JD(SF)–42–09
North Highlands, CA

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

A-1 DOOR AND BUILDING SOLUTIONS

and **Case 20-CA-34364**

MILLMEN AND INDUSTRIAL CARPENTERS UNION, LOCAL 1618, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

***Cecily Adams-Vix, Esq.*, of San Francisco, CA., appearing on behalf of the General Counsel.**

***Gary Provencher, Esq. (Weinberg, Roger, & Rosenfeld), of Sacramento, C*A., appearing on behalf of the Charging Party.**

***E. Aubrey Hubbert, Jr., Esq. (Rediger, McHugh, &* Hubbert, LLP), of Sacramento, CA., appearing on behalf of the Respondent.**

DECISION

BURTON LITVACK: ADMINISTRATIVE LAW JUDGE

Statement of the Case

The unfair labor practice charge in the above-captioned matter was filed by Millmen and Industrial Carpenters Union, Local 1618, United Brotherhood of Carpenters and Joiners of America, herein called the Union, on March 11, 2009. After an investigation, on May 24, 2009, the Regional Director for Region 20 of the National Labor Relations Board, herein called the Board, issued a complaint, alleging that A-1 Door and Building Solutions, herein called Respondent, engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, which accompanied the instant complaint, the above-captioned matter came to trial before the above-named administrative law judge on September 2, 2009 in Sacramento, California.[1] At the trial, all parties were afforded the rights to examine and to cross-examine witnesses, to offer into the record any relevant documentary evidence, to argue their legal positions orally, and to file post-hearing briefs. Such briefs were filed by each of the parties, and they have been carefully scrutinized by me. Accordingly, based

[1] Unless otherwise noted, all events herein occurred during 2009.

upon the entire record herein, including the post-hearing briefs and my observations of the demeanor, while testifying, of each of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office and place of business located in North Highlands, California, is engaged in the business of manufacturing and/or supplying doors, windows, hardware, and millwork to residential and commercial construction contractors. During the calendar year ending December 31, 2008, which period is representative, Respondent, in conducting its above-described business operations, sold and shipped from its North Highlands, California facility, goods, valued in excess of $50,000, directly to customers located outside the State of California. At all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Labor Organization

At all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Issues

The complaint alleges, and the General Counsel argues, that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act by failing and refusing to provide to the Union necessary and relevant information, including copies of all documents in the personnel files for Daniel Carrasco and Vladimir Tishchenko and copies of any work performance evaluations for Eduardo Maravilla, Daniel Carrasco, and Vladimir Tishchenko from January 1, 2002 through December 31, 2005, and by, from about February 24, 2009 until about March 17, 2009, unnecessarily delaying in furnishing the Union with the work performance evaluations for the time period January 1, 2006 through December 31, 2008. Respondent denies the commission of the alleged unfair labor practices and affirmatively asserts that the requested information is protected from disclosure by Respondent under the Constitution and laws of the United States and by the State of California Constitution and that, by written agreement, the Union has waived its right to file the above unfair labor practice charge.

III. The Alleged Unfair Labor Practices

A. The Facts

Respondent, a corporation, manufactures doors, windows, and related products primarily for installation in residential properties and apartment buildings and in some commercial buildings and distributes its products in central and northern California and western Nevada. Dale Winchester is Respondent's president. The record discloses that Respondent and the Union, which represents Respondent's employees engaged in the manufacturing of its products, including the latter's shipping and receiving employees and forklift operators, have had a 40-year bargaining history, with the parties' most recent collective-bargaining agreement having expired by its terms on May 1, 2007, and that negotiations over a successor agreement became "stalled" over Respondent's refusal to accede to the Union's request to provide the latter with information concerning its profit-sharing plan, a matter which is currently the subject of unfair labor practice litigation before the Board. The record further discloses that from a peak of in excess of 150, the bargaining unit complement currently totals 30 employees. According to

Winchester, the decrease in the number of Respondent's production employees has been concomitant with the severe slowdown in the residential construction industry since September 2006.

The genesis of the events pertaining to the instant unfair labor practice allegations was a grievance filed by a former bargaining unit employee, Eduardo Maravilla, who had been employed by Respondent for 17 years and who was laid off on April 21, 2008. In his grievance, Maravilla asserted that he had been laid off in violation of the expired collective-bargaining agreement's seniority provision as, in selecting him for layoff, Respondent bypassed other employees working in his job classification who possessed less company seniority than him.[2] The record reveals that Respondent processed Maravilla's grievance through the various steps of the contractual grievance procedure; that, on or about October 20, 2008, the parties agreed to submit the grievance to arbitration;[3] and that, eventually, the arbitration hearing was scheduled to commence on March 17, 2009. The record further reveals that, just three weeks prior to the scheduled date for the arbitration hearing, by a letter dated February 24, David Imus, a business representative for the Northern California Carpenters Regional Council, sent a letter to Respondent's attorney, Anthony Hubbert, requesting certain information including "copies of any and all documents in the personnel files for Eduardo Maravilla, Daniel Carrasco, and Vladimir Tishchenko" and "copies of all employee evaluations since 1-1-2002 for Eduardo Maravilla, Daniel Carrasco, and Vladimir Tishchenko." Questioned as to the reasons underlying the Union's information requests, Imus testified ". . . when--considering the skill and ability clause that's within the seniority clause, we needed to look at the employee records for both [Carrasco and Tishchenko] to determine whether or not the company had done evaluations throughout the years . . . how were the least senior employees rated, what their skill and ability was, what was it over a period of time. . . ." Continuing, Imus testified that he believed the requested information was relevant for the arbitration ". . . because I was full aware that the company would make the claim that the two least senior people would have more skill and ability and I wanted to look at the personnel files to determine what evaluations and what documents were in there that might support or be detrimental to my case."[4]

On March 6, in a letter on behalf of Respondent, another attorney, Robert L. Rediger, who works for the same law firm as Hubbert, enclosed copies of all the documents in Maravilla's personnel file but declined Imus's request for documents in the personnel files of Carrasco and Tishchenko on grounds that said request was "overly broad," sought "irrelevant information," and violated the two employees' "rights of privacy" pursuant to the United States Constitution and the State of California Constitution. Further, Rediger refused Imus's request for copies of Maravilla's Carrasco's and Tishchenko's work performance evaluations on grounds that said request was "overly broad," sought "irrelevant information," and "encompassed information

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[2] Apparently, the seniority provision of the parties' expired collective-bargaining agreement permitted Respondent to consider its employees' skills and ability, along with seniority, in selecting individuals for layoff.

[3] The parties agreed that the arbitrator would ". . . have full authority to render a decision that [would] be binding on the parties including any claims of violations of the . . . Act arising out of the April 21, 2008 layoff of [Maravilla]."

[4] According to Imus, in his experience, work evaluations are "typically" found in personnel files.

protected form disclosure by the rights of privacy discussed above."[5] Nevertheless, Rediger informed Imus that the requested performance evaluations for Maravilla were included in his personnel file,[6] that any work performance evaluations for Carrasco and Tishchenko also were included in their personnel files, and that he anticipated "presenting the documents through [Respondent's] witnesses at the arbitration hearing." Notwithstanding Rediger's letter, as it believed the documents in the personnel files for Carrasco and Tishchenko and the work performance evaluation documents for the three individuals were necessary for preparing for the arbitration hearing, the Union continued to press its demand for the disputed documents.[7] Thus, a "day or two" prior to the hearing, Mathew Gauger, an attorney representing the Union, had a "brief" conversation with Rediger, with whom he has been long acquainted. According to Gauger, he asked Rediger ". . . if the employer was going to hand over the documents the Union had requested," and Rediger replied ". . . well, no, they're personnel files, they're confidential, forget it." Gauger believed Rediger was serious and decided there was no point in arguing with him.[8]

As scheduled, on March 17, the arbitration hearing on Maravilla's grievance was held in a library at the offices of the law firm, which represents Respondent. Among those present at the hearing were Rediger for Respondent and Imus and an attorney, Gary Provencher, for the Union. According to Imus, prior to the commencement of the proceedings, Rediger repeated to the arbitrator ". . . that he did not want to turn the [disputed personnel] files over to the Union, that he was not going to do it unless the judge forced him to do it" and, while uttering "confidentiality" assertions, failed to elaborate upon them. After listening to the attorneys argue their points, the arbitrator ruled ". . . that he would look at [the documents in the personnel files] first and then he would allow [the Union} to look at them." He proceeded to view the documents in Carrasco's and Tishchenko's respective personnel files *in camera* and eventually gave them to the Union to examine. In this regard, Imus remembered being able to view the contents of the two employees' personnel files, each of which contained in excess of 50 pages of documents, for just "a few minutes" and feeling "very rushed" in doing so. Nevertheless, Imus conceded, the Union apparently had sufficient time, at least, to make copies of any pertinent documents contained in the files. Finally, as to the two personnel files, Imus testified that neither contained the requested work performance evaluation documents for the years 2002 through 2008.

With regard to the latter documents, Imus testified that Respondent failed to provide these to the Union until midway through the arbitration hearing itself when the former's forklift supervisor identified work performance evaluations for Maravilla, Carrasco, and Tishchenko for

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[5] Rediger also suggested that, if Imus narrowed his request for documents in the personnel files, ". . . we can discuss the feasibility of the arbitrator examining appropriate documents `*in camera'* at the hearing . . . ."

[6] Contrary to Rediger's assertion, the work evaluations for Maravilla were not included in the personnel file documents for him.

[7] In the face of Respondent's refusal to provide the requested information, the Union requested a continuance of the arbitration hearing. Respondent objected, and the Union's request was denied.

[8] Imus believed the Union was harmed by Respondent's failure and refusal to provide it with the personnel files of Carrasco and Tishchenko and the employees' work evaluations as such hampered pre-arbitration preparation in that, without viewing the personnel files, the Union had no way to determine relevancy or whether further information requests may have been necessary.

the years 2006 through 2008 and testified that he had compiled the documents and had utilized the performance evaluations in selecting Maravilla for layoff.[9] However, such was the extent of Respondent's evidence offer; it failed to either identify or offer into the arbitration record any work evaluations for the time period 2002 through 2005. As to the 2006 through 2008 work performance evaluation documents, Respondent's president Winchester testified that, with the onset of the slowdown in the building and construction industry in 2006, ". . . we started . . . saying . . . we're going to have to start making some cuts and how do we do this . . . . And so we started looking at people's skills and abilities . . . . and how long they had worked at the company." In doing so, Respondent developed criteria and forms for evaluating its employees' work performance. Asked if his company possessed any similar performance evaluations for the time period 2002 through 2005, Winchester said, "No, no, we didn't have that system in [those years]" and added that what evaluations Respondent possessed were provided during the arbitration hearing.[10] As to whether Respondent ever informed the Union that it did not possess any work performance evaluations for its bargaining unit employees for the years 2002 through 2005, Winchester averred "I don't know if I talked to Dave Imus about it or not, I couldn't tell you," and Respondent's attorney Hubbert replied "Not to my knowledge."

On May 22, 2009, the arbitrator issued his written decision, denying Maravilla's grievance.

B. Legal Analysis

As set forth above, the complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by failing and refusing to provide, pursuant to the Union's request, information, including the entire contents of the personnel files for employees Carrasco and Tishchenko and all work performance evaluations for laid- off, former employee Maravilla and current employees Carrasco and Tishchenko for the years 2002 through 2005, information relevant and necessary for the Union to prepare for the arbitration of Maravilla's grievance concerning his layoff, and by unreasonably delaying in providing the Union with the requested work performance evaluations for Maravilla, Carrasco, and Tishchenko for the years 2006 through 2008, likewise relevant and necessary information. There is no dispute about the applicable court and Board law. Thus, it has long been established that, generally, an employer is under a statutory obligation to provide information, upon request, to a labor organization, which is the collective-bargaining representative of its employees, if there is a probability that the information is necessary and relevant for the proper performance of the labor organization's duties in representing the bargaining unit employees. *Detroit Edison Co. v.* NLRB, 440 U.S. 301 (1979); NLRB *v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997). This duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary for effects bargaining and for the administration of a collective-bargaining agreement including information required by the labor organization to process a grievance through arbitration. *Acme Industrial*, *supra*; *Disneyland* Park, supra; Postal *Service*, 337 NLRB 820, 822 (2002); *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Sands Hotel*, *supra*. The standard for relevance is a "liberal discovery-type standard," and the sought-after information

[9] Apparently, the Union was permitted to retain copies of all of the employees' work performance evaluations, which were received into the arbitration record by the arbitrator.

[10] Contrary to his attorney Rediger, Winchester testified that the work evaluations have never been placed in the employees' personnel files. Rather, Respondent's department supervisors maintain them.

need not be necessarily dispositive of the issues between the parties but, rather, only of some bearing upon the said issues and of "potential or probable" use to the labor organization in carrying out its statutory responsibilities. *Disneyland Park*, *supra*, at 1258; *Postal Service*, *supra*. In this regard, in the case of possible relevance, the Board does not pass upon the merits, and the labor organization is not required to demonstrate that the information is accurate, not hearsay, or even, ultimately reliable. *Postal Service*, *supra*. "The [labor organization] is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter." *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). Further, necessity is not a guideline itself but, rather, is directly related to relevancy, and only the probability that the requested information will be of use to the labor organization need be *established*. *Bacardi Corp.*, 296 NLRB 1220 (1989). Moreover, information, which concerns the employees in the bargaining unit and their terms and conditions of employment, is deemed "so intrinsic to the core of the employer-employee relationship" so as to be presumptively relevant, and an employer must provide the information to a labor organization, which has requested it. *Disneyland Park*, *supra*; *Sands Hotel*, *supra*. "However, where the information requested by the [labor organization] is not presumptively relevant to the [labor organization's] performance as bargaining representative, the burden is on the [labor organization] to demonstrate the relevance." *Disneyland Park*, *supra*; *Richmond Health Care*, 332 NLRB 1304, 1305 at n. 1 (2000). Particularly germane to the issues herein, the Board has held that information, which aids the arbitration process, is relevant and should be provided regardless of whether the request for information is at the grievance stage or made after the parties have agreed to proceed to arbitration.[11] *Jacksonville Area Association For Retarded Children*, 316 NLRB 338, 340 (1995); *Pfizer, Inc.*, 268 NLRB 916, 918 (1984). Finally, with regard to Respondent's alleged unlawful unreasonable delay in providing the Union with Maravilla's, Carrasco's and Tishchenko's work performance evaluations for the years 2006 through 2008, the Board holds that "when a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished." *Regency Service Carts*, 345 NLRB 671, 673 (2005); *Beverly California Corp.*, 326 NLRB 153, 157 (1998). As to whether the requested information has been furnished in a timely manner, the Board requires that an employer "'. . . respond to the request as promptly as circumstances allow.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003); *Good Life Beverage Co.*, 312 NLRB 1060, 1062, n. 9 (1993).

Counsel for the General Counsel contends that the contents of the personnel files for employees Carrasco and Tishchenko and the 2002-2008 work performance evaluations for Maravilla, Carrasco, and Tishchenko constitute "classically presumptively relevant" information, which an employer must provide to a labor organization upon request. Initially, I note that the most recent collective-bargaining agreement between Respondent and the Union permitted the former, in addition to company seniority, to consider skill and ability in selecting employees for layoff; that Eduardo Maravilla alleged in his grievance that Respondent violated the terms of the said agreement by selecting him for layoff and retaining Carrasco and Tishchenko, each of whom possessed less company seniority than him; that the parties had agreed to arbitrate Maravilla's grievance; and that the Union made its aforementioned information request a mere three weeks prior to the commencement of the arbitration hearing. With regard to the Union's

[11] "Such an approach toward the process of exchanging information encourages the resolution of disputes short of full-fledged arbitration so that the arbitration system is not `woefully overburdened.'" *Acme Industrial*, *supra*; *Jacksonville Area Association for Retarded Children*, *supra*.

request for all of the documents in the personnel files for Carrasco and Tishchenko, it is clear that the Union believed it required the information, including work performance evaluations, which typically are contained in employees' personnel files, in order to assess Carrasco's and Tishchenko's work skills and ability as compared to those of Maravilla and, if favorable to Maravilla's position, as a potential source of evidence at the arbitration hearing. Thus, business representative Imus, who impressed me as being a veracious witness, credibly testified that he was aware of Respondent's defense to Maravilla's grievance and that, therefore, the Union required the personnel files in order to learn whether or not Respondent had performed work evaluations on each employee, and, if so, to determine each employee's work ability over a period of time and whether said evaluations and other related documents in each file supported or were detrimental to Maravilla's grievance position. On this point, I note that, in his response to the information request, attorney Rediger buttressed Imus's understanding by confirming that the work performance evaluations for Carrasco and Tishchenko were included in the personnel file for each employee.[12]

The Board has long held that the entire contents of employees' personnel files may constitute information relevant to a requesting labor organization's performance of its statutory responsibilities. For example, in *Fleming Cos.*, 332 NLRB 1086 at 1086 (2000), the Board concluded that the entire contents of an employee's personnel file constituted relevant information as the documents therein were "`intrinsic to the core of the employer-employee relationship . . . .'" Further, in *Booth Newspapers, Inc.*, *supra* at 296 at n.1, at a time when it was contesting the discharges of two employees during an arbitration proceeding, the union requested the entire personnel files of 22 bargaining unit employees from the employer in order to obtain memos related to the discipline of said employees and to determine whether additional grievances were cognizable under the parties collective-bargaining agreement. The Board reinforced its conclusion as to the relevancy of the disputed 22 complete personnel files, noting that each file contained disciplinary records, which, of course, are presumptively relevant. *Id*. at 299. Likewise, in *Saginaw General* Hospital, 320 NLRB 748 (1996), a laid-off bargaining unit employee and a non-bargaining unit employee each applied for a vacant bargaining unit job. The employer determined that the laid-off employee was not qualified for the job and awarded the position to the nonbargaining unit employee. The union requested the entire personnel file for the nonbargaining unit employee, arguing it needed the documents in the said file, showing his work experience, in order to compare said employee's qualifications and work experiences for the position with those of the grievant and to prepare for the arbitration hearing.[13] Moreover,

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[12] Subsequently, of course, upon examining the personnel files and not finding any performance evaluations, the Union discovered that Rediger had either intentionally misinformed Imus or had himself been misled by his client as to whether employees' job performance evaluations were placed in the employees' personnel files. In the latter regard, I note that Respondent's president Winchester contradicted Rediger, testifying that said documents are not maintained in the personnel files but, rather, upon completion, are, and always have been, retained by the employees' supervisors. However, without regard for Winchester's credibility, Board law is instructive that, in refusal to provide information cases, one must only consider the situation, which existed at the time of the request. *Booth Newspapers, Inc.*, 331 NLRB 296, 300 (2000). Herein, I believe that, at least as of March 6, the Union clearly was justified in its belief that the evaluation documents were maintained in the employees' personnel files.

[13] *Saginaw General Hospital* is particularly relevant to the instant matter as, in the former, the union requested the entire contents of a personnel file three weeks prior to an arbitration hearing and the employer denied the request on grounds that the request was too broad and was an attempt at discovery.

in *Leland Stanford Junior University*, 307 NLRB 75 (1992), during the processing of a grievance concerning the suspension of an employee for alleged laboratory errors, the union asserted that the employer engaged in disparate treatment and demanded that the latter furnish it with the complete personnel file of another employee in order to establish the existence of documents demonstrating work accommodations for that employee which were denied to the grievant. Herein, Imus credibly testified that work evaluations are typically placed in employees' personnel files; attorney Rediger informed Imus that Maravilla's, Carrasco's, and Tishchenko's respective work performance evaluations were included in their personnel files; and the Board has held that such documents constitute presumptively relevant information. *LBT, Inc.*, 339 NLRB 504, 505 (2003); *Allied Mechanical Services*, 332 NLRB 1600, 1602 (2001). In light of the foregoing, as the Union requested the two employees' respective personnel files, which presumably contained work performance evaluations, in order to compare their work skills and ability to those of Maravilla and to prepare for the pending arbitration hearing, I find that the entire contents of the respective personnel files for employees Carrasco and Tishchenko constituted relevant information. I also find that, whether as documents contained in the personnel files for Maravilla, Carrasco, and Tishchenko or maintained separately, the 2002 through 2008 work performance evaluations, which, according to attorney Rediger, Respondent had been placed in the employees' respective personnel files,[14] constituted presumptively relevant information for the use of by Union in preparing for the arbitration of Maravilla's grievance.

In its answer and post-hearing brief, Respondent's counsel asserted two discernable affirmative defenses to the allegations that his client unlawfully refused the Union's request for the above-described information-- that the documents sought are protected by disclosure under the Constitution of the United States and the State of California Constitution and that, by entering into the agreement to arbitrate, the Union waived its right to file the above unfair labor practice charge and the Board should defer to the decision of the arbitrator. With regard to Respondent's initial defense, counsel presumably asserts that disclosure of the personnel files and of the work performance evaluations would violate the affected employees and Respondent's rights to privacy. Under the Act, a limited right to confidentiality does exist. Thus, a party ". . . must show that it has a legitimate and substantial confidentiality interest in the information sought." *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Once such a 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." *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Northern Indiana Service Co.*, *supra*. Finally, even if said conditions are met, the party, which asserts the confidentiality interest, ". . . may not simply refuse to provide the 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." *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). While the documents in the personnel files for Carrasco and Tishchenko are not part of the instant record, obviously, personnel files may contain presumptively relevant material bearing upon wage rates, pay raises, promotions, transfers, disciplinary matters and similar documents and may also contain

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[14] Winchester testified at the hearing that Respondent did not begin evaluating the bargaining unit employees' respective job performance until 2006 and, therefore, did not possess any work performance evaluations for said employees for the years 2002 through 2005. However, given the wording of his March 6, 2009 letter, I believe that Rediger either intentionally or inadvertently deceived the Union and that the latter could certainly have reasonably understood Rediger's letter to mean such documents existed and were contained in the employees' personnel files.

documents which may legitimately be kept confidential such as medical records or documents which might reasonably lead to retaliation or harassment. *Northern Indiana Public Service Co.*, *supra*; *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). However, in his letter to Imus, attorney Rediger failed to specify any document in either employee's personnel file, in which Respondent or the employee may have had a confidentiality interest; rather, he merely asserted a blanket claim of confidentiality. In such a circumstance, where a personnel file may contain both confidential and nonconfidential material, a refusal to furnish the entire contents of the said file constitutes a violation of Section 8(a)(1) and (5) of the Act. *Pennsylvania Power Co.*, *supra*; *Bacardi Corp.*, *supra*.[15]

Next, as to Respondent's contention that, by virtue of the Union having entered into the agreement to arbitrate Maravilla's grievance, the latter waived its right to file the instant unfair labor practice charge and the Board should defer to the decision of the arbitrator, in his post-hearing brief, counsel for Respondent argues that, in said document, the Union agreed that the arbitrator had "full authority" to decide any unfair labor practice claims, that, pursuant to State of California law, the Union could have requested subpoenas from the arbitrator for any documents it felt necessary for preparation for the arbitrator; that it was "inexcusable" for the Union to have made its first request for documents ten months after filing the Maravilla grievance and merely three weeks before the arbitration hearing; and that it was "inexcusable" for the Union to have violated the express terms of the arbitration agreement and to have filed the instant unfair labor practice charge. Contrary to counsel and in agreement with counsel for the General Counsel, I note that Section 10(a) of the Act states that the Board's authority to prevent unfair labor practices ". . . shall not be affected by any other means of adjustment or provision that has been or may be established by agreement, law, or otherwise . . . ." Interpreting this section of the Act, the Supreme Court has stated that the Board is "empowered" by the Act with the "exclusive" authority to prevent any entity from engaging in unfair labor practices and that the Act sets forth a "restricted" procedure for resolving unfair labor practices in which the actor is the Board and not the Charging Party. *Amalgamated Utility Workers v Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). Further, the Act confers "vindication" of employees' rights exclusively to the Board, and no private right to action is contemplated. *Id*. at 270. The Board itself adheres to the "general rule" that, when the Government is not a party to a prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law, which a private party may have litigated unsuccessfully, and "the Board, as a public agency asserting public rights, should not be collaterally estopped by the resolution of private claims asserted by private parties." *Field Bridge Associates*, 306 NLRB 322 at 322 (1992). Moreover, a court of appeals has held that the Board's determination in a work assignment and jurisdiction dispute takes precedence over a conflicting arbitration award (*New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755, 768 (5th Cir. 1966)), and another court of appeals has held that "the standard rule . . . is that the right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract," including agreements to arbitrate.

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[15] Counsel for Respondent relies upon a State of California court decision, *El Dorado Savings and Loan Assn. v. Superior Court*, 190 Cal. App. 3rd 342 (1987) a support for its position that disclosure of Carrasco's and Tishchenko's personnel files would violate theirs' and Respondent's rights to privacy under the state's constitution. Contrary to counsel, even assuming portions of the two personnel files, at issue, contained material, which the State of California deems confidential, contrary to the above-stated Board law, while state law may be considered in assessing whether there exists a legitimate confidentiality issue with regard to disputed documents, Respondent made a blanket claim of confidentiality and never sought an accommodation with the Union as to items in the personnel files which are clearly not confidential and should be disclosed to the Union.

International Association of Machinists, AFL-CIO v. United Aircraft Corp., 337 F.2d 5, 8 (2nd Cir. 1964).[16] Accordingly, I find Respondent's second defense to be without merit and further find that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union, upon its request, with the respective entire personnel files for employees Carrasco and Tishchenko and the work evaluations for the years 2002 through 2005 for employees Maravilla, Carrasco, and Tishchenko.[17] *Booth Newspapers*, *supra*; *LBT, Inc.*, *supra*.

Turning to the complaint allegation that Respondent unlawfully delayed in providing the 2006 through 2008 work performance evaluations for Maravilla, Carrasco, and Tishchenko, I reiterate that said documents constituted presumptively relevant information (*LBT, Inc.*, *supra*) and note that Respondent itself recognized this when, in his March 6, 2009 letter, attorney Rediger informed Imus that Respondent would rely upon the evaluations and offer the documents as evidence at the arbitration hearing. In this regard, given his client's stated intent, Rediger's explanation, particularly his assertion of confidentiality for refusing to furnish the evaluations to the Union prior to the arbitration hearing, was wholly inadequate and utter sophistry. Inasmuch as there is no evidence or, indeed, any claim that the performance evaluations, at issue, were unavailable, difficult to retrieve, voluminous, or time consuming to produce, furnishing the documents to the Union prior to the arbitration would not have been burdensome upon Respondent. Moreover, I agree with counsel the General Counsel that even short delays, such as Respondent's three week delay, may be unlawful. *Woodland Clinic*, 331

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[16] Counsel for Respondent argues that the Union was not prejudiced by his client's failure to provide the requested relevant information as its representatives were permitted to view the contents of the two disputed personnel files prior to the arbitration hearing and it was given copies of the work evaluation documents after Respondent offered them as evidence during the arbitration hearing. However, I agree with counsel for the General Counsel that Respondent should not be permitted to benefit from the commission of unfair labor practices. Thus, "the right of the Union to the information requested must be determined by the situation which existed at the time the request was made and not at the time the Board . . . vindicate[s] that right. Otherwise, important rights under the Act would be lost simply by passage of time and the course of litigation . . . ." *Booth Newspapers, Inc.*, *supra* at 300; *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989).

[17] I am cognizant that Respondent's president Winchester was uncontroverted that said documents do not exist. However, in his March 6 response to the Union's information request, not only did attorney Rediger fail to inform the Union that said documents of this fact but also the Union reasonably understood him to mean that said documents did exist and were contained in the bargaining unit employees' personnel files. In my view, in responding to the Union's request, rather than misleading the Union, Respondent clearly was obligated to have informed the former that the requested 2002 through 2005 performance evaluations did not exist. Nevertheless, I shall deny counsel for the General Counsel's request that I make an unfair labor practice finding in this regard. Thus, the General Counsel failed to specify this as an unfair labor practice allegation in the complaint, and, at the hearing, after Respondent arguably admitted failing to inform the Union that no bargaining unit employees' performance evaluations for the years 2002 through 2005 existed, counsel had the opportunity to move to amend the complaint but did not do so. Absent said allegation, I decline to make an unfair labor practice finding. *Raley's Supermarkets*, 349 NLRB 26, 28 (2007). In her post-hearing brief, in arguing that I make such a finding, counsel for the General Counsel relies upon then member Liebman's dissenting opinion in *Raley's*, but said dissent is just that-- a dissenting opinion and not the law of the case. If the General Counsel desires that the Board overturn *Raley's*, such is the provence of the Board and not an administrative law judge.

NLRB 735, 737 (2000); *Pennco Inc.*, 212 NLRB 677, 678 (1974). Such is especially true herein as the Union required the information in order to prepare for the arbitration hearing and as the time when Respondent provided the information "severely diminished its usefulness" to the Union.[18] *Woodland Clinic*, *supra*. In these circumstances, I find that Respondent unreasonably delayed in providing the requested 2006 through 2008 performance evaluations for Maravilla, Carrasco, and Tishchenko to the Union and, thereby, engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By failing and refusing to provide to the Union, which requested said documents, copies of all the documents in the personnel files of two current bargaining unit employees, which documents the Union required in order to assess the merits of a grievance, filed by a former bargaining unit employee, and to prepare for the arbitration hearing involving said grievance, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

4. By failing and refusing to provide to the Union, which requested said documents, copies of all work performance evaluations for the years 2002 through 2005 for a former bargaining unit employee and two current bargaining unit employees, which documents the Union required in order to assess the merits of a grievance, filed by the former bargaining unit employee, and to prepare for the arbitration hearing involving said grievance, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

5. By unreasonably delaying in providing to the Union copies of all work performance evaluations for the years 2006 through 2008 for a former bargaining unit employee and two current bargaining unit employees, which documents the Union requested and which documents it required in order to assess the merits of a grievance, filed by the former bargaining unit employee, and to prepare for an arbitration hearing on said grievance, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

6. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Unless set forth above, Respondent engaged in no other unfair labor practices.

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[18] Of course, Respondent did not simply provide the information to the Union. Rather, it offered the performance evaluations as evidence and, in so doing, merely provided copies to the Union.

The Remedy

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. Accordingly, I shall recommend that Respondent be ordered to cease and desist from engaging in said acts and to post a notice, informing its bargaining unit employees of certain commitments pertaining to its unfair labor practices.[19]

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[19] I shall not recommend that Respondent be ordered to furnish to the Union either copies of all of the documents in the respective personnel files of bargaining unit employees Carrasco and Tishchenko or the work performance evaluations for employees Maravilla, Carrasco, and Tishchenko for the years 2002 through 2005. As to the former documents, the issue appears to be moot. Thus, the Union representatives were permitted to view the documents in Carrasco's and Tishchenko's respective personnel files prior to the start of the arbitration hearing and, apparently, were able to make copies of any documents, which they considered relevant; the arbitrator issued his decision on the merits of Maravilla's grievance several months prior to the instant unfair labor practice hearing; and the Union has neither appealed his decision nor indicated any other need for the documents. In *Borgess Medical Center*, *supra*, at 1106, in identical circumstances, the Board, with then member Liebman dissenting, determined that the union ". . . no longer ha[d] an on-going need for the information requested" and, inasmuch as the union failed to assert it needed the requested information for any other purpose, declined to order the respondent to provide the said information to the union. There are no significant differences between *Borgess Medical Center* and the instant matter, and, as such is the extent Board law, I must adhere to it. Regarding the disputed 2002 through 2005 performance evaluations, the record evidence simply is that such documents do not exist and never did exist. Therefore, it would be pointless to order production of said documents.

In his post-hearing brief, the Union's attorney requests an order, requiring that Respondent provide the requested information to the Union and, subsequent to the Union being afforded sufficient time to review and analyze the said information, requiring that the arbitration hearing be reopened to permit the parties to offer additional evidence. At the outset, of course, I do not believe that I have the authority to require that an arbitration proceeding be reopened; such a requested remedy should be addressed to the Board. Furthermore, noting then member Liebman's dissent in the above-cited decision and while I have sympathy for counsel's argument that, not requiring Respondent to comply with its statutory obligation to provide the disputed information to the Union may create an incentive for other employers to procrastinate until the day of an arbitration hearing before disclosing relevant information to a requesting union, I fail to understand how requiring Respondent to again provide the personnel files for Carrasco and Tishchenko to the Union would be of any value. In this regard, the record evidence is that the Union's representatives were afforded an opportunity to examine the two personnel files, did examine the documents in said files, and did have sufficient time to make copies of any relevant items. Moreover, while counsel asserts that the parties must be able to place before the arbitrator additional or missing information, consisting of ". . . the information that the employer has failed to turn over to the Union concerning the qualifications of the less senior employees who were not laid off," the record evidence is that all the existing, requested performance evaluations, albeit belatedly, was provided, there is no record evidence or allegation that Respondent deliberately removed or withheld relevant material from the two employees' personnel files, and I reiterate that there is no evidence contraverting Winchester's testimony that Respondent did not compile performance evaluations for bargaining unit employees for the years 2002 through 2006. In short, the Union had the opportunity to present all relevant existing information to the arbitrator. Accordingly, the Union's request for an additional remedy is denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, **A-1 Door and Building Solutions**, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide to the Union, which requested said documents, copies of all documents in the personnel files of two current bargaining unit employees, which documents the Union required in order to assess the merits of a grievance, filed by a former bargaining unit employee, and to prepare for the arbitration hearing involving said grievance;

(b) Failing and refusing to provide to the Union, which requested said documents, copies of all work performance evaluations for the years 2002 through 2005 for a former bargaining unit employee and two current bargaining unit employees, which documents the Union required in order to assess the merits of a grievance, filed by the former bargaining unit employee, and to prepare for the arbitration hearing involving said grievance;

(c) Unreasonably delaying in providing to the Union copies of all work performance evaluations for the years 2005 through 2008 for a former bargaining unit employee and two current bargaining unit employees, which documents the Union required in order to assess the merits of a grievance, filed by the former bargaining unit employee, and to prepare for an arbitration hearing on said grievance;

(d) 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) Within 14 days after service by the Region, post at its facility in North Highlands, California copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 Respondent shall duplicate and mail, at its own expense, a

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[20] 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.

[21] 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."

copy of the notice to all current employees and former employees employed by the Respondent at any time since March 6, 2009.

(b) 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., November 24, 2009.

Burton Litvack
Administrative Law Judge

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 fail and refuse to provide to **Millmen and Industrial Carpenters Union Local 1618, United Brotherhood of Carpenters and Joiners of America,** herein called the Union, which requested said documents copies of all the documents in the personnel files of two current bargaining unit employees, which documents the Union requires to assess the merits of a grievance, filed by a former bargaining unit employee, and to prepare for the arbitration hearing involving said grievance.

WE WILL NOT fail and refuse to provide to the Union, which requested said documents, copies of all work performance evaluations for the years 2002 through 2005 for a former bargaining unit employee and two current bargaining unit employees, which documents the Union requires in order to assess the merits of a grievance, filed by the former bargaining unit employee, and to prepare for the arbitration hearing involving said grievance.

WE WILL NOT unreasonably delay in providing to the Union all work performance evaluations for the years 2006 through 2008 for a former bargaining unit employee and two current bargaining unit employees, which documents the Union requires in order to assess the merits of a grievance, filed by the former bargaining unit employee, and to prepare for the arbitration hearing involving the said grievance.

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

A-1 Door and Building Solutions
(Employer)

Dated _____ By _____
(Representative) (Title)

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

901 Market Street, Suite 400

San Francisco, California 94103-1735

Hours: 8:30 a.m. to 5 p.m.

415-356-5130.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.