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 TRADES, PAINTERS UNION
1791

Charging Party.

# COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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## I. INTRODUCTION[1]

This case is about Respondent Endo Painting Service, Inc.'s refusal to produce information requested by the International Union of Painters and Allied Trades, Painters Union 1971 (Union).[2] On March 8, 2012, the Union filed a class grievance, MS-12-001, alleging that Respondent violated numerous provisions of the parties' Labor Agreement. (ALJD 5:14-17). On April 24, 2012, the Union sent Respondent an information request in order to investigate class grievance MS-12-001. (ALJD 6:11-14). On May 4, 2012, Respondent issued a blanket denial of the Union's April 24 request for information. (ALJD 6:28-37). Since May 4, Respondent has failed to produce any information in response to the Union's April 24 request for information.[3] (Tr. 65). Respondent has yet to offer any valid justification for its refusal to produce the presumptively relevant and potentially relevant information the Union requested.

ALJ Gerald A. Wacknov's issued his decision on February 22, 2013. The ALJ found Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act

[1] The Administrative Law Judge is referred to herein as "ALJ" or "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. Respondent's Exceptions to the ALJD is referred to herein as "Resp. Except." followed by the page number(s).

[2] 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).

[3] On July 20, 2012 Respondent denied that it had an organizational chart. (Joint Exh. 15). On July 20 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).

(the Act) by delaying, failing, and refusing to furnish information necessary for the Union to investigate and present its grievance to the Joint Industry Committee. (ALJD. 10:35-38).

On March 22, 2013, in response to the ALJ's reasoned conclusions, Respondent filed its Exceptions to the Decision of the Administrative Law Judge.[4] Nearly all of Respondent's exceptions and arguments stem from either Respondent's convoluted reading of the Labor Agreement or Respondent's ignorance of, or blatant disregard, for its obligation under the Act. In fact, in some cases it is difficult to ascertain exactly what Respondent's exceptions are, and which arguments were intended to support each exception.

## II. RESPONDENT SHOULD NOT BE ALLOWED TO INTRODUCE NEW FACTS AND ASSERTONS LACKING REFERENCE TO THE RECORD

Paragraphs 13, 14 and 15 in the Material Facts section of Respondent's Exceptions (Resp. Except. 9), fail to cite to record evidence to support the assertions contained therein. Furthermore, it appears that Respondent referenced a "Joint Conference Committee" in paragraphs 14 and 15, instead of calling it the Joint Industry Committee[5] (JIC). (Resp. Except. 9). Even considering the mistaken identity of the JIC, Respondent failed to cite to the record or any other exhibits for matters asserted in paragraphs 13, 14, and 15. Since there is no evidence in the record or exhibits to support

[4] Respondent initially filed Resp. Except. without a Table of Contents and Table of Authorities as required under Sections 102.46(c) and (j) of the Board's Rules and Regulations. Respondent also failed to timely serve Resp. Except. on the Regional Director for Region 20. On March 25, 2013, Respondents untimely filed an addition to Resp. Except., pursuant to the instruction of the Office of the Executive Secretary, which included a Table of Contents, Table of Authorities and an Amended Certificate of Service that indicated the untimely service of Resp. Except. on the Regional Director for Region 20.

[5] 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).

the matters asserted in the paragraphs in question, paragraphs 13, 14, and 15 should be stricken.

## III. RESPONDENT'S EXCEPTION TO THE ALJ's CONCLUSION THAT A CLASS GRIEVANCE IS VALID UNDER THE LABOR AGREEMENT IS BASELESS

Respondent excepted to the ALJ's conclusion that class grievances are valid under the Labor Agreement. (Resp. Except. 9). Respondent also excepted to the ALJ's finding that Respondent failed to show by clear and unmistakable evidence that the Union waived its right to file class action grievances. (Resp. Except. 9). Respondent's assertions ignore the wealth of case law that supports the ALJ's finding and appears have been made without full appreciation of its obligations under the Act.

### A. The Union Has A Statutory Right to Bring Class Grievances on Behalf of Bargaining Unit Employees

Respondent excepts to the ALJ's finding that nothing in the Labor Agreement constitutes a clear and unmistakable waiver of the Union's right to bring class action grievances. (Resp. Except. 9). Respondent argued that the Union failed to cite any case law or provide any rational argument supporting right to file class grievances. (Resp. Except. 13). Respondent ignores well-settled case law establishing a union's right to file class grievances.

The Board held in *D.R. Horton* 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). Under the reasoning of the Board in

*D.R. Horton*, employees have a statutory right, under Section 7 of the Act, to join together and bring class-wide claims before a court or arbitrator. Therefore the Union, as the employees' exclusive bargaining representative, possesses the right to bring class-wide claims in court or before an arbitrator on behalf of its bargaining unit members.

B. ALJ Correctly Found that Respondent Failed to Show By Clear and Unmistakable Evidence that the Union Waived Its Statutory Right to File Class Grievances

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 practice), 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).

Respondent argued that the Union's "contention that nothing in the [Labor Agreement] prohibits the filing of a class grievance" is "extremely weak." (Resp. Except. 11). Once again, Respondent evidences its ignorance of the employee's statutory rights, under Section 7 of the Act, to participate in class-wide actions. Respondent also appears unaware of the well-settled case law regarding the waiver of a statutory right by a party to a collective-bargaining agreement. It is obvious that the Labor Agreement is silent as to class grievances, but its silence cannot be construed as a waiver.

1. ALJ correctly found that nothing in the Labor Agreement constitutes a clear and unmistakable waiver of the Union's right to bring class action grievances.

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 presented no evidence of previous discussion between the Union and Respondent regarding a waiver of the right to file class grievances and failed to point to any clear and unmistakable waiver in the Labor Agreement itself. Respondent simply argued that nothing in the Labor Agreement authorized the Union to file class grievances, therefore the Union has no authority to file class grievances. (Joint Exh. 13; Resp. Exh. 2). The ALJ properly rejected Respondent's argument 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 Supreme Court stated clearly,

> "[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." 460 US at 708.

Respondent presented no evidence that the issue of class grievances were "fully discussed and consciously explored," and that the Union "consciously yielded or clearly and unmistakably waived its interest in the matter." 325 NLRB at 420-21. Consequently, Respondent's argument that Labor Agreement does not authorize class grievances must be rejected.

2. ALJ correctly found that the past conduct of the Union and Respondent validates the Union's right under the contract to bring class action grievances.

The ALJ correctly found that the past practice of the JIC, Respondent, and the Union validates the Union's right to file class grievances. (ALJD 9:11-12). The Union

had previously filed a class grievance against Respondent on March 23, 2011 (ALJD 3:43-46). Respondent's President Greg Endo (Endo) attended a JIC hearing held on April 28, 2011, regarding the 2011 class grievance. (ALJD 8:42-43). The ALJ correctly found that the class action nature of the 2011 grievance was or should have been known to Endo. (ALJD 8:42-43). The ALJ correctly found that Endo, during the 2011 class grievance hearing, did not argue that the JIC was unauthorized to entertain class grievances. (ALJD 43-44). The JIC unanimously upheld the 2011 class grievance in favor of the Union. (ALJD 4:19-21). Respondent's past failure to object to the 2011 class grievance and the JIC's award in the 2011 class grievance manifest a past practice inapposite to Respondent's claim that the Union waived the right to file class grievances. Respondent simply responds that "[w]hether or not any party objected in the past to the filing of a class grievance is not germane.. ." (Resp. Except. 14). It appears Respondent's only authority for this argument is its bold statement that it is so. Respondent presented no evidence of a past practice evidencing a waiver of the Union's statutory right to file class grievances. The past practices of the Union and Respondent support the ALJ's finding validating the Union's right to file class grievances. Respondent's exception to the ALJ's finding should be rejected.

C. Respondent Misrepresents the Plain Language of the Collective-Bargaining Agreement

Respondent excepts to the ALJ's finding that *Society of Professional Engineering Employees in Aerospace v. Spirit Aerosystems*, 2012 WL 5995552 (D. Kansas, November 30, 2012) is inapposite. (Resp. Except. 15). The ALJ correctly found that the Labor Agreement between the Union and Respondent lacked the "additional specific language" of the collective-bargaining agreement in *Spirit Aerosystems* limiting the union's right to

bring class action grievances. (ALJD 9:37-40). Respondent argued that the ALJ misstated the holding of the District Court for the District of Kansas in *Spirit Aerosystems.* (Resp. Except. 15). Respondent further argued that the ALJ "does not even identify what the 'other specific affirmative contract language' was that the *Spirit Aerosystems* court relied upon." (Resp. Except. 15). Respondent's argument is futile.

Respondent partially quoted the grievance steps in the *Spirit Aerosystems* collective-bargaining agreement. Not surprisingly, Respondent failed to quote the clear and unmistakable waiver limiting the union's right to bring class actions under the collective-bargaining agreement. Section 3.6 of the *Spirit Aerosystems'* collective-bargaining agreement stated:

> "Unless otherwise agreed by the parties, each grievance appealed to arbitration shall be the subject of a **separate and distinct arbitration hearing and decision, and no arbitrator shall be selected by the parties to hear or decide more than one (1) grievance in any one (1) arbitration proceeding**...." *Spirit Aerosystems* 2012 WL 5995552 (Emphasis added).

The District Court in *Spirit Aerosystems* cites directly to Section 3.6 in holding that the collective-bargaining agreement "precludes the arbitration of broad disputes between union and company involving hundreds or thousands of employees." (2012 WL 5995552). The operative language in *Spirit Aerosystems* bearing on the union's right to bring a class action grievance in that case simply does not exist in the instant Labor Agreement. The Labor Agreement in the instant case lacks specific contract language bearing on the Union's right to bring a class action grievance.

Furthermore, the District Court points to additional language in the collective-bargaining agreement in *Spirit Aerosystems* that appears to limit the right of the union to file class grievances. Section 15.1(d) of the agreement in that case only allows the union

to file class grievances in very specific instances relating to the no-lockout obligation under the contract. 2012 WL 5995552. Once again, the Labor Agreement between the Union and Respondent in this case lacks any specific contract language bearing on the Union's right to bring a class action grievance, as the ALJ correctly concluded. (ALJD 9:37-39). Respondent's puzzling exception to the ALJ's finding that the Labor Agreement between the Union and Respondent lacks the additional specific contract language bearing on the Union's right to bring class action grievances should be rejected.

D. Respondent Misstates the Plain Language of the Labor Agreement

Respondent unflinchingly misrepresents the plain language of the Labor Agreement in excepting to the ALJ's finding that *Spirit Aerosystems* is inapposite. The collective-bargaining agreement in *Spirit Aerosystems* contains numerous references to the employee-based nature of its grievance process. The Labor Agreement in the instant case lacks similar language limiting the grievance process to employees. Despite the lack of such language, Respondent refers multiple times, over the course of its exceptions, to the unsupported and mythical requirement that Step #1 of the grievance process must be initiated by an employee. Respondent incorrectly argued that the grievance procedure in the Labor Agreement, like the grievance procedure in *Spirit Aerosystems*, is "individual-specific – that is, it only authorizes complaints against [Respondent] from 'specific, individual employees to challenge' an employment-related action of [Respondent]." (Resp. Except. 11). In attempting to justify the misapplication of *Spirit Aerosystems* to the present case, Respondent boldly stated that "[a] class grievance is not authorized between parties merely because the the (sic) CBA does not expressly preclude it." (Resp.

Except. 10). Again, Respondent's only authority to support this assertion is because Respondent says it is.

Instead of citing any authority Respondent, again, offered only a convoluted reading of the Labor Agreement that "obviously [the Labor Agreement] precludes class action grievances because it requires each grievance to be supported by a written and signed complaint **from an aggrieved employee** and the complaint must be filed within 7 days of the date that the alleged grievance occurred." (Resp. Except. 10) (Emphasis added). Respondent constantly and improperly stated throughout its exceptions that the Labor Agreement requires a written and signed complaint from "an aggrieved employee." (*See* Resp. Except. 10, 11, 12, 13, 17, 19, 20, 21, 26, 27 and 29). The plain language of the Labor Agreement does not support Respondent's convoluted interpretation. Section 18 of the Labor Agreement requires that "[n]o grievance subject to the grievance procedure or arbitration shall be recognized unless considered in Step #1 within 7 working days after the date of the alleged violation." (Joint Exh. 6). Section 17 of the Labor Agreement states the requirements for a valid grievance at Step #1:

> Step #1. A written and signed complaint must be presented to the Union within 7 working days from the date the alleged grievance occurred.

Clearly Respondent misreads the Labor Agreement's requirement for a valid grievance. Union business representative Mitchell Shimabukuro provided the un-rebutted testimony that nothing in the Labor Agreement requires an employee to file a complaint under Step #1 of the grievance process. (Tr. 29). Respondent offered no evidence to rebut Shimabukuro's testimony or the plain language of the Labor Agreement, which lacks any requirement that the grievance initiates with a complaint from an employee.

In defense of its unsupported position that the Labor Agreement requires a grievance originate from an employee, Respondent argued it would be "nonsensical to suggest that the Union could write its own complaint and 'present' it to itself." (Resp. Except. 12). Once again, Respondent cites no authority for its position that the Union cannot initiate grievances on behalf of its members. The plain language of Step #1 of the grievance process states that grievances initiate with the Union. (Joint Exh. 6). There is no limitation in the Labor Agreement on who may initiate a grievance with the Union. Respondent failed to provide any evidence of a restriction on the Union from initiating grievances.

The Board should reject Respondent's exception to the ALJ's finding that class grievances are valid under the Labor Agreement.

## IV. RESPONDENT FAILED TO SHOW BY CLEAR AND UNMISTAKABLE EVIDENCE THAT THE UNION WAIVED ITS RIGHT TO PURSUE GRIEVANCE REMEDIES ENCOMPASSING MORE THAN A 7-DAY TIME PERIOD

Respondent excepted to the ALJ's finding that Respondent failed to show by clear and unmistakable evidence that the Union waived its right to pursue grievance remedies encompassing more than a 7-day time period. (Resp. Except. 9-10). Respondent argued that the ALJ is "absurd" to read the Labor Agreement to allow the Union to file a class grievance outside the alleged seven-day "statute of limitation." (Resp. Except. 12). Once again, Respondent cites no authority in excepting to the ALJ's finding that Respondent failed to show that the Union waived its right to pursue grievance remedies encompassing more than a 7-day time period.

Respondent complains that allowing the Union to seek remedies outside the 7-day "limitations period" would lead Respondent to suffer "unfair prejudice" in continually

having to respond to "grievance upon grievance" and the related information requests. (Resp. Except. 12-13). By Respondent's own reasoning, limiting grievance remedies to a 7-day period would not only create an unrealistic requirement for the Union to survey its members every seven days to ascertain if Respondent had violated their contractual rights, but would also lead to the Union filing grievances against Respondent on a weekly basis. By Respondent's own reasoning regarding the Union's right to file class grievances, the Union would necessarily file dozens of grievances, every seven days to properly – under Respondent's misguided logic – grieve Respondent's alleged violations of the Labor Agreement. Yet, Respondent argues that it should not have to respond to "grievance upon grievance." Respondent's arguments defeat themselves.

Respondent presented no evidence to rebut the ALJ's finding that the contract language, coupled with the 2011 decision of the JIC, supports the right of the Union to seek remedies outside the 7-day time period. The JIC has final and binding authority to determine questions relating to the application and interpretation of the Labor Agreement. (Joint Exh. 6). The JIC unanimously held in favor of the Union's 2011 class grievance and approved an award against Respondent encompassing a time period greater than the 7-day limitation Respondent now asserts. (ALJD 4:19-21). The past practice of the JIC validates the Union's right to bring class grievances. Respondent's exception to the ALJ's finding upholding the Union's right to seek remedies outside the 7-day time period must be rejected.[6]

Respondent argued that it offered to provide "relevant information" relating to four employees who submitted signed written complaints to the Union pertaining to the

[6] Respondent, of course, can make this argument to the JIC if the Union's underlying grievance is presented to the Committee. But the argument cannot work as a defense to the Union's right to necessary and relevant information needed to represent the bargaining unit and enforce the Labor Agreement.

grievance in question. (Resp. Except. 19). Respondent concludes that because it offered information for four employees, limited to a 7-day time period, it has "satisfied its duty to provide relevant requested information." (Resp. Except. 19). Respondent conveniently ignores that it has failed to provide any information to the Union. Respondent's disingenuous statement that it has satisfied its duty to provide relevant information must be rejected.

## V. RESPONDENT'S ARGUMENT THAT THE UNION'S INFORMATION REQUEST WAS "PER SE" IRRELEVANT IS INCREDIBLE

Respondent argued that because a valid grievance does not exist under Labor Agreement "the information requested by the Union is per se irrelevant." (Resp. Except. 27). By making this argument Respondent again reveals its ignorance of its responsibilities under the Act. Under Section 8(a)(5) of the Act, which imposes the duty to bargain in good faith, 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).

### A. Respondent Failed to Produce Presumptively Relevant Information

Respondent ignores the presumptively relevant standard regarding information requests. 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).

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. (Joint Exh. 12). Respondent bears the burden of justifying its failure to produce presumptively relevant information, which it failed to do. As the ALJ correctly found, Respondent failed to show during the hearing that the Union was not entitled to the information requested. (ALJD 10:22-24). Respondent failed to produce any evidence to rebut the presumption of relevance of the information requested.

B. Respondent Failed to Produce Potentially Relevant Information Requested by the Union

Respondent's argument that "the information requested by the Union is not relevant" demonstrates Respondent's unfamiliarity with its responsibility under the Act to produce potentially relevant information the Union requests. (Resp. Except. 16). The Union is entitled to non-presumptively relevant information after providing an initial showing of relevance. *The Earthgrass Company*, 349 NLRB 389 (2007). A union is entitled to potentially relevant information where the 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). Respondent ignores the wealth of evidence in the record and the un-rebutted testimony of Shimabukuro that the information requested is relevant and useful to the Union in carrying out its statutory duties and responsibilities.

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.[7] Item 10 concerns Respondent's organizational chart.

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 relates to the allegation in grievance MS-12-001 that Respondent 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 received complaints from employees that Respondent 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).

[7] The Complaint does not allege 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)

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 to employees 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 reject Respondent's mistaken claim that the Union's information request is *per se* irrelevant. 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).

## VI. ALLEGED DEFICIENCIES IN THE UNDERLYING GRIEVANCE DO NOT EXCUSE RESPONDENT'S BLANKET DENIAL OF THE UNION'S INFORMATION REQUEST

Respondent argued that the grievance underlying the Union's information request is invalid, therefore Respondent is under no obligation to honor the Union's request for information. (Resp. Except. 18-19). Once again, Respondent ignores an abundance of case law stating that the Board does not pass on the merits of the underlying grievance in

information request cases. Respondent also ignores well-settled Board law that the Union's right to relevant information extends beyond the grievance procedure.

A. Merits of the Underlying Grievance Are Irrelevant to Respondent's Duty to Provide Information

Respondent argued that "the information requested is...irrelevant because it cannot possibly give rise to any valid and recognizable grievance nor can it save the class grievance from being time barred." (Resp. Except. 17). Respondent admits in its Exceptions that "the obligation to provide relevant information is derived from statutory duties independent of the labor contract." (Resp. Except. 25). It is clear that Respondent understands that its obligation to provide relevant information to the Union does not rest solely on the terms of the Labor Agreement, including the grievance procedure as outlined therein. Despite acknowledging the source of its obligation to produce relevant information, Respondent argued that because the Union failed to comply with Respondent's convoluted interpretation of the procedural requirement in Section 17 of the Labor Agreement, the grievance, and thus the related information request, is invalid. Respondent's procedural deficiency arguments should be rejected. The Board in *Des Moines Cold Storage, Inc.* found that:

> "[I]t is well established that an employer is required to provide such information regardless of the potential merits of a grievance. This principle applies **even if the employer has a colorable procedural defense to the grievance**. Consequently, even if the Respondent could maintain a valid timeliness defense against the grievance, it unlawfully refused to provide the requested relevant information." 358 NLRB No. 58, slip. op. at 2 (2012) (internal citations omitted) (emphasis added).

Under established Board law, information sought in support of a procedurally deficient grievance is not irrelevant since the Board does not pass on the merits of the union's claim that the employer breached the collective-bargaining agreement. *In Re*

*U.S. Postal Serv.*, 339 NLRB 1162, 1167 (2003), citing *Postal Serv.*, 303 NLRB 502, 509 (1991), citing *Island Creek Coal Co.*, 292 NLRB 480 (1989). *See also Asarco Inc.*, 316 NLRB 636, 643 (1995) (the Board, in determining that information is producible, does not pass on the merits of the grievance underlying a request). The Board in *Postal Service*, affirmed an administrative law judge's finding that the employer was obligated to produce information the union requested, even where the underlying grievance was two years beyond the contractual grievance time bar. 303 NLRB at 507-08. The Board held that the merits of the grievance are for arbitrator to decide; Section 8(a)(5) "obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative" even where grievance is obviously time barred under the grievance process. 303 NLRB at 507-08

Even if the underlying grievance was procedurally deficient, Respondent has violated the Act by failing and refusing to produce the information the Union requested. The Board should reject Respondent's argument that it is under no obligation to produce the information requested due to the alleged procedural deficiencies of the underlying grievance.

B. Respondent's Reliance on the Federal Rules of Civil Procedure Further Demonstrates Respondent's Lack of Understanding of the Act

Respondent relies on *Seay v. McDonnell Douglas Corp.,* 427 F.2d 996 (9th Cir. 1970), for the misguided proposition that since the class grievance in question failed to conform to Rule 23 of the Fed. R. Civ. P., Respondent is under no obligation, under the Act, to provide the presumptively relevant and other relevant information the Union requests. (Resp. Except. 14). Respondent's reliance on *Seay* is misplaced and reveals

Respondent's lack of knowledge of the Act and well-settled Board law. The dispute in *Seay* regarded, among other issues, the certification of a class action in a civil suit filed before the District Court of the Central District of California based on Fed. R. Civ. P. 23. Respondent's reliance on *Seay* ignores the fact that the present grievance was filed under the grievance process as outlined in the Labor Agreement, not under Fed. R. Civ. P. 23's requirements to certify a class action in a federal civil suit. In *Seay*, bargaining unit employees sought a class action against their employer and union regarding non-union member agency fees required as a condition of employment. 427 F.2d at 997-998. *Seay* does not involve an action by a union, acting as the exclusive bargaining representative of all bargaining unit employees, against an employer. *Seay* does not involve a request for presumptively relevant and otherwise relevant information that the employer is required to produce, even where the underlying grievance is alleged to be procedurally deficient. *Seay* is completely inapplicable to the instant case.

## VII. UNION'S RIGHT TO RELEVANT INFORMATION EXTENDS BEYOND THE GRIEVANCE PROCESS

Respondent's reliance on *Seay* ignores established Board law that a grievance need not be filed before a union is entitled to the information. A union's request for information is valid to "determine whether it should exercise its representative function in the pending matter," including whether the information will warrant further processing of a grievance or determining whether a violation of the contract occurred. *Island Creek Coal Co.,* 292 NLRB 480, 487-88 (1989). *See also Ohio Power Co.*, 216 NLRB 987, 991 (1975) (not required that there be a grievance, the union is entitled to the information in order to determine whether the information will warrant further processing of the grievance); *W-L Molding Co.*, 272 NLRB 1239 (1984), *citing Boyers Construction Co.*,

267 NLRB 227, 229 (1983) (union need not demonstrate actual instances of contractual violations before the employer must supply information); *Doubarn Sheet Metal*, 243 NLRB 821, 824 (1979) (not necessary that the union demonstrate actual instances of contractual violations before the respondent must supply information. If the union had sufficient information to prove contractual violations, it would not need to request information from the respondent). The Union is entitled to information potentially relevant to discharging its statutory duties, including monitoring compliance and policing the Labor Agreement. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001). Respondent's President Endo admitted that Respondent had violated the Labor Agreement by paying employees in cash and banking overtime hours in violation of the Labor Agreement. (ALJD 5:8-11; Tr. 743, 169). The information the Union requested is relevant to its duty to police and enforce the Labor Agreement, especially in light of Respondent's past violations of the Labor Agreement. The Board should ignore Respondent's erroneous reliance on *Seay* and Respondent's exception to the ALJ's finding that Respondent violated Section 8(a)(5) of the Act by refusing and failing to provide information the Union requested to fulfill its statutory duties as bargaining representative.

Respondent relies on *Emeryville Research*, 441 F.2d 880 (9th Cir. 1971) for the erroneous argument that the requested information has no relevance to any legitimate Union collective bargaining need, and therefore Respondent's refusal to furnish the information could not be a unfair labor practice. (Resp. Except. 16, 19). *Emeryville Research* is distinguishable from the instant case. The ALJ correctly found that Respondent failed to show that the Union was 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). Shimabukuro testified at length to the relevance of the information requested. The ALJ correctly found that Respondent failed to show that the Union was 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). Furthermore, the Union is entitled to the information to enforce and police the Labor Agreement because Respondent had already admitted to similar violations of the Labor Agreement and the Union had received reports of continued violations of the Labor Agreement. (ALJD 5:8-11, 14-17; Tr. 743, 169). Respondent's reliance on *Emeryville Research* should be rejected.

## VIII. RESPONDENT'S ARGUMENT THAT THE INFORMATION REQUEST IS OVERLY BROAD, BURDENSOME, OR WAS MADE IN BAD FAITH SHOULD BE REJECTED

Respondent argued that the Union's request for information is overbroad and burdensome. (Resp. Except. 19). Respondent argued that the Union sought, impermissibly, to audit Respondent to "verify that there have been no violations of the [Labor Agreement]." (Resp. Except. 19). Again, Respondent failed to cite any authority to justify its argument that an alleged audit of Respondent's compliance with the Labor Agreement is impermissible.

Respondent cites the testimony of its Vice President, Ivan Yamasaki, that it would take five to six months to compile the information the Union requested. (Resp. Except. 19). Yamasaki's testimony is unreliable based on his further testimony. Yamasaki 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 and would certainly not require five to six months to accomplish.

Despite the 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). The testimony of Respondent's President and Vice President, as well as Respondent's conduct during the hearing, do not support Respondent's assertion that the Union's request for information is overbroad or burdensome. Respondent's claim that the request for information is overboard and burdensome should be rejected.

Furthermore, 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 788, 789 (2005) 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 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). 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 Respondent argued that the sole purpose of the Union's information request was to harass Respondent. (Resp. Except. 20). 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."[8] (ALJD 10:17, Tr. 20, 81). The ALJ correctly ignored this unsubstantiated allegation and 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

[8] 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.

requested information is justified. *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788 (2001).

Respondent argued that the Union's request for information was overbroad. Respondent had the opportunity at the hearing to show that the information requested was overbroad. As the ALJ correctly found, Respondent failed to show that the Union was either not entitled to the information requested 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 should reject Respondent's argument that the Union's request for information is overbroad, unduly burdensome and made in bad faith.

A. Contrary to Respondent's Assertion, Respondent, Not the Employees, Bears the Burden to Furnish Information Requested

Respondent argues that "information that the Union would need to investigate a grievance must necessarily come from the employee as he is the party that would know when a grievance has allegedly occurred." (Resp. Except. 19). Respondent failed to cite any authority to support its bold assertion that the information requested should be produced by the aggrieved employee, not Respondent. Once again, Respondent's argument clearly demonstrated that it is unaware of its obligations under the Act. The mere fact that requested information could be obtained elsewhere does not excuse the employer from its obligations. *Holyoke Water Power Co.*, 273 NLRB 1369 (1985). The Board in *IronTiger Logistics* reasoned that the "minimal burden" is placed on the employer to produce requested information because the employer is in a "clearly superior position to ensure that a dispute is avoided" and to "encourag[e] the parties themselves to address potential disputes before they disrupt the collective-bargaining relationship and

burden the parties and the public with the cost of administrative investigation and litigation." 359 NLRB no. 13 at slip op. 3. The Board should reject Respondent's argument that the information the Union requested should be produced by the employees, not Respondent, especially in light of Endo's own admission at the April 28, 2011 JIC hearing and at the ALJ hearing that Respondent had paid its employees in cash and banked overtime hours in violation of the Labor Agreement. (ALJD 5:8-11; Tr. 743, 169).

B. Labor Agreement Does Not Require the Union to Turn Over Complaints

Respondent argued that it has "every right to deny the Union's request for information" due to the Union not providing to Respondent the signed-written complaints of aggrieved employees. (Resp. Except. 21). Again, Respondent failed to cite any authority to support its claim that the Union's alleged failure to produce the signed-written complaints rebuts Respondent's obligation to produce the requested information. Respondent ignores that the Union voluntarily provided the signed-written complaints of four employees in response to Respondent's request for the complaints. Despite receiving the four complaints that the Union was not obligated to provide, Respondent has failed to produce any information the Union requested.

Respondent argued that no valid grievance could be recognized until signed-written complaints from aggrieved employees are produced to Respondent. (Resp. Except. 21). Once again, Respondent clearly misreads the Labor Agreement. The Labor Agreement contains no provision requiring the Union to produce, to Respondent, the signed-written complaints of aggrieved employees. The Labor Agreement only requires that a signed-written complaint be made to the Union to initiate a grievance at Step #1.

(Joint Exh. 6). There is no requirement in the Labor Agreement that a signed-written complaint originates from an employee or that the Union produce such complaint to Respondent in order to create a valid grievance. The Union had reason not to readily produce the signed-written complaints initiating the grievance. Shimabukuro testified that the Union was concerned of potential "retaliatory actions" by Respondent against employees who filed complaints. (Tr. 79). Respondent's reasoning that it has the right to deny a request for information based on its creative reading of the Labor Agreement should be rejected.

## IX. RESPONDENT'S ARGUMENT THAT THE BOARD DOES NOT HAVE JURISDICTION OVER THIS MATTER FURTHER DEMONSTRATES ITS UNFAMILIARITY WITH THE ACT

Respondent excepts to the ALJ's finding that interim arbitration of the contractual grievance provisions is neither warranted nor feasible given the 2011 award of the JIC under the contractual scheme established by the Association and the Union. (Resp. Except. 22). Respondent argued that the JIC's 2011 award "on a past grievance is irrelevant to the disputed issues here." (Resp. Except. 22). Yet again, Respondent cites no authority to support this argument. Respondent ignores the plain language of the Labor Agreement that the JIC has final and binding authority to determine questions relating to the application and interpretation of the Labor Agreement. (Joint Exh. 6). Respondent ignores the 2011 JIC's final and binding decision upholding the Union's 2011 class grievance against Respondent. Respondent ignores its own failure to object to or challenge the class action nature of the 2011 class grievance.

Respondent instead relies on *Square D Co. v. N. L. R. B.*, 332 F.2d 360 (9th Cir. 1964) for its defense that the Board lacks jurisdiction over the dispute between

Respondent and the Union. (Resp. Except. 22). The ALJ correctly distinguished *Square D*. (ALJD 9:21-22). 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. 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 matter before the ALJ in this case is not one of the construction of the Labor Agreement. There is no dispute that the subject matter of the instant grievance involves potential violations of the Labor Agreement. The potential violations of the Labor Agreement however, do not involve actual waiver language that must be interpreted and Respondent has provided no evidence that the dispute in the instant grievance relates to such interpretation. As discussed above, Respondent presented no evidence that the Union waived its right to file class grievances. Furthermore, the JIC has already ruled in favor of the Union in past class grievances, without Respondent's objection. Respondent's insistent reliance on *Square D* should be rejected.

Respondent argued that there is a dispute as to whether the Union complied with the grievance procedure of the Labor Agreement and that the instant dispute must be submitted to arbitration; not subject to an unfair labor practice proceeding before the Board. (Resp. Except. 24). Respondent relies on *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960) to support its claim that the Board lacks jurisdiction over the dispute between the Union and Respondent. (Resp. Except. 23).

Respondent's reliance on *United Steelworkers* is again misplaced. In *United Steelworkers,* the union sought to compel arbitration over a dispute about whether the employer violated the parties' collective-bargaining agreement where the agreement included an arbitration clause encompassing all grievances. 363 U.S. at 564-65. The underlying grievance between Respondent and the Union, like *United Steelworkers*, concerns a dispute regarding the application of the collective-bargaining agreement. 363 U.S. at 569. The instant Complaint, however, does not seek to resolve Respondent's alleged violations of the Labor Agreement underlying the information request. Unlike the *United Steelworkers*, the dispute presently before the Board concerns Respondent's alleged violation of the Section 8(a)(5) and 8(a)(1) of the Act stemming from Respondent's refusal to produce information the Union requested.[9] The Board maintains jurisdiction to resolve violations of the Act. Respondent's exception based on the Board's jurisdiction should be rejected.

Respondent further relies on *Burns Int'l Sec. Services v. N.L.R.B.*, 146 F.3d 873 (D.C. Cir. 1998) to support its claim that the Board lacks jurisdiction over this dispute. (Resp. Except. 24). Respondent's reliance on *Burns Internat'l* is once again misplaced. In *Burns Internat'l* the union filed a refusal to bargain charge regarding an alleged unilateral change to holiday pay. *Id*. at 874. The employer defended against the charge claiming its actions were authorized by the collective-bargaining agreement. The Court found that where a collective-bargaining agreement provides for arbitration as the method of resolving disputes over the meaning of the agreement, the Board is required to defer to arbitration. *Id*. at 877.

[9] *United Steelworkers* did not address the issue of the Court's jurisdiction regarding an information request stemming from a grievance conducted under the grievance process of a collective-bargaining agreement.

Respondent's reliance on *Burns Internat'l* should be rejected. It is well-established under Board law that Section "8(a)(5) complaint allegations concerning failure to provide requested information are not appropriate for deferral." *Daimlerchrysler Corp. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (Uaw), Local 412, (Unit 53), AFL-CIO*, 344 NLRB 1324 (2005), citing *U.S. Postal Serv. & Am. Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL-CIO*, 302 NLRB 767 (1991). Despite the wealth of cases stating that information cases are not appropriate for deferral, Respondent insists that the instant case is subject to *Collyer* deferral. (Resp. Except. 25). Respondent cites not a single case that stands for the proposition that information cases can be deferred to arbitration. Respondent instead argues that "**in the cases where the NLRB has held that a dispute regarding information requests are not subject to arbitration or *Collyer* deferment (sic), there was no allegation that the grievances were per se invalid due to time bar**." (Resp. Except. 25)(Emphasis in original). Once again Respondent ignores Board law requiring an employer to comply with an information request even when the underlying grievance is untimely and likely barred under the collective-bargaining agreement. *See Postal Serv.*, 303 NLRB at 508 (1991). Furthermore, the Board in *Safeway Stores* held that "before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all." 236 NLRB 1126, 1126 (1978).

Board precedent is clear -- information cases are not subject to deferral to arbitration. In cases where there is a question of the arbitrability of a grievance, the union

retains the statutory right to potentially relevant information from the employer. Respondent's exception to the ALJ's finding that interim arbitration of the contractual grievance provisions is neither warranted nor feasible and should be rejected.[10]

## X. RESPONDENT'S OTHER EXCEPTIONS SHOULD BE REJECTED

Respondent excepts to the ALJ's factual finding that the Union responded to Respondent's March 14, 2012 request for the names of allegedly aggrieved employees by attaching a lengthy list of names of current and former bargaining unit employees to the Union reply letter dated April 5, 2012. (Resp. Except. 28). Respondent argues that the Union did not properly respond to Respondent's March 14 letter. (Resp. Except. 28). The Union filed a class grievance alleging various violations of the Labor Agreement. Because of the class nature of the grievance and because the Union is permitted to investigate the merits of a grievance and the scope of a remedy sought, and especially in light of Respondent's admission and the 2011 JIC ruling that Respondent had committed similar violations of the Labor Agreement, all of Respondent's bargaining unit employees are potentially harmed by Respondent. The Union properly responded to Respondent's March 14 letter by providing to Respondent a list of the current and former bargaining unit employees. Respondent's exceptions to the ALJ's finding regarding the Union April 5 letter should be rejected.

[10] Finally, even if information requests could be deferred, by Respondent's demand for *Collyer* deferral Respondent argues against its own position because *Collyer* deferral requires parties to waive the time limitations of the underlying grievance. Respondent argued throughout its exceptions that the underlying grievance is untimely and therefore invalid. Respondent's request for *Collyer* deferral is disingenuous in light of its entrenched position that the underlying grievance giving rise to the Union's information request is time barred and invalid. Respondent's argument that the Union's request for information is subject to *Collyer* deferral is contradictory and should be rejected.

## XI. CONCLUSION

It is respectfully submitted Respondent's exceptions be rejected. The Judge's findings of fact and conclusions of law were fully supported by the record evidence and by appropriate legal standards. The Decision and Recommended Order should be adopted by the Board.

DATED AT Honolulu, Hawaii, this 5th day of April 2013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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