UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH

UNIMARK TRUCK TRANSPORT, LLC

and **CASES** **16–CA–081303**
16–CA–090200

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Kelly Elifson, Esq., *for the Acting General Counsel.*
Jeffrey C. Kauffman, Esq. and Kathryn E. Siegel, Esq., *for the Respondent.*
Rod Tanner, Esq.*, for the Charging Party.*

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Ft. Worth, Texas on November 28 through 30, 2012 and January 8 through 10, 2013. The International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) filed the charges in Cases 16–CA–081303 and 16–CA–090200 on May 17, 2012 and September 27, 2012, respectively. The Union amended the charge in Case 16–CA–090200 on November 1, 2012.[1] Based on the charges and amended charge, the General Counsel issued the consolidated complaint on November 6.[2] The complaint, as amended several times at the hearing, alleges that the Respondent, Unimark Truck Transport, LLC, violated Section 8(a)(1) and (5) of the Act in connection with the implementation of a new "business model" in January 2012. Specifically, the complaint alleges that the Respondent violated Section 8(a)(5) by unilaterally implementing changes in employees' terms and conditions of employment, without the consent of the Union, before the expiration of a collective-bargaining agreement; by bypassing the Union and dealing directly with unit employees regarding the new terms and

[1] All dates are in 2012 unless otherwise indicated.

[2] The General Counsel previously issued a complaint, on August 31, based on the charge in Case 16–-CA–081303. That complaint has been merged into and superseded by the instant consolidated complaint.

conditions of employment; by bargaining in bad faith with the Union over the terms of a new collective-bargaining agreement in April-May; by withdrawing recognition from the Union on May 31; and by making further unilateral changes in employees' terms and conditions of employment after withdrawing recognition. The complaint further alleges that the Respondent also violated Section 8(a)(5) of the Act by failing and refusing to furnish the Union, since April, with requested information regarding the new terms and conditions of employment, and by refusing to furnish the Union, since September, with a list of employees with their dates of hire and home addresses. Finally, the complaint alleges that the Respondent independently violated Section 8(a)(1) of the Act, in June, through statements made by its safety director, Donna Finch, to employees at the Respondent's Cleveland, North Carolina facility, and by maintaining a provision in Independent Contractor Agreements signed by employees that restricts their right of access to the Board.

The Respondent filed its answer to the complaint on November 20, denying that it committed the unfair labor practices alleged in the complaint and asserting a number of affirmative defenses. The primary defense raised by the Respondent is that its actions vis-a-vis its drivers do not constitute violations of the Act because the drivers are independent contractors and not employees as defined in the Act. The Respondent also asserts that the Union essentially waived any right to bargain over the drivers' terms and conditions of employment though the express language of the parties' collective-bargaining agreement as well as through bargaining history and past practice.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Wisconsin limited liability company with its principal office in Joplin, Missouri and facilities in Laredo, Texas, Williamstown, West Virginia, Mount Holly, North Carolina[3] and Cleveland, North Carolina, is engaged in the business of truck transport services. The Respondent annually performed services valued in excess of $50,000 in States other than the State of Texas. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Business

The Respondent is one of about 12 companies operating as part of a holding company called JHT Holdings, which has its main office in Wisconsin. Matthew Troha is the vice

[3] The Mount Holly facility had closed by the date of the hearing.

president of human resources and deputy general counsel of JHT. In that capacity, he devised the new "business model" for the Respondent, sometime in the latter half of 2011. This new "business model" became the basis for the changes allegedly implemented that impacted the working conditions of the Respondent's drivers beginning in January 2012, and which ultimately led to the complaint in this case.

The Respondent has its headquarters in Joplin, Missouri where it is engaged in the "drive-away" business. Jim Johnston was the Respondent's president from 2002, when the relationship with the Union commenced, until August 2011. He was replaced by John Harrington, who served as president from December 2011 to July 2012. As of the close of the hearing, a new president had not been appointed. Instead, Mike Milton, the Respondent's vice president of operations, has carried out the duties and responsibilities of president. Johnston and Troha testified in this proceeding.

As described by Troha and other representatives of the Respondent who testified, the Respondent's business involves drivers hired by the Respondent picking up new tractors and specialty trucks from manufacturers and "driving them away" to be delivered to the manufacturers' customers throughout the United States. The drivers may be called upon to transport single or combination loads. A single load is one truck. A combination may consist of two or more trucks with the Respondent's driver driving one truck and hooking up the other truck or trucks and, in essence, towing them to their destination. A driver must be specially qualified to deliver combination loads. In addition to its headquarters in Joplin, where drivers undergo orientation and training, the Respondent maintains facilities at various locations near the truck manufacturers' facilities. These locations serve as a dispatch facility for the drivers. The location of these other facilities has changed over time as the Respondent's customers have changed. The local facilities are often nothing more than a trailer at or near the truck manufacturing plant.

B. The Bargaining History

There is no dispute that the Respondent has had a contractual relationship with the Union since 2002, about the time the Respondent came into existence. What is in dispute is whether this contractual relationship is a collective-bargaining relationship governed by the Act or sui generis, tailored to the Respondent's business needs. When the Respondent's alleged unfair labor practices commenced, in January 2012, there existed an agreement between the Respondent and the Union that was effective for the term April 24, 2009 to April 21, 2012. This agreement was the third in a series of contracts going back to 2002, all of which contained identical provisions.[4]

The last agreement, in its entirety, with any changes from the previous two agreements italicized, reads as follows:

[4] The first agreement was executed November 20, 2002, and was set to expire on November 30, 2003, unless extended by mutual agreement. The second agreement was executed on April 26, 2004, and was effective until April 25, 2009. As noted, the last agreement was executed on April 24, 2009, for a 3-year term.

Agreement and Understanding Between Unimark Truck Transport, Inc. and International Association of Machinists and Arospace Workers, AFL-CIO and Its Affiliated District 9 Lodge, St. Louis, Missouri

This MEMORANDUM OF AGREEMENT AND UNDERSTANDING is entered into this 24th day of April, 2009, by and between Unimark Truck Transport, Inc. (the Company) and International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated lodges (the Union).

WHEREAS, the Company is in the business of transporting new, used and specialty trucks from and to locations throughout the United States and Canada; and

WHEREAS, because of the highly competitive nature of the Company's business, it must utilize a variety of means and methods of conducting the above business including, but not limited to, utilizing its "contract drivers" who are independent contractors; and

WHEREAS, it is the Union's desire to protect the wages, benefits, and working conditions of the members it presently represents as well as to preserve the work that they presently perform as well as future work which is fairly claimable by such members; and

THEREFORE, to accomplish the objectives of work preservation and stability between the Company and the Union, the Company and the Union do hereby agree as follows:

1. The Company hereby recognizes the Union as the sole and exclusive bargaining representative of all of its Contract Drivers who perform work covered by the parties' collective bargaining agreement and who become party to a "Contract for Independent Contractor" in a form attached hereto as "Attachment A" or as may be from time to time amended.

2. All Contract Drivers, as a condition of continued status as a Contract Driver, shall be required to become a member of the Union in good standing within thirty-one (31) days of the effective date of their Contract referred to in paragraph 1, above, and to remain a member in good standing throughout the term of their Contract.

3. The Company will deduct from the amounts due to the Contract Driver the initiation fee and dues and/or uniform assessments of the Union and agrees to remit promptly to the Union such amounts so deducted provided the Contract Driver has provided the

Company with a valid, signed authorization for the deduction of such payments.

4. The minimum mileage rates to be paid to such Contract Drivers shall be:

Rate Schedule A – Authorized Terminals:

Single	-	$0.50 per mile. Fuel provided
Decked	-	$0.75 per mile. Fuel provided

Rate Schedule B – All Other Locations:

Single (non CDL)	-	$0.45 per mile
Single (CDL)	-	$0.55 per mile
2-way	-	$1.00 per mile
3-way	-	$1.15 per mile
4-way	-	$1.20 per mile

Contract Drivers will receive a $.01 per mile "Damage Free Delivery" bonus, provided the driver drives more than 75,000 miles in a rolling twelve (12) month period without any accidents or reportable damage.

Fuel surcharges will be passed to the Contract Drivers as long as there have been no extraordinary trip expenses allowed.

5. Contract Drivers shall be permitted to use the Company's fuel card subject to such rules for their use as determined by the Company. *The Company shall provide an annual corporate lodging card which will be made available for lodging for each independent contractor.* Notwithstanding such use, fuel and lodging expenses shall be borne by the Contract Driver. Amounts charged to such cards shall be deducted from any settlements due to Contract Drivers.
Company agrees if a truck(s) is/are not available at the point of pick-up at an agreed upon time through no fault of the Contractor, reasonable expenses will be reimbursed.

6. Grievance and Arbitration

   A. The parties agree that any and all grievances and questions of interpretation of this agreement shall be submitted to the grievance procedure, and that all grievances will be processed through District 9 I.A.M.A.W., in St. Louis, Missouri.

B. The parties agree there will be no cessation of work, nor slowdown, nor lock out over any controversy that might arise, and
C. Grievances should be submitted to local management for possible resolution. If unable to resolve, the Union and Company will hold a local level to attempt settlement. If the parties still cannot reach agreement, the issue may be submitted to arbitration, and
D. If a grievance goes to arbitration, the parties agree to utilize the Federal Mediation and Conciliation Service. The FMCS will provide a panel of seven (7) arbitrators until one is agreed to between the parties, and
E. The Expense of the arbitration shall be borne equally by both sides. The Company and Union shall each bear the expense of its own witnesses and council.

This Agreement expires on April 21, 2012, unless mutually agreed to extend as determined by the parties.

The italicized portion is the first change in contract language since 2002.[5]

The Independent Contractor Agreement (ICA), incorporated by reference in section 1 of the Respondent's agreement with the Union, is six pages long and contains 16 sections. Two appendices are attached, i.e., Appendix 1, which is the Independent Contractor Fee Schedule, and Appendix 2, which is entitled "Insurance". The 2002 Agreement between the Union and the Respondent that is in evidence does not contain a copy of the ICA in use at that time.[6] The ICAs attached to the 2004 and 2009 Union contract are identical. As will be discussed in further detail later in this decision, the 16 sections of the ICA set forth the terms under which the Respondent hires a driver to deliver loads for its customers and their respective duties and responsibilities. On its face, the ICA is between the Respondent and an individual driver. It makes no reference to the Union or to the Respondent's contract with the Union. Article XVI of the ICA seeks to define the relationship between the Respondent and its drivers as follows:

> It is the intention of the parties to this agreement that the CONTRACTOR shall be and remain an Independent Contractor. Nothing herein contained shall be construed as inconsistent with that status. Neither the CONTRACTOR nor the employees, agents or servants of the CONTRACTOR, are to be considered employees or servants of the CARRIER at any time under any circumstances or for any purpose.

[5] The language in Section 5 requiring the Respondent to provide drivers with a corporate lodging card replaces language that required the Respondent to provide drivers with an annual membership to AAA (Automobile Association of America). The other italicized provisions are new.

[6] The 2002 fee schedule, which by its terms was effective October 1, 2002, is in evidence and is identical to the fee schedule that is part of the ICA attached to the 2004 union contract.

> Both parties recognize that the performance of their respective obligations hereunder must be accomplished in compliance with applicable governmental regulations and neither party shall utilize governmental regulations to interfere with the right of the other party to control the means and methods of such performance. The parties affirm and represent that the observance of applicable governmental regulations will not interfere with their creating and maintaining the relationship of Independent Contractor to each other.

Boysen Anderson, the IAM's automotive coordinator, testified for the General Counsel regarding the establishment and history of the parties' bargaining relationship. According to Anderson, the Union already had a collective-bargaining agreement with another JHT Holdings company called Auto Truck Transport when he met with Jim Johnston, the Respondent's president at the time, to negotiate a first contract with the Respondent. Anderson testified that he met with Johnston at the Union's District Lodge 9 office in Bridgeton, Missouri in October 2002. He recalled that the negotiations lasted several days but, when questioned on cross about these negotiations, he claimed he could not recall how long they took and claimed that the negotiations were not all face-to-face meetings. Anderson testified that he and Johnston not only negotiated the language of the union contract, but also negotiated the language in the ICA. He testified further that they also discussed how future changes to the ICA would be handled, i.e., that the Respondent would notify the Union if it wanted to make a change and they would then either agree or disagree. As noted previously, the ICA attached to the union contract was unchanged from 2002 until 2009. Although Anderson and Johnston negotiated the contract and, according to Anderson, he drafter the agreement, neither signed the final agreement. Instead, Dave Meinell, then the business representative for the Union's Local Lodge 777, signed for the Union. An individual whose signature no one could identify signed on behalf of the Respondent. Anderson's testimony regarding the negotiation of the 2004 agreement was similar, i.e., he and Johnston negotiated and, after reaching agreement, Meinell signed for the Union. Johnston signed for the Respondent this time.[7]

Anderson's testimony indicates that the 2009 negotiations were handled differently. Although Anderson testified that he met with Johnston one time in St. Louis and proposed a 1-cent per mile safety bonus for the drivers and that he prepared the contract proposals, Mark Conner, then the Local 777 business representative actually met with Johnston to negotiate the agreement. Once agreement was reached, Anderson approved the contract before Conner was authorized to sign it on behalf of the Union. Conner testified via video conference because he was recovering from surgery after an accident, and corroborated much of Anderson's testimony regarding the 2009 negotiations. As noted previously, there were several changes to the contract in 2009, including the safety bonus, that resulted from proposals made by the Union. However, email correspondence between Johnston and Connor shows that the Respondent opposed any changes to the drivers' terms that could make them employees rather than

[7] As noted above, the 2002 and 2004 union contracts were identical.

independent contractors. There is nothing in the record to indicate that the Union objected to these concerns.

Johnston, who was no longer employed by the Respondent when he testified at the hearing, having resigned in August 2011, was called as a witness by the Respondent. According to Johnston, he did not meet Anderson until he became the Respondent's president in 2003 and he negotiated only two contracts with the Union, in 2004 and 2009. He did not recall negotiating the first contract with Anderson, but he acknowledged negotiating with Anderson for the 2004 agreement. Johnston testified that all of the negotiations for the 2009 agreement were conducted with Connor and that he had no communication with Anderson as part of those negotiations. Johnston also contradicted Anderson's testimony regarding the ICA. According to Johnston, that document had been in existence for many years, in the same form, and had never been negotiated with the Union.

The General Counsel offered evidence to show that the Union has represented unit drivers through the filing and processing of grievances during the period covered by the contracts. However, the most recent grievance occurred during the term of the 2004 contract. The Union conceded that, although it appointed a business representative from Local Lodge 777 to service the unit, it had no stewards in the unit. The Union did enforce the union-security provisions of the agreement by providing a packet of documents to the Respondent to be given to newly hired drivers that included a membership application and dues-checkoff authorization. There is no dispute that no union representative met with these new drivers during the term of the contracts.[8]

C. The Hogquist Affair

There is no dispute that, in early 2010, Nelson Hogquist, one of the Respondent's drivers covered by the union agreement, began to file grievances disputing certain actions taken by the Respondent with respect to his compensation. At one point, he asserted a claim that the Respondent was mischaracterizing the drivers as independent contractors. Correspondence in evidence shows that the Union and Respondent discussed Hogquist's grievances and attempted to resolve them, but apparently not to Hogquist's satisfaction. Eventually, Hogquist found his way to the National Labor Relations Board where he filed charges that led to a complaint that the union-security provision in the parties' 2009 agreement was unlawful because it did not provide the 30-day period before a new employee could be required to become a member and pay dues to the Union. The Respondent signed a settlement agreement in April 2011, with a nonadmissions clause, agreeing not to collect dues from employees before they had completed 30 days of

[8] There is evidence that, after unfair labor practice charges were filed in 2010, which led to complaint allegations that the union-security language of the agreement was unlawful, the Respondent ceased its practice of providing union membership materials to drivers when hired. The three drivers who testified for the General Counsel were all hired after 2010 and testified that they were unaware of the Union when hired.

employment. The Respondent and the Union also agreed that they would rewrite the union security clause as part of the new agreement in 2012.

In addition to his grievance and unfair labor practice charge, Hogquist also filed with the IRS in 2011 a form challenging his designation as an independent contractor. On August 9, 2011, the IRS issued a letter finding that Hogquist was an independent contractor for 2009 and 2010 tax years. After reconsideration, the IRS reversed that determination by letter dated December 19, 2012, finding that Hogquist had been an employee of the Respondent for tax years 2008 through 2010.

Troha, the vice president of human resources and general counsel for the Respondent's holding company, testified that the Hogquist complaints and charges in 2010 and 2011 led the Respondent to reevaluate its "business model" in order to make sure that the drivers were indeed independent contractors and not employees. The changes that resulted from this process led to the charges and complaint at issue.

D. The Respondent's Announcement of its "New Business Model"

There is no dispute that, in late 2011, the Respondent made changes to the ICA that individual drivers were required to sign when hired. There is also no dispute that the Respondent informed its drivers about these changes at a series of meetings, in December 2011, held near the terminals. The General Counsel offered the testimony of three drivers, all assigned to the Cleveland, North Carolina terminal, who attended the meetings at that location. The meetings took place at a Golden Corral Restaurant in Statesville, North Carolina. Drivers were informed of the meeting by terminal manager David Parker and through a notice on the bulletin board. According to driver Grover Garrison, some of the drivers were transported to the meeting from the terminal in a company van with the Unimark logo. The meeting lasted about 2½ to 3 hours. The Respondent paid for the drivers' meals and also compensated them for the time spent at the meeting at the rate of $10/hour.

At the meeting, the Respondent distributed a 13-page handout entitled: "Contractor Pay Rates", which included a new fuel surcharge table, new pay rates, and rates paid to trainee and trainer drivers. The Respondent's director of operations, Mike Smith, Payroll Manager Jan Pekarek, Safety Manager Donna Finch, and dispatcher Joe Cosgriff represented the Respondent at the meeting and explained the new terms. Smith did most of the talking, explaining how the new fuel surcharge and mileage rates would be paid. Finch told the drivers that the Respondent would be offering a bonus for drivers with clean logbooks and told them about the option of drivers getting their own insurance. Dispatcher Cosgriff spoke about the new boom load rates. The drivers were then given the opportunity to ask questions about the new terms. The Respondent had a sign-in sheet for drivers where they listed their qualifications, class of driver's license and endorsements. The Respondent distributed pens, logbook rulers, hats and shirts with Respondent's logo. There is no dispute that no Union representatives were at any of these meetings and that the Union was not informed of the meetings in advance.

The Respondent began implementing the changes to drivers' terms in January and, at the same time, began soliciting drivers to sign the new version of the ICA. As detailed in counsel for the General Counsel's brief, the new ICA made substantial changes to the driver's terms, primarily with the goal of enhancing the independent contractor relationship. For example, the new ICA specified that the Respondent was not obligated to offer, and the driver was not obligated to accept any minimum number of loads and that the driver was free to accept or reject any delivery. The new ICA also contained a total rewrite of the provision (art. XI) dealing with the driver's responsibilities as an independent contractor. The most significant change was the new fee schedule attached as Appendix A which changed the mileage rates and the method of calculating compensation. The testimony and documentary evidence also shows that the new ICA went through further revisions over time, as the Respondent implemented the changes, and that some drivers were solicited to sign more than one version of the ICA. There is no dispute that the Respondent did not notify the Union in advance of any of the revisions to the ICA that had been incorporated by reference in the Union contract.

E. Negotiations for a New Union Contract

Conner, the Union's business representative, sent the Respondent the requisite 60-day notice of its desire to negotiate a new agreement on February 13. After the exchange of email over several months, as the Respondent advised the Union that it was in the process of hiring a new spokesperson for negotiations, since Johnston had left the Company, and as the parties negotiated over a request for information made by the Union in anticipation of negotiations, the parties finally agreed to meet, for the first time, on April 4. The meeting took place at the District Lodge 9 office in Bridgeton, Missouri. Anderson, the International Union's automotive director represented the Union and was assisted by local Business Representatives Dave Weaver and Roy Collins. The Respondent was represented by Troha and Director of Operations Mike Smith.

Anderson testified that Troha opened the meeting by telling the Union that this was a "courtesy meeting," that the Respondent had implemented a new business model and made changes to the ICA. At some point in the meeting, Anderson presented Troha with a set of written proposals for a new union contract and asked Troha if he wanted to discuss them. According to Anderson, Troha rejected this, reiterating his statement that this was just a courtesy meeting. In response to Anderson's questions regarding the changes the Respondent had made, Troha presented a two-page document entitled, "April 1, 2012 Model." This document set forth the changes the Respondent had already made and announced to the drivers at the meetings in December 2011. After reviewing the document, Anderson asked Troha questions about each of the five numbered changes listed under "Significant changes in Unimark Independent Contractors". Anderson asked Troha to explain the "new, reengineered standardized compensation plan" referenced in item 1. Troha responded that he did not have to explain it and that Anderson did not have a right to that information. Nevertheless, Troha said he would think about it and get back to Anderson. Anderson then asked Troha to explain the "new compensation plan" referenced in item 2. Troha gave the same response, that he did not have to explain it but

he would think about it and get back to Anderson. According to Anderson, he then asked Troha for an explanation of the fuel surcharge program that was instituted, as set forth in item 3. He received essentially the same response. When Anderson asked about item 4, referencing the drivers' responsibility for expenses involving food, lodging, fuel and return transportation, Troha responded by giving Anderson a copy of the new ICA and directing his attention to section VII of that agreement. Section VII reads as follows:

> The CONTRACTOR shall pay all costs and expenses incident to the performance of movements under this agreement, including but not limited to the following: fuel, transportation, food and lodging. CONTRACTOR understands that he must have an authorization number from dispatch for any and all agreed reimbursable items other than oil, antifreeze, and fuel additives. CONTRACTOR understands that all receipts for additional expenses must be presented for payment within 10 days of delivery or the CONTRACTOR will not be reimbursed. CONTRACTOR shall not act as agent or employee of CARRIER for any purpose, including repairs, and shall not pledge any credit for CARRIER. All repairs shall be made through the form of com-checks.[9]

Anderson then moved on to the next item, referencing the new ICA that had been "finalized" to document the changes, and asked for a copy of it. Troha responded that the new ICA was the document he had just given Anderson in response to his question regarding item 4. When Anderson asked Troha if the Respondent had implemented the new ICA, Troha responded affirmatively.

According to Anderson, he then proceeded to ask Troha about each of the bulleted items under the next section of the Respondent's "April 1, 2012 Model," which is entitled: "Other notable contractor changes/enhancements." When Anderson asked Troha to explain the "accelerated compensation option," Troha referred him to the document, saying that the driver would get paid in 48 hours, as stated. Anderson then asked for an explanation of the next item, "competitive insurance program." Troha responded that he could not explain it and told Anderson that he did not have anything to present regarding the insurance. Anderson then asked if the Respondent had a toll-free customer service number, as referred to in the next item, and Troha said he did not know. When Anderson asked Troha about the items to be included in the "Unimark Branding Campaign" listed on the document and whether drivers would be required to purchase these items, Troha was unable to give him a response. With regard to the "supplier discounts" that would be offered the drivers under this new model, Troha refused to answer, claiming confidentiality. As to the last bullet point in this section, "Referral Bonus Program," Troha did not have an answer as to how the bonus would be paid and how much it would be. Finally, Anderson asked about the new fuel card mentioned in the last bullet point and Troha said that it would be available on April 15.

After going through the Respondent's "April 1, 2012 Model" in this fashion, the meeting came to a conclusion with Troha telling Anderson that he was rejecting the Union's

[9] Contractor is the driver and Carrier is the Respondent. This language, with a few changes, was in the original ICA.

contract proposals and that there was no need for any further meetings.[10] Troha's version of the meeting is not entirely inconsistent with Anderson.

After the meeting, Troha sent Anderson an email, dated April 5, explaining his position that the purpose of the meeting on April 1 was to explain the Respondent's decision to change the nature of its business model to one requiring the exclusive use of independent contractors. Troha indicated that the Respondent was only willing to discuss the effects of this decision. He admitted that the Respondent had already implemented some changes and stated that the Respondent had the right to make these changes to its business model under the contract and past practice. Troha, in the email, acknowledged that Anderson had asked for information about the new model at the April 1 meeting and he requested that Anderson put these requests in writing. Troha stated that if any of the information requested involved sensitive, proprietary, or confidential information, the parties would have to negotiate a confidentiality agreement.

Anderson responded to Troha's email with an email of his own on April 10. In this e-mail, Anderson formally requested documents, including emails, electronically stored documents, notes, memoranda, and drafts, regarding the changes listed on the Respondent's "April 1, 2012 Model." Specifically, Anderson requested information regarding the "re-engineered contractor compensation plan"; the new consistent compensation plan; the new fuel surcharge program; the supplier discount program; and the referral bonus program. Anderson stated that he needed this information to get a better understanding of the changes outlined in the Respondent's documents. Anderson also advised Troha that it was the Union's position that the drivers were employees, not independent contractors. Anderson also reminded Troha that he had stated at the meeting that there was no need to schedule further meetings for negotiations and he asked Troha to let him know if his position changed.

Troha responded to Anderson's email with a letter dated April 17. Troha reiterated his position that the Respondent had made a decision to change the Respondent's business model to one exclusively utilizing independent contractors. He referred to this as a "fundamental business model change" that was entrepreneurial, was not amenable to collective bargaining and had nothing to do with "labor costs." Troha stated that "there [was] nothing the Union could propose or offer that could possibly 'change the Company's mind' about the decision itself." He reiterated his position that the Respondent was willing to bargain with the Union regarding the effects of the decision but saw no reason to bargain for a new collective-bargaining agreement. Troha also advised Anderson in this letter that the Respondent was not taking a position on whether the drivers had been or were employees under the Act during the term of the contract but they would not be employees once the Respondent fully implemented its new business model upon the expiration of its contract with the Union. In response to Anderson's written information request, Troha asserted generally that the documents were confidential but indicated a willingness to discuss a confidentiality agreement that would protect the Respondent's interest and accommodate the Union's need for the information.

[10] Weaver and Collins did not testify in this proceeding.

Anderson responded by letter on April 23, rejecting Troha's general claim of confidentiality but stating his willingness to consider a more specific request for a confidentiality agreement. Anderson renewed his request for the information and gave the Respondent a deadline of April 30 to furnish the information, which Anderson characterized as "presumptively relevant." Anderson also disagreed with Troha's assertion that the Union had stated it was unwilling to bargain with the Respondent. Anderson then proposed four dates for additional meetings. Anderson concluded the letter by reiterating the Union's position that the drivers were and had always been employees, not independent contractors. Through further communication, the parties ultimately agreed to schedule another meeting, for May 1, again at the District Lodge office in Bridgeton, Missouri. The Respondent did not furnish any of the information Anderson requested before the parties met.

Anderson and Collins represented the Union at the May 1 meeting and Troha was there with Vice President of Operations Milton. Troha opened the meeting by telling the Union that the Respondent intended to move forward with the "April 1, 2012 Model." He told the Union that the Respondent had already implemented the new ICA that he had provided to the Union at the last meeting. Anderson suggested the parties extend the current contract while they continued to negotiate and Troha rejected this. Anderson then asked for the information he had requested at the previous meeting and in his April 10 letter. Troha refused to provide any of the information, claiming he had sent the Union a proposed confidentiality agreement. Anderson disputed this and repeated his willingness to discuss the Respondent's specific claims of confidentiality. Troha replied that he was not going to give the Union the information anyway.

The parties have had no further meetings to negotiate a successor to the expired 2009 contract. On May 31, the Respondent sent a letter to all the drivers that was signed by Mike Milton, the Respondent's vice president of operations. In the letter, Milton advised the drivers that the Respondent had met with the Union and had advised the Union of its plan not to renew the contract with the Union based on the changes that the Respondent had implemented. Milton asserted that the drivers were independent contractors, not employees, and as such, they could not be covered by a collective-bargaining agreement or required to pay dues to the Union. Milton went on to inform the drivers, in this letter, of the changes that were itemized on the "April 1, 2012 Model" that had been given to the Union on April 4. Milton also told the drivers in this letter that the Union's position, that they were employees and not independent contractors, "would likely cause all of Unimark's present work to be in jeopardy and at risk of permanent loss." Milton concluded the letter by telling the drivers that the Respondent would "continue moving forward with the business model currently in effect which can be administered directly between the contractor and Unimark."

F. Alleged Interrogation and Solicitation of Grievances

William Pope, a driver at the Respondent's Cleveland, North Carolina terminal, testified for the General Counsel regarding a visit to the terminal in June by the Respondent's Safety Manager, Donna Finch, and Recruiter Jimmy Johnston, who is the son of the former

president.[11] According to Pope, Finch met with about seven drivers in the drivers' room at the terminal for about an hour. Pope testified that Finch asked the drivers if someone from the Union was showing up at the terminal. Finch said she wanted to know which drivers were talking to the Union. According to Pope, Finch said, "You know, we take care of you guys, so why have a union come down here?" Finch said that the Respondent could do better for the drivers and that they did not need a union. Pope testified further that, during the meeting, Finch took notes as the drivers voiced complaints about the dispatch procedure and about perceived preferential treatment of certain drivers. Finch told the drivers that she would inform Smith, the Respondent's director of operations, and Milton, the Respondent's vice president, of their complaints and that someone from upper management would come to the terminal to talk to them. Finch was not called as a witness by the Respondent.

G. The Union's Information Request

As noted above, the Respondent has not furnished the Union with any of the information Anderson requested in April regarding the changes that Respondent was implementing as part of its new business model. On September 20, Anderson made a written request to Troha for the "names, dates of hire, addresses with zip codes of all current unit employees." The Respondent last furnished such information to the Union on March 22, in preparation for contract negotiations. Anderson testified that he needed an updated list so that the Union could communicate with current drivers because there is high turnover among the drivers.

Troha responded to Anderson's request on September 20, suggesting that Anderson have the Union's counsel communicate directly with the Respondent's counsel regarding the request.[12] The Union's counsel submitted a request for this same information to the Respondent's counsel on October 2. The Respondent's counsel refused to provide the information and requested that the Union provide the Respondent with all information showing that the Union was entitled to recognition as the drivers' exclusive collective-bargaining representative. As of the date of the hearing, the Respondent had not furnished any of the information to the Union.

H. Additional Alleged Unilateral Changes

Consistent with its position that the drivers are independent contractors and that the Union cannot legally represent them, the Respondent has made subsequent changes to terms and conditions of employment. The General Counsel offered uncontradicted testimony that, in July, the Respondent's dispatcher at the Cleveland terminal, Joe Frierson, announced a change in dispatch procedures. Under the new procedures, the drivers would have to show up at the Cleveland terminal and sign a list in order to get a load assigned. Drivers would also have to wait at the terminal until they were offered a load. However, after many of the drivers complained to Frierson about the hardship of requiring them to travel long distances to

[11] Pope worked for the Respondent as a driver at Cleveland from March until October 2012.

[12] By September, an initial complaint had issued in this case regarding the Respondent's unilateral changes in drivers' terms and conditions.

Cleveland to sign a dispatch list and wait for a load, Frierson suspended the new procedures, sometime in September.

I. The Independent Contractor Status of the Respondent's Drivers

Mike Smith, the Respondent's director of operations, testified for the Respondent regarding the working conditions of the drivers to show that they were and are independent contractors. The General Counsel offered the testimony of three drivers. Pope, whose testimony regarding Finch's visit to the Cleveland terminal was described above, worked for the Respondent in 2012, after the Respondent began implementing changes to its ICA. Kenneth Tate, who was hired in October 2011, was still working as a driver at Cleveland when he testified at the hearing. Grover Garrison had been employed at the Cleveland terminal for about 2 years until he was placed on a leave of absence shortly before testifying at the hearing. All three testified regarding their relationship with the Respondent and the manner in which they carried out their work responsibilities in a forthright manner and were credible witnesses. Smith, the Respondent's witness testified more in terms of the theory of the Respondent's relationship with its drivers than the actual practice. I also note, as pointed out by counsel for the General Counsel, that much of his testimony on crucial matters related to the drivers' status was elicited by leading questions from the Respondent's counsel. As a result, I found his testimony less reliable as evidence than if he had testified in a direct, candid and forthright manner.

All drivers who work for the Respondent sign an ICA as part of their orientation. As noted, the ICA explicitly states that the relationship between the Respondent and the driver, or contractor as he is called in the ICA, is that of an independent contractor. Historically, the Respondent has been under no obligation to offer a particular amount of assignments to individual drivers and the drivers have been free to turn down an assignment if he determines it is not financially or otherwise acceptable. The drivers did testify that, on occasion, if they turned down an assignment, they might lose out on other more lucrative assignments as a consequence. The testimony also reveals that, once an assignment is accepted, the driver is free to follow any route he chooses to make the delivery within a delivery time window. However, because the drivers, before and after 2012, have been paid on a mileage basis based on the shortest interstate route from pickup point to delivery, their freedom to determine a route is constrained. If they choose a route that is longer mileage wise, or requires more fuel, they will not earn as much as if they followed the prescribed route on which the Respondent has based their compensation.

The record also shows that drivers, when hired, are required to attend a 1-week orientation at the Respondent's Joplin headquarters where they learn the Respondent's procedures for delivering loads, preparing documentation for reimbursement on their trips, completion of logbooks and other policies. During this time, the drivers also receive training on decking and undecking and transporting combination loads. In the past, the Respondent has paid for the transportation and lodging of drivers to attend orientation. In addition, the Respondent paid the drivers a $200-orientation bonus upon completion of the orientation, which the drivers could use to purchase the decking tools they needed. Smith testified that the Respondent no longer does this.

The evidence also reveals that the drivers are required to supply their own tools for decking and undecking but that they may purchase them from the Respondent. The drivers are also responsible for meeting all requirements for and obtaining their commercial drivers license and any State permits required to drive the tractors they are delivering for the Respondent. They must adhere to Federal and State regulations applicable to truckdrivers, including maintaining logbooks that show they are not driving more than the allowable number of hours.

Drivers are also responsible for the cost of getting to the location where they pick up the tractor for delivery and for food and lodging while en route to the delivery point. All drivers are issued a Com-Data card which is like a debit card that they can use to pay for expenses. Money earned for the deliveries made by the drivers is deposited into the Com-Data account once the driver completes and submits his paperwork for each trip. Drivers can also obtain an advance deposit into their Com-Data account to fund their trip, subject to balancing after the paperwork is submitted. The drivers are issued a 1099, rather than a W-2, for tax purposes. The Respondent makes no deductions for taxes, social security, or FICA. The Respondent does not offer health or life insurance or any other fringe benefits to drivers. The drivers are required, pursuant to the ICA, to obtain, at their own expense, workers' compensation/occupational accident insurance for themselves and anyone they may choose to hire to meet their obligations to the Respondent. The Respondent "facilitates" the drivers' insurance coverage by offering coverage through a designated insurance company with the premiums deducted from any money earned by the driver for completing deliveries. Although not required to obtain the required insurance through the Respondent, virtually all the drivers opt to do so.

Smith testified that the drivers are free to work for other carriers who perform similar work. It offered evidence of one driver who in fact worked for a competitor while driving for the Respondent. However, this occurred in late 2012, well after the Respondent had implemented the changes to its business model. The Respondent, who is in possession of records that might have shown otherwise, failed to offer any evidence of drivers working for other companies during the term of its contractual relationship with the Union. Moreover, as the General Counsel pointed out, there was a provision in the independent contractor manuals used before the 2012 changes that states that drivers were expected to drive a minimum of 1,500 miles a week for the Respondent, leaving little opportunity to drive for others. In addition, the occupational/accident insurance that drivers were required to maintain only covered them for time spent driving for the Respondent. A driver would have to obtain additional insurance if he planned to drive for other entities.

There is no dispute that the terms for its drivers, as spelled out in the ICA, and also in previously utilized Independent contractor manuals, are unilaterally set by the Respondent. There is no evidence in the record of any "bargaining" between a driver and the Respondent over the rates he will be paid, or the expenses, if any, he will be reimbursed. While it may be true, as noted above, that the driver is free to accept or decline a load, and has freedom to determine his route between pickup and delivery and whether and when to stop for the night,

these choices are constrained by the manner in which the Respondent has chosen to structure its compensation plan.

The parties are in agreement that the burden of proof as to independent contractor status lies with the party asserting it. *Community Bus Lines,* 341 NLRB 474 (2004); *BKN, Inc.,* 333 NLRB 143 (2001). The parties also agree that the Board applies the common law agency principles set forth in the Restatement 2d., *Agency* §220(2). *Roadway Package Systems,* 326 NLRB 842, 850 (1998). Specifically, the following 10 factors are relevant to consider:

a) The extent of control which . . . the master may exercise over the details of the work;
b) Whether or not the one employed is engaged in a distinct occupation or business;
c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
d) The skilled required in the particular occupation;
e) Whether the employer or top workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f) The length of time for which the person is employed;
g) The method of payment, whether by the time or by the job;
h) Whether or not the work is part of the regular business of the employer;
i) Whether or not the parties believe they are creating the relation of master and servant; and
j) Whether the principal is or is not in business.

No one factor is controlling in making the determination of an individual's status as an employee or independent contractor. The Board has cautioned that these 10 factors are not exclusive, or exhaustive' and that it will consider other relevant factors that are incidental to the relationship between the parties. *St. Joseph News-Press,* 345 NLRB 474, 478 (2005); *Argix Direct Inc.,* 343 NLRB 1017 (2004); *Slay Transportation Co.,* 331 NLRB 1292, 1293 (2000); *Roadway Package Systems,* supra. As the Supreme Court stated, in addressing this issue:

> There is no shorthand formula or magic phrase that can be applied to find an answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

NLRB v. United Insurance Co., 390 U.S. 254, 258 (1968).

At the hearing, the Respondent took no position on whether the drivers were independent contractors before it implemented the changes in 2012 as part of its new business model. The Respondent instead focused on whether the drivers were independent contractors as a result of the changes and therefore not subject to the Act. However, in its posthearing brief, the Respondent argues forcefully that the drivers have always been independent contractors, notwithstanding the 10-year relationship with the Union, and that the 2012 changes merely tweaked the relationship to avoid any misunderstanding about its true nature.

The General Counsel has consistently argued that the drivers have always been employees, notwithstanding the explicit contrary language in the Respondent's contracts with the Union and the individual drivers. The evidence offered by both parties at the hearing and cited in their briefs present a close question, with some factors suggesting independent contractor status while others would support a finding of employee status. After much wrestling with the facts and weighing the various factors, and noting the reality of the relationship as described by the witnesses with first-hand knowledge, i.e., the drivers, I must conclude that the Respondent failed to meet its burden of proving that, in early 2012, when the Respondent began implementing changes to its business model, the drivers were independent contractors.

I note that the duties performed by the drivers, i.e. transporting trucks from the manufacturer to the ultimate customer, is an integral part of the Respondent's business, accounting for 100 percent of its revenue. I also note that neither the drivers, nor the Respondent, own the trucks that the drivers drive. They are merely performing a service for the Respondent's customers. Although the drivers have specialized skills as commercial drivers, they also receive additional training from the Respondent to the extent necessary to deliver the combination loads that make up the majority of the Respondent's business. The trucks driven by the drivers are operated under the Respondent's motor carrier license and bear signage identifying the Respondent, rather than the individual driver. I also note that, at least until sometime in 2012, the Respondent provided its drivers with a manual that specified in great detail what was expected of them as a driver and provided that the Respondent could terminate its contract with the driver for noncompliance with these expectations. As noted above, the Respondent has historically set the terms of its relationship with the drivers unilaterally, without any input from the drivers. This was especially relevant with respect to the 2012 changes that were announced at meetings with the drivers as a fait accompli, not as a proposal that was subject to negotiation.

While it may be true that the drivers have always been free to accept or decline a load, and generally can determine the route to follow in making deliveries, the choices the drivers make are constrained by terms set unilaterally by the Respondent. In particular, rather than being compensated for the actual miles driven, the driver only receives pay for the distance calculated by the Respondent's computer program, thus making it economically unfeasible to choose another route. Similarly, although a driver could reject a load if he didn't like the location of the delivery or the prospect of earning money to make it worthwhile, he faced the prospect of going to the "bottom of the list" if he did so, as credibly testified by driver Tate. One of the most significant factors in the present case, and one often cited by the Board, is the absence of any true entrepreneurial opportunities involving risk of loss or profit for the drivers. *Standard Oil Co.,* 230 NLRB 967, 968 (1977). See also *Corporate Express Delivery System,* 332 NLRB 1522 (2000); *C.C. Eastern v. NLRB,* 60 F.3d 855, 860 (D.C. Cir. 1995)

The fact that the written agreements between the Respondent and the drivers, as well as the agreement with the Union, defined the relationship as that of an independent contractor, is not dispositive. *Corporate Express Delivery System,* supra; *Big East Conference,* 282 NLRB 335, 345 (1986); *National Freight,* 153 NLRB 1536 (1965). Similarly, the fact that the Respondent does not make payroll deductions and that the drivers are responsible for paying their own taxes, is not determinative. *Miller Road Dairy,* 135 NLRB 217, 220 (1962).

Accordingly, based on the above and the record as a whole, I conclude that the Respondent's drivers were employees within the meaning of the Act prior to January 1, 2012. It is unnecessary to determine whether the Respondent succeeded in converting their status to independent contractors as part of its new business model because, as discussed infra, the Respondent had an obligation to notify the Union and bargain upon request, regarding such changes.

J. The 8(a)(5) Allegations

There is really no dispute that the Respondent acted unilaterally when it revised the drivers ICA and made significant changes in their rate and method of compensation and in other terms and conditions of employment as part of the new business model implemented in 2012. The uncontradicted testimony of the drivers shows that the Respondent announced these changes at drivers meetings in December 2011 without any union representative present, or even made aware that such meetings would occur. Although the Respondent attempted to show that the changes were not implemented until after its contract with the Union expired in April, the testimony of the drivers, as well as admissions by Troha, establish that the Respondent began implementing its new model even before the union contract expired.

The Respondent doesn't seriously challenge the allegation regarding the unilateral manner in which it changed the drivers terms and conditions of employment. On the contrary, it belatedly argues, in its brief, that the Respondent's decision to implement a new business model was not a mandatory subject of bargaining because it was a core entrepreneurial decision. See *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981), and its progeny. Such an argument is contrary to the claims made by the Respondent's own witness that the new business model was intended to "tighten the ship" and clarify the independent contractor status of the drivers. This characterization by Troha recognizes that the Respondent continued to engage in the same business, using the same drivers, servicing the same customers in the same manner as before. The only significant change was the rate and method of compensation for those drivers and the manner in which the Respondent interacted with them. I find that the subjects encompassed by the new business model were mandatory subjects of bargaining because they affected the wages, hours and other terms and conditions of employment of the Respondent's drivers who were represented by the Union.

The Respondent's failure to afford the Union with sufficient notice and opportunity to bargain regarding the changes implemented in 2012 was continued when the parties finally met for "negotiations" in April. Troha essentially told the Union that there was no point to meeting because the Respondent had no intention of signing another contract with the Union and was prepared to implement its new business model, to the extent it had not already done so. The Respondent's willingness to bargain over the "effects" of its decision was meaningless. It was its failure to bargain regarding the decision to make these changes that was unlawful.

I agree with the General Counsel that the Respondent engaged in an additional unilateral change when the dispatcher at the Cleveland terminal announced a new dispatch

procedure in July that required the drivers to appear at the terminal, sign a list and await an assignment in order to obtain work. By that point in time, the Respondent had withdrawn recognition from the Union so the unilateral nature of the conduct is not contradicted. The fact that the Respondent's dispatcher rescinded the change within 2 months, in the face of driver complaints, does not cure the violation or obviate the need for a remedy for this conduct.

Accordingly, based on my finding that the drivers were employees before the Respondent implemented changes to their terms and conditions of employment, I find that the Respondent violated the Act by making unilateral changes, as alleged in the complaint, by refusing to bargain in good faith with the Union for a contract to succeed the 2009 agreement and by withdrawing recognition from the Union upon expiration of the 2009 contract.

K. Direct Dealing

There is also no dispute that the Respondent met with the drivers represented by the Union in December 2011 to inform them that it was revising the ICA and that, beginning in January, it solicited individual drivers to sign the new ICA, without having notified the Union that it planned to do so. Although the Respondent had always had new drivers sign an ICA as part of their orientation process, without involvement of the Union, this was different. The ICA that drivers were asked to sign before January 2012 was the ICA that was attached to and incorporated by reference into the union contract. The Union had in essence agreed that the Respondent could solicit employees to sign these agreed-upon ICAs. The new ICA, implemented in January 2012, had never been submitted to the Union for review and there had been no opportunity for the Union to request bargaining before employees were asked to sign it. The Respondent's direct solicitation of drivers to sign the new ICA is direct dealing in violation of the Act. This direct dealing was part of the Respondent's plan to eliminate the Union as the employees' bargaining representative even before the contract expired. See *General Electric Co.,* 150 NLRB 192, 194 (1964).

L. The Refusal to Furnish Information

There is no dispute that the Union, through Anderson, asked the Respondent for information related to the items described in the Respondent's "April 2012 Model" that was submitted to the Union at the April 4 meeting. The request was made orally at the meeting and subsequently reduced to writing on April 10. The information requested was presumptively relevant because it related to proposed changes to the drivers compensation and other terms and conditions of employment that were subject to bargaining. *International Protective Service,* 339 NLRB 701 (2003); *Hofstra University,* 324 NLRB 557 (1997). The Respondent never furnished this information to the Union. Instead, Troha asserted some vague, generalized confidentiality concerns and suggested the parties discuss a confidentiality agreement. Although Anderson expressed a willingness to accommodate any legitimate confidentiality concerns, Troha never followed up on the request. The Respondent did not attempt to show at the hearing that any of the information requested by the Union in April was in fact confidential. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish this information. *King Broadcasting Co.,* 324 NLRB 332 (1997).

The Union made another request for information, in September. This time, the Union asked for an updated list of drivers and their contact information. The Respondent, through counsel, refused to furnish this information on the basis that the drivers were independent contractors and could not be represented by the Union. The law is clear that information such as the names, dates of hire and addresses of unit employees is presumptively relevant. *Newcor Bay City Division of Newcor,* 345 NLRB 1229, 1237 (2005); *Europa Auto Imports, Inc.,* 357 NLRB No. 114, slip op. at 2 (2011). The Respondent's refusal to provide this information in September, in reliance upon its unlawful unilateral changes and withdrawal of recognition, violates Section 8(a)(5) and (1) of the Act. See *Samaritan Medical Center,* 319 NLRB 392, 398 (1995).

M. The Section 8(a)(1) Allegations

The testimony of driver Pope regarding statements made by the Respondent's Safety Manager Finch was not contradicted by any witness for the Respondent. In particular, Finch was never called as a witness to rebut this testimony. I may draw an adverse inference from this omission.[13] As noted previously, I found Pope to be a credible witness and see no reason to disregard his testimony regarding Finch's June visit to the Cleveland terminal. That testimony establishes that Finch asked a group of drivers if the Union had been visiting the terminal and she asked further who had talked to the Union. This is interrogation plain and simple and clearly violates Section 8(a)(1) of the Act. *Rossmore House,* 269 NLRB 1176 (1986). See also, *Management Consulting, Inc.,* 349 NLRB 249 (2007); *Frank Black Mechanical Services,* 271 NLRB 1302, 1314 (1984). According to Pope, Finch also solicited grievances from the assembled drivers, writing down their complaints and assuring them that she would inform Smith and Milton, the Respondent's director and vice president of operations respectively. She promised that someone from upper management would come to Cleveland to talk to them. This promise, in the context of the Respondent's having informed the drivers that they did not need a union, amounts to an unlawful promise of benefits. See *MEMC Electronic Materials, Inc.,* 342 NLRB 1172, 1173 fn. 5 (2004).

The General Counsel amended the complaint at the hearing to allege that article XVI of the ICA, quoted at page 6 above, violated Section 8(a)(1) of the Act. The General Counsel argues that this language would lead employees to reasonably believe that their right to file charges with the Board was restricted. The General Counsel relies on the Board's decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 655 (2004), and *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). The General Counsel concedes that the provision at issue does not explicitly restrict employees' right of access to the Board or the exercise of any other protected activity. Rather the General Counsel relies upon the language that "neither party shall utilize governmental regulation to interfere with the right of the other party to control the

[13] Although the Respondent's counsel alluded to some health issues with Ms. Finch, he never requested an adjournment until she would be available to testify, nor did he take advantage of an opportunity to have Finch testify by videoconference, as was done with one of the General Counsel's witnesses. Moreover, the Respondent did not offer any documentation to show that Finch was in fact physically unable to testify.

means and methods of performance [of their respective obligations under the ICA]" and the language affirming that "observance of applicable governmental regulations will not interfere with their creating and maintaining the relationship of Independent Contractor to each other." Counsel argues that utilizing governmental regulations could reasonably be read to include filing charges with the NLRB. I disagree. The General Counsel's strained interpretation of this language overreaches and attaches a meaning that clearly was not intended or understood by the parties to the ICA. Accordingly, I shall recommend dismissal of this amended allegation.

CONCLUSIONS OF LAW

1. The drivers employed by the Respondent under the collective-bargaining agreement with the Union are employees within the meaning of Section 2(3) of the Act.

2. By interrogating employees regarding their union activities and the union activities of other employees, and by soliciting employee grievances with an implied promise to adjust them, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By dealing directly with drivers represented by the Union and soliciting them to sign new Independent Contractor Agreements that had not been proposed to the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section2(6) and (7) of the Act.

4. By implementing changes to unit employees rate and method of compensation and other terms and conditions of employment, including dispatch procedures, without first notifying the Union and affording it an opportunity to bargain regarding such changes, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section2(6) and (7) of the Act.

5. By failing and refusing to bargain in good faith regarding a collective bargaining agreement to succeed the 2009 agreement, and by withdrawing recognition from the Union upon expiration of that agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

6. By failing and refusing to furnish the Union, upon request, with information regarding changes to unit employees' terms and conditions of employment and with the names, addresses and dates of hire of unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

7. The Respondent did not violate the Act in any other manner alleged in the complaint, as amended.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that the Respondent be ordered to rescind the unilateral changes it announced and implemented in 2012, including the new ICA that drivers were required to sign; that it recognize the Union and, upon request, bargain in good faith for a new collective bargaining agreement to succeed the expired 2009 agreement; and that it furnish the Union with the information it requested in April and September 2012. I shall also recommend that the Respondent be ordered to make whole any employees who lost earnings or other benefits as a result of the Respondent's unilateral implementation of new terms and conditions of employment, including any losses resulting from the change in dispatch procedures that occurred between July and September 2012 at the Cleveland terminal. Any backpay owed shall be paid 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). I shall also recommend that the Respondent post and abide by an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Unimark Truck Transport, LLC, Joplin, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Soliciting employee grievances with an implied promise to adjust them.

(c) Unilaterally changing the rate and method of compensation and any other term and condition of employment of employees represented by International Association of Machinists and Aerospace Workers, AFL–CIO (the Union).

(d) Dealing directly with employees represented by the Union.

(e) Failing and Refusing to bargain in good faith with the Union.

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

(f) Failing to furnish the Union, upon request, with information that is relevant to and necessary for the performance of its obligations as the employees' exclusive bargaining representative.

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

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

(a) Rescind the changes to drivers' rates and method of compensation and other terms and conditions of employment that were announced in December 2011 and implemented beginning in January 2012 as part of the new "Business Model", including the revised Independent Contractor Agreement.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, including changes included in the new "Business Model," and, if an understanding is reached, embody the understanding in a signed agreement:

> All contract drivers who perform work covered by the collective bargaining agreement, excluding all other employees, and guards and supervisors as defined in the Act.

(c) Furnish the Union with the information requested in April 2012 regarding the changes in employees' terms and conditions of employment that were listed in the "April 1, 2012 Model" and with the names, dates of hire and addresses of unit employees that was requested on September 20, 2012.

(d) Make whole any unit employees who suffered a loss of earnings and other benefits as a result of the unilateral changes implemented in 2012, in the manner set forth in the remedy section of the decision.

(e) 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.

(f) Within 14 days after service by the Region, post at its facilities in Joplin, Missouri, Laredo, Texas, Williamstown, West Virginia, and Cleveland, North Carolina, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the

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

Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2011.

(g) 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, Washington, D.C. February 25, 2014

Michael A. Marcionese
Administrative Law Judge

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a Judgment of the United States Court of Appeals Enforcing an Order of the 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 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 coercively question you about your union support or activities.

WE WILL NOT solicit grievances from you and make promises to correct them.

WE WILL NOT make changes to your rate and method of compensation, or to any other term or condition of your employment, without first notifying International Association of Machinists and Aerospace Workers, AFL-–CIO (the Union) and affording it an opportunity to bargain about such changes.

WE WILL NOT bypass the Union and deal directly with you.

WE WILL NOT fail and refuse to bargain in good faith with the Union

WE WILL NOT fail and refuse to furnish the Union, upon request, with relevant and necessary information.

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

WE WILL rescind the changes to your terms and conditions of employment that we announced in December 2011 and implemented in 2012, including the new Independent Contractor Agreements.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All contract drivers who perform work covered by the collective bargaining agreement, excluding all other employees, and all guards and supervisors as defined in the Act.

WE WILL furnish the Union with the information it requested in April 2012 and on September 20, 2012.

WE WILL make employees whole for any loss of earnings and other benefits resulting from the unlawful unilateral changes we implemented in 2012.

UNIMARK TRUCK TRANSPORT, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178

(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2925.