus one or more employees.” ALJD at sec. III,C, par. 1. Similarly, the judge found that “[b]oth [AT&T Employee Relations Vice President] Burk and [CWA’s] Irvine agree that Article 24 permits the Respondent to make the initial decision to declare a surplus, and governs the subsequent formalized procedure which may ultimately result in the ‘venting’ of the workforce.” ALJD at sec. III,B, par. 22. We disagree with the judge’s conclusion that CWA’s Irvine “agreed” to this interpretation of art. 24. Rather, Irvine’s testimony, while ambiguous in part, suggests that CWA viewed art. 24 as governing bargaining only over the *effects* of any decision to lay off employees. Given our basis for dismissing the failure-to-bargain allegation, we conclude that the judge’s mischaracterization of CWA’s view of art. 24 is harmless error.

⁹ Similarly, we do not regard the WARN notice that AT&T provided State and local officials as indicating that AT&T had no intention of changing its mind. The notice, which was required by law, was necessary for AT&T to preserve its position that it planned to close the Tucson facility on March 7. The notice itself stated that the employees would be separated on March 7 “unless you are notified otherwise,” suggesting that the decision was not irrevocable.

¹⁰ E.g., *Sewanee Coal Operators Assn.*, 167 NLRB 172 fn. 3 (1967), *enfd.* denied on other grounds sub nom. *Tennessee Products & Chemical*

believe that the record, fairly considered as a whole, will support such a finding here. This is so because of what McGrath “did not do following [the January 22] conversation.” Specifically, McGrath did not follow up on his expressed intention to request bargaining with Stuart’s superiors in AT&T management, did not request bargaining with any other AT&T official, and did not renew his request for information. In addition, McGrath did not use the procedure available to him under article 24 to “offer the Company, in writing, a plan to accomplish the force adjustments deemed by the Company to be required.” Although we are not deciding whether article 24 constituted a waiver of any statutory right to bargain CWA may have had, McGrath’s failure to invoke the widely used article 24 procedure is a telling indication of his lack of due diligence in seeking to persuade AT&T to change its Tucson decision.

Given McGrath’s unexplained departure from his announced plan to “push this issue up the line” and given his avoidance of a contractual procedure that was as common to the parties as “popcorn [in] a popper,” we cannot say that AT&T violated Section 8(a)(5) by failing to volunteer to bargain over the Tucson closure after the unfair labor practice charge was filed.

In sum, under the precedent cited above, a union must exercise due diligence to ensure that its demand to bargain is continuous. Under all the circumstances, we conclude that there was a lack of due diligence on McGrath’s part here following the January 22 conference call. Accordingly, we shall dismiss the complaint in its entirety.¹¹

Corp. v. NLRB, 423 F.2d 169 (6th Cir. 1970), cert. denied 400 U.S. 822 (1970).

¹¹ Chairman Hurtgen agrees with his colleagues that McGrath’s course of conduct demonstrated a lack of due diligence in pursuing bargaining about AT&T’s Tucson decision. As an additional basis for dismissing the failure-to-bargain allegation, Chairman Hurtgen would apply a “contract coverage” analysis, as set forth by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (1993). As he has said stated elsewhere (see, e.g., *Mt. Sinai Hospital*, 331 NLRB 895 (2000)), where, as here, a contract clause is offered as a defense, the Board’s task is simply to interpret the language of the clause. Chairman Hurtgen would find, therefore, that art. 24 permits AT&T to decide to lay off employees without initially bargaining with the Union about the decision, and then provides for a 45-day window thereafter for the Union to attempt to alter the initial layoff decision through bargaining, if it so chooses. Because the Union failed to abide by the time limits set out in art. 24, no failure-to-bargain allegation can rest against AT&T.

Member Bartlett has not previously addressed whether he would apply the D.C. Circuit’s “contract coverage” analysis, rather than the “clear and unmistakable waiver” standard applied under current Board precedent, in evaluating whether a contract clause waives the union’s right to bargain. The issue is currently pending before the Board in other cases. For example, the Council on Labor Law Equity (COLLE) has filed an amicus curiae brief in *Bath Iron Works Corp.*, Cases 1–CA–36658, et al., urging the Board to adopt the D.C. Circuit’s “con-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

Mitchell S. Rubin, Esq. and *William Mabry, III, Esq.*, for the General Counsel.

James Cutlip, Esq. (Cutlip & Associates), of Glen Ridge, New Jersey, for the Respondent.

Michael McGrath, President, Communications Workers of America, Local 7026, of Tucson, Arizona, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Phoenix, Arizona, on September 1, 2, and 3, 1998, and March 23, 24, and June 22, 1999. Communications Workers of America, Local 7026, AFL–CIO (the Local Union) filed the initial charge on January 26, 1998, and an amended charge was filed by the Local Union on April 23, 1998. Thereafter, on April 29, 1998, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by AT&T Corp. (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), and on August 13, 1998, the Regional Director issued an amended complaint and notice of hearing. The Respondent, in its answer to the complaint and amended complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

The Respondent is a Delaware State corporation engaged in the business of providing telecommunications services, and maintains offices and facilities throughout the United States. In the course and conduct of its business operations the Respondent annually provides services valued in excess of \$50,000 to customers located throughout the United States. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

tract coverage” analysis. As it is not necessary to reach the issue in this case, and in order to avoid further delay in issuing the Board’s decision, Member Bartlett will defer judgment on the issue to another case.

¹ The exhibits in this proceeding are covered by a protective order issued by the me, and no exhibits are to be furnished to outside sources pursuant to the Freedom of Information Act (FOIA) or pursuant to other requests.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times both the Local Union and the International Union, of which the Local Union is a constituent member, has been labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with the International Union or its designee, and by failing to provide the International Union or its designee with requested information necessary for the purposes of collective bargaining.

B. *The Facts*

The parties to this proceeding agree that they have enjoyed "an extremely cooperative" collective-bargaining relationship over an extended period of time and throughout many successive collective-bargaining agreements. The International Union represents a single-nationwide unit of some 55,000 employees who are members of constituent local unions of the International Union, such as the Charging Party herein,² and are covered under the provisions of a single-nationwide collective-bargaining agreement. Thus, neither the Local Union herein nor any other constituent local union represents a distinct appropriate unit for the purposes of collective bargaining.

Approximately 1000 of these employees currently work at seven facilities located throughout the United States, as operators in the Respondent's toll free directory assistance division (TFDA). These operators assist customers who call TFDA (1-800-555-1212) and request toll-free 800 telephone numbers. The customers they assist may be located anywhere, as each information call is routed through one of two centralized "switches" and is automatically directed to the operator, wherever located, who has been "off line" for the longest period of time. Thus, for example, an operator at a TFDA facility in Pensacola, Florida, may assist a customer calling from California. In this regard, the work of all the TFDA operators nationwide is entirely fungible.

Due to increasing competition in the telephone industry in general and, in particular, as a result of telephone information services offered by other entities and sources such as internet providers and CD-ROM-purchased directories, the Respondent has, over a period of several years, sought to reduce its costs within its TFDA division in a variety of ways: It has hired part-time "term" and "temp" employees to reduce costs, as such employees are generally at the lower end of the pay scale and do not receive the same benefits as regular full-time employees; it has offered incentives to employees to voluntarily leave the Respondent's employ; it has expanded some facilities to take advantage of economies of scale; and it has closed other facilities.

² The International Union has not entered an appearance in this proceeding.

The layoff, or "surplusing" of some 106 TFDA operators at the Respondent's Tucson, Arizona TFDA facility, resulting in the closure of that facility, is what caused the Local Union herein to file the instant charge in this proceeding. These employees were laid off because of the anticipated immediate introduction of voice recognition automated technology with the capability of automating some 12 percent of the calls received by TFDA on a nationwide basis. Thus, with this technology in place, the most frequently requested numbers would no longer be handled by an operator at all, or would be automated to a lesser extent so that an operator's time in handling such a call would be reduced.

The Respondent determined that it was more cost effective to close a single facility rather than to distribute the reduction in force among all of its facilities. Tucson, rather than some other TFDA facility, was selected by the Respondent to be closed for primarily the following reasons: because the number of operators at Tucson more closely matched the number of operators who would be replaced by the new technology; because the productivity of the Tucson operators was lower and the associated unit costs were higher than comparable costs at certain other locations; and because the Respondent, owning the building in which the Tucson facility was housed, was thereby not committed to a long-term lease arrangement.

Both the manager of the Respondent's Tucson facility, Catherine Berry,³ and the president of the Local Union herein, Michael McGrath, were very much aware that the Tucson facility was a likely target for closure. Thus, it was widely known that the aforementioned demands of competition, the Respondent's preference to cut costs by conducting its TFDA operations from megacenters, and the introduction of innovative voice recognition automation technology, placed less productive or more expendable TFDA facilities in a highly vulnerable and precarious position.

Both Berry and McGrath understood that those facilities with the most employees, and thus the ability to handle the greatest call volume, were more likely to survive the downsizing that was taking place. This downsizing had resulted in the recent closing of the Allentown, Pennsylvania TFDA facility.⁴ Further, due to incentives provided by the Respondent on a nationwide basis, some 34 longtime and highly productive operators at the Tucson facility had elected to voluntarily leave the Respondent's employ. This not only left the Tucson facility with many fewer employees, thus reducing its "critical mass," but also caused the production statistics of the remaining employees, and associated costs, to be adversely affected. Thus, employees who, coincidentally, happened to have the highest absentee rate and because of this were unable to secure other employment,⁵ or otherwise elected not to take advantage of the

³ Berry, called as a witness by the General Counsel, left the Respondent's employ on June 30, 1998, shortly after the Tucson facility was closed.

⁴ The closure of this facility was announced on October 14, 1997. This closure affected 53 employees covered under a contract between the Respondent and the IBEW.

⁵ Many operators with the best records and least absenteeism were permitted, under the terms of the collective-bargaining agreement, to

incentive to quit, remained at the Tucson facility; this resulted in a concomitant reduction in the positive factors that the Respondent utilized to evaluate and compare the efficiency and costs at each of its TFDA facilities.

As a result of the foregoing, Berry and McGrath closely collaborated in an effort to suggest a plan that they believed would provide Respondent's upper management with a reason to hire employees and increase the size, and therefore the call volume, of the Tucson facility, while at the same time reducing the unit cost per call as compared with the other facilities. Thus, if lower-cost part-time or term employees could be hired, this would have the effect of reducing the unit cost or cost per call handled.⁶ Apparently, qualified employees who would be willing to work on a part-time basis at entry-level wages and benefits were not readily available, and McGrath conceived the idea of offering, as an incentive, "Alliance"⁷ funds in the amount of \$5000 for each employee. This would not lower costs to the Respondent, but hopefully would have the beneficial effect of inducing college-age children of current employees to work for the Respondent by permitting them to enroll in college courses at Alliance's expense.

On November 22, 1997, McGrath wrote to Robert Stuart, division manager for TFDA, in order to set up a meeting "to discuss the future of the Tucson 800 TFDA office." The letter continues as follows:

After numerous conversations with Kitty [Tucson manager Catherine Berry], it appears that in an effort to provide Tucson's operators with opportunity [to leave the Respondent's employ] we may have inadvertently placed this office in a precarious position. OTP [the contractual procedure whereby employees were offered incentives to leave the Respondent's employ] and an intense effort to prepare operators for openings at Lucent, have left this office somewhat disadvantaged. Certainly, no one wants opportunity like we have worked so hard for to actually be a deterrent. However, with the loss of many fine operators, I am concerned that the actual numbers in this office are askew, specifically absence and expense. While I realize that there are no "magic pills" to remedy this situation, I do believe that now is the time to do something positive for our members while concurrently assisting this office to improve results. Clearly, this Local's goal is to grow the office, however, I do not believe that to do this we must engage in a zero-sum game.

Bob, locally, I believe we have a relationship that can accomplish a great deal for both of our organizations. I have asked Kitty to assist in coordinating this meeting and I would ask that she participate in the discussion around

obtain positions at Lucent Technologies, a spinoff of the Respondent, and were given preference for such positions with that entity.

⁶ This was not an innovative idea, as the Respondent had utilized this method of reducing costs at other facilities.

⁷ "Alliance" is a distinct corporation established by the Respondent, the International Union, and the International Brotherhood of Electrical Workers (a union that also represents certain employees of the Respondent), for the purpose of providing educational, training, and job placement funds for qualified employees of the Respondent.

the possibilities at hand. Thank you in advance. Hope to hear from you soon.

And 4 days latter, on November 26, 1997, McGrath wrote a followup letter to Stuart as follows:

After talking with Kitty⁸ I am concerned that my last letter to you may have been too vague. Allow me to expound on a couple of the ideas that I have for the Tucson office.

Earlier I spoke of a possible fix for the issues of absence and overhead. While I believe that an increase of Operators here in Tucson would have an inverse effect on the absence index I realize that the departments [sic] overhead must enter into this equation. Consider this, if we could come to agreement it may be possible for us to trial a program that would reduce and eventually eliminate the use of Regular Part-Time by replacing them with Term Part-Time. At first blush I'm sure that this doesn't sound very earth shattering. However, if we then replace the benefit load on the department and move it to the Alliance we gain possibilities.

Terms of 20-hour classification clearly reduce overhead and terms who receive educational assistance would certainly understand and accept their role as temporary if in fact the larger goal was to receive an education. Additionally, if those Terms came from the households of this Local's 1000 members, we move the discussion of absence from the managers [sic] office to the dinner table. In fact, if we were unsuccessful in obtaining the needed numbers through the local we could do a blitz (with a good PR spin) at the local colleges. In Tucson we have access to over 35,000 college students attending the University of Arizona and Pima Community College. We may even be able to partner with the community and some of the high schools to fill the need. Understanding that the "devil is in the details," and we definitely need more dialogue on the issues at hand, I believe all of this to be workable. Bob, our issues are strictly selfish, we want to maintain a secure, growing presence at AT&T in order to maintain viable employment for our members. With that in mind we tend to do a lot of our work "out of the box." I hope that this helps to clarify some of our positions and that they will not be rejected out of hand. I still look forward to face-to-face discussion, as there may be circumstances out of our control which could affect any decisions we make.

McGrath received no response from Stuart. Rather, about mid-December 1997, the Respondent announced that the Tucson TFDA office would be closing, and on December 30, 1997, pursuant to WARN Act (Worker Adjustment and Retraining Notification Act) requirements, various Arizona State and city officials were notified by the Respondent's director-government affairs "that on January 6, 1998, the Company will order a permanent plant closing at the site of employment known as Business Communications Services, located at 112 E. Alameda,

⁸ On the same date Berry also wrote a letter to Stuart supporting McGrath's ideas and including reasons of her own for continuing Tucson as a viable office.

Tucson, Arizona 85711-4028. . . . A total of 106 occupational employees (84 full time, 22 part time) are facing employment loss. Unless you are notified otherwise, the employees will be separated on March 7, 1998.”

On the evening January 5, 1998, the Respondent faxed the International Union a five-page document entitled “CWA Notification of Surplus,” notifying the International Union that as of January 6, 1998, some 490 unit employees located at various facilities, including the 106 Tucson TFDA employees,⁹ were being declared “surplus”¹⁰ and that their “Resolution Date,” that is, apparently, the date of their final day on the job, would be March 7, 1998, exactly 60 days after the January 6, 1998 written notification. What transpired after this notification was given provides the gravamen of the instant complaint.

McGrath phoned Stuart on about January 12, 1998, and left a message that he wanted to talk with Stuart about the decision to close Tucson. Stuart returned McGrath’s call on January 15, 1998, and McGrath reiterated that he wanted to talk to him about the decision. Stuart was agreeable and said that since the decision to close Tucson was based on purely budgetary considerations it would be necessary to have Diane Haynes involved in the conversation.¹¹ There was some discussion about arrangements for a face-to-face meeting but, as events transpired, the parties agreed to meet by conference call. This teleconference meeting was held on January 22, 1998: Stuart was in Indianapolis, Haynes was in her office in St. Louis, and McGrath and Berry were in Berry’s office at the Tucson TFDA facility on a speakerphone. The conference call lasted between 40 minutes and 1 hour. Only Stuart and McGrath spoke during the substance of the meeting. Haynes took copious notes, and Berry, apparently, merely listened.

Stuart, who at the time of the hearing herein was no longer working for the Respondent, did not testify in this proceeding.¹² Haynes, subpoenaed and called as a witness by the General Counsel, recounted the conversation in detail, using her notes to reconstruct the sequence and substance of the conversation.

This is not a surface bargaining case. The principal issue in this proceeding is simply whether Stuart’s failure to provide certain written information requested by McGrath during this call is violative of Section 8(a)(5) of the Act. Thus, it appears unnecessary to specifically recount the conversation.¹³ During

the conversation there was detailed discussion of the reasons why the Respondent selected the Tucson facility for closure. There is no contention that Stuart did not specifically answer each of McGrath’s inquiries regarding every point raised by McGrath, including the Respondent’s budgetary constraints, the reasons why McGrath’s ideas to hire part-time employees and increase the size of the Tucson office were not adopted by the Respondent, the reasons for the selection of Tucson, the reasons for not selecting some other facility for closure rather than Tucson, the reasons for not surplus-ing an equal number of operators from each facility rather than closing the Tucson facility, and any other matters that McGrath was interested in discussing.

At approximately the midpoint of the conversation the discussion apparently centered on the physical real estate that housed certain TFDA offices, and whether such property was owned or leased by the Respondent. Also, apparently during this segment of the discussion, McGrath asked to see the “decision charts” that the Respondent had prepared to aid its decision-making process.¹⁴ In response to McGrath’s request for written documentation, Stuart replied that such information was proprietary.¹⁵ McGrath said that he would keep it proprietary, and Stuart responded, according to the credited testimony of Haynes, that he would verbally share the proprietary information with McGrath. Thereupon, I find, Stuart proceeded to verbally furnish this information to McGrath, in considerable detail, and the conversation continued on for an additional 20 or 30 minutes, during which time McGrath did not renew his request for documents to substantiate the information that Stuart was verbally providing. At no time did McGrath ask Stuart to slow down or repeat anything so that McGrath could include it in his notes; nor did he tell Stuart that he simply could not comprehend the ideas or statistics and metrics that Stuart was presenting to him; nor did he request a further meeting, either face-to-face or by conference call.

Insofar as the record shows, Stuart verbally gave McGrath all the information he requested, and was willing to discuss the matter for as long as McGrath wanted to continue the meeting. McGrath, apparently feeling that continued discussion would not be helpful as Stuart had stated that his superiors had made the decision to close Tucson and it was out of his hands, elected

⁹ There is some confusion in the record as to whether 106 or 108 employees were declared surplus.

¹⁰ At that time the Respondent had decided to surplus many additional non-TFDA employees who performed a variety of jobs in various facilities throughout the country; however, the instant case concerns only the 108 Tucson TFDA employees who were declared surplus.

¹¹ Haynes, until her retirement on June 30, 1998 (the same day as Berry), reported to Stuart and, as district manager for all of the staff support functions, was very conversant with budgetary matters and the various considerations that resulted in the decision to close Tucson.

¹² As Stuart was equally available to both the Respondent and the General Counsel, no adverse inference may be drawn from the Respondent’s failure to call Stuart as a witness. See *Reno Hilton*, 326 NLRB 1421 fn. 1 (1998).

¹³ I credit the account of the conversation given by Haynes who took seven pages of contemporaneous notes and had a clear understanding of the issues being discussed as she had been involved in the decision-making process. McGrath was clearly preoccupied with listening to

Stuart and thus was able to take only a page of notes which, he admitted, he did not totally understand; moreover, McGrath claimed that he did not understand many of the things that Stuart was discussing.

¹⁴ It is not clear from the record precisely what these charts are or specifically what documents McGrath was requesting.

¹⁵ At this point, according to McGrath’s testimony, he advised Stuart that “nothing was proprietary in bargaining,” and Stuart said something about his reluctance to give McGrath any documents that may be furnished to International Vice President Jim Irvine, as Irvine might, during the course of contract bargaining which was scheduled to commence some months later, show them to Thomas Burk, employee relations vice president. McGrath did not understand the point that Stuart was trying to make. It appears that Stuart was telling McGrath that if Irvine gained access to proprietary information without Burk’s knowledge and presented it during the course of contract negotiations, this might surprise Burk and/or embarrass Stuart. In any event, it appears that this aspect of the conversation is not important to the issues herein, and the General Counsel did not ask Haynes any questions about it.

not to pursue the matter further with Stuart. Rather, according to Haynes' account of the telephonic meeting, McGrath ended the conversation by advising Stuart that he did not agree with the Respondent's decision, and that he intended to "push this issue up the line" first by contacting Stuart's superior, Vice President Ray Robinson, and after that by contacting Robinson's superior, Dick Falcone, the head of the TFDA business unit. According to Haynes the "issue of bargaining did not come up on this call," as "the reason of the conference call was to provide information so that Mike [McGrath] could understand why Tucson was closed over some other office."

Several days after the meeting, Stuart sent a memo, dated January 26, 1998, to Robinson, advising him of the conversation with McGrath and detailing the substance of that conversation. The memo begins as follows: "Dianne Haynes and I had a discussion with Mike McGrath, Tucson CWA president, concerning the decision to close Tucson. Mike wanted the rationale on 'Why Tucson?'" The memo concludes as follows: "The bottom line is that Mike [McGrath] understands our rationale but doesn't like the conclusion. Mike will no doubt call you and/or Mr. Falcone to discuss the issue."¹⁶ There is no reference in this memo to McGrath's request for documents.

It is important to focus on what McGrath did and did not do following this conversation. He did not call either Robinson or Falcone to continue the discussion, even though he claims that he did not understand everything that Stuart had told him. And he did not renew his request, either verbally or in writing, for written information even though in the course of his responsibilities as an experienced Local Union president he was well aware of the customary method for requesting documents by sending the Respondent a written request for information on a standard information request form that the Local Union expressly used for such purposes. Rather, McGrath telephoned International Union Vice President James Irvine and asked him for advice. Irvine advised him of an analogous situation involving the 1996 closure of a facility in Seattle, Washington, and suggested that he contact a local union official in Seattle to find out how that matter was handled. McGrath did so.¹⁷ Then, on January 26, 1998, McGrath filed the initial charge in this matter, as follows:

On or about January 6, 1998, the employer announced its intention to close the Tucson Toll Free Directory Assistance office. This announcement had the effect of unilaterally changing the wages, hours, and working conditions of the employ-

¹⁶ The body of the memo sets forth the points that were made by Stuart, and is of importance to show that in fact Stuart presented the Respondent's rationale in substantial detail and shared an abundance of information with McGrath. But for the possible proprietary nature of some of the information contained therein, this memo would be set forth in its entirety in this decision to demonstrate that the information provided by Stuart to McGrath was detailed and extensive.

¹⁷ McGrath did not relate the details of his conversation with this individual; however, it is clear from the record evidence that the announcement of surplus in Seattle and the closing of that facility was handled by representatives of the International Union and the Respondent under the provisions of art. 24 of the collective-bargaining agreement, *infra*.

ees. This action taken by the employer was without first giving adequate notice to the union or the opportunity to bargain.

Article 24 of the collective-bargaining agreement between the parties is entitled "Force Adjustment-Layoff-Part-timing, and Recall." It has remained in the contract without change for many years and provides the mechanism whereby employees are laid off and declared surplus. It is a highly important and frequently utilized contractual provision. Indeed, according to Employee Relations Vice President Burk, some 75,000 employees have been declared surplus under article 24 within the last 5 years.¹⁸ And, according to James Irvine who, as vice president for CWA's communication and technology division, is Burk's counterpart and the spokesperson for national bargaining for both the CWA and the IBEW, the Respondent's declarations of surplus under article 24 of the contract "pass through our office like popcorn through a popper."

Article 24, in pertinent part, is as follows:

(b) In the event that further force adjustments by means of layoff *are deemed by the Company to be necessary*, the Union shall be advised by the Company as to its proposed plan for accomplishing such further force adjustments sixty (60) days before the adjustment is to become effective. During the first forty-five (45) calendar days of the sixty (60) day period, the Union may offer the Company, in writing, a plan to accomplish the force adjustments deemed by the Company to be required. If the Union's plan meets the foregoing requirements, the Company agrees to consider the plan proposed by the Union. If no such written plan is received by the Company from the Union within the said forty-five (45) days, or if the parties are unable to agree upon a plan, the Company will proceed with the force adjustments according to the plan the Company proposed. [Emphasis added.]

Both Burk and Irvine agree that article 24 permits the Respondent to make the initial decision to declare a surplus, and governs the subsequent formalized procedure which may ultimately result in the "venting" of the work force. Burk and Irvine also agree that, while article 24 does not specifically so state, it is understood and interpreted to mean that the Respondent may, without first notifying or bargaining with the International Union, make a decision to surplus employees and declare a surplus for any reason, and thereupon the International Union,¹⁹ once the declaration of surplus is given, has a 45-day window of opportunity to bargain over the decision and/or the effects of the decision,²⁰ and attempt to cause the Respondent to

¹⁸ This does not mean that all of the employees declared surplus have left the Respondent's employ.

¹⁹ It is understood that International union representatives or individuals such as Local Union representatives designated and authorized in writing by International union officials may be included within the bargaining committee established to bargain over the matter.

²⁰ As a practical matter, the "effects" of the decision, that is, the rights, benefits, and continued job opportunities of the employees selected for surplus, are governed by extensive contractual provisions giving employees bumping, layoff, retirement, and other privileges which the employees must exercise within the 45-day window period;

modify or rescind its decision. Burk acknowledged that during this 45-day period the Respondent is required to bargain with the International Union in good faith within the meaning of the Act, and that this obligation encompasses the furnishing of any pertinent information requested by the International Union that would enable it to fulfill its bargaining obligations to its members.²¹ Further, it is clear that article 24 establishes the parameters of the parties' respective duties and obligations regardless of the number of employees declared to be surplus and regardless of whether the surplus results in the closure of a facility. And it also is clear that, as has happened in the past, once the parties commence bargaining within the framework of article 24, the time periods and requirements specified therein may be modified by specific agreement of the parties. Thus, the 45-day or 60-day time periods may be extended, and an agreed on verbal plan may be deemed to be a satisfactory alternative to a written plan. In short, the strictures of article 24 may be modified by mutual agreement of the parties in accordance with the exigencies of the situation.

As noted above, the Respondent's January 6, 1998 declaration of surplus commenced the 45-day period during which the International Union could request information and/or initiate bargaining over the Respondent's decision to close the Tucson facility. No such request was forthcoming, and the employees were apparently laid off 60 days later, on March 7, 1998, as the International Union had been initially advised.

It was not until April 23, 1998, some 4 months after the filing of the initial charge and some 6 weeks after the closure of the facility, that McGrath, on behalf of the Local Union, filed an amended charge in this matter pursuant to the request of the Regional Office. This amended charge contains two significant changes from the initial charge. Thus, unlike the initial charge which does not mention the International Union, the amended charge alleges that the Respondent refused to bargain with the "International Union" with regard to the Respondent's intention to close the Tucson facility, and further alleges that "[s]ince on or about January 22, 1998, the Employer has refused to supply the International Union information relevant and necessary for the handling of its representational duties." The complaint herein was issued by the Regional Office 6 days thereafter, on April 29, 1998.

Analysis and Conclusions

Both the Respondent and the International Union, the only two parties to the contract, clearly agree that article 24 of the contract initially permits the Respondent to make a decision that results in a determination to surplus one or more employees. Thereupon, the International Union may elect to accept the

thus, bargaining regarding the "effects" of any decision to surplus employees is largely a moot point.

²¹ It is clear from the record herein that the Respondent fully understands its duty to furnish relevant information to union representatives even though such information may be proprietary; however, the Respondent is very much concerned about leakage of such information to outside sources, and therefore attempts to maintain tight control over which union representative and/or department, such as the International Union's research department, is in possession of specific proprietary information.

Respondent's decision by doing nothing and letting the provisions and time constraints of article 24 proceed to their intended conclusion, or by demanding information and/or bargaining and challenging the decision in an effort to cause the Respondent to rescind or modify its declaration of surplus and thereby, for example, to keep one individual from being terminated or to keep an entire facility from being closed. Clearly, in this manner the International Union is provided with an established forum in which to represent its membership in the event of anticipated plant closings or any other situation that could result in loss of employment. Article 24, as negotiated, understood and interpreted by the parties, is simple and it works: It benefits the International Union by eliminating potentially lengthy litigation over what is and is not a mandatory subject of bargaining,²² it benefits the Respondent by establishing time parameters so that important business decisions may be made and bargained expeditiously, and it gives the effected employees a definitive and proscribed amount of time in which to pursue alternatives under other contractual provisions.

It is the Board's established practice to give "controlling weight" to the "parties' actual intent underlying the contractual language in question."²³ Here there can be no doubt as to the parties' intent. For many years the provisions of article 24 have fairly, expeditiously and with certitude governed the affairs and obligations of the parties in similar circumstances. I therefore find without merit the General Counsel's argument, unsupported not only by the record evidence but also apparently by the International Union, that article 24 is inapplicable to the instant situation.

Having found that article 24 establishes the parameters of the parties' bargaining obligation governing the closure of the Tucson facility, I further find that the International Union or its designee has failed to request bargaining under article 24. As set forth above, the initial charge herein filed by McGrath as president of the Local Union states as follows:

On or about January 6, 1998, the employer announced its intention to close the Tucson Toll Free Directory Assistance office. This announcement had the effect of unilaterally changing the wages, hours, and working conditions of the employees. This action taken by the employer was without first giving adequate notice to the union or the opportunity to bargain.

This charge clearly lacks merit, as the language and established intent of article 24 gives the Respondent the right to make the initial decision to surplus employees, and the Respondent need not, in the language of McGrath's charge, "first [give] the [International Union or its designee] the opportunity

²² See, for example, the instant case where the Respondent takes the position that if art. 24 does not govern this situation, then the Respondent has no bargaining obligation herein as the matter of technological innovation and capital outlays for automation technology is not a mandatory subject of bargaining under *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964); and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). See also *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enfd.* in relevant part sub nom. *Food & Commercial Workers Local 150 A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. denied* 511 U.S. 1138 (1994); *Sands Hotel & Casino*, 324 NLRB 1101 (1997).

²³ *Conoco, Inc.*, 318 NLRB 60 (1995).

to bargain.” Rather, Respondent’s bargaining obligation does not attach until *after* the Respondent’s initial decision has been made. The International Union did nothing to initiate bargaining,²⁴ and, assuming arguendo that McGrath was the designee of the International for purposes of bargaining under article 24, McGrath simply elected not to pursue the matter. I shall dismiss this allegation of the complaint.

It is clear that Stuart understood that the January 22, 1998 conference call meeting with McGrath was for the purpose of providing McGrath with information and justification for the Respondent’s decision to surplus all the Tucson employees and close that facility pursuant to the Respondent’s January 6, 1998 notification. Both McGrath and Stuart were highly conversant with article 24. Stuart, a middle-management person, had no authority to bargain on behalf of the Respondent under article 24, and McGrath, insofar as Stuart was aware, was simply a local union representative seeking information about the matter. Stuart had absolutely no reason to even remotely divine that perhaps McGrath was really an authorized designee of the International Union and was attempting to bargain about Tucson under article 24. Indeed, if McGrath had made any such claim to Stuart, then clearly Stuart would have simply advised him that he was talking with the wrong person, and that McGrath should have International Union Vice President Irvine contact Employee Relations Vice President Burk as these are the individuals who bargain under article 24 about a “plan” to cause the Respondent to modify or rescind a declaration of surplus.

Stuart, I find, was highly cooperative, and furnished McGrath with all pertinent information during the conversation. At the approximate midpoint of the conversation McGrath requested certain “decision charts” and perhaps underlying information in writing, and Stuart, maintaining that the information was proprietary, declined the request to furnish documents, but went on to verbally share this information with McGrath. This, I find, was a reasonable attempt to accommodate the Respondent’s proprietary concerns and the Local Union’s request for the information.²⁵ Indeed, as McGrath had been verbally provided the information, he was then in a better position to assess its importance in order to decide whether the documents would be useful for his purposes. However, during the ensuing 20- or 30-minute discussion, McGrath never made another request for such information. And it was not until McGrath filed the amended charge in this matter on April 23, 1998, about a month after the Tucson facility had been closed, that McGrath belatedly alleged that 5 months earlier, on January 22, 1998, the Respondent had refused to provide him and/or the International Union with information.

I find that at the end of the January 22, 1998 telephonic meeting, Stuart could have reasonably believed, had he given the matter any more thought, that McGrath was satisfied with the verbal information provided to him, and that McGrath was

not continuing to request written information. Moreover, McGrath had informed Stuart that he intended to proceed up the chain of command and contact Stuart’s superiors about the matter; thus, Stuart could have reasonably believed that in the event that McGrath was dissatisfied with the manner in which Stuart accommodated McGrath’s request for information, McGrath could renew his request at a higher level of management. Nor does the filing of the initial charge by McGrath several days later amount to a renewed request for information, as the charge is silent with respect to any refusal to furnish information, and would not have reasonably put the Respondent on notice that the charge was, in effect, a request for information. I find that under these circumstances, in the absence of some renewed request by McGrath that would constitute reasonable notice of a demand for information, Stuart, who had accomplished his purpose of candidly and thoroughly providing McGrath with the Respondent’s rationale for deciding to close Tucson, had no further obligation to McGrath. It was simply not incumbent on Stuart or the Respondent to do anything further. Therefore, I shall dismiss this complaint allegation.²⁶

Moreover, even assuming arguendo that McGrath was an authorized International Union designee and was, in fact, engaged in article 24 “bargaining” with Stuart during their discussion,²⁷ it is clear that McGrath simply “dropped the ball” by failing to pursue the matter through the managerial hierarchy as he had advised Stuart he intended to do. Clearly, bargaining must be initiated or continued by an appropriate demand to bargain. As noted above, the parties agree that they have maintained an excellent bargaining relationship over the years, and insofar as the record shows the Respondent has never refused an appropriate bargaining request.²⁸

McGrath, during his testimony herein, emphasized that the requested information was highly relevant, that without it he was unable to fulfill his duties as a Local Union representative and/or an International union designee, and that his inability to speak “Apache” (meaning that much of the statistics and metrics provided by Stuart were foreign and incomprehensible to him) placed him at a distinct disadvantage during the discussion. Further, McGrath claimed that he needed the information so that he could furnish it to the International’s research department in Washington, D.C. for detailed analysis in order that the research department could, in turn, make sense of it and formulate an alternative solution that would save the Respondent some \$2.5 million and thus save the jobs of the Tucson operators.²⁹

²⁶ See, for example, *Rebbie Storage & Moving Co.*, 313 NLRB 510, 513 (1993); cf. *GTE Southwest, Inc.*, supra.

²⁷ McGrath testified that in October 1997, Irvine had verbally empowered him to propose to Stuart the ideas contained in McGrath’s aforementioned letters to Stuart, and that after January 6, 1998, Irvine had further verbally empowered him to do whatever was needed to keep Tucson from closing.

²⁸ Indeed, in response to Irvine’s belated June 1998 request to bargain over the matter, Burk responded affirmatively and agreed to bargain even though the facility had been closed. The record does not show whether, in fact, any such bargaining took place.

²⁹ In this regard McGrath testified that during the January 22, 1998 conversation, Stuart stated that if McGrath could find a way to save the

²⁴ It was not until June 17, 1998, about 3 months after the closure of the Tucson facility that Irvine first raised this matter with Burk: Irvine’s several letters to Burke, sent after the complaint herein had been issued, are belated, self-serving, and patently transparent communications, in the nature of position statements, which are simply designed to bolster the Local Union’s posture in this matter.

²⁵ *GTE Southwest, Inc.*, 329 NLRB 563 (1999).

I do not credit McGrath's assertions. It is inconceivable that McGrath, an astute and experienced union representative, would attach such importance to information without specifically requesting it in writing during the critical 45-day period, as provided in article 24, when the union members he represented were preparing for their layoffs. This is not conduct characteristic of a knowledgeable union representative who is anxious to obtain allegedly critical information and who, immediately following Stuart's reference to the proprietary nature of the information, claims that he retorted that "nothing was proprietary in bargaining." Rather, I find that McGrath was abundantly aware that neither the Local Union nor the International Union could conceivably devise any plan under article 24 to cause the Respondent to change its mind about the introduction of voice recognition technology which would automate, and thereby eliminate, over 12 percent of the TFDA jobs,³⁰ and that, having been verbally given the information, he was not at all interested in obtaining the information in documentary form because he knew that it would be of no use to him.³¹

What really happened here should be perfectly apparent to all parties and may be reasonably adduced from the record evidence. The inaction of representatives of both the Local Union and the International Union is not the result of inattentiveness, or unfamiliarity with the collective-bargaining agreement, or lack of knowledge about how to obtain relevant bargaining information. These are competent, experienced, sophisticated union representatives, with a duty to safeguard the rights and protect the positions of thousands of employees, and they are fully aware of the arsenal of means available to them to accomplish this end. They are intimately familiar with the workings of article 24, and understand that this provision establishes the bargaining parameters for such surplus situations. They know that article 24 establishes a very effective forum for obtaining information and for attempting, through bargaining,

Respondent \$2.5 million then Stuart would not close Tucson. I find that if Stuart made such a statement it was merely to emphasize that McGrath, who was arguing for the addition of some 68 new part-time employees for Tucson while the Respondent, due to voice recognition automation, had decided to eliminate some 108 employees and close the facility, was simply deluding himself if he believed his ideas presented a viable solution to the situation.

³⁰ It is important to note, as the Respondent emphasizes, that at no time has the Local Union or the International Union ever requested information or bargaining over the introduction of voice recognition technology.

³¹ As a result of an extensive subpoena duces tecum issued by the General Counsel, the Respondent has furnished voluminous information, including all information utilized by the Respondent in making and documenting its decision to close Tucson. This information was furnished to the International Union's research department for analysis well prior to McGrath's June 22, 1999 testimony herein, and neither McGrath nor the International Union has provided one iota of evidence in this proceeding that such documentary information is of any significance whatsoever in enabling either the Local Union or the International Union to formulate a viable alternative to the closing of Tucson.

to cause the Respondent to modify or rescind decisions that adversely impacted the continued employment of their members. Indeed, the International Union has utilized article 24 for this very purpose in an effort to prevent the closing of the Seattle facility. It must therefore be reasonably concluded that in the instant matter the representatives of the International Union consciously elected to refrain from pursuing these contractually established rights because they knew that they could not formulate, under article 24, any feasible alternative plan. If they had harbored even the slimmest hope that they could convince the Respondent to reverse its decision to close Tucson, certainly they would have made such an attempt under article 24, in a timely fashion, while the Tucson facility was still open and their members were still employed.

On the basis of the foregoing, I shall dismiss the complaint herein in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated Section 8(a)(1) and (5) of the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended³²

ORDER

The complaint is dismissed in its entirety.

³² 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.