

United States Postal Service and American Postal Workers Union, Phoenix Metro Area Local, AFL-CIO. Case 28-CA-21451

July 31, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On February 27, 2008, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief to the exceptions, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

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

There are no exceptions to the judge's recommended dismissal of the complaint allegation pertaining to the information request involving the "clock rings" of certain employees.

We adopt the judge's recommended dismissal of the complaint allegation pertaining to the information request involving Form 7468A. While the judge relied on alternative justifications for his dismissal, we find it unnecessary to pass on his findings relating to interpretation of the contract (including art. 32) and the alleged confidentiality of Form 7468A. Assuming the Respondent had a bargaining obligation regarding the temporary subcontracting of the Sun City Route, we adopt the judge's findings that the Union's asserted explanations for seeking Form 7468A failed to establish the relevancy of that form to the Union's representative status and responsibilities.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

Johannes Lauterborn, Esq., for the General Counsel.
Samuel J. Schmidt, Esq., of Sandy, Utah, and *Teresa A. Gon-salves, Esq.*, of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on December 18 and 19, 2007. American Postal Workers Union, Phoenix Metro Area Local, AFL-CIO (the Union or the Charging Party) filed an unfair labor practice charge in this case on July 2, 2007. Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on October 22, 2007. The complaint alleges that the United States Postal Service (the Respondent or the Postal Service) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices, and raising a number of affirmative defenses.¹

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,² I now make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides postal services for the United States of America and operates various facilities throughout the United States in the performance of that function, including facilities in the Phoenix, Arizona metropolitan area (the Phoenix facilities), which are a part of the Respondent's Arizona District. The Board has jurisdiction over the Respondent and

¹ In its answer, the Respondent denies that the charge was served on the Respondent on July 2, but acknowledges receipt 3 days later on July 5, 2007. While the Affidavit of Service admitted into evidence as GC Exh. 1(b) shows that service was made upon the Respondent on July 2, 2007, by regular mail, as provided for in Sec. 102.14(c) of the Board's Rules and Regulations, the dispute is of no genuine consequence. The Respondent does not deny timely service of the charge, regardless of whether it was served on the date set forth in the complaint or, received 3 days later, as alleged in the answer.

² The credibility resolutions made on this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

this matter by virtue of Section 1209 of the Postal Reorganization Act (PRA), 39 U.S.C. §§1209. Also, I find that the Respondent is an employer subject to the jurisdiction of the Board.

Further, the complaint alleges, the answer admits, and I find that at all material times (the Union) has been a labor organization within the meaning of Section 2(5) of the Act. Additionally, the parties agree and I find that at all material times the American Postal Workers Union, AFL–CIO (the National Union), has been a labor organization within the meaning of Section 2(5) of the Act; and that the Union has been a constituent local of the National Union.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Dispute*

The Respondent and the National Union have had a long collective-bargaining relationship, with the parties entering into their first contract in 1971. The present collective-bargaining agreement (the Agreement) was effective on February 3, 2007, and remains in effect until November 20, 2010. (Jt. Exh. 1.)

The complaint alleges, the answer admits, and I find that the employees of the Respondent referred to in the present Agreement, including the Respondent's employees employed at its facilities located in Phoenix, Arizona, in the Respondent's Arizona District (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and Chapter 12 of the PRA. Further, since about 1971, the National Union has been designated exclusive collective-bargaining representative of the unit and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the present Agreement. At all material times the National Union, based on Section 9(a) of the Act and Chapter 12 of the PRA, has been the exclusive collective-bargaining representative of the unit.

The parties further agree that at all material times the National Union has designated the Union as its designee for the purpose of conducting certain of its functions as the exclusive collective-bargaining representative of the unit, including, but not limited to, the filing and processing of grievances and requests for information under the Agreement at the Respondent's Phoenix facilities, in the Respondent's Arizona District.

The dispute between the Union and the Respondent involves two separate areas of inquiry for which the Union has requested information from the Respondent. In the first instance, the Union has requested information submitted by a private contractor who was the successful bidder on a temporary contract to carry mail from the "Phoenix plant" to other postal facilities located on the west side of the Phoenix valley and referred to as the Sun City Route. This information is recorded by the contractor during the bidding process on a Postal Service Form 7468A (the Form). The Respondent has refused to furnish the Union with an unredacted copy of the Form, arguing that the information supplied by the contractor is proprietary and confidential. On the other hand, the General Counsel contends that the information contained on the Form is necessary and relevant for the Union to properly administer the Agreement, including for consideration in deciding whether to file grievances.

The second area of inquiry made by the Union involves a series of weekly requests for the "clock rings" of "casual" employees. Clock rings are the daily hours, including regular and overtime, worked by employees. The Postal Service uses casual employees as a supplemental work force. The Respondent does not deny that the Union was entitled to these clock rings in order to administer the Agreement. However, it strongly denies that there was any unreasonable delay in forwarding this information to the Union. Further, the Respondent contends that any delay was inadvertent and resulted, in part, from the Union's refusal to cooperate with management by furnishing the specifics of what the Union was requesting. The General Counsel is unpersuaded by such arguments and contends that whether deliberate or not, the Respondent's failure to timely furnish the requested information was unlawful.

B. *The Request for Form 7468A*

The Union represents a unit of the Respondent's motor vehicle employees who are employed in the Postal Vehicle Services Department (PVS) at the Phoenix Processing and Distribution Center, also referred to as the General Mail Facility in Phoenix, Arizona (the Phoenix plant). This unit is comprised of approximately 200 tractor-trailer operators (truckdrivers), clerks and vehicle mechanics. The truckdrivers transport bulk quantities of mail between the Phoenix plant and retail postal facilities located throughout the Phoenix metropolitan area. These include a number of facilities located on the west side of the Phoenix valley. The route that services these west side facilities is referred to as the Sun City Route.

The contract between the National Union and the Postal Service appears to give the Postal Service very broad subcontracting authority. As its "expert" on the current agreement, the Respondent called its manager of contract administration, John Dockins. He is the individual who administers the contract with the National Union for the Postal Service. Dockins referenced article 32 of the contract, entitled "Subcontracting." He testified that this article gives the Postal Service "the right to subcontract any work[] of the unit out," as long as the Postal Service provides notice to the bargaining representative. Several witnesses, including Dockins and Dan Benton, the Respondent's manager transportation networks for the Phoenix plant, testified that when the Postal Service awards a contract for mail transportation between postal facilities, it is, thereafter, referred to as a Highway Contract Route (HCR) to differentiate it from a route delivery performed by the Respondent's employees using Postal Service equipment, a Postal Vehicle Service Route (PVS). Both Dockins and Benton testified that a HCR is also called a Star Route.

The Postal Service awards three types of contracts, regular, temporary, and emergency. According to Royale Ledbetter, a Postal Service purchasing and supply management specialist, a regular contract is utilized when the term is for as long as 4 to 6 years. A temporary contract may have a term of up to 2 years, and an emergency contract is generally for no more than 6 months. According to Dockins, temporary or emergency contracts are expressly excluded from the notice and other requirements of article 32, and the Postal Service may subcontract that work freely. Specifically, he refers to article 32.2.H

of the collective-bargaining agreement, which states that “star route contracts let on a temporary or emergency basis” are not encompassed by this “Section.” Dockins testified that “star route” is just another way of referring to a HCR. Further, he testified that article 32.2. H refers to the entirety of article 32, not just article 32.2, and the Postal Service has consistently applied and interpreted the phrase that way. He contended that in the past no argument has been made to the contrary by the National Union. It is important to note that this contention was un rebutted by the production of any evidence from the General Counsel.

In the specific matter before me, Benton testified that the Postal Service had been for some time concerned with providing cost effective service to the public during a period of explosive population growth on the west side of the Phoenix metropolitan area. An internal evaluation was conducted, as a result of which, on March 2, 2007,³ the Phoenix District submitted a request to upper management for permission to convert the Sun City Route, which was being serviced by Postal Service employees and equipment (PVS) to a Highway Contract Route (HCR) to be serviced by the employees and equipment of a private contractor. By letter dated March 6, the Respondent’s Western Area Distribution Networks Office concurred with the request by the Phoenix District to convert the Sun City Route. (GC Exh. 6, A–D.)

The letter of March 6 makes reference to the utilization of a Postal Service Form 5505, for the fourth quarter of fiscal year 2006. The Form 5505 “Cost Evaluation-Postal Vehicle Service vs. Contract Service” is used to compare the “estimated cost” to the Respondent of hiring a private contractor to service the route verses performing the work “in house” with Postal Service employees and equipment. As is reflected in the letter, it was estimated that the savings to the Postal Service by this conversion was in excess of \$850,000 per year.

It must be stressed that this Postal Service evaluation and estimated savings anticipated that the conversion would be pursuant to a “regular contract.”⁴ The collective-bargaining agreement between the National Union and the Postal Service in article 32.2.A states that in selecting the means to provide transportation, “the Postal Service will give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees.” However, as noted above, under article 32.2.H, such requirements do not apply to “temporary contracts.”

By letter of April 11, John Dockins, the Respondent’s manager of contract administration, provided notice of the proposed conversion to the National Union, through Robert Pritchard, director of motor vehicle services division for the National Union. Attached was a copy of the Form 5505 mentioned above. (R. Exh. 27.) According to Dockins the information is provided for proposed “regular contract” conversion so as to enable the parties to “engage in an intelligent conversation,” as envisioned by article 32.2 of the collective-bargaining agree-

ment. There is some dispute between the parties as to why subsequent discussions regarding the “regular contract” conversion were not held, but it is not germane to the issues before me.

In any event, the Postal Service approved the conversion, and a “regular contract” for the Sun City Route was awarded to Eagle Express Lines, with a beginning date of January 26, 2008. The term of this “regular contract” is 3-years and 2-months. (R. Exh. 13.) It is important to note that the Respondent has taken the position that in awarding this “regular contract” and the “temporary contract,” which preceded it, no bargaining unit members have lost their jobs. This contention is un rebutted by the General Counsel.

Having recited the history of the “regular contract,” it is now necessary to turn my attention to the “temporary contract,” from which the Union’s request for information led to this dispute. During the period of time when the conversion request for regular service was pending at the Respondent’s headquarters, the Respondent’s local managers at the Phoenix plant decided to temporarily subcontract out the Sun City Route, pending final approval and implementation of the “regular contract.” This action was deemed a stop-gap measure in order to service the route because of an anticipated increase in vacation time taken by Postal Service drivers in the summer months, and due to normal attrition among the drivers. Benton testified that he considered other options to temporarily service the route, but they were not feasible in view of fact that local management was in the process of seeking a regular conversion of the route, and anticipated that approval for the regular conversion would shortly occur. However, in the event that headquarters denied the conversion request for regular service, the temporary contract could simply be terminated.

During a meeting with the Union on April 24, local management informed the Union’s motor vehicle director, Steven Auerbach, and the Union’s president, Mary Lou Pavoggi, of the plans to subcontract the Sun City Route beginning either May 19 or June 2. The union officials expressed their desire to retain the work “in house,” however, the Respondent’s local officials went forward with the plan for conversion of this route.

Subsequently, the Postal Service solicited bids for a “temporary contract” for the Sun City Route from various potential subcontractors by sending them a packet, which, among other items, included the U.S. Department of Labor wage determination for the contract that the subcontractor is required to pay to employees in the specified occupations, and Postal Service Form 7468A, the “Highway Transportation Contract-Cost Worksheet.”

The Form 7468A separates the bidding contractor’s estimated costs into a number of categories the bidder expects to incur, including, among others, the following: vehicle costs, taxes, registration, fuel, oil, insurance, road taxes, tolls, straight time, overtime, payroll taxes, fringe benefits, suppliers’ wages, and return on investment. The final, or bottom line, on the Form is for the “Total Offer,” the amount the contractor is preferring to accept as payment from the Respondent for the contractor’s performance of the work bid upon. (GC Exh. 8k; R. Exh. 23.) It is very important to note that the Form only contains the potential contractor’s estimate of costs and does not

³ All dates are in 2007, unless otherwise indicated.

⁴ While ultimately a “regular contract” was entered into by the Respondent to convert the route to a HCR, the dispute before the undersigned does not involve that “regular contract.”

reflect any actual wages or other payments made. According to Royale Ledbetter, the Respondent does not even “require” that potential contractors provide anything other than the bottom line bid, which is the only listed item that a bidding contractor cannot readjust. However, she indicated that it is to the bidder’s advantage to supply the additional information itemized on the Form, so as to be able to seek future adjustments and modifications from the Postal Service, assuming the successful bidder’s costs increase. This testimony from Ledbetter, a purchasing and supply management specialist for the Respondent, was unrebutted by the General Counsel.

Ultimately, the Respondent awarded the temporary contract for the Sun City Route to MTR Transport LLC. The term of the contract was from June 2 to October 31, 2007.⁵ The temporary contract number was #852L7. (GC Exh. 8k.)

On June 1, the Union presented the Respondent with a request for information, listing 14 separate items, the first of which was a “[c]opy of the 7468A for Sun City Route or temporary contract #852L7.” (R. Exh. 6.) By memorandum dated July 7, Benton responded, informing Auerbach that the Form 7468A was “proprietary information and the supplier’s line item costs are not public information.” Benton did furnish the Union with the amount of the successful contractor’s bid, \$2,321,323, and advised that if the Union was still requesting the “cost worksheet” to “please explain the relevancy of the request[ed information].” (R. Exh. 7.)

In a letter dated July 9, Auerbach responded that the Union “would like to review the 7468A and compare the data against the 5505 that was submitted showing the breakdown for the cost related to the postal services calculations.” (R. Exh. 9.) Also, Postal Service paralegal Beverly Burge testified that on July 19 she participated in a telephone conversation with Auerbach during which he reiterated that the Union wanted to see the Form 7468A to compare it to the Form 5505, and further that he wanted to compare the cost of labor reflected on the Form 7468A with “some Department of Labor figures on wages.”

Burge responded by email dated July 27, indicating that the Union’s justification for obtaining the Form 7468A, showing the contractor’s itemized costs, was inadequate as “cost was not the driving factor behind establishing [the] 852L7,” the temporary contract. Further, she reminded Auerbach that the Union had already been furnished Forms 7505B,⁶ 7409B, and 5443, which “forms have the annual costs needed for grievance purposes.” (R. Exh. 15.)

It is the Respondent’s position, as testified to by Benton, that in preparing for and soliciting bids for a “temporary contract” that “cost” is not the overriding factor. It was allegedly for that reason that no Form 5505 was every prepared for the “temporary contract” number #852L7.⁷ Benton’s testimony is sup-

ported by his memorandum to Auerbach dated July 31, in which he states that the Form 7468A cannot be compared to a Form 5505 for the “temporary contract” as no Form 5505 was prepared. The memo reflects that his was because “cost was not a primary consideration in the establishment of [the] temporary contract.” (R. Exh. 10.) This evidence was never rebutted by the General Counsel.

Auerbach testified that on several occasions he explained to Beverly Burge in conversations that another reason the Union needed to see the Form 7468A was to determine whether the successful bidder was complying with the Department of Labor (DOL) regulations on wages and benefits. While the undersigned is not clear as to precisely when Auerbach made these arguments, I accept his testimony that this was part of the Union’s justification as to why it needed the Form. However, as the Respondent’s counsels point out in their posthearing brief, the cost of wages and benefits, as estimated by the contractor on the Form 7468A, was just that, an “estimated” cost. The contractor was at liberty to change an item on its work sheet except the final bottom line figure. Further, it was only after actual wages and benefits were paid by the contractor to its employees that there could possibly be a violation of DOL regulations.⁸

It is undisputed that at some time during this period Benton sent Auerbach a nondisclosure agreement, to be used in connection with the receipt of the Form 7468A.⁹ According to Auerbach, he could not sign the agreement as its terms were “extremely restrictive.” It is unclear as to whether Auerbach’s decision not to sign the nondisclosure agreement caused the Respondent, through Beverly Burge, to withdraw the agreement, but it was withdrawn. Auerbach testified that Burge informed him that the Union would only be provided with the bottom line figure, the total bid amount, and not the contractor’s various cost estimates from the Form 7468A. Thereafter, on August 2, Burge provided the Union with a heavily-redacted copy of the Form 7468A from the successful contractor whose bid was accepted for the “temporary contract” on the Sun City Route. All estimated costs were redacted. The only itemized monetary figure left unredacted was the bottom line total bid offer. (GC Exh. 8k)

“regular contract.” There is no Form 5505 in evidence prepared for the Sun City Route conversion under the “temporary contract.”

⁸ As testified to by a number of Postal Service witnesses, any alleged violation of the DOL regulations by the contractor would have to be referred to the DOL for investigation and adjudication.

⁹ Much testimony was taken at the hearing concerning the Postal Service’s previous use of a nondisclosure agreement in connection with furnishing the Union a Form 7468A regarding a facility know as Daisy Mountain. There appears to be some dispute between the parties as to whether the release of the Form in the Daisy Mountain matter was to be considered a nonprecedential disclosure. Regardless, there appears to be no dispute that historically the release of the Form 7468A to the Union was a very rare occurrence, which was almost always accompanied by a requirement that a union official sign a nondisclosure agreement. In any event, I do not believe that the parties’ rare past practice is relevant to the issue before me, which involved facts unique to the bidding process of a “temporary contract” for the Sun City Route.

⁵ Apparently the term of this “temporary contract” was extended through January 25, 2008, after which the contractor awarded the “regular contract” began to service the route. It appears that these two contractors are separate and distinct entities.

⁶ This reference by Burge to the Form 7505B was apparently a typo, as the actual number of the Form is 7405B. (R. Exh. 4.)

⁷ It should be noted that while there are several Forms 5505 in evidence, they were prepared for the Sun City Route conversion under the

Legal Analysis (The Form 7468A)

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

Specifically, where the union's request for information pertains to employees in the bargaining unit, the Board reiterated that the "information is presumptively relevant and the [r]espondent must provide the information. However, where the information requested by the union is not presumptively relevant to the union's performance as bargaining representative, the burden is on the union to demonstrate the relevance." *Disneyland Park*; and cases cited therein including, *Richmond Health Care*, 332 NLRB 1304 (2000); *Associated Ready Mixed Concrete, Inc.*, 318 NLRB 318 (1995), *enfd.* 108 F.3d 1182 (9th Cir. 1997); *Pfizer, Inc.*, 268 NLRB 916 (1984), *enfd.* 736 F.2d 887 (7th Cir. 1985). The Board went on to say that "[a] union has satisfied its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant," citing to *Knappton Maritime Corp.*, 292 NLRB 236, 238-239 (1988).

Finally, in the *Disneyland* case the Board repeated its well-established principle that it "uses a broad discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information."¹⁰ Still, where the information requested is not presumptively relevant, as not pertaining to employees in the bargaining unit, "the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the respondent under the circumstances. [Internal citations omitted] Absent such a showing, the employer is not obligated to provide the requested information."

In the matter before me, there can be little doubt that the Form 7468A concerns "subcontracting" exclusively. The Form itself does not directly pertain to employees within the bargaining unit. (GC Exh. 8k.) It is a cost worksheet prepared by a contractor offering a bid to perform certain work for the Postal Service, which bid was solicited by the Postal Service. As noted above, no Postal Service employee lost any work as a result of this subcontracting under the "temporary contract"

¹⁰ Other cases have described a union's burden under these circumstances as "not an exceptionally heavy one." *SBC Midwest*, 346 NLRB 62, 64 (2005).

#852L7.¹¹ The Form is required to be submitted by the contractor as part of the bidding process. Ultimately, the successful bidder is awarded the contract and the route is converted from one performed by the Respondent's employees and equipment (PVS) to one performed by the subcontractor's employees (HCR).

Based on the un rebutted testimony of John Dockins, and a review of the collective-bargaining agreement, I conclude that the agreement gives the Respondent exclusive authority to subcontract work to private contractors performing under the terms of a "temporary contract." (Jt. Exh. 1, art. 32.2.H.) In this respect, the language of the collective-bargaining agreement, which gives the Respondent the authority to subcontract work, is less restrictive for a "temporary contract," than it is for a "regular contract." As I read the collective-bargaining agreement and understand the un rebutted testimony of Dockins, the Postal Service is not required to even consult with the Union when deciding whether to award a "temporary contract" for conversion of a route from PVS to HCR. While the Respondent did consult with the Union regarding the Sun City Route "temporary contract," it appears that this was merely a courtesy extended by the Postal Service to one of its negotiation partners.

It is well established that "subcontracting information. . . is not presumptively relevant and therefore a union seeking such information must demonstrate its relevance." *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004), citing *Sunrise Health & Rehabilitation Center*, 332 NLRB 1304 (2000); *Associated Ready Mixed Concrete*, *supra*. In the matter before me, I am of the view that as the requested Form 7468A concerns only the "subcontracting" of the Sun City Route, it is not presumptively relevant. As the National Union has specifically relinquished to the Respondent the exclusive authority to subcontract delivery routes (HCR) under "temporary contracts" (Jt. Exh. 1, art. 32.2.H), it is even more obvious that this issue is not presumptively relevant. *Ingham Regional Medical Center*, *supra*. Further, I conclude that the Union's "generalized conclusory explanation of relevance is 'insufficient to trigger an obligation to supply information that is on its face not presumptively relevant.'" *Disneyland Park*, *supra*, at fn. 14, quoting *Island Creek Coal Co.*, 292 NLRB 480, 490 fn. 19 (1989), *enfd.* 899 F.2d 1222 (6th Cir. 1990).

The Union's proffered reasons for its need to view the unredacted Form 7468A are without merit. Auerbach argued to management that the Union needed the unredacted Form so that they could compare it to and verify the figures provided on the Form 5505 cost evaluation. According to the testimony of Bob Pritchard, the Union was concerned about a contractor "low balling" the Postal Service by submitting unrealistically low costs and a low bid, in order to obtain the contract. Presumably, the contractor would then return to the Postal Service in

¹¹ The Respondent's route drivers typically use a seniority system to designate favorite routes that they prefer to drive. Obviously, with the conversion of the Sun City Route from a PVS to a HCR there will be fewer routes among which the Respondent's drivers can designate a preference.

subsequent years and attempt to have the value of its contract increased, alleging increased costs.

However, there was no Form 5505 prepared in connection with the “temporary contract.” Auerbach was so informed on several occasions. A number of the Respondent’s managers explained to him that “cost” was not the overriding issue in converting the Sun City Route from a PVS to a HCR. Rather, the Respondent was principally interested in providing quality service to the public during the interim period prior to the anticipated conversion of the route through a “regular contract.” The “temporary contract” gave the Respondent’s local management the flexibility they needed while awaiting the final decision on the regular conversion. Accordingly, even assuming the Union obtained an unredacted copy of the Form 7468A with the itemized list of the contractor’s costs, there was no Form 5505 for the “temporary contract” to which it could be compared.

Even so, the Respondent provided the Union with other information that the Union might use in arguing that the contractor was “low balling” the Postal Service. The redacted Form 7468A containing the contractor’s bottom line bid price to service the route was furnished to the Union. (GC Exh. 8k.) Additionally, the Union was provided with Postal Service Form 7409B, which contained the annual mileage of the temporary contract, the contract rate (bottom line cost figure), the rate per mile, the name of the contractor to whom the temporary contract was awarded, and the contract term; Form 5443, which provided annual miles of the temporary contract, annual hours, vehicle requirements (including quantity, description, length, cubes, and payload), the effective date of the award, the contract term, and the name of the successful contractor; and Form 7405B, which provided the contract term, the name of the successful contractor, the rate of contract compensation (bottom line cost), and the name and position of the offeror. (R. Exh. 4.)

Accordingly, the Union’s argument that it needed the unredacted Form 7468A to compare it to the Form 5505 is meritless. Additionally, the Postal Service furnished the Union with alternate documents, which the Union could use to determine whether the successful contractor was under-valuing its costs to arrive at a “low ball” bottom line bid.

The second reason proffered by the Union as to why it needed the unredacted Form 7468A was to ensure that the contractor awarded the “temporary contract” was complying with the Service Contract Act (SCA), and the Department of Labor’s (DOL) wage determinations. As set forth in the Respondent’s contract solicitation, bidders are required to comply with the SCA and DOL’s wage determinations. (R. Exh. 24.) While the Form 7468A has a place for the contractor to list the expected wages and benefits to be paid to its employees while servicing the route, a number of management officials testified that these were just “estimated” expenses, which could be altered as the contractor saw fit. Only the bottom line amount of the contract could not be altered by the successful bidder. Further, the figures listed on the Form were submitted before the contract was awarded and before even one cent in wages or benefits were paid to employees. The Form does not reflect any actual wage

or other payments made. This testimony was un rebutted by the General Counsel.

According to Royale Ledbetter, it is the DOL, and not the Postal Service, which is ultimately responsible for enforcement of the SCA and compliance with the related wage determinations. Any complaints regarding a contractor’s alleged non-compliance are referred by the Postal Service to the DOL. The DOL then investigates and takes action as necessary. Further, as noted earlier, the Postal Service does not even require contractors bidding on a route to list the estimated wage and benefits costs. Only the bottom line cost of the contract is absolutely required from the bidder. This figure was provided to the Union through a number of different documents, including the redacted Form 7468A.

Thus, the Union’s argument that it needed the unredacted Form 7468A from the successful bidder on the “temporary contract” in order to ensure compliance with the SCA and DOL regulations is without merit. The Form would in no way have served as evidence that the contractor was in violation of the SCA or DOL wage determinations. Only time would reveal the details of the contractor’s compliance with the statute and regulations, and only after the contractor servicing the route began to pay wages and benefits to its employees.

As noted above, I have concluded that as the Union is seeking information strictly concerning the “subcontracting” of the Sun City Route through a “temporary contract,” its request for the Form 7468A is not presumptively relevant. Further, I have concluded that the reasons proffered by the Union for requesting the Form are meritless and do not establish relevance. However, assuming, for the sake of discussion, that the Union has established the relevance of its request for the Form, I concur with the Respondent’s argument that the Form should be protected against disclosure based on proprietary and confidentiality concerns, which outweigh the Union’s need for the information.

Where an initial showing of relevance is made by a union, an “employer has the burden to prove a lack of relevance. . . or to provide adequate reasons as to why [it] cannot in good faith, supply such information.” *National Grid USA Service Co.*, 348 NLRB 1235, 1242 (2006). In the “seminal case” of *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318–320 (1979), the Supreme Court held that where the relevance of requested information has been established, an employer can meet its burden of showing an adequate reason for refusing to supply the information by demonstrating a “legitimate and substantial” concern for the confidentiality interests that might be compromised by disclosure. Where an employer has raised issues of asserted confidentiality, the Board first determines whether the employer has established legitimate and significant confidentiality interests and, if so, then balances those interests against the union’s need for the requested information. *National Grid*, supra; *Detroit Edison*, supra, at 315, 318; *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982); *Pfizer Inc.*, 268 NLRB 916 (1984).

The Respondent’s purchasing and supply management specialist, Royale Ledbetter, testified that the Postal Service protects the Form 7468A from disclosure for four principal reasons. First, the release of this information may adversely affect

the Postal Service and the taxpayers by resulting in the submissions of higher bids. Should competitors know the amount being bid on a contract, they may seek to offer a bid that is only slightly lower than that submitted, thus, not allowing the market forces at work in “blind bidding” to result in even lower bids being received.

Second, the Union should not be permitted to obtain through an information request that which it gave up the right to receive through the collective-bargaining agreement. As I have explained, the plain language of article 23.2.H, plus the unrebutted testimony of John Dockins, leads me to conclude that the Respondent can convert a PSV route, using Postal Service employees and equipment, into a HCR,¹² using the employees and equipment of a private contractor, under the terms of a “temporary contract,” without providing any justification or information to the Union. (Jt. Exh. 1.)

Third, in the contract between the Postal Service and the successful bidder awarded the route, it states that the Respondent will not release the Form 7468A to any party, other than the contractor itself. The specific language is, “If you receive an award, Form 7468A furnished by you will not be distributed to individuals other than the supplier.” (R. Exh. 24, Terms and Conditions, p. 23, sec. 3.1.2.A(2)(d).) Certainly, to thereafter release the information to the Union would constitute a breach of that agreement.

Fourth, the Form 7468A constitutes what, for all practical purposes, is the contractor’s “business plan.” It sets out in detail the bidder’s estimated costs and even anticipated “return on investment.” (GC Exh. 8k; R. Exh. 23.) It is the contractor’s “blueprint” for success. The Form constitutes confidential, proprietary information, which if disclosed to a competitor could seriously and irreparably damage any competitive advantage that the bidder may have. In fact, the Postal Service’s internal supply guidelines, entitled “Supplying Principles and Practices,” acknowledge this, and, thus, preclude disclosure of the information contained on the Form to other suppliers. (R. Exh. 26, at 247.) The Respondent’s guidelines state, that “[i]nformation may not be disclosed to any supplier as to another’s. . . [b]usiness and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information.” (Id. at 293.)

The Board has repeatedly held that “in dealing with union requests for relevant but assertedly confidential information, [it is] required to balance a union’s need for such information against any ‘legitimate and substantial’ confidentiality interests established by the employer, accommodating the parties’ respective interests insofar as feasible in determining the employer’s duty to supply the information.” *Allen Storage & Moving Co.*, 342 NLRB 501, 502 (2004) (citing *Detroit Edison*, supra, and *Minnesota Mining*, supra).

In balancing the conflicting right of the Union to obtain the Form 7468A with the Respondent’s right to keep the successful bidder’s proprietary information confidential, I conclude that

the balance clearly tips in favor of the Postal Service. As I have indicated above, the Union’s stated reasons for needing the costs enumerated on the Form are meritless. The Form 7468A could not be compared to the Form 5505, as no Form 5505 was prepared by the Postal Service prior to entering into the “temporary contract” for the Sun City Route. Cost was not the overriding factor in awarding this contract. Further, the costs listed on the Form 7468A were merely estimates, which the contractor was free to change, as long as there was no change to the bottom line bid price. Again, the possession of this information could not benefit the Union as “estimates” would not establish that the contractor was “low balling” the Respondent. Since no wages or benefits were paid until the contract went into effect, the Form could also not serve as a basis to file charges with the DOL regarding alleged violations of the SCA.

The collective-bargaining agreement provided the Respondent with the exclusive right to enter into a “temporary contract” for conversion to a HCR. (Jt. Exh. 1, art. 32.2.H.) While there appears to be no legitimate basis upon which the Union could file a successful grievance, even assuming such a basis, the Union has failed to articulate how its possession of the Form 7468A could assist in that endeavor. On the other hand, the Respondent has demonstrated the serious and irreparable harm that could befall the contractor if the Form 7468A containing its “business plan” were disclosed to competitors. Also, the harm to the Postal Service could be substantial by way of causing the Postal Service to breach its assurance to bidders that the information on the Form would remain confidential. A release of the information could adversely affect the bidding process by resulting in the Respondent having to pay too much for the temporary conversion of the Sun City Route.

Finally, it is important to note that the Respondent did attempt to satisfy the Union’s desire for information about the “temporary contract” through means of a redacted Form 7468A and by furnishing other Postal Service Forms that provided some of the same information as that contained on the 7468A. (GC Exh. 8K; R. Exh. 4.) None of that satisfied the Union. However, while the Union initially offered to execute a nondisclosure agreement, Auerbach ultimately declined to sign such an agreement, which he categorized as overly restrictive. While the Postal Service ultimately withdrew the offer, the Union’s reluctance to enter into such an agreement offers an interesting perspective as to whether the Union thought that if it obtained the document it would be able to restrict third parties from viewing the information. Apparently it did not feel confident that it could do so.

Based on the above, I conclude that the refusal by the Postal Service to furnish the Union with an unredacted Form 7468A for the Sun City Route (temporary contract #852L7) did not constitute a violation of Section 8(a)(1) and (5) the Act.

C. The Request for the Clock Rings

Paragraph 6(d) of the complaint alleges that from about mid-April 2007 through mid-August 2007, the National Union, by the Union, made in person requests of the Respondent that the Union be furnished with “[t]he daily hours, including regular and overtime work, worked by casuals per week through clock

¹² It is worth repeating that I have previously concluded, based on the unrebutted testimony of Dockins and Benton, that a Highway Contract Route (HCR) is synonymous with a Star Route. Art.23.2.H of the collective-bargaining agreement uses the term “Star Route.”

rings or overtime analysis reports.” Further, the complaint alleges that this information was necessary and relevant to the National Union in order for it to perform its collective-bargaining and representative duties on behalf of the unit employees, and that the Respondent delayed in furnishing the Union with the requested information in violation of the Act.

During the hearing, the parties stipulated that the Union was entitled to the orally requested information, which was relevant and necessary for the Union to carry out its collective-bargaining responsibilities. However, the Respondent declined to stipulate that the requests for the information were made during the time period set forth in the complaint, and strongly denied that the Postal Service engaged in any unreasonable delay in furnishing the requested information. The stipulation having been admitted into evidence, there is no dispute as to the relevance of the requested information, or the Union’s right to receive it.

Casual employees are used as a supplemental work force. They are not part of the bargaining unit, and, of course, any utilization of casuals constitutes work time not available to the regular career unit employees. It is undisputed that in December 2006, the Union filed a grievance alleging that the Respondent was hiring casual instead of career employees in violation of the collective-bargaining agreement.

Steve Auerbach testified that on December 11, 2006, he filed a written request for information with the Respondent. In that written document, he requested “clock rings for all MVS Casuals from the first day of their placement up to this date. That weekly clockrings be given the Union as long as casuals are employed in MVS.”¹³ (GC Exh. 13.) Pursuant to that request, Auerbach received clock rings from the supervisor of transportation at the Phoenix plant, Dean Murdoch. Auerbach testified that he also spoke with the manager of the facility, Keith Tucker, about receiving the clock rings and that Tucker “okayed” him to receive the information, which was subsequently provided to him by either Tucker or Murdoch.¹⁴ Auerbach acknowledged that he received the information “promptly” and on a regular basis, every few weeks from the time of his original request until he last received the information on approximately May 11, 2007. It is important to note that in effect, Auerbach admits receiving the requested information from the Respondent in a timely fashion from approximately December 11, 2006, through May 11, 2007, a period of 5 months.

Michael Meaker replaced Tucker as the transportation manager at the Phoenix facility. Meaker testified that his start date and first day on the job in his new position was April 30, 2007. However, he did not assume his official duties and begin taking over the assignment of work until 2 weeks later, in mid-May. During these first 2 weeks in his new position, Meaker was transitioning and working directly with his predecessor, Keith

Tucker. It is significant to note that Meaker assumed his official duties in mid-May at approximately the same time that Auerbach testified he last received the clock ring information on a regular basis.

According to Meaker, he first met Auerbach on Meaker’s first day at his new job, April 30. He recalls a conversation with Auerbach in mid-May when Auerbach first mentioned to him the Union’s need for the clock ring time records. Meaker testified that at the time he “didn’t really know” how the transportation department processed Union requests for information.¹⁵ Later he learned that the transportation department kept a log where union requests for information were recorded along with the status of the request. (R. Exh. 1.) However, not knowing of the existence of the log for some time, Meaker testified he did not “log in” Auerbach’s request made to him for the clock rings. Meaker acknowledged that he had a number of subsequent conversations with Auerbach, in which Auerbach, among many other issues, mentioned the Union’s need for the clock rings and other information. Meaker’s testimony was un rebutted that through this period he furnished the Union with other requested information. However, he admitted that he “dropped the ball” in not furnishing Auerbach with the clock rings.

Meaker indicated that he failed to furnish the Union with the clock rings simply because he was very busy learning a new job, did not realize the Union’s immediate need for the records, and merely due to his inadvertence. According to Meaker, as a manager, in his previous dealings with Postal Service unions, he had never used untimeliness as a basis to deny a grievance, and so did not fully understand that time was an issue. In explaining his attitude, Meaker testified that he has “never played a time game with the Union.”

Dean Murdoch testified that from April 30 until he transferred to Seattle at the end of August, he reported to Meaker. He testified that he never discussed the Union’s request for the clock rings with Meaker. Further, while Auerbach had previously come directly to him to request and receive the clock rings, starting in April, Auerbach no longer did so. He knows of no reason why Auerbach suddenly stopped requesting the records directly from him. In commenting about the log that was kept by the transportation department to record and track union requests for information, Murdoch testified that “oral” requests were not typically recorded.¹⁶ Finally, while Murdoch initially helped train Meaker, he still had his own job to perform, and from April through the end of August, when he transferred, he made a number of trips to Seattle in preparation for his transfer. Accordingly, during this period of time, he was not always on site at the Phoenix plant. His replacement in Phoenix was Chuck Hydeman, who he was also responsible to train.

¹³ Clock rings are timeclock reports that show what time an employee clocked in for work, clocked in and out for lunch, and clocked out of work. The clock rings also show whether an employee is entitled to night-time or Sunday premium pay.

¹⁴ At the time he testified, Murdoch had been promoted and transferred to Seattle. However, during his time employed at the Phoenix plant, he reported to Tucker.

¹⁵ All of Meaker’s previous experience with the Postal Service had been in the distribution operations, which sorted and moved mail to customers.

¹⁶ Apparently the Union made at least one written request for the clock rings, as such a request was received by Murdoch on March 22, 2007, and is in evidence. (GC Exh. 15.)

Auerbach testified that he would speak with Meaker approximately once a week about getting the clock rings for the casuals. However, Auerbach apparently decided initially not to press Meaker about not furnishing the records, as Auerbach appreciated that Meaker was busy learning a new job. According to Auerbach, Meaker “was very busy, and he was learning the job, so I figured okay, I won’t push real hard. I understand [Meaker’s] learning, so okay, you know, I wanted to work with him.” Auerbach was willing to give Meaker “some latitude because [he] understood someone [like Meaker] not knowing transportation [at the Postal Service].” Auerbach claims that Meaker told him that he was going to assign the task of gathering the clock rings to Chuck Hydeman, who was taking over for Dean Murdoch. On cross-examination, Auerbach testified that it was for that reason that he did not take his unfulfilled request for the information to Murdoch, who had previously given him the records, or to Dan Benton, manager, transport networks.

As noted above, Auerbach testified that he last received clock rings from the Respondent on May 11. On July 2, the Union filed the unfair labor practice charge involved in this case. (GC Exh. 1(a).) That was a little less than 2 months after receiving the last clock rings. This was the only charge filed in this case, apparently intending to cover both the allegation that the Respondent had failed to furnish the Form 7468A and the casual clock rings. However, the charge itself simply reads, “During the past six months the above named employer has failed and refused to provide the Union with relevant and necessary information including but not limited to information regarding the motor vehicle craft.” As counsel for the Postal Service points out in her posthearing brief, the charge on its face contains no description of the information that the Union was lacking, did not specify who had submitted the information requested, or the date of the request, nor did it explain the relevance of the information requested.

The Respondent received the charge on July 5, 2007. The matter was then turned over for processing to Beverly Burge, a paralegal for the western area law office of the Postal Service. According to Burge, on July 11 she participated in a conference call with Auerbach and Dan Benton to discuss the charge. During this conversation, Auerbach acknowledged that the Union was seeking the Form 7468A for the temporary contract on the Sun City Route. However, Auerbach indicated that without his notes he could not say what other information might be at issue in the charge.¹⁷ Benton then contacted several union officials, including president Pavoggi and Vice President Cuccinotto in an unsuccessful effort to determine what information the Union was complaining had not been furnished.

On July 19, Benton and Burge placed a conference call to Auerbach and again attempted to determine specifically what documents the Union had allegedly requested, which were the subject of the charge, in addition to the Form 7468A. Burge testified that when asked what other documents were involved, Auerbach responded, “I’m not going to tell you. I won’t tell you until I’ve told my full story to the Board.” According to

¹⁷ The charge itself had actually been filed not by Auerbach but, rather, by the Union President Mary Lou Pavoggi.

Burge, she was “dumbfounded,” as usually the Union was interested in “get[ting] its hands on” the requested documents as soon as possible, and so would want to cooperate. She testified that Auerbach’s response “seemed irrational. . . really odd.” Further, her testimony is supported by notes that were made by her simultaneously with this conversation, in which she records Auerbach’s response. (R. Exh. 21.)

When cross-examined by counsel for the Postal Service about this conversation, Auerbach was vague, evasive, and uncooperative. He claimed not to recall certain specifics about this conversation, as he did about other matters when under cross-examination. After watching Auerbach testify, I am of the belief that he displayed “selective memory” when trying to avoid answering difficult questions from counsel for the Respondent, often responding with, “I can’t say.” In this respect, I found his testimony less than credible. On the other hand, I credit Burge’s testimony whenever the two disagree. She seemed straight forward and candid, with no attempt to avoid answering difficult questions. Although both Auerbach and Burge were partisans for their respective sides, he seemed to testify with an agenda in mind, and she did not.

Counsel for the Postal Service pressed Auerbach as to what response he gave Burge on July 19, but still he testified, “I may or may not. I can’t say for sure.” Finally, counsel asked him if it was “fair” to say that he at least told Burge that he was going to the Board, and did not want to talk about the requested documents with her. Auerbach reluctantly admitted that it was a fair statement, and also that he has never furnished Burge with the specific information as to what documents were encompassed by the charge.

It is, of course, part of the Respondent’s defense that its managers were attempting to furnish the Union with any relevant information that the Union had requested, and that had Burge and Benton known earlier as to what specific information was encompassed by the charge, it would have been immediately provided to the Union.

Burge testified at some length about her efforts to get Region 28 of the Board to specify the records that were alleged by the Union not to have been provided. However, according to Burge, it was not until August 21 that the Respondent learned from the Region, not the Union, that it was the casual clock rings or time records that were at issue in the charge. This testimony was un rebutted. Further, Burge testified that upon getting that information, she contacted Benton and informed him that it was the casual clock rings, which were the remaining documents that the Union contended in the charge had not been furnished.

Benton testified that upon learning from Burge that it was the casual clock rings that the Union was complaining about in the charge, he directed Meaker to make them available to the Union and so informed Auerbach in writing dated August 23. Further, Benton informed Auerbach that additional clock rings would be made available to him within a week. (R. Exh. 11.)¹⁸ Once Meaker learned from Benton that the charge involved the

¹⁸ See letter from Benton to Auerbach dated August 23, 2007, specifically item 4; and first attachment email from Burge to Benton dated August 22, 2007, specifically item 4.

clock rings, he almost immediately made them available to Auerbach. None of this is apparently disputed, as paragraph 6(d) of the complaint only alleges a failure to provide the clock rings through mid-August 2007.

Finally, it is worth noting that Benton testified that prior to August 23, he personally was not aware that the Union was complaining it had not received certain clock rings for casual employees. According to Benton, had he known earlier that the Union had requested these records and that they had not been provided, he would have directed that management furnish them to the Union immediately.

Legal Analysis (The Clock Rings)

There is no dispute that the clock rings requested by the Union were relevant and necessary for the Union's performance of its collective-bargaining duties, and that the Respondent was required to furnish these documents to the Union promptly. However, the parties strongly disagree as to whether the Postal Service's delay in providing the clock rings to the Union was unreasonable.

The case law is clear 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 as circumstances allow." *Allegany Power*, 339 NLRB 585, 587 (2003), *enfd.* in pertinent part 349 F.3d 233 (4th Cir. 2005). Further, "[i]n determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident." *Earthgrains Co.*, 349 NLRB 389 fn. 22 (2007) (quoting *Allegany Power*, 339 NLRB at 587).

In my view, the time period that the Union was required to wait for receipt of the requested documents and the reasons for such a delay are critical in determining whether the Respondent was acting in good faith. To begin with, the parties do not agree as how long receipt of the documents was delayed. Union official Auerbach acknowledged that he did receive the requested information "promptly" and on a regular basis from approximately December 11, 2006, through May 11, 2007, a period of 5 months. However, complaint paragraphs 6(d) and (g) allege that the Respondent delayed in furnishing the clock rings beginning on or about "mid-April 2007." That date is plainly wrong, as Auerbach testified that he last received the clock rings on approximately May 11, 2007. Accordingly, I conclude that the time period during which the documents were not forthcoming begins no earlier than approximately May 11.

There then follows the period of time between May 11 and the filing of the unfair labor practice charge on July 2, which charge was received by the Respondent on July 5. This was a period of just under 2 months. It was at the start of this period that Michael Meaker began to fully perform all his duties as the new transportation manager at the Phoenix facility. Both Meaker and Auerbach agree that during this period Auerbach frequently requested the clock rings from Meaker, with Auerbach testifying the requests were as frequent as once a week.

Meaker candidly testified that he "dropped the ball" in not furnishing Auerbach with the clock rings. He admits this was simply inadvertence on his part, caused by being extremely busy trying to learn and perform a totally new job, which re-

quired all his attention. Further, he testified that he did not appreciate the importance of time in producing the requested documents.

It seems from his testimony that Auerbach was initially very sympathetic to Meaker's plight in learning to perform a new job. Auerbach testified that Meaker "was very busy, and he was learning the job, so I figured okay, I won't push real hard . . . I wanted to work with him." However, Auerbach also testified that he did not seek to get the documents from anyone else, such as Dan Benton, or Dean Murdoch, from whom he had previously received these records. It is unclear as to why he did not do so.

In any event, Auerbach's sympathetic attitude soon changed, and he filed the unfair labor charge at issue. Thereafter, his actions appear to me to be rather strange. When Beverly Burge received a copy of the charge, she called Auerbach on July 11 in an attempt to determine what records were specifically at issue, as the charge was worded generally. In that initial conversation, Auerbach told Burge that he did not know, as he was without his notes. She pursued the matter, and on July 19 again called Auerbach to question him about what records the Union was complaining had not been furnished.¹⁹ According to the testimony of Burge, which I credit for the reasons stated above, when she asked him what documents were involved in the charge, other than the Form 7468A, he responded, "I'm not going to tell you. I won't tell you until I've told my full story to the Board." Further, it is undisputed that Auerbach never informed the Respondent that the charge involved the failure to furnish the casual clock rings. It was not until August 21 that Burge learned from Region 28 of the Board, not the Union, of the specifics of the charge. Two days later, on August 23, the Respondent supplied the Union with the requested clock rings.

Paragraphs 6(d) and (g) of the complaint allege that the Respondent's failure to furnish the Union with the clock rings ended on about August 23, 2007, which, of course, is 2 days after the Region informed Burge of the specifics of the charge. However, it is the Respondent's position that the failure of its Phoenix plant managers to furnish the clock rings to the Union effectively ended on July 11, when Burge first attempted to find out from Auerbach what document's he was requesting. As the Union was essentially uncooperative after that time, the Respondent takes the position that its managers were not responsible for any further delay in delivering the requested documents to the Union.²⁰ I agree.

¹⁹ In the interim, Dan Benton had tried unsuccessfully to get the specific information from the Union's president and vice president.

²⁰ Counsel for the Respondent also argued at trial, and to some extent in her posthearing brief, that after the filing of the charge, Region 28 was in part responsible for the further delay in the Respondent's furnishing the clock rings to the Union. Allegedly, the Region was not in compliance with a November 6, 2002 memorandum (OM 03-18) from the Associate General Counsel regarding "Procedures for Handling Postal Service Cases Involving Refusal to Supply Information . . ." (R. Exh. 14.) According to counsel, had the Region immediately provided the Respondent with the specifics of the charge, the Postal Service managers would have quickly furnished the Union with the requested clock rings.

According to Burge, she was “dumbfounded” by Auerbach’s response to her question as to what documents were encompassed by the charge. Certainly, his response was rather surprising, and seems to clearly suggest that Auerbach was much more interested in having the Board find that the Respondent had committed an unfair labor practice, rather than in obtaining the clock rings as soon as possible. I would characterize Auerbach’s attitude as “playing gotcha” with the Postal Service. He was simply not going to cooperate with the Respondent once the charge was filed, even if that meant, as it did, that the Union would have to wait even longer to receive the clock rings.

It is clear to me from the credible testimony of both Burge and Benton that they were diligently trying to determine the specifics of the unfair labor practice charge in order to furnish the Union with whatever relevant information the Union was entitled to receive. In fact, that is exactly what they did, two days after learning that the clock rings constituted the items not furnished, in addition to the Form 7468A. The Union obstructed this effort through Auerbach’s refusal to furnish the specifics of the charge. I believe that under these circumstances, the Union had a duty to cooperate with the Respondent, which it failed to fulfill.²¹

As the Union failed to cooperate with the Respondent when first requested to do so by Burge on July 11, and continued to so refuse, I conclude that such a lack of cooperation serves to toll the period of the Respondent’s failure to furnish the Union with the requested clock rings. Accordingly, I am of the view that the total period during which the Respondent failed to furnish the Union with the clock rings was from on or about May 11 to July 11, an approximately 2-month period.

I will now turn my attention to that 2-month period to determine whether, under the totality of the circumstances, the Postal Service had failed to put forth a good-faith effort to respond to the Union’s request for the clock rings as promptly as circumstances allowed. *Allegany Power*, supra; *Earthgrains Co.*, supra. For the following reasons, I conclude that the Respondent did not fail to do so.

It is important to put the request for the clock rings in perspective. Auerbach testified that he first requested the weekly clock rings on December 11, 2006, and that he promptly received them and continued to do so through May 11, 2007. Therefore, it is undisputed that he received the documents promptly and on a regular basis every few weeks for that five

Of course, it is axiomatic that the Region’s processing of this case is not on trial. Further, it is certainly not within the province of an administrative law judge to consider whether a Regional Office is in compliance with a General Counsel Memorandum. Finally, although it may well be that the Union’s action or inaction could have affected the Respondent’s subsequent course of conduct, I fail to see how the processing of this case by the Region could serve as an exculpatory basis for a delay in furnishing the Union with requested relevant information.

²¹ Certainly an analogy can be drawn to that line of cases that hold that a union, which represents a unit of employees, has a duty, similar to that of an employer, to furnish information relevant to the bargaining process. *Newspaper & Periodical Drivers*, 309 NLRB 901, 902, 904 (1992); *Tool & Die Makers’ Lodge 78 (Square D Co.)*, 224 NLRB 111, 111 (1976).

month period.²² However, what changed in the department after that period was the replacement of Keith Tucker with Michael Meaker as the transportation manager.

Meaker was new to the Respondent’s transportation operation. Previously all his experience at the Postal Service had been in the distribution operation. His first day in his new position was April 30, followed by two weeks of training with Tucker. Initially he was very busy learning his new job. Auerbach recognized the situation and seemed to sympathize with Meaker. Auerbach testified that he knew Meaker “was very busy, and he was learning the job.” Further, Auerbach “figured okay, I won’t push real hard. I understand [Meaker is] learning.” On cross-examination, Auerbach even acknowledged that as being new to the transportation manager position, Meaker needed some additional time to “transition.”

There is no question that Meaker did not intentionally fail to furnish the clock rings to the Union. He credibly and candidly admitted that he “dropped the ball” in not acting more expeditiously to furnish the Union with these documents. Meaker simply failed to appreciate the time element involved in responding to Auerbach’s request for the records. In his past positions with the Postal Service, his dealings with the Respondent’s unions had apparently not involved production of requested documents within any specific period of time. Meaker credibly testified that in the past he had “never played a time game with the Union.” Further, Meaker testified that despite being very busy learning his new job, he did furnish Auerbach with certain requested documents during this period of time, other than the clock rings. (R. Exh. 1.) This testimony from Meaker is un rebutted.

While Meaker should have acted expeditiously to furnish the clock rings, and in not doing so “dropped the ball,” it seems odd that Auerbach did not take his request for the records to another manager, in particular Dean Murdoch. For many months prior to Meaker’s assumption of the transportation manager position, Auerbach had obtained the clock rings directly from Murdoch. Auerbach offers no plausible reason why he failed to seek Murdoch’s assistance when after mid-May the records were not forthcoming. Therefore, I am left with the impression that timeliness was simply not of great concern to Auerbach.²³

When Meaker learned in August, apparently from Dan Benton, that the Union’s unfair labor practice charge involved the clock records, he immediately went to Auerbach and made the records available to him within 30 minutes. This further supports Meaker’s testimony and the Respondent’s contention that his failure to produce the records was not intentional, and simply the result of being very busy learning a new job.

²² While a failure to put forth a good-faith effort in responding to a union’s request for information does not require establishing that an employer acted intentionally, it is certainly worth noting that in the matter before me the Respondent complied promptly for at least a 5 month period in furnishing the Union with the requested clock rings.

²³ Apparently the Union has not been prejudiced by any delay in receipt of the clock rings, as Auerbach testified that the underlying grievance concerning the hiring of casuals, filed on December 6, 2006, is still pending. (GC Exh. 13.)

Under the Board's totality of the circumstances test, I do not believe that during the 2 month period, May 11 to July 11, that the Postal Service failed to put forth a good-faith effort to respond to the Union's request for the clock rings. While the records were not furnished during this period of time, the circumstances surrounding Meaker's assumption of the transportation manager position and Auerbach's acquiescence in and acknowledgement of Meaker's difficulty in learning to perform his new duties militate against a finding that the Respondent did not put forth a good-faith effort to respond to the Union's request.

Therefore, I conclude that the Respondent's conduct in responding to the Union's request for the clock rings did not constitute a violation of Section 8(a)(1) and (5) the Act.

Accordingly, based on the above, and the record as a whole, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent, United States Postal Service, is an employer over which the Board has jurisdiction pursuant to Section 1209 of the Postal Reorganization Act.

2. The Union, American Postal Workers Union, Phoenix Metro Area Local, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The National Union, American Postal Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union is a constituent local of the National Union.

5. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The complaint is dismissed.

²⁴ 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.