

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

E.I. DU PONT DE NEMOURS
AND COMPANY

Case 5-CA-101359

and

AMPTHILL RAYON WORKERS, INC., LOCAL 992,
INTERNATIONAL BROTHERHOOD OF DUPONT
WORKERS

THE GENERAL COUNSEL'S BRIEF IN SUPPORT
OF EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

This is a case involving a Section 8(a)(5) failure to provide information. On June 27, 2013¹, the Region issued Complaint against E.I. du Pont de Nemours and Company (herein “Respondent” or “DuPont”) based on a charge filed on March 26 by the Ampthill Rayon Workers, Inc. International Brotherhood of DuPont Workers (herein “the Union”) alleging DuPont violated Section 8(a)(5) by failing to provide information. After a hearing in Richmond, VA on September 25, the Administrative Law Judge issued a decision on February 20, 2014. On March 10, the Parties requested an extension of time to file exceptions until April 17, which was granted by the Office of the Executive Secretary.

In her decision, the Administrative Law Judge found that Respondent violated the Act when it failed to furnish the Union with some of the information it requested concerning a grievance over the termination of employee James Lewis.² However, the General Counsel excepts to the Administrative Law Judge’s failure to find a violation concerning Respondent’s failure the Union with the remainder of the information requested, concerning Respondent’s application of common safety policies to supervisors.

As explained below, the General Counsel contends that the Union had a reasonable basis to believe, based on the information available to the Union at the time, comparable discipline issued to supervisors over safety violations would be relevant to Lewis’ termination, which the Union articulated to Respondent. Respondent never told the Union that safety policies were not

¹ Unless otherwise noted, all dates referenced will refer to the year 2013.

² The Administrative Law Judge correctly found that Paragraphs 6, 7 and some of Paragraph 11 of the Union’s request for information were relevant and Respondent’s failure to provide the information described in those paragraphs was unlawful. The General Counsel does not except to those findings and urges that the Board uphold them.

relevant to Lewis discharge nor provided the Union with information about what was relevant to Lewis' discharge.

In her decision, instead of examining the Union's reasonable belief in the requested information's relevance, the Administrative Law Judge erroneously focused the inquiry on Respondent's testimony concerning the actual causes for Lewis' termination. This faulty premise lead the Administrative Law Judge to make a determination on an issue not framed by the pleadings, the actual reasons Respondent discharged James Lewis. As fruit of this poisoned tree, the Administrative Law Judge found disciplines under the common safety policy to be irrelevant. This approach disregarded Board precedent which requires only that a union have a reasonable belief in the information's relevance.

STATEMENT OF THE FACTS

A. The Termination of James Lewis and The Lewis Site Review

In December 2012, Respondent terminated James Lewis, a bargaining unit employee at its Spruance Facility, after an incident at the plant in December 2012 that resulted in a loss of product. (ALJD p.4, lines 42-44)³. Shortly before Lewis' termination was finalized, Respondent prepared a site review document which identified relevant policies to its investigation of the incident (herein "Site Review"). (ALJD pp.4-5, lines 45, 1-2). The Lewis Site Review identifies Respondent's policies on discipline, discharge, and safety; including specific references to its Tag, Lock, Clear, Try policy (herein "TLCT Policy"). (ALJD p.5, lines 2-27).

³ This brief will use the following abbreviations: "GC Exh." for "General Counsel's Exhibit;" "Jt. Exh." for "Joint Exhibit;" "Resp. Exh." for "Respondent's Exhibit;" "U. Exh." for "Union Exhibit;" "Tr." for "Transcript page" and "ALJD" for "Administrative Law Judge's Decision."

B. Respondent's Bargaining Relationship with the Charging Party Union

The Union represents a bargaining unit of production and maintenance employees of Respondent at its Spruance Facility near Richmond, VA. (ALJD p.2, lines 34-37). Respondent and the Union have a collective bargaining relationship and a current agreement which runs from September 2012 to September 2015. (ALJD p.2, lines 32-34).

The collective bargaining agreement has a grievance procedure. (Tr. 19-20). Donny Irvin is the Union Grievance Committee Chairman, a position he has held for about 20 years. (Tr. 19-20). (Tr. 18-19). Bruce Harris, the Labor Relations Manager at the Spruance facility, serves as Respondent's representative and spokesperson for all matters dealing with the labor unions at the Spruance site. (GC Exhs. 1-C, 1-E; Tr. 95).

C. Respondent's Site Review Procedure

Respondent's plant manager and administrative staff evaluate acts of misconduct and safety rule violations at the facility using a procedure called "site review." (ALJD p.4, lines 21-24). In this procedure, Respondent's administrative staff prepare reports on acts of serious misconduct, including relevant facts and policies and a recommendation on disciplinary action, for the Plant Manager to review before making a decision about discipline. (ALJD p.4, lines 24-26). The Union does not participate in the Site Review procedure nor attend the meetings where the decision is made. (ALJD p. 4, lines 27-28).

D. Respondent's Safety Policies

All individuals working at the Spruance plant are required to adhere to common safety rules, including supervisors and bargaining unit employees. (Tr. 21, 120-121). One of the safety policies common to all individuals is the TLCT policy, which is enforced through the site review

procedure. (Tr. 23-24). Every person in the plant, including supervisors, must follow the TLCT procedure when operating a piece of equipment. (Tr. 24, 119).

If anyone in the facility, whether a bargaining unit employee or supervisor, violates the TLCT policy, Respondent conducts an investigation of the violation, called a Serious Site Incident investigation. (ALJD p.4, 30-34). The results of the Serious Site Incident investigations are contained in Serious Incident reports that are publicized for everyone in the plant to see. (ALJD p.4, lines 34-37). Supervisors review the Serious Incident reports with employees at the beginning of their shifts. (Tr. 26). The Union learns of these incidents through witnesses, affected unit employees, Serious Incident reports or from supervisors who discuss them in the beginning of shift meetings. (ALJD p.4, lines 36-38).

Respondent's policy for discharging employees is embodied in the Site Administrative Manual D-5. (ALJD p.3, lines 4-32; Resp. Exh. 1). Respondent's developmental discipline policy is embodied in Site Administrative Manual D-7. (ALJD p.3, lines 35-43; Resp. Exh. 2). Policies D-5 and D-7 do not apply to exempt employees such as supervisors. (ALJD p.4, lines 8-9). Respondent claims that it disciplines supervisors under a separate policy. (Tr. 99). Respondent claims it requires supervisors to follow the same safety rules as everyone else in the plant, and that supervisors can be disciplined for safety violations (ALJD p.4, lines 9-17).

E. The Union's Information Request

On February 27, the Union attorney Ken Henley sent Respondent attorney Chris Michalik a request for information "necessary for the Union to prepare for and present its case in the above matter (discharge of James Lewis)." (ALJD p.7, lines 15-19; Jt. Exh. 1-E) (parentheses in original). The Union's request contains 11 paragraphs, only Paragraphs 6, 7, and 11 are at issue here.

i. Paragraphs 6 and 7

Paragraph 6 requests:

Beginning on January 1, 2002[,] and continuing to December 31, 2012, for each employee who engaged in conduct considered by the Company to be a flagrant safety violation or a violation of the sleeping policy, provide the name of the employee, the date of the conduct, the nature of the conduct, the discipline administered and the employee's disciplinary status at the time of the discipline.

(ALJD p.7, lines 21-25; Jt. Exh. 1-E). Grievance Chairman Irvin testified that the Union requested the information mentioned in paragraph 6 to aid in making a determination about whether to arbitrate the Lewis grievance (Tr. 35). Specifically, Irvin explained that this information would show how Respondent treated other employees engaged in similar conduct, and whether Lewis was treated fairly. (Tr. 35).

Paragraph 7 requests:

Provide all information that was considered by the Company in making its decision to discharge Mr. James Lewis that concerns how other employees were treated in terms of discipline who engaged in flagrant safety violations or sleeping violations.

(ALJD p.7, 27-30; Jt. Exh. 1-E). Irvin testified that the Union requested this information to “find out what cases the Company considered that they compared to Lewis to so we could determine whether it was like or similar, how the disciplines were meted out in each case,” and this information helped the Union make its decision whether to arbitrate because it allowed them to compare the treatment of one employee with the treatment of other employees who had committed the same act to determine whether he or she had been treated fairly. (Tr. 36-37).

ii. Paragraph 11

Paragraph 11 has two parts, Paragraph 11(a) and Paragraph 11(b) which ask that

Respondent provide:

All documents relating to safety violations, including site incident reports, site reviews, and other investigative and/or disciplinary records, committed by the following supervisors: Lauren Ramos, Steve Sharwisky, Jim Davenport, Kevin Saunders, and Keith Estes. These actions were committed sometime in 2012 or 2013.

a. Also provide the discipline, if any, and the written record of such, administered to each of these supervisors for the actions in question.

b. Also provide the written policy from the SAMS manual regarding TLCT's that was in effect from 1/1/12 through the present. If there is a separate policy regarding TLCT's that you allege applies to supervision during the time period, please provide a copy of that policy and the date (including the written record) of when it went into effect.

(ALJD p.7, lines 32-45; Jt. Exh. 1-E).

iii. The Union's Belief in the Relevance of Paragraph 11

Irvin testified that the Union asked for the information specified in Paragraph 11(a) because Lewis' Site Review Presentation listed violations of plant safety standards and the TLCT policy as relevant information in making its recommendation to discharge Lewis. (Tr. 37). Irvin understood from bargaining unit employees who had witnessed incidents and from Serious Site Incident reports supervisors reviewed with their teams that the supervisors listed by name in Paragraph 11(a); Lauren Ramos, Steve Sharwisky, Jim Davenport, Kevin Saunders, and Keith Estes; had violated the same site-wide TLCT safety policy. (Tr. 37). Irvin testified that he also had independent knowledge of the supervisors' violations from the Serious Site Incident reports, which Respondent made available to the Union. (Tr. 41). The Serious Site Incident reports did not identify the supervisors by name, but Irvin associated the incidents with specific managers through his knowledge of the what happens in the plant and reports from employees. (Tr. 84).

Irvin testified that the Union asked for the information requested in Paragraph 11(b), Respondent's safety policy that applied to supervisors to "make sure it was the same policy we knew of." (Tr. 38-39). Irvin testified that since a bargaining unit employee, such as Lewis, could get discharged for a safety violation, the Union asked for information about the supervisors' disciplines to find out what the difference was since the supervisors named in Paragraph 11 were still working at the Spruance facility and had apparently not been terminated. (Tr. 38-39). Irvin explained the Union wanted to see if Lewis' treatment under the common TLCT policy "how he compared to those [supervisors], either favorably or unfavorably." (Tr. 43).

F. The Meeting on March 14 between Irvin and Harris

On March 14, Labor Relations Manager Harris provided Irvin with a response letter and some documents responsive to the information request. (ALJD p.8, lines 21-23; Jt. Exhs. 1, 1-F). Respondent did not provide any documents responsive to Paragraphs 6 and 7; Harris claimed to be still gathering information. (ALJD p.8, lines 24-26).

Regarding Paragraph 11, Respondent's March 14 cover letter listed the response: "Irrelevant." (ALJD p.8, line 24; Jt. Exh. 1-F). Irvin and Harris discussed Paragraph 11 during the March 14 meeting; Irvin explained to Harris the reason the Union had made the request in Paragraph 11. (ALJD p.8, lines 28-33; Tr. 46). In his testimony, Irvin described their conversation:

I asked Mr. Harris why I wasn't going to get the information, he said you're not going to get that information, you don't represent exempts. I said I understand that. I said but it's a comparison case; I need to see D-5. I said, D-5 is very broad; I need to find out how these managers were treated in their site review in regards to Mr. Lewis.

Bruce said, Donny, you're not going to get it; you know you're not going to get it. We're not going to give you any information. We don't – we're not going to tell you how we treat the managers. And I said, well, Mr.

Harris, I said, I really don't care how you treat the managers; I need to the site reviews so I can see how – why their violation was less severe than Mr. Lewis' violation. I said, I'm – I said so could you give me the information minus the discipline? He said, we're not giving you any information.

(Tr. 46: lines 5-20). Harris testified that that the only explanation he gave for refusing to provide the information requested in Paragraph 11 was that the Union did not represent exempt employees and “therefore, it's irrelevant.” (Tr. 115).

G. Henley's March 20 email to Michalik

On March 20, counsel for the Henley sent an email to counsel for Respondent Michalik, writing that the Union “disagrees” with Respondent's assessment that the information requested in Paragraph 11 is irrelevant. (ALJD pp. 8-9, lines 41-43, 1-2; Jt. Exh. 1-H). Henley repeated the rationale that Irvin had previously explained to Harris for requesting this information:

According to the Company itself, supervisors are subject to the same safety rules as employees, particularly with regard to the serious safety violations the named supervisors in paragraph 11 are believed to have committed. Accordingly, how the company treated these employees as a result of those violations relates directly to how the Company should have treated James Lewis. For this reason, the Union believes the Company's failure to provide the information in this paragraph violates its obligations under the National Labor Relations Act.

(Jt. Exh. 1-H).

H. The meeting on March 28 between Irvin and Harris

On March 28 Respondent's Labor Relations Director Harris provided Irvin with a supplemental response but no additional documents. (ALJD p.9, lines 9-15).

The March 28 letter had the typewritten response for Paragraph 11: “Irrelevant – The exempt employees listed are not part of the bargaining unit, therefore, the union does [sic] represent these employees and the case of relevancy has not been made convincingly by the union.” (Jt. Exh. 1-G). Irvin testified that on March 28 he told Harris “that Mr. Lewis was

discharged for a D-5 violation. All these managers had committed D-5 violations, so I [need] the information to see how they compared...I understand that I don't represent them, but they had to go to a site review, and I'm asking for a site review." (Tr. 52). Mr. Irvin's testimony at trial continued,

I explained to Mr. Harris the duty of –the law of the duty of fair representation, and we needed to determine whether [Mr. Lewis] was treated fairly. I told Mr. Harris I felt like they were just looking away and down from everything they put against Mr. Lewis, hoping that someone would discharge him, and they were not clear in the site review of what he was discharged for. Therefore, I needed to see the other site reviews to see how he compares.

(Tr. 52).

I. Henley's April 5 email to Michalik

On April 5, Union counsel Henley e-mailed Respondent counsel Michalik renewing the Union's request for information, writing that the information requested in Paragraph 7 (the information considered by Respondent in discharging Mr. Lewis) was "required by the Company's own written procedures" and "has been a matter for which evidence has been presented by both the Company and Union in past arbitration cases." (ALJD p.9, lines 36-43; Jt. Exh. 1-I). About Paragraph 11, Henley challenged Respondent's position that the information sought was irrelevant, explaining,

this request concerned how certain named non unit employees at the site were treated for committing safety violations similar to the one allegedly committed by James Lewis. As I stated to you in my 3/20/13 email, according to the Company itself, supervisors are subject to the same safety rules as employees, particularly with regard to the serious safety violation the named supervisors in paragraph 11 are believed to have committed. Accordingly, how the Company treated these non unit employees as a result of those violations relates directly to how the Company should have treated James Lewis. For this reason, in contrast with the Company's assertion that this information is 'irrelevant', this information is, in fact, very relevant and the Company is obligated to provide it.

(Jt. Exh. 1-I).

J. The documents Harris provided Irvin on September 23

On September 23, two days before the hearing in this case, Harris provided Irvin with some additional documents purportedly in response to Paragraphs 6 and 7. (Tr. 53). The Administrative Law Judge found this to not be a complete response to Paragraphs 6 and 7. (ALJD pp. 12, lines 24-46, 1-42).

STATEMENT OF THE QUESTIONS PRESENTED

- I. Did the Administrative Law Judge err by failing to find and conclude that the Union, based on the limited information Respondent had provided, reasonably believed the requested information about Respondent's application of its safety policies to supervisors was relevant?

- II. Did the Administrative Law Judge's err when she assessed the actual reasons for Lewis' termination?

SUMMARY OF ARGUMENT

For the reasons explained below, the Board should answer both of the questions presented in the affirmative. First, the Union's reasonable belief in the relevance of the requested information stemmed from the limited information due to Respondent's unlawful failure to provide information about its reasons for Lewis discharge, information requested in Paragraph 7; the Union was forced to rely on a Site Review report which included citations to safety policies. Believing the safety policies relevant to Lewis' discharge, the Union needed examples of Respondent's application of those policies to make comparisons useful in processing the grievance to arbitration. When the Union communicated this to respondent, its belief was subsequently reinforced by Respondent's conspicuous failure to ever disclaim the relevance of the safety policies at the heart of the Union's request.

Second, when the Administrative Law Judge made a factual determination on the actual reasons for Lewis' termination, a question not framed by the pleadings in this case, she missed the proper path of inquiry for cases involving the failure to provide information that was not presumptively relevant: assessing the reasonableness of a union's belief in the information's relevance and whether it was articulated to the employer. Instead the Administrative Law Judge wandered into the weeds around the merits of the underlying grievance. As a result of the this mistaken course of thought, the Judge, enlightened by evidence revealed at trial, weighed in on the actual reasons for Lewis' termination and concludes that the information in Paragraph 11 was not relevant. By contrast to the Judge, the Union, without the benefit of sworn testimony from Respondent's Labor Relations Manager, was kept in the darkness by Respondent's unlawful failure to provide the information requested in Paragraph 7. The Administrative Law Judge's decision let Respondent off the hook too easily, allowing of one unlawful refusal to provide information excuse Respondent from responsibility for another.

ARGUMENT

Introduction and Legal Framework

The Supreme Court has held that employers have a duty to furnish relevant information to unions regarding contract negotiations, administration of contracts and grievance processing. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) ("There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties"); *Postal Service*, 332 NLRB 635, 635 (2000). In order to trigger this obligation, a union must make a request and the information requested must be relevant to the union's collective-bargaining need. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 544 (2003).

The obligation to provide information includes responding to requests for information that aid a union in the grievance-arbitration process. *NLRB v. Acme Industrial Co.*, 385 U.S. at 438. Information sought concerning the terms and conditions of employment for bargaining unit employees is presumptively relevant and requires no specific showing of relevance. *Ohio Power Co.*, 216 NLRB 987, 988 (1975) enfd. 531 F.2d 1381 (6th. Cir. 1976). Presumptively relevant information also includes information “related to discipline of bargaining unit employees.” *Dish Network Service Corp.*, 339 NLRB 1126, 1134 (2003) (citing *Booth Newspapers, Inc.*, 331 NLRB 296, 299-300 (2000)). The Board has also held that information relied upon by an employer when denying an employee’s request to transfer was presumptively relevant. *Postal Service*, 337 NLRB 820, 821 (2002).

The issue raised on appeal concerns requests for information about individuals outside the bargaining unit. Such information is not presumptively relevant and the Union bears the burden of establishing relevance. *United States Testing*, 324 NLRB 854, 859 (1997) enfd. 160 F.3d 14 (D.C. Cir. 1998); *Reiss Viking*, 312 NLRB 622, 625 (1993). The test for relevance is a liberal, “discovery-type standard.” *NLRB v. Acme Industrial Co.*, supra, 385 U.S. at 437. A union must articulate the reason for the relevance to the employer unless the relevance of the information is apparent under the circumstances. *Disneyland Park*, 350 NLRB 1256 (2007). A union satisfies its burden when it demonstrates a reasonable belief in its relevance supported by objective evidence for requesting the information. *United States Testing*, supra. A union must offer “more than a mere suspicion for it to be entitled to the information.” See *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1988). In assessing alleged violations of the duty to provide information, the Board does not rule on the merits of the grievance, nor is the requesting union obligated to show that the information requested is accurate, not heresy, or reliable. *Postal*

Service, 337 NLRB 820, 822 (2002). The information requested must have bearing on the issue between the parties, but does not have to be dispositive. *Disneyland Park*, supra. When a union requests information about supervisors, the union must communicate the reason for the relevance of that information to the employer. *Id.*

Here, the Union, through Irvin's March 14 conversation with Harris and Henley's emails to Michalik, communicated why the requested information was relevant to the Lewis grievance, satisfying the requirements of Board law: a reasonable belief in its relevance supported by objective evidence.

I. The Union established the relevance of the information in Paragraph 11(a) by articulating its reasonable belief in the information's relevance to Respondent.

The Board has held that a union satisfied its burden of establishing the relevance of information requested relating to a supervisor when the union made its request based on evidence of possible disparate treatment of supervisors and bargaining unit members under a common policy, when an employee was disciplined under that policy. *Postal Service*, 332 NLRB 635, 635 (2000). In that case, the employer had an attendance policy that was common to the whole plant and applied to both bargaining unit employees and supervisors. *Id.* at 635. The Board held that the union had established the relevance of an information request about a supervisor's discipline under the attendance policy where the union showed the request was supported by a reasonable belief of disparate treatment for a supervisor. *Id.* at 636. The reasonable belief of disparate treatment was based on objective evidence because union members had witnessed the supervisor's absences. *Id.*

Here, the Union, through Irvin's March 14 conversation with Harris, as well as Henley's emails to Michalik satisfied the requirements of Board law by showing a reasonable belief in its

relevance supported by objective evidence. The record shows that the Union met this burden because they had all three requirements, a reasonable belief in the relevance, supported by objective evidence that was articulated to Respondent. First, the Union had a reasonable belief in Paragraph 11(a)'s relevance, because, as Irvin testified at trial, the Union uses comparison cases when processing grievances to determine whether a bargaining unit-employee was treated "fairly" when deciding to proceed to arbitration and to see what made violations "more grievous than others." (Tr. 36, lines 21-25). The Administrative Law Judge correctly found that the disciplinary records requested by the Union in Paragraphs 6 and 7 were relevant to its grievance processing duties. (ALJD p. 12). The disciplinary records requested in Paragraph 11(a) referenced a common safety policy that applied to both bargaining-unit employees and supervisors. (Jt. Exh. 1-E). As the Board found in *Postal Service*, an Employer's application of a common policy is relevant to a collective bargaining representative's grievance processing over violations of that policy. 332 NLRB 635, 635 (2000).

Secondly, this reasonable belief was supported by objective evidence from the site review document prepared by Respondent and given to the Union and, additionally, independent knowledge of the named supervisors' violations. The Site Review document prepared by Respondent regarding Lewis' misconduct contains numerous references to safety policies allegedly violated by Lewis, including (1) a 'Berger Dot' under "Policy/Procedure Violated" listing "SP 2316 - Line 2 Windup Operation" safety policy, an explanation of the TLCT safety procedure on page 5, and Lewis' failure to follow the "Try-Step" of the TLCT safety procedure on the bottom of page 8. (Jt. Exh. 1-A, Tr. 30, lines 2-5; Tr. 31, 10-18). Additionally, Irvin had objective information that the named supervisors had, in fact, violated the safety policies based on

his experience working at the plant in the summer of 2012. (Tr. 40, lines 5-14; Tr. 41-42, lines 15-25, 1).

Accordingly, there was objective evidence to support the Union's reasonable belief that Lewis had violated the safety and that the named supervisors had also violated the safety policy. Finally, the Union articulated that reasonable belief to Respondent: Irvin's testimony at hearing about his March 14 conversation with Harris was undisputed by Respondent. In that testimony, Irvin testified that on that day he told Harris that the Union needed Respondent's site reviews prepared regarding supervisors safety violations for use as comparisons in processing the Lewis grievance in order for the Union to know why the supervisor's violations were less severe than Lewis' violation of the safety policy. (Tr. 46, lines 5-20). Henley also emailed Respondent regarding Paragraph 11(a), saying that because supervisors are subject to the same policies particularly with regards to serious safety violations that the supervisors named are believed to have committed and how they treated the supervisors under the policy directly relates to how the company should have treated Lewis. (Jt. Exh. 1-H). Henley further elaborated in an April 5 email saying that the documents requested in Paragraph 11(a) concern certain non-unit employees were treated to committing safety violations similar to the one allegedly committed by James Lewis. Because the rules apply to supervisors as well as employees, how the company treated those supervisors relates directly to how the company should have treated Lewis. (Jt. Exh. 1-I). Any one of these communications would likely be enough to satisfy the ⁴ Union's burden in articulating its reasonable belief; the cumulative effect of them leaves little doubt.

Finally, the Administrative Law Judge found that the information in Paragraph 11(a) is not relevant because the policies at issue were not applied in Lewis' termination. However,

⁴ Respondent did introduce evidence at hearing, the testimony of Bruce Harris, on the reasoning behind Lewis' discharge.

Respondent never communicated to the Union which policies were applied in the decision to discharge James Lewis' discharge, or the precise reasoning behind it. As the Administrative Law Judge correctly ruled, Respondent violated Section 8(a)(5) by failing to provide that very information, which was requested by the Union in Paragraph 7 of its information request. Had Respondent provided the Union with information about Respondent's justification for Lewis' termination, the parties may have bargained to narrow the scope of the information request or engaged in a discussion about why exactly the safety policies were mentioned in the Site Review if they were not applied. However, instead of offering some explanation of why the information requested in Paragraph 11(a) was not relevant, Respondent simply offered a flat denial because the information concerned non bargaining unit member. However, in the absence of such an explanation, the information about Respondent's application of its safety policies to supervisors remains relevant and Respondent should be order to provide it to the Union.

II. The Administrative Law Judge improperly assessed the actual reasons for Lewis' termination.

Here, the Administrative Law Judge ruled that the information requested in Paragraph 11(a) was not relevant based on a determination that James Lewis was terminated under the development and sleeping policies, and not Respondent's safety policies. However, a determination on the reasons for James Lewis' discharge was not one framed by the pleadings in this case. (GC Exh. 1-C). In request for information cases, it is improper for an Administrative Law Judge to rule on the merits of the underlying grievance. See *Postal Service*, 337 NLRB at 822. The Administrative Law Judge's intrusion in this area is misguided and improperly muddies the waters about the true issue of the case: what knowledge the Union had when it made the

information and whether it was sufficient to support a reasonable belief that the requested information was relevant.

Instead, the proper question is whether the Union sufficiently established the relevance of the information by articulating to Respondent a reasonable belief in the information's relevance supported by objective evidence. *Postal Service*, 337 NLRB at 822. The Administrative Law Judge also failed to credit the evidence about the Union's belief in the information's relevance. When Irvin testified about his lack of knowledge over the reasons for Lewis' discharge, the Administrative Law Judge found it inconsistent with the Site Review, writing:

I find Irvin's assertion that he and the Union never knew the reasons or real reason why Lewis was terminated is clearly inconsistent with the site review report, if not somewhat disingenuous.

(ALJD, p.6, lines 11-13). She even goes as far as suggesting Irvin's testimony may have been "disingenuous" when he said the Site Review did not make clear Respondent's reasons to him. A plain language reading of Site Review document reveals that the document is far from clear on its face about the precise basis for its recommendation; it cites numerous policies, including the Discharge Policy, Development Procedure, sleeping policy and safety policies, such as the TLCT policy.

The Administrative Law Judge may find the site review clear but she had the benefit of sworn testimony from Respondent's Labor Relations Manager about Respondent's reasons for terminating Lewis to aid in her interpretation of the Site Review.

In discrediting Irvin's testimony about his own ignorance, the Administrative Law Judge also ignores the undisputed evidence disclosed at hearing that Respondent that the Union does not sit in on Respondent's Site Review meetings and Respondent never told the Union the basis

for its decision to terminate Lewis. The Union was in the dark about Lewis' termination in large part to the very denial of information requested in Paragraph 7 that the Administrative Law Judge correctly found to be unlawful. Because of Respondent's unlawful failure to provide the Union with the information requested in paragraph 7 concerning their reasoning for Lewis' discharge, the Union was forced to rely on Respondent's Site Review document, which bases its recommendation on citations of both the development procedure and safety policies. (Jt. Exh. 1-A). When confronted with the Union's request for the information about Safety Violations, Respondent conspicuously never disclaimed the relevance of those policies to Lewis discharge⁵; the only issue defense raised by Respondent was that it concerned supervisors. (Tr. 46, lines 12-20). Any reasonable union in that situation would find their belief in the relevance of the safety policies confirmed by the absence of a denial.

By assessing the reasons for Lewis' termination, the Administrative Law Judge improperly takes up a question that should be left to the grievance procedure and abandon's the proper line of inquiry into what the Union knew about the reasons for Lewis discharge when it made the request for information and whether Respondent provided the Union with the same information it introduced as evidence at the hearing.

⁵ Had Respondent simply told the Union that Lewis was not terminated for committing safety violations, its failure to provide that information would not be a violation of the Act.

CONCLUSION

In view of the above and foregoing, Counsel for the General Counsel respectfully submits that the Decision and Recommended Order of the Administrative Law Judge in this action is due to be modified.

Respectfully submitted

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STATEMENT OF SERVICE

I hereby certify that on April 17, 2014, copies of the Brief of the Counsel for the General Counsel were served by e-mail on the following parties:

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