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Embarq Corporation and International Brotherhood of Electrical Workers Local Union # 396, AFL-CIO. Cases 28-CA-22019, 28-CA-22020, and 28-CA-22070

March 31, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On February 13, 2009, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions, and the General Counsel and the Charging Party filed answering briefs. The General Counsel also filed exceptions and a supporting brief, and the Respondent 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 affirm the judge's rulings, findings, and conclusions as modified below,¹ to modify his remedy,² and to adopt the recommended Order as modified.³

¹ In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) by refusing to provide nonunit information requested by the Union that was relevant to bargaining about the effects of the closure decision, Member Hayes does not agree with the judge's finding that the relevance of the information was self-evident at the time of the request. Further, while he acknowledges that extant Board law does not require a Union to identify the objective facts supporting a claim of relevance when requesting nonunit information, he would apply the Third Circuit standard requiring a union to tell an employer at that time "of facts tending to support" its request for such information. *Hertz Corp. v. NLRB*, 105 F.3d 868, 874 (3d Cir. 1997) (emphasis omitted). However, even under this standard, the Respondent was aware of the factual basis for the Union's request by the time of the hearing and continued in its refusal to provide such information. Accordingly, Member Hayes would find a violation as of this later date. See *Contract Flooring Systems*, 344 NLRB 925, 925 (2005) (concurring position of former Chairman Battista and former Member Schaumber).

No party excepts to the judge's dismissal of the allegation that the Respondent bypassed the Union and dealt directly with employees.

² We adopt the judge's recommendation of a conditional backpay remedy for the Respondent's refusal to bargain about the effects of the Las Vegas center closing. Consistent with the Board's usual statement of this remedy, the sum paid to any employee beyond a 2-week minimum shall not exceed the amount that the employee would have earned as wages from the date of the closure of the Las Vegas call center to the time he or she secured equivalent employment, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. The judge's statement of the remedy failed to include the italicized language.

Additionally, backpay shall be based on earnings which the unit employees would normally have received during the applicable period,

We agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain with the Union over its decision to close its call center in Las Vegas, Nevada, and to relocate that work to its call center in Altamonte Springs, Florida. However, we reject the judge's characterization of this case as a "hybrid situation," combining elements of *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. in pertinent part 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994). Instead, we believe that this case is properly analyzed under *Dubuque Packing*, where the Board announced the following test for determining whether an employer's decision to relocate is a mandatory subject of bargaining:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

303 NLRB at 391. In applying the *Dubuque* framework, we find, unlike the judge, that the Respondent failed to rebut the General Counsel's prima facie case that the relocation of unit work was unaccompanied by a basic change in the nature of the Respondent's operation. Af-

less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

³ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

ter the relocation, the Respondent continued to provide its customers with the same bilingual customer service, and its call center employees continued to perform their work in same manner. We further find, unlike the judge, that the Respondent failed to prove that labor costs were not a factor in its decision to relocate unit work. The Respondent was clearly focused on the efficiency and productivity of its call center employees. These constitute indirect labor costs.⁴

Nonetheless, we agree with the judge, for the reasons stated in his opinion, that the Respondent proved that the Union could not have offered labor-cost concessions sufficient to alter the Respondent's decision to relocate.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Embarq Corporation, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified by substituting the following for paragraph 2(e).

“(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representatives, copies of the attached notice marked ‘Appendix’³¹ to the Union and to all unit employees who were employed by the Respondent at its Las Vegas, Nevada facility on, or at any time since, June 6, 2008. In addition to physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

³¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ‘Mailed by Order of the Na-

⁴ Cf. *Nu-Skin International*, 320 NLRB 385, 385–386 (1995). As the judge found, the mega-center concept was “primarily intended to make the Respondent's customer service and sales of products more efficient.” (356 NLRB No. 125, slip op. at 9.) Cindy Andrus, the Respondent's manager of strategic planning, testified repeatedly that being more efficient meant that one support staffer was producing sales campaigns for 250 consumer solutions representatives instead of just 100.

⁵ Member Hayes would affirm the judge's finding that the decision to close the Las Vegas call center as part of a companywide consolidation of operations involved a “change in the scope and direction” of the Respondent's enterprise and was therefore not a mandatory subject of bargaining under the principles set forth in *First National Maintenance*, supra. In the alternative, he agrees that the Respondent's failure to bargain about this decision was lawful under the test set forth in *Dubuque Packing*, for the reasons the judge stated. Under these circumstances, and in the absence of a request by any party to revisit the *Dubuque* standard in this case, Member Hayes finds it unnecessary to address his concurring colleague's views.

tional Labor Relations Board’ shall read ‘Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.’”

Dated, Washington, D.C. March 31, 2011

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LIEBMAN, concurring.

Today we decide that the Respondent was not required to bargain over its decision to close one of its facilities, and to relocate bargaining unit work to another facility, because the Union could not have offered labor-cost concessions that would have changed the Respondent's mind. Because the relocation decision was not a mandatory subject of bargaining, it follows that the Respondent was not required to provide the Union with information related to the decision. Today's result follows from existing precedent, but it illustrates an anomaly created by *Dubuque Packing Co.*, 303 NLRB 386 (1991), enf'd. in pertinent part 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994), which controls this case.

In *Dubuque*, the Board correctly observed that an employer “would enhance its chances of establishing” that labor-cost concessions would have been fruitless “by describing its reasons for relocating to the union, fully explaining the underlying cost or benefit considerations, and asking whether the union could offer labor cost reductions that would enable the employer to meet its profit objectives.” 303 NLRB at 392 (footnote omitted). Providing requested information to the union is surely part of this desirable process, because such information will often be necessary for the union to bargain intelligently. But current law does not *compel* the production of information at the time when it is sought—or, indeed, ever—if the Board, in hindsight, determines that concessions would have made no difference, even where (as here) no bargaining ever occurred and the union had no opportunity to explore or influence the employer's decision. In such cases, the Board's determination is based, to greater or lesser degree, on guesswork about the concessions that a well-informed union would have offered and about the employer's response to those proposals. In

my view, neither the after-the-fact attempt to assess whether bargaining might have been successful, nor the attempt, years later, to restore the status quo in those cases where the Board finds a bargaining violation, are constructive for any of the parties concerned.

The Board's task would be easier, and, more importantly, the Act's policy of promoting collective bargaining might well be better served, if employers were required to provide unions with requested information about relocation decisions whenever there was a reasonable likelihood that labor-cost concessions might affect the decision.

To encourage more constructive good-faith bargaining, we might modify the *Dubuque* framework, for example, by requiring the employer to timely advise the union whether its contemplated relocation plan turns on labor costs. If the relocation does not turn on labor costs, the employer would be required to so advise the union and explain the basis of its decision. If it does turn on labor costs, the employer, upon a timely request, would be required to provide the union with information about the labor-cost savings and advise whether, in its view, the union could make concessions that could change its decision. If the employer provided the information, and the union failed to offer concessions, the union then would be precluded from arguing to the Board that it could have made concessions. If the employer failed to honor information requests where labor costs are a factor, it would be precluded from arguing that the union could not have made concessions.

These possible modifications to *the existing Dubuque* framework, under which a decision to relocate is prima facie a mandatory subject of bargaining once the General Counsel proves that the decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation, would have several advantages: they would encourage employers to classify their decisions as they are being made, rather than forcing the Board to do so long after the fact; they would permit the union to know in a timely manner whether the employer believes it has an obligation to bargain about the decision or only its effects; they would encourage the sharing of information that might facilitate bargaining and lead to more efficient outcomes; and they would encourage bargaining rather than an after-the-fact assessment of whether bargaining might have been successful, as is presently the case under existing law.

Because no party has asked the Board to revisit existing law, I join the decision. But in a future case, I would

be open to modifying the *Dubuque* framework in connection with union requests for information.

Dated, Washington, D.C. March 31, 2011

Wilma B. Liebman, Chairman

NATIONAL LABOR RELATIONS BOARD

Joel C. Schochet, Esq., Las Vegas, NV, for the General Counsel.

F. J. Morton, Esq., Las Vegas, NV, for the Union.

Stanley E. Craven, Esq., and *Julie E. Grimaldi, Esq.*, Overland Park, KS, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Las Vegas, Nevada, on December 2, 3, and 4, 2008. This case was tried following the issuance of a Consolidated Complaint and Notice of Hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board (the Board) on September 30, 2008. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by International Brotherhood of Electrical Workers Local Union # 396, AFL-CIO (the Union or the Charging Party). It alleges that Embarq Corporation (the Employer or the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.¹

During the hearing, the Respondent and the Union entered into a non-Board settlement agreement resolving the issues in dispute in Case 28-CA-22019. As a result of that settlement, the Union requested permission to withdraw the charge it filed against the Respondent in Case 28-CA-22019. Counsel for the General Counsel offered no objection to the withdrawal, which I then permitted. Further, counsel for the General Counsel moved to withdraw paragraphs 6, 7, 10, and 11 of the complaint, as the allegations found in those paragraphs were premised on the withdrawn charge. I approved the unopposed motion and permitted the withdrawal of those complaint paragraphs, which thereby removed the alleged Section 8(a)(3) violation and any contention that the Respondent engaged in discriminatory conduct because of its employees' union or protected concerted activity.

Also, during the hearing, counsel for the General Counsel filed a motion to amend the complaint, to add certain new allegations as violations of Section 8(a)(1) and (5) of the Act. (G.C. Ex. 1(o).) Counsel for the Respondent opposed the motion and denied the new allegations. I granted the motion over

¹ In its answer, the Respondent admits the various dates on which the enumerated original and amended charges were filed by the Union and served on the Respondent as alleged in the complaint.

counsel's objection because I concluded that the new allegations were closely related to certain of the existing complaint allegations as to time and substance. Further, I concluded that the Respondent would not be prejudiced by such an amendment, as I offered to grant the Respondent a continuance to prepare to rebut any evidence proffered by the General Counsel in support of the new allegations.²

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by all counsel, and my observation of the demeanor of the witnesses,³ I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Delaware corporation, with an office and place of business in Las Vegas, Nevada (herein called the Respondent's facility), where it has been engaged in the business of furnishing telephone service. Further, I find that during the 12-month period ending July 11, 2008, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000; and that during the same period, the Respondent performed services valued in excess of \$50,000 in States other than the State of Nevada.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, and employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

In essence, the dispute in this case involves the Respondent's closure of a call center in Las Vegas, Nevada, and the corresponding lay off of the customer solutions representatives (the CSRs) employed at that call center. The General Counsel contends that the Respondent was legally obligated to bargain with the Union, which represented the CSRs, over the decision to close the call center and that by failing to do so, the Respondent was violating the Act. Further, the complaint alleges that the Respondent unlawfully failed and refused to furnish the Union

² All pleadings reflect the complaint and answer as those documents were finally amended.

³ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

with requested information, relevant and necessary for the Union's performance of its duty as the collective bargaining representative as it related to the Respondent's decision to close the call center and the effects of that decision.

In addition to the alleged failure and refusal to bargain with the Union over its decision to close the call center, it is also alleged that the Respondent unlawfully failed and refused to bargain with the Union over the effects of the closure on the bargaining unit employees. Finally, the complaint was amended to allege that the Respondent unlawfully bypassed the Union and engaged in direct dealing with employees by soliciting their relocation to another call center.

The Respondent admits that it did not submit its decision to close the Las Vegas call center to the collective bargaining process, but argues that it was not legally required to do so, under the controlling case law as established in *First Maintenance v. NLRB*, 452 U.S. 666 (1981); and *Dubuque Packing Company, Inc.*, 303 NLRB 386 (1991). Further, the Respondent defends its actions by contending that it was willing to engage in effects bargaining with the Union, which it acknowledges that it was legally required to do, but rather that it was the Union that failed and refused to do so.

Regarding its alleged failure to furnish the Union with requested information, the Respondent admits that, for the most part, it refused to do so. However, it argues that as the Union never indicated a relevant, legitimate reason for needing the information, the Respondent was privileged to deny the request as it appeared to relate solely to the decision to close the facility, which decision was not a mandatory subject of bargaining. As to the alleged direct dealing with employees, the Respondent contends its supervisor's informal comments about other job opportunities constituted a harmless exchange, unrelated to the CSRs' current terms and conditions of employment. Allegedly, there was no wrongful intent in such an exchange, and no erosion of the Union's position as the collective bargaining representative.

B. The Facts

For the most part, the facts in this case are not in dispute. Since approximately 1954, the Union has represented a unit of the Respondent's employees, or that of the Respondent's predecessors, including Sprint of Nevada. Those employees include the customer solutions representatives (the CSRs).⁴ The most recent collective bargaining agreement between the parties is effective from March 15, 2006 through March 31, 2009. (Jt. Ex. 1.)

At the time of the events in question, the Las Vegas call center was one of two bilingual (English/Spanish) call centers op-

⁴ In its answer to the complaint, the Respondent admits that the following employees of the Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: The Respondent's Operator Services and Clerical employees in the various departments as defined by the Act, as to the extent certified by the National Labor Relations Board on November 2, 1945, in Case 28-RC-2644. Further, the Respondent admits that based on Section 9(a) of the Act, that the Union has been the exclusive collective bargaining representative of the employees in the Unit since at least 1954.

erated by the Respondent, with the other being a call center located in Altamonte Springs, Florida. The CSRs were employed to receive and adjust customer complaints over the telephone, while at the same time attempting to convince those customers calling in for service to purchase additional products, such as satellite television and high-speed internet. The CSRs were paid an hourly wage, as well as a commission based on the additional products that they sold.⁵

From the uncontested evidence offered by the Respondent, it is obvious that the Respondent's business is in serious economic trouble. The Respondent operates a traditional "land line" telephone system throughout various portions of the United States. This type of telecommunications system is under severe economic competition from the newer "cellular" telephone systems. Various documents admitted into evidence establish that the Respondent's total access lines fell from 4,730,907 in the third quarter of 2006 to 3,894,176 two years later. (Res. Ex. 2, p.1.) Further, total call center calls received declined from 1,506,138 in January 2007 to 1,073,951 in June 2008. Calls to the two bilingual call centers declined similarly. (Res. Ex. 3, pp. 1-2.) Based on the record evidence, it is clear to me that, as all economic trends are lower, the prognosis for the Respondent's economic future is not bright.

Cindy Andrus, manager of strategic planning, testified on behalf of the Respondent. Her testimony was largely un rebutted. According to Andrus, at the time the Respondent was "spun off" from Sprint in 2006 as a separate company, there were a total of 12 call centers located at various points around the country. By the time of the hearing, there were only 8 remaining. This was a deliberate effort by the Respondent to consolidate the small individual call centers into fewer "mega-centers," as part of its strategic plan to become more efficient. Andrus testified that the decision as to where these mega-centers should be "strategically located" was made based on geographical location, ideally in company owned buildings, as opposed to leased buildings, where support staff for the CSRs was available, and near a pool of customers, so as to be directly involved in the community. Untimely, the plan is to have even fewer of these mega-centers, approximately five or six.

Because of the corresponding decline in the volume of Spanish language calls nation-wide, a decision was made to reduce the number of bilingual call centers to one. Consideration of which bilingual call center to close began as early as 2007. It was decided that the Las Vegas call center would be closed and all calls nation-wide routed to the remaining bilingual call center in Altamonte Springs, Florida. According to Andrus, Altamonte Springs was selected to remain open because that call center was located in a company owned building with lots of space to expand, unlike the Las Vegas call center, which was in a leased building. Further, at the location in Altamonte Springs other classifications of Embarq employees were also housed, giving all those employees greater opportunity for advancement. Andrus contends that this arrangement is much

more efficient, with approximately 80% of the new mega-center calls being Spanish language calls (20% English), as compared to the mix of calls prior to the closure of the Las Vegas call center when Altamonte Springs handled only 50% Spanish language calls (50% English).

Andrus testified at length, both under direct and cross-examination, that employee performance was not a factor in the decision as to which call center to close. Neither were wages a factor in the decision making process. According to Andrus, there were simply no concessions that the Union could have offered that would have changed the decision to close Las Vegas. She acknowledged that the sales volume had increased in Las Vegas prior to its closure, but that was not an issue, as customer calls could be routed from any where in the country.

While both Las Vegas and Altamonte Springs were efficient and doing well, there were more customers in the eastern half of the country than the western half, and more in Florida than in Nevada. Since the closure of the Las Vegas call center, the Altamonte Springs' office has needed to stay open longer hours, in order to cover calls from customers in the western time zones. There were approximately 48 CSRs in Las Vegas at the time it closed, and Altamonte Springs has increased by about 18 CSRs so that the additional volume of Spanish language calls received in that office could be serviced. Overall, the number of bilingual CSRs has decreased since the Las Vegas office closed. However, because of a high turn over rate among CSRs, there is an ongoing need to recruit and train new employees. Further, the Respondent has recently instituted a pilot program to allow certain highly trained, motivated, and independent bilingual CSRs to work from their homes. Andrus stressed that under the Respondent's nation-wide bidding system, any laid off employee, such as those CSRs from the Las Vegas call center, could bid on vacancies existing anywhere in the country and announced on its intranet system.

On June 6, 2008,⁶ union business manager Charles Randall received a call from the Respondent's labor relations manager, Corwin Johnson, asking him to come to the Las Vegas facility that morning. When Randall arrived for the meeting with Johnson, a second man,⁷ who Johnson did not recognize, was also present for the Respondent, and the Respondent's director of client and labor relations, Kathleen McBee, was participating by speaker phone. McBee announced that the Las Vegas call center would be closed as of August 8. She mentioned that two other call centers would also be closing, and that all the affected employees would be notified of the closure by noon.

According to Randall, McBee was in a hurry to get off of the telephone, as she still needed to make calls to the other offices that were closing. Apparently after she hung up, the unidentified man read to Randall a list of "talking points." According to Randall, who had only learned of the closure for the first time that morning, he told Johnson that he had "a hundred questions" regarding the closure and wanted to discuss them. Johnson responded that he was leaving town that day, but that

⁵ In addition to the CSRs, the bargaining unit also included call center coaches, who were more experienced employees. However, at the time of the events in question, there were apparently no "coaches" assigned to the Las Vegas call center.

⁶ All dates are in 2008, unless otherwise indicated.

⁷ While there is disagreement by the witnesses as to whom this individual was, it is unnecessary to make a specific identification, as it is clear that he was representing the Respondent.

Randall should get back to him with his questions and they would talk. Later that afternoon, a document entitled “Key messages/Talking Points-Charlie Randall[,] June 6, 2008” was emailed to Randall. (G.C. Ex. 2.) Randall testified that this was the document read to him at the meeting by the unidentified individual.

The document announces the closing of three call centers, including Las Vegas, which was to close on August 8. It indicates that approximately 50 employees will be affected by the closure, and that employees represented by the Union “will be offered separation benefits in accordance with the respective union contract.” Also it mentioned that, “Outplacement assistance to union represented employees will be offered per provisions in the union contract.”⁸

Further, the document states that the closures are necessary because the Employer “needs fewer call center representatives.” The number of calls that are being received from customers is “dropping dramatically.” Of particular significance, the document goes on to say that, “In deciding which call centers should remain open, we select those that are in the strongest position to serve customers, support sales and are strategically located.”⁹

The document closes by thanking Randall for his continued support. It also emphasizes that the CSRs are expected to continue to meet their sales and production targets and to provide great customer service throughout the remaining period of their employment.

When Randall returned to his office following the meeting of June 6, he drafted and both mailed and emailed a letter to Corwin Johnson. (G.C. Ex. 3.) The letter indicated the Union’s “desire to negotiate” regarding the “notification to close,” and called upon the Respondent to “cease and desist from closing the call center until such time [as the parties were] able to sit down and negotiate.” Johnson was asked to contact Randall by no later than June 20 “to set up dates to bargain.”

Next, Randall contacted his International Union to alert the International of the Respondent’s decision to close the Las Vegas call center. Following a conference call, the International’s lawyers drafted a request for information, which the Union was instructed to make to the Respondent. Pursuant to those instructions, Randall both mailed and emailed a letter dated June 19 to Corwin Johnson, which letter contained 19 separate paragraphs seeking information in connection with the closure.¹⁰ The letter requested that the information be fur-

⁸ It should be noted that the “Reduction in Force” provisions of the current collective bargaining agreement are found in Article 8 of that contract. (Jt. Ex. 1, pp. 11-13.)

⁹ As noted above, when Cindy Andrus testified she indicated what the Respondent meant by the term “strategically located.” However, it is the position of the General Counsel and the Union that this term was never specifically explained to the Union.

¹⁰ Paragraph 9(a), and its subparagraphs, of the complaint enumerate the information request made by the Union to the Respondent on June 19, which failure to furnish on the part of the Respondent is alleged to constitute a violation of the Act. However, the complaint only lists 18 of the 19 paragraphs of information requested by the Union. The General Counsel specifically does not allege as an unfair labor practice the Respondent’s failure to furnish the Union with the information re-

nished to the Union by no later than July 3, and indicated that this requested information was “vital to IBEW Local 396.” (G.C. Ex. 4.)

By a certified letter dated July 2, Johnson replied that the Union’s request for information “is hereby declined as the Company has decided that it does not wish to commit its resources to gathering the requested information.” Further, Johnson indicated with respect to “Item 7,” the current seniority list and salaries for bargaining unit employees, that if the Union “sincerely” lacked such information, he would send them a copy of the current collective bargaining agreement and seniority list. (G.C. Ex. 5.) To date, the Respondent has not furnished the Union with any of the requested information.¹¹

The parties, thereafter, had one additional meeting of importance regarding the closure of the Las Vegas call center. That meeting was held on July 9, and was attended by Randall, Johnson, Ken Martin, the Respondent’s human resources manager for the Las Vegas facility, and Robert Herrera, the Respondent’s assistant business manager. Unfortunately, the parties disagree about certain statements made at this meeting, with the Union’s witnesses having a somewhat different recollection than the Respondent’s witnesses.

According to Johnson, a meeting was scheduled for July 9, and on the day before, he called Randall to confirm the time for the meeting. He testified that he told Randall that he was coming into town and would be “prepared to do effects bargaining.” Johnson testified that Randall told him that he was not prepared to meet, as the Employer had not furnished the documents requested by the Union. Johnson claimed that he told Randall that it seemed to him that most of the requested information was related to the “decision” to close the call center, and was “targeting decisional bargaining,” which he was not going to discuss. He repeated that he was coming only to discuss the effects of the closure, but that if Randall brought the information request with him, they could go through it “item-by-item” to determine whether any of the requested information was relevant to effects bargaining. They agree to do so.

They met the following day at 1 p.m. Initially, they discussed a number of grievances, which had been scheduled and were unrelated to the issues at hand. Thereafter, Johnson asked if the Union were ready to talk about the closure of the call center. Randall stated that he would not discuss the closure as the Employer had refused to furnish the requested documents. Johnson asked whether Randall had brought the request with him so they could look at it, and Randall replied that he had not done so. According to Johnson, Robert Herrera then asked what the Employer was prepared to offer, but Randall cut him off, saying they had to return to the union hall. Johnson asked if they could meet again the following day with the Union bringing the information request so that they might look to see whether any of the documents related to effects bargaining.

quested in paragraph 7 of the Union’s letter, specifically that dealing with the “seniority list and current salaries for the bargaining unit employees.”

¹¹ Pursuant to subpoena from counsel for the General Counsel, the Respondent did produce at trial certain of the documents contained in the Union’s information request.

Johnson testified that Randall agreed to do so. However, the following day, Randall called and said that the Union was unable to meet. Johnson then left town.

On cross-examination, Johnson testified that the Respondent was prepared to offer “enhanced termination allowances” to the CSRs, but did not do so as Randall refused to discuss effects bargaining without the requested documents. He takes the position that the Union never gave him a chance to offer anything in connection with the effects of the closure upon the employees.

For the most part, Ken Martin’s testimony supports Johnson. According to Martin, Randall was focused on the requested documents, which the Respondent had refused to produce. Johnson wanted to know which documents were relevant to “impact bargaining,” as it seemed to him that they were instead related to the decision to close the facility. The Respondent was refusing to discuss that decision. Martin testified that Randall repeated that without the documents he did not have enough information to discuss any of the issues. Herrera did make one “impact proposal,” the substance of which Martin could not recall. In any event, Randall allegedly cut him off and ended the meeting.

Randall’s recollection of the meeting was somewhat different, but mostly in its emphasis on the matters discussed. He testified that Johnson made it clear that the Respondent was not going to furnish the requested documents, and was not at the meeting to negotiate the decision to close. Randall told Johnson it was “imperative” the Union received the documents in order to fairly represent the employees. Johnson still refused to provide the documents and allegedly said that “he wasn’t there to discuss the decision,” and that while he was “willing to sit and listen, nothing was going to change.” According to Randall, he decided that without the requested documents that there was no way in which he could go forward and have meaningful discussions and so he ended the meeting. He asked Johnson to reconsider the Respondent’s refusal, and a meeting was scheduled for the following day. It is important to note that in response to a question from the undersigned as to whether in this meeting with Johnson on July 9 he had ever specifically asked Johnson to bargain over the “effects” of closing the call center, Randall indicated that he had not used the word “effects.”

The next morning Randall called Johnson and asked him whether he had reconsidered the refusal to furnish the requested documents. As Johnson indicated that he had not, Randall said that, therefore, there was no reason for the men to “waste [their] time,” and the meeting was cancelled.

Robert Herrera’s testimony generally supports Randall, although there are some contradictions. He claims that at the meeting of July 9, Randall made it clear that the documents were needed to bargain over both the decision to close and the effects of that decision. Allegedly, Johnson said that no matter what was discussed, it would not change the decision to close the Las Vegas facility. According to Herrera, Johnson did ask whether they wanted to bargain over the effects. However, Randall declined to do so as they had never received the requested documents. The union representatives felt that without the documents, they would be “coming in [to the negotiations] blind.” He claims that Johnson had his “mind set,” had a “con-

descending” attitude, and would simply not furnish the documents. Therefore, it was the Union’s position not to bargain over either the decision or the effects without them.

As noted, there are differences between the versions of the meeting of July 9 as told by the Union’s and the Respondent’s witnesses. In fact, the truth may lie somewhere in between. However, for the most part it is possible to reconcile the two versions as the differences are mostly over what was emphasized at the meeting, rather than the substance of the discussions. To the extent that the conflicts can not be reconciled, I credit the story as told by Johnson and Martin, as I found their testimony to be somewhat more consistent and logical, considering what had transpired between the parties to that date.

By letter dated July 25, Johnson expressed to Randall his disappointment with what had transpired on July 9 and 10. Johnson complained that he had traveled to Las Vegas for the “purpose of affects [sic] bargaining relative to the closure of the call center, [which Randall] had chose[n] not to do....” Further, the letter continued that “the closure is on track and the Company continues to make final preparations for the announced closure date of August 8, 2008.” (G.C. Ex. 6.)

The final document involving these issues was a letter dated August 1 from Randall to Johnson. In the letter, Randall “reiterates” the Union’s “intent to bargain not only the closure [of the call center] but the effects of said closure....” However, the Union “continues its demand of the documentation that [it has] asked for in the formal request [it] sent to [Johnson] on June 19, 2008.” (Res. Ex. 22, p. 9.) On August 8, 2008, the Las Vegas call center closed. To date the Respondent has not furnished the Union with any of the documents requested. As noted above, the collective bargaining agreement between the parties contains provisions related to a reduction in force, and certain benefits that inure to laid off employees. (Jt. Ex. 1, Article 8, pp. 11–13.) While Randall, under cross-examination, indicated a lack of knowledge as to whether the laid off CSRs received those benefits, he admitted that the Union had not filed any grievance under the contract alleging a violation of the reduction in force provisions.

C. Analysis and Conclusions

1. The alleged duty to bargain over the decision to close

Preliminarily, I will note my sense, based on the record evidence, that the Respondent and the Union were “talking past each other” over the issues that separated them. The Union certainly made it clear that it desired to bargain with the Respondent over both the decision to close and the effects of that decision. However, the Union was also clearly intent on getting all the documents that it had requested from the Respondent before it would discuss anything involving the closure of the call center, either the decision itself or the effects of that decision. The Respondent had refused to furnish any of the requested documents. It also refused to bargain over the decision to close, which it contended was a non-mandatory subject of bargaining, but was willing to bargain over the effects of that decision. Of course, effects bargaining were never held because the Union continued to insist on receipt of the requested documents, which the Respondent failed to produce.

It appears to me that this is the proverbial case of which comes first, “the chicken or the egg.” By this I mean, which issue must be settled first, the alleged duty to bargain or the alleged duty to produce requested documents. I believe that the threshold question involves the alleged duty to bargain over the decision to close the call center. All other issues follow from that determination. The seminal cases in this area are *First National Maintenance v. NLRB*, 452 U.S. 666 (1981); and *Dubuque Packing Company, Inc.*, 303 NLRB 386 (1991).

In *First National*, the Supreme Court announced a balancing test regarding the duty to bargain over certain fundamental business decisions. The employer operated a cleaning and maintenance business pursuant to which it contracted with commercial customers to provide a labor force and supervision in return for a management fee. The employer canceled its contract with a customer, failing to bargain with the union representing its employees about either the decision to terminate the contract or the effects of that decision on its employees. The Supreme Court’s holding was limited to the issue of the decision to cancel the contract.¹² The Court concluded that the decision involved a change in the “scope and direction of the enterprise,” which was akin to the decision as to whether to be in business at all. The Court further concluded that a subject involves “mandatory bargaining” only where the subject proposed for discussion is “amenable to resolution through the bargaining process.” Under the specific facts in this case, the Court struck a balance in favor of the employer’s interest in running a profitable business and the flexibility needed to do so. It held that the employer did not have a duty to bargain over this decision. Although certainly very significant, the case seems limited to a situation where an employer seeks to partially close a business.

In *Dubuque Packing*, the Board further expanded on this balancing test as it related to a relocation of unit work. It held that the initial burden is on the General Counsel to show that where there is a “relocation of unit work,” it is unaccompanied by a basic change in the nature of the employer’s business. Where the General Counsel carries this burden, he will have established a prima facie case that the relocation decision is a “mandatory subject of bargaining.” However, the employer may then produce rebutting evidence by establishing that the work performed at the new location is significantly different from the work previously performed; or that the work performed at the previous location is to be discontinued entirely and not moved to a different location; or that the decision involves “a change in the scope and direction of the enterprise.” As an alternative, the employer may establish that the “labor costs (direct and/or indirect)” were not a factor in the decision; or that even if labor costs were a factor, the union could not have offered labor cost “concessions” of such significance as to change the employer’s decision to relocate. In this case, the Board found that the employer had unlawfully failed to bargain.

I agree with counsel for the Respondent’s assessment in his post-hearing brief that the reduction in the Employer’s cus-

¹² The Court did also find that under such circumstances, the employer had a duty to bargain with the union over the “effects” of its decision on the members of the bargaining unit.

tomers base, which resulted in its decision to close a number of call centers including the Las Vegas facility, is a hybrid situation constituting both a “partial closing” and “work transfer.”¹³ As such, it combines elements of both the *First National* and *Dubuque Packing* cases.

The Respondent concedes that the General Counsel has met his initial burden under *Dubuque Packing* of establishing that there was “a relocation of unit work unaccompanied by a basic change in the nature of the employer’s operation.” This is clearly so, as the Respondent has continued to remain in the landline telephone business, providing phone service to customers at various locations throughout the country. At the same time, there was some relocation of unit work from the bilingual call center in Las Vegas, which was closed, to the bilingual call center in Altamonte Springs, with some hiring at that location, and to a limited extent some bilingual CSRs were hired to work from their homes. Spanish language calls previously handled from Las Vegas were simply routed to Altamonte Springs, or to the CSRs working from their homes. However, as noted above, there was an overall reduction in the number of bilingual CSRs employed by the Respondent nationwide.

It is the Respondent’s position that it has rebutted the General Counsel’s prima facie showing under *Dubuque Packing* by establishing that the consolidation of the call centers into fewer mega-centers constituted a “change in the scope and direction” of its business. I agree.

Cindy Andrus, the Respondent’s manager of strategic planning, testified at length about the significant diminution in the Respondent’s customer base, and the Respondent’s efforts to address that problem. A new business model was developed, which called for a reduction in the number of call centers from 14 small centers to eight call centers at the time of the closure of the Las Vegas center,¹⁴ ultimately to 5 or 6 large “mega-centers.” In my view, this new business model constituted a significant and meaningful “change in the scope and direction” of the Respondent’s business and is exactly the type of change that the Court indicated in *First National* would be a non-mandatory subject of bargaining.

The Respondent made a business decision not to operate specific small call centers, but, rather, to close them and divert the work to fewer mega-centers. This also appears to be precisely the kind of managerial decision that the Court in *First National* had in mind when it stated that a “decision whether to be in business at all” was not in itself a decision primarily about “conditions of employment,” although the effect of that decision might be to terminate employees. *Id.* at 677–678. Thus, it

¹³ The record evidence established that following the closure of the Las Vegas call center and the lay off of its bilingual CSRs, a subsequent hiring of bilingual CSRs for Altamonte Springs and other locations still resulted in an overall reduction nationwide in the number of bilingual CSRs.

¹⁴ Since the beginning of 2006, the Respondent has closed two outsourced centers (TelCity and AFNI) and two Company-operated centers (Fayetteville, NC and Killeen, TX). Further, at the time the Las Vegas call center was closed, another center was closed in Fort Myers, FL, with the closure of the call center in Clinton, NC following the next month. (Res. Ex. 4.)

would seem the decision to close the Las Vegas call center was a non-mandatory subject of bargaining.

Further supporting the proposition that the closure of the Las Vegas call center was not a mandatory subject of bargaining is *Owens-Brockway Plastic Products, Inc.*, 311 NLRB 519-521, fn. 5 (1993). Although in that case the Board found that the employer, who was looking for monetary concessions, had violated the Act, it held that a “relocation” decision was covered by *Dubuque Packing*. Such a decision “to consolidate operations,” could, under the right set of circumstances, meet the “scope and direction” prong as set forth in *Dubuque*.¹⁵

In my view, the closure of the Las Vegas call center and relocation of that work as part of the Respondent’s new business model was just such a situation. This was not primarily a money saving program, as much as it was a restructuring of manpower to create more efficient mega-center offices. Accordingly, I conclude that the decision to close the Las Vegas call center involved a fundamental “change in the scope and direction” of the Respondent’s business model. As such, it was a non-mandatory subject of bargaining. The Respondent freely admits that it refused to bargain with the Union over its decision to close the call center, and I find that such a refusal did not violate the Act.

In the alternative, I also conclude that the Respondent has met the second prong in the *Dubuque* case in that “labor costs” were not a factor in the decision to close, and that even if a minor factor, the Union could not have offered cost concessions significant enough to have altered the Respondent’s decision to relocate. Cindy Andrus testified credibly and at length that “labor costs” were not a factor in the decision to close the Las Vegas call center. That closure was merely part of a much larger course of action intended to reduce the number of call centers and to create a smaller number of mega-centers.

Andrus was the manager primarily responsible for making the recommendation that led to the decision to close Las Vegas and route almost all Spanish language calls to Altamonte Springs. She was cross-examined at length, and her testimony remained largely un rebutted. The premise that the decision was not primarily related to labor costs was not contradicted.

According to Andrus, while both Las Vegas and Altamonte Springs were performing well, performance was not a factor in the determination as to which Spanish language call center to leave open.¹⁶ As noted earlier, the entire mega-center concept was at least several years in the planning, and it was primarily intended to make the Respondent’s customer service and sales of products more efficient. As reflected in the “talking points (G.C. Ex. 2.), and Andrus’ testimony, the Respondent was of the opinion that Altamonte Springs was more “strategically located” than was Las Vegas. It was located in a company owned building with space to expand, where support staff and

other employee components were available, and in a geographical area near a large number of the Respondent’s customer base. As Andrus credible testified, there were no concessions that the Union could have offered that would have affected any of those factors. Her testimony that the “driving motive” behind the closure of the Las Vegas call center was the Respondent’s overall plan to create mega-centers, and that wages were not a consideration was convincing.¹⁷

Based on the above, I am of the opinion that the Respondent has met its burden under *Dubuque Packing* of establishing that labor costs were not a factor in the decision to close the Las Vegas call center, and that even if labor costs were a minor factor in the decision, the Union could not have offered labor cost concessions as would have changed the Respondent’s decision to have most Spanish language calls handled by Altamonte Springs. Therefore, I find that the decision to close the call center in Las Vegas was not a mandatory subject for bargaining, as the “decision” itself did not involve the wages, hours, or working conditions of the unit employees. Concomitantly, the Respondent’s refusal to bargain over the closure decision was not a violation of the Act.

Accordingly, I shall recommend that complaint paragraphs 8 and 13,¹⁸ only as they relate to the refusal to bargain over the “decision” to close, be dismissed.

2. The request for information

As has been set forth above in detail, on June 19, 2008, the Union submitted a lengthy request for information to the Respondent. (G.C. Ex. 4.) This information request dealt with the closure the Las Vegas call center. The Respondent has refused to furnish any of that information, taking the position that it is not legally required to do so as the information request covers a non-mandatory subject of bargaining, namely the decision to close the call center.

In *Disneyland Park and Disney’s California Adventure*, 350 NLRB 1256 (2007), the Board recited certain well established legal principles regarding an employer’s obligation to provide requested information to a union representing the employer’s employees. As the Board said, “An employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective bargaining representative.” The Board cited to a number of Supreme Court decisions including, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); and *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Further, the Board added that, “This includes [information needed for] the decision to file or process grievances,” citing to *Beth Abraham Health Services*, 332 NLRB 1234 (2000).

¹⁷ While extensive company documents were admitted into evidence showing the nation-wide decline in the Respondent’s customer base and the implementation of the strategic plan to create mega-call centers, there was no indication in any of this documentation that labor costs were a significant issue.

¹⁸ At the hearing there was an extensive amendment to the complaint. Amended paragraph 13 was formerly paragraph 12. (G.C. Ex. 1(o).)

¹⁵ In the *Owens* case, the Board simply found that the employer’s decision to close a plant and relocate the work was not part of its consolidation of operations.

¹⁶ Despite a significant amount of testimony from employee witnesses regarding competition between Altamonte Springs and Las Vegas, there was no credible, probative evidence that management took performance into consideration when deciding which call center to close.

In the *Disneyland* case, the Board repeated its well established principle that it “uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer’s obligation to provide information.” Further, the Board reiterated that where the union’s request for information pertains to employees in the bargaining unit, that the “information is presumptively relevant and the [r]espondent must provide the information.”

The Respondent argues that it was not required to furnish the requested information because the request was not made in good faith, since it was highly burdensome; that in part it requested information outside the terms and conditions for the recognized bargaining unit, and was, therefore, not relevant; and because it dealt with a non-mandatory subject of bargaining, namely the closure of the Las Vegas call center. In my view, the first two of the Respondent’s stated reasons for refusing to furnish the requested information are without merit. While the information request was certainly very detailed and sought a great deal of documentation, that by itself would not serve as a legitimate basis to refuse to comply, assuming the requested information was relevant and necessary for the Union’s performance of its representational duties. Also, although information requested about matters outside the bargaining unit are not presumptively relevant, a union can satisfy its burden of proving relevance merely by demonstrating a reasonable belief, supported by objective evidence, that the requested information is relevant.¹⁹ *Knappton Maritime Corp.*, 292 NLRB 236, 238–239 (1988). However, I need not address these two reasons in detail, as I have concluded in agreement with counsel for the Respondent that to the extent the information request sought documents covering the “decision” to close the call center, the Respondent was not required to produce them.

I have already determined that the “decision” to close the Las Vegas call center was not a mandatory subject of bargaining. The Respondent’s refusal to bargain over the closure “decision” was not unlawful. It, therefore, logically follows that the Respondent was not legally required to comply with the Union’s information request, to the extent that it dealt with the “decision” to close. The Board has so held in a number of cases. See *BC Industries*, 307 NLRB 1275 (1992), citing *Cowles Communications*, 172 NLRB 1909 (1968).

Obviously, requiring the Respondent to produce documents that the Union could not use, because the Respondent was lawfully refusing to discuss the “decision” to close, would constitute “an exercise in futility.” It would cause the Respondent a great deal of effort with no legitimate purpose to be served. When placed in this context, Corwin Johnson’s statement in his July 2 letter to Charles Randall stating that the Respondent “declined” to furnish the requested documents because it “does

not wish to commit its resources to gathering the requested information” does not seem unreasonable. (G.C. Ex. 5.)

However, while I have concluded that the Respondent did not violate the Act by refusing to furnish the Union with information regarding the “decision” to close the Las Vegas call center, a non-mandatory subject of bargaining, it still must be determined whether any of the information sought in the June 19 request related to any other subjects.²⁰ In their post-hearing briefs, both counsel for the Respondent and counsel for the General Counsel make reference to paragraph 6, and its subparagraphs, of the information request. (G.C. Ex. 4, par. 6A,B,& C.) It is significant to note that said paragraph is the only numbered paragraph that counsel for the General Counsel refers to specifically as “information the Union requested relating to the effects of the move.” Similarly, counsel for the Respondent alludes to “effects” bargaining when referencing this numbered paragraph, and in that reference states that had “that reason for the request ever been explained or understood, Respondent likely would have been obligated to have produced the information, and Respondent would have done so.”

By the above exculpatory statement, counsel for the Respondent is arguing that even if the information in paragraph 6 was related to “effects” bargaining, the Respondent was not required to produce the documents because the Union failed to explain to the Respondent’s representatives, in particular Corwin Johnson, why the information was relevant. I do not agree.

Following the Respondent’s notification to the Union on June 6 that it was closing the Las Vegas call center, the Respondent should have reasonably expected that, at a minimum, the Union would want to bargain over the “effects” of the closure on the bargaining unit employees. In fact, the Respondent did expect that and, according to Johnson, was prepared to bargain with the Union over effects, which he testified was the purpose of his trip to Las Vegas on July 9 and 10. The documentation requested in paragraph 6 of the Union’s information request clearly related to effects bargaining as it sought the locations to which bilingual calls were to be routed, to whom they would be referred, whether there were plans to hire additional CSRs to handle those calls, and whether there were efforts underway to hire such employees. The Respondent’s managers were quite capable of recognizing that such information was necessary for the Union in order for it to determine whether the members of the bargaining unit would be able to transfer to the new work situs, or by some other means be allowed to continue to perform this work. As it should have been self evident to the Respondent that this information was needed for “effects” bargaining, the Union was entitled to receive the documents without having to further explain itself to the Respondent.

It is very well established law that an employer has a duty to bargain with a union representing its employees over the “effects” of the closure of a business, even if the employer does not have a duty to bargain over the economic “decision” to

¹⁹ As the Board has held that “potential or probable relevance is sufficient to give rise to an employer’s obligation to provide information,” it would seem the Union would have no difficulty reaching this standard. *Disneyland*, supra; *Wisconsin Bell, Inc., d/b/a SBC Midwest*, 346 NLRB 62, 64 (2005) (holding that a union’s burden under these circumstances is “not an exceptionally heavy one.”)

²⁰ As noted earlier, the complaint does not allege the failure to furnish the seniority list and salaries of bargaining unit employees to constitute a violation of the Act. (G.C. Ex. 4, par. 7.)

close the business. See *National Car Rental Systems*, 252 NLRB 159 (1980), *enfd.* 672 F.2d 1182 (3rd Cir. 1982); *Gannett Co., Inc.*, 333 NLRB 355 (2001); also see *Champion International Corporation*, 339 NLRB 672 (2003); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Los Angeles Soap Co.*, 300 NLRB 289, 295 (1990).

In summary, I have concluded that the Respondent did not have a duty to furnish the Union with documentation in response to the Union's June 19 request for information relating to the Respondent's "decision" to close the Las Vegas call center, as this was a non-mandatory subject of bargaining. However, the Respondent did have a duty to furnish the Union with documentation in its request for information relating to the "effects" of that decision on the unit employees. Only paragraph 6, subparagraphs A, B and C, of the information request of June 19 related to "effects" bargaining. Accordingly, by failing and refusing to furnish the Union with this information since June 19, the Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged in paragraph 9(a), subparagraphs (6)(a),(b) and (c), and paragraphs 9(b), 9(c), and 13 of the complaint. Correspondingly, I shall recommend that all other subparagraphs of paragraph 9(a) be dismissed.

3. The alleged duty to bargain over the effects of closing

As I have indicated above, it is axiomatic that an employer has a duty to bargain with a union representing its employees over the "effects" of the closure of a business, or, under the same rational, a partial closure, even if the employer does not have a duty to bargain over the economic "decision" to close the business. See *National Car Rental Systems*, *supra*; *Gannett Co., Inc.*, *supra*; *Champion International Corporation*, *supra*; *Willamette Tug & Barge Co.*, *supra*; and *Los Angeles Soap Co.*, *supra*. Although counsel for the Respondent acknowledges this duty and contends that the Respondent was ready and willing to bargain over the effects of the closure of the Las Vegas call center, he admits that no such bargaining was conducted. However, he places the blame on the Union, contenting that it was the Union that refused to do so.

Looking back on the meeting of July 9, it is clear that Corwin Johnson had specifically come to Las Vegas to meet with the Union's representatives to negotiate over the effects of the decision to close the call center. That is clear not only from the credible testimony of Johnson and Ken Martin, who attended the meeting, but, for the most part, also from the testimony of Charlie Randall and Robert Herrera, who met with them. Additionally, Johnson's letter of July 25 (G.C. Ex. 6.), in which he expresses his disappointment over what had transpired on July 9 when he had hoped to engage in effects bargaining, supports the Respondent's position that it was willing and prepared to do so. Johnson, of course, places the blame on the Union, contending that Randall refused to have such discussions without first being provided with the documents requested in the Union's letter of June 19.

It does appear to be largely accurate that Randall was refusing to discuss or negotiate the effects of the closure without the documents, and apparently all of them. While Randall's and Herrera's testimony as to what transpired at the meeting of July

9 was somewhat evasive on this issue, their overall testimony regarding the conversations they had with management following the Union's request for information letter of June 19 reveals that it was the Union's position not to bargain over either the decision to close the call center or the "effects" of that decision without first receiving all the documents requested.

Still, as I have decided above, the Respondent was legally required to furnish the Union with the documents requested in paragraph 6, and its subparagraphs, of the information request. These documents pertained to the "effects" of the Respondent's decision, over which the Respondent was obligated to bargain. Who can know what could have happened had the Respondent tendered this information? As the Union had indicated a desire to bargain over both the decision and the effects, it certainly could be that had the Respondent tendered the "effects" documents, the Union may have been satisfied and commenced "effects" bargaining. Of course, we will never know, as the Respondent did not do what it was legally required to do, namely furnish the "effects" documents.

The Union should not be forced to commence bargaining over "effects" without first obtaining the documents that it was legally entitled to have, and which certainly may have been beneficial to the Union's bargaining position. It is my view that the Respondent's refusal to furnish the "effects" documents was the precipitating event, which privileged the Union's refusal to commence "effects" bargaining.²¹ Despite Johnson's professed willingness to negotiate over the "effects" of the decision to close, the Respondent's refusal to furnish the effects documents served as a continuing refusal to negotiate over those effects. Accordingly, I conclude that since June 19, 2008,²² the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to engage in effects bargaining with the Union as alleged in paragraphs 8(d) and 13 of the complaint.²³

4. Alleged bypassing of the Union and direct dealing with employees

At the hearing, I permitted counsel for the General Counsel to amend the complaint to allege that Jerry Wagy, an admitted supervisor, bypassed the Union and dealt directly with the employees in the bargaining unit by soliciting employees to relocate to a different call center operated by the Respondent. However, in his post-hearing brief, counsel for the General Counsel is silent regarding this Section 8(a)(5) allegation. Similarly, counsel for the Charging Party, who joins in the brief of the General Counsel, makes no mention of this allegation, even where he adds separate comments. Counsel for the Respondent, in his brief, takes the position that any conversations

²¹ Had the Respondent furnished the Union with the effects documents and had the Union, thereafter, still refused to commence "effects" negotiations without all of the other documents in its information request of June 19, there would have been no unlawful refusal to bargain by the Respondent.

²² As June 19 was the date of the Union's request for information, the Respondent's refusal, thereafter, to furnish the "effects" documents was the precipitating event of its refusal to negotiate over those effects.

²³ As note earlier, at the hearing there was an extensive amendment to the complaint. Amended paragraph 13 was formerly paragraph 12 (G.C. Ex. 1(o).)

between Wagy and unit employees constituted harmless exchanges between a manager and his employees, over a matter not in contention. In any event, the evidence regarding this allegation is not in dispute as neither Wagy, who did not appear at the hearing, nor any other management officials testified in contradiction to the employee witnesses.²⁴

Jerry Wagy was the Respondent's call center manager in Medford, Oregon. He was temporarily assigned to the Las Vegas call center during the events in question. Wagy was present at a meeting, along with Ken Martin and certain other managers, two or three days after the Las Vegas CSRs were first informed of the impending closure of that facility. It was apparently at that meeting that Wagy asked the assembled employees for a "show of hands" as to whether anyone would be interested in moving to Medford and working in the call center there, once the Las Vegas facility closed.

Further, a number of weeks before the closing, Wagy, in individual separate conversations, told at least one employee that he had done a good job in Las Vegas and that Wagy would welcome him at the Medford call center if he wanted to move there after the Las Vegas call center closed. Isauro Antonio Reyes testified about such a conversation. According to Reyes, he asked Wagy whether the Respondent would pay "relocation" expenses. Wagy is alleged to have answered, "Well, if you are interested, we can talk." Since Reyes was not really interested, no further discussion was held.²⁵

In my view, these incidents do not rise to the level of an unfair labor practice. The evidence was uncontested that the Respondent posts notices of vacancies nation-wide on its intranet system. Any employee, including the CSRs from the Las Vegas call center, was free to research the vacancies and to submit an application. Complimenting employees by saying that they had performed well and encouraging them to seek a transfer to Medford, Oregon, or asking whether employees would be interested in such a transfer was nothing more than an effort to support employees about to be laid off. There is no evidence that Wagy actually "offered" any of these employees a job, or that he in any way negotiated with them over terms and conditions of employment, including some type of a severance arrangement.

It appears that these conversations were informal and casual in nature, as between a manager and his employees, whereby the manager was seeking to give the employees some encouragement and positive thoughts in an otherwise unsettled time. There was clearly no wrongful intent and no effort to bypass or undermine the authority of the Union as the collective bargaining representative. These few statements by Wagy surely were not likely to erode the Union's position as the employees' exclusive representative. See e.g. *Modern Merchandising*, 284 NLRB 1377, 1379 (1987). Suggesting to employees about to be laid off some avenues or opportunities that they might seek

in obtaining future employment should, in my opinion, be encouraged not chastised.

Accordingly, I conclude that the statements made by Wagy neither constituted direct dealing with employees, nor an attempt to bypass the Union as the collective bargaining representative. Therefore, I shall recommend that complaint paragraph 10 be dismissed.²⁶

CONCLUSIONS OF LAW

1. The Respondent, Embarq Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers Local Union # 396, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: The Respondent's Operator Services and Clerical employees in the various departments as defined by the Act, as to the extent certified by the National Labor Relations Board on November 2, 1954, in Case 28-RC-2644.

4. Since at least 1954, the Union has been the exclusive collective bargaining representative of the Respondent's, or that of its predecessors', employees in the Unit within the meaning of Section 9(a) of the Act.

5. The most recent collective bargaining agreement between the Respondent and the Union is effective from March 15, 2006 through March 31, 2009.

6. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (5) of the Act:

(a) Failing and refusing to furnish the Union with the information the Union requested in its letter of June 19, 2008, specifically paragraphs 6A, B, and C, related to the effects of the Respondent's decision to close the Las Vegas call center; and

(b) Since June 19, 2008, failing and refusing to bargain with the Union over the effects of its decision to close the Las Vegas call center.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has not violated the Act except as set forth above.

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 take certain affirmative action designed to effectuate the policies of the Act.

As a result of the Respondent's unlawful failure to bargain in a meaningful manner and at a meaningful time about the effects of its closure of the Las Vegas call center, the employees of that facility have been denied an opportunity to negotiate through their collective bargaining representatives at a time when the Respondent might still have been in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic

²⁴ The facts regarding this direct dealing allegation are not set forth earlier in the fact section of this decision as they are not disputed.

²⁵ Another employee, Richard Campos, testified about a conversation that he had with supervisor Sarah Sterling about Wagy holding a "job fair," but there was no allegation that such a "job fair" was actually held, or that there were any subsequent job offers to employees.

²⁶ This is renumbered paragraph 10, following the amendment at the hearing.

strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, I shall recommend that, in order to effectuate the purposes of the Act, the Respondent bargain with the Union concerning the effects on its employees of the closure of the Las Vegas call center, and shall order a limited backpay requirement designed both to make whole the Las Vegas call center CSRs for losses suffered as a result of the violation and to recreate in some practical manner a situation in which the parties' bargaining is not entirely devoid of economic consequences for the Respondent. Thus, the Respondent shall pay to the CSRs in the unit represented by the Union at the Las Vegas call center on the date the Respondent notified them of its decision to close the facility their normal wages from 5 days after the date of the Board's Decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the decision to close the Las Vegas call center; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of the Board's Decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount that he or she would have earned as wages from the date of the closure of the Las Vegas call center to the time he or she secured equivalent employment; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ at the Las Vegas call center, with interest.²⁷ Interest is to be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁸

Further, I shall recommend that the Respondent be ordered to provide the Union with the information requested in its letter of June 19, 2008, specifically paragraphs 6A, B, and C, related to the effects of the Respondent's decision to close the Las Vegas call center.²⁹

Since the Respondent has closed its Las Vegas call center, this facility is no longer available to post a notice to employees regarding violations and remedy. Therefore, I shall recommend that the Respondent be ordered to mail signed copies of the notice to the Union and to all the Respondent's CSRs represented by the Union and employed at the Las Vegas call center

²⁷ This remedy is as provided for in *Transmarine Navigation Corporation*, 170 NLRB 389 (1968), as modified by *Melody Toyota*, 325 NLRB 846 (1998).

²⁸ In the complaint, the General Counsel requests that interest on backpay and other monies due be awarded by compounding interest on a quarterly basis, rather than on simple interest. However, the Board has repeatedly declined to deviate from its current practice of assessing simple interest. See *Morse Operations, Inc., d/b/a Sawgrass Auto Mall*, 353 NLRB 436 fn. 3 (2008), citing to *Carpenters Local 687 (Convention & Show Services)*, 352 NLRB 1016 fn. 2 (2008). Accordingly, I deny the General Counsel's request.

²⁹ See G.C. Ex. 4.

on June 6, 2008, the date the employees were notified of the intended closure.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

ORDER

The Respondent, Embarq Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to furnish the Union, International Brotherhood of Electrical Workers Local Union # 396, AFL-CIO, with the information requested by it in its letter of June 19, 2008, specifically paragraphs 6A, B, and C, related to the effects of the Respondent's decision to close the Las Vegas call center;

(b) Failing and refusing to bargain in good faith with the Union over the effects of its decision to close the Las Vegas call center; and

(c) In any like or related manner interfering with, restraining, or coercing its 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) Forthwith furnish the Union with the information requested by the Union in its letter of June 19, 2008, specifically paragraphs 6A, B, and C, related to the effects of the Respondent's decision to close the Las Vegas call center;

(b) On request, bargain in good faith with the Union as the exclusive collective bargaining representative of its CSRs at the Las Vegas call center with respect to the effects on its CSRs of the decision to close the Las Vegas call center and, if any understanding is reached, embody it in a signed agreement;

(c) Pay to its CSRs formerly employed at the Las Vegas call center as of June 6, 2008, and represented by the Union their normal wages for the period set forth in the remedy section of this decision;

(d) 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;

(e) Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix,"³¹ at its own expense, to all CSRs who were employed by the Respondent at its Las Vegas call center at any time from June 6, 2008, the date

³⁰ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³¹ 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."

the employees were informed of the intended closure, until the date the call center was actually closed. The notice shall be mailed to the last known address of each of the CSRs after being signed by the Respondent's authorized representative. A signed copy shall also be mailed to the Union; and

(f) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. on February 13, 2009.

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 a 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 do anything that interferes with these rights. Specifically:

WE WILL NOT fail and refuse to bargain with the International Brotherhood of Electrical Workers Local Union # 396, AFL-CIO (the Union) regarding the effects of our decision to close the Las Vegas call center where customer solutions representatives (CSRs) are represented by the Union.

WE WILL NOT fail and refuse to give the Union information that it has requested and needs to represent CSRs at the Las Vegas call center that we decided to close, which information specifically relates to the effects of the closing upon our represented employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, on request, bargain with the Union as the representative of our Las Vegas call center CSRs regarding the effects upon our represented employees of our decision to close the facility, and put in writing and sign any agreement reached as a result of such bargaining.

WE WILL immediately furnish the Union with all information that it previously requested related to the effects of our decision to close the Las Vegas call center, which information is necessary for the Union to bargain over the effects of that closure and its impact on our Las Vegas call center CSRs.

WE WILL pay to our Las Vegas call center CSRs represented by the Union, and who were employed on June 6, 2008, the date we notified them of our intention to close the facility, their normal wages for a period specified by the Board.

EMBARQ CORPORATION