

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

MANAGEMENT & TRAINING CORPORATION

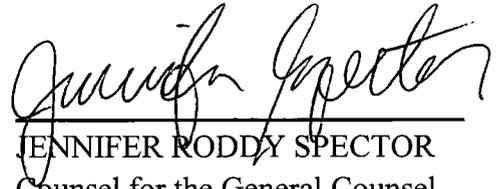
and

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 668

Cases 04-CA-095456
04-CA-097114 and
04-CA-104790

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

Respectfully submitted,



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Dated: March 13, 2014

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE.....	1
II. STATEMENT OF FACTS.....	2
a. <u>Background</u>	2
b. <u>Bargaining and Information Requests</u> <u>(Cross-Exceptions 5-6, 11-17, and 9)</u>	2
c. <u>Heather Rebarchak’s Grievance</u> <u>(Cross-Exceptions 9 and 10)</u>	5
III. QUESTIONS PRESENTED.....	7
IV. ARGUMENT.....	7
a. <u>Respondent failed and refused to provide, and delayed in providing,</u> <u>relevant information the Union needed for ongoing bargaining, in</u> <u>violation of Section 8(a)(5) of the Act (Cross-Exceptions 2-7</u> <u>and 11-17)</u>	7
b. <u>Respondent threatened Heather Rebarchak in order to discourage her from</u> <u>pursuing a grievance, in violation of Section 8(a)(1) of the Act</u> <u>(Cross-Exceptions 1 and 8-10)</u>	18
c. <u>Respondent followed through on its threat by making a retaliatory and regressive</u> <u>proposal, in violation of Section 8(a)(5) of the Act</u> <u>(Cross-Exceptions 18 and 19)</u>	20
V. CONCLUSION AND REMEDY.....	21

TABLE OF CASES

833 Central Owners Corp., 359 NLRB No. 66 (2013) 20

A-1 Door and Building Solutions, 356 NLRB No. 76 (2011) 15

Amerisig Graphics, 334 NLRB 880 (2001)..... 12

AT&T Corp., 337 NLRB 689 (2002)..... 14

Caldwell Mfg., 346 NLRB 1159 (2006) 11

Cook Paint & Varnish, 246 NLRB 646 (1979),
not enfd. 648 F.2d 712 (D.C. Cir. 1981)..... 19

Coupled Products, 359 NLRB No. 152 (2013). 17, 18

Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979)..... 11

Disneyland Park, 350 NLRB 1256 (2007) 11

Fresh & Green’s of Washington, DC, 359 NLRB No. 145 (2013). 18

Kraft Foods N. America, 355 NLRB 753 (2010)..... 12

Leland Stanford Junior University, 262 NLRB 136 (1982), enfd.
715 F.2d 473 (9th Cir. 1983) 12

NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)..... 11

NLRB v. City Disposal Systems, 465 U.S. 822 (1984)..... 18

NLRB v. Truitt Mfg., 351 U.S. 149 (1956)..... 11,17

Peterbilt Motors, 357 NLRB No. 13 (2011)..... 15

Piggly Wiggly Midwest, 357 NLRB No. 191 (2012),..... 16

Public Service Electric & Gas, 323 NLRB 1182 (1997), enfd. 157 F. 3d 222 (3rd Cir. 1998) 14

Quality House of Graphics, 336 NLRB 497 (2001)..... 21

Samaritan Medical Center, 319 NLRB 392 (1995)..... 12

<i>Service Technology Corp.</i> , 196 NLRB 845 (1972).....	19
<i>Shoppers Food Warehouse</i> , 315 NLRB 258 (1994).....	12
<i>U.S. Postal Service</i> , 359 NLRB No. 4 (2012)	13
<i>Valley Inventory Service</i> , 295 NLRB 1163 (1989).....	12
<i>Woodland Clinic</i> , 331 NLRB 735 (2000).....	13

I. STATEMENT OF THE CASE

The three charges which are the subject of this case were consolidated for hearing in an Amended Consolidated Complaint (the Complaint) on July 16, 2013,¹ and were heard by Administrative Law Judge Arthur J. Amchan on December 9, 2013. The ALJ issued his Decision on January 30, 2014. Management & Training Corporation (Respondent) filed Exceptions and a Brief in Support of its Exceptions on February 27, 2014. The General Counsel filed an Answering Brief to Respondent's Exceptions, Cross-Exceptions, and this Brief in Support of Cross-Exceptions on March 13, 2014.

This case involves three bargaining units of employees represented by Service Employees International Union Local 668 (the Union) who work in a facility known as the Keystone Job Corps Center operated by Respondent in Drums, Pennsylvania. The Union was engaged in bargaining for a successor contract for the Maintenance Unit, and in wage re-opener bargaining for the other two bargaining units, when it made an information request on June 29, seeking to test various claims Respondent had made at the table. Counsel for the General Counsel cross-excepts to the Judge's failure to find the undisputed facts showing that Respondent made various claims at the table about the wages and other employment terms of non-unit employees. The extra-unit information the Union sought was relevant because it sought to test these claims. Respondent provided the requested information about unit employees months later, explaining only that its counsel "forgot" to send it; the General Counsel cross-excepts to the Judge's finding that the tardy submission was permissible because Counsel for the General Counsel failed to prove that Respondent had not provided the information verbally. On January 15 and 31, 2013, Respondent threatened an employee of the Professional Unit with

¹ All dates herein are in 2012 unless otherwise noted.

discipline if she failed to either withdraw her grievance or compose a pre-arbitration “witness statement” concerning the incident which was the subject of the grievance; the General Counsel cross-excepts to the Judge’s failure to find that this demand was an unlawful threat.

II. STATEMENT OF FACTS

a. Background

The Union represents three bargaining units employed by Respondent at the Keystone Job Corps Center in Drums, Pennsylvania. Respondent operates KJCC under contract to the U.S. Department of Labor (DOL); the facility provides training and education for disadvantaged youth. (ALJD 2:8-10)² The Maintenance Unit includes maintenance, food service, and transportation employees, and its collective bargaining agreement was effective by its terms from July 1, 2009 through June 30 (ALJD 2:22-23 and 28-29). The Professional and Residential Advisor Units’ collective bargaining agreements expired June 30, 2013. (ALJD 2:29-30)

b. Bargaining and Information Requests (Cross-Exceptions 5-6, 11-17, and 19)

The Union made its initial successor contract proposals in writing on April 10. The Union initially proposed a \$1 an hour pay increase, and Respondent’s counter was that they had a 0% inflationary cap in the DOL contract, and chose not to give a wage increase. (ALJD 2:32-33, RX38) Respondent made written counterproposals that same day (RX37), and the following day. (GCX2) Both of Respondent’s counterproposals premised specific proposals on its contract with DOL: the April 10 proposal indicates that the Union’s proposal to increase the boot allowance was rejected because “\$50 is all that is currently approved by DOL as adopted

² Throughout this brief, abbreviated references are employed as follows: “ALJD” followed by page and line numbers to designate the ALJ’s Decision; “T” followed by page number to designate Transcript pages; “GCX” followed by exhibit number to designate General Counsel’s Exhibits; and “RX” followed by exhibit number to designate Respondent’s Exhibits.

into the DOL contract,”³ and the April 11 proposal indicates that several of the Union’s proposals, including its wage increase proposal, are rejected because “DOL has given 0% operational increase this contract year. MTC is not willing to give any labor increase.” At re-opener bargaining in the Residential Advisor and Professional Units, Respondent maintained the same position: no increase, “because of the 0% inflationary cap and it chose not to give a wage increase.” (T. 20)

By email of May 1, the Union made a brief information request, which indicated it was requesting the subject information “[i]n order to investigate” “rumors that despite the 0% DOL increase all the employees in security have received a \$2.00 per hour wage increase.” (GCX3, T. 21)⁴

Respondent asserted at the May 8 bargaining session that non-unit security guards received a pay increase because they were being paid less than DOL-mandated minimum wage rates. Respondent also advised the Union that the union and non-union employees were now subject to separate pay grades, whereas previously, there had been a single, integrated pay scale for union and non-union employees. Respondent verbally provided the starting pay rate and pay grade for non-unit security employees, and starting pay rate and pay grade for unit Residential Advisors (as requested in the May 1 email) across the table, without any objection or assertion that it was irrelevant. (T. 21-22, 24-25, GCX15 p.2)⁵ Respondent also indicated that non-unit Recreation staff employees had received pay increases as a result of assertedly being under a DOL-mandated minimum. (T. 32)

³ The General Counsel has cross-expected to the Judge’s failure to find this undisputed fact (RX 37, Cross-Exception 11).

⁴These undisputed facts are the subject of Cross-Exception 12.

⁵Again, these facts are the subject of the unrebutted testimony of Business Agent Kimberly Yost, and are corroborated by the stipulated testimony of Michael Martine, Center Director; the ALJ’s failure to find them is the subject of Cross-Exceptions 13 and 14.

Before making its June 29 information request, the Union questioned Respondent at the table about rumors that managers and supervisors were receiving bonuses. (T. 30-31) At the table on June 21, Michael Martine, Respondent's Center Director, told the Union that if there were under-run funds available at the end of the contract year, Respondent would have to inform DOL and request permission to use those funds. "Under-run" refers to budgeted funds which are left over at the end of the contract year. The Union was inquiring about under-run monies because in the past, these funds have been applied to provide wage increases or bonuses to unit employees. Martine also told the Union's bargaining committee that there had not been bonuses for the non-unit Residential Living Supervisors. (T. 29-31, GCX 15 pp. 2-3)⁶

At the table in June, the parties reached an overall tentative agreement for a successor contract in the Maintenance Unit. (ALJD 2:36-38) However, this agreement was not ratified by the Maintenance Unit, and the Union so notified Respondent by email of June 28.⁷ (RX33) Almost immediately thereafter, the Union requested further information from Respondent, following up on Respondent's representations at the table, by email dated June 29. This information request is the subject of the Complaint, and the requested information, and Respondent's replies, are detailed at ALJD 3:1-47 through 4:1-14.

The parties returned to the table for successor contract and re-opener in bargaining in October. At re-opener negotiations in the Residential Advisor Unit, Martha Amundsen, Respondent's counsel and chief negotiator, asserted that she had forgotten to provide the information about unit employees the Union had requested. Ms. Amundsen provided that information by email on October 10. (T. 38-39, GCX 8)

⁶ These ALJ's failure to find these facts, as evidenced by the un rebutted testimony of Yost, and the stipulated testimony of Michael Martine, is the subject of Cross-Exception 15.

⁷ The Union was thus correct when it suggested that the rumors about pay increases and bonuses for non-unit employees and managers would make it difficult to reach an agreement. (T. 22-23)

The parties next met for collective bargaining on April 3 and 4, 2013. (ALJD 5:12-20) On April 3, 2013, Ms. Amundsen announced to the Union that bargaining would change due to the Union's filing of unfair labor practice charges. (ALJD 5:17-18) The Union made one new proposal that day, which was designed to address what the Union believed to be an inequity in the existing provision on bumping, which presently requires that laid off employees bump the least senior person, whether full-time or part-time. The Union's proposal would have permitted bumping of the least senior person closest to the laid-off employee's number of hours. (ALJD 5:30-39)

At bargaining the following day, April 4, 2013, Respondent handed the Union a written counterproposal (GCX14), then reviewed it verbally. In its startling counterproposal, Respondent proposed eliminating arbitration entirely; its only explanation for this radical development was that the Union "filed frivolous grievances," without citing any grievance. (ALJD 5:22-24) Respondent also proposed eliminating employee bumping rights entirely, in response to the Union's proposal of the previous day; proposed eliminating premium pay for night shift employees, without explanation; proposed limiting the number of stewards rather than leaving the number subject to agreement, explaining that this was "since we are in negotiations;" and retreated to an earlier, less favorable proposal on leaves of absence, also with no explanation. (ALJD 6:5-8; 5:42-45; 6:1-3) In prior bargaining, Respondent had proposed a limited change to the grievance and arbitration process (i.e., switching from AAA to FMCS as the source for arbitrators), but had at no time proposed anything so radical as eliminating arbitration entirely. (ALJD 5:24-28) Respondent had never previously proposed any change to the bumping procedure, any limit on the number of stewards, or any change to the night shift premium pay. (ALJD 6:3 and 7-8; Yost T. 55)

c. Heather Rebarchak's Grievance (Cross-Exceptions 9 and 10)

Employee Heather Rebarchak was previously employed in the Professional Unit. (ALJD 4:45-46) By email dated October 16, Respondent's Human Resources Manager Lori Thuringer requested that Rebarchak give a statement concerning an incident involving student complaints, for which she was eventually disciplined. Rebarchak responded that she would "not be submitting a statement due to the fact that" she denied making the comments in question. (ALJD 4:24; GCX11/RX18) Respondent imposed the discipline, a verbal warning, on October 19, 2012. (ALJD 4:18; GCX10) An initial grievance meeting was held October 26. (ALJD 4:28; RX17) A formal grievance was filed on November 8. (ALJD 4:32; GCX9/RX16) A formal grievance meeting was held November 27. (ALJD 4:36; RX15)

By email from Martha Amundsen dated January 15, 2013 and addressed to Kimberly Yost, among others, Respondent for the first time objected to Rebarchak's asserted failure to "give a statement" in the matter, and demanded that she do so, on pain of discipline. The email required that Rebarchak choose between the following options:

- 1) Provide a truthful written statement.
- 2) Provide an untruthful written statement and if proven untruthful, be subject to discipline (up to and including termination) for a Category II violation of the Rules of Conduct Policy 203.1 for #19) "making malicious, false or unsubstantiated statements" and/or #20) "Falsification of Records."
- 3) Don't provide a written statement and withdraw her grievance, then she won't be disciplined for refusal to provide a written statement as it is a moot point.
- 4) Don't provide a written statement and receive discipline (up to and including termination) for "Insubordination" and "Impeding or interfering with an Investigation."

(ALJD 4:40-43;GCX12/RX14) Respondent reiterated its demand directly to Rebarchak by email from Thuringer dated January 31, 2013, again threatening discipline for failing to comply. This email specifically cited Rebarchak's grievance, not her discipline, as the reason "Management has a duty to complete a full and thorough investigation," and indicated that Rebarchak had a duty to "cooperate" and "be truthful," in this investigation. The email threatened that if she either refused to give a statement or gave a false one, she would be disciplined. (ALJD 4:43-44; GCX13) Rebarchak acquiesced and provided a statement. (ALJD 5:1-2; RX12) Respondent denied the grievance at the 4th step, and it remains pending arbitration. (ALJD 5:5-7 and 4:fn. 1; RX11, RX10)

III. QUESTIONS PRESENTED

- a. **Whether the Board should modify the Administrative Law Judge's findings and conclusions of law to find that Respondent unlawfully failed and refused to provide, and unlawfully delayed in providing, relevant information the Union needed for ongoing bargaining, in violation of Section 8(a)(5) of the Act. (Cross-Exceptions 2-7 and 11-17)**
- b. **Whether the Board should modify the Administrative Law Judge's findings and conclusions of law to find that Respondent threatened Heather Rebarchak in order to discourage her from pursuing a grievance, in violation of Section 8(a)(1) of the Act. (Cross-Exceptions 1 and 8-10)**
- c. **Whether the Board should modify the Administrative Law Judge's findings and conclusions of law to find that Respondent made a retaliatory and regressive proposal, in violation of Section 8(a)(5) of the Act, which should be rescinded in its entirety. (Cross-Exceptions 18 and 19)**

IV. ARGUMENT

- a. **Respondent failed and refused to provide, and delayed in providing, relevant information the Union needed for ongoing bargaining, in violation of Section 8(a)(5) of the Act. (Cross-Exceptions 2-7 and 11-17)**

The Union requested that Respondent provide it with information that was relevant, and indeed, critically needed for ongoing contract and wage re-opener bargaining. It is undisputed

that Respondent flatly refused to provide much of the information, and provided some of it only after an unreasonable delay. (GCX 8). It thereby violated Section 8(a)(5) of the Act.

The Judge concluded that Respondent had no duty to provide the extra-unit information sought by the Union, but inexplicably failed to find, or even discuss, the undisputed facts that formed the basis for the Union's requests. As to the requested information about unit employees, the Judge found that although Respondent's delay of more than two months was unreasonable, it was excused because the General Counsel failed to prove that Respondent had not already provided that information verbally, despite the fact that Respondent never asserted it had already provided the subject information, and despite contrary record evidence. (ALJD 7:31-34)

The Union initially raised concerns about Respondent's willingness to give wage increases to non-unit employees despite its 0% inflationary cap in the DOL contract (its expressed reason for the unwillingness to provide wage increases to unit employees) in its May 1 information request. In response to that inquiry, Respondent provided an initial, verbal response to those questions. Those responses at the table, including Ms. Amundsen's assertion that DOL mandated the wage increases because the non-unit employees were below a DOL minimum, and that there were now separate wage scales for "union and non-union" employees, prompted further questions, and the Union accordingly requested additional information, as well as written confirmation of the information provided verbally.

Contrary to the ALJ's finding, it is clear in the record which items were provided verbally (and then were the subject of the June 29 follow-up request to provide them in writing) and which were requested for the first time on June 29, and thus could not possibly have been provided earlier, verbally or otherwise. These requests and responses are detailed in the chart below.

As shown at ALJD 3:1-47 through 4:1-14 and Appendix A to the Complaint, the information the Union requested on June 29 was as follows:

Item Requested	Basis for Request and <i>MTC's Responses</i>
1. What is the amount of under run for this contract year?	Yost's un rebutted testimony that in the past, under-run funds have been applied to provide additional unit employee wage increases (T. 29) and stipulated testimony concerning Respondent's June 21 assertion at the table that it would have to seek permission from DOL to use that money. (T. 30-31, GCX 15 pp. 2-3) <i>Refused.</i>
2. Was bonus money given out to employees? To whom? How much?	Presumptively relevant concerning unit employees; un rebutted testimony that rumors about management/supervisor bonuses were making it difficult to reach agreement; stipulated testimony concerning Respondent's June 21 assertion that non-unit employees had not received bonuses. (T. 30-31, GCX 15 pp. 2-3). <i>Refused as to non-unit employees, delayed as to unit employees until October 10.</i>
3. What pay grade is a [non-unit] security officer?	Provided verbally in response to May 1 request; Union requested in writing in connection with request for pay scale. <i>Refused.</i>
4. What pay grade is a [unit] RA?	Provided verbally in response to May 1; Union requested in writing in connection with request for pay scale. Unit Residential Advisors and non-unit Recreation staff had previously been on the same pay grade under the old system. (T. 31) <i>Delayed until October 10.</i>
5. What pay grade is [non-unit] Recreation?	Provided verbally in response to May 1 request; Union requested in writing in connection with request for pay scale. Unit Residential Advisors and non-unit Recreation staff had previously been on the same pay grade under the old system. (T. 31) <i>Refused.</i>
6. What is the starting rate for a [non-unit] Security officer?	Provided verbally in response to May 1 request; Union requested in writing in connection with request for pay scale. <i>Refused.</i>
7. What is starting rate for [non-unit] Recreation Aides?	Provided verbally in response to May 1 request; Union requested in writing in

	connection with request for pay scale. <i>Refused.</i>
8. Please provide a copy of the non-union pay scale. (What classification at each step)	Unrebutted testimony that Respondent represented to the Union at the table on May 8 that there were new, separate pay scales for “union” and “non-union” employees, and that Respondent did not provide it with the pay scales. The Union sought this information to test Respondent’s claims, and to determine whether unit employees’ pay grades remained comparable with non-unit employees who had previously been at the same pay grade. (T-21-22, 24-25, 34, GCX 15 p. 2) <i>Refused.</i>
9. Please provide a copy of union pay scale (what classification at each step)	Unrebutted testimony that Respondent represented to the Union at the table on May 8 that there were new, separate pay scales for “union” and “non-union” employees, and that Respondent did not provide it with the pay scales. (T-21-22, 24-25, 32, GCX 15 p. 2) <i>Delayed until October 10.</i>
10. DOL established minimum and maximum for [non-unit] security	Unrebutted testimony that Respondent represented to the Union that these employees had received pay increases because they were being paid less than a DOL-mandated minimum. (T. 21-22) <i>Refused.</i>
11. DOL established minimum and maximum for [unit] RA	Unrebutted testimony that Respondent represented to the Union that other employees had received pay increases because they were being paid less than a DOL-mandated minimum. (T. 21-22) <i>Delayed until October 10.</i>
12. DOL established minimum and maximum for [non-unit] Recreation Aides	Unrebutted testimony that Respondent represented to the Union that these employees had received pay increases because they were being paid less than a DOL-mandated minimum. (T. 21-22) <i>Refused.</i>
13. Where was the extra money given to [non-unit] Security and Recreation Aides last year taken from?	Unrebutted testimony that Respondent represented to the Union that security employees had received pay increases because they were being paid less than a DOL-mandated minimum (T. 21-22), coupled with Respondent’s repeated assertions that it would not agree to any wage increases because of the “0% increase” in its contractual inflationary cap. <i>Refused.</i>
14. Why were [non-unit] recreation and	Unrebutted testimony that Respondent

security staff given additional increases?	represented to the Union that security employees had received pay increases because they were being paid less than a DOL-mandated minimum (T. 21-22) This topic had arisen because the Union initially questioned Respondent about “rumors” that the security and recreation staff had received an across the board increase in spite of the 0% inflationary cap. (T. 21, 35, GCX 3) <i>Refused.</i>
15. Other than the DOL inflationary increments, when was the last time MTC provided workers at KJCC with wage increases?	Unrebutted testimony that Respondent represented to the Union that security employees had received pay increases because they were being paid less than a DOL-mandated minimum (T. 21-22) <i>Refused.</i>
16. Please provide a copy of the contract between MTC and DOL for KJCC. ⁸	Respondent’s repeated linkage of its financial proposals to a “0% increase” in its contractual inflationary cap; explicit linkage of its unwillingness to agree to an increase in the boot reimbursement allowance to a provision of the DOL contract. <i>Refused.</i>

An employer engages in bad faith bargaining when it fails or refuses to provide relevant information requested for contract negotiations. *NLRB v. Truitt Mfg.*, 351 U.S. 149, 152 (1956). Information which is relevant and necessary to a union’s statutory duties and responsibilities in representing employees must be provided. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). The test for imposing the duty on an employer is the “probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *NLRB v. Acme Industrial Co.*, supra, at 437.

When the information sought concerns unit employees, there is a presumption that such information is relevant to the Union’s bargaining obligations. *Disneyland Park*, 355 NLRB 1256, 1257 (2007). With respect to non-unit employee information, the General Counsel must

⁸ The Administrative Law Judge found merit to the allegation that Respondent unlawfully refused to provide this item.

demonstrate that the information is relevant. Where such a showing of relevance is required, either because the presumption has been rebutted or because the information request concerns non-unit employees, the burden is “not exceptionally heavy.” *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). “The Board uses a broad, discovery-type of standard in determining relevance,” *Caldwell Mfg.*, 346 NLRB 1159, 1160 (2006), quoting *Shoppers Food Warehouse*, *supra*; *Acme Industrial Co.*, *supra* at 437. Thus, the General Counsel need show only the “probable” or “potential” relevance of the information. *Ibid.* Information about non-unit employees sought to test assertions made at the bargaining table meets this standard where there is such a probability. *Kraft Foods N. America*, 355 NLRB 753, 755 (2010).

Respondent made no effort to rebut the presumption of relevance concerning the unit employee information. Rather, it provided the information concerning unit employees, following a delay of more than three months. The only explanation proffered for the delay was that Respondent’s counsel “forgot” about it. An unreasonable delay, standing alone, “is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Amerisig Graphics*, 334 NLRB 880, 885 (2001), citing *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). The Board holds that a delay is unreasonable absent evidence justifying the reasons for it. In evaluating whether a response is sufficiently timely, the Board considers how complex and voluminous the information sought is, and the difficulty involved in obtaining it. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). Here, there is no evidence the information sought was particularly complex, voluminous, or burdensome to gather, and Respondent’s only explanation, that it “forgot,” is simply insufficient to justify the significant delay from June 29 until October 10. The Board has consistently found that delays of this length, and significantly

shorter, are unlawful absent a justifying explanation. *U.S. Postal Service*, 359 NLRB No. 4 (2012), slip op. at 6 (four week delay); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (seven week delay).

The Judge found that “the record establishes that some or all of this information was provided verbally in a timely fashion,” ALJD 7:33-34, yet cited only the written information request itself to evidence Respondent’s supposed verbal provision of this information. As is undisputed in the record, the Union made an initial information request on May 1, then had several discussions of the subjects of that request at the table with Respondent. As detailed in the chart above, during these discussions, the information the Union requested on May 1 was provided verbally. The Union made a follow-up request in writing on June 29 for written confirmation of the verbally provided information, and a significant amount of additional information, and requested that it all be provided in writing. In its responses to the Union’s request, Respondent never asserted that it had already provided any of the requested information verbally, nor did it proffer any evidence at hearing that it had done so.

The June 29 information request does contain the phrase, as the Judge cited, that “most responses have been given verbally,” but there is simply nothing in the record to support his conclusion that this statement referred to the new information requests that followed, rather than prior requests or discussion across the table. Rather, the record demonstrates that only the limited material set out in the May 1 request was provided verbally. The June 29 information request includes the sentences, “As negotiations have progressed we have asked for many pieces of information, most responses have been given verbally. In order to make sure all parties are on the same page the Union is asking for the following information in writing.” (Appendix A to the Complaint) The Union was requesting that a response to the information request be made in

writing, rather than verbally; there is simply no evidence that all of the requests that appeared after those sentences duplicated prior requests that had been fulfilled verbally.

Moreover, even if these requests were requests for written documentation of material previously provided verbally, the Board has held that such verbal responses suffice only where there has been no renewed or follow-up request to provide the information in writing. *AT&T Corp.*, 337 NLRB 689, 691 (2002). Here, there was a detailed, written “follow-up,” which made clear that verbal responses would not be sufficient. Besides its expressed desire to confirm verbal responses, a written list of the pay rates and pay grades it had already received verbally would enable the Union to compare that information directly with the pay scales it requested pursuant to Respondent’s assertion at the table that there were new pay scales, which unrebutted testimony shows were never provided. (T. 22) To require the General Counsel to prove the negative – that Respondent had not already provided all of the information verbally – is to require the General Counsel to negate a defense that Respondent itself never proved nor even asserted.

With respect to the information the Union sought about employees outside the bargaining unit, it is entitled to the information if it can show that the information was at least potentially related to matters at the table. *Public Service Electric & Gas*, 323 NLRB 1182, 1186 (1997), *enfd.* 157 F. 3d 222 (3rd Cir. 1998). The undisputed evidence at hearing demonstrated that it was. Respondent explicitly linked its proposals on wages and other financial proposals to the 0% inflationary cap in its contract with the Department of Labor. Although Respondent also indicated that it “chose not to” give an increase, the plain implication of the linkage between the inflationary cap and the financial proposals was that the “0% increase” was the reason it would not give unit employees any greater wage increases or other financial terms. As it believed

Respondent was providing wage increases and/or bonuses to non-unit employees despite the 0% cap, the Union requested information that would confirm or disprove this belief, and an explanation. Respondent attempted to explain away the Union's concerns verbally, but when the Union called on it to provide documentation for its claims (that new pay scales had been imposed by DOL, and that DOL required it to raise starting pay rates for certain employee classifications), Respondent refused to provide it. Respondent refused to provide any of the requested documents that would enable the Union to test Respondent's claims concerning the reasons for its willingness to give pay increases to other employee groups.

Recent Board cases demonstrate that information about non-unit employees is relevant where it is sought to test claims made at the bargaining table. In *Peterbilt Motors*, 357 NLRB No. 13 (2011), slip op. at 3-4, the Board found that a union was entitled to information about non-unit employees needed to test claims the employer had made at the table. The Board stressed the union's need to show only the probable or potential relevance of the information, and rejected the employer's defense that it had not premised its proposals on the information that the union sought. Like the union in *Peterbilt Motors*, the Union here sought the information, as Yost explained, so that it did not have to "bargain in a vacuum," and also to assuage unit employees' concerns that Respondent was not dealing fairly with them. (T. 22-23) The information would have permitted it to assess Respondent's assertions and explanations, and determine whether they were trustworthy. Similarly, in *A-1 Door and Building Solutions*, 356 NLRB No. 76 (2011), slip op. at 1-2, the union sought information concerning non-unit employees' bonuses, where it believed that the larger bonuses it suspected for non-unit employees "might have an adverse impact on the funds available for bargaining unit employees' bonuses." The Board found that the union had made a sufficient showing of the relevance of this

non-unit information. Similarly, the Union here sought information after hearing that non-unit employees had received bonuses and pay increases, despite Respondent's explicit linkage of its economic proposals to its 0% inflationary cap, imposed by DOL. Respondent made certain claims in response as to the existence of the increases and bonuses, but refused to respond to an information request interposed to test those claims. As Respondent points out in its Brief in Support of Exceptions, the June 29 request came shortly after the Union had been unable to get a tentative agreement ratified; thus the Union was under significant pressure at this time to allay employees' concerns about how they were being treated as compared with non-unit employees.

All of Respondent's proposals had been explicitly linked to the 0% inflationary cap imposed by DOL. The Union initially made the May 1 information request citing the rumors of wage increases that had been awarded to non-unit employees "despite the 0% DOL increase." (GCX3) The parties discussed those wage increases and related matters at the table, with Respondent explaining that they were a result of its need to bring the wages into compliance with DOL-mandated minimums, and that there was now a separate pay scale for unit and non-unit employees. (T. 21-22, 24-25, GCX15 p. 2) Later at the table, Michael Martine discussed potential "under-run" funds with the Union, as well as whether there had been bonuses distributed to non-unit Residential Living Supervisors. (T. 30-31, GCX 15 pp. 2-3)

Thus, the reasons for the requests were clear from their context; the parties were engaged in wage re-opener and successor contract negotiations, and the matters the Union sought information about had all been discussed at the table. In *Piggly Wiggly Midwest*, 357 NLRB No. 191 (2012), slip op. at 2, the Board held that where the relevance of non-unit information is apparent from the context, the union is under no obligation to spell it out further. In that case, as here, it was readily apparent that the Union information requests referred to various concerns

expressed at the bargaining table. As the Supreme Court has held, “Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims.” *NLRB v. Truitt Mfg.*, supra at 152.

The Judge’s reliance on the *Truitt* “inability to pay” line of cases is misplaced, and his description of the requested material as “financial information” within the meaning of those cases is inaccurate. It is undisputed that Respondent never made a general “plea of poverty,” and thus the examination of those cases is wholly unnecessary. The General Counsel has never argued that this is a “plea of poverty” case, nor asserted that there is any justification for Respondent to “open its books.” Rather, the General Counsel relies only on the specific claims made at the table which justify the narrowly tailored requests for information the Union made on June 29. Respondent repeatedly referred to the 0% inflationary increase in its contract with DOL, and over and over, explicitly linked its proposals to the lack of inflationary increase. Respondent was not obliged to open its books completely to the Union, but because it explicitly premised its proposal on its budget, the Union was legitimately concerned that pay increases or bonuses for non-unit employees would result in less money available for unit employees.

Respondent sought to allay these concerns, and made representations to explain away the rumors. Yet it was unwilling to back up its claims in response to the Union’s follow-up inquiry via its June 29 information request. The Board holds that while a “plea of poverty” can premise a request for substantiating financial information, where, as here, an employer has made claims “short of an asserted inability to pay, but...relevant to the parties’ bargaining proposals and thus subject to verification by the union...a liberal discovery-type relevance standard applies.” *Coupled Products*, 359 NLRB No. 152 (2013), slip op. at 2. This is simply not a case where the

General Counsel seeks to require Respondent to provide “the panoply of financial information that must be furnished upon an employer’s claim of inability to pay, as Board law defines it.” *Id.*

b. Respondent threatened Heather Rebarchak in order to discourage her from pursuing a grievance, in violation of Section 8(a)(1) of the Act. (Cross-Exceptions 1 and 8-10)

Respondent’s threat to employee Heather Rebarchak, presenting her with the Hobson’s choice of withdrawing her grievance or submitting a statement concerning the events for which she was disciplined – on pain of further discipline if she refused – violates Section 8(a)(1) of the Act.

Employees’ resort to the grievance process is itself protected concerted activity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835-836 (1984). Indeed, the Board has recently held that merely enlisting a Business Agent’s help to pursue a complaint outside the grievance process is also protected concerted activity. *Fresh & Green’s of Washington, DC*, 359 NLRB No. 145 (2013), slip op. at 4-5.

It is clear that it was Rebarchak’s protected use of the grievance process, and not any need to “investigate” the matter for which she already been disciplined, that prompted Respondent’s threat. Respondent initially requested a “statement” from Rebarchak by email dated October 16. She responded by denying the incident occurred, and Respondent disciplined her. No further “statement” was requested until after Rebarchak filed a grievance on November 8; nearly two months after the grievance was filed, Respondent demanded an additional “statement” in January 2013, requiring in the most explicit terms that Rebarchak either withdraw her grievance or be further disciplined for refusing to provide the statement. Respondent made its motive of discouraging Rebarchak from using the grievance process even more evident by noting that if it determined that the statement she provided was “proven untruthful,” by means

unspecified, that Rebarchak would be disciplined for that as well. By its expressed willingness to forego the statement if she withdrew her grievance, Respondent makes clear that it simply had no other reason for demanding it.

The Judge found that the General Counsel's theory of the case requires an "inference" of discriminatory motive that is not found in the record. However, no inference is required. Simply put, it was unlawful for Respondent to make this demand after it had already decided to impose discipline and a grievance had been filed. Its initial request, on October 16, before it decided to discipline Rebarchak, and while it was conducting a legitimate investigation before deciding whether to discipline her, was perfectly lawful. *Service Technology Corp.*, 196 NLRB 845, 845 fn. 1 (1972). But once it had made its decision and imposed discipline, and Rebarchak sought to challenge that decision via the grievance process, it was unlawful for Respondent to make the demand, and to threaten discipline if Rebarchak did not comply.

Contrary to the Judge's conclusion that it "was not unreasonable for Respondent to force Rebarchak to exhaust her recollection of the incident in writing well in advance of the arbitration, so as to know precisely what it needed to contradict at the arbitration," Respondent had no right to demand such information from the grievant in advance, and certainly not to threaten discipline if she did not comply.⁹ Respondent's insistence on a post-disciplinary investigation demonstrates only an illegitimate attempt to seek pre-arbitral discovery to support its position, not an attempt to "investigate" discipline it had already imposed. *Cook Paint & Varnish*, 246 NLRB 646, 646 (1979), not enf'd. 648 F.2d 712 (D.C. Cir. 1981).

⁹The Judge also relied on hearsay evidence, a memorandum generated by Respondent, for his finding concerning what Rebarchak said at the October 26 grievance meeting. What she said post-discipline is not relevant – the Judge appears to suggest it justified Respondent's demand for a fuller explanation - but the document itself is not only unreliable, as it contains only one person's summary impressions, but unclear as to when she made the asserted statement. Neither the author of the document nor Rebarchak herself testified. (ALJD 4:28-29)

Indeed, Respondent threatened discipline if she did comply, as well; contrary to the Judge's conclusion that "[t]here is no basis for me to conclude that Respondent would have disciplined Rebarchak if she had provided a statement," Respondent indicated explicitly that it would make its own assessment whether Rebarchak's statement was "truthful" or not, and discipline her if she was "untruthful." As Respondent expressly explained to her, Rebarchak was free from the threat of further discipline only if she withdrew her pending grievance. No inference as to Respondent's intent is required here; whether it intended to chill employee's protected recourse to the grievance process or not, it certainly did so by these threats. The Board has held that threatening an employee with discharge and unspecified reprisals unless he withdraws a grievance violates the Act. *833 Central Owners Corp.*, 359 NLRB No. 66, slip op. at 2 (2013).

c. Respondent made a retaliatory and regressive proposal, in violation of Section 8(a)(5) of the Act, which should be rescinded in its entirety. (Cross-Exceptions 18 and 19)

Respondent's proposal of April 4, 2013 fulfilled the threat it made at the table the day before, and thereby violated the Act. Respondent made regressive proposals in several areas, including night shift premium pay, bumping procedures for layoffs, number of stewards, leaves of absence, and, most egregiously, arbitration. Respondent's explanations for these proposals at the table were either specious or non-existent, and Respondent proffered no evidence in support of the proposals at hearing. The General Counsel cross-excepts to the ALJ's failure to find that the number of stewards¹⁰ was also retaliatory and regressive, and to the ALJ's failure to order Respondent to withdraw its April 4, 2013 proposal in its entirety.

¹⁰ The Judge found that the Respondent's number of stewards proposal was not regressive (ALJD 6:3). It is undisputed, and the Judge found, that Respondent retreated from a position that would have left the number open to agreement, rather than limiting it.

Moreover, since the entire proposal was tainted by Respondent's explicit, retaliatory motive, it should be required to withdraw it in its entirety, as was the remedy for similar violations in *Quality House of Graphics*, 336 NLRB 497, 500 (2001).

V. CONCLUSION AND REMEDY

Based on all of the above, it is respectfully submitted that the Board should modify the Administrative Law Judge's recommended Order to require Respondent to withdraw its proposal of April 4, 2013 in its entirety and return to the bargaining table, and that the Board should modify the Judge's Findings and Conclusions of Law to find that Respondent violated Section 8(a)(1) of the Act by demanding on pain of discipline that an employee give a witness statement in retaliation for her protected resort to the grievance process; and that Respondent violated Section 8(a)(5) of the Act a) by failing and refusing to provide the Union with requested relevant information about non-unit employees and b) by delaying in providing requested relevant information about unit employees.

As remedies for these violations, Counsel for the General Counsel requests that the Board require that Respondent be required to cease and desist from their unfair labor practices, withdraw the retaliatory bad faith proposal it made on April 4, 2013 in its entirety, provide the Union with the outstanding requested relevant information, rescind its written demand for Heather Rebarchak's witness statement, post an appropriate Notice to Employees, and any other relief deemed appropriate by the Board.

Respectfully submitted,


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Dated: March 13, 2014