

**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 ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-
EXCEPTIONS TO THE DECISION OF THE HONORABLE ADMINISTRATIVE LAW
JUDGE DAVID GOLDMAN**

Dated: August 29, 2011

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I. TABLE OF AUTHORITIES

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<i>Yorke v. NLRB</i> , 709 F.2d 1138, 1144-45 (7th Cir. 1983).	30

II. INTRODUCTION

The ALJ correctly concluded that the information requested in items requested in items 16, 27, 30 and 34 were not relevant to effects bargaining. Furthermore, the record supports the ALJ's conclusion that the Company's response to Item No. 39 was sufficient, and that the Company had already produced the sales agreement. The General Counsel mistakenly contends that the Company was not ordered to produce the franchise agreement. However, the General Counsel still has not demonstrated that the franchise agreement is relevant to effects bargaining.

Moreover, the record and the Board's case law supports the ALJ's conclusion that the Company did not unreasonable delay in responding to the Union's December 17, 2009, request for information.

In any event, the Transmarine remedy is inappropriate when the Union did not state that it needed the information requested in Items 16, 27, 30, 34, 39 and 63 for effects bargaining until the time of the Unfair Labor Practice hearing, the Company gave the Union more than sixty (60) days notice of the store closing, the Company provide extensive information requested by the Union and engaged in effects bargaining until the Union refused to continue to bargain.

III. STATEMENT OF FACTS

This case involves the sale of two "Piggly Wiggly" retail grocery stores—Store 23, located in Appleton, Wisconsin, and Store 31, located in Sheboygan, Wisconsin. On October 30, 2009, Piggly Wiggly Midwest informed the Union that Store Nos. 23 and 31 were closing as a result of sales to independent franchisees.¹ On that same day, Union President John Eiden sent a

¹ Tr. at p. 48-49.

letter to Piggly Wiggly Midwest's attorney, Robert Simandl, requesting effects bargaining.² On November 5, 2009, Union Secretary Treasurer Grant Withers requested from Piggly Wiggly Midwest the following information:

1. The identity of the buyer(s)
2. Contact person for the buyer(s)
3. Address and telephone numbers for this person or entity.

In addition, the Union requests a copy of any and all documents including correspondence between the purchaser and seller relative to the Collective Bargaining Agreement relating to the purchase of these stores that have been executed or prepared for execution by the parties.³

The parties met for effects bargaining on November 16, December 1, and December 18, 2009.⁴ In these meetings, the parties discussed a variety of issues related to the sale of the stores. During the November 16, 2009, meeting, Attorney Simandl provided the names and contact information of the individuals who were purchasing the stores, pursuant to the Union's November 5, 2009, information request.⁵ Attorney Sweet, chief spokesperson for the Union, requested copies of the transactional documents relating to the sale of the stores.⁶ Attorney Simandl responded that he was researching the legal duty to provide the documents and that "if the Union was legally entitled to that information and that it was responsive to the request, that he would provide it by the end of the week."⁷ The parties also discussed issues related to seniority, bumping, vacations, holiday and pending grievances.⁸ No proposals for agreement were made by either party and effects negotiations were continued until the next scheduled session.

² Jt. Ex. 10.

³ *Id.*

⁴ Tr. at pp. 58-59.

⁵ Tr. at p. 296.

⁶ Tr. at p. 60.

⁷ *Id.*

⁸ *Id.* at p. 61.

On November 20, 2009, Attorney Simandl responded as promised to the remaining portion of the Union's November 5, 2009, information request.⁹ Attorney Simandl conveyed "the only information [he] could find that related to the collective bargaining agreements for the stores that were being affected."¹⁰

The parties met again on December 1, 2009. Attorney Sweet reiterated his request for the franchise agreements.¹¹ Attorney Simandl explained that they contained no labor and employment information and said: "if there's a legal basis that I've got to give this to you, please provide it to me and I'll be glad to consider it."¹² In addition to issues that were unrelated to effects bargaining for the stores,¹³ the parties discussed payroll issues,¹⁴ personal holidays,¹⁵ classification of employees,¹⁶ seniority¹⁷ and accrued vacations.¹⁸ The Union did not offer any proposals on the store sales or the effects on the employees during the December 1, 2009, bargaining session.¹⁹

On December 17, 2009, Mr. Sweet, on the behalf of the Union, sent to Piggly Wiggly Midwest an information request containing nearly 100 subparts. This request was responded to on January 19, 2010 by Attorney Simandl.

⁹ Jt. Ex. 14.

¹⁰ Tr. at p. 303.

¹¹ Tr. at p. 314.

¹² *Id.*

¹³ Tr. at p. 321.

¹⁴ *Id.* at p. 317.

¹⁵ *Id.*

¹⁶ *Id.* at p. 318.

¹⁷ *Id.* at p. 321.

¹⁸ *Id.* at p. 322.

¹⁹ *Id.* at p. 323.

During the December 18, 2009, bargaining session, the Union offered two severance proposals but the parties did not come to any agreement.²⁰ No further effects bargaining occurred.

On January 19, 2010, the Union filed unfair labor practice charges, as set forth in the formal papers.²¹ The Region determined Respondent did not have a duty to bargain about the decision to sell Store Nos. 23 and 31 to the franchisees. The Region further determined the franchisees were not alter-egos or disguised continuances of Piggly Wiggly Midwest.

The Region also determined that Piggly Wiggly Midwest failed and refused to provide the Union certain information related to Piggly Wiggly Midwest's decision to make Store Nos. 23 and 31 franchises, but based on the Region's other findings, it would not effectuate the purpose of the Act to require Respondent to provide that information to the Union. However, the Region determined that Respondent had failed to engage in good faith bargaining when it failed and refused to provide, or delayed in providing, certain information to the Union; that is, the Respondent failed to fully respond to the November 5, 2009, information request and to portions of the December 17, 2009, information request. At issue here today are items 16, 27, 30, 34, 39 and 63 of the Union's December 17, 2009 request.

IV. ISSUES PRESENTED

1. Whether the information requested in items 16, 27, 30 and 34 is relevant to effects bargaining?
2. Whether the Respondent's response to Item 39 was a sufficient response?
3. Whether the ALJ was correct in not ordering the Respondent to provide the Union with information responsive to Item 63?

²⁰ *Id.* at p.327.

²¹ General Counsel Exhibit 1.

4. Whether the ALJ was correct in not ordering the Respondent to provide the Union with sales agreements?

5. Whether the Respondent's response to the Union's December 18, 2009 information request was timely?

6. Whether a *Transmarine* remedy is inappropriate when the Union did not state that it needed the information requested in Items 16, 27, 30, 34, 39 and 63 for effects bargaining until the time of the Unfair Labor Practice hearing, the Company gave the Union more than sixty (60) days notice of the store closing, the Company provide extensive information requested by the Union and engaged in effects bargaining until the Union refused to continue to bargain?²²

Counsel for the Respondent submits that these issues should be answered affirmatively for the reasons set forth below.

²² *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

V. ARGUMENT

A. The Union is Not Entitled to the Information Requested by the Union in Items 16, 27, 30, and 34 for Effects Purposes Because the Union Failed to Set Forth Any Legitimate Reasons Why the Information Would be Relevant for Effects Bargaining.

An employer's duty to provide information to a union is well established.²³ Upon request, an employer must provide a union with information that is necessary to carry out its statutory duties and responsibilities in representing employees.²⁴ The duty to provide information includes information that is relevant to bargaining.²⁵ Information that concerns terms and condition of employment of bargaining unit employees is presumptively relevant, and the employer has the burden of disproving the relevance.²⁶ However, where the information sought by a union concerns employees outside the bargaining unit, the union must show that information is relevant to its representation.²⁷ Board precedent recognizes that documents such as a sales or franchise agreement between a buyer and seller pertain to matters outside the bargaining unit.²⁸ Consequently, it is the Union's burden to articulate a relevant reason for such information.²⁹

In the current case, the ALJ accepted the general principle that documents such as a sales or franchise agreement between a buyer and seller pertain to matters outside the bargaining unit, but pointed out the burden to demonstrate relevance is "not exceptionally heavy,"³⁰ comparing the standard to the broad *discovery* standard in civil litigation.³¹ Further downplaying the Union's burden to demonstrate relevance, the General Counsel attempts to cite *Embarq Corp.* in

²³ *Monmouth Care Center*, 354 NLRB No. 2, slip op. at 41 (2009).

²⁴ *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 867 (2006).

²⁵ *National Broadcasting Co.*, 352 NLRB 90, 97 (2008); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).

²⁶ *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995).

²⁷ *Dodger Theatricals*, *supra* at 14; *Bryant Stratton Business Institute*, 321 NLRB 1007, 1013 (1996).

²⁸ *Sierra Int'l Trucks*, 319 NLRB 948, 950(1995).

²⁹ *Id.*

³⁰ *ALJ Decision*, pp. 17-18 (quoting *Leland Stanford Junior University*. 262 NLRB 136, 139 (1982)).

³¹ *Id.* at p. 18.

support of the idea that it should be self-evident to the Respondent that information outside the bargaining unit is relevant to effects bargaining.³²

However, General Counsel ignores the difference between the type of information requested here, which substantially distinguishes *Embarq Corp.* from the instant case. In *Embarq Corp.*, “[t]he documentation requested ... sought the locations to which bilingual calls were to be routed, to whom they would be referred, whether there were plans to hire additional CSRs to handle those calls, and whether there were efforts underway to hire such employees.”³³ Clearly this information would help the Union make effects proposals for bilingual customer service representatives. The Union could use the information to determine if it was possible to transfer its members to the new facility and make proposals relating to transfer and seniority rights at the new facility. Unlike the information sought by the Union in *Embarq Corp.*, the Union in the current case requested information that does not on its face appear to have any relevance to any possible proposals that the Union might make regarding the effects on employees of the store closures.

Further, just as there are limits and rules regarding what is discoverable under the Rules of Civil Procedure, there are limits and rules to discoverable information in the collective-bargaining context.³⁴ Namely, the Union has the burden of proving relevance as it relates to the particular circumstances before Respondent is obligated to provide the information, and the question of relevancy is determined by the relevance of the information at the time of the request.

³² See General Counsel’s Brief in Support of Cross-Exceptions to the Decision, 15 (citing *Embarq Corp.*, 356 NLRB No. 125, fn. 1 and p. 10. (March 31, 2011)).

³³ *Id.* at p. 17.

³⁴ See *General Elec.*, 916 F.2d at 1167-68; *San Diego Newspaper Guild*, 548 F.2d at 868.

i. In Order for the Respondent to be Required to Provide the Information Requested in Items 16, 27, 30 and 34, the Union was Required to, and Failed to, Provide Explanations at the Time the Information was Requested as to Why the Requested Information was Relevant to Effects Bargaining.

A primary consideration when determining whether an employer has a duty to disclose information is whether the information is relevant to the union's collective-bargaining duties.³⁵ Certain types of information are “so intrinsic to the core of the employer-employee relationship” that they are presumptively relevant.³⁶ When 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.”³⁷

Additionally, the Union not only has the burden of proving relevance generally, the Union also has the burden of proving relevance as it relates to the particular circumstances.³⁸ Further, the question of relevancy is determined by the relevance of the information at the time of the request.³⁹ 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.⁴⁰ And while the relevance standard is a liberal standard, the courts will not allow a union to go on unfounded fishing expeditions.⁴¹ The union must demonstrate “a reasonable basis based on objective facts” for suspecting that the information sought will aid its

³⁵ *Id.*

³⁶ *Atlas Metal Parts Co., Inc. v. NLRB*, 660 F.2d 304, 310 (7th Cir.1981) (citations omitted)(emphasis added).

³⁷ *Id.* (citing *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir.1977)).

³⁸ *Id.* at 1335 (The court determined that the Board only found that the Employer violated the Act in failing to provide information relevant to the negotiations, and it did not conclude that the Employer violated the Act in failing to provide information relevant to the policing of the old agreement.).

³⁹ *Id.* at 1330.

⁴⁰ *General Elec. Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1990).

⁴¹ See *General Elec.*, 916 F.2d at 1167-68; *San Diego Newspaper Guild*, 548 F.2d at 868.

representational duties.⁴² Moreover, the Courts of Appeals for the Fourth, Fifth and Ninth Circuits have also articulated the standard as requiring a showing of reasonable suspicion.⁴³

General Counsel takes exception to the ALJ's determination that the information requested in items 16, 27, 30 and 34 of the Union's December 17, 2009 information request were not relevant to effects bargaining. In order to prevail on its exceptions, General Counsel is required to prove that the Union provided the reason why it needed the information (the relevance) as it related to effects bargaining (the particular circumstances) at the time the information was requested.

While at hearing, the Union feebly attempted to argue they needed the requested information to formulate effects bargaining proposals. They never even attempted to make such an argument during the period of actual effects bargaining. During bargaining, none of the Union representatives ever said they needed the requested information at issue here so they could formulate effects bargaining proposals. It appears that the Union requested the information as part of a fishing expedition to support its spurious, and ultimately discredited, alter-ego theory. The Union only attempted to articulate justification for the information, in the context effects bargaining, at the time of the hearing.

⁴² *Illinois-American*, 933 F.2d at 1378 (quoting *Pfizer*, 763 F.2d at 889).

⁴³ 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....").

ii. Even if the Board Determines that the Union Could Provide Explanations as to Why the Requested Information was Relevant to Effects Bargaining at the Unfair Labor Practice Hearing, the Union is not Entitled to the Information for Effects Bargaining Because the Union Failed to Provide the Required Explanations at the Hearing.

General Counsel argues that during the hearing, the Union clearly articulated the relevance of the requested information for effects bargaining and, therefore, met the relevancy burden that triggers the Respondent's duty to provide the information.⁴⁴ When asked what the Union could learn from the information requested that would help the Union develop effects bargaining proposals, Grant Withers, the Union's representative, stated that he did not know, and even admitted to never seeing a transactional document before.⁴⁵ Even Attorney Sweet struggled at hearing to explain how the information would have been helpful at the bargaining table.

For example, Item 16 states: "Identify amount(s) involved, reason(s) for, and date(s) of transfer of any funds between your company and the non-union company."⁴⁶ Attorney Sweet testified at hearing that the Union needed the information request in item 16 for effects bargaining in order to "know whether or not to make a demand that the employees get paid out [for accrued vacation]."⁴⁷ First, § 109.03(1)(2)&(3), *Wis. Stats.*, require payout of accrued vacation. Second, Attorney Sweet testified that "under state law [Respondent] would have to

⁴⁴ General Counsel's Brief in Support of Cross-Exceptions to the Decision, 21.

⁴⁵ Q So, the reason that you felt that you needed these transactional documents was so that you could find out whether or not – or so that you could develop bargaining proposals for the effects bargaining, correct?

A That's correct.

Q And once again I've got to ask you, what did you think would be in it and could be in the transactional documents, to your knowledge, that would help you formulate bargaining proposals?

A I don't know. I've never seen one.

Tr. at 122 lines 9-18.

⁴⁶ Jt. Ex. 15.

⁴⁷ Tr. at p. 261, Lines 16-17.

pay out the accrued vacation of the employees.”⁴⁸ The Respondent had already notified the Union that it intended to pay out accrued vacation to employees.⁴⁹ Third, Attorney Sweet’s bald, self-serving testimony begs the question—precisely how would the requested information affect whether or not the Union should make a demand for vacation payout? And finally, no other information relating to vacation could possibly be garnered from amounts of funds transferred between the Respondent and the franchisee. Therefore, the “vacation” reason for the information relating to item 16 does not support a legitimate relevant need for the information in item 16 for effects bargaining.

Attorney Sweet also attempted to justify the relevance of the information requested in Item 16 to bargain over reversion rights.⁵⁰ Specifically, Mr. Sweet stated:

[The Union would] also know if there was funds given from Piggly Wiggly Midwest to the corporate store to help them with startup costs, if there was an ability – you know, if they failed to meet a certain threshold over a certain period of time, perhaps there’s an automatic reversion where the Piggly Wiggly Midwest would buy the company back, the franchise back, from the franchisee.⁵¹

Although convoluted, it appears that Mr. Sweet’s testimony was that he requested the amount(s) involved, reason(s) for, and date(s) of transfer of any funds between the Respondent and the franchisee to see if automatic reversion exists. Certainly it is not reasonable to believe that a list of fund transfers will reveal an automatic reversion agreement between the Respondent and the franchisee. Therefore, the “automatic reversion” reason for the information relating to item 16 does not support a legitimate relevant need for the information in item 16 for effects bargaining. Plus, resolution of the reversion issue had already been definitely established by the Recognition Clauses of the respective collective bargaining agreements. The Recognition Clause in the

⁴⁸ Tr. at p. 235, Lines 24-25.

⁴⁹ Tr. at p. 301, Lines 1-5.

⁵⁰ Tr. at p. 261, Lines 18-24.

⁵¹ Id.

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”).⁵² (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”).⁵³ (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 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”).⁵⁴ (emphasis added)

⁵² Jt. Ex. 1.

⁵³ Jt. Ex. 2.

⁵⁴ Jt. Ex. 3.

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.

The two reasons Attorney Sweet labored to articulate at hearing regarding why the Union needed the information requested in Item 16 failed to demonstrate the information's relevance for effects bargaining. This is because the requested information was not relevant to effects bargaining and the Respondent has no duty to provide information that is not relevant. Consequently, the ALJ is correct in ruling that the Respondent did not commit an unfair labor practice by refusing to provide information pertaining to the item 16 information request.

Item 27 states: "Regarding equipment transactions between your company and the non-union company, identify the purchase, rental or lease rate, equipment involved, calendar period, and dollar amount of each transaction."⁵⁵ Attorney Sweet testified that the Union needed the information request in Item 27 for effects bargaining in order to determine "reversionary rights of the Union with regard to transactions that may have taken place."⁵⁶ As indicated above, the employees' reversionary rights were explicitly established by the very collective bargaining agreements that Attorney Sweet negotiated, but in any event, it is not reasonable to believe that a list of leased equipment could possibly reveal a reversion agreement between the Respondent and the franchisee. Further, reversionary rights and the possible concomitant reemployment and placement of employees would have to be negotiated with the Union at the time of reversion. And the question no one seems to be able to answer, least of all Attorney Sweet, is how a list of leased equipment would materially impact the Union's ability to make reversion proposals. The "reversion" reason does not support the relevance of the information to effects bargaining.

⁵⁵ Jt. Ex. 15.

⁵⁶ Tr. at p. 262, Lines 5-6.

Therefore, the ALJ is correct in ruling that the Respondent did not commit an unfair labor practice by refusing to provide information pertaining to the Item 27 information request.

Item 30 states:

Identify those of the following services that are provided to the non-union company by or at your company.

- (a) administrative
- (b) bookkeeping
- (c) clerical
- (d) detailing
- (e) drafting
- (f) managerial
- (g) other⁵⁷

In his testimony during the unfair labor practice hear, Mark Sweet testified that the Union needed the information request in Item 30 for effects bargaining because:

... if the Employer was providing to the new franchise services that are outlined here, we would have been able to make effects-bargaining proposals that would have recognized that they're already putting a commitment of time and money into these areas. But without knowing that, we didn't know. And, again, this request was also made with the intent of receiving information that would have been relevant to whether the Piggly Wiggly Midwest, LLC and the franchisee were – whether there was an arms-length transaction between the two.⁵⁸

Clearly the Union's true intent with the information requested was to determine whether the franchisee was an alter-ego of the Respondent, because no effects bargaining proposals could be created or modified with the Union's knowledge of the information requested in Item 30. Administrative, bookkeeping, clerical, detailing, drafting, and managerial duties are all activities outside of the scope of the work performed by Union employees. The fact that the Respondent provides or does not provide administrative support or assists in bookkeeping procedures does not make a severance proposal more or less likely to be accepted by the Respondent. Nor does it give any indication of how seniority or transition proposals would be viewed.

⁵⁷ Jt. Ex. 15.

⁵⁸ Tr. at p. 262, Lines 12-21.

The Union does not know how the information requested in Item 30 would be helpful for effects bargaining, they just blindly assume that it would be. This is not enough justification for forcing the Respondent to provide the information. The probability of such information altering effects proposals is negligible. Therefore, the ALJ is correct in ruling that the Respondent did not commit an unfair labor practice by refusing to provide information pertaining to the Item 30 information request.

Item 34 states: “Identify work your company performs on behalf of the non-union company.”⁵⁹ In his testimony during the unfair labor practice hear, Mark Sweet testified that:

... with regard to provision of meaningful effects-bargaining proposals, if [the Union] knew that the, that Piggly Wiggly Midwest was performing advise ... we may have better understood the commitment that the Company was making to its franchisees and understood how to meaningfully provide a bargaining proposal that recognized that commitment.⁶⁰

As an example of “meaningful effects bargaining proposals” that the Union would have been able to make, Mr. Sweet stated:

[I]f the Company was providing financial benefits to the franchisee and they wanted, they were trying to make the employer succeed, then it would be less likely that they would have a problem with the Union guaranteeing that the old wage rates would be, would come into effect immediately upon the reversion back to the corporate ownership. If they’re making this fundamental and sincere commitment to the franchisee that they’re going to be guaranteeing their success through financial commitment of district managers around the Company and Koenig himself or his successor to make sure that they’re providing the same Piggly Wiggly services, then we would expect they’d have less of a problem of even guaranteeing maybe a 20-percent pay increase upon reversion back to the corporate-owned stores, because they’re committing time and money to make sure that the company succeeds.⁶¹

It is not reasonable to believe that the Respondent would be more or less willing to accept reversion proposals because the Respondent provides support to its franchisees. It is beyond

⁵⁹ Jt. Ex. 15.

⁶⁰ Tr. at p. 262, Line 24 – p. 263, Line 6.

⁶¹ Tr. at p. 263, Lines 8-23.

faulty logic to the point of ridiculousness to believe that knowing the work the Respondent performs on behalf of the franchisee would make it more likely that the Respondent would be willing to provide a twenty percent wage increase upon reversion. A brief glimpse at the bargaining history with the Respondent and the Union would clearly show that a twenty percent wage increase would never be taken seriously by the Respondent, or any employer.

The Union and the General Counsel appear to believe that throwing out the words “effects bargaining” and “reversion” is sufficient to meet the relevance burden required to demand information from the Respondent. However, they are incorrect. “Effects bargaining” and “reversion” are not magic words and simply asserting and repeating them does not allow the Union to gain access to any and all information the Union desires. Rather, the Union must demonstrate the probable relevance of the information requested in the Union’s carrying out of its statutory duties and responsibilities.⁶² The word “probable” is defined as:

Having the appearance of truth; having the character of probability; appearing to be founded in reason or experience. Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely.⁶³

The Union’s claimed relevance for effects bargaining of the information requested in items 16, 27, 30 and 34 does not have an appearance of truth, does not appear to be founded in reason or the Union’s experience, does not appear to be more likely relevant than not, and does not incline a reasonable mind to believe that such information is relevant to effects bargaining. Thus, the Union failed to prove that the information was relevant. Therefore, the ALJ was correct in ruling that the information requested in items 16, 27, 30 and 34 was not relevant to effects bargaining and that the Respondent did not commit an unfair labor practice by not providing the information.

⁶² *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

⁶³ *Black’s Law Dictionary* 834 (6th ed. 1991).

B. The Respondent did not Commit an Unfair Labor Practice in Regards to Item 39 of the Union’s December 17, 2009 Information Request Because the Respondent Provided an Appropriate Response to Item 39.

Item 39 of the December 17, 2009 information request states: “Identify by job title and respective employment dates of those employees of your company who are or have been employees at the non-union company.”⁶⁴ The Respondent’s response was as follows: “The Company has no information responsive to this inquiry.”⁶⁵ In other words, there were no individuals currently employed by the Respondent who were either employed by or previously employed by the franchisee. The ALJ correctly ruled that this response was a legitimate response to the requested information pertaining to Item 39 because it was a truthful, straightforward answer to the question.

General Counsel mistakenly assumes the request in Item 39 requests information regarding employees currently employed at the franchisee store who were currently or formerly employed by the Respondent.⁶⁶ However that is not the information requested. Further, the Union never indicated that the information they were seeking was anything different than what the information request asked for on its face. Rather than alleging that the Respondent failed to provide in the information requested in Item 39 (which is untrue), General Counsel is alleging that the Respondent failed to provide information relative to an information request that was never made by the Union.

Either way, the ALJ was correct that the Respondent did not commit an unfair labor practice in regards to the Item 39 information request.

⁶⁴ Jt. Ex. 15.

⁶⁵ Jt. Ex. 19.

⁶⁶ GC Br. At 30-31.

C. The ALJ Did Not Err In, as a Matter of Law and Fact, by Failing to Conclude the Information Requested in Item 63 of the Union’s December 17, 2009 Information Request Because the Respondent Provided the Information Requested in Item 63 at the Unfair Labor Practice Hearing.

General Counsel believes that the ALJ erred by failing to order the Respondent to provide the information requested in Item 63, to the extent it has not already done so.⁶⁷ Item 63 states: “Identify any contractual relationship between you [*sic*] company and the non-union company and provide all documentation of such relationship.”⁶⁸ According to the Mark Sweet, the Union’s attorney, Item 63 was specifically requesting the sales and franchise agreements.⁶⁹

Blacks Law Dictionary defines a franchise as: “an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services,”⁷⁰ it is not a document that would list “pools of money set aside for employees”⁷¹ as the Union unreasonably envisioned. The Union had no reasonable suspicion that the franchise agreement was anything different than any other franchise agreement, such as a McDonald’s or Subway franchise agreement. When one thinks of franchise agreement, one does not think “pool of money set aside for employees.”

Thus, the Union failed to how the information is relevant. Therefore, the ALJ was correct in ruling that the Respondent is not required to provide the Union with the franchise agreement.

⁶⁷ General Counsel’s Cross-Exceptions at 2.

⁶⁸ Jt. Ex. 15.

⁶⁹ Tr. at p. 265:2-10.

⁷⁰ *Black’s law dictionary* 454 (6th ed. 1991).

⁷¹ Tr. at p. 56, Lines 17-19.

D. The Company Responded Diligently to the Union's Requests For Information.

The Company acted diligently in responding to all of the Union's requests for information. Indeed, given the Union's delay in seeking information and the depth and breadth of its requests, the Union's requests for information were arguably made in bad faith. In any event, the ALJ correctly concluded that the timeliness of the Company's response to the Union's December 17, 2009, request for information did not violate the Act (and correctly concluded that the Company should have provided the sales and franchises agreements on November 16, 2009, when the Union clarified its previous ambiguous request for information).

On December 17, 2009—approximately one (1) week before the Christmas holiday and twelve (12) days before the stores were scheduled to close and re-open as franchise stores—the Union submitted an exhaustive eight (8) page and over sixty-three (63) item request for information.⁷² The information and documents sought by this request included, but were not limited to, the following information for the Company and the franchisees:

1. Banking institution, branch location and account numbers for its regular accounts.
2. Banking institution, branch location and account numbers for its payroll accounts.
3. Where and by whom the accounting records were kept.
4. The identity of the principal accountant.
5. Where and by whom the corporate records are kept.
6. Where and by whom the other business records are kept.
7. The identity of the principal bookkeeper.
8. The identity of the principal payroll preparer.
9. The carrier and policy number for the workers compensation provider.

⁷² While the request included sixty-three (63) numbered items, many of these items included both numbered and un-numbered sub-parts.

10. The carrier and policy number for the health insurance provider.
11. Where and by whom the federal tax returns are kept.
12. The identity and source of the line of credit.
13. The identity of businesses to which the Company and the franchisees rents, leases or otherwise provides office space.
14. The identity of the Company's and franchisees' building and office suppliers, including information regarding types of office supplies purchased, the amounts of the purchase and the dates of the purchase.
15. The identity of the businesses that use the Company's and the franchisees' equipment.
16. The identity of the businesses to whom the Company and the franchisees sells, rents or lease as its operating equipment or office equipment.
17. The following information regarding equipment transactions between the Company and the franchisees and other entities:
 - a. the purchase, rental or lease rate;
 - b. the equipment involved;
 - c. the applicable calendar period; and
 - d. the dollar volume of each transaction.
18. The identity of the business to whom the Company and the franchisees buy, sell or lease its office equipment.
19. Where the Company and the franchisees advertise for customer business.
20. Where the Company and the franchisees advertise for employee hires.
21. The dollar volume of sales by the Company and the franchisees.

22. Job title and number of employees of the Company and the franchisees.
23. The skills of the employees of the Company and the franchisees.
24. Identify where the employees of the Company and the franchisees report to work.
25. The identity of the Company and the franchisees' supervisors with authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct employees, adjust their grievances, or effectively to recommend such action.
26. A description of the Company's and franchisees' compensation programs including employee wages.
27. A description of the Company and the franchisees' fringe benefit programs.
28. The identity of the following types of individuals for both the Company and the franchisees:
 - a. the persons who establish or control labor relations policy;
 - b. the labor relations representative;
 - c. officers;
 - d. directors;
 - e. owners and/or stockholders.⁷³

In addition, the December 17, 2009, request for information sought extensive information regarding the relationship between the Company and the franchisees, including, but not limited to, the following information:

1. Transfers of funds between the Company and the franchisees.
2. Provision of office space by the Company to the franchisees.

⁷³ Jt. Ex. 15.

3. Office supplies provided by the Company to the franchisees.
4. Equipment transactions between the Company and the franchisees.
5. The following types of services provided between the Company and the franchisees:
 - a. administrative;
 - b. bookkeeping;
 - c. clerical;
 - d. detailing;
 - e. drafting;
 - f. managerial; and
 - g. all other types of services.
6. The work performed by the Company and the franchisees on behalf of the other.
7. The identity of employees of the Company and the franchisees who had transferred between them.
8. Identify employees of the Company and the franchisees working on projects of the other.
9. Supervisors in common between the Company and franchisees.
10. Owners and/or stockholders in common between the Company and the franchisees.
11. Any contractual relationship between the Company and the franchisees.⁷⁴

The foregoing is only a *summary* of the information and documents sought by the Union's December 17, 2009, request for information. As the ALJ correctly noted, the Union controlled the timing of this massive request for information, which was approximately one (1)

⁷⁴ Jt. Ex. 15.

week before Christmas and twelve (12) days before the stores were scheduled to close and re-open as franchise stores.

“In determining whether an employer has unlawfully delayed in responding to an information request, the Board considers the totality of the circumstances surrounding the incident.”⁷⁵ This is just what the ALJ did in this case. “Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule.”⁷⁶ “What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow.”⁷⁷

In evaluating the promptness of an employer’s response to a request for information, “the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information.”⁷⁸ As demonstrated above, the Union’s request for information was complex and extensive in both depth and breadth.

Furthermore, the information was not readily available and the Company encountered great difficulty in obtaining the information. The ALJ concluded that Attorney Simandl credibly testified the Company began putting together its response to the Union’s December 17, 2009, request of information the day after it was received, and that he explained the arduous task of obtaining the information requested by the Union as follows:

you know, there was, gosh, I think almost a hundred, you know, subparts and everything put together. Lot of it had various aspects of the business that had to get involved. Mike, the CFO. There was information regarding the organizational structure; there was information request relative to the – I think there were questions about the principle accountant; where the corporate records are kept. You know, there was – I had a million different department

⁷⁵ *In re West Penn Power Co.*, 339 NLRB 585, 587 (2003), *enforced in relevant part*, *West Penn Power Co.*, 394 F.3d 233 (2005).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* (Internal quotation omitted.)

departments to go through to try to gather all this information. There wasn't one source within the Company that says "I got it all."⁷⁹

The General Counsel has not even attempted to make the required showing that ALJ's credibility determination regarding Attorney Simandl's testimony is contrary to the "clear preponderance of all the relevant evidence."⁸⁰ Instead, the General Counsel focuses on the number of requests to which no responsive information was provided. The General Counsel misses the point. Even though responsive information did not exist to many of the requests, the Company still had to engage in the difficult task of determining what information existed (and did not exist) that was responsive to an incredibly complex and extensive information request. This took a substantial amount of time regardless of what information was ultimately discovered by the Company.⁸¹

The Company responded to the Union's December 17, 2009, request for information approximately one (1) month later on January 19, 2010.⁸² This response time was reasonable given the complex and extensive nature of the request, that the Union controlled the timing of the request and that the Union chose to make the request approximately one (1) week before Christmas and twelve (12) days before the stores were scheduled to close and re-open as franchise stores. Furthermore, the General Counsel has not produced any evidence that the Company could have responded to the request faster.⁸³ Indeed, the Company's response time

⁷⁹ Tr. at p. 331:11-21.

⁸⁰ *Union Carbide Corp.*, 275 NLRB 197, 198 n.1 (1985).

⁸¹ Tr. at p. 331:11-21.

⁸² Jt. Ex. 19.

⁸³ For the reasons previously discussed, the General Counsel's argument based upon the lack of response information to certain requests is ill-founded.

was substantially less than responsive times to similar requests that the Board has found to be reasonable.⁸⁴

Furthermore, the effects bargaining was not affected even though the stores closed and re-opened before the Company responded to the request. As the Seventh Circuit stated in a similar case: “The sale is separate from the consequences and is allowed to go through while the consequences are being bargained over.”⁸⁵ Indeed, the effects bargaining was continuing when the Company responded to the information request.⁸⁶

In any event, any adverse effect on the effects bargaining that did occur was a result of the Union’s delay in making the information request until twelve (12) days before the stores were scheduled to close and re-open as franchise stores. As the ALJ observed: “That timing [of the information request], chosen by the Union, cannot transform the Respondent’s response into an unreasonably delayed one, given the size of the information request.” (Material in brackets added.)⁸⁷

Finally, the General Counsel apparently is contending that the ALJ should have concluded that the Company should have provided the sales and franchise agreements in response to the Union’s November 5, 2009, letter, and not as of the Union’s clarification of said correspondence during a meeting on November 16, 2009. The General Counsel is splitting hairs. The Union’s November 5, 2009, correspondence ambiguously sought “any and all documents...relating to the purchase of these stores that have been executed or prepared for

⁸⁴ *Union Carbide*, 275 NLRB at 199 (10 and ½ month delay in responding to request for information was not unreasonable); *Dallas & Marvis Forwarding Co.*, 291 NLRB 980, 983-84 (1988) (approximately a 7 month delay in providing information was not unlawful), *enforcement granted by*, *NLRB v. Mavis Forwarding Co., Inc.*, 909 F.2d 1484 (1990).

⁸⁵ *Chicago & North Western Transp. Co. v. Railway Labor Executives’ Ass’n*, 908 F.2d 144, 153 (7th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991).

⁸⁶ Tr. At p. 332:7-9.

⁸⁷ ALJ, at p. 27, lines 40 – 43.

execution by the parties.”⁸⁸ This request was clarified by the Union during the parties’ November 16, 2009, meeting to include the sales and franchise agreements.⁸⁹

The ALJ logically concluded that November 16, 2009, should be the date of production based upon the clarification. While the Company takes exception to the ALJ’s conclusion that the sales and franchise agreements should have been produced, the ALJ’s conclusion regarding the date of production is reasonable, and the eleven (11) day difference could hardly have made any difference in effects bargaining.

For all of these reasons, the Company did not unreasonably delay in responding to the Union’s requests for information. Indeed, the Union unreasonably delayed in requesting information. Therefore, the ALJ’s decision in this regard should be affirmed.

E. Even if the Board Determines that the Respondent was Required to Provide the Information for Effects Purposes, a *Transmarine* Remedy is Not Appropriate.

In *Transmarine Navigation Corp.*,⁹⁰ the employer effectively refused to engage in any bargaining regarding the effects of its decision to terminate operations at a particular location. The union received a letter from employer's vice president, dated just three days before employer was to terminate the operations. This letter gave insufficient notice of the closure to the union. By withholding notice of its decision to terminate operations, the employer deterred effects bargaining and committed an unfair labor practice. Therefore, the Respondent violated the Act by closing a facility and terminating employees without giving notice and without bargaining the effects of the closure with the Union.⁹¹ On review, the Ninth Circuit ruled that the Respondent's decision, based solely on economic factors, to terminate its business was not a subject of

⁸⁸ Jt. Ex. 10.

⁸⁹ Tr. at p. 219:23- 220:3.

⁹⁰ 170 NLRB 389 (1968).

⁹¹ *Id.*

mandatory collective bargaining within the meaning of Section 8(a)(5) of the Act.⁹² However, on remand, the Board determined that the Respondent violated the Act by refusing to bargain with the Union over the *effects* of its decision to close its facility.⁹³

In fashioning an appropriate remedy, the Board noted that *pro forma* bargaining is all that is likely to result unless the Union is able bargain under conditions *essentially similar* to those that would have been obtained, had Respondent bargained at the time the Act required it to do so.⁹⁴ Therefore, the Board issued a limited back pay remedy; *i.e.*, back pay tied to the date continued bargaining ceases, with a minimum back pay of two weeks.⁹⁵ However, in determining the appropriate remedy, the Board notes that “the remedy should be adapted to the situation that calls for redress.”⁹⁶ Subsequently, the Boards has imposed *Transmarine* remedy for an employer’s failure or refusal to provide information to the union and there was no effects bargaining.⁹⁷

As in the *Transmarine* case, the Respondent had the right to close its stores without having to bargain over its decision. However, that is where the similarities end. In this case the Respondent gave more than sixty-days’ notice to the Union of the store closing and bargained in good faith the effects of the stores closures with the Union on several occasions prior to the store closures

⁹² *NLRB v. Transmarine Nav. Corp.*, 380 F.2d 933, 939 (9th Cir. 1967).

⁹³ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *e.g. Emsing's Supermarket, Inc.*, 872, F.2d at 1291. Usually the relevant information the employer withheld or refused to provide was adequate notice of the business closing, sale or relocation.

i. A Transmarine Remedy Is Not Appropriate When The Union Did Not State That It Needed The Requested Information For Effects Bargaining Until The Time Of The Unfair Labor Practice Hearing.

The Board has ruled that information regarding the sale of the employing enterprise “is 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 the business.⁹⁸ However, the employer must still bargain over the effects of its decision on bargaining unit employees.⁹⁹ As such, the employer “must normally give the union access, *upon request*, to the sale agreement and more generally, to “information concerning the sale.”¹⁰⁰ However, 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.¹⁰¹ It may also be true that “[t]he Board's standard remedy in effects bargaining cases is the remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).”¹⁰²

However, 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.

The ALJ did not find significant the Union’s failure to articulate reasons for the information prior to hearing. In his decision, the ALJ cites *U.S. Postal Service, H&R Industrial*

⁹⁸ *Compact Video Services, Inc.*, 319 NLRB 131 (1995).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Ag Comm'n Sys. Corp. & Lucent Technologies, A Single Employer & Int'l Bhd. of Elec. Workers, Local 21, AFL-CIO & Communications Workers of Am., AFL-CIO, Party in Interest*, 350 NLRB 168 (2007) (emphasis added).

Services, and *Brazos Electric Power Cooperative*¹⁰³ to support his ruling that a “union’s reasons for requesting information that is not presumptively relevant may be communicated at the unfair labor practice hearing.”¹⁰⁴ First, “[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*.”¹⁰⁵ Therefore, the Union’s failure to give the Respondent its reasons for the information is significant.

Second, the cases cited by the ALJ did not involve effects bargaining and did not involve imposition of a *Transmarine* remedy. The Board simply ordered the employer to provide the requested information:

[w]hether the Respondent’s duty to respond to the Union’s information request runs from [the date of the information request], or from [the date of the hearing in which the Union’s reasons for requesting the information were articulated], the remedy would be the same. Respondent would in either case be ordered to provide the requested information.¹⁰⁶

Consequently, *U.S. Postal Service*, *H&R Industrial Services*, and *Brazos Electric Power Cooperative*¹⁰⁷ are not persuasive in this case.

If the Board in this case determines that the Respondent’s duty to provide the information requested by the Union commenced on the date of the hearing, there would be no unfair labor practice related to effects bargaining because the Union did not articulate the relevance of the

¹⁰³ *U.S. Postal Service*, 356 NLRB No. 75, slip op. at 4 fn. 9 (2011); *H&R Industrial Services*, 351 NLRB 1222, 1224 (2007); *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980).

¹⁰⁴ ALJ Decision at 22 fn. 13.

¹⁰⁵ *N.L.R.B. v. George Koch Sons, Inc.*, 950 F.2d 1324, 1331 (7th Cir. 1991) (internal citations omitted) (emphasis added).

¹⁰⁶ *H & R Indus. Services, Inc. & United Bhd. of Carpenters & Joiners of Am., Metro. Reg'l Council of Carpenters, Se. Pennsylvania, State of Delaware & E. Shore of Maryland*, 351 NLRB 1222 (2007).

¹⁰⁷ *U.S. Postal Service*, 356 NLRB No. 75, slip op. at 4 fn. 9 (2011); *H&R Industrial Services*, 351 NLRB 1222, 1224 (2007); *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980).

information requested to the effects bargaining any time prior to hearing and the Respondent provided the requested information at the hearing. If there is no unfair labor practice, there certainly cannot be a *Transmarine* remedy. If the Board determines that the Respondent's duty to provide the information requested by the Union commenced on the date of the request, and finds that a *Transmarine* remedy is appropriate, the Respondent is responsible for paying, at minimum, two weeks wages to every employee affected by the store closing. Clearly, these divergent results were neither considered, nor intended by the Board in *U.S. Postal Service*, *H&R Industrial Services*, and *Brazos Electric Power Cooperative*.

Conflating the rulings in *U.S. Postal Service*, *H&R Industrial Services*, and *Brazos Electric Power Cooperative* with a *Transmarine* remedy would place an unfair burden on employers and would provide a potent economic weapon that unions can use to punish employers that exercise their legitimate business right to close facilities. 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. In reality, this holding results in mandatory two-week minimum severance packages without any good-faith bargaining required on the part of the Union. This result would clearly be punitive in nature.

The Supreme Court has ruled that "while the Board is given wide leeway in fashioning remedies, the remedy chosen must 'achieve the remedial objectives which the Act sets forth,' and must not punish the employer for its violations."¹⁰⁸ The Board attempted to comply with the

¹⁰⁸ *Yorke v. NLRB*, 709 F.2d 1138, 1144-45 (7th Cir. 1983) (citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-13 (1940)).

Supreme Court's ruling when creating the *Transmarine* remedy.¹⁰⁹ As such, in its typical application, a *Transmarine* remedy achieves the remedial objectives of the Act in two ways. First, the remedy seeks to make employees whole for their losses.¹¹⁰ "Secondly, and more importantly, *Transmarine* ... remedies are designed to restore at least some economic inducement for an employer to bargain as the law requires."¹¹¹ In this particular case the Union retained considerable bargaining power, inasmuch as the employees of the stores that were franchised are in the same bargaining unit and represented by the same Union as virtually all of the employees in Respondent's remaining stores in Sheboygan and Appleton, Wisconsin.¹¹²

The punitive result in combining the rulings in *U.S. Postal Service*, *H&R Industrial Services*, and *Brazos Electric Power Cooperative* with a *Transmarine* remedy flies in the face of the Board's remedy making powers. With the Union's ability to unilaterally induce mandatory two-week minimum severance packages, the result also contradicts one of the purposes of the *Transmarine* remedy: to induce good-faith bargaining. Therefore, the ALJ's suggested *Transmarine* remedy cannot stand.

ii. The Board Does Not Always Order a *Transmarine* Remedy and Distinguishes Between a Failure to Provide Information and the Reasons for a *Transmarine* Remedy.

It has been said that "[t]he Board's standard remedy in effects bargaining cases is the remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)."¹¹³ However, a *Transmarine* remedy is not awarded in every effects bargaining case.¹¹⁴ For example, the Board in *Thompson Transp. Co.*, 184 NLRB 38 (1970) awarded back pay, but not an order to bargain

¹⁰⁹ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

¹¹⁰ *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1291 (7th Cir. 1989).

¹¹¹ *Id.*

¹¹² See General Counsel Exhibits 16, 17 & 18.

¹¹³ *Ag Comm'n Sys. Corp. & Lucent Technologies, A Single Employer & Int'l Bhd. of Elec. Workers, Local 21, AFL-CIO & Communications Workers of Am., AFL-CIO, Party in Interest*, 350 NLRB 168 (2007).

¹¹⁴ *Ag Comm'n Sys. Corp. & Lucent Technologies, A Single Employer & Int'l Bhd. of Elec. Workers, Local 21, AFL-CIO & Communications Workers of Am., AFL-CIO, Party in Interest*, 350 NLRB 168 (2007).

when the Respondent refused to bargain the effects of the facility closing with the Union until five weeks after the close of the facility.¹¹⁵ Likewise, in *Nat'l Terminal Baking Corp., Subsidiary of Kosher Kitchens, Inc.*, 190 NLRB 465 (1971) the Board awarded neither back pay nor a bargaining order despite the Respondent refusing to bargain the effects of the facility closing with the Union until five months after the facility was closed.¹¹⁶

Even when the Board finds that a *Transmarine* remedy is appropriate, it is not owing to a failure to provide requested information. In *Compact Video Services, Inc.*, 319 NLRB 131 (1995), 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 employees it represented.”¹¹⁷ Though the Board found that the Respondent violated 8(a)(5) by failing to produce executed sale transaction documents, the Board’s decision to implement a *Transmarine* remedy was not motivated by that particular violation. Rather, “to remedy the Respondent's *unlawful withholding of the information...*,”¹¹⁸ the Board’s Order required that the Respondent “...immediately furnish the Union with the information in question, without need for further request by the Union, and the backpay feature of my Order contemplates that the ‘backpay period’ will in no event terminate before the Respondent furnishes the information in question to the Union, or the Union waives its right to such information.”¹¹⁹ Though the failure to provide the transaction documents modified the length of the *Transmarine* remedy, it was not the reason for the remedy.

¹¹⁵ *Thompson Transp. Co.*, 184 NLRB 38 (1970).

¹¹⁶ *Nat'l Terminal Baking Corp., Subsidiary of Kosher Kitchens, Inc.*, 190 NLRB 465 (1971).

¹¹⁷ *Compact Video Services, Inc.*, 319 NLRB 131 (1995) (emphasis added).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Likewise, if the Board determines that the Respondent in this case committed an unfair labor practice by failing to provide sale transactional information, the proper remedy is to require the Respondent to immediately provide the documents, not to require the two-week minimum backpay remedy provided for in *Transmarine*.

VI. CONCLUSION

In light of the above, the Respondent respectfully requests the Board deny the General Counsel's cross-exceptions to the ALJ's decision.

Respectfully submitted this 29th Day of August, 2011.

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CERTIFICATE OF SERVICE

Pursuant to Section 102.114(i) of the Board's Rules and Regulations, I certify that a copy of the foregoing brief has been served by electronic mail on the following:

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