

The Earthgrains Company, a wholly owned subsidiary of Sara Lee Bakery Group, Inc. and Chauffeurs, Teamsters and Helpers Local Union No. 215, a/w International Brotherhood of Teamsters. Case 25-CA-29803

February 22, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On July 28, 2006, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Earthgrains Company, Owensboro, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Michael T. Beck, Esq., for the General Counsel.

John L. Collins, Esq., of Houston, Texas, for the Respondent.

Samuel Morris, Esq., of Memphis, Tennessee, for the Charging Party.

¹ In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to furnish requested relevant information, we find it unnecessary to pass on the judge's apparent finding that the Respondent was obligated to retain and furnish documents that were created after October 11, 2005, the date of the information request. The judge's recommended Order, which the Board has adopted, requires the Respondent, *inter alia*, to furnish the Union with the information requested in certain paragraphs of the October 11 request. Any dispute as to the scope of information encompassed by that request may be raised and litigated in compliance.

In finding that the Respondent failed to establish a claim of confidentiality, Member Schaumber does not rely on the judge's finding that the Respondent did not timely raise this claim and his inference therefrom that the Respondent did not possess a legitimate confidentiality interest in the requested information. Further, Member Schaumber finds that the judge's reliance on cases in which the Board inferred unlawful motivation from an employer's use of shifting defenses is misplaced. As the Respondent stated in its Feb. 14, 2006 response to the Union's information request, "this *supplements*" the Respondent's earlier response to the information request. (Emphasis added.) In Member Schaumber's view, an employer has a right to supplement its response to an information request and the judge erred by drawing an adverse inference therefrom.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Owensboro, Kentucky, on May 16, 2006. The charge was filed November 28, 2005,¹ and the complaint was issued February 27, 2006.

The complaint alleges that the Company unreasonably delayed in furnishing certain information requested by the Union. It further alleges that the Company refused to provide other information sought by the Union. Because it is contended that the information is necessary for, and relevant to, the Union's performance of its duties as collective-bargaining representative of certain of the Company's employees, the General Counsel alleges that the Company's conduct has been in violation of Section 8(a)(5) and (1) of the Act.² The Company filed an answer denying the material allegations of the complaint.

As described in detail in the decision that follows, I find that the Company waited over 4 months before providing certain information requested by the Union, an unreasonably long period of time. I further find that the Company has refused to provide additional information requested by the Union. Having also determined that the information requested is relevant to, and necessary for, the performance of the Union's duties as collective-bargaining representative, I conclude that the Company's conduct has been in violation of Section 8(a)(5) and (1) of the Act.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, produces food products at its facility in Owensboro, Kentucky, where it annually sells and ships goods valued in excess of \$50,000 directly to points outside the Commonwealth of Kentucky and purchases and receives goods valued in excess of \$50,000 from points outside the Commonwealth of Kentucky. The Company admits,⁴ and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Sara Lee Bakery Group, Inc. operates approximately 50 bakeries across the United States. Among these is one located

¹ All dates are in 2005, unless otherwise indicated.

² At the beginning of the trial, counsel for the General Counsel moved to amend two minor aspects of the complaint. He corrected a misspelling of the Company's name and changed a date alleged in par. 6(d) of the complaint from November 22, 2006, to November 22, 2005. These changes were unopposed, and I granted the motion to amend.

³ All dates are in 2005 unless otherwise indicated.

⁴ See the Company's answer to the complaint, pars. 2(d) and 3. (GC Exh. 1(e).)

in Owensboro, Kentucky, belonging to its wholly owned subsidiary, The Earthgrains Company. The Owensboro facility has two production lines making bread and buns. The bakery distributes its product in two ways. It employs route sales drivers who deliver baked goods directly to retail establishments. It also has 16 transport operators who drive tractor-trailer trucks taking products to other bakeries and depots owned by Sara Lee. Fourteen of these transport drivers have specified bid runs allocated on the basis of seniority. The remaining two are a relief driver and a driver who covers vacancies due to employees' vacations.

For approximately 20 years, Local 215 has been the collective-bargaining representative for both the route sales and transport drivers. All of the Owensboro drivers are members of the same bargaining unit. The parties negotiated their current collective-bargaining agreement over a period of 7 months. The agreement commenced on May 10, 2005, and extends through May 10, 2007. (GC Exh. 5.) It provides a grievance procedure culminating in arbitration.

The Union's business agent responsible for contract enforcement at the Owensboro facility is Larry Murray. He works with the drivers' steward, Billy Ballard. Ballard has been a transport driver for 11 years and has served as steward for 3 years. He is also a member of the Union's negotiating committee.

William Baird is the Company's plant manager at Owensboro. He has had extensive experience, beginning as a foreman and production manager at Owensboro. He was promoted to the position of plant manager at the Company's bakery in London, Kentucky. For a period in 2003 and 2004, Baird served as plant manager for both the Owensboro and London facilities. In the fall of 2004, he assumed his current position as Owensboro's manager.

The matters at issue in this case involve the Company's manner of distributing its baked goods among its bakeries in Kentucky and its depot in Louisville. Transport drivers take products to the Company's depots and also from one bakery to another. With specific regard to this case, transport drivers at the Owensboro bakery haul baked goods to the depot located in Louisville. As mentioned, Sara Lee also owns a bakery located at the other end of the state in London. Drivers from London also deliver products to the depot in Louisville. The heart of this controversy involves movement of the Company's products from the Owensboro bakery to the London bakery.⁵

Baird has been a major figure responsible for the current design and operation of the distribution chain from London to Owensboro and back. He testified that, at the time he became plant manager at London in July 2002, there was a driver assigned to make a regular run from London to Owensboro. The purpose of this run was to drop off London's products at

⁵ Baird testified that there are several reasons why the Company moves products from one bakery to another. For example, if a particular product is not in heavy demand, it is more efficient for one bakery to produce enough to service that demand and ship it to the other bakery. In addition, the parent company certifies certain bakeries to produce specialty items. Certification is a difficult process and facilities that lack certification in a particular product need to receive that item from certified bakeries.

Owensboro and return to London carrying goods baked at Owensboro. As of Baird's arrival at London, this work was performed by drivers employed by Sara Lee. Implementing a plan developed before Baird assumed his duties as plant manager at London, the transport work at London was outsourced to another company, Worldwide Logistics. Just "a week or two" after Baird arrived, Worldwide commenced operations at London, hiring the transport drivers who had been performing the same work for Sara Lee.⁶ (Tr. 115.)

Approximately a month or two after taking over at London, Baird instituted a cross-docking system to improve the efficiency of the Kentucky operations.⁷ He testified that he realized that both Owensboro and London transport drivers were already making runs to the depot in Louisville. It made sense for the London truck, after delivering its trailer to the depot, to pick up the Owensboro trailer and return to London. By the same token, the Owensboro driver could drop off his load at the depot and take the trailer with London products back to Owensboro. As Baird put it

[W]e were both going [to the Louisville depot] anyway. It is just—it is cost effective and it is a better way of doing the business. The downside of that is, we both have to be there at a specific time [to complete the transfer of trailers].
[Tr. 89.]

Baird testified that, upon implementation of cross-docking at Louisville, there was a period in 2002 when there was "no truck originating out of London going directly to Owensboro." (Tr. 91.) All products destined for either bakery were exchanged through cross-docking.

Eventually, scheduling problems and market changes required reinstatement of runs directly between London and Owensboro. In late 2002, the Company introduced a new cottage loaf bread product. The product was baked in London and a portion was transferred to Owensboro. As a result, 5 days each week a London driver working for Worldwide made a run to Owensboro to deliver bread. A further practice developed, described by Baird:

There were occasions when Owensboro could not meet the time window for cross-docking [at Louisville]. Again, you are meeting another transport in Louisville at a specific time.

⁶ At roughly the same time, the previously nonunion drivers at London selected another Teamsters local to represent them. They remain represented by that organization.

⁷ There was some dispute in the testimony between Baird and Ballard regarding the reason for the institution of cross-docking. Ballard claimed that it was devised as settlement of a grievance arising out of the Union's dissatisfaction with direct transfer of products using London drivers. He presented no evidence or documentation for this contention. The absence of such corroboration, coupled with Baird's firm assertion that he developed cross-docking for business reasons unrelated to labor relations, leads me to conclude that Ballard is mistaken. In reaching this conclusion, I place particular weight on the logic behind cross-docking as explained by Baird. Cross-docking is clearly a felicitous means of streamlining the delivery process. I also note that while under cross-examination, Ballard conceded that Baird would be the person best situated to know the reasons for instituting cross-docking.

So, what that means is, you have to leave the Owensboro facility at a specific time. In the event that the Owensboro product was not ready to go to the cross-docking trailer, after we re-instituted the London to Owensboro . . . run, that gave the Owensboro facility a Plan B to get the product back to London. [Tr. 92.]

In other words, if Owensboro product destined for the London facility was not ready in time to make the run to Louisville, it could be loaded onto the empty trailer used by the London driver to make his direct delivery at Owensboro. The parties referred to this manner of delivery between Owensboro and London as “backhauling.” This practice was followed from late 2002 through 2005.

In testimony that highlights the source of the Union’s concerns reflected in this case, Baird was unable to provide a straightforward statement regarding the frequency of this backhauling practice over the period under consideration. Instead, he testified that:

[I]t was on occasion. I cannot say that it was every day and I cannot say that it was once a week either . . . once a week, once every two weeks. Sometimes it was more; sometimes it was less, just depending on the market conditions, as well as, how well or how bad the plant ran. [Tr. 92–93.]

In addition to the imprecision of this testimony as to the Union’s central concern underlying this case, the estimate proffered here stands in sharp variance with the Company’s formal position regarding the same question. In a written response to the Union’s information request, the Company made the following representation:

We can state that from at least March 2002 through September 2005, on an average of approximately three times per week, a truck emanating from London would backhaul less than approximately half a load of product from Owensboro to London. [GC Exh. 9, p. 2.]

Similarly, in his posttrial brief, counsel for the Company reported that:

[T]he Company’s best estimate [as to the amount of backhauling] is approximately three times per week in a volume of less than half a trailer each time. [R. Br., at p. 5.]

While these two estimates are almost as disturbingly vague as Baird’s testimony, they are strikingly different from that testimony. To summarize, the Company’s general manager testified that the backhauling, while variable, occurred about “once a week, once every two weeks.” (Tr. 93.) The Company’s formal position in this litigation is that the backhauling actually happened at a rate of approximately thrice weekly.⁸

⁸ The source of the Union’s concern can be readily demonstrated by some arithmetic. At its narrowest, the Baird estimate and the Company’s formal position vary by a factor of 3 (once weekly versus thrice weekly). At its widest, those two estimates vary by a factor of 6 (once biweekly versus thrice weekly). I also note that the Company did not provide any indication of how it arrived at this estimate. It is impossible to discern if management based the estimate on an analysis of reports of the type being sought by the Union in this case.

The situation continued to evolve. In July 2005, Sara Lee developed another new product, wholegrain white bread. The introduction of this product was hugely successful. The bread was baked at Owensboro and had to be shipped to London. The amounts needed by London were very large. As a result, both cross-docking and backhauling were utilized. Ballard testified that during the summer of 2005, the amount of backhauling “increased and it increased.” (Tr. 20.) He opined that Worldwide drivers were transporting products directly from Owensboro to London “every day.” (Tr. 34.)

Ballard testified that the Union grew increasingly concerned at the amount of product that was being backhauled. He expressed this concern to his business agent, Murray. On July 28, the Union filed a grievance regarding the subject. That grievance cited a specific incident on July 23, when a Worldwide driver took a trailer directly from Owensboro to London. The grievance contended that the trailer in question was supposed to be driven to Louisville by a bargaining unit member for purposes of cross-docking. It was asserted that this violated specific provisions of the collective-bargaining agreement. (GC Exh. 2.)

On August 18, the parties met to discuss the grievance. Ballard and Murray represented the Union. Present on behalf of the Company were Baird and at least 3 other management officials. The discussion was not limited to the narrow issue involving the July 23 run, but covered the entire subject of backhauling as well. Murray testified that, regarding the specific incident, Baird explained that “this was a mistake. They did not instruct this [Worldwide] guy to come and get this load. He apparently just did it.” (Tr. 65.)

As to the parties’ discussion of the larger picture, the testimony of Murray and Baird is relatively consistent. Both agree that Baird attributed the increase in backhauling to the success of the wholegrain white bread. He explained that the London bakery was attempting to receive certification so that it could begin producing this product. Murray reported that Baird also minimized the amount of product being backhauled, describing it as just “a couple of stacks at a time.” (Tr. 65.) As Baird testified, he told Murray that once London became certified the amount of backhauling would “go back to like it had been since January of ’03, you know, on the as-needed basis to whatever degree that was.” (Tr. 103–104.) Murray replied that if the current situation “is just going to end here real soon, you know, that is fine.” (Tr. 65.)

Ballard testified that later on the same day that the Union had received these assurances he observed a London driver backhaul half of a trailer load of bread to London. As Murray characterized it, “this couple of stacks of bread turned into be [sic] a half a load.” (Tr. 66.) Murray testified that upon further observation of the Company’s practices, “we would check and there would be more bread than they were saying there was.” (Tr. 66.)

Based on its continuing concern with the practice of backhauling, the Union filed a second grievance on September 20. The grievance form explained:

This is our work and we want to keep it . . . It is our agreement to haul this to this bakery’s distributors and depots, etc. This includes what goes to London Bakery. No other com-

pany should be entitled to our work. I am requesting arbitration with backpay for each load hauled out by another company All drivers need to be made whole in every way. [GC Exh. 3.]

The Company's written response as listed on the grievance form was, "[d]enied—no contractual violation." (GC Exh. 3.) The final entry on the grievance form, written in another handwriting, indicated that the Company "claims this is a dock pickup." (GC Exh. 3.)

On October 11, the parties held a second meeting to discuss the grievance and the practice of backhauling. Ballard and Murray represented the Union. Baird led the management team which included at least five other officials. Baird testified that he told Murray that Owensboro was in the process of gaining approval to bake buns and, "[a]s soon as we got it approved, the 10 truck that originated in London to Owensboro would go away completely." (Tr. 104.) Of course, in that event backhauling would no longer be possible. Ballard testified that Baird also continued to minimize the amount of backhauling, indicating that "it was only two or three racks." (Tr. 44.)

During this meeting, Murray presented Baird with the written request for information that is the subject matter of this case.⁹ The letter began by noting that the subject was, "Worldwide Logistics taking bread off of the Sara Lee, Owensboro dock." (GC Exh. 6.) He asserted that Baird had promised that this backhauling would cease after 2 weeks and noted that it had persisted beyond the promised limit. As a result, Murray requested that the Company provide the following information:

1. The name, address and phone number of the subcontracting company;
2. The number of baskets hauled in 2005 to date by that entity, stating the date and amount hauled for each date;
3. The price paid to the [entity] for the loads and the total amount paid to date;
4. The total miles to date driven by each driver performing subcontracting work, for each day performed;
5. Copies of any letters of agreement, e-mails, contracts, or anything else reflecting the agreement between the company and the contractor.

[GC Exh. 6.]

Finally, Murray added that Baird should "further consider this our demand to bargain on this new round of subcontracting work." (GC Exh. 6.)

After the conclusion of the October 11 meeting, Murray wrote another letter to the Company advising them that the Union was advancing its grievance to arbitration. (R. Exh. 2.)

The Company prepared its response to the information request exactly 6 weeks after having received the document. This letter, dated November 22, was written by Stacey M. Moulton, associate chief counsel for Sara Lee Bakery Group. The letter characterized the relationship between the Owensboro and London bakeries as one between a seller and its customer, noting that "the London bakery can choose to purchase product from the Owensboro bakery, which is the current arrangement."

⁹ Baird confirmed that he was given this letter during the meeting.

(GC Exh. 7.) Having described the relationship between the bakeries as one of buyer and seller, Moulton observed that Owensboro uses different transport methods for servicing its various customers, adding that, "[s]ome customers prefer dock pick-up basis" for delivery of their purchases.¹⁰ (GC Exh. 7.)

Moulton's letter went on to assert that "the Teamsters have not lost any work, hours or pay Therefore, Sara Lee fails to see how the Teamsters have been harmed." The letter's ultimate conclusion was that "[f]or the reasons stated above, we decline to provide you with the documentation that you have requested." (GC Exh. 7.) In consequence, the Union filed the charge in this case on November 28. (GC Exh. 1(a).)

During the autumn, the backhauling situation continued to evolve. London began to produce its own wholegrain white bread and Owensboro started baking its own bun product. As a result, Baird testified that the final London to Owensboro run was made on January 2, 2006. Immediately thereafter, on January 4, 2006, counsel for the Company filed a position statement addressed to the Board agent investigating the Union's charge.

In his position statement, counsel clearly asserted that the Company's "response to this [information] request and to the subsequent unfair labor practice charge, is twofold." (GC Exh. 9, p. 4.) The two reasons given were that the request failed to seek information that is relevant to the grievance, and that the Company "does not have records that break out product moved from the Owensboro plant via backhaul by London trucks." (GC Exh. 9, p. 4.) The statement concluded with the contention that, "[f]or all of the foregoing reasons, the charge should be dismissed."¹¹ (GC Exh. 9, p. 5.)

On February 14, 2006, counsel for the Company wrote another letter to Murray in order to supplement his original response to the October 11 request for information. That letter began by continuing to dispute the Union's characterization of the backhauling practice as "subcontracting." Counsel went on to provide the information requested in the first item of the Union's original request, the name of Worldwide Logistics' parent company, along with its address and telephone number.

In a paradoxical fashion, the letter informed the Union that the Company "does not have data that identifies how product

¹⁰ I have already indicated that the Union's grievance form in this case contained a notation that the Company contended that the backhauling to London represented a so-called "dock pickup." (GC Exh. 3.) Moulton's letter also seems to be making this claim. If that is the Company's contention, it may have implications for this case. The parties' collective-bargaining agreement authorizes the Company to use dock pickup as a means of attracting new business. However, under those circumstances, article 43 of the collective-bargaining agreement provides that the Union "shall have the right to request documentation" regarding the need to employ this method of delivery. (GC Exh. 5, p. 19.)

¹¹ Counsel's letter appears to contain an inadvertent but significant error when describing the factual background. In citing a hypothetical example, he indicated that on a given day two trucks may be dispatched from Owensboro to the Louisville depot for purposes of cross-docking. (GC Exh. 9, p. 5.) Because this is an important point as discussed later in this decision, I carefully questioned Baird about it. Baird clearly and repeatedly testified that Owensboro has never dispatched more than one truck per day to the depot for cross-docking purposes. (See Tr. 131-132.)

received at the London plant from the Owensboro plant traveled to London.” (GC Exh. 9, p. 2.) Nevertheless, he advised the Union that

We can state that from at least March 2002 through September 2005, on an average of approximately three times per week, a truck emanating from London would backhaul less than approximately half a load of product from Owensboro to London.¹² [GC Exh. 9, p. 2.]

In addition, counsel raised a new objection to the provision of certain of the remaining requested information. For the first time, he noted that, “[t]he Company objects to disclosing the financial terms of its contract with Worldwide Logistics because that information is highly confidential.” (GC Exh. 9, p. 2.) Counsel also observed that the Company believed that it had now satisfied its obligation to respond to the information request. He ended his letter with the following statement:

As always, the Company remains willing to negotiate with your Union as to any additional information you may contend you need to carry out your duty to represent members of the Owensboro bargaining unit. [GC Exh. 9, p. 2.]

Two weeks later, the Regional Director filed the complaint and notice of hearing in this case, alleging that the Company had unreasonably delayed its response to the request for identifying information regarding the Company that was performing the backhauling of product and had unlawfully refused to provide the additional information sought by the Union. (GC Exh. 1(c).) The Company’s answer denied the material allegations and asserted defenses of confidentiality and waiver by the Union. Specifically, the Company contended that its confidentiality interest “outweighs whatever legitimate interest the Union might assert for such information.” (GC Exh. 1(e), pp. 2–3.) It also contended that it had “offered to negotiate with the Union to accommodate its needs, and the Union did not engage in such negotiations.” (GC Exh. 1(e), p. 3.) As a result, the Company asserted that the Union had waived its right to the information.

Although the legal issues were joined at this point, the events underlying this controversy continued to develop. It will be recalled that direct transfer of products between Owensboro and London had ceased on January 2, 2006. It is undisputed that such transfer resumed on April 25, 2006, and continued through April 30. The reason for the temporary reinstatement of this practice was the need to shut down the London production line in order to install a new oven.¹³ After April 30, 2006, this practice ceased. On May 1, the Union filed another grievance alleging that the direct transfer of products on April 25–30 violated specific provisions of the parties’ collective-bargaining agreement. (GC Exh. 8.)

¹² I have already noted that this is certainly a much greater level of activity than that described in Baird’s testimony. At trial, he indicated that, while sometimes quite variable, the frequency of backhauling was in the range of “once a week, once every two weeks.” (Tr. 93.)

¹³ At trial, I noted that what was being done in April 2006 was not technically “backhauling.” Baird indicated that the trucks that departed from London did not take product to Owensboro. They loaded Owensboro’s goods and took them to London.

As of the date of trial, there did not appear to be any current direct transport of goods between Owensboro and London. Baird testified that such direct hauling of products “has ceased,” but he confirmed the accuracy of counsel for the Union’s summary of the Company’s viewpoint; that the Company “still maintains it has the right to do it, on whatever basis it deems necessary.” (Tr. 127.)

B. Legal Analysis

The sole issue in this case is whether the General Counsel has correctly asserted that the Company’s manner of responding to the Union’s request for information dated October 11, 2005, was unlawful. In contesting this conclusion, the Company has raised a variety of defenses. I will address each of these in turn.

1. Relevance of the requested information

First and foremost, the Company claims that the information being sought by the Union does not pass the test of relevance. The Board holds that an employer must provide information being sought by the Union only if it is relevant to the Union’s statutory duties as collective-bargaining representative. *Pieper Electric, Inc.*, 339 NLRB 1232 (2003). Information pertaining to employees who are members of the bargaining unit is presumptively relevant. *Calmat Co.*, 331 NLRB 1084, 1095 (2000). However, as counsel for the Company points out, this is not such a case.

In this case, the Union seeks information about the activities of a subcontractor and its employees and information regarding the Company’s relationship to that subcontractor. In such circumstances, the General Counsel must demonstrate the relevance of the information. The Board has often described the standard to be employed in assessing such a claim. Very recently, it summarized it as follows:

[W]hen the representative requests information that does not concern the terms and conditions of employment for the bargaining unit employees—such as data or information pertaining to nonunit employees—there is no such presumption of relevance, and the potential relevance must be shown. The burden to show relevance is “not exceptionally heavy,” and “[t]he Board uses a broad, discovery-type of standard in determining relevance in information requests.” When there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for nonunit employees. [Citations omitted.]

Caldwell Mfg. Co., 346 NLRB 1159, 1160 (2006).

Under the Act, relevant information is obtainable beyond the confines of the parties’ negotiations for a collective-bargaining agreement. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court held that the statutory duty to furnish relevant information applied to union requests made in connection with the processing of grievances. Indeed, it is interesting to note that the facts in that case bear much resemblance to the issues here. The union, being concerned about the preservation of bargaining unit work, filed 11 grievances relat-

ing to the employer's movement of machinery from the plant. It also filed a request for information about the employer's actions. The employer denied the request, observing that it had not violated the collective-bargaining agreement because it had not made any layoffs or reductions in job classifications. The Court affirmed the Board's finding that the information sought was relevant to "enable the Union to evaluate intelligently the grievances filed." *Id.* at 435.

As with the general discovery-type standard, the Board's test for relevancy of information being sought in connection with a grievance is a liberal one. As the Board explained in *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991):

[T]he information need not be dispositive of the issue between the parties but must merely have some bearing on it.

In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided.

....

Moreover, information of "probable relevance" is not rendered irrelevant by an employer's claims that it will neither raise a certain defense nor make certain factual contentions, because "a union has the right and the responsibility to frame the issues and advance whatever contentions it believes may lead to the successful resolution of a grievance." Further, because the Board, in passing on an information request, is not concerned with the merits of the grievance, it is also not "willing to speculate regarding what defense or defenses an employer will raise in an arbitration proceeding." [Citations omitted.]

Having outlined the broad principles that I must apply, it is now useful to examine the Board's precedents in cases involving similar or related issues. Over the decades, the Board has not hesitated to find relevance when a union requests information that is reasonably related to its concern about the preservation of bargaining unit work in conformity to its collective-bargaining agreement with the employer. A number of examples will illustrate this.

In *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 753 (6th Cir. 1969), the union was worried about allocation of work between two locations. The company denied a request for information, contending that "information about employees and work done outside the geographical scope of the bargaining unit could not be relevant." *Id.* at 957. The Court affirmed the Board's contrary conclusion, observing that, "[t]he preservation or diversion of unit work is a subject of mandatory bargaining under the Act." *Id.* The Court went on to note that it was not the Board's function to assess the merits of the union's inquiry or the employer's conduct. Instead, the Board, having found that the union had "reasonable grounds to fear that unit work was being transferred," was within its authority under the Act to order disclosure of the information sought. *Id.* at 957.

United Graphics, 281 NLRB 463 (1986), involved a union's concern about work preservation in the context of the use of temporary employees supplied by a contractor. The employer objected to providing information about the extent of such use, contending that the workers were not its employees and were

merely casual laborers who would be excluded from the bargaining unit. The Board found a violation of the Act, holding that:

[E]ven assuming that the temporary workers are nonunit employees, it is clear that information regarding individuals who are engaged in performing the same tasks as rank-and-file employees within the bargaining unit "relates directly to the policing of contract terms." [Citation omitted. *Id.* at 465.]

Some years later, the Board affirmed an administrative law judge's finding of a violation where an employer refused to provide information regarding the employees of a subcontractor. The employer contended that the information was not "useful or helpful in processing the grievances" filed by the union. *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991). The judge rejected this contention, noting that:

[A]ssuming arguendo the information would not be helpful in processing the grievance, the information is useful in assisting the Union to determine whether to prosecute the grievance. The number of employees used by the subcontractor as well as the wage scale paid also have relevance to the Union's legitimate interest in determining if appropriate unit work and promotional opportunities were adversely impacted.

In sum, I conclude the sought information is relevant to processing the grievance, it directly relates to policing the terms of the collective-bargaining agreement. To evaluate the request further would adversely impact on the contractual arbitration procedure by first deciding in this proceeding the merits of the grievance under the guise of determining the relevance of the requested information. The information sought by the Union is sufficiently related to its duties to police the contract to establish relevance without undermining the contractual resolution mechanism. [Citation omitted. *Id.* at 246.]

Most recently, the Board reversed a judge's more restrictive reading of the standard for relevance involving an information request regarding an employer's operations at a separate nonunion facility. In *Certco Distribution Centers*, 346 NLRB 1112 (2006), the union had represented employees at the company's Verona facility since 1962. In 2004, the employer opened a new facility at Helgesen. This was staffed with nonunion employees. The union sought information regarding the "transfer of product to Helgesen" and "the establishment, management and staffing of the new Helgesen facility." *Id.* at 1113. The judge ordered production of the information related to transfer of products but denied the request for the additional information. The Board reversed, finding that the union had met its responsibility of demonstrating the relevance of all the requested information. It held that:

The Union has shown that it had legitimate concerns about the possible transfer of unit work from Verona to Helgesen and had filed a grievance related to those concerns. In these circumstances, we find that the Union has shown that the information requested about nonunit Helgesen operations was relevant. [Citation omitted. *Id.* at 1113.]

Having outlined the parameters of the analytical process to be employed, I will now turn to the facts of this case. On September 20, the Union filed a grievance regarding the backhauling of products from Owensboro to London by drivers employed with Worldwide Logistics. The written grievance claimed that the Company's actions were in violation of two specific contractual provisions, articles 27 and 28 of the collective-bargaining agreement. Article 27 in its entirety provides:

The Company agrees not to enter into any Agreement, either written or verbal, which is in conflict with this Agreement. [GC Exh. 5, p. 10.]

Article 28, in pertinent part, provides:

The "Employer" agrees that all conditions of employment in its individual operation relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement. [GC Exh. 5, p. 10.]

The written information request, while rather terse, advised the Company that the Union sought the information due to the backhauling activity by the subcontractor. Moreover, the letter also specifically asserted that the Company had made representations regarding the scope and extent of this activity. Finally, it characterized the backhauling issue as a "new round of subcontracting." (GC Exh. 6.)

Taken together, the Union's written grievance and the written information request filed in connection with that grievance and presented to management during a meeting concerning that grievance, demonstrate the relevance of the requested information under the liberal standard traditionally employed by the Board. I recognize that the Company contends that the backhauling practice did not replace a bargaining-unit bid run and did not result in the loss of bargaining-unit positions. Nevertheless, backhauling did involve work that was performed in significant part by bargaining-unit employees.

It is clear that the established routine method of transfer of products between the two bakeries was for a bargaining-unit employee to drive the trailer from Owensboro to Louisville and a Worldwide Logistics employee to drive it on to London. Backhauling obviated the need for a bargaining-unit employee to transport the products to Louisville. At a minimum, this could have some impact on the work available to the Owensboro drivers. Murray testified that, while he did not think there would be enough additional work to support a new bid run, the extra work could enable the relief driver or the vacation driver "to pick up some extra hours and haul this." (Tr. 76.)

The evidence establishes that, at the time of the information request, the practice of backhauling appeared to be increasing in frequency. In addition, I credit the testimony of Ballard and Murray indicating that the Company's explanations of its activities in this regard were inaccurate and evasive. Ballard testified that, during the parties' first grievance meeting about backhauling, Baird assured him that the amounts were small. Despite this, shortly after receiving these assurances, he observed a backhaul trailer that contained a significantly larger quantity of product. This testimony was uncontroverted.

Moreover, Baird's general testimony about the scope and extent of backhauling was notable for its vagueness and it stood in significant conflict with the Company's formal representations on that subject made in its second letter to the Union. I have no difficulty in concluding that the evidence showed that the Union's officials were genuinely concerned about both the increasing amount of backhauling and the Company's apparent lack of forthrightness and precision in explaining the situation.

In sum, I conclude that the Union's grievance cited specific contractual provisions that could reasonably be implicated by the Company's growing practice of backhauling. The credible testimony further showed that the union officials had a legitimate concern that the Company was violating those provisions and attempting to disguise its conduct. In such circumstances, the decision to seek additional information regarding the backhauling strikes me as a classic example of policing the contract.¹⁴

Beyond this, the type of information being sought appears directly related to the nature of the policing task. Establishing the precise identity and location of the subcontractor was a necessary predicate to any such investigation. Determining the quantity of product hauled was essential to evaluate the accuracy of the Company's representations. Assessing the mileage driven by Worldwide drivers was a useful cross-check as to the amount of backhauling being performed. The sums paid to Worldwide Logistics for its backhauling work provided insight into the legitimacy of the motivation of the Company's managers in employing the backhauling method and provided billing information that, when compared to the terms of the contract between the Company and the subcontractor, could also be used as a cross-check as to the amount of backhauling being done by Worldwide. Finally, a genuine question regarding the Company's compliance with its promise not to enter into inconsistent agreements with other entities having arisen, it was entirely relevant for the Union to seek disclosure of the contract entered into with the entity that was backhauling products that would otherwise have been driven to Louisville by bargaining-unit employees.

I have carefully considered the vigorous argument on the issue of relevancy presented by counsel for the Company in his brief. He correctly notes that for the Union's requests to meet the test of relevance, the information sought must be "[l]ogically connected" to some matter at issue. (R. Br. at 13, citing *Black's Law Dictionary*.) This is undoubtedly correct.¹⁵ However, in my view, counsel errs in his assessment of which matter is at issue. The matter at issue before me is not whether, as counsel describes it, "the fact of the backhauling . . . violate[s] the Owensboro labor contract." (R. Br. at 13.) Rather, the issue I must decide is whether the materials requested are logically connected to the Union's statutorily protected right to

¹⁴ As I have already noted, the Board steers clear of assessing the merits of the grievance. My comments should not be read as expressing any view as to the eventual outcome of the arbitration of this dispute.

¹⁵ As the Federal Rules of Evidence describe it, relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination . . . more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

obtain information that will enable it to police its agreement with the Company and represent its members in the contractual grievance process.

At its heart, the inquiry comes down to this. In the collective-bargaining agreement, the Company promised not to enter into any contractual relationship that would conflict with its labor contract with the Union. The Company's routine method of delivery of goods from Owensboro to London involved their transport to Louisville by a bargaining unit driver. With increasing frequency, the Company elected to effectuate the transfer of goods by transporting them on a truck operated by a third party. While so doing, the Company's officials made vague and evasive statements to the Union regarding the issue. The Union's requests to obtain the Company's contract with that third party and information designed to illuminate the extent of the Company's activities with that third party are logically connected to its duty to police that portion of the collective-bargaining agreement that prohibits the Company from entering into agreements that are inconsistent with its labor contract.¹⁶

For these reasons, I conclude that all of the information sought by the Union in its letter of October 11 was relevant to the grievance it had filed and necessary for the performance of its duty to police the parties' collective-bargaining agreement. Absent some other lawful reason, Section 8(a)(5) of the Act requires that it be produced by the Company.

2. The defense of confidentiality

The Company is particularly focused on its objections to the Union's request for a copy of the agreement between the London bakery and Worldwide Logistics. In his opening statement, counsel for the Company noted that the case "really boils down" to this issue. (Tr. 15.) I have already concluded that the Union's request has passed the first hurdle, the test of relevancy.

In further objection to the production of the agreement with its subcontractor, the Company has asserted the defense of confidentiality with respect to this document. The Board takes

¹⁶ I am not saying that the mere existence of this contractual provision in the collective-bargaining agreement would give the Union a right to obtain copies of any and all contracts signed by the Company. That broad question is not before me. Rather, I conclude that the Union is entitled to access to this particular contract because the Company has both been engaged in a practice that raises a reasonable concern that it has entered into a contact with Worldwide Logistics that may be inconsistent with its obligations to the Union and has made vague and inconsistent representations regarding the nature and extent of its activities. I recognize that, as counsel for the Company points out, the Board declined to order production of agreements with subcontractors in *SBC Midwest*, 346 NLRB 62 (2005). In my view, the situation in that case was significantly different. The contracts were not sought pursuant to a clause in the labor agreement prohibiting the employer for entering into inconsistent agreements. Beyond this, the employer had already provided the union with a great deal of documentation concerning the extent of its subcontracting activities. By contrast, the employer in this case has provided virtually nothing. As discussed later in this decision, the evidence also shows that the Company actually destroyed relevant documentation even after becoming aware of the Union's request for it.

such a claim quite seriously. Very recently, it has summarized its analytical test for evaluating an invocation of this defense:

Under Board law, a party may refuse to furnish confidential information to the other party in a collective-bargaining relationship under certain conditions. Initially, the party must show that it has a legitimate and substantial confidentiality interest in the information sought. If this showing is made, the Board must weigh the party's interest in confidentiality against the requester's need for the information, and the balance must favor the party asserting confidentiality. Finally, even if these conditions are met, the party may not simply refuse to provide the requested information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality. [Citations omitted.]

Northern Indiana Public Service Co., 347 NLRB 117, 118 (2006). I will now apply this test.

At the first step, the Employer must demonstrate that it has a legitimate and substantial confidentiality interest in the contract with Worldwide. I conclude that it has failed to meet either prong of this standard. As to the legitimacy of the confidentiality defense, two things strike me as particularly significant.

It will be recalled that the Union presented its written request for a copy of the contract during the grievance meeting held on October 11. The Company drafted its response to this letter exactly 6 weeks later, a period of time that was clearly sufficient to afford it the opportunity to thoroughly consider and evaluate the Union's position and its own needs and objectives. The response was drafted by the parent company's associate chief counsel. The letter began by informing the Union that it constituted the Company's response to the information request. It then explained to the Union that it was not required to provide any of the information being sought because it was "in compliance with the terms of the [collective-bargaining agreement]." (GC Exh. 7, p. 1.) The letter concluded by observing that the information request was being rejected, "[f]or the reasons stated above." (GC Exh. 7, p. 2.) What is noteworthy about all this is that the explanatory letter made absolutely no claim of confidentiality.

After the Union filed its unfair labor practice charge, the Company submitted its position statement to the Board agent investigating the matter. This was prepared on January 4, 2006, by counsel for the Company. He informed the Board agent that the Company had a "twofold" response to the Union's charge. (GC Exh. 9, p. 4.) Those reasons were that the charge should be dismissed because the information being sought was irrelevant and, in some cases, that it did not exist. Nowhere in counsel's detailed exposition does the issue of confidentiality appear.

The Company first raised the issue of confidentiality in a letter to the Union dated February 14, 2006, written by counsel for the Company. Thus, the employer did not assert this defense until over 4 months after it had received the request for this item. Having belatedly raised the issue, the Company again asserted this defense in its answer to the complaint.

Although arising out of different contexts, the Board has had frequent occasion to comment on the inferences properly drawn

from belated assertions of employers' rationales. For example, in *Meaden Screw Products*, 336 NLRB 298, 302 (2001), it commented on an employer's tardy offering of an additional justification for the discharge of its employee, noting that

It is well established that shifting of defenses weakens the employer's case, because it raises the inference that the employer is "grasping for reasons" to justify an unlawful discharge. [Citation omitted.]

Similarly, when the employer in *Black Entertainment Television, Inc.*, 324 NLRB 1161 (1997), offered "shifting explanations" of its conduct, the Board observed that

The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted. [Citation omitted.]

In my view, the Company's failure to raise the issue of confidentiality in its first and second responses to the information request cast grave doubt on the legitimacy of this defense. Indeed, the Board has noted that, "the confidentiality claim must be *timely raised* and proven before the balancing test is triggered." *Mission Foods*, 345 NLRB 788, 793 (2005). (Emphasis added.) The timing of the Company's assertion of this defense leads me to draw a strong inference that it is merely a makeweight reason offered as a means to fend off the General Counsel's investigation and complaint. See, for example, *Desert Toyota*, 346 NLRB 118, 121 (2005) (belatedly adding "makeweight reasons" for employer's conduct suggests that employer was "simply making up its defenses as it went along.")

In *Mission Foods*, above, immediately after noting that a confidentiality claim must be timely raised, the Board observed that it must also be supported by appropriate proof. It added that, "a blanket claim of confidentiality will not satisfy the respondent's burden of proof." Shortly after deciding *Mission Foods*, the Board reiterated this point in *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005), holding that "[b]lanket claims of confidentiality in response to requests for relevant information are disfavored." (Citations omitted.)

As stated in *Mission Foods*, it is the Company's burden to present sufficient evidence to support its claim of confidentiality. In this case, it has utterly failed to do so. In first raising this defense, counsel for the Company simply stated that the contract "is highly confidential." (GC Exh. 9, p. 2.) By the same token, the Company's answer to the complaint merely claims that the information is "highly confidential." (GC Exh. 1e), p. 3.) Nowhere, including in the post trial brief, does counsel elaborate on this bare conclusion by explaining the reasoning supporting it.

Apart from the failure to present any argument in support of the asserted confidentiality defense, it would have been more important for the Company to have presented evidence as to this key point. At trial, the employer presented a single witness, the plant manager. Nowhere in his testimony did he raise any issue regarding the confidentiality of the agreement between the London bakery and Worldwide Logistics. Indeed,

neither the term "confidential" nor any of its derivatives or synonyms was mentioned in Baird's testimony. The Board holds that, "[t]he party asserting privacy or confidentiality has the burden of proof." *River Oaks Center for Children, Inc.*, supra at 1336. The Company has done nothing whatsoever to meet its burden. I decline to substitute speculation or guesswork for genuine evidence as to any potential harm to the Company from disclosure to the Union.¹⁷

Based on the utter failure of proof of any significant interest in confidentiality, coupled with the inferences raised by the tardy manner in which this issue was raised, I conclude that the Company does not possess a legitimate or substantial confidentiality interest that would lawfully preclude compliance with the Union's request for the contract with Worldwide Logistics.¹⁸

3. The existence of the information

In its request, the Union asked for statistical information that would shed light on the frequency of backhauling. This included the amount of product being shipped by this method, the price paid to Worldwide Logistics to cover the cost of such shipments, and the mileage being driven by Worldwide's drivers while making these deliveries. The Company contends that the evidence at trial demonstrated that it cannot comply with these requests because it does not have this information in its possession. Baird testified to this effect and, as counsel for the Company observes, "the Union has not presented any contradicting or rebuttal evidence on this matter." (R. Br. at p. 8.)

There are two difficulties with this argument. First, the evidence showed that some of the most probative information being sought did exist and was simply discarded by the Company. Second, the Company failed to conduct a search for the requested information in a manner consistent with its obligations under the Act.

It is evident that the most useful information from the Union's point-of-view would have been information showing the amount of baskets of baked goods actually transported from Owensboro to London by Worldwide's drivers. The undisputed evidence does indicate that the Company did not maintain records that directly set forth this information. Baird testified that the Company prepared records called "load sheets"¹⁹ that showed the total amount of product to be shipped between Owensboro and London, but did not create or possess records that differentiated between products shipped via the Louisville depot or products transported directly to London via backhaul. However, the inquiry cannot simply end there.

¹⁷ In this regard, it is noteworthy that there is no evidence that this Union has ever engaged in conduct harmful to any legitimate company interest in confidentiality. See *Pertec Computer*, 284 NLRB 810, 811 (1987), enfd. in pertinent part 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991) (disclosure ordered where, inter alia, "the Respondent has not shown the Union to be unreliable in respecting confidentiality agreements").

¹⁸ Because of this failure of proof, I need not reach the balancing of interests portion of the Board's test. In addition, I need not comment further on the failure of the Company to make any attempt at accommodation of the Union's need for the information. See *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004) ("[t]he burden of formulating a reasonable accommodation is on the employer").

¹⁹ An example of one of these load sheets is found at R. Exh. 3.

Baird testified that, in addition to load sheets containing the total amount of products shipped from Owensboro to London, the Company also maintained “transport sheet” forms that contained a schematic diagram of each transport trailer.²⁰ When goods were shipped from Owensboro to London, these transport sheets were annotated with information showing the precise amount of product contained in the trailer. Counsel for the General Counsel examined Baird regarding the impact of comparing the load sheets with the transport sheets:

COUNSEL: [I]f somebody had the load sheet for London for [a particular day] and had the transport sheet from the driver who is driving the product for London to the [Louisville] depot, could they not compare those two and see what is left over and thereby determine what, if anything, was backhauled directly from Owensboro to London?

BAIRD: If you have that paperwork, theoretically you could do that. [Tr. 112.]²¹

Thus, while it may be correct that the Company did not create a single piece of paper that showed the amount of product being backhauled, it did produce two pieces of paper which, when compared to each other, would reveal much of the desired information regarding the extent of the backhauling.

While the Company created these probative documents, it did not preserve them. Baird testified that it was routine corporate practice to destroy both load sheets and transport sheets 7 days after the deliveries were made. The uncontroverted evidence as to this point partially explains why the Company could not provide the entire record of load and transport sheets for the period of time requested by the Union. Unfortunately, after receiving the Union’s information request on October 11, the Company simply chose to continue its routine practice of destroying these documents 7 days after delivery of the goods. Counsel for the Union explored this point with Baird:

COUNSEL: Despite getting this request from the Union on October 11, 2005, requesting that information, you kept throwing the documents away, did you not?

BAIRD: Yes, I would say that is correct.

COUNSEL: You have continued to throw away the documents which would have provided an answer to that request to date?

BAIRD: We continued with our normal procedure, yes. [Tr. 124.]

I note that the Company drafted its first response to the Union’s information request on November 22, exactly 6 weeks after the request was given to Baird. Had it chosen to preserve the load and transport sheets once it was aware of the Union’s request, it could have provided the Union with those reports covering a substantial period of time. This would have greatly aided the Union in evaluating the quantity of backhauling and

would have represented a significant effort to comply with the Company’s statutory obligation. As counsel for the Union notes:

Although the Employer maintains that the records no longer exist, this cannot absolve it from its violation. For one thing, on any given day, seven days worth of records exist As of October 11, 2005 the Employer was on notice that the Union sought this information; therefore, for the Employer to continue disposing of its sole copy of the paperwork containing this information with knowledge that it was the subject of an information request cannot be excused. Even had the Employer disputed the relevance of the information, it was aware that it was sought and at that point was under an obligation to preserve the information pending determination of its relevance. [CP Br. at 9–10.]

I agree with this reasoning. By knowingly continuing to destroy documents containing key information being sought by the Union, the Company manufactured its inability to produce those records. It requires no citation to authority to conclude that an employer cannot defend against an alleged violation of Section 8(a)(5) by pleading that it is unable to produce the records that it knew were being sought because it threw them in the trash bin.

In my view, an equally important difficulty with the Company’s defense based on lack of possession of the requested information relates to the Company’s strikingly incomplete effort to locate and obtain that information. The Board requires far more than a mere cursory search effort. In particular, it is apparent from the evidence presented that the Company made no effort to determine whether the statistical data requested could be retrieved from its computerized databases. Baird testified that the Owensboro-to-London load sheets are generated by a computer located at another location and subsequently downloaded and printed at Owensboro. A glance at the sample load sheet introduced into the record confirms that it is a computer printout from something called the “Distribution Management System.” (R. Exh. 3.)

While Baird readily agreed that the load sheets are computer generated, he also made it very clear that the Company had done nothing to determine whether the information sought by the Union could be retrieved from that system. Counsel for the Union thoroughly explored this point with Baird:

COUNSEL: Okay. It is just a simple question. Has anybody checked to see if that—today, that information remains in the computer that originally generated it?

BAIRD: No, I am not aware.

COUNSEL: Never made any effort to determine whether those records could still be printed out again because the information is still on a hard drive somewhere?

BAIRD: I would say that is true. [Tr. 126.]

Indeed, the total inadequacy of the Company’s effort to locate and provide the information in its possession was illustrated by the fact that it chose to call Baird as its only witness, despite Baird’s blithe admission that “I am not a computer person, by any means.” (Tr. 126.)

²⁰ An example of one of these transport sheets is found at R. Exh. 4.

²¹ Counsel for the Company acknowledged the accuracy of this testimony in his brief. (R. Br. at 6.) Baird also testified that the Company never dispatched more than one truck per day to Louisville for the purpose of cross-docking with London. As a result, the calculations involved are quite straightforward.

Because the uncontroverted evidence demonstrates that the Company has maintained relevant records on an electronic database and failed to make any effort whatsoever to locate and retrieve those records, I find that it failed to meet its statutory obligation.

Beyond this lies another failure. The Board has clearly articulated a requirement that an employer faced with a request for relevant information may not arbitrarily limit its search to its own corporate premises. Where appropriate, the statutory duty includes the duty to seek the information from its parent company, its sister subsidiaries, and even its subcontractors. Several examples illustrate the breadth of the duty involved.

In *United Graphics*, 281 NLRB 463 (1986), the union sought information regarding non-bargaining unit employees supplied to the company by a subcontractor. In response, the company contended that it did not possess this information regarding persons whom it did not employ. The Board rejected this defense, holding that

[T]here is no evidence that the Respondent has requested [the subcontractor] to provide it with the information that the Union has sought. The Respondent thus has failed to demonstrate that such information is unavailable. [Footnotes omitted. *Id.* at 466.]

The Board rejected a similar defense in *Arch of West Virginia, Inc.*, 304 NLRB 1089 (1991), citing *United Graphics*, and observing that:

[T]he Respondent has not shown that it has requested any information from its parent corporation and sister subsidiaries and that they have refused to provide the Respondent with such additional information. Under these circumstances, the Respondent has failed to demonstrate that such information is unavailable. [*Id.* 1089 at fn. 1.]

See also *Public Service Co. of Colorado*, 301 NLRB 238, 246–247 (1991) (the 8(a)(5) violation where company failed to request information from its subcontractor).

An interesting discussion of the scope of the Board's precedents regarding an employer's duty to make a thorough search for relevant requested information is found in *Congreso de Uniones Industriales de Puerto Rico v. NLRB*, 966 F.2d 36 (1st Cir. 1992). In that case, the Board had declined to require an employer to obtain a copy of a contract that was within the possession of its parent company. The Court of Appeals reversed, noting that

[W]e do not see how the Board can square its decision here with a substantial line of Board authority requiring an employer, confronted with an information request, to make reasonable efforts to obtain the relevant information from another corporation, such as a parent company. [Citations, including those to *Arch of West Virginia* and *United Graphics*, omitted.] *Id.* at 37.]

In particular, the Court quoted from another Board decision, *Firemen & Oilers Local 288 (Diversity Wyandott)*, 302 NLRB 1008, 1008–1009 (1991), where it was held that

[W]e have extended the employer's duty to supply relevant information during grievance processing to situations where

that information is not in the employer's possession, but where the information likely can be obtained from a third party with whom the employer has a business relationship that is directly implicated in the alleged breach of the collective-bargaining agreement.

On remand from the Court of Appeals, in a decision issued under a different caption, the Board concurred in the Court's analysis of its own precedents. *Rice Growers Assn.*, 312 NLRB 837 (1993).

In the case before me, the Company claims that it does not possess the information sought by the Union but has made no showing whatsoever that it has requested that information from its parent company, Sara Lee Bakery Group, Inc.,²² its sister subsidiary at London, or its subcontractor, Worldwide Logistics. As I have indicated, it is entirely possible that computer databases at other affiliated locations contain some or all of the desired information. It is also reasonable to infer that the subcontractor could possess such information as it could certainly be expected to keep records regarding the miles traveled by its drivers, the quantity of goods hauled, and the amounts charged for its services. Furthermore, Baird conceded that Worldwide may also maintain other records, such as driver logbooks, that could be probative. When asked whether such logs may exist, Baird replied, "well, that would be a question for Worldwide, but I would think so." (Tr. 117.)

In sum, I conclude that the Company's defense that it does not possess much of the statistical information being sought is unavailing because the Company utterly failed to conduct a good-faith inquiry to determine whether it possesses such records in electronic form, whether its parent company possesses the records, whether its sister facilities in London and Louisville have them, or whether its subcontractor has those types of records or similar information related to the Union's request. This failure to conduct a reasonable inquiry constituted a violation of Section 8(a)(5) of the Act.

4. The Union's alleged waiver

In its answer to the complaint, the Company raised a defense, claiming that

The Union waived its right to insist on production of the disputed information because the Company offered to negotiate with the Union to accommodate its needs, and the Union did not engage in such negotiations. [GC Exh. 1(e), p. 3.]

Although the Company has not addressed this defense in its brief, I will comment on it.

The Company's only witness, Baird, never testified that the Company made any offer, verbal or written, to negotiate with the Union regarding the information requested by letter on October 11. The only conceivable offer must therefore be con-

²² This is true despite the active role of the parent company in this case. For example, the initial response to the Union's information request was sent by Sara Lee Bakery Group's associate chief counsel on Sara Lee letterhead. (GC Exh. 7.) And, the brief filed by counsel for the employer is captioned, "Post-Hearing Brief of Sara Lee Bakery Group, Inc." (R. Br. at 1.)

tained in either of the Company's written responses to the October 11 letter.

The first response, prepared by Sara Lee's associate chief counsel, made no explicit offer to discuss the information request. It concluded with this flat assertion: "For the reasons stated above, we decline to provide you with the documentation that you have requested. If you have additional questions pertaining to this matter, please contact me." (GC Exh. 7, p. 2.)

The second and final response was drafted by counsel for the Company. It provided a small portion of the information requested and gave its reasons for refusing to provide the remaining items. Once again, it contained no explicit offer to negotiate. The letter concluded with this language:

We believe that the information contained in this letter satisfies the Company's obligation to respond to your information request. As always, the Company remains willing to negotiate with your Union as to any additional information you may contend you need to carry out your duty to represent members of the Owensboro bargaining unit. [GC Exh. 9, p. 2.]

Very recently, Board Member Liebman had occasion to comment on the assertion of a similar claim of waiver. In *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006), the employer raised a defense of confidentiality and contended that it had made a satisfactory offer to accommodate the Union's need for the information. In her dissenting opinion in that case, Member Liebman noted,

[The employer] argues only that it met its duty to accommodate by ending its letter with "Please contact me if I can be of further assistance in this matter." Not surprisingly, [the employer] has provided no support for the proposition that such a formal pleasantry constitutes a legally adequate offer of accommodation, and the majority does not contend that it suffices. [Id. 222 fn. 19.]

In this case, the similar formal pleasantries are even less persuasive. The example quoted by Member Liebman at least referred to further assistance in "this matter." By contrast, the closing remarks in the final response from the Company specifically referred to "additional information you may contend you need." I find it evident that these remarks were mere pleasantries devoid of substantive meaning, and simply represented an offer to respond to any new requests for information by the Union. Neither written response by the Company contained any offer to negotiate regarding the information already being sought by the Union.

Because the Company never offered to negotiate regarding the Union's information request of October 11, the Union could not, and did not, waive its right to seek that information.

5. The issue of unreasonable delay

After initially denying all of the Union's requests for information, the Company eventually relented so far as to provide the identifying information about Worldwide Logistics that had been requested. The request had been made on October 11, 2005. The information was provided on February 14, 2006, slightly over 4 months after it was requested. The General Counsel contends that this constituted a violation of the Act as

it represented an unreasonable delay in responding to the Union's request.

Regarding an employer's duty in this sphere, the Board holds:

An employer must respond to the information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. [Citations omitted.]

Amersig Graphics, Inc., 334 NLRB 880, 885 (2001). The Board recently summarized the standard that it employs in assessing a claim of unreasonable delay:

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 as circumstances allow. 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. [Internal quotation marks and citations omitted.]

West Penn Power Co., 339 NLRB 585, 587 (2003), enf. in pertinent part 349 F.3d 233 (4th Cir. 2005).

In this case, application of this analytic test is simple. The information being sought, the identity and contact information for Worldwide Logistics, was easily available, probably through a simple telephone call from the Owensboro bakery to the London bakery. There is no reason offered for the delay. I find that the Company's provision of the information 4 months after it was requested was an unreasonable delay in responding to a simple, straightforward request. As such, it constituted a violation of the Act.²³

CONCLUSIONS OF LAW

1. By failing and refusing to provide relevant information requested by the Union on October 11, 2005, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By unreasonably delaying its provision of other relevant information requested by the Union on October 11, 2005, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

²³ Compare to *Island Creek Coal Co.*, 292 NLRB 480, 491 (1989), enf. 899 F.2d 1222 (6th Cir. 1990), where the Board found a 2-month delay in providing production forecasts to be an unreasonable delay.

In particular, having found that the Company failed to take several steps that are reasonably designed to comply with the Union's information request, I will order them to take these measures to locate and furnish the information being sought.²⁴ I will direct that the Company make a diligent search of all computerized databases maintained by the Owensboro bakery, the London bakery, the parent organization, and any other relevant related corporate entities in order to locate and provide the information sought by the Union. I will further direct that the Company file a certification by an official with supervisory responsibilities in the Company's information technology area describing the nature and extent of this search and the outcome of it. I will also direct that the Company request the information being sought by the Union from its parent company, its appropriate sister subsidiaries, and from Worldwide Logistics and, if necessary, from its parent company, UPS Supply Chain Logistics. Once again, I will order that the Company provide a certification that it has made these requests and a description of the results.

One further matter must be addressed. Counsel for the General Counsel has requested additional extraordinary remedies; namely that the Company be ordered to "post an appropriate notice to its employees at all of its facilities and mail said notice to all of its employees." (GC Br. at. 10.) Frankly, I am perplexed at the nature of this request for a very broad remedy involving approximately 50 nationwide locations and many employees. Neither at the trial of this matter nor in the posttrial brief does counsel for the General Counsel provide any explanation of the need for such extraordinary relief. Nor does he cite any authority that would justify these forms of relief in the circumstances presented.

I recognize that this employer has previously been found to have violated the information requirements of Section 8(a)(5) of the Act. See: *Earthgrains Baking Cos.*, 327 NLRB 605 (1999). However, that case involved a failure to provide pricing information at one facility located in California. Counsel for the General Counsel does not cite any other indicia of a pattern of unlawful behavior. In my view, this case is similar to, albeit far less compelling than, the situation discussed by the Board in *Beverly Health & Rehabilitation Services*, 339 NLRB 1243 (2003). In that case, the employer had numerous prior instances of unlawful conduct. Nevertheless, the Board declined to impose the sort of extraordinary remedies suggested here, noting that, "this case involves discrete violations at an individual facility. . . traditional remedies are [those] warranted." *Id.* at 1244. I reach the same conclusion here, finding that the posting of a notice at the Owensboro bakery is well calculated to achieve the remedial purpose being sought by counsel for the General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

²⁴ In drafting this portion of my recommended order, I will adapt language used by the Board in a similar situation in *Garcia Trucking Service*, 342 NLRB 764 fn. 1 (2004).

²⁵ 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

ORDER

The Respondent, the Earthgrains Company, Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Chauffeurs, Teamsters and Helpers Local Union No. 215, a/w International Brotherhood of Teamsters (Local 215) by refusing to furnish Local 215 with the information requested in paragraphs 2, 3, 4, and 5 of the request dated October 11, 2005.

(b) Refusing to bargain collectively with Local 215 by unreasonably delaying its response to the information requested in paragraph 1 of the request dated October 11, 2005.

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

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

(a) Furnish Local 215 with the information within its possession that was requested in paragraphs 2, 3, 4, and 5 of the request dated October 11, 2005, make a reasonable effort to secure any unavailable information, and, if any information remains unavailable, explain and document the reasons for its continued unavailability.

(b) Within 21 days of the date of this Order, file with the Regional Director for Region 25, a sworn certification of a supervisory official with responsibilities in the area of information technology, setting forth the efforts made to retrieve the information requested by Local 215 in its letter of October 11, 2005, from the Company's computerized and electronic databases.

(c) Within 21 days of the date of this order, file with the Regional Director for Region 25, a sworn certification of a responsible company official setting forth the efforts made to obtain the information sought by Local 215 in its letter of October 11, 2005, from its parent company, Sara Lee Bakery Group, Inc., its appropriate sister subsidiaries including the facility located in London, Kentucky, and from its contracting party, Worldwide Logistics, and, if necessary, from its parent company, UPS Supply Chain Logistics.

(d) Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky, copies of the attached notice marked "Appendix"²⁶ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Re-

adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 11, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. To the extent appropriate, this certification may incorporate by reference the additional certifications required in paragraphs 2(b) and 2(c) above.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with Chauffeurs, Teamsters and Helpers Local Union No. 215, a/w International Brotherhood of Teamsters (Local 215) by failing and refusing to provide relevant information requested by Local 215.

WE WILL NOT refuse to bargain collectively with Local 215 by unreasonably delaying our provision of relevant information requested by Local 215.

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

WE WILL promptly furnish Local 215 with all of the information requested in its October 11, 2005 information request letter. If we are unable to locate any of the information requested, WE WILL explain and document the reasons for the unavailability of such information.

THE EARTHGRAINS COMPANY