

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

ETHICON, A JOHNSON & JOHNSON CO.

-and-

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

Case No. 22-CA-089085

**BRIEF IN SUPPORT OF
EXCEPTIONS OF CHARGING PARTY
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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The Charging Party, Local 630, New York-New Jersey Regional Joint Board, Workers United, Service Employees International Union, submits this Brief in Support of Exceptions to the Decision of the Administrative Law Judge, issued on May 28, 2013.

STATEMENT OF THE CASE

This case involves a bargaining unit that has, over the course of the past several years, been considerably reduced in size as more and more work at the employer's facility—Ethicon, Inc., a Johnson & Johnson Co. (“Ethicon” or the “Company”)—has been subcontracted to companies that have maintained a continuing presence at the facility.

Five years ago, there were approximately 100 employees that comprised the bargaining unit of Local 630, New York-New Jersey Regional Joint Board, Workers United, Service Employees International Union (the “Union”). Two years ago, the number of unit employees stood at approximately 77. Currently, there are approximately 50 bargaining unit members. (See Hearing Transcript (hereinafter “Transcr.”) at 19:22 to 20:1 and 23:6-13.) Part of the Union's concern regarding the use of subcontractors at the Ethicon facility stems from a side letter to the collective bargaining agreement which provides that Ethicon may subcontract the following types of work: (1) new work, (2) general construction, and (3) “peak maintenance loads.” (See General Counsel's Exhibit (hereinafter “GCX”) 2, p. 179.) “Peak maintenance loads” refers to work that would normally be performed by bargaining unit members, but due to a high volume of work, or an unforeseen increase in work, and the unavailability of unit employees to perform the work, “peak maintenance” tasks are subcontracted. (See Transcr. at 115:24 to 116:12.) According to the Union, a shrinking bargaining unit increases the likelihood of subcontracted “peak maintenance” work. This concern was heightened when, in December of 2011, 11 bargaining unit employees were discharged for theft of time.

In March of 2012, the Union filed a grievance against the Company alleging that Ethicon had failed to post the vacant positions created when the 11 bargaining unit employees were terminated. (See GCX-3.) In connection with its processing of the grievance, by letter dated May 15, 2012, the Union requested certain information about the subcontracting work being performed at the facility. (See GCX-5.) The Union identified specific subcontractors known to it and requested for each subcontractor: (1) the exact nature of the work being performed by the subcontractor; (2) the number of the subcontractor's employees working 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 of the contracts and agreements between the subcontractor and Ethicon. (*Id.*) The Union requested this information for the time period December 1, 2011 to the date of the letter.

Ethicon responded to the information request with a letter dated June 5, 2012 and with various documents, among them: (1) requests for subcontracting work that had been issued during the relevant period; (2) monthly communications of Ethicon's Subcontracting Committee, including meeting agendas and attendance sheets, and; (3) summaries showing hours of work performed by employees of certain subcontractors referred to in the Union's May 15, 2012 request for information. (See GCX-6 and GCX-8.) Ethicon did not provide the contracts and agreements between it and the subcontractors.

On September 5, 2012, the Union filed unfair labor practice charges alleging violations of Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act ("the Act"). The Union alleged that Ethicon failed and refused to bargain in good faith "by refusing to provide information about sub-contracting including the costs of sub-contracting." (See GCX-1.) On January 30, 2013 the General Counsel issued a complaint against Ethicon alleging violations of

Sections 8(a)(1) and 8(a)(5) of the Act. (*Id.*) On March 12, 2013, a hearing was conducted before Associate Chief Administrative Law Judge (“ALJ”) William Nelson Cates and post-hearing briefs in the case were exchanged approximately one month later.

At the March 12 hearing, when asked at one point why the Union needed the contracts between Ethicon and the subcontractors, Union representative Gene Kaniecki testified that the information was necessary for bargaining with Ethicon. Kaniecki explained that: “[W]ith contract negotiations approaching I need to know and be able to formulate a very constructed and articulate response or proposal to the company, trying to demonstrate to the company the rationale for hiring full-time employees rather than subcontracting out this work.” (See Transcr. at 45:1-7.) When asked again on cross-examination why the Union needed the information in the contracts between Ethicon and the subcontractors, Mr. Kaniecki explained that: “I need to do a comparative analysis, number one, regarding the labor rate so I can craft proposals that would be meaningful and that could be debated adequately during contract negotiations ...” (See Transcr. at 76:14-25.)

Despite the clearly direct and relevant connection underlying the Union’s request for the contracts and agreements between Ethicon and the subcontractors, the ALJ found that the requested information was somehow not relevant and erroneously concluded that Ethicon had not violated § 8(a)(5) of the Act.

QUESTIONS PRESENTED

1. Did the ALJ err when he found that Ethicon was not required to provide information requested by the Union regarding subcontracting—including the cost of subcontracting—because the information was irrelevant since Ethicon claimed not to have considered cost when it subcontracted bargaining unit work?

2. Did the ALJ err when he concluded that the Union did not need the requested information because there “were no ongoing contract negotiations and the parties[’] collective-bargaining agreement would not expire for an additional 2 years or until June 2014?” (See ALJ Decision (hereinafter “Decision”) at 14:12-14.)

ARGUMENT

A. The Standard Regarding the Obligation for an Employer to Furnish Information

The duty to furnish information is a well-settled one. See *N.L.R.B. v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956); *Stephens Media, LLC*, 356 NLRB No. 63, 43 (2011); *E.I. DuPont de Nemours & Co.*, 346 NLRB 553, 577 (2006) (“It is well settled that an employer, on request, must provide a union with information that is relevant to carrying out its statutory duties and responsibilities in representing employees.”). “An employer’s obligation to bargain in good faith includes the obligation to disclose to the employees’ collective-bargaining representative information relevant and necessary to its role as bargaining agent, including enforcing provisions of a collective-bargaining agreement and processing grievances.” *U.S. Steel Corp. Minn., Ore Operations*, 2005 WL 762211 (N.L.R.B. Div. of Judges March 31, 2005) (emphasis added) (citing *Republic Die & Tool Co.*, 343 NLRB No. 78 (November 19, 2004)).

“As a general rule, an employer must provide a union with requested information ‘if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties as the employees’ exclusive bargaining representative.’” *In re Crittendon Hospital*, 2002 WL 1336598 (N.L.R.B. Div. of Judges June 13, 2002) (citing *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967)); see also *Engineering Contractors, Inc. and ECI of Washington, LLC, Alter Egos*, 357 NLRB No. 127 (2011). “[I]f the information being sought relates to the terms and conditions of employment of employees represented by a union, the information is

deemed to be presumptively relevant and necessary, and must be produced, unless the employer can establish a lack of relevance.” *Crittendon Hospital*.

“The duty to furnish information may also extend to providing requested information related to non-unit employees especially where those employees perform unit work.” *U.S. Steel Corp.*, 2005 WL 762211. “For information requests relating to non-unit persons, the requesting party must show that there is a logical foundation and a factual basis for the requested information.” *Id.*; see also *Bogner Construction Co.*, 2002 WL 1454118 (N.L.R.B. Div. of Judges) (June 28, 2002).

“The standard for determining what information is ‘relevant and necessary’ is broadly construed, to encompass information that will probably be relevant and of use to the union in carrying out its statutory duties and responsibilities.” *U.S. Steel Corp.*, 2005 WL 762211 (citing *Republic Die & Tool*). “The burden to show relevance is ‘not exceptionally heavy.’” *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1160 (2006) (citing *Leland Stanford Junior Univ.*, 262 NLRB 136, 139 (1982)). A “Union’s burden is to show only a ‘probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.’” *KIRO Inc.*, 317 NLRB 1325, 1328 (1995) (citing *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)) (emphasis added); see also *New Jersey Bell Telephone Co.*, 289 NLRB 318, 329 (1988) (“In determining the parameters of relevance, the criteria used is a broad discovery type of standard; namely, whether the information requested is probably or potentially relevant.”) (emphasis added).

The court of appeals for the District of Columbia Circuit in *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. N.L.R.B.*, 598 F.2d 267 (D.C. Cir. 1979), described the relevancy standard as follows:

[T]he standard for assessing the relevancy of requested information to a bargainable issue is a liberal one, much akin to that applied in discovery proceedings ... Under the Federal Rules of Civil Procedure governing discovery, “relevancy is synonymous with ‘germane’”; and a party must disclose information if it has any bearing on the subject matter of the case ... Any less lenient rule in labor disputes would hamper the bargaining process.

Detroit Newspaper, 598 F.2d at 271 (citing *C. Wright & A. Miller*, Federal Practice & Procedure: Civil s 2008 at 48 (1970) (emphasis added); see also *Caldwell Manufacturing Co.*, 346 NLRB at 1160. Thus, “the sought-after evidence need only have a bearing upon the disputed issue.” *Venue Trading Co.*, 359 NLRB No. 106, at *5 (April 30, 2013). Consequently, “[t]he Board has repeatedly supported a union’s right to request information about workers outside of a unit, who are potentially diverting work from a represented unit.” *Venue Trading Co.*, 359 NLRB No. 106 at *7.

An employer’s obligation to furnish relevant information requested by a union “extends beyond contract negotiations and applies to administration of the contract, including grievance processing.” *Stephens Media*, 356 NLRB No. 63, 43 (emphasis added). That obligation is succinctly expressed in *Trustees of Boston University*, 210 NLRB 330 (1974):

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,” 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.

Trustees of Boston Univ., 210 NLRB at 333 (citing *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967)).

An employer should provide information requested by a union that is not presumptively relevant—but deemed relevant nonetheless—if the information assists the union in developing counterproposals to an employer’s proposals. See *Caldwell Manufacturing Co.*, 346 NLRB at

1160. Moreover, “[a] union is entitled [to relevant information] to verify an employer’s assertions.” *Finch, Pruyn & Co., Inc.*, 349 NLRB 270, 276 (2007). In *Wallace Metal Products, Inc.*, 244 NLRB 41 (1979), the ALJ found that an employer violated § 8(a)(5) when it repeatedly refused to provide a union with the employer’s “subcontracts” so that the union could verify assertions made by the company during negotiations. In keeping with the well-settled standard for furnishing such information, the ALJ wrote: “The Board has held many times that an employer is obligated to supply relevant requested information to assist the employees’ collective-bargaining representative in intelligently performing its functions of administering the contract, processing grievances, and conducting negotiations.” *Wallace Metal Products*, 244 NLRB at 48. The ALJ in *Wallace Metal Products* ordered the employer to provide the union with the requested subcontracting information. *Id.* at 51.

A union’s request of cost information from an employer that is related to subcontracting is not rendered irrelevant simply because the employer claims that it does not consider costs in making certain decisions. *See U.S. Steel Corp.*, 2005 WL 762211 (in that case, ALJ Cates, who rendered the erroneous decision in the instant matter, stated: “I reject the Company’s contention that by never raising cost as an issue in any contracting out matter, the contractor charge rates are irrelevant and unnecessary for the purpose of grievance evaluation.” (emphasis added)).

B. The Requested Information in This Case is Clearly Relevant

ALJ Cates determined that the Union was not entitled to the cost information it requested regarding what Ethicon paid subcontractors ostensibly because that information was not relevant since Ethicon never claimed that it made subcontracting decisions on the basis of cost. Clearly, according to the liberal standard established by the Board for the relevance of requested

information, the Union is entitled to the subcontracting agreements and contracts and information regarding the cost of subcontracting.

As noted above, Union representative Gene Kaniecki explained at the March 12 hearing that the Union needs the subcontracting information in order to be fully informed for negotiations. He testified that he “need[s] to know and be able to formulate a very constructed and articulate response or proposal to the company, trying to demonstrate to the company the rationale for hiring full-time employees rather than subcontracting out this work. (Transcr. at 45:1-7.) Knowledge of what Ethicon pays subcontractors to do work would allow the Union to be in a position to formulate bargaining proposals that may consequently reduce or obviate the need to rely on subcontractors for the work they currently perform. There is no question that this information has bearing on the issue of whether Ethicon is properly subcontracting bargaining unit work. The subcontracting information is obviously relevant to the Union’s duties as the representative of the bargaining unit employees at the Ethicon facility. While Ethicon may choose not to consider the cost of using subcontractors for certain work at the facility, the Union should have the opportunity to assess the cost of doing such work and should be in a position to present alternatives to subcontracting that work.

ALJ Cates in fact had come to the same conclusion the Union is advancing here in a previous case with a fact pattern remarkably similar to the facts in this case. In *U.S. Steel Corp.*, 2005 WL 762211, ALJ Cates determined that the employer violated the Act when it refused to provide the union with the rates that subcontractors were charging to perform certain bargaining unit work. In that case, the employer “contract[ed] with outside vendors or entities to perform numerous work projects at its ... facility,” and like the Union and Ethicon, the parties in *U.S.*

Steel Corp. “devote[d] an entire section in their collective-bargaining agreement to contracting out work.” ALJ Cates noted further that:

The guiding principle of their agreement regarding contracting out work is that the Company will use unit employees to perform any and all work, which they are, or could be, capable in terms of skill and ability of performing. The collective-bargaining agreement permits the Company to contract out certain bargaining unit work if the Company meets certain contractually itemized exceptions to the use of unit employees for production and maintenance work. Certain of the exceptions under which the Company may contract work to outside entities includes new construction and surge maintenance work. New construction work is described as work associated with significant projects involving the installation, replacement or reconstruction of equipment or production facilities. Surge maintenance is described as maintenance and repair work which is required, by bona fide operational needs, to be performed on equipment or facilities where the use of outside entities would materially reduce the duration of the work and could not reasonable [sic] be performed by bargaining unit employees without delaying other work necessary to the Company’s operations. Even under those circumstances the Company must offer all reasonable and appropriate requested overtime on surge maintenance to qualified unit employees before it utilizes outside entities to perform the surge maintenance work.

U.S. Steel Corp., 2005 WL 762211 (emphasis added).

The “surge maintenance” work at issue in *U.S. Steel Corp.* is similar to the “peak maintenance” work performed by subcontractors in the instant case. The union in *U.S. Steel Corp.* requested the employer to provide the rates charged by the subcontractors used by the employer. Among the arguments made by the General Counsel in the *U.S. Steel Corp.* case for why the union was entitled to the requested information was as follows:

The Government also argues having contractor charge rate information allows the Union to determine cost to the Company of using a subcontractor on a particular job and to evaluate it against the cost to the Company of using bargaining unit employees on overtime. The Government recognizes that while cost may not be a limitation for subcontracting by the Company, the Government argues the Company is only privileged to contract out surge maintenance work, for example, provided it has offered all

reasonable and appropriate overtime to all qualified unit employees.

U.S. Steel Corp., 2005 WL 762211 (emphasis added).

Moreover, and perhaps most significantly, in *U.S. Steel Corp.*, “The Government also argue[d] [that] information on contractor charge rates is necessary and relevant to the Union for the purpose of proposing practical alternatives to subcontracting out unit work by the Company.”

The employer in *U.S. Steel Corp.* refused to provide the requested information, claiming, as Ethicon does here, that it had not considered the cost of subcontracting when it decided to subcontract the work in question and that “it has never attempted to justify any decision to contract out work based on the cheaper cost of doing so.” *U.S. Steel Corp.*, 2005 WL 762211. “Accordingly,” wrote ALJ Cates, “the Company assert[ed] contractor charge rates are neither necessary nor relevant for any of the Union’s stated purposes and as such it is not required to provide the information requested by the Union.” *Id.* Nevertheless, ALJ Cates’ conclusion was: “I reject the Company’s contention that by never raising cost as an issue in any contracting out matter, the contractor charge rates are irrelevant and unnecessary for the purpose of grievance evaluation.” *Id.* The ALJ found that the Company in *U.S. Steel Corp.* violated § 8(a)(5) and ordered that it provide the union in that case with the subcontracting information. *Id.* The same result should have been reached with respect to Ethicon.

Lastly, ALJ Cates’ decision reached the following erroneous conclusion in connection with the relevancy of the requested subcontracting information:

The Union’s contention [that] 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.

Decision at 14:9-16.

As noted above in the quote from *Trustees of Boston University*, “[s]ince ‘the duty to bargain’ ... ‘unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement,’ 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.” *Trustees of Boston Univ.*, 210 NLRB at 333 (citing *N.L.R.B. v. Acme Industrial Co.*) (emphasis added). It is, therefore, of no consequence that “there were no ongoing contract negotiations and that the parties[’] collective-bargaining agreement would not expire for an additional 2 years or until June 2014.”

By requesting the subcontracting information, including the cost of subcontracting, well in advance of the negotiation period, the Union was diligently “fulfilling its statutory duties as the employees’ exclusive bargaining representative,” *In re Crittendon Hospital*, 2002 WL 1336598 (N.L.R.B. Div. of Judges June 13, 2002), by gathering the data it would need to present a cogent and comprehensive bargaining position on the issue of subcontracting.

CONCLUSION

For the reasons stated above, the Union, the Charging Party herein, respectfully requests that the National Labor Relations Board grant its exceptions and find that Ethicon violated the Act when it refused to provide the requested information regarding subcontracting.

Dated: July 9, 2013
New York, New York

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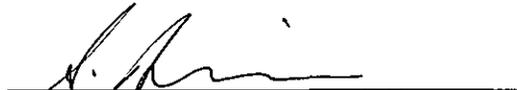
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CERTIFICATE OF SERVICE

I hereby certify that copies of the: (1) Exceptions of Charging Party to the Decision of the Administrative Law Judge and (2) Brief in Support of Exceptions of Charging Party to the Decision of the Administrative Law Judge, have been served electronically on this date, at the email addresses indicated below, upon:

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