**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 16**

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| **UNITED PARCEL SERVICE, INC.** | ) | | |
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| **Respondent,** | ) | | |
| | ) | | |
| | ) | | |
| **and** | ) | **Cases** | **16-CA-028064,** |
| | ) | | **16-CA-062316,** |
| | ) | | **16-CA-070588,** |
| **INTERNATIONAL BROTHERHOOD OF** | ) | | **16-CA-081494, and** |
| **TEAMSTERS, LOCAL UNION 373,** | ) | | **16-CA-085218** |
| **Affiliated with INTERNATIONAL** | ) | | |
| **BROTHERHOOD OF TEAMSTERS,** | ) | | |
| | ) | | |
| **Charging Party.** | ) | | |

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**BRIEF IN OPPOSITION TO EXCEPTIONS ON BEHALF OF**
**UNITED PARCEL SERVICE, INC.**

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## PRELIMINARY STATEMENT

This Answering Brief is filed pursuant to Section 102.46(d) of the Board's Rules and Regulations. The Counsel for the General Counsel (hereinafter referred to as the "GC") has filed 71 Exceptions to the Administrative Law Judge Keltner W. Locke's Decision that was issued on August 15, 2013 (hereinafter referred to as the "Decision"), asserting that Judge Locke erred in dismissing the Third Consolidated Complaint. As more fully set forth below, the GC's Exceptions are without merit and Judge Locke's Decision must be upheld by the Board.

## SUMMARY OF ARGUMENT

The National Labor Relations Act (the "Act") requires both management and labor to confer in good faith with respect to terms and conditions of employment. This good faith requirement places the onus on management to respect the Union's right to request "necessary and relevant" information and on labor to request information for the sole purpose of performing its duties as a bargaining representative. Union stewards are not permitted to request information for personal pursuits unrelated to bargaining rights or for personal vendettas.

United Parcel Service, Inc. (hereinafter, "UPS") has, at all times, engaged in good faith bargaining with the Union. It has spent countless hours and thousands of dollars producing thousands of documents responsive to the Union's information requests, conducting training on its document retention and information request process, and offering the Union reasonable alternatives to voluminous, overly broad, duplicative, and unduly burdensome information requests.

Reginald Thomas ("Thomas"), the chief union steward at UPS's Texarkana Center, one of the most underperforming drivers in the Texarkana Center, and the individual responsible for all of the information requests that are subject to this dispute, has deliberately abused the information request process by engaging in a bad faith campaign to inundate UPS with

voluminous, overly broad, duplicative, and unduly burdensome information requests that are not necessary to investigate and resolve underlying grievances, and are intended solely to negatively impact UPS's operations.

Thomas' efforts are driven by his false belief that UPS is discriminating against him by allowing other drivers to work through their lunch breaks so that their performance appears better than his. Thomas filed an EEOC complaint and an NLRB charge asserting this claim, both of which were dismissed for lack of sufficient evidence. Thomas has also filed 18 grievances regarding UPS's purported harassment of him, all of which are the subject of this dispute. At about the same time that the EEOC dismissed his complaint for lack of sufficient evidence and only days after being disciplined for continued sub-par performance, Thomas began inundating UPS with grievances related to lunch breaks, and information requests to determine whether other drivers were taking and/or inaccurately recording their lunch breaks.

Any attempt to engage Thomas regarding the scope of his requests has been frustrated by his refusal to identify a single driver he believes missed a lunch break, his refusal to narrow the scope of his information requests in any way whatsoever, and his refusal to explain why knowing what every driver is doing every minute of every day for weeks at a time is even remotely relevant to whether they took a lunch break. Thomas fully acknowledges that he has refused to give "an inch" on any of his requests, and has made clear that he wants <u>everything</u> UPS has.

Judge Locke concluded that Thomas engaged in bad faith bargaining and his conduct violates the spirit of the Collective Bargaining Agreement ("CBA") and the NLRA. In assessing Thomas' credibility, Judge Locke found that Thomas "hijack[ed]" the information request process "using his position as chief steward for his own ends rather than to perform the Union's statutory duties as exclusive bargaining representative." Judge Locke found that Thomas

harbored an intent to jeopardize UPS's operations that "affected not only the decision to file the information requests and the contents of those requests, but also the Union's willingness to engage in the discussion process, the give and take, which forms the essence of the collective bargaining relationship." Thomas' underlying motive in requesting information could not, according to Judge Locke, be ignored because doing so would "condone the misuse of the information request process and set a highly pernicious precedent."

The General Counsel completely discounts Judge Locke's credibility findings and well-reasoned conclusion that Thomas abused the information request process by arguing that UPS violated the Act when it did not produce every single document Thomas requested even though: (1) the documents were admittedly redundant and irrelevant; (2) furnishing such documents would be time-consuming and onerous; (3) Thomas admittedly was unwilling to compromise on any of his requests; and (4) Thomas was both unwilling and unable to offer any plausible explanation as to why every single document he requested was "necessary and relevant" to pending grievances.

It is well settled that the law does not require UPS to respond to requests made in bad faith, or to produce documents that are irrelevant, overly broad, duplicative, or unduly burdensome. Therefore, Judge Locke correctly dismissed the Third Consolidated Complaint in its entirety.

## STATEMENT OF THE CASE

This action involves five consolidated ULP charges (16-CA-028064, 16-CA-062316, 16-CA-070588, 16-CA-081494, and 16-CA-085218) filed by Thomas, on behalf of the Union, on June 13, 2011, August 9, 2011, December 12, 2011, May 21, 2012, and July 13, 2012, respectively, each of which allege that UPS violated 8(a)(1) and 8(a)(5) of the NLRA by failing

and/or refusing to furnish requested information. GC Exhibit 1.[1] The Region consolidated all five ULP charges in a Third Consolidated Complaint on October 31, 2012. GC Exhibit 1. The Third Consolidated Complaint relates to information requests that were made by Thomas and many of which pertain to grievances that Thomas filed against UPS or caused others to file against UPS. Most of Thomas' information requests relate to the same, singular issue: whether drivers in the Texarkana Center were taking and/or inaccurately recording their lunch. Several of Thomas' requests demand the production of information for all 44 Texarkana package car drivers for a 10 day period: time cards[2], delivery reports[3], manifests[4], telematics[5], a time between stop section summary,[6] a weekly operation report,[7] and a driver recap summary.

UPS filed its Answer to the Third Consolidated Complaint denying that it violated the Act and raising several affirmative defenses, including that the Union's information requests were submitted in bad faith, that the specific information requested was irrelevant, overly broad, duplicative, and unduly burdensome, and that UPS complied with the March 6, 2012 informal settlement agreement of Cases 16-CA-028064, 16-CA-062316, and 16-CA-070588. GC

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[1] UPS will refer to the General Counsel's exhibit numbers as "GC Exhibit __" and UPS's exhibit numbers as "R Exhibit __."

[2] A time card provides information regarding an employee's statistics for the day including, but not limited to, the employee's name, employee's ID, route ID, punch-in time, the punch-out time, whether an employee took a lunch, the time the employee leaves and returns to the building, and the number of packages delivered and picked up. Tr. at 412; GC Exhibit 5. Time cards are maintained at the Texarkana Center for 22 days. Tr. at 413.

[3] A delivery report provides information regarding the stops an employee has during the day, the times packages are delivered and the individuals who signed for the receipt of packages. Tr. at 111; GC Exhibit 7. Delivery reports are maintained at the Texarkana Center for approximately 30 days. Tr. at 109.

[4] A manifest provides information regarding the stops a package car driver has on a particular day. Tr. at 415; GC Exhibit 8. Manifests are maintained at the Texarkana Center for 14 days. Tr. at 413.

[5] A Telematics GPS map report does not exist unless a supervisor utilizes Telematics to create a report pinpointing a particular performance issue for a package car driver. Tr. at 415-16.

[6] Rosebaugh testified that, at all relevant times, a time between stop section summary report has not been used by the Texarkana Center and that he advised Thomas of this. Tr. at 413, 441. The Center now uses is a driver stop summary report, which provides similar information to a time between stop section summary report including a recording of a driver's stops. Tr. at 413; R Exhibit L.

[7] A weekly operation report provides statistical information regarding the hours an employee worked along with the packages delivered by that employee. Tr. at 415. These reports are maintained at the Texarkana Center for 7 weeks. Tr. at 414.

Exhibit 1. On January 23 and 24, 2013, a hearing was held before Judge Locke, in Texarkana, Arkansas.

**Judge Locke's Decision and Credibility Findings**

On August 15, 2013, Judge Locke issued a ruling and found that UPS engaged in good faith bargaining, complied with the March 6, 2012 informal settlement agreement, and did not violate the Act. Decision at p. 60. Judge Locke concluded that Thomas, as the Union's chief steward, engaged in bad faith bargaining in requesting information that was solely intended for non-bargaining purposes - to harass and negatively impact UPS. This conclusion is supported by the following credibility findings of the General Counsel's chief witness, Thomas:

- Thomas "had a significant interest in the outcome of the proceeding" and an "emotional investment in winning his case" that affected the veracity of his testimony. Decision at p. 4.
- Thomas was deliberately "evasive" because he knew that "truthful answers would hurt his case." Thomas repeatedly gave contradictory testimony by claiming certain documents were more detailed than others, but then stating the opposite at later points of his testimony. For example, Thomas denied on cross-examination that delivery reports provide similar information as manifests, but on direct stated just the opposite. Thomas also denied that telematics were sufficiently similar to weekly operating reports, but later recanted. Additionally, Thomas lied about his knowledge of which drivers skipped lunch breaks. Id. at pp. 4, 56.
- Thomas "bore some hostility towards the manager in charge of the Texarkana facility, Randy Rosebaugh … admitted[ly] refer[ring] to Rosebaugh as a racist [and] … want[ing] to see him lose his job." Id. at p. 4.

- Despite being a steward for nearly two decades, Thomas routinely requested information without considering whether the information was "relevant and necessary" to the grievance. Id. at p. 10.
- Thomas had a persistent pattern of refusing to entertain reasonable requests to "lessen the burden [of a request] by negotiating an accommodation," and failing and refusing to respond to inquiries about the true purpose of a request so that the "contours of the information request could be shaped to fit the need." Id. at p. 20.
- Thomas demonstrated a willingness to "use the information request process for purposes other than the Union's statutory duties," admittedly knew that what he did exceeded the scope of his authority, and attempted to cover up his conduct during the hearing by being evasive when asked about the true purpose of his requests. Decision at p. 20.
- Thomas' demonstrated willingness to "use the information request process for one inappropriate purpose -- gaining information to support an EEOC charge -- leads me to conclude that he would be willing to use it for other inappropriate purposes." Id. at p. 35.
- Thomas refused to explain, in any correspondence, why the information requested related to his lunch break grievances was relevant and necessary. He repeated such behavior on the witness stand, demonstrating a lack of candor and good faith. Id. at p. 43.
- Thomas' veracity was called into question when he tried to explain the relevance of information that related to lunch break grievances by stating that he needed to know

which drivers missed stops but were not disciplined, even though he had already identified those drivers. Id. at p. 10.

- "The record as a whole creates a rather strong impression that the information requests were Thomas' crusade, with Business Agent Driggers quietly going along rather than 'making waves.'" Id. at p. 59.

According to Judge Locke, Thomas' testimony along with the documents produced by him demonstrated that he was "attempting to use [the information request process] for a malicious purpose" and he "harbored an intent to cause management such extra work and inconvenience that it foreseeably would do harm to [UPS's] operations." Id. at p. 22. Judge Locke refused to be complicit in Thomas's conduct stating:

> Thomas' claim that he "was gathering information for his grievance [while] procedurally … true … strikes me as disingenuous…. Thomas' primary motivation for filing broad, onerous information requests was to strike back at management. It was the one means available to him to make management work unpleasant. Additionally, if management's efforts to supervise Thomas consistently resulted in having to respond to onerous information requests, it might well discourage such supervision….
>
> Both my impressions of the witnesses … and the entire record lead me to conclude that Thomas was not acting in good faith when he made the information requests. Although he claimed to seek the information for grievance-related purposes, I find that his dominant motive was retaliatory."

Decision at pp. 35, 43. Unable to dispute Judge Locke's findings, the General Counsel characterizes them as assumptions and claims that Judge Locke "seized upon perceived inconsistencies to discredit Thomas."[8] The General Counsel would strip Judge Locke of any

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[8] The General Counsel incorrectly relies on Island Creek Coal Co., 292 NLRB 480 (1989) for the proposition that reversal is appropriate when an ALJ fails to consider critical evidence in the record. Here, unlike there, Judge Locke considered the totality of the record evidence including the steward's motives in requesting information and

authority to question Thomas' credibility and veracity, or to make reasonable inferences regarding his actual intentions in requesting information simply because he asked for it on a form typically used by the Union and demanded information that was "presumptively relevant." No Board authority supports this position.

## STATEMENT OF FACTS[9]

Thomas has been and continues to be one of the most underperforming package car drivers in the Texarkana Center. Transcript of Proceedings dated January 23-24, 2013, at 417-18 ("Tr. at __"). He has consistently been considered a "help needed driver," a driver who takes longer than expected to deliver packages on an assigned route. Id. Thomas, on average, takes approximately 1½ to 3 hours longer than he should to complete his route, and has consistently demonstrated noticeable improvements in his stops per on road hour (SPOHR),[10] a measure of driver performance, whenever he is supervised by a UPS manager. Tr. at 247, 418; R. Exhibits A-B. UPS has treated Thomas the same as every other under-performing driver by training, counseling, and, when necessary, disciplining him. Id. at 418-20; R. Exhibits A-G.

### I. Thomas' Discrimination Claim

On or about November 18, 2009, after receiving 23 verbal warnings regarding his performance, a documented talk-with,[11] and a virtual on-the-job supervision (OJS),[12] Thomas filed a complaint with the Board alleging that he was discriminated against because of "his membership and activities [on] behalf of Teamsters Local 373." R. Exhibit F. On or about

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his evasive behavior during the hearing that called into question those motives, along with the veracity of the reasons he needed information.

[9] The Statement of Facts responds to the General Counsel's Exception Nos. 6-53, 55-59, 61-71.

[10] A SPOHR is a calculation of the average number of packages a driver delivers each hour during a shift, less the driver's lunch break. Tr. at 417. UPS does not calculate a driver's SPOHR between stops. Id.

[11] A talk-with is a counseling session to discuss performance issues and reiterate expectations. Tr. at 290.

[12] A virtual OJS ride is a means of tracking an employee's performance electronically during the day without having a supervisor ride with the employee. A lock-in-ride is a similar retraining tool, but where a supervisor rides with an employee for three days to go over the driver's performance and delivery methods. Tr. at 419.

September 24, 2010, Thomas changed his theory of the case and filed a complaint with the Equal Employment Opportunity Commission (EEOC).[13] R. Exhibit G. In that complaint, Thomas alleged the following:

> "In September 2009, I was given a letter of record. On February 18, 22, and 23, 2010, I was given a verbal warning. On April 9, 2010, I was given another verbal warning. On May 24, 25, and 26, 2010, I was written up by the Center Manager. On June 25, 2010, I was written up. On July 19, 2010, I was written up. I was written up <u>because white drivers go out and skip their lunch while running my route and I do not skip my lunch</u>. I was told I was written up for failure to meet the (SPOHR) stops per on road hours. Also, because these white drivers are younger people than I am. I am 50 years old and they average 38 years old. I believe I am being disciplined because of my race, Black, in violation of Title VII and my age, 50, in violation of the Age Discrimination in Employment Act of 1967…."

Tr. at 257-58; R. Exhibit G, *emphasis supplied*. On or about May 30, 2011, the EEOC dismissed Thomas' complaint for lack of sufficiency of evidence. Tr. at 261; R. Exhibit H.

Despite being advised by both agencies that his claims lacked merit, Thomas testified as follows:

> Q: Do you believe that [your performance] numbers are just manipulated …?
> A: …Yes.
> Q: By whom?
> A: Someone ….
> Q: Who?
> A: I can't put no name to it. No.
> * * *
> Q. Is it true or not that you called Randy Rosebaugh a racist?
> A. Yes, I have…. I might have mentioned it to him, but I know I mentioned it to the other drivers.
> * * *

[13] The General Counsel contends that the EEOC Complaint was too remote in time to have anything to do with Thomas' requests. GC Brief at p. 56. This contention is incorrect, especially when considering the totality of the record evidence. It also ignores Thomas' own testimony that he previously requested information for purposes of substantiating an EEOC Complaint. It also discounts Thomas' own, admitted, interest in proving that UPS was allegedly manipulating his performance data for a discriminatory purpose.

Q. Isn't it true that you want to see him lose his job?
A. I might have made that statement….

Tr. at 252-56, 263. Thomas admitted at the hearing that it is never appropriate for a union steward to use the information request process to further an individual's discrimination claim. Tr. at 245. Yet, he acknowledged that, immediately upon becoming the chief steward for the Union, he submitted over 20 information requests and filed multiple grievances, most of which concerned UPS's purported harassment of him and whether drivers were taking and/or inaccurately recording lunch breaks, the central focus of his EEOC and NLRB filings. GC Exhibits 30, 31, 33, 34, 37, 38, 40, 41, 44, 45, 50, 51, 54, 55, 58, 59, 66 and 67. Thomas believed that management's effort to make him more efficient by lightening his workload was somehow discriminatory. At all relevant times, Thomas believed these actions to be "a stratagem to hurt him" even though nothing supported this belief and there was no evidence that management harbored any animus against him. Decision at p. 34. Judge Locke noted that Thomas' accusations framed the information request process as follows:

> In one sense, the grievance seemed to be secondary to the information requests, rather than the other way around. The grievance provided justification for the information requests which, essentially, had become Thomas' ammunition. Thomas considered management's meticulous measurement of his work performance to be harassment. The information request procedure armed him with a way to make that scrutiny more costly.

Decision at p. 35. This is substantiated by the following record evidence:

**A. <u>9.5 hour grievances and corresponding information requests</u>**

During the pendency of his EEOC proceeding, Thomas filed five separate grievances with UPS alleging that "the company … caused [him] to work over 9.5 hours per day" during a particular work week. GC Exhibits 10-14. He further alleged that UPS violated Article 37 of the parties' National Master United Parcel Service Agreement and the Southern Region

Supplemental Agreement (CBA) which states, in pertinent part, that the "[e]mployer shall not in any way intimidate, harass, [or] coerce … any employee in the performance of his duties." GC Exhibit 2, p. 120.

On or about May 3, 2011, Thomas requested the following information for Texarkana Center package car drivers who ran route 29A during the period January 3, 2011 through April 29, 2011: time cards,[14] delivery reports,[15] manifests,[16] and telematics reports.[17] GC Exhibit 15. According to Thomas, the purpose of this request was to, *inter alia*, determine "if the driver who ran 29A during this period documented and took their lunch," and to know "exactly what the driver did that day." Tr. at 121-22, *emphasis supplied*. Yet, Thomas failed to explain why he needed documents that post-dated Brandon Rayfield's termination and that related to other employees when the grievance only related Rayfield. Decision at pp. 9-10. Additionally, Judge Locke found that Thomas' testimony lacked credibility because it was non-responsive, unintelligible, and unreasonable for Thomas to believe that taking a lunch break had anything to do with an integrity grievance. Decision at pp. 10, 14. Not to mention that, at that time, Thomas knew that most of the documents he had requested had already been purged by UPS, and telematics reports (a large piece of what he had been requesting) did not exist unless a performance issue came up and was not used by the facility until March 2011. Tr. at 417.

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[14] A time card provides information regarding an employee's statistics for the day including, but not limited to, the employee's name, employee's ID, route ID, punch-in time, the punch-out time, whether an employee took a lunch, the time the employee leaves and returns to the building, and the number of packages delivered and picked up. Tr. at 412; GC Exhibit 5. Time cards are maintained at the Texarkana Center for 22 days. Tr. at 413.

[15] A delivery report provides information regarding the stops an employee has during the day, the times packages are delivered and the individuals who signed for the receipt of packages. Tr. at 111; GC Exhibit 7. Delivery reports are maintained at the Texarkana Center for approximately 30 days. Tr. at 109.

[16] A manifest provides information regarding the stops a package car driver has on a particular day. Tr. at 415; GC Exhibit 8. Manifests are maintained at the Texarkana Center for 14 days. Tr. at 413.

[17] A Telematics GPS map report does not exist unless a supervisor utilizes Telematics to create a report pinpointing a particular performance issue for a package car driver. Tr. at 415-16.

### B. OJS Ride grievances and corresponding information requests

Shortly after his EEOC complaint was dismissed, Thomas filed three separate grievances regarding OJS rides. GC Exhibits 19, 22, 23. Thomas alleged in those grievances that "the company uses [telematics] to target certain drivers" and that UPS "manipulated and falsified the records to harass [him]." Tr. at 132, 138, 141; GC Exhibits 19, 22, 23, *emphasis supplied*. While Thomas did not specifically allege that he was being discriminated against on the basis of his age and/or race, these allegations mirrored the allegations in his failed EEOC complaint. These grievances were accompanied by information requests submitted on June 29, 2011, August 31, 2011, and September 1, 2011. GC Exhibits 18, 21, 24. According to Thomas, the information was needed, *inter alia*, to determine whether other drivers "documented and took their lunch," and to determine whether Randy Rosebaugh ("Rosebaugh") was manipulating the packages in his car. Tr. at 138, 141-43, *emphasis supplied*. Despite that Thomas requested information for "other" package car drivers, the intent was to show that he, unlike other drivers, was being targeted, and that other drivers were allowed to work through their lunch breaks so that their SPOHR appeared better than his. Id. Judge Locke noted that when questioned about these various requests, the scope and purpose of them became clear - Thomas was only interested about his own performance and how management attempted to manipulate his data for purposes of discipline. Decision at pp. 23-35.

### C. Lunch break grievances and corresponding information requests

Six days after Thomas was suspended without pay for continued sub-par performance, he filed the first of several grievances regarding lunch breaks (the "lunch break grievances") alleging that UPS:

> "[h]as caused the drivers in the Texarkana Center to skip their lunch…. Most drivers skip their lunch or take their lunch after the 8th hour in fear of retaliation from Center Manager Randy

> Rosebaugh. Rosebaugh uses these manipulated and falsified performance numbers to scare most drivers into not taking their lunch or taking it after the 8th hour. Most drivers put their lunch in the board bud not take it."

GC Exhibit 30; R. Exhibit E. Thomas continued to file similar grievances with UPS every 10 days. Tr. at 158, 162; GC Exhibits 33, 37, 40, 44, 50, 54, 58, 66; Decision at p. 36. None of these lunch break grievances identified anyone other than Thomas as an impacted employee. Id. Yet, all of the lunch break grievances were accompanied by requests for information for all 44 Texarkana Center package car drivers for a 10 day period. GC Exhibits 31, 34, 38, 41, 45, 51, 55, 59, 67. According to Thomas and Tommy Driggers ("Driggers"), the Assistant Business agent for Local 373, the sole purpose of these requests is to determine whether "drivers in the Texarkana Center [are] … skipping their lunch…." Tr. at 154, 162; GC Exhibit 39. At the hearing, Thomas admitted that despite receiving thousands of documents, many of which show whether drivers are accurately recording their lunch breaks, he cannot identify a single driver who has skipped his/her lunch break. Tr. at 267. Thomas testified as follows:

> Q. Do you have any idea how many drivers ask and are granted permission to take a shorter lunch …?
> A: No… I don't have any knowledge of how many drivers were skipping their lunch.

Tr. at 267. Driggers, however, represented to UPS, in writing, just the opposite. GC Exhibit 39. He also represented the same to Judge Locke stating that Thomas refused to give UPS names of those individuals he knew to be skipping their lunch breaks for fear of retaliation. Tr. at 83-84, 86.

### D. Safety ride grievances and corresponding information requests

Two days after Thomas was confronted about his ongoing performance issues, he filed another grievance claiming that UPS:

> "[h]as manipulated and falsified the performance numbers to harass me…. Management has treated me differently because of my attitude, personality, past incidents and experiences, and union activity. They also treat me differently because I have filed NLRB charges against them."

GC Exhibit 74; Tr. at 213, *emphasis supplied*. On May 18, 2012, Thomas submitted information requests for purposes of demonstrating that his performance was not sub-par and that he was being harassed yet again. Tr. at 217; GC Exhibits 75, 77.

## II. Thomas' "All or Nothing" Approach to the Information Request Process

Thomas has refused to negotiate over information requests related to his lunch break grievances.[18] All of his requests regarding lunch break grievances seek the following information for all 44 Texarkana package car drivers for a 10 day period: time cards, delivery reports, manifests, telematics, a time between stop section summary,[19] a weekly operation report,[20] and a driver recap summary.[21] GC Exhibits 31, 34, 38, 41, 45, 51, 55, 59, 67. Despite the intended purpose of these requests (to determine whether drivers in the Texarkana Center were taking and/or inaccurately recording their lunch), Thomas' requests far exceed the scope of his grievances. According to Thomas, he wanted every single piece of information about what every single driver does every minute of every day. GC Exhibit 39; Tr. at 71, 154-55, 184-85,

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[18] Thomas requested information related to all 44 Texarkana Package Car Drivers on November 21, 2011, December 5, 2011, December 19, 2011, January 3, 2012, January 16, 2012, January 30, 2012, March 19, 2012, April 2, 2012, and April 16, 2012. These requests are identified in paragraphs 10(g) through 10(n) and 10(p) of the Third Consolidated Complaint.

[19] Rosebaugh testified that, at all relevant times, a time between stop section summary report has not been used by the Texarkana Center and that he advised Thomas of this. Tr. at 413, 441. He uses a driver stop summary report, which provides similar information to a time between stop section summary report including a recording of a driver's stops. Tr. at 413; R Exhibit L.

[20] A weekly operation report provides statistical information regarding the hours an employee worked along with the packages delivered by that employee. Tr. at 415. These reports are maintained at the Texarkana Center for 7 weeks. Tr. at 414.

[21] A driver recap summary provides the same information as a weekly operation report but for a single day. Tr. at 415. These reports are maintained at the Texarkana Center for approximately 30 days. Tr. at 109.

225, 272. In Thomas' own words: "I kind of got smart with him and told [him] that I wanted everything that he had." Tr. at 225, 272.

At the hearing, Rosebaugh made clear that it would be impossible to comply with a request of this kind, because it would take him approximately 20 hours to provide information for every package car driver in the Texarkana Center for a single day. Tr. at 427-28, 430. Additionally, UPS's Industrial Engineer, John Fullen, confirmed that in order to retrieve documents from UPS's archives to respond to a single information request for all 44 Texarkana package car drivers, UPS would have to produce up to 10,000 pages of documents, spend well over $2,000 in production and shipping costs, and expend up to 16 hours of labor. Tr. at 450-51. Even Driggers acknowledged that the cost, time, and effort associated with these requests would be significant. Tr. at 85.

Recognizing the overly broad and unduly burdensome nature of Thomas' requests, Cedric Williams ("Williams"), UPS's then-District Labor Relations Manager, timely objected to each of them. GC Exhibits 35, 42, 48, 56, 65; R. Exhibits R-S.[22] On December 15, 2011, Williams asked that the Union engage in a dialogue regarding the information sought so that the parties could determine whether responsive documents could be provided through a less burdensome process, and whether the scope of the requests could be reasonably narrowed to focus on a specific individual's involvement in a pending grievance. GC Exhibit 35. As Judge Locke recognized, these efforts were intended to put the Union on notice of the tremendous

[22] The General Counsel argues that Rosebaugh would not provide information "even though many of the requested documents were located at the Texarkana facility." GC Brief at pp. 6, 26. This argument misconstrues Rosebaugh's testimony and ignores that UPS's customary practice of responding to voluminous requests was to have Rosebaugh send the request to the labor department so that Williams could work with Thomas in narrowing his requests. Tr. at 301, 434-38.

burden responding would entail, and to reach a compromise that would "give the Union the information it needed while reducing [UPS's] burden." Decision at p. 39.

On December 21, 2011, the Union's business agent only clarified the purpose of these requests (to determine whether drivers were taking their lunch breaks), but did not provide any reason why Thomas needed know what each driver in the Texarkana Center was doing every minute of every day for weeks at a time. GC Exhibit 39.

On January 6, 2012, Williams advised the Union that Driggers' clarification of the nature of Thomas' grievances did not make his requests any less objectionable because Thomas did not need several different categories of documents to determine whether a package car driver took and/or inaccurately recorded a lunch break, and that compiling the requested information for a 10-day period would be unduly burdensome. GC Exhibit 42. Williams offered alternatives to Thomas' requests including the production of records of a sampling of drivers for a single day, or the production of records for those drivers who have alleged to have skipped their lunch breaks. Id.

Thomas subsequently responded to Williams' letter by asserting, without any basis, that the information requested was necessary for purposes of defending grievances, and demanded that all of the documents be produced in their native format. GC Exhibit 43. Thomas stated:

> "The Union is aware that the company keeps most of the information requested at the center for a period of fifteen to twenty-two days. It should not be any reason for the Company to provide the information requested."

Judge Locke recognized that Thomas had no intention of considering a compromise or accommodation (e.g., identifying another driver who alleged that he/she missed a lunch break, or agreeing to discuss the scope of his requests), lessening UPS's burden of responding, providing UPS with a legitimate basis for the stalemate, or explaining how the requested information

related to the performance of the Union's statutory duties. Decision at p. 40, 43; Tr. at 271-72, 284, 334, 335; GC Exhibits 43, 52, 57, 72.

Judge Locke also recognized that Thomas deliberately made the process more difficult by refusing to answer any questions that would help UPS narrow his request. For example, when Rosebaugh asked Thomas to identify those drivers who he believed to be deliberately skipping their lunch breaks, Thomas refused to provide that information and stated "you know who they are." Tr. at 83-84, 334-35. Thomas also ignored Williams' statement that "the Union is well aware that it is not necessary to review six different categories of documents to determine whether a driver took a meal period on a particular day." According to Thomas, it would be "easy for the company to print a few documents that it already possesses" and that "it is time for all this whining to stop and give the Union the information it is seeking." GC Exhibits 57, 72. Yet, at the hearing, Thomas acknowledged that he had no basis for making this statement, he failed to dispute that most of the documents he requested were irrelevant to whether or not an employee took a lunch break, and he made it clear that he "wants what he wants," and that despite the burden responding to his requests entailed, it was "not [his] problem." Tr. at 270-71, 337, 340, 426, 450. The following testimony is instructive:

> Q: For every single information request you've made that's encompassed within this hearing, within this complaint, have you ever given one inch?
>
> * * *
>
> A: All this information is needed in processing grievances.
>
> Q: Of all the dozens and dozens of requests that are made a part of this complaint, no compromise by you at all. Agree or disagree?
>
> A: I guess I agree….
>
> * * *
>
> Q: Do you know how much time it takes to produce the records that were provided to you …?
>
> A: No.
>
> Q: Do you know how much money it cost …?

> A: No.
> Q: So what should be the limit on how much time the company should devote…?
> A: I don't know a limit. I just want the information requested.
> Q: You want what you want. Right?
> A: Yes….

Tr. at 270-72. Thomas' "all or nothing" approach evidenced his bad faith intent, especially since he, himself, had everything to gain by it. Judge Locke explained:

> Chief Steward Thomas had a choice: On one hand, he could indulge the personal animosity he harbored towards Manager Rosebaugh. He could use his power as a union officer, his authority to file grievances and information requests, to cause needless extra work for the manager and, when possible, make him look bad. On the other hand, Thomas could choose to give priority to the needs of the bargaining unit employees he represented. Serving them effectively as steward entailed putting aside personal pique and dealing with management in good faith to resolve problems. It was a clear choice. Thomas could not nurse both a grudge and the bargaining relationship. Thomas' January 9, 2012 letter, ignoring [UPS's] request that the parties try to reach an accommodation, individuate which choice Thomas made.

Decision at p. 41.

### III. The March 8, 2012 Settlement Agreement

On or about March 8, 2012, UPS and the Union agreed to enter into an informal settlement of the following charges: 16-CA-028064, 16-CA-062316, and 16-CA-07058 (the "Settlement Agreement"). GC Exhibit 53. As part of the Settlement Agreement, UPS denied any wrongdoing, but committed to do the following:

- Post NLRB's "Notice to Employees" for 60 days, distribute the NLRB's "Notice to Employees" in a monthly newsletter and send a copy of that newsletter to the NLRB;

- Distribute NLRB's "Notice to Managers and Supervisors" and a copy of the settlement agreement to managers and supervisors along with written instructions directing those managers and supervisors to comply with the provisions of the settlement agreement;

- Post the NLRB's "Notice to Employees" and a "Notice to Managers and Supervisors" near computer stations for 60 days;
- Hold a meeting of employees and read the notice;
- Provide training to Texarkana Union representatives and UPS supervisors regarding the information request process;
- Return the "Certification of Posting" form to the NLRB with four signed original notices; and
- Produce documents, if available, that are responsive to the information requests in the settlement agreement.[23]

Id.

### A. Pre-settlement document production

Prior to entering into the Settlement Agreement, on or about January 11, 2011, UPS provided thousands of documents responsive to the Union's information requests dated May 3, 2011, May 4, 2011, August 31, 2011, and September 1, 2011. Tr. at 316-17, 446; R. Exhibits K, O; GC Exhibit 17 (commonly referred to as the "60-pound box").[24] For example, in the documents bates stamped UPS Doc. Nos. 575-592, UPS produced information from its archives that would have otherwise been referenced in a time card including an employee's name, employee's ID, route ID, punch in and punch out time, and the time the employee took a lunch break. Tr. at 447-48; R. Exhibit K. These documents were all secured through UPS's archives, and thus produced in their non-native format.[25] Tr. at 312. As Judge Locke noted, this attempt

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[23] UPS agreed to provide documents, if available, that were responsive to the Union's requests dated May 3, 2011, May 4, 2011, June 29, 2011, August 31, 201,1 and September 1, 2011. These requests are identified in allegations 10(a) through 10(f) of the Third Consolidated Complaint.

[24] Additionally, after diligently searching its archives, there were no documents responsive to Thomas' June 24, 2011 request, which is referenced in Allegation 10(d) of the Third Consolidated Complaint. Tr. at 324. Thomas was advised whenever documents were no longer available at the Texarkana Center. Tr. at 439-40.

[25] There is nothing in the record that supports the General Counsel's contention that non-native documents are unusable. GC Brief at p. 15. While some documents may have had notations on them that Thomas was unfamiliar with, that, by itself, does not make them irrelevant or unusable. The fact that it would have only taken a few

to respond to the Thomas' requests was a "good faith effort, indeed an effort bordering on the heroic, to comply fully with [them]." Decision at p. 41.[26]

Yet, Thomas was not satisfied with UPS's response. On January 21, 2012, Thomas sent a letter to Williams stating that "the information received is not the information requested." GC Exhibit 49. The letter did not explain Thomas' position or describe how the documents produced differed from the documents requested. Id. Instead, it accused UPS of deliberately stalling in providing information responsive to the Union's so-called "investigations." Decision at p. 42.

Since there was no evidence that UPS was, in any way, "dragging its feet," Judge Locke characterized Thomas' accusation as "difficult to square with reality" and further evidence of his bad faith motive. Decision at p. 42.

Contrary to the General Counsel's averments (GC Brief at p. 15), prior to entering into the settlement, UPS was under no obligation to provide Thomas with training on how to interpret documents in their non-native format and at no time after receiving these documents did Thomas inform UPS that he could not understand them. Tr. at 306, 423. Instead, Thomas demanded the production of records in their native format and incorrectly claimed that nothing was produced. GC Exhibit 64. Thomas' testimony is instructive:

> Q: What did you do with the thousands [of documents] that were produced to you from IE in compliance with the settlement agreement?
>
> A. We used those, the ones that I did understand.

Tr. at 273-75.

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seconds to comprehend the data and obtain the relevant information is all the more reason Thomas should have simply requested assistance. Tr. at 364, 377-78, 447-48.

[26] The General Counsel misconstrues Judge Locke's finding that the production of the 60-pound box served as an excuse for UPS not responding to information requests related to Thomas' lunch-break grievances. GC Brief at p. 65. Thomas' bad faith bargaining along with the overly broad and unduly burdensome nature of these requests alleviated any need to respond to them.

### B. Post-settlement document production

On or about March 23, 2012, after diligently searching its archives, UPS produced the following additional information that was responsive to Thomas' demands:

- With respect to Thomas' May 3, 2011 requests for information regarding routes 37D and 29A,[27] UPS produced information from its archives that would have otherwise been provided to Thomas in a time card, manifest, delivery report and a telematics report. That information included the hours an employee worked, the number of packages delivered, the time a package was delivered, the number and type of stops a package car driver had during the day, the location of a delivery, the employee ID, the employee name, and the route ID for the period January 31, 2011 through April 29, 2011. Tr. at 316-17; R. Exhibits L, M, N, O.
- With respect to Thomas' August 31, 2011 request for information regarding route 29A,[28] UPS produced, *inter alia*, manifests for the period August 25-29, 2011 and delivery reports for the period August 22-29, 2011, that show the same information as a manifest (location of deliveries for a particular route). Tr. at 324; R. Exhibits O, P.
- With respect to Thomas' September 1, 2011 request for information regarding route 30D,[29] UPS again produced information from its archives that would have otherwise been provided to Thomas in a time card, manifest, delivery report and telematics reports. That information included the hours an employee worked, the number of packages delivered, the time a package was delivered, the location a

[27] Thomas' May 3, 2011 requests are referenced in allegations 10(a) and 10(b) of the Third Consolidated Complaint.
[28] Thomas' August 31, 2011 request is referenced in allegation 10(e) of the Third Consolidated Complaint.
[29] Thomas' September 1, 2011 request is referenced in allegation 10(f) of the Third Consolidated Complaint.

package was delivered, the number and type of stops a package car driver had during the day, the employee ID, the employee name, the route ID, and the employee's daily SPOHR for the period January 1, 2011 through September 1, 2011. Tr. at 329; R. Exhibits O, Q.

It is undisputed that there are no further responsive documents to the above requests in UPS's possession.[30] Tr. at 287-88.

It is also undisputed that UPS complied with all of the posting requirements in the Settlement Agreement. Tr. at 330, 352-53. On March 23, 2012, UPS posted approved NLRB notices throughout the Texarkana Center, including the dispatch office, the bulletin board, the driver turn-in area, the mail office, the stairway to the break room, and the training trailer. Tr. at 302; R. Exhibit J. At the same time, UPS posted notices near each computer station. Id. All of these notices were posted for a minimum period of 60 days in accordance with the Settlement Agreement. Id. Shortly thereafter, UPS distributed to all managers and supervisors the NLRB's "Notice to All Managers and Supervisors" via interoffice mail. Id.

On April 4, 2012, UPS notified the Union, in writing, that documents would be produced from UPS's archives, offered training on how to interpret these documents, and requested a mutually convenient time to conduct the training. Tr. at 306; GC Exhibit 60.

On April 16, 2012, rather than offer his availability, Thomas replied to UPS's letter by complaining that he did not receive information identified in the Settlement Agreement.

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[30] The General Counsel points to Fullen's demonstration of how to interpret non-native records as evidence that those documents are unusable because the specific documents he identified did not "show the number of stops, if the stop was business or residential, if a package was left on a porch, or if a signature was obtained." GC Brief at p. 22. Since Fullen only used a handful of documents that only contained information analogous to what Thomas would find in a time card which would not have included that information, the information the General Counsel contends is missing from those documents is somewhat misleading.

R. Exhibit I. While UPS was "ready, willing, and able" to conduct this training, Thomas ignored UPS's request for dates. Tr. at 279, 448. The following testimony demonstrates this:

> Q: Did you provide dates to the company?
> A: No, I did not.
> Q: Does (the April 16th) letter provide dates to the company?
> A: No, it does not.
> Q: You never provided dates to the company?
> A: It's not my job to supply dates. Under the Settlement Agreement, it's not our responsibility.
> Q: Is that your position?
> A: I'm a steward. That goes higher than me….
> Q: So, it's Mr. Driggers' fault?
> A: … It's not mine.
> Q: Did you bother checking with Mr. Driggers, hey, we need some dates?
> A: No.

Tr. at 279. Judge Locke did not credit Thomas' testimony and found his claim that "he did not have authority, as a steward, to inform [UPS] of available dates and times" to be disingenuous. Decision at p. 59.

At that point in time, Thomas had already received over 5,000 documents, none of which were mentioned in his April 16th letter. Tr. at 306; R. Exhibits J, K, L, M, N, O, P, Q. At the hearing, Thomas admitted that he never reviewed all of the documents that UPS produced in response to the Settlement Agreement, but had earlier claimed that he did not receive any documents responsive to his requests. Tr. at 274-75. Yet again, Thomas provided contradictory testimony.

On June 7, 2012, UPS conducted a joint training session (as required by the settlement) for all local Union representatives and UPS supervisors and managers regarding the information request process. Tr. at 43; GC Exhibit 82. During the training session, UPS made clear that information was frequently purged by it in accordance with its document retention protocols, and that requests should be made as soon as possible in order for those documents to be produced.

Tr. at 45. At no time during that meeting did Thomas ask questions or request assistance in interpreting documents that had already been provided to him in their non-native format. Tr. at 48, 305- 06, 423.

### C. UPS's responses to Thomas' remaining requests

UPS has produced documents responsive to Thomas' remaining requests for information dated April 13, 2012, April 23, 2012, April 25, 2012, May 9, 2012, May 18, 2012 (1st Request), and May 18, 2012 (2nd Request). Thomas admitted that these documents were in their native format making training on how to interpret them unnecessary. Decision at p. 60

In April/May 2012, UPS responded to Thomas' April 13, 2012 request[31] by producing time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Brandon Blizzard for April 11, 2012. Tr. at 345-46; R. Exhibits O, T [5045-5055]. Thomas alleges that he is missing stops 11-76 in a telematics report (driver recap summary). Tr. at 239. Yet, upon a review of these records at the hearing, Thomas admitted that he may have been mistaken. Tr. at 240; R. Exhibit T [5045-5055]. Additionally, in Thomas' July 21, 2012 email to Driggers, he indicated that he had received all telematics reports for Mr. Blizzard, the Package Car Driver, as of that date. GC Exhibit 80.

In April/May 2012, UPS responded to Thomas' April 23, 2012 request[32] by producing time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Thomas for the week ending April 21, 2012. Tr. at 345-46; R. Exhibits O, V. Thomas incorrectly alleges that UPS failed to produce time between stop summary reports and weekly

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[31] On April 13, 2012, Thomas requested time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Brandon Blizzard for April 11, 2012. This request is identified in allegation 10[o] of the Third Consolidated Complaint.

[32] On April 23, 2012, Thomas requested time cards, delivery reports, manifests, weekly operation reports, and telematics reports for himself for the week ending April 21, 2012. This request is identified in allegation 10[q] of the Third Consolidated Complaint.

operation reports. First, Thomas knew that, prior to April 23, 2012, the Center no longer used time between stop summary reports. Tr. at 417, 441. Similar reports (telematics reports) that showed exactly the same information were provided to him instead. R. Exhibit V [5130-5150]. "For the Union to insist that [the same information] had to be delivered on an outdated form quite literally exalts form -a form -over substance."[33] Decision at p. 51.

On April 27, 2012, UPS responded to Thomas' April 25, 2012 request[34] by producing time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Package Car Driver Leland Spikes for the week ending April 14, 2012. Tr. at 346; R. Exhibits O, W. Again, Thomas incorrectly alleges that time between stop summary reports exist, and fails to acknowledge receipt of similar documents. Tr. at 417, 441; R. Exhibit W [5166-5175].

On May 10, 2012, UPS responded to Thomas' May 9, 2012 request[35] by producing time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Thomas for April 30, 2012. Tr. at 349-50; R. Exhibits O, X. Here too, Thomas incorrectly alleges that time between stop summary reports exist, and fails to acknowledge receipt of similar documents. Tr. at 417, 441; R. Exhibit V [5130-5150].

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[33] Since there was no evidence that the telematics reports were inaccurate, it was unnecessary to produce other documents (i.e., weekly operations reports) that contained the exact same information. Decision at p. 49.

[34] On April 25, 2012, Thomas requested time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Leland Spikes for the week ending April 14, 2012. This request is identified in allegation 10[r] of the Third Consolidated Complaint.

[35] On May 9, 2012, Thomas requested time cards, delivery reports, manifests, weekly operation reports, and telematics reports for himself for April 30, 2012. This request is identified in allegation 10[s] of the Third Consolidated Complaint.

On May 24, 2012, UPS responded to Thomas' first May 18, 2012 request[36] by producing time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Thomas for the weeks ending May 5, 2012 and May 12, 2012. Tr. at 351; R. Exhibits O, Y. While Thomas alleges that UPS failed to produce manifests for April 30, 2012, May 2, 2012, and May 3, 2012, he fails to identify this information as missing in his July 21, 2012 correspondence. GC Exhibit 80. Additionally, Thomas admitted that the same information that is referenced in a manifest can be found in a delivery report, a document that was previously produced.[37]

Finally, on May 24, 2012, UPS responded to Thomas' second May 18, 2012 request[38] by producing time cards, delivery reports, manifests, weekly operation reports, and telematics reports for Thomas for May 7, 2012 and May 15, 2012. Tr. at 351; R. Exhibits O, Y. Again, Thomas incorrectly alleges that time between stop summary reports exist, and fails to acknowledge receipt of similar documents. Tr. at 417, 441; R. Exhibit Y [5281-5286, 5361-5362, 5368-5373, 5383-5393].

It is undisputed that there are no further responsive documents to all of the above requests in UPS's possession. Tr. at 352-53.

### IV. The Settlement of All Grievances

It is undisputed that all of the information requests referenced in the Third Consolidated Complaint are tied to grievances. Tr. at 228. It is also undisputed that those grievances have all been settled. Tr. at 359. With respect to Thomas' lunch break grievances, in September 2012,

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[36] On May 18, 2012, Thomas requested time cards, delivery reports, manifests, weekly operation reports, and telematics reports for himself for the weeks ending May 5, 2012 and May 12, 2012. This request is identified in allegation 10[t] of the Third Consolidated Complaint.

[37] Thomas testified that "Delivery records tell exactly what a driver had on his package car that day as far as the amount of stops, what stops they were, what time he delivered, who signed for the stops, and if he or she missed any stops or not." Tr. at 111.

[38] On May 18, 2012, Thomas requested time cards, delivery reports, manifests, weekly operation reports, and telematics reports for himself for May 7, 2012 and May 15, 2012. This request is identified in allegation 10[u] of the Third Consolidated Complaint.

the Union and UPS agreed to settle all outstanding grievances by providing package car drivers flexibility to skip or shorten their lunch breaks for various reasons provided they first make a request for an accommodation with Rosebaugh. Tr. at 266-67, 356-57. Since that time, approximately 25% of the Texarkana Center package car drivers have requested lunch break accommodations each day. Tr. at 356-57. By practice of the parties, there is no longer a need for the requested information. Tr. at 359.

## ARGUMENT

### I. Judge Locke's Credibility Findings Should Not be Disturbed by the Board.[39]

The determination of a witness' credibility and any adverse inferences rest solely within the sound discretion of an administrative law judge. See Standard Dry Wall Products, Inc., 91 NLRB 544, 546 (1950). The Board has long held that an ALJ's credibility determinations are given special weight because the ALJ is in the best position to observe a witnesses demeanor and assess his/her veracity. Id. That is why it is the Board's established policy "not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces [the Board] that the resolutions are incorrect." F.W. Woolworth Co., 251 NLRB 1111, 1111 fn.1 (1980). Similarly, the Board must affirm a ruling of an administrative law judge unless the judge acted arbitrarily and capriciously or otherwise abused his discretion. See Aladdin Gaming, LLC, 345 NLRB 585, 587 (2005).

### II. Judge Locke Correctly Concluded That Thomas Engaged in Bad Faith Bargaining, Thereby, Alleviating Any Obligation by UPS to Produce Documents Responsive to Information Requests Related to Grievances Filed by Thomas.[39]

The Union must "confer in good faith with respect to wages, hours, and other terms and conditions of employment…." See 29 U.S.C. § 158(b). That good faith requirement demands that both parties "engage each other in an honest manner." See NLRB v. Truitt Manufacturing, 351 U. S. 149, 152-53 (1956) (emphasis supplied). "Sham discussions in which unsubstantiated reasons are substituted for a genuine argument" can be considered evidence of bad faith." See NLRB v. General Electric Company, 418 F.2d 736 (2d Cir. 1969). Ultimately, an employer is not obligated to provide information merely because the Union requests it. See NLRB v. Truitt

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[39] Section II of UPS's Argument responds to the General Counsel's Exception Nos. 1, 2, 5, 10, 11, 14, 15, 17, 20, 21- 43, 47, 49, 50, 51, 54-62, 67 and 71.

Mfg., 351 U.S. 149, 153-54 (1956). The Board must first determine whether the Union's statutory obligation to bargain in good faith has been met. Id. A union cannot demand, as it did here, the production of duplicative and voluminous records while remaining utterly unwilling to clarify the information sought or to limit the number of its requests. See Columbus Maintenance Co., 269 NLRB 198, 203 (1984); Exxon Chemical Americas and Exxon Corp., 2000 WL 33664332 (ALJ Carson II, July 27, 2000) (noting that unreasonable bargaining demands can be an indicia of bad faith bargaining). Where a union takes an all-or-nothing approach to its information requests, as Thomas did here, such acts "cast[] doubt on the union's good faith need or desire for the information." See Columbus Maintenance Co., 269 NLRB at 203.[40]

In NLRB v. Wachter Const., Inc., 23 F.3d 1378, 1385 (8th Cir 1994), the union requested information from the employer regarding hundreds of the employer's subcontractors. The Eighth Circuit found that the union, through the information request process, attempted to "overburden" the employer and that serving "voluminous requests for information on any 'boilerplate' type of asserted good faith rationale will wreak havoc on the negotiation process." Id. at 1386. The Eighth Circuit also found that the union's "predominant motivation in making its information request" was inconsistent with its duty to police the contract because it attempted to force the employer to make concessions on subcontracting work. Id. at 1386. Based upon the

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[40] See also Exxon Chemical Americas and Exxon Corp., 2000 WL 33664332 (2000) (noting that unreasonable bargaining demands can be an indicia of bad faith bargaining); NLRB v. St. Joseph's Hospital, 755 F.2d 260, 265 (2d Cir. 1985) ("stonewalling" by a union should not be rewarded through an enforcement action against the employer); East Tennessee Baptist Hosp. v. NLRB, 6 F.3d 1139, 1145 (6th Cir. 1993) (holding that employer's counter-proposals for producing information were facially reasonable and must be addressed prior to a finding by the Board that the employer allegedly refused to bargain); Emeryville Research Center, Shell Development Co. v. NLRB, 441 F.2d 880, 885-86 (9th Cir. 1971) (refusal to supply relevant salary information in the precise form demanded did not constitute a violation of §8(a)(5) when the company's proposed alternatives were responsive to the union's needs).

union's underlying motivation, the Court held that it engaged in bad faith bargaining, alleviating the employer's obligation to respond to information requests. Id.

Similarly, in ACF Industries, 347 NLRB 1040 (2006), the union requested information immediately prior to the employer declaring an impasse. Id. at 1043. The Board found that the union's request for information intended to delay the negotiation and was "purely tactical." Id. Accordingly, there was no obligation to respond to the union's request because where there is "a legitimate doubt as to whether the Union was truly interested in the information … the [employer] cannot be faulted for no furnishing the information more promptly." Id.

The totality of the record evidence demonstrates that Thomas engaged in a pattern of abusive conduct to further his own interests by requesting voluminous and irrelevant records, refusing to compromise an inch on any of his requests, and failing to give any explanation as to why he needed every single document requested. Judge Locke correctly found that Thomas did not credibly testify and that, through the information request process, Thomas harbored a retaliatory motive intending to strike back at UPS for what he believed were discriminatory practices against him. Judge Locke explained:

> [Thomas'] insistence that Respondent furnish documents he did not need for grievance processing demonstrates that the objective of inflicting inconvenience on [UPS] had become more important. The intent to burden supervisors with time-consuming tasks of gathering, copying and furnishing massive amounts of documents gave Thomas' bad faith an egregious quality, and this motivation had become the dominant one. Nonetheless, Respondent made a good-faith effort to comply with the information request. In these circumstance, any omission by the Respondent neither manifested bad faith nor violated the Act.
>
> …[Using] the information request process as a weapon of retaliation greatly damages bargaining relationships and undermines the system Congress envisioned. That system fails when rational self-interest get trampled by the brooding beasts of spite. It should be stressed that the mere presence of hostile

> feeling does not signal that the information request process has been converted from plowshare into a sword wielded with malice. Rather, such a rare kind of change will manifest a constellation of additional symptoms including these: (1) the information request or requests will require the production of a vast number of documents; (2) furnishing them will be time-consuming and onerous; (3) because of overlap and redundancy, all relevant and necessary information can be obtained from a subset of the records sought; (4) the requesting party is unwilling to agree to any accommodation which would reduce the burden even if the compromise would still provide all relevant and necessary information; (5) the requesting party is unwilling or unable to offer a plausible explanation as to why every single document is necessary…. By itself, a party's unwillingness to make a particular compromise does not suggest that the party is acting in bad faith, <u>but an unwillingness to make any compromise at all over a long period of time certainly does</u>…. [A]ppropriating a mechanism designed to promote informed bargaining and changing it into an engine of retaliation is malignant. Such cancerous mutation poses too much danger to be condoned.

Decision at p. 23, *emphasis added*.

This matter is similar, and in many respects identical, to <u>Wachter Const., Inc.</u> and <u>ACF Industries</u>. Thomas' bad faith tactics to harass UPS and further his own discrimination claim, a purpose he, himself, acknowledged was improper, is evident from the following:

First, Thomas has repeatedly made clear that he believes that UPS harasses and discriminates against him by manipulating lunch breaks, and has filed countless grievances and two unsuccessful administrative agency complaints asserting this claim. Tr. at 252, 257-58, 263; R. Exhibits F, G, H; GC Exhibits 10-15, 19, 22, 23, 30, 33, 37, 40, 44, 50, 54, 58, 66, 74.

Second, only days after being disciplined did Thomas significantly expand the scope of his previous information requests from a handful of package car drivers to <u>all</u> of them to determine whether anyone in the Center was not accurately recording and/or taking their lunch breaks. R. Exhibit E; GC Exhibits 31, 34, 38, 41, 45, 51, 55, 59, 67.

Third, Thomas has advised other employees that he believes Rosebaugh to be a racist, currently has a big lawsuit against UPS, and intends to get Rosebaugh fired. Tr. at 263, 421.

Fourth, Thomas' information requests are in direct contravention to two separate settlement agreements. The first of which is a side agreement settling all of his lunch break grievances and providing employees with flexibility to shorten or skip their lunch breaks. Tr. at 266, 354-57. Since that settlement, approximately 25% of package car drivers in the Texarkana Center request lunch break accommodations each day from Rosebaugh. Tr. at 356. Yet, despite these facts, Thomas intends to continue to file grievances and requests for information to determine whether employees skip their lunch breaks. Tr. at 270.

The second of which is an agreement reached by UPS and the Union to not use telematics reports for disciplinary purposes. Tr. at 88, 406. It is undisputed that the identification of individuals who are not taking lunch breaks could lead to disciplinary action in accordance with the CBA. Tr. at 405-06. Thomas has made clear that he fully intends for his Union brethren to be disciplined as a result of the production of documents that show that they are either not taking lunch breaks or inaccurately recording that they did. Id.; GC Exhibit 2, p. 206 ("failure to take and properly record the required meal period may be cause for disciplinary action"). [41]

Fifth, none of Thomas' lunch break grievances identified any other impacted employees, and when given the opportunity to do so, he refused and was deliberately antagonistic to Rosebaugh, the individual he believes to be a racist. Tr. at 83-84, 334-35; GC Exhibits 30, 33, 37, 40, 44, 50, 54, 58, 66.

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[41] This is yet another example of Thomas' contradictory and evasive testimony during the hearing. On one hand, his stated purpose for requesting information related to "others" was to prove the package car drivers skipped lunch breaks and that they should be treated similarly. Yet, Thomas deliberately refused to narrow his request by providing the names of those employees that skipped their breaks. Tr. 83-84, 36. GC Exhibit 39.

Finally, Thomas refused to negotiate over information requests related to lunch break grievances. It is well settled that "[w]hen the employer presents a legitimate, good faith objection … [to an information request], and offers to cooperate with the union in reaching a mutually acceptable accommodation, it is incumbent on the union to attempt to reach some type of compromise with the employer as to the form, extent, or timing of disclosure." Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1098 (1st Cir. 1981), *abrogated on other grounds* by 494 U.S. 775 (1990) (emphasis supplied). UPS, on several occasions, timely objected to Thomas' boilerplate requests for information that were related to all 44 Texarkana Center package car drivers and repeatedly offered reasonable alternatives to these requests. GC Exhibits 35, 42, 48, 56, 65; R. Exhibits R-S. However, as Judge Locke found, Thomas demonstrated a clear disinterest to discuss the scope of these requests with UPS by: (a) blatantly asserting that his requests were relevant; (b) refusing to acknowledge that many of the documents requested either do not exist or are irrelevant; and (c) refusing to acknowledge the significant cost and expense associated with producing the documents responsive to his requests. Decision at pp. 35, 43; Tr. at 270-72, 284, 334-35; GC Exhibits 43, 52, 57, 72. It is clear that Thomas has no intention of discussing reasonable alternatives to his requests and did not intend to budge an inch. This is far from making conjecture as the General Counsel contends. GC Brief at p. 66.

The General Counsel argues that UPS had an obligation to produce every document requested because "each information request sought presumptively relevant information and each request was tied to a grievance."[42] This argument ignores the burden to prove that Thomas'

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[42] The General Counsel contends that Thomas had a "good reason" for his requests because he sought presumptively relevant information. GC Brief at p. 56. This argument is circular and fails to take into consideration the totality of the record evidence. Additionally, it is not supported by any demonstrative testimony. Nor does the General Counsel cite to a single case that stands for the proposition that a proper motive must be inferred from any request for records related to an employee's terms and conditions of employment.

motives were proper, but also the totality of the record evidence that establishes that they were not - that Thomas did not intend to police the contract, but to, instead, further his own personal gripe against UPS by overwhelming it with overly broad and unduly burdensome information requests, while at the same time fishing for information to further his claim that he is being treated differently from his colleagues. It also ignores that the grievances for which the information was sought were filed by Thomas to prove he was being discriminated against and his performance was being allegedly manipulated and falsified. See supra, Statement of Facts, Sections I and II.

The General Counsel's premise that the discussion ends when a Union requests information that is "presumptively relevant" is incorrect. The Board has made clear that "[t]he obligation to supply information is determined on a case-by-case basis, and it depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it." Coca-Cola Bottling Co., 311 NLRB 424, 425 (1993) . It has "repeatedly reiterated" the principle that:

> [W]age and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth.

Id. Therefore, once the relevance of information is rebutted, the burden is placed on the union to prove otherwise. Id.

The General Counsel incorrectly relies on Six Star Cleaning & Carpet Services, Inc., 359 NLRB No. 146, at *7 (2013) and Westinghouse Electric Corporation, 239 NLRB 106, 110-11 (1978). In Six Star Cleaning & Carpet Services, Inc., unlike here, evidence of a retaliatory motive was lacking and the employer relied on timing alone to demonstrate that that union's

request was made in bad faith. Similarly, in Westinghouse Electric Corporation, unlike here, there was no evidence that the Union harbored any animus towards the employer, that the union conceded it could not properly request information related to an EEOC complaint, or that the information requested was intended to dissuade the employer from effectively managing staff. Instead, the union had a long history of bargaining over equal opportunities and the advancement of women and minorities that was reflected in its collective bargaining agreements, and was directly sought in furtherance, and as part, of that bargaining process. See International Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC, 648 F.2d 18, 25 (D.C. Cir. 1980).

It strains credulity to compare the requests made by each union in the above cases to those made by Thomas. The record here is replete with evidence of Thomas' bad faith intent and that Thomas' retaliatory motive "tainted both the drafting and filing of the onerous information requests and the Union's refusal to agree to any accommodation." Decision at p. 46. This is supported by: (1) Thomas' admittedly improper use of the information request process previously; (2) hostility towards Rosebaugh; (3) refusal to entertain an accommodation; (3) baseless belief that UPS' measurement of Thomas' performance was discriminatory; (4) refusal to provide a legitimate explanation for his requests; (5) refusal to acknowledge the burden associated with requests; and (6) blatant evasive and contradictory testimony during the hearing.[43] See supra, Statement of Facts, Section II. The General Counsel tries to characterize Thomas' requests as "presumptively relevant" requests to support grievances he filed on his and other employees' behalf. GC Brief at p. 61. Nothing in the record supports this characterization,

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[43] The General Counsel also incorrectly argues that even though information is sought for an irrelevant purpose that does not rebut the presumption of relevance. As mentioned above, the record establishes that Thomas' requests for information related to all 44 Texarkana drivers to determine whether a driver took a lunch break on a particular day had only one purpose - a retaliatory one. This motive became clear only after Thomas' credibility on cross-examination was damaged. See supra, Statement of Facts, Section I.

as Thomas only testified about his own alleged treatment and deliberately refused to identify other employees who may have been impacted by his grievances. The record is clear - it was all about Thomas all of the time.

The General Counsel also posits that regardless of a requester's motive, an employer must comply with an overbroad and unduly burdensome request for information that relates to an employee's terms of employment, and then negotiate the cost. GC Brief at p. 60. This position is contrary to well-settled authority that "if information requested is shown to be irrelevant to any legitimate union collective-bargaining need" there is no duty to furnish any responsive information. See Coca-Cola Bottling Co., 311 NLRB at 425. It is also inconsistent with the Board's ruling in Iron Tiger Logistics, Inc., 359 NLRB No. 13, at *2 (2012), that an employer is only required to "respond to a union's request for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time." Id. There is no requirement to produce documents and then debate the costs of the production. Were the General Counsel correct, Thomas could have requested every employment record for every employee in the Texarkana Center for an unlimited period of time, and UPS would have had to comply with this request and then negotiate the cost of producing what could amount to thousands of irrelevant records. The Act clearly does not envision this as part of the "good faith" negotiation process.

Additionally, the General Counsel incorrectly faults Judge Locke for disbelieving Thomas that he needed information for "grievance processing." GC Brief at p. 65. Thomas' evasiveness and inconsistency during the hearing along with his refusal to explain the basis for his requests (at the time they were made) led Judge Locke to correctly conclude that Thomas lacked all credibility, thereby, revealing the true reasons for his requests. As noted by Judge

Locke, it is impossible to understand how information related to what a package driver is doing every minute of every day for weeks at a time is "relevant and necessary" to whether that driver took and/or accurately recorded a lunch break. While the General Counsel may not agree with this conclusion, they must live with it because it is based, in part, on the testimony of, and evidence produced by, the General Counsel's chief witness.

### III. Judge Locke Correctly Concluded that Information Regarding "Other Drivers" was Voluminous, Overly Broad, Duplicative, and Unduly Burdensome[44]

An employer's obligation to produce information is not as absolute as the General Counsel alludes. The obligation is triggered by a request for "relevant and necessary" information to fulfill a union's statutory duties as the exclusive bargaining representative. See East Tenn. Baptist Hosp. v. NLRB, 6 F.3d 1139, 1144 (6th Cir. 1993). The General Counsel's assertion that Thomas is entitled to information whenever it has "some bearing" on a grievance, is inconsistent with settled legal authority that requires that the information requested must "substantiate specific assertions on which [the union] premises its bargaining positions" and be made in good faith. KLB Industries v. NLRB, 700 F.3d 551, 563 (D.C. Cir. 2012).

The Board has held that "[r]elevance cannot be established by speculative argument alone without record evidence to support the applicability of those arguments to the present circumstances." See Kentile Floors, 242 NLRB 755, 757 (1979); Grinnell Fire Production System Co. v. NLRB, 272 F.3d 1028, 1029 (8th Cir. 2001) (refusing to find that an employer engaged in an unfair labor practice where the information requested has "dubious relevance" to the bargaining unit). "[A] union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner

[44] Section III of UPS's Argument responds to the General Counsel's Exception Nos. 1-4, 6-14, 16, 22, 23, 33, 37, 38, 39, 47, 54, 55, 56, 69, 61, 67 and 71.

requested." Pennsylvania Power Co., 301 NLRB 1104, 1105 (1991) (citing Detroit Edison Co v. NLRB, 440 U.S. 301 (1979)).

Judge Locke correctly concluded that several of Thomas' requests regarding "other employees" were overly broad and irrelevant to any pending grievance. The record established that these requests were supported by conjecture and speculation exceeding the scope of permissible discovery under the Act.

With respect to Brandon Rayfield's ("Rayfield") grievances, Thomas knew that there was no basis for a request for time cards, delivery reports, manifests, and telematics for anyone but Rayfield. Thomas claimed that he needed the information to challenge Rayfield's discharge for dishonesty, but when questioned on direct Thomas offered a different explanation: "I wanted to know who ran his area during that period and if they took their lunch." Tr. at 121-22. The latter explanation, as Judge Locke noted, did not provide any basis for Thomas to look into what other drivers did. Decision at p. 10. [45]

The General Counsel, not unlike Thomas, now claims that the information "pertaining to other drivers and whether they missed stops could lead to potentially relevant information." However, Rayfield was discharged for not telling the truth when confronted by management about missed stops. That notwithstanding, Thomas made clear that his intended purpose of his requests was to prove others didn't take lunch breaks, a wholly irrelevant and unhelpful purpose.

Knowing that Thomas' rationale for requesting records for "other employees" does not withstand scrutiny, the General Counsel claims that Thomas was entitled to the information because it would have supported Rayfield's EEOC claim. GC Brief at p. 43. Thomas, himself,

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[45] The General Counsel incorrectly argues that Judge Locke dismissed Complaint allegations 12(a) and 12 (c) related to Brandon Rayfield on the grounds of bad faith. Judge Locke dismissed these allegations because: (1) all of the information requested was not "necessary and relevant" to Rayfield's integrity grievance; and (2) UPS complied with the March 6, 2012 settlement agreement.

testified that requesting information for that very purpose was improper. Tr. at 245. The General Counsel points to the CBA's non-discrimination clause for support, but nothing in the record suggests that Rayfield grieved his dismissal under that clause. This is nothing more than a creative attempt by the General Counsel to justify an overly broad request.

The General Counsel also argues that Judge Locke "erroneously shifted the burden of establishing relevance from Respondent to the Union." GC Brief at p. 37. This argument misconstrues Judge Locke's finding that documents related to "other employees," even though they concerns terms and conditions of employment, have no bearing on the issues in dispute. Decision at p. 9 ("the actions of employees other than Rayfield has very little relevance, if any at all, to the Union's representation of Rayfield). It also ignores "the unusual circumstances [that] call into question the union steward's motivation for submitting the information requests, [and that these] circumstances make it not merely desirable but quite important to ask whether the evidence rebuts the presumption of relevance." Decision at p. 12. It is well-settled that an ALJ has a statutory obligation to "determine whether the information was needed, relevant to the bargaining unit, and important enough to invoke a statutory obligation for the other side to produce said information." Tool & Die Makers' Lodge 78, IAM, 224 NLRB 111, 111 (1976). As Judge Locke explained:

> "[t]he presumption does not change the government's burden of proof, but merely counts as evidence to carry that burden. The General Counsel still must show that when the Union made its request it had a reasonable basis for believing that the information would be necessary to its in carrying out its statutory obligation."

Decision at p. 11. The fact that Judge Locke took into consideration Thomas' motives, only demonstrates that he considered the totality of the record evidence to determine whether the purported purpose of Thomas' requests was actually true.

Thomas' request for information related to "other employees" for purposes of his 9.5 hour grievances (Complaint paragraph 10[b]) is equally unavailing. Again, Thomas claimed that he needed the information to show what a driver did every minute of each day and whether they took a lunch break. Tr. at 121-22. However, Thomas' grievances and the remedies sought only had to do with the number of hours he worked each day. GC Exhibits 19, 22, 23. They had nothing to do with other drivers, nor was there some type of "class action" grievance pending, as the General Counsel alludes.

The same is true for Thomas' request for information regarding every employee who ran area 30D for an eight month period (Complaint paragraph 10[f]). Thomas intended to use this information to prove that "Rosebaugh was manipulating [Thomas'] SPORH." Decision at p. 33. However, none of the requested information concerned his route and Thomas never explained how information regarding other drivers would help him prove Rosebaugh's alleged "plot" against him. Based on Thomas' speculation that these documents would bear fruit along with his willingness to use the information request process for an improper purpose, Judge Locke correctly found Thomas' claim of relevance to be disingenuous and that Thomas fully intended to "strike back at management." Id. at p. 35.[46]

It is undisputed that Thomas' intended purpose for information related to lunch break grievances is to further his own claim of discrimination rather than to enforce the collective bargaining agreement on behalf of the membership. As Thomas concedes, the negotiated grievance process is not the proper venue to seek this type of information. Tr. at 245.

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[46] According to the General Counsel, Judge Locke exceeded his authority by considering Thomas' motives and credibility because "the information requested is presumptively relevant and directly tied to a grievance." Just because an information request is purportedly tied to a grievance does not mean it along with its drafter cannot be scrutinized by an ALJ. This is exactly what Judge Locke did by concluding Thomas' real reason for requesting records of "other employees" was a malicious one. Decision at pp. 35-36; Aladdin Gaming, LLC, 345 NLRB at 587) (the ALJ is in the best position to make credibility determinations and those determinations should not be overruled unless they are arbitrary and capricious).

That notwithstanding, Thomas is well aware that it is not necessary to review several different categories of documents to determine whether a driver took a lunch break on a particular day. It is undisputed that this information could be gleaned from two documents (time cards and driver stop summary reports). Tr. at 450. Yet, Thomas' requests related to lunch break grievances (Complaint paragraph 10[g]-[n] and 10[p]) not only sought information on whether a package car driver took a lunch break, but also:

- the type of packages that were on an employee's package car;
- where those packages were located in the package car;
- where particular drivers were delivering packages;
- how many business stops a driver had during his/her shift;
- the total number of stops a driver had during his/her shift;
- the driver's SPOHR;
- the speed of the driver's vehicle;
- the amount of miles an employee drove during his/her shift;
- how many packages a driver picked up during his/her shift;
- the time a driver left and returned to the Center;
- the number of times a driver backed up during his/her shift;
- the length a driver backed up during his/her shift;
- how many times the driver opened the package car door;
- whether the package car door was open during the driver's deliveries;
- the time between stops; and
- where a driver was every minute of his/her shift.

Tr. at 114-15, 153-55, 161-63,184-85, 189-92. Clearly, the above information is not even remotely relevant to whether a driver is taking and/or inaccurately recording a lunch break. Additionally, Thomas has made clear that the only reason he has requested information regarding <u>all</u> 44 Texarkana Center package car drivers is to support his pending grievances. Tr. at 71, 154, 163; GC Exhibit 39. It is undisputed that there are no package car drivers, other than Thomas, that have pending grievances regarding skipped lunch breaks. Tr. at 83, 334-35; GC Exhibit 42. Nor is Thomas aware that any exist despite being previously provided with over 5,000 documents regarding the daily activities of several different package car drivers for months at a

time. Tr. at 267-68, 316-17, 446; R. Exhibits K, L, M, N, O, P, Q; GC Exhibit 17. Thomas never provided UPS with a basis for his requests and continues to seek everything UPS has regardless of whether such information has any relevance to lunch break grievances. See U.S. Postal Service, 307 NLRB 429, 432 (1992) (a request must at least be "reasonably necessary" for the Union's function as the employees' statutory representative).

According to the General Counsel, Judge Locke erred in dismissing these allegations because UPS did not notify Thomas that certain documents were unavailable. GC Brief at p. 69. UPS never claimed that the information related to lunch break grievances was unavailable - it timely and legitimately objected to the nature and scope of Thomas' request, explained the burden responding would entail, and offered reasonable alternatives to which Thomas ignored. GC Exhibits 35, 42, 48, 56, 65.

Even assuming, *arguendo*, that information regarding all 44 Texarkana Center package car drivers is relevant, the production of these documents would be unduly burdensome to UPS. UPS is in the business of delivering packages; it has limited resources to devote to the task of compiling information which is both irrelevant an duplicative. Tr. at 428-30. Thomas has not offered any evidence to dispute that the production of these documents would cost thousands of dollars and weeks of labor, and that it would be impossible for the Center Manager to search and produce responsive documents. Tr. at 427-28, 430, 450-51. If the information is "objectively relevant … a union's request may [still] be denied if its compilation would be unduly burdensome." See Safeway Stores, Inc. v. NLRB, 691 F.2d 953, 956 (10th Cir. 1982). Although UPS respects Thomas' right to request information, there are limits. See Kroger Co. v. NLRB, 399 F.2d 455, 459 (6th Cir. 1968) (refusing to enforce an order finding that an employer

committed an unfair labor practice "[w]here the union has sought considerably more information than is required for or is relevant to its collective bargaining purposes . . .").

Accordingly, Judge Locke correctly ruled that UPS had no legal obligation to provide documents responsive to Thomas' voluminous, irrelevant, overly broad and unduly burdensome requests related to "other employees."

### IV. Judge Locke Correctly Ruled That UPS Complied With the Information Requests Referenced in Allegations in Paragraphs 12(e), 12(o) and 12(q) through 12(u) of the Third Consolidated Complaint. [47]

It is undisputed that UPS "made a good faith effort" to produce documents responsive to Thomas' information requests dated April 13, 2012, April 23, 2012, April 25, 2012, May 9, 2012, May 18, 2012 (1st Request), and May 18, 2012 (2nd Request). (Tr. at 345-46, 349-51) (R. Exhibits O-Y). See Good Life Beverage Co., 312 NLRB 1060, 1062 (1993) (the law only requires that an employer make a "reasonable good faith effort to respond to [a] request as promptly as circumstances allow"). Thomas does not allege, nor does the General Counsel suggest, that UPS's responses were anything but timely. See Center City Int'l Trucks, Inc., 2011 WL 5562020 (2011) (finding that an employer's response to an information request within a month is not considered unreasonable); United Parcel Service Inc., 2013 WL 819359 (ALJ Brakebusch, March 4, 2013) (finding that the production of shift reports, staffing reports, timecards, weekly operation reports and payroll histories within 12 days of the request to be reasonable).

There is also no dispute that UPS engaged in good faith bargaining when it produced documents responsive to those requests referenced in 12(e), 12(o) and 12(q) through 12(u). According to the General Counsel, Judge Locke erred in ruling that certain documents need not

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[47] Section IV of UPS's Argument responds to the General Counsel's Exception Nos. 37, 44-48, 54, 57, 60, 61, 65, 67, and 71.

be produced because they were duplicative. GC Brief at p. 69. In making this argument, the General Counsel relies upon immaterial differences between documents requested by Thomas, and ignores testimony from its key witness that documents such as manifests and delivery provide virtually the same information. Tr. at 111. Even if the Board were to find that UPS should have produced all documents requested by Thomas, it is undisputed that, pursuant to the settlement agreement, UPS produced all documents that it had in its custody and control. Tr. at 109, 240, 417, 438-39, 441. Therefore, substantial compliance with a request does not demonstrate bad faith bargaining. See Good Life Beverage Co., 312 NLRB 1062.

Thomas' claim that UPS has not fully satisfied the above information requests is not credible, because he knew that certain documents that were not produced did not exist, and admittedly received documents that he previously claimed were missing. Tr. at 109, 240, 417, 438-39, 441; GC Exhibit 80.

Based upon the foregoing, allegations 12(e), 12(o) and 12(q) through 12(u) of the Third Consolidated Complaint were properly dismissed.

### V. Judge Locke Correctly Ruled that the March 8, 2012 Settlement Agreement was Improperly Set Aside.[48]

A settlement agreement will only be set aside if its provisions are breached or a party engages in post-settlement improper practices. See Oster Specialty Products, Div. of Sunbeam-Oster Corp., 315 NLRB 67, 70 (1994). Neither occurred here. UPS fully complied with all of the terms of the Settlement Agreement. It complied with all of the notification requirements in the Settlement Agreement, conducted necessary training on its information request process, and produced thousands of documents responsive to information requests referenced in the

[48] Section V of UPS's Argument responds to the General Counsel's Exception Nos. 52, 53, 63, 64, 65, 67, 68, 69, 70, 71.

Agreement. Tr. at 267-68, 287-88, 316-17, 446; R. Exhibits J, K, L, M, N, O, P, Q; GC Exhibit 17. It also offered training to help interpret documents in their non-native format, which Thomas admittedly ignored. Tr. at 279, 306; GC Exhibit 60.

Judge Locke explained:

> "[E]ven were I to assume that Respondent had an obligation to give effect to this language in the notice, the Respondent made a good-faith effort to do so…. The Union has sought this training claiming it was necessary for understanding the reams of documents it was requiring Respondent to produce. Then abruptly, inexplicably, union officials lost interest. In fairness, the Union's turning fickle should not put Respondent in a pickle. Because it was the Union's inaction which stalled the training plans, it would be both illogical and unjust to blame the Respondent."

Decision at p. 61. According to the General Counsel, Judge Locke's finding somehow renders the settlement terms meaningless. GC Brief at p. 76. This, of course, ignores all of the other extraordinary remedies for which UPS did comply,[49] that after March 23, 2012 UPS did not produce documents in a "non-native format," and that UPS attempted to schedule training, to no avail. While the Union may contend that it sought training on June 6, 2012, that belief is belied by Thomas' failure to respond to UPS's request for the Union's availability along with his evasive testimony on cross-examination as to why he did not. According to the General Counsel, UPS should have conducted the training regardless of whether the Union was available. That clearly defeats the purpose of the notice and opens UPS to a claim that it failed to comply with the settlement agreement by conducting the training without the Union present. Fullen's demonstration of how to read non-native documents is the same type of training UPS would have provided to the Union had it responded to requests for its availability. It also illustrates how

[49] Even the General Counsel recognizes the notice provisions for which UPS previously complied to be "special remedies" and asks the Board to grant such remedies in this case. GC Brief at pp. 78-79.

simple the process really is and that Thomas truly had no interest in the content of the documents he received and was more interested in documenting his requests. Tr. at 442-52.

Additionally, Judge Locke correctly ruled that UPS has also, at all relevant times, engaged in post-settlement good faith bargaining. It has produced hundreds of documents responsive to reasonable requests for information and has timely objected to requests that are irrelevant, overly broad and unduly burdensome, and has offered reasonable alternatives to those requests, which Thomas has also ignored. Tr. at 270-72, 284, 334-35, 345-46, 349-51; R. Exhibits O, P, Q, R, S, T, U, V, W, X, Y; GC Exhibits 35, 42, 43, 48, 52, 56, 57, 65, 72.

Based upon the foregoing, the Settlement Agreement was improperly set aside.

## CONCLUSION

Judge Locke correctly ruled that Thomas' allegations have no basis in law or fact. His ruling should be affirmed because Thomas engaged in bad faith bargaining; UPS is not obligated to produce documents responsive to voluminous, duplicative, overly broad and unduly burdensome requests; and UPS complied with the Settlement Agreement.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2014, the foregoing has been filed using the NLRB's electronic filing system and a copy has been served via First Class Mail, postage pre-paid upon the following:

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