

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

AIRBORNE FREIGHT CORP.,
d/b/a AIRBORNE EXPRESS

and

Case19-CA-28586

GENERAL TEAMSTERS LOCAL UNION NO. 174,
affiliated with the INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

On Behalf of the General Counsel
Nia Renei Cotterell, Esq.
Seattle, Washington.

On Behalf of the Charging Party
Lawrence Schwerin, Esq.
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Seattle, Washington.

On Behalf of Respondent
Clifford D. Sethness, Esq.
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Los Angeles, California.

DECISION

Statement of the Case

John J. McCarrick, Administrative Law Judge. This case was tried in Seattle, Washington on August 26, 2003¹, upon General Counsel's Complaint that alleged Airborne Freight Corp., d/b/a Airborne Express (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to provide General Teamsters Local Union No. 174 (Union) with information necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following:

¹ All dates herein refer to 2003 unless otherwise noted.

Findings of Fact

I. Jurisdiction

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Respondent, a Delaware corporation with an office and place of business in Tukwila, Washington (Respondent's facility), has been engaged in the business of transporting documents and small packages throughout the United States and internationally. During the past twelve months, Respondent in conducting its business operations derived gross revenues in excess of \$50,000 from the transportation of freight from the State of Washington directly to points outside that State. 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.

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The issue presented for decision is a limited one. Did Respondent violate Section 8(a)(1) and (5) of the Act by failing to provide the Union with the information it requested relating to a merger between Respondent and DHL.

III. Alleged Unfair Labor Practices

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A. The Facts

1. Introduction

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The Union has represented Respondent's drivers and warehouse employees employed in Seattle, Washington since at least 1954. There has been a collective-bargaining relationship between the Union and Respondent embodied in a series of collective-bargaining agreements for nearly 50 years. The collective-bargaining agreements have always been local agreements rather than national or Master agreements. The most recent local contract expired on April 30, 2003. The parties commenced negotiations for a successor agreement on March 31. Kevin Connelly (Connelly) was the chief negotiator for Respondent in the negotiations. Connelly is Respondent's Regional Field Services Manager for the Northwest Region responsible for Respondent's day-to-day operations in the Northwest including labor relations in the Seattle, Washington area. Michael Werner (Werner), a Business Representative for the Union, was responsible for administering and negotiating the Union's collective-bargaining agreement with Respondent.

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2. The Request for Information

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On March 25, Respondent announced a planned merger with DHL, an international corporation engaged in transporting and delivering documents and packages throughout the world. In conjunction with the merger announcement, on March 25, Connelly provided the Union with three documents.² The first document consists of "Talking Points", an outline of an announcement that was made to all of Respondent's employees between March 25 and March 29 regarding the DHL merger. The second document is a March 25 letter from Respondent to DHL confirming that Respondent had provided DHL with copies of all collective-bargaining agreements with Teamsters Local Unions. The third document is a letter dated March 25 from Respondent to James Hoffa, Teamsters President, notifying him of the DHL sale. The Union's

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² Herein referred to as Respondent's Exhibit 2.

website confirmed that both of these letters had been received by the Union on March 25.³ Respondent's Exhibit 2 was produced at the hearing.

5 On March 31, the Union sent Respondent a letter⁴ requesting information relating to communications between Respondent and DHL. It is this letter that constitutes the Union's information request at issue in this case. The letter stated in pertinent part:

10 Finally, in preparation for this aspect of our discussions, please provide to us a copy of the most recent written agreement(s) between Airborne, Inc. and DHL, whether or not such agreement(s) has or have been finalized or agreed-to or are, instead, in draft or conditional form. Please also provide us all documents, including e-mails, memoranda, correspondence and all other written material, relating to communications between Airborne, Inc. and any of its subsidiaries and DHL addressing the topic of the Airborne Express's Local 174-represented workforce, and any internal Airborne documents, including e-mails, memoranda, correspondence, and all other written material, addressing in any way the possible impact of the planned merger agreement on Airborne Express's Local 174-represented workforce.

20 Respondent replied to the Union's March 31 letter by its letter of April 1.⁵ The letter indicated that DHL had agreed to assume existing agreements between the Union and Respondent. Respondent further was agreeable to an extension of the current collective-bargaining agreement with the Union. Finally, Respondent agreed to provide the Union with much of the information requested in the March 31 letter. In the interim Respondent advised the Union could find much of the information sought on the Securities and Exchange Commission (SEC) website (www.sec.gov) or at Respondent's website at www.dhlairborne.com.

30 Counsel for Respondent provided additional documents in a letter dated May 19.⁶ Enclosed were the Agreement and Plan of Merger as of March 25 between DHL and Respondent. The letter noted that filed exhibits and schedules to the Agreement and Plan of Merger were available at the SEC. The letter concluded that there were no other non-privileged documents responsive to the Union's request.

35 On May 23, counsel for the Union wrote to Respondent and stated that there must be documents responsive to its March 31 information request. The letter⁷ stated Respondent's May 19 response was "both implausible and unsatisfactory" and requested Respondent to identify what privilege Respondent believed applied to permit it to refuse to produce requested documents.

40 Respondent's counsel responded by letter of June 3,⁸ stating that the exhibits and schedules to the Agreement and Plan of Merger were the responsive documents and that they were attached to the letter. While Respondent stated that it had not refused to produce responsive documents, Respondent's counsel raised confidentiality and relevancy concerns

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³ Respondent's Exhibit 1, pages 42 and 43.

⁴ Joint Exhibit 2.

⁵ Joint Exhibit 3.

⁶ Joint Exhibit 4.

50 ⁷ Joint Exhibit 5.

⁸ Joint Exhibit 6.

regarding the disclosure of all information but indicated a willingness to discuss an accommodation that satisfied both the Union's need for information concerning the merger and Respondents concerns about relevancy and confidentiality.

5 In its June 17 letter to Respondent, the Union again indicated that the documents provided by Respondent on June 3 were not responsive to their information request.

10 Meanwhile, during April, May and June, Respondent and the Union bargained for a successor collective-bargaining agreement in 14 bargaining sessions. An agreement was reached at the end of June and was ratified by Respondent's members on June 29.

15 At the hearing Connelly said that there were no other documents responsive to the Union's March 31 request. Connelly testified further that he was not aware of anything in writing that would have told him if there was going to be anything specifically integrated between the two companies.

3. The Analysis

a. The Refusal to Furnish Additional Documents

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The governing principles in deciding whether an employer is required to furnish a union with information are well established. The general rule is that an employer has a statutory obligation to supply requested relevant information, which is reasonably necessary to the exclusive collective-bargaining representative's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). These "responsibilities" include the administration of the contract and the processing and evaluating of grievances. *Clinchfield Coal Co.*, 275 NLRB 1384 (1985). Whether information is relevant or not is determined by the probability that the desired information would be of use to the union in carrying out its statutory duties and responsibilities. The standard for determining whether information is relevant is a liberal one much akin to that applied in discovery proceedings, and a party must disclose information that has any bearing on the subject matter of a particular case *Leland Stanford Jr. University*, 262 NLRB 136 at 139 (1982).

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35 There is no dispute that the information requested by the Union was relevant and necessary to its obligations as exclusive collective-bargaining representative. The Union seeks information relating to the bargaining unit it represents and the impact of the impending merger on that unit. However, Respondent contends that it furnished all extant information to the Union and that no other information exists. General Counsel argues that contention is incredible and some relevant documents must exist. General Counsel argues that the belated production of Respondent's Exhibit 2 at trial, proves that other documents must exist.

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45 In support of her argument, Counsel for the General Counsel cites *Walt Disney World Co.*, 329 NLRB 904 (1999) and *Boise Cascade Corp.*, 279 NLRB 422 (1986). In *Walt Disney World*, the Administrative Law Judge found the employer's denial of the existence of information requested by the union incredible. In making this finding, the judge considered that employer consistently made incredible claims that it knew of no contracts between itself and another corporation that hired its union represented employees where it and the other corporation were commonly owned and had common directors and that the employer untruthfully told the union that the other corporation did not exist. In *Boise Cascade*, the Administrative Law Judge discredited Respondent witness' testimony concerning the existence of certain maintenance cost savings reports requested by the union. The judge found that there was evidence the employer possessed the requested information, including repeated failures by the employer to

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deny the reports' existence, the employer's statement that the union would get the reports during arbitration and the employer's study of similar cost saving programs at similar mills.

Respondent argues that General Counsel has failed to sustain her burden that Respondent failed to produce relevant documents. Respondent cites *Howe K. Sipes Co.*, 319 NLRB 30 (1995), *Island Creel Coal Co.* 289 NLRB 851 (1988), *Whittier Area Parents' A'ss'n.*, 296 NLRB 817 (1989) and *Automation & Measurement Div'n., the Bendix Corp.*, 242 NLRB 62 (1979) to support its contention. In each of the cases cited by Respondent there was no evidence that the requested documents existed.

In the instant case in response to the Union's March 31 information request for documents concerning the DHL merger and the impact on the Union represented employees, on May 19 Respondent provided the Union with the Agreement and Plan of Merger between itself and DHL, noting that exhibits and schedules could be found on the SEC and Respondent websites, and stated there were no other non-privileged documents. On June 3, Respondent provided the Union with the exhibits and schedules to the Agreement and Plan of Merger. Respondent again stated it was not refusing to produce relevant documents, but raised confidentiality and privilege issues and indicated it was willing to reach an accommodation that satisfied both the Union's need for information concerning the merger and Respondent's concerns about relevancy and confidentiality. At the hearing, Connelly testified that no other responsive documents exist as there has been nothing in writing or through discussions that would have told him if there was going to be anything specifically integrated between the two companies.

Unlike the facts in *Walt Disney World Co.* and *Boise Cascade Corp.*, *supra*, there is nothing herein that establishes lack of truthfulness or candor on the part of Respondent. Respondent has consistently stated that no responsive documents existed, other than those turned over to the Union. While Respondent's June 3, letter suggests there could be an accommodation regarding the issues of confidentiality and relevance, unlike the case in *Boise Cascade*, Respondent herein consistently stated that it was not refusing to produce responsive documents. To suggest that Respondent's Exhibit 2, provided at the hearing, establishes prevarication on Respondent's part, neglects to take into consideration the context in which those documents were provided. Connelly testified without contradiction that he supplied the Union with Respondent's Exhibit 2 on about March 25. The evidence from the Union's website corroborates his testimony that the documents were supplied to the Union. I find that there is no evidence to support a finding that additional documents responsive to the Union's March 31 information request exist. Therefore, I decline to find Respondent has violated Section 8(a)(1) and (5) of the Act by failing to produce additional documents.

b. Respondent's Exhibit 2

This leaves the issue of whether Respondent complied with the Union's March 31 information request when it sent the Union Respondent's exhibit 2 on March 25. Counsel for the General Counsel contends that Respondent did not present Respondent's Exhibit 2 to the Union in response to its information request until the trial herein and this belated delay in presentation of requested documents violated Section 8(a)(1) and (5) of the Act. Counsel for the General Counsel cites *West Penn Power Co.*, 339 NLRB No. 77 (2003) and *The Kroger Co.*, 226 NLRB 512 (1976) in support of her position. Respondent contends that the documents were furnished to the Union.

In *West Penn Power*, the Board found the employer's four month delay in providing requested documents violated Section 8(a)(1) and (5) of the Act. The Board found that under

the circumstances of that case, the employer's delay was unreasonable. In *West Penn Power*, slip op. at 2, the Board set forth the test for determining if a delay in furnishing information violates the Act:

5 In determining whether an employer has unlawfully delayed responding to an
information request, the Board considers the totality of the circumstances
surrounding the incident. "Indeed, it is well established that the duty to furnish
requested information cannot be defined in terms of a per se rule. What is
required is a reasonable good faith effort to respond to the request as promptly
10 as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9
(1993). In evaluating the promptness of the response, "the Board will consider
the complexity and extent of information sought, its availability and the difficulty in
retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398
(1995).

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In *Kroger*, the employer refused to provide the union with requested scheduling
information, arguing that the union had access to the payroll records. The Board found that:

20 Absent special circumstances, a union's right to information is not defeated
merely because the union may acquire the needed information through an
independent course of investigation. The union is under no obligation to utilize a
burdensome procedure of obtaining desired information where the employer may
have such information available in a more convenient form. The union is entitled
25 to an accurate and authoritative statement of facts which only the employer is in
a position to make. (Fn 10)

In footnote 10 the Board suggested in that even if the union unknowingly possessed all
of the necessary information requested, the employer would at least be obligated to notify the
30 union that it could furnish no information which the union did not already possess, citing *S.H.
Kress & Co.*, 108 NLRB 1615, 1620-21 (1954).

Unlike the facts in *West Penn Power* and *Kroger*, in this case Respondent did not refuse
to produce requested information, rather the Union was in knowing possession of Respondent's
35 Exhibit 2 since March 25. The Union presumably authorized the public display of Respondent's
Exhibit 2 on its website. Given the fact that Respondent's Exhibit 2 was available to all who
chose to view the website, the Union cannot assert it was unaware it had Respondent's
Exhibit 2 since March 25. As the Board has recently stated in *West Penn Power*, the duty to
furnish information is not a per se rule but requires a good faith effort to respond to the
40 information request as soon as possible. Respondent, in providing the Union with Respondent's
Exhibit 2 on March 25, satisfied its obligation to provide requested information to the Union and
did not violate Section 8(a)(1) or (5) of the Act.

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Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I hereby make the following recommended:⁹

ORDER

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I recommend that the complaint be dismissed in its entirety.

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Dated at San Francisco, California this 27TH day of October 2003.

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John J. McCarrick
Administrative Law Judge

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⁹ All Motions inconsistent with this recommended order are hereby denied. In the event that 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.