JD(ATL)–14–13
Somerville, NJ

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

ETHICON, A JOHNSON & JOHNSON CO.

and **CASE 22–CA–089085**

LOCAL 630, NEW YORK NEW JERSEY REGIONAL JOINT BOARD, WORKERS UNITED, SEIU

***Lisa D. Pollack, Esq.*,**
for the Acting General Counsel.[1]
Francis X. Dee, Esq.* and *Mark E. Williams, Esq.
for the Respondent.[2]
***Serge Ambroise, Esq.*,**
for the Charging Party.[3]

DECISION

Statement of the Case

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried in Newark, New Jersey, on March 13, 2013.[4] The Union filed a charge initiating this matter on September 12, and the Acting General Counsel issued a complaint and notice of hearing (complaint) on January 30, 2013. The government alleges the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing to furnish information requested by the Union related to subcontracting and the filling of "open" maintenance jobs at the Company's Somerville, New Jersey facility. The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner set forth in the complaint. The Company asserts the complaint is barred by the terms of the party's applicable collective-

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1 I shall refer to counsel for the Acting General Counsel as counsel for the government and to the National Labor Relations Board (Board) as the government.

2 I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

3 I shall refer to counsel for the Charging Party as counsel for the Union and I shall refer to the Charging Party as the Union.

4 All dates are 2012, unless otherwise indicated.

bargaining agreement and that the requested information is not presumptively relevant because it does not pertain to bargaining unit employees nor is it otherwise relevant. Stated differently the Company asserts information pertaining to subcontractor employees is not presumptively relevant and that the Union cannot, and did not, show relevance here.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations here. I have studied the whole record,[5] and based on the detailed findings and analysis below, I conclude and find the Company did not violate the Act in any manner alleged in the complaint.

Findings of Fact

I. Jurisdiction, Supervisory/Agency Status, Labor Organization, and Unit

The Company is a corporation with an office and place of business in Somerville, New Jersey, where it is engaged in the manufacture and nonretail sale of sutures and other innovative products for wound closure, general surgery, bio-surgery, women's health, and aesthetic medicine. Annually, the Company, in conducting its operations, sales and ships from its Summerville, New Jersey facility, goods valued in excess of $50,000 directly to points outside the State of New Jersey. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted Company Human Relations Director Joe Strauss (HR Director Strauss or Strauss), at all times material herein, acted as an agent of the Company within the meaning of Section 2(13) of the Act, and, I so find. It is undisputed Gene Kaniecki (Union Representative Kaniecki or Kaniecki), at all times material herein, served as a representative for the Union in its dealings with the Company. Carlos Gonzalez has, at all times material, served as the Company's New Jersey facilities manager (Facilities Manager Gonzalez or Gonzalez) and David Durham, a 15-year unit employee, is the local union president.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

It is admitted "All employees within the unit certified by the National Labor Relations Board on February 19, 1944 and October 29, 1954 employed by the Employer at its Somerville, NJ facility" constitutes a unit (unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and that at all times since February 19, 1944 and October 29, 1954, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

[5] I grant the Company's posttrial motion to supplement the record to include a new copy of GC Exh. 8. The original GC Exh. 8 contained no date stamps, page numbers nor was it in chronological order. Counsel for the Acting General Counsel and union counsel consent to the relief sought.

II. Alleged Unfair Labor Practices

A. Brief Background

The parties most recent collective-bargaining agreement is effective by its terms from June 2009 to June 2014, and automatically renews for successive terms of 1 year unless either party gives 60-days notice prior to the expiration date its intention to terminate the agreement at the end of the then, current term. There are approximately 1200 employees who work in the 3-city block size facility with approximately 50 of those currently unit members. Union Representative Kaniecki explained that in addition to unit manufacturing employees there are unit employees that perform facilities maintenance in electrical, carpenter, pipefitters, plumber, painter, and instrument crafts.

B. Issues and Related Facts

It is specifically alleged in the complaint that on or about May 15, the Union requested in writing, information concerning subcontracting and the filling of "open" maintenance jobs at the Company's Somerville, New Jersey facility. It is further alleged the Company, through HR Director Strauss, in writing on or about June 5, failed and refused to provide the requested information.

The parties current collective-bargaining agreement contains provisions addressing or relating to subcontracting. There was a negotiated June 15, 2009 letter, "Ethicon Subcontracting," setting forth "the procedure to be followed when sub-contracting work" at the Company.

Article XIX of the parties collective-bargaining agreement "Employer Prerogatives" section A, provides in part, that the Company, by exercising any one or more of its "Exclusive Prerogatives," as defined and limited in section B "shall not at any time be subject to collective bargaining, or to review in accordance with the grievance and arbitration procedure provided in this Agreement." Section B sets forth a category of "Exclusive Prerogatives" including, at (6), "the establishment of new units, the closing or curtailment of old units; the amount of work to be subcontracted; provided, however, that no such action shall be taken to discriminate against, or avoid bargaining with the Union." Additionally, at B(16) of the "Exclusive Prerogatives" the Company retains the exclusive right to "appropriations and expenditure of funds in whatever amount and for whatever purpose."

The negotiated side letter dated June 15, 2009 sets forth, as noted above, "the procedure to be followed when sub-contracting work" at the Company and more specifically the "policy" to be followed "in handling of sub-contracting of maintenance work." The policy follows:

> It is the objective of the Company to staff Plant Engineering and Site Management so that we can maintain our plant and equipment. All <u>new</u> <u>work, general</u> <u>construction</u> and <u>peak</u> <u>maintenance</u> <u>loads</u> will normally be sub-contracted. It is on this basis we establish our manpower needs, and once these needs are established, that workforce is provided with a forty-hour week and usually with

reasonable overtime. It is agreed that the Company has the inherent right to sub-contract.

The side letter also sets forth a procedure applicable in all cases "in order to communicate to the Union matters relating to sub-contracting of maintenance work." The stated purpose "is to expedite all such matters in a friendly and practical way." The procedures are:

> A sub-contracting committee will be appointed. This committee will consist of the Plant Engineer or his designated representative, together with such other supervisors as he may require, the steward and assistant steward of the Maintenance Department, and a representative of each craft. The duties of this committee will be to consult with the Plant Engineer on all matters pertaining to sub-contracting of maintenance work. Their advice and recommendations will be carefully considered.
>
> The Sub-contracting Coordinator will meet with the employee sub-contracting committee to discuss any problems or concerns relating to sub-contracting. The monthly meeting will also be used to communicate any issues, tends and developments relating to sub-contracting.
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> When the Company intends to subcontract work defined with prints, renovation or facilities maintenance, the Sub-contracting Coordinator will review the details of the job with the involved craft representative. Work defined with prints and facilities maintenance shall be broken down into hours required of each involved craft. In the case of facilities renovation, the completion date and a breakdown of the job into hours for each craft will be communicated if available. In all cases where agreement is reached, the Sub-contracting Coordinator will proceed with the sub-contracting. In those instances where no agreement can be reached, and if the Union desires, this decision will be reviewed promptly at a special Step IV meeting with the Plant Manager, or a designated representative, and his decision will be final. If, however, the Union requests a sub-contracting review meeting, such meeting will be held as soon as possible. The Company's decision will be final.
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> When the Company intends to sub-contract design and build work not defined with prints, and new construction, the Plant Engineer will inform the Union of the work to be sub-constructed when known.

The procedure concludes, "It is understood that all matters relating to this policy are not arbitrable."

Union Representative Kaniecki acknowledged the parties have an established procedure for discussing subcontracting. Kaniecki said, though invited, he had not attended the monthly subcontracting meetings "for many years" but had actually attended such meetings in the past. Kaniecki explained representatives from the Union and Company meet and the Company

presents work orders, or vouchers, regarding certain work needed to be subcontracted, along with a brief description of the work to be performed. Kaniecki explained that designated union stewards, and elected union representatives, have difficulty obtaining information at the meetings "because there are so few people working in the bargaining unit that they cannot attend the meetings."

Company Facilities Manager Gonzalez testified that at the beginning of each year the Company "ask[s] for a representative from each of the craft groups to be a member of that [subcontracting] committee." All members have computers and the Company notifies each committee member, including union officials, of the date and time for the meetings. Gonzalez said many times the local union president did not attend the meetings but the stewards "frequently" attended. Gonzalez said the purpose of the meetings was to allow the parties to discuss issues or trends associated with subcontracting and provided the Company an opportunity to present the Union with the "jobs that they see are going to be subcontracted." Company staff engineer Scott Hinkle testified one such issue discussed resulted in an analysis demonstrating the Company currently subcontracts facility maintenance at an equivalent of one full-time employee (approximately 2000 work hours) per year. Local Union President Durham, however, explained he had observed 15 to 20 employees daily that were not unit employees, but was not always sure which were doing unit work, or which, if any, were performing "new construction work." Durham stated those he observed included subcontractor "stop gap" employees performing work the 11 terminated unit employees had performed.

The Company, per the agreement, normally subcontracts all new work, general construction, and peak maintenance work loads. Union Representative Kaniecki defined "peak maintenance loads" as "after all unit members have been polled for hours, and those hours have been exhausted the Company can then begin subcontracting." Kaniecki, however, acknowledged the word "polling" is not mentioned in the subcontracting provisions of the collective-bargaining agreement. Company Regional Facilities Manager Gonzalez described peak maintenance work as arising with little or no advance notice resulting from, for example, an emergency or unplanned situation or events or unplanned employee(s) absence(s). Gonzalez stated it would also include work that could not wait but rather needed to be taken care of immediately. Gonzalez explained "new work," "would be considered capital type work" and gave as an example "a roof replacement." Gonzalez described "general construction" simply as a general description for facility maintenance and could involve "specialty type skilled work" not inherently part of unit work such as fencing an area or paving a parking lot.

Facilities Manager Gonzalez defined "stop gap" employees as subcontractor employees filling in here for the 11 bargaining unit employees terminated by the Company for "stealing time" and "not being productive." Gonzalez said it took "the entire year of 2012" for the Company to hire 6 new unit employees to replace the 11 terminated unit employees. It is undisputed the Company terminated 11 unit employees in December 2011 for "stealing time." What it appears happened was one employee would clock in multiple employees as though they were at work when that was not the case.

On March 15, Union Steward Frank Dumbreski, at Union Representative Kaniecki's request, filed a grievance (Grievance D-1408), concerning the 11 vacant unit positions and the

nonposting of the job vacancies. Kaniecki asked Dumbreski to file the grievance because "at the time we had 11 people which were terminated for [theft] of service and it was indicated to me through various conversations with a host of company representatives that many of those jobs may not be filled or might not be filled." Kaniecki said he also caused the grievance to be filed because of concerns regarding subcontracting. Kaniecki added "subcontracting was literally running amuck at the Ethicon facility and we were losing, and the bargaining unit was being eroded as a result." Grievance D-1408 was denied by Maintenance Supervisor Ed Tackach and thereafter withdrawn by the Union. In that regard, Kaniecki first testified on direct and cross-examination that grievance D-1408 was still pending, however, after additional cross-examination and after being shown a memorandum he had sent on July 24, to HR Director Strauss local union officials and union counsel in which he wrote he was "withdrawing Grievance D1408," did he acknowledge he had withdrawn grievance D-1408. Kaniecki stated the Union would "pursue our concerns pertaining to job vacancies and the greater implications of subcontracting of Ethicon craft maintenance work through the National Labor Relations Board."

Kaniecki, in a letter of May 15, requested the Company provide certain specific information to the Union because the Union had "filed a grievance (D1408) regarding subcontracting and the filling of 'open' maintenance jobs" at the Company. The request covered records from December 1, 2011 until May 15. The Union explained it needed the information; "In order to properly represent our members, ensure the Company's compliance with its obligations under the Collective Bargaining Agreement, State and Federal Laws, and to fully investigate the case." The Union, in its letter further explained the requested information concerned "maintenance subcontractors working at the Ethicon Somerville campus." At trial Kaniecki testified he needed the information not only for grievance D-1408, but, to "glean information regarding subcontracting and filling those [11] positions" and to see if that work should be in the unit. Kaniecki explained he also needed the information to "put together a comprehensive plan for negotiating with the Company during bargaining." Kaniecki testified he chose the time period of December 1, 2011 to May 2012, because "December 1, 2011 was around the time the 11 people were terminated for theft of service; so I used that as my base for the information as it was associated . . . directly . . . with the grievance, D-1408." Kaniecki further testified he needed the requested information because "we just lost 11 people out of a very small facility's maintenance group that services a very large building, and I wanted to find out exactly who was doing these jobs . . . and put together a scenario" for filling those jobs.

Specifically, the Union, in its May 15 letter, requested the following information concerning six named subcontractors[6] performing work at the Company:

1. The exact nature (type) of work being performed.
2. The number of contractors working at the Ethicon campus.
3. The total hours worked (average per week).
4. Labor rates per employee. This should include all forms of compensation.

[6] The six companies were: P. Lepore and Sons Incorporated; Electrical Installation and Design Incorporated; PJM Mechanical Contractors; Cyma Builders and Construction Managers LP; United Technologies Carrier; and, Monsen Engineering Company.

5. All contracts and agreements between this firm/company/organization and Ethicon Inc.

On June 5, HR Director Strauss responded, in writing, to the Union's May 15 information request. Strauss acknowledged the information request concerned "maintenance subcontractors" pertaining to grievance 1408 and noted the Company had responded to grievance 1408. Strauss indicated the Company, without waiving its right to contest the Union's entitlement to subcontracting documents, was providing "information concerning subcontracting year-to-date in 2012." Strauss informed the Union the Company had concluded some of the requested information "is not presumptively relevant" because the parties collective-bargaining agreement clearly and unequivocally permitted subcontracting. Strauss explained that pursuant to the parties collective-bargaining agreement subcontracting is recognized as an "inherent right" and "not arbitrable" under their current or prior collective-bargaining agreements. Strauss asserted some of the requested information would be burdensome to collect while other portions were confidential in nature. Strauss addressed the types of information the Union sought for the vendors and what information the Company was, by attachment,[7] providing. The Company's specific responses follows:

1. The exact nature (type) of work being performed.

   This information can be found in the attached subcontracting notification documents that have been attached. Additional information can also be found in the subcontracting committee meeting minutes that have been attached.

2. The number of contractors working at the Ethicon campus.

   The Company issues Purchase Orders (PO) to third-party vendors for subcontracting to be conducted on the Ethicon, Somerville campus. As has been communicated previously, in the 2007 and 2009 requests for information, the PO is the contract between Ethicon, and the contractor. The Company does not correlate purchase orders with subcontracting notices, as this has never been a requirement for subcontracting. Any attempt to correlate this information would be speculative at best. The third-party vendors determine the number of contractors for each particular PO required to complete projects. The Company does not track the number of contractors for each PO as this is determined at the discretion of the third-party vendor.

[7] In the 100 plus pages of attachments the Company provided: actual hours worked by CYMA Builders and Construction Managers LP and Electrical Installation and Design Incorporated; 41 pp. of subcontractor committee meeting emails with attachments; 59 pp. of notifications of subcontracting distributed to the subcontracting committee and 3 pp. of seniority lists of unit employees.

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3. The total hours worked (average per week).

The Company issues Purchase Orders (PO) to third-party vendors for subcontracting to be conducted on the Ethicon, Somerville campus. As has been communicated previously, in the 2007 and 2009 requests for information, the PO is the contract between Ethicon, and the contractor. The Company does not correlate the PO with subcontracting notices, as this has never been a requirement for subcontracting as per the collective bargaining agreement. Any attempt to correlate this information would be speculative at best. The third-party vendors determine the total hours worked for each particular PO required to complete projects. The Company does not tract the total hours worked for each PO as this is determined at the discretion of the third-party vendor.

4. Labor rates per employees.

The Company issues Purchase Orders (PO) to third-party vendors for subcontracting to be conducted on the Ethicon, Somerville campus. As has been communicated previously, in the 2007, and 2009 requests for information, the PO is the contract between Ethicon, and the contractor. The Company does not correlate purchase orders or contractor labor rates with subcontracting notices, as this has never been a requirement for subcontracting as per the collective bargaining agreement. Any attempt to correlate this information would be speculative at best. The third-party vendors determine their labor rates. The Company does not tract the labor rates for employees of contractors for each PO as this is determined at the discretion of the third-party vendor.

5. All contracts and agreements between this firm/company/organization and Ethicon, Inc.

This information is proprietary and confidential to the Company. In addition, it is burdensome to collect.

Based on the unique circumstances posed by the terminations that occurred in December of 2011, there was a requirement to provide additional Crafts support. The Company is prepared to share the following detailed information for this period of time:

i) A total subcontracting notification of 3,300 hours was provided to the union. Of these estimated hours, a total of 2,936 were used. These labor hours were provided through three contractors: Electrical Installation and Design Incorporated, PJM Mechanical

Contractors, and CYMA Builders and Construction Managers LP. (Please see PDF File of actual hours provided by CYMA and EID).

ii) With regard to specialty work (the annual subcontracting notification of work customarily performed by contractors due to specialty skills, etc.), a total of 2,228 hours were notified at the start of the 2012. This notification captures the work performed by United Technologies Carrier, and Monsen Engineering Company.

iii) The balance of the subcontracting notifications, account for Peak Demand and Capital Incorporated. The details and nature of that work, as well as estimated hours, are provided in the attached subcontracting notifications.

Union Representative Kaniecki acknowledged receiving certain information, including a seniority list, from the Company in response to his request but states the Union has never been provided information pertaining to the exact nature of the work being performed by the subcontractors; the exact number of hours worked by subcontractor employees nor the labor rates paid subcontractor employees; nor, the actual contracts between the vendors (subcontractors) and the Company.

Gonzalez testified the Company provided all information requested by the Union except information related to costs associated with subcontracting. The Company asserts it did not provide information related to the costs of subcontracting, such as specific labor rates and/or contracts and agreements between the Company and its subcontractors, because, it asserts, such information is not relevant. Facilities Manager Gonzalez said costs have never been a factor in determining whether, or not, to subcontract work, nor, has costs been a factor in deciding whether to use bargaining associates verses subcontractor employees. Gonzalez explained costs are not a factor because the Company has a situation where it "need[s] to do [a] job" or "accomplish the task at hand" and costs, Gonzalez added, "is only of concern in the event" "we have multiple bids" where the Company is afforded the option to "get the most efficient among the contractors." Gonzalez testified the Company has never provided the Union, although previously requested, with subcontracting costs, wage rates, or the actual contracts with the vendors. Gonzalez indicated the Company does not provide the Union with the vendor contracts because, among other reasons, it is unfair to the vendors and takes away the vendors competitive advantage. Gonzalez contends the Company *does* provide the nature of the work to the Union when it provides the Union with the subcontracting notifications at the monthly subcontracting meetings. Gonzalez explained that in the subcontracting notifications are the type(s) of work the Company intends to subcontract as well as an estimate of man hours and crafts needed.

Facilities Manager Gonzalez testified the number of subcontractor employees working on site or utilized by a subcontractor on a job was not provided because, "in subbing out this type of work routinely what we do is just get a price to do the task at hand. So, how the contractor chooses to formulate that price and how they choose to use labor is strictly up to how they want to execute that particular task." Gonzalez explained the Company did not provide labor rates for "non-stop gap" work because it treated such information as confidential between the Company and its vendors and to make such information public would not be

appropriate. Gonzalez further explained the Company does not have labor rates for the subcontractors because, "We can't tell what is the actual labor rate or the fee being paid to the associate of the contractor." The work, according to Gonzalez, "is based on the task at hand, it's a full price and how the contractor chooses to execute that, that's his call. It includes materials for the job and doesn't delineate any labor hours."

As to "stop-gap" work, which Gonzalez described as the Company needing a laborer to help perform day-to-day work, as opposed to someone on a special project, the Company has and does provide the Union, the hourly rates for those subcontractor employees. Gonzalez added that the hourly price the subcontractor provides is "full loaded" in that it includes the subcontractor's level of profit, overhead, insurance, and related items. The information does not specifically indicate what a subcontractor employee is actually paid.

While the essential facts here are, for the most part, not in dispute; it is nonetheless helpful to briefly speak to credibility determinations. I am persuaded Company Facilities Manager Gonzalez testified truthful. I was impacted by impressions I formed as I observed him testifying. He exhibited an excellent recall of facts, and, on exhibits he was questioned about or references were made to, support the accuracy of his testimony. I decline to rely on the testimony of Union Representative Kaniecki that is contradicted by other witness(es) or is in conflict with documentary evidence.

III. Analysis, Discussion, and Concluding Findings

The issue here, is, as alleged in the complaint, whether the Company violated Section 8(a)(5) and (1) of the Act, by since, on or about, June 5, failing and refusing to furnish the Union information, requested on May 15, concerning subcontracting and the filling of "open" maintenance jobs at the Company's Somerville, New Jersey facility. The Union's May 15 request, from which the complaint allegations are drawn, states in pertinent part, "The Union has filed a grievance (D1408) regarding subcontracting and the filling of 'open' maintenance jobs at the [Company] . . . The information requested is concerned with 'maintenance subcontractors' working at the [Company.]"

Pursuant to Section 8(a)(5) of the Act, an employer is obligated to provide the union, upon request, relevant information it needs to properly perform its duties as the employees' bargaining representative. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967) (citing *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152 (1956)). This includes a decision by the union to file or process a grievance. *Beth Abraham Health Services,* 332 NLRB 1234 (2000). The duty to supply information turns upon the circumstances of the particular case. *Detroit Edison v. NLRB,* 440 U.S. 301, 303 (1979). When the union's requested information pertains to employees within the bargaining unit, the information is presumptively relevant and the employer must provide it. Where the requested information is not presumptively relevant, it is the union's burden to demonstrate relevance. *Disneyland Park,* 350 NLRB 1256, 1257 (2007). A union satisfies its burden by demonstrating a reasonable belief, that is also supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra. The Board in *Disneyland Park,* at 1258 stated:

> Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant. Therefore, a union seeking such information must demonstrate its relevance. (Case citations omitted.)
>
> The Board uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. Id. To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information or, (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. See *Allison Co.,* 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018–1019 (1979), enfd. in relevant part 615 F.2d 1100 (8th Cir. 1980). Absent such a showing, the employer is not obligated to provide the requested information

Here the government concedes information about subcontracting agreements including those relating to bargaining unit employees' terms and conditions of employment do not constitute presumptively relevant information. Thus, a union seeking such information must demonstrate its relevance.

Before accessing whether the Union here met its burden it is helpful to review what information was actually provided to the Union by the Company in response to the Union's May 15 information request. The Company provided the Union in excess of 100 pages of information related to subcontracting at its facility for pertinent times. Included in the provided information were the notices of subcontracting and meeting minutes related thereto. This information was distributed to all, both Company and Union, subcontracting committee members. Spreadsheets from vendors (subcontractors) were provided where the work being performed was of a "stop-gap" nature. The Company also provided the unit seniority list asked for by the Union in its June request for information. Work request notifications distributed at the subcontracting committee meetings, and provided to the Union pursuant to the Union's May 15 request, specifically included: the name of the requesting official; each request "id" number; the requestor's email address, department, and telephone number; the location where the work was to be performed; the type of work requested; the craft skill(s) required; the date for the work; the reasons for the work; and, an indication whether the work was "capital" or "non-capital;" along with a description of the work to be performed and an estimated number of work hours to accomplish the task.

Union Representative Kaniecki, specifically identified information he concluded the Company had not provided in response to his May 15 request. Those items are: 1) the exact nature of the work being performed by the subcontractors; 2) the exact number of hours worked by or the labor rates paid to subcontractor employees; and, 3) the actual contracts between the vendors (subcontractors) and the Company.

I find, as explained hereinafter, the Company was not obligated to provide the information the Union contends was not provided. The relevance of the nonunit information

was not established and the information's relevance was not apparent to the Company from the surrounding circumstances.

I am persuaded no credible evidence was presented that the Company's actions related to subcontracting violated the parties collective-bargaining agreement. The Company had the "exclusive" and "inherent right" to "subcontract" work; to establish the "amount of work to be subcontracted;" and to the "expenditure of funds in whatever amount and for whatever purpose" it deemed appropriate and that subcontracting "shall not at any time be subject to collective bargaining, or review in accordance with the grievance and arbitration procedure provided in this Agreement." The Union agreed that "new work," "general construction," and "peak maintenance loads" will "normally be sub-contracted" and there is no showing the Company violated the parties agreement by sub-contracting any work.

The Union contends the exact nature of the work to be performed was not set forth in the subcontract notifications provided to the Union; however, the evidence establishes otherwise. For example, the contractor notification of December 7 describes the work as moving furniture and then elaborates the work entails providing a desk or table in the contract administration cage located in the old cafeteria basement. Other contract notifications describe various work assignments to be performed by subcontractors as: installing a window in a door in a specifically identified office; constructing a wall with glass inserts dividing a specifically described room into two rooms; striping wall paper and painting a specific area of the facility; a pipefitter was needed to repair a burner on a hot water heater; repairing a specific leaking water line in a specific location; making the rear door on the acid dock functional and removing old fencing on the outer door platform; performing parking lot line striping for parking stalls, handicap parking, visitor parking, yellow cross hatching and directional arrows; and, numerous emergency repair subcontractor notifications that specifically described items or equipment to be repaired as well as annual subcontracting of facility repairs described specifically and in detail in the subcontractor notifications. The fact Union Representative Kaniecki may not have fully reviewed the subcontractor notifications provided the Union, or, the fact the Union did not always send or provide a representative at the subcontractor meetings does not require a different conclusion here. The information that was provided set forth, in detail the type work to be performed. Simply stated the Union has been provided the exact nature of the work to be performed by subcontractors.

Information regarding the exact number of subcontractor employees on site and the exact rates they are paid are inextricably intertwined and I address together the obligation to provide such information. The Company does not consider or track the number of employees a subcontractor utilizes to complete a task or project, but rather, pays a price for the completion of a task or job and leaves to the subcontractor's discretion the number of employees it will utilize to accomplish the task. The Company does not track or keep records of the number of subcontractor employees on its facility. The same is true for total hours worked by subcontractors per week. The Company does not determine or keep the total hours worked by subcontractors per week because hours worked is left to the subcontractors discretion because the Company's interest is in a completed task, job, or project. The Company does keep, and provided the Union, hours worked when the subcontractors performed "stop-gap" work where worker(s) simply filled in for absent regular employee(s). With respect to labor rates, again the

credited evidence establishes the Company does not keep, track, or have labor rates the subcontractor employees are paid because the contracts or purchase orders with subcontractors are for specific jobs, projects or tasks to be accomplished for a price, and that price includes materials, insurance, profit, and related items, and, the Company does not break out the labor rates the subcontractors pay its employees. These requests all center around costs and the evidence establishes costs was not one of the factors the Company considered in deciding whether to subcontract work. Sub-contracting costs would be relevant, and such information required to be provided, if, the Union had shown or demonstrated the Company somehow justified its subcontracting on costs. Here no such showing was made.

The evidence demonstrates the actual contracts between the Company and its subcontractors or vendors has never been provided to the Union. Gonzalez credibly testified costs have never been a factor in determining whether to subcontract work nor has the cost of using bargaining unit employees versus using subcontractor employees been a consideration in deciding whether to subcontract any jobs, tasks, or projects at the Company. The only time cost is a factor is when the Company has more than one subcontractor seeking a particular job, task, or project; or, when the subcontractor is asked to start a project immediately rather than being given lead time such as a week or more to start a project. Again as cost was never a factor in subcontracting work here; the Company was not obligated to furnish cost type information to the Union.

I now address other specifically raised contentions of the government and Union. The government asserts the Union needed the information to protect bargaining unit work in light of the Company's ever increasing reliance on subcontracting and the ever shrinking bargaining unit work. First, the Company had a contractually negotiated right to subcontract work. The collective-bargaining agreement, in pertinent part, states the Company shall determine as one of several "exclusive prerogatives," "the amount of work to be subcontracted; provided, however, that no such action shall be taken to discriminate against, or avoid bargaining with the union." The parties agreement also states that "exclusive prerogatives," such as subcontracting, "shall not at any time be subject to the collective bargaining agreement, or to review in accordance with the grievance and arbitration procedure provided in this Agreement." Further the parties agreement states, "It is agreed that the Company has the inherent right to sub-contract" work and specifically that all "new work," "general construction," and "peak maintenance" work will "normally be sub-contracted." Second, the government presented no valid evidence the Company violated the parties collective-bargaining agreement by subcontracting work, or that it had improperly subcontracted new work, general construction, and/or peak maintenance work, or that its contracting those types of work had caused an erosion of bargaining unit work. The government only presented evidence the Union had observed a continued presence of subcontractor employees at the facility; however, the Union was unable to identify whether the subcontractor employees it observed were performing work specifically permitted by the parties collective-bargaining agreement or not. There was no showing that any "non-peak" work was wrongfully subcontracted nor was there any showing, under the circumstances here, to explain the relevance of the requested subcontractor information. No showing has been established that subcontracting caused a reduction in unit work, especially as it relates to the 11 unit employees discharged in December 2011. It is undisputed those 11 unit employees were discharged for stealing time. The Company utilized "stop gap" contractor employees to fill in

for the employee shortage caused by the termination of the 11 unit employees until full-time permanent unit employees could be hired and trained. The Company made a determination after utilizing the equivalent of 6 subcontractor employees that it only would and did hire 6 permanent full-time unit employees to replace the 11 terminated for stealing time. This does not establish a showing that subcontracting caused a reduction or erosion of unit work related to the 11 terminated employees or the number hired to replace them. It would appear that if one or more of the 11 terminated employees "swiped" employee cards of others as being at work, when in fact, they were not, would tend to indicate, as the Company concluded, it did not need to replace all 11 of the terminated unit employees in order to get the work accomplished.

The Union's contention it needed the nonprovided subcontractor cost-related information (discussed earlier above) including the actual vendor contracts to, as Union Representative Kaniecki stated, "put together a comprehensive plan for negotiating with the Company during bargaining" does not establish its relevance here. At the time of the information request in May/June there were no ongoing contract negotiations and the parties collective-bargaining agreement would not expire for an additional 2 years or until June 2014. There was no showing that contract negotiations were even likely to occur anytime in the near future. Thus, contract negotiations were too far in the future to trigger a production of the information at the time requested here. Union Representative Kaniecki contended he "need[ed] to be able to explain to the Company why it's more cost effective to have bargaining unit members performing this work rather than outside contractors" does not trigger, in the circumstances here, an obligation on the Company to furnish the information. First, the Company could subcontract work. Second, the Company established the cost of subcontracting was never raised with the Union as a factor it utilized in deciding whether to subcontract work at the facility. Third, at best this information could be utilized for contract negotiations; however, negotiations were not scheduled to take place for at least 2 years. Stated differently, the government failed to establish the Union raised concerns related to timely contract negotiations that would trigger an obligation on the part of the Company to supply the requested information not already provided to the Union.

For this reasons discussed above, I conclude and find that the allegations the Company violated Section 8(a)(5) and (1) of the Act by, since on or about June 5, failing and refusing to provide the Union with certain information it requested on May 15 should be dismissed.

Conclusions of Law

1) The Company, Ethicon, a Johnson & Johnson Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2) The Union, Local 630, New York New Jersey Regional Joint Board, Workers United, SEIU, is a labor organization within the meaning of Section 2(5) of the Act.

3) The evidence does not establish the Company committed the violations alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, DC, May 28, 2013.

William Nelson Cates
Administrative Law Judge

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.