UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CATHOLIC HEALTH INITIATIVES COLORADO d/b/a CENTURA HEALTH-ST. MARY CORWIN MEDICAL CENTER and COMMUNICATION WORKERS OF AMERICA, LOCAL 7774	Cases 27-CA-092767 27-CA-097152

RESPONDENT'S BRIEF IN RESPONSE TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

INTRODUCTION

Catholic Health Initiatives Colorado d/b/a Centura Health – St. Mary Corwin Medical Center ("Respondent"), by its attorneys, Kutak Rock LLP, respectfully submits this Answering Brief in response to the Counsel for the Acting General Counsel of the National Labor Relations Board's ("General Counsel") Brief in Support of Limited Exceptions to the Administrative Law Judge's ("ALJ") Decision and Order in this matter ("Exceptions Brief"), pursuant to the National Labor Relation Board's Rules and Regulations, section 102.46.

In the Exceptions Brief, the General Counsel objected to the ALJ's limited conclusion of law finding that the Respondent only violated Section 8(a)(5) and (1) of the National Labor Relations Act ("Act") by "failing to furnish information relevant to grievance processing." (Exceptions Brief, p. 7). The General Counsel argues that the ALJ should have applied his conclusion more broadly by stating that the Respondent violated Section 8(a)(5) and (1) by failing to furnish the Union with information more generally relevant to its performance of its functions. In support of this, the General Counsel cited the oft-quoted *NLRB v. Acme Industrial*

Co.[1] which states that an employer has a duty to furnish the Union with relevant information necessary to carry out the Union's duties. 385 U.S. 432, 437 (1966).

General Counsel's exceptions mischaracterize how the statutory obligation to provide a Union with relevant and necessary information to carry out its responsibilities interacts with both the facts of a particular case and with the applicable terms of a collective bargaining agreement. A conclusion that a Union has a statutory right to requested information is only triggered after a careful, specific, case-by-case analysis demonstrates that the Union has a legitimate need (i.e., one that relates to a legitimate Union duty or responsibility) for the information it has requested. *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

The General Counsel's analysis in the Exceptions Brief fails to show that, in this specific case, that statutory obligation should be triggered. Broad, bare assertions regarding relevance are not enough to trigger the statutory obligation. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). Instead of specifically showing why the Union needed the requested information in this particular case, the General Counsel asserts broad, general purposes for the information requested. That is not enough. *Id*. The General Counsel's exceptions should be disregarded because they are not supported by the evidence in the record.

[1] The present proceeding can be distinguished from *NLRB v. Acme*. In that case, a grievance had been filed prior to the request for information. The Court's actual holding treated the information request as a type of "discovery" and thus justified the application of a broad relevance standard. *Acme*, 385 U.S. at 437-438. However, in the present proceeding, no grievance was filed that would justify the application of a broad relevance standard. Under the terms of the CBA, the union in this case could only file a grievance on behalf of one individual. It chose not to do that. Its request for information, therefore, should not be judged by the inapplicable standard of *Acme*.

I. GENERAL COUNSEL MISCHARACTERIZES THE STATUTORY OBLIGATION OF AN EMPLOYER TO PROVIDE THE UNION RELEVANT INFORMATION, AS THAT OBLIGATION IS TRIGGERED ONLY IF THE INFORMATION RELATES TO A LEGITIMATE UNION DUTY OR RESPONSIBILITY.

A. The Statutory Obligation To Provide Information Must Be Triggered By A Request That Is Relevant To A Union Duty.

The General Counsel mischaracterizes the statutory obligation to provide Union information by assuming that it broadly applies to every request for information. Generally, an employer's statutory obligation to provide information to a Union "presupposes that the information is relevant and necessary to a union's bargaining obligation" as the exclusive bargaining representative of the unit. *Coca-Cola Bottling Co.,* 311 NLRB at 425; *see also Watkins Contracting, Inc.,* 335 NLRB 222, 224 (2001).

However, before this statutory obligation can even be triggered, it must be shown that the requested information is relevant to a legitimate duty of the Union. *See Coca-Cola Bottling,* 311 NLRB at 425; *see Emeryville Research Center v. NLRB,* 441 F.2d 880, 883 (9th Cir. 1971). If the requested information is not relevant to a legitimate Union duty or responsibility, it is not an unfair labor practice to refuse to provide that information. *Id*.

B. Relevance Must Be Determined Through A Case-By-Case Analysis.

A case-by-case analysis must be conducted to determine if the statutory obligation can be triggered. *Coca-Cola Bottling*, 311 NLRB at 425. This analysis relies heavily on the particular facts and the record surrounding the dispute. *Id*. (for example, concluding that, "[t]he Respondent has shown that substantial record evidence rebuts the presumptive relevancy of the information, as requested, and that it is irrelevant to any legitimate collective bargaining need of the Union as representative of the Respondent's employees.").

Further, this analysis also must consider the terms of the applicable collective bargaining agreement. *See, e.g, Safeway Stores, Inc.,* 236 NLRB 1126, 1127-1128 (1978); *Collyer Insulated Wire*, 192 NLRB 837, 839-840 (1971). If the contract clearly addresses the terms of the dispute, the contract terms control the resolution of the issue. *Collyer*, 192 NLRB at 839 (stating, "because this dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes."); *NLRB v. Honolulu Star-Bulletin, Inc.*, 372 F.2d 691, 693 (1967)(concluding that because the CBA "gave the Company discretion as to the institution of bonus incentive plans" the Company did not violate the Act by refusing to bargain about those plans).

C. Assertions Of Presumptive Relevance May Be Rebutted By The Employer.

Even if the information being requested were considered presumptively relevant in light of the facts and the terms of the Collective Bargaining Agreement between the parties, a union is required to show "*precise*" relevance when an "*effective employer rebuttal comes forth.*" *Curtiss-Wright Corp v. NLRB*, 347 F.2d 61, 69 (1965). Thus, if the employer rebuts the presumption through the evidence it presents, the Union must then precisely demonstrate that the requested information is relevant to a legitimate duty or responsibility. *Id*. If the information being requested is not considered presumptively necessary and relevant to a Union's responsibility, then the "union must, by reference to the circumstances of the case, initially demonstrate more precisely the relevance of the data it desires." *Id*.

II. THE GENERAL COUNSEL'S EXCEPTIONS DO NOT CONTROVERT THE EVIDENCE IN THE RECORD OR OVERCOME THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, WHICH DEMONSTRATE THAT THE REQUESTED INFORMATION WAS NOT RELEVANT TO A LEGITIMATE UNION DUTY OR RESPONSIBILITY.

The General Counsel's exceptions seek a broader Conclusion of Law No. 3 than the ALJ's conclusion that the Respondent violated the Act "by failing and refusing to furnish the Union with information relevant to grievance processing." As an initial matter, the ALJ's conclusion could not be broader because there was no evidence to support a broader conclusion. Mr. Ellingson testified on behalf of the Union as follows:

> Q. So what you wanted to do with the information that you requested dated September 5 and in November, in your email to me, was to be able to challenge the rating that an employee received, the supervisor judgment about that, or the process of establishing those standards.
>
> A. I would agree with that.

TR 101:11-16.[2]. Thus, the only purpose for the requested information as clearly and unequivocally established by the testimony of the Union's representative was related to the potential processing of a grievance. Although the ALJ's decision suffers from other infirmities, discussed hereafter, it did not suffer from under breadth. The ALJ' decision was as broad as the evidence would allow.

A. The Evidence In The Record Does Not Support A Broad Finding That The Respondent Failed To Provide Information Relevant To The Union's Duties.

1. *The Requested Information Would Not Be Used During The 2013 Wage Reopener Period.*

The General Counsel asserts in the Exceptions Brief that the requested information was relevant because that specific information could be used to "formulate wage proposals in

[2] Hearing record will be cited as TR, citing to page and then applicable lines.

connection with contract bargaining, specifically the 2013 wage and benefit reopener…") (Exceptions Brief, p. 6).

However, the clear evidence in the record unequivocally demonstrates that the requested information would not be used during the 2013 wage and benefit reopener. When asked during the hearing whether the requested information might be needed for the 2013 bargaining wage reopener, Mr. Lew Ellingson, the Union Representative, emphatically, and colorfully, stated, "There is no way in hell." TR 114:8-24

2. *The Requested Information Was Not Relevant To Union Duties Stipulated In The Collective Bargaining Agreement ("CBA") and the Letter of Agreement ("LOA").*

The General Counsel further asserts in the Exceptions Brief that the requested information was relevant to "purposes of policing the Pay for Performance Agreement and ensuring that Unit employees are given merit-pay increases in a fair and just manner." (Exceptions Brief, p. 6).

However, the terms of the CBA and the LOA clearly delineated the rights exclusively reserved to Management and the rights of the Union related to the Pay for Performance increases. Article 2.2 of the CBA stated that the Management held the exclusive right regarding "the establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship required." Article 2.4 further stated that unless rights of management are "limited by the clear and explicit language of some other provision of this Agreement," Management reserved all other rights. Finally, Article 20 provided a waiver such that both parties agreed that "the other shall not be obligated to bargain with respect to any subject matter whatsoever since this Agreement is the sole source of rights for the employees."

The LOA provided that only an employee who received a 0% increase had a right to grieve that outcome and that arbitration was not available for that grievance. With that one

exception, Management held exclusive and unilateral rights to establish standards and judge workmanship. The Union had no other duties or responsibilities regarding the Pay for Performance plan. Thus, the information requested by the Union for all bargaining unit employees was not relevant to a duty the Union had because it was not the Union's duty to police the Pay for Performance (beyond potentially filing a grievance for an employee who received a 0% increase). The Union was given identifying information for the one employee who received a 0% increase. It filed no grievance on behalf of that employee. It had no other role or function.

3. *The Requested Information Was Not Relevant To Even The Union's Understanding Of The Rights They Had Under The CBA And The LOA*.

It is also significant that, despite General Counsel's assertions regarding relevance, the Union's Representative, Mr. Ellingson, understood the CBA and the LOA to constitute the full and complete agreement of the parties:

> Q. You understood that [under] 2.5, the collective bargaining agreement, together with the Article 25 amendment that was agreed to by the parties [the LOA], constituted the full and complete agreement of the parties, right?
>
> A. Correct.
>
> Q. And that no other understanding or practice would be recognized in the future, unless it was in writing and signed by both parties as a supplement to the CBA, right?
>
> A. Correct.
>
> Q. And that's exactly what the September 5th letter of agreement is, right?
>
> A. Correct.
>
> Q. Has there been any other written agreement signed by both parties addressing the subjects of the September 5th letter of agreement supplementing Article 25?
>
> A. Not to my knowledge.

TR 103:22-104:12.

Mr. Ellingson further stated his understanding that Article 2.4 of the CBA meant that Management rights could only be limited by "clear and explicit" language.

> Q. You understood at the time you were involved in the questions regarding pay for performance that under 2.4 the rights of management could only be limited by clear and explicit language in the CBA or its signed amendments, right?
>
> A. Correct.

TR 101:20-25.

Additionally, when questioned specifically regarding the Union's right to bargain regarding the subjects of its request for information, Mr. Ellingson confirmed his understanding that there was no "clear and explicit" language granting the Union such a right.

> Q. So let's turn to…Joint Exhibit 3 [the LOA] and let's search for clear and explicit language. Is there any clear and explicit language, any provision limiting, mandating, governing or establishing the methodology for issuing performance appraisals or ratings?
>
> A. I don't see any.
>
> Q. Is there any clear and explicit language, any provision for challenging the reasons or the judgment of supervisors in making the evaluations in the final performance ratings?
>
> ***
>
> THE WITNESS: I don't see any language in here.
>
> Q. Is there any clear and explicit language requiring mid-year evaluations?
>
> ***
>
> A. No, there's nothing in here.
>
> Q. Is there any clear and explicit provision requiring disclosure to the Union of individual employees' numerical ratings or performance appraisals?
>
> A. There is not in here.

TR 102:1-24.

Further, In reference to the provisions of the LOA, Mr. Ellingson testified:

> Q. Is there any clear and explicit provision allowing any challenge by an employee or the Union of any wage increase, other than a zero percent increase?
>
> A. There is no language in here.

TR 102:25-103:3.

Finally, Mr. Ellingson conceded in the hearing his understanding that, absent a negotiated provision granting the Union the right to demand information about a subject reserved to Management, the Union could not legitimately request such information:

> Q. So if the CBA had contained a provision -- this is a hypothetical. If the CBA had contained a provision requiring the Hospital to serve pepperoni pizza in the cafeteria every day, the Union could insist that the Hospital do so and could grieve and arbitrate the issue if it failed to do so, right?
>
> A. That would be correct.
>
> Q. But the Union could not complain about or bargain about the kind of dough used in making the pepperoni pizzas, if it had not negotiated into the CBA a provision requiring or regarding the pizza dough, right?
>
> A. Hypothetically.
>
> Q. And if it could not complain or bargain about the dough, you would agree that it would have no right to demand information about the recipe used in making the dough, right?
>
> A. Hypothetically.
>
> Q. When you say "hypothetically," you mean hypothetically yes?
>
> A. Well, hypothetically to your question, yes, correct.

TR 104:19-105:11.

Mr. Ellingson's uncontroverted testimony combines to clearly demonstrate that, despite General Counsel's claims of relevance, the Union recognized that the clear terms of the CBA and the LOA did not grant it rights to request information regarding subjects that it did not have a right or duty to police.

4. *The Requested Information Was Not Relevant For The Union To Pursue Grievances Related To The Merit-Pay Increases Of Unit Employees.*

Finally, General Counsel asserts in the Exceptions Brief that the information requested was relevant because it would allow the Union to pursue grievances related to Merit-Pay Increases.

However, as discussed above, the LOA only granted the Union a narrow right to grieve pay increases of 0%. This was the Union's sole, explicitly allocated duty and responsibility in relation to grieving merit-pay increases. The Union's request for information regarding the pay increases for all bargaining unit fell outside of its negotiated rights and duties. Further, the Union was provided identifying information regarding the one employee who did have rights to grieve—the one employee who received a 0% increase- and the Union did not choose to pursue a grievance on behalf of that employee.

B. The General Counsel's Exceptions Must Fail.

While the General Counsel asserts that the ALJ was insufficiently broad in his conclusions of law, the facts and evidence on record, as well as the applicable terms of the CBA, precluded the ALJ from entering a broader conclusion.[3] By the Union's own admission, it did not have rights related to the information it requested and it was not going to use that information to wage re-opener negotiations. Further, the explicit terms of the CBA and the LOA clearly confirmed that any conclusion of law the ALJ could have made when assessing the Union's legitimate duties and responsibilities could not have been broader. The General Counsel's assertions related to broadening conclusions of law as well as broadening remedies therefore must fail.

[3] Please note that Respondent does NOT concede that the Union had a right to bargain further regarding grievance processing. See Respondent's Brief In Support Of Exceptions for Respondent's position. However, Respondent is responding to General Counsel's basic assertion that the ALJ should have concluded more broadly, beyond the issue of the grievance process.

III. GENERAL COUNSEL HAS NOT SHOWN THAT THE UNION HAS DEMONSTRATED BEYOND BARE ASSERTIONS THAT THE INFORMATION IT REQUESTED WAS RELEVANT.

Further, even assuming that the statutory obligation to provide the Union with relevant information had been triggered (and Respondent's position is that it has not), if an employer rebuts a presumption of relevance with facts and evidence (see proceeding discussion), the Union must show that the information it has requested is precisely relevant to a legitimate need. *See Curtiss-Wright Corp,* 347 F.2d at 69. Such a showing must be more than "bare assertions of need." *Coca-Cola Bottling,* 311 NLRB at 427; *see NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 153 (1956). The General Counsel has not shown precise relevance in the Exceptions Brief. Rather, the evidence on record demonstrates that the Union did not, beyond mere assertions of need, provide Respondent with an adequate showing of relevance.

In the first Request For Information dated September 5, 2012, while the group of documents and the types of documents were identified, there was no indication of why the Union considered its broad request for information regarding all unit employees as relevant to its duties. Joint Exhibit 8B. Despite Counsel for Respondent's request to Mr. Ellingson to provide reasons why the Union considered their broad request as relevant, the Union did not provide Respondent with reasons. See Joint Exhibit 16 (Counsel for Respondent stated in an email to Mr. Ellingson, "I remind you that you still have never been willing to respond to my questions about why you believe you are entitled to what you have asked for and why you believe you need it to carry out your obligations to union members."). While the Union did, in response, provide a more detailed list of the specific information they were then requesting (such as "the reasons for issuing merit raises" to employees), the Union did not provide reasoning of any kind demonstrating precise relevance. Instead, Mr. Ellingson declaratively stated, as a response, "Give us the info you used

to determine the Wage increases (if any) for all bargained for folk," and then informed Respondent this response was the "end of the discussion." Joint Exhibit 16.

Therefore, while the Union may have desired the information for purposes it felt were legitimate, it did not show, beyond bare assertions, why the information was relevant to its obligations as the bargaining representative of the unit, under the CBA and the LOA that contained the Pay for Performance amendments to the CBA. Further, nothing the General Counsel offered in the Exceptions Brief asserted otherwise.[4] The General Counsel's exceptions must fail on this count as well.

CONCLUSION

While General Counsel asserts that the ALJ's decision was not broad enough, the evidence on record does not support a broader decision. The General Counsel has not shown, based on facts or negotiated CBA and LOA terms, why or how the Union's request for information related to a legitimate duty or obligation it had as representative of the unit. The statutory obligation to provide the requested information was not triggered. The Respondent did not, therefore, violate the Act by refusing to provide the requested information.

Further, even had the statutory obligation been triggered, Respondent has shown by evidence in the record that the requested information was not relevant to a legitimate Union need. Because the General Counsel has not indicated more precisely why the Union's request was relevant, it was not an unfair labor practice for the Respondent to refuse to furnish the requested information.

[4] Even if General Counsel had shown precise relevance in the Exceptions brief, such assertions should not be considered, as they would represent assertions previously un-litigated in the prior hearing, and would constitute a denial of Respondent's due process if they were allowed to be asserted here. *See NLRB v. Temple-Eastex, Inc.*, 579 F.2d 932, 936 (1978)("Due process requires that the Board base its findings against a party only upon matters brought to the party's attention in the complaint or during the administrative hearing, and that are fully litigated.").

Respectfully submitted this 29th day of July, 2013.

KUTAK ROCK LLP

s/ Melvin B. Sabey
Melvin B. Sabey, Esq.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 29th day of July, 2013, a true and correct copy of the foregoing was served via e-mail transmission, as follows:

Mr. Lew Ellingson
Staff Representative
Communications Workers of America, District 7
8085 E. Prentice Avenue
Greenwood Village, CO 80111-2705

Via E-mail: lellingson@cwa-union.org

Julie M. Durkin
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower
Denver, CO 80202-5433

Via E-Mail: Julia.Durkin@nlrb.gov

Leticia Pena
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower
Denver, CO 80202-5433

Via E-Mail: Leticia.Pena@nlrb.gov

s/ Peggy L. Forest