

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHO-ME POWER ELECTRIC COOPERATIVE

and

Case 14-CA-097071

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION
NO. 53, affiliated with INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

I. Overview..... 5

II. Statement of the Facts..... 5

III. Respondent’s Exceptions.....6

 A. The Union established relevance.....7

 1. Legal Framework..... 7

 2. The requested information was relevant..... 8

 a. Relevance to policing and monitoring agreements..... 9

 b. Relevance to the pending XG 52 grievance.....18

 B. The Union’s request was not overly broad.....20

 C. Judge Dibble’s decision was not punitive.....21

 D. Deferral is not appropriate.....22

 1. Legal Standard.....22

 2. Relevance of the Unions information request extends
 beyond a single pending grievance.....22

IV. Conclusion..... 23

CASES

<i>Aerospace Corp.</i> , 314 NLRB 100, 103 (1994).....	7
<i>AK Steel Corp.</i> , 324 NLRB 173, 184 (1997).....	14
<i>Albertson's, Inc.</i> , 310 NLRB 1176, 1178 (1993).....	16
<i>Allison Co.</i> , 330 NLRB 1363, 1367 (2000).....	8
<i>Associated Ready Mixed Concrete, Inc.</i> , 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9 th Cir. 1997).....	8
<i>Bacardi Corp.</i> , 296 NLRB 1220 (1989).....	8
<i>Brazos Electric Power Cooperative, Inc.</i> , 241 NLRB 1016, 1018-1019 (1979).....	8, 17
<i>Chrysler Corp.</i> , 331 NLRB 1324, 1325 fn. 3 (2000).....	22
<i>Chrysler, LLC</i> , 354 NLRB No. 128 (January 6, 2010).....	15-16
<i>Contract Flooring Systems</i> , 344 NLRB 925 (2005).....	17
<i>Crowley Marine Services</i> , 329 NLRB 1054, 1060 (1999).....	16
<i>Disneyland Park</i> , 350 NLRB 1256, 1258 (2007).....	8, 14, 15
<i>Dodger Theatricals Holdings</i> , 347 NLRB 953, 970 (2006).....	19
<i>Howard University</i> , 290 NLRB 1006 (1988).....	7
<i>Island Creek Coal Co.</i> , 292 NLRB 480, 491 (1989), enfd. 899 F.2d 1222 (6 th Cir. 1990).....	14
<i>Medco Health Solutions of Spokane, Inc.</i> , 352 NLRB 640, 641 (2008).....	22
<i>Meeker Cooperative Light and Power Association</i> , 341 NLRB 616, 618 (2004)///.....	16
<i>New Jersey Bell Telephone Co.</i> , 289 NLRB 318, 329 (1988).....	19
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967).....	7, 8, 14, 16, 19
<i>NLRB v. Truitt Mfg. Co.</i> , 351 U.S. 149 (1956).....	7
<i>Postal Service</i> , 280 NLRB 683 fn. 2 (1986).....	22
<i>Public Service Electric & Gas Co.</i> , 323 NLRB 1182, 1186-1188 (1997).....	16
<i>Richmond Health Care</i> , 332 NLRB 1304 (2000).....	8
<i>SBC Midwest</i> , 346 NLRB 62, 64 (2005).....	8, 19
<i>Schrock Cabinet Co.</i> , 339 NLRB 182 fn. 6 (2003).....	14
<i>Shoppers Food Warehouse</i> , 315 NLRB 258, 260 (1994).....	19
<i>Superior Protection Inc.</i> , 341 NLRB 267, 269 (2004), enfd. 401 F.3d 282 (5 th Cir. 2005)..	21
<i>Super Valu Stores</i> , 279 NLRB 22 (1986).....	8

<i>Team Clean, Inc.</i> , 348 NLRB 1231 fn. 1 (2006).....	22
<i>Trade Show Supply</i> , 359 NLRB No. 106 (April 30, 2013).....	16
<i>United States Postal Service</i> , 302 NLRB 918, 918 (1991).....	22
<i>United Technologies Co.</i> , 274 NLRB 504 (1985).....	8, 19, 22
<i>Walter N. Yoder & Sons, Inc</i> NLRB 652, 655 fn 6, enfd in relevant part 754 F.2d 531, 534 (4 th Cir. 1985).....	17
<i>Washington Beef, Inc.</i> , 328 NLRB 612, 617 (1999).....	7
<i>W-L Molding Co.</i> , 272 NLRB 1239, 1240 (1984).....	16

I. OVERVIEW

This case is before the National Labor Relations Board (Board) based on a Complaint that Sho-Me Power Electric Cooperative (Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (Act) by its refusal to provide subcontracting information requested by the International Brotherhood of Electrical Workers Local Union No. 53, affiliated with International Brotherhood of Electrical Workers, AFL-CIO (Union) on August 7, 2012, and subsequent dates thereafter. By decision dated July 22, 2013, Administrative Law Judge Christine E. Dibble concluded that Respondent violated the Act, as alleged. Thereafter, on August 16, 2013, Respondent filed timely exceptions wherein it argues that Judge Dibble erred in finding that the Respondent had a legal obligation to provide the requested subcontracting information.

In accordance with Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel respectfully files this answering brief, and for the following reasons, submits that Respondent's exceptions are without merit.

II. STATEMENT OF THE FACTS

Respondent is a corporation with an office and place of business located in Marshfield, Missouri, where at all times it has been engaged in the transmission of electricity, principally at 69 kilovolts, from a generation source to nine electric distribution cooperatives, various municipalities, and Fort Leonard Wood in south-central Missouri. The Union has represented a bargaining unit of Respondent's employees dating back to 1951. (GCX 1).¹ The unit is described as follows:

All employees of Sho-Me Power electric cooperative within the bargaining unit defined in the certificates of representative of the National labor Relations Board in cases 17-RC-1033, 17-UA-1877 and 17-RC-5946, including communication foreman, central office 40 technician foreman, dispatching foreman, fiber foreman, line foreman, meter & relay foreman, substation

¹ References to the trial transcript will be denoted by "Tr" followed by the page number. References to Acting General Counsel's exhibits will be denoted by "GCX" followed by the exhibit number. References to Respondent's exhibits will be noted by "R" followed by the exhibit number. References to the Judge's Decision will be denoted by "JD" followed by the applicable page and line numbers.

foreman, vehicular maintenance foreman, warehouse foreman, aerial bucket operator, lead communication technician, lead central office technician, lead fiber technician, lead lineman, lead meter & relay technician, lead substation mechanic, communication technician, central office technician, dispatcher, engineering aid, fiber 45 optic technician, lineman, maintenance mechanic, meter & relay technician, substation mechanic, storekeeper, ground construction & maintenance man, and apprentices, but excluding professional employees, guards, office clericals, and supervisors as defined in the Act. (GCX 1)

The parties have been signatories to successive collective bargaining agreements during their relationship. The relevant contracts in this matter were effective July 1, 2009 to June 30, 2012, and September 25, 2012 to June 30, 2014. (Tr. 16-20, GCX 2, GCX 3).

In a letter dated August 7, 2012, Union Business Representative Dexter Drerup requested from Respondent, "...a list of contractors' that are presently working on SHO ME's property (name, hours, and type of work) for which I am entitled to by law." (Tr. 24-25, GCX 5). As the parties stipulated at the hearing, it is this request, and only this request, that is at issue in this matter. (Tr. 8). By letter dated August 28, 2012, Respondent counsel Rodric Widger responded to Drerup advising that he thought the matter was to be turned over to the parties' attorneys for discussion regarding the relevance of the Union's request. (Tr. 34, GCX 7). Through subsequent correspondence from Union attorney Dick Waers on November 29, December 6, December 18, and December 20, 2012, the Union repeated and detailed the relevance of its request for Respondent's subcontractor information (names, hours, type of work). (Tr. 35-38), GCX 8, GCX 8a). Since the Union's initial request for this information on August 7, 2012, Respondent has failed and repeatedly refused to furnish the Union with the requested subcontracting information. (Tr. 39, GCX 8, GCX 8a).

III. RESPONDENT'S EXCEPTIONS

Respondent's Exceptions to Decision of the Administrative Law Judge essentially attacks Judge Dibble's decision in a circular and redundant manner within the following categories: (1) Judge Dibble erroneously found that the information requested by the Union was relevant; (2) Judge Dibble failed to

recognize that the Union's request was overly broad; (3) Judge Dibble's decision was punitive in nature; and (4) Judge Dibble erred when she failed to grant Respondent's motion for dismissal and deferral to a subcontracting grievance currently pending arbitration. For the reasons set forth below, Counsel for the Acting General Counsel maintains that Judge Dibble reached the correct legal conclusions.

A. The Union established relevance

In a repeated fashion, Respondent argues that Judge Dibble failed to adequately establish the relevance of the information the Union requested. In support of this position, Respondent argues that a real controversy did not exist; the Union failed to meet its evidentiary burden; Judge Dibble found conjecture to be the equivalent of a likely contract violation; Judge Dibble failed to require objective evidence as proof of a material fact; and Judge Dibble failed to focus on the Union's duty. As the judge noted in her decision, the facts and the law are squarely with the Union and the Acting General Counsel with respect to this issue.

1. Legal framework

As cited by Judge Dibble in her decision, the Board law relevant to this case is indisputable. The Board has long held that "an employer is under a statutory obligation, upon request, to provide a labor organization, which is the collective-bargaining representative of the employer's employees, with information, which is necessary and relevant for the proper performance of the labor organization's duties in representing the bargaining unit employees." *Washington Beef, Inc.*, 328 NLRB 612, 617 (1999)(ALJ decision affirmed in relevant part), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Aerospace Corp.*, 314 NLRB 100, 103 (1994); *Howard University*, 290 NLRB 1006 (1988). Information that relates directly to bargaining unit employees' terms and conditions of employment is considered presumptively relevant and the employer is obligated to furnish that information. However, when the information in question is not considered

presumptively relevant, such as subcontractor information, the burden is on the requesting party to establish its relevance. See *Richmond Health Care*, 332 NLRB 1304, 1305 (2000); *Associated Ready Mixed Concrete, Inc.*, 318 NLRB 318, 318 (1995), *enfd.* 108 F.3d 1182 (9th Cir. 1997). “To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances.” *Disneyland Park*, 350 NLRB 1256, 1258 (2007), citing *Allison Co.*, 330 NLRB 1363, 1367 *fn.* 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018-1019 (1979), *enfd.* in relevant part 615 F.2d 1100 (8th Cir. 1980). The Board applies a broad, liberal, discovery-type standard in information cases under Section 8(a)(5) of the Act. *NLRB v. Acme Industrial Co.*, *supra* at 437. The burden to establish relevance is “not an exceptionally heavy one.” *SBC Midwest*, 346 NLRB 62, 64 (2005). What is required is a showing of 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.” *NLRB v. Acme Industrial Co.*, *supra*; *Bacardi Corp.*, 296 NLRB 1220 (1989). Relevance includes information necessary for the processing of grievances and the administering of a collective bargaining agreement. *United Technologies Co.*, 274 NLRB 504 (1985). If the standard is met, the information must be provided. *Super Valu Stores*, 279 NLRB 22 (1986).

2. The requested information was relevant

Regardless of Respondent’s attempt to dismiss all arguments regarding the relevancy of the Union’s request in this matter or shoehorn the relevance down one path, the record and Judge Dibble’s decision are clear that the Union communicated a legitimate two-fold relevancy explanation to Respondent. The Union detailed that it believed the requested subcontractor information was relevant to (1) its need to police and monitor the parties’ collective-bargaining agreements and related grievance

settlement due to concerns that Respondent was violating the terms of those agreements and (2) a pending subcontracting grievance scheduled for arbitration. Judge Dibble appropriately found that the Union demonstrated the necessary relevance of its request and the record is clear that the relevance was otherwise apparent to Respondent.

a. Relevance to policing and monitoring agreements

In the Union's initial written request of August 7, 2012, for a list of contractors that are currently working on Respondent's property, including names, hours and type of work performed, the Union accurately communicated to Respondent that this was information it was "entitled to by law." (GCX 5). It is true that on November 29, 2012, when Union attorney Dick Waers repeated the Union's request for this information, he explained that the Union needed the information to evaluate a subcontracting grievance between the parties that is currently pending arbitration ("XG 52 grievance"). (GCX 8, GCX 8a). However, in subsequent emails exchanged between Waers and Respondent attorney Rodric Widger, the Union provided additional detailed explanations concerning the reasons for the Union's request and how relevance that existed for that information extended beyond that of a pending grievance. (GCX 8, GCX 8a). As Waers wrote in his December 6, 2012, email to Widger (in relevant part):

"However, we renew our request for the list of subcontractors and the work they are performing. The relevance is twofold. First, we have a pending grievance concerning the XG52 Project. When weighing the propriety of subcontracting, arbitrators frequently look to the frequency of subcontracting by the employer. ***Secondly, the cba includes limitations on subcontracting. In administering the cba, the union has a right to investigate to determine if additional violations of subcontracting provisions have occurred. I believe that nlr case authority provides us with the right to this information*** (emphasis added)." (GCX 8, GCX 8a).

Waers provided further details to Respondent in his December 18, 2012, email to Widger, communicating further explanation as to why the requested information was relevant to the Union's administration and enforcement of the parties' collective bargaining agreement (in relevant part):

"I think that we simply need to agree to disagree. I understand your arguments with respect to the merits of the XG grievance. However, these contentions are not grounds for the refusal to furnish relevant information. The duty to furnish information is grounded in the union's status as the exclusive collective bargaining representative, not in any contractual provision. The union's right to information extends both to grievance processing and administering and enforcing the collective bargaining agreement. The U.S. Supreme Court has established a liberal "discovery type" standard for the duty to furnish information. See generally, *NLRB v. Acme Industrial*, 385 U.S. 432 (1967). With respect to subcontracting issues, the NLRB has specifically sanctioned the union's request for information pertaining to subcontracting as part of the union's obligation to police the contract, *Public Service of Colorado*, 301 NLRB 238 (1991). The relevance of our information request is clear. Article II of the cba gives the employer the right to subcontract certain work. Otherwise, subcontracting is prohibited. The relevance of our request is to determine if subcontracting by your client is for one of the reasons permitted under the cba. If not, the union's position is that said subcontracting violates the cba. The union needs that information to determine if a contractual breach has occurred. The union cannot make that determination without information concerning the subcontracting." (GCX 8, GCX 8a).

While Waers goes on in his December 18, email to explain the Union's position as to why the information is also relevant to the XG 52 grievance, he has clearly and unequivocally communicated to Respondent the relevance of the requested information with respect to the policing and monitoring of the subcontracting provisions set forth in the parties' collective bargaining agreements, not only the contract that expired on June 30, 2012, but also the newly negotiated agreement that was effective September 20, 2012. Through Waers, the Union renewed its August 7, request on four occasions throughout November and December 2012. (GCX 8; GCX8a).

In the final correspondence between the parties on this issue, for a third time, Waers reiterated the Union's need to monitor and enforce the terms of the parties' agreements in his December 20, email (in relevant part):

“Further, the new language in the cba lends additional support to our position. The employer pledged in good faith to have bargaining unit employees do bargaining unit work. I don’t know how the union can monitor the amount of subcontracting without the requested information.” (GCX 8, GCX 8a).

In addition to Waers’ emails to Widger in December 2012, Union Business Representative Dexter Drerup provided testimony at the hearing that further supported the reasons why the Union felt the information requested on August 7, 2012, was relevant to the Union’s policing and monitoring of the potential improper assignment of its bargaining unit’s work. Drerup testified that the parties have been signatories to successive collective bargaining agreements, including the two most recent contracts effective July 1, 2009 to June 30, 2012, and September 25, 2012 to June 30, 2014. (Tr. 16-20, GCX 2, GCX 3). Both collective bargaining agreements contain language that speaks to Respondent’s limited ability to subcontract bargaining unit work. (Tr. 16-20, GCX 2, GCX 3). The language set forth in both contracts is found in Article II, Section 2 under “Management Rights.” (Tr. 16-20, GCX 2, GCX 3). Although the language changed between the 2009 and 2012 contracts, neither contract provides Respondent with unfettered discretion to contract away bargaining unit work. In the contract effective July 1, 2009, Article II, Section 2 reads:

“(a) Non-bargaining unit employees may perform bargaining unit work in cases of emergency; training of employees; when failure to perform the work would create a danger of damage to Employer or customer property or injury to any person; or would result in interruption of service. However, it is agreed such work will not be performed in amounts so as to cause a bargaining unit employee to be laid off, or does not reduce the employee’s work week to less than forty (40) hours.

(b) In addition, the Employer shall have the right to continue its present practice of contracting for the construction of electric transmission lines, substations, and related facilities. It shall not do so for the purpose of laying off its regular employees.” (GCX 3, page 2).

In the parties’ contract effective September 25, 2012, Article II, Section 2 reads:

“(a) The employer pledges its good faith effort to cause unit work to be done by unit personnel. Notwithstanding this commitment, non-bargaining unit employees and contractors may from time to time perform bargaining unit work to promote efficient operations of the cooperative. Such work will not be performed in such amount, frequency or duration so as to cause a bargaining unit employee to be laid off or to reduce the employee’s work week to less than forty (40) hours.

(b) (language is identical to the 2009 contract)” (GCX 2, page 3).

In addition to the parties’ collective-bargaining agreements, pursuant to a grievance settlement entered into by the parties on December 9, 2009, Respondent is further limited in subcontracting with respect to the number of hours it can utilize subcontractors on an annual basis in the performance of certain types of work. (Tr. 20-24, 32, GCX 4). With this contractual language and grievance settlement in mind, Drerup testified that during the parties’ May to September 2012, contract negotiations, his Union members told him that they noticed a substantial number of Respondent contractors that they felt were performing work that the bargaining unit had performed for forty or fifty years. (Tr. 26). As Drerup also testified, this was a concern for the Union because its position is that Respondent’s ability to subcontract bargaining unit work is limited by the parties’ collective bargaining agreement and the terms set forth in the parties’ 2009 settlement agreement. (Tr. 25-26).

It cannot be disputed that the relevant contractual provisions in this matter fail to give Respondent unfettered discretion in their ability to subcontract bargaining unit work. Although the language of Article II, Section 2 changed between the 2009 and 2012 contracts, the limitations on Respondent did not. (GCX 2, GCX 3). The parties’ 2009 collective bargaining agreement specifically lists the limited situations when Respondent is allowed to subcontract (in relevant part): “...in cases of emergency; training of employees; when failure to perform the work would create a danger of damage to Employer or customer property or injury to any person; or would result in interruption of service.” (GCX 3, page 2). The parties’ 2012 language continues to limit Respondent’s subcontracting power, starting with the opening line to Article II, Section 2: “The employer pledges its good faith effort to

cause unit work to be done by unit personnel.” (GCX 2, page 3). Respondent is obligated to make a concerted effort to assign bargaining unit work to bargaining unit personnel. Although the provision goes on to read that “non-bargaining unit employees and contractors *may from time to time* perform bargaining unit work... (emphasis added)”, that ability is clearly blanketed by Respondent’s obligation to first utilize Union personnel to perform work that has historically been performed by the bargaining unit. (GCX 2, page 3). Additionally, the parties have negotiated further restrictions on Respondent through their December 9, 2009, subcontracting grievance settlement. (GCX 4). Through that settlement, the parties agreed that Respondent can continue its practice of subcontracting new construction or new turn up work, but otherwise, the outsourcing of work such as trouble or emergency calls to Fidelity or any equivalent subcontractor is limited to 200 hours per year. (GCX 4).

With the parties’ negotiated limitations as a backdrop, Drerup began to hear from his membership that there had been a large subcontractor presence of late and that those subcontractors were performing work that was historically performed by bargaining unit employees. (Tr. 26). Rightfully so, Drerup took the position that he could not police and enforce the provisions of those agreements without the names of contractors performing work on Respondent’s property, the hours worked by those contractors and a description of the type of work performed. (Tr. 25-26). Drerup’s testimony mirrors and strengthens the explanations provided to Respondent by Union attorney Dick Waers in his December 6, December 18, and December 20, 2012, emails. (GCX 8, GCX 8a). The Union could not determine whether or not a viable grievance existed without the requested information.

As cited above, “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 Respondent under the circumstances.” *Disneyland Park*, 350 NLRB 1256, 1258 (2007), and cases cited therein. The Union has met both prongs of this standard.

The Board looks to whether “the 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 Industrial Co.*, supra at 437. This analysis is also used in cases where the information in question relates to the subcontracting of bargaining unit work. “Documentary information requested to enable the Union to assess whether the Respondent has violated the collective-bargaining agreement by its method of contracting out bargaining unit work and, accordingly, to assist the Union in deciding whether to resort to the contractual grievance procedure, is relevant to the Union's representative status and responsibilities.” *AK Steel Corp.*, 324 NLRB 173, 184 (1997), citing *Island Creek Coal Co.*, 292 NLRB 480, 491 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990); See also *Schrock Cabinet Co.*, 339 NLRB 182, 182 fn. 6 (2003)(relevance established by informing employer that the requested information was necessary for the purpose of assessing potential grievances pursuant to the parties’ existing collective bargaining agreement). The Union has proven its need to decide whether contractual violations have taken place and as such, has met its burden in establishing relevancy of its requests made on August 7, December 6, December 18, and December 20, 2012.

With respect to the second prong addressed in *Disneyland Park*, under the circumstances, the relevance of the requested information was readily apparent to Respondent. Not only is Respondent aware of the existence of the limitations set forth in the parties’ collective bargaining agreements and grievance settlement, but it is also armed with the knowledge that the Union possessed hearsay evidence that Respondent was potentially violating the terms of those agreements. Furthermore, all of that is taking place while the parties have the XG 52 grievance pending arbitration over whether or not Respondent improperly subcontracted bargaining unit work. (Tr. 26-32, GCX 6). Respondent cannot possibly take the position that it was clueless regarding where the Union was coming from in its request

to determine whether or not Respondent had engaged in further contractual violations in the manner that it subcontracts bargaining unit work.

The basic facts of this case are very similar to those set forth in *Chrysler, LLC*, 354 NLRB No. 128 (January 6, 2010). In *Chrysler*, the Board adopted the ALJ's finding that the employer violated Sections 8(a)(1) and (5) of the Act when it failed to comply with the union's request for information related to the outsourcing of bargaining unit work. That case involved an employer that regularly subcontracted work at its facility. *Id.* at slip op. 4. The union made separate identical requests related to the work of seven different subcontractors utilized by the employer. *Id.* The union cited to memoranda of understanding within the parties' collective bargaining agreement related to subcontracting. *Id.* The Union went on to declare in each of its requests:

“In order for the Union to properly prepare and process for possible grievances, fulfill the unions [sic] contract administration and bargaining responsibilities, and to monitor and administer the collective bargaining agreement we request the following information from the Company. Please inform the Union following information pertaining to the engineering resource, [name of company], which is being utilized by Chrysler LLC. This is to include but not limited to: A list of all programs and/or vehicles that engineering, design, packaging and prototype tasks are being performed for Chrysler LLC and its subsidiaries. A complete Chrysler Development System (CDS) breakdown of the program...” *Id.* at slip op. 4-5.

The ALJ noted in his decision that the Union's request was made “primarily to determine whether the Company's use of outsourcing violated any provisions of the collective-bargaining agreement, particularly with respect to performance of bargaining unit work.” *Id.* As Respondent has done in the instant case, the employer in *Chrysler* also argued that the union failed to establish the relevance of its requested information. *Id.* at slip op. 9. The ALJ in *Chrysler* cited the two-prong test described in *Disneyland Park*, *supra*. As the ALJ noted, “Here, the RFI's referenced specific MOU's in the collective bargaining agreement, requested certain types of information, and stated that the Union sought the information for, inter alia, possible grievances.” *Chrysler* at slip op. 10. As a result, the ALJ and the Board found that the union's request was relevant. The facts in this case very closely

mirror those in *Chrysler*. The Union referenced the relevant subcontracting provision of the parties' collective bargaining agreement and advised Respondent that it needed the information in question to determine whether or not there had been violations of that provision. As in *Chrysler*, the Union "sought the information for possible grievances." Respondent argues that the Union has failed to cite to a specific "dispute" or "controversy" or provide an example of how the collective bargaining agreement has been violated – and that only then is the Employer is required to furnish the requested information. Respondent's view of the law is flawed. The Union's right to the requested information is not purely based in contract. It is statutory and grounded in the Act. See *Albertson's, Inc.*, 310 NLRB 1176, 1178 (1993), citing *NLRB v. Acme Industrial Co.*, supra. ("it has long been settled case law that an employer has a *statutory duty* to supply requested information to a union...(emphasis added)"). See also *Meeker Cooperative Light and Power Association*, 341 NLRB 616, 618 (2004(Section 8(a)(5) violation where no specific subcontracting provision existed in the parties' collective bargaining agreement). Furthermore, the Board in *Chrysler* clearly disagreed with Respondent's position as no such requirement was set forth and its decision in that case is not an isolated one. The Board has consistently held that actual instances of contract violations are not required, nor must information that triggered the information request be accurate, nonhearsay or even ultimately reliable. *W-L Molding Co.*, 272 NLRB 1239, 1240 (1984); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186-1188 (1997). The Union is not required to demonstrate that the information it relied upon was correct and need only show that it had a reasonable basis for suspecting potential improper conduct by Respondent. *Crowley Marine Services*, 329 NLRB 1054, 1060 (1999). The Board has recently spoken to its stance on this issue in *Trade Show Supply*, 359 NLRB No. 106 (April 30, 2013). In that case, the Board found that the employer had unlawfully failed to provide the union with information concerning the employer's "staff employees." *Id.* As the Board stated,

“The judge found that the Union was entitled to the information in order to evaluate whether to pursue a grievance, even though the Union’s position ‘might eventually prove unsuccessful’ due to the lack of express contractual support, and the prospects for arbitral success might be ‘diminish[ed]’ by the Union’s earlier failure to vigorously represent the Respondent’s ‘staff employees.’ We agree with the judge that the relevance of the Union’s information request does not depend on the merits of a potential grievance or arbitration.”
Id. at slip op. 2 fn 2.

Furthermore, to argue that a dispute or controversy does not exist between the parties is incredible. The Union has provided specific concerns that it has with respect to Respondent’s subcontracting practices. In addition to the necessity set forth in Dick Waers’ emails, Dexter Drerup provided direct testimony of the concerns his bargaining unit members communicated to him during Union meetings. Drerup testified that his members informed him that there were a number of subcontractors performing work that historically has been performed by the bargaining unit. (Tr. 26). Although Respondent does not believe it to be sufficient, or even noteworthy, the Union is allowed to reasonably rely on the observations of its bargaining unit employees. See *Walter N. Yoder & Sons, Inc*, 270 NLRB 652, 655 fn 6, enfd in relevant part 754 F.2d 531, 534 (4th Cir. 1985)(Disclosure of information warranted based on union member reports that the employer was interchanging employees and work with a nonunion business). Therefore, Respondent’s stance that it lacks legitimate notification of relevancy is simply not accurate. It received more than enough notification by correspondence from Dick Waers as well as from Dexter Drerup during the hearing. *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1019 (1979), enfd. in relevant part 615 F.2d 1100 (5th Cir. 1980); *Contract Flooring Systems*, 344 NLRB 925 (2005). Therefore, consistent with Judge Dibble’s decision, Respondent had a statutory obligation to provide the requested subcontractor information and it has violated the Act by its failure to do so.

b. Relevance to the pending XG 52 grievance

Respondent's position regarding relevance is inaccurate for a second reason – the XG 52 grievance. Union Business Representative Dexter Drerup testified that on April 27, 2012, the Union filed the XG 52 grievance because bargaining unit employees had been performing work on Respondent's XG 52 project and prior to its completion, Respondent took away that work from the bargaining unit and awarded it to Fidelity, one of Respondent's subcontractors. (Tr. 26, 28-31; GCX 6). In his August 7, 2012, letter to Manager of Human Resources Rebecca Gunn, Drerup requested that Respondent furnish the Union a list of contractors presently working on Respondent's property, including names, hours and type of work performed. (Tr. 24-25, GCX 5). After Rodric Widger responded to Drerup on August 28, 2012, indicating that he thought the relevance of the request would be addressed through counsel, the Union turned the matter over to its attorney, Dick Waers. (Tr. 34, GCX 7). On multiple subsequent occasions, the Union explained to Respondent its position as to why it needed the information for the XG 52 grievance and why it felt it was relevant. (GCX 8, GCX 8a). In Waers' initial November 29, 2012, letter to Widger, he reiterated that the Union needed the information in order to evaluate and move forward with the XG 52 grievance. (GCX 8, GCX 8a). By email dated December 5, 2012, Widger disagreed with Waers' stance that Respondent had an obligation to furnish the requested information. (GCX 8, GCX 8a).

On December 6, 2012, Waers responded to Widger by advising that the parties "have a pending grievance concerning the XG 52 project. When weighing the propriety of subcontracting, arbitrators frequently look to the frequency of subcontracting by the employer." (GCX 8, GCX 8a). Within his December 18, 2012, email to Widger, Waers wrote (in relevant part),

"Further, with respect to the XG project, again the information is relevant so that the union can determine the extent of employer subcontracting." (GCX 8, GCX 8a).

At the hearing, Drerup asserted that he felt the information would benefit the Union's case while presenting the XG 52 grievance to an arbitrator. Drerup testified,

"I thought it would strengthen my case in front of an arbitrator... Well, I –if—if they are just giving – if they are just assigning work to subcontractors, and a lot of work, it might be our work, and if I can prove that they are doing this, then that is going to help my work in front of an arbitrator on this particular grievance." (Tr. 33)

The standard for relevancy is not whether Respondent agrees with the Union. As discussed previously, the standard for determining relevancy is very low and liberal. *NLRB v. Acme Industrial Co.*, supra; *SBC Midwest*, supra. Relevance includes information that would assist the Union in its assessment of potential and pending grievances. *United Technologies*, 274 NLRB 504, 506 (1985). This includes information the Union could utilize in the potential disposal of a grievance if the information in question supports a conclusion that the union will not ultimately prevail in front of an arbitrator. As set forth in *New Jersey Bell Telephone Co.*, 289 NLRB 318, 329 (1988), "Therefore it need not be shown that the information will result in the union winning an arbitration, so long as it is relevant to the disputed subject matter. Indeed, the fact that the information may even tend to show that a grievance or potential grievance is without merit, equally serves as a legitimate purpose of collective bargaining because such disclosure would enable the Union to determine which grievances it will pursue to arbitration and which it will not." Again, Respondent does not get to make the decision as to what is or is not beneficial for the Union in its role as the collective bargaining representative for Respondent's bargaining unit employees. See *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 970 (2006)("The Board need only decide whether the information sought has some 'bearing' on these issues, or would be of use to the union." See also *Shoppers Food Warehouse*, 315 NLRB 258, 260 (1994)("[T]he Board's discovery-type standard favoring disclosure is intended to facilitate the arbitral process by permitting a union access to a broad scope of potentially useful information."). The XG 52 grievance pertains to the Union's allegation that Respondent has subcontracted away bargaining unit work in a manner that is

violative of the parties' collective bargaining agreement. The subcontracting information it has requested on August 7, 2012, and dates in November and December 2012, may provide evidence to an arbitrator that the XG 52 project was not an isolated event in that Respondent actually constitutes a recidivist when it comes to improperly subcontracting the type of work in question. As the evidence established, if the type of work at issue on the XG 52 project falls under the category of work that is restricted to 200 subcontract hours pursuant to the parties' 2009 settlement agreement, it is possible that Respondent has violated the terms of that agreement. Then again, the requested information might prompt the Union to drop its grievance altogether. Either way, the information is necessary and relevant for such a decision to be made by the Union and not Respondent.

B. The Union's request was not overly broad

Respondent argues that the judge erred in refusing to find that the Union's request lacked in specificity. The judge found that Respondent's argument that the Union's request was overly broad, ambiguous and vague lacked a legal basis. Counsel for the Acting General Counsel submits that Judge Dibble reached the appropriate conclusion on this issue.

The judge accurately noted that the Union, in its role as the collective bargaining representative of Respondent's unit employees, needs to "assess the list of contractors, the type of work they performed, and the number of hours they worked meets its definition of unit work that is proscribed by the CBA and settlement agreement." (JD 11, lines. 22-24). A finding that the Union is required to be more specific with respect to identifying contractors as those performing bargaining unit work would result in exactly what Judge Dibble described in her decision. Specifically, it would result in Respondent having sole autonomy in determining which contractors it deemed to be performing unit work and ultimately being the decision maker in deciding what information should be turned over to the Union. (JD 11, lines 24-28). As can be seen by the XG 52 grievance and the testimony of Manager of

Human Resources Rebecca Gunn and Business Representative Dexter Drerup, that concern is compounded due to the fact that on more than one occasion the parties have disagreed as to what constitutes bargaining unit work. (GCX 6; Tr. 63-65, 69-70). Although the parties will be in a position to filter out work that is clearly unrelated to bargaining unit work, Respondent does not retain sole discretion in making that decision. While Respondent might argue otherwise, Judge Dibble correctly noted that in the correspondence exchanged between the parties' attorneys, although Rodric Widger contested the Union's request at every turn based on relevancy, he did not seek clarification regarding any alleged ambiguity. See *Superior Protection Inc.*, 341 NLRB 267, 269 (2004), *enfd.* 401 F.3d 282 (5th Cir. 2005).

C. Judge Dibble's decision was not punitive

In its exceptions, Respondent argues that Judge Dibble compounded the burden on Respondent by requiring that it provide the Union with the subcontractor information it requested on August 7, 2012 (names, hours, and type of work), as well as the subsequent dates that the Union repeated its request for the information. Respondent somehow claims a bias of the judge and jumps to the accusation that she has "unfairly and unjustly taken up the cause of the Union to require that Respondent's voice be vanquished." Without a real explanation of how the Union's repeated request does not constitute a valid continuing one, Respondent circles back to its overly broad and relevancy arguments. Respondent has no ground to support its arguments in this case and this particular exception is not immune to the error of Respondent's ways. Respondent makes reference to Judge Dibble's identification of "unstated subsequent dates." Respondent is clearly aware of the limited dates involved in this matter where Union attorney Dick Waers repeated the Union's request for subcontractor information within his correspondence with Rodric Widger. (GCX 8; GCX 8a). Respondent has provided no legal basis to support a reason why it should not have provided the requested subcontractor information that was

initially requested as of August 7, 2012, and again as of the dates set forth the parties' correspondence in November and December 2012, nor is there a basis to support its accusations of punitive findings.

D. Deferral is not appropriate

During the hearing conducted on May 1, 2013, Respondent's counsel moved to defer the information request at issue in this matter to the XG 52 grievance currently pending arbitration between the parties. Judge Dibble requested that Respondent submit its motion in writing and all parties subsequently separately briefed their respective positions. As discussed below, Counsel for the Acting General Counsel agrees with Judge Dibble's application of current Board law because deferral is clearly inappropriate in this case.

1. Legal Standard

The Board is clear on its policy with respect to the deferral of requests for information to the grievance process. "The Board has held that issues concerning a refusal to supply information are not subject to deferral to the grievance arbitration process." *United States Postal Service*, 302 NLRB 918, 918 (1991), citing *Postal Service*, 280 NLRB 685 fn. 2 (1986). See also, *Medco Health Solutions of Spokane, Inc.*, 352 NLRB 640, 641 (20008); *Team Clean, Inc.*, 348 NLRB 1231 fn. 1 (2006); *Chrysler Corporation*, 331 NLRB 1324, 1325 fn. 3 (2000); *United Technologies, Inc.*, 274 NLRB 504, 505 (1985). Respondent's position regarding deferral is nothing less than opposition to years of consistent Board law.

2. Relevance of the Union's information request extends beyond a single pending grievance

In addition to seeking reversal of Board policy, Respondent argues that deferral of the Union's information request to arbitration is proper because there is an arbitration pending between the parties concerning a single subcontracting grievance ("XG 52 grievance") filed on April 27, 2012, and because the Union takes the position that the requested information is relevant, in part, to that grievance. As

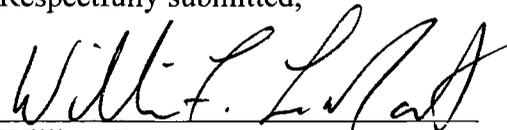
discussed in detail above, in making this argument, Respondent attempts to brush aside the substantial evidence set forth at the hearing that clearly identifies the two-fold relevancy argument made by the Union with respect to the reasons it has requested the subcontractor information at issue on August 7, 2012, and subsequent dates. The arbitrator assigned to the XG 52 grievance is solely tasked with deciding whether or not Respondent subcontracted the XG 52 project in a manner that violated the terms of the parties' collective bargaining agreement and/or grievance settlement. The arbitrator is obligated to interpret the four corners of the parties' collective bargaining agreement. It is not the arbitrator's position or role to determine whether or not the Union met its burden under the Act in establishing relevancy of the subcontractor information requested on August 7, 2012, where the relevance clearly extends beyond the matter to be heard by the arbitrator. That is a matter solely appropriate for the Board.

IV. CONCLUSION

Counsel for the Acting General Counsel respectfully submits that the evidence establishes that Respondent's refusal to furnish the Union with requested relevant information related to subcontractors was a clear violation of its duty under Sections 8(a)(1) and (5) of the Act. Respondent has failed to establish any evidence or proffer any legitimate argument to support a conclusion that Judge Dibble's decision was improper or that it acted in a lawful manner. Accordingly, Respondent violated the Act as alleged.

Dated: August 30, 2013

Respectfully submitted,



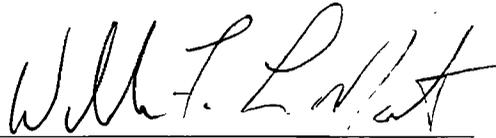
William F. LeMaster

Counsel for the Acting General Counsel

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to Decision of the Administrative Law Judge on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Board with service by electronic mail on the parties identified below.

Dated: August 30, 2013



William F. LeMaster
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