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

AK STEEL CORPORATION

and **Case 6–CA–062501**

UNITED AUTO WORKERS LOCAL 3303
a/w/ UNITED AUTOMOBILE, AEROSPACE,
AGRICULTURAL AND IMPLEMENT WORKERS
OF AMERICA

JoAnn Dempler, Esq. (NLRB Region 6),
for the Acting General Counsel

G. Randall Ayers, Esq. (AK Steel Corporation),
of Cincinnati, Ohio, for the Respondent

Marianne Oliver, Esq. (Gilardi Oliver and Lomupo),
of Pittsburgh, Pennsylvania, for the Charging Party

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves the contention that an employer unlawfully delayed furnishing a union with requested and relevant information. The union requested accounting and financial information from the employer about the collectively-bargained profit-sharing plan and the calculation of payments to employees under the plan. For the reasons explained herein, I conclude that the employer unlawfully delayed furnishing the requested information to the union.

STATEMENT OF THE CASE

On August 11, 2011, the United Auto Workers Local 3303 a/w United Automobile, Aerospace, Agricultural and Implement Workers of America (Union) filed an unfair labor practice charge against AK Steel Corporation (AK Steel), docketed by Region 6 of the National Labor Relations Board (Board) as Case 6–CA–062501.

On November 28, 2011, based on an investigation into the charge filed by the Union, the Acting General Counsel (General Counsel), by the Acting Regional Director for Region 6 of the Board, issued a complaint and notice of hearing against AK Steel alleging a violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). AK Steel filed an answer denying all violations of the Act.

A trial in this case was conducted before me on March 1 and 7, 2012, in Pittsburgh, Pennsylvania.

The complaint originally alleged an unlawful delay in furnishing the Union requested and relevant information from on or about June 13, 2011, to on or about September 6, 2011 (¶12(b)), and further, an unlawful failure to provide other requested information (¶12(c)(1)-(4)).

At the beginning of the hearing on March 1, 2012, the General Counsel moved, consistent with pretrial discussions, to amend ¶12(c)—the subparagraph alleging the failure to provide certain requested information. The General Counsel moved to amend ¶12(c)(1) to allege a delay in furnishing information from on or about June 13, 2011 to December 1, 2011. Subsequently, in light of witness testimony, the General Counsel made a similar motion to amend ¶12(c)(4) to allege a delay in furnishing information from on or about June 13, 2011 to December 1, 2011. The General Counsel further moved to add ¶12(c)(5) and (6), alleging the failure to furnish certain additional requested information to the Union. I granted the motions to amend. The Respondent opposed the motions only to the extent of the amendment to add 12(c)(6). Subsequently, the morning of the second day of hearing, March 7, 2012, the General Counsel moved further amendments to reflect the receipt that morning by the Union of the remaining items allegedly not provided to the Union. Thus, with my permission, and without objection by the Respondent, complaint ¶¶12(c)(4), (5) and (6) were amended to allege a delay in furnishing the requested information to the Union from on or about June 13, 2011, to on or about March 7, 2012. With these amendments to the complaint, the General Counsel agreed that all requested information (or the parties' agreed to modifications of the requested information) had been provided, and that the allegations in this case were now wholly ones of unlawful delay and no longer of unlawful refusal to provide information.

Counsel for the General Counsel and for AK Steel filed briefs in support of their positions by April 11, 2012. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

AK Steel is a corporation with an office and steel-making facility in Butler, Pennsylvania, among other locations. It manufactures and sells steel and steel products at its Butler, Pennsylvania facility. During the 12-month period ending July 31, 2011, AK Steel, in conducting its business operations, sold and shipped from its Butler, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The General Counsel alleges, and AK Steel admits, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

A. Background facts

AK Steel is an integrated steelmaker producing a wide-range of nonretail steel and steel products at facilities in Ohio, Pennsylvania, Kentucky, and Indiana. It employed approximately 6,600 employees at the end of 2011. It is the corporate successor to the American Rolling Mill Company (ARMCO) which traces its roots to the late 19th century and the first wave of

integrated steel production in America. Production began at what is now AK Steel's Butler Pennsylvania plant in the early years of the 20th century. The Butler plant employees have been represented by UAW Local 3303 since 1933.

AK Steel and the Union are parties to a collective-bargaining agreement, effective October 1, 2006, and scheduled to expire no earlier than September 30, 2012, which covers the terms and conditions of employment for the hourly production, maintenance, and service employees of the Butler plant. This labor agreement provides (at Exhibit 1 to Appendix B) for a profit-sharing plan that pays quarterly payments to employees based on quarterly and annual

> [p]retax operating profit as reported in the Financial and Operating Results for the Butler and Zanesville Works. The cumulative profit sharing accrual is an item in the general ledger.

The "Zanesville Works," referenced in Appendix B refers to the Employer's Zanesville, Ohio plant. While the profit-sharing calculation is based on the profits earned at both the Zanesville and Butler plants, currently only Butler employees receive profit-sharing payments. Some years ago Zanesville employees accepted a one time "buy out" from the plan and no longer receive payments from the plan.

Individual payments are made to an employee as a percentage of the employee's base wage. The first three payments for the year are made to employees on approximately the middle of the month following the completion of the quarter. The fourth payment, according to witness testimony, is a "true up type of a calculation, where any adjustments and so forth, that would impact the profit sharing plan for the year, are determined and put through that fourth quarter. And that is . . . paid somewhere around February 15th or February 20th each year."

According to the profit-sharing plan's terms:

> **F. Information Confidentiality**
>
> In order to protect the confidential nature of AK Steel's financial results, certain restrictions must be recognized. Specific financial information will be shared with union personnel who are bound by secrecy agreements (and their CPA, if requested). Payment results will be communicated, as available, to all employees.
>
> **G. Changes in the Plan**
>
> It is not anticipated that any change will need to be made in any features of the plan. However, changes in accounting procedures may be prescribed by the Internal Revenue Service, Securities and Exchange Commission, Financial Standards Board, the Vice President of Corporate Finance, or others. Also, major changes in capital facilities or product processing could also have some major impact on financial results. All such changes will be reviewed and mutually agreed to by the appropriate union personnel, along with the necessary adjustments to the plan to enable it to continue to provide results equitable to those that would have otherwise been obtained.

In addition to the profit-sharing plan, Appendix B of the labor agreement also provides for two "add on" plans to the profit-sharing payment. One (at Exhibit 2) is a "Customer

Assurance Plan" which provides for an add on of ten percent of the profit-sharing payout based on "[o]utstanding performance for customer assurance," calculated pursuant to a formula that reflects low sales returns or credits. The second (at Exhibit 3) is a "Safety Performance Plan" that provides for another "add on" of ten percent for "outstanding safety performance," measured as "zero major injuries for the Butler Works for 750,000 safe man-hours attained in a quarter."[1]

B. The 2010 information request and profit-sharing dispute

The allegations of this case involve the Employer's delay in providing information requested in 2011 regarding 2010 profit sharing (and the related Appendix B plans). However, the events in this case overlap and to some extent are intertwined with the parties' dispute regarding the 2009 profit-sharing calculations.

The profit-sharing payment to employees in 2009 declined from 2008. In April 2010, the Union contacted and then engaged a certified public account, Larry Barger, and his firm Alpern Rosenthal, to work with the Union to verify the profit-sharing payments made by the Employer in 2009 and then, later, for 2010 as well.

With the assistance of Barger, on May 3, 2010, the Union sent the Employer an extensive information request, with approximately 27 numbered items, seeking an array of financial and accounting information regarding the profit-sharing payment and the calculations on which the 2009 profit sharing was based.

In addition, on May 24, 2010, the Union filed the first of four grievances under the labor agreement challenging the profit-sharing calculation and payments and alleging that unilateral changes had been made to the plan in 2009. The May 24 grievance challenged the first quarter 2010 payout, 2009 payouts, and alleged changes to the plan in 2009. Subsequent grievances filed August 3, and November 2, 2010, and then on March 11, 2011, challenged the remaining profit-sharing calculations and payments for the 2010 financial year. These grievances were ultimately scheduled for arbitration on September 12, 2011, after a continuance related to witness availability. As discussed below, the arbitration was then postponed until October 25, 2011, when the dispute was heard by an arbitrator.

The Union filed an unfair labor practice charge over the Employer's response to the May 2010 information request (seeking 2009 financial information). The Acting General Counsel issued a complaint and the matter was set for trial on March 16, 2011. Just days prior to the trial, the parties reached a partial settlement agreement in which, inter alia, the Employer agreed to furnish the Union with many (approximately 20) of the requests from the May 2010 information request, some as modified by the parties' through discussion. This left seven items from the information request unresolved, and an unfair labor practice hearing regarding the Employer's duty to provide those items went forward on March 16, 2011, conducted by Administrative Law Judge Eric Fine. On May 27, 2011, Judge Fine issued a decision and recommended order requiring the Employer to provide six of the items from the letter (with some customer and supplier information redacted) and dismissing the General Counsel's allegations as to one item (item 7).

[1]The full text of Appendix B of the labor agreement containing the profit sharing and two add on plans is found in the record at GC Exh. 2, at pages 151–157. It is unnecessary to reproduce the lengthy text of Appendix B as part of this decision.

In early May 2011, the Employer provided 2009 information that was covered by the March 2011 pretrial settlement.

On June 13, 2011, the Union sent a letter to the Employer seeking clarification and additional information related to some of the 2009 information that had been provided. According to email correspondence from the Union, the Employer was going to provide this follow-up information by July 8. However, an attorney for the Employer, Stephanie Bisselberg, responded that due to a "significant incident at the Butler plant on July 1"—later identified in the record as a breakout that damaged the Butler works new electric arc furnace—the furnishing of the information would be delayed 11 days until July 19.

On July 8, the Regional Director for Region 6 of the Board approved a settlement reached by the parties in response to Judge Fine's decision. This settlement ended the litigation over the 2009 financial documents, provided for the Respondent's furnishing of the remainder of the documents that Judge Fine found should be provided, and provided measures for protecting the confidentiality of the furnished documents.

On or about July 20, the Employer provided responses to the Union's June 13, follow-up request. On July 28, 2011, the Employer provided the additional 2009 information pursuant to the settlement approved by the Regional Director on July 8.

On August 30, 2011, the Union's accountant, Barger, participated in a phone call with Bisselberg, during which they went through the 2010 request (for 2009 financial information), discussing remaining items he needed and follow-up questions he had about what had been provided. During this meeting Barger requested some additional information and the parties discussed Barger's request to have someone from his firm visit the Butler works to review additional information. This visit ultimately occurred on September 9. Barger's additional questions, completion of the information request and the additional information requested for 2009 financials occurred over the course of fall 2010. Most of the additional information and/or answers to questions were provided either by October 12, November 15, or December 8, 2011, in correspondence from the Employer. A final piece of 2009 financial information was provided in January 2012.

C. The Union's initial request for 2010 profit-sharing information

The Union's initial request for 2010 profit-sharing information was made January 27, 2011. The local union's financial secretary treasurer, Daniel Green, sent a letter to AK's manager of labor relations, Patrick Bennett, stating:

> In order to insure that the Appendix B [the profit sharing provision of the labor agreement] 2010 profit sharing calculations are correct, the Union is requesting to do a financial audit of the company's 2010 financial records when they are finalized. Enclosed please find a list of the financial information our accountants need to have in order to make the review of the financial records. Nationally, the Union is willing to execute an appropriate confidentiality agreement in order to obtain this information.

Enclosed with this letter was a 27-item information request list developed by the Union's accountant, Larry Barger, based on the very similar information request Barger had used seeking 2009 financial information on the profit sharing.

There was no response to the letter and no discussion between the parties regarding the information requested in Green's January 27, 2011 letter. As discussed above, in March the parties engaged in unfair labor practice litigation over the 2010 request for information, and in May, Judge Fine issued his decision. As of June 13, 2011, there was no discussion between the parties, and no response from the Employer regarding the January 27, 2011 request for 2010 financial information.

D. The June 13, 2011 information request for 2010 financial information

On June 13, 2011, a follow-up request for information, largely duplicative of the January request for information, but adding a couple of additional items, and dropping one, was sent to Bennett by Green. The letter stated:

> Dear Mr. Bennett:
>
> I sent you a letter on January 27, 2011 a copy of which I have attached. The letter was to inform the Company that the Union wished to review the relevant 2010 financial information, as it pertains to the 2010 profit-sharing payouts, when the records were finalized. I have never received a response but I am assuming that financial information has certainly been finalized by this time. If I am wrong in that regard, please advise me promptly.
>
> I am now making my information request based upon the finalized financial records and I am asking that the Union's auditor be provided the necessary information, as indicated, as soon as possible. Naturally, the Union is willing to execute an appropriate confidentiality agreement in order to obtain this information.
>
> I have also attached a revised information request. Item number (7) from the original request has been eliminated and we are asking for an updated Exhibit C from the NLRB partial Settlement Agreement to include all of the 2010 and 1st quarter 2011 quarterly profit sharing payments (item 28). In addition we have added two more items as additional clarification to the previously requested information, they are items: 29 and 30.

The list of the 30 requested items was attached to this letter. The Union's CPA, Barger, testified about the relevance to the Union of each of the items sought in the June 13, 2011 information request. Below, his testimony as to each item is reviewed:

Item 1

> Provide internal financial statements for Butler/Zanesville and Consolidated AK Steel internal financial statements.

Barger testified that internal financial statements would typically include a balance sheet, a statement of income or statement of operations, and statement of cash flows. Barger testified that in simplest form, the profit-sharing calculation under the contract is based on the revenues and costs of the Butler and Zanesville facilities. Accordingly, Barger testified that the

> income statement is definitely necessary and relevant from the standpoint of inputs to the profit sharing calculation.
>
> The balance sheet has relevancy from the perspective specifically of inventory and of property, plant and equipment numbers. Again, related to as they flow -- as inventory becomes cost, if its sold, expenses flow in to income statement.
>
> If property, plant and equipment is depreciated, that flows in to the income statement. And that also flows to the profit sharing calculation. . . .
>
> [T]he initial request was for Butler Zanesville and a consolidated schedule, which showed all other entities and consolidation to AK Holdings, to make sure that the information was rolling in to the consolidated financial statements for AK, that was then included in the company's public filing of the FCC and 10K report. . . .
>
> [This item] No. 1 would be integral to the overall engagement.

Item 2

> Provide the Butler/Zanesville Quarterly Profit Sharing Computation for quarters ended March 31, 2010, June 30, 2010, September 30, 2010 and December 31, 2010.

Barger testified:

> That represents the actual calculation of the amount of the profit sharing and the amount payable to the employees. . . . [T]hat is substantially the source document of the engagement. Without that, I don't even know what the profit sharing calculation is or represents.

Item 3

> Provide the Butler/Zanesville Profit Sharing Plan document.

Barger testified that this request was originally requested in 2009, but through that process the Union learned that profit-sharing plan is the plan set forth in the collective-bargaining agreement. The Union requested it again in 2010

> to ensure that there were not any modifications or amendments to the plan, which for a profit sharing plan or any kind of employee benefit plan from time to time, there can be amendments made. In this case, they were the same. Based on what we were told by the company.

Item 4

> Provide the 2010 quarterly payroll registers (supporting total quarterly hourly wages).

Barger testified that this request allowed the Union to see the money spent by AK on payroll, which is “an integral part of the profit sharing calculation [in] determining . . . [the] pro

rata allocation of the payment" as each employee receives his or her amount of profit-sharing based on his or her actual wages. It was also a way of measuring labor costs, which is "[o]ne of the key expenses" deducted from the calculations to arrive at the amount of profit on which payouts were based under the profit-sharing plan.

Item 5

Provide the general ledger detail of 2010 profit sharing contribution expense.

Barger testified that the general ledger would constitute AK's "summary accounting records" and would reveal the "journal entries and postings to that general ledger" which could be compared to AK's profit-sharing calculations to make sure the same amounts were posted to the general ledger. It also enabled the Union to ensure that cumulative profit-sharing accruals were accurately added back to previous quarters in order to ensure that operating income before taxes—which was the calculation on which profit sharing was based—was accurately stated.

Item 6

Provide the 2010 sales journal and reconciliation of net sales from sales journal to the general ledger.

Barger testified that "the first component of operating income before taxes would be the sales or revenue number for the Butler Zanesville facility. So these sales journals would represent some underlying detail[ed] sales information . . . probably prepared on a monthly basis for their financial statements." Barger explained, that "[i]f you look at statement of income or operations, the top one is generally sales number[s]."

> So that if we obtain those for each month of the year, first of all, we can summarize them and total them to make sure the sales agrees to the Butler Zanesville statement of operations.
>
> Secondly, from time to time, any employer can have reconciling items between the sales journal and the general ledger.
>
> If there were reconciling items, that we could determine through the reconciliation process what they were and were they what they were and were they significant, do they impact the profit sharing plan at all or not.

Item 7

Provide a 2010 schedule of average gross margin by product.

In his May 27, 2011 decision, Judge Fine did not uphold the Union's right to obtain this item, which was requested for 2009 profit-sharing calculations. As a result, the Union did not continue to seek this item for the 2010 profit-sharing calculations. Green's June 13, 2011 cover letter indicated the Union was not seeking this information and the item was listed but marked through to indicate it was being struck from the 30-item list.

Item 8

As part of the March 16, 2011 pretrial settlement over the 2010 financial information, the Union agreed to modify this request upon the Employer's agreement to provide the following:

The Employer will provide a schedule showing results (sales and cost) of product transferred from Butler to Mansfield books.

The Union also treated its outstanding request for item 8 for 2010 financial information as subject to this modification.

Barger explained that the Union understood that historically there have been transfers of product from the Butler and Zanesville facility to the Employer's Mansfield, Ohio. For a variety of reasons, certain steps in the manufacturing process of other AK plants might be performed at Zanesville or Butler and the subsequent product transferred to the Mansfield facility (which is not subject to this collective-bargaining agreement or the profit-sharing calculations). The objective of this request, according to Barger, was to ensure that "expenses were properly charged with expenses related to those things transferred" and that the Butler and Zanesville facilities "were give credit for ultimate sales revenue." In terms of profit sharing, "[w[ho gets credit for the revenue and who bears the cost would be the two key questions."

Item 9

Provide gross margin by plant for plants under AK Steel.

The Union was told that this information did not exist, and at trial, Barger did not explain the reason the Union requested it.

Item 10

Provide the December 31, 2010 perpetual inventory report. We will provide a listing of inventory items selected for testing from the December 31, 2010 inventory report and request that the most recent invoices/purchase orders for the items selected for testing be provided to us.

Barger testified that this request was for an inventory report to enable the Union to make a sample selection of inventory items to ensure that they were properly recorded as inventory because "ultimately, they flow from inventory in the balance sheet to the statement of income or operation." In other words, this was a way of checking that the correct figures were being included and excluded in the cost of goods sold, which, according to Barger, is one of the largest single expense items on the statement of operations. If the inventory was not accounted for accurately the error would work its way into the profit-sharing calculation.

Item 11

As part of the March 16, 2011 pretrial settlement over the 2010 financial information, the Union agreed to modify this request upon the Employer's agreement to provide the following:

The Employer will provide the information and calculations based upon the Employer's 10(k) report.

The Union also treated its outstanding request for item 11 for 2010 financial information as subject to this modification.

Barger explained that in the Butler Zanesville statement of operations, there is a reference to base cost:

> The objective of request this was because . . . these expenses are part of the profit sharing calculation [and] we wanted to be able to perform an analytical procedure from a reasonableness test basis to verify again the interrelationships, the approximations, if these amounts were reasonable that were flowing in to the statement of operations and ultimately profit sharing plan.

Item 12

As part of the March 16, 2011 pretrial settlement over the 2010 financial information, the Union agreed to modify this request upon the Employer's agreement to provide the following:

> Payroll information—Employer will provide payroll information as calculated at the corporate headquarters related to Butler/Zanesville to reflect the transfer to the Butler/Zanesville ledger.

The Union also treated its outstanding request for item 12 for 2010 financial information as subject to this modification.

Barger explained that this request was a complement to the request for item 4. While item 4 sought the more detailed payroll register, that information would ultimately be entered as part of a general ledger item for the payroll. Barger explained that "the quarterlies [from item 4] then roll up in to the general ledger to make sure the postings to the general ledger are complete and accurate from the detail and flow up."

Items 13-16

Item 13

> Provide accounting policy for allocating shared corporate expenses from management including accounting, human resources, information systems and executive compensation (including stock options), payroll benefits (e.g., postretirement benefits), and legal expenses.

Item 14

As part of the March 16, 2011 pre-trial settlement over the 2010 financial information, the Union agreed to modify this request upon the Employer's agreement to provide the following:

> Administrative Expenses—Employer will provide Butler/Zanesville and 10k consolidated statement regarding administrative expenses.

The Union also treated its outstanding request for item 14 for 2010 financial information as subject to this modification.

Item 15

As part of the March 16, 2011 pre-trial settlement over the 2010 financial information, the Union agreed to modify this request upon the Employer's agreement to provide the following:

> Taxes and Insurance allocations—Employer will provide, if it exists, a policy that describes how each insurance policy is divided according to insurable values and how it was allocated to Butler/Zanesville. With regard to tax bills, the Company will make these available..

The Union also treated its outstanding request for item 15 for 2010 financial information as subject to this modification.

Item 16

As part of the March 16, 2011 pre-trial settlement over the 2010 financial information, the Union agreed to modify this request upon the Employer's agreement to provide the following:

> Building and Equipment allocations - The Employer will provide documents showing assets bought and charged to Butler. Additionally, it will provide its policy relating to the approval policy regarding how assets are bought, and the corporate policy for approval of new assets.

The Union also treated its outstanding request for item 16 for 2010 financial information as subject to this modification.

As to all these requests, Barger explained that knowing these expenses and allocations for shared corporate expense, administrative expense, tax, insurance, building, and equipment allocations were important for validating the items that went into, or potentially could go into the expense portion of the profit sharing calculation, and therefore, such expenses could directly affect the profit-sharing calculation and payout to employees. Barger testified that these expenses were deducted from revenues and therefore affected the profit-sharing calculation.

Item 17

> Provide a schedule of depreciation expense as a percentage of total property, plant and equipment by plant and on a consolidated level.

Barger testified that this request was "an analytical testing step to gain some comfort over the relative percentage of depreciation being allocated to the Butler Zanesville operations versus other companies in the consolidated AK."

Item 18

> Provide the general ledger detail of 2010 repairs and maintenance. We will make a sample selection of repair and maintenance expenditures and request that the invoice and related documentation be provided to us.

Barger testified that this request would help to validate the expense category in the profit-sharing calculation, so the Union could more clearly see and assess the items being charged as an expense against the profit-sharing calculation. Barger testified that the Union would use the information to make a sample selection to verify that they are in fact repairs and maintenance items and not expenses that should have been capitalized and depreciated as part of the facility.

Item 19

Provide policy for allocating selling cost to the Butler/Zanesville plants.

Barger testified that there is a category in the operations statement called Selling and Administrative cost that is deducted from profit sharing. This request was an attempt to follow that expense and see how it is part of the statement of operations for Butler/Zanesville plants.

Item 20

Provide policy for allocating research and development costs to the Butler/Zanesville plants.

Barger explained that,

> as with most manufacturing companies, there are research and development . . . costs incurred, so this item is requesting the company's policy for allocating or charging research and development cost to the Butler Zanesville operations.

These costs, again, would typically be counted as an expense that ultimately reduces the profit-sharing calculation.

Items 21 and 22

As part of the March 16, 2011 pre-trial settlement over the 2010 financial information, the Union agreed to modify these requests upon the Employer's agreement to provide the following information described herein:

> LIFO calculations for Butler/Zanesville are done only for their inventory. No information on a plant by plant basis is available for comparison.
>
> LIFO reserve adjustments are only available for Butler/Zanesville. No information on a plant by plant basis is available.

The Union also treated the outstanding requests for items 21 and 22 for 2010 financial information as subject to this modification.

Barger explained that LIFO is a methodology of accounting for inventory and cost of goods sold. Barger testified that a LIFO calculation is prepared and then a "LIFO [reserve] adjustment is recorded on the company's books, in this case it is also part of the profit sharing calculation." According to Barger, there would be an "adjustment [to the] company records on a monthly or quarterly basis to mark the change from period to period in the [ ] inventory" as recorded by LIFO calculations.

Item 23

As part of the March 16, 2011 pretrial settlement over the 2010 financial information, the Union agreed to modify this request upon the Employer's agreement to provide the following:

Policy for Allocating Costs—Employer will provide its CFI's (company financial instructions, if one exists), and employer will provide the Butler P&L statement.

The Union also treated its outstanding request for items 23 for 2010 financial information as subject to this modification.

This would illuminate expenses that are ultimately taken out of the profit calculation.

Item 24

Provide 2010 schedule of expenses as a percentage of tonnage sold and revenues for the Butler/Zanesville plants on a consolidated basis.

Barger explained that this was "an analytical type of a procedure or request to look at their expense information as a percentage of tonnage sold and revenues. Again, from a comparative perspective" it would give an indication of whether the level of expenses was reasonable compared to sales and revenues. Barger would assess whether the level of expenses "looks reasonable compared to other plants. Not a perfect science given. There are differences from plant to plant to plant."

Item 25

Provide a 2010 schedule [f]or total man hours, safe man hours and major injuries on a quarterly basis for the Butler/Zanesville plants.

As referenced above, the profit sharing includes a component (Exhibit 3 to Appendix B) that pays ten percent of the quarterly profit-sharing payout for "outstanding safety performance in a quarter." "Outstanding safety performance" is based on safety statistics for the period in question.

Item 26

Provide a 2010 schedule of quarterly injuries reclassified as lost work day injuries and supporting documentation for the Butler/Zanesville plants.

Barger testified that this request is also related to the safety "add on" component to profit sharing. Section C of this component describes a process for reclassifying these types of injuries.

Item 27

Provide a 2010 schedule of quarterly net manufacturing claims as a percentage of net sales plus net manufacturing claims for the Butler/Zanesville plants.

Barger testified that this request is related to the customer assurance "add on" to the profit sharing. This information would provide evidence for whether or not the ten percent customer assurance add on was correctly calculated.

Item 28

> Provide an updated Exhibit C from the NLRB partial Settlement Agreement to include all of 2010 and 1st quarter 2011 quarterly profit sharing payments.

This was an updated request for a written account of any changes to the Employer's profit-sharing plan, the date of changes, and the impact of these changes. In Exhibit C to the NLRB partial settlement agreement the Employer had agreed to provide this information through the first quarter of 2010. Barger testified that changes the Employer made in the methodology for calculating overhead allocation, first adopted in the second quarter of 2009, and learned about in detail by the Union for first time in February 2011, was, in the Union's view, a breach of the labor agreement, and this provided the basis for the argument to this effect made by the Union in an October 2011 arbitration over the profit sharing.

Item 29

> The information provided in response to request #8 was a summary of transfers between Butler and Mansfield which included total tons transferred, total sales dollars, etc. Please provide a detail listing of the transfers to Mansfield so that we could make selections of items transferred to ensure the appropriate costs were recorded and Butler received credit for the sale if it performed the necessary critical processes in accordance with the Company's policy.

Barger testified that the request for item 29 was a detailed request of the documents in item 8. As part of the settlement regarding item 8, the Employer provided a one page summary of transfers. Item 29 requested detail for those transfers that, together would be rolled into the summary provided by item 8. This enabled Barger to make a sample selection and test those transfers on an individual basis to make sure that cost and expenses were being properly charged to Butler or Mansfield.

Item 30

> Please provide the corporate overhead allocations for each quarter of 2010 which agrees to the summary profit sharing payout history provided by AK Steel under both the old and new corporate allocation methods.

Barger testified that this request was related to item 28. Item 28 requested summaries by quarter and for 2010 the Union received a one page summary from the Employer. This item 30 sought more detailed allocations that would support the summary. Overhead is an expense item and therefore affects profit sharing.

E. August 11, 2011: the Union files unfair labor practice charges over its request for 2010 records and serves an arbitral subpoena for the documents

The arbitration over the profit-sharing grievances filed in 2010 and 2011 was scheduled to be heard September 12, 2011. The Union's grievances alleged that the profit-sharing payments in 2009, and in subsequent years, had been adversely affected by changes the Employer had made in the plan without consultation with the Union.

According to the testimony of Union Attorney Marianne Oliver, settlement of the 2009 financial information issues in Judge Fine's case in July 2011, was motivated by the Union's desire to expeditiously obtain the documents in time to use them in the upcoming arbitration on profit sharing.

As to the 2010 financial information request, submitted in January and then again on June 13, 2011, as of August 11, 2011, the Union had not received any information responsive to this request, nor any response at all. While there had been discussions about furnishing the 2009 information, there had been no discussions between the parties regarding the Union's request for 2010 information.

On August 11, 2011, the Union filed the unfair labor practice charge at issue in this case, alleging the Employer's unlawful failure to provide the requested 2010 profit-sharing information. That same day, the Union procured an arbitration subpoena, which was served on the Employer August 15, requiring the production by September 1, 2011, of most of the same 2010 financial information requested by the Union in its June 13, 2011 request.

The Employer responded to the Union's subpoena on September 2, 2011, moving to quash the subpoena or, in the alternative to reschedule the arbitration hearing. In its motion it argued that the subpoena should be quashed as an unwarranted effort at arbitral discovery. However, the thrust of the Employer's argument was that it was willing to provide the information but could not do so in time for the arbitration hearing scheduled for September 12, 2011. Accordingly, the Employer requested that either the subpoena be quashed, or, in the alternative, that the arbitration hearing be continued to a later date, which it suggested be 60 days later. During a September 6, 2011 conference call with the arbitrator to discuss the matter, the Employer's representative (Attorney G. Randall Ayers) told the Union representative (Attorney Marianne Oliver) that it would take several weeks for the Employer to gather the information for 2010 and it wanted to postpone the arbitration for that reason. During this call Ayers agreed to provide the documents by October 14, 2011. The hearing was then rescheduled to October 25 and 26, 2011.

F. The Employer's furnishing of 2010 information

The Union received a significant amount of the requested 2010 financial information October 12, and then some additional information October 13-14, 2011. Some of this information related to the 2009 information request but it also encompassed information requested for 2010, as the Employer had agreed in discussions with the arbitrator. This was the first 2010 financial information received by the Union. Barger testified that he and the Union worked with the 2010 information that was received in the (less than) two weeks before the arbitration, which went forward October 25, but knew there was further requested information that the Employer had not provided.

Union Attorney Oliver testified that the Union went forward with the arbitration even though it had not received all of the requested information. "We decided to cut and run. Go with what we had. Because we had a series of grievances we had filed. We were going on the first grievance we had filed." Oliver testified: "our thought process was well, if we got more of the information we believed would tell the tale and was relevant, we would just do another grievance with whatever additional information we would get." Oliver explained that the "members were anxious. They wanted this done." In fact, in August, the Union had opposed the Employer's motion to reschedule the arbitration, arguing that even without the 2010 financial information the arbitration could go forward as scheduled September 12, as the requested

"financial information requested goes primarily to remedy" and, therefore, "is no basis for the Company's request to delay this hearing again."

This material sent to the Union by the Employer between October 12-14, satisfied the following items from the 30-item 2011 request for 2010 financial information:

1-5, 8, 10-20, 23-26, 28.

Of the outstanding requests, the parties agreed, in accordance with Judge Fine's ruling regarding the same 2010 request, that item 7 did not need to be provided. The Employer had indicated that there were no documents responsive to item 9.

Thus, after October 14, 2011, the items yet to be provided were items 6[2], 21, 22, 27[3], 29[4], and 30[5].

On December 1, 2011, the Union received further information satisfying the 2011 request for items 6, 22, and 29.

On March 7, 2012, item 21 and the remainder of items 27 and 30 were furnished to the Union.

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[2]As to item 6, on October 12, the Union received from the Employer the requested 2010 sales journals and reconciliations for the third quarter of the year. The remainder of the requested information (covering the other three quarters of the year) was received December 1.

[3]As to item 27, on October 12, the Union received responsive information listing the schedule of quarterly net manufacturing claims as a percentage of net sales plus net manufacturing for Butler/Zanesville for the third quarter only. But, not until March 7, 2010, was the information pertaining to the remainder of the 2010 quarters provided.

[4]On October 12, the Union received detailed transfer information responsive to item 29 for one month only, September 2010. On December 1, the information pertaining to the remaining months of 2010 was provided.

[5]As to item 30 (which was a request for quarterly corporate overhead allocations, which agrees with the summary profit-sharing payout history provided by the Employer), the Employer's October 12 response on this item referred the Union to its response to item 28, which covered changes in the Employer's profit-sharing plan. Barger contacted the Employer's representative, in-house attorney Stephanie Bisselberg, and after email correspondence, on December 8, 2011, Bisselberg asked Barger to choose 3-5 additional months, and the Employer would provide the data for those months only. Barger acceded to this and requested certain months in January 6, 2012 email correspondence. Bisselberg replied the day before the hearing in this matter, on February 29, 2012, indicating that the request was almost compiled and that the information would be provided the following week. It was provided March 7, 2012.

Analysis

The General Counsel alleges that the Employer was statutorily obligated to furnish the Union the information it requested June 13, 2011, and that it unlawfully failed to do so in a timely manner.

A. The duty to provide information

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). "An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *A–1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011). See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). As the Board explained in *A–1 Door & Building Solutions*, supra:

> An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). By contrast, information concerning extra unit employees is not presumptively relevant; rather, relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 257, 259 (1994). The burden to show relevance, however, is "not exceptionally heavy," *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982) enfd. 715 F.2d 473 (9th Cir. 1983); "[t]he Board uses a broad, discovery-type standard in determining relevance in information requests." *Shoppers Food Warehouse*, supra at 259.

Where the information is requested in connection with a grievance, the Board's test for relevance remains a liberal one. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court endorsed the Board's view that a "liberal" broad "discovery type" standard must apply to union information requests related to the evaluation of grievances. Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in *Moore's Federal Practice* that

> it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy.

4 Moore, *Federal Practice* P26.16[1], 1175–1176 (2d ed.), quoted in *Acme Industrial Co.*, 385 U.S. at 437 fn. 6.

Notably, when dealing with nonunit information where relevance must be established, once the burden of showing the relevance of nonunit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information. Depending on the circumstances and reasons for the union's interest, information that is not presumptively relevant may have "an even more fundamental relevance than that considered presumptively

relevant." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969).

"An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB 11, 51 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB No. 29 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005).

Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

B. Relevance

In this case the Union sought information to verify and understand the profit-sharing (and related "add on" plans) calculations and payments made by the Employer to unit employees. This profit sharing was a term and condition of employment for unit employees, and, as such, information about it is presumptively relevant. See, *A–1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2. I recognize that the type of information sought by the Union—in depth financial information that goes into the Employer's calculation of profit—is the type that is usually not considered presumptively relevant. But the introduction of profit sharing as a term and condition of employment makes the financial data presumptively relevant—as the profit-sharing calculation is a direct determinant of income paid to each bargaining unit employee.

In any event, the issue need not be a cause for extensive analysis in this case. Even assuming, arguendo that the information was not presumptively relevant, the Union's accountant, Barger, testified credibly as to the usefulness to the union of each requested item, as set forth above. His testimony was uncontradicted on this score. Under the liberal standard of relevance utilized by the Board, the relevance of the Union's information request has been demonstrated. *NLRB v. Acme Industrial Co.*, supra at 437 (question is only whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities").

Notably, the Employer's challenge to the relevance of the Union's request is narrowly drawn. Indeed, it does not claim that the *type* of information requested by the Union is without relevance. Rather, the Employer contends that the Union's relevance interest in the information ended after the Union went forward with the arbitration with only some of the requested documents in hand. (R. Br. at 21-22.) The Employer points out that as early as September 6, 2011, the Union was opposing a delay in the arbitration hearing on account of the Employer's failure to provide the 2010 financial information, telling the arbitrator that the information went "primarily to remedy" and, therefore, argues the Employer, evidently unnecessary for the arbitration. On this basis, the Employer contends that the Union's relevance interest was limited

to receiving information prior to the arbitration proceeding and that the information provided to the Union on or before October 14—before the arbitration—"satisfied the Union's desire for 'relevant and reasonably necessary information" (R. Br. at 21). According to the Employer, the information provided to the Union after the arbitration, in December 2011 and March 2012, was not relevant and necessary for the Union.

Given my resolution of the delay issue for these later-furnished documents (see, below), it would be possible to skip over the Employer's argument. However, I believe it seriously misconstrues the Board's relevance standard. I reject the Employer's claim that the Union's request was relevant *only* to the extent it could have (or did) form the basis for specific arguments the Union chose to make at the arbitration hearing. More generally, I reject the contention that the relevance of the Union's information request narrowly turns on its relevance to the profit-sharing grievances or profit-sharing arbitration. This is far too constricted a view of the Union's right to receive requested information that is relevant—as this information is—to monitoring, verifying, and understanding collectively-bargained income paid by the employer to unit employees. *Des Moines Cold Storage, Inc.*, 358 NLRB No. 58, slip op. at 2 fn. 7 (2012) (information about unit employees' benefits "is presumptively relevant (even in the absence of a grievance)").

In determining whether an employer is obligated to supply particular information, the question is only whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Quite apart from the grievances the Union filed, profit sharing is an important part of unit employees' pay and part of the collectively-bargained terms and condition of employment. The Union's desire to monitor, verify, and familiarize itself with the calculations and information comprising the profit-sharing calculation is relevant as a matter of the Union's right and duty to administer the labor agreement. *A–1 Door & Building Solutions*, supra, slip op. 2 fn. 7. The usefulness of the information to the Union is not *limited* by its decision to move forward with a grievance or pursue the matter in arbitration prior to receiving all of the information. Notably, the Union never indicated that the *only* reasons it sought the information was to prepare for the arbitration hearing. Its more general desire and right to verify and understand this important source of employee income stands apart from whether it was able to use the information in the arbitration proceeding. *Des Moines Cold Storage*, supra at slip op. 2 fn. 7.[6]

I would add that, even as to the profit-sharing arbitration, the fact that the 2010 information primarily went to remedy does not render the information *not relevant* until the parties reach the remedy stage of the arbitration. Less critical, perhaps, but not irrelevant. Information on remedy obviously can be of value and import to a party's strategy and decisions about which claims to pursue on the merits in litigation or in an arbitral proceeding. Moreover, the Union is entitled to start considering and preparing its arguments on remedy at any stage of the grievance procedure. The Employer does not get to dictate when the Union is entitled to requested information based on the Employer's contentions about which phase of the arbitration proceeding the information will be of must use to the Union.

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[6]The Union's broad right to request and receive information related to the employees' contractually-negotiated terms and conditions justifies the relevance of the Union's request on its own terms. In any event, I note the perverse incentive to delay that would be created by adoption of the Employer's suggestion that the information loses its relevance if the Union proceeds to arbitration without having received information requested long before the arbitration hearing.

Accordingly, I find that the Union's information request was relevant and necessary and that the Employer was under a statutory obligation to provide the information requested (or the compromise agreement reached between the parties on particular items).

C. Delay

The gravamen of this case is the allegations of delay. The General Counsel alleges that the Employer violated the Act by delaying the furnishing of information to the Union in response to the Union's June 13, 2011 information request

The request was first made (although much of the information was not yet prepared) in January 2011. It was reiterated, with a couple of additional items requested on June 13, 2011. However, the General Counsel's claim of delay is not quite as straightforward as a claim that the information was requested June 13, none provided until October 12-14, and the rest provided December 1, and finally, March 7, 2012.

The complaint first alleges (¶12(a)) that on or about September 6, 2011, "the Respondent and the Union agreed that the Respondent would furnish the Union's auditor with the information requested by . . . . no later than October 14, 2011." This former date, September 6, was the date on which, in a conference with the arbitrator called in response to motion filed regarding the Union's subpoena for the documents, the Employer agreed to provide the 2010 financial information by October 14, 2011.

The General Counsel then alleges (taking into account the oral amendments to the complaint at trial), that the Respondent unlawfully delayed furnishing the bulk of the items (items 1-5, 8, 10-20, 23-26, 28) from June 13, 2011 to September 6, 2011. However, these items were not actually furnished until October 14, or on the day or two before October 14. In other words, for these items, which were ultimately furnished by October 14, 2011, the General Counsel does not allege that the Employer unlawfully delayed furnishing the items from September 6 to October 14. Presumably, the General Counsel views the agreement reached with the arbitrator to turn over the documents October 14, as satisfactory.

However, the Government further claims that the information that was supposed to be but was not furnished by October 14, but by December 1 (most of items 6 and 29 and item 22), was unlawfully delayed from June 14, 2011, straight through until its December 1, 2011 receipt. Similarly, as to items 21, 27, and 30, provided March 7, 2012, the Government alleges that the furnishing of these items was unlawfully delayed from June 14, 2011 to March 7, 2012.

The General Counsel's approach is not with justification, but it limits the initial threshold inquiry to whether AK unlawfully delayed furnishing any of the information in the request from June 13 to September 6—not to October 14, when much of it was furnished.

The Employer's defense is, essentially, "we provided what we could when we could." Its witness, manager of finance John Vichich, discussed the long hours that the limited number of employees assigned to respond the information request were working on tasks unrelated to the information request, as well as the fact that they were already responding to the 2010 information request.

In assessing the reasonableness of the Respondent's response, several factors stand out.

First, the request, while extensive, is standard accounting and financial information that is routine grist for the mill for accountants, auditors, and corporate finance departments. Notably, the Respondent does not claim otherwise, and putting aside for the moment the claims of the time it would take to provide this information, there is no claim by the Respondent that the request sought unusually complex information or that it made incomprehensible demands for information. This is standard accounting and finance "stuff."

Second, the request (or nearly all of it) was first made in January 2011. As the Respondent points out, the General Counsel does not allege that there was an unlawful delay until after the Union repeated its request June 13, 2011. That is true, but the January request stands as an almost perfect illustration of relevant and probative background evidence. When the Respondent received the June 13, 2011 information request, as a matter of the Act's precedents, it had already been under a duty to provide the requested information, and as a matter of fact, it had been on notice for many months that the Union was seeking the information. Thus, the January 2011 information request informs and shapes our understanding of the "reasonableness" of the 12 weeks after June 13 that it took the Respondent—not to furnish—but to agree to furnish the requested information. The request was extensive but it was not unexpected—indeed, for the most part, it had already been pending as of June13.

Third, the 2011 requests (January and June) were almost identical to the requests made in 2010, but sought updated data. Thus, in June 2011, not only did the Respondent already know that these requests were pending, but it had provided (as a result of the March 2011 pretrial settlement) or was providing (because of negotiations resulting from Judge Fine's May 2011 decision) precisely the same type of information for the previous year's financial data. Based on the Respondent's witness's description of the information gathering process, there were obviously huge economies of time and effort available as a result of the contemporaneous obligation to provide the Union with the same information for 2009 and 2010 over the course of the same summer. Moreover, by July 8, 2011, the Union and the Respondent had reached a settlement on the confidential treatment of the 2009 financial information. This removed the only potential dispute between the parties that could reasonably have delayed production of the 2010 financial information. Notably, there is no evidence of any problems relating to the confidential treatment of the documents peculiar to the 2010 financial information. This issue had been ironed out between the parties.

I recognize that the Respondent argues that its obligation to provide both the 2009 and 2010 information at the same time, even conceding some economies of scale, *added* to its burden and increased the "reasonable" time for supplying the information. But it is notable that the Respondent provided *none* of the June 13, 2011 request prior to October 12, 2012. Thus, while the Respondent claims that certain of the requests (items 4, 8, 10, and 17) required significant man hours to retrieve and calculate, many of the items clearly did not, and the Respondent does not claim otherwise.[7] The Respondent offers no justification for providing *none* of the requested information prior to the September 6 agreement with the arbitrator.

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[7]Vichich's testimony on the estimated amount of time involved in producing the information for items 4, 8, 10, and 17, (120 hours for item 4, 36 hours for item 8, 10 hours for item 10, and 10 hours for item 17) included significant amounts of time to create a computer program for each of these items. On cross-examination it became clear that for some or all of these items he was not involved in the writing of these programs and did not appear to have firsthand knowledge of how much time was spent creating them to respond to the 2011 information request. He agreed that it would be "relatively easy" to update the programs used to provide the 2009 financial information (produced between May and July 2011) to acquire the 2010 financial

Fourth, given that the governing standard is "a good faith effort to respond to the request as promptly as circumstances allow" (*Good Life Beverage Co.*, supra), it is probative that AK did not respond at all until an arbitral subpoena for the same information at issue here focused its attention on the June 13 information request. Thus, putting aside the time it might have reasonably taken the Respondent to furnish the information—it did not respond in any fashion to the June 13 information request until the Union forced the matter 12 weeks later through the arbitral subpoena process.

Of course, the Respondent stresses that the Union did not follow up its June 13, 2011 request with further requests for the information, and, instead, worked with the Employer on receiving the information requested in 2010. In the Respondent's view, if the Union wondered where the requested information was "all the Union had to do was ask." (R. Br. at 25). However, the Union had requested the information in January 2011, and in the June 13 request asked that the information be provided "as soon as possible." The Respondent's silence on the issue of providing the 2011 information cannot be equated with the Union's failure to request it (a third time) again. It is well-settled that a party requesting relevant information to which it is entitled does not need to repeat the request. *De Palma Printing Co.*, 204 NLRB 31, 33 (1973); *Aero-Motive Mfg.*, 195 NLRB 790, 792 (1972), enfd. 475 F.2d 27 (6th Cir. 1973); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (rejecting employer's defense to unlawful delay of "the Union's own failure to repeat its requests for information during the numerous telephone conversations with the Respondent during that period").

It was the Respondent's obligation to respond to the information request. *U.S. Postal Service*, 332 NLRB 635, 639 (2000) ("The Respondent could not simply remain silent in the face of the Union's request for information"); *Pennco. Inc.*, 212 NLRB 677, 678 (1974) (part of unlawful delay analysis includes the employer's initial failure to respond to the Union's requests).

Thus, all of this might look different had AK Steel promptly responded to the June 2011 information request. If it had said to the Union: "we have these two requests, what is the priority and how can we best get this information to you."

Instead, there was silence. It undercuts the after-the-fact claims of the Respondent that it was too busy to respond and is probative of unlawful delay.

As referenced above, the Respondent's primary defense, based on the testimony of its manager of finance, John Vichich, was that in the summer of 2011, the Respondent was working as hard as it could, given its normal workload, and a few unexpected events, to provide the requested information. According to Vichich, the economic downtown of 2009, some two years before, left the finance groups at Butler "shorthanded" and with a limited number of employees available to collect the requested information. Vichich estimated the number of

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information. It also became clear that some of this information, such as "perpetual inventory" "total sales out of Butler" and "payroll register, payroll data" is already included in the Butler-Zanesville statement of operations, created as part of standard accounting practices. I do not doubt that these four requests took more time than others, but Vichich's estimates appeared to be "hypothetical," as if starting from scratch. Given that the Employer had only recently or was in the process of providing the same information for 2009 at the time the request for 2010 information was pending, Vichich's estimates overstate the actual burden on the Respondent posed by these items.

people working on the request as two at the Butler plant, and two at the corporate headquarters. They already were working 60-70 hours a week to meet the regular requirements of their job, which included the filing of annual, quarterly, and monthly reports, along with "forecasting" that became a daily obligation in July of 2011. In addition, a fire in the Respondent's new electric arc furnace added 15-20 hours a week to employees' workload beginning in July 2011. To this workload, potential corporate mergers and acquisitions, and a property audit further burdened the group responsible for responding to the information requests. Respondent's counsel asked Vichich how he attended to the Union's information request given the schedule of tasks Vichich described. Vichich answered:

> We kind of put it in the priority of things that had to be done. And when we had availability. We worked on them as diligently as we did. . . .
> We prioritize what had to be done.
> We had to get the normal month end forecasting and that stuff done.

The "prioritizing" did not did not include making a response to the Union's 2011 information request. As referenced above, no documents were provided, and no response to the Union offered, even as Vichich admitted that he talked with AK's corporate controller about the "timing problems" he was having with the Union's requests. However, according to Vichich, the Respondent unilaterally decided they were not "using unreasonable amount of time to answer this request."

With the exception of the breakout at the electric arc furnace—which was the basis for the Respondent's contemporaneous explanation to the Union in July of why there would be an 11-day delay in furnishing information—none of the duties described by Vichich are unusual, or even avoidable by a major corporate publicly-held entity. The General Counsel stresses, and it cannot be overlooked, that AK Steel is not a "mom and pop" operation: it employs 6,600 employees, operates seven facilities, and had net sales of approximately $6.4 billion in 2010. Given that nearly every duty Vichich described may be called standard duties for a company of this size and complexity, it is fair to conclude that AK Steel had the time for the Union's information requests that it decided it would give them. They obviously were not prioritized, and Vichich's testimony is an implicit admission of this.

In any event, the defense of "too busy with other pressing matters" is a nonstarter under Board precedent. "An employer cannot justify delays in supplying information on the basis of other, unrelated, demands on the responder's time." *Comar, Inc.*, 349 NLRB 342, 352 (2007) (rejecting employer argument that it was busy responding to information requests from the Board's regional office); *Samaritan Medical Center*, 319 NLRB 392, 398 (1995) (employer's busyness with other matters that it considered more important or urgent does not justify delay in responding to union information request); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (rejecting employer's reliance, in part, for delay in providing information on its officials' preoccupation with an impending acquisition).

By all evidence, the Respondent took no action on the 2011 request (both June and January's) until receiving an arbitral subpoena for the information in August. Then it argued to the arbitrator that it could provide the 2011-requested materials within 60 days and agreed to provide it within 38 days, by October 14.

These considerations lead me to conclude that the Respondent did not respond to the Union's June 13 request "as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). At a minimum, the Respondent could have responded—in

some fashion—and could have attempted to arrange a mutually acceptable schedule with the Union for furnishing the documents. Instead, the Respondent's response to the June 2011 information request was silence. Nothing. Until the Union forced the issue through the arbitral process. But the Union was not required to do that. The Union should not be and is not dependent on a private contractually-based process of arbitration to obtain the relevant and requested documents it needs. The Act promises the Union the right to a prompt response to its information request. The failure to provide it is a violation of the Act.

I accept the Respondent's admission that it was a question of the "priority" placed on responding to the information request, and clearly, it was given low priority among the many competing demands placed on the limited staff allotted to this task. I also note the Respondent's admission to the arbitrator on September 6 that it could supply the requested information within 60 days, and its agreement to provide it within 38 days. At that time it was still engaged in the non-information related work projects referenced by its witness to explain how busy the staff had been. It was still actively working with the Union to supply the information requested in 2010. Thus, it seems justifiable, indeed, it gives the benefit of the doubt to the Respondent, to conclude that the Respondent reasonably could have supplied the 2011-requested information within 60 days of the June 13, 2011 request, had it prioritized the matter and sought to comply as soon as reasonably possible with the Union's request. I find that the Respondent violated the Act by unlawfully delaying the furnishing of information to the Respondent.[8]

Given my findings, it is unnecessary to reach the General Counsel's further allegations that failure to provide item 22 and the bulk of items 6 and 29 until December 1, and the failure to provide items 21, 27, and 30 until March 7, 2012, was violative of the Act. Such further findings would be cumulative and would not affect the remedy. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1324 (2005).

CONCLUSIONS OF LAW

1. Respondent AK Steel Corporation is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party United Auto Workers Local 3303 a/w United Automobile, Aerospace, Agricultural and Implement Workers of America (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the recognized exclusive collective-bargaining representative of the Respondent's bargaining unit employees employed at its Butler, Pennsylvania facility.

[8]In reaching this conclusion I do not rely on the testimony of the Union's CPA Barger (or the similar information in summary exhibits) regarding the estimated amount of time he believed it would have reasonably taken the Respondent to produce individual items of the 2011 request. This testimony was akin to expert testimony—offered on the basis of his experience in the field and his work auditing a variety of companies—but not based on first hand knowledge of AK Steel's financial or data storage systems.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying the furnishing of requested information to the Union that is relevant and necessary to the Union's performance of its representational duties.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, 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. 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 all current employees and former employees employed by the Respondent at any time since June 13, 2011. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent AK Steel Corporation, Butler, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   a. Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by delaying the furnishing of

[9]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.

requested information that is relevant and necessary to the Union's performance of its duties as collective-bargaining representative of the Respondent's employees.

b. 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.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

a. Within 14 days after service by the Region, post at its Butler, Pennsylvania facility the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, 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 Respondents to ensure that the notices are not altered, 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 any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 2011.

b. 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. July 10, 2012

_____
David I. Goldman
U.S. Administrative Law Judge

[10]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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
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.

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
Choose not to engage in any of these protected activities.

WE WILL NOT delay furnishing the Union with requested information that is relevant and necessary to the Union's performance of its duties as your collective-bargaining representative.

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

AK STEEL 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.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111
(412) 395-4400, 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, (412) 395-6899.