

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

**UNITED UNION OF ROOFERS, WATERPROOFERS,
AND ALLIED WORKERS, LOCAL 162**

and

**Cases 28-CB-080496
28-CB-085690**

A.W. FARRELL & SON, INC.

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relation Board (the Board), the Counsel for the Acting General Counsel (General Counsel) submits this Answering Brief to the Exceptions filed by United Union of Roofers, Waterproofers, and Allied Workers, Local 162 (Respondent), to the Decision (ALJD) of Administrative Law Judge Robert A. Ringler (the ALJ) in this matter.¹

By its exceptions and the arguments in support thereof, Respondent seeks to have the Board ignore the record evidence and the well-reasoned determinations of the ALJ that Respondent unlawfully refused to provide and unreasonably delayed in providing necessary and relevant information to A. W. Farrell & Son, Inc. (the Employer), and seeks to overturn the ALJ's suggested Remedy and Order. Respondent filed several exceptions regarding the Employer's unfair labor practices to which the General Counsel takes no position.²

¹ The ALJD was issued on May 13, 2013.

² Gregory M. Gleine served as General Counsel in the CA case while Larry A. Smith and Nathan A. Higley served as General Counsel in the CB case. (ALJD 1 fn. 2) Accordingly, the exceptions considered here are exceptions 24-27, 30, 33, 35, and 40.

Respondent should prevail on its exceptions only if the Board chooses to ignore its well-established policy that unlawful actions are generally not excused by another party's unfair labor practices. Furthermore, to succeed on Respondent's exceptions regarding the Remedy and Notice, the Board would have to abandon its standard remedies and leave the employees without any identifiable remedy. Respondent's exceptions are without merit and should be denied in their entirety.

II. FACTS

A. Respondent's Operations

The Employer is a commercial roofing contractor in the building and construction industry. (ALJD 2:22-24) Respondent is a labor organization which entered into a collective bargaining agreement and a successor agreement with the Employer which were effective through July 31, 2010, and which covered Las Vegas and the surrounding vicinity.³ (ALJD 2:38-44, 3:1-5; JTX 105) Respondent and the Employer exchanged communications regarding a successor agreement including an April 16, 2010, Respondent notice to the Employer of its intent to begin negotiations to replace the prior agreement, and an April 26, 2010, Employer notice of its intent to terminate, modify or amend the agreement. (JTX 97; 98; 105) In 2010, Respondent met with the Employer and other contractors for convenience bargaining to negotiate terms of a successor agreement. (ALJD 5:6-10) The Employer refused to sign the agreement, and on April 28, 2011, it informed Respondent that it was terminating its collective bargaining relationship based on Section 8(f) of the Act. (ALJD 5:10, 16-19) An unfair labor practice hearing was held, and Administrative Law Judge Lana Parke issued a Decision and Order on December 28, 2011, holding that Respondent was the

³ GCX___ refers to General Counsel's Exhibit followed by the exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number. JTX ___ refers to Joint Exhibit followed by the exhibit number.

Section 9(a) representative of the unit, but did not hold that the Employer was required to sign the new contract. (ALJD 5:29-33; JTX 96)

B. Respondent's Demand to Bargain and Subsequent Information Requests

On August 10, 2011, the Employer asked for eight items of information including employee benefits and funds, annual reports, trust agreements, trust administration contracts, contracts to provide associated professional services to the plans or which establish or operate the plans.⁴ (ALJD 7:1-33) The information requests were repeated on August 25, and September 14, 2011. (ALJD 8; JTX 7; 9) Respondent answered on August 31, 2011, and on September 29, 2011, that the information was in the possession of the Trust Funds, and that Respondent would ask the Trust Funds to provide those documents. (ALJD 8; JTX 8; 10) The information was not provided in 2011.

On January 4, 2012,⁵ Respondent “demand[ed] negotiations and requests that you provide dates when your client will be available for such negotiations[,]” but made no claim that the Employer was required to simply execute an agreement. (JTX 13) Following Respondent's demand for negotiations, the Employer and Respondent exchanged a series of communications about information requests similar or identical to the August 2011 information request. These included renewed information requests on January 13, February 21, 28, March 9, June 25, July 12, 31, September 4, 11, 21, and October 9, in which the Employer repeated the earlier request and provided clarification on how the requests had not been fulfilled. (ALJD 8; JTX 13; 14; 22; 26; 29; 31; 32; 52; 61; 67; 77; 79; 85; 88)

⁴ The Trust Funds or plans include: the National Roofers Union, Employer's Joint Health and Welfare Fund; the National Roofing Industry Pension Fund; the Roofers and Waterproofers Research & Education Joint Trust Fund; and the Southern Nevada Joint Apprenticeship Committee. (JTX 15; 49; 51; 71; 72; 86; 88; 89).

⁵ All dates are in 2012, unless otherwise noted.

Respondent provided some of the requested information in piecemeal fashion including: on January 27 when it provided the summary plan description for the Health and Welfare Fund and demanded that the Employer sign an agreement; on June 17 and 19 when it sent the National Roofing Industry Pension Fund Trust Agreement and the Health and Welfare Fund and four amendments; on August 8 when it provided form 5500 for the Health and Welfare plan; on August 14 when it transmitted the Health and Welfare Trust Agreement; on September 4 when it sent the Apprentice and Journeyman Training Fund Trust Agreement. (ALJD 8; JTX 15; 49; 51; 71; 72; 86) Respondent provided limited details about what it had done to request the information. On February 24, Respondent stated that other documents “are maintained by the Trust Funds” and offered to contact the Trust Fund and ask for copies. (ALJD 8; JTX 25) On March 5, Respondent asserted that it had “asked the Trust Funds to provide the plan documents and other documents you have asked for.” (JTX 27) On June 15, it did not mention the earlier “request” to the Trust Funds, when it stated that “[w]e suggest you use this letter and forward it directly to the benefit plans and ask them for this additional information.” (ALJD 8; JTX 27; 48) On June 27, Respondent stated that “we will transmit your request directly to the Trust Funds and see if they are willing to provide the information.” (JTX 53) On July 27, Respondent forwarded the July 24 response from the National Roofing Industry Pension Plan to Respondent’s “June 6”⁶ [sic] request where it declined to produce any of the documents. (JTX 63) On August 22, Respondent asserted that the trustees of the Joint Health and Welfare Trust had not approved the request.⁷ (JTX 74; cf. JTX 58)

⁶ The July 24 communication incorrectly states the July 6 request as June 6. No other requests by Respondent to the other entities were offered into evidence. (JTX 63; Cf. JTX 58)

⁷ Respondent requested some of the information from the Joint Health and Welfare Fund on July 6. (JTX 58)

III. RESPONDENT'S EXCEPTIONS

A. Respondent's Violations for Failure to Provide Information (Respondent's Exceptions 24 to 27, 30)

Respondent argues that its failure to provide information was excused because of the Employer's actions. (RB 19) It asserts that the Employer's August 2011 information request was for the purpose of negotiation which was not required because a collective bargaining agreement was already in place, and that the ALJ incorrectly relied on the August 2011 information request at a time when the Employer had refused to recognize Respondent in violation of Administrative Law Judge Parke's decision. (RB 19) Additionally, it argues that its failure to provide information, or the delay in providing information is excused because it had previously requested the information from the Health and Welfare and Pension Trusts, which had denied the request. (RB 19-20) In support of this exception, it argues that the ALJ suggested that Respondent must compel the Trust Fund to provide the information or that it had to seek other means to provide the information. (RB 20)

There is nothing in the ALJ's decision which suggests that Respondent was required to compel the Trust Funds to provide the information or to seek other means to provide the information. To the contrary, it was the failure to provide relevant information for 5 to 13 months which was the basis for finding a violation. (ALJD 13:11-26) Respondent was required to respond in a timely manner and had a duty to provide the information absent a valid defense. *Leland Stanford University*, 307 NLRB 75, 80 (1992); see e.g. *Mary Thompson Hospital*, 296 NLRB 1245 fn. 1 (1989). Its delay in providing the information was unreasonable and was as much a violation as refusing to provide the information. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). Respondent's actions are not excused by the fact that it provided some of the information months after the requests. *Teamsters Local*

921 (*San Francisco Newspaper*), 309 NLRB 901, 902 (1992). Although Respondent eventually requested information from the Trust Funds,⁸ it failed to explain the steps it had taken to obtain the information or why it could not provide the information. It was obligated to request information from the Trust Funds, and to have done so much earlier than July 6, almost a year after the initial request and six months after Respondent's demand to bargain. See *Firemen & Oilers Local 288 (Diversity Wyandotte)*, 302 NLRB 1008, 1008-1009 (1991); cf. *Pittston Coal Group, Inc.*, 334 NLRB 690, 692 (2001) (finding no violation for the respondent's good-faith effort to persuade the third party company to provide names of employees hired off the street pursuant to a grievance where there was nothing more the respondent could reasonably be required to do to satisfy its bargaining obligation). It was obligated to make a reasonable effort to secure available information and explain the reasons for the continued unavailability. *Garcia Trucking Service, Inc.*, 342 NLRB 764, fn. 1 (2004) (rejecting the respondent's assertion that the subcontracting information was unavailable where the respondent "made no effort to obtain the information from the subcontractors themselves").

Respondent incorrectly asserts that the ALJ relied on the August 2011 information request to find a violation, and that it was not required to provide information until at least April 2012. The evidence demonstrates a series of information requests that were a result of Respondent's refusal to provide the information, and the failure to provide a complete response to a number of information requests, a refusal that continued for months after April 2012. Respondent's argument that the information requests were for unnecessary contract

⁸ The "request" arguably suggested to the Trust Funds that they should refuse to provide the information. "[W]hether [the trust fund] is willing to provide the additional information [] or where the trust has a policy of not providing this under these circumstances. We do not believe that the Local has an obligation to provide this information if it does not have it. We only believe that there is an obligation to ask the trust whether it will provide it." (JTX 58)

negotiations ignores the fact that it was Respondent that demanded negotiations on January 4, prior to the applicable information requests upon which a violation was found. Respondent's demand for negotiations, and the subsequent information requests, undercut its assertion that it was not required to provide the information solely because a contract was already in place. Respondent set the stage for negotiations, including the applicable information requests regardless of whether the Board ultimately decides that a contract existed at the time of the requests. If the Board decides that a contract existed, then Respondent acted at its peril when it demanded negotiations and subsequently failed to provide relevant information for negotiations.

Respondent argues that it is excused because the Employer has not complied in full with Administrative Law Judge Parke's decision, including failing to provide evidence that it posted a Board Notice or took other required affirmative actions. (RB 20) The ALJ did not find a violation for Respondent's bargaining conduct and excused its failure to bargain based on the Employer's failure to recognize Respondent as the Section 9(a) representative of the unit, but did not excuse the failure and delay to provide information. (ALJD 13:30; 14:22-30) Respondent essentially engages in finger-pointing, asserting that the Employer's failure to follow Judge Parke's decision excused its conduct. However, the Employer's and the Respondent's obligations stem from the parties' bargaining relationship under the Act, as opposed to an administrative law judge decision which remains pending before the Board. Respondent essentially argues that the Employer must have presently perfected its performance as ordered by Judge Parke before it was obligated to act. The failure to comply with a pending administrative law judge's decision, without more, is not a basis to excuse a party's unfair labor practices.

B. The ALJ's Remedy and Order (Respondent's Exceptions 33, 35, 40)

Respondent excepts to the Remedy, Order, and Notice, as applied to it, but states no reasons or case law in its brief in support of its exceptions other than those discussed above. By these independent objections, Respondent asks the Board to ignore its actions and give it a free pass. Respondent's argument is contrary to precedent as it wants the Board to ignore: 1) its unlawful actions; 2) the standard remedy the Board uses in addressing such violations; and 3) the only remedy which could potentially restore employee rights under the Act. Respondent's arguments lack merit and should be rejected.

IV. CONCLUSION

It is respectfully submitted that, based on the foregoing reasons, the credited record evidence, and applicable Board law, the Board should issue a Decision and Order adopting the ALJ's findings, conclusions, and recommended Order, and providing whatever other remedies deemed appropriate to address and remedy Respondent's violations of Section 8(b)(3) of the Act, including but not limited to electronic Notice posting.

Dated at Las Vegas, Nevada, this 10th day of July 2013.

Respectfully submitted,

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that the ACTING GENERAL COUNSEL'S ANSWERING BRIEF in United Union of Roofers, Waterproofers, and Allied Workers, Local 162 Cases 28-CB-080496 and 28-CA-085690, was served via E-Gov, E-Filing, and electronic mail, on this 10th day of July 2013, on the following:

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