*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**The New York Presbyterian Hospital *and* New York State Nurses Association.** Case 2–CA–38512

April 29, 2009

## DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On December 8, 2008, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party each filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief and a reply brief. The General Counsel and the Charging Party each filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified herein, and to adopt the recommended Order as modified.

We affirm the judge's findings that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to furnish the Union with requested information about nurse practitioners working at the Respondent's facility, including both bargaining unit nurse practitioners represented by the Union and nonunit nurse practitioners on the payroll of Columbia University. The information was relevant to the processing of a grievance alleging that the nonunit nurse practitioners performed bargaining unit work in contravention of restrictions set forth in the collective-bargaining agreement between the Respondent and the Union. The General Counsel and the Charging Party cross-except to the judge's failure to address an additional complaint allegation that the Respondent unlawfully refused to furnish the Union with all documents between the Respondent and Columbia University concerning the employment of nurse practitioners. For the same reasons set forth in the judge's decision regarding the relevance of other requested information about Columbia University nurse practitioners, we find that the Union met its burden of proving that this additional nonunit information was relevant to the pending grievance.[4] We therefore conclude that the Respondent unlawfully failed and refused to provide this information to the Union. We shall modify the Order accordingly.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The New York Presbyterian Hospital, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a).

"(a) Furnish the Union with the following information it requested regarding the identity and functions of nurse practitioners working in the Respondent's hospital:

"(1) The shifts worked of all nurse practitioners who are directly employed by the Respondent.

"(2) For the nurse practitioners who are on the payroll of Columbia University and assigned to work in the Hospital, their names, their dates of hire and/or termination, their job duties, their departments or areas of work, their shifts, and whether they are full-time or part-time workers.

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[1] 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 Liebman and Member Schaumber 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.

[2] The Respondent 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.

[3] The Respondent has asserted that the Union's request for information should be deferred to the parties' contractual grievance-arbitration procedures. Member Schaumber agrees with the judge that deferral is inappropriate in this case because an arbitrator has already refused to rule on the Union's subpoena demand for production of this information. The judge further stated that 8(a)(5) allegations of a failure to provide requested information are not deferrable pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). See, e.g., *Shaw's Supermarkets*, 339 NLRB 871, 871 (2003). Member Schaumber would defer information request allegations to arbitration in appropriate cases. See *Team Clean, Inc*., 348 NLRB 1231 fn. 1 (2005). He recognizes, however, that Board precedent is to the contrary. Accordingly, for institutional reasons, he concurs in finding on this additional basis that the information request allegation at issue should not be deferred to arbitration. See also *Daimler Chrysler Corp*., 344 NLRB 1324 fn. 1 (2005); *SBC California*, 344 NLRB 243 fn. 3 (2005).

[4] In finding that the Respondent violated Sec. 8(a)(5) by refusing to provide requested nonunit information, Member Schaumber finds that the parties' communications about the Union's grievance sufficiently demonstrated to the Respondent that the Union had an objective basis for believing that the requested information was necessary for, and relevant to, the processing of the grievance.

"(3) All documents between the Respondent and Columbia University Medical Center and/or Trustees of Columbia University concerning the employment of nurse practitioners."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 29, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to furnish to the Union information relating to the grievance/arbitration process and that is relevant to the administration of our collective-bargaining agreement with the Union.

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

WE WILL furnish to the Union updated and current information as to shifts worked by all nurse practitioners on our payroll and information for all other nurse practitioners who work on our premises as will show their names, their dates of hire and/or termination, their job duties, their departments or areas of work, their shifts, and whether they are full-time or part-time workers.

WE WILL furnish to the Union all documents between The New York Presbyterian Hospital and Columbia University Medical Center and/or Trustees of Columbia University concerning the employment of nurse practitioners in our hospital.

THE NEW YORK PRESBYTERIAN HOSPITAL

*Simon-Jon H. Koike, Esq.,* for the General Counsel.
*James Frank, Esq., Steven M. Swirsky, Esq.,* and *Terence McGuire, Esq.,* for the Respondent.
*Elizabeth Orfan, Esq.,* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York on September 3, 4, 9, and 10, 2008. The charge and the first amended charge were filed on October 31, 2007, and January 24, 2008. The complaint was issued on May 30, 2008, and as amended at the hearing, alleged as follows:

1. That since on or about October 25, 2007, the Respondent has violated Section 8(a)(5) by refusing the Union's request for the following information requested on October 11, 2007.

> (a) All documents between Respondent and Columbia University Medical Center and/or all documents between the Respondent and Trustees of Columbia University concerning the employment of nurse practitioners for the period January 1, 2004 to date.
>
> (b) All documents which show the shifts worked of all nurse practitioners designated as union represented employees.
>
> (c) All documents which show the names, titles, unit worked, shifts worked, status as full or part time, and date of hire and date of termination of all nurse practitioners who are not designated as union represented employees working on the premises of the Respondent for the period January 1, 2004 to date.
>
> (d) Job descriptions for union and non-union nurse practitioners.

Among other things, the principle contention of the Respondent is that the nurse practitioners, about whom information is being sought, are employed by Columbia University and not by the Respondent. As such, it contends (a) that these particular nurse practitioners are not in the bargaining unit; (b) that Columbia University has refused to divulge this information to the Respondent; (c) that the Respondent does not have any obligation to provide information regarding these nonunit employees; and (d) that the Respondent does not have the information.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

### I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the

[1] With one exception, the Respondent's unopposed motion to correct the transcript is granted. However, on p. 105 L. 22 (not L. 23), the transcript should read: "MR. FRANK: We don't have job titles."

Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The New York Presbyterian Hospital (the Hospital) is a huge metropolitan hospital encompassing 6 main buildings plus about 10 satellite clinics. These are located mainly in the Washington Heights section of Manhattan. The Hospital employs about 2600 bargaining unit nurses.

The Respondent is also a teaching hospital. Accordingly, it has an affiliation with the Columbia University School of Medicine (School of Medicine). The School of Medicine in turn is one of many schools operated by the University. (Columbia University has an undergraduate college plus numerous graduate schools such as the School of Medicine, the School of Nursing, the School of Social Work, and the School of Law.)

In terms of the relationship between the Respondent Hospital and the Columbia School of Medicine, all or almost all of the physicians who perform medical services for patients at the Hospital are on the faculty of Columbia University and are directly employed by that institution. (Columbia University is a not-for-profit entity and is one of the major private universities in the country). Also, although not involved in the present case, nurse faculty of the School of Nursing also work at the Hospital as this is a venue for teaching nurses.

The Columbia University School of Medicine is not alleged as a Respondent in this case and therefore I take it that for purposes of this proceeding, the General Counsel is not alleging that Columbia University and the Respondent constitutes a single employer, a joint employer, an alter ego, or a joint venture.

The parties agree that since 1973, the New York State Nurses Association and the Respondent have had a collective-bargaining relationship covering various classifications of nurses, including nurse practitioners. The Union was first certified by the New York State Labor Board and later by the NLRB.

The parties further agree that for many years, the Union has represented a category of people now called nurse practitioners who have been direct employees of the Respondent Hospital. Thus, although this term has not been used in the collective-bargaining agreement, the parties concur that they are encompassed by the category of clinical nurse VI.

Introduced into evidence were several successive collective-bargaining agreements, the last of which was effective for the period from January 1, 2007, through December 31, 2010.

In all of these contracts, article 1, entitled Agreement Scope, states inter alia that the agreement covers all full-time and regularly employed part-time professional nurses, per diem nurses, and individuals authorized to practice as registered professional nurses employed by New York Presbyterian Hospital, Columbia Presbyterian Medical Center in a variety of titles including clinical nurse VI (which encompasses nurse practitioners), *but excluding* various supervisory and managerial people who hold nursing degrees as well as all office clerical, managerial and supervisory employees as well as confidential employees, and security employees.

These contracts also contain a standard union-security clause requiring membership after 30 days of employment.

In addition, all of these contracts have a side letter which contains the following provision:

> 4. Except for certification, training or experimentation and emergencies, registered nurses who are outside of the bargaining unit will not routinely or consistently perform those clinical duties normally performed by members of this bargaining unit.

Nurse practitioners are people who are licensed nurses who have gone further in their education to obtain an advanced degree and certification that allows them to perform, some, but not all of the functions normally done by a physician in a particular field of practice. (For example, in emergency rooms or in intensive care units.)

New York State statutes define the permissible functions of registered professional nurses, licensed practical nurses, and nurse practitioners. Under the law, a certified nurse practitioner may diagnose illness and physical conditions and perform "therapeutic and corrective measures within a specialty or practice, in collaboration with a licensed physician qualified to collaborate in the specialty involved; provided such services are performed in accordance with a written practice agreement and written practice protocols. The written practice agreement shall include explicit provisions for the resolution of any disagreement between the collaborating physician and the nurse practitioner regarding a matter of diagnosis or treatment that is within the scope of the practice of both. To the extent the collaborating practice agreement does not so provide, then the collaborating physician's diagnosis or treatment shall prevail."

For many years, the Hospital has employed a group of nurse practitioners who have performed their services for patients located in the Hospital. It is not clear exactly when, but it seems that in or about 2004, a small group of nurse practitioners began to be seen in the Hospital performing medical services for patients located in the Hospital but who were not directly employed by the Respondent. Rather, this group of nurse practitioners, which seems to have grown over time, was put on the payroll of Columbia University School of Medicine.

Union Representative Roberta Murphy testified that in the spring of 2004, she learned that there was a nurse practitioner in one of the Hospital's departments who was not in the Union and that this person was an employee of Columbia University School of Medicine. Murphy states that when she investigated the matter, she discovered that there were about seven other nurse practitioners who were working in the hospital in various medical departments but who were employed not by the Hospital but by the University.

On June 4, 2004, the Union filed a grievance. In substance, this stated that the Hospital violated the contract in relation to, but not limited to "Section 1, Agreement Scope." It states that the "hospital has hired nurse practitioners in a nonunion capacity to do bargaining unit work." As a remedy, the grievance states: "Make whole. Make nurse practitioners union positions."

By letter dated May 18, 2005, Stacie Williams, Respondent's manager of human resources, wrote to Roberta Murphy as follows:

> This letter is in response to the above referenced Association grievance.
>
> Please be advised that the individuals you are referring to are Columbia University employees, not Hospital employees. They do not fall within the Hospital's span of control nor are the governed by the Hospital's Policies and Procedures.
>
> Therefore, this grievance is denied.

Murphy testified she had several meetings with management and that the Respondent consistently took the position that the grievance lacked merit because the nurse practitioners involved were not covered by the collective-bargaining agreement. The Respondent claimed that these people were not employees of the Hospital but rather were employees of the University.

On August 31, 2006, the Union filed a charge in Case 2–CA–37868 against both the Hospital and the University. This alleged that the Hospital and the trustees of Columbia University were a single employer or alter egos and that they had restrained and coerced nurse practitioners at New York Presbyterian Hospital by employing nurse practitioners to work at the Hospital under terms and conditions of employment different from those specified in the collective-bargaining agreement. The charge further alleged that the Hospital and the University, as a single employer or alter ego, discriminated against employees based on their union affiliation or membership by not applying the terms and conditions of employment specified in the agreement between the Nurses Association and the Hospital.

By letter dated October 23, 2006, the Regional Director informed all of the parties to the above-referenced charge that she was deferring any further processing of the charge to arbitration.

By letter dated October 30, 2006, Michael T. McGrath, attorney for Columbia University, wrote to counsels for the Union and the Hospital. In substance, he stated that in relation to Case 2–CA–37868, the University, as a nonsignatory to the collective-bargaining agreement, although not objecting to the Board's deferral of the matter, it would not participate, as a party, in any arbitration, nor would it be bound to any award or agreement resulting from such arbitration. The letter advised both counsels that the University would advise the NLRB of its position regarding the arbitration proceeding.

On February 27, 2007, the Union, by its counsel issued a subpoena duces tecum, to Bart Minsky of New York Presbyterian. (Pursuant to sec. 2308(b) of the New York Civil Practice Law and Rules.) This demanded that he appear at the arbitration hearing and produce the following documents:

> 1. All documents between New York Presbyterian Hospital and Columbia University Medical Center and/or the Trustees of Columbia University . . . concerning employment of nurse practitioners for the period January 1, 2004 to date.
>
> 2. Documents as will show the (a) names, (b) titles, (c) unit(s) assignments, (d) shift(s) worked and (e) date of hire/termination date of all nurse practitioners designated as NYSNA represented employees.
>
> 3. Documents as will show the: (a) names, (b) titles, (c) unit(s) assignments, (d) shift(s) worked and (e) date of hire/termination date of all nurse practitioners who are *not* designated as NYSNA represented employees working on the premises of New York Presbyterian Hospital for the period January 1, 2004 to date.
>
> 4. Documents as will show the job description and/or duties for each Nurse Practitioner in items #2 and #3 above.
>
> 5. Documents as will show (a) names, (b) titles, (c) unit(s) assignments, (d) shift(s) worked and (e) date of hire/termination date for any nurse practitioner who has worked at New York Presbyterian Hospital in the period January 1, 2004 to date who has been at any time designated as an employee of Columbia University Medical Center and/or Trustees of Colombia University in the City of New York.
>
> 6. Documents as will show the salary/wages and benefits of all Nurse Practitioners not currently represented by NYSNA as set for in item #3 for the period January 1, 2004 to date.

It seems that the arbitrator designated to hear the case was ill and the hearing was postponed. Therefore, there is no evidence that the Respondent refused, at that time, to provide the information requested by the subpoena.

By letter dated May 31, 2007, James Frank, attorney for the Respondent, wrote to Elbert Tellem and stated that the arbitration had been rescheduled to October 25, 2007, and that the arbitrator was Jonas Aarons. As far as I know, Columbia University was not given notice of the hearing and was not invited to attend.

The Union's demand for arbitration states:

> Nature of Dispute: Association Grievance—Grievance #73873: Violation of the Collective Bargaining Agreement, including but not limited to Section 1—Agreement Scope. The employer has violated the Collective Bargaining Agreement by employing non-union nurse practitioners to perform bargaining unit work of union nurse practitioners.
>
> Claim or Relief sought: 1) the employer will cease and desist employing non union nurse practitioners. 2) Make the non-union nurse practitioners union employees. 3) Make registered nurses whole for any and all losses incurred.

On October 10, 2007, the Union issued another subpoena in the arbitration case. This subpoena demanded that the Hospital produce many of the same documents that had previously been requested on February 27, 2007. However, the subpoena additionally called for the production of another set of documents that could relate to the Union's contention that the Hospital and the University were either an alter ego, a single employer, or joint employers.

By letter dated October 11, 2007, the Union requested information from Stacie Williams, the Hospital's director of labor relations. This basically was a request for the same information

that was requested by the subpoena, except that it did not request information regarding the relationship between the Respondent Hospital and Columbia University. Thus, if one could categorize the information requested by this letter, it would be information that would show, *irrespective of who was their employer*, **(a)** who were the nurse practitioners who worked in the hospital; **(b)** when were they hired or terminated; **(c)** what jobs they were assigned to do; **(d)** which departments or areas of the hospital were they assigned to work; **(e)** were they full-time or part time workers; and **(f)** on what shifts did they work.

With respect to this information request, it is admitted by the General Counsel that the information regarding nurse practitioners who are employees of the Respondent, had been, for the most part, turned over to the Union in other contexts. The only information that the General Counsel asserts was not turned over was in response to the request for the shifts worked by the Respondent's nurse practitioners. The Respondent's position on this was that the omission was inadvertent. (But if inadvertent, why has the Respondent still failed to furnish this information?)

By letter dated October 24, 2007, the Respondent, by its counsel, asked the union counsel to withdraw the subpoena. (This apparently is the procedure required under New York's Civil Practice rules.)

The arbitration hearing opened on October 25, 2007 (without the presence of Columbia University), and the parties presented arguments about the appropriateness of the information demanded by the subpoena. For better or worse, there was no transcript made. But the Union's witness testified, without contradiction, that the arbitrator simply refused to decide the issue. Thus, although the Respondent's counsel asserted at the outset of this hearing, that the arbitrator decided against the Union and that the arbitrator concluded that the subpoenaed information was not relevant, this was not shown to be the case.

After presenting evidence in the arbitration case, the Union, because of the refusal of the Respondent to turn over the information requested, asked for an adjournment. And on October 31, 2007, the Union filed the instant charge which is now before me.

In the course of the investigation, the Respondent asserted that it did not have the information requested about the nurse practitioners who were employees of Columbia University. The Region suggested that perhaps the Respondent might request Columbia University to provide that information to the Respondent which could then be forwarded to the Union. This was done on March 14, 2008. And by letter dated April 3, 2008, counsel for the University replied. In pertinent part, he stated:

> As we previously advised you and counsel for NYSNA, [the Union], Columbia is not a signatory to the collective bargaining agreement between the Hospital and NYSNA; nor is it a party to the arbitration; nor will it be bound by the outcome of that proceeding. Accordingly Columbia is under no obligation to respond to your request or to the subpoena. Nevertheless, in an effort to assist the Hospital and NYSNA in their resolution of this matter, but without waiving any of its rights, Columbia provides the following information.
>
> Response to Inquiry No. 1
>
> We are unaware of any "documents between" the Hospital and the University . . . as that phrase is undefined in the Subpoena. We note, however, that several of the University Faculty Practices employ, inter alia, Nurse Practitioners to support those practices. Some of these NP's work in buildings or on floors, (or in portions of floors), that are controlled by the Hospital. Those NP's are employees of the University. Consequently, the terms and condition of their employment are set by the University. Additionally, we are aware that the Hospital contracts with certain faculty of the School of Nursing for the provision of NP services at the Hospital. It is my understanding that all such NP's are now credentialed through the Hospital's Nursing Office. The Hospital has those records to the extent that they are responsive to this request.
>
> Response to Inquiry No 2
>
> (Documents showing the names, titles etc of union represented nurse practitioners). Not applicable. Inquiry No. 2 addresses Hospital employees.
>
> Response to Inquiry No. 3
>
> (Documents showing names, titles, etc on nurse practitioners who are not designated as union represented employees working at the Hospital). Not applicable. Inquiry No. 3 addresses Hospital employees. (The letter indicates that University Counsel did not interpret the letter as asking for information regarding University employees).
>
> Response to Inquiry No. 4
>
> See response to Inquiry 2 and 3.
>
> Response to Inquiry No. 5
>
> To the extent that this inquiry refers to NP's who are employed in University Faculty Practices but work in buildings or on floors, (or in portions of floors), that are controlled by the Hospital, or to the contracts between the School of Nursing and the Hospital for NP services, we believe that the Hospital has potentially responsive documents in the credentialing files of such NPs.
>
> Response to Inquiry No 6
>
> See response to inquiry 3 above. (This was request for salary and benefits of non-union Nurse practitioners).
>
> Response to Inquiry No. 7
>
> See response to inquiries 1 through 6 above. (This was request for any other documents concerning nurse practitioners not represented by the Union).

The University's letter goes on to respond to items in the Union's subpoena relating to the issue of joint employer, alter ego, or single employer. With respect to certain information relating to the University, counsel referred to the filing of IRS form 990s. He states that Columbia University is a not-for-profit organization and that accordingly, there are no owners, no directors, and no shareholders. The letter states that it shares no common labor relations policies with the Hospital and that

Columbia's chief labor relations official is Sheila Garvey, who since April 2007, has been the assistant vice president of labor relations. The letter also states that the University's chief human resources official is Lucinda Durning, who has been the vice president of human resources since July 2006.

Ultimately, the complaint in this case was issued on May 20, 2008. It should be noted that the complaint alleges that the Respondent refused to furnish some, but not all of the information that the Union sought during the arbitration proceeding. Thus, the complaint does not allege that the Respondent refused to furnish information relating to the possible joint- or single-employer relationship between the Respondent and Columbia University. On the contrary, the complaint alleges only that the Respondent refused to furnish information that would identify the nurse practitioners on the payroll of Columbia University who actually performed nurse practitioner work in the Respondent's hospital and to indicate when they were employed, where in the Hospital they were assigned, what their shifts were, whether they were full- or part-time workers, and what jobs they were assigned to do. As to the nurse practitioners who were on the payroll of the Hospital, it is conceded that most of the information, except for identifying what shifts they worked, had been turned over to the Union at one time or another.

Although the Respondent has claimed that that it does not have information regarding the nurse practitioners who are on the University's payroll, the evidence shows otherwise.

In order to work at the Respondent's Hospital, a nurse practitioner, whether or not directly employed by the Hospital must be "credentialed." This means that at the end of a review process conducted by the Hospital, they would receive privileges to work in a specific area of medicine within the Hospital.

In order to obtain privileges, a nurse practitioner even if on the payroll of Columbia University, would have to submit the same information and forms that would have to be filled out by nurse practitioners that are employed directly by the Respondent. Thus, if a Columbia University nurse practitioner is going to be allowed to work on the Hospital's premises, he or she would need to first submit to the Respondent, directly or through someone at Columbia, the following documents: (a) a Collaborative Practice Agreement; (b) a form called "Delineation of Privileges;" (c) a "Scope of Practice Agreement;" (d) a "Verification of Practice Protocol;" and (e) a "Statement of Clinical Duties." The Collaborative Practice Agreement is a document signed by the physician under whom the nurse practitioner will be authorized to practice. This document lists the job duties that the nurse practitioner will be expected to perform at the hospital. *Thus, contrary to the Respondent's claim that it did not have possession of the information requested by the Union, all of these documents are kept by the Respondent and therefore are within the scope of its control*. They show among other things, the nurse practitioners' names (including those on Columbia University's payroll); the departments or units where the nurse practitioners are assigned to work; their job duties and their start dates at the Hospital.

Analysis

The information sought in the present case relates to the processing of a grievance that the Union filed against the Respondent. It therefore is information that is sought for the purpose of administering the collective-bargaining agreement. The legal test in these types of situations is whether the information is relevant to the grievance and the determination of relevancy is made based on a liberal, discovery type of standard. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 437 (1967); *Knappton Maritime Corp.,* 292 NLRB 236 (1985). Moreover, the fact that the information may even tend to disprove a grievance is as equally relevant as those situations where the information would tend to support a grievance. This is because the process of resolving grievances is served by the disclosure of information which will tend to resolve grievances one way or the other. *NLRB v. Acme Industrial Co*., supra; *Square D Electric Co*., 266 NLRB 795, 797 (1983); *Ohio Power Co.,* 216 NLRB 987, 991 (1975).

I note here that there is a somewhat different standard when information is sought about bargaining unit employees versus non-bargaining unit employees. The General Counsel's burden is lower when dealing with information about bargaining unit employees than when the information requested relates to non-bargaining unit people.

In *Sheraton Hartford Hotel,* 289 NLRB 463 (1984), the Board stated:

> Section 8(a)(5) obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the Union in fulfilling its statutory duties as bargaining representative. Where the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit the information is presumptively relevant. Where the information does not concern matters pertaining to the bargaining unit, the Union must show that the information is relevant. When the requested information does not pertain to matters relating to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information.

This does not mean that a union seeking information about nonbargaining unit people, has an inordinately high burden for establishing relevance. The Board has held that this burden can be met where a union has demonstrated the "'probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *Frito-Lay Inc.,* 333 NLRB 1296 (2001).

For example, in *ATC of Nevada*; 348 NLRB 796 (2006), the information requested by a union was similar to the information requested in the present case. The employer refused a union's request for information in relation to a grievance concerning the company's alleged use of nonunit employees to perform bargaining unit work. The union requested the names, addresses, telephone numbers, and dates of hire, of nonunit employees who had been assigned to perform bargaining unit work. Additionally, the union asked for the hours that these people worked while doing bargaining unit, and their rates of pay, including benefits, when they were assigned to do bargaining unit work.

The administrative law judge, in a Decision adopted by the Board, rejected the respondent's argument that it did not have to furnish this information because the information related to nonbargaining unit employees.

In *Postal Service,* 310 NLRB 391 (1993), the Board held that the employer, in the context of a grievance concerning a suspension for attendance irregularities, was required to turn over the timecards of supervisors where the absenteeism/lateness rules were the same for supervisors and bargaining unit employees. In that case the Board stated:

> Requests for information relating to persons outside the bargaining unit require a special demonstration of relevance. Thus, the requesting party must show that there is a logical foundation and a factual basis for its information request. The standard to be applied in determining the relevance of information relating to non-unit employees, is however, a liberal "discovery type standard." *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 437 (1967). And in applying this standard, the Board need find only a probability that the requested information is relevant and would be of use to the union in carrying out its statutory responsibilities.

The Union's grievance in this case relates to the alleged performance of bargaining unit work by certain individuals whom the Respondent asserts are not really its own employees. Nevertheless, the Union had obtained reliable information that these individuals (who happen to be on the payroll of Columbia University), performed work as nurse practitioners (a bargaining unit position), within the hospital for patients who are being treated in the hospital.[2] From any objective point of view, these people are doing the same type of functions, in the same place, for the same people, under the same supervision, under the same State laws and pursuant to the same type of privileges as the nurse practitioners who are directly employed by the Respondent.

On June 27, 2005, the Union in submitting the grievance to arbitration defined the dispute as follows:

> NATURE OF DISPUTE: Association Grievance—Grievance #73873: Violation of the Collective Bargaining Agreement, including but not limited to Section 1—Agreement Scope. The employer has violated the Collective Bargaining Agreement by employing non-union nurse practitioners to perform bargaining unit work of union nurse practitioners.

As noted above, the arbitration submission is mainly based on section 1 of the contract. But it is not limited to that section, which essentially defines what categories of the Respondent's employees are covered by the collective-bargaining agreement. There is also a side letter that is part of the collective-bargaining agreement that states:

> Except for certification, training or experimentation and emergencies, registered nurses who are outside of the bargaining unit will not routinely or consistently perform those clinical duties normally performed by members of this bargaining unit.

As in *ATC of Nevada,* supra, the Union here has filed a grievance alleging that the Respondent hospital has been utilizing a set of people who, while working on the Hospital's premises and performing services for its patients, have been doing bargaining unit work. The side letter could be construed as being analogous to a no-subcontracting clause and therefore be interpreted to preclude the Hospital from allowing such individuals to work on its premises if they do work traditionally done by its own employees. Assuming the legality of such a contractual provision, it is my opinion that the Union, in pursuing its contract breach claim, is entitled to know who these people are, what they do, what hours they work, when they were hired or fired, and where they are assigned to work.

The Respondent asserts as a defense that if the arbitrator rules in favor of the Union's grievance, this would be the equivalent of enforcing an illegal 8(e) hot cargo agreement. I don't agree.

For one thing, the Respondent could have filed an 8(e) charge and may have done so for all I know. But it is within the General Counsel's sole discretion to issue a complaint based on such a charge and no such complaint has been issued. I therefore am in no position to find that the Union's effort to enforce its contract by way of arbitration, would be a violation of Section 8(e) of the Act. That assertion is simply not within the purview of my jurisdiction.

Secondly, unions and employers are entitled to negotiate contracts that "preserve" unit work by way of no-subcontracting or similar clauses, *even if the enforcement of such agreements may cause the contracting employer to cease doing business with someone else*. This was made clear by the Supreme Court in *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612 (1967). And under the test defined by that case, the question is whether the particular contract provision has the purpose of preserving bargaining unit work for bargaining unit members or has the purpose of furthering union interests elsewhere. (Typically, a clause that seeks to compel a general contractor to require its subcontractor to adopt or sign a union contract covering its own employees would be construed as an 8(e) agreement.) For a more fully explicated discussion of Section 8(e), see my decision and the Board's opinion in *Heartland Industrial Partners, LLC,* 348 NLRB 1081 (2006).

In my opinion, neither the scope of agreement clause (art. 1), nor the side letter, can be construed as being facially invalid hot cargo clauses. The evidence shows that the Union was seeking to enforce its contract and require the Hospital to assign unit work to bargaining unit members who are employed by the Hospital. To the extent that the arbitrator might conclude that the Hospital breached the contract, he could, under the terms of the side letter, enjoin the Hospital from having nurse practitioners work on its premises who are not employed by the Hospital. Or it could mean that the arbitrator could issue an order recompensing the Union and the employees it represents in

[2] In establishing relevance, the union may rely on hearsay as the basis for its position regarding an asserted contract breach. *Magnet Coal*, 307 NLRB 444 fn. 3 (1992). See also *Mt Clemens General Hospital*, 344 NLRB 450, 463 (2005).

some other manner. (Perhaps by monetary damages for lost potential work.)[3]

Any breach of contract finding would be a matter for the arbitrator and not for me. Similarly, any potential remedy would be up to the arbitrator and reviewable by an appropriate judicial forum. None of that is within my purview. I am simply being asked to determine whether the information requested by the Union is relevant to the grievance/arbitration proceeding. If the Respondent doesn't like the provisions of its contract with the Union, it can always seek to alter, modify or change those terms when a new contract comes up for negotiation.

The Respondent contends that the complaint is barred by Section 10(b) of the Act. It bases this contention on the fact that the charge was filed more than 6 months after the Union issued the arbitration subpoena on February 27, 2007. This contention is rejected inasmuch as Section 10(b) does not run from the date that the information request is made but from the date that the Respondent unequivocally refuses to furnish the information. The evidence shows that a subpoena was issued in preparation for an arbitration hearing that was originally scheduled for March 2007. But because of the arbitrator's unavailability, that hearing was postponed until October. For the next hearing, the Union repeated its requests for the information and this was rejected by the Respondent on October 25, 2007. As the Respondent's unequivocal refusal occurred within 6 months of the charge being filed, I reject this defense.

In its brief, the Respondent contended that the nurse practitioners on the payroll of Columbia University were statutory supervisors. The Respondent made no such claim during the hearing and even it did, this would make no difference. The grievance issue is whether nonunit people were performing bargaining unit work. It is irrelevant if they are supervisors.

The Respondent contends that the laws of New York law prohibit disclosure of credentialing files. Notwithstanding the fact that Federal law in these circumstances would prevail, a legitimate confidentiality issue would present a problem if I was being asked to order the Respondent to turn over the raw files to the Union. (These files could contain recommendations from previous employers, information regarding patient complaints, employee evaluations and other material that would reasonably be construed as confidential and not particularly relevant to the grievance.) But it is not my intention to require the Respondent to turn over the files in their existing form. All I would propose is that only the information requested, be turned over and none of that information is deemed by me to be confidential in nature. This can be done either by furnishing redacted documents that are contained in the files or alternatively by separately compiling the relevant information for disclosure.

The Respondent contends that the Union had access to the information and could have gotten it by itself. This is simply not a valid defense and even if the Union could ascertain through alternative means, all of the information it sought, this does not excuse the Respondent's from its obligation to furnish relevant information when requested to do so.

The Respondent contends that the Board should defer this matter to the arbitrator and let the arbitrator decide whether to require the Respondent to furnish the information. This would be an interesting argument assuming that the arbitrator either had ruled on the information request/subpoena or had concluded that the information was neither relevant nor material to the Union's grievance. But the evidence is that the arbitrator refused to rule on the question and as a result, the Union asked the arbitrator for an adjournment and came to the Board to get the information. In any event, the current Board policy is not to defer cases involving information requests. See *Medco Health Solutions of Spokane, Inc.,* 352 NLRB 640, 641 (2008).[4]

Finally the Respondent contends that a settlement that was made in June 2004, regarding another grievance should bar the allegations in the present complaint. That grievance dealt with the misclassification of two nurses who were directly employed by the Hospital and in no way dealt with the question of whether nonbargaining unit people were assigned to do bargaining unit work. That was a completely different matter not relevant to the present case.

## CONCLUSIONS OF LAW

1. By refusing to furnish to the Union certain information regarding the identity and functions of nurse practitioners working at The New York Columbia Presbyterian Hospital, the Respondent has violated Section 8(a)(1) and (5) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(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.

As noted above, I shall recommend that the Respondent furnish nonconfidential information regarding the identity and status of various nurse practitioners who are assigned to work in the Hospital, whether or not they are directly employed by the Respondent. To the extent that information contained in such files is confidential as previously described, the information may be provided, either by redacting documents or by arranging with the Union to compile a separate document that would describe the relevant information.

[3] I do note that one issue that the Union raised in the arbitration proceeding was whether the Hospital and the University, vis a vis the nurse practitioners, were joint employers. If successful in this contention, then the Union would have a legitimate argument that the nurse practitioners who are on the University's payroll, should be covered by the collective-bargaining agreement, including the union-security clause. However, in the absence of the University as a party to the arbitration proceeding, it seems unlikely that an enforceable award could be issued to that effect.

[4] As a related matter, I am not being asked to and I am not enforcing a New York State subpoena. To the extent that the information was demanded by a subpoena, the question here is whether the Union, under the NLRA, is entitled to information relevant to the grievance process. The Board, pursuant to Sec. 8(a)(5) of the Act, is empowered to decide this question irrespective of whether the same information is demanded by a subpoena authorized under State laws.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, The New York Columbia Presbyterian Hospital, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish to the Union information relating to the processing of a grievance alleging that the Respondent has assigned bargaining unit work to nonbargaining unit individuals.

(b) In any like or related manner interfering with, restraining, or coercing employees in 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) Upon request, furnish to the Union the following information:

(1) The shifts worked of all nurse practitioners who are directly employed by the Respondent.

(2) For the nurse practitioners who are on the payroll of Columbia University and assigned to work in the Hospital, their names, their dates of hire and/or termination, their job duties, their departments or areas of work, their shifts, and whether they are full-time or part-time workers.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 25, 2007.

(c) 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.

Dated, Washington, D.C., December 8, 2008.

[5] 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.

[6] 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."

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.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to furnish to the New York State Nurses Association, information relating to grievance/arbitration process and that is relevant to the administration of our collective bargaining agreement with The New York Presbyterian Hospital.

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

WE WILL on request, furnish to the Union, updated and current information as to shifts worked by all nurse practitioners on our payroll and information for all other nurse practitioners who work on our premises as will show their names, their dates of hire and/or termination, their job duties, their departments or areas of work, their shifts, and whether they are full-time or part-time workers.

THE NEW YORK PRESBYTERIAN HOSPITAL