

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL MEDICAL TRANSPORT, INC.)		
)		
and)	Case Nos.	28-CA-023399
)		28-CA-060435
)		28-CA-061218
INDEPENDENT CERTIFIED EMERGENCY)		28-CA-062824
PROFESSIONALS OF ARIZONA, LOCAL #1)		
_____)		

**RESPONDENT'S ANSWERING BRIEF TO THE GENERAL
COUNSEL'S CROSS-EXCEPTIONS**

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COMES NOW, Professional Medical Transport, Inc. (“Respondent” or “PMT”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, files this Answering Brief to the Cross Exceptions of the General Counsel in the above captioned matter.

FACTS

The General Counsel filed Cross Exceptions to the Decision of the ALJ in the above captioned matter. The cross exceptions can be summarized as follows: the General Counsel (“GC”) excepts to the ruling of the ALJ that there was no violation of Section 8(a)(5) of the Act by Respondent’s refusal to provide certain requested information without cost-sharing by the Union and that Respondent did not make a unilateral change to its “Move-Up” policy.

The mere fact of the GC’s filing cross-exceptions over these issues illustrates the vendetta perpetrated against PMT in this matter. The GC could not be satisfied with the ALJ’s findings, 95% of which were in the GC’s favor. Rather, the GC felt compelled to ensure that every avenue of potential liability against Respondent, even regarding those matters on which Respondent clearly acted lawfully, be relentlessly pursued. From a purportedly neutral agency, this overly-aggressive pursuit is troubling. Regardless of the GC’s motivation, the exceptions have no merit.

ARGUMENT

A. The ALJ properly found that PMT did not unlawfully refuse to provide requested information on or about June 29, 2011.

Paragraph 8(d) of the Complaint alleged that the Union has requested the following information and that such information has not been provided: 1) list of people disciplined for 10-8 times under two minutes within the prior 6 months; compliance reports broken down by unit since December 2010; and the language in city contracts that mandates 100% out of chute time

compliance. (Compl. ¶ 8(d); G.C. Ex. 10.) The ALJ found that, only as to item three in the June 29 request for information, the Respondent's failure to furnish to the Union that information violated Section 8(a)(5).¹ (ALJD 18:16-18.)² The ALJ found that as to the remainder of the allegation, PMT did not violate the Act by failing to furnish the requested information.

The June 29 correspondence contained several specific information requests, including the slide presentation regarding hostile work environment given by Michael Grubbs, the data and messages sent to Unit 604's Blackberry on June 13, 2011, the information used to terminate employee Michael Weinman, PTO information on Joshua Barkley, and paperwork from discipline given to Mr. Barkley. (G.C. Ex. 10.) PMT responded the same day to Mr. Barkley's request and provided the slide presentation and PTO information. (G.C. Ex. 11.) PMT also advised Mr. Barkley that it would have a response to him on the other requests. (*Id.*) Within a few days, PMT provided more information to Mr. Barkley, including the Blackberry messages, as well as an answer to his question regarding "100% out-of-chute time compliance." (*Id.*) PMT's response also included a portion of the requested compliance reports. (*Id.*) Thus, PMT immediately provided most of the information that existed that was requested in the June 29, 2011 request for information.

However, PMT did not provide the 10-8 discipline and additional compliance reports. Rather, PMT requested that the Union assist with the cost of compiling the requested

¹ As fully set forth in Respondent's Brief in Support of Exceptions, this finding was in error as PMT fully responded to this request for information. In fact, PMT responded that same day to Mr. Barkley's request and provided the some of the information requested. (G.C. Ex. 11.) PMT also advised Mr. Barkley that it would have a response to him on the other requests. (*Id.*) Within a few days, PMT provided more information to Mr. Barkley, including the Blackberry messages, as well as an answer to his question regarding "100% out-of-chute time compliance." (G.C. Ex. 12.) The response attached PMT's policy regarding emergency response times and explained the PMT policy's interaction with the city contracts. (*Id.*) Accordingly, PMT responded promptly and in full to the request for information.

² Citations to Decision of the Administrative Law Judge will be "ALJD" followed by the page number, a colon, and the line numbers from where the exception is based in whole or in part.

information. (*Id.*) While the GC attempts to paint this request as a demand, the plain language of the various responses refutes that picture. For example, Joy Carpenter, PMT's Human Resources Director, responded to the information request by stating "[w]e would ask that the ICEP reimburse the company for this expense." (*Id.*; *see also*, G.C. Ex. 13 (stating "if you propose a different arrangement, please let us know as well."; G.C. Ex. 19 (same).) Asking and demanding are two very different concepts. Accordingly, General Counsel's allegation that PMT "required the Union to pay \$12.00 per hour" for the cost of compiling the documents is absolutely, unequivocally refuted by the documentary evidence.

The company-suggested cost-sharing approach places the dispute within the context of collective bargaining and is not a violation of the Act. In *Tower Books*, 273 NLRB 671, 671 (1984), the NLRB theorized that the employer should have given the union a charge per page for copying and hourly rate for the administrative expense in order to give the union an opportunity to decide whether to continue requesting the allegedly burdensome information. *Id.* Despite several opportunities to do so, the Union never responded to PMT's efforts to discuss the issue to come up with an acceptable fee sharing arrangement. (Transcript of Hr'g. in Case No. 28-CA-023399, hereinafter "Tr." at 527:25-528:3.) Further, despite the GC's attempt to place the burden of bargaining over the issue *back* into PMT's hands, the ball was firmly in the court of the Union based on PMT's communication. Because the Union never responded to PMT's overtures, there was no opportunity or need to advise the Union regarding the burdensomeness of the request or where PMT came up with the \$12.00 per hour request.

Finally, the GC attempts to cast aspersions on PMT's motivation for proposing the cost-sharing arrangement because the Union was purportedly broke and PMT was aware of this fact. While motivation is not relevant in this context, there is no evidence that PMT knew whether or

not the Union was collecting dues. In fact, Ms. Carpenter testified that she was not aware of whether or not the Union was collecting dues. (Tr. at 48:3-8.) This testimony was uncontroverted. Additionally, the ALJ rejected the GC's effort to make this implication during the hearing by sustaining PMT's objection to certain questioning over this issue. (Tr. at 463.)

Because the only information that was not provided was that subject to negotiation over fee sharing, the ALJ properly found in favor of Respondent on this allegation. The GC's exceptions to this finding should be denied.

B. The ALJ properly found that PMT did not unlawfully refuse to provide requested information on or about August 16, 2011.

Paragraph 8(h) of the Complaint alleged that the union has requested, since August 16, 2011, the following information, which has not been provided: 1) A copy of the video from Station 604; A copy of the work order that replaced the lock on the bedroom closet door at Station 604; 3) A list of individuals interviewed in the investigation of Barkley; 4) List of unit personnel that have been placed on administrative leave for 5 weeks or longer; and 6) all documentation concerning Barkley's discipline. Mr. Barkley unreasonably demanded that all of this information be provided within 24 hours. (G.C. Ex. 13.) Because the information requested related *directly* to a pending unfair labor practice charge, PMT's refusal to provide the requested information was not unlawful. Accordingly, the GC's exceptions to the ALJ's findings in this regard are without merit and should be denied.

As Mr. Barkley admitted, the information request came *after* Mr. Barkley had filed an unfair labor practice charge with the NLRB alleging that his being placed on administrative leave was unlawful. (Tr. at 528:18-529:5; G.C. Ex. 1(m).) Mr. Barkley filed the unfair labor practice charge on or about July 14, 2011. (G.C. Ex. 1(m)). He then requested the information on August 16, 2011. (G.C. Ex. 13.). Two days later, on August 18, 2011, he filed an amended charge related

to this allegation. (G.C. Ex. 1(s)). The NLRB process does not allow a Union to engage in discovery by framing its discovery requests as mere requests for information. Accordingly, when information is sought that relates to a pending charge, the employer need not provide that information. *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994). Where, as here, the timing and subject of request indicate that information is related to pending charges, the Board will not find a refusal to provide such information unlawful. (*Id.*) Because the request for information related exclusively to the pending unfair labor practice charge, PMT was under no obligation to provide such information.

Additionally, despite the fact that these requests related to an outstanding unfair labor practice charge, PMT did actually provide Mr. Barkley with the entire investigative file regarding his discipline. (G.C. Ex. 19; Tr. at 529:24-530:4.) The video of the closet at Station 604, which was not provided, was not part of the investigation of Barkley's case. (G.C. Ex. 19.) In fact, as PMT explained in its response to Mr. Barkley's request for information, the closet search was a separate compliance investigation which resulted in no disciplinary action of any field employee. (*Id.*) Accordingly, the relevant information that existed in relation to this request was provided to Mr. Barkley, despite PMT having no legal obligation to provide such documentation.

The correspondence and testimony relating to this allegation illustrates PMT's attempts to reasonably accommodate Mr. Barkley's continuous, burdensome information requests. Despite having no legal obligation to do so, PMT provided the requested information. Yet, PMT still was forced to defend itself from a meritless unfair labor practice charge relating to this purported "refusal" to provide requested information. Now, PMT must defend itself again from a meritless exception to the ALJ's finding on this issue. This allegation, and the GC's exceptions

to the ALJ's proper finding, demonstrates the vast overreaching by the GC in this case. The ALJ properly found no violation of the Act under these facts and the GC's exceptions to this finding should be denied in their entirety.

C. The ALJ properly found that PMT did not unlawfully require the Union to pay \$12.00 per hour for administrative costs

Paragraph 8(0) of the Complaint alleged that since July 1, 2011, PMT has required the Union to pay \$12.00 per hour for administrative costs in compiling the information requested regarding 10-8 times. At the hearing, the Complaint was amended to allege this also occurred on April 15, 2011. The ALJ properly found no violation of the Act by PMT's proposed cost-sharing arrangement.

As outlined above, PMT did ask the Union to share the costs, at \$12.00 per hour, of burdensome information requests. This has been limited to the six months of "10-8" discipline requests, as well as compliance reports from December 2010 through June 2011. (Compl. ¶¶ 8(d)-8(o). Again, while the General Counsel characterizes this as a demand or requirement, the plain language of the various responses refutes that characterization. For example, Ms. Carpenter's responses stated "[w]e would ask that the ICEP reimburse the company for this expense." (G.C. Ex. 12.; *see also*, G.C. Ex. 18; G.C. Ex. 13 (stating "if you propose a different arrangement, please let us know as well."; G.C. Ex. 19 (same).) Accordingly, General Counsel's allegation that PMT "required" the Union to pay the cost of compiling the documents is inconsistent with the statements in the documentary evidence.

Again, the company-suggested cost-sharing approach places the dispute within the context of collective bargaining and is scarcely a violation of the Act. In *Tower Books*, 273 NLRB 671, 671 (1984), the NLRB theorized that the employer should have given the union a charge per page for copying and hourly rate for the administrative expense in order to give the

union an opportunity to decide whether to continue requesting the allegedly burdensome information. *Id.* Despite several opportunities to do so, the Union never responded to PMT's efforts to discuss the issue to come up with an acceptable fee sharing arrangement. (Tr. at 527:25-528:3.)

In fact, rather than receiving any response to its requests to bargain over the issue, PMT simply received an unfair labor practice complaint over the issue. In *Boeing Company*, 337 NLRB 758 (2002), the ALJ, with Board approval, stated that a union does not preserve its statutory bargaining right by declining to meet and negotiate while seeking to assert a bargaining right by filing an unfair labor practice charge. The same principle applies here. Rather than seeking to clarify, discuss and negotiate with PMT over the \$12.00/hr request, Mr. Barkley simply looked to the NLRB, which is consistent with the Union's history of "bargaining" with PMT.

Once again, however, the GC attempts to place the burden of bargaining over the issue *back* into PMT's hands, despite PMT's communication to the Union. As previously outlined, the onus was on the Union to make a counterproposal to PMT's request, or, at the least, object to the request. The Union failed to do so, instead choosing to file an unfair labor practice charge over the issue. Because the Union never responded to PMT's overtures, there was no opportunity or need to advise the Union regarding the burdensomeness of the request or where PMT came up with the \$12.00 per hour request.

Because the only information that was not provided was that subject to negotiation over fee sharing, the ALJ properly found in favor of Respondent on this allegation. The GC's exceptions to this finding should be denied.

D. The ALJ properly found that PMT did not unilaterally change its policy regarding “move-ups” nor has PMT issued any discipline to employees under any new “move-up” policy.

Paragraph 8(1) of the Complaint alleged that PMT unilaterally changed its policy regarding move-up times in or about December 2011. There was no evidence in the record that PMT ever changed its policy. Accordingly, the ALJ properly found no violation of the Act under these facts.

PMT’s written Response Time Standards policy has been in effect since October 2005 and has never changed during that time. (G.C. Ex. 22; Tr. at 634:14-20; 639:1-6.) PMT’s policy provides that the “Out of Chute” time for emergency calls should be no longer than 60 seconds. (G.C. Ex. 22.) This is the “10-8 time” that was referred to throughout the hearing. (Tr. at 395:21-25.) A “move-up” is considered a “non-emergency” response and is and always has been subject to a two-minute response time requirement. (G.C. Ex. 22; Tr. at 639:1-6; Tr. at 652:21-653:2.)

Again, PMT’s move-up policy has not changed. The documentary evidence supports this. (G.C. Ex. 22.) The uncontroverted testimony supports this. (Tr. at 653:4-7.) There was no evidence presented at the hearing that any PMT employees have ever been counseled or disciplined for move-up times that were quicker than two-minutes, as required by the long-standing policy. (G.C. Ex. 22; Tr. at 298:15-17.) General Counsel did offer an “agenda,” which incorrectly reflected that the move-up time requirement was one minute. (G.C. Ex. 45.) However, this is not a PMT policy and a one-minute requirement for move-ups has never been a company policy, nor has it been enforced. (Tr. at 653:23-25.)

The testimony and evidence at the hearing confirmed that PMT’s policy has been consistent since October 2005. There was no evidence presented of any change in the time requirements for move-ups, nor was any evidence presented of discipline to employees on the

basis of a purported “change.” The GC’s exceptions to the ALJ’s findings on this issue are meritless and should be denied.

CONCLUSION

As outlined above, the GC’s exceptions to the Order of the ALJ are without merit.

Accordingly, the Cross-Exceptions should be dismissed in their entirety.

DATED this 14th day of February, 2012.

SHERMAN & HOWARD L.L.C.

/s/ Michael C. Grubbs _____

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CERTIFICATE OF SERVICE

I certify that I caused a copy of Respondent's Statement of Exceptions to be electronically filed this 14th day of February, 2012, and that a **COPY** of the foregoing was sent first class mail this 14th day of February, 2012, to:

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COPY of the foregoing was sent via email this 14th day of February, 2012, to:

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