

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20, SUBREGION 37

ENDO PAINTING SERVICES, INC.	)	CASE	20-CA-080565
	)		
Employer,	)		
	)		
and	)		
	)		
INTERNATIONAL UNION OF PAINTERS	)		
AND ALLIED TRADE, PAINTERS UNION	)		
LOCAL 1791 (2012-004),	)		
	)		
Union.	)		
	)		
	)		

(129:51)

**LOCAL 1791'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

**CERTIFICATE OF SERVICE**

Of Counsel:  
TAKAHASHI and COVERT  
Attorneys at Law

HERBERT R. TAKAHASHI	#1011-0
REBECCA L. COVERT	#6031-0
DAVINA W. LAM	#9115-0
345 Queen Street,	Room 506
Honolulu, Hawaii	96813
Telephone Number:	526-3003

Attorneys for Charging Party  
INTERNATIONAL UNION OF PAINTERS  
AND ALLIED TRADE, PAINTERS UNION  
LOCAL 1791

## TABLE OF CONTENTS

	Page #
I INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	2
A. The Background On The Employer And Local 1791.....	2
B. Prior Class Grievances Filed by Local 1791 With Endo Painting and With Other Employers in the Painting and Decorating Contractors Association.....	4
C. Local 1791 Pursues Class Grievance MS-12-001 with Endo Painting .....	7
D. Local 1791's Information Request to Endo Painting on Class Grievance MS-12-001.....	9
E. The Regional Director Issues A Complaint in 20-CA-080565.....	16
III. RELEVANT STATUTORY SECTIONS.....	17
IV. STANDARD OF REVIEW .....	18
V. ARGUMENT .....	19
A. LOCAL 1791 HAD A RIGHT TO THE INFORMATION REQUESTED AS RELEVANT TO ITS DUTIES AS THE EXCLUSIVE REPRESENTATIVE.....	19
B. THE UNION HAD MORE THEN A BARE ASSERTION TO SUPPORT THE GRIEVANCE, THUS TRIGGERING THE EMPLOYER'S DUTY .....	23
C. THE EMPLOYER LACKS ANY EVIDENCE OR ANY LEGAL BASIS FOR THE OTHER DEFENSES IT ADVANCED FOR ITS NON-COMPLIANCE .....	26
VI. CONCLUSIONS.....	32

## TABLE OF AUTHORITIES

### FEDERAL CASES

<u>Acme Industrial Co.</u> , 385 U.S. 432 (1967) .....	18, 19
<u>Brewers and Malsters, Local Union No. 6 v. N.L.R.B.</u> , 414 F.3d 36 (D.C. Cir. 2005) .....	19, 20
<u>Burns International Security Svcs v. N.L.R.B.</u> , 146 F.3d 873 (D.C. Cir. 1998) .....	32
<u>Children's Hospital Medical Center Of No. Calif. V. California Nurses Association</u> , 283 F.3d 1188 (9th Cir. 2002).....	31
<u>Communications Workers of America AFL-CIO Local 1051 v. N.L.R.B.</u> , 644 F.2d 923 (1st Cir. 1981).....	31
<u>Congreso de Uniones Industriales de Puerto Rico v. N.L.R.B.</u> , 966 F.2d 36 (1st Cir. 1992).....	22
<u>Frankl v. HTH Corp.</u> , 825 F. Supp. 2d 1010 (D. Hawai'i 2011).....	19
<u>NLRB v. Associated General Contractors of Cal., Inc.</u> , 633 F.2d 766 (9th Cir. 1980) .....	26
<u>N.L.R.B. v. C &amp; C Plywood Corp.</u> , 351 F.2d 224 (9th Cir. 1965) .....	31
<u>N.L.R.B. v. C &amp; C Plywood Corp.</u> , 385 U.S. 421 (1967) .....	31
<u>N.L.R.B. v. Davol Inc.</u> , 597 F.2d 782 (1st Cir. 1979) .....	24, 30
<u>NLRB v. Truitt Manufacturing Co.</u> , 351 U.S. 149 (1956).....	19
<u>N.L.R.B. v. Whitesell Corp.</u> , 638 F.3d 883 (8th Cir. 2011) .....	20, 23, 26
<u>Public Srvc. Co. of New Mexico v. N.L.R.B.</u> , 692 F.3d 1068 (10th Cir. 2012) .....	21
<u>Retlaw Broadcasting Co., A Subsidiary of Retlaw v. N.L.R.B.</u> , 172 F.3d 660 (9th Cir. 1999) .....	20, 23, 26
<u>Rivera-Vega v. ConAgra, Inc.</u> , 70 F.3d 153 (1st Cir. 1995).....	18, 19
<u>Seay v. McDonnell Douglas Corp.</u> , 427 F.2d 996 (9th Cir. 1970) .....	29, 30
<u>Teleprompter Corp. v. N.L.R.B.</u> , 570 F.2d 4 (1st Cir. 1977) .....	26

<u>United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960)</u> .....	32
--	----

**NATIONAL LABOR RELATIONS BOARD CASES**

<u>Caldwell Manufacturing Co., 346 N.L.R.B. 1159 (2006)</u> .....	19
<u>Columbia University, 298 N.L.R.B. 941 (1990)</u> .....	21
<u>Contract Carriers Corp., 339 N.L.R.B. 851 (2003)</u> .....	18
<u>Daimler Chrysler Corp., 344 N.L.R.B. 1324 (2005)</u> .....	32
<u>Doubarn Sheet Metal, 243 N.L.R.B. 821 (1979)</u> .....	19
<u>H &amp; R Industrial Services, 351 N.L.R.B. 1222 (2007)</u> .....	19
<u>HTH Corporation, 37-CA-7311, JD (SF)-35-09, 2009 WL 3147894 (James Kennedy, ALJ Sept. 30, 2009)</u> .....	18
<u>Keauhou Beach Hotel, 298 N.L.R.B. 702 (1990)</u> .....	21
<u>Magnet Coal, 307 N.L.R.B. 444 (1992)</u> .....	23, 27
<u>Postal Srvc., 302 N.L.R.B. 767 (1991)</u> .....	32
<u>Praxair, Inc., 317 N.L.R.B. 435 (1995)</u> .....	20
<u>Shoppers Food Warehouse, 315 N.L.R.B. 258 (1994)</u> .....	23, 27
<u>Square D Co. v. N.L.R.B., 332 F.2d 360 (9th Cir. 1964)</u> .....	30
<u>Summa Health System, Inc., 330 N.L.R.B. 1379 (2000)</u> .....	21, 26

**STATUTES**

29 U.S.C. § 158.....	17, 19
----------------------	--------

**PUBLISHED ARBITRATION AWARDS**

<u>City of Coquille, 115 LA 1100-1104-05 (Reeves 2001)</u> .....	29
--	----

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20, SUBREGION 37

ENDO PAINTING SERVICE, INC.	)	Case No. 20-CA-080565
	)	
Employer,	)	UNION'S MOTION FOR EXTENSION OF
	)	TIME ON DEADLINE TO FILE POST-
and	)	HEARING BRIEF; COS
	)	
INTERNATIONAL UNION OF	)	
PAINTERS AND ALLIED TRADES,	)	
PAINTERS LOCAL UNION 1791 (2012-	)	
004)	)	
Union.	)	
	)	

(129:51)

**LOCAL 1791'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

**I.**  
**INTRODUCTION**

The complaint in this case arose when the Employer Endo Painting Service, Inc. ("Endo Painting" or "Employer") failed to timely and fully respond to the information request of the International Union of Painters and Allied Trades, Painters Local Union 1791 ("Painters," "Local 1791," or "Union") dated April 24, 2012 related to a class grievance MS-12-001. (Joint Exhibit ("JE") 12, JE 16, 16 at 9 to 10; JE 1, Stipulated Facts ("Stip") ¶¶ 10, 20). The Employer unwarrantedly delayed its response and then only provided a very limited response to the request. (JE 16 at 9). Local 1791 then pursued a charge against the Employer (JE 2) and after an investigation, the Regional Director for Region 20 issued a Complaint. (JE 18; JE 1, Stip ¶ 20).

A hearing on the Complaint was held before Administrative Law Judge Gerald A. Wacknov on October 16 and 17, 2012. (Transcript of proceeding "Tr." at 1, 197). ). The following witnesses were called to testify during the hearing:

<b>Witness Name</b>	<b>Position, Company</b>	<b>(Tr. #-#)</b>
Mitchell Shimabukuro	Business Representative, Local 1791 (Tr. 24)	Tr. 23-128 202-244
Gregory Shuji Endo	President, Endo Painting (Tr. 128	Tr. 128-195
Ivan K. Yamasaki	Operations Manager, Endo Painting (Tr. 244).	Tr. 244-312

Joint Exhibits (J. Exh.) 1-20 (Tr. 49), General Counsel Exhibits (G.C. Exh.) 1-6 (Tr. 53, 110, 113, 115, 117, 204), Union Exhibit 1 (Tr. 229), and Respondent Exhibits 1 through 2 (Tr. 182, 235) were received into evidence.

## **II.**

### **STATEMENT OF THE CASE**

#### **A. The Background On The Employer And Local 1791**

The Employer provides painting services on the islands of Maui, Oahu, and Hawaii. (JE 1 Stip ¶ 4; Tr. 129). It is a sub contractor to a general contractor and residential painting. (Tr. 168-69, 250). Greg Endo (Mr. Endo) is the president of Endo Painting Service, Inc. and is a supervisor as defined under the National Labor Relations Act (“Act”). (JE 1, Stip ¶ 7; Tr. 128-29). Mr. Endo tries to have at least three projects on Oahu running every day with one foreman on each job. (Tr. 132). Payroll for employees on Maui and Oahu is centralized in the Maui office. (Tr. 130-31). Payroll for the Hilo employees is handled by Mr. Endo’s cousin who manages the Hilo operations. (Tr. 130-31). Mr. Endo testified that Honolulu faxes over the time cards of employees for the Maui office to prepare payroll but all originals generated on Oahu are kept in the Oahu office. (Tr. 144, 164). Ivan Yamasaki is the operations manager of the Oahu office of Endo Painting and the highest person in the company’s hierarchy for the Oahu office. (Tr. 130, 248). Mr. Yamasaki testified that he keeps the original time cards for a couple weeks after faxing them to Honolulu and then destroys them. (Tr. 269-70). Mr. Endo testified that

although he goes to the Honolulu's office he never inspected the paperwork kept by the Oahu office. (Tr. 144-45, 158).

Local 1791 represents employees in the bargaining unit of Endo Painting and is a labor organization within the meaning of the Act. (JE 1, Stip ¶ 6, 8). Mitchell Shimabukuro is a business representative for Local 1791 (Tr. 24; See JE 11 at 2). He has been the sole representative for Local 1791 filing grievances on the behalf of the Union since June 2010.<sup>1</sup> (Tr. 24). The Employer recognizes the Union as the exclusive bargaining representative of Respondent's employees. (JE 1, Stip ¶ 9).

Endo Painting employed between 53 to 80 employees in the February to April 2012 time period in the bargaining unit represented by Local 1791. (See JE 9, JE 9 attach. 3 and 4; Tr. 299-300). The bargaining unit consists of forepersons, sub-forepersons, journeyperson, and apprentices, performing work as painters, paper hangers, and other work as defined in the collective bargaining agreement. (JE 1, Stip. ¶8).

The collective bargaining agreement ("agreement") is between the Painting and Decorating Contractors Association of Hawaii ("Association") and Local 1791. (JE 6). Approximately 40 to 41 employers are signatories to the Agreement. (JE 6; Tr. 26-27). Endo Painting is an employer-member of the Association and a signatory to the agreement. (JE 6 at 33; JE1 Stip ¶ 9; Tr. 134). Endo Painting had authorized the Association to represent it in negotiating and administering labor agreements with the Union, one of the purposes of the Association. (JE 1, Stip ¶ 9).

---

<sup>1</sup> Prior to June 2010 the grievances were filed by Joseph Bazemore, who handled the grievances for the Union for about 30-35 years and who died in July 2012. (Tr. 24-25).

Pursuant to the Agreement, all grievances or disputes involving the application, interpretation, or alleged violation of the Agreement are raised by a grievance filed by the Union and handled through the grievance procedure outlined in Section 17 of the Agreement. (JE 6 at 13). Grievances not resolved by step 2 are referred to a Joint Industry Committee (“JIC”), composed of three members representing the employers (appointed by the Association) and three members representing the Union (appointed by the Union). (JE 6 at 13 to 14; Tr. 40). Employer members who are a party to the grievance or dispute brought before the Committee are replaced by an alternate. (JE 6 at 13). A grievance is resolved by a decision of the Committee by majority vote and if a majority vote is not reached, the grievance is submitted to binding arbitration. (JE 6 at 13 to 14).

**B. Prior Class Grievances Filed by Local 1791 With Endo Painting and With Other Employers in the Painting and Decorating Contractors Association**

Mr. Shimabukuro testified that Local 1791 had filed several class grievances prior to grievance MS-12-001 with Endo Painting and other signatories to the Agreement that went to the JIC for a decision. (Tr. 30-31, 34, 36-37). He testified that nothing in the Agreement prohibited the filing of a class grievance. (Tr. 43-44). At no time did the JIC find the grievance was procedurally defective because it was filed as a class grievance. (See GC Exhs. 2 through 6). Mr. Shimabukuro testified that at no time with respect to any of these class grievances did any of the employers object to the use of a class grievance. (Tr. 36, 38, 96-99).

On March 23, 2011 Local 1791 pursued a class grievance with Endo Painting alleging violations of Sections 9, 13, 14, and 15 of the Agreement.<sup>2</sup> (General Counsel Exhibit

---

<sup>2</sup> Mr. Endo testified that at the time the class grievance was filed his eye did not “catch” the class status of the grievance. (Tr. 137). Mr. Endo never went to his Association for an explanation. (Tr. 137). Although he claimed he only read the collective bargaining agreement

("GE Exh.") 2). The March 23, 2011 grievance alleged *inter alia* that Endo Painting violated the Agreement by making payment of cash to employees contrary to the terms of the Agreement.<sup>3</sup> (GE Exh. 2). The March 23, 2011 grievance was not adjusted by step 2 and was presented to the Joint Industry Committee. (GC Exh. 2).

Mr. Endo attended the hearing with the Joint Industry Committee on the March 23, 2012 grievance. (Tr. 138). Mr. Endo testified that he recalled speaking at that meeting and admitted that at the meeting he stated that he would pay employees cash if they wanted cash after they worked their 40 hours in a week.<sup>4</sup> (Tr. 140). He might have also said he let employees bank their hours,<sup>5</sup> it's something he might have said, but he could not recall. (Tr. 140). Mr. Yamasaki testified that there was banking of hours going on and then the supervisor from Maui came, maybe the end of January 2012, and met with employees and told them not to bank their hours. (Tr. 258-59). Mr. Endo said that at some point Mr. Yamasaki called Mr. Shimabukuro and was told to stop banking of hours or paying cash, or "whatever," and after that Endo Painting stopped such practices. (Tr. 143, 180). Mr. Endo testified that he did not know if the Employer kept a record of the cash payments and said employees might be assigned to work a residential job,

---

after the Joint Industry Committee's meeting on the first grievance against Endo in 2011 (Tr. 139-40), on cross by his counsel he testified that he went to the JIC meeting without an attorney because the contract said he could not appear with counsel. (Tr. 174). He explained that maybe he just read that one section of the agreement before the JIC meeting. (Tr. 186). Mr. Endo agreed that even after he had legal counsel he never went to the Association for an interpretation on the use of class grievances. (Tr. 141).

<sup>3</sup> The grievance also alleged employees were allowed to use drugs on the job site, information received by a non-employee. (Tr. 218-19).

<sup>4</sup> Mr. Yamasaki testified that he learned from Mr. Endo that the Employer was paying employees cash. (Tr. 254).

<sup>5</sup> Mr. Yamasaki testified that "banking" hours was when employees worked overtime but instead of being paid overtime, saved the hours to be applied later. (Tr. 256; See also Tr. 55). Asked to explain why an employee would opt not to be paid at overtime rate, he testified that in some cases employees just don't like to be paid time and a half. (Tr. 257).

paint a house, and the workers would have that direct interaction with the home owner. (Tr. 168-69). Mr. Endo testified that on occasion Endo Painting would also pay the employee cash if the employee asked for cash. (Tr. 169). Mr. Endo testified that at the meeting with the Joint Industry Committee he complained that there were no written signed complaints from employees but the Committee sustained the grievance anyway. (Tr. 175).

No member of the Joint Industry Committee or Mr. Endo objected to the use of a class grievance vehicle or required Local 1791 to produce any employee complaints underlying to the March 23, 2011 grievance. (Tr. 117). By a majority vote the Committee found that Endo violated the Agreement by paying employees in cash without making proper deductions of payroll and other taxes and failed to make appropriate payments for trust fund contributions. (GC Exh. 2). The decision of the Committee was confirmed by the Circuit Court of the First Circuit, State of Hawaii. (Union Exhibit ("U Exh.") 1; Tr. 187-88). The circuit court also denied Endo Painting's motion to vacate the Committee's decision and award. (U Exh. 1). Judgment was entered on July 30, 2012. (U Exh. 1). Mr. Shimabukuro testified that the JIC award included a back pay component but Endo Painting never provided information for calculating the back pay and he had to research and prepare the amounts. (Tr. 42). To the present the back pay was not paid. (Tr. 42). The JIC also ordered Endo Painting to produce books and accountings of payroll of bargaining unit ees from January 1, 2012 to present indicating hours worked for examination by an independent CPA and Endo Painting has never compiled with that requirement. (Tr. 104).

Prior to MS-12-001, Local 1791 pursued at least two other class grievances against Endo Painting including a March 24, 2011 grievance that the Employer was not in compliance with the job referrals of individuals. (GC Exh. 3). The Joint Industry Committee also

decided by a majority that the Employer violated the Agreement by a unanimous vote. (GC Exh. 3). Another class grievance filed in 2011, MS-11-001, alleged Endo Painting (with JD Painting & Decorating, Inc.) violated the Agreement related to referrals of individuals to work for the Employer. (GC Exh. 4; Tr. 38). Grievance MS-11-001 did not limit the time period to seven days prior to the grievance being filed and neither JD Painting or Endo Painting objected to the scope of the time period at that time. (Tr. 105-06). MS-11-001 was also sustained by the Committee and ordered Endo Painting to cease and desist from further similar violations. (GC Exh. 4; Tr. 39).

Grievance MS-11-002 filed with A & J Painting was filed as a class grievance over the company not paying subsistence pay. (GC Exh. 6; Tr. 38-39). The grievance went to the Joint Industry Committee and the JIC ordered a cease and desist practice, that was the end of the matter. (GC Exh. 6; Tr. 39). This year, Local 1791 filed a class grievance with Akira Yamamoto Painting, Inc. alleging violation so the Agreement related to stand by and show up time. (GC Exh. 5; Tr. 39). The JIC unanimously sustained the class grievance in part and ordered the company to cease and desist and to allow their employees, if they so wished, to drive straight to the job site. (Tr. 40).

**C. Local 1791 Pursues Class Grievance MS-12-001 with Endo Painting**

On or about March 8, 2012, after receiving reports from four bargaining unit members at Endo Painting, the Union filed a grievance, MS-12-001 against, Endo Painting and alleged that the Employer, in violation of the terms of the Agreement, refused to pay overtime to employees, changed timesheets of bargaining unit employees to reflect lower amount of hours worked, failed to comply with required contributions to the various funds under the agreement, paid employees in cash for work performed, and required employees to use their personal

vehicles to transport workers and materials.<sup>6</sup> (JE 1, Stip ¶ 10; JE 7; JE 14; Tr. 27-28). The allegations reflected assertions contained in four complaints the Union had received from employees in the Endo Painting bargaining unit. (See JE 1, ¶17; JE 14; Tr. 27-28). Mr. Shimabukuro testified that after the JIC award in the March 23, 2011 grievance that issued a cease and desist order to Endo Painting, the Union thought the conduct had stopped and when they learned it was continuing they filed the grievance over the continuous violation. (Tr. 205, 225). He testified the Agreement does not bar a grievance based on a continuing violation. (Tr. 225-26).

In reply to MS-12-001 Respondent's attorneys requested of Local 1791 copies of all "written and signed complaints and evidence upon which the grievance is based."<sup>7</sup> (JE 1, Stip ¶ 11; JE 8). Local 1791 responded that the grievance MS-12-001 was filed on behalf of "all bargaining unit employees of the Respondents." (JE 1, Stip ¶ 12; JE 9). The Union also attached documents obtained thus far in its investigation of the violations alleged in MS-12-001 that included the evidence relevant to the allegations that employees had to "bank" all hours in excess of forty hours per week and not be paid overtime (attachment 7) and that employees were required to take compensatory time off at straight time hourly rate (attachment 8). (JE 9).

On April 12, 2012 Endo Painting again through its attorneys made a second request for information including a request for the complaints and the basis for filing a class type grievance. (JE 1, Stip ¶ 13; JE 10). On April 24, 2012 Local 1791 wrote the Employer to explain

---

<sup>6</sup> Mr. Shimabukuro testified he also received calls from spouses of the bargaining unit employees at Endo Painting with complaints related to the allegations. (Tr. 67-68).

<sup>7</sup> Step 1 of the grievance procedure states that "a written and signed complaint must be presented to the Union within 7 working days from the date the alleged grievance occurred." (JE 6 at 13). The procedure does not specify who must sign the complaint. (Id.; Tr. 29).

that the written and signed reports were in the union files and that class grievances were authorized by the agreement and case law. (JE 1, Stip ¶14; JE 11). On May 22, 2012 the Union furnished to Endo Painting the signed written complaints of bargaining unit employees Erick Dias (dated 2/21/12), Preston Foster, Jr. (dated 2/24/12), Yancy Medeiros (dated 3/2/12), and Jantzen Song (dated 3/2/12). (JE 1, Stip ¶ 17; JE 14). The complaints alleged that employees were given compensatory time off in lieu of overtime, paid cash, required to change time sheets, required to bank hours, and required to use their own equipment and truck on the jobs. (JE 14).

**D. Local 1791's Information Request to Endo Painting on Class Grievance MS-12-001**

On April 24, 2012 Mr. Shimabukuro requested that the Respondents furnish the Union information related to class grievance MS-12-001. (JE 1, Stip ¶ 15; JE 12). Specifically, the Union requested:

1. Please provide a true and accurate listing of all employees of Endo Painting Services Inc. (Endo) covered by the labor agreement by and between the Painting and Decorating Contractors Association of Hawaii (Association) and the International Union of Painters and Allied Trades Local Union 1791, AFL-CIO (Union) who were employed by Endo during any period from January 1, 2010 to the present, and with respect to each such employee please provide the following information:<sup>8</sup>

- a. Name of Employee:
- b. Address:
- c. Job classification (See Section 2 of Agreement):
- d. Date of initial hire by Endo:
- e. Dates employed by Endo during the period from January 1, 2010 to the present:
- f. Straight time hourly rate of pay:
- g. Overtime rate of pay:
- h. Name of immediate supervisor of the employee:

---

<sup>8</sup> Mr. Shimabukuro testified he asked for two years of information because under the Agreement the employer can keep paying employees the rate in the Agreement at the time a bid was submitted for a project for a time period up to two years. (Tr. 46). The project site and name of the project supervisor was requested because the project supervisor would know the length of the job at any given site. (Tr. 46-47).

i. Project sites assigned from January 1, 2010 to the present and period of assignment:

2. For each employee identified in response to item #1 above please provide a true and accurate copy of the legibly printed, typewritten, or handwritten notice or electronic notice provided by Endo to each employee pursuant to Section 387-6 (c) , Hawaii Revised Statutes (HRS), indicating the following for each pay period from January 1, 2010 to the present:<sup>9</sup>

- a. Name of employee:
- b. Address of employee:
- c. Total hours worked:
- d. Overtime hours:
- e. Straight-time compensation:
- f. Overtime compensation:
- g. Other compensation:
- h. Total gross compensation:
- i. Amount and purpose of each deduction;
- j. Total net compensation:
- k. Date of payment:
- l. Pay period covered:

3. For each employee identified in response to item #1 above please provide a true and accurate copy of the following documents and records for each pay period from January 1, 2010 to the present:

- a. Daily time sheet or card as illustrated by Attachment 1.<sup>10</sup>
- b. Extra hours sheet or card as illustrated by Attachment 2.<sup>11</sup>
- c. Endo Painting Service Inc. Weekly Detail Report as illustrated by Attachment 3.<sup>12</sup>

---

<sup>9</sup> Mr. Shimabukuro testified that the information from the Employer (GC Exh. 1), only shows the total paid without a breakdown on overtime and regular pay or the rate paid. (Tr. 47, 48-51). The Employer claimed the Union already had the information responsive to item 2 but never gave a break down of the information the Union had. (Tr. 48).

<sup>10</sup> Mr. Shimabukuro testified that the attachment 1 was an employee's entry of his hours and showed some hours were banked. (Tr. 53-54; JE 12, attach. 1).

<sup>11</sup> Mr. Shimabukuro testified that attachment 2 indicated it was recording "extra hours" and he did not know what that was and was seeking clarification. (Tr. 56; JE 12, attach. 2).

<sup>12</sup> Mr. Shimabukuro testified he was seeking copies of the Weekly Detail Report to cross reference with the time cards. (Tr. 57-58; JE 12, attach. 3).

- d. Endo Painting Service Inc. Work Log as illustrated by Attachment 4.<sup>13</sup>
- e. Daily Report as illustrated by Attachment 5.<sup>14</sup>
- f. Weekly Project Recap as illustrated by Attachment 6.<sup>15</sup>

4. Please indicate the names, positions, addresses, and roles of all individuals who were responsible for preparing the following documents for Endo Painting Services Inc. from January 1, 2010 to the present:<sup>16</sup>

- a. Weekly Detail Report - See Attachment 3
- b. Work Log - See Attachment 4
- c. Daily Report - See Attachment 5
- d. Weekly Project Recap - See Attachment 6.

Answer:

Name:

Position:

Address:

Describe Role:

5. Please identify the names of all employees of Endo Painting Services Inc. who were paid “cash” for work performed on and after January 1, 2010 to the present by Endo or any of its managers and supervisors, and with respect to each such employee please indicate the following:<sup>17</sup>

- a. Name:
- b. Position:
- c. Job Classification:

---

<sup>13</sup> Mr. Shimabukuro testified the information provided on this form would serve as another method to check the number of hours employees actually worked. (Tr. 58; JE 12, attach. 4).

<sup>14</sup> Mr. Shimabukuro testified attachment 5 showed employees were working on a Sunday. (Tr. 60). Under certain circumstances an employer can avoid paying overtime for Sunday work but it has to register with the Union and Endo Painting never did that. (Tr. 60; JE 12, attach. 5).

<sup>15</sup> Mr. Shimabukuro testified that attachment 6 would show all the actual hours worked to cross reference with the other forms being requested. (Tr. 61).

<sup>16</sup> The information about who prepared the forms is relevant again because the rate paid an employee may vary from the agreement depending on when the bid was submitted. (Tr. 62).

<sup>17</sup> Mr. Shimabukuro testified that this information was relevant to the allegation of cash payments. (Tr. 62). The Board’s complaint limited this request to only bargaining unit employees. (JE 16 ¶ 7 (d)).

- d. Dates of cash payments:
- e. Hours worked by employee:
- f. Amounts of cash payments:
- g. Hourly rate at which payment in cash as paid:
- h. Hourly rate normally paid under the collective bargaining agreement at the time:
- i. Project site or location where work performed:
- j. Name of owners for whom work was performed:
- k. Address of the owner:
- l. Total amount paid for work performed on project to Endo:
- m. Manager or supervisor who made cash payment to employee:
- n. Bank account from which cash was drawn:
- o. Reason why cash payment was made:

6. Please identify the names of all employees of Endo Painting Services Inc. (Endo) for the period January 1, 2010 to the present who were requested to “bank” hours in excess of 40 hours worked per week and to use the hours banked as compensatory time off from work, and with respect to each employee please indicate the following.<sup>18</sup>

- a. Name:
- b. Position:
- c. Job Classification:
- d. Pay periods during which employee was requested to bank hours in excess of 40 hours worked per week:
- e. Amount of banked hours per pay period:
- f. Pay periods during which employee took compensatory time off from work for those banked hours:
- g. Hourly rate at which compensatory time off was paid:
- h. Amount of contributions paid to the trust funds for the banked hours.

7. Please identify all motor vehicles including trucks, vans, and cars owned and/or operated by Endo Painting Services Inc. from January 1, 2010 to the present which were available for use on the island of Oahu for transport of workers or materials and with respect to each motor vehicle indicate the following:<sup>19</sup>

---

<sup>18</sup> Mr. Shimabukuro testified this information was relevant to the allegation of banked hours. (Tr. 62). The Board’s complaint limited this request to only bargaining unit employees. (JE 16 ¶ 7 (d)).

<sup>19</sup> Mr. Shimabukuro testified this information was relevant to the allegations employees were required to use their own vehicles instead of a company van. (Tr. 62-63).

- a. Model, year, and make of the motor vehicle:
  - b. Date the motor vehicle was purchased:
  - c. Purchase price of the vehicle:<sup>20</sup>
  - d. License plate number of the motor vehicle:
  - e. Manager or supervisor to whom the motor vehicle was assigned for use;
  - f. Description of use of motor vehicle.
8. Please identify the names of all employees of Endo Painting Services Inc. who were allowed to use a company credit card to fill gas at the Waipio and Kapolei Shell service stations in their personal vehicles for use during work to transport workers or material from January 1, 2010 to the present and with respect to each such employee please produce the following:<sup>21</sup>
- a. Name of employee:
  - b. Address of employee:
  - c. Credit card number:<sup>22</sup>
  - d. A true and accurate copy of all charges approved and paid by Endo from January 1, 2010 for each employee:
  - e. Amounts charged to Endo and the date of the charge:
9. Please identify the names of all employees, representatives and agents of the Endo Painting Services Inc. who are providing the responses to this request for information, and indicate the following with respect to each individual:<sup>23</sup>
- a. Name:
  - b. Position:
  - c. Address:
  - d. Role in preparing and submitting information:
10. Please provide a true and accurate copy of the organizational chart of Endo Painting Services Inc. in effect from January 1, 2010 to the present which

---

<sup>20</sup> The Board did not include this request as part of the Complaint. (J. Exh. 16 ¶ 7(a) (7)).

<sup>21</sup> Mr. Shimabukuro explained that if a document showed employees were allowed to fill up their vehicle with gasoline using the Employer credit card it was evidence the employees were using their vehicles for work. (Tr. 63). The Board's complaint limited this request to only bargaining unit employees. (JE 16 ¶ 7 (d)).

<sup>22</sup> The Board's Complaint excluded this subitem from the Complaint. (JE 16 ¶ 7 (a) (8)).

<sup>23</sup> Mr. Shimabukuro testified that this information was relevant to know who actually prepared the timesheets to get an accurate count on hours and job sites. (Tr. 63).

would indicate the names of all personnel, positions, and roles of individuals and provide their address where said employees may be summoned.<sup>24</sup>

(JE 12). The attachments to the information request were in part exemplary copies of the document being referenced in the request. (JE 12).

Mr. Endo recalled receiving the information request but did not recall sending any of the attachments to the operations manager on Oahu, Mr. Yamasaki. (Tr. 146-47). Mr. Endo said if he had sent it to Mr. Yamasaki he does not recall what if any response Mr. Yamasaki gave him. (Tr. 147). Later Mr. Endo testified that he sat down with Mr. Yamasaki on the attachments in the information request.<sup>25</sup> (Tr. 164). Mr. Endo testified he reviewed the time cards as faxed over to the Maui office and they did not have the scribbles that are on the attachments to the Union's information request. (Tr. 177).

On May 4, 2012 the attorneys for Endo Paintings responded to the Union's information request but did not produce any information, instead asserting the information sought was "not appropriate," and requesting *inter alia* the "written and signed complaints." (JE 1, Stip ¶ 16; JE 13). By May 31, 2012 Endo Painting had received the Union's May 22, 2012 letter with the complaints of the four employees but did not write to the Union again until July 20, 2012. (JE 1, Stip ¶ 18, 19; JE 14; JE 15).

On July 20, 2012 the attorneys for the Respondents wrote to the attorney for the Union to acknowledge receipt of the four complaints signed by the employees. (JE 1, Stip ¶ 19; JE 15). Endo Painting agreed to provide "relevant information requested for the four employees

---

<sup>24</sup> Mr. Shimabukuro recalled at one point the Employer said it had no organizational chart. (Tr. 64-65).

<sup>25</sup> Mr. Yamasaki testified Mr. Endo provided him a copy of the Union's information request (Tr. 274), but then testified that he did not know the Union was asking for some of the documents in the request. (Tr. 278). He also testified that he did not read the request. (Tr. 279).

in question . . . that relates to the 7-day period immediately preceding the date of the employees' written and signed complaint." (JE 15). Respondents refused to provide information outside the 7-day period or for other Endo Painting bargaining unit employees. (JE 15). Endo Painting agreed to provide information on the condition that the Union either provide all complaints related to grievance MS-12-001 or otherwise verify there were only the four employees complaints. (JE 15). In the July 20, 2012 letter, Endo Painting for the first time represented to the Union that the Employer did not maintain an organization chart, one of the documents of the Union's April 24, 2012 information request. (JE 1, Stip ¶ 24; JE 12). Endo Painting did not give an explanation for its failure to respond sooner. (JE 15).

Mr. Shimabukuro testified that he made two requests for the same information. (Tr. 65; JE 12, JE 14). Other than the response that there is no organizational chart, no other information was provided by Endo Painting to the Union responsive to the April 24, 2012 information request. (Tr. 65).

Mr. Yamasaki testified that he guessed it would take him five to six months to put together the documents sought in the Union's information request. (Tr. 304). Mr. Yamasaki testified that the list of employees, item 1 on the request, would be kept on Maui. (Tr. 304; JE 12 ¶ 1). Since he did not keep the notices to employees informing them of their legal rights, he would not need any time to prepare a response to item 2. (Tr. 305-06; JE 12 ¶ 2). With respect to item 3 of the request and employee times cards, he only keeps them for two weeks. (Tr. 307; JE 12 3). With respect to attachments 2 through 6, they would be located in the former supervisor's

desk, Mr. Medeiros.<sup>26</sup> (Tr. 307-09). Mr. Shimabukuro testified that Mr. Endo never asked him to restrict or limit the scope of information request. (Tr. 105).

Mr. Endo testified that when he requested copies of the time cards as retained at the Maui office for Oahu employees his staff was able to retrieve them for him. (Tr. 181). He did not know where the cards were stored at the Maui office. (Tr. 181). In 2012 he had only gone to the Oahu office once. (Tr. 189). Mr. Yamasaki testified that on government jobs he was required to submit certified payroll records to the general contractor and in some cases the general contractor requests a written report on the payroll records. (Tr. 251-52). Mr. Yamasaki testified that after he knew the Union was requesting time cards he continued his practice of destroying them after a couple weeks. (Tr. 279). Mr. Yamasaki testified that Mr. Endo never asked him how hard would it be to make copies of all of the information requested by the Union or what if any of the documents were stored in the Oahu office responsive to the request. (Tr. 280, 285-86). Mr. Yamasaki testified that a former supervisor for Endo Painting on Oahu, Yancy Medeiros, was the one generating the forms that were the attachments to the Union's information request. (Tr. 296, 298, 299).

**E. The Regional Director Issues A Complaint in 20-CA-080565**

On May 7, 2012 Local 1791 filed a charge in 20-CA-080565 that was amended on July 26, 2012 and on July 27, 2012. (JE 1, Stip ¶¶ 3; JE 1A, JE 3, JE 5). As amended the charge alleged:

Since on and after May 4, 2012, the above named employer breached its duty to bargain in good faith by failure to provide information needed by the union to investigate and process a class action grievance filed on or about March 8, 2012 in MS-12-001.

---

<sup>26</sup> Mr. Yamasaki testified that Mr. Medeiros had stored paper in two desks and he'd have to look through that in responding to the Union's request. (Tr. 307-08).

Since on or about May 4, 2012 and thereafter, by the above and other acts and conduct, the Employer interfered with, restrained, and coerced its employees in the exercise of their rights as guaranteed in Section 7 of the Act.

....

(JE 5).

On July 31, 2012 the Regional Director for Region 20 issued a Complaint and Notice of Hearing in Case 20-CA-080565. (JE 1, Stip ¶20; JE 16). On August 14, 2012 the Employer filed an Answer and First Amended Answer to the Complaint. (JE 1, Stip ¶ 22, 23; JE 19 and 20). On August 16, 2012 the Employer filed a Second Amended Answer to the Complaint. (JE 1, Stip ¶ 23; JE 20). At the hearing held October 17, 2012 before the Administrative Law Judge, the Employer submitted a Third Amended Answer to the Complaint that added “maybe two or three additional affirmative defenses” to its answer. (Tr. 229-30, 232; R. Exh. 2)

### **III.** **RELEVANT STATUTORY SECTIONS**

The National Labor Relations Act states in relevant portions as follows:

29 U.S.C. § 158 Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

....

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees

to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification[.]

#### **IV. STANDARD OF REVIEW**

The U.S. Supreme Court in Acme Indus. Co., 385 U.S. 432 (1967), recognized the general rule that an employer is obligated to provide the employees' statutory bargaining representative with information in its possession needed by the bargaining representative for the proper performance of its duties, including collective bargaining. See Acme Indus. Co., 385 U.S. at 435-36; See also HTH Corporation, 37-CA-7311, JD (SF)-35-09, 2009 WL 3147894 (James Kennedy, ALJ Sept. 30, 2009) (citing Acme Indus. Co., as well as Detroit Edison, 440 U.S. 301 (1979), N.L.R.B. v. Truitt Mfg. Co., 341 U.S. 149 (1956) and other federal court and NLRB cases). The employer's statutory duty to produce the documents arises where there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. HTH Corp., *supra*. "Information relating to wages, hours, and other terms and conditions of employment is presumptively relevant and necessary for the union to perform its obligations." Rivera-Vega v. ConAgra, Inc., 70 F.3d 153, 158 (1<sup>st</sup> Cir. 1995).

The burden lies with the non-requesting party to validate its failure to produce requested information that is presumptively relevant. See Contract Carriers Corp., 339 NLRB 851, 858 (2003). The duty to furnish relevant information to the Union, upon its request, likewise

applies to the investigation and processing of grievances and the information sought is presumptively relevant if it concerns wages, benefits, hours, and working conditions. See Brewers and Malsters, Local Union No. 6 v. N.L.R.B., 414 F.3d 36, 45-46 (D.C. Cir. 2005). The employer's delay or refusal to provide the information may also be a violation of Section 8 (a) (1) and (5) of the Act. Id. at 46.

## V. ARGUMENT

### A. LOCAL 1791 HAD A RIGHT TO THE INFORMATION REQUESTED AS RELEVANT TO ITS DUTIES AS THE EXCLUSIVE REPRESENTATIVE

It is an unfair labor practice under Sections 8(a)(5) and (d) of the National Labor Relations Act ("Act") for an employer to refuse to bargain in good faith with its employees' representative. 29 U.S.C. § 158(a)(5), (d); River-Vega, 70 F.3d at 158. "One element of the duty to bargain in good faith is that the employer must, upon request, supply relevant information needed by the union 'for the proper performance of its duties as the employees' bargaining representative.'" Id. (citations omitted).

"It is long-established law that the duty to bargain in good faith embodied in Section 8(a)(5) of the Act includes the obligation of employers to provide their employees' collective-bargaining representatives with requested information which is relevant and necessary to the representative's duty to bargain on behalf of employees." H & R Indus. Servs., 351 NLRB 1222, 1223 (2007) (citing NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967)); Doubarn Sheet Metal, 243 NLRB 821, 823 (1979). An employer fails to bargain in good faith in violation of § 8(a)(5) of the Act when it delays and/or fails to produce relevant information. Acme Indus. Co., 385 U.S. at 437; NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). "[T]he Board uses a broad, discovery-type of standard in determining relevance in information requests." Caldwell Mfg. Co., 346 NLRB 1159, 1160 (2006) (citations omitted). (Emphasis added).

Frankl v. HTH Corp., 825 F. Supp. 2d 1010, 1038 (D. Hawai'i 2011).

The duty to provide information is not limited to collective bargaining but “extends to data requested in order properly to administer and police a collective bargaining agreement as well as to requests advanced to facilitate the negotiation of such contracts.” N.L.R.B. v. Whitesell Corp., 638 F.3d 883, 894-95 (8<sup>th</sup> Cir. 2011) (while quoting WCCO Radio, Inc. v. N.L.R.B., 844 F.2d 511, 514 (8<sup>th</sup> Cir. 1988)); Praxair, Inc., 317 NLRB 435, 435-36 (1995) (“Regardless of whether a union has requested such information to negotiate a new contract or, as here, to administer an existing contract, the employer's obligation to supply the information is predicated on the union's need ‘to provide intelligent representation of the employees.’”). “Information pertaining to the wages, hours and working conditions of employees in the bargaining unit is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant.” Retlaw Broadcasting Co., A Subsidiary of Retlaw v. N.L.R.B., 172 F.3d 660, 669 (9<sup>th</sup> Cir. 1999) (quoting WCCO Radio, Inc., 844 F.2d at 514).

Endo Painting failed in its duty to furnish relevant information to the Union, as requested on April 24, 2012, that related to the investigation and processing of the grievance MS-12-001. The information sought in the Union’s April 24, 2012 letter was presumptively relevant since it dealt with employee allegations of being paid in cash and required to bank hours, and the use of personal vehicles for work purposes. See Brewers and Malsters, Local Union No. 6 v. N.L.R.B., 414 F. 3d 36, 45-46 (D.C. Cir. 2005). As the stipulated facts make clear, the only response from the Employer with actual information was the July 20, 2012 letter from Endo Painting’s counsel that provided only one complete response and that was to tell the Union there was no organization chart. (JE 1, Stip ¶¶ 19, 24; Tr. 64-65). Otherwise the Employer never responded to Local 1791’s April 24, 2012 information request. (Tr. 65).

The Employer's delay in responding to item 10 as well as items 1 through 9 of Local 1791's information request was a violation under the Act. See Columbia University, 298 NLRB 941, 945 (1990) ("Failure to make either response in a reasonable time is, by itself, a violation of Section 8 (a) (5) and (1) of the Act.") (citing Ellsworth Sheet Metal, 232 NLRB 109, 109 (1977)); See also Summa Health System, Inc., 330 NLRB 1379, 1399 (2000) (finding delay of two months violated Act where it prevented Union from "ascertaining the possible lack of merit of employee reports."). In this case, the Employer's repeated refusal to provide information relevant in several of Local 1791's grievances supports that the delay was not some oversight but rather a tactical decision by the Employer to ignore the Union's right to the information. See id., 330 NLRB at 1399 (discussing employers' "cavalier attitude toward information-request compliance" in finding a violation under the Act for the delays).

The Employer argues that the information requested is overly broad and burdensome to produce. The Board may consider whether an information request, while presumptively valid, may still be defective because it is overly burdensome or raises confidentiality concerns. See Public Srvc. Co. of New Mexico v. N.L.R.B., 692 F.3d 1068, 1073 (10<sup>th</sup> Cir. 2012) (noting that the claims the union's discovery request was overbroad, unduly burdensome, or an invasion of the privacy interests of its employees under some circumstances, may excuse a company's obligation to provide the information under the National Labor Relations Act). "It is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." Keauhou Beach Hotel, 298 NLRB 702, 702 (1990). Even if the information is not readily available to the

employer, employers have an obligation to make reasonable efforts to secure any unavailable information. Congreso de Uniones Industriales de Puerto Rico v. N.L.R.B., 966 F.2d 36, 37-38 (1<sup>st</sup> Cir. 1992).

Here the Employer has failed to make a showing the request is burdensome or overly broad. Mr. Yamasaki testified that Mr. Endo never asked him how hard would it be to make copies of all of the information requested by the Union or what if any of the documents were stored in the Oahu office responsive to the request. (Tr. 280, 285-86). Although Mr. Yamasaki testified that he guessed it would take him five to six months to put together the documents sought in the Union's information request (Tr. 304) when questioned in detail it appeared most of the documents were located in two desks at his office. (Tr. 307-09). Mr. Yamasaki testified that the list of employees, item 1 on the request, would be kept on Maui. (Tr. 304; JE 12 ¶ 1). Mr. Yamasaki testified that on government jobs he was required to submit certified payroll records to the general contractor and in some cases the general contractor requests a written report on the payroll records. (Tr. 251-52). Since he did not keep the notices to employees informing them of their legal rights, he would not need any time to prepare a response to item 2. (Tr. 305-06; JE 12 ¶ 2). With respect to item 3 of the request and employee times cards, he only keeps them for two weeks. (Tr. 307; JE 12 3). Mr. Endo testified that when he requested copies of the time cards as retained at the Maui office for Oahu employees his staff was able to retrieve them for him. (Tr. 181). Mr. Shimabukuro testified that Mr. Endo never asked him to restrict or limit the scope of information request. (Tr. 105).

**B. THE UNION HAD MORE THEN A BARE ASSERTION TO SUPPORT THE GRIEVANCE, THUS TRIGGERING THE EMPLOYER'S DUTY**

Despite admitting that Endo Painting had previously paid employees cash, Endo Painting is arguing the Union's claims are meritless and thus the Employer had no duty to produce the information sought in the April 24, 2012 request from Mr. Shimabukuro. The Board has consistently applied a liberal, discovery-type standard to determine whether information sought by the union is relevant, or potentially relevant, to require its production. See Retlaw Broadcasting Co., 172 F.3d at 669; N.L.R.B. v. Whitesell Corp., 638 F.3d at 894 (citing Acme Indus. Co., 385 U.S. at 437 n.6). Nor does the Employer's argument bear weight that the Union's grievance lacks merit. The Board does not consider the merits of the grievance in examining an employer's failure to produce information based in part on that defense. "In this regard, the Board does not pass on the merits of a union's claim of breach of a collective-bargaining agreement in determining whether information relating to the processing of a grievance is relevant." Shoppers Food Warehouse, 315 NLRB 258, 259 (1994).

In Magnet Coal, 307 NLRB 444 (1992), the union was seeking information on whether an alter ego relationship existed between two companies. The Board confirmed that the union had an objective factual basis for its belief to support the information request even though based on hearsay. "A union's information request," the Board stated, "may be based on hearsay." Magnet Coal, 307 NLRB at 444 n.3 (citing Leonard B. Hebert Jr., 259 NLRB 881, 885 (1981), enf'd. 696 F.2d 1120 (5th Cir. 1983), cert. denied 464 U.S. 817 (1983)). At least four employees of Endo Painting and some spouses had come to the Union with complaints of the cash payments, banking of hours, and use of personal vehicles. This was not the first time such accusations were raised and the last time in 2011 Mr. Endo admitted to the practice of cash

payments. When they heard the practice was still on-going the Union has reason to believe a violation was continuing of the same nature and filed and pursued the grievance in order to investigate further. (JE 12). Since a union has a lawful right to the information even where no grievance procedure is established, where as here a grievance was filed, the duty to provide the information was triggered. See N.L.R.B. v. Davol Inc., 597 F.2d 782, 786-87 (1<sup>st</sup> Cir. 1979) (finding duty to provide information even if grievance might later be found non-arbitrable by the arbitrator).

With respect to information sought about non-unit employees, “union's need and the employer's duty depend, in all cases, on the “probability that the desired information is relevant, and that it will be of use to the union in carrying out its statutory duties and responsibilities.” N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 437 (1967) (internal formatting omitted). To the extent the information request is reviewed on whether it is presumptively relevant or examined for relevancy as it relates to information outside the bargaining unit, all of the information requested as covered by the Complaint were requests enforceable under the Act.

Items 1, 2, 3, 5, 6, and 8 of the April 24, 2012 as listed in the Board’s Complaint, request information pertaining directly to the wages, hours and terms and conditions of employment of employees in the bargaining unit. See JE 16 ¶ 7 (a) (7), (8). Applying the above analysis the information is presumptively relevant and the Employer violated the Act by refusing to provide the relevant information.

Item 4 sought information related to the identity of the individuals responding to the request for information. Mr. Shimabukuro explained that under the collective bargaining agreement the rate of pay specified in the contract may not necessarily be applicable if the job in

question was started under an earlier rate in the contract set at the time the employer was bidding on the project. (Tr. 62). The Union needed the names of those who prepared the payroll records and other documents sought in the request because those individuals would know if a particular rate was accurate even if lower than the contract rate at the time the employee was being paid. (Tr. 62). This has a sufficient nexus to the bargaining unit employees to warrant the employer producing the information.

Item 7 requested information about the Employer's motor vehicles. Mr. Shimabukuro testified this information was relevant to the allegations employees were required to use their own vehicles instead of a company van. (Tr. 62-63). Since the employees use of their own vehicles to perform work for the employer would affect wages and terms and conditions of employment, the information was relevant to the Union carrying out its statutory duties and responsibilities.

Item 9 requested the names of all employees, representatives and agents of the Endo Painting Services Inc. who were providing the responses to the request for information. Mr. Shimabukuro testified that this information was relevant to know who actually prepared the timesheets to get an accurate count on hours and job sites. (Tr. 63). Mr. Shimabukuro testified that the information sent to the trust funds was summary information and did not give a breakdown of hours and rates paid. Tr. 47, 48-51. If time cards were in fact being altered, cross references to determine accuracy would be needed and the information was relevant to the Union's role as exclusive bargaining representative and to grievance MS-12-001.

Finally item 10 sought the organization chart. In light of the allegations of banking hours and paying cash, knowing who had authority in the company would be useful

information. Under the liberal standard described in the case law discussed above, the request had support and the Employer's delay of four months in responding was unlawful. See Summa Health System, Inc., supra.

Since all the information covered by the Complaint in 20-CA-080565 has been shown related to the Union's role as exclusive bargaining representative covering mandatory subjects for which the Employer had a duty to bargain or sought information that was likely to lead to evidence that would be relevant, and given the factors discussed above, see supra Part IV.A, the Employer has not shown a valid defense to its failure to provide the information based on a claim the Union lacked a reasonable basis to pursue its investigation. See NLRB v. Associated Gen. Contractors of Cal., Inc., 633 F.2d 766, 770-71 (9th Cir. 1980) (holding that a showing that the information requested is needed to aid in an investigation of contract violations is sufficient to prove relevance). Clearly, there has been a sufficient showing of relevance under the Board's liberal "discovery-type" standard for the ALJ to conclude that Respondent was obligated to furnish the information requested by the Union. See Retlaw Broadcasting Co., A Subsidiary of Retlaw Enterprises, Inc. v. N.L.R.B., 172 F.3d at 669; N.L.R.B. v. Whitesell Corp., 638 F.3d at 894-95; Teleprompter Corp. v. N.L.R.B., 570 F.2d 4, 8 (1<sup>st</sup> Cir. 1977) (failure to furnish information per se failure to bargain).

**C. THE EMPLOYER LACKS ANY EVIDENCE OR ANY LEGAL BASIS FOR THE OTHER DEFENSES IT ADVANCED FOR ITS NON-COMPLIANCE**

On October 17, 2012 the Employer submitted Respondent's Exhibit 2, its Third Amended Answer to Complaint. (Respondent Exh. 2; Tr. 229-232). The third amended complaint added additional defenses and from pages 5 to 10 contained the Employer's position

statement to the NLRB during the investigation of the Union's charge. (Tr. 231-32). The Union submits that none of their defenses have merit.

The first defense is that the charge is barred by the applicable statutes of limitation and the seven day statute of limitation in the collective bargaining agreement. (R. Exh. at 2). The charge was filed on May 7, 2012 and Mr. Shimabukuro's testimony indicates he learned of the possible violations when the members signed the complaints and he received calls from some of the wives of the employees. (Tr. 68-71). Even assuming the Union learned of the violations on January 1, 2012, the charge was filed within six months of when it knew of the continuing violations. As to whether the grievance was timely, issues of procedural timeliness go the merits of the grievance and are not a basis to withhold the information from the Union. See Shoppers Food Warehouse, 315 NLRB at 259.

The second defense was that the claims are frivolous, baseless, and without merit. (R. Exh. at 2). As argued above the standard on information requests involving wages, hours and terms and conditions of bargaining unit employees is presumptively relevant. Even when seeking information based on even hearsay are sufficient to require the production. See Magnet Coal, 307 NLRB at 444 n.3 ("A union's information request," the Board stated, "may be based on hearsay.").

The third defense is the Respondent's request to conduct discovery on whether the claims are barred by failure to exhaust administrative or contractual remedies. (R. Exh. at 2). These defenses may go to the merits of the arbitration but not to whether the Employer is required to provide the information sought in the April 24, 2012 information request.

The fourth defense is the Respondent's request to conduct discovery on whether the claims are barred by the doctrine of after-acquired evidence.<sup>27</sup> (R. Exh. at 2-3). Local 1791 does not agree that the grievance process requires that the Union have signed written complaints from members as a condition precedent to filing a grievance. That said, the Employer produced no evidence to dispute Mr. Shimabukuro's testimony that he had in his possession the signed complaints of the members at the time the grievance was filed. (Tr. 68-71).

The fifth defense is the Respondent's request to conduct discovery on whether the Union failed to mitigate any damages. (R. Exh. at 3). Again, this may be a subject raised in arbitration and remedy, however, is not relevant to whether the Union was entitled under the law to the information sought in the April 24, 2012 information request.

The sixth defense is the Respondent's request to conduct discovery on whether Local 1791's claims are barred by doctrines of waiver, estoppel and unclean hands. (R. Exh. 2 at 3). The presumption the information is relevant when related to wages, hours, and terms and conditions of employment of bargaining unit employees is not defeated by a showing of the Union's conduct.

The seventh defense is that Respondent acted in good faith at all times relevant to the "lawsuit." (R. Exh. 2 at 3). The Employer has made no showing that its good faith is a basis to avoid producing the responses to the April 24, 2012 information request and in fact the delay is evidence to the contrary.

---

<sup>27</sup> The eleventh defense argues that Endo Painting could not determine whether the four written complaints were provided to the Union with 7 days of the date of the occurrence giving rise to the complaint. (R. Exh. 2 at 6 ¶ 4).

The eighth defense is that Local 1791 pled numerous facts from which it reasonably could be inferred that Petitioner engaged in practices with malice and/or with callous indifference to Endo's federally protected rights. (R. Exh. 2 at 3). The ninth defense sought punitive damages. (R. Exh. 2 at 3). This charge was filed to compel the Employer to produce responses to the April 24, 2012 information request. At the hearing Endo Painting advanced the argument that the grievance, based on four employee complaints, warranted information related to all employees was harassment. (Tr. 20, 81-82). As the conduct, if on-going, is a continuation of prior conduct Mr. Endo admitted occurred in Endo Painting, the scope of the information request was appropriate.

In the tenth defense, the Employer argues that Local 1791 failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure or NLRB case law required to constitute a class. (R. Exh. 2 at 4). In the eleventh defense Endo Painting argues the class grievance is invalid and unauthorized. (R. Exh. 2 at 7). This is not a civil suit and the rules of civil procedure are inapplicable to the processing of either the grievance or the charge filed by the Union in the above-entitled matter. As the Union pointed out in its letter to the Employer on April 24, 2012, the arbitrable law supports class grievances even if the agreement does not specifically state that class grievances may be filed. See JE 11; City of Coquille, 115 LA 1100-1104-05 (Reeves 2001) (finding provision in contract that "employee, with or without the association representative shall make up the grievance" did not prohibit the union to file a group or class grievance). Employer's cited case, Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9<sup>th</sup> Cir. 1970), was a civil matter seeking declaratory action related to an agency fee agreement. The

court specifically found that the matter before it did not involve a grievance or unfair labor practice. Id. at 1002.

Endo Painting's eleventh defense asserts that it includes arguments presented by Endo in its position papers to the NLRB. (R. Exh. 2 at 4-5). In its eleventh defense, Endo Painting argued that the Union failed to respond to the Employer's information request that it needed to commence the grievance procedure. (R. Exh. 2 at 6 ¶¶ 1, 2). As discussed above, even in the absence of a grievance the Union can seek information as needed to carry out its role as the exclusive bargaining representative. See N.L.R.B. v. Davol Inc., 597 F.2d 782, 786-87 (1<sup>st</sup> Cir. 1979) (finding duty to provide information even if grievance might later be found non-arbitrable by the arbitrator).

Although Endo Painting has never provided the Union with the information ordered by the Joint Industry Committee related to the March 23, 2011 grievance (Tr. 42, 104), Endo Painting argues in its eleventh defense that the Union is seeking information already in its possession. As Mr. Shimabukuro explained the information from the trust funds only shows total wages paid and does not give a breakdown of hours worked and hourly rates. Tr. 47, 48-51. This defense also argues the request is unduly burdensome, overly broad, and request irrelevant information. All of these defenses have been discussed above. See supra Part V.A.

Endo Painting argued in its eleventh defense that the grievance procedures in the collective bargaining agreement did not allow the Union to request information. (R. Exh. 2 at 7-8). The Employer cites Square D Co. v. N.L.R.B., 332 F.2d 360 (9<sup>th</sup> Cir. 1964), to argue the

Union had waived any right to compel responses to information under the collective bargaining agreement<sup>28</sup> and therefore the Board lacked jurisdiction regarding the information request.

The Court in Square D Co., found that it would need to construe the collective-bargaining agreement in order to find an unfair labor practice and “the Board has no jurisdiction to adjudge an unfair labor practice where the existence of an unfair labor practice is dependent upon the resolution of a preliminary dispute involving only the interpretation of the contract.” N.L.R.B. v. C & C Plywood Corp., 351 F.2d 224 (9<sup>th</sup> Cir. 1965) (discussing Square D Co.). In N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421 (1967), the U.S. Supreme Court rejected the notion that Congress intended to withhold power to the Board to decide any case involving interpretation of a labor contract.

It is said that the rejection by Congress of a bill which would have given the Board unfair labor practice jurisdiction over all breaches of collective bargaining agreements shows that the Board is without power to decide any case involving the interpretation of a labor contract. We do not draw that inference from this legislative history.

385 U.S. at 426-27. Instead, the Court concluded that Congress intended to give the Board jurisdiction to provide a means by which an agreement may be reached with respect to wages, hours, and working conditions. Id. at 427. Here, enabling the Board to pursue complaints where one party refuses to provide information that could resolve labor disputes over wage, hours, and working conditions advances the purposes of the Act and the role of the Board.

---

<sup>28</sup> The Board and the courts do not look favorably on waivers and require clear and unmistakable waiver. See Children’s Hospital Medical Ctr. Of No. Calif. V. California Nurses Ass’n., 283 F.3d 1188, 1192 (9<sup>th</sup> Cir. 2002) (finding no strike clause in collective bargaining agreement was not clear and unmistakable waiver of right to engage in sympathy strikes); Communications Workers of Am. AFL-CIO Local 1051 v. N.L.R.B., 644 F.2d 923, 928 (1<sup>st</sup> Cir. 1981) (finding union by its conduct in bargaining did not waive its right to obtain photo-copies of grievance related documents).

The Employer also cites United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960) (R. Exh. 2 at 9). In that case the union sued in federal court to compel arbitration. The jurisdiction of the National Labor Relations Board was not even discussed in the opinion. In Burns Int'l Sec. Svcs v. N.L.R.B., 146 F.3d 873 (D.C. Cir. 1998) (R. Exh. 2 at 9), the Board refrained from initiating an unfair labor practice proceeding by deferring the dispute first to arbitration. The Board has continuously made clear, before and after the 1998 decision, that it will not defer on a complaint related to a failure to provide information. See Daimler Chrysler Corp., 344 NLRB 1324, 1324 (2005) and Postal Svcs., 302 NLRB 767 (1991).

## **VI. CONCLUSIONS**

For the aforementioned reasons, the International Union of Painters and Allied Trades, Painters Local Union 1791 respectfully requests this Administrative Law Judge to find that the Employer, Endo Painting Service, Inc., violated sections 8 (a) (1) and 8 (a) (5) by refusing to timely and fully respond to the April 24, 2012 information request and order that the Employer produce the information promptly and in full and such other relief as warranted under the Act, including a cease and desist order from engaging in similar conduct.

DATED: Honolulu, Hawaii, December 3, 2012.

/s/ Rebecca L. Covert  
\_\_\_\_\_  
REBECCA L. COVERT  
Attorney for Union

