

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

ENDO PAINTING SERVICE, INC.

Respondent,

Case 20-CA-080565

and

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADE, PAINTERS UNION
1791

Charging Party.

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by
Dale Yashiki
Scott Hovey, Jr.
Counsel for the Acting General Counsel
National Labor Relations Board
Region 20
300 Ala Moana Boulevard,
Room 7-245
Honolulu Hawaii 96850

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I. INTRODUCTION

This case is before the Board upon Administrative Law Judge Gerald A. Wacknov's¹ February 22, 2013 Decision, which found Respondent in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) by delaying, failing, and refusing to furnish information necessary for the International Union of Painters and Allied Trades, Painters Local Union 1791 (Union) to investigate and present its grievance to the Joint Industry Committee.² (ALJD. 10:35-38).

The Union requested from Respondent various relevant and presumptively relevant information for the Union to properly investigate a grievance which was filed in response to bargaining unit members' complaints of violations of the collective-bargaining agreement. The Respondent delayed in responding to the Union's request for information and thereafter refused to provide the Union with the requested information. Crediting the testimony of the General Counsel's witness, the ALJ correctly found that the Union is entitled to obtain the requested information from the Respondent in furtherance of its grievance in accordance with well established guidelines. (ALJD 10:12-13). Because the facts of the case and the case law fully support the ALJ's decision, it should be affirmed.

¹ Hereafter referred to as the ALJ or the Judge. Counsel for the Acting General Counsel will be referred to as the "GC." All references to the transcript are noted by "Tr." followed by the page number(s). All references to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number(s). All references to the Union's exhibits are noted as "Union Exh." followed by the exhibit number(s). All references to Respondent's exhibits are noted as "Resp. Exh." followed by the exhibit number(s). All references to Joint exhibits are noted as "Joint Exh." followed by the exhibit number(s). All references to Stipulations are noted as "Stip." followed by the paragraph number(s). All references to the ALJ Decision are noted as "ALJD" followed by the page number and line number.

² Under the grievance process of the Labor Agreement, the Joint Industry Committee (composed of representatives of the Union and Association employers) is tasked with making final and binding determinations of alleged violations and interpretations of the Labor Agreement. (Tr. 12; Joint Exh. 6).

II. FACTS

A. The Union is the Recognized Collective-Bargaining Representative of Respondent's Employees

Respondent has been a signatory party to a succession of collective-bargaining agreements between the Painting and Decorating Contractors Association of Hawaii (Association) and the Union since the 1960s. (ALJD 2:34-36). The collective-bargaining agreement (Labor Agreement) in effect at all material times extended from February 1, 2008 to January 31, 2013. About 40 employers are signatories to the Labor Agreement, including Respondent. (ALJD 10:37-38).

Mitchell Shimabukuro (Shimabukuro) is the Union's business representative and since 2010 he has been the sole Union representative responsible for filing grievances on the Union's behalf. (ALJD 3:42-43).

B. The Union Filed a Class Grievance Based on its Belief that Respondent was Violating the Labor Agreement.

On March 8, 2012, Shimabukuro filed class grievance MS-12-001 alleging that Respondent violated numerous provisions of the Labor Agreement. (ALJD 5:14-17, Joint Exh. 1, Stip. 10(a); Joint Exh. 7; Tr. 28). Specifically, the Union alleged that Respondent violated Sections 10.B and 14.B of the Labor Agreement by failing to pay overtime to unit employees (Joint Exh. 1, Stip. 10(c); Joint Exh. 7); that Respondent violated Sections 13 and 31.C of the Labor Agreement by changing unit employees' timesheets to reflect a lower amount of hours worked resulting in a failure of the Respondent to comply with wages, classifications and contributions to various funds as outlined in the Labor Agreement (ALJD 5:21-23, Joint Exh. 1, Stip. 10(d); Joint Exh. 7); that Respondent failed to provide unit employees with a statement of earnings and

deductions in violation of Section 14.B of the Labor Agreement (Joint Exh. 1, Stip. 10(e); Joint Exh. 7); that Respondent required unit employees to use their personal vehicles to transport workers and materials in violation of Section 15.N of the Labor Agreement (ALJD 5:23-24, Joint Exh. 1, Stip. 10(f); Joint Exh. 7); and that Respondent made unilateral changes to the terms and conditions of employment of unit employees in violation of Section 3 of the Labor Agreement. (Joint Exh. 1, Stip. 10(b); Joint Exh. 7).

The Union had previously filed a similar grievance with Respondent. On March 23, 2011, Shimabukuro filed class grievance MS-11-001 alleging a violation of Section 14 of the Labor Agreement. (ALJD 3:43-46, GC Exh. 2). In that grievance, the Union alleged that Respondent compensated employees in cash in violation of Section 14 of the Labor Agreement. (ALJD 4:9-10, GC Exh. 2).

During a Joint Industry Committee hearing regarding class grievance MS-11-001, Respondent's President, Gregory Shuji Endo (Endo), admitted that Respondent made cash payments to employees "on occasion." (Tr. 143, 186). On April 29, 2011, the Joint Industry Committee unanimously upheld and sustained class grievance MS-11-001 and found, among other findings, that Respondent violated the Labor Agreement by "paying employees in cash without making appropriate payments for trust fund contributions." (ALJD 4:27-29, GC Exh. 2). The Joint Industry Committee ordered Respondent, *inter alia*, to produce the books and accounts of its payroll of bargaining unit employees from January 1, 2010 to the present, indicating all hours worked, for examination by an independent certified public accountant who would calculate the amount of back pay and contributions due and owing to the trust funds under the Labor Agreement. (ALJD 4:37-40).

Shimabukuro testified that in early 2012 he received reports from four individual employees and verbal complaints by spouses of member employees alleging that the Respondent was once again violating the Labor Agreement. (ALJD 5:14-17, Tr. 67-68). Consequently, Shimabukuro filed class grievance MS-12-001 on March 8, 2012. (ALJD 5:14-17, Tr. 28).

C. On April 24, 2012, the Union Requested Information to Investigate the Grievance.

On April 24, 2012, Shimabukuro sent Respondent's President Endo an information request by mail in order to investigate class grievance MS-12-001. (ALJD 6:11-14). The Union requested certain information dating back to January 1, 2010 to determine whether Respondent paid employees in cash, changed time sheets, failed to pay overtime pay, and failed to make contributions to the various trust funds. (Joint Exh. 12). The Union requested information regarding Respondent's employees, including the names, addresses, job classifications, dates employed and pay rates for bargaining unit employees (Joint Exh. 12); copies of the Haw. Rev. Stat. § 387-6 (c)³ notice issued to each bargaining unit employee for the period dating back to January 1, 2010 (Joint Exh. 12); daily time sheets, extra hours sheets, weekly detail reports, work log daily reports and weekly project recaps for bargaining unit employees for the period dating back to January 1, 2010 (ALJD 6:16-17, Joint Exh. 12); asked Respondent to identify and provide certain information regarding employees who were paid cash for the period dating back to January 1, 2010 (ALJD 6:17-18, Joint Exh. 12); and to name and provide

³ Haw. Rev. Stat. § 387-6 (c) requires every employer in the state of Hawai'i to furnish to each employee at every pay period a notice showing the employee's total hours worked, overtime hours, straight-time compensation, overtime compensation, other compensation, total gross compensation, amount and purpose of each deduction, total net compensation, date of payment and the pay period covered.

certain information regarding employees who were requested to bank hours worked in excess of 40 hours per week in lieu of overtime pay. (ALJD 6:18-20, Joint Exh. 12).

To determine whether Respondent was requiring bargaining unit employees to use their personal vehicles to transport workers and equipment in violation of Section 15.N of the Labor Agreement, the Union requested information regarding Respondent's vehicles and the identity of employees authorized to use Respondent's credit cards at local gas stations. (ALJD 6:20-21, Joint Exh. 12).

The Union also requested information regarding Respondent's organization chart and asked Respondent to identify those employees, representatives or agents who prepared the response to the Union's April 24 request for information. (Joint Exh. 12).

On May 4, 2012, Respondent, by letter through its attorney, wrote to the Union's attorney regarding the April 24 request for information. Respondent characterized the Union's April 24 request for information as "not appropriate." (ALJD 6:29). Respondent stated that Shimabukuro "failed to cite any authority requiring [Respondent] to provide the information [Shimabukuro] request[s]." (ALJD 6:29-30). On May 22, 2012, Shimabukuro wrote to Endo reiterating the April 24 request for information. (ALJD 6:48). With his May 22 letter, Shimabukuro presented Endo with copies of the signed written complaints of four bargaining unit employees of Respondent underlying grievance MS-12-001. (ALJD 6:39-41)

D. Respondent Failed to Respond to the Union's Information Request for Nearly Three Months.

Respondent failed to respond to the Union's request for information until July 20, 2012 – nearly three months after the Union's initial request. (Joint Exh. 1, Stip. 19; Joint Exh. 15; Tr. 105). When Respondent's attorney finally wrote a response to the Union's

attorney on July 20, the letter did not offer any explanation for the delay in responding. (Joint Exh. 15). For the first time Respondent attempted to assert relevancy arguments, despite the fact that most of the information requested directly related to bargaining unit employees. Respondent agreed only to limited compliance with the April 24 request for information, proposed to provide information only relating to the four employees who had provided the Union with signed written complaints and only for a seven-day period immediately preceding the date each grievant signed their respective written complaints. (ALJD 6:50-55, Joint Exh. 15).

In the same letter, Respondent also offered to provide the name, dates of employment, hourly rate of pay, overtime rate of pay, project sites assigned, paycheck information (including name of employee, address of employee, total hours worked, overtime hours, straight-time compensation, overtime compensation, other compensation, total gross compensation, amount and purpose of deductions, total net compensation, date of payment, and pay period covered), daily time sheet or card, and extra hours sheet only for the four employees who provided signed written complaints and only for the seven days preceding the date of the signed complaints. (Joint Exh. 15). Respondent denied that the four employees were paid cash for work or that they were asked to bank hours. (Joint Exh. 15). Respondent denied that the four employees were allowed to use Respondent's credit card for gas. (Joint Exh. 15). Finally, Respondent, for the first time, denied that it had an organizational chart. (Joint Exh. 15).

In the July 20 letter, Respondent denied the relevance and appropriateness of all other information requested and invited the Union to explain, if it disagreed. (Joint Exh. 15). Respondent predicated its offer of limited partial compliance on the Union

certifying that the signed-written complaints were the only signed-written complaints the Union had received or in the alternative, that the Union provide to Respondent any other signed-written complaints in its possession. (Joint Exh. 15).

III. ARGUMENT

A. The ALJ Properly Found that Respondent Had a Duty to Provide Requested Information that was Potentially Relevant and Useful to the Union in Its Role as Bargaining Representative

The ALJ correctly noted that the issue as alleged in the Complaint was that “the Respondent’s failure to furnish the requested information, and its delay in responding to the Union’s information request, is violative of Section 8(a)(1) and (5) of the Act.” (ALJD 7:39-41). Under Section 8(a)(5) of the Act a unionized employer must provide, on request, information that is relevant and necessary to the union’s performance of its duties as collective-bargaining representative, which includes the processing of grievances and policing of the contract. *IronTiger Logistics, Inc.*, 359 NLRB No. 13, slip op. at 2 (2012), citing *Acme Industrial Co.*, 385 U.S. 432 (1967). It is undisputed that the Union is the recognized bargaining representative of Respondent’s employees. As Shimabukuro’s April 24 letter states, the Union filed the April 24 information request in order to investigate and process the class grievance filed on March 8. (Joint Exh. 12).

Even if the Union had not filed the class grievance, the Union is entitled to the information. For example, the Board has found that a union can make an information request in order to determine whether or not to file a grievance or to further process a grievance. *Island Creek Coal Co.*, 292 NLRB 480 (1989), citing *Ohio Power Co.*, 216 NLRB 987 (1975). Moreover, an employer’s duty to bargain regarding information requests exists even where no grievance procedure is in place. *Wackenhut Corp.*, 345

NLRB 850 (2005). Moreover, an employer's duty to provide requested information exists in a variety of situations where the information would be useful to the union in discharging its responsibilities as representative, such as monitoring compliance with the collective-bargaining agreement (*Washington Beef, Inc.*, 328 NLRB 612, 617-618 (1999)); enforcing provisions of the collective-bargaining agreement (*In Re Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001)); and evaluating claims made during negotiations (*Nat'l Labor Relations Bd. v. Truitt Mfg. Co.*, 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956)).

When determining the relevance of requested information, the Board uses a broad discovery-type standard, wherein the union's burden requires only a showing of probability that the desired information is relevant and that it would be of use to the union in carrying out its duties. *Certco Distribution Centers & Teamsters Local Union No.695, Affiliated with the Int'l Bhd. of Teamsters*, 346 NLRB 1214, 1215 (2006). Clearly, ALJ Wacknov's finding that the Respondent had a duty to provide the information requested by the Union is amply supported by the facts and well-settled case law. Consequently, the Board should uphold the ALJ's finding that the Union is entitled to obtain information from the Respondent in furtherance of its grievance. (ALJD 10:12-13).

B. The ALJ Correctly Found that the Union Requested Presumptively Relevant Information Which Respondent Had a Duty to Provide

The Board should also affirm the ALJ's finding that the Respondent failed to demonstrate during the hearing that the Union was not entitled to the information requested. (ALJD 10:21-24). Requested information pertaining to bargaining unit employees is presumptively relevant, and the requester does not need to provide an initial showing of relevance. *In Re Int'l Protective Services, Inc.*, 339 NLRB 701 (2003) and

Hofstra Univ., 324 NLRB 557 (1997). Rather, the burden to justify a failure to produce presumptively relevant information is on the non-requester, who must rebut the presumption of relevance. *In Re Contract Carriers Corp.*, 339 NLRB 851, 858 (2003). Further, the presumption of relevance is not rebutted by a showing that the union also seeks the information for purposes unrelated to its representative function. *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

Items 1, 2 3, 5, 6, and 8 of the Union's April 24 letter specifically request information directly pertaining to Respondent's bargaining unit employees.⁴ (Joint Exh. 12). Respondent bears the burden of justifying its failure to produce presumptively relevant information, which it failed to do. Under the circumstances, the ALJ's finding that the Respondent failed to demonstrate that the Union was not entitled to the information requested should be affirmed.

C. The ALJ Properly Found that the Respondent Had a Duty to Produce the Potentially Relevant Information Requested by the Union

The Board should affirm the ALJ's finding that the Respondent failed to demonstrate that the information requested by the Union would not be probative of any issues relative to the Union's investigation and processing of the class grievance. (ALJD 10:21-24). Items 4 and 9 of the Union's April 24 request for information ask Respondent to identify the individuals who prepared the response to the request for information. Item 7 requests information regarding Respondent's motor vehicles.⁵ Item 10 concerns Respondent's organizational chart.

⁴ The Complaint does not alleged that Respondent's failure to produce item 8, subparagraph c of the Union's April 24 request for information violated the Act. (Joint Exh. 16).

⁵ The Complaint does not alleged that Respondent's failure to produce item 7, subparagraph c of the Union's April 24 request for information violates the Act. (Joint Exh. 16)

Information about non-unit employees is considered non-presumptively relevant information. The requester may be entitled to non-presumptively relevant information after providing an initial showing of relevance. *The Earthgrains Company*, 349 NLRB 389 (2007). This does not mean that a union seeking information about non-bargaining unit individuals has an inordinately high burden for establishing relevance. The Board has held that this burden can be met where a union has demonstrated the "probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Frito-Lay, Inc.*, 333 NLRB 1296 (2001).

With respect to the information requested for non-unit employees, Shimabukuro's testimony demonstrated that the information is relevant and useful to the Union in carrying out its statutory duties and responsibilities. Shimabukuro testified that item 4 is necessary to correlate the foreman on the jobsites with the workers on the jobsites and the hours worked and employee pay rates. (Tr. 62). Shimabukuro testified that information requested in item 9 is necessary for the Union to verify the accuracy of hours and jobsites reported in response to the information request. (Tr. 63).

Shimabukuro testified that the information requested in item 7 directly related to the allegation in grievance MS-12-001 that Respondent had forced employees to use their personal vehicles to transport workers and equipment in violation of Section 15.N of the Labor Agreement. (Tr. 62-63). Shimabukuro testified that the Union had received complaints from employees that Respondent had forced employees to use their personal vehicles in violation of the Labor Agreement. (Tr. 62-63). Section 15.N. of the Labor Agreement prohibits Respondent from requiring its employees to use their personal vehicles to transport workers or materials. (Joint Exh. 6). Shimabukuro testified that the

information regarding Respondent's motor vehicles was necessary to establish whether Respondent had violated the Labor Agreement based on the number of jobsites and whether Respondent had sufficient motor vehicles to transport its employees to service the various jobsites. (Tr. 63).

Shimabukuro explained that the information requested in item 10 was necessary to identify Respondent's supervisors to verify the validity of the records Respondent would provide in response to the April 24 information request. (Tr. 64). The Union alleged in the underlying grievance that Respondent "changed times sheets to show less hours worked" in violation of the Labor Agreement. (Joint Exh. 7). Shimabukuro testified that the Union needed the information in item 10 "to see if whatever documents that come (sic) up is accurate." (Tr. 64). In light of the Respondent's past history of making cash payments and failing make proper trust fund contributions (ALJD 4:25-29), the Union's request for documents and information to verify the validity of Respondent's records is certainly relevant.

Shimabukuro's un rebutted testimony established the probative value of the information requested. The Board should affirm the ALJ's finding that the Respondent failed to demonstrate that the information the Union requested would not be probative of any issues relative to the Union's investigation and processing of the class grievance. (ALJD 10:21-24).

D. The ALJ Correctly Found that Respondent's Failure to Timely Respond to the Request For Information Violated the Act

The Board should also affirm the ALJ's finding that the Respondent's delay in furnishing the information requested by the Union is a violation of Section 8(a)(1) and (5) of the Act. (ALJD 10:35-38). The Board has held that a delay of seven weeks in

providing presumptively relevant information is unlawful. In *Woodland Clinic* the Board rejected the employers defense that its delay of approximately seven weeks in providing presumptively relevant information to the union was insufficient to support an unfair labor practice finding. 331 NLRB 735, 737 (2000). The Board in *Woodland Clinic* found the seven week delay a violation of the Act. The Board in that case cited to *Bundy Corp.*, 292 NLRB 671 (1989) and *Engineers Local 12*, 237 NLRB 1556 (1978). 331 NLRB at 737, fn. 5. The Board in *Bundy Corp.* held that the employer violated the Act when the union requested presumptively relevant information and the employer delaying in providing the information for two and a half month. 292 NLRB at 672. The Board in *Engineers Local 12* adopted an Administrative Law Judge's decision finding a violation of the Act where an employer had for six weeks delayed providing the union with requested presumptively relevant information. 237 NLRB at 1559.

The Board also held that a delay of two months in providing non-presumptively relevant information is unlawful. The Board held in *In Re Summa Health Sys., Inc.*, 330 NLRB 1379 (2000), that a delay of two months in responding to a request for information related to whether bargaining unit work was being performed by non-unit employees was unlawful. The Board found that the two-month delay prevented the Union from determining the merit of their concern. The Board held in *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109 (1977) that a delay of three months in responding to a request for information is sufficient, in itself, to establish the alleged violation of the Act. As the Board in *Columbia University* held, "an employer must respond to a union's request for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time. Failure to make either

response in a reasonable time is, by itself, a violation of Section 8(a)(5) and (1) of the Act. Some kind of response or reaction is mandatory." 298 NLRB 941, 945 (1990), citing *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109 (1977).⁶ In *IronTiger Logistics*, the Board found an unlawful delay even where the requested information was ultimately held to be irrelevant to the underlying grievance. 359 NLRB No. 13, slip op. at 2. The Board found that even where a request is made for information that is ultimately found to be irrelevant, the employer must respond in a reasonably timely manner. *Id.* The Board reasoned that the "minimal burden" is placed on the employer because the employer is in a "clearly superior position to ensure that a dispute is avoided" and to "discourage burden[ing] the parties and the public with the cost of administrative investigation and litigation." *Id.* at slip op. 3. Even when an employer may have a justification for not actually providing requested information, a timely response is required. *Id.* at slip op. at 2.

Finally, the Respondent's failure to timely provide the information the Union requested is not excused by its assertions that the request is overbroad or ambiguous. The Board in *Gruma Corp.* held that although a union's information request may not be specifically limited to bargaining unit employees, and therefore could be construed as requesting information pertaining to non-unit as well as unit employees, this does not justify an employer's blanket refusal to comply with the union's request. 345 NLRB 788, 789 (2005). The Board held that an employer must request clarification of the information requested or comply with the information request to the extent it encompasses necessary and relevant information. 345 NLRB at 789 citing *Streicher*

⁶ See also *Nw. Graphics, Inc. & Local 505-m, Graphic Communications Int'l Union, Afl-Cio*, 342 NLRB 1288 (2004) (delay is as much of a violation of Section 8(a)(5) as not giving information at all).

Mobile Fueling, Inc., 340 NLRB 994 (2003), and *Superior Protection Inc.*, 341 NLRB 267 (2004).⁷

It is undisputed that the Union made an information request on April 24, 2012, that Respondent, on May 4, issued a blanket denial of the Union's request for information, and the Union, on May 22, renewed the April 24 request for information. Respondent's May 4 blanket denial failed to seek a clarification of the information requested. Respondent simply denied the Union's request as not appropriate and denied the Union's right to seek such information. Respondent failed to respond at all to the Union's May 22 renewal of the April 24 request for information until July 20, 2012. Respondent's July 20 response offered only limited compliance with the April 24 request for information; limited to four employees and for only a seven-day period. Respondent's July 20 response offered a complete response to only one item of information the Union requested, informing the Union that Respondent did not have an organizational chart. The facts and case law strongly support the ALJ's finding that Respondent's delay in providing the information requested by the Union violated the Act.

E. Judge Wacknov Properly Rejected Respondent's Defenses

Respondent argued that: the Complaint allegations lack merit because the Union lacked the authority to file class grievances; the right of the Union to file class grievances should be subject to interim arbitration; and that the production of the information requested was unduly burdensome and made to harass Respondent. The ALJ correctly rejected Respondent's defenses.

⁷ See also *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990) (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).

1. **Respondent presented no evidence of the parties agreeing to limit the filing of class grievances.**

The ALJ correctly found that the Respondent failed to show by clear and unmistakable evidence that the Union waived its right to file class grievances. (ALJD 10:6-8). The Board’s decision in *D.R. Horton* found that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the [Act].” 357 NLRB No. 184, slip op. at 3 (2012). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7. 29 U.S.C. §158(a)(1).

The Labor Agreement is silent as to class grievances, but its silence cannot be construed as a waiver. A waiver of a statutory right can occur in one of three ways: by express provision in the collective-bargaining agreement, by the conduct of the parties (including past practices), or by a combination of the two. *Chesapeake & Potomac Tel. Co. v. N.L.R.B.*, 687 F.2d 633, 636 (2d Cir. 1982). A union’s waiver of a statutory right must be “clear and unmistakable.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000) citing *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983).

The Board in *Georgia Power Co.* found that “[e]ven when an employer relies on contract provisions in an attempt to show that a union has waived its right to bargain over an issue, either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.” 325

NLRB 420, 420-421 (1998). Respondent argues that nothing in the Labor Agreement authorized the Union to file class grievances. (Joint Exh. 13; Resp. Exh. 2). The ALJ properly rejected Respondent's defense finding that nothing in the contract constitutes a clear and unmistakable waiver of the Union's right to bring class action grievances. (ALJD 8:28-30).

The ALJ correctly rejected Respondent's reliance on a District Court's decision in *Society of Professional Engineering Employees in Aerospace v. Spirit Aerosystems*, 2012 WL 5995552 (D. Kansas, November 30, 2012). (ALJD 9:32-34). Respondent ignores specific language in the collective-bargaining agreement in *Spirit Aerosystems* that restricted the Union's right to file class grievances. The ALJ correctly found, in the instant case, that the Labor Agreement lacks such additional specific contract language bearing on the Union's right to arbitrate class action grievances. (ALJD 9:37-40).

The Board should affirm the ALJ's finding that the language of the Labor Agreement and the 2011 decision of the Joint Industry Committee are dispositive. (ALJD 10:5-6). On March 23 and March 24, 2011, Shimabukuro filed two class grievances against Respondent regarding alleged violations of the Labor Agreement. (GC Exh. 2, GC Exh. 3; Tr. 34. 108). A Joint Industry Committee hearing was held regarding these two grievances on April 28, 2011, and Respondent did not raise any issue or objection to the Union filing the class grievances. (ALJD 8:43-44, GC Exh. 2; Tr. 35). The ALJ correctly found that the class action nature of the 2011 grievance was or should have been clearly apparent to Endo who attended the hearing. (ALJD 8:42-43). Respondent did not raise before the Joint Industry Committee an objection to the filing of class grievances. (Tr. 35). The Joint Industry Committee unanimously issued an award

in favor of the Union's 2011 class action grievance. The ALJ correctly found that the Joint Industry Committee's April 29, 2011 award validates the Union's right, under the Labor Agreement, to bring class action grievances. (ALJD 9:11-12).

2. The ALJ properly rejected Respondent's argument that the Union's right to file class grievances is subject to interim arbitration.

Respondent argued that language in the Labor Agreement is not self-explanatory regarding the Union's right to file class grievances and should be submitted to arbitration before the Board can determine the merits of the instant complaint. (ALJD 8:33-35). The ALJ correctly found that interim arbitration of the contractual grievance provision is neither warranted nor feasible given the 2011 award of the Joint Industry Committee under the contractual scheme established by the Association and the Union. (ALJD 9:16-19).

The ALJ correctly rejected Respondent's reliance on *Square D Co. v. N. L. R. B.*, 332 F.2d 360 (9th Cir. 1964) to establish that the Board lacks jurisdiction over the dispute between the Respondent and the Union. (ALJD 9:21-30). In *Square D*, a dispute arose between the union and the employer regarding the construction of the collective-bargaining agreement and an incentive plan that was not contained in current and past collective-bargaining agreements between the parties. 332 F.2d at 361. The Ninth Circuit found the dispute concerned the construction of the contract and that the union was not entitled to the information requested until an arbitrator had decided the issue of whether the union, by contract, had waived its right to grieve respecting the group incentive plan. *Id.* at 366. The ALJ correctly found, in the instant case, that there is no evidence concerning the negotiating history of the Labor Agreement's grievance

procedure and that the April 29, 2011 Joint Industry Committee award demonstrates that the Union may pursue class grievances under the Labor Agreement. (ALJD 9:27-30). As the ALJ correctly found, interim arbitration of the contractual grievance provision is neither warranted nor feasible given the 2011 award of the Joint Industry Committee validating the Union's right to file class grievances under the contractual scheme established by the Association and the Union. (ALJD 9:16-19).

3. Production of the requested information is not overly burdensome and the Union did not make the request to harass Respondent.

The Respondent argued that the Union's information request was unduly burdensome. (ALJD 10:17). Although it does not appear that the ALJ directly addressed Respondent's burdensome defense, the ALJ found that the April 29, 2011 Joint Industry Committee award, which ordered Respondent to produce, for the Union, information similar in scope to that requested in the instant case, validates the current information request.⁸ (ALJD 9:11-14). This finding, coupled with the ALJ's recommended order that would require Respondent to produce the information that the Union requested strongly suggests that the ALJ rejected the Respondent's burdensome defense.

The Board in *Gruma Corp.* held that the failure to raise, at the time of the request, any issue concerning the possible burden of complying with the union's request undermines its claim of burdensomeness as a defense. 345 NLRB at 789 citing *Anthony Motor Co., Inc.*, 314 NLRB 443, 450 (1994), citing *Oil, Chem. & Atomic Workers Local Union No. 6-418, AFL-CIO v. N.L.R.B.*, 711 F.2d 348, 353 n.6 (D.C. Cir. 1983) (if a party "does wish to assert that a request for information is too burdensome, this must be

⁸ The Joint Industry Committee imposed a remedy requiring, inter alia, the production of records beginning January 1, 2010, and payment of back pay and trust fund contributions from January 1, 2010 to the present for all adversely affected bargaining unit employees. (ALJD 9:11-14).

done at the time information is requested, and not for the first time during the unfair labor practice proceeding"). Respondent failed to object to the request for information as burdensome at the time the request was made and only raised that defense nearly three months after the Union made the initial request for information. (Joint Exh. 15). Further, although the Board and courts have held that there are some acceptable limits on information requests that would otherwise entail an undue burden, the onus is on the employer to show that production of the data would be unduly burdensome, and to offer to cooperate with the union in reaching a mutually acceptable accommodation. *Yeshiva Univ.*, 315 NLRB 1245, 1248 (1994). The Respondent did none of this.

The ALJ's properly rejected Respondent's argument that its lax recordkeeping practices would place a significant burden on it to search for and produce the records requested. (ALJD 10:30-33). The Board in *Gruma Corp.* held that a respondent's failure to raise, at the time of the information request, any issue concerning the possible burden of complying with the Union's request undermines its claim of burdensomeness as a defense. 345 NLRB at 789. Bolstering the ALJ's finding was the testimony of Respondent's own witnesses. Endo testified that he did not know how long it would take to produce all the information requested. (Tr. 179). Endo estimated it would take a "long time" to produce the information but clarified that until he got started, he would not know how long it would take to produce the information. (Tr. 197). Respondent's Vice President Yamasaki also testified that responding to the Union's request for information would require sorting through two 9' x 3' desks under Respondent's O`ahu office (Tr. 284-285), a task which does not appear to be too daunting. Furthermore, despite its claim that responding to the information request would be unduly burdensome, Respondent

offered at the hearing to produce the information requested for four employees going back two years. (Tr. 91, 100).

Respondent argued for the first time at the hearing that the Union's request for information was a "technique for harassment" and a "harassment tactic."⁹ (ALJD 10:17, Tr. 20, 81). The ALJ correctly found that the Respondent failed to demonstrate that the Union was either not entitled to the information or that the information would not be probative of any issues relative to the Union's investigation and processing of the grievance. (ALJD 10:21-24). The Board will presume that a union's request for information is made in good faith until the employer can demonstrate otherwise. *Columbia Univ.*, 298 NLRB at 945 citing *O & G Indus.*, 269 NLRB 986, 987 (1984). The fact that an information request is voluminous does not indicate bad faith. *Gruma Corp.*, 345 NLRB at 788. Under the Board's standard for determining good faith with regard to information requests, the good-faith requirement is met if "at least one reason for the demand can be justified." *Ak Steel Corp.*, 324 NLRB 173, 184 (1997). The mere assertion of harassment is insufficient to overcome the presumption of good faith accorded to the Union. Shimabukuro testified that the Union made the April 24 information request to further investigate class grievance MS-12-001. (Tr. 45). The April 24 information request clearly states that "the information is needed to properly investigate and process the class action grievance." (Joint Exh. 12). The Union has thereby demonstrated it has met the good-faith requirement and that its need for the requested information is justified. *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788 (2001).

⁹ Bad faith is an affirmative defense that must be pled and proved by the Respondent. *Island Creek Coal Co.*, 292 NLRB 480, 489 n.14 (1989). The Respondent did not raise the issue of bad faith in answer to the complaint.

Respondent failed to offer any credible evidence to support its claim that complying with the Union's request for information in its entirety would be overly burdensome, and has not made any effort to reach a mutually acceptable accommodation with the Union. Under these circumstances the ALJ properly rejected Respondent's burdensome and harassment defenses.

IV. CONCLUSION

It is respectfully submitted that the Judge's findings of fact and conclusions of law were fully supported by the record evidence. To this extent, accordingly, the Decision and Recommended Order should be adopted by the Board.

DATED AT Honolulu, Hawaii, this 22nd day of March 2013.

Respectfully Submitted,

/s/ Scott E. Hovey, Jr.
Dale K. Yashiki
Scott E. Hovey, Jr.
Counsel for the Acting General Counsel
National Labor Relations Board
SubRegion 37
300 Ala Moana Boulevard, Room 7-245
Honolulu, HI 96850

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Acting Counsel for the General Counsel's Brief to the Administrative Law Judge has this day been served by electronic mail and last known address upon the following persons:

Cid H. Inoyue, Esq.
Kristi L. Arakaki, Esq.
O'Connor Playdon & Guben
733 Bishop Street, 24th Floor
Honolulu, Hawaii 96813
CHI@opglaw.com
KLA@opglaw.com

Rebecca Covert
Takahashi and Covert
345 Queen Street #506
Honolulu, Hawaii 96813
rcover@hawaii.rr.com

Dated at Honolulu, Hawaii, this 22nd day of March 2013.

/s/ Scott E. Hovey, Jr.
Scott E. Hovey, Jr.
Counsel for the Acting General Counsel
National Labor Relations Board, Region 20,
SubRegion 37
300 Ala Moana Boulevard, Room 7-245
P.O. Box 50208
Honolulu, Hawaii 96850-0001