

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22

ETHICON, A JOHNSON & JOHNSON COMPANY

AND

Case 22-CA-089085

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

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

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## **PRELIMINARY STATEMENT**

Administrative Law Judge (“ALJ”) William Nelson Cates issued a decision in this case May 28, 2013. The ALJ made an error of law in his finding and conclusion regarding the allegation that Respondent unlawfully refused to provide information related to subcontracting and the filling of “open” maintenance jobs at Respondent’s Somerville, New Jersey facility.

The ALJ correctly stated that an employer is obligated to provide the union, upon request, relevant information it needs to properly perform its duties as the employees’ bargaining representative. The ALJ further correctly stated that requested information pertaining to subcontracting agreements, even those relating to bargaining unit employees’ terms and conditions of employment, is not presumptively relevant and a union seeking such information must demonstrate its relevance. However, the ALJ erred in placing a too restrictive standard as to relevance upon the Union. As a result of this incorrect interpretation of the law, the ALJ then erred in dismissing the instant charge.

## **STATEMENT OF THE CASE**

Pursuant to a charge in Case No. 22-CA-089085 filed by Local 630, New York New Jersey Regional Joint Board, Workers United, SEIU (“Union”), on September 12, 2012, the Regional Director issued a Complaint and Notice of Hearing. The Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by, since on or about June 5, 2012, refusing to furnish the Union with the information requested by letter dated May 15, 2012. A hearing was held before ALJ William Nelson Cates on March 13, 2013.

Respondent is a corporation engaged in the manufacture and the nonretail sale of sutures and other innovative products for wound closure, general surgery, biosurgery, women's health and aesthetic medicine. The Union represents for the purposes of collective bargaining a unit of all wage employees of Respondent within the unit certified by the National Labor Relations Board on February 19, 1944 and October 29, 1959. This recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective by its terms from June 15, 2009 through June 14, 2014.

The current collective-bargaining agreement contains a subcontracting agreement. This agreement provides, *inter alia*, that normally all new work, general construction and peak maintenance loads will normally be subcontracted. "Non-peak" maintenance loads are handled by bargaining unit members; non-peak maintenance loads are not subcontracted. The agreement does not limit the types of information that can be requested from Respondent in connection with subcontracted work to be performed at the facility. Nor has the Union ever signed any agreement limiting what types of information it can request in probing the validity of Respondent's subcontracting, or waiving its right to receive information regarding Respondent's subcontracting of unit work. While issues regarding subcontracting cannot be resolved through arbitration, the Union can resolve these types of issues through the parties' grievance procedure and the National Labor Relations Board.

There are approximately 1200 or so people working at Respondent's facility of which approximately 50 people are unit employees. Some of these unit employees work in the production plant where surgical products are manufactured. In addition to these employees, the Union also represents maintenance employees that service the building

itself and some skilled machinists. The crafts include electricians, instrument men, plumbers, carpenters, pipefitters, tool crib attendants, painters, machinists and mechanics. In total there are presently approximately 16 craft unit employees.

In addition to the unit employees, there are several contractors and subcontractors working at all times at the Respondent's Somerville, NJ facility. The subcontractors do the same types of work as the craft unit employees except that they are supposed to be doing "new work, general construction and peak maintenance loads." They work at the facility and they engage in all the same craft skills as do unit employees. The work of the subcontractors is often identical to the work of unit employees. It is often difficult for the Union to distinguish subcontractor's employees from unit employees. In this regard several subcontractor employees often wear T-shirts with the Ethicon logo on it as do unit employees

In the last 5 years there has been a substantial decline in the number of bargaining unit employees employed by Respondent at its Somerville, NJ facility. The Union is concerned that this decline is due to the increased presence of contractors and subcontractors at Respondent's Somerville, NJ facility.<sup>1</sup> Thus, there are presently three times as many subcontractor employees as unit employees working at Respondent's Somerville, NJ facility.

At relevant times herein, Gene Kaniecki, a Union representative, received information from shop stewards, the Union president and designated Union

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<sup>1</sup> On December 16, 2011, the Employer terminated 11 bargaining unit maintenance employees for theft of time. On March 15, 2012, the Union initially filed a grievance on these discharges, as well as Respondent's failure to post the jobs of the discharged employees. Besides its concern for the discharged employees, the Union filed the grievance to determine if the unit work that had been done by the discharged employees was being subcontracted out in violation of the parties' contract. While this grievance was ultimately withdrawn, the Union explained that it was its intention to continue addressing concerns regarding subcontracting.

representatives about the difficulty in obtaining information regarding subcontracting at the subcontracting meetings. Mr. Kaniecki became further concerned that Respondent might be subcontracting unit work when advised that the Employer might “not be filling all eleven positions since it believed that the past employees were inefficient in performing their jobs...” Moreover, the Union viewed that Respondent’s possible use of subcontractors to fill some of the discharged employees’ positions as a possible violation of the collective-bargaining agreement that could not continue, especially with so many Union positions vacant. Kaniecki reasonably believed that the Respondent’s position was that the Union employees had performed “inefficiently” and that management was assessing its current staffing needs.

As a result of its concerns, the Union, by Gene Kaniecki, sent a request for information dated May 15, 2012 to Respondent. In that request, Kaniecki asked Respondent to provide the following information for each of six specific subcontracting companies Ethicon used to perform maintenance work: (1) the exact nature of the work being performed by the subcontractor; (2) the number of the subcontractor's employees at the Ethicon facility; (3) the total hours worked by the subcontractor's employees; (4) the labor rates for each of the subcontractor's employees; and (5) all the contracts and agreements between the subcontractor and Ethicon.<sup>2</sup>

The Union asked for information on these companies as they all maintain a constant presence on the Ethicon campus. The testimony establishes that the Union needs this information to ascertain the exact nature of the work being performed to determine if the subcontractors are performing the same kind of work that should be done by the

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<sup>2</sup> The subcontractors referred to in this information request are: (1) P Lepore and Sons, Inc., (2) Electrical Installation and Design, Inc., (3) PJM Mechanical Contractors, (4) Cyma Builders and Construction Managers, LP, (5) United Technologies Carrier and (6) Monsen Engineering Co.

bargaining unit such as painting, electrical work, plumbing etc. and to put together a comprehensive plan for bargaining with the Employer in the future. The Union claims that this information is necessary to do a comparative analysis regarding labor rates to craft meaningful proposals for the next contract negotiations. The costs would be in the contracts between the subcontractor and Respondent and would show exactly what type of work was being performed by the subcontractor. The Union needed this information to be able to explain to Respondent why it is more cost effective to have bargaining unit members perform this work rather than outside contractors. The Union carefully limited the data to be provided from December 1, 2011 until May 15, 2012 to test the bona fides of Respondent's claim that it did not need to replace all 11 terminated employees.

Respondent never provided the Union with information pertaining to the exact nature of the work being performed by the subcontractors; the exact number of hours worked by the subcontractor employees; the labor rates paid subcontractor employees; nor the actual contracts between the vendors (subcontractors) and Respondent. Respondent admits that it has not provided information related to the cost of subcontracting, such as specific labor rates and/or contracts and agreements between the Respondent and its subcontractor, claiming that such information is irrelevant. While Respondent provides a general description of the nature of work subcontracted in its monthly subcontracting notifications to the Union, it does not provide a specific description that would be found in the contracts between Respondent and its subcontractors and only provides an estimate of the hours required to perform various tasks, not the actual hours worked, or the costs of those hours. In some instances, the

notifications did not even specify the exact number of subcontractors on the premises. nor the exact nature of the work that was being subcontracted.

While the ALJ credited the Respondent's assertion that it did not rely on labor rates in making its decision to subcontract, its own "Sub-Contractor Notification Requests" belie this assertion. Thus, in some of documents provided to the Union at the subcontracting committee meetings as found in General Counsel' Exhibit 8, subcontractor Facilities Engineering refers to Respondent's interest in its "associated labor rates." Many of the items listed in the "Sub-Contractor Notification Requests" include jobs requiring bargaining unit skills like painting, pipe repairs etc. Respondent also did not provide the Union's request for the contracts and agreements, rather calling them "information that is proprietary and confidential to the Company" and "burdensome to collect." However Respondent presented nothing to the Union in support of its assertion that the information is confidential or burdensome to collect

### **ISSUES PRESENTED**

1. Whether the ALJ erred in failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully refusing to furnish the Union with the information requested by it in its letter dated May 15, 2012?
2. Whether the ALJ erred by recommending to dismiss the charge, by failing to recommend an Order that required Respondent to provide the information requested by the Union in its letter dated May 15, 2012 and by failing to require Respondent to cease and desist from refusing to provide relevant information requested by the Union?

## ARGUMENT

**A. The ALJ erred as a matter of law by finding that the relevance of the non-unit information was not established and the information's relevance was not apparent to the Respondent from the surrounding circumstances.**

While the information request here seeks information about items outside of the unit, and thus is not presumptively relevant, the Union may overcome the presumption by showing its impact on unit employees. Thus, the Board has found that once the Union establishes the relevance of this type of information to a legitimate statutory purpose, the Union is entitled to this information. *See, Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266 (1955). This requirement is not unduly restrictive. A union need only meet a liberal "discovery-type standard," that is, a "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." *NLRB v. Acme Industries Co.*, 385 U.S. 432, 437 (1967); *Pittston Coal Group, Inc.*, 334 NLRB 690, at slip op. 3 (2001), and cases cited therein. If the standard is met, the information must be produced. *Super Valu Stores*, 279 NLRB 22 (1986).

Here, in the face of substantial bargaining unit terminations, the Union had ample concern about Respondent's increasing reliance on subcontracting to perform various tasks around Ethicon's campus and tailored its information request accordingly. Thus, in view of Respondent's complex and varied practices of using subcontractors, the Union's information request is not unreasonable or irrelevant. *Wehr Constructors, Inc.*, 315 NLRB 867, 875 (1994). The ALJ thus erred in not applying the above cited cases to the instant matter.

**B. The ALJ erred by making a conclusion that no credible evidence was presented that the Respondent's actions related to subcontracting violated the parties collective-bargaining agreement.**

As noted above, there are ample reasons to believe that Respondent's actions related to subcontracting violated the parties' collective bargaining agreement. The Union has seen its bargaining unit substantially diminish over the last few years. While the Respondent has the right to subcontract some work, it is clear from the contract that it does not have the right to subcontract non-peak maintenance loads. Although Respondent has given the Union some documentation to show who was doing the work previously done by the 11 discharged employees, the Union does not have to rely on the word of the Respondent. It should have the right to review the subcontractors' contracts with the Respondent to see if the Respondent is subcontracting out work rightfully belonging to the Unit. Those contracts are the only reliable way for the Union to check this out.

**C. The ALJ erred in finding that the Union has been provided the exact nature of the work to be performed by subcontractors.**

There is no question Respondent provided the Union with information, but must the Union rely on the say so of the Respondent here? In this regard, the information provided had no documentation to substantiate its reliability. The Union had to rely on what the Respondent claimed was the exact nature of the work it subcontracted to the subcontractors. Since peak maintenance loads is work done by subcontractors and the work does not differ from the type of work done by unit employees doing non peak maintenance loads, there is no way for the Union to check the validity of the Respondent's information other than reviewing the contracts between Respondent and its subcontractors. It is the only way to find out the exact amount of work being

subcontracted. Thus the ALJ is assuming that the Union has been provided the exact nature of the work to be provided by subcontractors and the Union can only be sure it has received all the information by receipt of the contracts between the subcontractors and the Respondent.

**D. The ALJ erred in finding that the Union needed to, but failed to, establish that the Respondent somehow justified its subcontracting on costs.**

The ALJ cited no authority for this statement. Rather the case law, as noted above requires that the Union need only meet a liberal “discovery type” standard. *Pittston Coal Group, Inc., supra*. In any event as noted in the facts, the Respondent’s own “Sub-Contractor Notification Requests” contradict the ALJ’s finding in this regard. A review of the subcontractor notification requests provided to the Union contains only notations (without further explanation) referring to Respondent’s interest in the subcontractor’s “associated labor rates.” Further while the grievance herein was withdrawn, nothing prevents the Union from filing another grievance regarding subcontracting. The parties agree that before Respondent can subcontract peak maintenance loads, it must make sure that it has offered all reasonable and appropriate requested overtime to qualified unit employees. With costs information, the Union would potentially be better able to evaluate whether an arbitrator, on a given grievance, might find Respondent had offered all reasonable and appropriate overtime on non-peak maintenance loads. Thus, if the Union ascertains from the requested information that overtime costs on any specific subcontracting project would be substantially higher than the subcontractor rates it might well conclude an arbitrator would find the Respondent had offered all reasonable and appropriate overtime to unit employees. The Union might then not wish to pursue such a grievance. Thus the requested information is necessary for

and relevant to the Union for evaluating grievances. See *U.S. Steel Corporation, Minnesota Ore Operations*, 2005 WL 76221 at page 12 (N.L.R.B. Div. of Judges)

**E. The ALJ erred in finding that the government presented no valid evidence the Respondent violated the parties' collective bargaining agreement by subcontracting work, or that its contracting those types of work had caused the erosion of bargaining unit work.**

The ALJ cited no case law requiring that the government must present valid evidence of this kind. Further, the Union established the need for information related to the cost of the subcontracting to evaluate the propriety and reasonableness of the Respondent's increasing reliance on subcontracting in light of the shrinking bargaining unit and the Respondent's claim that it did not need to replace all 11 employees discharged in late 2011. Maintaining a viable bargaining unit is certainly an obligation of the Union. See *Globe Stores, Inc. et. al.*, 227 NLRB 1251 (1977). In fact, "the Board has frequently required an employer to provide financial information to a union where such information has proven relevant and necessary for the union to pursue its contractual obligations and/or determine whether to take a contractual issue to arbitration." *Island Creek Coal Company*, 289 NLRB 851, 860 (1988). See also *U.S. Steel Corporation, Minnesota Ore Operations, supra*.

**F. The ALJ erred in finding that no showing has been established that subcontracting caused the reduction in unit work, especially as it relates to the 11 unit employees discharged in December 2011.**

Union representative Gene Kaniecki testified at the hearing that unit work has been eroding steadily over the past few years while the number of subcontractors has steadily increased. The Employer does not deny this fact. The record also established that the subcontractors do the same kind of work as do unit employees. The only logical conclusion from these facts is that the subcontracting may have something to do with the

erosion of the bargaining unit which the Union has the right to investigate through their information request.

**G. The ALJ erred in finding that the Union's contention it needed the non-provided subcontractor costs-related information including the actual vendor contracts to put together a comprehensive plan for negotiating with the Respondent during bargaining does not establish its relevance here.**

As noted above, maintaining a viable bargaining unit is an obligation of the Union. Respondent does not deny that it has been increasingly relying on subcontracting to perform essential functions at its place of business. Being able to evaluate cost related information on subcontracting can allow the Union to come up with proposals to dissuade Respondent from its increasing use of subcontractors in its business. Whether it is 2 months or 2 years before the next negotiations is irrelevant. Neither the ALJ nor Respondent cites any case law to the contrary.

Moreover, The Union did not waive its right to this kind of information. There is no contract provision or agreement where the Union waived this right. This is made abundantly clear by comparison to where the Union explicitly waived it right to other information in other parts of the contract. *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (1983).

Therefore as this information would help the Union draft proposals to address the problem of increasing subcontracting, it is relevant and should be produced.

**H. The ALJ erred in failing to recommend that the Board order Respondent to cease and desist from refusing to provide the Union with information requested in its May 15, 2012 letter and erred in concluding that the evidence does not establish Respondent committed the violations alleged in the complaint.**

In *Trustees of Boston University*, 210 NLRB 330, 333 (1974), the ALJ noted that:

It is now settled law that the duty to bargain in good faith imposed upon an employer by Section 8(a)(5) of the Act includes the obligation to provide the employees' representative with information relevant and reasonably necessary to the intelligent performance of its function as bargaining agent.<sup>3</sup> Since "the duty to bargain," as the Supreme Court has observed, "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement,"<sup>4</sup> the employer's obligation to furnish information extends with equal force to material needed by the Union for the effective administration of an existing contract and the processing of grievances thereunder even through arbitration.

Respondent admitted that it is in receipt of the May 2012 request for information and that it did not provide the Union with all of the information requested. While Respondent provided the Union with a substantial amount of information, it is not entitled to decide what information is relevant to the Union's representative needs and what is not. *Dodger Theatrical Holdings Inc.*, 347 NLRB 953, 972 (2006). The cost information is critical for the Union to evaluate the propriety and reasonableness of the Respondent's increasing reliance on subcontracting to perform maintenance work in light of the shrinking bargaining unit and the fairly recent discharge of 11 Union members.

The information requested is specific and discrete; it pertains to a period of time not too distant from the date of the request and it asks the Respondent to provide information that would be kept in the ordinary course of business, i.e. the contracts between Respondent and its subcontractors. If the specific labor rates are not found in the contracts, it would not be burdensome for the Respondent to obtain this information from its subcontractors. Respondent has provided no evidence that it would be burdensome. See *Public Service Company of Colorado*, 301 NLRB 238 (1991)

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<sup>3</sup> *N.L.R.B. v. Acme Industrial Co.*, 385 NLRB *supra*. at 435-436 (1967); *The Prudential Insurance Company of America v. N.L.R.B.*, 412 F. 2d 77, 81 (C.A. 2), cert. denied 396 U.S. 928 (1969); *The Timken Roller Bearing Company v. N.L.R.B.*, 325 F. 2d 746, 750 (C.A. 6 1963), cert. denied 376 U.S. 971 (1964).

<sup>4</sup> *N.L.R.B. v. Acme*, *supra*, 436.

The Union is not barred from access to the information by the parties' collective bargaining agreement.

The Respondent has not met its burden in establishing any of its alleged defenses. Thus any claim that production of the information is either confidential or burdensome must also fail. The law is clear that an employer who claims that requested information is confidential must demonstrate that the information is indeed confidential and must make a showing that the Union would improperly disclose that information. See *Island Creek Coal Co., supra*. Further, even where the Respondent has shown that the requested information is confidential, it is a violation of the Act "for an employer to refuse to make information available where there is no evidence that would show that if the information were made available its confidentiality would, in some way, be abused." *Island Creek Coal Co., supra* at 859. Here, there has been no indication that the Union will improperly disclose any of the requested information. Thus, as long as the information had "potential relevance to the [employees'] grievance [it] must be supplied to the Union as their bargaining agent." See, *Trustees of Boston Univ.*, 210 NLRB at 333. Therefore providing the information is proper here where Ethicon "has failed to adduce any evidence which would show that, were the [requested information] made available to the Union, it would in any way be misused." *Designcraft Jewel Industries, Inc.*, 254 NLRB 791, 798 (1981); see also *Island Creek Coal Co.*, quoted and cited above; *WCCO Radio, Inc.*, 282 NLRB 1199, 1206 (1987) and, as noted *supra*, the Respondent has not shown that the information requested is burdensome.

The Union's situation is distinguishable from *Connecticut Yankee Atomic Power Co.*, 317 NLRB *supra.* at 1266 (1995) where the employer therein had an unfettered right to subcontract unit work. The union in that case never filed a grievance concerning the employer's use of subcontractors. Here, contrary to Respondent's assertion, Respondent does not have an unfettered right to subcontract unit work, only new work, general construction and peak maintenance loads. There is nothing in the contract that says that nonpeak maintenance loads may be subcontracted. The Union has a statutory duty to protect nonpeak work from being subcontracted.

Therefore as Counsel for the Acting General Counsel has proven her case the ALJ should have found a violation and included a cease and desist from refusing to provide the Union with information requested in its May 15, 2012 letter.

**I. The ALJ erred in recommending that the complaint be dismissed.**

As the Acting General Counsel established its case as shown above, the ALJ erred in recommending that the Complaint be dismissed. Rather the proper order here is to require the Respondent to provide all the information that had been requested by the Union on May 15, 2012. Respondent should also be ordered to cease and desist from refusing to provide information requested that is necessary for the Union to perform its duties as collective-bargaining representative of this unit of employees.

**CONCLUSION**

Acting General Counsel respectfully requests the Board to reverse the ALJ's findings, conclusions and recommended order as detailed above.

Dated at Newark, New Jersey  
July 9, 2013

Respectfully submitted,

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CERTIFICATION OF SERVICE

Copies of General Counsel's Brief to the Administrative Law Judge have been mailed today on the parties and counsel as follows:

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