

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PROFESSIONAL MEDICAL TRANSPORT, INC.

and

**Cases 28-CA-023399
28-CA-060435
28-CA-061218
28-CA-062824**

**INDEPENDENT CERTIFIED EMERGENCY
PROFESSIONALS OF ARIZONA, LOCAL #1**

ACTING GENERAL COUNSEL'S REPLY BRIEF

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I. INTRODUCTION

On January 31, 2012, Counsel for the Acting General Counsel (General Counsel) filed Cross-Exceptions, and a Brief in Support, to the decision of Administrative Law Judge (ALJ) Lana Parke [JD(SF) 49-11] (ALJD), issued on December 20, 2011, in the above captioned cases.¹ On February 14, 2012, Respondent filed an Answering Brief to the General Counsel's Cross-Exceptions. Pursuant to Section 102.46(h) of the Board's Rules and Regulations, the General Counsel files this Reply Brief to Respondent's Answering Brief.

At the outset of its Answering Brief, Respondent makes the absurd argument that the General Counsel must have a vendetta against Respondent because, after the ALJ sustained the majority of the allegations against Respondent, the General Counsel filed limited Cross-Exceptions. What follows in its Answering Brief is continued arguments as to how the General Counsel and the Region are pursuing some outlandish and unjustified litigation against

¹ Professional Medical Transport, Inc. is referred to as Respondent. The Independent Certified Emergency Professionals of Arizona, Local #1 is referred to as Union. References to the ALJD show the applicable page number. "Tr. ___" refers to pages of the transcript from the hearing held between October 11 through October 14, 2011. "GCX ___" refers to exhibits introduced by General Counsel at the hearing. "RX___" refers to exhibits introduced by Respondent at the hearing. "UX___" refers to exhibits introduced by the Union at the hearing.

Respondent, despite Respondent's repeated and serious violations of the National Labor Relations Act—violations that have been sustained by the United States Court of Appeals for the Ninth Circuit. See *NLRB v. Professional Medical Transport, Inc.*, No. 11-71785 (9th Cir. 2011). Respondent's entire Answering brief and its assertions about the General Counsel and the Region are nothing more than repeated and tired arguments that have no validity and should be rejected by the Board.

II. THE GENERAL COUNSEL CROSS-EXCEPTIONS AND RESPONDENT'S ARGUMENTS

A. Cross-Exceptions Regarding June 29, 2011² Information Request and Unilateral Change.

The General Counsel argued in its cross-exceptions that the ALJ erred in failing to find that Respondent's violated Section 8(a)(1) and (5) of the Act by refusal to provide certain information to the Union, pursuant to a June 29 information request, without the Union's agreeing to pay administrative costs, and that the requirement to pay administrative costs for relevant information was a unilateral change. Respondent has offered nothing new in its Answering Brief to the General Counsel's Cross-Exceptions.

In its Answering Brief, Respondent does not address the ALJ's finding that the information request on June 29, was relevant and necessary. (ALJD at 17-18) Rather, Respondent spends a great deal of its Answering Brief merely congratulating itself for providing **some** of the information that was requested by the Union on June 29, and failing to address the information itself and its relevance. Further, it argues that the General Counsel has labeled Respondent's insistence that the Union pay administrative costs a "requirement" or "demand," while Respondent claims it was only an invitation to bargain about the cost of compiling the information. Respondent is incorrect in its argument.

² All dates herein will be 2011, unless otherwise noted.

The Union requested information on June 29, concerning only six months of disciplinary records of bargaining unit members, records related to discipline for a specific type of alleged performance deficiency—a delayed response time to a call. The Union had numerous individuals, including two Union officers, who had received discipline for the same type of alleged misconduct. Moreover, the Union and Respondent were in bargaining over the response times, discussing how better equipment in the various geographical locations where bargaining unit employees worked resulted in quicker response times. This information, as found by the ALJ, was per se relevant and necessary for the Union. (ALJD at 17-18) The ALJ found, however, that Respondent was justified in asking for the Union to pay administrative costs prior to turning over the relevant information and, therefore, dismissed the allegation as the Union did not agree to pay the costs. (ALJD at 17-18) The ALJ also dismissed the allegation that this requirement by Respondent constituted a unilateral change. (ALJD at 19) Respondent appears to argue that, because it provided some of the information, it should be congratulated, and its failure to provide all of the relevant information should be ignored.

The record evidence is clear—Respondent was not going to provide these relevant documents without the Union paying \$12.00 an hour for an administrative clerk to search and compile the information. (Tr. 47; GCX 12) Respondent provided no indication to the Union as to how many hours this would take, how many records were in existence, nor why compliance reports that are prepared monthly, as required for city contracts, required another individual to compile them. This was a “requirement,” not an invitation to bargain or a suggestion.

Moreover, Respondent fails to address the Board's decision in *Marin Marietta Energy Systems*, 316 NLRB 868 (1995), where an employer's unverified assumption concerning the expenses of compiling health insurance costs was insufficient to demonstrate that the financial impact of a union's information request was burdensome. Claims of financial impact have had limited success before the Board without specific evidence showing how complying with the information request is burdensome and expensive. The ALJ erred when she found that Respondent's claims of burdensomeness and expense were reasonable. Respondent presented no evidence, other than an unverified statement on an email from Human Relations Manager Joy Carpenter, that Respondent did not keep "a list" of those records and it would take time to find the records in employees' personnel files. (GCX 18) The gathering of comparative disciplinary reports for a limited time period, along with compliance reports of ambulance units for a six-month time period, that are routinely kept, is not burdensome. The Board considers the complexity and extent of information sought, its availability and the difficulty in retrieving the information to determine whether the request is burdensome. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). See also *West Penn Power Co.*, 339 NLRB 585, 587 (2003) enf. 394 F. 3d 233 (4th Cir. 2005). Information that is used in the ordinary course of business is neither burdensome nor time consuming, and when it is maintained on a daily basis by Respondent, it must be produced. *Tree Fruits Labor Relations Committee, Inc.*, 121 NLRB 516, 518 (1958). Respondent is required to provide compliance reports, every month, to the various cities in which it operates. (GCX 34, page 3) Respondent presented no record evidence showing how the production of similar documents to the Union was burdensome; instead it merely stated they did not have the records in an electronic or computer form. Therefore, there is a lack of any credible evidence that the Union's request

was burdensome either financially or with respect to the time needed to collect the information. This deficiency in the evidence is not addressed by Respondent in its Answering brief.

Additionally, Respondent does not address how it came up with its purported costs to compile the information, or discuss why it did not bargain over those costs with the Union. Although a union may be required, in certain circumstances, to pay the reasonable costs of providing copies in accordance with a request for information, the Board has held that the parties should bargain in good faith over which party shall bear such costs. *Food Employers Council*, 197 NLRB 651 (1972). In *Tower Books*, 273 NLRB 671 (1984) *enfd.* 772 F. 2d 913 (9th Cir. 1985), an employer was found to have violated its duty to bargain when it refused to provide information unless the union paid all copying and administrative expenses in advance. The employer did not specify the copying cost per page, the approximately number of copies, or the administrative hourly expense, and the union had no objective basis upon which to decide whether it wished to incur these charges.

The facts here are strikingly similar, Respondent announced on July 1, that it was charging the Union \$12 an hour to search for the records the Union requested. (GCX 12) Respondent gave no alternative to the Union—pay or you don't get the documents. Respondent failed to identify: (1) how it came up with the figure of \$12 per hour; (2) how long it would take an administrative employee to search for the records; (3) how many documents existed; and (4) a possible alternative to the actual documents themselves. Respondent made this pronouncement knowing that the Union had not collected dues since 2008, that it had no paid officers, and that the only money available to the Union was the wages those employees made working for Respondent. Respondent may feign ignorance as

to the Unions financial state, but Respondent is well aware that it had stopped dues check-off authorizations several years earlier, and that all of the Union's officers are full-time employees of Respondent. Requiring the Union to pay the costs associated with relevant and necessary information requests, seeking only six months of disciplinary reports, and compliance reports that Respondent must already prepare and provide to various cities, without bargaining with the Union about those costs, is unlawful. *Tower Books*, supra. Any implication that the Union could have proposed an alternative is belied by Respondent's email clearly indicating that \$12 per hour was the amount Respondent would charge the Union if it wanted the information. (GCX 12)

The ALJ erred by failing to find that Respondent instituted a unilateral change by setting forth this requirement, and further erred by not requiring Respondent to provide per se relevant information. Respondent's Answering brief is devoid of any meaningful argument to this cross-exception.

B. Cross-Exceptions Regarding August 16 Information Request.

The General Counsel filed Cross-Exceptions to the ALJ's finding that Respondent did not violate Section 8(a)(1) and (5) of the Act when it refused to provide information request by the Union on August 16. Respondent argues that the ALJ was correct in her decision because the Union's request was merely a request for discovery, due to an unfair labor practice charge having been filed prior to the information request. Respondent also argues in its Answering Brief that the mere fact the General Counsel has filed a cross-exception to this allegation indicates a "vast overreaching" by the General Counsel.

Respondent utterly fails to address the central argument of the General Counsel's Cross-Exceptions—that the line of cases supporting Respondent's argument that information requests can be denied if there is an unfair labor practice pending, appear to apply only to

cases where the employer and the union have a collective-bargaining agreement with a set procedure for grievance and arbitration claims. See *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992) Furthermore, there is no absolute rule against providing the information—it is a case-by-case analysis, something not done by the ALJ in her decision, nor addressed by Respondent in its Answering Brief.

C. Cross-Exceptions Regarding a Unilateral Change in the Move-up Policy.

The General Counsel filed cross-exceptions to the ALJ’s failure to find that Respondent’s December 14, 2010 announcement to employees, for the first time, that move-ups had to be accomplished within one minute of receiving the notification to “move-up” as opposed to the two-minute policy that was in existence, was a unilateral change in violation of Section 8(a)(1) and (5) of the Act. Respondent argues that there was no change in the “move-up” policy, and this item announced to all 911 bargaining unit members was merely a “suggestion.” Respondent further argues that, because there is no evidence Respondent enforced this “one-minute” requirement, there could not have been a change.

Respondent incorrectly asserts that the October 2005 policy regarding “calls” sets forth Respondent’s policy concerning “move-ups” and that the policy has remained the same since then. This argument contradicts the record evidence indicating otherwise. Respondent requires 911 ambulances to “move-up” at various times during their shifts. (Tr. 105) A “move-up” is an action taken by a 911 ambulance that is moving to another geographical location, where the 911 ambulance assigned to that particular location is unavailable. (Tr. 105) This allows a 911 ambulance to be in a specific geographical location, available for a 911 call, at all times. (Tr. 105-106)

Until December 14, 2010, Respondent had never maintained a written move-up policy concerning the allotted time it allowed for a 911 ambulance to “move-up.” (Tr. 411; GCX

45) Respondent has maintained a policy regarding emergency and non-emergency calls. (GCX 22) Respondent has routinely referred to GCX 22 when asked for its move-up policy, and continues to do so in its Answering Brief. (Tr. 66-69; GCX 21) However, Pat Cantelme, the CEO of 911 Operations, testified clearly, on at least three occasions, that a “move-up” is not the same as a “call.” (Tr. 104, 106-107) A “call” originates from the 911 dispatcher at the Phoenix Regional Dispatch System, where the 911 ambulance must respond to a patient in distress. (Tr. 103) A “move-up” request originates from Respondent’s dispatcher, and by Respondent’s own admission, is not a “call,” and is not otherwise an non-emergency response call. (Tr. 104; 413) Despite this clear evidence to the contrary, Respondent continues to argue the fiction in its Answering Brief that a “non-emergency call” is a “move-up.”

On December 14 and 15, 2010, Respondent held meetings with all employees working in the 911 system. (Tr. 171-173; GCX 43, 44) During these meetings, it was announced, for the first time, that the “move-up” policy required employees to respond to “move-up” calls within one minute, 100% of the time. (GCX 45) Despite this announcement and the record evidence, Respondent argues that this pronouncement was not a change in policy, merely a suggestion. However, Respondent fails to address the issue of the March 21 meeting between employee Greg Empey, Union Vice President Travis Yates, supervisors Wayne Clonts and Barbie Marr. At this meeting, when asked to see the policy on “move-ups,” Clonts and Marr brought out the December 14, 2010 memo and told Yates and Empey that this was the policy. (Tr. 174; 282; 579; 595; GCX 45) Respondent also fails to address in its Answering Brief, the fact that the policy for “move-ups,” at one time, was 90 seconds, as related to the Union by Cantelme. (GCX 23)

Moreover, while Respondent argues that it has never disciplined employees under the GCX 45 one-minute policy, it fails to mention its attempts to discipline Empey on March 21 under this exact policy. The ALJ fails to address this as well, when she determined that there was no clear evidence of a deviation from the established two-minute policy. In fact, the ALJ appears to agree with Respondent's contention that that any written reference to a one-minute move-up time was erroneous. (ALJ at 18) However, such an agreement is error, as Respondent announced to employees in two meetings, one on December 14, 2010, and another the next day, that the policy had changed. These were not a written references, but verbal announcements by three different Regional Managers to all employees working in the 911 system that the move-up policy had changed to one-minute. Clearly, the ALJ erred, and Respondent failed to convincingly address the General Counsel's argument in its Answering Brief.

III. CONCLUSION

It is respectfully requested that the Board accept the General Counsel's cross-exceptions and find the additional violations of the Act, as alleged, and provide the appropriate remedy.

Dated at Phoenix, Arizona, this 28th day of February 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in PROFESSIONAL MEDICAL TRANSPORT, INC., Cases 28-CA-023399 et al. was served by E-Gov, E-Filing, and E-Mail on this 28th day of February 2012, on the following:

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