

NACCO Material Handling Group, Inc. and Independent Lift Truck Builders Union. Case 25–CA–083948

June 21, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On April 24, 2013, Administrative Law Judge Christine E. Dibble issued the attached decision. The Acting General Counsel filed limited exceptions with supporting arguments.¹

The National Labor Relations Board has considered the decision and record in light of the exceptions and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, NACCO Material Handling Group, Inc., Danville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Independent Lift Truck Builders Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s employees in the unit set forth below.

(b) Unilaterally changing the terms and conditions of employment of its unit employees.

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

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

(a) Furnish to the Union in a timely manner the employee discipline information requested by the Union

¹ The Acting General Counsel’s exceptions are limited solely to the judge’s inadvertent failure to incorporate fully her proposed Order regarding the Respondent’s unlawful unilateral change to its past practice into her proposed notice to employees.

The Respondent did not file any exceptions, including to the judge’s rejection of its argument that the Board, and its agents and delegates, lack the authority to act because the President’s recess appointments of Members Griffin and Block are constitutionally invalid. In any event, we would reject that argument for the reasons stated in *Bloomington, Inc.*, 359 NLRB 1003 (2013).

² We agree with the Acting General Counsel’s limited exceptions. We shall also modify the judge’s recommended Order to conform to the Board’s standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

orally on March 16, 2012, and in writing on March 30, 2012.

(b) Rescind the unlawful unilateral change in the established past practice of allowing the union vice president to use the company-paid time allocated to the chief steward when substituting for the chief steward.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All production and maintenance employees at NACCO Material Handling Group, Inc., located within Vermilion County, Illinois, excluding watchman, foreman, employees in a supervisory or confidential capacity, and all employees on the salaried payroll.

(d) Within 14 days after service by the Region, post at its facility in Danville, Illinois, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 16, 2012.

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

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to bargain collectively with the Independent Lift Truck Builders Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of employees in the unit described below.

WE WILL NOT unilaterally change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL furnish the Union in a timely fashion the employee discipline information it requested on March 16 and 30, 2012.

WE WILL rescind the changes to the established past practice of allowing the union vice president to use company-paid time allotted to the Union to serve in the role of the absent chief union steward.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All production and maintenance employees at NACCO Material Handling Group, Inc., located within Vermilion County, Illinois, excluding watchman, foreman, employees in a supervisory or confidential capacity, and all employees on the salaried payroll.

NACCO MATERIAL HANDLING GROUP

Raifael Williams, Esq., for the Acting General Counsel.
Richard S. McAtee, Esq., for the Respondent.
Martin P. Barr, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge.¹ This case was tried in Danville, Illinois, on December 4 and 5, 2012. The Charging Party, Independent Lift Truck Builders Union (the Union), filed the charge in Case 25-CA-083948 on July 26, 2012.² The Regional Director for Region 25 Subregion 33 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on September 22, 2012. The Respondent filed a timely answer on October 8, 2012, denying all material allegations in the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA/the Act) when (1) on or about March 2012, the Respondent failed and refused to provide the Union with relevant and necessary information related to the discipline of a union member,³ and (2) since on or about April 12, 2012, the Respondent has refused to allow the union vice president to use company time allotted to the Union to serve in the role of the absent chief union steward.⁴ (GC Exh. 1.)⁵

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, warehouses and distributes aftermarket parts for its global affiliates and North American dealers from its parts distribution center (PDC) in Danville, Illinois. (Tr. 16.) The Respondent annually sells and ships from its Danville, Illinois facility goods valued in excess of \$50,000 directly to points outside the State of Illinois. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

¹ The Respondent argues that any actions taken by this Board, including its agents and delegates, lacks authority because the court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), found the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid. Thus, the Board lacks a quorum. The Board does not accept the decision in *Noel Canning*, in part, because it is the decision of one circuit court and there is a conflict in the circuits regarding this issue. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

² All dates are in 2012, unless otherwise indicated.

³ This allegation is alleged in pars. 6(d) and 8 of the complaint.

⁴ This allegation is alleged in pars. 7(a) and 8 of the complaint.

⁵ Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

II. ALLEGED UNFAIR LABOR PRACTICES

Overview of the Respondent's Operation

The Respondent operates a PDC in Danville, Illinois, that warehouses and distributes parts for lift trucks to dealers in North America and globally. In the 1990s, the Respondent purchased Hyster-Yale Material Handling Company (Hyster), which manufactured forklift trucks in Danville, Illinois. During that period, the Respondent operated three facilities in Danville, Illinois: a manufacturing plant, marketing center, and the PDC. (Tr. 14–15.) The manufacturing plant produced lift trucks, also referred to as forklift trucks. The marketing center handled “the marketing operations of the company.” (Tr. 17.) In 2001, the Respondent closed the manufacturing plant in Danville, Illinois, and sometime thereafter closed the marketing facility. (Tr. 18.) The Respondent's remaining facility, the PDC, currently employs approximately 89 workers who are members of the Union.

At all material times since approximately 1952, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following bargaining unit:

All production and maintenance employees at NACCO Material Handling Group, Inc., located within Vermilion County, Illinois, excluding watchman, foreman, employees in a supervisory or confidential capacity, and all employees on the salaried payroll.

The Union and the Respondent have entered into successive collective-bargaining agreements (CBA), the most recent of which is effective from June 4, 2012, to June 7, 2015. (GC Exh. 1.) The CBA relevant to the issues before me was effective from June 8, 2009, to June 3, 2012. (R. Exh. 1.)

Michael Gregory (Gregory) began his employment with Respondent in March 1992. Since July 2008, Gregory has been the director of parts operations. From October 2006 until July 2008, he was the manager of distribution operations in the PDC. Prior to October 2006, he served as the manager of customer satisfaction. (Tr. 154–155.) In his current position, Gregory oversees the operations in the PDC, including employee salaries, the operations area of the human resources department, and shipping operations for Respondent's North American dealers. (Tr. 11.) Crissy Duitsman (C. Duitsman) has been employed by Respondent since October 1991. Since February 2011, she has been the human resources manager. She oversees salary and benefits administration, labor relations, payroll, timekeeping, workers' compensation program, and staff training. (Tr. 12, 169–170.) From 2005 until February 2011, C. Duitsman was a supervisor in human resources. (Tr. 169–170.)

The Union Executive Board Elected between 2009
through 2012

In February, the Union holds an annual election for its bargaining members to select the executive board. In 2012, the executive board members were: Todd Duitsman (T. Duitsman),⁶ president; Eugene Cox (Cox), vice president; Thomas Odle (Odle), chief steward; Tom Hubbard (Hubbard),

⁶ Todd and Crissy Duitsman are not related by birth or marriage. (Tr. 178.)

treasurer; Tom White (White), secretary; and Connie Cheesman (Cheesman), sergeant-at-arms. (Tr. 29, 61, 137, 156.) All of the executive board members elected in 2012, except for Cox, have held the same union positions since 2010. Cox was the vice president in 2011 and 2012. Robert Lack was the vice president of the Union in 2010. The 2009 executive board members were: President Lauren Brown, Vice President Michael Weese, and Chief Steward Harry (Butch) Watson (Watson). On or about July 1, 2009, however, Weese served as chief steward for 1 month. Effective August 1, 2009, Rick High (High) replaced a retiring Watson as the chief steward. (Tr. 123–125, 205; GC Exh. 2.)

The Union's Request for Information in March 2012

At an unknown date in 2012, C. Duitsman received a complaint that an employee, Edward Hall (Hall), had sexually harassed a coworker. She held a meeting with Hall to notify him of her investigation into the allegations against him. During that first meeting and a subsequent meeting, she asked him if he wanted union representation. He declined and informed her that he wanted to keep the matter “private.” (Tr. 150–151, 175–176.) Hall was subsequently issued discipline for subjecting a coworker to sexual harassment. (Tr. 149–150.)

In March, T. Duitsman was informed by an unnamed source that an employee, Hall, might have been disciplined by management for the alleged sexual harassment of a coworker. (Tr. 33.) Therefore, on or about March 16, T. Duitsman met with C. Duitsman and verbally requested information regarding the disciplinary action Respondent was or had taken against Hall. C. Duitsman declined to provide him with information.⁷ (Tr. 32–33.) During this same timeframe, Odle met with C. Duitsman to ask if management was or had taken disciplinary action against Hall for his purported sexual harassment of a coworker. C. Duitsman informed him that she could not discuss the matter. (Tr. 62.) Subsequently, T. Duitsman and Odle composed a written request for information dated March 30 and Odle submitted the following to C. Duitsman:

I would like to formally request an answer to my question about any disciplinary action done, or planned to be done, to Ed Hall concerning Maria Munioz on about March 16th. I'm not asking for any details in the matter except for any disciplinary action you may intend. [GC Exh. 3.]

In response to the written request, C. Duitsman verbally informed Odle that the Union had to ask Hall for the information because he had requested that the matter be kept confidential. (Tr. 177.) C. Duitsman provided uncontroverted testimony that she also told Hall the Union had made a request for information about his discipline, and he responded that he would “handle” the request if the Union approached him. (Tr. 178.) As of the date of the hearing in this matter, the Respondent has not provided the requested information.

⁷ C. Duitsman denied that T. Duitsman presented a verbal request to her for information about the discipline issued to Hall on approximately March 16, 2012. (Tr. 177–178.) Based on the entire record and T. Duitsman's overall demeanor, I credit his testimony on this point.

Respondent's Timekeeping Procedures Pre
and Post 2005

The evidence is undisputed that prior to late 2008, the Respondent's employees used paper timecards to record their work hours and absences. (Tr. 42, 71, 222–223, 237.) At the start of their shift, the employees' start time would be recorded on a paper timecard and at the end of the shift the time they stopped working would likewise be reported on that same timecard.⁸ (Tr. 240–241.) If the employee was unavailable or forgot to sign out ("punch out") at the end of the shift, the supervisor (also referred to as foreman) would write on the timecard the number of hours the employee worked and initial the entry. (Tr. 241.) In late 2008, the Respondent implemented a computerized "swipe card" system to electronically track the time and attendance of employees. The evidence is undisputed that the paper time and attendance records have been destroyed pursuant to the Respondent's document retention schedule. (Tr. 222.) Respondent produced relevant portions of those records which established that from 2009 until at least through March 2012, the union vice president has used company-paid time allocated to the union president while the president was on vacation. (R. Exhs. 3–16.) The evidence is undisputed that this is a practice that has been allowed by the Respondent for many years. (Tr. 75, 162.)

Allocation of Company-Paid Time for Union Business

The evidence presented by the parties reveals a long history regarding the use of company-paid time to conduct union business. The evidence is undisputed that the CBA covering the period at issue (or past CBAs) does not contain a provision authorizing company-paid time for union representatives to conduct union business during work hours and the allocation of that time among the union representatives. However, dating at least to the 1980s, the Respondent has provided this benefit to the Union's officers. (Tr. 79, 96, 119, 130, 138; R. Exh. 1.) The amount of paid time the Respondent authorized the union officers for conducting union business during business hours has varied over the years. In 2003, the Respondent and the Union agreed to a reduction in company-paid union time. (GC Exh. 2.) Effective April 14, 2003, the Respondent reduced the paid time for union business to 50 hours a week. The hours were allocated in the following manner: 40 hours a week for the president and 10 hours for the chief steward. (GC Exh. 2.) Pursuant to a request from the Union, in July 2009, the company-paid hours were reallocated as follows: 40 hours a week for the president, 6 hours a week for the chief steward, 2 hours a week for the treasurer, and 2 hours a week for the secretary. (GC Exh. 2.) By memorandum dated March 13, the Respondent informed the Union that because of the reduction in the bargaining unit membership, effective April 2, 2012, it would reduce the company-paid hours for union business to 20 hours a week. The memorandum read in part:

This time can be allocated as 10 hours per week for the Union President, 6 hours per week for the Chief Steward, 2 hours per

week for the Treasurer and 2 hours per week for the Secretary, or in whatever other method the Union believes best serves its interests. Likewise, work would be made available for your return to the floor.

The amount and allocation of the company-paid hours as set forth in the March 12 memorandum was in effect during the period at issue.⁹ (Tr. 66, 172; R. Exh. 2.)

The Union's Vice President's use of Company-Paid
Hours Allotted to the Chief Steward

In March 2012, a dispute arose between the parties regarding the allocation of company-paid time for union business. The parties introduced conflicting evidence consisting of testimony about the allocation of company-paid hours before the changes in April 2003. Gregory and C. Duitsman testified that since they started working for Respondent, in 1992 and 1991 respectively, Respondent has not allowed the vice president, in the chief steward's absence, to use the company-paid time allocated to the chief steward. (Tr. 162, 190–181.) However, several past union vice presidents (T. Duitsman, Dennis Askins, Lauren Brown, and Robert Lack) testified that extending back to at least 1988, they used the company-paid hours to perform, during work hours, the chief steward's union duties in his absence. (Tr. 79–80.)

In 2001, T. Duitsman was the Union's vice president and worked in the manufacturing facility. In August 2001, he performed Chief Steward Watson's union duties while Watson was on a month-long vacation. T. Duitsman provided undisputed testimony that he notified then Operations Manager Brent Hegen or Jan Vorheese that he was substituting for Watson. Again, he provided uncontroverted testimony that he received his normal paycheck with no decrease in his pay for the hours he substituted for the chief steward.

Dennis Askins (Askins) was employed by the Respondent from 1969 to 2000 as a warehouse worker. He ended his career working in the Respondent's PDC. During his tenure of employment, he held several union positions at the Respondent's facility. Most significantly, he served as the Union's vice president in 1988 and 1989 and again from 2002 to February 2003. (Tr. 78.) Askins testified that as the union vice president he used company-paid time to substitute for Danny Wells (Wells) the chief steward in the assembly plant and Chief Steward Owen Barney (Barney) in the manufacturing plant. However, he primarily substituted for Watson in the PDC.¹⁰ (Tr. 79–81.)

⁹ C. Duitsman gave undisputed testimony that the terms of the March 12 memorandum were implemented. (Tr. 172.)

¹⁰ Respondent, through testimony from Gregory and C. Duitsman, denied that it has ever allowed the Union's vice president to utilize the company-paid hours allocated to the chief steward in his absence. However, I credit Askins' testimony that during his tenure as vice president, he substituted for the chief steward when he was absent and used the company-paid hours allocated to the chief steward for union duties. I find Askins' detailed testimony was more persuasive and probative than that of Gregory and C. Duitsman. While Askins' testimony was corroborated by six credible witnesses, the Respondent provided no corroborating testimony or more importantly documentation to support the testimony of Gregory and C. Duitsman on this point. I find

⁸ C. Duitsman gave undisputed testimony that the paper copies of the employees' recorded time and attendance prior to 2009 have been destroyed pursuant to their retention schedule. (Tr. 221–222.)

Lauren Brown (Brown) worked for the Respondent from 1966 to 2012. While employed he served as the union vice president from 2003 to 2006 and president from 2006 to February 2010. He recalled that as the vice president, in 2003 he used company-paid time to perform the chief steward duties for Watson while he was on vacation. (Tr. 96, 110–111, 115.) During the time he was president of the Union, the vice president used the company-paid hours to substitute for the chief steward in his absence.¹¹ (Tr. 116.)

From 1969 to 1970 and again from 1989 to 2011, Robert Lack (Lack) worked for the Respondent. At the time of his retirement, Lack worked as a warehouse associate in the PDC. (Tr. 94.) Lack was the Union's vice president from 1998 to 2000. During his tenure as vice president, Watson was the chief steward in the PDC and Wells served as the chief steward for the assembly plant. He used the company-paid time allotted to Chief Stewards Watson and Wells when he substituted as the chief steward in their absence.¹² (Tr. 129–131.) He was always paid for the time he substituted for the chief steward and his paycheck was never docked for the time. (Tr. 239–241.) There is no evidence to contradict him on this point. Lack also testified without contradiction that he notified his foreman when he substituted for the chief stewards. (Tr. 134, 241.)

Michael Weese (Weese) was employed by the Respondent as a warehouse associate from October 1969 to March 2012. (Tr. 117.) He served as the Union's vice president from 2006 to 2009. In August of 2006, 2007, 2008, and 2009 he used company-paid time allotted to the chief steward (Watson) while he was on a month-long vacation. He would perform the chief steward's duties 3 days a week for 2 hours each day.¹³ (Tr. 117–118) Upon Watson's retirement on July 1, 2009, Weese acted as the chief steward until August 2009 when Rick High (High) was permanently placed in the position. (Tr. 123–126.)

that the totality of the evidence is consistent with Askins' testimony on this point.

¹¹ Despite Gregory's and C. Duitsman's contradictory testimony, I credit Brown's testimony of this point. Brown's testimony was consistent with the record and there is credible testimony corroborating his version of events. Further, I find that his overall demeanor adds to the credibility of his testimony.

¹² Despite Gregory's and C. Duitsman's testimony to the contrary, I credit Lack's testimony on this point. Lack's testimony was consistent with the record and there is credible testimony corroborating his version of events. Further, I find that his overall demeanor adds to the credibility of his testimony.

¹³ Again, the Respondent presented testimony from Gregory and Duitsman to prove that it has never had a policy to allow, in the chief steward's absence, the Union's vice president to substitute for and use the company-paid hours allotted to him. I credit Weese's testimony that he used company-paid time to substitute as the chief steward in Watson's absence. There is no evidence that prior to 2006 Gregory had responsibility for or played a role in union-management relations. Thus, there is no evidence that he would have been knowledgeable about the agreed on past practice between the Union and the Respondent regarding the vice president's use of company-paid time to substitute for the chief steward in his absence. I also find Weese's testimony more credible than C. Duitsman's testimony because it was corroborated by six credible witnesses and his overall demeanor added to the credibility of his testimony.

Eugene Cox (Cox) has worked for the Respondent for 43 years. His current position is carpenter. He became the Union's vice president in February 2011. (Tr. 137, 141.) In 2011, he substituted for the chief steward (Odle) for a week. (Tr. 139, 144.) Cox provided undisputed testimony that he used the company-paid time to perform Odle's chief steward duties, and notified his supervisor at the time, Tony Forshee (Forshee) or Bob Andrews (Andrews). (Tr. 138–139.) In 2012, Cox also performed the chief steward duties while Odle was absent.¹⁴ Again, Cox provided undisputed testimony that he notified Forshee who approved it. (Tr. 145.)

March 12, 2012, Respondent Precluded the Union from Reallocating the Chief Steward's Company-Paid Hours

During the period March 12 to 16, Odle took vacation. (R. Exh. 16.) On approximately March 12, T. Duitsman informed C. Duitsman that Cox would use the company-paid time to substitute as chief steward for Odle in his absence. However, C. Duitsman told him that the Respondent had never allowed the type of substitution proposed by T. Duitsman and would not change its position on the matter. Further, C. Duitsman informed him that Cox would be charged 2 hours of pay if he substituted as chief steward for Odle in his absence. T. Duitsman responded to her that in 2000, he substituted for Watson (chief steward) for a month. (Tr. 36, 181–182.) C. Duitsman again repeated that this type of substitution had never been permitted. (Tr. 36.) She also told “. . . him [Cox] the same thing. I let him know that we have not allowed that and that we were not going to start allowing that.” (Tr. 182.) The evidence is undisputed that as a result of C. Duitsman's articulation of management's position, none of the Union's vice presidents have since used company-paid hours to substitute for the Union's chief stewards in their absence.

III. DISCUSSION AND ANALYSIS

Legal Standards

Section 8(a)(5) of the Act mandates that an employer provides a union with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). “[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967). Information requests regarding bargaining unit employees' terms and conditions of employment are “presumptively relevant” and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 649 (2010), enf'd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). The standard for establishing relevancy is the liberal, “discovery-type standard.” *Alcan Rolled Products*, 358 NLRB 37, 40 (2012), citing and quoting applicable authorities.

¹⁴ Cox testified that it was in May or June 2012 that he substituted for Odle. However, I find that the evidence supports that Odle confused the dates and after March 12, 2012, he did not serve as chief steward in Odle's absence.

In *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992), the Board summarized its application of these principles as follows:

... the Board has long held that Section 8(a)(5) of the Act obligates an employer to furnish requested information which is potentially relevant to the processing of grievances, an actual grievance need not be pending, nor must the requested information clearly dispose of the grievance. It is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731.

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

The law is well settled that the type of information request at issue, disciplinary action of a unit employee, is presumptively relevant and must be furnished on request. See *Booth Newspapers, Inc.*, 331 NLRB 296 (2000), and the cases cited therein; See also *Salem Hospital Corp.*, 359 NLRB No. 82 (2013), (employer violated Sec. 8(a)(5) of the Act when it ignored and refused to furnish the requested disciplinary records).

March 2012 the Respondent's Refusal to Agree to the Union's Request for Information

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when on or about March 2012, the Respondent failed and refused to provide the Union with relevant and necessary information related to the discipline of a union member.

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

1. Relevancy of information

The Respondent asserts it was justified in its refusal to produce the requested information because it was not relevant and thus not required to disclose it. Since the requested information relates to discipline of bargaining unit employees, it is presumptively relevant and the burden is on the Respondent to rebut the relevancy. *Leland Stanford Junior University*, supra at 80.

The Respondent argues the information is not relevant because a grievance was not filed on behalf of Hall, nor was a grievance filed or pending on behalf of any other bargaining unit employee who was subject to the same type of discipline. The Respondent contends that the speculative nature of the Union's concern makes its request irrelevant and premature.

I find that the Respondent's argument fails to overcome the presumptive relevant nature of the requested information. The Union requested information on whether a bargaining unit em-

ployee, Hall, had been disciplined for allegedly harassing a coworker. T. Duitsman and Odle credibly testified that they needed the information to ensure that the Respondent was and would in the future consistently mete out discipline to its employees according to the terms of the CBA. T. Duitsman testified the Union needed the information, "In case something arose later on with another individual, we'd like for them to be treated pretty—same way that this individual was treated. We like to be consistent. That way, the—if something happened later on with another individual, we'd try to see that it's handled the same way." (Tr. 35.) Odle confirmed that the Union asked for the information to ensure that discipline for future similar acts would be issued uniformly. (Tr. 63, 75.)

I find that the requested information is necessary for the Union to effectively monitor and enforce the terms of the CBA. Its access to Hall's discipline information enables it to compare discipline issued to employees for similar violations and ensure that the Respondent is consistently implementing the discipline of bargaining unit employees. Additionally, the information requested in this matter is relevant and necessary because it enables the Union to make a determination on whether to file a grievance on behalf of not only Hall, but other unit employees who might have unknowingly been the victim of discriminatory discipline. This is a legitimate function of the Union and the requested information is necessary for it to fulfill that duty. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731(1973).

The Respondent maintains that the request for information is premature because a grievance had not been filed. However, the Board has held that the union is not required to wait until a grievance is pending to make a request to the employer for relevant and needed information. The law dictates that the Union is entitled to the information at issue to determine if it is prudent and appropriate to file a grievance. *Ohio Power Co.*, 216 NLRB 987 (1975); *Leland Stanford Junior University*, supra.

The Respondent also argues that the Union does not have an interest in Hall's discipline because he did not want the Union to file a grievance on his behalf. The Respondent contends that the CBA provides "... the employee (and not the Union) must institute the grievance process." (R. Br.) I, however, must agree with the Charging Party's counter argument that to accept the Respondent's argument "... the Union's right to enforce virtually any provision of the Agreement [would be] subject to the whims of bargaining unit employees. Its right to information will be dependent upon, and be controlled by, the desire of employees to file grievances." (CP Br.) This is not an outcome envisioned by the Act. While the CBA describes the grievance procedure in terms of an employee's right to file, the Union is empowered by the Act with enforcing the Respondent's obligations under the CBA through the grievance process or any other legal means. To accept the Respondent's argument would be to strip the Union, for all practical purpose, of its statutory duties as the exclusive bargaining representative of unit employees and its powers to enforce violations of the CBA. *United Graphics, Inc.*, 281 NLRB 463, 465 (1986) (the Board held that information presumptively relevant to the un-

ion's role as bargaining agent must be provided to the union as it "relates directly to the policing of contract terms").

Second, there is no provision in the CBA that prohibits the Union from filing without the authorization of the employee or group of employees. (R. Exh. 1.) T. Duitsman gave undisputed testimony that the Union has filed a grievance on behalf of a group of employees without the signature of a specific employee on the grievance. (Tr. 52.) The record does not establish that the Union explicitly (or implicitly) waived its right to file grievances on behalf of employees without their consent. The Board requires a waiver of a union's right to file a grievance be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962). "A clear and unmistakable waiver may be found in the express language and structure of the collective-bargaining agreement or by the course of conduct of the parties. The burden is on the party asserting waiver to establish that such a waiver was intended." *Leland Stanford Junior University*, supra. See also *NLRB v. New York Telephone Co.*, 930 F.2d 1009 (2d Cir. 1991), enfg. 299 NLRB 44 (1990); *United Technologies Corp.*, supra. Given the lack of a clear and express waiver in the CBA or elsewhere, I find that the evidence shows the Respondent has failed to sustain its burden.

2. Confidential information

The Respondent further defends its position arguing it was justified in not providing the information because it was confidential and Hall asked that it remain so. In addition, the Respondent posits that the Union could have asked Hall directly for the information. I reject the Respondent's defense on both counts.

It is well-settled law that the party asserting confidentiality has the burden of proof. *Postal Service*, 356 NLRB 483 (2011); *Detroit Newspaper Agency*, supra; *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006). Even assuming that the Respondent meets its burden, it cannot simply refuse to furnish the information, but rather must engage in accommodative bargaining with the Union to seek a resolution that meets the needs of both parties. In *Alcan Rolled Products*, supra at 15, the Board explained:

Confidential information is limited to a few general categories that would reveal, contrary to promises or reasonable expectations, highly personal information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Such confidential information may include "individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits." *Id.* Additionally, the party asserting the confidentiality defense may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Id.* at 1072.

As set forth earlier in the decision, C. Duitsman convened a meeting with Hall to notify him that he was under investigation

for charges of sexual harassment filed against him by a coworker. It is undisputed that C. Duitsman asked Hall on two occasions if he wanted the Union involved in the matter and he declined. It is also undisputed that Hall asked C. Duitsman not to discuss the matter with anyone, including the Union. He told her that if approached by the Union for information, he would "handle" it. In response to the Union's oral inquiry to C. Duitsman about the discipline issued to Hall, she refused to give it the requested information and instructed the Union to contact Hall for the information. It is clear that in its second request to C. Duitsman, which the Union submitted in writing, it was attempting to accommodate the Respondent's confidentiality concerns by narrowing the scope of its requests. The Union did this by noting in its request, "I'm not asking for any details in the matter except for any disciplinary action you may intend." (GC Exh. 3.) It is equally clear, however, that the Respondent took no steps towards working with the Union to reach an accommodation.

Equally unpersuasive is the Respondent's argument that the Union could have obtained the information from Hall. In *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), the Board held, ". . . the availability of information from another source does not alter a party's duty to provide relevant and necessary information that is readily available." I have found that the information requested was relevant and necessary. Further, the facts unequivocally establish that the Respondent had the information readily available. The facts clearly show that the Respondent did not make a valid attempt at an accommodation.

The Respondent's additional argument against providing the Union with the requested information is the Union did not renew its request to C. Duitsman. As previously noted, the Board has held where an employer does not timely respond to a request for information the union does not have to repeat the request. *Bundy Corp.*, supra at 672. Consequently, the Respondent's argument fails.

The Respondent finally argues that there is nothing in the CBA that requires the Respondent to provide copies of employees' disciplinary records to the Union. This argument is not supported by the law. The CBA's silence on this issue does not abrogate the Respondent's statutory obligation under the Act. Again, the Board has clearly held that the information on disciplinary actions of bargaining unit employees is presumptively relevant. *Leland Stanford Junior University*, supra at 80. Therefore, the CBA's silence on the information request is irrelevant.

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

The Respondent's Unilateral Change in the use of Company-Paid Hours for Union Business

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when since on or about April 12, 2012, the Respondent, without prior notice to the Union and without giving the Union an opportunity to bargain with the Respondent, unilaterally prohibited the union vice president from using in the chief union steward's absence the company time allocated to the chief union steward.

I find that the Respondent unilaterally changed the past practice of the allocation of company-paid time for union business without providing the Union with prior notice and an opportunity to bargain over the change. I also find that the allocation of company-paid time for union business is a mandatory subject for bargaining.

The law is well settled that an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). The remuneration of union representatives for time spent administering the CBA is a mandatory subject of bargaining and, hence, a unilateral change therein likewise constitutes a refusal to bargain. *BASF Wyandotte Corp.*, 276 NLRB 1576 (1985); *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986); *BASF Wyandotte Corp.*, 278 NLRB 173 (1986). In *Axelton, Inc.*, 243 NLRB 414, 415 (1978), the Board defined mandatory subjects of bargaining as:

those comprised in the phrase “wages, hours, and other terms and conditions of employment” as set forth in Section 8(d) of the Act. While the language is broad, parameters have been established, although not quantified. The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.

In *Axelton, Inc.*, supra, the Board held that remuneration of union representatives for carrying out union duties are “union-related matters [that] inure to the benefit of all of the members of the bargaining unit by contributing to more effective collective-bargaining representation and thus “vital affect” the relations between an employer and employee.” Id. at 415. Accordingly, unilateral action that substantially changes such a contractual term or past practice violates Section 8(a)(5) and (1) of the Act. See *Logemann Bros. Co.*, 298 NLRB 1018 (1990) (employer violated Sec. (a)(5) and (1) when it unilaterally ceased paying employees for time spent in contract negotiations and grievance processing); See also *Arizona Portland Cement Co.*, 302 NLRB 36 (1991) (employer violated Sec. 8(a)(5) and (1) when it unilaterally ceased allowing employee representatives to conduct union business during work hours with compensation).

The fact that a specific working condition or benefit is not expressly set forth in the governing collective-bargaining agreement is immaterial where satisfactorily established by practice or custom. See *Hotel Texas*, 138 NLRB 706, 712–713 (1962), enfd. 326 F.2d 501 (5th Cir. 1962); *Frontier Homes Corp.*, 153 NLRB 1070, 1072–1073 (1965); *Central Illinois Public Service Co.*, 139 NLRB 1407, 1415 (1962), enfd. 324 F.2d 916 (7th Cir. 1963). Regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if not addressed in a collective-bargaining agreement. Therefore, these past practices cannot be changed without offering the unit employees’ collective-bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), citing *Granite City Steel Co.*, 167

NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). This applies even for a practice that is denominated a “privilege,” voluntarily instituted or bestowed by the employer. *Central Illinois Public Service Co.*, 139 NLRB at 1415. However, a past practice must occur with such regularity and frequency that employees could reasonably expect the “practice” to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353–354 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999).

As cited above, I found credible the testimony of past and present union vice presidents and chief stewards that there was a longstanding practice of the Respondent allowing the vice presidents to use the company-paid hours allotted to the chief steward while substituting for the chief steward in his absence. I further find that the Respondent unilaterally ceased the past practice on or about 2009 but the Union was not notified of the change until April 12, 2012.

The evidence is undisputed that in late 2008, the Respondent implemented an electronic swipe card system to track employees’ time and attendance. (Tr. 222.) Based in part on those records, the Respondent was able to establish that starting in 2009 for each occasion the vice president was compensated for performing union business, he was acting for the president in the president’s absence. (R. Exhs. 3–16.) As previously noted, the Respondent admits that it allows the vice president to use the time allotted for the president in his absence. (Tr. 162.) The records also show that beginning in 2009, whenever the vice president substituted for the chief steward and received compensation for the entire workday, it was because the vice president was also acting for the president in his absence. I find that this undisputed evidence establishes that beginning in 2009 the Respondent unilaterally ceased the past practice of allowing the vice president to use company-paid time allocated to the chief steward when substituting for the chief steward in his absence.

I find, however, that the Respondent waited until April 12, to notify the Union that it was unilaterally ceasing the practice of allowing the reallocation of company-paid hours for the chief steward. Furthermore, the Union could not reasonably have known until April 12, when told by the C. Duitsman, that the Respondent had stopped the past practice at issue. The evidence established that on April 12, during an exchange between T. Duitsman and C. Duitsman, C. Duitsman instructed him that in the chief steward’s absence the company-paid time could not be reallocated to the vice president to use while acting for the chief steward. There is no evidence that prior to this conversation the Respondent told the Union about the change in practice. Although the Respondent argues the Union is time barred from prevailing on this charge, I reject that argument. I agree the Union would have been time barred from prevailing on this issue if I had found the Union had notice or should have reasonably known of the change in policy soon after it was implemented in 2009. However, the evidence does not support such a finding. None of the union officials that served from 2009 to 2012 testified that they were proficient in the administration of

the computerized time and attendance system implemented in late 2008. There is no evidence that they had access to the system or training on the use of the system other than to swipe their card at the start and end of their shifts. The Respondent did not dispute their testimony on these points. On the contrary, C. Duitsman testified that the computerized time and attendance system is under the “control” of the human resources department, for which she has the ultimate responsibility. (Tr. 184–185) Therefore, from 2009 to April 12, the union officers would have been unaware of the unilateral change to the policy at issue as documented by the new computerized system.

Next, I turn to the question of whether after notifying the union of the unilateral change in the past practice at issue the Union was provided a reasonable opportunity to bargain over the change. The duty to bargain, however, only arises if the changes are “material, substantial and significant.” *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001). The General Counsel bears the burden of establishing this element of the prima facie case. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006).

I find that the unilateral change to the past practice at issue significantly impacts the Union’s ability to represent its unit employees in disputes that are “those most essential of employee concerns—rates of pay, wages, hours and conditions of employment.” *Arizona Portland Cement Co.*, supra. In preventing the vice president from using the company-paid hours allotted to the chief steward in his absence, the vice president would lose a significant portion of wages when substituting of the chief steward. The evidence showed that the Respondent threatened to deduct from Vice President Cox’s paycheck the hours he would have used substituting for Chief Steward Odle while he was on vacation. (Tr. 36, 41, 182.) Second, implementation of the change in policy left unit members without a representative in the chief steward’s absence to address “those most essential of employee concerns—rates of pay, wages, hours, and conditions of employment.” *Id.*

Moreover, I find that clearly the Respondent did not provide the Union an opportunity to bargain over the change prior to its implementation. The Respondent’s unilateral change of the past practice at issue was accomplished approximately 3 years prior to its notification to the Union of the change. The Respondent, therefore, could not justify its decision to effectuate the change in the past practice at issue on the failure of the Union to request bargaining. *Sunoco, Inc.*, supra at 244, 246.

Based on the evidence of record, I find that the Respondent violated Section 8(a)(5) and (1) when it unilaterally ceased the past practice of allowing the vice president to use company-paid time allotted to the chief steward when substituting for the chief steward in his absence.

CONCLUSIONS OF LAW

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

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

3. By failing and refusing to fully provide presumptively relevant information requested by the Union in its verbal request on March 16, 2012, and written request dated March 30, 2012, the Respondent, NACCO Material Handling Group, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

4. By unilaterally abandoning its established past practice of allowing the union vice president to use the company-paid time allotted to the chief steward when substituting for the chief steward, the Respondent violated Section 8(a)(5) and (1) of the Act.

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

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

REMEDY

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

The Respondent will be ordered to produce the requested and relevant information, rescind the unlawful unilateral change in the established past practice and provide the Union with the opportunity to bargain over the same, and post and communicate by electronic post to employees the attached appendix and notice.

[Recommended Order omitted from publication.]