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Chapin Hill at Red Bank and Local 707 Health Employees Alliance Rights & Trade (HEART).
Case 22–CA–095604

January 10, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On July 12, 2013, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent, Chapin Hill at Red Bank, filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt the recommended Order as modified¹ and set forth in full below.

In affirming the judge’s conclusion that the Respondent unlawfully failed to provide information requested by the Union, we agree with the judge’s finding that the request was not rendered moot by the resolution of a grievance the Union had filed on behalf of unit employee Joanne Klich. As found by the judge, the requested information has present and continuing relevance for the Union to determine whether the Respondent has been complying with a provision in the parties’ collective-bargaining agreement governing the Respondent’s use of nonunit employees to perform bargaining unit work.

In its exceptions, the Respondent cites two cases in which the United States Court of Appeals for the Third Circuit declined to enforce portions of Board orders (requiring that information unlawfully withheld be furnished) because the court found that the information requested by the unions was not currently relevant: *C-B Buick, Inc. v. NLRB*, 506 F.2d 1086 (3d Cir. 1974), and *International Telephone & Telegraph Corp. v. NLRB*, 382 F.2d 366 (3d Cir. 1967), cert. denied 389 U.S. 1039 (1968). Those cases are distinguishable. In *C-B Buick*, the union had requested financial information bearing on the parties’ contract negotiations, but by the time the case reached the court, the parties had reached an agreement and there was no evidence that the union needed the information to administer that agreement. 506 F.2d at 1093–1095. In *International Telephone & Telegraph*, the union had requested seniority information about all

¹ We shall modify the judge’s recommended Order and substitute a new notice to conform to the Board’s standard remedial language.

nonunit employees who were eligible to transfer into the unit, but no such transfers were imminent and there was no evidence that the information otherwise was relevant to the union’s ability to police the parties’ agreement. 382 F.2d at 371–372. By contrast, the record here fully supports the judge’s finding that the Union has a present need for the requested information.²

ORDER

The National Labor Relations Board orders that the Respondent, Chapin Hill at Red Bank, Red Bank, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Local 707 Health Employees Alliance Rights & Trades (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

² In so finding, we note that the judge quoted a portion of the Board’s decision in *International Telephone & Telegraph Corp.*, 159 NLRB 1757, 1759 (1966), which the court reversed in relevant part. As explained, however, the court’s decision in that case does not warrant a different result here.

We also note that, in his analysis of the mootness issue, the judge erroneously characterized the Board’s decision in *Bloomsburg Craftsmen*, 276 NLRB 400 (1985), as holding that an employer is not required to provide unlawfully withheld grievance-related information where the grievance and arbitration process has already concluded. In fact, the Board ordered the employer to provide the requested information. See 276 NLRB at 400 fn. 2; but see *Borgess Medical Center*, 342 NLRB 1105 (2004) (not requiring production of information bearing on a completed arbitration proceeding where the union did not indicate another need for the information). We need not address the merits of *Bloomsburg* or *Borgess*, however, because we agree that the Union’s request is not moot for the reasons stated above.

Finally, we affirm the judge’s finding that deferral to arbitration is inappropriate. The Board has long held that deferral is inappropriate in 8(a)(5) information request cases. See, e.g., *United Technologies Corp.*, 274 NLRB 504, 505 (1985); *DaimlerChrysler Corp.*, 331 NLRB 1324, 1324 fn. 3 (2000), enfd. 288 F.3d 434 (D.C. Cir. 2002). We find it unnecessary to rely on *Medco Health Solutions of Spokane, Inc.*, 352 NLRB 640 (2008), cited by the judge, which was decided by a two-member Board. See *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010).

Because the Union requested the information at issue here to police the parties’ collective-bargaining agreement as well as in connection with a grievance arbitration, Member Miscimarra finds it unnecessary to pass on the foregoing cases or decide whether—and, if so, under what circumstances—it would be appropriate to defer to arbitration a dispute about information requested solely in connection with a pending grievance.

(a) Furnish to the Union in a timely manner the information requested by the Union on August 14, 2012.

(b) Within 14 days after service by the Region, post at its Red Bank, New Jersey facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 14, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 10, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Local 707 Health Employees Alliance Rights & Trades (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union on August 14, 2012.

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Lisa D. Pollack, Esq., for the Acting General Counsel.
J. Ari Weiss, Esq. (Law Offices of Morris Tuchman), of New York, New York, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried on May 7, 2013,¹ in Newark, New Jersey, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 22 of the National Labor Relations Board (NLRB or Board) on March 28. The complaint alleges that Chapin Hill at Red Bank, New Jersey (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) by failing to furnish information requested by Local 707 Health Employees Alliance Rights & Trades (the Charging Party or Union), which was the certified bargaining representative of an appropriate unit of its employees. Respondent filed a timely answer to the complaint denying the material allegations in the complaint.

After the close of the hearing, the briefs were timely filed by the Acting General Counsel and Respondent, which I have

¹ All dates are in 2012, unless otherwise indicated.

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carefully considered. On the entire record, including my observation of the demeanor of the witness, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New Jersey corporation with its principal office in Red Bank, New Jersey, is engaged in the operation of a nursing home and rehabilitation center providing in-patient medical and residential care. During a representative 1-year period, the Respondent derived gross annual revenue in excess of \$100,000 and has purchased and received goods valued in excess of \$5000 at its Red Bank facility directly from suppliers located outside the State of New Jersey. Accordingly, I find, as the Respondent admits, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Union's Request for Information on August 14

The Union and Respondent have engaged in a collective bargaining relationship after the Board certified the Union on February 21, 2008, as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate bargaining unit of

All full-time and regular part-time CNAs, COTAs, PTAs, laundry employees, housekeeping employees, cooks, dietary aides, central supply, staffing coordinator, restorative aides, transporters, drivers, activity aides, LPNs, accounts payable clerks, rehabilitation technician, rehabilitation aides, unit secretary and telephone operators employed by the Employer at its 110 Chapin Avenue, Red Bank, New Jersey facility, but excluding all confidential employees, RNs, professional employees, managers, guards and supervisors as defined under the Act.

Terms and conditions of employment were embodied in an existing collective bargaining contract (CBA or contract) since May 1, 1998 to April 30, 2012. The union president, Odette Machado-Ramadeen (Machado),² testified that the CBA has an automatic annual extension continuing to date and there have been no relevant changes or revisions to the contract. (GC Exh. 2; Tr. 14, 15.)³

On August 14, Machado sent an email to Joseph Schlanger (Schlanger), who was and is the Executive Director for the Respondent. (Jt. Exh. 1.) The email referred to a pending arbitration on a grievance filed by the Union on behalf of Joanne Klich (Klich) which alleges, among other items, that the Respondent failed to provide Klich with extra and/or overtime hours while assigning hours of work that were requested by

² Machado was the only witness to testify at the trial.

³ Testimony is noted as "Tr." (Transcript). The exhibits for the Acting General Counsel and Respondent are identified as "GC Exh." and "R Exh." The joint exhibit is identified as "Jt Exh." The closing brief for the Acting General Counsel is identified as "GC Br." and for the Respondent as "R Br."

Klich to non-bargaining unit employees. (GC Exh. 3.) The email, in part, stated

In order to assure speedy resolution of this matter, we are requesting the following:

- That you respond to the Union promptly with the information we requested,
- A date that is mutually agreeable to the Union and Management for the above Multiple Issue Arbitration,
- A resolution that is acceptable to the Union.

In the email, the Union requested the following information

Time Sheets/Schedules and Assignment Sheets for all BU (bargaining unit) Departments and a list of non BU employees who were assigned BU work, all from March 2012 to the current time.

Machado explained that the information requested was relevant and necessary

... for the Union to have meaningful discussions with the Employer regarding a resolution for the improper use of non BU employee who do bargaining unit work while denying BU employees OT (overtime) and [sic] extra hours.

According to Machado, the information was necessary in order to effectively monitor the contract and in the event there are contractual violations, the information would be useful to clarify the grievance procedure. Machado testified that Article 22 of the contract provides for per diems, no frills and temporary employees to substitute for regularly scheduled unit employees. (GC Exh. 2 at 18.) Article 22.1 reads

Per Diem/no frills and temporary (including Agency) employees shall be used on an on-call, as needed basis only to substitute for regularly scheduled employees during their absence on non-working benefit days (sick leave, Union days, holidays, personal leave days, or vacation).

Machado explained that the information requested would enable the Union to determine whether there is a violation of article 22.1 and to enforce the contract if per diems were in fact being given extra work hours over bargaining unit employees or if management was over utilizing per diems. Machado testified the information requested would also assist the Union in the grievance-arbitration procedure. Machado said that the Klich arbitration involves a supervisor doing bargaining unit work that Klich had requested to perform. (Tr. 18-21.)

B. The Information Request on October 24

Machado repined that she never received a response from Schlanger to the information requested in her August 14 email. While Machado was visiting the Respondent's facility in her capacity as the union president (she could not recall the specific date, but it was in sometime in autumn; about 3 weeks to a month after the email), she encountered Ben Sherer (Sherer), the new administrator of the facility and introduced herself. At that encounter, Machado informed Sherer that she had requested information on the per diems and never received a response from Schlanger on her request. According to Machado, Sherer

replied that she should contact Schlanger since she has been dealing with him. (Tr. 23–25.) Machado agreed that Sherer’s suggestion made sense, so she decided to call Schlanger at their next weekly telephone conference call. Machado said that Schlanger was not available, so she left him a voice message. She also sent Schlanger another email on October 24. (Tr. 26–29.) The October 24 email (GC Exh. 4) stated

Dear Joseph,

Please be advised that the union is revising its grievance to **clarify its position** regarding Management’s contract violations and also the remedy we are seeking as they relate to articles including but not limited to the following:

Failing to recognize the union and failing to apply the contract to numerous employees who do bargaining unit work.

REMEDY REQUESTED BY THE UNION: Make the union whole in every way, including: MANAGEMENT TO COMPLY THE CONTRACT, including but not limited to the following articles:

Bargaining Unit
 Union Security
 Wages and all Benefits
 Union Orientation and Notification of the Union by Management to new potential union employees.
 Seniority
 Hours of Work
 Reports to the Union
 Maintenance of Standards
 Per Diems etc
 Check-off and Union Dues and Union initiation fees.

Please noted that the clock is ticking and and (sic) that the union intends to file arbitration no later than October 30th if these matter are not resolved.

We are available to meet regarding these matters, please call (deleted) to schedule an appointment

Thank You

Odette Machado

There is some dispute as to whether the October 24 email was a second request for the same information reflected in the August 14 email. The Respondent argues that the emails were pertaining only to the grievance pending in arbitration. Machado maintained that the October 24 email was in fact regarding the information requested earlier in addition to requiring the information for the pending arbitration.

The Respondent did not respond to her October 24 email, although Machado testified that she attempted to contact Schlanger on a weekly basis. (Tr. 30–33.) The Respondent has argued that it did not consider the October 24 email a supplemental information request and that it was only a recitation of the grievance pending in the arbitration. (Tr. 54–60; R Br. at 4.)

C. The Information Request on January 7

Machado made another attempt to obtain the information requested on January 7, 2013, by email to Schlanger (GC Exh. 5),

which, in part, read

Dear Joseph,

The facility has disregarded our request for information each and every time we requested it. We need the information to determine how the facility utilizes per diems and other non union who do bargaining work.

It appears that the facility is over utilizing such workers and is in direct violation of the CBA. Chapin Hill is hiring non BU workers, placing them on union schedules and assignments while no initiation fees and union dues from them are remitted to the union.

In many cases these workers are getting hours which are equal to or more than what BU workers get. We requested that you apply the CBA to those workers including the union security article, to be specific, those employees have to be terminated in accordance with the union security article, for failing to join the union.

Your failure to comply with our request for the following:

- Information regarding the use of per diems and other non BU workers who do BU work,
- Salary information we requested on a specific dietary employee
- To terminate non BU workers who have failed to join the Union will leave us no choice but to continue to take all necessary steps to assure that the facility cease and desist committing unfair labor practices and contract violations as they relate to this matter.

We look forward to your prompt compliance in handling this matter

Thank you

Odette Machado.

Machado testified that the Respondent did not respond to the January 7, 2013 information request. (Tr. 33.) According to Machado, she met with Sherer regarding a pending grievance the week following her January 7 email. At that grievance meeting, Machado raised with Sherer that the Union never received the information requested from her August 14 email. Machado complained to Sherer that there were employees the Union had identified that were not in the bargaining unit and the information requested on the number of hours they had worked was essential to determine if there was a contract violation. Machado said she showed Sherer a copy of her August 14 email and he promised to provide her with the information, but never did. (Tr. 33–40.)⁴ To date, the Respondent has not provided any of the requested information.

⁴ The Acting General Counsel proffered GC Exh. 6 showing an email dated March 21, 2013, in which the Union again requested the information, but Machado testified that the email was actually sent shortly after her February 17, 2013 meeting with Sherer and before February 21, 2013. Unable to adequately explain the discrepancy as to when the email was actually sent, the Acting General Counsel withdrew this exhibit. (Tr. 41, 42.)

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III. DISCUSSION AND ANALYSIS

A. *The Union's Information Request was Necessary and Relevant*

The Acting General Counsel argues that the information requested was necessary for the Union to carry out its representative responsibilities under the collective bargaining contract.

It is well established that, as a corollary of the duty to bargain in good faith, parties to a bargaining relationship are required, upon request, to provide certain information within their possession. It is a violation of 8(a)(5) and (1) of the Act when an employer fails or refuses to provide information requested for contract negotiations. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

The Union requested the information on August 14 and on October 24. While there is a dispute as to whether the information requests were specifically related to the Union's need to monitor and ensure compliance with the CBA or merely a demand by the Union to the Respondent to resolve the pending grievance, it is well settled that a union is not required to repeat the request, *Bundy Corp.*, 292 NLRB 671 (1989), and that an employer is obligated to request clarification if the initial request was not understood. *Azabu USA (Kona) Co.*, 298 NLRB 702 (1990). Here, the Respondent failed to provide a credible rationale for not responding to the Union's information request or to request a clarification if it believes that the August 14 and October 24 requests were only related to the grievance-arbitration procedure.

My review of the emails dated August 14 and October 24 shows that the information requested would allow for the Union to monitor compliance with article 22.1 of the CBA and to assist the Union in its pending arbitration.

I credit Machado's testimony as fully credible when she stated that the Union requested the information in order to monitor article 22.1 of the contract to ensure that the Respondent was not over utilizing per diem employees to the detriment of the unit employees. Her testimony is consistent with her August 14 information request, which specifically stated that the information is needed "... for the Union to have meaningful discussions with the employer regarding a resolution for the improper use of non BU employees who do bargaining unit work while denying BU employees OT and extra hours." Machado credibly testified that the information was also needed for a pending arbitration relating to the article 22.1 when the Respondent failed to provide Klich, a unit employee, with overtime work hours.

In addition, Machado's October 24 information request specifically stated that she wanted management to comply with the contract (to include, among other items) wages and all benefits, hours of work, and per diems. In my opinion, while the August 14 and October 24 requests for information related to the pending arbitration, it also clearly reflects the Union's responsibility to monitor and ensure compliance of the CBA as the exclusive bargaining representative of the unit.

The Respondent violated Section 8(a)(5) and (1) of the Act when it failed to provide the Union with relevant information that is necessary to properly perform its duties as the exclusive bargaining representative. *Truitt Mfg. Co.*, supra. The infor-

mation was necessary and relevant for the Union to ensure compliance with the contract. Under article 22.1 of the contract, the Respondent is entitled to utilize per diem employees as needed basis *but* only to substitute for regularly scheduled employees who are absent from work. It is well settled that an employer is obligated to furnish information requested by its employees' collective-bargaining agent that is relevant and necessary to the Union's bargaining responsibilities and contract negotiations. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *Iron Workers Local 207*, 319 NLRB 87, 90 (1995). Relevancy should be broadly construed and absent any countervailing interest, any requested information that has a bearing on the bargaining process must be disclosed. The burden to show relevancy is not exceptionally heavy, "requiring only that a showing be made of a 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.*, 385 U.S. 432, 437 (1967). The standard for relevancy to apply is a liberal discovery-type standard requiring only that the information be directly related to the union's function as a bargaining representative and that it appear "reasonably necessary" for the performance of that function. *Acme Industrial Co.*, supra.

The Union requested time, schedules and assignment sheets for all bargaining unit departments and a list of non-bargaining unit employees who were assigned bargaining unit work from March 2012 to the current time. It is well settled that the foregoing type of information regarding the wages, terms and conditions of unit employees is presumptively relevant to the Union's bargaining obligations and must be furnished upon request. *Fused Solutions, LLC*, 359 NLRB No. 118 (2013); *Metro Health Foundation, Inc.*, 338 NLRB 802 (2003); *Southern California Gas Co.*, 342 NLRB 613, 614 (2004).

A request for information outside of the bargaining unit, such as information about per diems, temporary employees or subcontracting, is not considered presumptively relevant and thus the relevance required to be established is somewhat more precise. *Ohio Power Co.*, 216 NLRB 987, 991 (1975); *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). In *Sheraton Hartford Hotel*, 289 NLRB 463 (1988), the Board stated:

Section 8(a)(5) obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the Union in fulfilling its statutory duties as bargaining representative. Where the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit the information is presumptively relevant. Where the information does not concern matters pertaining to the bargaining unit, the Union must show that the information is relevant. When the requested information does not pertain to matters relating to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information.

The burden to show relevancy is not exceptionally heavy, but it does require "... a showing of probability that the desired information is relevant and ... would be of use to the union in

carrying out its statutory duties and responsibilities.” *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 544, 545 (2003). Machado explained that the Union needed the time, assignment and schedule sheets of the nonunit employees in order to determine how much contracting out of bargaining unit work was occurring in order to monitor and enforce the collective-bargaining agreement.

In *United Graphics*, 281 NLRB 463 (1986), the employer was utilizing temporary workers, but were not receiving wages and benefits in accordance with the collective-bargaining agreement. The Board held, “it is clear that information regarding individuals who are engaged in performing the same tasks as rank-and-file employees within the bargaining unit ‘relates directly to the policing of the contract terms.’” *Id.* at 465, quoting *Globe Stores*, 227 NLRB 1251, 1253–1254 (1977) (names, rates of pay, and store of employment of group managers performing the same tasks as rank-and-file employees).

In *Mt. Clemens General Hosp.*, 344 NLRB 450, 463 (2005), the union believed that the employer was awarding positions to nurse externs over bargaining unit employees, which was a violation of the collective-bargaining agreement. When the union requested the employer for the names and job descriptions of the nonunit workers, the employer provided only the job descriptions. The Board held that the union’s information pertaining to the non-bargaining unit employees is relevant and the employer’s refusal to provide the requested information was a violation of the Section 8(a)(5) and (1) because the union reasonably believed that the employer was utilizing non-bargaining unit workers to the detriment of unit employees.

The information requested was also needed for a pending arbitration and a violation of the Act when the Respondent failed to provide the information. The Union claimed in its grievance that the Respondent had violated the CBA when shift work was given to a management employee to the detriment of Klich, a member of the bargaining unit.

An employer’s refusal to furnish information pertaining to grievances during the term of the collective bargaining contract is also a violation of the duty to bargain in good faith. *Acme Industrial Co.*, supra, *Curtiss-Wright*, 145 NLRB 152, 156–157 (1963). That information could have helped the Union to assess the contracting work that was occurring and influence it on proceeding with the grievance. The Board has held that by failing to provide information necessary to decide whether to proceed with a grievance or arbitration, the employer violated Section 8(a)(5) and (1) of the Act. *Acme Industrial*, supra, *Eazor Express*, 271 NLRB 495 (1984); *Island Creek Coal Co.*, 292 NLRB 490, 491 (1989); *Bud Antle, Inc.*, 359 NLRB No. 140, slip op. at 8, 9 (2013).

In *New York Presbyterian Hospital*, 354 NLRB 71 (2009), the Board found that the employer violated Sections 8(a)(5) and (1) of the Act by refusing to produce work shift documents on nurse practitioners, who were not bargaining unit employees, to the union for an arbitration hearing. The Board found that the union’s request was relevant because the nurses who were not in the bargaining unit performed the same type of work as those who were in it. This information was pertinent to a breach of contract claim the union filed against the employer for giving duties to non-bargaining unit employees that it could only give

to employees in the bargaining unit, and therefore consistent with the union’s function to collectively bargain and relevant.

I find and conclude that the Union has met its burden to show that the information requested of bargaining and non-bargaining unit employees was relevant and necessary for it to perform its statutory duties in carrying out the collective-bargaining agreement in monitoring the terms of the contract and to process the pending grievance.

B. The Information Requested Was Not Moot

The Respondent argues that the information requested was not relevant as the underlying grievance had been heard and an award issued in favor of Klich and the Union on November 14. In that matter, the arbitrator was required to draw an adverse inference when the Respondent refused to provide the information requested prior to the arbitration. (R. Exhs. 1, 2.) The Respondent maintains that the information requested was solely for the purpose of the pending arbitration. The Respondent contends that the Union’s August 14 request for information which Machado needed for the grievance and arbitration was no longer relevant and necessary after the arbitration award was issued in the Union’s favor.

The Board has dismissed alleged violations of Section 8(a)(5) and (1) of the Act for a refusal to bargain when the information was relevant when initially requested, but the underlying issue for the unfair labor practice charge became moot by the time it was filed. *Bloomsburg Craftsmen, Inc.*, 276 NLRB 400 (1985); *Glazers Wholesale Drugs*, 211 NLRB 1063, 1066 (1974). Among the reasons that the Board has rendered previously relevant information requests moot is when the issue behind the charge was resolved at arbitration. *Bloomsburg*, 276 NLRB at 405.

In *Bloomsburg*, supra, the union pursued a grievance on behalf of a bargaining unit employee who had been terminated by the employer. The Union filed for arbitration when the grievance was denied. While the grievance was pending arbitration, the union requested the employer for records on the terminated employee, including dates of hire and termination and job description, for the stated purpose of verifying if the personnel actions of the Respondent complied with the CBA, but the employer refused. The grievance was upheld during arbitration and the terminated employee was reinstated and awarded backpay. The Board found that the employer’s refusal to provide information on the terminated employee violated Section 8(a)(5) and (1) of the Act because the requested information was relevant to the union’s processing of the grievance for the terminated employee. Even though it was unlawful for the employer to withhold this type of information during the arbitration period, the Board held that the union could no longer access it, without making a new formal request, because “otherwise relevant information expires when subsequent events render the issue moot.” *Id.* at 405.

The key question in this case is whether the underlying issue of the Union’s charge was resolved during arbitration and was therefore moot, notwithstanding the relevance of the Union’s information request before the arbitral award. The Respondent argues that the underlying issue, whether the Respondent should have complied with the subpoena and information re-

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quest, was specifically resolved during arbitration, with the arbitrator using the adverse inference principle in ruling in favor of the Union. The Respondent reasons that the Union's request for information is no longer relevant and necessary because an arbitration award regarding the information issue was given out, and argues that the request should now be rendered moot. The Respondent also argues that, aside from the request later settled by the arbitral award, there are no outstanding information requests from the Union that are relevant and require the Board's consideration because no other request affects the Union's obligation to administer the CBA.⁵ In contrast, the Acting General Counsel argues that the underlying issue for the information requested was for the administration and monitoring of article 22.1 of the CBA to ensure there were no contract violations, and therefore, the information requested should not be moot despite a favorable arbitral award. I agree.

The stated purpose of the August 14 information requested as credibly articulated by Machado was two-fold, that is, to enable the Union to administer the contract and to assist the Union in its pending arbitration. The underlying rationale for the information requested pertaining to the grievance-arbitration procedure may have been moot once the arbitrator's decision was issued in favor of the Union. However, the underlying rationale for the information requested pertaining to the monitoring and compliance of the CBA was not rendered moot by the arbitrator's decision. A reasonable reading of the information requested on August 14 and October 24 would direct one to conclude that the Union was requesting the information for its duty to administer the contract and for the pending arbitration. In my opinion, the more significant of the two rationales for the information was to enable the Union to administer its contract; to enable the Union to determine whether there was a violation of article 22.1 and the possible adverse effects of nonunit workers doing unit work.

The Board held in *International Telephone & Telegraph Corp.*, 159 NLRB 1757, 1759 (1966), that the

The Union's right to such data, however, turns not on whether the employees to whom the data refers are in a unit, but rather on whether the data itself is necessary and relevant to the Union's role as bargaining representative. Where, as here, the requested information relates to the possibility of unit job displacement by nonunit employees, we do not see how the Union could properly detect infractions of the contract or institute grievances in order to protect the rights of unit employees improperly or adversely affected . . . unless it were given the requested information. Nor do we see how the Union could intelligently discharge its further bargaining function of counseling and advising unit employees of their rights and status

⁵ The January 7 request was made after the unfair labor practice charge was filed with the Board in December. The Respondent argues that the charge referenced only the August 14 request and any information requested after December was outside the scope of the complaint. (R. Br.) Assuming this to be true, it is not necessary for me to assess the validity of this argument since it is sufficient to find a violation of the Act when the Respondent refused to provide the information requested on August 14 and October 24 that was relevant and necessary for the Union to carry out its bargaining duties.

under the contract which the Union negotiated for them unless the Union had access to such data.

If the Respondent was not certain or needed a clarification as to the purpose of the information, it was obligated to request the Union to clarify the purpose or relevancy of the request, which the Respondent never did. It is well established that ". . . an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information."⁶ *Azabu USA (Kona) Co.*, supra at 702.

Accordingly, I find and conclude that the August 14 information requested by the Union was necessary and relevant to enable the Union to discharge its statutory bargaining function of administering the contract and that the information requested was not rendered moot by the arbitration decision. I further find and conclude that the Respondent, by refusing to furnish the Union with the requested information, violated Section 8(a)(5) and (1) of the Act.

C. Deferral to Arbitration is Not Appropriate

The Respondent raises an affirmative defense that this matter in dispute should be deferred to grievance-arbitration procedure under the contract. The Respondent points to article 22.5 of the CBA, which states "The Employer shall provide to the Union upon request evidence showing that there were no bargaining unit employees available to work the needed shift (GC Exh. 2)." The Respondent argues that this clause should trigger a contractual obligation independent of the statutory obligation to provide the requested information and consequently, should be deferred to arbitration. In *Sheet Metal Workers' Intl. Assn. Local 18*, 359 NLRB No. 121, 122 (2013), the Board, citing *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971), held that it will find deferral to a grievance-arbitration procedure appropriate when:

the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration.

The Board has long held that issues regarding a refusal to provide information are not subject to deferral to the grievance-arbitration procedure. In *Medco Health Solutions of Spokane, Inc.*, 352 NLRB 640, 641 (2008), the Board reverse the judge's findings that deferral of the refusal to furnish information to arbitration was appropriate. The Board has maintained a policy against deferral to arbitration in failure to furnish information

⁶ Even assuming that the Union had not fully articulated the relevancy for this information, the Board has made clear that "where the factual basis of a request for nonunit information is obvious from all the surrounding circumstances, the Union's failure to spell it out will not absolve the employer from its obligation under the Act." *Piggly Wiggly Midwest*, 357 NLRB No. 191 (2012).

issues because “. . . deferral can result in a “two-tiered” process that may cause delay in resolving the underlying dispute and undue expense for the parties involved, and because the bargaining representative has a statutory right to relevant information that is independent of the rights accorded under the contract.” Also *Postal Service*, 276 NLRB 1282 (1985).

The Respondent concedes that the existence of contractual rights and obligations to use grievance and arbitration procedures do not divest the parties of their rights and duties under the Act nor oust the Board of jurisdiction to determine whether unfair labor practices have occurred and to remedy them if they have. This is particularly so where the issue involves primarily one not of contractual interpretation.

The Respondent also concedes that issues regarding the refusal to provide information are not subject to deferral to the grievance-arbitration process, but respectfully submit that the policy of nondeferral of information request to the grievance and arbitration procedure is frankly outdated and argues that the dispute over the validity of the information requested is appropriate for the parties’ grievance-arbitration procedure and to dismiss the complaint.

It is a well-established principle that Board judges have the responsibility to apply Board precedent in making rulings when neither the Supreme Court nor the Board has overruled it. *International Brotherhood of Teamsters, Local No. 507*, 306 NLRB 118, 144 (1992). As stated by the Board in *Insurance Agents*, 119 NLRB 768, 773 (1957)

It remains the [judge’s] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

This rule has been enforced in later Board decisions and is without exception. *Douglas Autotech Corp.*, 357 NLRB No. 111, 119 (2011); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). As so succinctly stated in *Waco, Inc.*, 273 NLRB 746, 749 fn. 14.

In his discussion of this issue, as elsewhere, the judge improperly relied on court of appeals decision instead of initially considering relevant Board decisions on the issues presented. And, on one issue, the judge relied on the dissent of a single Board member rather than on the Board majority in that decision. We emphasize that it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). It is for the Board, not the judge, to determine whether that precedent should be varied.

Accordingly, I find and conclude that the deferral of the refusal to furnish information to the Union would be inappropriate and contrary to established Board precedent.⁷

⁷ The Respondent raised a second affirmative defense that I find wholly without merit. The Respondent contends that the charge was untimely under the statute of limitations. (GC Exh. 1(e).) Although not fully articulated by the Respondent, I presume the Respondent is alleging that the charge was untimely because the information requested was outside of the 6-month statute of limitations prescribed by Sec.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to fully furnish the relevant information to the Union in its August 14, 2012 request, the Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

4. By delaying and refusing to promptly provide the relevant information to the Union in its August 14 and October 24, 2012 requests, Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

5. The Respondent’s above described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section (a)(5) and (1) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommend⁸

ORDER

The Respondent, Chapin Hill at Red Bank, New Jersey, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Refusing to bargain collectively in good faith with the Union, Local 707 Health Employees Alliance Rights & Trades.

(b) Refusing to furnish information to the Union of all the time sheets, schedules and assignment sheets for all bargaining unit departments and a list of all nonbargaining unit employees who were assigned bargaining unit work from March 2012 to the current time.

(c) Refusing to promptly and without delay to furnish the information in the Union’s August 14 and October 24, 2012 requests.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. The Respondent shall take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Furnish the Union with the full information it requested on August 14, 2012.

(b) Within fourteen (14) days, post at the Chapin Hill at Red Bank, New Jersey facility, a copy of the attached notice marked

10(b) of the Act. However, here, the charge was served on December 28, 2012. The initial request for information was on August 14, 2012, well within the 6-month period.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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“Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 14, 2012.

(c) Notify the Regional Director in writing within 21 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. July 12, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union (Local 707 Health Employees Alliance Rights & Trades) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the employees in the following unit:

All full-time and regular part-time CNAs, COTAs, PTAs, laundry employees, housekeeping employees, cooks, dietary aides, central supply, staffing coordinator, restorative aides, transporters, drivers, activity aides, LPNs, accounts payable clerks, rehabilitation technician, rehabilitation aides, unit secretary and telephone operators employed by the Employer at its 110 Chapin Avenue, Red Bank, New Jersey facility, but excluding all confidential employees, RNs, professional employees, managers, guards and supervisors as defined under the Act.

WE WILL NOT delay in promptly furnishing the information requested by the Union that is relevant and necessary to the Union’s performance of its duties as the collective-bargaining representative of the employees in the above unit.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL furnish the Union with the information it requested on August 14, 2012, and to specifically include the following: all the time sheets, schedules and assignment sheets for all bargaining unit departments and a list of all non-bargaining unit employees who were assigned bargaining unit work from March 2012 to the current time.

CHAPIN HILL AT RED BANK