

**Pieper Electric, Inc., PPC Holdings, Inc. (Single Employer) and International Brotherhood of Electrical Workers, Local 494, AFL-CIO.** Case 30-CA-15504

August 21, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On November 1, 2002, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish to the International Brotherhood of Electrical Workers, Local 494, AFL-CIO (Local 494 or the Union) certain requested information.<sup>2</sup> Specifically, the Union asked for the names of all Local 494 members who were participating or had been solicited to participate in the Respondent's Employee Stock Purchase Plan (ESPP). The basis of the Union's request was section 12.05 of the parties' collective-bargaining agreement, which restricts stock ownership by covered employees. As explained more fully below, we find that the Respondent had no duty to furnish the requested information because both section 12.05 and the ESPP concern permissive subjects of bargaining. Accordingly, by our Order, we will reverse the judge's 8(a)(5) violation finding and dismiss the complaint.

I. THE FACTS

Pieper Electric, Inc. is an electrical contractor located in Milwaukee, Wisconsin, and a member of the National

<sup>1</sup> We disagree with the judge's finding, in fn. 6 of his decision, that a union has an absolute right to police provisions of the parties' agreement. While a union has the right to police contract provisions, this does not give it the absolute right to obtain all requested information. The information must be of use in fulfilling its statutory duties. Thus, there is no duty to furnish information concerning a nonmandatory subject of bargaining.

<sup>2</sup> As used herein, the term "Respondent" refers to Pieper Electric, Inc. and PPC Holdings, Inc. as a single employer. Under the terms of a stipulation that was admitted into evidence, Pieper Electric, Inc. and PPC Holdings, Inc. deny that they are a single employer, but agree to be treated as such "for purposes of the information request at issue in the Complaint and any decision or remedial order issued and enforced by the Board or court of appeals in this case."

Electrical Contractors Association of Milwaukee (NECA), a multiemployer association consisting of approximately 100 employers. NECA and Local 494 have been parties to successive collective-bargaining agreements, to which Pieper Electric has been bound since 1977 under a letter of assent. Since the mid-1960s, those agreements have contained the following provision as section 12.05:

No employer shall allow an employee to hold and no employee shall hold stock in any shop or company employing employees covered by this agreement. Avoidance of the intent of this section shall not be allowed by pretense of ownership of stock or interest in the subject contracting business by an immediate member of the family.

PPC Holdings, Inc. (PPC) owns Pieper Electric and two other subsidiaries, and is owned in turn by its shareholders. PPC's subsidiaries include some nonunion contractors. Prior to 2000, the majority shareholder of PPC was Richard Pieper, chairman and CEO of both PPC and Pieper Electric. In a January 2000 memo to employees, Richard Pieper announced that PPC would be implementing an employee ownership program. This same memo also stated that once implemented, the ESPP would reduce Richard Pieper to a minority shareholder and give employees majority control. This announcement did not go unnoticed by the Union. In the Union's February 2000 newsletter, Local 494 Business Manager Paul Welnak remarked that "[o]ne of our employers is proposing to sell stock to his employees," and added that in his opinion section 12.05 would have to be changed before an employee ownership program could be implemented.

The then-current collective-bargaining agreement between Local 494 and NECA was set to expire May 31, 2000. During negotiations for a successor agreement, NECA proposed deleting section 12.05. Welnak responded that he would be willing to discuss NECA's proposal if Pieper Electric were not affiliated with nonunion companies. The Union ultimately rejected NECA's proposal, and section 12.05 remained a part of the collective-bargaining agreement effective June 1, 2000, through May 31, 2003.

Welnak addressed the ESPP again in the Union's August 2000 newsletter. According to Welnak, Pieper Electric was taking the position that the ESPP was not in conflict with section 12.05 because employees would buy stock in PPC, a nonsignatory company, rather than in Pieper Electric. Welnak rejected this position, stating that he was not interested in "the spider web of com-

pan[ies] that Pieper has created.” He also stated that Local 494 would view participation in the ESPP by Union members as a violation of both section 12.05 and the IBEW Constitution, and added that “charges could be filed.” At a subsequent meeting with Pieper Electric employees, Welnak said that if they purchased PPC stock, they could be put on trial by the Union, disciplined, and fined.

The salient features of the ESPP are explained in a PPC-authored document introduced into evidence by the General Counsel:

- Between \$3.5 and \$4.5 million worth of PPC stock was to be sold to employees during the January 1, 2001 initial offering. The proceeds of the initial offering were to be used to purchase stock from Richard Pieper, with the goal of reducing his ownership stake in PPC below 50%. The initial offering share price was \$20. Dividends will not be paid.
- The price of PPC stock equals its “book value,” determined annually by outside auditors. For mid-year transactions, the average change in book value over the three prior years, prorated for the portion of the year through the transaction date, is added to the most recent book value determination. For example, assume that book value is fixed annually on December 31; that during the three years ending December 31, 2003, the book value of PPC stock has increased an average of \$4 per year; and that book value on December 31, 2003 is \$32 a share. Under these assumptions, when PPC stock changes hands on March 31, 2004, the share price would be \$33.
- Only current employees of PPC’s three subsidiaries may purchase PPC stock. Employees must sell their stock back to PPC when their employment terminates, with two exceptions: laid-off employees may keep their stock up to two years and one day after layoff, and retirees may retain their shares indefinitely (although shares held by retirees convert at retirement into nonvoting stock). PPC stock cannot be bequeathed. When a stockholder dies, PPC repurchases his shares “so that the stock [can be made] available to be sold to current employees.”
- Employees were permitted to buy shares either through a lump sum payment on the

date of the initial offer, or through payroll deductions for up to two years after that date. Employees choosing the latter plan purchased stock quarterly with their accrued payroll deductions for that quarter. As stated above, stock purchased on the initial offering date cost \$20 a share. However, the cost of stock purchased through payroll deduction depended on the share price on the several quarterly transaction dates. In other words, while payroll-deduction participants were permitted to spread the cost of their stock purchases over two years, they risked paying a higher per share price than was paid by lump-sum buyers if the book value of PPC stock increased after the initial offering date. Payroll deductions for stock purchases were made from after-tax income.

The ESPP went into effect on January 1, 2001. By letter dated January 5, 2001, Welnak requested from Pieper Electric a list of all Local 494 members who were participating in the ESPP. Pieper Electric responded that it possessed no records relating to the requested information because the ESPP had been established by PPC, “a totally separate and distinct entity.” By letter dated March 12, 2001, addressed to Richard Pieper as chairman and CEO of both Pieper Electric and PPC, Welnak asked for a list of all union members who were participating or had been solicited to participate in the ESPP. Richard Pieper responded in two separate but identically worded letters on behalf of Pieper Electric and PPC, respectively, reiterating that PPC, not Pieper Electric, had established the ESPP, and observing that PPC has no collective-bargaining relationship with Local 494. Additionally, Pieper stated that he was aware of “threatening statements” Welnak had made concerning ESPP participation by members of Local 494, and added that “even if Pieper Electric possessed [the requested] information, and even if PPC Holdings were an employer obligated to provide such information, we would question the relevancy of the requested information and the legality of the request itself.”

## II. THE POSITIONS OF THE PARTIES

The Respondent denies that its refusal to furnish the requested information violated Section 8(a)(5). Its principal argument is that the names of ESPP participants were irrelevant to the Union’s duties as collective-bargaining representative because the Union’s purpose in requesting those names was to impose internal union discipline on ESPP participants. Additionally, the Re-

spondent argues that the Union was not entitled to the requested names because section 12.05 concerns a permissive subject of bargaining. In support of this contention, the Respondent points out that section 12.05 prohibits nonemployees—i.e., employees' immediate family members—from buying stock. In the Respondent's view, this aspect of section 12.05 relegates it to permissive bargaining status under *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (*Chemical Workers*). Alternatively, the Respondent takes the position that section 12.05 concerns an illegal subject of bargaining.

In his post-hearing brief to the judge, the General Counsel contended that because the requested information relates to a provision of an existing collective-bargaining agreement, it is demonstrably necessary to the Union in performing its statutory duty to enforce that agreement. Challenging the Respondent's permissive subject argument, the General Counsel cites two cases—*Richfield Oil Corp.*, 110 NLRB 356 (1954), and *Foodway*, 234 NLRB 72 (1978)—in which the Board found employee stock purchase plans to be mandatory subjects of bargaining. The General Counsel denies that section 12.05 is an illegal subject of bargaining.

### III. ANALYSIS AND DISCUSSION

As stated above, the Respondent's principal argument is that the Union's aim of disciplining ESPP participants rendered their names irrelevant to the Union's statutory duties. In so arguing, the Respondent relies chiefly on *Nordstrom, Inc.*, 229 NLRB 601 (1977).<sup>3</sup> In *Nordstrom*, the employer refused the union's request for the names of employees who had crossed a picket line. *Id.* at 610. The Board dismissed the resulting 8(a)(5) allegation, finding that the employer had no duty to furnish those names because the union wanted them “not so it could deal more effectively with Nordstrom as concerns mandatory subjects of bargaining, but purely to simplify the identification and disciplining of those who breached its picket lines. . . . [U]nion discipline is not an area of mandatory bargaining.” *Id.* at 611.

The Respondent evidently reads *Nordstrom* as broadly holding that employers may lawfully refuse an informa-

<sup>3</sup> The Respondent also cites *Page Litho, Inc.*, 311 NLRB 881 (1993), for the rule that an employer may lawfully withhold the names of employees where there is “a clear and present danger that the information would be misused by the union.” *Id.* at 882. However, *Page Litho* involved a request for the names of replacement workers, and the concern was that the union would harass the replacements. *Page Litho* did not concern union discipline, and thus does not support the Respondent's contention that such discipline constitutes union misuse. *Chicago Tribune Co. v. NLRB*, 965 F.2d 244 (7th Cir. 1992), also cited by the Respondent, similarly involved a request for the names of striker replacements.

tion request whenever the union seeks information for union disciplinary purposes. However, *Nordstrom* cannot so hold without contradicting *Blue Cross & Blue Shield of New Jersey*, 288 NLRB 434 (1988), cited by the General Counsel. In *Blue Cross*, the employer began letting employees take work home. The union viewed home overtime work as violating the parties' collective-bargaining agreement. A union official asked the employer for the names of employees doing such work, stating that he intended to recommend fines and suspensions for those employees. *Id.* at 435. Despite this stated purpose, the Board found that the union was entitled to the requested names. *Id.* at 436–437.

*Nordstrom* and *Blue Cross* are not inconsistent. In *Nordstrom*, the union requested names, not to police a collective-bargaining agreement, but simply to facilitate union discipline of members who had crossed a picket line. Thus, there was no duty to furnish those names because “union discipline is not an area of mandatory bargaining.” 229 NLRB at 611. In *Blue Cross*, the union asked for names to police a collective-bargaining agreement with respect to overtime work, clearly a mandatory subject of bargaining. Thus, there was a duty to furnish the requested information notwithstanding the union's disciplinary intentions. In the instant case, as in *Blue Cross*, the Union requested information for the purpose of policing a contract provision—specifically, section 12.05—by means of union discipline. Thus, if section 12.05 concerns a mandatory subject of bargaining, we would agree with the General Counsel that the Respondent has a duty to furnish that information. As explained below, however, we find that section 12.05 concerns a permissive subject of bargaining, as does the ESPP itself.<sup>4</sup>

We begin by reviewing some relevant principles. A union is entitled to requested information “if there is a probability that such data is relevant and will be of use to

<sup>4</sup> In finding that sec. 12.05 concerns a permissive subject of bargaining, we reject the Respondent's alternative contention that sec. 12.05 violates Sec. 8(a)(3) of the Act and therefore constitutes an illegal subject of bargaining. It is true that an employer violates the Act by maintaining an employee stock purchase plan that excludes union members. *Computer Sciences Corp.*, 258 NLRB 641, 648 (1981). However, sec. 12.05 does not compel signatory employers to violate the Act because employers are under no legal obligation to maintain employee stock purchase plans. Signatory employers may comply with sec. 12.05 without discriminating based on union membership simply by not selling stock to their employees in the first place.

Agreeing with the Respondent that sec. 12.05 concerns a permissive subject of bargaining, we need not pass on the Respondent's additional arguments that (1) the Union breached its duty of fair representation by seeking to enforce sec. 12.05; (2) sec. 12.05 is an undue restraint on alienation, unenforceable under Wisconsin law; (3) enforcing sec. 12.05 would constitute tortious interference with contract; and (4) sec. 12.05 is contrary to sound public policy.

the union in fulfilling its statutory duties as the employees' exclusive bargaining representative." *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985). This liberal discovery-type standard nevertheless contains an important limitation: the data must be of use in fulfilling statutory duties. The "duty to furnish . . . information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining." *Cowles Communications, Inc.*, 172 NLRB 1909 (1968). Thus, there is no duty to furnish information concerning a nonmandatory subject of bargaining. *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223 fn. 1 (1988).<sup>5</sup> Furthermore, "[p]arties do not have the power to alter this result merely by reaching agreement on the terms of a nonmandatory subject." *Id.* at 1225; see *Chemical Workers*, supra, 404 U.S. at 187 ("By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining."). That there is no duty to furnish information relevant to a contract provision concerning a permissive subject is consistent with the rule laid down in *Chemical Workers* that unilateral modification or termination of a contract provision violates Section 8(a)(5) only if that provision concerns a mandatory subject. *Id.* at 185–188. The greater principle includes the lesser: since it is not an 8(a)(5) violation to terminate a contract provision concerning a permissive subject, neither can it be an 8(a)(5) violation to refuse to furnish information relevant to policing such a provision.

In *Chemical Workers*, the Supreme Court held that an employer has no duty to bargain concerning benefits for retirees because retirees are not "employees." *Id.* at 165. Relying on this holding, the Respondent contends that section 12.05 concerns a permissive subject because it affects nonemployees—i.e., employees' immediate family members—by restricting their right to own stock. The General Counsel responds that the wording of section 12.05 makes it clear that restrictions on stock ownership by family members apply only where the employee is trying to circumvent the intent of that provision, and thus section 12.05 remains directed at employees themselves. We need not resolve this dispute, however, because we rely on a different rationale in finding that section 12.05 concerns a permissive bargaining subject.

Mandatory subjects are limited to those that settle an aspect of the relationship between an employer and its employees, or that involve individuals outside the employment relationship but vitally affect the terms and

conditions of employment of those within that relationship. *Chemical Workers*, supra at 178–179. By its terms, section 12.05 prohibits employees from holding stock, not only in their own employers, but also in any of the roughly 100 companies that are signatory to the collective-bargaining agreement between the Union and NECA. Even assuming that employee ownership of stock in the employee's own employer is a mandatory subject of bargaining, a prohibition on employee ownership of stock in other companies neither settles nor vitally affects any aspect of the relationship between signatory employers and their own employees, and thus is not a mandatory subject. However, because the information request in this case pertains to the Union's effort to enforce section 12.05 with respect to ESPP participants, who do own stock in their own employer, we will also consider whether the ESPP itself concerns a mandatory or permissive subject of bargaining.

Citing *Richfield Oil Corp.*, 110 NLRB 356 (1954),<sup>6</sup> the judge found a "strong presumption" that the ESPP is a mandatory subject of bargaining. In addition, the General Counsel cites *Foodway*, 234 NLRB 72 (1978), as supporting a like finding. We find *Richfield Oil* and *Foodway* distinguishable.

In *Richfield Oil*, employee members of the stock purchase plan contributed up to 5 percent of monthly pay into individual "member" accounts, and the employer made matching contributions of up to 75 percent into a separate "trusteed" account for each plan member. The trustee of the Richfield plan used the funds in both the member and trusteed accounts to purchase Richfield common stock. No stock was distributed to employees while they remained with the company. Upon separation from service at or after age 55 (for men) or 50 (for women), plan members received 100 percent of the stock in both of their accounts. If employment ended before that age, the employee received 100 percent of the stock in his member account and a percentage of the stock in his trusteed account, depending upon length of time in the plan—from zero percent if fewer than 5 years, up to 100 percent if 10 years or more. 110 NLRB at 358–359.

The Board found the Richfield plan to be a mandatory subject of bargaining for two reasons. First, it constituted "wages" because the employer made matching contributions, an "emolument of value." *Id.* at 359. Second, because employees did not receive stock until their employment ended, the Richfield plan also came within the scope of "other conditions of employment" because employees "perform[ed] their work under a pledge . . . of

<sup>5</sup> Petition for review denied 905 F.2d 476 (D.C. Cir. 1990), cert. denied 498 U.S. 1082 (1991).

<sup>6</sup> Enfd. 231 F.2d 717 (D.C. Cir. 1956), cert. denied 351 U.S. 909 (1956).

future payments in the form of company stock.” *Id.* at 360–361. Observing that the Richfield plan emphasized “long term accumulation of stock for future needs rather than . . . stock ownership as such,” and that benefits under the plan “are related to the employees’ length of service and amount of wages while participating,” *id.* at 360, the Board found no real difference between the Richfield stock purchase plan and a retirement and pension plan, *id.* at 360 fn. 7.

In *Foodway*, employees were offered options to purchase shares of company stock “on a payroll deduction credit basis” at \$33.95 a share, which was 11.1 percent below fair market value. 234 NLRB at 73. Thus, the Board found the Foodway plan to be a mandatory subject of bargaining because it gave employees the opportunity to buy company stock “on a partial extension of credit and at a discount from fair market value with the consequential opportunity for capital gain realization.” *Id.* at 76.

The ESPP differs from both these plans. First, it does not constitute “wages” because employees receive no “emolument of value.” Unlike in *Richfield Oil*, the Respondent makes no matching contributions. Unlike in *Foodway*, shares are sold at fair market value—i.e., at book value as determined by outside auditors. The Respondent’s employees were permitted to buy stock through payroll deduction, but this did not involve any extension of credit. As explained above, the Respondent’s payroll deduction plan simply allowed employees to set aside a portion of after-tax income for stock purchases at the share prices on the several quarterly transaction dates, not on the earlier initial offering or payroll deduction dates. Thus, payroll deduction participants incurred the risk of paying a higher per share price than participants who purchased all their shares on the initial offering date.

Second, the ESPP does not come within the scope of “other conditions of employment” because it does not operate as a retirement plan. Unlike in *Richfield Oil*, the Respondent’s employees do not “perform their work under a pledge . . . of future payments in the form of company stock,” *id.* at 360–361, the amount of stock an employee acquires is not tied to length of service, and the ESPP does not emphasize “long term accumulation of stock for future needs rather than . . . stock ownership as such,” *id.* at 360. On the contrary, the whole point of the ESPP is precisely stock ownership as such because its purpose is to vest majority ownership of PPC in its subsidiaries’ employees. Consistent with this purpose, PPC shares may not be bequeathed, and employees must sell their stock back to the company if they quit, are dis-

charged for cause, or are laid off longer than a stated length of time.

Accordingly, we find that the ESPP does not come within the scope of those subjects of bargaining made mandatory by Section 8(d) of the Act: wages, hours, or other terms and conditions of employment. For that reason, and because section 12.05 itself also concerns a permissive subject of bargaining, we conclude that the Respondent did not violate Section 8(a)(5) by refusing to furnish the Union the names of ESPP participants.

Our conclusion is bolstered by *Harrah’s Lake Tahoe Resort*, 307 NLRB 182 (1992). In that case, the Board found unprotected an employee’s advocacy of a proposed leveraged buyout, through an employee stock ownership plan (ESOP) trust, of 50 percent of the stock of the employer’s parent corporation. In so finding, the Board emphasized that “any 50-percent shareholder, including an ESOP trust, would as a practical matter exercise effective control over every detail of corporate policy,” and that “the thrust of the proposal was to cast employees in the role of owners with ultimate corporate control, and thus fundamentally to change how and by whom the corporation would be managed.” *Id.* Accordingly, the Board found the employee’s activities to be outside the scope of Section 7 protection because the ESOP proposal he advocated “[did] not advance employees’ interests as employees but rather advance[d] employees’ interests as entrepreneurs, owners, and managers.” *Id.* Based on this finding, the ESOP proposal itself would have constituted a nonmandatory bargaining subject had that issue been raised. See *G & W Electric Specialty Co.*, 154 NLRB 1136, 1137–1138 (1965) (holding that Section 7 sweeps more broadly than Section 8(d) inasmuch as it protects conduct undertaken not only “for the purpose of collective bargaining,” but also for “other mutual aid or protection”).<sup>7</sup> Thus, *Harrah’s* supports our finding that the ESPP, which similarly sought to give employees a controlling interest in their employer’s parent corporation, does not concern a mandatory subject of bargaining.

According to our dissenting colleague, the ESPP provides the Respondent’s employees with “substantial benefits.” We disagree. One such purported benefit is that employees do not pay fees “that normally accompany the purchase and sale of stock.” This is comparing two different kinds of transactions: transactions in shares of publicly traded companies versus transactions in shares of closely held corporations such as the Respondent. Fees normally accompany the former because

<sup>7</sup> *Enf. denied* in part 360 F.2d 873 (7th Cir. 1966). While the court of appeals disagreed with the Board’s finding that the particular conduct at issue in *G & W Electric* was protected, it did not dispute the principle for which *G & W Electric* is cited here.

those transactions take place on a stock exchange and require the services of a broker. Fees do not accompany the latter, however, because those transactions are not brokered. There is no benefit whatsoever, let alone a substantial benefit, in not having to pay for services not rendered.

The other purported benefit our colleague relies on is that employees are guaranteed a continuously available book-value buyer for their shares, an arrangement he characterizes as “opportune and convenient.” It is neither. First, the fact that the Respondent stands ready to repurchase employee-owned shares is not a convenience, but a legal necessity. As our colleague notes, employees may sell their shares *only* to the Respondent. If the Respondent did not furnish a market, its stock could not be sold at all. Such an absolute restriction on the transfer of shares would be void as against public policy. See 18 Corpus Juris Secundum § 220. Second, the fact that employees’ shares are repurchased at book value may well be the opposite of “opportune.” Suppose that the book value of the Respondent’s stock has held steady for several years at \$20 a share. The following year, the Respondent’s business grows dramatically. That same year, but before the annual share revaluation, an employee quits, forcing a sale of his shares to the company at \$20 a share. Shortly thereafter, the auditor does his work, and book value rises to \$30 a share. Had the Respondent’s stock been publicly traded, the market would have continuously readjusted its value, and the share price at the time of the sale would have reflected the Respondent’s recent growth. Under the book value system, however, the employee loses out on that growth. Admittedly, the converse scenario could also occur, in which case the book-value system would insulate the forced sale from a sudden decline in the Respondent’s business. The point, however, is that the book-value system is a double-edged sword, and there is no guarantee that it will cut in employees’ favor.

Assuming *arguendo* that employees benefit from the ESPP, our colleague’s argument still fails to persuade. Our colleague believes that because the ESPP benefits employees, it is “self-evidently and incontrovertibly” an employee benefit. However, his view does not square with *Harrah’s Lake Tahoe Resort*, *supra*. As we have explained, in that case the Board found an ESOP that would have made employees 50-percent shareholders advanced employees’ interests *not as employees*, but rather as entrepreneurs, owners, and managers. Since the ESPP similarly purposes to vest majority ownership of the Respondent in its employees, the same finding ap-

plies here. It follows, therefore, that even if the ESPP benefits employees, it is not an “employee benefit.”<sup>8</sup>

#### ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

The Respondent’s Employee Stock Purchase Plan (the ESPP or Plan), which provides its employees with substantial advantages related to their purchase of the Respondent’s stock, is clearly a mandatory subject of bargaining. Therefore, contrary to my colleagues, I would find that the Respondent unlawfully refused to provide the Union with the information it requested about employee participation in the Plan, in the course of the Union’s attempt to enforce section 12.05 of the parties’ collective-bargaining agreement.

#### Facts

Section 12.05, set out in full by the judge and by my colleagues, expressly prohibits the Respondent from allowing its employees to hold stock in the Respondent, and expressly prohibits employees from holding such stock. By clear implication, therefore, it also prohibits the Respondent from selling its stock to its employees. These prohibitions have been in the parties’ collective-bargaining agreements since 1977. During negotiations for the most recent collective-bargaining agreement (June 1, 2000—May 31, 2003), the Respondent tried to get the Union to agree not to retain this provision. The Union did not agree, and section 12.05 was retained.

Notwithstanding these contractual prohibitions, the Respondent unilaterally implemented the Employee Stock Purchase Plan in January 2001, encouraging employees to purchase and hold stock in the Respondent.

<sup>8</sup> Our colleague’s attempt to distinguish *Harrah’s Lake Tahoe Resort*, 307 NLRB 182 (1992), is unpersuasive. Member Walsh correctly states that in *Harrah’s*, the ESOP proposal would have effected a fundamental change in corporate control through a leveraged buyout. He also states that “the Respondent made it clear to the employees that even if they collectively purchased more than 50 percent of the Respondent’s stock, the Respondent would continue to operate as it had been operating, with the same operating structure.” From this, he concludes that unlike the ESOP in *Harrah’s*, the ESPP’s intended transfer of majority ownership from Dick Pieper to the Respondent’s employees would be effected “without relinquishing control over the operation of the company to the employees.” But this is impossible. If employees hold majority ownership, they necessarily wield corporate control. That the Respondent will continue to have the same “operating structure” simply follows from the fact that the Respondent will continue to be a *corporation* after its employees acquire majority control. By statute, the corporate form entails a certain structure—i.e., oversight by an elected board of directors. The crucial point, however, is that the employees will do the electing. Indeed, the Respondent made this clear to the employees, stating that Dick Pieper plans to remain as chairman of the board for at least 5 more years “if the stockholders choose to retain him as chairman.”

Shortly after the Plan went into effect, and in an effort to enforce the prohibitions in section 12.05, the Union asked the Respondent to provide it with the names of all union members who were participating in the Plan. The Respondent refused to provide the requested information. In March 2001, the Union again requested that information, and also requested the names of each union member who had been solicited to participate in the Plan. The Respondent again refused to provide the requested information.

### Analysis and Conclusions

#### 1. Mandatory subject of bargaining

My colleagues have accurately described and summarized the Plan. Only employees of the Respondent are eligible to buy the Respondent's stock from the Respondent under the Plan, and they are permitted to sell it only to the Respondent. The employees purchase the stock directly from the Respondent. If they prefer, the Respondent directly withholds the purchase money from their paychecks. The employees incur no brokerage or transaction fees. The Respondent also provides a continuously available market for its employees to sell their shares back to the Respondent. The Respondent is obligated to buy all the shares that the employees want to sell, at independently audited book value, and again without the employees incurring brokerage or transaction fees.

These substantial rights and benefits conferred on employees by the Respondent under the Plan are expressly and entirely premised on their status as the Respondent's employees. My colleagues cannot contend that the Plan does not provide the employees with substantial benefits. It provides the employees with a convenient system for purchasing the Respondent's stock, and selling it back to the Respondent on a continuous basis. It allows them to avoid the brokerage and transaction fees that normally accompany the purchase and sale of stock of publicly traded companies. My colleagues say that I am comparing two different kinds of transactions. Precisely. One kind of transaction, the purchase or sale of stock in publicly traded companies, generally involves the services of a broker and thus the payment of brokerage fees. Another, different kind of transaction, the purchase or sale of stock in closely held companies, such as the purchase or sale of the Respondent's stock under the ESPP, does *not* involve the services of a broker and thus does *not* require the payment of brokerage fees. The ability of the Respondent's employees under the ESPP to buy and sell stock in the Respondent without requiring the services of a broker, and thus without incurring brokerage fees, is clearly a benefit for them when compared to their *inabil-*

*ity* to buy and sell stock in publicly traded companies without requiring the services of a broker and the payment of brokerage fees. And this benefit to the Respondent's employees under the ESPP is exclusively available to them solely on the ground that they *are* the Respondent's employees. This ESPP benefit is, therefore, a term and condition of their employment, and thus a mandatory subject of bargaining.

The fact that the Respondent has legally obligated itself to repurchase its stock from its employees does not make that option any less opportune and convenient to the employees. Rather, it guarantees a book value buyer for those shares. My colleagues, however, say that this is *neither* opportune nor convenient. First, it is hard to imagine a more convenient way to sell stock than to a guaranteed purchaser on demand without incurring brokerage fees. But my colleagues also say that the sale-back option under the ESPP is not opportune because the employees might wind up selling the stock for less than its soon-to-be recomputed value. But, as my colleagues concede, the employees also might wind up selling the stock for more than its soon-to-be recomputed value. In any event, the employees still have the ability under the ESPP to choose the most opportune time for them to sell their stock back to the Respondent, given their personal situations and the vagaries of stock valuation.

The Plan is, therefore, self-evidently and incontrovertibly an employee benefit and a term and condition of employment. As such, it is a mandatory subject of bargaining.<sup>1</sup> And, contrary to my colleagues' view, the Plan is *no less* a mandatory subject of bargaining simply because there are differences between it and the plans that were also found to be mandatory subjects of bargaining in *Richfield Oil Corp.* and *Foodway*, *supra*. Indeed, the plans in those cases were different from each other as well, and yet they were both found to be mandatory subjects of bargaining notwithstanding their differences. My colleagues do not contend, nor can they, that the particulars of the plans in those cases delineate the boundaries of the universe of employee stock purchase plans that are mandatory subjects of bargaining.<sup>2</sup>

<sup>1</sup> See *Foodway*, 234 NLRB 72 (1978); *Richfield Oil Corp.*, 110 NLRB 356 (1954), *enfd.* 231 F.2d 717 (D.C. Cir. 1956), *cert. denied* 351 U.S. 909 (1956).

<sup>2</sup> My colleagues also rely on *Harrah's Lake Tahoe Resort*, *supra*, as support for their conclusion that the Plan is not a mandatory subject of bargaining. Their reliance on that case is, however, misplaced. Unlike the instant case, the dispositive issue in *Harrah's* was whether employee Larry George was engaged in activity protected by Sec. 7 of the Act when he solicited employee support for his proposal that an employee stock option plan purchase 50 percent of the employer's parent corporation, by means of a leveraged buyout in which the plan would borrow \$335 million to buy 50 percent of the parent's outstanding stock and also assume \$450 million of the parent's corporate debt. The

## 2. Refusal to provide requested information

My colleagues have set out the well-settled principles governing the question of when an employer is obligated to provide a union with requested information. An employer must provide a union with requested information if there is a probability that the information is relevant and will be of use to the union in fulfilling its role as the collective-bargaining representative of the employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 423 (1967).

Section 12.05 of the parties' collective-bargaining agreement prohibits the Respondent from selling its stock to its employees, and prohibits its employees from holding it. But the entire *raison d'être* of the Respondent's Plan is to sell the Respondent's stock to its employees and for them to hold it or sell it directly back to the Respondent. Thus, in Union Business Manager Welnak's January 5, 2001 letter to the Respondent, he requested information about conduct by the Respondent and the employees that was apparently in direct violation of section 12.05. The letter, from Welnak to the Respondent, stated:

As you are aware, Local 494 has long taken the position that it would be a contract violation for Pieper to sell to, or for [Local] 494 members to own stock in your company.

In order for me to fulfill my obligations to all of our members, in my capacity as Business Manager of Local 494, I am requesting that you provide me with a list of any and all [Local] 494 members who are participating in this program.

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Board majority found that George's conduct was not protected by Sec. 7's mutual aid or protection clause because the thrust of his proposal was to fundamentally change how and by whom the parent corporation would be *managed*, by placing the employees themselves in ultimate control of the corporation.

The instant case does not present the issue or the facts presented in *Harrah's*. Here, the Respondent made it clear to the employees that even if they collectively purchased more than 50 percent of the Respondent's stock, the Respondent would continue to *operate* as it had been operating, with the same operating structure. George's attempt in *Harrah's* to use the existing employee stock option plan as a vehicle to effect an employee leveraged buyout of the employer's parent company, in order to fundamentally change how and by whom the parent corporation would be controlled and *operated*, is thus fundamentally different in kind from the Respondent's creation of the Employee Stock Purchase Plan to liquidate Owner Dick Pieper's interest in the Respondent without relinquishing control over the operation of the company to the employees.

In sum, the Board majority in *Harrah's* found that George's scheme had no more than an attenuated relationship to, and did not advance, his fellow employees' interests *as employees*. Here, by clear contrast, the Respondent's Employee Stock Purchase Plan was conceived and designed *specifically* for the direct, immediate benefit of the Respondent's employees—as, and only as, employees.

In his March 12, 2001 letter to the Respondent, Welnak again requested essentially the same information as he asked for in his January letter, for the same expressed reason:

As you are aware, Local 494 believes it would be a contract violation for Pieper to offer Local 494 members such stock ownership.

In order for Local 494 to carry out its responsibilities and to administer the collective bargaining unit [sic] . . . I am requesting that you provide me a list of each [Local] 494 member who has been solicited to participate in the program and any response from [Local] 494 members and a list of those [Local] 494 members participating in the program.

Applying the above principles to the circumstances here, and in light of the fact that the Plan is a mandatory subject of bargaining, it is clear that the Respondent has violated Section 8(a)(5) and (1) of the Act as alleged by refusing to provide the Union with the information it requested about the employees' participation in the Plan, in the course of the Union's attempt to enforce section 12.05 of its collective-bargaining agreement with the Respondent.<sup>3</sup>

*Paul Bosanac, Esq.*, for the General Counsel.

*Jonathan O. Levine, Esq.*, of Milwaukee, Wisconsin, for the Respondent-Employer.

*Mathew R. Robbins, Esq.*, of Milwaukee, Wisconsin, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on August 5, 2002, in Milwaukee, Wisconsin, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 30 of the National Labor Relations Board (the Board) on July 30, 2001.<sup>1</sup> The complaint, based upon an original charge in Case 30-CA-15504 filed by International Brotherhood of Electrical Workers, Local 494, AFL-CIO (the Charging Party or Union), alleges that Pieper Electric, Inc., PPC Holdings, Inc. (single employer) (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations

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<sup>3</sup> See *Blue Cross & Blue Shield of New Jersey*, 288 NLRB 434 (1988), in which the Board found that although the union contractually waived the right to bargain over implementation of home overtime, it did not waive the right to verify the circumstances of the implementation, or monitor the conduct, of the home overtime program. The Board found that the names of employees doing home overtime work were presumptively relevant to the union's function in administering and policing the collective-bargaining agreement, even if the sole reason the union wanted the employees' names was to take internal disciplinary action against them.

<sup>1</sup> All dates are 2001 unless otherwise indicated.

Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

#### Issues

The complaint alleges that the Respondent refused to provide necessary and relevant information to the Union in violation of Section 8(a)(1) and (5) of the Act.

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

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent is a corporation engaged in the construction industry in Milwaukee, Wisconsin, where it annually received goods valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Respondent expressly denies that PPC and Pieper are a single-employer. However, for purposes of judicial economy, Pieper and PPC shall be treated as a single- employer for the information request at issue in the complaint and any decision or remedial order issued and enforced by the Board or appropriate Court of Appeals in this case (GC Exh. 14).

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *Background and Facts*

On March 22, 1977, Respondent entered into a letter of assent to the collective-bargaining agreement between the Union and the National Electrical Contractors Association, Milwaukee Chapter (NECA), and agreed to be bound by such future agreements unless timely notice was given (GC Exh. 3). NECA and the Union negotiated the most recent June 1, 2000, to May 31, 2003 inside wiremen agreement on behalf of approximately 100 signatory employers including Respondent (GC Exh. 2). The collective-bargaining agreement contains the following provision in article XII, section 12.05:

No employer shall allow an employee to hold and no employee shall hold stock in any shop or company employing employees covered by the agreement. Avoidance of the Intent of this section shall not be allowed by pretense of ownership of stock or interest in the subject contracting business by an immediate member of the family.<sup>2]</sup>

On January 10, 2000, Respondent's chairman/CEO, Richard R. Pieper Sr., issued a memorandum to all employees informing them that approximately 76 percent of the employees were interested in purchasing stock in the Employer (R. Exh. 7). In

<sup>2</sup> If an applicant for employment owned stock, the employer would be in violation of the agreement if it hired the applicant. Likewise, if a wife owned stock, her husband could not be employed under the provisions of the agreement.

February 2000, the Union in its Relay newsletter to members, referred to the fact that one of the signatory employers to the parties' collective-bargaining agreement was proposing to sell stock to his employees and referenced the section 12.05 provision. Union Business Manager Paul Welnak opined that article XII would have to be changed to allow employees to own stock. Welnak indicated that any changes to the stock ownership article would have to be completed during upcoming negotiations and all the employers and the Union would have to agree (R. Exh. 5).

The parties' to the NECA agreement commenced renewal negotiations in advance of the May 31, 2000 expiration date. NECA proposed a number of changes to the agreement including a proposal submitted by Respondent to delete section 12.05. After extensive discussions between the Employer and the Union on section 12.05, the provision remained unchanged and was included in the parties' current collective-bargaining agreement.

In the August 2000 Relay newsletter, Welnak addressed the issue of the stock ownership issue with his members.<sup>3</sup>

<sup>3</sup> The August 2000 Relay newsletter read:

I have always refrained from identifying individual contractors in this newsletter or in public. I can no longer do so due to a pending issue. Pieper Electric has proposed an Employee Stock Ownership Plan to its employees. I will not attempt to argue the merits or what I perceive to be disadvantages of the Plan. I will merely set the record straight on 494's position on this issue.

The Milwaukee Inside Agreement states in Article XII, Section 12.05 "Holding Stock-No employer shall allow an employee to hold, and no employee shall hold stock in any shop or company employing employees covered by this agreement. Avoidance of the intent of this section shall not be allowed by pretense of ownership of stock or interest in the subject contracting business by an immediate member of the family." This section of the contract was discussed during our recently negotiated contract. The employers had brought it to the table. It was not changed, just as some of the issues 494 brought to the table were not changed, and it is now a dead issue. Pieper Electric is now saying that you will not buy stock in Pieper, but in PPC a holding company. The Executive Board of Local 494 and I are not interested in the corporate veil and the spider web of companies that Pieper has created. As in any violation by a 494 member, of the agreement or constitution, charges could be filed. Trials of those charged are heard by the Local 494 Executive Board. We will view employee stock ownership as a violation of the Milwaukee Inside Agreement and the IBEW Constitution, Article XXV, Section 1, Subsection (g) "Wronging a member of the I.B.E.W. by any act or acts (other than the expression of views or opinions) causing him physical or economic harm." The violation of the Constitution will be considered because PPC owns many non-union electrical contracting firms, most of them in the State of Georgia. However, they also own Carroll Electric who operates in Janesville, Beloit, Jefferson and Watertown, Wisconsin, and have been known to enter into 494's jurisdiction. There is also a problem with all of the 494-benefit plans-Health and Welfare, Pension, Annuity, etc. These are Taft Hartley Trust Funds and participation by employers, or owners, is a violation of federal law. I believe that holding

On August 28, 2000, the Union called a special meeting for Respondent's employees to discuss concerns regarding the stock purchase plan (R. Exh. 4).

On September 15, 2000, Respondent distributed to all employees a list of questions and answers from employee meetings concerning the stock purchase plan (GC Exh. 7).

By memorandum dated September 20, 2000, Respondent informed employees that the stock ownership plan had been approved and purchase of the stock would commence on January 1 (GC Exh. 6).

On January 2, by letter, Respondent communicated with employees seeking their attitudes toward owning stock in the Employer (GC Exh. 8).

On January 5, Welnak sent a letter to Respondent informing it that the Union has long taken the position that it would be a contract violation for Respondent to sell to, or for union members to own stock in Respondent. Accordingly, the Union requested that the Employer provide it with a list of any and all union members that are participating in the program (GC Exh. 9).

By letter dated January 22, Respondent informed the Union that it has no knowledge and possesses no records relating to the information it requested, and is unable to provide the information (GC Exh. 10).

On March 12, Welnak wrote a second letter to Respondent and requested a list of each union member who has been solicited to participate in the program and any union member who is participating in the program. The Union informed Respondent that the information was necessary to carry out its responsibilities and to administer the parties' collective-bargaining agreement (GC Exh. 11).

By letter dated March 15, Respondent informed the Union that it is under no obligation to provide the information. In addition, Respondent apprised the Union that it has come to its attention that threatening statements have been made concerning participation by union members in the stock ownership plan, and that such statements may be motivated by the Union's efforts to organize certain nonunion electrical contracting firms (GC Exhs. 12, 13). Thus, even if Respondent possessed such information, it would question the relevancy of the requested information and the legality of the request itself.

#### B. Analysis

The General Counsel alleges in paragraph 6 of the complaint that the information requested by the January 5 and March 12 letters is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative. Since the Respondent has failed and refused to furnish the Union with the information, it is failing and refusing to bargain collectively and in good faith with the exclusive collective-

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stock would make you a part owner in a company. As you can see, there are a lot more obstacles here than just Paul Welnak, as you may have been led to believe. In addition, I have discussed this issue with Tim Driscroll the Business Manager of IBEW Local 2150. He is also opposed to this proposal and will be addressing it with all of the outside line construction members that he represents.

bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Respondent opines that the bare assertion that a union needs information does not automatically require an employer to produce it. Under the particular circumstances of this case, the Respondent argues that the Union does not need the names of the employees who have purchased stock in the plan. Indeed, the Respondent points to the fact that the Union did not need the information to prepare for and file a grievance or to prepare for arbitration. Rather, the Union acknowledged that it needed the information to determine whether internal discipline was warranted against union members for possible breach of the parties' agreement or the Union's constitution and bylaws. The Respondent contends that since the information was not needed for issues relating to wages, hours, or working conditions, but rather for potential discipline against employees or to leverage the Employer into granting recognition to affiliate nonunion employers, there was no need to provide the information to the Union.<sup>4</sup> Lastly, the Respondent argues that since the Union was willing to consider eliminating section 12.05 from their agreement if the Respondent would consent to union recognition of several of its nonunion affiliate employers, it reflects the true motivation of the Union. Thus, Respondent opines that since the information was not necessary and relevant and was sought for illegal purposes, they were privileged in refusing to provide it.

The Board explained in *Asarco, Inc.*, 316 NLRB 636, 643 (1995), enfd. in relevant part 86 F.3d 1401 (5th Cir. 1996):

In dealing with a certified or recognized collective-bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal*, 224 NLRB 1505 (1976). In each case, the inquiry is whether or not both parties meet their duty to deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). . . . The legal standard concerning just what information must be produced is whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc.*, 272 NLRB 1128 (1984).

Applying these principles, I find that the information requested by the Union is relevant and necessary for the following reasons.<sup>5</sup>

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<sup>4</sup> To further support its argument that it had no obligation to provide the information, Respondent asserts that sec. 12.05 is illegal and contrary to public policy.

<sup>5</sup> The Board in *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257 (2000), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001), held that the names of employees were necessary for the union to negotiate a successor contract. Likewise, the Board held in the case of *A-Plus Roofing*, 295 NLRB 967 (1989), enfd. 39 F.3d 1410 (9th

Welnak credibly testified that he needed the information to determine if section 12.05 of the parties' agreement was violated.<sup>6</sup> If he obtained the names of the union members who subscribed to and purchased stock, he would be able to apprise them that unless they divested their interests in the stock ownership plan they would be in violation of section 12.05. If an employee were unwilling to divest their stock holdings, the Union would inform the individual that he/she could be subject to internal union charges and potential discipline. If the Union did not receive the names of the union members who purchased stock, an employee, upon request of the Union, could withhold information that he or she actually purchased stock in the plan or a family member made the purchase on their behalf.

I note that the Respondent entered into the Letter of Assent in 1977 and the section 12.05 (Holding Stock) provision has been included in all successor agreements including the one that was scheduled to expire on May 31, 2000. At no time prior to the expiration of that agreement did the Respondent attempt to withdraw from NECA or inform the Union that it no longer wanted to be bound by the agreement. Further, at no time during the term of that agreement did the Respondent file a grievance or contend that the provision was illegal or contrary to public policy. While NECA, during negotiations that were held prior to the expiration of the May 31, 2000 agreement proposed to delete section 12.05, the provision was not removed and remains in full force and effect in the parties' current agreement (GC Exh. 2).<sup>7</sup> Likewise, while the Respondent could file a

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Cir. 1994), that the employer's obligation includes the duty to supply information necessary to administer and police an existing collective-bargaining agreement, and if the requested information relates to an existing contract provision it thus is information that is demonstrably necessary to the union if it is to perform its duty to enforce the agreement.

<sup>6</sup> The Union has an absolute right to police provisions of the parties' agreement. I conclude that if the Union can establish this threshold the Respondent's refusal to provide the requested information violates the Act. An employer should not be able to preclude a labor organization from using necessary and relevant information as it sees fit. Any prohibition in this manner would infringe on the internal right of a labor organization to govern and enforce its rules and regulations.

<sup>7</sup> I note that the Board in *Richfield Oil Corp.*, 110 NLRB 356 (1954), enf. 231 F. 2d 717 (D.C. Cir. 1956), cert. denied 351 U.S. 909 (1956), held that a stock purchase plan is a mandatory subject of bargaining because it relates to wages, and also falls within the purview of other conditions of employment. Thus, there is a strong presumption in this case that the stock purchase plan is a mandatory subject of bargaining. I also note that the Supreme Court in *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), held that the unilateral midterm modification of a permissive subject that had been included in the agreement did not constitute an unfair labor prac-

grievance under the current agreement that section 12.05 was illegal and contrary to public policy, no such grievance has been filed. Finally, I conclude that even if Welnak informed representatives of Respondent prior to and during negotiations for the current agreement that he would not oppose employee stock ownership if Carroll Electric became unionized, I attribute this to posturing between parties during the course of collective-bargaining negotiations and not to any illegal motive. Thus, I do not consider this to be improper motivation that would privilege the Respondent from providing the requested information.

For all of the above reasons, I find that when the Respondent refused to provide the requested information to the Union, it violated paragraph 6 of the complaint and Section 8(a)(1) and (5) of the Act.

#### CONCLUSIONS OF LAW

1. 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. At all relevant times, the Union has been the exclusive collective-bargaining representative of the following employees of Respondent in an appropriate bargaining unit within the meaning of Section 9(b) of the Act.

All employees performing work within the jurisdiction of the Union for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment.

4. By failing and refusing to furnish the Union with the information requested in its January 5 and March 12, 2001 information requests, the Respondent has failed to fulfill its statutory obligations and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

#### REMEDY

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

[Recommended Order omitted from publication.]

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tice under the Act, although the clause could be enforced under § 301. Even assuming that sec. 12.05 is a permissive subject of bargaining, the Respondent to date has not repudiated or attempted to make a unilateral midterm modification of its provisions.