UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 18
(Precision Pipeline, LLC),

and **Case 9–CB–109639**

STEPHEN A. WILTSE, an Individual,

PIPE LINE CONTRACTORS ASSOCIATION,
Intervenor.

INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 18
(Rockford Corporation),

and **Case 9–CB–118659**

GARY LANOUX, an Individual,

PIPE LINE CONTRACTORS ASSOCIATION,
Intervenor.

Counsel:

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DECISION AND RECOMMENDED ORDER

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. A pre-job conference report is a form completed by representatives from a local union and an employer before commencing work on a job covered under the nationwide collective-bargaining agreement between the local union's international union and the employer's national association of pipeline contractors.

In these unfair labor practice cases, the government alleges that a local union's refusal to furnish its members with pre-job reports upon request is arbitrary and, therefore, a breach of the duty of fair representation owed by the local union to its members. As discussed herein, I find that the union's motivation for not disclosing the pre-job reports upon demand is rational, indeed substantial. But rational and thus, non-arbitrary, is enough to require dismissal of the complaint under the controlling Supreme Court precedent. There is no basis for the government to override the local union's judgment that there would be negative consequences for the union, its members, and its relationship with the contractors, if pre-job reports were disclosed upon demand. And that is particularly so here. Even assuming that an employee with a particularized need to review a pre-job report—perhaps on grounds that it contained information relevant to his grievance—would have a specific interest in the pre-job report that would render the union's rationale for nondisclosure irrational, the employees in this case have no such interest. I dismiss the complaint.

STATEMENT OF THE CASE

On July 22, 2013, Stephen A. Wiltse (Wiltse) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by the International Union of Operating Engineers Local 18 (Local 18), docketed by Region 9 of the National Labor Relations Board (Board) as Case 09–CB–109639. Based on an investigation into the charge, on September 26, 2013, the Board's Acting General Counsel, by the Regional Director for Region 9 of the Board, issued a complaint and a notice of hearing alleging that Local 18 violated the Act. Local 18 filed an answer to the complaint denying all alleged violations of the Act.

On December 10, 2013, Gary Lanoux (Lanoux) filed an unfair labor practice charge alleging violations of the Act by Local 18, docketed by Region 9 of the Board as Case 09–CB–118659. Based on an investigation into the charge, on March 6, 2014, the Board's General Counsel, by the Regional Director for Region 9 of the Board, issued an order consolidating Cases 09–CB–109639 and 09–CB–118659, issued a consolidated complaint alleging that Local 18 violated the Act, and an order rescheduling the hearing. Local 18 filed an answer to the consolidated complaint denying all alleged violations of the Act.

A trial was conducted in this matter on April 14 and 15, 2014, in Cincinnati, Ohio. At the commencement of the hearing, I granted a motion to intervene in the proceedings filed by the Pipe Line Contractors Association (PLCA).[1] At trial the Respondent filed a motion to dismiss the proceedings, which I took under advisement but declined to rule on before hearing the evidence

[1]In addition, at the commencement of the hearing, I granted counsel for the General Counsel's motion to amend the consolidated complaint. Throughout this decision references to "the complaint" are to the extant amended version of the consolidated complaint. Posthearing, at my direction, counsel for the General Counsel submitted a revised GC Exh. 7(b), which is intended to substitute for the incomplete version of GC Exh. 7(b) offered at trial. There has been no objection to the revised submission. I hereby substitute it for the original.

in the case. Counsel for the General Counsel, Local 18, and the PLCA, filed excellent post-trial briefs in support of their positions by May 20, 2014. I granted a motion to file reply briefs and the parties filed 3-page reply briefs by June 3, 2014. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The Respondent Local 18 is a labor organization within the meaning of Section 2(5) of the Act. Precision Pipeline, LLP (Precision) is a gas pipeline contractor in the construction industry, with an office and place of business in Eau Clair, Wisconsin. During the past 12 months, in conducting its operations, it performed services valued in excess of $50,000 in states other than the State of Wisconsin. It is alleged in the complaint, not denied by the Respondent (and therefore deemed admitted),[2] and I find, that at all material times, Precision has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As discussed herein, since at least 1949, the International Union of Operating Engineers (IUOE or International Union) is and has been a party to a series of collective-bargaining agreements—currently called the National Pipeline Agreement (NPA)—with the PLCA. The NPA currently applies to pipeline construction work performed by signatory contractor-employers throughout the continental United States. In 2011, the NPA was entered into effective February 1, 2011 through at least January 31, 2014, and for purposes of our case is the relevant version of the NPA. Precision was a signatory contractor to the NPA. In the NPA, the PLCA and its assenting contractors recognize the IUOE as the exclusive representative of all employees in the classifications of work covered by the agreement. The Respondent Local 18 is one of many local unions that is authorized to represent the IUOE for certain purposes under the agreement, including representing the IUOE at pre-job conferences occurring within the designated jurisdiction of Local 18. Charging Parties Wiltse and Lanoux were members of Local 18 and, at various times in 2013, worked for signatory contractors on work covered by the collective bargaining agreement, and at which Local 18 represented the IUOE for purposes of the pre-job conferences, among other duties. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

INTRODUCTION

The PLCA is an association of approximately 74 pipeline construction contractors. One of its chief functions is to act as the agent for its member contractors in labor negotiations for industry-wide collective-bargaining agreements with unions representing employees in the pipeline industry. The IUOE is a labor organization representing employees in, among other industries, the pipeline construction industry and one of the unions that negotiates collective-bargaining agreements with the PLCA. As stated above, the PLCA and the IUOE were parties to an NPA that by its terms was effective February 1, 2011 through at least January 31, 2014.

The NPA provides the terms and conditions prevailing at a broad range of pipeline transportation and construction work, including laying cross country pipeline, stationary work performed at compressor stations (which feed the power source to localities), and related maintenance work performed throughout the United States. (Work performed in Hawaii and Alaska are also “covered” by the agreement, but the agreement provides that the applicable wage

[2]See, Board Rules and Regulation Sec. 102.20.

rates and any special conditions will be negotiated specifically for that work.) The employer members of the PLCA that sign the agreement are bound to operate under its terms. In practice and custom, most employer members of the PLCA sign on to the NPA. This includes Precision Pipeline, Rockford Corporation (Rockford), and CBC, Inc. (CBC), each of which is a contractor member of the PLCA, which performs work under the agreements negotiated by the PLCA.

The NPA provides that the employers recognize the IUOE as the "exclusive representative of all Employees in the classifications of work covered by this Agreement for the purpose of collective bargaining . . . ." Art. II(A). The NPA further provides that "All of the work covered by this Agreement shall be done under and in accordance with the terms and conditions of this Agreement." Art. I(E). Further, the NPA provides that "This Agreement shall supersede all other agreements between [the PLCA and signatory contractors] and any local of the [International] Union for any work covered herein." Art. I(M). The NPA also provides (art. XIII) for "special amendments"—agreements between the PLCA and the IUOE providing for "special wages and conditions for specific areas or projects," which may be negotiated between the IUOE and the PLCA "in order to be more competitive in certain areas of the country."

Throughout the country, local unions affiliated with the IUOE are organized around geographic districts. The Respondent in this case, Local 18 is one such local union. Its jurisdiction is the State of Ohio, save for the three eastern Ohio counties of Mahoning, Trumbull and Columbiana. In addition, Local 18 covers four counties in northern Kentucky.

Pipeline projects are typically awarded to a prime contractor pursuant to a competitive bidding process conducted by the owner or client commissioning the work, often a gas or energy company. Employers prepare bids by preparing crews sheets estimating the needed number of employees, equipment, and the anticipated costs of those items. In preparing these bids, employers rely on previous bids and previous actual job costs on awarded work. Thus, an employer's bidding calculations for awarded work will be a basis for future bids. Operator labor costs comprise approximately 25 percent of overall labor costs. Total labor costs comprise approximately 40 percent of total job costs.

Donald Thorn is the president of an employer contractor and a longtime PLCA board member, who has held numerous high-level positions with the association, including president, vice-president, and treasurer. From 2002 to 2012, he was on the PLCA's labor committee that negotiates the NPA with the International Union. Thorn testified credibly that, armed with a contractor's labor costs or total job costs, a competitor "would have a very good idea of how I estimate my work. And [consequently], a very good idea of what they would need to do to underprice another job somewhere."

The pre-job conference

When an employer bound to the NPA obtains a job that is covered under the NPA, it agrees to notify the International Union about the job ("the location, size and length of the proposed pipe line and the proposed starting date"). In turn, the International Union "agrees to advise Employer which local union or local unions have jurisdiction of the job, and Employer will then contact each local union having jurisdiction for the purpose of arranging a pre-job conference." Art. II(C).

As set forth in the NPA (Art. II(D)):

> Representatives of the Employer and all local unions with jurisdiction over the job authorized to represent the Union shall hold a pre-job conference for the entire area covered by the job. . . . It shall be the purpose of the pre-job conference to agree upon such matters as the length of the work week, the number of Employees to be employed, the applicable wage rates in accordance with the Contract, and any other matters not including any interpretation of the clauses of this Agreement, it being agreed that interpretation of this Agreement should be made between the [PLCA] the International Union . . .so that proper application thereof may be made on the jobs.

The NPA adds (Art. II(D)) that demands made at the pre-job conference may not conflict with or go beyond the terms and conditions of the NPA. ("No representative of any individual Employer and no representative of the [International] Union or any of its local unions shall demand at the pre-job conference, or at any other time during the continuance of the job, any term or condition not covered by this Agreement"). The NPA further provides that

> A copy of the report made of each pre-job conference shall be furnished to the [PLCA] and to the International Union . . . and no agreement made at any pre-job conference which adds to or modifies, in any way, the terms and conditions of this Agreement, shall be binding on any individual Employer or the [International] Union, or any of its local unions, unless approved and ratified by the [PLCA] and the International Union.

As noted, one of the key functions of the pre-job conference is to establish the number and classification under the NPA of employees that the contractor will require for the job. This determination is subject to the NPA's hiring rules. Specifically, without regard to the local union's jurisdiction, the Employer on the job "shall have the right to employ and bring into the job . . . up to fifty percent (50 percent) of the required Employees as Regular Employees." Art. II(I). The term "Regular Employees" refers to "those who are regularly and customarily employed by the individual Employer . . . and who, because of their special knowledge and experience in pipe line construction, are considered as 'key men.'" In other words, the employer can mandate that up to 50% of the workforce on a job be composed of its "key men," also known as "travelers." As stated in the NPA, "At the pre-job conference Employer shall notify the Union and/or local union(s) of the number and classifications of Regular Employees. Before the start of the job Employer will furnish where possible Union and/or local union(s) with a list of the names, social security numbers, and, if possible, Union register numbers of the Regular Employees to be hired initially."

The remainder of the work force for the job is supplied by the local union (assuming it has enough qualified employees). Pursuant to the NPA, where an exclusive referral procedure has been established through collective bargaining between the local union and an area association of highway and heavy contractors the "[International] Union shall notify the [PLCA] . . . as to the existence of such exclusive referral procedures, and Employer agrees to utilize such referral procedures . . . ." This is the case for Local 18, which maintains a collective-bargaining agreement with an exclusive referral procedure with the Ohio Highway and Heavy Contractors Association. Thus, this procedure is used by the employer and Local 18 to hire operators on NPA projects after the Employer has identified its "key men."[3]

[3] I note that there are some further details and nuances to the hiring procedures that need not concern us here. The text provides a basic summary of the system.

Accordingly, the hiring procedures, manning needs, equipment requirements are determined at the pre-job conference. The NPA describes other issues to be addressed at the pre-job conference. The Employer is to provide its "company driver policy standards" at the pre-job" so that only qualified applicants will be referred. If a master mechanic is to be employed in a supervisory capacity "his selection shall be discussed at the pre-job conference." Art. II(O). Further, the job assignment of the employee selected to be the union steward on the job "will be a subject to be decided at the pre-job conference" to ensure that the steward's assignment does not "prevent his normal function as a steward." Art IV(A). According to Thorn's testimony, the employer "can object or reject the steward if we've had an issue with him in the past." The rate of pay for the employee employed to maintain the small machinery used on the job is to be decided upon at the pre-job conference." Art V(F). Further, the "work week and work day shall be established at the pre-job conference" as to all "Station Work." Id. at E.5 and Attachment 2(V). The initial maintenance employee hires (the first four maintenance employees hired) is to be determined at the pre-job conference, thereafter the general hiring procedures of the NPA prevail. Attachment 3 to NPA at E.1.

In addition to the references in the NPA to the pre-job conference, the pre-job form, which was first developed in the 1940s, indicates the information that is germane to the pre-job conference. A copy of the pre-job form is attached as an appendix to this decision.

The first page is a cover sheet, which states:

> Please complete the attached set of Pre-job Conference and Key Men Reports in detail. This information must be available to the administrative offices of the Central Pension Fund and the IUOE and Pipeline Employers Health & Welfare Fund so that they can control the receipt and proper allocation of contributions.
>
> The fully completed reports will also help the International Union of Operating Engineers and the Pipe Line Contractors Association to provide you with any services required of their offices.
>
> There are four copies of each form to be distributed as follows:
> (1) White- Mack Bennett, International Union of Operating Engineers . . . .
>
> (2) Pink- Central Pension Fund . . . .
>
> (3) Green- Retained by local union representative. . . .
>
> (4) Yellow- Retained by employer representative. . . .

The second page contains the substance of the pre-job form. Much of the information sought by the form is self-explanatory: the meeting place where the pre-job conference is held; the date of the pre-job conference, the contractor awarded the work, the local union with jurisdiction over the project, the job location, the owner or client awarding the work, and a brief description of the job.

Much of the form is devoted to a listing of the quantity and type of the various equipment expected to be needed for the job. In addition, the number of employees, and whether as spelled out in the NPA, they will be group 1 (highly skilled operators who run major pieces of equipment) or group 2 (semiskilled operators running smaller pieces of equipment) or group 3 (essentially,

apprentices), is listed on the form and determined, in large part, by the equipment needs. The pay and benefits for the various types of employees needed for the job is determined by the NPA. The form lists the date the job is starting, and the approximate completion date of the job.

The form lists the pension and health and welfare benefit funds to which the employer is required to submit payments. This is determined by Art. XV of the NPA, and, as stated in the NPA, varies according to which funds the relevant local union is attached to or co-administering.

There are places on the pre-job form to check whether the work is covered under any of the addendums to the NPA (e.g., the 16-inch addendum or the 12-inch addendum, which are "special amendments" described in art. XIII of the NPA and negotiated by the International Union and the PLCA).

There are provisions on the pre-job form for getting employee payroll data, and an indication that the employer will process the payroll and provide a list of employees on the payroll each week. There is a place to mark whether the local union has a referral or hiring plan that it uses. As stated above, the NPA mandates that the local's hiring plan be used for the local employees in most instances. There is a place for the job hours and days to be marked (typically six 10-hour days per week). There is a spot to mark whether the employer plans to hire on a "1 & 1 basis" which means that it will hire one local for each "key man" hired. There is a spot to mark when the employer's pay day is, and who the chief local union steward will be, when he is to report to work, and to which state unemployment compensation is to be made.

Finally, there is room for "remarks," which may also be handwritten on any part of the form, for any additional information or procedures. Typically, this would relate to the employer's drug testing or safety plan. According to the testimony, while the individual employer must conform to Art. XIV of the NPA governing drug and alcohol testing, for the most part, the NPA leaves an employer free to determine its own drug testing rules and policies. This discretion also applies to safety policies (i.e., policies on hard hats, safety glasses, boots), which are determined by the individual employer, and the employer's safety orientation procedures. Notes regarding these items are often put in the "remarks" section of the pre-job form. Employers convey their safety and other working rules to employees during an initial orientation shift at the beginning of the job.[4]

In addition, in at least some instances, the employer's "truck pay" rate will be written into the pre-job form. Under the NPA the employer is obligated to provide transportation to the job site from the warehouse location that it establishes. While this is an ongoing contractual obligation, some contractors will offer to pay employees "truck pay" if the employee drives his or her own truck to the jobsite in lieu of relying on the contractor for transportation. It is the employer's option whether it offers truck pay and how much it pays. Even when it is offered the employee retains the option of declining truck pay and taking the employer-provided transportation required by the terms of the NPA. The union steward will advise employees with regard to the employer's truck pay.

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[4]Under the NPA, working rules are prescribed by art. V. However, art. V(E) provides that the "Employer shall have the right to make and revise, from time to time, working rules which are not inconsistent with any of the terms and conditions of this Agreement or with existing laws." Thus, the NPA provides the employer with unilateral discretion—within the bounds of the NPA—to mandate its own safety and other work policies.

Near the bottom of page 2, just above where the local union and employer representatives sign, the pre-job form states that:

> The undersigned hereby agrees that this job is covered by the terms of the current National Pipeline Agreement for the United States of America as executed by the International Union of Operating Engineers and the Pipe Line Contractors Association.

Finally, the third page of the pre-job conference report is a form on which the employer lists the "key men" it is using on the job. The form provides for a listing of each "key man's" name, social security number, local union (if any), registration number, and classification

A witness from the International Union, national pipeline Director Mack Bennett, testified that there were over 1,600 pre-job conferences, and presumably forms, filed with the IUOE in 2013. Bennett testified that local unions have no authority to negotiate terms and conditions of employment under the NPA. Bennett described the pre-job conference as

> an estimate. It's an internal document to verify wages in accordance to the [NPA] as posted either on the Internet or in the book. . . . It's an estimate of how long they're going to be on the job. The type of . . . equipment being used on the job. And who's going to do the inspection. And also the key people that they're going to use.

According to Bennett, one reason that he did not freely share the pre-job conferences with members in years past when he was business manager for a local union (not Respondent Local 18) was that he believed that the information on the form could be sold to a nonunion contractor as it sets forth a panoply of information about the job that would be of interest and use to a nonunion contractor. ("Well, you've got your length and size of pipe. You've got who's going to do the inspection. You've got the gas company that awarded it. Where the warehouse is going to be located. How many guys that you're going to have on the job. What pieces of equipment you're going to use on that job. What benefits you're going to pay on the job. How many hours a week you're going to work on that job. The hourly wage is on there"). In years past, when Bennett was the business manager of an IUOE local union in Texas, he would permit members who requested copies of pre-job reports to come into the office and review the reports, but he did not permit them to make or keep copies, or take notes on them.

As referenced above, Donald Thorn is the president of an employer-contractor, and a longtime PLCA board member and officer. Thorn testified that with the information from the pre-job form someone knowledgeable with the industry could calculate the contractor's total estimated labor cost for the particular project: "you could take those numbers and build from that into what my total labor cost for the project is estimated to be."

Thorn testified that the information contained in the pre-job form is "quite similar" to that used to prepare a bid for new work. Indeed, Thorn testified that the information on the pre-job form is "generally taken from that "[bidding] information." Thorn explained that "you take that information [from the bid] and transfer it to a, basically, spreadsheet in preparation for the pre-job." Thus, a competitor with access to a pre-job form would be able to calculate the contractor's labor and job costs and thus, "would have a very good idea of how I estimate my work. And subsequently a very good idea of what they would need to do to underprice another job somewhere." As noted above, a winning bid is used by contractors in the future for subsequent bids.

Thorn testified that not only nonunion competitors, but also other PLCA contractors would be in a position to underbid him on NPA work if they knew how he manned and bid his projects. As Thorn stated, the PLCA members "are competitors." For this reason, Thorn admitted that over the years he has thought that it would be beneficial for him to see a competitor's pre-job forms—but he never has. Thorn testified that it is expected that the pre-job forms will remain confidential. Although the PLCA office is one of the parties which receives a copy of the completed pre-job forms, and although Thorn is a longtime member of the PLCA board of directors, he does not have access to other contractors' pre-job forms. And the PLCA does not make the pre-job reports available to its members. According to Thorn, "those are not revealed to anybody. I'd say it's an attorney-client privilege is the way the office treats them" and in past years this has always been the view of the PLCA when the matter has been discussed.

Charging Parties' requests for pre-job conference forms

Charging Party Wiltse is a member of Local 18 and has been a heavy equipment operator for at least 30 years. He also owns and operates his own non-union contracting business.[5]

In mid-May 2013, Wiltse was dispatched to an NPA project, working for Precision as of May 20, 2013. He was dispatched to operate a bulldozer, however there were more bulldozer operators than necessary, and no excavator operators. Wiltse volunteered to operate the excavator. In the middle of the second week, on approximately May 28, Wiltse was terminated "for being unsafe." However, the day before his termination, Wiltse recalled that he had objected to a foreman operating an excavator. Wiltse told the foreman "that wasn't in the agreement. He can't be the foreman and an operator." Wiltse testified that the foreman said, "no problem" and "[r]elinquished the seat." The next morning Wiltse was told he was "unsafe" and no longer allowed on the project.

Wiltse immediately contacted the job steward, Richard "Tam" Smallwood. Smallwood went into Precision's office trailer, talked with Precision officials and resolved the matter on the

[5]On cross-examination, Wiltse first flatly and repeatedly denied owning or operating a non-union construction business. ("That's not true. . . . Q. You don't own a non-Union construction company? . . . A. No I don't"). When asked specifically about his company, "M.O.L. Excavating," Wiltse claimed that it had been dissolved in 2010 (which he later amended to 2012), after he could not find enough operators "because I was denied signatory [status] with the Union" and "I was found in default." Wiltse attributed June and August 2013 certification renewal requests directed to M.O.L from the city of Cincinnati, and December 2013 references to M.O.L.s "prequalification" for work in construction journals to "clerical error." In any event, he freely admitted creating a new contracting company to replace M.O.L., and he indicated that the city's notices and the "spirit" of the listings in the construction journal were intended for the new company, for which, he admitted, at least as of December 2013, he was soliciting business as a nonunion employer.

Thus, his initial denial that he owned a nonunion construction company was shown to be flatly false, even assuming, with a prayer and a leap, the truth of his claim that the continued advertising of M.O.L. in subscription-based trade journals was all a mistake. This testimonial incident fit his demeanor. As a witness, Wiltse radiated defiance, devoted to jousting with counsel, rather than with truth telling. Fortunately, his credibility plays a minor role, or perhaps, no role in the outcome of this case—he did ask for the pre-job report, he did not get it, the rest is mostly a question of the Respondent's obligation under the Act. However, in areas where his credibility is at issue, he presented as an untrustworthy reporter of the facts.

spot. He came out of the trailer and told Wiltse, "I got good news for you. You were dispatched to run a bulldozer, not an excavator. I've gotten them to send you out on a bulldozer tomorrow."

Wiltse began on the bulldozer that afternoon, and worked the next day. However, at the end of that day, Smallwood approached him and "told me that I wasn't capable of cutting grade [a]nd that I was being terminated, again."

Wiltse told Smallwood he wanted to file a grievance. Smallwood concurred. He told Wiltse to come to the Local 18 office in Franklin, Ohio. Before going to Franklin, Wiltse called his friend, fellow union member Gary Lanoux. Lanoux told Wiltse that "before I file a grievance be sure to get a copy of the contract, Pipeline Agreement, and anything that might affect it." Although Lanoux testified that he did not know what is contained in the pre-job reports, he testified that he told Wiltse that "he needs to understand the contracts and the pre-jobs . . . if you're going to file a grievance."

When Wiltse got to the Franklin office he told Local 18 agent Conductor Ken Waughtal that he wanted "a copy [of] the pipeline contract and anything that pertains to it; pre-jobs, so on." Waughtal told Wiltse he would get him a copy of the labor agreement, and he asked Wiltse to write up a statement of what had happened. Wiltse did so and thinking that was sufficient to file a grievance left. It turned out that Wiltse needed to fill out a grievance form, not just a statement. The union arranged another meeting for him to do that. Wiltse missed the first meeting set up for the morning of June 3, and the union official called him back, stating, according to Wiltse, "We want to set a meeting at your convenience. Come on up here. I got your agreement, [and] grievance form." Wiltse went to the union hall later that day and met with union auditor Gary March and obtained a copy of the collective-bargaining agreement and the grievance form.

Wiltse surreptitiously recorded this meeting. Wiltse was upset that his grievance had not already been filed, and said he had thought that writing out the statement would accomplish that. During the meeting Wiltse asked for a "a copy of the minutes to the pre-job or anything that might [pertain] as far as amendments and so on and so forth about my situation." Marsh gave Wiltse the NPA and the grievance form. In the meeting, Wiltse rebuffed efforts to have the union assist him in writing the grievance with him, stating, "No, I don't believe that is in my best interest. I think I need time to look over the agreement and see exactly where I felt that I have been aggrieved."

Wiltse went home. On June 12, he returned to the union office for another meeting at the Franklin office with Smallwood, Waughtal, and Local 18 Business Representative Stan Brubaker. Wiltse also recorded this meeting, this time openly. According to a tape and transcript of the meeting entered into evidence, the officials and Wiltse discussed his grievance.

As is evident from the tape and transcript, Wiltse struck a sarcastic combative tone throughout the meeting. Wiltse told the union officials that "I have many complaints where I feel that my rights as a member of this Union were violated . . . [s]tarting with Tam [Smallwood] not holding my hand and walking in there to grieve my grievance—blah, blah, blah to the Employer." Smallwood and Wiltse argued that Smallwood had gotten Wiltse his job back and "stood up for you when they wanted to run you off" after Wiltse had volunteered to run the backhoe instead of the excavator. Wiltse claimed he had been "steered" away from filing a grievance by Tamwood, which Tamwood denied. Tamwood and Wiltse argued over whether Wiltse had asked to file a grievance after his initial removal from the backhoe.

Wiltse said that he wanted "access to the pre-job," arguing, "[w]hat if it has a bearing on my rights as an operator?" Waughtal replied, "Well, you [undecipherable] questions about the pre-job such as truck pay, the rates, all the classifications will be as per contract." They argued further about why Wiltse had yet to file a grievance, with Wiltse saying "by omission you deceived me" because he did not know there was a grievance form to fill out. Waughtal denied deceiving Wiltse and told Wiltse that he had told Wiltse, "We'll fill out a grievance and Stan's going to get you a contract. Stan called you. That was on Friday, the 31st. Stan called you Monday."

After more arguing, Wiltse asked, "Are you going to give me the pre-job or not?" Brubaker told Wiltse, "No. No. We don't give out pre-jobs to the members."

After more arguing, Wiltse stated, "We can have all the conferences you want just to document that you are not going to let me look at the pre-job. I don't know what's so important about it if it's so inconsequential." Brubaker began to reply, "Well the pre-job is union documentation and we use it for"—at which point Wiltse interrupted and stated, "Well, will my eyes set it alight?" Brubaker asked Wiltse, "What kind of questions do you have on it." Wiltse replied, "Well, how am I to know that until I have a chance to examine the document?" Brubaker replied, "Well, apparently you know what's on it because—" at which point Wiltse interrupted and stated "No. I don't. All I know is what was provided to me in the National Pipeline Agreement."

The conversation continued (and degenerated) from there. Wiltse accused Smallwood of not standing up for him, of not bringing him into the Precision trailer, and they accused each other of lying about why a grievance was not filed the first day upon Wiltse's termination. The meeting ended soon thereafter.

At the hearing, Wiltse testified that he has never seen a completed pre-job form and has no first-hand knowledge of what is in it. He agreed—calling it a "no-brainer"—that as the owner of a construction company it would be of use to him in preparing successful bids to learn his competitor's budget and labor costs for a project. While the jobs he seeks are smaller than that of the prime contractors which work on NPA projects, he agreed that he would be eager to take on subcontracting demolition work on a pipeline project if it was available.

Charging Party Lanoux, also a member of Local 18, testified that he asked the steward, whenever he is assigned to a new job, to let him see the pre-job for the project. This included on or about June 11, 2013, when he was working for Rockford on a pipeline project and asked the steward, Burt Milhone, for the pre-job. Milhone told Lanoux that "he can't give that information. Mr. Sink [the Respondent's business agent] doesn't allow that information to be published."[6] Later, in October 2013, Lanoux sent a certified letter to Local 18's president requesting the pre-job agreement with Rockford for the pipeline project on which he had been working until about a week before. On or about November 13, 2013, Lanoux started working for CBC contractors on a pipeline project. He requested the pre-job agreement from the steward. While Lanoux could not remember the exact answer, he did not receive the pre-job.

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[6]The Respondent argues this is hearsay. It is not. Milhone is an admitted agent of the Respondent. (GC Exh. 1(p) at ¶4.) His statement, as testified to by Lanoux—i.e., that "Mr. Sink doesn't allow that information to be published"—was offered appropriately against the Respondent for the truth of the matter asserted. See, Fed.R.Evid. 801(d)(2). And this would be the case even if Milhone was reporting Mr. Sink's assertion to him, as Sink, too, is an admitted agent of the Respondent. (GC Exh. 1(p) at ¶4.)

Lanoux has never seen a pre-job. He testified that he surmised it could contain agreements to change wages based on his reading of the "Special Amendments" article (XIII) of the NPA, which provides that "[i]n order to be more competitive in certain areas of the country," the International Union and the PLCA could "mutually agree to put into effect special wages and conditions for specific areas or projects."

There was no evidence presented that would suggest that "special amendment" agreements between the IUOE and the PLCA are negotiated as part of the pre-job conferences conducted by the employer-contractor and the local union. To the contrary the NPA provides that special amendments are negotiated between the IUOE and the PLCA.

Analysis

The General Counsel contends that Local 18's refusal to provide Wiltse and Lanoux with the requested pre-job conference reports is a breach of the Respondent's duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

The duty of fair representation is a judicially-created cause of action implied from a union's statutory grant of exclusive bargaining rights under the Railway Labor Act (RLA). *Steele v. Louisville Nashville Railway Co.*, 323 U.S. 192 (1944). The concept reflects that "when Congress empowered unions under the RLA to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the unit as a whole, it imposed on unions a correlative duty, inseparable from the power of representation, to exercise that authority fairly." *California Saw and Knife*, 320 NLRB 224, 228 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998). In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1963), the Supreme Court confirmed that these principles extended to unions recognized under the Act. See also, *United Steelworkers v. Rawson*, 495 U.S. 362, 373 (1990) ("The Union's duty of fair representation arises from the National Labor Relations Act itself").

In *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf't. denied 326 F.2d 172 (2d Cir. 1963), a Board majority adopted and applied the duty of fair representation as it had been developed by federal courts. The Board held for the first time that breaches of a union's duty of fair representation constitute unfair labor practices under 8(b)(1)(A) or 8(b)(2):

> we are of the opinion that Section 7 [of the Act] gives employees the right to be free from unfair or irrelevant invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b) (1) (A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.

The Second Circuit Court of Appeals refused to enforce the Board's decision in *Miranda Fuels* and rejected the effort "to read into Section 7 and Section 8 the duty of fair representation implicit in Section 9." 326 F.2d at 176. However, since *Miranda Fuel*, the Board has developed a wide-ranging unfair labor practice jurisprudence applying the duty of fair representation in the 8(b) context. For its part, five years after the Board's decision in *Miranda Fuel*, the Supreme Court answered a question left open in *Ford Motor v. Huffman*, holding that, assuming that a breach of the duty of fair representation may be an unfair labor practice claim cognizable before the Board, courts also continued to have independent jurisdiction over fair representation claims. *Vaca v. Sipes*, 386 U.S. 171, 176–188 (1967). Thus, "*Garmon*'s pre-emption rule does not extend to suits alleging a breach of the duty of fair representation." *Breininger v. Sheet Metal Workers Int'l*

Ass'n, Local Union No. 6, 493 U.S. 67 (referring to inapplicability of general rule announced in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that courts do not possess jurisdiction over claims based on activity that is "arguably" subject to the Act).

Perhaps because of this, and because the origins of the duty of fair representation are judicial, the Supreme Court has offered substantial guidance on the standards to be applied in duty of fair representation cases—more guidance than in many other areas where Board jurisdiction is exclusive.

Settled Supreme Court precedent establishes that "[a] breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). This standard "applies to all union activity." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991); *Steamfitters Local Union No. 342*, 329 NLRB 688 (1999), enf't. denied, 233 F.3d 611 (D.C. Cir. 2000).

Here, the General Counsel makes no claim (and there is no evidence for it) that the denial of the pre-job reports to Wiltse and Lanoux was motivated by bad-faith or discrimination. The General Counsel's claim is that the Respondent's actions were arbitrary.

The Board and the Supreme Court have made clear that "A union's actions are considered arbitrary only if the union has acted 'so far outside 'a wide range of reasonableness' as to be irrational." *Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.)*, 360 NLRB No. 96 (2014) (quoting *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) and *Ford Motor Co. v Huffman*, 345 U.S. at 338). In serving unit employees, a union must be allowed "a wide range of reasonableness" and "any subsequent examination of a union's performance must be 'highly deferential.'" *Branch 529, Letter Carriers*, 319 NLRB 879, 881 (1995), quoting *O'Neill*, supra at 78). In considering this prong of the duty, "[s]o long as the union's conduct . . . is not wholly irrational or arbitrary . . . there is no breach of its duty of fair representation." *Firemen & Oilers Local 320 (Phillip Morris, U.S.A.)*, 323 NLRB 89, 91 (1997).

In this case, the claim that the Respondent's refusal to provide the pre-job reports to Wiltse and Lanoux was arbitrary or irrational is simply unsustainable as a matter of the English language, not to mention precedent.

Arbitrary means, essentially, without a reason. Irrational means a reason that is without logic. Neither applies to the Respondent's motivation for not providing the pre-job reports to these employees. The Respondent has a reason for not distributing the pre-job reports and it is hardly irrational—even if the General Counsel or the Charging Parties would have the union follow a different policy, were they charged with formulating union policy.

The pre-job reports are documents devoted to and containing information about the operational requirements of the specific job—a guide for the local union and contractor to anticipate how many and what type of employees will need to be referred to the job. They contain a raft of information about anticipated equipment, labor costs, pipeline materials, and length of the project, much of which is directly transferred from the contractor's project bid document, and which even the union contractors of the PLCA do not share with one another.

For sure, there is other information: wage rates, benefit compensation, etc., taken from the NPA, and accuracy of which, should there be a dispute, is governed by what is in the NPA, not what is in the pre-job report. The record is devoid of evidence suggesting that any of these rates were collectively-bargained or negotiated at or as part of the pre-job conference. Indeed,

the testimony and the documentary evidence (i.e., the clear prohibitions in the NPA and in the pre-job report on local unions and employers having the authority to vary the negotiated terms and conditions of employment) affirmatively militates against the possibility. Thus, the General Counsel proves exactly nothing when he points to particular wage or benefit rates in the pre-job forms he has in his possession and argues that they do not match the wages or benefits listed in the NPA. Even if true, this does not suggest much less prove that the change was made at or in conjunction with the pre-job conference report. It does not suggest much less prove that the local union and the employer negotiated the change. The explanation for these disparities, whatever it is—whether a misreading of the NPA, a result of a "special addendum," or an error—does not turn on something negotiated by the local union and the employer at the pre-job conference. As to contractually-covered wages and benefits, the evidence is that the pre-job report is a memorialization—not an independently enforceable agreement.

And, finally, there is a small class of information that may be listed on the pre-job forms—such as safety and drug policy—that, pursuant to the NPA, is within the discretion of the individual employer to establish on a particular job. There is no evidence that these are "bargained" at the pre-job conference, nor any reason to believe that the pre-job reports represent binding agreements on what work policies the employer will utilize. Rather, these work rules and individual employer rules are conveyed to employees and enforced by the contractor at orientations for employees beginning on the project. In other words, there is no evidence that the pre-job reports are the *source* of any rights for employees.

The system has evolved—with the contractors sharing this information and meeting with the local unions before each job—because it expedites and abets the operations, and informs the local union of the hiring demands. It places on one sheet of paper a summary of the job, including terms and conditions of employment negotiated elsewhere, or in a few cases, permitted (through prior bargaining) to be within the employer's discretion.

The union recognizes that this informal but important cooperation between labor and management would be threatened if the union acceded to the General Counsel's demand to distribute this information on request to any of the 30,000 members who asked for it. The IUOE and the local unions have an interest in the maintenance of the pre-job system and the cooperation and exchange of information it fosters. If the unions must disclose pre-job reports, the PLCA and its contractors fear that the PLCA contractors will obtain each other's pre-job reports and be in a position to underbid each other. This is also legitimate concern for the International Union and local unions too. Moreover, this concern is exacerbated and multiplied for all these parties when one considers the prospect of the pre-job reports being easily obtainable by nonunion contractors through their contact with union members. With the pre-job report "bidding" information in hand, nonunion contractors could look to craft their bids to make themselves more attractive to owners and awarders of construction bids. Obviously, this concern informs the local union's policy of not distributing copies of the pre-job reports on request to members. Bidding is, after all, a competitive process. And, indeed, coincidentally (I assume) one of the charging party's here operates a small nonunion construction firm. The local union has an obvious and legitimate interest in taking steps to bolster and protect the competitiveness of the unionized contractors and the PLCA members. Whether or not the General Counsel agrees, or would enact the same policy were he operating a labor union, it is not a serious argument to contend that the policy of not distributing the pre-job reports upon requests is irrational or arbitrary. By the same token, federal law protects the right of the members of Local 18 to elect leadership that will change the policies with regard to the pre-job reports. But neither the duty of fair representation specifically, nor Section 8(b)(1)(A) generally, provides legal relief for members who object to a non-discriminatory, good faith, and rational policy with which they disagree.

Notably, it is not necessary, under the circumstances presented, to paint too broad a brush in order to insulate the Respondent's policy from challenge from the fair representation claims at issue here. While there may be some situations where an employees' request for the pre-job report could be considered central to his grievance or concern, that is not the case here. For instance, if an employee had a dispute with an employer that implicated the safety policies adopted by the individual employer, the pre-job report might—arguably—contain notations helping to establish what policies the employer had told the local union it was adopting. We need not consider whether, under those circumstances, Local 18's policy must give way, because that is not this case. In other words, even accepting the proposition that the "rationality" of the local union's policy must be evaluated in terms of the importance of the requesting employee's interest in the pre-job report, here the employee's interest is unidentifiable except as an abstract demand to be entitled to any document that might list or mention a term or condition of employment.

Wiltse's grievance and his complaint concerned his termination for his work performance, and his suspicion that this termination might have been prompted by his challenge to a supervisor for performing unit work. No party to this case, including the General Counsel who has seen the pre-job reports in question, has explained or can explain what the pre-job report will add to his consideration of the grievance. For his part, Lanoux does not have any dispute with an employer. He seeks the pre-job reports purely on principle, believing that if it concerns the job, he should be able to see it.

Thus, if ever the importance of the pre-job reports to employees could warrant the conclusion that the union's policy against disclosure was irrational, that is surely not the case here. Accordingly, a broad holding that a union never breaches its duty of fair representation by refusing to provide the pre-job forms need not be reached. But in this case, clearly, the policy concerns that animate the union's rule are rational and nonarbitrary, unchallenged as they are by any legitimate need for the reports by Lanoux or Wiltse.

The General Counsel's arguments for finding a violation effectively ignore the Supreme Court-mandated standards, which require deference to a union's rational, good-faith, non-discrimininatory decision-making. At bottom, and at odds with the controlling standard, the General Counsel presumes a violation and the right of employees to receive the pre-job forms, and challenges the union to prove why it cannot honor this "right." The government's approach turns the law on its head.

Thus, the General Counsel dismisses as irrelevant the Respondent's concern that liberal disclosure of the pre-job reports could benefit nonunion contractors to the disadvantage of union contractors, the union, and the employees. According to the General Counsel (G.C. Br. at 13), the "motivation of the requestor is irrelevant when there is a duty to disclose. . . . [E]ven if the pre-job forms are of some use to members who operate their own small construction companies, the requestor would not know this use until they were able to view the document." The General Counsel's position—in which a presumed "right" of the employees to the union's information trumps the union's rational motivations for refusing to disclose the information—is unmoored from the Supreme Court's teachings on the duty of fair representation.

Similarly, the General Counsel disputes the confidentiality concerns articulated by the Respondent and the PLCA regarding disclosure of the pre-job forms. The General Counsel analogizes the issue to that of an employer asserting the confidentiality of documents requested by a union in an 8(a)(5) duty to bargain information case. In such cases, the employer's statutory duty to bargain with a union includes the affirmative duty to provide requested information, subject to proof by the employer that the documents are confidential (in which case disclosure

may occur with restrictions). However, this is not an 8(a)(5) case. It is an 8(b)(1)(A) case. Unlike an employer faced with a union's request for information, here there is no statutory duty for a union to collectively bargain with its members. Here, there is no general affirmative duty to provide relevant requested documents upon request.[7]

In short, the Respondent is not required to prove an enforceable confidentiality interest in order to win its case. It is enough that the Respondent's concerns about disclosure of the pre-job reports are credible, rational, and nonarbitrary. Whether or not the PLCA, its members, the International Union, or the Respondent, has demonstrated a legally enforceable, nonwaived, no-exceptions confidentiality interest in the pre-job reports is not the point. This case involves consideration of whether the credited concerns about having to provide pre-job reports upon request are rational in view of the overall circumstances confronting the union. They are, particularly here, where the requesting employees have no specific need for the documents.[8]

The apogee of error in the General Counsel's claim is found in its contention (GC Br. at 7–9) that Local 18's refusal to provide Wiltse and Lanoux with the requested pre-job reports is an unlawful breach of the duty of fair representation because it denies them "all the information they need to evaluate whether Respondent is representing them fairly." (GC Br. at 9). For this argument, the General Counsel looks to the Board's decision in *Law Enforcement & Security Officers, Local 40B*, 260 NLRB 419 (1982). However, the General Counsel misreads the holding of that case to claim an expansive but nonexistent "right" under the Act for employees to receive upon request any paper that might have a term or condition of employment on it—even if that document is not the negotiated source of the term and condition, even when the source of the agreement (the collective-bargaining agreement) is available to employees, and even when the union has sound reasons for not wanting to disclose the document. The General Counsel's position is at odds with the principles of the duty of fair representation and that inconsistency is patent in a case like this one where the Respondent's rationale for not providing the pre-job conferences is countered only with a generalized desire but no tangible reason that the charging parties have need for the pre-job reports.

In *Local 40B*, the Board considered an 8(b)(1)(A) claim involving a union that refused to provide an employee with copies of the collective-bargaining agreement and the health and welfare fund that covered him. The employee wanted to see the labor agreement to determine if he was eligible for certain overtime pay, and wanted to see the health and welfare plan to determine if he could be reimbursed for certain medical expenses he had incurred. Instead of furnishing the documents, as it first promised to do, the union required the employee to send his medical bills to the union for the union's consideration under the plan. Without ever showing the

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[7]The General Counsel contends (G.C. Br. at 11) that the principles of section 8(a)(5) information cases are "instructive" and claims that they were "applied" in an 8(b)(1)(A) context in *Mail Handlers Local 307*, 339 NLRB 93, 96 (2003). This is 100 percent wrong. In fact, the ALJ in that case expressly rejected any equivalency, and stated that "[t]he Union's obligations must be evaluated solely on the basis of whether its countervailing interest in refusing to provide documents is genuine and sufficiently reasonable to be rational." 339 NLRB at 96. The Board adopted the judge's conclusions, adding its own analysis, which did not mention or make a nod to the principles of Section 8(a)(5) cases.

[8]Given my conclusions, I do not reach the question of whether the PLCA has proven that it or its members has an enforceable confidentiality interest in the pre-job reports. It is enough that its witness testified credibly of the concerns associated with distribution of the pre-job reports. The Respondent, reasonably, shares these concerns, for many of the same reasons.

documents to the employee, the union obtained reimbursement for the employee for some but not all of his medical bills, and the employee received no overtime. Under these circumstances, the Board found a violation, reasoning that while:

> [e]mployees must rely on their union to represent them fairly in all matters covered by the collective-bargaining agreement, which controls the terms and conditions of the employment[,] . . . when a union denies the employees it represents the opportunity to examine its agreement with their employer, it severely limits the employees' ability to determine whether they have been afforded the fair representation that is their due. In the instant case, Respondent's failure to make available to Charging Party [ ] copies of its collective-bargaining agreement and its health and welfare plan impeded his ability to understand his rights under those documents and hampered his ability to determine the quality of his representation under them.

260 NLRB at 420 (footnote omitted).

The Board's decision in *Local 40B* fits squarely within the Supreme Court-mandated standards for duty of fair representation cases. The union in *Local 40B* offered no reason at all for refusing to provide the employee with the labor agreement or health and welfare plan that governed his terms and conditions of employment. The union offered no explanation for its conduct. Its conduct was arbitrary and without rationale.

But nothing in *Local 40B* justifies the General Counsel's reading of it to state an indefeasible "right" for an employee to receive any kind of document he or she wants from the union as long as it might list a term and condition of employment.

As discussed above, much of what is on the pre-job report does not relate to matters that are typically bargained about with regard to each individual job, such as the location, the owner, the number of pieces of equipment and the number of operators needed. Of course, the wage rates, benefit payments, etc., are listed on the pre-job report and are terms and conditions of employment—but those figures are not negotiated as part of the pre-job conference, they are taken from the collectively-bargained agreement—the NPA, which the employees have—and then recorded on the pre-job report. Even under the General Counsel's wrong and expansive reading of *Local 40B*, employees are not entitled to *every* memorialization of terms and benefits negotiated elsewhere.

I do agree that one can imagine a case where what is written on the pre-job report might, for example, impact an employee's dispute with the employer over whether the employer's safety policy required steel toe boots. Perhaps the pre-job report could be evidence confirming or contradicting the parties' understanding of terms of the employer's safety policy. And in that case, the issue would be whether the union's unwillingness to share that pre-job report—or at least, that portion of the pre-job report—could be deemed arbitrary in light of the centrality of it to the employee's grievance. But that is not this case. Here the Respondent's rational rationale for not disclosing the pre-job reports "on demand" is unopposed by any serious need articulated by Wiltse or Lanoux.

Other cases relied upon by the General Counsel are similarly inapposite. Thus, in *Branch 529, Letter Carriers*, 319 NLRB 879 (1995), a local union was found to have breached the duty of fair representation by refusing to provide an employee with requested copies of the grievance forms in the grievance she filed. In that case, the Board noted specifically the "self-evident" and

"particular" interest the grievant had in obtaining "grievance documents" that "specifically pertained" to the grievance she filed. Here, by contrast, the pre-job report had no relationship with--nothing all to do with—Wiltse's grievance. And as for Lanoux, he had no grievance or any explicable reason for wanting the pre-job report, other than his avowed conclusory legal view that he was entitled to it.

On the other side of the "rationality" balance, the local union in *Branch 529* raised "no substantial countervailing interest" in refusing to provide the requested documents. Instead, the respondent relied upon the fact that the forms were its "property," which the Board noted was an irrelevancy as the employee sought copies not originals. The respondent's other rationale was that it looked to the international union for advice on the matter, and the international union representative told the respondent, and testified at the hearing, that its "policy" was that the forms not be provided because "it's the property of the union" and "[w]e just don't give it."

The problem for the respondent in *Branch 529* is apparent and not at issue here: the respondent in *Branch 529* offered no reasoned explanation for not providing the employee the forms. It rested on irrationalities (the forms are our property) and deference to a conclusory explanation that it was following a "policy" that had no apparent or articulated rationale. In short, the union's explanation in *Branch 529* was "we just don't give it." Arbitrary means no reason. The respondent (and the international union) claimed there was an international union policy of refusing to provide members with grievance forms but never offer a rationale for that policy. Nonarbitrary policies have reasons. A bare reason for its position was what *Branch 529* lacked.

This case is very different. Here the Respondent has articulated a rational reason why it does not provide pre-job reports upon request. I find the reason credible, in other words, I believe it is the reason. Thorn's credible testimony on this score buttresses my view about the rationality and credibility of the Respondent's position. Given this, that the government thinks it is not a sound policy, or that a better policy would be to provide the forms upon request, is of no moment under the Supreme-Court required standard in duty of fair representation cases. A rational reason is enough, particularly in light of the general, indeed, abstract interest of the charging parties in receiving the pre-job reports.

Perhaps even more strained is the General Counsel's effort to tease support for its position from the Board's decision in *Teamsters Local 282*, 267 NLRB 1130 (1983). In *Local 282*, the Respondent was found to have breached the duty of fair representation by failing to inform laid-off employees about an arbitration award that required them to contact the employer once a year in order to maintain their seniority. The union, including its president, had previously assured laid off employees that they remained on the seniority list indefinitely and did not need to contact the employer to retain seniority. Under the circumstances, the Board equated the duty to inform employees about the change in their rights with the duty to avoid purposely misinforming employees about matters affecting their employment, and found the union's actions breached its duty of fair representation. The Board rejected the union's argument that it was simply following its "normal practice" of not contacting laid-off employees about arbitration issues. Given the history of contrary instructions from the union to the laid off employees, and given that the precise subject of the arbitration was the employment rights of the laid off employees, the Board found the union's rote adherence to "normal practice" lacked a rational basis.

How does that case in any way bear on matters here? After all, the decision not to provide the pre-job reports to Lanoux and Wiltse did not affect their employment rights one whit, and involved no contradiction with previous advice on terms and conditions of employment.

The General Counsel argues that the Respondent's explanation to Lanoux and Wiltse, offered at the time of their requests, that the local does not provide members with the pre-job reports, is like the union's explanation in *Local 282* that it is following "normal practice." However, quite apart from and in addition to the utter lack of impact of the pre-job reports on Lanoux and Wiltse's employment, the Respondent in the instant case did not limit its explanation to an unexplained adherence to a normal practice. Rather, at the hearing, the Respondent, aided by the PLCA, explained the rationale for its practice in depth.

In this regard, I note that there is no basis in law or logic for the General Counsel's implicit argument that the evaluation of the Respondent's reasons for not providing the pre-job report must be limited to the reasons that the Respondent's representatives gave to Lanoux and Wiltse. Essentially, these representatives told Wiltse and Lanoux that pre-job reports were not given out to members and in Wiltse's case, explained why the pre-job report had no relevance to his grievance. That the representative failed to provide, or perhaps, did not know the full explanation of why the Respondent and the International Union regularly refused such requests does not undermine the legitimacy of the Respondent's full policy rationale offered at trial. In any organization, policies and practices often have legitimate origins and explanations with which the front-line personnel may be unfamiliar. They execute the policies, without explaining and perhaps without knowing their full import. The relevant issue is whether the rationale for not providing the reports that was offered at trial is credible. I believe it was credibly offered.[9]

"A union is its members' representative, not their puppet, and its duty of fair representation is not a servitude to their individual whims." *Amburgey v. Consolidation Coal Co.*, 923 F.2d 27, 30 (4th Cir. 1991). As far as the duty of fair representation is concerned, the Board does not sit to intervene in or pass judgment on the wisdom or effectiveness of good-faith and nondiscriminatory union policies that individual members do not like. Here, Respondent's conduct must be arbitrary for a violation to be found. It is not.[10]

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[9]Other cases cited by the General Counsel in support of his argument do not advance the case. Essentially, the Board is willing to find an 8(b)(1)(A) fair representation violation when a union fails—without justification—to disclose information that is directly pertinent to legal or financial claims of the employees. Thus, in *UAW Local 909*, 325 NLRB 859 (1998), the Board found a violation when the union refused to provide employees with a requested accounting of why employees received disparate and in some cases no payments pursuant to a grievance settlement with the employer. (Asked for an explanation, the union representative "proclaimed that he did not have to discuss the settlement" and told employees "it is none of your business.")

In *Teamsters Local 232*, 280 NLRB 733, 735 (1986), the Board found a violation where, without "sufficient reason" the union refused to provide two employees with information that would allow them to determine their position on the union's exclusive hiring hall job referral lists in order to protect their referral rights. In each of these cases, the union acted (1) without justification to deny the complaining employees information that (2) directly affected employee rights in an ongoing dispute. Neither is the case here.

The General Counsel also cites *NALC, Branch #47*, 330 NLRB 667 (2000), enfd. 254 F.3d 316 (D.C. Cir. 2000), but that case involved an 8(b)(1)(A) violation where the motive for the refusal to provide information was retaliatory. No such ill-motive is at issue in the instant case.

[10]The Respondent filed a motion to dismiss at the hearing arguing, essentially, that because it is not party to the NPA—rather, the IUOE is--it does not owe a duty of fair representation to the charging parties and is not properly a respondent in these cases. This argument is repeated in its posthearing brief. (R. Br. at 16–20.) Given the outcome I reach in these cases I deny as moot the Respondent's motion to dismiss, and do not reach the issue as raised in the brief.

CONCLUSIONS OF LAW

The Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

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

David I. Goldman
U.S. Administrative Law Judge

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

APPENDIX

INSTRUCTIONS FOR COMPLETION OF PRE-JOB CONFERENCE REPORT

Please complete the attached set of Pre-job Conference and Key Men Reports in detail. This information must be available to the administrative offices of the Central Pension Fund and the IUOE and Pipeline Employers Health & Welfare Fund so that they can control the receipt and proper allocation of contributions.

The fully completed reports will also help the International Union of Operating Engineers and the Pipe Line Contractors Association to provide you with any services required of their offices.

There are four copies of each form to be distributed as follows:

(1) White – Mack Bennett, International Union of Operating Engineers
4700 Bryant Irvin Court, Ste. 302
Fort Worth, TX 76107

(2) Pink – Central Pension Fund
4115 Chesapeake Street, NW
Washington, DC 20016

(3) Green – Retained by local union representative.

(4) Yellow – Retained by employer representative.

NCR Paper, which does not require a carbon insert, has been used.

JX2

IUOE PIPELINE PRE-JOB CONFERENCE REPORT

For Office Use Only
Contractor # _____
Job # _____
Start: _____
Finish: _____
Form Sent: _____

Meeting Place: _____ Date: _____

Contractor _____ Local Union (s) _____

Awarded By _____ Superintendent _____

Job Location _____

Warehouse Location _____ Phone (_____) _____

Job Description _____

Length _____ Size of Pipe _____

Radiographic Inspection By _____

_____ASV/Brushog	_____Directional Drilling	_____Log Truck	_____Rubber Tire Backhoe
_____Bending Machine	_____Ditching Machine	_____Mechanic	_____Sideboom
_____Boom Truck	_____End Loader	_____Motor Grader	_____Skidder
_____Bulldozer	_____Farm Tractor	_____Oiler	_____Small Equip Operator
_____Challenger	_____Forklift	_____Operators on Dredges	_____Tack Tractor
_____Clam	_____Gin Truck	_____Others	_____Tow Tractor
_____Crane	_____Grease Truck	_____Rake Tractor	_____Track Hoe
_____Cutter Tractor	_____Hydrostatic Testing	_____Road Boring Machine	_____Vac Hoe

Total _____

Job to Start _____ (Required) Approximate Completion _____ (Required)

Date of First Fringe Benefit Reports _____

REPORTS TO BE MADE TO:			Group 1	Group 2	Group 3
Central Pension Fund	Yes X	No _____	Amount $ _____	Amount $ _____	Amount $ _____
Pipeline Health & Welfare Fund	Yes X	No _____	Amount $ _____	Amount $ _____	Amount $ _____
Local Pension Fund	Yes _____	No _____	Amount $ _____	Amount $ _____	Amount $ _____
Local Welfare Fund	Yes _____	No _____	Amount $ _____	Amount $ _____	Amount $ _____
Other Local Fringes	Yes _____	No _____	Amount $ _____	Amount $ _____	Amount $ _____

This Work is Covered Under the Terms and Conditions of the: 16" Addendum _____ 12" Addendum _____

Company to Get Basic Data Card Filled Out: Yes _____ No _____

Company to Furnish Payroll List Each Pay Period: Yes _____

Hiring Plan: Yes _____ Hours _____ Days _____
No _____ Hire on 1 & 1 Basis Yes _____ No _____
Check off of Union Dues Yes _____ No _____ Payday _____
Local (s) to Furnish Forms: Yes _____ No _____ CPF Poster: Yes _____ No _____
Where Are Unemployment Comp. Payments Made: (State) _____ Notice Posted _____
Steward _____ Date to Report _____
To Whom _____ Work _____
Remarks: _____

Hourly Rates: Group 1 _____ Group 2 _____ Group 3 _____

The undersigned hereby agree that this job is covered by the terms of the current National Pipeline Agreement for the United States of America as executed by the International Union of Operating Engineers and the Pipe Line Contractors Association

For Company: _____
Jobsite Address: _____
_____
Jobsite Phone No. (_____) _____

For Union: _____
_____
_____

MAIL REPORTING FORMS
To: _____
Address: _____
_____

White Copy To: Mack Bennett
International Union of Operating Engineers
4700 Bryant Irvin Court, Suite 302
Fort Worth, TX 76107

DECW 48

KEY MEN

Name	Social Security No.	Required Local Information (if any)	Registration No.	Classification

White Copy to:

Mack Bennett
International Union of
Operating Engineers
4700 Bryant Irvin Ct., Ste. 302
Fort Worth, TX 76107

UECW 400