UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MOUNTAIN VIEW COUNTRY CLUB, INC.

and Case 21-CA-083930

LABORERS' PACIFIC SOUTHWEST
REGIONAL ORGANIZING COALITION,
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

# ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO RESPONDENT'S EXCEPTIONS

Submitted by:
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## I. STATEMENT OF THE CASE[1]

In a decision that issued on January 24, 2013, Administrative Law Judge Mary Miller Cracraft ("ALJ") held that Respondent, Mountain View Country Club, violated Section 8(a)(1) and (5) of the National Labor Relations Act by unreasonably delaying furnishing information to the Laborers' Pacific Southwest Regional Organizing Coalition, Laborers' International Union of North America, AFL-CIO.[2] Respondent filed exceptions to all of the ALJ's findings and conclusions. In addition, relying on Noel Canning v. National Labor Relations Board, 705 F.3d 490 (D.C. Cir. 2013), in its Exceptions Respondent argues that the NLRB does not have a proper quorum and, therefore, must refrain from exercising jurisdiction over this matter or from entering any Order in this matter. This Brief answers Respondent's exceptions.

## II. ISSUES PRESENTED

1. Whether the ALJ correctly concluded that Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying furnishing the Union with discipline information;

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1 "ALJD" refers to the Administrative Law Judge's Decision. Citations will refer to the page number followed by the line number. The transcript will be referred to as "Tr." followed by a reference to the page number. The Acting General Counsel's exhibits will be referred to as "G.C.X" followed by the appropriate exhibit number and Respondent's exhibits will be referred to as "R.X" followed by the appropriate exhibit number.

2 The ALJ incorrectly referred to the Charging Party, Pacific Southwest Regional Organizing Coalition, Laborers' International Union of North America, AFL-CIO, as the certified collective-bargaining representative of Respondent's employees. The Laborers' International Union of North America, Local No. 1184, AFL-CIO, herein called the Union, is the correct name of the certified collective-bargaining representative of Respondent's employees. The Charging Party is the Union's organizing department. (Tr. 10).

2. Whether the ALJ correctly concluded that Respondent's asserted justification does not excuse the delay;
3. Whether the ALJ correctly concluded that the pace of bargaining does not justify Respondent's delay; and
4. Whether the NLRB has a proper quorum and, therefore, is properly exercising jurisdiction in this matter.

## III. STATEMENT OF FACTS

### A. Background

Respondent, Mountain View Country Club, Inc., operates a golf club in La Quinta, California. On March 22, 2011, the Union was certified to represent Respondent's maintenance employees. There are approximately 23 employees in the certified bargaining unit. (ALJD 2: 6-32).

After the Union was certified, it contacted Respondent to begin negotiations for a collective-bargaining agreement. Negotiations began in about April 2011. (ALJD 2:33). Approximately nine negotiation sessions have been held, but an agreement has not yet been reached. The parties agree that the negotiations have been "amicable." (ALJD 2:36). Michael Dea, the Union's Recording Secretary and a business agent, is the Union's chief negotiator, and he is assisted by Daniel Brennan, another business agent. Daniel Handman, Respondent's attorney, represents Respondent at negotiations. (Tr. 11-13).

## B. The Union Orally Requests Discipline Information.

At one of the first negotiation sessions, in April, May, or June of 2011, Dea asked Handman for information about employee discipline. He asked for copies of any suspensions, terminations, or write-ups issued to unit employees. Handman replied that he would have to get the information from his client. Having received no response to his initial request, Dea repeated his request for this discipline information at subsequent negotiation sessions, but the information was never provided. (ALJD 2:37-44).

## C. The Union Needs Discipline Information.

The Union needed the discipline information for multiple reasons. Dea testified that he asked for the information because it was relevant to the grievance procedure and, generally, to representing employees. He said that the Union requested this information because it wanted to make sure that employees were receiving due process and that Respondent was acting in good faith. Brennan added that the Union sought this information also to determine whether the Respondent was targeting union supporters. He said that the Union finds that employers often target union supporters and attempt to get rid of them to encourage other employees to decertify the union. (Tr. 50).

## D. On May 2, 2012, the Union Puts Its Request for Discipline Information in Writing.

Having not received discipline information in response to oral requests made at negotiation sessions, the Union decided to put its request in writing. Dea directed

Brennan to send Handman an email requesting the information. The first time Brennan made a written request was by email on May 2, 2012.[3] In that email he wrote:

> Please consider this email an official request for all disciplinary actions, suspensions and/or terminations that have occurred in the past 12 months. I need this information within the next few days. The Union will seek all remedies to obtain the requested information. Thank you. (ALJD 2:45-50).

Handman responded two days later, but did not provide the information. Instead, he said he would find out how long it would take to assemble the information and let Brennan know what he heard. (ALJD 3:1-3).

Having heard nothing from Handman, on May 18, Brennan sent Handman another email requesting the discipline information. Handman responded by email on May 24, saying that Brennan's email "got spammed" and he just received it. He promised to call his client, find out what they had, and get back to Brennan as soon as he could. Handman did not get back to Brennan. (ALJD 3:5-10).

On May 31 Dea sent Handman a letter suggesting dates for the next negotiation session. (G.C. X 3). They agreed to meet on June 26. In a telephone conversation before the meeting, Handman asked Dea if he could bring the information to the June 26 meeting. Dea replied, "Just provide us with the information as requested." (ALJD 3:7-9).

On June 25, the Union filed a charge alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide information. On June 26, the charge was mailed to Respondent. (G.C. X 1(a) and 1(b)).

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[3] All dates hereafter refer to 2012 unless otherwise indicated.

## E. The Union Did Not Excuse Respondent from Providing the Information at the June 26 Meeting.

A negotiation session was held on June 26, attended only by Dea and Handman. Dea testified that although he asked Handman for the discipline information at the meeting, Handman did not provide it. Rather, according to Dea, Handman said he would have to confer with his client. Dea denied telling Handman anything to the effect that Respondent did not need to provide the information or that it could postpone providing the information. (ALJD 3:12-19). Handman did not testify about what he and Dea said at the meeting. However, he produced his notes from the meeting,[4] which were admitted into the record. According to the last entry in Handman's notes, when he asked Dea whether the Union really needed all of the discipline information or whether the Union was "f-ing with us," Dea told him he could hold off providing the information. As between Dea's testimony and Handman's notes, the ALJ credited Dea's "forthright and consistent testimony denying telling Respondent it did not need to produce the information requested." (ALJD 3:16-19).

## F. The Union Makes a Third Request on July 18 and a Fourth on August 14.

Having not received any information, Dea directed Brennan to make another request for the discipline information. On July 18, by email, Brennan again requested that Handman provide the Union with discipline information. Brennan wrote:

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[4] Handman, Respondent's negotiator, also acted as Respondent's attorney at the hearing. The Acting General Counsel (General Counsel) objected to Handman testifying in a narrative form because it deprived the General Counsel of the opportunity to object to a question before it was answered. However, General Counsel did not object to Handman testifying if a question-and-answer format were used. Handman chose not to testify about what was said at the meeting but to testify only to authenticate the notes he took of the meeting. The General Counsel did not object because Handman asked himself questions and then answered them.

> Specifically, to date, I have not received the information requested in the email below. Please provide me with all disciplinary actions/suspensions/ and/or terminations since the certification at Mountain View Country Club. It has been more than two months since my initial request. If you have any questions, please contact me. (ALJD 3:19-21).

On August 14, as directed by Dea, Brennan sent another email asking Handman to provide the information as soon as possible. Respondent promised to provide it "shortly." (ALJD 3:21-22).

### G. Respondent Provides the Information on August 23.

The Union did not receive the information directly from Handman on or about August 17, as promised. Rather, on August 23, Handman sent the discipline information by email to Board Agent Sylvia Meza, and copied both Dea and Brennan on the email. (ALJD 3:22-23).

## IV. ARGUMENT

### A. RESPONDENT VIOLATED SECTION 8(a)(5) OF THE ACT BY UNREASONABLY DELAYING PROVIDING THE UNION WITH DISCIPLINE INFORMATION.

#### 1. The Duty to Provide Information

The principal issue in this case is the legality of Respondent's delay in providing information. It is well-settled that an employer is obligated to provide information needed by a bargaining representative for the proper performance of its duties. NLRB v. Truitt Mfg., 351 U.S. 149 (1956). Thus, an employer is required to provide a union

with requested information as long as the information is potentially relevant to a union's statutory duty as the employees' collective-bargaining representative. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). The applicable standard in determining if the requested information is relevant is a liberal, discovery-type standard. Metropolitan Home Health Care, 353 NLRB 25, 27 (2008). Under this standard, information is relevant merely if there is a probability that the information will be useful to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative. Lenox Hill Hospital, 327 NLRB 1065, 1068 (1999). It is well-settled that information regarding employee discipline since a union's certification is considered presumptively relevant. E.g. DIRECTV U.S. DIRECTV HOLDINGS LLC, 358 NLRB No. 33 (April 16, 2012).

Applying these principles, the ALJ correctly concluded that the discipline information the Union requested is presumptively relevant. (ALJD 3:35-36). All the Union requested was copies of discipline notices issued to employees since its certification, information that is obviously useful to a newly certified collective-bargaining representative attempting to negotiate its first collective-bargaining agreement. Indeed, Respondent does not contest the relevance of the information.

### 2. The Duty to Timely Provide Information

The duty to supply requested information includes the duty to provide the information in a timely fashion. Mary Thompson Hospital, 296 NLRB 1245 (1989). Absent sufficient justification, an employer is required to provide requested information promptly. An unreasonable delay in furnishing information violates the Act. American Signature, Inc., 334 NLRB 880, 885 (2001). The Board has viewed a delay of even two

months as unlawful. E.g. Gloversville Embossing Corp., 314 NLRB 1258 (1994); Postal Service, 308 NLRB 547 (1992) (7 weeks after requested).

### 3. Respondent Never Explained the Delay.

When a union requests presumptively relevant information, it is entitled to the information when making the request, and it is the employer's duty to provide the information as quickly as possible. Woodland Clinic, 331 NLRB 735, 737 (2000). Citing Allegheny Power, 339 NLRB 585, 587 (2003), as the ALJ correctly noted, the Employer must make a "reasonable good faith effort to respond to the request as promptly as circumstances allow." (ALJD 3:39-41).

The Board does not hesitate to scrutinize an employer's explanation to determine whether the delay was reasonable. In Bundy Corp., 292 NLRB 671, 672 (1989), the employer defended its delay by arguing that its officers were preoccupied with a impending acquisition, that the union did not repeat its request in the numerous telephone calls between the parties, and that the request was made by the chief negotiator's assistant. In rejecting the employer's defense, the Board characterized the employer's explanation for the two and one-half month delay as "specious" when the information requested consisted of documents readily available in the employer's files.

Like the aforecited cases, in this case the record contains uncontradicted evidence that Respondent never provided the Union with an explanation for the three and one-half months it took to provide the information. In the three and one-half month period, from the Union's first request on May 2, to August 23 when the information was provided, Handman gave only two perfunctory responses, one on May 4 and another on May 24. Respondent never explained why it did not provide the information in response

to Brennan's July 18 email. When Brennan first requested the information on May 2, and asked for the information in three days, Handman's response, on May 4, was that he had been "out of the office" but would contact his client and find out how long it would take to assemble the information. Handman never told the Union that he had ever contacted his client as he said he would in his May 4 email.

Handman's second response, on May 24 when replying to the Union's May 18 email requesting the discipline information, was equally unenlightening. Handman simply said that the Union's email had been "spammed," and repeated his previous assertion that he would speak to his client about providing the information. Although on both occasions, on May 4 and May 24, Handman promised to contact his client and get back to the Union, he never lived up to his word. Rather, he ignored the Union's requests for information. Similarly, Handman did not respond in writing to either the Union's July 18 or August 14 request. Like the employer in Bundy Corp., supra, Respondent's purported explanations could be characterized as specious. Thus, by failing to provide an explanation to the Union for its delay in furnishing relevant information, the Respondent violated the Act.

**4. The Nature of the Information Requested**

In determining whether a delay in providing information is unreasonable, as the ALJ correctly held, the Board looks at the complexity and extent of the information requested, including the volume of the information requested, its availability and whether the information is difficult to obtain. (ALJD 3:42-44); Postal Service, supra at 551. In the Postal Service case, the Board affirmed an ALJ's finding that the employer unreasonably delayed providing copies of certain forms for two employees when the

employer took 4 weeks to provide the documents. The information requested was not shown either to be complex or difficult to obtain, and the employer provided no explanation for the delay.

The explanation an employer provides must demonstrate that the employer acted promptly and diligently to provide the information. In Civil Service Employees Assn., 311 NLRB 6 (1993), the employer explained that it took about 10 weeks to provide requested records because the employee assigned to assemble the information was on vacation for a few weeks and did not begin assembling the information as soon as she returned. The employer further explained that much of the information was in storage and, therefore, not easy to obtain. According to the employer, it took about a total of 8 or 9 days to collect the information.

In that case the Board held that a 10-week delay was unreasonable because when faced with a request for presumptively relevant information, the employer must respond "with reasonable dispatch," and "without undue delay." While the request involved the compilation of a substantial amount of material, the 10-week delay was not justified because the information took only 8 or 9 days to assemble.

In the instant case, the record contains no evidence that the information the Union requested, copies of disciplinary notices issued to a unit of less than two dozen employees over a 14-month period, was difficult to assemble, hard to locate or consisted of a large amount of material. Indeed, when the information was eventually provided on August 23, only 14 pages were produced. Handman never told the Union that his client had any difficulty gathering these 14 pages. Rather, more than once Handman simply told Dea that he would have to speak to his client. Thus, the ALJ

correctly concluded that that Respondent made no effort to obtain the information from May 2 until August 23. (ALJD 4:3-5). Had the Respondent acted promptly, and with reasonable diligence, clearly it could have provided the information much earlier.

## B. RESPONDENT'S ASSERTED JUSTIFICATION FOR THE DELAY DOES NOT EXCUSE THE DELAY.

### 1. Dea Did Not Excuse Handman from Providing the Information.

The credible evidence establishes that the Union did not excuse Respondent from providing the information. Respondent asserts that it was justified in taking 3 1/2 months to provide the information, and that the Union waived its right to the information, because, according to Handman's notes, Dea told Handman at the June 26 meeting that he could hold off providing the information until the Union decided what to do with the bargaining unit. Dea, whose testimony the ALJ credited over Handman's notes, denied telling Handman anything to the effect that he could postpone providing the information; he testified, both on direct examination and on cross-examination, that he never excused Respondent from providing the information.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence demonstrates that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951). Here, the ALJ gave a reasoned explanation for crediting Dea. The ALJ explained that she credited Dea's testimony because his testimony was "consistent and forthright." (ALJD 3:17). Moreover, it makes no sense that Dea would have told Handman not to bother providing the information because the Union filed the charge the

day before this meeting. In any case, as the ALJ further explained, any confusion created by the June 26 meeting was clarified three weeks later, on July 18, when the Union once again requested the same information. (ALJD 3:18-19).

**2. Handman's Notes Should Not Be Credited.**

The ALJ correctly credited Dea's testimony and discredited Handman's conflicting notes. In addition to the reasons cited by the ALJ, the notes should not be credited because they are uncorroborated hearsay evidence. While Board proceedings do not require strict adherence to the Federal Rules of Evidence, the Board gives "little weight" to hearsay evidence that is uncorroborated. W. D. Manor Mechanical Contractors, Inc., 357 NLRB No. 128, slip op. at 2 (December 7, 2011). Only if the hearsay evidence is "rationally probative" and corroborated by more than "the slightest amount of other evidence" does the Board ever credit hearsay evidence. Dauman Pallet, Inc., 314 NLRB 185 (1994).

Handman's notes should not be credited because they are not corroborated by any other evidence. Had Handman testified about what was said at the meeting, for example, the probative value of his notes would be viewed differently. However, because Handman chose not to testify about what was said at the meeting, the General Counsel was not afforded an opportunity to question Handman about his recollection of what was said at that meeting. Without Handman's testimony about what was said at the meeting, or any other evidence, Handman's notes remain uncorroborated. Thus, the ALJ correctly credited Dea's testimony rather than Handman's notes.

### 3. The Union Did Not Waive Its Right to the Information.

Respondent argues that the Union waived its right to the information because of Dea's statements at the June 26 meeting. Even assuming *arguendo* that the ALJ's credibility resolutions in this regard are incorrect, the record still fails to establish that the Union waived its right to the information. Citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), as Respondent correctly notes in the memorandum submitted in support of its exceptions, waiver can be established only by "clear and unmistakable conduct." Here, the Union's conduct both before and after the June 26 meeting demonstrates that the Union did not waive its right to request the information. The Union filed the charge alleging that Respondent unlawfully refused to provide information the day before the meeting, and the Union sent Respondent another request for the same information three weeks after the meeting. Rather than establishing that the Union clearly and unmistakably demonstrated that it did not want the information, the Union's conduct both before and after the meeting demonstrates the exact opposite.

Even if Handman's notes are fully credited, they establish that Dea only temporarily excused Respondent from providing discipline information because, according to Handman's notes, the Union was unsure whether it was going to continue to represent the employees. By July 18 at the latest, Respondent was put on notice that the Union still wanted the discipline information. Thus, the record does not contain the requisite evidence to establish that the Union waived its right to the discipline information.

## C. THE PACE OF BARGAINING DOES NOT JUSTIFY RESPONDENT'S DELAY.

Respondent asserts that its delay in providing the discipline information was justified by the totality of the circumstances, including the slow pace of the bargaining, the amicable nature of the negotiations, and the Union's delay in scheduling meetings. The ALJ correctly rejected Respondent's argument. (ALJD 4:7-16). Without evidence of waiver, of which there is none, as the ALJ noted, the amicable nature of the bargaining does not excuse the delay. (ALJD 4:9-12).

Respondent cites Quality Engineered Products, Inc., 267 NLRB 593, 598 (1983) in support of its position. However, in that case the Board held that an employer's "Intense hostility" was evidence that the employer engaged in bad-faith surface bargaining. The Board did not state anything to suggest that hostility is a necessary element to a finding that an employer unlawfully refused or delayed providing information.

An employer is required to act in good faith in responding to an information request, and the totality of the circumstances, which includes "the larger pattern of conduct regarding the relations of the parties" is always considered. Santa Barbara News-Press, 358 NLRB No. 141 (September 27, 2012). Thus, where a union's information request is shown to be "purely tactical" and "submitted solely for purposes of delay," causing an employer to have a "legitimate doubt as to whether the Union was truly interested in the information," an employer's delay may be justified. ACF Industries, 347 NLRB 1040,1043 (2006).

In this case the record contains unrebutted evidence that the Union wanted the discipline information to prepare for bargaining, to make sure employees were treated

with due process, and to make sure Respondent was not targeting union supporters for discipline. Contrary to the union in the ACF Industries case, which requested information to delay the employer's implementation of its final offer after impasse, the record here contains no evidence that the Union's request for information was "purely tactical" or "solely for the purposes of delay."

Not only does the record clearly establish the sincerity of the Union's motivation for making the information request, it casts doubt on the sincerity of Respondent's conduct. The record contains uncontradicted evidence that each time the Union made a request for the discipline information, Respondent responded in a less than forthright manner. When the Union first made a request on May 2 asking for the discipline information in 3 days, Handman replied on May 4 asserting that he would find out how long it would take to assemble the information and notify the Union. He never did contact the Union. Likewise, on May 24, Handman said he would call his client and get back to the Union, but he never did.

Similarly, Handman left a voicemail for Brennan some time before August 14 asking Brennan if the Union would drop the NLRB charge if the information were provided. But he still did not provide the information. Even on August 17, when he sent Brennan an email indicating that he would send the information "shortly," he did not send the information. Although Handman asserts in his email to the Board Agent on August 23[5] that he furnished the Union with the information on August 17, he failed to produce either proof of mailing or a copy of a cover letter that would normally accompany a set of documents. In short, while the record establishes the sincerity of

[5] R. X 2.

the Union's need for the information, the record contains evidence establishing that Respondent was less than forthright in responding to the Union's repeated requests for information.

## D. THE NLRB HAS A PROPER QUORUM AND, THEREFORE, IS PROPERLY EXERCISING JURISDICTION IN THIS MATTER.

For the first time in this proceeding, in its exceptions to the ALJ's decision, Respondent argues that the NLRB lacks a proper quorum and, therefore, is improperly exercising jurisdiction in this matter. It is not appropriate for the Board to suspend its activities in response to a claim that Presidential appointments to the Board are not valid. Although the Respondent correctly points out that on January 25, 2013, the D.C. Circuit, held that the President's appointments to the Board were not valid, the Board has publicly stated that it disagrees with that decision. In addition, we note that in *Noel Canning*, the D.C. Circuit itself noted that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare Noel Canning v. NLRB, 705 F.3d 490, 498-499, 502 (D.C. Cir. 2013) with Evans v. Stephens, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); United States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); United States v. Allocco, 305 F.2d 704, 709-15 (2nd Cir. 1962). Moreover, even in the absence of a circuit conflict, it has been the Board's longstanding practice not to acquiesce in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties. See Letter of Acting Solicitor, National Labor Relations Board, Industrial Turnaround Corp. v. NLRB, 118 F.3d 248 (4th Cir. 1997) (explaining that "the Board, for more than 50 years, has taken the position that it is not obliged to follow decisions of a

particular court of appeals in subsequent proceedings not involving the same parties," and discussing the grounds for that position).

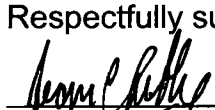
## V. CONCLUSION

For all the foregoing reasons, the General Counsel respectfully requests that the Board adopt the ALJ's decision that Respondent, Mountain View Country Club, Inc., violated Section 8(a)(1) and (5) of the Act on unreasonably delaying providing the Union with disciplinary information first requested in writing on May 2.

## VI. REMEDY

Counsel for the General Counsel respectfully requests that the Board adopt the ALJ's recommended order.

Respectfully submitted,



Jean C. Libby
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21

Dated at Los Angeles, California,
this 14th day of March, 2013.

## STATEMENT OF SERVICE

I hereby certify that a copy of the **Answering Brief of Counsel for the General Counsel to Respondent's Exceptions** was submitted by E-filing to the Executive Secretary of the National Labor Relations Board on March 14, 2013.

The following parties were served with a copy of said document by electronic mail on March 14, 2013.

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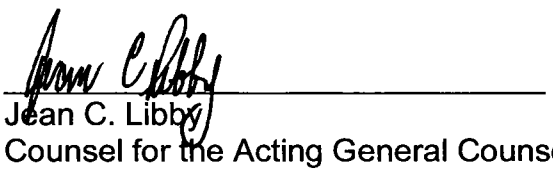
Respectfully submitted,



Jean C. Libby
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National Labor Relations Board

Dated at Los Angeles, California, this 14th day of March, 2013.