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**

REPLY BRIEF IN FURTHER 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 Reply Brief in Further Support of Exceptions to the Decision of the Administrative Law Judge, issued on May 28, 2013.

PRELIMINARY STATEMENT

Ethicon, Inc. a Johnson & Johnson Co. ("Ethicon" or the "Company") continues to insist that because the Company ostensibly did not use cost to determine when to subcontract work, the information request by the Charging Party, Local 630, New York-New Jersey Regional Joint Board, Workers United, Service Employees International Union (the "Union") is not relevant and therefore the decision of the Administrative Law Judge should be affirmed. Ethicon's position in this regard merely obscures the underlying issues in this case, which are straightforward and simple: (1) Ethicon subcontracts a significant amount of work; (2) over the years, the size of the bargaining unit has shrunk considerably while subcontractors remain a permanent presence at the Ethicon facility; (3) the Union believes that some of the work subcontracted may be bargaining unit work; (4) the Union seeks to confirm the exact nature of the work being subcontracted and to gather information regarding the cost of subcontracting the work so that it can propose to the Company alternatives to subcontracting that will potentially advance the interests of both parties. The cost information requested by the Union is, therefore, directly relevant to the Union's duty as bargaining representative for the members at the Ethicon facility.

The Union acknowledges that the collective bargaining agreement contains a side letter that expressly permits the Company to subcontract certain types of work. However, that the letter enumerates specific categories of work that the Company may subcontract is the clearest, most unequivocal indicator that the Company's right to subcontract is not without limit. A ruling to

the contrary would render the terms of the side letter meaningless. Moreover, the provision in the "Employer Prerogatives" on which Ethicon relies to demonstrate that the Company's right to subcontract has no boundaries is also qualified language which states that the Company reserves the "prerogative" to subcontract work "provided, however, that no such action shall be taken to discriminate against, or avoid bargaining with the union." It is, therefore, simply not the case that subcontracting was intended to proceed unfettered and without any challenges from the Union. Ethicon's interpretation of these provisions would permit the Company to subcontract the bargaining unit out of existence. That result is not only repugnant to the protections set forth in the Act, but obviously not what the Union bargained for.[1]

ARGUMENT

A. The Collective Bargaining Agreement Does Not Prevent the Union from Rightfully Obtaining the Requested Information

At the outset, it is important to note that the provision of the collective bargaining agreement ("CBA") to which Ethicon repeatedly refers does not present a bar to the Union's right to bargain regarding subcontracting. Article XIX, the CBA provision cited by Ethicon begins as follows, at Section A:

> Subject always to the right of the Union to bargain collectively with the Employer with respect to rates of pay, wages, hours of

[1] The Union notes that Ethicon seized fervently on that portion of the ALJ's decision which read: "I decline to rely on the testimony of Union Representative Gene Kaniecki ("Kaniecki") that is contradicted by other witness(es) or is in conflict with documentary evidence." (See ALJ Decision at p.10:16-18.) The Union's Exceptions to the ALJ's decision focused on his ruling regarding a question of law, namely, whether § 8(a)(5) requires Ethicon to provide the information requested by the Union on May 15 and June 18, 2012. The facts of this case speak for themselves and it must be noted that while the ALJ's decision to "decline" to rely on uncontradicted testimony by Kaniecki, the most pertinent points of Kaniecki's testimony remain uncontradicted: the Union needs the requested information to formulate meaningful proposals to address the issue of subcontracting, an objective clearly in line with the Union's duty as the employee representative of the bargaining unit. The requested information, therefore, is manifestly relevant to the performance of that duty.

> employment, and other conditions of employment, the exercise by the Employer of any one or more of its Exclusive Prerogatives, as defined and limited in Section "B" of this Article, 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.

(See General Counsel's Exhibit (hereinafter "GCX") 2, p. 102.) Section B goes on to enumerate sixteen items that are reserved as "prerogatives," and lists among them "6) the establishment of new units, the closing or curtailing 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." (*Id.*, emphasis added.)

The June 15, 2009 side letter which sets forth the procedure regarding the subcontracting of work makes clear that "[a]ll new work, general construction and peak maintenance loads will normally be sub-contracted." (GCX-2, p. 179, emphasis in original.)

"[T]here is a presumption that unions have not abandoned rights guaranteed them in the Act." *Pertec Computer Corp.*, 284 NLRB 810, 817 (1987). A clear and unmistakable waiver is necessary to rebut the presumption that the Union had not abandoned its right to good faith bargaining. *See E.I. DuPont de Nemours & Co.*, 346 NLRB 553, 570 (2006); *Pertec Computer*, 284 NLRB at 817. "[S]uch a waiver is not lightly inferred by the Board." *E.I. DuPont de Nemours*, 346 NLRB at 570. The language of Article XIX and the June 2009 side letter do not constitute a clear and unmistakable waiver of the Union's right to bargain regarding Ethicon's right to subcontract work. Starting with the language of Article XIX, the "prerogative" established by the Company is clearly qualified and provides that Ethicon exercise the "prerogative" regarding subcontracting in a way that will not "discriminate against, or avoid bargaining with the union." It is significant that none of the other enumerated "prerogatives" of the sixteen listed in Article XIX is so qualified. The plain language of the June 2009 side letter

also makes clear that the parties intended for specific categories of work to be "normally" subcontracted. Thus, there is no clear and unmistakable waiver of the statutory right to bargain in good faith over when the Company can subcontract work.

The Union's ability to effectively bargain in good faith, however, is handicapped by Ethicon's refusal to furnish relevant information that the Union may use to exercise this right. The right is protected by the Act and preserved in the agreement of the Union and the Employer.

B. Cases Cited By Ethicon Are Readily Distinguishable

Ethicon's argument that the requested information regarding subcontracting is not relevant relies largely on two cases, both of which present very different situations from that in this case: *Disneyland Park*, 350 NLRB 1256 (2007) and *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266 (1995). The conclusions in those cases, denying certain information to the unions, are inapplicable in this case.

The contract at issue in *Disneyland Park* prohibited the employer from "subcontracting work for the purpose of evading its obligations under this Agreement," but permitted the employer to subcontract "where the subcontracting of work will not result in the termination or layoff, or the failure to recall from layoff, any permanent employee qualified and classified to do the work." *Disneyland Park*, 350 NLRB at 1256. In that case, the Board found that the union had not demonstrated the relevance of the requested subcontracting information "because there were no claims that: any employee had been terminated or laid off; any previously laid-off employee had not been recalled; or any such actions had resulted from subcontracting." *Id.* The Board found that "the Union never made the claim that any subcontracting had [the] evasive purpose" prohibited by the contract, "[n]or were the surrounding circumstances such that the [employer]

should have been aware that this was the Union's concern, and was its basis for requesting the information." *Id.* at 1259.

Conversely, in the case at bar, the surrounding circumstances at Ethicon and the Union's specific allegations that the Company violated the contract, made clear the Union's concerns. Indeed, the Union filed a grievance on the issue (GCX-3) as well as the unfair labor practice charge that is the subject of these proceedings (see GCX-1). Ethicon was clearly on notice that the Union's concern was that the Company was violating the terms of the subcontracting provision set forth in the 2009 side letter. Ethicon cannot now look to *Disneyland Park* and rely on the reasoning in that case, which would suggest that it was never told by the Union that the Union was alleging a specific violation of the contract. Gene Kaniecki's May 15, 2012 information request to Ethicon (GCX-5)—sent to the Company two months after the grievance on the issue was filed—specifically named six subcontractors about which the Union requested the information that is the subject of these proceedings. This is considerably different from the union in the *Disneyland Park* case, which simply asserted that it was "concerned that such subcontracting may not comply with the terms of the agreement." *Disneyland Park*, 350 NLRB at 1256. In fact, part of the information requested by the *Disneyland Park* union was "a list of all the subcontractors which have performed work with [the union's] jurisdiction." *Id.* at 1263. Here, Kaniecki provided the names of the subcontractors, putting Ethicon on notice that the Union was specifically concerned with the scope of the work performed by those contractors. Moreover, the grievance was filed after 11 bargaining unit members had been terminated and were not timely being replaced. The Union had reason to believe that the subcontracting was occurring to discriminate against Union members.

In *Connecticut Yankee*, the Board found that there was insufficient evidence to show that the employer had violated the contract provision permitting subcontracting under certain circumstances. *Connecticut Yankee*, 317 NLRB at 1268. In that case, the suspected contract breaches were originally conceived by the international union, which drafted a broad information request and transmitted that information to the local union, which simply forwarded the international's concerns to the employer without actually confirming that the issues raised in the information request were pertinent to the local. *Id.* at 1271-1272. In the Ethicon matter, Kaniecki crafted a specific, targeted information request which listed named subcontractors identified by the Union. Moreover, the Board in the *Connecticut Yankee* decision noted that the bargaining unit had actually expanded, not contracted, as the union made these information requests. *Id.* at 1268. Here, there is uncontradicted testimony from Kaniecki that the bargaining unit at Ethicon has shrunk considerably over the years and was further reduced by the termination of 11 bargaining unit members in December 2011. (See Hearing Transcript at 19:22 to 20:1 and 23:6-15.)

C. The Union Demonstrated That the Requested Material is Clearly Relevant

As the particular facts in the cases cited by Ethicon are inapplicable to the circumstances of this case, it is clear that based on the Board's standard governing relevance, the information requested by the Union regarding the subcontracted work is absolutely relevant to the Union's performance of its duty as the collective bargaining representative of the employees in the bargaining unit. The relevance standard was discussed extensively in the Union's July 9, 2013 Brief in Support of Exceptions of Charging Party to the Decision of the Administrative Law Judge (hereinafter "Union's Brief in Support of Exceptions"). Though the situation in *Disneyland Park* is different, the decision does properly set forth the standard regarding the

relevance standard, stating that "where the information requested by the union is not presumptively relevant to the union's performance as bargaining representative, the burden is on the union to demonstrate the relevance." 350 NLRB at 1257. "A union has satisfied its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant." *Id.* As discussed in detail in the Union's July 9 brief and as set forth in *Disneyland Park*:

> 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. To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the Repondent under the circumstances.

Id. at 1258. Using the "broad, discovery-type standard" established by the Board, the Union has shown that the information requested by Kaniecki in the May 15, 2012 letter is relevant. The May 15 information request calls for the contracts and agreements between the subcontractors and Ethicon, which would include cost information. The Union needs this information in order to formulate proposals that will provide alternatives to subcontracting and secure work for the bargaining unit and protect against any further erosion of the bargaining unit. The connection to be made between the information requested and the reason articulated by the Union for it is not so attenuated as to make it not relevant, and it clearly falls into the "broad, discovery-type standard" established by the Board.

D. Case Law Cited by the Union Has Not Been Reversed

Ethicon asserts in its opposition to the Union's Exceptions that in *U.S. Steel Corp. Minn., Ore Operations*, Case 18-CA-17397, 2005 WL 762211 (N.L.R.B. Div. of Judges Mar. 31, 2005), quoted in the Union's Brief in Support of Exceptions, ALJ Cates found that cost was a factor in

the employer's decision to subcontract. (See Brief of Ethicon, Inc. in Opposition to Exceptions Filed by General Counsel and Charging Party Seeking Affirmance of the Administrative Law Judge's Findings and Recommended Order at 32.) However, Ethicon's recitation of the findings in that case fails to mention an important detail: ALJ Cates stated that he rejected the employer's "contention [that] cost was not a factor in this particular situation" directly after he referred to two occasions—provided by way of example by the union—where the union, after learning of the cost of the employer's projects, approached the employer and suggested relying more on bargaining unit members as a cheaper alternative. See *U.S. Steel Corp.*, 2005 WL 762211. In the instant case, Ethicon never provided the Union with any cost information that would allow the Union to propose alternatives, which is the Union's goal in making the information request. Therefore, in the Ethicon case, there was no opportunity to inquire as to whether Ethicon considered cost differences presented by the Union because the Union is prevented from offering such alternatives due to Ethicon's refusal to provide the cost information. ALJ Cates' decision in *U.S. Steel Corp.* noted:

> [The union vice president] Malek testified he could not effectively offer reasonable alternatives to contracting out by the Company unless he knew the contractor charge rates for cost comparisons. Malek stated he hoped he could "persuade [the Company] not to contract out the work for either financial or contractual reasons." I am persuaded the Union has established that the requested contractor charge rate information is necessary for and relevant to the Union in presenting new ideas and alternative means to contracting out unit work. ... The Company's argument overlooks potential uses that may be made of cost information toward developing new or practicable ideas for alternatives to the use of outside entities.

U.S. Steel Corp., 2005 WL 762211 (emphasis added). Moreover, ALJ Cates in his *U.S. Steel Corp.* decision also found in agreement with the General Counsel that: "these two examples [where the union convinced the company to use bargaining unit work] demonstrate what

informed bargaining can accomplish, and clearly demonstrates the necessity for and relevance of the requested contractor charge rate information. *Id.* (emphasis added).

Finally, there is nothing to indicate that the findings and conclusions in *U.S. Steel Corp.* are no longer precedential, even after *Disneyland Park*, where the facts are distinguishable.

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.

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New York, New York

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply Brief in Further Support of Exceptions of Charging Party to the Decision of the Administrative Law Judge, have been served electronically on August 27, 2013, at the email addresses indicated below, upon:

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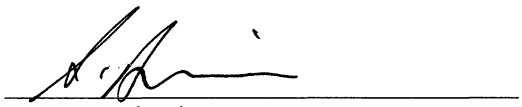

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