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Sho-Me Power Electric Cooperative and International Brotherhood of Electrical Workers, Local 53, affiliated with International Brotherhood of Electrical Workers, AFL-CIO. Case 14-CA-097071

February 25, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On July 22, 2013, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each 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,¹ and conclusions and to adopt the recommended Order as modified.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to furnish requested information to the Union, we find, in agreement with the judge, that the Union established that the information was relevant to the parties' pending XG 52 Project grievance arbitration and to the Union's obligation to determine whether the Respondent was complying with the contracting provisions set forth in their collective-bargaining agreements and 2009 settlement agreement. With regard to the latter point, we find that the circumstances should have made the relevance apparent to the Respondent, as the collective-bargaining agreements and settlement agreement permitted the Respondent to use contractors to perform unit work only in specific circumstances and subject to specific limitations. See, e.g., *Allison Corp.*, 330 NLRB 1363, 1367 *fn.* 23 (2000). Further, and without passing on whether it was correctly decided, we find that *Disneyland Park*, 350 NLRB 1256 (2007), cited in support by the Respondent, is distinguishable because the information request in that case (i.e., for all subcontracts arguably within the union's jurisdiction) was more general than the Union's request here.

Member Johnson adopts the judge's finding that the requested information is relevant to the pending XG 52 Project grievance arbitration, but finds it unnecessary to pass on the judge's finding that it is

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sho-Me Power Electric Cooperative, Marshfield, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following paragraph for paragraph 2(a).

“(a) Furnish to the Union in a timely manner the information requested by the Union on August 7, 2012.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 25, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) 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

relevant to the Union's obligation to monitor compliance with the parties' agreements.

Finally, we note that the judge stated that the Union's business representative, Dexter Drerup, testified that bargaining unit members told him that the Respondent's contractors were performing bargaining unit work "in violation of the CBA and settlement agreement." In fact, Drerup testified only that bargaining unit members told him that they saw contractors performing bargaining unit work. This mischaracterization of the testimony does not affect our disposition of this case.

² We shall modify the judge's recommended Order and substitute a new notice to conform to the Board's standard remedial language.

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, International Brotherhood of Electrical Workers, Local 53, affiliated with International Brotherhood of Electrical Workers, AFL–CIO, 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 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 technician foreman, dispatching foreman, fiber foreman, line foreman, meter & relay foreman, substation foreman, vehicular maintenance foremen, 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 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.

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 7, 2012.

SHO-ME POWER ELECTRIC COOPERATIVE

William F. LeMaster, Esq., for the Acting General Counsel.

Rodric A. Widger, Esq., for the Respondent.

Michael E. Amash, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Overland Park, Kansas, on May 1, 2013. The Charging Party, International Brotherhood of Electrical Workers, Local 53, affiliated with International Brotherhood of Electrical Workers, AFL–CIO (the Union), filed the charge in Case

14–CA–097071 on January 25, 2013.¹ The Regional Director for Region 14, Subregion 17 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on March 29, 2013. The Respondent filed a timely answer on April 4, 2013, denying all material allegations in the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when (1) since on or about August 7, 2012, and subsequent dates, the Respondent failed and refused to provide the Union with relevant and necessary information related to the identity, hours, and type of work performed by the Respondent’s contractors.² (GC Exhs. 1A–1H.)³

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the General Counsel) and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with its principal office in Marshfield, Missouri. (GC Exh. 1.) It is 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. (Tr. 7.) The Respondent admits, and I find, that in conducting its business operations during the 12-month period ending February 28, 2013, the Respondent derived gross revenues in excess of \$250,000. During the 12-month period ending February 28, 2013, the Respondent, in conducting its operations, purchased and received at its facility goods valued in excess of \$50,000 directly to points outside the State of Missouri. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Overview of Respondent’s Operation

The Respondent operates a member-owned Missouri electric cooperative that is engaged in the transmission of electricity. The Respondent’s headquarters is located in Marshfield, Missouri. It also houses equipment and crews at facilities in Cuba and Willow Springs, Missouri. (Tr. 58.) In addition, the Respondent has 150 sub-stations and approximately 2000 miles of electricity lines located on property it owns or on privately owned property on which the Respondent has an easement. (Tr. 57.)

¹ All dates are in 2012, unless otherwise indicated.

² This allegation is alleged in pars. 6(c) and 7 of the complaint.

³ Abbreviations used in this decision are as follows: “Tr.” for transcript; “R. Exh.” for Respondent’s exhibit; “GC Exh.” for General Counsel’s exhibit; “CP Exh.” for Charging Party’s exhibits; “GC Br.” for the General Counsel’s brief; “CP Br.” for Charging Party’s brief; and “R. Br.” for Respondent’s brief.

SHO-ME POWER ELECTRIC COOP.

At all material times since approximately 1951, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the following bargaining unit:

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 technician foreman, dispatching foreman, fiber foreman, line foreman, meter & relay foreman, substation 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 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. (GC Exh. 1.)

The Union and the Respondent have entered into successive collective-bargaining agreements (CBA), including a CBA effective from July 1, 2009 to June 30, 2012, and the most recent one which is effective from September 25, 2012 to June 30, 2014. (GC Exh. 1.)

Rebecca Gunn (Gunn) is the Respondent's manager of human resources. She has been employed with the Respondent for 31 years and has held her current position for the past 5 years. (Tr. 55.) In her capacity as manager of human resources, Gunn is responsible for recruiting, hiring, employee training, and relationship development with bargaining unit employees. (Tr. 55.) At all material times, Rodric Widger (Widger) was an attorney for the Respondent and an agent of the Respondent within the meaning of Section 2(13) of the Act. (Tr. 7-8.)

CBA Effective July 1, 2009 to June 30, 2012, and
December 2009 Settlement Agreement

The evidence is undisputed that the parties entered into a CBA effective July 1, 2009 to June 30, 2012, which contained provisions addressing the Respondent's ability to utilize contractors. CBA article 2, sections 2(a) and (b) sets forth the limits on the Respondent's use of nonbargaining unit employees performing the work of bargaining unit employees. The sections read as follows:

- 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. (Tr. 18; GC Exh. 3.)

On an unspecified date in 2009, the Union filed a grievance concerning the use of contractors. As a result of the grievance, on December 9, 2009, the Union and Respondent entered into a settlement agreement. (GC Exh. 4.) The terms of the settlement agreement provided for limiting the amount of work the contractor, Fidelity, or any other contractor can perform to: 200 hours each year for trouble calls and emergencies or the equivalent; allows the contractor to continue to perform construction and new "turn-ups"; and all planned maintenance in the Cuba, Missouri service area must be performed by bargaining unit communication technicians. (Tr. 21-23; GC Exh. 4.) The settlement agreement is effective from December 9, 2009 through the present.⁴

CBA Effective September 25, 2012 to June 30, 2014

The evidence is undisputed that the parties negotiated the current CBA (effective September 25, 2012 to June 30, 2014), which also contains provisions addressing the Respondent's ability to utilize contractors. CBA article 2, sections 2(a) and (b) sets forth the limits on the Respondent's use of non-bargaining unit employees performing the work of bargaining unit employees. The sections read as follows:

- a) The employer pledges its good faith effort to cause the 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. (GC Exh. 2.)

Article 2, section 2(a) of the 2012 CBA was changed from the 2009 CBA to include the Respondent's commitment to make a good-faith effort to provide unit work to bargaining unit members. The remainder of article 2, section 2(a) remains essentially unchanged from the 2009 CBA, as does article 2, section 2(b). (Tr. 18-19.)

The Union Files a Grievance Involving the XG 52 Project

A dispute arose between the parties regarding work performed by one of the Respondent's contractors, Fidelity, on a job identified as the XG 52 Project. The Union filed a grievance because it felt the work Fidelity was performing on the project was bargaining unit maintenance work. (Tr. 28-31; GC Exh. 6.) The Union argued that pursuant to the 2009 settlement agreement and the CBA, Fidelity was limited to performing 200 hours of work on the project. (GC Exhs. 3, 4, and 6.) The grievance proceeded to step 4 of the grievance process, at which point Respondent denied it. (R. Exh. 2.) Consequently, by letter dated May 29, 2012, Drerup notified Gunn that the Union wanted the grievance submitted to arbitration. (R. Exh.

⁴ There is no objective evidence that the terms of the settlement agreement were invalidated with the expiration of the CBA that was effective from July 1, 2009 to June 30, 2012.

3.) By letter dated July 2, 2012, Mark Berger was notified that the parties agreed to select him to serve as the arbitrator. (R. Exh. 4.) The grievance concerning the XG 52 Project is currently pending arbitration. (Tr. 46–47.)

The Union's Request for Information on August 7, 2012

Dexter Drerup (Drerup) has been the business representative for the Union for 11 years. The Union represents about 77 or 78 of the Respondent's employees. In a bi-monthly unit meeting on an unspecified date after May 2012, bargaining unit members complained to Drerup that some of Respondent's contractors were performing work that had historically been done by bargaining unit members. (Tr. 26, 40–41.) During this same timeframe, the Union was also in the middle of negotiating a new CBA with the Respondent. (Tr. 26.) Subsequently, Drerup submitted a written request for information to Gunn dated August 7, 2012. The request for information read:

I sent you a letter on June 4, 2012, requesting information for our upcoming arbitration, specifically a schematic of the XG 52 Project. So far you haven't complied with my request. Since then I have also asked you over the phone for a list of contractors' [sic] that are presently working on SHO ME's property (name, hours, and type of work) for which I am entitled to by law. I once again am asking for this information as outlined in this letter. This letter will also serve as my last correspondence on the matter and from this day forward, our law firm will handle these items. [GC Exh. 5.]

Gunn did not respond to the request for information, but rather forwarded it to the Respondent's attorney to address. By letter dated August 28, 2012, Widger responded to Drerup with the following:

Your letter dated August 7 was received by Rebecca [Gunn] after you and I spoke about the same topic on August 6. My understanding in regard to the request for contractor information was that you would have your attorney give me a call so we could discuss the relevance of the request. We have previously provided the project schematic and Rebecca [Gunn] will send it to you again. [GC Exh. 7; Tr. 34.]

After receipt of the August 28 response from Widger, all subsequent correspondence regarding the information request was handled by the Union's attorney, Dick Waers (Waers),⁵ and Widger. (Tr. 35.) By letter dated November 29, Waers wrote in part to Widger:

In order to prepare for the arbitration, there is certain information that the Union needs to evaluate the grievance. On August 7, 2012, Dexter Drerup wrote to Rebecca Gunn requesting information concerning work by contractors. You replied to Dexter that you thought counsel would be involved in this matter. This information has not been provided. Enclosed is a copy of this letter for your review. We again re-

quest that you provide us with this information so that we can move this matter forward. [GC Exh. 8a.]

From December 5 through 20, Drerup and Widger exchanged a series of emails arguing their clients' different perspectives regarding the relevance of the requested information. By email dated December 6, 18, and 20, Waers informed Widger that the information was relevant to assist the Union in evaluating the pending grievance concerning the XG 52 Project; and to assist the Union in determining if the Respondent violated the contracting provisions of the CBA. (GC Exhs. 8a, 8.) In a series of emails dated December 5, 12, 13, and 18, Widger responded that the Respondent refuses to provide the Union with requested information because it is not relevant to the current grievance, and the Union does not have a contractual right to the information. (GC Exhs. 8a, 8.) As of the date of the hearing in this matter, the Respondent has not provided the requested information.

III. DISCUSSION AND ANALYSIS

Legal Standards

1. Legal standard for deferral to arbitration

Prior to addressing the merits of the allegation at issue, I must first rule on the Respondent's motion for dismissal and deferral of the instant case to arbitration.⁶

In *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board set forth the standard for determining the appropriateness of the referral of an unfair labor practice charge to the arbitration process. The Respondent argues that *Collyer* is applicable in this case. The General Counsel and Charging Party argue, correctly, that *Collyer* is not generally relevant to an information request charge. In cases concerning the failure to provide information, the Board does not traditionally defer the charge to arbitration. *Hospital San Cristobal*, 356 NLRB No. 95, slip op. at 1 fn. 3 (2011). See also *Rochester Gas & Electric Corp.*, 355 NLRB 507 (2010) ("deferral is not appropriate as the [c]omplaint alleges violations of Section 8(a)(5) of the Act for failing and refusing to provide information"). Clearly, the only allegation in the matter at issue is the Respondent's refusal to provide information requested by the Union. Therefore, the charge is not appropriate for dismissal and deferral to the arbitration process absent a legally recognized exception. *Postal Service*, 302 NLRB 918 (1991); *Postal Service*, 280 NLRB 685 fn. 2 (1986); *Medco Health Solutions of Spokane*, XXX 352 NLRB 640, 641 (2008); *Daimler Chrysler Corp.*, 331 NLRB 1324, 1324 fn. 3 (2000). The Respondent has failed to set forth such an exception. Consequently, I find that deferring this case to arbitration would be inappropriate, thus the Respondent's motion for dismissal and deferral to arbitration is denied.⁷

⁶ See Sec. 102.35(a)(9) of the Board's Rules.

⁷ By motion dated May 8, 2013, the Respondent filed a Motion for Dismissal and Deferral to Arbitrator. The General Counsel and Charging Party filed timely responses opposing the Respondent's motion. In their posthearing briefs, all parties reiterated their respective positions regarding deferral of the charge to arbitration.

⁵ The parties entered into a stipulation that at all material times Waers served as attorney for the Union and was an agent for the Union within the meaning of Sec. 2(13) of the Act. I accepted the stipulation into the record. (Tr. 8.)

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2. Legal standard for violations of 8(a)(5) request for information

Section 8(a)(5) of the Act mandates that an employer provides a union with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *Detroit Edison v. NLRB*, 440 U.S. 301, 303 (1979). “[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967). Information requests regarding bargaining unit employees’ terms and conditions of employment are “presumptively relevant” and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 635 (2010), enf. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

If the requested information is not directly related to the bargaining unit, the information is not presumptively relevant, and the requesting party has the burden of establishing the relevance of the requested material. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Earthgrains Co.*, 349 NLRB No. 34 (2007). The relevance standard for nonunit employees is described as:

When [a] union asks for information which is not presumptively relevant, the showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation. . . . Conversely, however, to require an initial, burdensome showing by the union before it can gain access to information which is necessary for it to determine if a violation has occurred defeats the very purpose of the “liberal discovery standard” of relevance which is to be used. Balancing these two conflicting propositions, the solution is to require some initial, but not overwhelming, demonstration by the union that some violation is or has been taking place. *Newspaper Guild, Local 95 v. NLRB*, 548 F.2d 863, 868 (9th Cir. 1977).

The General Counsel in establishing relevance must show 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.” *Id.* at 1258; *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). The evidence must show that the Union’s information request has a “probable” or “potential” relevance to its statutory duties as the bargaining representative. *NLRB v. Acme Industrial Co.*, above at 438.

The standard for establishing relevancy is the liberal, “discovery-type standard.” *Alcan Rolled Products*, 358 NLRB No. 11, slip op. at 4 (2012), citing and quoting applicable authorities. In *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992), the Board summarized its application of these principles as follows:

[T]he Board has long held that Section 8(a)(5) of the Act obligates an employer to furnish requested information which is potentially relevant to the processing of grievances. An actual

grievance need not be pending nor must the requested information clearly dispose of the grievance. It is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731.

The requested information does not have to be dispositive of the issue for which it is sought, but only has to have some relation to it. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991). The Board has also held that a union may make a request for information in writing or orally. Further, if an employer fails to respond timely to a request for information, the union does not need to repeat the request. *Bundy Corp.*, 292 NLRB 671, 672 (1989).

Respondent’s Refusal to Agree to the Union’s Request for Information

The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) of the Act when on or about August 7, 2012, and additional dates the Respondent failed in its obligation to provide information requested by the Union which was relevant and necessary to the performance of its duties as the exclusive bargaining representative. The Respondent argues that it is not obligated to provide the information because it is not relevant under contract provisions and is unduly broad, vague, and ambiguous.

I find that the information sought by the Union is relevant to the performance of its statutory obligations and that the Respondent has failed to establish a defense justifying its refusal to furnish the requested information.

1. Relevancy of information

Since the requested information relates to employees outside of the bargaining unit, it is not presumptively relevant and therefore the burden is on the Union “to demonstrate the relevance of [the requested] information.” *US Testing Co.*, 160 F.3d 14, 19 (D.C. Cir. 1998), citing *Tritac Corp.*, 286 NLRB 522 (1987).

The Union asked for a list of contractors presently working on the Respondent’s property, including their names, number of hours the contractors have worked, and the type of work they have been contracted to perform. (GC Exh. 5.) Drerup gave undisputed testimony that he requested the information because bargaining members told him there were contractors performing bargaining unit work in violation of the CBA and 2009 settlement agreement. (Tr. 26.) He asserted that he needed the information to confirm that the contractors were not performing work in violation of both the CBA and settlement agreement. He pointed to the subcontracting clause in the CBA which limited the type and amount of work a subcontractor could perform. (Tr. 26–27.) Drerup also testified that the information would assist him in defending the grievance in the pending arbitration involving the XG 52 Project. (Tr. 33, 35.) Further, Waers emphasized to the Respondent’s attorney, Widger, in a series of emails that the information was relevant and necessary for use in the grievance and pending arbitration involving the XG 52 Project and to ensure that the Respondent was not vio-

lating the limitations on contracting imposed by the CBA and 2009 settlement agreement. (GC Exhs. 8a, 8.)

The Respondent argues the requested information is not relevant because it is based on mere speculation voiced by unit members at a bi-monthly unit meeting. (Tr. 26; R. Br. 12, 24.) According to the Respondent, “the Union here has no specific harm in mind, no specific Company actions to be investigated and no articulable present belief that a contract provision has been breached.” (R. Br. 13.) Accordingly, the Respondent argues that the standard for relevance “must be judged in the context of a contract provision and a fact based dispute tied to that provision.” (R. Br. 15.) The Respondent points to Drerup’s testimony that he made the request for information after unit employees complained to him that they believed contractors were performing more work than allowed by the CBA and settlement agreement. According to the Respondent the information request was not based on an actual contractual violation and therefore it is not relevant. The Respondent contends that the speculative nature of the Union’s concern makes its request irrelevant.

I find that the Respondent’s argument on this point fails. The Board has held that the union is allowed to reasonably rely on the observations of bargaining unit employees in suspecting violations of the CBA and thus asking for information from the employer. *Walter N. Yoder & Sons, Inc.*, 270 NLRB 652, 655 fn. 6, enf’d. in relevant part 754 F.2d 531, 534 (4th Cir. 1985). The Board has also held that specific violations of the CBA 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 only required to show that it had a reasonable basis for suspecting possible discriminatory conduct by the Respondent. *Meeker Cooperative Light & Power*, 341 NLRB 616 (2004). Based on Drerup’s credible and uncontradicted testimony about the complaints he received from unit members during a bi-monthly unit meeting about their belief that contractors were performing work in violation of the CBA and settlement agreement, I find that the Union had a right to the information in order to investigate the complaints to determine the validity of the complaints and whether a grievance should be filed. *New Presbyterian Hospital*, 354 NLRB No. 5 (2009); *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Acme*, 385 at 437.

Moreover, as the exclusive bargaining representative for the unit members, the Union had a statutory duty to investigate its members’ claims that the Respondent was violating the terms of the CBA and 2009 settlement agreement. The Union’s ability to review a list of contractors performing work on the Respondent’s property and the amount and type of work they were performing would demonstrate the Respondent’s compliance (or noncompliance) with the terms of both the CBA and 2009 settlement agreement. Drerup credibly testified that the Union needed the information to verify that the Respondent was not giving contractors more than the 200 hours of work a year as agreed to in the CBA and settlement agreement, nor giving them the type of work that was proscribed by both. Its access to the contractors’ information enables the Union to track the

number of hours a contractor has performed on a job in compliance with the CBA and settlement agreement. In addition, the Union will have information necessary in assessing whether the nature of the jobs given to the contractors is subject to the limitations in the CBA and settlement agreement. The information requested in this matter is also relevant and necessary because it enables the Union to make a determination on whether to file a grievance on behalf of the unit employees whose work hours might have been negatively affected by Fidelity’s and any other listed contractor’s work. Drerup emphasized this point noting the information was necessary and relevant because “if [Respondent is] setting a pattern of awarding work to subcontractors that traditionally belongs to the bargaining unit employees, then I believe that [the requested information] will strengthen my case in front of an arbitrator on a particular grievance.” (Tr. 35.) The most effective and accurate manner for the Union to discern if its members’ hours have been negatively impacted and a grievance is warranted is for it to review the requested information. Consequently, I find that the requested information is necessary for the Union to effectively monitor and enforce the terms of the CBA. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731 (1973).

The Respondent also argues that because the Union did not file a grievance after receiving complaints from the unit members about Fidelity’s possible contract violations, the information request is premature. This argument fails. The Board has consistently held that the union is not required to wait until a grievance is pending to make a request to the employer for relevant and needed information. The law dictates that the Union is entitled to the information at issue to determine if it is appropriate to file a grievance. *Ohio Power*, 216 NLRB 987 (1975); *Leland Stanford Junior University*, supra.

The Union articulated a second relevant reason for requesting the information, the pending XG 52 grievance. As previously noted, in a series of email exchanges the Union’s attorney, Waer, notified the Respondent that the requested information was relevant to the pending XG 52 grievance because, “When weighing the propriety of subcontracting, arbitrators frequently look to the frequency of subcontracting by the employer.” (GC Exhs. 8A, 8.) The Respondent contends, however, that the Union cannot use the pending grievance on the XG 52 Project as a basis for establishing relevancy because, “The status of contractors’ activity on August 7, 2012, when the parties were out of contract, was legally and factually remote from the arbitration of a grievance arising from March or April work. It was too tardy to support a grievance under the expired contract . . . and it was premature to support a grievance under the new contract.” (R. Br. 22.) I, however, must agree with the General Counsel’s and Charging Party’s counter argument that the expiration of the CBA is immaterial, in this case, to the Respondent’s obligation to provide the Union with the relevant requested information. The XG 52 Project grievance was filed approximately 2 months prior to the expiration of the 2009 CBA. Regardless, Board case law has consistently established that “an employer has an obligation to provide information after the expiration of a contract that relates to a pre-expiration grievance.” *Nolde Bros. v. Baker Workers Local 358*, 430 U.S. 243, 251 (1977). Further, the parties were in the midst of nego-

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tiations of a successor agreement that had not reached an impasse. As such the Respondent was required to maintain the status quo and refrain from taking unilateral action regarding wages, hours, and other terms and conditions of employment. See *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001). (GC Br. 25.)

Next, the Respondent implies that the Union's failure to submit a "contractor list disclosure" proposal during contract negotiations constituted a waiver of its right to the requested information. Nonetheless, I agree with the General Counsel's argument and find that the Union's failure to submit a "contractor list disclosure" proposal during contract negotiations did not constitute a waiver of the Union's statutory rights. The Board requires a waiver of a union's statutory rights to be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962). "A clear and unmistakable waiver may be found in the express language and structure of the collective-bargaining agreement or by the course of conduct of the parties. The burden is on the party asserting waiver to establish that such a waiver was intended." *Leland Stanford Junior University*, supra. See also *NLRB v. New York Telephone Co.*, 930 F.2d 1009 (2d Cir. 1991), enfg. 299 NLRB 44 (1990); *United Technologies Corp.*, supra. Given the lack of a clear and express waiver in the CBA or elsewhere, I find that the evidence shows the Respondent has failed to sustain its burden on this point.

The Respondent argues that it is unable to provide the Union with the requested information because it is unavailable. In addition, the Respondent notes that approximately 3 months prior to the Union's August 7 request for information, it had provided the Union with 6 years of contractor information for its use in preparation for contract negotiations. (R. Br. 13; Tr. 50.) The Respondent's argument fails on both points. Gunn admitted that she did not contact any of the Respondent's contractors or any subcontractors to obtain the information. Likewise, there is no evidence that any other agent of the Respondent tried to get the requested information from the contractors or subcontractors. (Tr. 62-63.) The Board has held that if the requested information is not in the respondent's possession then it has a duty to inform the union and make a "good-faith" attempt to get information, or if unavailable, explain or document the reasons why it is unavailable. *Public Service Co. of Colorado*, 301 NLRB 238 (1991). See *Earthgrains Co.*, 349 NLRB 389 (2007), enfd. in part and denied in part sub nom. *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 430 (5th Cir. 2008) (although the employer did not retain the records, the employer "utterly failed to conduct a good-faith inquiry" to determine if the information was available from other sources).

Second, the information provided to the Union for its use in preparation for contract negotiations was not in response to the August 7 information request at issue. The information provided by the Respondent to the Union was in response to a request made on June 4 by the Union for a schematic of the XG 52 Project. (GC Exh. 5.)

Therefore, I find that the Respondent failed to conduct a search for the requested information consistent with its obliga-

tion under the Act or properly document the reasons for the asserted unavailability.

Last, the Respondent advances the position that it is not required to produce the requested information because it is overly broad, ambiguous, and vague. (R. Br. 19.) Specifically, since the request for information does not define, with specificity, the words "contractors" and "property," the Respondent argues that these ambiguities render the information request irrelevant because it does not refer to "unit work." (R. Br. 19-20; Tr. 57-58.) I find the argument lacks a legal basis.

In this case, the Union's role is to assess whether 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. For me to accept the Respondent's argument that the Union's failure to set out with more specificity the information it seeks (identities of contractors, name of property, and hours worked) would be to allow the Respondent alone to determine what constitutes unit work and consequently determine what information it feels is relevant to produce. The Union is not required to accept the Respondent's contention that to produce the information related to all "contractors" on the Respondent's "property" will not yield relevant information. The Board has held that that the union is entitled to the actual information to verify the employer's assertions. *Wallace Metal Products*, 244 NLRB 41 fn. 2 (1979) (the union requested to review the subcontracts of unit work that the Respondent had subcontracted as a result of a strike and the board held it was entitled to the actual contracts to "facilitate verification"). Further, there is no evidence that the Respondent asked the Union for clarification regarding its request. *Superior Protection Inc.*, 341 NLRB 267, 269 (2004), enfd. 401 F.3d 282 (5th Cir. 2005) (an employer must seek clarification of a request it believes is ambiguous or overbroad or comply with the request to the extent it includes relevant information.) There is, however, ample evidence that the Respondent consistently denied the Union's repeated requests based on relevancy grounds. (GC Exhs. 8a, 8.)

Based on the foregoing and the overall record, I find the Respondent's refusal to provide the requested information violates Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Sho-Me Power Electric Cooperative, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Electrical Workers Local 53, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to fully provide relevant information requested by the Union in its written request dated August 7, 2012, and subsequent dates, the Respondent, Sho-Me Power Electric Cooperative, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

4. The above violation is an unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in a certain unfair labor practice, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent will be ordered to produce the requested and relevant information, and post and communicate by electronic post to employees the attached appendix and notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Sho-Me Power Electric Cooperative, in Marshfield, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide the International Brotherhood of Electrical Workers Local 53, International Brotherhood of Electrical Workers, AFL-CIO with information requested that is necessary and relevant to its role as the exclusive representative of the employees in following unit:

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 technician foreman, dispatching foreman, fiber foreman, line foreman, meter & relay foreman, substation 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 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.

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

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

(a) Within 14 days from the date of the Board's Order, furnish the Union with all information it requested in writing on August 7, 2012 and subsequent dates.

(b) Within 14 days after service by the Region, post at its facilities in Marshfield, Cuba, and Willow Springs, Missouri,

copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 14 Subregion 17, 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 and members are customarily posted. 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 7, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director 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. July 22, 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.

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 (International Brotherhood of Electrical Workers Local 53, affiliated with International Brotherhood of electrical Workers, AFL-CIO) 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 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,

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.

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."

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17-UA-1877, and 17-RC-5946, including communication foreman, central office technician foreman, dispatching foreman, fiber foreman, line foreman, meter & relay foreman, substation 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 optic technician, lineman, maintenance mechanic, meter & relay technician, substation mechanic, storekeeper, ground construction & maintenance man, and apprentices, but excluding professional em-

ployees, guards, office clericals, and supervisors as defined in the Act.

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 Act.

WE WILL furnish the Union with the information it requested on August 7, 2012 and subsequent dates, specifically providing a list of contractors that were working at the time of the initial request and are currently working on Sho-Me's property, including their names, hours worked, and type of work performed.

SHO-ME POWER ELECTRIC COOPERATIVE