

LBT, Inc. and Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, Local 5-0699. Cases 17-CA-20235 and 17-CA-20300

June 30, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAMBER, AND ACOSTA

On February 23, 2001, Administrative Law Judge George Carson II issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed answering briefs, and the Charging Party 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 briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent, LBT, Inc., violated Section 8(a)(5) and (1) of the Act in two respects: (1) by refusing to provide information about the factors used by the Respondent in selecting employees for a layoff, and (2) by failing to pay vacation pay to striking employees. The judge recommended dismissal of both allegations.

We agree with the General Counsel and the Union that the Respondent's refusal to provide information violated Section 8(a)(5) and (1). However, we agree with the judge that the failure to pay the strikers vacation pay was not unlawful. Our reasons follow.

Refusal to Provide Information

Facts

The Respondent, LBT, Inc., and the Charging Party Union have been parties to a series of collective-bargaining agreements beginning in February 1994 and continuing through at least August 2001, with one exception: from June 12 through August 8, 1999, no agreement was in effect and the bargaining unit employees were on strike. The parties continued bargaining during the strike and on August 9, 1999, entered into a new contract, ending the strike.

During a collective-bargaining session on July 13, 1999, Yvon Gagnon, the employee relations manager for LBT's corporate parent, informed the Union that, because of business lost during the strike, a layoff of bargaining unit employees might be imminent. In response

¹ The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

to this announcement, the Union promptly requested information regarding LBT's layoff selection criteria and their application. Gagnon provided documentation regarding the process by which employees would be selected for layoff, which was similar to the procedures used in a 1997 layoff.

As it had in 1997, LBT also provided a redacted version of the employee evaluations that the Company had compiled and used in selecting employees for the 1997 layoff.² These evaluations consisted of a spreadsheet with a row of numerical scores of zero through three in each of several categories and an overall score for each employee. In each row associated with a retained employee, all information identifying the employee was deleted from the chart (other than codes apparently indicating the employee's job), leaving unidentified rows of scores for well over 100 employees.

The Union requested an unredacted copy of the spreadsheet showing retained employees' names matched up with their scores. The Union explained that it needed this information to (1) test check the validity of 1999 evaluations; (2) formulate a layoff proposal for the new contract; and (3) determine the validity of the methodology of assigning points. LBT refused to provide unredacted evaluations. It claimed that these evaluations were confidential,³ that they were outdated and potentially misleading, and that their release could cause disruption among the employees. LBT remained unwilling to provide the information despite the Union's promise not to release the information to rank-and-file employees.

The parties discussed the information request at length, but were unable to resolve their disagreement. There was no layoff in 1999. The 1999-2001 contract contained a revised "Job Security and Retention" provision that established the standards and procedures the Company was to apply if a layoff became necessary. Most of these standards and procedures were among those that the Company had used in selecting employees for layoff in 1997.

Analysis

The judge recommended dismissing the allegation that the Respondent violated Section 8(a)(5) and (1) by refusing to provide 1997 employee evaluation information requested by the Union. He concluded that the evaluations were not relevant to the Union in 1999. We disagree and reverse.

² In response to the 1997 layoffs, the Union filed grievances on behalf of an unspecified number of laid-off employees, and one grievance was settled by the employee's reinstatement. The Union did not pursue any grievance to arbitration or file unfair labor practice charges.

³ The Company has not argued before the judge or the Board that the evaluations were confidential; thus, we do not address this issue.

Under the National Labor Relations Act, “[a]n employer has a duty to furnish requested information to a union which is the collective-bargaining representative of the employees if the requested information is relevant and reasonably necessary to the union’s performance of its responsibilities.” *Allied Mechanical Services*, 332 NLRB 1600, 1601 (2001). A liberal, “discovery-type standard” of relevance governs requests for information between parties to a bargaining relationship.⁴ *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

Under longstanding principles, we find that the 1997 employee evaluations requested by the Union were presumptively relevant. It is well established that “[w]here the union’s request is for information pertaining to the workers in the bargaining unit, which goes to the core of the employer-employee relationship, that information is presumptively relevant.” *Uniontown County Market*, 326 NLRB 1069, 1071 (1998). It is undisputed that the 1997 employee evaluations requested by the Union pertained to the workers in the bargaining unit. And, because those evaluations were designed to be used, and were used, in determining which of the bargaining unit employees would be laid off and which retained,⁵ they went to the core of the employer-employee relationship.⁶ Indeed, it is difficult to imagine an issue more fundamental to the employer-employee relationship than an understanding of how and why the employer decided whether or not to terminate it. Accordingly, the 1997 evaluations were presumptively relevant, even in 1999.⁷

Assuming in the alternative that the 1997 evaluations were no longer presumptively relevant in 1999 because of the passage of time or intervening changes in the employees’ skills, we would conclude that the information’s continuing relevance was demonstrated. Contrary to the judge,⁸ we find that the Union offered at least two rea-

sons for requesting the information that established its relevance: to determine the validity of the Company’s methodology of assigning points, and to formulate a layoff proposal for the new contract.⁹

These rationales are intertwined: the Union needed to understand the process that had actually been followed in the 1997 layoffs in order to carry out its representative duties in 1999 and afterward. Because the Union had not received complete information in 1997, it remained unable, in 1999, to assess the application of the layoff process, particularly its fairness and consistency with the stated guidelines. The redacted spreadsheet furnished to the Union did not allow the Union to connect the listed scores with the individuals who received them, and thus it was impossible for the Union to assess whether the scores accurately captured the employees’ skills, abilities, and productivity. Without the ability to make such an assessment, the Union could not identify any deficiencies in the process that could be rectified either through the grievance mechanism or by a contract provision addressing the deficiencies.¹⁰ The expectation of a new layoff under a process similar or identical to that used in 1997 establishes the continued relevance of the

its reasons for the information request at the bargaining table. The Union had already explained, in writing, why it needed the 1997 employee evaluations. It was not required to explain orally its written request, particularly since there is no evidence that the Company requested further explanation. Neither was the Union required to persist in its demands for relevant information, especially since the Company had previously rejected requests for the exact same kind of information. “[T]o require the Union to keep renewing its request repeatedly at each meeting is not only futile, but tantamount to playing a broken recording in the vain hope that at some time or other one may eventually hear the end of the selection.” *Wallace Metal Products*, 244 NLRB 41, 49 (1979).

⁹ The Union also informed LBT that it needed the information to test check the validity of 1999 evaluations conducted in anticipation of the expected layoff. There is no evidence, however, that LBT performed any evaluations in 1999, and the complaint does not allege that LBT’s failure to provide the 1999 evaluations or otherwise respond to the Union’s request for them was unlawful. At the hearing, the Union also argued that it needed the information to counsel employees how they might improve their skills to avoid being laid off under the system as applied, but it apparently did not inform LBT that it needed the evaluation information for this purpose. We need not rely on either of these rationales, however, because only one valid reason is needed to demonstrate the relevance of the requested information. See, e.g., *Crowley Marine Services v. NLRB*, 234 F.3d 1295, 1296–1297 (D.C. Cir. 2000) (per curiam) (union’s failure to prove one reason supporting right to requested information “beside the point,” where another basis existed). Here, the Union had two valid reasons for requesting the 1997 evaluations, both of which it explained contemporaneously to the Company.

¹⁰ Although LBT did provide complete spreadsheets for those employees who were chosen for layoff in 1997, the redaction of the names of retained employees prevented the Union from having a basis for comparison between the laid-off and retained employees or a way to assess whether the standards were applied fairly, even as to the laid-off employees.

⁴ The discovery-type standard applies not only where the information at issue is presumed relevant, but also where it must be demonstrated to be relevant. See *Postal Service*, 332 NLRB 635, 636 (2000).

⁵ The judge acknowledged that the 1997 evaluations were relevant at the time they were performed.

⁶ See *Allied Mechanical Services*, supra, 332 NLRB at 1612 (finding that employee evaluations that were a factor in merit raises were themselves wage data and hence were presumptively relevant); see also *Columbia University*, 298 NLRB 941, 945 (1990) (holding that unit employees’ “grades,” or classifications for salary purposes, were presumptively relevant); *Postal Service*, supra, 332 NLRB at 637 (holding that “climate assessment” report “contain[ing] data regarding unit members and their employment relationships, both among themselves and with their supervisor” was presumptively relevant).

⁷ Member Acosta agrees for the reasons that follow that the General Counsel has demonstrated the relevance of the information that the Union sought and therefore he finds it unnecessary to decide whether the 1997 evaluations were presumptively relevant when sought in 1999.

⁸ In particular, we reject the judge’s suggestion that the Union, to support its information request, was required to show that it discussed

complete 1997 employee evaluations for both of these purposes.

The Respondent argues that the absence of a layoff in 1999 and the parties' agreement on a new contract render the Union's information request moot. We reject that argument. Although there was no layoff in 1999, a new layoff could be conducted at any time, and it would be governed by the relevant provision in the new contract, which the Union agreed to in the absence of complete information. The Union thus has a continuing need for the employees' 1997 evaluations in order to understand how the layoff process actually works. The fundamental point is that even in 1999, and continuing at least through the term of the 1999–2001 contract, without the information the Union was limited in its ability to fulfill its representative roles of bargaining intelligently and administering the collective-bargaining agreement. Neither the passage of time, the negotiation of a new (and similar) agreement, nor the Company's cancellation of its expected layoff in 1999 change the fact that the Company's unlawful conduct has compromised the Union's ability to carry out its lawful representative role.

Failure to Pay Vacation Pay to Strikers

Facts

In each year between 1994 and 1998, the plant was shut down during the week of July 4, and employees received vacation pay for the shutdown period. As the judge found, however, the details of the annual shutdown, including the exact dates, were a product of negotiations and varied from year to year. In 1999, the employees were on strike during the week of July 4; there was no plant shutdown. When the strike ended and negotiations resumed, the Respondent did not include a proposal for a shutdown and vacation pay for 1999. The collective-bargaining agreement entered into by the parties on August 8, 1999, did not include vacation pay for a shutdown period for that year; the employees did receive vacation pay when the plant was shut down in 2000.

The complaint alleges that the Respondent violated Section 8(a)(5) by failing to pay vacation pay to striking employees in 1999. The judge dismissed this allegation, and the Union has excepted to this finding. We find no merit in the exception.

The complaint originally alleged that vacation pay was an accrued benefit, consistent with the charge that the Respondent violated Section 8(a)(3) and (5) by not paying the strikers vacation pay. At the hearing, however, counsel for the General Counsel amended the complaint to remove the allegation that vacation pay was accrued, and the parties stipulated to the removal of the charge that the Respondent's refusal to pay vacation pay vio-

lated Section 8(a)(3).¹¹ Counsel for the General Counsel litigated this issue solely on the theory that vacation pay was an established term and condition of employment, and that the Respondent violated Section 8(a)(5) by changing it unilaterally without bargaining to impasse.

Analysis

The judge found both that vacation pay had not accrued and that “[t]he employees were not otherwise entitled to vacation pay”—i.e., that a paid vacation during the week of July 4, concurrent with a plant shutdown, was not an established term or condition of employment. The Union excepted, but only to the finding that vacation pay had not accrued—the allegation that had been explicitly removed from the complaint. Neither the Union nor the General Counsel excepted to the judge's finding that vacation pay was not a term or condition of employment. Thus, no party has excepted to the judge's rejection of the only theory actually litigated at the hearing. In the absence of exceptions, then, we adopt the judge's finding that vacation pay was not an established term or condition of employment, and his conclusion that the Respondent did not violate Section 8(a)(5) by failing to pay vacation pay to the strikers.

Even if the Union or the General Counsel had properly excepted to the judge's dismissal of this allegation, we would affirm, on the merits, the judge's conclusion that the employees were not entitled to vacation pay.¹² Relying on differences among the various contracts' vacation and holiday provisions (particularly in the language describing the process by which shutdown dates were selected), the judge concluded that the timing of the summer shutdown/vacation was the product of negotiations between the parties rather than an established term and condition of employment. The General Counsel and the Union proved only that paid summer shutdowns occurred in every year from 1994 to 1998 and again in 2000; they failed to adduce evidence indicating how the timing of shutdowns was determined. In the absence of such evidence, we agree with the judge that the General Counsel

¹¹ At the hearing, the Union stipulated to the amendment of the charge but protested that the General Counsel's motion to amend the complaint prejudiced its position. The judge granted the motion to amend. Later in the hearing, the Union acknowledged that it had agreed to the amendment, but also agreed with the judge's characterization of its position on the matter as “at least, a semi-objection.” In any event, the Union filed no special appeal from and has not excepted to the judge's ruling amending the complaint.

¹² Member Liebman finds it unnecessary to decide on the merits whether vacation pay was an established term or condition of employment in 1999, or whether LBT's failure to pay vacation pay to the striking employees constituted a unilateral change in violation of Sec. 8(a)(5). She agrees with her colleagues that that issue has not been raised in exceptions.

and the Union have not demonstrated that a paid July 4 shutdown was a term and condition of employment.¹³

Conclusion

For all the foregoing reasons, we find that LBT violated Section 8(a)(5) and (1) by refusing to provide the Union with an unredacted list of the 1997 employee rankings used to select employees for layoff, and we shall order LBT to provide this information to the Union.¹⁴ We also find that LBT did not violate Section 8(a)(5) and (1) by failing to pay striking employees vacation/shutdown pay for the summer of 1999.

ORDER

The National Labor Relations Board orders that the Respondent, LBT, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish the Union with information requested and necessary for the performance of its duties as exclusive collective-bargaining representative.

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

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

(a) Furnish the Union in a timely manner with a copy of the complete spreadsheet of employee evaluations performed in preparation for employee layoffs in 1997, including the names of all employees, whether laid off or retained, matched up with their evaluation scores.

(b) Within 14 days after service by the Region, post at its Omaha, Nebraska, facilities copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places

¹³ Unlike the judge, however, we do not rely on *Nuclear Fuel Services*, 290 NLRB 309 (1988), in which the Board dismissed the allegation that the employer violated Sec. 8(a)(5) by failing to pay vacation pay to striking employees. The case is distinguishable both because the employees had not met their contractual obligation to work on the last scheduled workday before the vacation and because the contract provided for *paid vacation*, not *vacation pay in lieu of vacation*.

¹⁴ In finding, as we do, that the Respondent violated Sec. 8(a)(5) by refusing to furnish the Union with a copy of the unredacted employee evaluation chart, and in ordering the Respondent to furnish that unredacted chart, we acknowledge the Union's promise not to release the information contained therein to rank-and-file employees.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 14, 1999.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to furnish the Union with information requested and necessary for the performance of its duties as the exclusive bargaining representative.

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

WE WILL furnish the Union in a timely manner with a copy of the complete spreadsheet of employee evaluations performed in preparation for employee layoffs in 1997, including the names of all employees, whether laid off or retained, matched up with their evaluation scores.

LBT, INC.

Stanley D. Williams, Esq., for the General Counsel.
George C. Rozmarin, Esq., for the Respondent.
M. H. Weinberg, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Omaha, Nebraska, on January 9, 2001. The charge in Case 17-CA-20235 was filed on July 18, 1999.¹ The charge in Case 17-CA-20300 was filed on August 30, and was amended on November 24.² The consolidated complaint issued on December 15. The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by eliminating vacation/shutdown pay and refusing to pay that benefit to its unit employees and by failing and refusing to furnish relevant information regarding employee evaluations utilized in a layoff in 1997. Respondent's answer denies all of the alleged violations of the Act. I find that the evidence does not establish that the Respondent violated the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, LBT, Inc. (the Company), a corporation, is engaged in the manufacture and sale of liquid bulk tank trailers at its facility in Omaha, Nebraska, at which it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Nebraska and from which it annually sells and ships goods valued in excess of \$50,000 directly to points located outside the State of Nebraska. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, Local 5-0699 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

In 1994, the Company began manufacturing truck tank trailers at its facility in Omaha. Fruehauf Trailer Corporation had previously operated the facility for 30 years. When it commenced operations, the Company voluntarily recognized the Union. Thereafter, the Company and Union entered into successive collective-bargaining agreements. The initial agreement, effective from February 19, 1994, through December 31, 1994, provided for 3 weeks of paid time off, 2 weeks in the

summer, and 1 week at Christmas, and 5 paid holidays. Prior to the expiration of that agreement, the parties entered into their second collective-bargaining agreement, effective from November 18, 1994, through June 14, 1997. That agreement provided for 21 or 22 "days of paid vacations and holidays" in a calendar year, with 6 days designated as holidays and 10 days of vacation during which the plant was to be shut down, and 5 days designated as "floaters" which were prorated for employees who had worked less than 1 year. The third agreement, effective from June 14, 1997, through June 11, 1999, provided 21 or 22 days of vacation and holidays, with 5 days each over the weeks that included July 4 and Christmas Day when the plant was to be shut down. The 5 floater days were prorated for new employees.

On November 7, 1997, the Company experienced a layoff. To determine which employees would be laid off, the Company rated each employee upon various criteria including skill, ability, and productivity, assigning a numerical figure to each criterion. The numbers were totaled, and the 19 employees with the lowest totals were laid off. The Union requested, and the Company provided, various items of information, including a listing of the point totals for each employee evaluated. The names of the employees who were laid off appeared next to their point totals. The Company redacted the names of the employees who were not laid off. The Union filed several grievances, and documentary evidence shows that, in settlement of one of the grievances, one employee who had been laid off was reinstated. No grievance was pursued to arbitration. Although the Union objected to the redacting of the names of the employees who were not laid off, no unfair labor practice charge was filed.

On May 20, prior to the June 11 expiration date of the collective-bargaining agreement that was then in effect, the parties began negotiations for a new agreement. The parties were unable to conclude their negotiations by June 11. On June 12, the Union engaged in an economic strike that ended on August 8 when the parties executed a new collective-bargaining agreement. There were a total of 13 negotiating sessions. At these negotiations, the Company was represented by its attorney and Yvon Gagnon, employee relations manager of Remcore, the parent company of LBT, Inc. The Union was represented by International Representative Ron McKaye and Local Union President Gerald (Jerry) May, who is also a full-time employee in the shipping and receiving department.

B. Vacation/Shutdown Pay

1. Facts

Local Union President May testified that, from 1994 through 1998, employees received vacation pay during the summer shutdowns that occurred during the week of July 4. May recalled that, in 1994, the new owner had stated that he was not going to take things away from the employees, but that he could not afford to do as much as Fruehauf had done, noting that some employees were entitled to as much as 5 weeks of vacation. The first agreement between the parties provided 3 weeks of vacation, 2 in the summer and 1 during the Christmas holiday season, "the exact calendar weeks to be mutually agreed upon by the parties." The agreement effective from November 18, 1994, through June 14, 1997, provided 10 days

¹ All dates are in the year 1999 unless otherwise indicated.

² On December 16, after the complaint issued, this charge was amended a second time. The amendment deleted language charging that the elimination of vacation/shutdown pay discriminated against unit employees in violation of Sec. 8(a)(3) of the Act.

of vacation, the “dates and distribution . . . to be chosen by the Bargaining Committee.” The weeks chosen by the bargaining committee, as reflected on an appendix to the contract, were the weeks that included July 4 and Christmas Day. The third agreement, effective from June 14, 1997, through June 11, 1999, sets out a vacation and holiday schedule and reflects that vacations during which the plant would be shut down were scheduled for the weeks that included July 4 and Christmas Day. The collective-bargaining agreements provided 5 floater vacation days that were prorated for employees who had worked less than 1 year. Shutdown vacation pay was not prorated. May confirmed that “[a]s long as you’re there, you got the shutdown pay.” The record establishes that the employees laid off in November 1997 received vacation pay when the plant shut down over Christmas.

Although the record does not reveal the substance of any bargaining session before July 13, uncontradicted testimony by Gagnon establishes that, prior to the expiration of the collective-bargaining agreement on June 11, the Company submitted a proposal that included a vacation shutdown in the summer of 1999. President May acknowledged that the Union made an “early” proposal that proposed 12 holidays and 20 days of vacation “to be used as the employee decides.” No shutdowns were specified in the Union’s proposal. Cheryl Schissel, recording secretary of the Union, testified that, in May, the Union had requested that the parties address noneconomic issues first, and that negotiations proceeded in that manner. Thus, there would have been no discussion of the Company’s proposal that assumed continued operations with a shutdown or the Union’s proposal that included no shutdowns but did have July 4 as a holiday. The Union struck on June 12. Gagnon’s testimony that there was no shutdown in the summer of 1999 is uncontradicted.

On July 21, at the 10th bargaining session, the Company submitted a final proposal to the Union. Article 8 of that proposal related to vacations and holidays. It provided for vacation during summer shutdowns for the years 2000 and 2001. For 1999, the proposal bore the entry “N/A” (not applicable). Recording secretary, Schissel, recalled that, when a committee member questioned why the 1999 summer shutdown was not applicable, Gagnon responded, “[I]t’s gone, you lost it.” Gagnon recalled that he stated that the shutdown “won’t exist” because it was not specified in the proposal, that, consistent with the proposal, it “will be gone.” The Company proposal was not accepted by the Union on July 21. Counsel for the General Counsel argues that the Union was “[p]recluded by Respondent’s dictates from offering a counterproposal,” citing testimony by Schissel that the Federal mediator stated that the Union would be allowed to ask questions only when the Company presented its proposal on July 21. There is no evidence that this restriction extended beyond July 21 or that the Union was precluded from offering counterproposals at the bargaining sessions in August. Schissel recalled sessions on August 3 and 4, that “went very, very quickly.” She mentioned no restriction regarding the making of counterproposals at those sessions. There is no allegation of bad-faith bargaining. There is no claim that the parties ever reached impasse when bargaining for the

new collective-bargaining agreement. The parties executed a new collective-bargaining agreement on August 8.

May testified that, “at the tail end of the session prior to signing off” on the current contract, he questioned Gagnon regarding whether the unit employees were “going to be paid for our shutdown that we had missed,” and Gagnon replied that he would think about it. There is no evidence of any further discussion regarding this matter. Consistent with the provisions of the new collective-bargaining agreement, employees received vacation pay when the plant shut down in the summer of 2000.

The amended charge in Case 17–CA–20300 does not allege that vacation/shutdown pay was an accrued benefit. At the beginning of the hearing, counsel for the General Counsel amended paragraph 6(a) of the complaint by deleting the word “accrued” from the pleading.

2. Analysis and concluding findings

The complaint, as amended, alleges that, about the first week of July, the Respondent eliminated the payment of vacation/shutdown pay for unit employees and thereafter refused to pay that benefit, that this was a mandatory subject of bargaining, and that the Respondent “engaged in the conduct described” without bargaining with the Union.

The complaint does not allege an 8(a)(3) violation. This is consistent with precedent which holds that a prerequisite for an 8(a)(3) violation regarding the withholding of benefits during a strike is evidence that the benefit was accrued. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Texaco, Inc.*, 285 NLRB 241 (1987). In the instant case, the allegation that the benefit was accrued was specifically amended out of the complaint. In *Wallace Metal Products, Inc.*, 244 NLRB 41 (1979), cited by the General Counsel, the Board specifically found that vacation pay had accrued; thus, that decision is inapposite. *Id.* at fn. 2. *General Tire & Rubber, Co.*, 274 NLRB 591 (1985), cited by the General Counsel and the Charging Party, turned on the question of waiver. Furthermore, in that case, the employees were not on strike. They had continued to work and were, therefore, “otherwise entitled to” the benefits that the respondent had unilaterally ceased to pay. *Id.* at 593.

The General Counsel, proceeding on an 8(a)(5) theory of violation, argues that “one week of paid vacation in the summer” was a term and condition of employment and that failure to pay vacation/shutdown pay to the striking employees constituted a unilateral change in their terms and conditions of employment. There is no question that unilaterally “abrogating benefits accrued under . . . [a] recently expired contract” constitutes a violation of Section 8(a)(5) of the Act. *Vesuvius Crucible Co.*, 252 NLRB 1279, 1282 at fn. 17 (1980). In the instant case, vacation pay was not accrued. When there was a shutdown, “you got the shutdown pay.” Pursuant to the past practice under which employees were paid vacation pay when there was a scheduled plant shutdown, it is certainly arguable that, had there been a scheduled shutdown, failure to pay vacation pay would have constituted a unilateral change. The record does not establish that employees were entitled to vacation pay in the absence of a shutdown.

The limited bargaining history herein reveals that summer shutdowns were not a preexisting term and condition of em-

ployment. The timing of the shutdowns was negotiated. Although shutdowns occurred during the week of July 4 from 1994 through 1998, in each instance the date was the product of negotiations. In 1994, the contract to which the parties agreed granted employees 3 weeks of vacation, 2 in the summer and 1 during the Christmas holiday season, the exact calendar weeks to be “mutually agreed upon by the parties.” The 1995 and 1996 contract does not mention summer but provides for 10 days of vacation during which the plant would be shut down, the dates to be “chosen by the Bargaining Committee.” The contract effective from June 14, 1997, through June 11, 1999, specified a shutdown during the week of July 4 in 1997 and 1998. Thus, although a shutdown did occur under each contract during the week of July 4, the date was “mutually agreed upon” in 1994, chosen by the bargaining committee in 1995 and 1996, and agreed upon in negotiations and set out in the contract in 1997 and 1998. In short, the date of the summer shutdown was not a preexisting term and condition of employment but was specifically negotiated, and the manner in which it was scheduled differed in each of the three contracts. When the contract in effect for the first 5-1/2 months of 1999 expired on June 11, there was no shutdown scheduled for the summer of 1999.

I agree with the Charging Party that vacations are a mandatory subject of bargaining. There is no evidence that the Respondent failed or refused to bargain with regard to shutdowns or vacations. There is no evidence that the restriction on the parameters of bargaining announced by the Federal mediator on July 21 extended beyond that session, and there is no allegation of bad-faith bargaining. In negotiations, the Union had proposed 20 vacation days that were not dependent upon a shutdown but were to be used “as the employee decides.” Respondent had placed a proposal on the table in May that provided for a shutdown in July, but, since economic items were not discussed, the Respondent’s proposal was not discussed and certainly was not accepted. Thereafter the Union struck. Insofar as there was no impasse, the Respondent did not implement its proposal. Thus, there was no shutdown in July. On July 21, the Union was aware that the Respondent, as reflected in its proposal, considered vacation pay for a shutdown that had not occurred to be “not applicable.” In August, “[a]t the tail end of the [negotiating] session prior to signing off” on the current contract, May questioned Gagnon regarding whether the unit employees were “going to be paid” for the shutdown that had not occurred and Gagnon replied that he would think about it. Although May’s question reveals that the Union was concerned about this issue, the Union chose not to inject this issue into the negotiations at the 11th hour. The Union, in August, did not demand that the contract provide for a shutdown in late August or September, nor did it demand vacation pay for a shutdown that had not occurred in July. The parties bargained and agreed to a collective-bargaining agreement that provided for vacation pay during shutdowns in the summer of 2000 and 2001.

It is well settled that an employer “is not required under the Act to finance an economic strike against it[self] *General Electric*, 80 NLRB 510, 511 (1948). Vacation pay was not an accrued benefit; it was paid when there was a shutdown. When the prior contract expired on June 11, no shutdown was scheduled. The employees went on strike. No shutdown occurred. No

vacation pay was accrued and no vacation pay was paid. The employees were not otherwise entitled to vacation pay. In the absence of any entitlement to vacation pay, there was no unilateral change in violation of Section 8(a)(5) of the Act. See *Nuclear Fuel Services*, 290 NLRB 309, 310 (1988). I shall recommend that the allegation that Respondent unilaterally eliminated vacation/shutdown pay be dismissed.

C. The Information Request

1. Facts

On July 13, during a negotiating session, Gagnon mentioned that an order had been cancelled, that there was the possibility of a layoff, and that, if a layoff were necessary, it would be handled in the same manner as in 1997. On July 14, the Union questioned exactly how the layoff would be handled, and expressed dissatisfaction with the information that the Company had provided in 1997. In response to the Union’s request, the Company provided documents relating to the criteria that would be used in selecting employees for layoff, explaining that employees would be evaluated with regard to skill, ability, and productivity. Whether, as the Company claims, it provided a 15-page packet containing the contemporaneous requests and responses from 1997 is immaterial since President May acknowledges that the Union received all of the material in the packet. That material included the listing, first provided in 1997 or early 1998, that reflected the scores of all employees evaluated prior to the 1997 layoff, with the names of the employees who were not laid off redacted.

The Union had, in 1997, objected to the Company’s refusal to link the names to scores of employees not laid off. President May testified, “[W]e never had all the names attached to the rankings.” In refusing to link the names to the scores of employees not laid off, the Company had, in a letter dated November 26, 1997, stated to the Union that it was refusing to do so “because of the obvious disruption and controversy which it may cause in the unit.” The Company continued to maintain this position, advising by letter dated December 18, 1997, that, although it would disclose the scores of employees not laid off, it would not disclose the names because doing so “would be extremely harmful and disruptive.” In a letter dated January 26, 1998, the Company repeated that “releasing the relative ranking of all employees would be harmful and disruptive to the overall operation of the shop.” In response to a grievance, the Company again refused to provide this information, stating in a letter dated March 3, 1998, that “there is great risk involved with releasing the relative ranking of all employees” and asserting that the information was not relevant to the grievance. No grievance was pursued to arbitration, and no unfair labor practice charges were filed regarding any issue related to the 1997 layoff.

On July 14, May recalled that Gagnon stated that the information the Union was seeking was confidential and could cause serious problems in the plant, “the same position” the Company had taken in 1997. Following the supper recess, the Union presented the Company with a written request, dated July 14, that states in pertinent part:

[W]e respectfully request the company's evaluations concerning the reduction of the work force regarding the layoff of Nov. 1997, and as well, the evaluations which pertain to the layoff[s], which you inform us are impending.

We would appreciate receiving a detailed explanation of the standards used in the evaluations as well as how the points for each individual evaluated were computed, and/or assessed.

On July 15, the Company responded in a letter that, in pertinent part, states:

This letter is to confirm that in 1997 and again yesterday, the Union was provided all of the information requested to enable you to understand how the evaluation process worked for the 1997 layoff. The only information you were not provided in 1997 was the relative ranking of those persons who were not laid off. You were not provided that information because it was not relevant and would obviously be disruptive for no useful purpose.

The Union replied in a letter dated July 15 which stated that it was requesting the information regarding the 1997 layoff in order "to formulate our proposal for a layoff clause," to "test-check the validity of current evaluations for your proposed layoff," and to determine "the validity of the methodology of assigning points." There is no evidence that any current evaluations had been performed, and denial of current evaluations is not alleged as a violation. After the meeting of July 21 and prior to August 8 when the parties agreed to a new collective-bargaining agreement, Gagnon announced, at the bargaining table, that no layoff would occur.

The Union filed the unfair labor practice charge in Case 17-CA-20235 on July 16. Although the Union's letter refers to needing the data from 1997 in order to formulate a proposal, Gagnon testified that, at the bargaining table, the reason stated by the Union for needing the information was to determine "if we had done the right selection" in 1997. This is confirmed by Recording Secretary Schissel who recalled that, on July 21, a member of the Union's negotiating committee raised an issue regarding an employee who was able to weld stainless steel, steel, and aluminum and who had been laid off in 1997, whereas an employee who was able to weld only steel was not laid off. May recalled that the Union also stated that it wanted the information so that it could educate employees regarding their deficiencies. Gagnon stated to the Union that giving information that was 2 years old could be misleading "because what was true in 1997 was probably not true anymore in 1999."

There is no contention that the Company refused to discuss the layoff procedure. May's testimony confirms that the Company discussed the evaluation procedure. Gagnon testified that he became frustrated because, every time the procedure was discussed, the Union demanded the 1997 evaluations; we were "going simply nowhere." There is no evidence that the Union responded to Gagnon's statement that the 1997 evaluations could be misleading "because what was true in 1997 was probably not true anymore in 1999."

2. Analysis and concluding findings

The complaint alleges that the Respondent violated the Act by failing to provide the Union with the evaluations of employees not laid off in 1997. The principles concerning the provision of information are succinctly stated by the Board in *Coca-Cola Bottling Co.*, 311, NLRB 424, 425 (1993):

The obligation to supply information is determined on a case-by-case basis, and it depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it. *White-Westinghouse Corp.*, 259 NLRB 220 fn. 1 (1981). In making this determination, the Board has repeatedly reiterated the following principles enunciated by the Third Circuit in *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965):

[W]age and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth; as to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires.

Supervisory assessments of the relative competence of one employee vis-a-vis another employee are not at the core of the employer-employee relationship and require a specific showing of relevance. Such relevance is obvious when the assessment has resulted in denial of a raise or other adverse action such as being chosen for layoff. See *Aerospace Corp.*, 314 NLRB 100 (1994). Thus, there is no question that the evaluations sought by the Union in 1997 were relevant at that time. It seems clear that, had a charge been filed in 1997 regarding Respondent's failure to provide the evaluations, that charge would have been found meritorious and a complaint would have issued, absent settlement; however, no charge was filed.

In its letter of July 15, the Union asserted that it needed the 1997 evaluations in order to formulate a proposal for a layoff clause, to "test-check the validity of current evaluations for your proposed layoff," and to determine "the validity of the methodology of assigning points." Notwithstanding the statements in the Union's letter, there is no evidence of any discussion regarding the first two of those asserted reasons at the bargaining table. The Union never stated how the individual evaluations of employees not laid off in 1997 would assist it in formulating a proposal for a layoff clause. The Respondent provided information regarding the process that would be followed, i.e., employees would be rated by supervisors on various criteria including skill, ability, and productivity. There is no evidence or complaint allegation regarding any current evaluations related to the canceled August layoff.

The remaining basis for the Union's request, to determine the "validity of the methodology of assigning points," would, just as the Union did at the bargaining table, result in revisiting the 1997 layoff and arguing whether the Respondent had made

“the right selection” in 1997. Referring to May’s testimony, the Charging Party argues that production of the names of the employees evaluated in 1997 could assist the Union in educating employees regarding their deficiencies. This purported basis for needing the names of employees was an afterthought. It had never been stated previously and it was not stated in the letter of July 15. The evaluations were almost 2 years old and Gagnon specifically stated that those evaluations could be misleading in 1999 because “what was true in 1997 was probably not true anymore in 1999.” The Union did not dispute that statement. The probative evidence establishes that the request for the evaluations performed in 1997 had no purpose other than second guessing and objecting to ratings that had been given in 1997. On June 11, the prior collective-bargaining agreement expired. All grievances relating to the 1997 layoff had been settled or abandoned. In July, when the Union re-requested the evaluations, the 1997 layoff was history.

In *Westinghouse Electric Corp.*, 304 NLRB 703 (1991), the Board affirmed the administrative law judge’s finding that the respondent had violated the Act by not timely providing requested information and agreed that, notwithstanding this find-

ing, the information need not be produced since it had “no current relevancy.” *Id.* at 709. In the instant case, no charge was filed regarding the failure of the Respondent to provide the requested evaluations in 1997. Thus, no violation can be predicated upon its failure to do so some 2 years ago. The record does not establish any current need for the Union to obtain 2-year-old evaluations of employees who were not laid off under the provisions of a contract that has expired. I find that the individual evaluations of employees not laid off in 1997 had no current relevance when requested by the Union on July 14. The Respondent did not violate the Act by refusing to provide irrelevant information. I shall, therefore, recommend that this allegation be dismissed.

CONCLUSION OF LAW

The Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

[Recommended Order for dismissal omitted from publication.]