No. 11-1225

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

U.S. POSTAL SERVICE

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

USHA DHEENAN
Supervisory Attorney

NICOLE LANCIA
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2987

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce the Board's Order issued against the United States Postal Service, San Juan, Puerto Rico ("USPS"). The Board found that USPS committed an unfair labor practice in refusing to furnish the National Postal Mailhandlers' Union, Local 313 ("the Union") with information it requested on the 22 bargaining-unit employees hired in 2007, including their prehiring test scores, veterans' preference, final ratings, and hiring register standing.

The Board had subject matter jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 1209 of the Postal Reorganization Act.[1] The Board's Order issued January 5, 2011, and is reported at 356 NLRB No. 75. (A. 316.)[2] It is a final order with respect to all parties under Section 10(e) of the National Labor Relations Act ("the Act").[3] The Board applied for enforcement on March 2, 2011; the application was timely, as the Act places no time limitation on such filings. This Court has jurisdiction over the application under Section 10(e) of the Act[4] because the unfair labor practice occurred in San Juan, Puerto Rico.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that USPS violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the requested prehiring test scores, veterans' preference, final ratings, and hiring register standing of the 22 bargaining-unit employees hired in 2007.

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[1] 39 U.S.C. § 1209.

[2] "A." references are to the Appendix. "Br." references are to USPS's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] 29 U.S.C. §§ 151, 160(e).

[4] *Id.*

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union (A. 114, 129), the Board's General Counsel issued a complaint alleging that USPS violated Section 8(a)(5) and (1) of the Act[5] in failing and refusing to furnish the Union with, "among other things, the basic test scores and final ratings of all prospective candidates for mailhandler positions in [USPS's] Caribbean District Registry for calendar year 2007." (A. 134-38.) After a hearing, the administrative law judge issued a recommended Decision and Order finding that USPS violated the Act by failing and refusing to provide the prehiring test scores and final ratings of only the 22 bargaining-unit employees hired in 2007, not all applicants from that year. (A. 326.) USPS filed exceptions to the judge's decision.

On review, the Board affirmed the judge's finding of a violation, and adopted the judge's recommended Order, with some modification. (A. 316 n.2.) In its opening brief to the Court, USPS does not challenge the Board's rejection of its argument that the Board denied it due process in narrowing the request to the 22 hires; as such, USPS waived appellate review of that issue.[6] The facts supporting

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[5] 29 U.S.C. § 158(a)(5) and (1).

[6] *See DeCaro v. Hasbro, Inc.*, 580 F.3d 55, 64 (1st Cir. 2009) ("It is common ground that contentions not advanced in an opening brief are deemed waived."); Fed. R. App. P. 28(a)(9)(A) (opening brief must state party's "contentions and the reasons for them").

the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. The Board's Findings of Fact

A. Background; the Collective-Bargaining Agreement Between USPS and the Union

The Union is the exclusive bargaining representative for USPS mail handlers in Puerto Rico and the Virgin Islands. USPS employs 250 mail handlers in the Caribbean District, most of whom are located at the main facility in San Juan, Puerto Rico. Approximately 70% of mail handlers in the unit are United States armed forces veterans. (A. 316, 321; 209-10.)

In 2006, the parties negotiated the current collective-bargaining agreement ("CBA"), which is effective until November 2011. (A. 317, 321; 53-77.) The CBA outlines, in pertinent part, principles of employee seniority and USPS's responsibility to provide the Union with information necessary for collective bargaining. (A. 317, 321-22; 29-36.) Article 12 provides that, after successful completion of a 90-day probationary period, seniority will be computed based on the first day of employment. (A. 321; 54-55.) An employee's seniority determines when he may bid on and be considered for vacant positions, newly established duty assignments, or preferred assignments. It also states that the parties "will continue relative seniority standing properly established under past principles, rules and

instructions" and allows unit employees to request corrections to their seniority standing. (A. 317, 321; 55.)

B. Application Procedure for Mail Handler Positions; in 2007, USPS Hires 22 Employees Based On Their Final Ratings

Test 473 is the standard entrance exam given to all applicants for mail handler positions in USPS facilities, including the San Juan Post Office. Before taking the exam, those seeking mail handler positions must complete the Applicant Information Package, comprised of questions pertaining to the working conditions of mail handlers and carriers. The package contains a Privacy Act Statement, explaining, in pertinent part, that application information may be disclosed "in relevant legal proceedings," "to entities or individuals under contract with USPS" and "as required by the National Labor Relations Act." (A. 316, 322; 39.) USPS also maintains a separate "Guide to Privacy and Freedom of Information Act," available to the public and employees, which states that recruiting, examination, and placement records may, as a "Standard Routine Use," be disclosed to labor organizations when needed to perform their collective-bargaining obligations. (A. 316-17, 322; 104-05.)

Test 473 is intended to measure an applicant's aptitude, skills, and abilities, as well as relevant personal characteristics, tendencies, and experiences. Parts A through C ask applicants to compare two lists of addresses and identify any discrepancies, to identify where on a blank postal form to place certain

information, and to categorize information using a coding guide and from memory, respectively. In Part D, applicants answer questions about personal characteristics and work-related experiences, such as whether they agree with the statement "You plan things carefully and in advance." (A. 316, 322; 14-34.) The "473 Answer Sheet," which solicits certain personal information, informs applicants that providing this information is voluntary, but failing to do so may result in applicants not receiving full consideration; moreover, it states that USPS may disclose the information in certain instances, such as to "entities or individuals under contract with USPS" and "labor organizations as required by law." (A. 316, 322; 311-12.)

Passing scores range from 70 to 100 points, and applicants may receive an additional 5 to 10 points based on their veterans' status. Applicants who score at least 70 points receive a notice stating that they are eligible for employment and listing their "basic score," or test score, and their "final rating," the sum of an applicant's basic score and veterans' preference points. Passing applicants are placed on the mail handler hiring register in order of their final rating, from highest to lowest; final ratings determine applicants' "standing" on the register and, ultimately, when they may be hired. The hiring register contains the applicant's name, date of birth, standing, exam date, veterans' points, basic score, and final rating. Once applicants are hired, they are given an enter-on-duty date, which is

used to compute seniority, and their names are removed from the register. (A. 316, 322; 11, 181-82, 264-67.)

In 2007, over 9,000 applicants took Test 473, and about 8,000 passed and were placed on the hiring register. Of those 8,000 applicants, USPS hired 22 for its San Juan Post Office, with enter-on-duty dates ranging from March 3 to December 22. (A. 316, 326; 249, 261-62, 264, 315.)

C. Veteran Employees Complain to the Union That Nonveteran Employees Were Wrongly Hired Before Them; the Union Requests the 2007 Hiring Register to Determine If USPS Discriminated Against Veteran Employees, and USPS Fails to Satisfy the Union's Request

Among the 22 bargaining unit employees hired in 2007, many veterans complained to Union President Julio Figueroa that some nonveterans with lower final ratings and later application dates were hired before them and, thus, incorrectly had higher seniority. (A. 322, 326; 187-90, 204.) To investigate these claims, on July 2, 2007,[7] Figueroa emailed USPS Human Resources Specialist Carlos Perez, requesting "the register listing for those candidates qualified for hiring," including "veteran employees as well as non-veterans and their position in the roster." (A. 317, 322; 108, 161-62.) After receiving no response, on July 17, Figueroa emailed Perez, reiterating his request. Perez still did not respond. On July 26, Figueroa again emailed Perez, requesting the register and specifying that

[7] All dates are in 2007 unless otherwise noted.

the listing should include veterans and nonveterans. Finally, that day, Human Resources Manager Carol Rubenstein responded, stating that Labor Relations Manager Keith Reid would follow up on the request. (A. 317, 322-23; 109-11.)

In August, Figueroa and Union Vice President Miguel Pazo de Jesus met with Labor Relations Manager Reid in Reid's office. Figueroa restated his request for a copy of the 2007 hiring register, reminding Reid that USPS had not complied. Figueroa explained that he received complaints from veteran employees that nonveterans were given preferential hiring treatment and needed the register to determine "whether there had been discrimination." Reid assured Figueroa that he would receive the requested information, and called Human Resources Specialist Perez into the meeting. Though Perez insisted that Figueroa was not entitled to that information, Reid ordered Perez to provide the requested information anyway. (A. 163-67, 212-17, 294-97.)

Approximately two months later, USPS still had not provided Figueroa with any information. On October 18, Juan Delgado, another Labor Relations Manager for the USPS Caribbean District, emailed Figueroa, informing him that USPS was processing the request and that it was "extensive and encompasse[d] confidential information." (A. 317, 323; 113, 283.) Having received no further response, on November 15, the Union filed an unfair-labor-practice charge alleging that USPS

failed to provide "the listing for those candidates qualified for hiring, including veteran employees and nonveterans, and their positions in the roster." (A. 114.)

Another two months passed. On December 17, USPS's legal representative Leslie Rowe emailed Figueroa, acknowledging that the Union filed the unfair-labor-practice charge, expressing her mistaken belief that Figueroa already received "the list of candidates with the actual scores redacted," and asking whether Figueroa had obtained eligible candidates' consent to release the information. The email also stated that, if Figueroa did not have consent, "perhaps a list of the candidates with the order would suffice." A few hours later, Figueroa responded to Rowe's email, stating that USPS did not provide any documents and that the information was "related to [his] responsibility as the representative of employees in the U.S. Postal Service." He also insisted that USPS either provide the unredacted register or explain its legal basis for refusing to do so. (A. 317, 323; 116-17, 173-74.)

On December 19, Labor Relations Manager Delgado sent Figueroa a letter telling him that he could review the requested information in Delgado's office or, alternatively, Delgado could mail it to him. (A. 317, 323; 118.) On December 20, Rowe emailed Figueroa, offering to give the Union a copy of the 2007 hiring register with the basic scores and final ratings redacted, as "a way to satisfy [Figueroa's] request without compromising the privacy of the test takers."

(A. 317, 323; 119.) Later that day, Figueroa responded, contesting USPS's refusal to provide the information and stating that the Union could not accept the redacted register because "it [would] not fulfill [Figueroa's] request and [would] defeat the purpose of [his] collective bargaining investigation." (A. 317, 324; 120.) Shortly thereafter, Rowe emailed Figueroa and stated that she would give him one redacted page from the register the next day, demonstrating how his request could be satisfied "without violating the privacy of the applicants." Figueroa replied that he would review the document to see if it was satisfactory. (A. 317, 324; 121-22.)

D. USPS Provides the Hiring Register, Excluding the Basic Scores and Final Ratings Upon Which USPS Based Its Hiring Decisions; the Union Again Requests the Unredacted 2007 Hiring Register

On December 21, Figueroa met with Delgado in his office to review copies of the 2007 hiring register with the scores and final ratings redacted. He told Delgado that the information was unsatisfactory because of the redactions. Delgado answered that the basic scores constituted "sensitive and confidential" information that USPS could not disclose. (A. 317, 324; 178-79, 287, 290.) Later that day, legal representative Rowe emailed Figueroa one page of the hiring register, with the test scores and final ratings redacted. Figueroa responded to Rowe's email, disagreeing with her contention that the information was satisfactory and noting that he could not "detect who is a veteran and who is not." (A. 317, 324; 123-25.)

On January 30, 2008,[8] Figueroa emailed Labor Relations Manager Delgado with a follow-up information request, and copied Labor Relations Manager Reid on the email seeking: "Caribbean District Hiring Registers including the scores of all the candidates (veteran and non-veteran) for the year of 2007. The information shall include the name, the scores, whether or not they are veterans, the final scores for each candidate and their eligibility in the register." (A. 317, 324; 126.) Reid responded the same day, inquiring as to the relevance of the request since "many on the register are non employees" and, thus, not represented by the Union. Figueroa replied that the information he received from Rowe was "not complete because all the scores were blackened" and that Rowe sent Figueroa the same information he previously rejected from Delgado. (A. 317; 127-28.)

On February 1, Figueroa emailed Reid, repeating the Union's January 30 information request, and forwarded that request to Rowe. (A. 130-31.) Rowe responded on February 4, asking: "Are you requesting the same list of information that was sent to you previously? . . . Are you now asking for the test scores (basic and final) that were previously redacted from the list? . . ." (A. 317, 325; 132.) That same day, Reid responded to Figueroa's February 1 email, stating that he was "attempting to assess relevance as to who may have been injured and [the Union's] right to represent their interest." (A. 133.)

[8] All subsequent dates are in 2008 unless otherwise indicated.

There was no further communication between the parties. (A. 325.)

II. The Board's Conclusions and Order

On the foregoing facts, the Board (Chairman Liebman and Members Pearce and Hayes) found, agreeing with the judge, that USPS violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with the relevant and necessary information it requested on January 30, 2008 regarding the 22 employees hired in 2007, including their test scores, veterans' preference, final ratings, and register standing. (A. 320.)

The Board's Order requires USPS to cease and desist from the unfair labor practice found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. Affirmatively, the Order requires USPS to furnish the Union with the requested information on the 22 bargaining-unit employees hired into the Caribbean District during 2007, including their basic test scores and final ratings. The Board also ordered USPS to post a remedial notice at its San Juan, Puerto Rico facilities and, additionally, to distribute those notices electronically if USPS customarily communicates with its employees by such means. (A. 320.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that USPS violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with

the test scores, veterans' status, final ratings, and register standing of the 22 mail handlers in 2007. The Union requested that information to assess the complaints of newly hired veteran employees that USPS breached the CBA by first hiring nonveterans with lower final ratings and later testing dates, wrongly giving the nonveterans higher seniority. In this regard, the Union demonstrated the relevance of the information, showing that it was necessary to perform its collective-bargaining obligations by including policing the seniority clause in the CBA as applied to bargaining-unit veterans.

The Board also correctly found that USPS's asserted confidentiality concerns did not justify its refusal to furnish this relevant requested information. Indeed, USPS failed to establish the existence of a legitimate and substantial confidentiality interest in applicants' test results, since it made multiple disclaimers that such records may be disclosed to labor organizations and as required by the Act, and applicants could not expect that their scores would remain confidential. Moreover, USPS's reliance on *Detroit Edison Co. v. NLRB*[9] does not aid its defense. In that case, the employer administered a psychological aptitude test to applicants with an express promise that their test scores would not be disclosed; here, USPS affirmatively advised applicants that their scores could be disclosed. Thus, employees had no legitimate expectation of privacy on which USPS could

[9] 440 U.S. 301 (1979).

substantiate its blanket assertions of confidentiality. USPS also misreads *Detroit Edison* as creating a multi-factored test under which to analyze all cases concerning confidentiality; however, the Supreme Court merely listed a few factors it considered based on the particular facts in that case, just as the Board examined USPS's confidentiality defense based on these specific facts.

Furthermore, in seeking to bolster its confidentiality defense, USPS argues that the Privacy Act unconditionally prohibits the disclosure of employee testing records without employee consent. This assertion not only mischaracterizes the Privacy Act as a safe harbor for agencies faced with a union's relevant information requests, but ignores federal case law rejecting that exact argument. Indeed, the Privacy Act allows agencies to disclose information to unions as a "routine use," when done in compliance with the Act. Thus, USPS's confidentiality defense is based on a misguided assumption that the Board's Decision and Order eliminates all privacy protection for employee records requested by a union.

STANDARD OF REVIEW

The scope of this Court's inquiry in reviewing a Board order is quite limited. The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole,[10] and the Board's conclusions of law will be upheld if its

[10] 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 612 (1st Cir. 1987).

interpretation of the Act is "reasonably defensible."[11] This Court will "sustain inferences that the Board draws from the facts and its application of statutory standards to those facts and inferences as long as they are reasonable."[12] The Supreme Court recognized that Congress "made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain."[13] This duty includes an employer's obligation to furnish to the union relevant information needed to perform its duties as the employees' representative.[14] The Board's determination in a particular case of the relevance of requested information is "entitled to great deference."[15]

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT USPS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING AND REFUSING TO FURNISH TO THE UNION THE TEST SCORES, VETERANS' PREFERENCE, FINAL RATINGS, AND HIRING REGISTER STANDING OF THE 22 EMPLOYEES HIRED IN 2007

A. The Act Requires an Employer to Provide the Union with Requested Information That Is Relevant and Necessary to Its Role as Collective-Bargaining Representative

[11] *Kelley v. NLRB*, 79 F.3d 1238, 1244 (1st Cir. 1996); *accord McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 7 (1st Cir. 1997).

[12] *NLRB v. LaVerdiere's Enters.*, 933 F.2d 1045, 1050 (1st Cir. 1991).

[13] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *see* 29 U.S.C. § 158(d).

[14] *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967).

[15] *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 414 (1st Cir. 1988).

An employer violates Section 8(a)(5) and (1) of the Act by failing to furnish to the union information that is relevant to its role as the unit employees' representative, unless the employer establishes an accepted affirmative defense for refusing to provide that information.[16] Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively in good faith with the representative of its employees.[17] A violation of Section 8(a)(5) also results in a derivative violation of Section 8(a)(1),[18] which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights.[19] Part of an employer's duty to bargain includes "provid[ing] information that is needed by the bargaining representative for the proper performance of its duties."[20] As the Board explained: "Once a union has made a good-faith request for information, an employer must provide relevant information reasonably

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[16] *See Detroit Newspaper Agency*, 317 NLRB 1071, 1071-72 (1995) (finding that employer did not satisfy Section 8(a)(5) duty to provide relevant information because it made information available to union in unhelpful redacted form, and rejecting employer's defense that redacted information was confidential).

[17] 29 U.S.C. § 158(a)(5); *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

[18] *Metropolitan Edison Co.*, 460 U.S. at 698 n.4.

[19] 29 U.S.C. § 158(a)(1); 29 U.S.C. § 157 (guaranteeing employees the right "to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing. . .").

[20] *Acme Indus. Co.*, 385 U.S. at 435-36; *see NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956).

promptly in useful form."[21] Accordingly, an employer has a duty to furnish "information that would help the union make an informed judgment about the problem the information addresses."[22] Indeed, this Court has recognized that "[t]he right to bargain collectively would be little more than a hollow promise if a bargaining representative did not have the concomitant right to muster the information needed to conduct that bargaining effectively."[23]

Typically, the critical question in determining whether information must be produced is that of relevance. As this Court stated in *Providence Hospital v. NLRB*: "Requested information is relevant if it seems probable that the information will be of legitimate use to the union in carrying out its duties and responsibilities *qua* bargaining agent."[24] The Board follows liberal standards of pretrial discovery in evaluating the relevance of requested information,[25] and "a broad range of potentially useful information should be allowed the union [to] effectuat[e] the

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[21] *Detroit Newspaper Agency*, 317 NLRB 1071, 1071-72 (1995).

[22] *Id.* at 1072 (citing *Gen. Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983), *enforcing* 257 NLRB 1068 (1981)); *see Gen. Motors Corp.*, 700 F.2d at 1088 ("[A] violation of Section 8(a)(5) may be predicated on the failure of the employer to provide the Union with information necessary to enable the requesting party to intelligently evaluate and process grievances.").

[23] *Providence Hosp. v. NLRB*, 93 F.3d 1012, 1016-17 (1st Cir. 1996).

[24] *Id.* at 1017.

[25] *Mid-Continent Concrete*, 336 NLRB 258, 258 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002).

bargaining process."[26] Requested information must be produced "whether or not the theory of the complaint is sound or the facts, if proved, would support the relief sought."[27] Thus, as this Court acknowledges, "the relevancy threshold is low" and "the standard is neither onerous in nature nor stringent in application."[28]

Information pertaining solely to bargaining-unit members is presumptively relevant and must be produced.[29] Alternatively, when the requested information concerns matters outside of the bargaining unit, the Supreme Court has held that an employer must provide it if the union demonstrates a reasonable objective basis for it by showing "a probability that the desired information [is] relevant, and . . . would be of use to the union in carrying out its statutory duties. . . ."[30]

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[26] *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1378 (7th Cir. 1991).

[27] *Acme Indus. Co.*, 385 U.S. at 437 (citations omitted); *see Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979) (information is relevant if it "has any bearing" on the subject matter of the case); *accord U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

[28] *Providence Hosp.*, 93 F.3d at 1017.

[29] *E.g.*, *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1093 (1st Cir. 1981); *U.S. Testing Co.*, 160 F.3d at 19; *New Surfside Nursing Home*, 330 NLRB 1146, 1149 (2000).

[30] *Acme Indus. Co.*, 385 U.S. at 437; *see NLRB v. Realty Maintenance, Inc.*, 723 F.2d 746, 747 (9th Cir. 1984) (union need only prove that information is "directly related to the union's function as a bargaining representative and . . . appears reasonably necessary for the performance of that function").

An employer may assert confidentiality as an appropriate reason for refusing to furnish requested information. However, this Court has acknowledged that "it is the employer's burden to demonstrate that the requested information is shielded by a legitimate privacy claim."[31] The Board has found legitimate privacy interests in witness identities, memoranda prepared for pending lawsuits, and individual medical records,[32] but has refused to uphold blanket assertions of confidentiality.[33] Thus, if a union requests information that is relevant to its statutory collective-bargaining duties, absent a valid defense to producing it, an employer must provide it in accordance with its Section 8(a)(5) duty to bargain in good faith.

B. The Union Demonstrated That the 2007 Hires' Information, Including Basic Scores and Final Ratings, Was Relevant and Necessary to Performing Its Collective-Bargaining Duties

The Board correctly found that the test scores and final ratings of the 22 employees hired in 2007, as well as their names, veterans' status, and register standing, are clearly relevant to the Union's duties as bargaining representative,

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[31] *Providence Hosp.*, 93 F.3d at 1020; *see NLRB v. Borden, Inc.*, 600 F.2d 313, 317 (1st Cir. 1979) (assuming relevancy, it is the employer's burden to provide some good and sufficient reason why the union's request should be denied); *Pa. Power & Light Co.*, 301 NLRB 1104, 1105 (1991) (party asserting defense must prove legitimate and substantial confidentiality interest in information withheld).

[32] *See, e.g., U.S. Postal Service*, 306 NLRB 474, 474, 477 (1992) (names of witnesses to drug transactions); *Gen. Dynamics Corp.*, 268 NLRB 1432, 1432-33 (1984) (study prepared for pending litigation); *Johns-Manville Sales Corp.*, 252 NLRB 368, 368 (1980) (individual medical records and disorders).

[33] *Pa. Power & Light Co.*, 301 NLRB at 1105.

including policing the seniority provision in the CBA. (A. 319.) In so finding, the Board did not discuss whether that information related to the bargaining unit was presumptively relevant but, instead, concluded that the Union met a heavier burden of proving its relevance for nonbargaining-unit matters. (A. 319 n.9.)

First, the requested information is relevant and necessary to the Union's role in policing the seniority clause in Article 12 of the CBA. This article acknowledges USPS's practice of basing seniority on employees' enter-on-duty (EOD) dates. Eligible applicants' testing dates, test scores, veterans' status, final ratings, and register standing determine their EOD dates and, therefore, their seniority. For any employee who believes his EOD date is incorrect, Article 12 authorizes that employee or the Union to request a correction. (A. 54-55.) Among the 22 new employees, many veterans complained that their EOD dates should have preceded those of the nonveterans, since the veterans believed they took Test 473 earlier and had identical or higher final ratings. As a result, the Union requested the hiring register to assess whether USPS wrongly assigned earlier EOD dates to nonveteran employees and needed to correct any veterans' seniority standing, pursuant to the CBA. (A. 161-64.)

Second, the Union repeatedly explained the relevance of the hiring register, contemporaneously demonstrating its need for the information. In multiple verbal and email exchanges, Union President Figueroa told Labor Relations Manager

Reid and USPS legal representative Rowe that several bargaining-unit veterans complained about their EOD dates and that he needed the hiring register to investigate whether USPS discriminated against them; he also insisted that the unredacted version was necessary as it "related to [his] responsibility as the representative of the employees" in mail handler positions. (A. 324; 116-17, 120, 163-64.) At the unfair-labor-practice hearing, Figueroa again explained that the veterans' complaints were the basis for the information request, which also satisfied the Union's obligation to demonstrate the information's relevance.[34] (A. 322; 108, 161-63.) Still, USPS refused to provide the 22 unit employees' test scores and final ratings.[35]

Thus, the Union met its light burden of proving the relevance of the 2007 hiring register as it pertained to the 22 employees' seniority standing.

C. USPS Did Not Prove A Legitimate and Substantial Confidentiality Interest in Applicants' Test Results to Justify Withholding the Requested Information

In its opening brief, as before the Board (A. 319), USPS does not dispute the relevance of the requested information. Instead, its primary defense to producing it

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[34] *See H&R Indus. Servs.*, 351 NLRB 1222, 1224 (2007) (union may state at unfair-labor-practice hearing its reasons for requesting information not presumptively relevant, but necessary to police collective-bargaining agreement).

[35] *See also Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995) (finding employer violated Section 8(a)(5) and (1) when it failed to furnish unredacted copy of health and safety audit, where redacted copy that it provided was not useful).

is that the test scores and final ratings are confidential because applicants would be sensitive to disclosure of their results, as those results may reflect upon their basic competence. (Br. 11-20.) However, USPS did not establish a legitimate and substantial confidentiality interest in the information. (A. 319.) In this regard, it did not prove that applicants had a legitimate expectation that their test scores would remain confidential, given the various Privacy Act statements advising them that examination records may be disclosed to labor organizations. Moreover, the Supreme Court's decision in *Detroit Edison Co. v. NLRB*[36] and case law interpreting the Privacy Act do not support USPS's asserted defense.

The Board properly found that applicants could not have reasonably expected their examination records would be kept confidential, as USPS suggests. (A. 319.) In fact, USPS advised all applicants that it might disclose their test results to labor organizations as well as the Board. As discussed earlier,[37] the Applicant Information Package's Privacy Act statement notified potential applicants that USPS might disclose testing and personal application information. And upon taking Test 473, the answer sheet again advised applicants about the possible disclosure of their test results to labor organizations or as required by the National Labor Relations Act. (A. 319; 39, 311-12.) Consistent with those

[36] 440 U.S. 301 (1979).

[37] *See supra* at 5.

statements, USPS's separate "Guide to Privacy and the Freedom of Information Act" specifically informs employees, applicants, and the public that examination records—like the information USPS refused to provide here—may "be furnished to a labor organization when needed by that organization to perform its duties as the collective bargaining representative. . . ." (A. 322; 104-05.) Coupled with these multiple disclaimers, there is also no evidence suggesting that applicants disputed the scope of these statements. Thus, applicants reasonably understood that all information from the application process could be disclosed.

USPS's flawed attempt to establish a valid confidentiality defense under *Detroit Edison* must be rejected, as the dispositive facts in that case are distinguishable. As the Supreme Court stated in *Detroit Edison*: "The duty to supply information under [Section 8(a)(5)] turns upon the circumstances of the particular case."[38] There, the Supreme Court held that the employer had a legitimate and substantial concern about the confidentiality of applicants' scores on a psychological aptitude test, justifying its refusal to furnish such information to the union unconditionally.[39] The employer "administered the test to applicants with the express commitment that [test scores] would remain confidential."[40]

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[38] 440 U.S. at 314-15 (internal quotation marks omitted).

[39] *Id.* at 320.

[40] *Id.* at 306.

Here, USPS made no assurances of confidentiality; in fact, USPS did quite the opposite, given the multiple Privacy Act disclaimers informing applicants that their exam records may be released to labor organizations.[41] (A. 319-20; A. 39, 104-05, 312.)

Moreover, USPS misreads *Detroit Edison* as allowing employers to withhold testing information simply by making a blanket assertion of confidentiality. In its brief (Br. 13-14), USPS emphasizes the Supreme Court's recognition of the sensitive nature of test scores, in an effort to strengthen its weak confidentiality defense. Though the Supreme Court recognized an applicant's interest in preserving the confidentiality of test scores, it did so upon considering case-specific evidence "that disclosure of individual scores had in the past resulted in the harassment of some lower scoring examinees who had, as a result, left the Company."[42] In this case, there is no indication that any applicants ever expressed concerns about the potential disclosure of test results, and the record does not suggest any past instances of harassment or other disclosure-related incidents that might bolster USPS's defense. As such, *Detroit Edison*'s recognition of

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[41] *See NLRB v. U.S. Postal Service*, 841 F.2d 141, 146 (6th Cir. 1988) (distinguishing *Detroit Edison* where USPS advised applicants for supervisory positions that their applications may be disclosed to a labor organization as required by the Act, pursuant to the "routine use" exception of Privacy Act).

[42] *Detroit Edison*, 440 U.S. at 318-19.

applicants' sensitivity based on materially different facts does not justify USPS's refusal to provide employees' basic scores and final ratings here.[43]

USPS also mistakenly characterizes the Supreme Court's analysis in *Detroit Edison* as creating a test of three factors applicable in all cases raising a confidentiality defense to the disclosure of test scores.[44] (Br. 12-16.) But the Supreme Court made no such broad pronouncement. Instead, in *Detroit Edison*, the Court merely mentioned three considerations upon examining a particular set of facts and concluding that the employer could condition disclosure of that information on employee consent in light of those facts. Likewise, here the Board's Decision, like all other cases, rests upon a specific record and factual context, as discussed above.[45]

Assuming that the Board was required to discuss the same considerations as in *Detroit Edison*, USPS's refusal to provide the information would nevertheless be unlawful. First, USPS relies heavily on applicant sensitivity (Br. 13-14), but as

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[43] *Id.* at 314-15 ("The duty to supply information under [Section 8(a)(5)] turns upon the circumstances of the particular case. . . .") (internal quotation marks omitted).

[44] *Id.* at 319-20 (three factors on which the Court relied in determining whether employer was privileged to withhold test scores until union obtained employees' consent were whether: test information was sensitive, employer's condition that union first obtain employees' consent placed only a minimal burden on union, and employer fabricated privacy concerns to frustrate union's fulfillment of its duties).

[45] *See supra* at 22-25.

the Board found, "[r]egardless of any such sensitivity, the record shows that applicants had no legitimate expectation that their test results would remain confidential"—in contrast to *Detroit Edison*, where the employer expressly promised confidentiality. (A. 319.) Second, USPS contends that its condition of employee consent before furnishing the information placed only a minimal burden on the Union (Br. 14-15); however, unlike in *Detroit Edison*, employee consent was not required in this case because USPS repeatedly informed all applicants that testing information may be disclosed, such that those who continued applying understood that their test results may not remain confidential. Third, as USPS concedes (Br. 15), the Board did not find that USPS "fabricated concern for employee confidentiality" as a pretext to frustrate the Union's representation of unit employees; thus, its claim that "this factor weighs . . . against release of the test scores" is irrelevant. Assuming USPS's confidentiality concerns are sincere, such sincerity would not create a legitimate justification for withholding the necessary information. As shown, the employees here could not expect confidentiality.

Furthermore, USPS unsuccessfully attempts (Br. 18-20) to create a conflict between the Board's Decision and Order in this case and the Privacy Act's general protection of employee records. In doing so, USPS misrepresents the Board's Decision as eliminating all privacy protections for employee records requested by a

union and misconstrues the Privacy Act as unconditionally prohibiting the disclosure of employee test scores without consent. (Br. 16-20.) USPS ignores two courts' rejection of this same argument because USPS made no assurances of confidentiality and advised employees that records may be provided "for routine uses," such as disclosure to labor organizations or as required by the Act.[46] (A. 104.) As the Sixth Circuit observed:

> The Postal Service's assertion that the Privacy Act . . . is a valid defense to the union's informational request, depends solely on whether the information sought is relevant to the union's collective bargaining duties. Thus, this apparently separate issue is but another path to the central relevancy issue. . . . [I]t is clear that if the National Labor Relations Act requires the Postal Service to supply the desired information, the unconsented-to disclosure of such would fall within the "routine use" exception to the Privacy Act.[47]

USPS's cited case does not demand a different result.[48] (Br. 16.) There, the Fifth Circuit remanded the case to the Board because it concluded that certain

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[46] *See, e.g., NLRB v. U.S. Postal Service*, 888 F.2d 1568, 1572-73 (11th Cir. 1989) (Privacy Act does not prohibit disclosure to labor organizations where there was no expectation that requested information would remain confidential, USPS made no commitment to keep information confidential, and one of "routine uses" is furnishing records to labor organizations); *NLRB v. U.S. Postal Service*, 841 F.2d 141, 145 n.3, 146 (6th Cir. 1988) (disclosure required where USPS gave no assurances of confidentiality and applicants were notified that information may be disclosed as required by the Act, pursuant to "routine use" exception).

[47] *U.S. Postal Service*, 841 F.2d at 145 n.3.

[48] *NLRB v. U.S. Postal Service*, 128 F.3d 280 (5th Cir. 1997).

portions of the requested employee personnel files were not relevant to the union's purpose.[49] Thus, neither that case nor USPS's other cited authority validates its position that the Privacy Act justifies a refusal to provide relevant information to the union given the "routine use" exception,[50] and the relevance of the requested information is not disputed in this case. Accordingly, established law shows that the Act requires USPS to disclose the hiring register information of the 22 employees because it is relevant to the Union's collective-bargaining duties, and neither *Detroit Edison* nor the Privacy Act shield USPS from furnishing such relevant information.

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[49] *Id.* at 283-84.

[50] *See U.S. Postal Service*, 841 F.2d at 144 n.3 (Privacy Act defense "depends solely" on relevance of requested information); *U.S. Postal Service*, 307 NLRB 1105, 1110-11 (1992) (rejecting Privacy Act defense), *enforced*, 17 F.3d 1434, 1994 WL 47743 at *3-4 (4th Cir. 1994) (unpublished table decision).

CONCLUSION

To investigate veteran employees' complaints that nonveterans were wrongly hired before them, the Union requested the test scores, veterans' status, and final ratings of the 22 recently hired employees. However, USPS indefensibly refused to provide that information, thereby preventing the Union from fulfilling its statutory duties as employees' collective-bargaining representative. Based on the foregoing, the Board respectfully requests that this Court enforce the Board's Order in full.

s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

s/ Nicole Lancia
NICOLE LANCIA
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2948
(202) 273-2987

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
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Petitioner	*	No. 11-1225
	*	
v.	*	
	*	
U.S. POSTAL SERVICE	*	Board Case No.
	*	24-CA-10805
Respondent	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,582 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 29th day of June, 2011

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	*	

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and will be served by the CM/ECF System:

David C. Belt
Stephan J. Boardman
Peter J. Henry
U.S. Postal Service
475 L'Enfant Plaza, S.W.
Washington, DC 20260

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 29th day of June, 2011