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Active Transportation Company, L.L.C. and Teamsters Local Union No. 71, a/w International Brotherhood of Teamsters, AFL-CIO. Case 11-CA-19328

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On August 8, 2002, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering 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 has decided to adopt the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified² and set forth in full below.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit to the Respondent's exception to the judge's failure to draw an adverse inference from the failure of Sam Carter to testify. At the time of these proceedings, Carter was no longer an official of the Union, and the judge generally discredited Bruce Jackson's testimony.

² The judge recommended that the Respondent be permitted to litigate in compliance the issue whether the contributions due the benefit funds may be offset by the payments the Respondent made to its own company provided fringe benefit plans. In adopting the judge's recommendation, we note that "[e]mployees have, in addition to a stake in receiving benefits negotiated on their behalf by their own chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted." *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), enf. denied in pertinent part 107 F.3d 882 (D.C. Cir. 1997). See also *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983) (contributions to union funds are properly ordered where employer's "diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs"), cert. denied mem. 466 U.S. 937 (1984).

Although the above citations reflect current Board law, nothing herein shall be read to preclude the Respondent from raising such issues in compliance.

³ The judge failed to include the requisite provisions in his recommended Order and notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent Active Transportation Company, L.L.C., Mt. Holly, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Failing and refusing to execute, on request, a written contract incorporating any agreement it has reached with the Charging Party.

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

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

(a) Execute and implement a written contract embodying the agreement it reached with the Charging Party in September 2001.

(b) Make whole its employees for all losses they may have suffered because Respondent failed and refused to execute and implement the agreement on November 1, 2001.

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

(d) Within 14 days after service by the Region, post at its Mt. Holly, North Carolina, if that facility remains open, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."⁴ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

⁴ 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."

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 attached notice to every person who was a bargaining unit employee at Respondent's Mt. Holly, North Carolina facility on November 1, 2001.

(e) 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.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 in any like or related manner interfere with, restrain, or coerce our employees in the exercise of these rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT refuse to sign, on request, a written contract incorporating any agreement we reach with a union which is the exclusive collective-bargaining representative of any of our employees.

WE WILL sign and implement the agreement concerning health insurance and pensions which we reached in September 2001 with Teamsters Local Union No. 71, affiliated with the International Brotherhood of Teamsters, AFL-CIO.

WE WILL make all employees whole for any losses they suffered because we unlawfully failed and refused to execute and implement this agreement on November 1, 2001.

ACTIVE TRANSPORTATION COMPANY, L.L.C.

Donald R. Gattalero, Esq., for the General Counsel.
C. John Holmquist Jr., Esq., and Emily Robinson, Esq. (Dickinson Wright, PLLC), of Bloomfield Hills, Michigan, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on July 11, 2002, in Winston-Salem, North Carolina. After the parties rested, I heard oral argument, and on July 12, 2002, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹ The conclusions of law, remedy, recommended Order, and notice provisions are set forth below.

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. The Respondent must also post the notice to employees attached to this decision as appendix B.

In this case, the Respondent discharged the employees affected by its unfair labor practices after one of its customers gave its business to a competitor. The General Counsel has not alleged that these discharges violated the Act, and the present record would not support such a conclusion. Nonetheless, these employees, who will be affected by the remedy, should be notified that the Board has found that Respondent committed an unfair labor practice, and that pursuant to the Board's order, Respondent is taking corrective action.

Therefore, I recommend that the Board order Respondent to mail a copy of the notice to each of the former employees who worked at Respondent's Mt. Holly, North Carolina facility on November 1, 2001, the date of the unfair labor practice. See *Excel Container, Inc.*, 325 NLRB 17 (1997), modifying *Indian Hills Care Center*, 321 NLRB 144 (1996).

¹ The bench decision appears in uncorrected form at pp. 178 through 204 of the transcript [omitted from publication]. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

Respondent unlawfully refused to sign a written contract embodying the terms of an oral agreement it had reached with the Union. This agreement concerned the bargaining unit employees' health and pension benefits. As the Board stated in *G & T Terminal Packaging Co.*, 326 NLRB 114 (1998), "The normal remedy for an unlawful refusal to sign a contract is to require the offending party to sign the contract." Certainly, Respondent should be required to sign the local agreement it reached with the Union in September 2001.

Ordering Respondent to sign the agreement necessarily implies that Respondent must comply with its terms. However, unusual circumstances in this case raise the possibility that requiring full compliance with the terms of this local agreement would be punitive rather than remedial. In considering this possibility, it is helpful to begin by summarizing the pertinent facts.

Although the Respondent and the Union have enjoyed a bargaining relationship dating back two decades, before September 2001 they had never agreed that a group of Respondent's employees, employed in North Carolina, should be covered by the Central States health and pension plans. Instead, Respondent provided health insurance for these employees by contracting first with Blue Cross and later with Humana. To provide pension benefits for these employees, Respondent made contributions to a 401(k) plan.

This arrangement was exceptional. Respondent's bargaining unit employees at other locations did receive health insurance and pension benefits through the union-related Central States funds. Respondent belonged to a multiemployer association, and the bargaining unit employees of other employers in this association also received their health and pension benefits through the Central States funds. Thus, Respondent's North Carolina employees were unique.

In 1999, when the Union bargained with the multiemployer association for a new nationwide agreement, it sought unsuccessfully to have these North Carolina employees covered by the Central States health and pension funds. Instead, the Union obtained an agreement that the Respondent would pay no less for its employees' health and pension coverage than it would have had to pay to the Central States funds.

Two years later, the Union made Respondent a persuasive offer which provided, in part, that if Respondent switched its employees' health and pension coverage to the Central States plans, the Union would guarantee that health insurance rates would not increase for the next 4 years. Respondent accepted this offer before it learned that it was losing a major customer to a competitor. When Respondent received the first indications of this loss, it balked at signing the agreement and ultimately refused to do so.

If Respondent had not violated Section 8(a)(5) and (1) of the Act by refusing to sign the local agreement it had reached with the Union, it would have placed its employees under the Central States health and pension plans on November 1, 2002. Instead, it continued to cover the bargaining unit employees with the Humana plan health insurance until it lawfully terminated them, for lack of work, about 3 months later.

Under the national collective-bargaining agreement reached in 1999, Respondent had to make medical insurance and pen-

sion payments at least equivalent to the payments other employers had to make, under the agreement, to the Central States plans. Requiring Respondent to duplicate such payments—by paying similar amounts now to the Central States funds—arguably would go beyond a make-whole remedy. However, the parties have not litigated this issue, and I recommend that Respondent be allowed to raise it during the compliance phase of this proceeding.

Similarly, the parties have not litigated the factual question of whether Respondent's payments to the health insurance carrier and the 401(k) plan did equal the amounts other employers paid to the Central States funds. Respondent had a contractual obligation to make such payments, but the present record does not demonstrate whether or not it fulfilled this obligation. Therefore, if the Board permits Respondent to raise the legal argument that such payments should offset its obligation to the Central States funds, the factual support for this argument needs also be developed in the compliance proceeding.

Considering that Respondent did cover the employees with the Humana health insurance, it may be argued that requiring Respondent to make similar payments to the Central States health fund imposes a burden on Respondent without providing a benefit to the affected employees. Such an order might be considered punitive rather than remedial, but the parties have not litigated this question. Therefore, I recommend that the Board allow Respondent to raise and litigate such an argument during the compliance phase.

In any event, Respondent must undo any actual harm which employees suffered because it failed to enroll them in the Central States health fund, as it had promised to do. For example, Respondent's failure to provide this coverage may have made it necessary for employees to bear medical expenses which the Central States plan would have covered but which the Humana plan did not. Respondent must reimburse employees for such expenses, as determined in the compliance stage of this proceeding.

CONCLUSIONS OF LAW

1. The Respondent, Active Transportation Company, L.L.C., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Teamsters Local Union No. 71, affiliated with the International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute a written contract embodying an agreement it reached with the Charging Party in September 2001, after the Charging Party requested that Respondent sign this written agreement.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended²

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended

ORDER

The Respondent, Active Transportation Company, L.L.C., shall

1. Cease and desist from

(a) Failing and refusing to execute, upon request, a written contract incorporating any agreement it has reached with the Charging Party.

(b) In any like or related manner 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) Execute and implement a written contract embodying the agreement it reached with the Charging Party in September 2001.

(b) Make whole its employees for all losses they may have suffered because Respondent failed and refused to execute and implement the agreement on November 1, 2001.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Mt. Holly, North Carolina, if that facility remains open, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Duplicate and mail at its own expense a copy of the attached Notice to every person who was a bargaining unit employee at Respondent's Mt. Holly, North Carolina facility on November 1, 2001.

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

Dated Washington, D.C. August 8, 2002

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

³ 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."

APPENDIX A

Bench Decision in

Active Transportation Company

11-CA-19328

The hearing will be in order. This is a bench decision in the case of *Active Transportation Company*, Case 11-CA-19328. It is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged, by failing and refusing to execute an agreement it reached with the Union.

Procedural History

This case began on January 8, 2002, when Teamsters Local Union No. 71, affiliated with International Brotherhood of Teamsters, AFL-CIO (the "Union" or the "Charging Party") filed an unfair labor practice charge against Active Transportation Company, L.L.C. (the "Respondent"). The Union amended this charge on February 28, 2002.

After an investigation, the Acting Regional Director (the "Director") of Region 11 of the National Labor Relations Board issued a Complaint and Notice of Hearing (the "Complaint") on March 15, 2002. In issuing this Complaint, the Director acted for and on behalf of the Board's General Counsel (the "General Counsel" or the "government").

Respondent filed a timely Answer to the Complaint, and amended this Answer orally when the hearing opened before me on July 11, 2002 in Winston-Salem, North Carolina. On that day, both the General Counsel and the Respondent presented evidence, rested their cases, and gave oral argument. Today, July 12, 2002, I am issuing this bench decision.

Uncontested Allegations

Based on the admissions in Respondent's Answer, as amended orally at the hearing, I find that the government has proven the allegations raised in Complaint paragraphs 1, 2, 3, 4, 5, and 6. More specifically, I find that the Union filed and served the charge and amended charge as alleged.

Further, I find that at all material times, Respondent has been a Kentucky limited liability company with a terminal located at Mt. Holly, North Carolina, and that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Therefore, it is subject to the Board's jurisdiction. Additionally, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Complaint paragraph 7 alleged that a number of individuals were Respondent's supervisors and agents. Although Respondent initially denied these allegations, at hearing it amended its Answer to admit that Respondent's president, Bruce Jackson, and its vice president—labor relations, Todd Barnum, are its supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act. I so find.

Also at the beginning of the hearing, the General Counsel amended Complaint paragraph 8 to allege that the following employees of Respondent constitute a unit (the "Unit") appro-

priate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees covered under the National Master Automobile Transporters Agreement.

Based on a stipulation entered into by Respondent at the hearing, and the record as a whole, I conclude that this unit is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

Complaint paragraph 9 alleged that at all times since 1980, the Union has been the exclusive bargaining representative of the employees in the Unit, and that recognition of this status “has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from the period June 1, 1999 through May 31, 2003.” Respondent partially admitted these allegations. Its Answer stated as follows:

Active admits that the Union has been the exclusive representative of employees covered by collective bargaining agreement at its Mt. Holly, North Carolina terminal facility. It further admits that Active and Teamsters Local 71 were signatory to a multi-employer multi-local union collective bargaining agreement which was effected [sic] by its terms from June 1, 1991 through May 31, 2003. Active denies remaining allegations in paragraph 9.

Based upon these admissions and other evidence in the record, including the current collective-bargaining agreement, I find that the General Counsel has proven the allegations raised by Complaint paragraph 9. More specifically, I find that by virtue of Section 9(a) of the Act, the Union has been the exclusive bargaining representative of Respondent’s employees in the Unit at all times since 1980. Further, I find that such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from June 1, 1999 through May 31, 2003.

Disputed Allegations

This case turns on a single factual question: Did Respondent agree without reservation to a “rider” to the collective-bargaining agreement requiring it to provide pension coverage and health insurance for its bargaining unit employees by making contributions to two funds associated with the Teamsters Union? The General Counsel and the Union contend that Respondent agreed to these terms with “no strings attached” and that Respondent then violated the Act by refusing to sign a written document memorializing that agreement. Respondent asserts that it conditioned agreement on the occurrence of an outside event—securing a contract to transport vehicles for a company called Freightliner—and that because this event did not occur, the terms it discussed with the Union never ripened into a binding agreement.

For clarity, a discussion of the facts should begin with the bargaining relationship, which is somewhat unusual. Respondent is one of a number of trucking companies specializing in transporting new automobiles and trucks under contracts with the car makers. At the national level, these trucking companies have delegated their bargaining rights to a committee which

negotiates with a similar committee representing the local unions.

In the national agreement, the employers and unions have established a creative and rather elaborate mechanism which appears to promote cooperation between the companies and the local unions. Trucking company representatives and local union representatives sit on joint committees to resolve grievances.

These arbitration committees also serve another purpose, reviewing local supplemental agreements, sometimes called “riders,” negotiated by a single employer and a local union to address local problems. The national contract appears to encourage such local problem solving, so long as any local agreement does not conflict with the general terms applied nationwide. To make sure that such conflicts do not occur, any local agreement must be submitted to a specified arbitration committee, and receive the committee’s approval, before it may take effect.

Respondent operates a number of trucking terminals in various states and in Canada. The employees who drive the trucks from these locations are members of the bargaining unit and covered by the national agreement. However, Respondent’s employees at various locations do not work under identical terms and conditions of employment.

For health insurance and pension purposes, almost all of Respondent’s employees have been covered by plans associated with the Teamsters Union, namely, the Central States Health and Welfare Plan and the Central States Pension Fund Plan. However, the employees at Respondent’s facility in Mt. Holly, North Carolina did not have such coverage. Instead, Respondent paid premiums to a health insurance provider, such as Blue Cross and Blue Shield. Respondent also made contributions to a 401(k) plan for each of these employees. Respondent also paid employees yearly bonuses.

Union officials tried to get Respondent to place these employees within the coverage of the Central States health and pension funds, but the Respondent resisted. The federal Employee Retirement Income Security Act, or “ERISA,” applies to these Central States plans. ERISA includes “withdrawal liability” provisions which, Respondent feared, might expose it to severe monetary penalties under certain circumstances. Until recently, therefore, Respondent had been unwilling to bring its Mt. Holly employees under the Central States “umbrella.”

Several events changed management’s attitudes about the desirability of the Central States plans. Because Blue Cross-Blue Shield raised its rates, Respondent switched to another health insurance provider, Humana. Employees did not like this new coverage and began to complain about it.

Additionally, Respondent faced new business challenges. In 2001, it transported 40 percent fewer cars and trucks than previously, because fewer people were buying vehicles and, therefore, the manufacturers had no need to ship them from the factory to the dealer.

Further, in September 2001, Respondent received word of an event which could portend either good or ill for the company, an event which might be called a “double or nothing” opportunity. A company called Freightliner operated two facilities in North Carolina, in the towns of Mt. Holly and Cleveland. Respondent transported vehicles from Freightliner’s Mt. Holly

facility, and a competitor hauled vehicles from Freightliner's Cleveland plant.

Freightliner notified Respondent that it was going to consolidate these two operations, and that one trucking company would be assigned the work at both plants. The losing trucking company would not have work at either. To win this business, Respondent had to submit a more favorable bid than its competitor.

Preparing such a bid obviously entailed risk. If Respondent won the contract by bidding too low, it would wind up with a lot of work but no profit. Conceivably, in an effort to submit the lowest bid, management could achieve a Pyrrhic victory, a contract obligating it to operate at a loss.

Therefore, management needed accurate and reliable estimates of its operating expenses, including labor costs, for several years in the future. At this point, Union officials made the Respondent a proposal which sounded very attractive.

Union representatives told Respondent's management that they could lock in the costs of health insurance by switching to the Central States plan. The Union would agree to a "local rider" that these rates would not increase until the expiration of the collective-bargaining agreement after the current one. Respondent's president understood the Union offer to signify that it would not have to pay any increase in health insurance premiums until May 31, 2005, when Respondent's employees would switch to more expensive health and pension plans also administered by the Central States funds.

Considering the typical rise in health insurance costs, being able to avoid premium increases for four years could result in substantial savings to the Respondent. Also, by knowing its health care costs for the next four years, management could make a more informed estimate of its operating expenses, information it needed to make the most effective bid for the Freightliner contract.

Additionally, the Union representatives came to Respondent with another argument. They presented figures showing the managers that they actually could reduce operating expenses by switching to the Central States plan and eliminating the alternatives. In other words, the Union representatives argued, it would cost Respondent less to make the necessary contributions to the Central States health and pension plans than it would cost to pay the Humana premiums, support the 401(k) plans, and pay the yearly bonuses.

The Union's argument fell on receptive ears. Respondent's president, Bruce Jackson, fervently wanted to win the Freightliner contract. Moreover, the record suggests that Jackson faithfully practiced the art of positive thinking and, undoubtedly, this combination of zeal and confidence must have brought success on numerous occasions. So it appears likely that when the Union showed Jackson how he could reduce his operating expenses and lock in health care expenditures in the future, that knowledge gave him even more confidence that his company would prevail in the bidding war.

The Union's proposal appears to have made Jackson a convert, at least for a time. Although once wary of the Central States plans, he now embraced them for the help they could provide his company at this critical time.

The record clearly shows that both he and the Union representatives took the initial steps necessary for Respondent to switch over to the Central States plans. These steps entailed getting the employees to ratify the change, and getting the appropriate arbitration committee to approve it.

The record is less clear on exactly what Respondent said to the Union representatives. He testified that he agreed to the Union's proposal upon one condition, namely, that his company won the Freightliner contract.

Contradicting Jackson, a Union representative, Jimmy D. Wright, testified that Jackson did not mention such a condition at the time they negotiated the change, but only raised it much later, after learning that his company had lost the bidding war and would not be doing the Freightliner work.

In determining which witness to credit, it is helpful to examine the various events in the sequence they unfolded. The relevant events actually began during the early period of the parties' bargaining relationship.

The Complaint alleges and the Respondent has admitted that the Union has represented Respondent's bargaining unit employees since 1980. The record indicates that sometime early in the bargaining relationship, the Union and Respondent agreed that the employees would remain under the company-sponsored health and pension plans, and memorialized this agreement in a "local rider" to the collective-bargaining agreement.

During the 1999 negotiations for a nationwide collective-bargaining agreement, the Union committee proposed bringing Respondent's employees under the Central States plans, but the Respondent would not agree. The Union then made a modified demand, asking that Respondent raise its contributions to the existing health and pension plans, so that those contributions would be equivalent to payments other employers were making under the National Agreement. The parties agreed, and this proposal became part of the General Monetary Agreement on June 2, 1999.

The Union later sought to negotiate with Respondent another "local rider" to require Respondent to bring its employees into the Central States plans. Respondent took the position that language in the National Agreement precluded the parties from bargaining at the local level. This language provided that no subject matter "negotiated to conclusion and inserted into, deleted from or rejected in the National Master Agreement . . . will be a proper subject for Local Rider negotiations unless mutually agreed otherwise by the parties. . . ."

Ultimately, in February 2001, a Joint Arbitration Committee held that Respondent's position was correct, and that it did not have to bargain about this matter during the term of the National Agreement.

In late August or early September 2001, the Union made Respondent the offer to sign a "local rider" locking in the company's health insurance costs for five years, in return for Respondent switching to the Central States health and pension plans. Respondent's president, Bruce Jackson and Local 71's president, Samuel M. Carter, discussed this offer on September 5, 2001 and the next day, Carter sent some of the paperwork to Jackson by fax. Specifically, Carter faxed the "participation

agreements” which Respondent would enter into with the Central States funds.

Jackson’s office is in Kenosha, Wisconsin. On October 5, 2001, Jackson and Respondent’s vice president of labor relations, Todd Barnum, flew to Charlotte, North Carolina to meet with Union officials concerning this proposal. According to Jackson, he explicitly told the Union officials that Respondent’s willingness to sign the “local rider” was contingent upon it keeping the Freightliner contract in Mt. Holly and acquiring the Freightliner work performed by the competitor in Cleveland, North Carolina. Jackson testified, in part, as follows:

We made it very clear that the bid was ongoing and that it would be implemented, the first part, which was the health, welfare and pension part, would be implemented based on our getting and retaining the Mt. Holly business and getting the Cleveland business.

The General Counsel’s only witness, Union Representative Jimmy Wright, contradicted this testimony.

Respondent’s management did not sign the “local rider” it received from the Union. However, Respondent did take necessary steps to put this agreement into effect. On October 6, 2001, management discussed the change with its employees, who approved the contemplated change in a ratification vote that same day.

Before the “local rider” could become effective, it also had to gain the approval of an arbitration committee established under the National Agreement. On October 22, 2001, Respondent sent by facsimile a request to the management and union representatives of this committee, asking for the committee to consider the “local rider” when it met during the week of October 29, 2001 at Hilton Head Island, South Carolina.

When the arbitration committee convened and considered the request, Respondent’s President Jackson, Vice President Barnum and one other representative appeared and argued that the “local rider” should be approved. No court reporter transcribed this proceeding, but the Committee’s minutes include the following:

Bruce Jackson, Todd Barnum and Frank Prevatt appeared on behalf of Active USA. They acknowledged both Local Union 71 and the Company have reached, after extensive negotiations, an agreement whereby the Company’s existing private health care and Company retirement plan will be replaced by plans and benefits provided by the Central States Health and Welfare and Pension Plan. This agreement has been reached in conjunction with the Plan. The parties’ agreement was submitted for approval and ratification by the affected Mt. Holly employees which approved same on October 6, 2001.

The arbitration committee’s minutes, which reported a number of decisions it made concerning grievances and other matters, begin with the caveat that “The summary of discussion . . . does not constitute or purport to be verbatim testimony of the proceedings. . . . Material representations or facts submitted by some or all of the involved parties may have been inadvertently omitted from the summary of discussions.” However, I conclude that, at the very least, these minutes establish that Re-

spondent’s top management attended the arbitration committee meeting and argued in favor of the “local rider.”

Respondent’s witnesses testified that Jackson did inform the arbitration committee that the “local rider” would not take effect until and unless Respondent won the Freightliner contract. The arbitration committee’s minutes do not indicate that Union Representative Jimmy Wright, the General Counsel’s sole witness in this proceeding, attended the committee meeting. Rather, another Union representative, who did not testify in the present case, attended the committee meeting on behalf of the Union.

The arbitration committee’s minutes do not indicate that Respondent’s representatives told the committee that the “local rider” was contingent upon Respondent being awarded the Freightliner work. Considering the brevity of these minutes, and the disclaimer appearing on them, the minutes do not rule out that possibility.

By November 1, 2001, Respondent had received a good indication that it would not win the Freightliner contract. By facsimile on that date, Respondent’s president sent Union Representative Wright a letter stating the following:

While Active Transportation has yet to receive official notification of the National Joint Arbitration Committee’s decision regarding our rider change proposal in line with the change to Central States Health, Welfare and Pension plan, this is to advise you that the implementation will be subsequent to Freightliner’s decision in response to our latest proposal regarding Mt. Holly.

As you and I discussed on October 30, 2001, Freightliner responded to our proposal for Mt. Holly (in addition to Portland and St. Thomas (CN)) that our proposal was not cost competitive and gave us target prices. We responded October 30, 2001 and at this date do not have a specific timetable for a response from Freightliner to date.

That same day, Union Representative Wright sent a reply by facsimile to Jackson. It stated that some of Respondent’s employees were concerned that they would have no health insurance, either through Humana or Central States, adding, with underlined words, “*We need to know just where we stand with the Mt. Holly insurance coverage!*” The Union’s letter continued as follows:

Our understanding was [that] the Central States plans would go into effect on November 1, 2001, provided the grievance committee approved the change in that local rider item. I was told by Doc Conder there would be no problem since both the Company and the Union has [sic] agreed to the agreement.

If you plan to renege on our understanding about the Central States plans, we certainly need assurance that the Humana plan still covers the Mt. Holly employees. For this reason, it is urgent that you contact us immediately regarding this matter.

The next day, Respondent posted a notice informing its employees that their Humana health insurance remained in effect. It also sent a copy of this notice to the Union. The notice also mentioned Freightliner’s negative letter and Respondent’s fur-

ther effort to obtain the Freightliner business. The notice then stated, "As a result, the implementation of the Central States Plan will be delayed pending Freightliner's decision on our counter-proposal."

To determine whether Respondent orally conditioned implementation of the "local rider" on its obtaining the Freightliner contract, parol evidence must be used. The rider itself includes no reference to such a condition. Neither does Respondent's correspondence with the Union before November 1, 2001.

As already noted, the Union had sent Respondent the "participation agreements" in early September 2001. On October 18, 2001, Respondent's President Jackson gave copies of these to the labor relations vice president. Jackson also gave Barnum a memorandum with instructions pertaining to the participation agreements. The memo asked Barnum to refer to these documents and do the following:

1. Please verify the numbers are what we agreed to.
2. Check with Human Resources to see if we are required to give any notice to Humana to remove these employees from that plan.
3. Determine if there are any issues of removing these employees from the 401K.
4. It appears the effective dates will have to be changed to coincide with November 1 or December 1 start date. This will need to be communicated to Sam Carter.
5. The Local Rider will have to be changed to CLEARLY stating that it is the intention of this agreement to not be subjected to negotiations for anything other than the negotiated increases until the expiration of the next contract that begins on June 1, 2003 for a period to be determined by negotiation

(Emphasis in original)

This memorandum does not mention or suggest that execution of the local rider would be contingent on Respondent winning the Freightliner contract. No documents establish what action, if any, Vice President Barnum took after receiving this memo. For example, the record does not establish that Barnum contacted the Union concerning the memorandum's fifth paragraph, which stated that changes were necessary in the "Local Rider" agreement.

On October 19, 2001, Union Representative Wright signed a document captioned "Agreement between Active Transportation Company and Teamsters Local Union No. 71, Local Rider—Item 2." This document concerned the changes in pension and health insurance which the Union's membership had approved on October 6, 2001, and which would go before the arbitration committee later in October.

Respondent never signed this document. However, as already noted, three representatives of the Respondent, including its president, attended the arbitration committee meeting at Hilton Head Island to advocate that the committee approve the "local rider." It would seem somewhat unusual for the Respondent's president to travel from Wisconsin to South Carolina to persuade the committee to approve an agreement if the parties had not already agreed upon all the terms.

To the contrary, it appears more likely that Respondent had seized on the "local rider" as a means of stabilizing costs, creat-

ing a "foothold" to use in climbing out of the slump caused by the sudden loss of business in 2001. The record suggests that business conditions had reached a desperate level, both because of the 40 percent reduction in work and because Freightliner might take away the work which Respondent had been performing and assign that work to a competitor.

Considering this level of desperation, I conclude that it would be unlikely for Respondent to inform the arbitration committee that the agreement under consideration was merely tentative. Respondent would not want to tell this committee anything that could raise doubts about the agreement.

Moreover, the wording in Respondent's November 1, 2001 letter to the Union persuades me that before this letter, Respondent had never told the Union that agreement to the "local rider" was contingent upon it receiving the Freightliner business. Respondent's November 1, 2001 letter announces this condition by stating "this is to advise you that the implementation will be subsequent to Freightliner's decision in response to our latest proposal regarding Mt. Holly."

Customarily, people do not use this phrase—"this is to advise you"—to inform someone else of a fact that person already knows. Consider this hypothetical illustration: Suppose that a woman sent her fiance a letter which began, "Dear John, this is to advise you that we will not get married unless you are first inoculated against rabies and distemper." From this language, it appears pretty likely that the writer is stating a new requirement, not something previously discussed.

If the hypothetical engaged couple had reached agreement on this subject earlier, or had even discussed it, the letter would not begin, "this is to advise you. . . ." Rather, it would start "As we previously discussed" or even better, "As you previously agreed. . . ."

Perhaps it might begin with more tactful language, such as "John, do you remember how concerned I was that time you were frothing at the mouth. . . ." In any event, the letter's prefatory remarks would not suggest the announcement of a new fact but would either allude to previous discussion or at least be silent on that subject. The phrase "this is to advise you" makes sense only if the writer believes he is telling the reader something new.

Considering the stated reason for Respondent's November 1, 2001 letter to the Union, namely, to advise the Union of this condition, I cannot conclude that Respondent had raised the subject with the Union earlier. Jackson testified that his secretary may have sent the Union this letter while he was enroute back from the arbitration committee meeting in South Carolina. However, there is no reason to conclude that the secretary would send a letter over Jackson's signature if he had not first told the secretary what to say. Indeed, Jackson also testified that when he notified employees that their Humana health insurance remained in effect, he dictated the notice to his secretary, who had it printed and distributed.

Moreover, I do not rely solely on the wording of this November 1, 2001 letter in concluding that before this date, Respondent had not informed the Union that execution or implementation of the local rider would be conditioned on some other event. No letter or fax to the Union either mentioned or even alluded to such a condition.

Certainly, the Respondent must have told the Union about its difficulties. It appears beyond doubt that Respondent had described to the Union its precarious situation with the Freightliner account. But describing how Respondent would be hurt if it did not win the contract is quite different from expressly conditioning an agreement on that event.

This distinction may be illustrated by an excerpt from Jackson's testimony concerning his appearance before the arbitration committee and what the Respondent's representatives told the committee. When asked if there had been any discussion in the Respondent's presentation concerning when the local rider would become effective, Jackson gave this answer:

Well, in my part of the presentation, I talked to the reason that we made this agreement, and we made sure that the panel understood that there was a bid going on, and part of the process on the bid, you know, was trying to lock in some costs.

This answer does not establish that Jackson told the arbitration committee that the local rider was subject to a condition precedent. Indeed, it does not even disclose what he told the committee about when the local rider would take effect, which was the information the questioner sought.

It concerns me that the witness was trying to sidestep the question, or perhaps create the impression that he told the committee about such a condition even though his testimony really stops short of making such a statement. This testimony may reflect a more general tendency to try to finesse issues rather than meeting them squarely.

Another example appears in Jackson's November 1, 2001 letter to the Union representative. Respondent has taken the position in this proceeding that both the Union and management representatives had agreed that the local rider would be subject to a condition precedent, namely, that Respondent retained Freightliner's work at Mt. Holly and acquired its work at Cleveland, North Carolina. However, the November 1 letter does not come out and say as much. Rather, Jackson writes:

... this is to advise you that the implementation will be subsequent to Freightliner's decision in response to our latest proposal regarding Mt. Holly.

This statement falls short of declaring that the agreement they had just negotiated was subject to a condition precedent. Indeed, it falls short of saying that if Respondent did not receive the Freightliner business it would not implement the local rider. Literally, Respondent's words indicate that it would implement the local rider after Freightliner made a decision one way or the other and, presumably, regardless of whether that decision gave Respondent the contract.

If the Respondent is unwilling even to tell the Union, in plain words, that the agreement is subject to a condition precedent, then I am certainly not going to find that to be the case. At most, the evidence may support a conclusion that when Jackson and Barnum made statements to the Union about the company's serious financial problems and the importance of the Freightliner business, they may have believed such statements communicated that they were conditioning the agreement on a condition precedent. On the other hand, they may have felt it more convenient—and safer—to use vague and ambiguous language rather than plain talk.

In this situation, however, vague and ambiguous language does not suffice. If a party seeks to condition an agreement on the happening of some event, it must explicitly make the other party aware of such a condition.

It would appear quite likely that if Respondent insisted upon such a material condition, it would have referred to the condition in correspondence with the Union. Likewise, if Respondent had brought up such a condition during negotiations, it appears likely that the Union would have made some mention of it when corresponding with Respondent.

Should this correspondence between the Union and the company be considered a kind of fossil record, bearing witness to what happened, then I must conclude that the claimed condition precedent appeared spontaneously, a whole new species, on November 1, 2001. The claimed condition precedent affected a very important matter, namely, the date when and if the agreement would take effect. A matter that important would excite more communication between the parties than the documents reflect.

Therefore, I reject the testimony of Respondent's witnesses and instead credit that of Business Representative Wright. Based on this testimony, I conclude that Respondent did not, during negotiation of the local rider, condition its execution or implementation on its winning the Freightliner contract.

The question remains as to whether Respondent and the Union reached a total agreement. The October 18, 2001 memorandum from President Jackson to Vice President Barnum indicated that Jackson wanted some changes. However, I do not view these changes as material alterations in the understanding reached by the parties but rather as clarifications of language to assure that the document reflected the meeting of the minds and that the negotiated changes actually were implemented.

One item in Jackson's October 18, 2001 memo does state that it appears the effective dates will have to be changed to coincide with November 1 or December 1 start date. However, I do not read this observation as an indication that the parties had not reached agreement as to dates. Because of the events of September 11, 2001, there already had been some delay, and it appears that changing the effective date by one month was agreeable to all parties.

Additionally, by the time Respondent's officials appeared before the arbitration committee less than two weeks later, it is clear that they were submitting to the committee a complete agreement for approval.

Incidentally, it may be noted that the particular item regarding effective dates, appearing in numbered paragraph 3 of Jackson's October 18, 2001 memo, makes a statement inconsistent with the position later taken by Respondent, namely, that the agreement would not be effective until Freightliner made a decision on awarding its contract.

In sum, I conclude that Respondent and the Union reached agreement on all material terms of the "local rider," but Respondent later refused to execute it.

Section 8(d) of the Act includes, within the definition of the duty to bargain collectively, the requirement that the parties execute a written contract incorporating any agreement reached if requested by either party. Respondent has not satisfied this

obligation. Therefore, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the Complaint.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Counsel in this proceeding demonstrated great professionalism and civility, which I truly appreciate. The hearing is closed.

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 interfere with, restrain, or coerce our employees in the exercise of these rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT refuse to sign, on request, a written contract incorporating any agreement we reach with a union which is the exclusive collective-bargaining representative of any of our employees.

WE WILL sign and implement the agreement concerning health insurance and pensions which we reached in September 2001 with Teamsters Local Union No. 71, affiliated with the International Brotherhood of Teamsters, AFL-CIO.

WE WILL make all employees whole for any losses they suffered because we unlawfully failed and refused to execute and implement this agreement on November 1, 2001.

ACTIVE TRANSPORTATION COMPANY, L.L.C.