UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PIGGLY WIGGLY MIDWEST, LLC,

Respondent,

Case 30-CA-18574
30-CA-18575

and

UNITED FOOD & COMMERCIAL WORKERS
UNION LOCAL 1473,

Charging Party.

RESPONDENT'S REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF

Dated: July 28, 2011

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I. ARGUMENT

A. The Union Did Not Demonstrate That the Request for Information is Relevant.

In General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge, General Counsel spends considerable space arguing the Union requested information from the Respondent.[1] Although there may be differences between the parties regarding what was requested and when, there is little dispute that the Union requested information regarding the purchase of the stores and the employees' vacation and personal holiday accrual. Where there is dispute, however, is whether the information was pertinent to the effects bargaining, whether the Union had a duty to set forth the underlying basis that made the information relevant to the effects bargaining and whether the Respondent had a duty to provide the information under the circumstances in this case.

General Counsel agrees with the Respondent that when requested information, such as an Asset Sales Agreement, relates to matters outside the bargaining unit but might have a bearing on the terms and conditions of employment for bargaining unit employees, the Union must demonstrate that the information is relevant.[2] The Board has conceded, and courts of appeal have held, a union's request for information about employees with whom a union does not have a bargaining relationship is not presumptively relevant.[3] General Counsel also points out, however, that the Board uses a broad, discovery-type standard to determine the relevance of such information, arguing it is sufficient to demonstrate the information is probably relevant to carrying out its representational duties.[4] While a union can satisfy its burden of proving relevance by demonstrating a reasonable belief that the requested information is relevant, its

[1] Brief of General Counsel at 13-18.
[2] *Id*. at 18.
[3] *NLRB v. U.S. Postal Services*, 888 F.2d 1568, 1570 (11th Cir.1989); *Walter N. Yoder & Sons v. NLRB, Inc.*, 754 F.2d 531, 535 (4th Cir.1985).
[4] *Id*.

belief must be supported by objective evidence.[5] That is, the union must demonstrate "a reasonable basis, based on objective facts" for suspecting that the information sought will aid its representational duties.[6] In fact, the Courts of Appeals for the Fourth, Fifth and Ninth Circuits, have required a showing analogous to "reasonable suspicion."[7] Further, the question of relevancy is determined by the relevance of the information as it relates to the particular circumstances at the time of the request.[8] That is, both a union's reasons for requesting the information and an employer's reasons for refusing disclosure are evaluated by looking at information known at the time of the demand and refusal.[9] Consequently, a union is required to provide the reason why it needed the information (the relevance) as it related to effects or decisional bargaining (the particular circumstances) before the employer must comply."[10]

Applying the above criteria to this case, the Union here needed to demonstrate: (1) it had a reasonable basis for suspecting the franchises operations were alter-egos of the Respondent and (2) there was a reasonable basis for believing that this information would be helpful to its effects bargaining.[11] They did neither. The Union's "reasonable suspicion" that the franchise stores might be alter-egos was based upon two comments allegedly made by Mr. Butera over a year prior to the sale of the stores and the Union's past experience with other employers:

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[5] *Embarq Corp*., 356 NLRB 125 (2011), citing *Knappton Maritime Corp*., 292 NLRB, 236, 328-239 (1988).
[6] *Illinois-American*, 933 F.2d at 1378 (quoting *Pfizer*, 763 F.2d at 889).
[7] *See Walter N. Yoder & Sons,* 754 F.2d at 535 (if a union wishes to obtain information with regard to a possible contract violation due to the operation of an alter-ego company then the union need only establish "a reasonable basis to suspect such violations have occurred...."); *Leonard B. Hebert, Jr.*, 696 F.2d at 1125 (to obtain information with regard to possible double-breasting in violation of the collective bargaining agreement, "[i]t is sufficient that the information sought is relevant to possible violations where the union has established a reasonable basis to suspect such violations have occurred...."); *NLRB v. Associated Gen. Contractors*, 633 F.2d 766, 771 (9th Cir.1980), *cert. den.*, 452 U.S. 915, 101 S.Ct. 3049, 69 L.Ed.2d 418 (1981) (unions satisfied burden "by showing that the information sought is relevant to investigations of contract violations, and that there is a reasonable basis for further investigation....").
[8] *Id.* at 1330.
[9] *General Elec. Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1990).
[10] *N.L.R.B. v. George Koch Sons, Inc.*, 950 F.2d 1324, 1331 (7th Cir. 1991).
[11] *See Walter N. Yoder & Sons,* 754 F.2d at 535; *Leonard B. Hebert, Jr.*, 696 F.2d at 1125; *Associated Gen. Contractors*, 633 F.2d at 771.

> BY MS. JAENKE: Do you have any reason to believe that the store closings and moving to franchises might be what you described as an alter-ego or sham transaction?
>
> A Yeah. When Paul Butera was involved in bargaining first, he would make comments that he knew how to deal with the union, and at the trustee meeting in August of 2008 he called John Eiden … His comment—he made two comments that caused concern, "If you guys want to fight, I know how to get rid of the union," and he also made the comment, "When I'm non-union my pockets get like "this" and when I'm union my pockets are like "this," meaning empty."[12]
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> ***
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> Q Okay. All right, and what if anything else led you to believe that these store closings –that the franchisees might be alter-egos?
>
> A In the course of dealing with other employers, I mean, we've had several stores that have been sold to successor employers and so we didn't know what the terms of the sales were -- sale was or anything like that, so.[13]

The above testimony does not reflect "a reasonable basis, based upon objective facts" to formulate reasonable suspicion that the sale of the stores at question here were a sham or alter-egos. If it did, then there is no real standard at all!

At the hearing the Union argued it needed the requested information to formulate effects bargaining proposals, but it never said so during the effects bargaining. During effects bargaining, none of the Union representatives ever indicated they needed the requested information at issue here so they could formulate bargaining proposals. Not only did the ALJ conclude the requested information would not have been useful for formulating bargaining proposals, in rambling and often disjointed testimony, Attorney Sweet struggled to precisely explain how the information would have been helpful at the bargaining table.[14] Other than asserting some strained and specious associations to formulating economic bargaining proposals which could have been made in any event, the Union failed to provide any compelling evidence

[12] Tr. at pp. 55-56.
[13] *Id*.
[14] Tr. at pp. 258-265.

that its formulation of effects bargaining proposals were hampered by the lack of information regarding the business relationship between the Respondent and the non-union companies.

Attorney Sweet also claimed the Union needed the documents to monitor and guarantee reversion rights, should the stores end up coming back to the Company. However, resolution of this issue had already been definitely established by the Recognition Clauses of the respective collective bargaining agreements. The Recognition Clause in the Collective Bargaining Agreement governing the Retail Clerks and Meat Department Employees of Store 23 states:

> All employees of all present and **future Employer stores** located in the Counties of Outagamie and Winnebago, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").[15] (emphasis added)

The Recognition Clause in the Collective Bargaining Agreement governing the Meat Department Employees of Store 31 states:

> All employees of all present and **future Employer stores** working in the meat department located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of meat as defined in this Agreement, EXCLUDING employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty persons and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").[16] (emphasis added)

The Recognition Clause in the Collective Bargaining Agreement governing the Retail Clerks of Store 31 states:

> All employees of all present and **future Employer stores** located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees working in the meat department employees of other companies

[15] Jt. Ex. 1.
[16] Jt. Ex. 2.

> working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").[17] (emphasis added)

By operation of contract and law, employees of stores that reverted to the ownership of the Respondent would be bargaining unit employees. Therefore, the Union did not demonstrate the requested information is relevant.

B. The ALJ Exceeded His Authority and Violated Respondent's Due Process Rights by Finding a Violation of the Act Not Alleged in the Complaint.

While it may have been appropriate under *Pergament United Sales, Inc.*,[18] to amend the Consolidated Complaint *prior* to the hearing or *during* the hearing, but prior to the close of evidence (subject to an adjournment to provide the Respondent with a meaningful opportunity to respond to the new claim), the ALJ's finding of a violation based upon the alleged failure to provide the vacation/personal holiday information exceeded his authority under the Act and violated Respondent's constitutional right to due process. Therefore, the Board should reverse the ALJ's decision.

The Board's regulations permit amendment of the Consolidated Complaint at this stage of the proceedings, but only on "such terms as may be deemed just."[19] In *Green Const.*,[20] the Board affirmed the ALJ's decision to deny a motion to amend the Complaint to correct the identity of the Respondent (from Green Construction of Indiana, Inc. to Robert E. Green, individually) made seven (7) months after the close of the hearing and on the eve of the rendition

[17] Jt. Ex. 3.
[18] *Pergament United Sales, Inc*., 296 NLRB 333 (1989), *enfd*., 920 F.2d 130 (2nd Cir. 1990).
[19] Sec. 102.17.
[20] *Green Const*., 271 NLRB 1503 (1984).

of the ALJ's decision. The ALJ denied the motion to amend because it was "so tardy that basic fairness requires that it be denied."[21]

The Board affirmed the ALJ's decision because, *inter alia*; (1) the General Counsel had been appraised of the problem of the proper identity of the Respondent during the hearing and had not corrected the problem; (2) while Mr. Green had actual notice of certain facts, he was not on notice that he might be subject to individual liability; and (3) Mr. Green would have been unduly prejudiced by the amendment because there might have been witnesses and evidence he would have presented if he had been individually charged.[22]

Green Const. applies with even greater force to the case at bar for several reasons. First, like the General Counsel in *Green Const*., the General Counsel in this case knew of the facts surrounding the Respondent's alleged failure to provide the vacation/personal holiday information, but did not seek an amendment of the Complaint. Indeed, the General Counsel in this case (unlike the General Counsel in *Green Const*.) still has not moved to amend the Consolidated Complaint.

Second, similar to Mr. Green in *Green Const*., the Respondent in this case was not put on notice prior to the close of evidence at the hearing that its alleged failure to provide the vacation/personal holiday information could be a basis for finding it violated the Act. While there was some testimony regarding the provision of the vacation/personal holiday information, it was not objected to because it was background information which was primarily offered in response to questions that did not directly seek that information.[23] In fact, at the hearing, the

[21] *Id.* at 1503.
[22] *Id.*
[23] Tr. 61:3-8; 68:8-10; 130:13-14; 232:3-20, 235:20-236:21; 247:2-248:21.

Union's own witness, Grant Withers, admitted that "some of the discussions involving vacations had nothing to do with the facts but had more to do with the existing labor agreement."[24]

Third, like Mr. Green in *Green Const.*, the Respondent might have presented other witnesses and evidence had it been put on notice that liability under the Act might be imposed for failing to provide the vacation/personal holiday information. While the vacation/personal holiday pay was ultimately paid to the employees, the Respondent might have been able to present more compelling evidence that it was not able to provide the vacation/personal holiday information in the time requested by the Union. And the record indicates that the Respondent's ability to provide the information was hindered by its computer system.[25]

Therefore, under *Green Const.* the ALJ's finding of a violation based upon the alleged failure to provide the vacation/personal holiday information is "so tardy that basic fairness requires" it be reversed.[26] Further, the ALJ's conclusion that the vacation/personal holiday issue has been fully litigated is not supported by the record for several reasons. As previously discussed, the evidence presented by the parties regarding the issue was merely background information that occurred during bargaining; the Respondent could have presented additional evidence regarding why it could not provide the information in the time requested by the Union.

General Counsel's brief before the ALJ discussed the alleged failure to provide the vacation/personal holiday information, but never argued the vacation/personal holiday issues in the context of a charged violation, and the Union only mentioned vacations in its "facts" section of its brief. Moreover, the Respondent only addressed the issue in its brief in the context of making diligent efforts to comply with the Union's information requests and to show that bargaining had occurred.

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[24] Tr. 132:1-4.
[25] Tr. 299:17 – 300:10.
[26] *Green Const*., 271 NLRB at 1503.

Significantly, when the notice required by due process is provided by full litigation, unless the record reveals "uncontrovertibly" that the party "could not have prevailed in any defense" to the claim, there is "prejudice requiring reversal."[27] Given the evidence in the record regarding the Respondent's computer problems, the record does not reveal uncontrovertibly that Piggly Wiggly could not prevail on any defense to the vacation/personal holiday information claim. Accordingly, constitutional due process requires that the ALJ's decision be reversed.

C. The Facts of the Case are too Distinguishable from the Facts of the Cases Cited by General Counsel to Support a *Transmarine* Remedy.

In order to trigger an employer's duty to provide information, the Union must notify the employer that it needs the information for *effects* purposes.[28] In *Embarq*,[29] one of the two cases cited by General Counsel in support of the proposition that a failure to provide information requires a *Transmarine* remedy, the Board adopted the ALJ's *Transmarine* remedy because the Respondent committed an unfair labor practice charge when it refused to provide certain information. In its decision, the Board held that "the Union's information request clearly related to effects bargaining" and "it should have been self-evident to the Respondent that this information was needed for 'effects bargaining….'"[30]

Unlike the 'self-evidently' relevant information in *Embarq*, the Board has ruled that information that, like the information requested in the current case, regards the sale of the employing enterprise is generally "quite *irrelevant* to the question of a union's rights to information" because the employer is not legally required to bargain about its "decision" to sell

[27] *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983) (reversing Board's finding of a ULP that was not included in the Complaint), *cert. denied*, 467 U.S. 1241 (1984).
[28] *Compact Video Services, Inc*., 319 NLRB 131 (1995). (emphasis added)
[29] *Embarq Corp.*, 356 NLRB No. 125, p. 17 (2011).
[30] *Id.*

the business.[31] In the current case, the Union's December 17, 2009, information request did not even implicitly suggest the requested information was related to effects bargaining, nor did the Union provide any reasons at the bargaining table for the requested information, other than to bargain the decision or pursue its unfounded suspicion that the franchise stores were alter-egos of the Respondent. General Counsel and the ALJ inappropriately failed to find significant the Union's failure to articulate reasons for the information prior to hearing. However, the Seventh Circuit has held that "[w]hen the requested information is not ordinarily pertinent to a union's role as bargaining representative, but is alleged to have become pertinent under particular circumstances, the union has the burden of proving relevance *before the employer must comply*."[32] Therefore, the Union's failure to give the Respondent its reasons for the information is significant.

Employers have the right to refuse to provide information that is not inherently relevant unless the Union is able to articulate a reasonable need for the information, but if the ALJ's ruling holds, Unions will never articulate a reasonable need for information until the time of hearing in order to force employers to pay a *Transmarine* remedy. Therefore, the ALJ's suggested *Transmarine* remedy cannot stand.

Even when the Board finds that a *Transmarine* remedy is appropriate, it does not owe solely to a failure to provide requested information. In *Compact Video Services, Inc*.,[33] the Board found "that a '*Transmarine* backpay' order is required to remedy the Respondent's *unlawful failure and refusal to give the Union preimplementation notice of the sale*, and a meaningful opportunity to bargain, before the sale was *fait accompli*, about the effects of the sale on the

[31] *Compact Video Services, Inc*., 319 NLRB 131 (1995).
[32] *N.L.R.B. v. George Koch Sons, Inc.*, 950 F.2d 1324, 1331 (7th Cir. 1991) (internal citations omitted) (emphasis added).
[33] *Compact Video Services, Inc*., 319 NLRB 131 (1995).

employees it represented."[34] Likewise, in *Miami Rivet of Puerto Rico, Inc.*, the other case cited by General Counsel in support of the idea that a failure to provide information requires a *Transmarine* remedy, the Board found that a *Transmarine* remedy was appropriate because the Union was presented with a *fait accompli* on the effects issues when "the Respondent effectuated the layoffs 2 weeks prior to the time that it had informed the Union that the layoffs would be implemented."[35] Unlike in *Miami Rivet* and *Compact Video*, the Union in the current case was not presented with a *fait accompli* on the effects issue. The Respondent provided several months' notice and met on several occasions to discuss the effects. Therefore, the ALJ's suggested *Transmarine* remedy cannot stand.

II. CONCLUSION

In light of the above, the Respondent respectfully requests the Board to find that (1) since on or about December 18, 2009, the Respondent did not fail or refuse to bargain collectively over the effects of the closures of stores 23 and 31; and (2), that the Respondent did not fail or refuse to collectively bargain in good faith by not providing to the Union the franchise and sales agreements and items 27, 30, 34, and 63 in the Union's December 17, 2009, information request. Further, the Respondent respectfully requests the Board find the facts of this case fail to support the extraordinary remedy recommended by the ALJ.

Respectfully submitted this 28th Day of July, 2011.

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[34] *Id.* (emphasis added).
[35] *Miami Rivet of Puerto Rico, Inc.*, 318 NLRB 769 (1995).

CERTIFICATE OF SERVICE

I certify that a copy of the Respondent's Reply to General Counsel's Answering Brief has been served on the following parties *via* E-file and electronic mail, as indicated below:

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Dated this 28th day of July, 2011.

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