JD–26–12
Watertown, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NEW YORK AIR BRAKE CORPORATION

and

Cases 03–CA–028158
03–CA–065279

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL–CIO, DISTRICT LODGE 65, LOCAL
LODGE 761

*Kevin R. Kitchen, Esq.,* for the General Counsel.
*David M. Ferrara* and *Kseniyo Premo, Esqs.*
*(Bond, Schoeneck & King, PLLC),* of Syracuse,
New York, for the Respondent.

# DECISION

## STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Watertown, New York on January 11, 2012. The International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 65, Local Lodge 761, (the Union) filed the charge in Case 03–CA–028158 on August 25, 2011 and the charge in Case 03–CA–065279 on September 26, 2011. On November 15, 2011 the Regional Director for Region 3 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint, and notice of hearing. The consolidated complaint alleges that New York Air Brake Corporation (the Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by failing to provide information in a timely manner to the Union, that is necessary for, and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees. The consolidated complaint also alleges that the Respondent violated the Act by making a unilateral change in its policy regarding material that may be posted on the union bulletin boards.

The Respondent filed a timely answer to the consolidated complaint denying the essential allegations and requesting that the complaint be dismissed.

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the Acting General Counsel and the Respondent, I make the following

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## FINDINGS OF FACT

### I. JURISDICTION

15 At all material times, the Respondent, a corporation, with an office and place of business in Watertown, New York where it produces air brakes for use on locomotives. During the 12-month period preceding issuance of the consolidated complaint, a representative period, the Respondent, in conducting its business operations described above, sold and shipped from its Watertown, New York facility goods valued in excess of $50,000 directly to points outside the 20 State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

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Beginning in the summer of 2011 the Respondent experienced a substantial increase in orders. On June 10, 2011 (all dates are in 2011 unless otherwise specified), the Respondent sought suggestions from the Union as to how to increase production. The unit, as described in the complaint is:

30 All employees in the job classifications listed in the article on Rates of Pay[Article 19] or similar job classifications within the seniority divisions under the jurisdiction of the Union, as described in the collective-bargaining agreement between the Respondent and the Union effective from April 10, 2010 through April 21, 2013.

35 In essence the Union represents all 160 production and maintenance employees at the Watertown facility. The current collective-bargaining agreement is the latest of numerous successor collective-bargaining agreements negotiated by the parties.

On June 17 Rocky Maxson and Art Gamble, president and vice president of the Union, 40 respectively, met with Tim Sheridan the Respondent's operations manager to discuss ways to increase production. One way under discussion was a change in how employees were asked to work overtime. Overtime is voluntary at the facility. Traditionally, if overtime work was available in the job that the employee was assigned that employee was offered the overtime. If the employee refused, the employee was not offered overtime in any other job. This was true 45 even if overtime was available in another job for which the employee was qualified. In order for employees to work overtime on jobs other than the one they were assigned they had to sign an "extra list." The Union suggested that employees be asked it they wanted to work overtime, if they accepted they would be assigned the overtime work even though it was not on their regular assigned job.

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This change was immediately, and successfully, implemented. The fact that neither the Respondent nor the Union explained the change to the employees resulted in Maxson receiving several inquiries from employees. Because of the inquiries, Maxson asked Sheridan to give him a written request to change the way overtime would be administered under the collective-bargaining agreement. He also told Sheridan that he wanted a definite end date, in writing, for this temporary method of selecting employees to work overtime. These requests were made on June 24. Sheridan initially did not appear to oppose the requests. But on July 1 he told Maxson that a letter would not be forthcoming because the collective-bargaining agreement did not prohibit the Respondent from making the change.

On July 18 the Union sent a letter to Sheridan stating that the new method of soliciting for overtime "must be stopped immediately." Having notified the Respondent of its position the Union notified the unit employees by posting the following notices addressed to "Dear Brothers and Sisters," on the three bulletin boards in the facility dedicated solely for use by the Union.

> After numerous discussions and attempts at trying to give the Company some relief in the administration of overtime by allowing employees to work an open overtime assignment on a specific bid job other than their own specific bid job, it appears that no agreement can be reached.
>
> Therefore, it is the Unions [sic] position as per Article 5, Section 3, #1 A-G that employees must work overtime on their specific bid job before working an open overtime assignment on any other specific bid job.
>
> If you have any questions regarding this please see a member of the General Committee. (GC Exh. 6.)

Shortly after the notices were posted, John Chatterton, the Respondent's director of operations, told Maxson that the notices were encouraging a work stoppage. He asked Maxson to remove them. Maxson refused and Chatterton told him that he would remove the notices if Maxson did not. Maxson told Chatterton that he expected Chatterton to notify him before removing the notices. Chatterton removed the notices on August 2 without any notification to the Union.

The following day the Union filed two grievances alleging that the Respondent violated the collective-bargaining agreement by removing the notices and changing the way overtime was administered. Also on August 3 the Union made a request for the current extra overtime lists.

Shortly thereafter the Union posted another notice on the union bulletin boards. These notices were identical to the first notices with the addition of a paragraph stating that the intent of the notices was not to provoke or promote a work stoppage. (GC Exh. 8.) Those notices were also removed by the Respondent.

On August 9 the Union gave Sheridan a letter requesting a list of employees who worked overtime outside their job classification when overtime, was available on their specific bid job. The request also notes that the Union had not received the information requested by the union on August 3. The request specifically informs the Respondent that the information requested in both the August 3 and 9 letters is needed to prepare for the third step grievance meeting scheduled for August 22.

On August 15 or 16 Maxson and Sheridan had a brief conversation regarding both information requests. When Sheridan started to explain why the Respondent was not going to provide the information Maxson stopped him and told him to give a written response as to why the Respondent was not going to provide the information. Sheridan questioned the relevance of the requested information and suggested that Maxson obtain the information from the employees. By letter dated August 15 Maxson put in writing his request that Sheridan provide the Union with the written reasons why the Respondent could not provide the information requested on August 3 and 9.

The Respondent did not provide the information requested by the Union in the August 3, 9, and 15 letters. It was not until October 1, in response to a request dated September 13, that the Respondent provided the information the Union requested on August 3, 9, 15, and September 13.

## III. Analysis and Discussion

### *A. The Delay in Providing the Requested Information*

An employer has a statutory obligation "to provide information that is needed by the bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.,* 385 U. S. 432, 435–436 (1967). This obligation extends to information in furtherance of, or which would allow the union to decide whether to process a grievance. Id. at 436; *Kaleida Health, Inc.,* 356 NLRB No. 171, slip op. at 9 (2010). Information pertaining to employees within the bargaining unit is presumptively relevant to a union's representational duties, including that necessary to decide whether to proceed with a grievance or arbitration. Information regarding employee overtime, and specifically overtime information worked by individual employees, has been found to be presumptively relevant. *Blue Cross & Blue Shield of New Jersey,* 288 NLRB 434, 436 (1988) (total hours and overtime hours worked by each unit employee is presumptively relevant).

When the union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing of relevancy. The duty requires not only that the employer provide the information, but that it do so in a timely manner. An employer's unreasonable delay in furnishing information is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. [Internal quotation marks and citations omitted.] *Whitesell Corp.,* 357 NLRB No. 97, slip op. at 43 (2011).

Thus, "[p]resumptively relevant information must be furnished on request to the employees' collective-bargaining representative unless the employer establishes legitimate affirmative defenses to the production of the information." *Ralphs Grocery Co.,* 352 NLRB 128, 134 (2008) (and cited cases) reaffirmed and incorporated by reference, 355 NLRB 635 (2010). As noted above the finding that the information request is presumptively relevant resolves the Respondent's objections that the union did not adequately explain the relevance of the requested information. Because the Union has no obligation to explain the relevance of the information

5 sought, any alleged deficiencies are immaterial. *Commonwealth Communications,* 335 NLRB 765, 768 (2001).

The fact that Sheridan may have advised Maxson of an alternate way of obtaining the information does not excuse the Respondent of its statutory obligation to provide the requested 10 information. E.g. *King Soopers, Inc.,* 344 NLRB 842 (2005), enfd. 476 F.3d 843 (10th Cir. 2007).

The Respondent argues that because Maxson told Sheridan to stop telling him the reasons for not providing the requested information and to put them in writing the Union is the cause of a 15 "breakdown of communication between the parties." The Respondent further contends that this breakdown mislead the Respondent into believing that the Union had abandoned its request.

The forgoing scenario is premised on the brief conversation between Maxson and Sheridan on August 15 or 16. According to Maxson he was alone when Sheridan entered his 20 office. A discussion regarding the information request ensued. Sheridan began to offer reasons why the information request would not be granted. Maxson "stopped the meeting short," or cut Sheridan off. (Tr.47–48.) He did so because he wanted the reasons in writing. The record does not support the Respondent's argument that there was any breakdown in communication let alone that it was attributable to Maxson telling Sheridan to put his reasons in writing. Sheridan did not 25 even mention Maxson's abrupt request in his testimony. Sheridan did admit that they discussed the Union's August 9 letter. (GC Exh. 1(b).). At the beginning of that letter the Union explains that it is making the request to prepare for the grievance meeting on August 22. Thus, Sheridan clearly was aware of the time frame even if, as he testified, he did not believe that Maxson told him. Sheridan also erroneously testified that there was no "time reference" in "General Counsel 30 Exhibit 1(b)." (Tr. 101.) That exhibit is also the Union's August 9 letter, above.

I find that neither case cited by the Respondent supports its argument. *Postal Service,* 352 NLRB 1032 (2008), is a two-member decision which has no precedential value. See, *New Process Steel, LP v. NLRB,* 130 S. Ct. 2635 (2010). *Good Life Beverage Co.,* 312 NLRB 1060 35 (1993), involved an information request that the Board found "had substantial and legitimate confidentiality concerns," and that the employer was entitled to discuss those concerns with the union before surrendering the information. The Board found that it was the union's tactics that prevented the discussion. "Given these circumstances," the Board found that the Respondent "did not withhold or delay providing requested information in violation of the Act." Id. 1061—40 1062. Here there is no contention that the Union's presumptively relevant information request contains any confidentiality concerns, hence no discussion is required. What is required is that the employer supply the information in a timely fashion. *Regency Service Carts,* 345 NLRB 671, 673 (2005). The Respondent also has never provided any legitimate explanation why it took from August 3 until October 1 to compile simple lists that were routinely developed by its 45 supervisors. Accordingly, for the foregoing reasons I find that the Respondent unreasonably delayed providing the information sought by the Union's information request, in violation of Section 8(a)(1) and (5) of the Act.

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5 *B. The Unilateral Change*

As set forth above, on two occasions the Respondent removed notices posted on the three bulletin boards that had been used exclusively by the Union for at least 38 years. (Tr. 11, 24). The bulletin boards are in enclosed locked clear glass boxes. Only the Union and the
10 Respondent have keys. There is no dispute that the Union has no statutory right to use the bulletin boards, nor is there a provision in the collective-bargaining agreement that allows the Union access. Counsel for the Acting General Counsel contends that the Union has obtained the unrestricted right to use the bulletin boards as a result of past practice.

15 As the party alleging an established past practice, the counsel for the Acting General Counsel has the burden of proof. See *National Steel & Shipbuilding Co.,* 348 NLRB 320, 323 (2006), enfd. mem. 256 Fed. Appx. 360 (D.C. Cir. 2007). Specifically, the counsel for the Acting General Counsel must show that the past practice occurred with such regularity and frequency that employees could reasonably expect the "practice to continue or reoccur on a
20 regular and consistent basis." *Sunoco, Inc.,* 349 NLRB 240, 244 (2007). In addition "[i]t is implicit in establishing a past practice that the party which is being asked to honor it"—here the Respondent—"be aware of its existence." *BASF Wyandotte Corp.,* 278 NLRB 173, 180 (1986).

Maxson's credited and undisputed testimony satisfies the counsel for the Acting General
25 Counsel's burden. Maxson has been employed by the Respondent for approximately 38 years. (Tr. 11.). During that entire time the bulletin boards have been located at both ends of the shop and in the cafeteria. During that entire time the bulletin boards have been dedicated for exclusive use by the Union. The Union was never told to remove a notice nor was it ever required to have preapproval before posting a notice. I find that the counsel for the Acting
30 General Counsel has established as a long standing past practice of the Union's unlimited and unrestricted use of the three bulletin boards. The use of a bulletin board is a mandatory subject of bargaining. *RCN Corp.,* 333 NLRB 295, 310 (2001). It is well-established that an employer's regular and longstanding practices, even if those practices are not required by a collective-bargaining agreement, become terms and conditions of employment that an employer may not
35 alter without first notifying and bargaining with the union to agreement or a good faith impasse. E.g., *Granite City Steel Co.,* 167 NLRB 310, 315 (1967).

The Respondent claims that *Stevens Graphics, Inc.,* 339 NLRB 457 (2003), supports its contention that the counsel for the Acting General Counsel has not established a past practice of
40 allowing the Union unlimited and unrestricted use of the union dedicated bulletin boards. *Stevens Graphics* is inapposite. In that case the judge relied on the testimony of the employer's managers that the employer had maintained the right to limit postings of controversial matters. The former union chairman testified that the "postings…were generally limited to notices of meetings and changes of union representatives but no controversial material was posted by the
45 Union." Id. at 461. The material posted in *Stevens Graphics* was an unfair labor practice charge, a letter sent by a union official to the plant manager accusing a member of management of threatening to cut off employees' fingers and a letter alleging "creative billing." The judge found that these postings "clearly are controversial and inflammatory." That finding would not be appropriate in this case.

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Here there is no evidence of any limitations or restrictions on the parties established past practice and the Union's notice contains nothing controversial or inflammatory. Moreover, I find that Chatterton's "view" that the notice was meant to encourage a work stoppage is self-serving and disingenuous. The notice merely sets out the union position on the overtime issue. The notice is written in the same tone and tenor as the provisions contained in the overtime article of the collective-bargaining agreement. (GC Exh. 2 at 11.) The notice contains no heated rhetoric or hyperbole. Shortly after Chatterton's "view" was made known, the Union posted a second notice that contained an unambiguous disclaimer of any intention to provoke or promote a work stoppage. The Respondent removed that notice as well.

Based on the foregoing I find that the Respondent on August 2, 2011 unilaterally changed the past practice that existed regarding the bulletin boards that were dedicated to the Union. I further that the counsel for the Acting General Counsel has established that this change is material, substantial, and significant. See, e.g. *Crittenton Hospital,* 342 NLRB 686, 686 (2004). Because the Respondent made the change without giving the Union an opportunity to bargain I find that the Respondent violated Section 8(a)(1) and (5) of the Act.

## CONCLUSIONS OF LAW

1. The Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act when it unreasonably delayed providing the information sought by the Union's August 3, 9, 15 and September 13 information requests. The requested information was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All employees in the job classifications listed in the article on Rates of Pay[Article 19] of similar job classifications within the seniority divisions under the jurisdiction of the Union, as described in the collective-bargaining agreement between Respondent and the Union effective from April 10, 2010 through April 21, 2013.

4. The Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally changed the past practice regarding the use and posting of items on the Union's dedicated bulletin boards without giving the Union an opportunity to bargain over the change.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall also recommend, as requested by the counsel for the Acting General Counsel, that on request of the Union the Respondent shall meet and bargain in good faith over the use and posting of items in the union bulletin boards.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

## ORDER

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The Respondent, New York Air Brake Corporation, Watertown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Unreasonably delaying the provision of information requested by the Union that is relevant and necessary for the Union to perform its duties as the exclusive collective-bargaining representative of unit employees.

20 (b) Making unilaterally changes regarding the use and posting of items on the Union's dedicated bulletin boards without giving the Union an opportunity to bargain over any change.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain with the Union over the use and posting of items on the union bulletin boards.

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(b) Within 14 days after service by the Region, post at its facility in Watertown, New York copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive 35 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, 40 defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all current employees and former employees employed by the Respondent at any time since August 3, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 24, 2012.

JOHN T. CLARK
Administrative Law Judge

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**APPENDIX**

10

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
15 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

20 FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
25 Choose not to engage in any of these protected activities.

WE WILL NOT unreasonably delay providing information requested by the Union that is relevant and necessary for the Union to perform its duties as the exclusive collective-bargaining
30 representative of the employees in the following appropriate unit:

All employees in the job classifications listed in the article on Rates of Pay[Article 19] of similar job classifications within the seniority divisions under the jurisdiction of the Union, as described in the collective-bargaining agreement between Respondent and the Union effective from April 10, 2010 through April 21, 2013.

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WE WILL NOT unilaterally change the past practice regarding the use and posting of items on the union's dedicated bulletin boards without giving the Union an opportunity to bargain over the change.

40 WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, meet and bargain with the Union over the use and posting of items on the union bulletin boards.

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NEW YORK AIR BRAKE CORPORATION

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.