

**United Parcel Service of America, Inc. and International Brotherhood of Teamsters, Local Union 373.** Cases 16–CA–028064, 16–CA–062316, 16–CA–070588, 16–CA–081494, and 16–CA–085218

February 26, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND  
MCFERRAN

On August 15, 2013, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions as modified below and to adopt the recommended Order.

I. BACKGROUND

The Union represents a unit of employees, including about 45 package drivers, at the Respondent’s Texarkana, Arkansas facility. During the relevant time period, the Union filed a number of grievances pursuant to the parties’ collective-bargaining agreement. In conjunction with the grievances, the Union, primarily through Chief Union Steward Reginald Thomas, also submitted information requests to the Respondent. The complaint alleges that the Respondent failed to provide relevant information requested by the Union on 21 different occasions.

Thomas filed his first charge with the Board on June 13, 2011. Others followed on August 9 and December 12. The Regional Director issued a complaint on the basis of these charges, but postponed the hearing indefinitely when the parties agreed to an informal settlement, which was executed on March 6, 2012, and approved by the Regional Director on March 8. Subsequently, two more charges were filed alleging that the Respondent again failed to provide certain requested information. The Regional Director set aside the settlement agreement and issued a new complaint based on all of the charges.

As explained below, the disputed information requests fall into three categories: (1) requests seeking information related to a recurring “lunch grievance”;<sup>1</sup> (2) requests submitted from May 3 to September 1, 2011, be-

<sup>1</sup> These requests were submitted from November 2011 through April 2012, both before and after the informal settlement agreement was signed. The settlement did not purport to resolve the parties’ disagreement about whether the Respondent was obligated to provide documents requested in connection with the lunch grievances.

fore the March 6, 2012 settlement was signed; and (3) postsettlement requests submitted in April and May 2012.

For the reasons discussed below, we affirm the judge’s dismissal of the complaint. Specifically, we find that (1) the Respondent did not violate the Act by failing to provide information in response to “lunch grievance” requests; (2) the Respondent complied with the settlement agreement; (3) the Respondent did not commit any postsettlement violations; (4) the settlement agreement should be reinstated; and (5) the presettlement requests were resolved by the settlement agreement.

II. “LUNCH GRIEVANCE” INFORMATION REQUESTS

*A. Facts*

Beginning November 21, 2011, and approximately once every 10 days thereafter, Thomas filed grievances on behalf of all bargaining unit employees claiming that the Respondent was forcing drivers to work through their lunch period in order to avoid retaliation from Center Manager Randy Rosebaugh for not meeting their performance numbers, i.e., the Stops Per On-Road Hour (“SPORH”), a key component in the Respondent’s assessment of a driver’s performance. For each grievance, Thomas, acting for the Union, requested (1) timecards;<sup>2</sup> (2) delivery reports;<sup>3</sup> (3) manifests;<sup>4</sup> (4) “telematics,” also including average speed of vehicle in motion on each route;<sup>5</sup> (5) “time between stops” section summary;<sup>6</sup> (6) weekly operation report;<sup>7</sup> and (7) driver recap sum-

<sup>2</sup> Timecards show the time a driver punched in and out and whether the driver clocked out for lunch.

<sup>3</sup> Delivery reports show the number of packages on a truck, who signed for the packages, whether stops were business or residential, and whether the driver missed any stops.

<sup>4</sup> Manifests show the number of stops and packages, where packages are located on the truck, and delivery addresses.

<sup>5</sup> Telematics are comprehensive reports that show where a driver is located, the route taken, time spent at stops, time between stops, SPORH, hours worked, breaks, addresses, and more. These reports include “safety, service, and production” information, such as whether the driver is wearing his seatbelt, whether the truck’s door is opened, and time spent idling. Thomas also cited telematics’ ability to document how much time a driver spent backing up.

<sup>6</sup> The time between stop summary is a form that the Respondent no longer produces. When it was used, it provided much information that is now contained in telematics, including start/end times, breaks, time at and between stops, whether stops are residential or commercial, and addresses.

<sup>7</sup> The weekly operation report summarizes weekly hours worked, SPORH, miles traveled, and the number of deliveries.

mary<sup>8</sup> for all unit drivers, all covering the 10-day period immediately preceding the request.<sup>9</sup>

Those information requests led to a series of letters between the Respondent and the Union.<sup>10</sup> On December 15, 2011, Cedric Williams, the Respondent's district labor relations manager, sent a letter to Tommy Driggers, the Union's business agent, objecting to the requests as overly broad and unduly burdensome. Williams requested more details about the information sought so that the parties could determine whether the scope of the requests could be narrowed and whether responsive information could be provided through a less burdensome process. On December 21, Driggers responded that the information was requested in connection with the lunch grievances to identify which drivers were not properly taking their lunchbreaks.

On January 6, 2012,<sup>11</sup> Williams again protested that the requests were overly broad. Williams contended that six different categories of documents were not necessary to determine whether a driver took a meal period on a particular day. Williams suggested alternative, less burdensome ways for the Respondent to fulfill the request, such as by providing time records for a single day for a sampling of drivers or for specific drivers who alleged that they missed meal periods. On January 9, Thomas (rather than Driggers) replied that the requests were not overly broad because the information was needed to support filed grievances.

On January 20, Williams sent another letter, explaining again why the Respondent viewed the requests as overly broad, asking for a more narrowly focused request, and repeating his earlier suggestions for possible alternatives. Thomas responded by again stating that the Union wanted all of the information requested in order to process its grievances.

On March 28, Williams again protested the breadth of Union's information requests, repeating his suggestions for less burdensome ways the Respondent could provide necessary information, and complaining that the Union had not responded to his earlier suggestions that the Union narrow its requests. On April 1, Thomas answered that the Respondent, by executing the March 6 settlement agreement, had foregone the chance to tell an NLRB judge that the requests were overly broad and unduly burdensome. As noted earlier, the settlement agreement

<sup>8</sup> The driver recap summary apparently shows SPORH, number of packages, number of hours worked, mileage, and some telematics data such as seat belt use and backing events.

<sup>9</sup> The last request covered by the complaint was submitted on April 16, 2012.

<sup>10</sup> The judge's decision provides more details about the contents of these letters.

<sup>11</sup> All subsequent dates are 2012, unless stated otherwise.

did not refer to or purport to settle the dispute over the lunch grievance information requests.

The Respondent did not provide any information in response to the Union's requests related to the lunch grievances.

### B. The Judge's Decision

The judge found that the Union acted in bad faith when it made these information requests and when it subsequently refused to discuss or agree to any accommodation that would reduce the burden on the Respondent. The judge noted that Thomas was consistently unwilling even to discuss an accommodation and that he never attempted to explain why the Respondent's suggestions for less burdensome alternatives were insufficient. The judge also found that the Respondent acted in good faith and sought to comply with the requests. The judge therefore concluded that any failure to furnish the requested documents did not constitute a violation of Section 8(a)(5) and (1) of the Act.

For the reasons discussed below, we agree with the judge that the Respondent did not violate the Act by failing to provide the requested information. We do not, however, rely on the judge's findings that the Union acted in bad faith or that the Respondent sought to comply with the lunch grievance requests.<sup>12</sup>

### C. Discussion

An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its grievance-processing duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). See also *Postal Service*, 337 NLRB 820, 822 (2002); *Asarco, Inc.*, 316 NLRB 636, 643 (1995), *enf.* in relevant part 86 F.3d 1401 (5th Cir. 1996). The Board's standard for deter-

<sup>12</sup> Contrary to the judge, the record establishes that the Union had a good-faith basis for its lunch grievance information requests. A union is presumed to be acting in good faith when it requests information until the contrary is shown. The requirement that an information request be made in good faith is satisfied if at least one reason for the request can be justified. *Mission Foods*, 345 NLRB 788, 788 (2005); *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), *enf. denied* on other grounds 857 F.2d 1224 (8th Cir. 1988). Here, the Union submitted all of these information requests in support of corresponding grievances, providing the one necessary legitimate reason for the requests.

The judge's finding that the Respondent sought to honor the lunch grievance requests also is inconsistent with the record. The judge appears to have thought that documents related to these requests were included in a large box of documents that the Respondent produced in January 2012. That box, however, contained information related to the presettlement information requests, not the lunch grievance requests. The Respondent, moreover, does not claim to have provided any responsive documents.

mining which information requests must be honored is a liberal discovery-type standard. See, e.g., *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). The Board does not pass on the merits of the underlying grievance, and the union is not required to show that the information that triggered the request is “accurate, non-hearsay, or even ultimately reliable.” *W. L. Molding Co.*, 272 NLRB 1239, 1240 (1984) (quoting *Boyers Construction Co.*, 267 NLRB 227, 229 (1983)).

Where, as here, requested information is related to unit employees’ terms and conditions of employment, the information is presumptively relevant and the union need not make any specific showing of relevance. See *Mathews Readymix, Inc.*, 324 NLRB 1005, 1009 (1997), *enfd.* in relevant part 165 F.3d 74 (D.C. Cir. 1999). If an employer effectively rebuts the presumption of relevance, however, or otherwise shows that it has a valid reason for not providing the requested information, the employer is excused from providing the information or from providing it in the form requested. See *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993); *American Cyanamid Co.*, 129 NLRB 683, 684 (1960).

If, for example, the employer has a legitimate claim that a request for information is unduly burdensome or overbroad, it must articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation. *Mission Foods*, 345 NLRB at 789. Correspondingly, where an employer fulfills those obligations, the union may not ignore the employer’s concerns or refuse to discuss a possible accommodation, even when the requested information is presumptively relevant. See *American Cyanamid*, 129 NLRB at 684 (no violation where employer raised confidentiality concerns and union’s “adamant insistence . . . on its right to have the Respondent’s records in the terms set forth in its demand precluded, in effect, a test of the Respondent’s willingness to give the Union access to the [presumptively relevant] wage information involved on mutually satisfactory terms”). See also *Good Life Beverage Co.*, 312 NLRB 1060, 1062 (1993); *Century Air Freight*, 284 NLRB 730, 734–735 (1987).<sup>13</sup>

<sup>13</sup> Although occasionally disagreeing with the Board on the application of these legal principles to particular facts, courts have endorsed the principles themselves. In *Emeryville Research Center v. NLRB*, 441 F.2d 880, 885 (9th Cir. 1971), the Ninth Circuit found that the employer raised bona fide objections to an information request and that the union, by demanding the information in a very precise form but stating its need only in terms of general relevance to intelligent bargaining, failed to give the employer the opportunity to provide the information on mutually satisfactory terms. See also *NLRB v. St. Joseph’s Hospital*, 755 F.2d 260, 264–265 (2d Cir. 1985), *cert. denied* 474 U.S. 827 (1985) (no violation where employer’s concerns were legitimate

As the General Counsel points out, the information requested by the Union related to bargaining unit employees and was therefore presumptively relevant. However, we find that in the context of this case, the Respondent has effectively rebutted the presumption of relevance with respect to many of the requested documents and that, with respect to the requests as a whole, the Respondent has demonstrated that it timely raised legitimate concerns over the burdensomeness and overbreadth of the information requests, to which the Union did not respond adequately. In these circumstances, the General Counsel has failed to prove a violation of the Act.

As the judge explained, the Union was attempting to determine whether drivers were properly taking their lunchbreaks or instead were clocking out for lunch while continuing to work. Some documents, such as timecards, clearly would have been relevant to this inquiry. But, on the whole, the Union insisted on a vast number of documents and information that went far beyond what would appear to be even potentially relevant to determine if and when drivers recorded their lunchbreaks and whether they delivered packages during those breaks. The Union sought six different reports on every driver for every day for months. These reports contained information such as where packages were located on a truck, who signed for each package, how much time a driver spent backing up, and much more detailed information about the particulars of each driver’s workday. Like the judge and the Respondent, we are unable to see how this detailed information could bear on the question whether drivers delivered packages during their lunchbreaks. Significantly, neither the General Counsel nor the Union has ever explained how this requested information is even *potentially* relevant to the issue of lunchbreaks raised in the grievances. Moreover, many of these reports contain overlapping information,<sup>14</sup> and the Union has also never explained how it would benefit from having the same information in multiple reports.<sup>15</sup> Compare *Emeryville*

and substantial and employer suggested alternatives but union rejected all attempts at discussion); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1098 (1st Cir. 1981) (union does not need to participate in protracted negotiations but must attempt to reach some type of compromise with the employer as to the form, extent, or timing of disclosure), *abrogated on other grounds NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 fn. 7 (1990).

<sup>14</sup> Information contained in more than one report includes, among others things, drivers’ SPORH numbers, the number of packages on a truck, delivery addresses, the number of hours a driver worked, and some very specific information such as seat belt use and backing events.

<sup>15</sup> The record demonstrates that the Union could have requested certain documents in a form that excluded detailed, nonrelevant information. Telematics reports, for example, can be customized to provide only specified information. The Union, however, appears to have been

*Research Center v. NLRB*, 441 F.2d at 885 (holding that where employer has bona fide objections, union “must do more than rely on general avowals of relevance in order to establish its right to the information”). As a result, we find that the Respondent established that much of the requested information, although presumptively relevant, in fact was not relevant to the lunch grievances.

Moreover, the Respondent timely asserted its concerns over the burdensomeness and overbreadth of the lunch grievance information requests, and attempted to reach an accommodation with the Union. For example, in response to the Union’s request for timecards, the Respondent offered to furnish time records for a sample of drivers for a single day, or for specific drivers who claimed to have missed lunchbreaks. These proposals appear to have been reasonable in the circumstances, yet the Union rejected them out of hand, never stating why they would not have satisfied its needs. Compare *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004) (finding a violation where employer established legitimate confidentiality interest but union promptly showed why employer’s offer of an accommodation was not reasonable). The Union consistently rejected the Respondent’s multiple additional overtures as well. Instead, the Union, like the union in *American Cyanamid*, 129 NLRB at 684, continued to insist on receiving *all* of the requested information, thus effectively precluding a test of the Respondent’s willingness to give the Union the information it needed on mutually satisfactory terms.

In all of those circumstances, we find that the Respondent did not violate the Act by failing to provide the requested lunch grievance documents to the Union.<sup>16</sup>

### III. SETTLEMENT AGREEMENT

As mentioned, the Respondent and the Union executed an informal settlement agreement in March 2012, which the Regional Director set aside after additional charges were filed. The settlement agreement included a provision saying that the Respondent would provide training to the Union on how to interpret “non-native” documents

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requesting all of the information available in telematics; at least it never asserted that it was actually requesting only a subset of data.

The General Counsel argues that the judge improperly determined “what information he believed the Union needed to process the grievances.” We disagree. The judge did not determine what information would have been properly requested or provided. He simply found that the Union had failed to articulate any reason why all of the information it requested was potentially relevant to its grievance investigation.

<sup>16</sup> Unlike the General Counsel, we do not fault the Respondent for failing to comply “to the extent” that it could. In the absence of any indication from the Union as to what specific information it considered necessary, the Respondent had no way of knowing if any of its proposed accommodations was acceptable to the Union.

within 5 business days of providing such documents.<sup>17</sup> On April 4, 2012, Williams sent a letter to Driggers saying that the Respondent would provide the required training because it anticipated providing some non-native documents. The letter asked Driggers to “[p]lease let me know if the Union would like to participate in the in-person training and provide proposed dates and times for the training. The Company will identify a mutually convenient time and will schedule the training.”

Driggers faxed the letter to Thomas, but did not inform the Respondent of available dates. Thomas took no action. When asked why he did not provide dates and times for the training, Thomas explained, “I am a steward. I am not responsible in giving dates and times. I can’t set up dates and times for the training. That has to come higher up than me, because that would be more like Tommy [Driggers]’s job.”

The General Counsel argued that the Respondent failed to comply with the settlement agreement because it did not provide the training and that the Union’s failure to provide proposed dates was immaterial. The judge disagreed, finding that the Respondent made a good-faith effort to comply with the settlement by offering to provide the training, and it was the Union’s unexplained inaction which prevented the training from being scheduled. We agree with the judge, for the reasons he stated.<sup>18</sup>

### IV. POSTSETTLEMENT INFORMATION REQUESTS

This category of information requests includes five disputed requests made in 2012, for which the Respondent provided virtually all of the documents requested. The judge found that all of the missing documents were presumptively relevant and that the presumption had not been rebutted. Nevertheless, he found no violations, primarily because the documents the Respondent did provide contained all of the information requested.

The General Counsel excepts only to the judge’s finding that the Respondent did not violate the Act by failing to provide the weekly operating report for the week ending April 21 in association with a request made on April 23.

In some circumstances, an employer’s failure to inform the union that the information it seeks is available or has been provided in a different format from the requested one can be a violation of the Act. See, e.g.,

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<sup>17</sup> “Non-native” documents came from the Respondent’s off-site storage system and appeared in a format that the Union was not familiar with and did not know how to interpret.

<sup>18</sup> We do not rely, however, on the judge’s finding that the language of the settlement agreement did not obligate the Respondent to provide training because the requirement was included only in the notice and not in the body of the agreement itself.

*Postal Service*, 332 NLRB 635, 636 (2000) (finding violation where union was unaware requested report had already been turned over and employer neither produced the report again nor advised union it had previously provided report); *Yeshiva University*, 315 NLRB 1245, 1248 (1994) (finding violation where employer did not notify union that it had information in form not requested by the union). We find no such violation here.<sup>19</sup>

Although the Respondent did not provide the weekly operating report for the week ending April 21, it did provide all the other information that the Union requested, including time cards, delivery reports, manifests, telematics, and driver recap summaries for that week. Thomas testified that he requested this particular weekly operating report to see drivers' SPORH numbers (stops per on-road hour). Thomas also testified, however, that he knew that telematics reports, which the Respondent did provide, also contained drivers' SPORH numbers. We decline to find a violation in these circumstances, where the Union's own testimony clearly establishes that the Union knew that the information it was seeking was contained in other requested documents that had been provided.<sup>20</sup>

Having found that the Respondent complied with the settlement, and that it did not unlawfully refuse to provide requested information following the settlement, we necessarily also find that the settlement agreement should be reinstated.

#### V. PRESETTLEMENT INFORMATION REQUESTS

The Union made several information requests prior to the settlement agreement that are the subject of complaint allegations. The judge analyzed the merits of each allegation and found no violations. We find it unnecessary to pass on any of the judge's findings regarding these requests. Having reinstated the settlement agreement, we find instead that these matters were included in and resolved by the settlement agreement. For that reason, we adopt the judge's dismissal of the relevant complaint allegations.

#### VI. CONCLUSION

We find that the Respondent did not violate the Act by failing to provide information in response to the Union's "lunch grievance" requests, that the settlement agreement should be reinstated, that the requests submitted from May 3 to September 1, 2011, are covered by the settlement agreement, and that the Respondent did not commit

<sup>19</sup> Member Miscimarra agrees that the Respondent did not violate the Act, but in doing so he does not rely on *Postal Service*, 332 NLRB 635 (2000).

<sup>20</sup> In the absence of exceptions, we adopt the judge's dismissal of the remainder of the postsettlement allegations.

any postsettlement violations. As a result, we dismiss the complaint.

#### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Linda Reeder, Esq.*, for the General Counsel.

*Marcus Crider, Esq.* and *Aron Karabel, Esq.* (*Waller Lansden Dortch & Davis, LLP*), of Nashville, Tennessee, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. With questionable help from reality, a union steward began imagining that supervisors were plotting against him, and retaliated by filing onerous information requests. Finding a bad-faith abuse of the information request process, I recommend that the complaint be dismissed.

##### Procedural History

This case began June 13, 2011, when the International Brotherhood of Teamsters, Local Union 373 (the Union or the Charging Party) filed an unfair labor practice charge against United Parcel Service (Respondent). The Board docketed this charge as Case 16-CA-028064.

On August 9, 2011, the Union filed another charge against Respondent, which the Board docketed as Case 16-CA-062316. On December 12, 2011, the Union filed a further charge, docketed as Case 16-CA-070588. On May 12, and July 13, 2012, the Union filed charges against Respondent in Cases 16-CA-081494 and 16-CA-085218, respectively. Respondent has admitted that all charges were filed and served on it as alleged in the complaint, and I so find.

On October 31, 2011, after an investigation, the Board's Regional Director for Region 16 issued an order consolidating cases, consolidated complaint and notice of hearing in Cases 16-CA-028064 and 16-CA-062316. In doing so, she acted on behalf of the Board's Acting General Counsel (the General Counsel or the Government). Respondent filed a timely answer.

On February 17, 2012, the Acting Regional Director for Region 16 issued an order further consolidating cases, second consolidated complaint and notice of hearing, which consolidated Case 16-CA-070588 with Cases 16-CA-028064 and 16-CA-062316. Respondent timely answered.

On March 6, 2012, the Respondent and the Union executed an informal settlement agreement in Cases 16-CA-070688, 16-CA-028064, and 16-CA-062316. Also on March 6, 2012, the Regional Director for Region 16 issued an Order Postponing Hearing Indefinitely.

On May 21, 2012, the Union filed an unfair labor practice charge against Respondent which the Region docketed as Case 16-CA-081494.

On July 13, 2012, the Union filed an unfair labor practice charge against Respondent which the Region docketed as Case 16-CA-085218.

On October 31, 2012, the Regional Director for Region 16 issued an order further consolidating cases, third consolidated complaint and notice of hearing which had the effect of setting aside the settlement agreement and reviving the complaint allegations in Cases 16–CA–070688, 16–CA–028064, and 16–CA–062316 and consolidating those cases for hearing with allegations raised by the two more recent charges, Cases 16–CA–081494 and 16–CA–085218. (Below, for brevity, this pleading will be called the complaint.) Respondent filed a timely answer.

On January 23, 2013, a hearing opened before me in Texarkana, Arkansas. The parties presented evidence that day and on January 24, 2013, when the hearing closed. Counsel submitted posthearing briefs, which I have considered.

#### Admitted Allegations

Respondent has admitted a number of allegations in its answers. Based on those admissions, I find that the charges were filed and served as alleged in complaint 1(a) through 1(e).

Further, Respondent has admitted the allegations raised in complaint paragraphs 2, 3, and 4. Based on these admissions, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that it is engaged in the transportation and delivery of packages, and that it has an office and place of business in Texarkana, Arkansas. Therefore, I conclude that the Respondent is subject to the Board's jurisdiction, which is appropriately exercised here.

Based on Respondent's admission of allegations raised in complaint paragraph 5, I find that its center manager, Randy Rosebaugh, and its District Labor Relations Manager Cedric Williams are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act.

Based on the Respondent's admission of the allegations raised by complaint paragraphs 6, 7, 8, and 9, I make the following findings about the status of the Charging Party, International Brotherhood of Teamsters, Local Union 373. At all times material to this case, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act, and the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of Respondent's employees in the following unit:

INCLUDED: All feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), and car washers.

EXCLUDED: All professionals, guards and supervisors as defined in the Act.

Further, I conclude that this unit is an appropriate unit within the meaning of Section 9(b) of the Act. At all material times, the Respondent has recognized the Charging Party as such exclusive representative, and such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from December 19, 2007, to July 31, 2013.

The complaint raises numerous allegations that the Union requested information from Respondent on various specified

occasions. The Respondent has admitted many, although not all, of these allegations. They will be discussed below in connection with the disputed allegations that Respondent failed to provide the information requested.

Complaint paragraph 13(a) also alleges that Respondent previously entered into a settlement agreement disposing of Cases 16–CA–028064, 16–CA–062316, and 16–CA–070588 and that this settlement was approved on March 8, 2012. Respondent admits these allegations and I so find.

However, Respondent has denied that since March 8, 2012, it has refused to comply with this settlement, as alleged in complaint paragraph 13(b). That allegation will be addressed later in this decision.

#### Witness Credibility

Before considering the disputed allegations, it is appropriate to address the credibility of witnesses, particularly, that of one of the government's key witnesses, Chief Union Steward Reginald Thomas. For the reasons discussed below, I have doubts about the reliability of Thomas' testimony and credit it only when not contradicted by that of other witnesses.

Thomas had a significant interest in the outcome of this proceeding. He filed or prompted the filing of almost all of the grievances which were the reasons, or ostensible reasons, for making the information requests, as well as the requests themselves. Such an interest in the outcome does not, by itself, compel any conclusion about the witness's testimony, but it is a factor to be taken into account.

At times, Thomas' testimony appeared to be evasive. Respondent cross-examined Thomas concerning an information request Thomas made which sought documents relevant to a grievance filed on behalf of employee Brandon Rayfield. Thomas persisted in seeking the information even after the parties settled the underlying grievance. When pressed, Thomas admitted that he had continued to seek the information because Rayfield also had filed charges against Respondent with the Equal Employment Opportunity Commission (EEOC).

Three times, Respondent's counsel asked if Thomas considered it appropriate to use the information request procedure to assist an employee with a discrimination claim before the EEOC and not to pursue a pending grievance. Each time, Thomas did not give a responsive answer but instead replied, "I never received the information."

When counsel asked the question a fourth time, Thomas answered, "No. That's not appropriate. That's not my job." It appears clear that Thomas understood the question and also understood that a truthful answer would hurt his case. His efforts to avoid answering the question indicate that his interest in the outcome did, in fact, affect his testimony.

Any internal inconsistencies in a witness' testimony also say something about its reliability. Part of Thomas' testimony concerned the difference between two types of documents sought by the information requests. One type of document was called a "driver recap summary." The other was known as "telematics."

At first, Thomas testified that "a driver recap summary gives a recap of the day, sort of like telematics, but *it's a lot more detailed than telematics.*" (Emphasis added.) Within a very

short time, Thomas contradicted this testimony: “Telematics—*it’s more detailed*, and it gives number of miles, and it also gives a map.” (Emphasis added.)

Moreover, the record leaves little doubt that Thomas bore some hostility towards the manager in charge of the Texarkana facility, Randy Rosebaugh. Thomas admitted that in conversations with other workers, he had referred to Rosebaugh as a racist. Thomas’ testimony on cross-examination also included the following:

Q. Isn’t it true that you want to see him lose his job?

A. I might have made that statement in anger, because we do that sometimes.

It should be noted that no issue concerning racial discrimination is before me and I neither have considered nor made findings about such a matter. I take into account Thomas’ feelings towards Rosebaugh only to the extent that they are relevant to two issues: Here, it is appropriate to note Thomas’ dislike of Rosebaugh because it could affect the reliability of Thomas’ testimony. Later in this decision, the chief steward’s hostility towards Rosebaugh becomes relevant to whether the Union acted in good faith when the Respondent sought to negotiate a compromise regarding the amount of information it would have to produce.

For the reasons discussed above, I conclude that Chief Steward Thomas displayed an emotional investment in winning his case sufficient to affect his testimony. Because of my concern that the testimony is more partisan than impartial, I credit it only when not contradicted by other witnesses.

#### The Information Requests

When a union has been certified or recognized as the exclusive bargaining representative of an appropriate unit of employees, the employer must bargain with the union in good faith, as defined in Section 8(d) of the Act. 29 U.S.C. § 158(d). In dealing with the certified or recognized representative, one of the things the employer must do, on request, is to provide information which this union needs for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

This obligation actually flows two ways. Either party to a collective-bargaining relationship must provide the other party with requested information if the requesting party cannot perform its statutory responsibilities without the information.

The duty to provide requested information does impose a burden on the party furnishing the information, and the burden can be far from trivial. However, the justification for imposing this burden comes from the most practical of reasons: Necessity. Without the information, the requesting party cannot perform a function entrusted to it by the Act, causing the carefully-balanced system of collective bargaining to malfunction.

Because the obligation to furnish requested information arises to prevent a breakdown in the statutory scheme, this requirement only exists when the requesting party seeks the information to help it do things the statute expects it to do. For example, the Act entrusts certain responsibilities to a union which is the exclusive bargaining representative of a unit of employees. These responsibilities include representing

employees in negotiating the terms of a collective-bargaining agreement and in assuring that those terms are properly applied. If such a union requests information which is relevant to one of those functions and necessary to perform it, then an obligation arises for the employer to furnish it.

If a union requests information for some purpose other than performing a duty which the Act has imposed on it, then an obligation to furnish the information never arises. Thus, a requester’s true purpose determines whether the other party must comply with the request.

In most cases involving an alleged refusal to furnish requested information, the requester’s true purpose does not become an issue. That purpose is obvious from the circumstances and no one questions it or argues that the asserted purpose is actually a pretext. However, the present case is one of those less common ones in which the true purpose for the information request becomes a disputed issue.

The complaint alleges that the Respondent has failed and refused to furnish the Union with information relevant to the Union’s duties and necessary for their performance, which the Union sought in a number of information requests described below. The Union’s chief shop steward at the Respondent’s Texarkana facility made all of these requests. Most but not all of those information requests pertain to grievances that the steward, Reginald Thomas, had filed or caused to be filed on behalf of himself as a bargaining unit employee.

To comply with these information requests, Respondent has furnished the Union with a large number of documents, but not everything described in the requests. In some instances, discussed below, the Respondent asserts that the documents in question do not exist. More fundamentally, the Respondent argues that the Union made the information requests for improper purposes, that is, for reasons other than discharging its statutory duty to represent employees in the bargaining unit.

Respondent’s brief argues that the Union has allowed its chief steward, Reginald Thomas, “to abuse the information request process for his own personal gain. Mr. Thomas, one of the most under-performing drivers in the Texarkana Center, believes that UPS is discriminating against him by allowing other drivers to work through their lunchbreaks so that their performance appear better than his.” The brief further states:

Mr. Thomas filed an EEOC complaint and an NLRB charge asserting this claim, both of which were dismissed for lack of sufficient evidence. Mr. Thomas has also filed 18 grievances regarding UPS’ purported harassment of him and 18 information requests regarding those grievances, all of which are the subject of this dispute. At about the same time that the EEOC dismissed his complaint for lack of sufficient evidence and days after being disciplined for continued sub-par performance, Mr. Thomas began inundating UPS with grievances related to lunchbreaks, and irrelevant, overly broad and unduly burdensome information requests to determine whether other drivers were taking and/or inaccurately recording their lunchbreaks. Any attempt to engage Mr. Thomas regarding the scope of his requests has been frustrated by his refusal to identify a single driver he believes missed a lunchbreak, refusal to narrow the scope of his information requests in any way

whatsoever, and refusal to explain why knowing what every driver is doing every minute of every day for weeks at a time is even remotely relevant to whether they took a lunchbreak. Mr. Thomas fully acknowledges that he has refused to give “an inch” on any of his requests, and has made clear that he wants everything UPS has and does not care whether UPS is required to expend hours and thousands of dollars to respond to his requests. [Tr. at 270-272.] While Mr. Thomas’ grievances were subsequently settled, by his own doing, his position has not changed. This type of conduct is demonstrative evidence of Mr. Thomas’ intent to harass UPS and pursue, without limits, his claim of discrimination.

Thus, Respondent contends that the information requests submitted by Chief Steward Thomas were for his own personal purposes rather than to obtain information necessary for the Union to discharge its statutory responsibilities. If so, then the obligation to furnish requested information never arose in the first place.

A related argument presents the issue in somewhat different terms: Did the Union make the information requests in good faith? However, the Board does not presume and I will not presume that a party to a collective bargaining relationship is acting in bad faith. Instead, I will examine the evidence very carefully.

Respondent argues that one indication of the Union’s bad faith can be found in Chief Steward Thomas’ unwillingness to compromise or reach an accommodation which might lessen the Respondent’s burden while still giving the Union all the information needed for it to fulfill its duties. However, great care is warranted before drawing any conclusions from a requester’s unwillingness to agree to a proposed accommodation when the information request requires the production of a great many documents and thus imposes a substantial burden. It is well settled that the Board, in determining which information requests must be honored, uses “a liberal discovery-type standard.” See *Postal Service*, 337 NLRB 820 (2002); *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979). An information request which falls within this broad scope certainly does not suggest bad faith simply because of its size, so a refusal to narrow it would not, per se, indicate bad faith. Instead, I must consider the totality of the circumstances.

These factors include not only the scope of the information request but also whether it seeks a number of different documents which record the same information and, if so, whether the requester was willing to discuss making the request less onerous by excluding categories of documents which merely duplicated the information available from other documents without adding anything new. Additionally, facts extrinsic to the information requests, such as statements manifesting hostility or ulterior motive, also should be taken into account. With those considerations in mind, I now turn to the individual complaint allegations.

Complaint Subparagraphs 10(a) and (c), 11, and 12(a) and (c)

On May 3 and 4, 2011, the Union requested information, described below, in connection with the grievance of bargaining

unit employee Brandon Rayfield, whom the Respondent had discharged. In this instance, the information requests prepared by Chief Steward Thomas concerned an employee other than himself. In preparing and submitting the information requests, the chief steward clearly was performing a representation function contemplated by the Act and expected of the employees’ exclusive representative. In these circumstances, there can be little doubt that the Respondent had a duty to provide requested information to the extent such information was relevant to the Union’s discharge of its representation duties and necessary for that purpose.

Both the May 3 and 4 requests sought similar information, but one of the requests pertained to employees who worked in area “37D” and the other sought the information for employees who worked in area “37F.” Respondent has admitted that the Union made such a request for information pertaining to employees who had worked in “area 37D” from January 31 through April 29, 2011, as alleged in complaint subparagraph 10(a). Therefore, I find that the General Counsel has proven the allegations raised by complaint subparagraph 10(a).

However, Respondent’s answer denied that the Union made a request for similar information pertaining to employees who had worked in “area 37F,” as alleged in complaint paragraph 10(c). Nonetheless, uncontroverted evidence, including the information request itself, establish that the Union made it, as alleged. Therefore, I find that the General Counsel has proven the allegation raised in complaint paragraph 10(c).

The information requests sought the following documentation for bargaining unit employees who had driven routes in the specified areas (37D and 37F) during the time period January 3 through April 29, 2011: (1) timecards; (2) delivery reports; (3) manifests; and (4) telematics.

The first three types of documents—timecards, delivery reports, and manifests—are so common in industry they require no explanation. The Respondent’s brief described the fourth type, “telematics,” as follows:

Telematics is a computer program with GPS technology utilized to monitor a driver’s performance. Reports are generated through telematics to determine where a driver is located, the route taken by a driver on a particular date, how long the driver was at a particular stop, if the driver is wearing his seatbelt, whether the package car’s door is open, and other information regarding the package car.

One of Respondent’s managers at its Texarkana office, Randy Rosebaugh, testified as follows:

Telematics is a tool for gathering information. It’s safety, service and production. Basically you pull in all kinds of safety information from seat belt usage, bulkhead doors, if—a driver is reported when idling. It shows over/under. It shows—like the driver stop summary report would show, you know, the time between each stop, how long they were there, that kind of information.

From this testimony, I conclude that telematics gathers information about the actions of bargaining unit employees while they are on duty, and that this information pertains to how they are performing various aspects of their jobs.

According to Thomas, the Respondent stated that it had discharged Rayfield because Rayfield had not told the truth about where he had stopped along his delivery route. Telematics information about the operation of Rayfield's vehicle on the day in question certainly would be quite relevant to this issue because it would show where he had stopped. Moreover, because this requested information concerns the working conditions of a bargaining unit employee, it enjoys a presumption of relevance. *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006). The credited evidence does not rebut that presumption.

It is less clear that telematics information about other drivers' actions would be relevant here, where the stated reason for the discharge is not Rayfield's actions but rather his supposed failure to tell the truth about what he did. If Respondent had discharged or disciplined any other employee for dishonesty about his or her work, then information about that employee's work might have some relevance. Certainly, the Union would have a reason to investigate to determine whether the other employee had received less severe discipline than Rayfield for essentially the same offense. However, the Union did not limit its information request to documents concerning other employees who had received discipline for dishonesty.

Moreover, the record does not establish that another employee had received such discipline during the time period covered by the information request. In these circumstances, it is not at all obvious how telematics information about employees other than Rayfield could relate to Rayfield's grievance or be necessary for the Union's representation of Rayfield in that matter.

Additionally, the information request seeks documents for a considerable period of time *after* Rayfield's discharge. Although Respondent terminated Rayfield's employment on February 16, 2011, the information request seeks documents from January 3 through April 29, 2011.

Considering the totality of circumstances, I conclude that the requested telematics information concerning the actions of employees other than Rayfield has very little relevance, if any at all, to the Union's representation of Rayfield. Therefore, I further conclude that the record rebuts the presumption of relevance which arises because the information pertains to the work of bargaining unit employees.

On the other hand, I conclude that telematics information about the vehicle Rayfield drove while working on the day or days in question indeed is necessary and relevant and that Respondent had an obligation to furnish it. (By "day or days in question," I mean those dates on which, according to Respondent, Rayfield's actual conduct did not match the statements he made to supervision, resulting in his discharge.) This telematics information provides evidence about what Rayfield actually did, and thus is highly relevant to the merits of his grievance.

Rayfield's "driver recap summary" for each of the days in question also would be relevant because it would provide information relevant to whether Rayfield had been where he said he had been at various times.

The other information described in the information request does not appear relevant to Rayfield's grievance. For example, to demonstrate the relevance of the requested timecards, the

General Counsel elicited the following testimony from Chief Steward Thomas:

Q. Now, looking at General Counsel's Exhibit 4, I see a check mark next to time card, dated from 1/3/2011 to 4/29/2011. Why did you request the time cards for that period?

A. I wanted to know who ran his area during that period and if they took their lunch.

Q. Now, why would taking their lunch be relevant to an integrity grievance?

A. If a driver did not take their lunch on this particular area, because it's pretty tight, they would not make those stops, so I wanted to know if these drivers took their lunch or not; was that the cause of some drivers not taking their lunch or not finishing this area.

Q. And why did you request for a couple—well, that period of time, January 3 to April 29?

A. Well, in my investigation, I had found out there was other drivers who ran this area, and they told me themselves that, Yes, Reggie, I missed some stops during that particular time, and I wasn't disciplined. So I needed to know who those drivers were.

Thomas' testimony about the purported relevance of the requested information is not persuasive. The record does not suggest that Respondent discharged Rayfield for missing stops but rather for not being truthful when answering management's questions about what he did. The record does not provide a basis for concluding that information about the number of stops made by other drivers would have any relevance to a discharge for dishonesty. Likewise, whether other drivers took their lunchbreaks has no obvious relevance to whether Rayfield lied to management.

Thomas had an opportunity to explain the relevance when asked "why would taking their lunch be relevant to an integrity grievance" but his answer is not responsive. It did not explain why information about other drivers' actions would have any bearing on whether Rayfield had been truthful. Even applying the Board's broad, discovery-like standard, I cannot conclude that this requested information is relevant.

Moreover, Thomas' testimony, quoted above, does not allay my concerns about his reliability as a witness. After indicating that certain drivers told him that they missed some stops but were not disciplined, Thomas said he "needed to know who those drivers were." Thomas had been a steward for 20 years. Presumably, if a person said to him, "I missed some stops and I wasn't disciplined," Thomas would know who that person was and would not need any records to determine that fact. Additionally, review of an employee's timecard would not show whether that person had missed stops.

Because Thomas' claimed reason for seeking the records cannot be correct, it raises some question about the true reason. Thomas made the information request on a union form which long has been used for this purpose. The form lists various types of information, with a line by each. The requester places a check mark on the line to signify that he is asking for that information. As already noted, Thomas had been a steward for 2 decades, so it is quite possible that he simply checked the

particular lines routinely, without considering whether or not the information really was relevant and necessary to the grievance. The General Counsel's brief states, in part, as follows:

E. Information Routinely Requested by Thomas and Reasons for the Requests

When processing or investigating the above-referenced grievances, *Thomas routinely requested certain documents*. Thomas sought the time cards to determine whether drivers who ran the route took their lunch because if a route is "tight," taking a lunch period might cause the drivers not to finish the area (their route) or may cause a driver not to complete his route before 5:00 p.m. [Tr. 108, 123.] Time cards also show which driver was on the route and if they were documenting and taking their lunch. [Tr. 121, 123, 143, 154, 159, 162, 157, 171, 178, 184, 189, and 198.] In addition, time cards show the driver's name, employee identification number, the time a driver punched in and out, the time a driver left and returned to the building and the number of packages carried by the driver on a route. [Emphasis added.]

However, to say that certain information is routinely requested does not establish that it is relevant to a particular grievance. Indeed, requesting the same information regardless of the particular facts differs little from saying, "round up the usual suspects."

In analyzing whether requested information pertaining to bargaining unit employees is relevant to, and necessary for the Union in the performance of its representation duties, I begin with the rebuttable presumption, noted above, that such information is, in fact, relevant and necessary. *Caldwell Mfg. Co.*, above. Therefore, the question to be decided is whether credited evidence rebuts this presumption.

The presumption does not change the Government's burden of proof, but merely counts as evidence to carry that burden. The General Counsel still must show that *when the Union made its request* it had a reasonable basis for believing that the information would be necessary to it in carrying out its statutory obligations. However, the Government may rely on the presumption, unless rebutted, to carry that burden.

Unlike an absolute presumption, a rebuttable presumption welcomes rather than precludes inquiry into the soundness of its application in a particular instance. Because the rebuttable presumption allows such inquiry, another question arises: What evidence is sufficient to rebut the presumption?

The Board has articulated standards for determining what must be shown to establish relevance when the requested information does not enjoy a presumption of relevance. These standards would apply, for example, when a union seeks information about the employer's subcontracting practices.

A presumption of relevance does not affect the definition of relevance, that is, the standard by which relevance is tested, but only affects the requirement of coming forward with evidence, who bears that burden, and when. Accordingly, in examining here whether the presumption of relevance has been rebutted, it is appropriate to refer to the Board's teachings on relevance in cases where the requested information did not enjoy the presumption. In other words, the way the Board has

approached the issue of relevance in cases not involving the presumption provides essential guidance here, as well.

In *Disneyland Park*, 350 NLRB 1256 (2007), which concerned a request for such subcontracting information, not presumptively relevant, the Board stated that to show relevance a union must do more than cite a provision of the collective-bargaining agreement. It must demonstrate that the contract provision is related to the matter about which information is sought, and that the matter is within the union's responsibilities as the collective-bargaining representative.

Citing *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989), the Board further stated in *Disneyland Park* that a union's explanation of relevance must be made with some precision. A generalized, conclusory explanation is insufficient to trigger an obligation to supply information.

Other Board cases, including *Allison Corp.*, 330 NLRB 1363 (2000), and *Providence Hospital*, 320 NLRB 790, 793-794 (1996), enfd. 93 F.3d 1012 (1st Cir. 1996), illuminate the meanings of "relevance" and "necessity" in the context of an information request. In deciding whether the information at issue in *Allison Corp.* was "necessary," the Board looked to the reason for the request *at the time of the request*.

By itself, the word "necessary" has no meaning, but attains significance in relation to an objective. It states the obvious to observe that if a question merely asks whether something is "necessary," the only appropriate answer is another question: "For what?" In evaluating the necessity of an information request, the "what" is the Union's purpose *at the time it made the request*, not some other objective it may have thought of later.

In the present case, the requested information pertains to the work of bargaining unit employees and therefore does enjoy the presumption of relevance. However, Respondent has denied that the requested information is relevant and the record raises serious concerns. For example, based on the testimony of Chief Union Steward Thomas, other record evidence and my observations of the witnesses, I find that Thomas had a persistent, perhaps even obsessive hostility towards Manager Rosebaugh, that Thomas had remarked that he would like to see Rosebaugh fired, and that Thomas had used at least one information request for an improper purpose.

These unusual circumstances call into question the union steward's motivation for submitting the information requests and, therefore, whether the requests satisfy the Board's standards. The circumstances make it not merely desirable but quite important to ask whether the evidence rebuts the presumption of relevance.

The literal wording of the Act does not describe a specific obligation to provide requested relevant and necessary information. However, the Board and courts have found that the Act can create such a requirement because in certain circumstances, without such information, the requesting party cannot perform the duties which the Act imposes.

Thus, the duty to furnish requested relevant and necessary information arises by necessity; without such information, the system of collective bargaining which Congress carefully crafted breaks down. Board and court precedent has circumscribed the duty to furnish information so that it arises

only when the requested information is sought and needed for a party to perform the functions contemplated by the Act.

A failure to comply with the duty to furnish requested information frustrates the balanced collective-bargaining system devised by Congress to reduce industrial strife, but abuse of the information request process for improper purposes likewise causes harm. Just as the Board protects this system by enforcing the duty to furnish information (when it arises), it has a similar interest in keeping the process free of abuse.

For example, if the Union in this case used an information request for an objective other than to perform its statutory representation function, and were I then to order the Respondent to furnish the information, that action would, in a sense, make me complicit in the misuse. It would engage the authority of the Federal Government in furtherance of an improper purpose. Therefore, where the record gives reason to be concerned about the requesting party's motivation, it serves the purposes of the Act to determine whether the evidence supports the presumption.

Indeed, the question of whether the requesting party is seeking the information to perform its statutory duties actually arises as a threshold matter before any presumption of relevance can come into play. If the requesting party is not acting in furtherance of its statutory duties, then there is no obligation to furnish the information and the analysis stops. Only when the requesting party's purpose is proper does the analysis go on to consider whether the information sought is relevant to that purpose, the issue which the presumption addresses.

In sum, the fact that the requested documents pertain to bargaining unit work and therefore enjoy a presumption of relevance does not foreclose me from determining whether the Union made the information request for a proper purpose. Where, as here, there are independent reasons to question the purpose, it serves the objectives of the Act to examine this issue carefully.

Here, I find that the Union's purpose, at the time it made the information request, was to contest and seek to undo Respondent's discharge of Rayfield. This purpose is unmistakably clear from the face of the May 3, 2011 information request itself. The first paragraph of the form states: "The Union needs the following information or copies as requested to adequately investigate and or/process a grievance concerning: [blank space]" the blank appears only the handwritten notation "52 termination." The name of the discharged employee, Brandon Rayfield, appears lower on the form.

The number "52" refers to article 52 of the supplemental collective-bargaining agreement, which is captioned "Discharge or Suspension." Clearly, the information request sought information pertaining to Rayfield's discharge, in connection with the grievance over that discharge. Nothing on the information request form suggests any other purpose.

Similarly, the only reason stated on the Union's May 4, 2011 information request is "52 termination." This documentary evidence strongly supports a finding that the Union's objective in requesting the information was solely to provide employee

Rayfield effective representation in the grievance proceeding concerning Rayfield's discharge.

For reasons discussed above, I doubt the reliability of some of Thomas' testimony. Nonetheless, it is significant that this testimony also supports a finding that the Union requested the information to prepare to represent Rayfield effectively. Thomas' testimony on cross-examination includes the following:

Q. So even though the grievance was settled, you still think that the information request that's tied to that grievance, when it's settled and resolved, should continue?

A. Well, when I filed for the information request, that information request—I was needing those documents for that grievance. [Emphasis added.]

For these reasons, I find that when the Union filed the request, its purpose was to obtain information to support its processing and advocacy of Rayfield's grievance. Because the requested information pertained to bargaining unit employees, it enjoys the rebuttable presumption of relevance discussed above. *Caldwell Mfg. Co.*, above. In other words, I begin by presuming that the requested information is relevant and necessary to this purpose.

Judging the information request against the Union's purpose—representing Rayfield in the grievance process over his discharge for dishonesty—I conclude that the credible evidence clearly rebuts the presumption of relevance and necessity. Except for the records pertaining to Rayfield's work on the day or dates in question, the Union could not reasonably have concluded that the requested information was relevant or necessary to the issues raised by the Rayfield discharge.

In reaching this conclusion, I am mindful, as discussed above, that the Board applies a broad, discovery-type standard in determining relevance of information sought in information requests. *Daimler Chrysler Corp.*, 344 NLRB 772 (2005). Under that standard, even potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Postal Service*, 332 NLRB 635 (2000).

However, information about what other drivers did has no potential, let alone probable relevance to Rayfield's discharge for supposedly lying to management about what Rayfield had done. The record does not reflect how such information could be relevant to Rayfield's grievance or even how it could lead to relevant information. Therefore, except for the telematics information and the "driver recap" summary or summaries showing Rayfield's activities on the date or dates in question, I conclude that the presumption has been rebutted.

Considering the breadth of this standard, I conclude that the requested telematics data for the period *before* Rayfield's discharge, and limited to those dates pertaining to Rayfield's allegedly false statements, meets the "relevant and necessary" test and that if such information existed, Respondent had an obligation to provide it.

However, the business manager of the Texarkana facility, Randy Rosebaugh, testified that Respondent did not begin using telematics at that facility until March or April 2011, which would have been after Rayfield's discharge (although before the May 3 and 4, 2011 information requests). Based on

my observations of the witnesses, I conclude that this testimony is reliable and I credit it. Therefore, I find that Respondent did not begin using telematics at the Texarkana facility until sometime in March 2011 at the earliest.

Respondent obviously cannot be expected to furnish information that it didn't have. As noted above, I have concluded the telematics information for days after Rayfield's discharge was not relevant or necessary.

As discussed above, I also conclude that the requested "driver recap summaries" for the day or days in question were relevant and necessary. The record does not establish that Respondent provided this information before about January 11, 2012, at the earliest. Considering the totality of the circumstances, I conclude that such a delay, of 8 months, is not reasonable. *West Penn Power Co.*, 339 NLRB 585 (2003).

Accordingly, I further conclude that Respondent, by its failure to furnish the driver recap summaries for the day or days in question within a reasonable time, violated Section 8(a)(5) and (1) of the Act. However, as noted above, Respondent entered into a settlement agreement which was approved by the Region on March 8, 2012, but later set aside. This settlement and its effects will be discussed later in this decision.

#### Complaint Paragraphs 10(b), 11, and 12(b)

Complaint paragraph 10(b) alleges that since about May 3, 2013, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers who ran area 29A from January 31 through April 29, 2011: (1) timecards; (2) delivery reports; (3) manifests; and (4) telematics.

Complaint paragraph 11 alleges that this information is relevant to and necessary for the Union's performance of its duties as the exclusive bargaining representative.

Complaint paragraph 12(b) alleges that since about May 3, 2011, the Union has failed and refused to furnish this information to the Union. Respondent has denied all of these allegations.

The information request itself is in evidence. Based on that document and related testimony, I conclude that the government has proven the allegations raised in complaint paragraph 10(b).

This information request pertains to four grievances, filed March 8 and 11, April 14, and May 2, 2011. In each of these, Reginald Thomas was the grievant and another union steward signed the grievance on behalf of the Union. The grievances invoked article 37 of the collective-bargaining agreement, which stated, in part, as follows:

(c) The Employer shall make a reasonable effort to reduce package car drivers' workdays below nine and one half (9.5) hours per day when requested. If a review indicates that progress is not being made in the reduction of assigned hours of work, the following language shall apply, except in the months of November and December:

Such requests may only be made for the five (5) month periods beginning on each January 1 and June 1 of each year. No later than thirty (30) days prior to each January 1st and June 1st, each package center will post a "9.5 opt-in/opt-out list" for the applicable five (5) month period. Each full-time

seniority driver in the center must make an election to opt-in or opt-out of the 9.5 language in this subsection no later than ten (10) days prior to the applicable five (5) month period. Those full-time drivers who choose to opt-out of the 9.5 language in this subsection will have no right to file a grievance alleging excessive overtime either under this subsection or under an excessive overtime provision in the Supplement, Rider or Addendum.

Drivers who choose to opt-in on the 9.5 list shall have the right to file a grievance if the Employer has continually worked a driver more than nine and one half (9.5) hours per day for any three (3) days in a workweek.

Thomas did not have an exact copy of his March 11, 2011 grievance. However, from the record I conclude that it was similar to his April 14, 2011 grievance, which stated, in pertinent part, as follows:

The company has caused me to work over 9.5 hours per day week ending April 9, 2011. The grievant requests penalty pay for all time worked over 9.5 hours per day.

In connection with these grievances, Chief Steward Thomas also submitted the May 3, 2011 information request described in complaint subparagraph 10(b). As noted above, the request sought the following information for all Texarkana Center drivers who ran area 29A from January 31 through April 29, 2011: (1) timecards; (2) delivery reports; (3) manifests; and (4) telematics.

Thomas made the information request on a standard union form which included the words, "The Union needs the following information or copies as requested to adequately investigate and/or process a grievance concerning [blank space]." In the blank, Thomas had written "9.5 hours Article 63." Thus, the relevance of the requested information must be evaluated in relation to the stated purpose of the request, in this case, to investigate and/or process a grievance concerning the contractual provision limiting employees to 9.5 hours work per day.

Thomas testified as follows concerning the reasons for seeking the information specified in the request:

Q. Does this request seek information for all drivers or just those in a particular area?

A. No. This information was looking for every driver that ran Area 29A during this period.

Q. And what's 29A?

A. 29A is my route, so I wanted to know who besides me was working over nine-and-a-half hours, and I requested that information to find out who it was.

Q. Why did you request the time cards?

A. Time cards would give me—would let me know if the driver who ran 29A during this period documented and took their lunch.

Q. Why did you request the delivery reports?

A. Delivery records would tell me what driver during this period—what he had on the package car, how many packages he had for on the car, and who signed for it. Mainly how many business stops he had and who signed for it, and if he or she missed anything.

Q. And how would that assist in your 9.5 grievance?

A. Well, the number of packages on the car, who signed for it, would let me know that if a person had more business stops than I had a particular day, it would take them longer. If I had more business stops than that person had that particular day, it would take me longer, so I needed to know that information to process my grievances.

Q. Why did you request the manifest?

A. Manifest is a dispatch of the day. It tells exactly what's on the car, where it is, and how many packages it is and how many stops it is. I needed that information to know what kind of day these particular drivers was going out with.

Q. Why did you request the telematics?

A. Also, it's for every driver that ran 29A. I needed to know exactly what the driver did that day, like how many miles he had, how many times he backed up, how many times he delivered a package with the door open. These all reflects on a driver's day. If he's delivering packages when the door's open, he's going to have an easier day than I would.

The relevance of requested information depends on the purpose for which it is sought. In this instance, the Union made the information request in connection with the grievances concerning the hours Thomas worked during 2 separate weeks. Thomas sought "penalty pay" for hours he worked in excess of 9.5 per day. Assuming that Thomas was entitled to such penalty pay, computing it would require reference only to documents showing how much Thomas had worked; it would not be necessary to examine records showing how many hours other drivers had worked.

Additionally, the contractual language, quoted above, allows drivers to "opt out" of the 9.5 hours provision. If Thomas had been seeking a remedy for employees other than himself, presumably the information request would have sought records showing which drivers had opted in or out. It did not. Therefore, I conclude that the grievances pertained only to Thomas. Accordingly, the only issues presented by the grievances concerned how many hours Thomas worked each day of the weeks in question.

Focusing narrowly on the information actually needed to resolve issues raised by the grievance would lead to the conclusion that only documents showing how many hours Thomas had worked would be relevant, and that documents showing the hours worked by other employees would not be. Thus, I would have to conclude that except for Thomas' own time records, the remaining requested documents would not be relevant or necessary and would not have to be furnished.

However, would such a conclusion be consistent with Board precedent? As noted above, the Board tests the relevance of the requested information using a liberal discovery-type standard. *Daimler Chrysler Corp.*, above. Under this standard, *even potential or probable relevance* is sufficient to give rise to an employer's obligation to provide information. *Postal Service*, 332 NLRB 635 (2000); *Certco Food Distribution Center*, 346 NLRB 1214 (2006).

Yet, it remains difficult to see how records concerning work performed by other employees would have any potential

relevance, let alone probable relevance, to grievances seeking a remedy for one person, Thomas. Certainly, this information could have potential or probable relevance for some other purposes. For example, if union negotiators wanted to know how effectively the 9.5-hour clause was working so that they could propose different language to correct any problems, then information about the hours actually worked by bargaining unit employees would clearly be relevant. However, relevance must be judged in relation to the purpose for which the information had been requested. That purpose here pertained to grievances seeking a remedy for only one employee.

Judging the relevance of the information requested based on the stated purpose of the request, I conclude that the records of drivers other than Thomas would not have potential or probable relevance even under a broad "discovery-type standard."

Of course, the Board's application of a "discovery-type standard" in determining relevance does not suggest that discovery during litigation is exactly the same thing as an information request within a bargaining relationship. The adversarial relationship which characterizes litigation stands distinct from the attitude of cooperation which contributes to the success of a long-term bargaining relationship.

Congress enacted the National Labor Relations Act to reduce the industrial strife which resulted in labor disputes disrupting commerce. 29 U.S.C. § 151. Long-term collective-bargaining relationships, in which the parties respect each other and work out their differences in good faith, foster industrial stability, and peace. In such a partnership the parties find ways to compromise.

The Board contemplates that when an information request would impose a great burden, the parties, if possible, will try to negotiate an arrangement satisfying both sides. Thus, it places a duty on a party burdened by an information request to inform the requesting party promptly and seek an accommodation. *Mission Foods*, 345 NLRB 788 (2005).

Respondent did precisely that. However, when Respondent sought an accommodation, Thomas refused to budge. On cross-examination, Thomas gave the following testimony:

Q. BY MR. CRIDER: For every single information request you've made that's encompassed within this hearing, within this complaint, have you ever given one inch?

JUDGE LOCKE: I'll allow it. Overruled.

Q. BY MR. CRIDER: Have you ever compromised at all on anything?

A. All this information is needed in processing grievances.

Q. Is the answer, no, Mr. Thomas, because I believe it is. Do you agree with me that you haven't compromised on one request you've made? Of all the dozens and dozens of requests that are made a part of this complaint, no compromise by you at all. Agree or disagree?

A. We need this information to process grievances.

MR. CRIDER: Your Honor—

THE WITNESS: I guess I agree, because—

Q. BY MR. CRIDER: Okay. Thank you. It was simple. You agree.

A. Yes.

Q. Now, the company on the other hand has written multiple letters to you, saying, We need to find some middle ground so that we don't have to respond to unreasonable requests that cost thousands of dollars and hours and hours and hours. Correct?

A. Yes.

Q. Yet you've not given an inch.

A. (No audible response.)

Another portion of Thomas' testimony also reveals his unwillingness to compromise. In this testimony, on direct examination, Thomas described a conversation he had with Manager Rosebaugh on about May 24, 2011. Management recently had furnished the Union with computer-generated documents in response to the Union's information request. However, Thomas did not understand these records because they did not present the information in its "native format," the format which Thomas was accustomed to seeing. So Thomas complained to Rosebaugh that the Respondent had not furnished the information which the Union had requested.

Q. Now, directing your attention to about May 24, 2011, which would have been about four days after you received that, did you have another conversation with Mr. Rosebaugh about the information?

A. Yes. I think—I'm not real sure, but I think he asked me what I was really looking for. I think it was about—a conversation about telematics, what I was really looking for. And I think that was the day. But I remember having that conversation with him, and I told him, I want everything that you—that telematics entails. Everything that you showed me telematics has, that's what I want.

Q. Okay. Did he say anything about the size of the telematics report?

A. Yes. He said that was a huge file and that I would be asking a lot. And I told him, which was kind of smart, but I told him that was not my problem.

This conversation reflects a pattern characteristic of how Thomas dealt with the Respondent concerning information requests: The request itself is broad and burdensome, and Respondent raises the possibility of an accommodation. In seeking such a compromise, the Respondent quite reasonably asks about the Union's true purpose—"what I was really looking for"—so that the contours of the information request could be shaped to fit the need. However, Thomas never provides such an explanation but instead digs in his heels. In this instance, when Rosebaugh alluded to the burden, Thomas replied dismissively that it wasn't his problem.

A similar pattern appears in written communications, discussed later in this decision. When the Respondent seeks to lessen its burden by negotiating an accommodation based on the Union's needs, the Union ignores the request for an explanation, and merely repeats that it wants every document requested. Both the failure to explain and the refusal to compromise reflect on the Union's motivation.

Thomas' testimony acquires particular significance when considered together with his hostility towards Manager Rosebaugh, his seeking information clearly irrelevant to the stated purpose, his refusal to withdraw information requests

even after the grievance prompting the request had been settled, and the nonresponsive answers he offered on cross-examination.

The Board has held that there is a presumption that a union acts in good faith when it requests information from an employer, until the contrary is shown. *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), *enfd. denied* on other grounds 857 F.2d 1224 (8th Cir. 1988). This presumption cannot be rebutted simply by pointing to the large size of the information request and the burden it thereby imposes. See *Mission Foods*, above. Some other evidence is necessary.

In the present case, ample additional evidence supports a conclusion that the requesting party acted in bad faith. The record clearly establishes that the drafter of the information request, Chief Steward Thomas, harbored hostility towards the Texarkana Center's manager, Randy Rosebaugh. Thomas did not deny having said that he hoped Rosebaugh would be fired.

Additionally, the information request now under consideration sought documents beyond those relevant to the stated purpose of the request. Other information requests drafted by Thomas, such as those described in complaint paragraphs 10(a) and (c), discussed above, also sought irrelevant information.

Certainly, the mere fact that some of the requested information was irrelevant falls far short of establishing an improper purpose. However, the inclusion of irrelevant matters in an information request takes on additional significance because of the Union's intransigence when asked to narrow the request.

Moreover, Chief Steward Thomas had demonstrated a willingness to use the information request process for purposes other than the Union's statutory duties. Specifically, in the information requests described in complaint paragraphs 10(a) and (c), and discussed above, Thomas not only had sought relevant records but also documents he could use in connection with EEOC charges. On cross-examination, Thomas ultimately admitted that it was not appropriate to use the information request procedure to obtain such information. From his reluctance to make such an admission and his attempts to evade the question, I conclude that Thomas well knew that he was misusing the information request procedure but did so anyway.

To support the Government's argument that the Union did not act in bad faith, the General Counsel's brief cites a judge's recent decision in *United Parcel Service*, 2013 WL 819359 (NLRB Division of Judges, March 4, 2013). In this decision, the judge held that neither the length of the requests nor the requester's failure to tailor a request to the specific nature of the grievance sufficed to establish that the request had been made in bad faith. In contrast, the present record also provides credible evidence of the requester's hostility. Moreover, as already noted, the Union's inability to explain its need for the information and its unwillingness to exclude irrelevant and redundant documents, do not shout "good faith."

Thomas' willingness to "hijack" the information request procedure for his own purposes even though he knew it was not appropriate, his unyielding refusal to make any accommodation, his admitted hostility to the center's manager and his undenied desire that the manager be fired form a

consistent picture which rebuts the presumption that the information request had been made in good faith. I find that Thomas was using his position as chief steward for his own ends rather than to perform the Union's statutory duties as exclusive bargaining representative.

Further, I conclude that Thomas' conduct can be attributed to the Union, which enabled and condoned it. The record establishes that the Union had a practice which allowed Chief Steward Thomas to make information requests on its behalf. Thomas did so using a form titled "Steward Request for Information," which bore the Union's name, address, telephone number and logo. An assistant business manager, Tommy Driggers, acted as an intermediary between Thomas and Respondent but the record does not establish that Driggers ever told Thomas to change or revise an information request.

In these circumstances, Thomas acted with at least the apparent authority of the Union. Respondent received information requests on union forms bearing the Union's logo and address, and communicated about the requests with one of the Union's business agents. Under all the circumstances, Respondent reasonably would believe, and would have no reason to doubt, that Chief Steward Thomas was speaking and acting for the Union and reflected union policy. See, e.g., *Albertson's, Inc.*, 344 NLRB 1200 (2005). Respondent reasonably would believe that the requests came from the Union in its capacity as exclusive representative of bargaining unit employees.

In sum, I conclude that Chief Steward Thomas's bad faith is attributable to the Union and taints the information request under consideration here. However, the existence of bad faith does not necessarily render an information request entirely void. Rather, the effect of the bad faith must be judged, in each instance, on the totality of the circumstances.

The information requests described in complaint paragraphs 10(a) and (c), discussed above, sought documents which the Union needed in connection with the grievance concerning a discharged employee, Rayfield. Although I conclude that Thomas acted in bad faith when he sought to use the information requests for purposes unrelated to Rayfield's grievance—for example, by seeking information for use in connection with EEOC charges, and by seeking information for a time period after Rayfield's discharge—this bad faith should not affect the Respondent's obligation to furnish those requested documents which are indeed relevant to the Union's representation of Rayfield.

Stated another way, the grievant Rayfield should not be penalized because a union steward abused the information request process. The Union still needed information to represent Rayfield adequately. Therefore, I have concluded that Respondent remained obligated to provide this information in timely fashion, even though it had no duty to furnish other information sought by the request.

Applying similar reasoning to the information request under consideration here would lead to the conclusion that Respondent did have an obligation to furnish time records sufficient to show whether Thomas himself worked 9.5 hours or more on the days in question even though no duty would arise to furnish records of other employees. However, I do not reach

this conclusion because I find both that Thomas acted in bad faith when he filed the information requests and that this bad faith was of such a character as to relieve the Respondent of the duty to furnish information.

It should be stressed that not every improper motive for making an information request will be so egregious as to extinguish the duty to furnish information. However, I find that in this instance, unlike in the information requests pertaining to the Rayfield grievance, Thomas was not merely trying to use the information request procedure for a purpose (the EEOC charges) unrelated to the Union's statutory duties, he was attempting to use this process for a *malicious* purpose.

Thomas harbored an intent to cause management such extra work and inconvenience that it foreseeably would do harm to the Respondent's operations. Such an intention constitutes a particularly virulent strain of bad faith.

Ordinarily, the presence of a proper reason for the information request—here, to obtain information relevant to the issue raised by the grievances (the "9.5 hours" issues)—creates an entitlement to requested relevant and necessary information, and the concurrent existence of another purpose does not erase the obligation to provide that information. However, for reasons to be discussed further below, I conclude that Thomas' retaliatory motive is so antithetical to the purposes of the Act, has such great potential to damage the collective-bargaining process, and affected the Union's conduct to so great an extent, that it cannot be ignored.

In this regard, the retaliatory motive affected not only the decision to file the information requests and the content of those requests, but also the Union's willingness to engage in the discussion process, the give and take, which forms the essence of the collective-bargaining relationship. In these circumstances, and for reasons discussed further later in this decision, I conclude that Thomas' retaliatory motive cannot simply be ignored or held to be of no consequence. To do so would condone the misuse of the information request process and set a highly pernicious precedent.

Although not fully on point—because it does not address the present situation involving the coexistence of both a proper and improper objective—a recent Board decision does provide some guidance. In *ACF Industries, LLC*, 347 NLRB 1040 (2006), a union and employer had been involved in collective bargaining for a new agreement but were reaching impasse. When the employer was about to declare impasse and implement its final offer unilaterally, the union made an information request. The Board found that this information request "was purely tactical and was submitted solely for purposes of delay." Therefore, it concluded, the employer's failure to furnish the information right away did not violate the Act.

It is true that the union in *ACF Industries*, unlike the Union here, had no purpose which triggered the obligation to furnish information. Its desire to delay impasse was the sole motivation for its information request. However, in the present case, the improper purpose, although not the only motive, so dominated the Union's actions that the legitimate objective became increasingly less significant.

If Thomas' primary purpose had been obtaining information to bring his grievance to a successful resolution, he would readily have agreed to an accommodation allowing the exclusion of irrelevant and unnecessary documents. His insistence that Respondent furnish documents he did not need for grievance processing demonstrates that the objective of inflicting inconvenience on the Respondent had become more important.

The intent to burden supervisors with the time-consuming task of gathering, copying and furnishing massive amounts of documentation gave Thomas' bad faith an egregious quality, and this motivation had become the dominant one. Nonetheless, Respondent made a good-faith effort to comply with the information request. In these circumstances, any omission by the Respondent neither manifested bad faith nor violated the Act.

Therefore, I recommend that the Board dismiss the allegations arising from complaint paragraphs 10(b) and 12(b).

#### Complaint Paragraphs 10(d), 11, and 12(d)

Complaint paragraph 10(d) alleges that since about June 29, 2011, the Union has requested in writing that Respondent furnish it with the following information for all Texarkana Center drivers for June 24, 2011: (1) timecards; (2) delivery reports; (3) manifests; (4) virtual OJS; and (5) telematics.

Complaint paragraph 11 alleges that this information is necessary for, and relevant to, the Union's performance of its duties as exclusive bargaining representative. Complaint paragraph 12(d) alleges that since June 29, 2011, Respondent has failed and refused to furnish the Union with the requested information. Respondent denies all of these allegations.

The record clearly established that on June 29, 2011, the Union made the information request, which itself is in evidence. However, that document differs from the language in complaint paragraph 10(d) in one significant respect. According to the language in the complaint, the Union requested copies of the specified documents for "all Texarkana Center drivers." However, from the request itself, which does not use the words "all Texarkana Center drivers," the scope of the request is not clear.

The Union made the request on a standard form customarily used for that purpose. Check marks appear to the left of "Time Card," "Delivery Reports" and "Manifest" and, to the right of these words appears the handwritten notation "June 24, 2011." However, the request does not indicate for which employees these documents were requested.

On the same form, a check mark appears to the left of the word "Other" and to the right of that word appears the following in handwriting:

Virtual OJS—for date June 24, 2011

Telematics—for date June 24, 2011

Counsel for the General Counsel, during her cross-examination of Manager Rosebaugh, referred to this information request as seeking the specified documents "for all Texarkana drivers" and Rosebaugh did not contradict that characterization. However, his failure to disagree with the word "all" does not convince me that he believed the information request included documents for drivers other than Thomas. Counsel for the General Counsel did not specifically ask Rosebaugh about the scope of the information request but merely mentioned in passing, as part of her question, that it sought the documents "for all Texarkana drivers."

Chief Steward Thomas prepared the information request, so he should know what information he was seeking at the time he signed the document. He testified concerning the reasons he sought the various types of documents. This testimony is more consistent with a conclusion that he requested only documents pertaining to his own work on June 24, 2011, and did not ask for similar documents reflecting the work of other employees on that date:

Q. Now, turning your attention to Exhibit 18, request information for just one day?

A. Yes. June 24. That's the day—2011. I'm sorry. That's the day that he gave me the virtual OJS, and it was on a Friday.

Q. Why did you request the time cards for that day?

A. Time cards will show the company that I took my lunch—documented and took my lunch that day.

Q. The delivery reports?

A. Delivery reports tell the company exactly how many business stops I had that day, and if I had any misses that day.

Q. The manifest?

A. It was a dispatch of the day of how many stops I was having on the car and where they were loaded.

Q. The virtual OJS?

A. Yes. I wanted a copy of the virtual OJS, because we had a meeting on Tuesday of that following week about the virtual OJS done on Friday, and he was going over this with me, and I wanted a copy of it. I wanted to know exactly what he knew.

Q. Why did you request a telematics for June 24?

A. Telematics, too, gives a detailed day of what happened out on a—particularly on 29A that particular day, and when we were talking on that Tuesday about the virtual OJS and telematics, Supervisor Carnes went over a few things with telematics in his hand, so he had a copy of telematics with him, going over a few things on telematics, and I wanted a copy of it.

Q. Did you get the copy?

A. No.

This testimony, by the union steward who filed the information request, does not indicate that he was seeking documents pertaining to any employees other than Thomas himself. Based on this testimony and the fact that the information request itself does not state “for all Texarkana employees,” I conclude that complaint paragraph 10(d) erred in alleging that the Union’s June 29, 2011 information request sought the specified documents for all Texarkana employees. Rather, I find that it requested only the specified documents which pertained to Thomas’ work on June 24, 2011.

Chief Steward Thomas made this information request in connection with a grievance of the same date. The grievant was Thomas himself. Before addressing whether the requested information was relevant to the grievance, it is necessary to ascertain the exact nature of the grievance. What action did the grievance allege to be improper or in violation of the collective-bargaining agreement?

In typical cases, the thrust of a grievance can be summarized in a few words because the grievance alleges either a disciplinary action without “just cause” or a failure to comply with a specific contractual provision. However, it is not quite so easy to determine exactly what Thomas was grieving here. The grievance form includes a blank space for “statement of position.” In that space, Thomas wrote the following:

Supervisor Josh Carne talk with me about a Virtual OJS ride given to me Friday June 24, 2011. Steward Ricky Stout present. He went through Telematics of the day. Says that I backed more than usual says to watch excessive time. Told his [sic] that there was no excessive time. The company uses this tool to target certain drivers and will not give a copy of Telematics when asked. I never saw any other drivers questioned for the day of June 24, 2011.

On the line for “Remedy Requested,” Thomas wrote “To be made whole.” In the space for listing the contractual provisions allegedly violated, Thomas wrote “[Articles] 37 & 66 and all that apply.”

In his testimony, Thomas referred to this grievance as a “harassment grievance for giving me a virtual OJS.” The phrase “virtual OJS” is a term of art within Respondent’s operations and requires some explanation.

As discussed above, GPS-related devices on the delivery vans capture data about the location and movements of the vehicle. This data, when processed by the computer, yields much the same information that a passenger aboard the van could have obtained by observation. The technology thus eliminates the need for a supervisor actually to ride with the driver.

When a supervisor physically rides in the delivery van to observe a driver’s performance, it constitutes on-the-job supervision or “OJS.” When the supervisor uses the technology in lieu of riding in the vehicle, it is a “virtual OJS.” Thomas described the “virtual OJS” as follows:

They pretty much track you, like how long it take you to get from one stop to the next, what was your SPORH from that stop to the next stop, what time you got to your next stop, and it goes on all day like that. And they track you all day, and

they, at the end of the day or at the end of the time, they go over this information with you.

(“SPORH” is an acronym for “stops per on-road hour,” one of the metrics used by management to evaluate a driver’s efficiency.)

The grievance cites article 37 of the collective-bargaining agreement and article 66, which is part of a supplemental agreement. However, the grievance did not specify which sections of these articles applied. Sections 2 and 3 of article 37 state as follows:

#### Section 2:

Not more than one (1) member of management will ride with a driver at any time except for the purpose of training management personnel. No driver will be scheduled for more than one (1) day’s ride per year with more than one (1) member of management on the car. Such day will not be used for disciplinary purposes. The sole reason for two (2) management employees on the car is for supervisory training. If a supervisor assists a driver during an O.J.S., that day will not be used in determining a fair day’s work.

During scheduled safety training for feeder drivers the supervisor will only drive for demonstration purposes and this will not exceed one (1) hour per workday.

#### Section 3

Any alleged violation of this Article shall be subject to the applicable grievance procedure. Where an employee has submitted a grievance regarding an excessive number of rides, no member of management shall ride with that employee unless and until the local level hearing is concluded provided such hearing is held within five (5) working days. If the Union has a legitimate reason for not being available within the five (5) working days, the period will be extended up to a total of ten (10) working days.

The language quoted above applies to “OJS,” instances in which a supervisor actually rides with a driver. It is not clear to what extent this language also limits the use of “virtual OJS,” if it does at all.

Thomas referred to the grievance as a “harassment grievance.” Article 66, section 1 states as follows:

The parties agree that the principle of a fair day’s work for a fair day’s pay shall be observed at all times and employees shall perform their duties in a manner that best represents the Employer’s interest. The Employer shall not in any way intimidate, harass, coerce or overly supervise any employee in the performance of his or her duties. The Employer will treat employees with dignity and respect at all times, which shall include, but not limited to, giving due consideration to the age and physical condition of the employee. Employees will also treat each other as well as the Employer with dignity and respect.

However, the language of the grievance itself doesn’t describe any conduct which obviously would fall within the meaning of “harass, coerce or overly supervise” or which failed to treat an employee “with dignity and respect.” The grievance

only alleges that a supervisor told Thomas that on this particular day he backed his vehicle more than usual and that he should “watch excessive time.” Those words, on their face, seem to be rather mild job-related criticism.

Moreover, the grievance does not specifically allege that management had subjected Thomas to repeated “virtual OJS.” Rather, the grievance simply asserted that “The company uses this tool [virtual OJS] to target certain drivers and will not give a copy of Telematics when asked. I never saw any other drivers questioned for the day of June 24, 2011.”

Although it is not clear to me that the grievance, on its face, alleges a contract violation, it should be noted that I do not have authority to weigh the merits of the grievance which forms the basis for the information request and do not do so. *Certco Food Distribution Center*, above. Thus, I will neither consider nor entertain any opinion concerning how an arbitrator might rule if called upon to resolve the grievance.

Because the requested documents pertain to the work of an employee in the bargaining unit, they enjoy a presumption of relevance. Accordingly, the sole question to be decided is whether credible evidence rebuts this presumption.

Nothing in the record rebuts the presumption of relevance. Therefore, I find that the government has proven that the requested documents are relevant to the Union’s performance of its duties as exclusive bargaining representative and necessary for that purpose.

Above, in discussing the allegations raised in complaint paragraph 10(b), I found that the record established that the Union had made that particular information request in bad faith, and that the bad faith was egregious enough to relieve the Respondent of any obligation to furnish any of the requested information. However, also as noted above, such a conclusion must be made, in each instance, based on the totality of the relevant, credited evidence. Moreover, because such a conclusion about the Union has consequences for the employees the Union represents, it should be reached rarely and reluctantly.

Here, considering the totality of the circumstances, the record does not establish that the Union, by Steward Thomas, demonstrated the bad faith necessary to relieve the Respondent of its duty to furnish the information. For the reasons discussed above, I have concluded that the information request described in complaint paragraph 10(d), and now under consideration, only sought documents pertaining to Thomas’ work on one particular day, and did not ask for documents pertaining to other employees. Thus, unlike the information request discussed above with respect to complaint paragraph 10(b), this present information request is not a blunt object with which to cudgel management for personal retaliatory reasons.

Thomas testified that Respondent never produced the requested documents. The Respondent does not contend otherwise. Rather, its District Labor Relations Manager, Cedric Williams, testified that the documents described in complaint paragraph 10(d) do not exist.

With the possible exception of the Telematics and “virtual OJS” documents, the June 29, 2011 information request sought documents—timecards, manifests and delivery reports—which Respondent routinely generates and uses. Therefore, I

understand Williams testimony, that the documents “do not exist,” to mean that they no longer exist.

Additionally, Thomas testified that, during his June 24, 2011 meeting with Supervisor Carnes, when they discussed the telematics information Carnes had a copy of it in his hand. Crediting this uncontradicted testimony, I find that, on January 24, 2011, the telematics document did exist.

Manager Rosebaugh testified that his office retains manifests for 14 days and retains timecards for 22 days. Rosebaugh further testified that the telematics report includes a “driver stop summary report” which is kept for 30 days. The record does not establish that Respondent deviated from its customary document retention practices with respect to the records sought in the June 29, 2011 information request. Accordingly, I infer that the requested documents remained in existence at the Texarkana facility when management received the June 29, 2011 information request.

The Union certainly is entitled to have copies of the information relied upon by a supervisor in counseling a bargaining unit employee to improve his work performance. Without these documents, the Union cannot make an informed decision regarding how best to represent the employee. Therefore, I find that Respondent had a duty to furnish the Union with this requested information in a timely fashion and that doing so imposed little burden. Further, I find that Respondent did not do so.

Accordingly, I conclude the Respondent breached its duty to bargain in good faith and thereby violated Section 8(a)(5) and (1) of the Act. As discussed above, Respondent entered into a settlement agreement which the Region approved on March 8, 2012. The effect of that settlement agreement will be discussed later in this decision.

#### Complaint Paragraphs 10(e), 11, and 12(e)

Complaint paragraph 10(e) alleges that since August 31, 2011, the Union has requested in writing that Respondent furnish the Union with the manifests for all Texarkana Center drivers who ran area 29A for the dates August 22–24, 2011.

Complaint paragraph 11 alleges that this requested information is necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of the unit.

Complaint paragraph 12(e) alleges that since August 31, 2011, the Respondent has failed and refused to furnish the Union with this requested information. Respondent denies all of these allegations.

On August 31, 2011, Thomas, in his capacity of chief union steward, filed a grievance on behalf of himself. He testified that he filed the grievance “because the company was giving me a three-day OJS ride, and I wasn’t happy about it.” This was actual OJS, with a supervisor in the vehicle observing Thomas as he worked, and not a “virtual OJS” ride.

On the same date, the Union filed an information request related to this grievance. Union Steward Vince Coker, rather than Thomas, signed this request, which is in evidence. Based on this exhibit and testimony related to it, I find that the General Counsel has proven the allegations raised in complaint paragraph 10(e).

With respect to the allegation raised by complaint paragraph 11, that the requested information was relevant to the Union's performance of its duties as the exclusive bargaining representative and necessary for that purpose, I begin by noting that the requested documents pertain to the work of bargaining unit employees. Therefore, they are presumptively relevant.

Nothing in the record rebuts this presumption. Accordingly, I conclude that the Government has proven the requested documents' relevance and necessity.

Thomas testified that he never received the manifests for the dates August 22–24, 2011. As noted above, Manager Rosebaugh testified that his office retains manifests for 14 days. Thus, absent some departure from routine practice, the manifests for August 22–24, 2011, would still have been at the Texarkana terminal when the Respondent received the information request on August 31, 2011. The record does not reflect any departure from routine practice during this time period.

Respondent introduced into evidence a large number of documents which, it asserts, it furnished the Union in response to the information requests. Some of these documents lack titles and dates. However, to the extent that the documents could be identified with respect to date, none appeared to be a manifest for August 22, 23, or 24, 2011.

Additionally, Respondent cross-examined Union Chief Steward Thomas, who testified that he had not received these requested documents. If Respondent had, in fact, furnished the manifests for these dates, it could have confronted the witness with such documents. However, it did not. Therefore, I find that Respondent did not furnish the Union with the requested manifests for August 22, 23, and 24, 2011.

Nonetheless, for the reasons discussed below, I conclude that Respondent's failure to furnish these manifests did not breach its duty or violate the Act. Although Respondent did not provide the three manifests, it did furnish the Union with the relevant information.

For clarity, it may be noted that the information request sought a number of different documents in addition to the manifests mentioned in complaint paragraph 10(e). The government is not alleging that Respondent failed to furnish the Union with these other documents, but only that Respondent has not provided the Union with certain of the requested manifests.

Indeed, even a casual examination of the information request reveals that it sought a vast number of documents. Apart from the manifests mentioned in the complaint, the requested information includes timecards, delivery reports, time between stops summaries, and driver recap summaries for all drivers who drove in area 29A from January through August 2011. Additionally, it requested "driver recap summary (telematics)" for these drivers "as far back as telematics goes."

Complying with this information request imposed a significant burden on the Respondent, and yet the General Counsel alleges only that Respondent failed to furnish the requested manifests. Thus, it appears clear that Respondent did furnish the Union with almost all of the numerous documents, leaving out only these three manifests. However, the record does not indicate that Respondent purposefully withheld these

three pieces of paper or that it would have any motivation or reason to do so.

The record does indicate that the manifests would have provided no new information, relevant to the grievance, which was not contained in the other documents which Respondent did furnish to the Union. Chief Steward Thomas, testifying about another information request, described a manifest as follows:

Manifest is a dispatch of the day. It tells exactly what's on the car, where it is, and how many packages it is and how many stops it is.

Elsewhere in his testimony, Thomas gave this description of a manifest:

It tells exactly what's on the car, where it is, and how many packages it is and how many stops it is.

Although the complaint alleges that Respondent did not furnish the manifests sought in the August 31, 2011 information request, that same information request also asked for delivery reports for the same period of time, and Respondent did provide the Union with these documents. Thomas described the contents of such delivery reports while he was testifying about another information request he had filed:

Q. Why did you request the delivery reports?

A. Delivery records would tell me what driver during this period—what he had on the package car, how many packages he had for on the car, and who signed for it. Mainly how many business stops he had and who signed for it, and if he or she missed anything.

At another point in his testimony, Thomas provided a similar description of delivery reports:

Q. What would the delivery reports show?

A. If—I wanted to know what was on the package car, where the particular drivers were delivering packages, how many business stops they had, and if they were delivering their stops—packages from the time they showed their lunch, this give me a little bit better detailed report.

Comparing Thomas' descriptions of the manifests with his descriptions of delivery reports, I find that the two types of documents provide essentially the same information. Thus, even if Respondent failed to furnish the requested manifests, it did not prejudice Thomas, whose grievance concerned being singled out for ride-along supervision.

Presumably, Thomas wanted to use the manifests to determine whether he had been given a heavier workload than other drivers. If he had, in fact, been given more time-consuming assignments than other employees who worked in the same area, such a difference would explain his less satisfactory scores on indices such as stops-per-onroad-hour. The delivery reports which Respondent did furnish gave Thomas information similar to that in the manifests and therefore did not prejudice Thomas' ability to make this review.

An employer is not obligated to furnish information in the exact form requested; rather, it has an obligation to bargain in good faith. *Coca-Cola Bottling Co. of Chicago*, 311 NLRB

424, 427 (1993) (Member Oviatt, concurring), citing *NLRB v. Borden, Inc.*, 600 F.2d 313 (1st Cir. 1979).

In sum, Respondent furnished all relevant information even if it could not find or provide the three manifests. Therefore, I recommend that the Board dismiss the allegations related to complaint paragraphs 10(e) and 12(e).

#### Complaint Paragraphs 10(f), 11, and 12(f)

Complaint paragraph 10(f) alleges that since September 1, 2011, the Union has requested in writing that Respondent furnish the Union with the following information for every Texarkana Center driver who ran area 30D from January 2011 through September 1, 2011: (1) timecards; (2) delivery reports; (3) manifests; (4) time between stop section summary; (5) weekly operation report; (6) driver recap summary; and (7) telematics including average speed of the vehicle on the route. Respondent has admitted this allegation. Based on this admission, I find that the government has proven the allegations raised in complaint paragraph 10(f).

Complaint paragraph 11 alleges that this requested information is relevant to and necessary for the Union to perform its duties as exclusive bargaining representative, which Respondent denies. The Respondent also denies the allegation in complaint paragraph 12(f) that since September 1, 2011, it has failed and refused to furnish the Union with this requested information.

Thomas' displeasure with being more closely supervised did not dissipate after he filed the August 31, 2011 information request described in complaint paragraph 10(e) and the related grievance. Thomas drafted the additional information described in complaint paragraph 10(f). Although another steward signed this September 1, 2011 request, it is clear that Thomas was the moving force behind it.

A consistent motif throughout this case concerns Respondent's data-intensive approach to management. The existence of a large amount of numerical data, and its use by management, certainly bears on the relevance of the requested information. Therefore, a brief description of the conflict between Thomas and management concerning the data and its use may be helpful.

Respondent's quantitative approach to management may not be unique, but Respondent does rely on information technology to a remarkable if not singular extent. Advances in sensors and microprocessors have made possible data streams which could hardly have been imagined a century ago, when Frederick Taylor early advocated the methodical study of workflow to improve productivity. Respondent has equipped its delivery vehicles with devices to harvest this abundant data. Then it crunches the numbers.

The algorithms yield scores such as SPORH, which, as noted above, reflects a driver's stops-per-on-road-hour. Using such indices, Respondent determines which drivers need additional supervision to meet its standards. Respondent states that it scheduled Thomas for greater supervision because his performance data indicated a need for improvement.

Thomas, on the other hand, asserts that Respondent is not being forthright with its mathematical analysis and is using these numbers as a pretext. On September 2, 2011, he filed

another grievance protesting the "OJS ride." In this grievance, Thomas stated as follows:

It does not matter what SPORH that I run on my area. The company always says that I am over allowed. They have manipulated and falsified the records to harass me. Third day of a lock in ride. What number is the company looking for?

Thus, Thomas contends not only that Respondent is seeking to discriminate against and harass him but also that Respondent is using falsified records as a pretext for doing so. For clarity, it should be noted that notwithstanding this claim, no issue concerning discrimination or harassment is before me. The complaint in this case does not allege that Respondent has discriminated against Thomas for reasons prohibited by the Act. Additionally, the complaint does not allege that Respondent or its supervisors made any unlawful threat or statement, or engaged in any unlawful conduct from which an intent to discriminate against Thomas could be inferred. Rather, all violations alleged in the complaint pertain to Respondent's duty to provide information requested by the Union.

Respondent has denied that the September 1, 2011 information request, described in complaint paragraph 10(f), sought information relevant to the Union's representation duties and necessary for that purpose. The requested information pertains to the work of bargaining unit employees and therefore is presumptively relevant. The presumption, however, is rebuttable.

To examine whether the record rebuts the presumption of relevance, I begin by finding the Union's purpose in making the information request. As a threshold matter, such purpose must involve the Union's performance of a duty which the Act requires it to do as the exclusive bargaining representative. If the purpose meets this test, then I consider how the requested information relates to that purpose.

Chief Union Steward Thomas drafted the information request. His testimony sheds light on the purpose:

Q. Okay. Now, I see the January 2011 through September 1, 2011. Why did you choose that time period?

A. This was for every driver that ran Area 30D, and I wanted to know—that's the adjacent route to mine, and the adjacent route pretty much helps me if—during that three-day ride, my complaint was that center manager Randy Rosebaugh was taken off stops from my truck, from my package car, give it to 30D, *and giving me the easy stops from his package car, so that makes the SPORH even higher when he does that.* If I give him business stops, which takes me longer to get a signature, and he gives me residential where I can just drop off, the SPORH is going to be higher, so I wanted that information, because I knew that center manager Randy Rosebaugh was manipulating that SPORH. [Emphasis added.]

Clearly, Thomas has attributed to management a sinister motive which management itself absolutely denies. As noted above, no evidence supports Thomas' accusation that Respondent falsified data.

From management's perspective, here is what happened: When the Respondent's analytic data indicated that Thomas

was working less productively than other employees, Manager Rosebaugh decided to have a supervisor ride along with Thomas to observe how he was doing the work and, once the problem was identified, to work with Thomas on solving it.

Thomas' testimony suggests that Rosebaugh also took an interim step to alleviate the problem: The manager made Thomas' job easier by having him deliver packages which did not require him to get the recipient's signature. Such packages can be delivered more quickly than those which require the driver to knock on a door and hand someone a tablet to sign.

These two management actions seem perfectly unremarkable and unexceptional. Certainly, when numerical data indicated that a driver could work more efficiently, assigning a supervisor to observe and advise the driver is far from extraordinary. Likewise, it takes some imagination to view as discriminatory a temporary lightening of the workload.

Nonetheless, Thomas considered these actions to be part of a stratagem to hurt him by manipulating and falsifying the data. Such a plot necessarily would entail three stages: First, the manager would assign him work which could be done more quickly, establishing a benchmark of how many packages Thomas could deliver in an hour. Second, management would then assign him work that took longer, but still hold him to the original benchmark. Third, management would discipline Thomas when he failed to meet this standard.

In the absence of any evidence that Respondent actually was trying to set Thomas up for discipline or that management was manipulating the data to create a pretext, Occam's Razor dices the plot theory in favor of the simpler explanation, that management was trying to help Thomas become more efficient. The record provides no support for Thomas' conjectured plot. No credible evidence indicates that Respondent or any of its supervisors harbored animus against Thomas. No credible evidence indicates that management altered or manipulated any data for any reason.

Both the record and my observations of the witnesses leave me with the strong impression that neither Rosebaugh nor any other manager was trying to set Thomas up for disciplinary action. Rather, they were using the data to manage "by the numbers." Thomas may have disliked such rigorous supervision but that does not make it unlawfully discriminatory.

The information request which Thomas drafted sought 8 months worth of documents "for every Texarkana Center driver who ran area 30D" even though Thomas admitted that he worked a different route. In his testimony quoted above, Thomas explained his belief that Manager Rosebaugh was reassigning some of his work—delivery stops which Thomas ordinarily would have made—to drivers working in area 30D.

However, even if Rosebaugh made such reassignments, they would have amounted only to the most ordinary exercise of supervisory judgment. Indeed, it would seem to be a self-evident principle that if a bottleneck occurs, route around it.

The record does not include a scintilla of evidence that Rosebaugh was plotting against Thomas, and Thomas' own testimony fails to offer any credible basis for concluding that Rosebaugh harbored such an intention. Moreover, Thomas did not provide a cogent explanation of how the requested documents could reveal such a plot.

Assuming for the sake of analysis that supervisors indeed wanted to set Thomas up for discipline by making his numbers look good so that later he would be unable to meet the same standard, all the documents would show—at most—is that Thomas had received easier assignments than some of the other drivers, which also would happen if management simply was concerned about how quickly the packages were being delivered and shifted some of the load to more efficient employees. Thomas' testimony does not explain how the requested documents could help prove that management had harassed him, as he alleged in the grievance. Likewise, he did not explain how these records could reveal or even hint at the existence of a plot to make him look bad.

Although Thomas offered this conjecture and may even believe it, no credible evidence supports it. The present record leaves me with the strong impression that Rosebaugh is following the practice of management by objectives, not management by machinations. In the complete absence of proof that Rosebaugh was plotting against Thomas, and in the presence of persuasive evidence that management simply was trying to improve efficiency, I cannot make Thomas' belief a *folie à deux*.

It is not necessary to enter the forbidden area of weighing the merits of a grievance to question how seriously Thomas believed that the requested documents would assist him in pursuing the grievance. In one sense, the grievance seemed to be secondary to the information requests, rather than the other way around. The grievance provided justification for the information requests which, essentially, had become Thomas' ammunition. Thomas considered management's meticulous measurement of his work performance to be harassment. The information request procedure armed him with a way to make that scrutiny more costly.

Thomas, as chief union steward, well knew that the purpose of the information request must relate to the Union's performance of its statutory duties. Thus, as described in the Witness Credibility section, above, he tried repeatedly to evade answering a question concerning whether it was proper to use the information request procedure to obtain information to support an EEOC charge.

He clearly understood that claiming a grievance-related purpose would make the information request appear more legitimate. Moreover, Thomas' demonstrated willingness to use the information request procedure for one inappropriate purpose—gaining information to support an EEOC charge—leads me to conclude that he would be willing to use it for other inappropriate purposes.

Thomas claimed that he was gathering information for his grievance, and at least procedurally, that was true. However, that claim also strikes me as disingenuous. I find that Thomas' primary motivation for filing broad, onerous information requests was to strike back at management. It was the one means available to him to make management's work unpleasant.

Additionally, if management's efforts to supervise Thomas consistently resulted in having to respond to onerous information requests, it might well discourage such supervision. Such a retaliatory purpose hardly created a duty to furnish

information. Just as it was not proper to use an information request to delay impasse, as in *ACF Industries, LLC*, above, it is not proper to use an information request either as a means of retaliation or to discourage supervisors from doing their jobs.

The obligation to furnish information arises only if the requesting party seeks the information to perform one of its responsibilities under the Act, and only then if the information is relevant to and necessary for that purpose. However, the law does not impose on a union a duty either to take vengeance or to prevent management from supervising an employee.

For the same reasons discussed above in connection with complaint paragraphs 10(b) and 12(b), I conclude that bad faith motivated the filing of the information request under consideration here, and that such bad faith was so egregious that it nullified the Respondent's duty to furnish the requested information. Therefore, I recommend that the Board dismiss the allegations raised by complaint paragraphs 10(f) and 12(f).

Complaint Paragraphs 10(g) Through (n) and (p), 11, 12(g) Through (n), and (p)

Beginning November 21, 2011, and approximately once every 10 days thereafter, Chief Steward Thomas filed a grievance on behalf of all bargaining unit employees working at the Texarkana facility, and in connection with each grievance submitted an information request. The grievances all complain about the same matters, but for different time periods. The December 19, 2011 grievance, quoted here, is typical:

The Company has caused the drivers in the Texarkana Center to skip their lunch, drive over the speed limit, and work unsafe in order to achieve the companies [sic] manipulated and falsified performance numbers. Most drivers skip their lunch or take part of their lunch or take their lunch after the 8th hour in fear of retaliation from center manager Randy Rosebaugh. Rosebaugh uses these manipulated and falsified performance numbers to scare most drivers into not taking their lunch or taking their lunch after the 8th hour. Most drivers put their lunch into the DIAD but do not take their lunch. The grievant request[s] all drivers to be paid for the lunch they did not take. Part or all of the lunch.

Remedy requested: To be made Whole. Drivers paid part or all the 1-hour lunch they did not take.

The statement that most drivers "put their lunch into the DIAD but do not take their lunch" means that most drivers indicate on time records that they stopped work to take a lunchbreak but actually did not cease working during the time identified as lunchbreak.

Thomas gave the following explanation for why he filed an additional, but similar, grievance about every 10 days:

Q. Now, I see you requested documents for all drivers in the Texarkana Center from November 7 through November 18, 2011. Why did you select that time period?

A. Well, under the collective-bargaining agreement, we can only file grievances every ten days. After ten days, they're late, so at this period of time, I was filing these lunch grievances every ten days, and I was filing these steward requests for information every time I filed a lunch grievance.

As I understand this testimony, Thomas considered there to be a continuing problem which remained uncorrected, so, to cover the latest 10-day period, Thomas would file another grievance.

The Union filed an information request in connection with each such grievances. Complaint paragraphs 10(g) through (n) and (p) allege that the Union made these information requests, described in the following paragraphs.

Complaint paragraph 10(g) alleges that since November 21, 2011, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers for the dates of November 7, 2011 through November 18, 2011: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics also includes average speed of vehicle in motion on each route; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven the allegations in this complaint paragraph.

Complaint paragraph 10(h) alleges that since December 5, 2011, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from week ending November 26, 2011, to the week ending December 3, 2011: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics also includes average speed of vehicle in motion on each route; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven these allegations.

Complaint paragraph 10(i) alleges that since December 19, 2011, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from the week ending December 10, 2011 to the week ending December 17, 2011: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics also includes average speed of vehicle in motion on each route; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven these allegations.

Complaint paragraph 10(j) alleges that since January 3, 2012, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from the week ending December 24 to the week ending December 31, 2011: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics also includes average speed of vehicle in motion on each route; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven these allegations.

Complaint paragraph 10(k) alleges that since January 16, 2012, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from the week ending January 7 to the week ending January 14, 2012: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics also includes average

speed of vehicle in motion on each route; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the Government has proven these allegations.

Complaint paragraph 10(l) alleges that since January 30, 2012, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from the week ending January 21 to the week ending January 28, 2012: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics also includes average speed of vehicle in motion on each route; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven these allegations.

Complaint paragraph 10(m) alleges that since March 19, 2012, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from the week ending March 3 to the week ending March 17, 2012: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics including map; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven these allegations.

Complaint paragraph 10(n) alleges that since April 2, 2012, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from the week ending March 24 to the week ending March 30, 2012: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics including map; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven these allegations.

Complaint paragraph 10(p) alleges that since April 16, 2012, the Union has requested in writing that Respondent furnish the Union with the following information for all Texarkana Center drivers from the week ending April 7, 2012, to the week ending April 14, 2012: (1) timecards; (2) delivery reports; (3) manifests; (4) telematics including map; (5) time between stop section summary; (6) weekly operation report; and (7) driver recap summary. Based on the admission in Respondent's answer, I find that the government has proven these allegations.

Complaint paragraph 11 alleges that the requested information was relevant to the Union's representation duties and necessary for that purpose. Complaint paragraphs 12(g) through (n), and (p) allege that Respondent failed and refused to furnish the requested information. Respondent denies these allegations.

Each of the information requests seeks a number of different documents for each of the drivers working at the Texarkana Center. After receiving the first two of the information requests—the ones dated November 21 and December 5, 2011—Respondent's labor relations manager, Cedric Williams, sent a letter to Business Agent Driggers. This December 15, 2011 letter asked the Union to provide more details about the information request and sought to negotiate a compromise which would give the Union the information it needed while

reducing the Respondent's burden. Williams' letter stated, in part, as follows:

UPS objects to the requests because as drafted they are overly broad and unduly burdensome. Accordingly, UPS requests that the union provide additional details regarding the information sought so the parties can determine whether responsive information can be provided through a less burdensome process and whether the scope of the requests can be reasonably narrowed to focus on the specific individuals involved in the relevant grievance or investigation.

Williams' letter continued with a description of the information requests, noting that they would result in the expenditure of dozens of hours of work and the production of hundreds of pages of documents. The letter then stated:

Please specifically identify what information the union is attempting to obtain through the information requests so UPS can determine whether responsive information can be provided through a less burdensome process. In addition, the requests reference Articles "18, 37, 66, 68, 54 and all that apply" but do not indicate whether the request relates to a specific grievance or how the requests might otherwise relate to the union's representation of its members. We are not aware of a specific grievance that would make this request as drafted relevant. Please identify the grievance or investigation to which the requests relate so the scope of the requests can be reasonably narrowed to focus on information regarding the specific individuals involved in the grievance or investigation.

We look forward to your response.

Driggers replied with a one-paragraph letter dated December 21, 2011, which stated in its entirety as follows:

This letter confirms the receipt of your December 15, 2011 letter requesting specificity of information that the Union is attempting to obtain through steward requests dated November 21, 2011 and December 5, 2011. Stewards Reggie Thomas and Michael Fowler have submitted these requests due to the fact that Texarkana management is aware that Package Car Drivers are not properly taking or properly recording their contractual meal period as spelled out in the CBA. This has been brought to Center Manager Randy Rosebaugh's attention twice in local level hearings with no correction having been made. These information requests have been made to identify which Package Car drivers are being allowed or forced by the Company to violate the CBA. I am enclosing the specific grievances that were turned in along with these information requests. Thank you for your response in this matter and I look forward to a speedy resolution.

Labor Relations Manager Williams replied by a January 6, 2012 letter which quoted the details of the information requests and again protested that the requests were overly broad and unduly burdensome. Williams noted that because the Union had requested various records for every Texarkana driver for almost a month during the holiday peak season, complying with

the request would require many hours of work. The letter continued as follows:

The union is well aware that it is not necessary to review six different categories of documents to determine whether a driver took a meal period on a particular day. One category of documents would provide the necessary information. Moreover, an investigation of whether a driver took a meal period does not require the analysis of twenty-four days of work. The union could determine whether drivers are taking meal periods by reviewing time records for a single day from a reasonable sampling of drivers. In the alternative, the union could simply review the time records of drivers who allege they have missed meal periods, if any such drivers actually exist.

UPS is not aware of any specific drivers who have pending grievances regarding missed meal periods. If a driver had alleged he missed his meal period and filed a grievance then it would be reasonable for the union to request the driver's time records for the days in which the driver allegedly missed his meal period. That is not the current situation with regard to the pending information requests. Instead, the union has chosen to go on a "fishing expedition" but expects UPS to clean and gut the fish. Please narrow the scope of the overly broad requests so UPS can provide responsive information through a less burdensome process.

The Union responded to Williams' request for an accommodation by January 9, 2012 letter. Steward Thomas, not Business Agent Driggers, signed this letter. Parts of Thomas' letter are confusing because of their grammar or structure. For example, at one point the letter states:

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

At another point, the letter states that "The information provided can also clear any and all past Steward Information Request," followed by a list of such requests which begins with the two May 3, 2011 information requests discussed earlier in this decision. The meaning of this passage remains elusive.

However, in contrast, Thomas' letter becomes quite unambiguous when denying Williams' request for an accommodation or compromise. Although Thomas' letter does not explain why he was unwilling to find a middle ground, it leaves little doubt that no compromise proposal would be forthcoming. At one point, it states:

We feel that the information requested is not overly broad and unduly burdensome as it is the information needed in defense of each grievance filed.

At another point, Thomas' letter states:

This letter should clarify and clear up any confusion of the Company as to what is needed by the Union. The information is vital for the grievance process. The policing of the contract is the primary job of the Stewards in the Texarkana Center.

We feel this information is needed for the enforcement of the Collective Bargaining Agreement in Texarkana.

At no point in the letter does Thomas explain the basis for his statement that "We feel this information is needed for enforcement of the Collective Bargaining Agreement." Similar, the letter does not even attempt to answer—indeed, it does not even acknowledge—William's statement that "The union is well aware that it is not necessary to review six different categories of documents to determine whether a driver took a meal period on a particular day." Similarly, Thomas' letter does not even acknowledge, let alone respond to or address, Williams' suggestions concerning ways the Union could obtain the information it needed without seeking the vast amount of documentation described in the information requests.

Chief Steward Thomas had a choice: On the one hand, he could indulge the personal animosity he harbored towards Manager Rosebaugh. He could use his power as a union officer, his authority to file grievances and information requests, to cause needless extra work for the manager and, when possible, make him look bad.

On the other hand, Thomas could choose to give priority to the needs of the bargaining unit employees he represented. Serving them effectively as steward entailed putting aside personal pique and dealing with management in good faith to resolve problems.

It was a clear choice. Thomas could not nurse both a grudge and the bargaining relationship. Thomas' January 9, 2012 letter, ignoring the Respondent's request that the parties try to reach an accommodation, indicates which choice Thomas made.

Nonetheless, the record plainly establishes and I find that the Respondent made a good faith effort, indeed, an effort bordering on the heroic, to comply fully with the request. On January 18, 2012, the Respondent furnished to the Union a sizable box of requested documents. The box weighed about 60 pounds.

On January 20, 2012, Labor Relations Manager Williams sent another letter to the Union, again seeking some middle ground which would satisfy both sides. The letter, which Williams addressed to Business Agent Driggers, included the following:

UPS is not aware of any driver other than Reggie Thomas who has a pending grievance regarding missed meal periods. It would be reasonable for the union to request Mr. Thomas' time records for the days in which he allegedly missed his meal period. That is not the current situation with regard to the pending information requests seeking information regarding every driver at the Texarkana facility. The union continues its practice of making overly broad requests for information that is not necessary to conduct its investigation. Please narrow the scope of the overly broad request so UPS can provide responsive information through a less burdensome process.

On January 21, 2012, Steward Thomas sent a letter to Labor Relations Manager Williams. It informed him that "the information received is not the information requested." However, the letter did not explain that statement. It neither

described what documents were in the box the Respondent furnished or stated how those documents differed from the ones requested. The letter did state that Thomas had informed Manager Rosebaugh "that the information received was not the information requested." However, the letter did not describe what Thomas had told Rosebaugh.

Thomas' letter did not mention the Respondent's request for an accommodation or offer to meet to discuss one. Instead, the letter turned accusatory: "This is another attempt by the company to prolong providing the necessary information that is needed to complete the union's investigations." However, considering that the Respondent had just furnished the Union with a 60-pound box of documents, and in the absence of any evidence that the Respondent was intentionally dragging its feet, the accusation that Respondent was trying "to prolong providing the necessary information" is difficult to square with reality.

Thomas' letter does not explain what he meant by "the union's investigations." The record does not establish that any employee except Thomas believed that Respondent was falsifying records to require employees to work without taking lunchbreaks. Such a belief finds as little evidentiary support as Thomas' suspicion that management was plotting to set him up for future discipline by making his workload easier. Likewise, it is difficult to understand how Thomas could accuse the Respondent of trying to prolong providing the "necessary information" when the Union had ignored the Respondent's requests to explain the relevance and the Respondent had just furnished the Union with a 60-pound box of documents.

On March 6, 2012, Respondent's labor relations manager, Cedric Williams, signed a settlement agreement in Cases 16-CA-028064, 16-CA-062316, and 16-CA-070588. The Board's Regional Director for Region 16 approved the settlement.

During this time period, Thomas continued to file a grievance and information request about every 10 days. All the grievances concerned the "missed lunch" issue.

On March 28, 2012, Respondent's labor relations manager sent a letter to Union Business Agent Driggers. It again protested that the Union's information requests were overly and unnecessarily broad and burdensome. The letter again suggested ways the Union could obtain necessary information which would be less burdensome to Respondent. As the Respondent had requested previously, this letter urged the Union to narrow the scope of "the overly broad request so UPS can provide responsive information through a less burdensome process."

Although Respondent had sent this letter to Business Agent Driggers, the chief steward replied to it. Thomas' April 1, 2012 reply did not indicate any willingness to narrow the scope of the information request or to negotiate any accommodation. To the contrary, Thomas took a hard line:

The company had the opportunity to tell a NLRB judge that the Union information request[s] were overly broad and unduly burdensome but chose to take the settlement agreement. It is time for all this whining to stop and give the Union the information it is seeking.

Later, of course, the Respondent did, in fact, present its case to an NLRB judge, who also heard Thomas' testimony, observed him and the other witnesses and assessed their credibility. Both my impressions of the witnesses, discussed above, and the entire record lead me to conclude that Thomas was not acting in good faith when he made the information requests. Although he claimed to seek the information for grievance-related purposes, I find that his dominant motive was retaliatory.

The letters from Thomas to Respondent's labor relations manager particularly bolster the conclusion that the Union, through Chief Steward Thomas, was not acting in good faith. The unwillingness even to discuss an accommodation provides one indication of bad faith, but equally telling is the Union's failure to explain, in any of the letters, exactly how the requested information related to performance of the Union's statutory duties. Instead of providing even a brief explanation, Thomas simply ignored the issue, stating instead that Respondent had the ability to comply with the information request. However, asserting that the Respondent could comply in no way addresses the issues of relevance and necessity.

Respondent repeatedly raised the issue of necessity by observing that it appeared the Union could obtain all the information it needed from documents in just one of the categories the Union had sought, and then asking the Union why it needed the documents in all the other categories. This was a fair question and the Union's duty to bargain in good faith obligated it to provide an answer.

Beyond vague conclusory statements that the requested information was needed for enforcement of the collective-bargaining agreement, Thomas' letters do not explain or even try to explain why all the requested documents in all the categories were necessary.

Instead of answering the Respondent's legitimate question, Thomas used the same tactic which he attempted, less successfully, on the witness stand. He ignored it. When the Respondent repeated the question in a subsequent letter, Thomas ignored it again, and again. This evasive tactic, when used on the witness stand, does not manifest candor, and when used off the witness stand it does not manifest good faith.

It is true that the requested information enjoys a presumption of relevance because it pertains to bargaining unit employees, but that presumption does not affect a union's duty to provide a genuine answer when an employer says, "This request is very burdensome. Why do you really need all this information? Can't we cut it down?" If the union simply replied, "it's presumed relevant," that terse response would not be useful in discussing a compromise or accommodation. After all, parties acting in good faith are supposed to work these things out, if they can, and one indication of good faith is the willingness to make an honest effort.

Stated another way, a presumption is a legal concept which affects which party must present evidence, and when, during a hearing. But even if a presumption sometimes might substitute for evidence in that arena, it cannot substitute for facts in the rest of life. Here, the Respondent had a legitimate interest in knowing why the Union needed all the requested information so that it might propose a less burdensome way of meeting the

Union's needs. The Union's failure to answer this question reflected on its good faith.

In a case involving information which does not enjoy the presumption of relevance, the General Counsel's burden of proof includes establishing that when the union made its information request, it had a reasonable basis for believing that the information would be necessary to it in carrying out its statutory obligations. *Allison Corp.*, above, citing *Providence Hospital*, 320 NLRB 790, 793-794 (1996), enfd. 93 F.3d 1012 (1st Cir. 1996). In another decision not involving presumptively relevant information, the Board concluded that the union's letter to the employer, explaining the union's purpose in seeking the information, was not explicit enough to convey this objective to the employer. *Rice Growers Assn.*, 312 NLRB 837 (1993). The Board cited *Kentile Floors*, 242 NLRB 755, 757 (1979), for the principle that relevance cannot be established by speculative argument alone, without supporting evidence.

When the Union replied to the Respondent's letters, it ignored the relevance-related questions which the Respondent had asked. For the reasons discussed above, I have concluded that the Union manifested bad faith when it ignored rather than addressed these questions.

Moreover, the Union still has not provided a persuasive explanation regarding why the requested information is relevant to the performance of the Union's statutory duties or necessary for that purpose. Although the requested documents enjoy a presumption of relevance, that rebuttable presumption does not bar me from inquiring into whether the requested documents are, in fact, relevant to and necessary for performance of the Union's statutory duty. As noted above, if the Union has sought the documents for a reason unrelated to its duties under the Act, then the Act should not be brought to its assistance.

The facts in this case can be, and I believe should be, distinguished from those in *Associated General Contractors of California*, 242 NLRB 891 (1979). In that case, the Board disagreed with the judge's understanding of the motivation for the unions' information request. The Board stated that the judge's "conclusions appear totally based on attribution to the Unions of ulterior motivations for requesting the contested information. And such attribution is, in turn, largely the product of speculation and conjecture."

The "ulterior motivations" supposedly were to obtain information useful for organizing activities. Of course, unions routinely engage in the perfectly lawful and accepted endeavor of trying to recruit new members and, particularly, to organize employees of nonunionized employers and thereby become the employees' exclusive representative. The Act itself recognizes the propriety of such organizing efforts, protects employees' right to engage in organizing and provides for the certification of unions that win secret ballot elections. Nonetheless, and apart from the information which an employer must provide in connection with a Board-conducted election, a union's organizing efforts do not trigger a duty to furnish information. Only a union's activities related to the representation of employees, such as negotiating and administering a collective-bargaining agreement and processing grievances, entitle the

exclusive representative to request and receive relevant and necessary information.

In *Associated General Contractors of California*, the Board found no sound factual basis for the judge's conclusion that the unions had made the information request to further their organizing efforts rather than for policing and administering the collective-bargaining agreement. However, the Board went further: Even if the unions sought the information for organizing as well as for contract administration, the representation purpose obligated the employers to furnish requested relevant and necessary information, and the existence of another purpose did not diminish that obligation.

The Board stated that "it is well established that, where a union's request for information is for a proper and legitimate purpose, it cannot make any difference that there may also be other reasons for the request or that the data may be put to other uses. *Utica Observer-Dispatch, Inc. v. N.L.R.B.*, 229 F.2d 575 (2d Cir. 1956)." *Associated General Contractors of California*, 242 NLRB at 894.

In the present case, the Union filed its information requests in connection with grievances. Because representing bargaining unit employees in grievance proceedings clearly falls within a union's statutory duties, it certainly can be argued that the Union had at least one purpose which triggered the duty to provide requested relevant/necessary information. Moreover, based on *Associated General Contractors of California*, it further can be argued that the parallel existence of another purpose will not extinguish that duty.

I do not find that the Union filed the grievances simply as a pretext to justify the information requests. Rather, in this instance two separate motives probably were at work. It appears likely that Thomas filed the grievances with a desire to win them if he possibly could, but win or lose, he was also bent on imposing on management as heavy a burden as possible through the information requests. Winning a grievance may well have seemed a remote possibility to Thomas, one which depended on factors beyond his control. However, as chief union steward, he possessed the immediate certain ability to inflict distress through onerous information requests.

That ability may not quite amount to a "superpower," but it was a real power, indeed the only real power which Thomas could use to strike back against those whom he perceived to be harassing him. The fact that the discrimination charges he filed with the Board and the EEOC gained no traction did not change his subjective interpretation. Respondent's "by-the-numbers" management style might appear to an outsider to be rigorous but neutral, to be as unbiased and impersonal as a computer. Thomas still took it personally.

Likewise, the present record does not document any management falsification of the performance numbers—as Thomas alleged in grievances—and does not reveal any plot against Thomas, but the absence of such proof does not diminish Thomas' personal perception of persecution or make it any less powerful a motivator. I cannot and do not pass any judgment on Thomas' strong feeling that he had been wronged, but note that it explains why Thomas filed onerous information requests and remained unwilling to grant even the slightest relief from the burden.

Indeed, the record clearly shows that the information available from the various requested documents overlapped and that not all the documents would be necessary to provide the relevant and necessary information. In the total circumstances here, where agreeing to an appropriate accommodation would cause no harm, the refusal to narrow the request by eliminating redundant documents, or even to explain why all are needed, is evidence of a vindictive objective.

Unlike *Associated General Contractors of California*, above, in which the inference of “ulterior motivations” was a matter of conjecture, the present record provides a sound basis, consistent with my observations of the witnesses, to conclude that a retaliatory purpose tainted both the drafting and filing of the onerous information requests and the Union’s refusal to agree to any accommodation. However, the differences between the present case and *Associated General Contractors of California* go even further, to the nature of the “ulterior motivations.” The malignancy of the retaliatory intent in the present case makes *Associated General Contractors of California* inapposite.

Even if the unions in that former case intended to use the requested information for organizing, that purpose does not disrupt the statutory scheme. To the contrary, the Act specifically protects employees’ rights to form, join or assist labor organizations. A union’s intent to organize thus is compatible with the collective-bargaining system created by Congress when it passed and amended the Act.

On the other hand, using the information request process as a weapon of retaliation greatly damages bargaining relationships and undermines the system Congress envisioned. That system fails when rational self-interest gets trampled by the brooding beasts of spite.

It should be stressed that the mere presence of hostile feeling does not signal that the information request process has been converted from plowshare into a sword wielded with malice. Rather, such a rare kind of change will manifest a constellation of additional symptoms including these: (1) The information request or requests will require the production of a vast number of documents; (2) furnishing them will be time-consuming and onerous; (3) because of overlap and redundancy, all relevant and necessary information can be obtained from a subset of the records sought; (4) the requesting party is unwilling to agree to any accommodation which would reduce the burden even if the compromise would still provide all relevant and necessary information; (5) the requesting party is unwilling or unable to offer a plausible explanation as to why every single document is necessary.

The Act created a system which requires each side to deal with the other in good faith. Although this system does not compel either side to make any particular concession, it absolutely depends on the willingness of the parties to communicate with each other and contemplates that each side will be agreeable to compromises which do not harm its own position. By itself, a party’s unwillingness to make a particular compromise does not suggest that the party is acting in bad faith, but an unwillingness to make *any* compromise at all over a long period of time certainly does.

In other words, the same kind of prolonged intransigence which indicates bad faith during contract negotiations also

manifests bad faith in the context of information requests. It suggests an objective antithetical to the purposes of the Act, and this objective, unlike the possible “ulterior motivation” in *Associated General Contractors of California*—organizing employees—is not benign. To the contrary, appropriating a mechanism designed to promote informed bargaining and changing it into an engine of retaliation is malignant. Such a cancerous mutation poses too much danger to be condoned.

To summarize, I find that bad faith tainted the Union’s drafting and filing of the information requests and caused its refusal to agree to any accommodation which would reduce the burden on Respondent. Notwithstanding the Union’s unwillingness to narrow the information requests, the Respondent worked very hard to comply with those requests and furnished the Union with a prodigious number of documents.

In these circumstances, where Respondent acted in good faith notwithstanding the Union’s misuse of the information request procedure, I conclude that any failure to furnish all of the requested documents does not breach the Respondent’s duty to bargain in good faith and does not constitute a violation of Section 8(a)(5) and (1) of the Act. Therefore, I recommend that the Board dismiss the allegations raised by complaint paragraphs 10(g) through (n), and (p), 12(g) through (n), and (p).

#### Complaint Paragraphs 10(o), 11, and 12(o)

Complaint 10(o) alleges that since April 13, 2012, the Union has requested in writing that Respondent furnish the Union with the “time between stops” summary report for stops 1–2, 8–9, 16–18, 25–26, 29, 31–34, 36–37, 40–41, 43–46, and 48 for driver Brandon Blizzard for April 11, 2012. Respondent’s answer admits this allegation.

Respondent denies that this information is relevant to and necessary for the Union’s performance of its duties as exclusive collective-bargaining representative, as alleged in complaint paragraph 11, and also denies that it has failed to furnish it, as alleged in complaint paragraph 12(o).

The requested information pertains to the work of a bargaining unit employee, and the record does not rebut the presumption of relevance. I conclude that the government has proven that the requested information is relevant to and necessary for the performance of the Union’s duties as exclusive representative, as alleged in complaint paragraph 11.

The Union’s information request sought many other documents—timecard, delivery reports, driver recap summary, manifest, weekly operating report, virtual OJS report and telematics—besides the “time between stops summary” reports. As the General Counsel noted in the government’s posthearing brief, “Respondent provided these documents and they are not the subject of a Complaint allegation.”

In other words, the sole documents allegedly not produced were the “time between stops” reports. However, as the General Counsel’s brief acknowledges,

Respondent, through Rosebaugh, said Respondent no longer uses time between stop summary reports, but uses the driver stop summary reports instead.

The “driver stop summary report” referred to in the General Counsel’s brief is actually a section of the “telematics” data. It is highly plausible that Rosebaugh would stop using the older “time between stops” summaries when the more comprehensive telematics data became available. (As noted above, Rosebaugh began using telematics data at the Texarkana facility in March or April 2011, about a year before the information request under consideration here.)

Chief Steward Thomas’ testimony does not contradict that of Manager Rosebaugh:

Q. Does the company run time-between-stops summaries frequently?

A. I don’t know. I hadn’t seen one in a while.

Thus, based on the consistent evidence in the record, I conclude that Respondent did not provide the “time between stops” summaries because it no longer kept such documents. Instead, the same information could be found in the documents which Respondent did furnish the Union.

In sum, I find that Respondent provided all the requested information. Indeed, as the General Counsel’s brief admits, Respondent furnished the Union with a “virtual OJS report” which included essentially the same information which would have been observable by a supervisor riding in the delivery vehicle.

It would require advanced bureaucratic myopia to conclude that Respondent did not furnish the requested relevant information because it did not give the Union a piece of paper bearing the title “time between stops report” but instead provided other documents showing the time between stops. Therefore, I conclude that the Respondent fully met its duty to provide requested relevant and necessary information. Accordingly, I recommend that the allegations raised by complaint paragraphs 10(o) and 12(o) be dismissed..

#### Complaint Paragraphs 10(q), 11, and 12(q)

Complaint paragraph 10(q) alleges that since April 23, 2012, the Union has requested in writing that Respondent furnish the Union with the following documents for all Texarkana Center drivers who ran area 29A during the week ending April 21, 2012: (1) time between stop section summary; and (2) weekly operation report. Based on the admission in Respondent’s answer, I find that the General Counsel has proven this allegation.

Complaint paragraph 11 alleges that the requested information is relevant to and necessary for the Union’s performance of its duties as exclusive representative of the bargaining unit. Complaint paragraph 12(q) alleges that Respondent has failed and refused to furnish the requested information. Respondent denies both of these allegations.

The requested information pertained to a grievance filed on behalf of Thomas, who testified that he had been given “an intent to terminate for not running the SPORH. . . .” In other words, management considered his stops-per-onroad-hour number unsatisfactory. Accordingly, he requested records of all drivers who had worked this route during a particular week so that he could compare their SPORH scores with his own.

The records pertain to the work of bargaining unit employees and are presumptively relevant. Moreover, in this instance, the

record does not reflect any improper purpose. The records are for only a 1-week period, and limited to drivers similarly situated to Thomas. I conclude that the presumption of relevance stands unrebutted. Accordingly, I further conclude that the government has proven that the requested documents are relevant to and necessary for the Union to perform its functions as exclusive bargaining representative, as alleged in complaint paragraph 11.

This information request, like the one described in complaint paragraph 10(o), discussed immediately above, actually sought more information than alleged in the complaint. However, the Respondent provided other portions of the information, and the complaint only describes that information which allegedly was not furnished.

Thus, the information request also sought timecards, delivery reports, manifests, “virtual OJS” and “telematics including map” for the drivers who worked Thomas’ route on this particular week. The complaint does not allege that Respondent failed to furnish these documents and I find that Respondent did, in fact, provide them.

However, the complaint does allege that Respondent violated the Act by failing and refusing to provide the requested “time between stops” summaries. However, as discussed above, the Respondent had ceased using this report, because other records provided this information and more.

Thomas also sought the weekly operations reports because they provided information about the SPORH scores of the other drivers. The complaint alleges that Respondent failed to furnish the Union with these requested documents. However, the more detailed telematics information included precise information about stops and times.

I conclude that Respondent did furnish all requested information. Arguably, there may be situations in which a specific document, requested by name, must be produced to satisfy an information request. For instance, that might be the case if circumstances had called into question the authenticity or contents of the document itself. Such a question might concern whether the document included a particular clause or had been properly executed. However, those circumstances are not present here.

To the contrary, Thomas’ testimony makes clear that he requested these documents for the information they contained, notably, the SPORH scores. Because this information could be found in other documents, which Respondent did produce, there has been no refusal to provide information. Accordingly, I recommend that the unfair labor practice allegations arising from complaint paragraphs 10(q) and 12(q) be dismissed.

#### Complaint Paragraphs 10(r), 11, and 12(r)

Complaint paragraph 10(r) alleges that since April 25, 2012, the Union has requested in writing that Respondent furnish the Union with the “time between stops” section summary for driver Leland Spinks for the week ending April 14, 2012. Based on the admission in Respondent’s answer, I find that the General Counsel has proven this allegation.

Complaint paragraph 11 alleges that the requested information is relevant to the Union’s performance of its duties as exclusive bargaining representative, and relevant for that

purpose. Complaint paragraph 12(r) alleges that Respondent has failed and refused to furnish the requested information. Respondent denies both of these allegations.

Chief Steward Thomas submitted this information request in connection with a grievance he had filed on behalf of bargaining unit employee Leland Spinks, who was contesting being subjected to heightened supervision. Although the information request sought a number of different documents, the only ones identified in complaint paragraph 10(r) are “time between stops” summaries. The General Counsel’s brief includes a footnote stating that “The other documents Thomas requested were provided and, accordingly, were not made the subject of a complaint allegation.” The General Counsel’s brief also stated as follows:

Respondent provided some of the documents requested, but failed to provide the time between stop section summary. [Tr 211; R. Exh. W.] Thomas was never notified that Respondent no longer used the time between stop section summary and would not have asked for the forms if he had been notified. [Tr. 457.]

Although the General Counsel’s brief states that “Thomas was never notified that Respondent no longer used the time between stop section summary,” it would not appear that the government is arguing that Respondent violated the Act by failing to provide such notice. Certainly, the complaint does not include any allegation that Respondent committed an unfair labor practice by failing to notify the Union that it had discontinued use of a form. See *Raley’s Supermarkets & Drug Centers*, 349 NLRB 26, 28 (2007) (“At no time, even after learning that such a report did not exist, did the General Counsel amend the complaint to allege that the Respondent violated the Act by failing to timely inform the Union that there were no such reports. Accordingly, we would not find a violation on that basis.”).

Chief Steward Thomas testified as follows concerning why he sought the “time between stops” summary:

Q. Okay. Why did you request the time-between-stops summary?

A. Well, time-between-stops is important for determining what the SPORH was for Leland on each stop, and that determines the SPORH for the whole day, so we wanted a copy of the time-between-stops summary.

However, the record establishes that the April 25, 2012 information request sought, in addition to the time-between-stops summary, the telematics data for the same period and route, and the General Counsel does not dispute that the Respondent indeed furnished the telematics data. In the testimony quoted above, Thomas indicated he wanted the time-between-stops summary so that the SPORH could be determined, but elsewhere in his testimony, Thomas admitted that the telematics data provided this information:

Q. What is telematics?

A. Telematics is a complete day of a driver, how long that driver—what time that driver left, how long that driver takes to get to his first stop, how long that driver is in his first stop, going to his second stop, how long that driv-

er from his second stop to his third stop, and *it also generates SPORH for each stop.* [Emphasis added.]

Although Thomas was complaining that he needed the time-between-stops summary to ascertain the SPORH, the Respondent had furnished that same information as part of the telematics data. Considering that the telematics data not only included the SPORH but other detailed information useful for supervision and planning, it is no wonder that management discontinued use of the time-between-stops summary. Why would any company, let alone one so focused on efficiency as the Respondent, continue to use an old form which was redundant?

Indeed, it seems so obvious that management would discontinue an out-of-date form that Thomas’ testimony—that he was never notified—comes across as a bit disingenuous. Considering Thomas’ familiarity with the telematics data, he reasonably would have figured out for himself that the old form no longer served a purpose.

The Respondent provided the information. For the Union to insist that it had to be delivered on an outdated form quite literally exalts form—a form—over substance. An argument that the Union did not receive the requested information would be like a restaurant customer complaining that he did not get the combread he ordered because it came in a muffin rather than a wedge.

In sum, I conclude that the government did prove the relevance and necessity of the requested information, as alleged in complaint paragraph 11, but that Respondent, contrary to the allegation in complaint paragraph 12(r) furnished the information. Accordingly, I recommend that the Board dismiss this allegation.

Complaint Paragraphs 10(s) and (u), 11, and 12(s) and (u)

Complaint paragraph 10(s) alleges that since May 9, 2012, the Union has requested in writing that Respondent furnish the Union with the time between stop section summary for driver Reggie Thomas area 29A for April 30, 2012. Based on the admission in Respondent’s answer, I find that the government has proven this allegation.

Complaint paragraph 11 alleges the relevance and necessity of the requested information, and complaint paragraph 12(s) alleges that Respondent has failed and refused to furnish it. Respondent denies these allegations.

Complaint paragraph 10(u) alleges that since May 18, 2012, the Union has requested in writing that Respondent furnish the Union with the time between stop section summary report for driver Reggie Thomas for the weeks ending May 7 and May 15. (This information request is in evidence as GC Exh. 77.) Based on the admission in Respondent’s answer, I find that the General Counsel has proven this allegation.

Complaint paragraph 11 alleges the relevance and necessity of the requested information, and complaint paragraph 12(u) alleges that Respondent has failed and refused to furnish it. Respondent denies these allegations.

The requested information concerns the work of bargaining unit employee Reggie Thomas and enjoys a presumption of relevance. Although, as discussed above, I have concluded that Thomas did not always act in good faith when filing

information requests in his capacity as chief steward, it is not necessary to revisit that issue here. Rather, I will assume for the sake of analysis that Thomas acted in good faith and for a proper purpose in filing the information requests under consideration here. Further, I will presume that the government has proven the relevance and necessity of the information, as alleged in complaint paragraph 11.

The allegations in complaint paragraphs 10(s) and (u) and 12(s) and (u) raise the same kind of issues as those discussed above in connection with complaint paragraphs 10(r) and 12(r). The actual information requests submitted by the Union seek more information than described in complaint paragraphs 10(s) and (u), and Respondent furnished the Union everything except the "time between stops" forms.

The telematics information which Respondent did furnish the Union provided the same information which could have been obtained from the "time between stops" forms and, indeed, more. Accordingly, for the same reasons discussed above, I conclude that Respondent fully complied with the information requests alleged in complaint paragraphs 10(s) and 10(u). Further, I conclude that Respondent did not violate the Act and recommend that these allegations be dismissed.

#### Complaint Paragraphs 10(t), 11, and 12(t)

Complaint paragraph 10(t) alleges that since May 18, 2012, the Union has requested in writing that Respondent furnish the Union with the manifests for April 30, May 2 and 3, 2012, for driver Reggie Thomas for area 29A. Based on the admission in Respondent's answer, I find that the General Counsel has proven this allegation.

Complaint paragraph 11 alleges that the requested information is relevant to and necessary for the performance of the Union's duties as exclusive bargaining representative. Complaint paragraph 12(t) alleges that Respondent has failed and refused to furnish it to the Union. The Respondent denies these allegations.

The requested information described in complaint paragraph 10(t) is only part of the entire information request which the Union submitted to management on May 18, 2012. The actual information request prepared by Thomas and submitted to the Respondent on May 18, 2012, is in evidence as General Counsel's Exhibit 75. It sought the following documents for a 2-week period: Timecards, delivery reports, manifests, weekly operating reports, driver recap summaries, virtual OJS report and telematics, including maps.

On May 24, 2012, the Respondent provided the Union with documents in response to this information request. Of all the documents requested, the government only alleges that Respondent failed to furnish three of them, the manifests for April 30, May 2 and 3, 2012. The General Counsel's brief acknowledges that "other information requested pursuant to this request was provided."

The record indicates that after receiving information in response to a request, Thomas would review the documents and then, if any of the requested documents had not been provided, would send a note to Business Agent Driggers. This note would specify which documents had not been received. Driggers, in turn, would email the Respondent to seek the

missing information. These records do not establish that the Union informed the Respondent that it had not received manifests for April 30, May 2 and 3, 2012.

In view of the substantial amount of documentation which Respondent furnished to the Union in less than a week after the information request, in the absence of evidence establishing that the Union notified Respondent that it had not received the three manifests, and considering that they comprised only a fraction of the documentation requested and provided, it is difficult to conclude that the Respondent acted in bad faith. However, before deciding that issue, it is appropriate to take into account the reason for the information request.

The information request pertained to a grievance filed on behalf of Reggie Thomas. This grievance, like the information request, is dated May 18, 2012. Although another steward signed the grievance, Thomas drafted it. In it, Thomas stated as follows:

The company has manipulated and falsified the performance numbers to harass me. On May 15, 2012 meeting with Supervisor Josh Carnes, Steward Mike Fowler present. Discussed was the previous day SPORH and over allowed hours. Management has treated me differently because of my attitude, personality, past incidents and experiences, and union activity. They also treat me differently because I have filed NLRB charges against them.

As noted above, the complaint in this matter does not allege that Respondent discriminated against Thomas, or any other employee. The General Counsel does not allege that Respondent engaged in unlawful discrimination of any kind. Additionally, no credible evidence suggests that the Respondent falsified performance numbers and the General Counsel does not allege that Respondent engaged in harassment of Thomas or any other employee.

The grievance itself, quoted above, together with Thomas' testimony, indicate management again considered Thomas' performance "numbers" to be unsatisfactory and discussed it with Thomas at a meeting also attended by a union steward representing Thomas.

The grievance leaves no doubt that Thomas did not believe the performance numbers with which the supervisor confronted him. Rather, he considered these numbers to have been "manipulated" and "falsified" in an attempt to harass him.

No extrinsic evidence suggests that anyone altered these measurements. Likewise, no credible evidence suggests that any supervisor or manager intended to harass Thomas. In the absence of such evidence, I find that Supervisor Carnes, in his meeting with Thomas, was simply following the established procedure for counseling an employee whose performance did not measure up.

Presumably, Thomas wanted to look for and find evidence which would support his belief that management was altering the performance numbers to harass him. To that end, he filed the information request. In addition to searching for documents showing some kind of manipulation or falsification of the data, Thomas may also have been looking for mitigating factors which might explain or justify the amount of time he had taken

to make his deliveries. Thus, he gave the following explanation for why he had requested manifests:

Q. Okay. Why did you request the manifests?

A. Manifests gives a dispatch of the date. It lets me know if I'm heavy or not on those particular weeks and tells me how many stops is on the car, where they're located on the car, which is important.

If his delivery van (or "package car," in Respondent's terminology) had been loaded almost to overflowing, the time it took him to complete his route might well increase.

Although I have found that in some instances, described above, Thomas used the information request procedure to lash out at management and to retaliate, I do not get the sense that he did so in this particular matter. Here, Thomas did not seek a nearly astronomical number of documents and then refuse to compromise.

Rather, this particular information request sought a more limited number of documents for a relatively brief time period, a period related to the counseling he had received for unsatisfactory performance numbers. Moreover, by this point, Thomas was aware that his job might well be in jeopardy and, therefore, he felt a need to discredit the data which might be used as the basis for his discharge. Therefore, I conclude that the record does not rebut the presumption of relevance which the requested information enjoys. Accordingly, I conclude that the government has proven the allegations raised in complaint paragraph 11 concerning the relevance and necessity of the requested information.

No evidence suggests, even remotely, that Respondent withheld the three manifests when it furnished the Union with the other 100-or-so pages of documents. Likewise, the record neither reveals nor even hints at any reason why management, which had furnished a number of manifests, might not want Thomas or the Union to have these particular three. The only reasonable conclusion is that the failure to provide the Union with these three manifests was inadvertent.

Could the Union have received the information recorded on the manifests but from a different source? If so, it would be similar to the situation discussed above, in which the telematics data provided all the information to be gleaned from the times-between-stops summaries. However, the telematics information, which concerns the location of the vehicle at each point in time, does not duplicate the manifest information, which lists the name of the recipient and the method of shipment (such as "ground" or "first day air") for each package on the vehicle.

If not the telematics data, might some other requested document duplicate the information on the manifest? On cross-examination, Thomas testified, in part, as follows:

Q. BY MR. CRIDER: It's your testimony that manifests weren't produced. Is that what you're saying?

A. No. I say, all the manifests wasn't produced. I got most of the information. I was missing April 30, May 2 and May 3. I made that clear.

Q. Okay. Page 5312, is that a manifest for April 30?

A. That is not a manifest. This is a delivery report. This is not a manifest.

...

Q. BY MR. CRIDER: Now, the driver delivery report and the manifests contain essentially the same information, do they not, Mr. Thomas?

A. No, they do not.

Q. What's the difference?

A. Driver manifests is a dispatch report. It tells exactly how many packages are on the package car, how many stops a driver has, and where they are located on the package car.

At this point, Thomas did not elaborate on what information a manifest recorded but a delivery report did not. Thus, his testimony seems to imply that manifests list the packages carried and the stops but that delivery reports do not. However, such an impression would be absolutely incorrect. Earlier in his testimony, on direct examination, Thomas described a delivery report:

Q. Now, we've already talked about the time card. The next check is delivery reports. What are delivery reports?

A. Delivery records tell exactly what a driver had on his package car that day as far as the amount of stops, what stops they were, what time he delivered, who signed for the stops, and if he or she missed any stops or not.

Comparing this testimony, on direct examination, with Thomas' testimony on cross-examination leads to the conclusion that delivery reports do, in fact, record essentially the same information as manifests. For example, Thomas testified that the manifest "tells exactly how many packages are on the package car" and he testified that the delivery reports "tell exactly what a driver had on his package car."

Similarly, Thomas testified that the manifest shows "how many stops" the driver made and that the delivery report shows "the amount of stops, what stops they were . . . and if he or she missed any stops or not." In sum, Thomas' descriptions of delivery reports and manifests do not support his denial that the two documents provide essentially the same information. Indeed, this denial seems one further symptom indicating that Thomas' testimony should be viewed cautiously.

Without doubt, a manifest and a delivery report both record similar information about the number of packages and the number of stops, but that doesn't warrant a conclusion that there are no differences. It would be surprising for a company so focused on efficiency to use two forms when one would do. Because manifests and delivery reports serve different purposes, undoubtedly they diverge in certain respects.

However, the question here is whether the two types of documents differ in any way material to the Union's needs as exclusive bargaining representative. In other words, do the delivery reports include all the information which Thomas sought—and expected to obtain from the manifests—to defend against the assertion that he was working too slowly?

Obviously, the number of packages which Thomas had to deliver on a given day would be relevant to how long it should take him to finish the route. Similarly, the number of stops has obvious relevance.

If Thomas believed that the manifests recorded some other information relevant to his needs, information not available from the delivery reports, he certainly would have said so during his testimony. He cannot easily be described as a disinterested witness whose lack of concern about the outcome would lead him to overlook a fact favorable to his side.

Moreover, if the manifests contained any relevant information not available through the delivery reports, it seems likely that when Thomas sent his note to Business Agent Driggers about the completeness of the information provided, he would have mentioned that three manifests were missing. Likewise, the business agent would have informed the Respondent. The fact that Thomas did not mention the three missing manifests in his note to Driggers, so that the business agent could request them from Respondent, leads me to conclude that Thomas did not consider the three manifests all that important because he could obtain the same information from the documents which had been furnished.

In these circumstances, I find that Respondent did furnish to the Union all the relevant information sought by the Union's information request. Further, I find that Respondent made a fully reasonable attempt to locate the requested records, that it acted in good faith, and that the failure to find the three manifests was inadvertent. Therefore, I conclude that Respondent did not violate the Act as alleged in complaint paragraphs 10(t) and 12(t) and recommend that the Board dismiss these allegations.

#### The Settlement Agreement

On March 6, 2012, the Respondent and Charging Party executed an agreement which settled three of the five charges which form the basis of the third consolidated complaint in this matter. Those charges are Cases 16-CA-028064, 16-CA-062316, and 16-CA-070588. The Regional Director for Region 16 of the Board approved this settlement agreement on March 8, 2012.

However, on May 21 and July 13, 2012, respectively, the Union filed additional unfair labor practice charges which were docketed as Cases 16-CA-081494 and 16-CA-085218. On October 31, 2012, the Regional Director issued the complaint (more fully, the "order further consolidating cases, third consolidated complaint and notice of hearing") which had the effect of setting aside the settlement agreement, reviving the complaint allegations from Cases 16-CA-028064, 16-CA-062316, and 16-CA-070588 and incorporating them in a single complaint along with allegations from the more recently filed cases.

Here, I must consider whether the Region properly set aside the settlement agreement and revived the allegations it had resolved. The answer to that question carries significant consequences because I have found some of the allegations raised by the earlier charges to be meritorious. If the settlement agreement properly should have remained in effect, it would lay those meritorious allegations to rest—they would be deemed settled and remedied—and block further action on them here. However, if the Regional Director properly set aside the settlement agreement, then the once-settled

meritorious allegations have gained new life and must be remedied here.

To state the legal principle more exactly, well-established Board precedent holds that a settlement agreement disposes of all issues involving presettlement conduct unless prior violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties. *Fruehauf Trailer Services*, 334 NLRB 344 (2001); *In Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978).

In determining whether setting aside the settlement agreement is warranted, I draw guidance from another venerable line of Board precedent. The Board has long held that "a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), citing *Twin City Concrete*, 317 NLRB 1313 (1995), quoting *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1988), *enfd.* 914 F.2d 1442 (10th Cir. 1990).

Accordingly, I must decide whether either of two events has occurred: (1) Has the Respondent failed to comply with the provisions of the settlement agreement? (2) After the settlement agreement went into effect, did Respondent commit an unfair labor practice? If the answer to either question is "yes," then setting aside the settlement agreement was warranted.

In determining whether Respondent failed to comply with the terms of the settlement, it is helpful to begin with a description of those provisions, which are quite rigorous. In addition to the provisions typical of such informal settlements, the agreement includes other, less common requirements which obligate the Respondent to take a number of extraordinary steps. These requirements included posting notices not only in places where notices to employees customarily were posted, but also near each computer station at the Texarkana facility; providing a copy of the settlement agreement to every supervisor and manager working at the Texarkana facility (including individuals who worked as temporary supervisors for at least 10 days per year); training each supervisor and manager about the duty imposed by the Act to furnish the Union with requested relevant and necessary information; cautioning each supervisor and manager that failure to furnish such information or an unreasonable delay in providing it "shall not be tolerated" and would "subject the responsible supervisor or manager to discipline, up to and including discharge" and requiring each supervisor and manager to "acknowledge in writing that he or she has been furnished with a copy" of these instructions, understood them, and would "conduct himself or herself consistently therewith, and will not in any way commit, engaged [sic] in induce, encourage, permit or condone any violation of this Settlement Agreement and Notice Posting."

Another atypical provision in the settlement agreement obligates the Respondent to conduct one or more employee meetings at which a "responsible management official" would read the Notice to Employees out loud. The Board has

characterized such a requirement as an “extraordinary” remedy. See *Chinese Daily News*, 346 NLRB 906, 909 (2006).

Although a number of the requirements described above go beyond those typically found in informal settlement agreements, the General Counsel does not contend that Respondent failed to comply with them. Rather, the General Counsel, through the Regional Director for Region 16, concluded that the Respondent had not complied with the settlement agreement because of language which actually did not appear in the body of the settlement agreement itself.

Nothing in the body of the settlement agreement obligated Respondent to train union officials in how to interpret computer-generated data. However, as noted above, the agreement did require Respondent to post a Notice to Employees that was appended to the settlement as “Attachment A.” This notice included the following:

WE WILL, if unable to provide the Union with information in the format requested by the Union, provide the Union with in-person training in interpreting the documents provided and provide reasonable Union time in which to receive the training. This training will take place within five (5) business days of providing the information.

The General Counsel contends that Respondent did not follow through with this training and that its failure to do so constitutes a breach of the settlement agreement sufficient to justify setting it aside. Consideration of this rather novel issue must begin with a review of what actually happened.

On March 23, 2012, the Respondent furnished to the Union some computer-generated documents in a format other than the “native” format which the Union had requested. On April 4, 2012, Respondent’s labor relations manager sent a letter to Union Business Agent Tommy Driggers. It stated:

UPS will be responding to the Union’s information requests with documents that may not be in their native format. The Company will provide in-person training to Union officials to assist them in interpreting these documents. Please let me know if the Union would like to participate in the in-person training and provide proposed dates and times for the training. The Company will identify a mutually convenient time and will schedule the training.

Please let me know if you have questions.

After Driggers received this letter, he did not inform the Respondent of available dates for the training. Rather, on April 10, 2012, Driggers sent the letter to Chief Steward Thomas by fax. However, Thomas took no action. Thomas offered this explanation for his inaction:

Q. Did you provide dates and times for the training?

A. No.

Q. Why not?

A. I am a steward. I am not responsible in giving dates and times. I can’t set up dates and times for the training. That has to come higher up than me, because that would be more like Tommy’s job.

Q. Okay. Was there any other reason why you didn’t provide the dates and times for the training?

A. No. But the settlement agreement says that the training had to be done by March 23, and I was assuming that we would have this training done by March 23.

Thomas’ testimony that the settlement agreement required training by March 23 is incorrect. As noted above, the language in question was not in the body of the settlement agreement but rather in the notice, and it made no reference to March 23. It simply stated that within 5 business days of furnishing information in a format other than requested by the Union, the Respondent would provide training to the Union. Respondent furnished the documents of March 23, a Friday, and 5 business days later would have been March 30.

Although Thomas testified that he did not have authority, as a steward, to inform the Respondent of available dates and times for the training, this modest disclaimer strikes me as a bit disingenuous. It was Thomas, not Driggers, who signed the settlement agreement on behalf of the Union. Similarly, Thomas, acting for the Union, signed the unfair labor practice charges on behalf of the Union.

The record as a whole creates a rather strong impression that the information requests were Thomas’ crusade, with Business Agent Driggers quietly going along rather than “making waves.” In one instance, when Respondent’s labor relations manager sent a letter to Driggers, it was Thomas, not Driggers, who replied.

Moreover, Business Agent Driggers certainly must have sent the letter to Thomas for a reason, either so that Thomas could communicate directly with Respondent about dates for the training or else so that Thomas could inform Driggers about convenient dates which Driggers could then pass along to the Respondent. However, the Union did not provide Respondent with suggested dates for the training and it never took place.

The record suggests that such training would not have been necessary anyway. Thomas testified that after March 23, he did not receive any documents from Respondent which were not in the desired “native” format.

The General Counsel argues that the Union’s failure to reply to the request for training dates does not matter, that the only relevant fact is simply that the training never occurred. Moreover, the government notes that the Respondent’s April 4, 2012 letter was not sent within 5 business days of the date when it furnished the information. That is true. Respondent sent this letter on the 8th business day.

Nonetheless, I conclude that Respondent did not violate the terms of the settlement agreement. This conclusion rests on several reasons.

First, the language of the settlement agreement did not obligate Respondent to provide this training. By signing this document, Respondent agreed to post the notice to employees but agreement to post the notice is not the same as an agreement to perform the actions described in the notice. The settlement agreement included a number of extraordinary requirements, such as that a “responsible management official” read the notice to employees. The parties placed these terms in the body of the agreement and they clearly were binding on Respondent. Whether or not the notice referred to them does not alter the Respondent’s obligation to comply.

Just as easily, the parties could have included in the agreement itself language requiring Respondent to provide the document-interpretation training. They did not.

Alternatively, the parties easily could have included in the settlement agreement language which not only required a management official to read the notice out loud to employees—itsself an extraordinary requirement—but also required Respondent to comply with the statements in the Notice. However, they did not.

In *Gadsden Tool, Inc.*, 327 NLRB 164 (1998), the Board, citing the Supreme Court's decision in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), noted that it had no authority to change the substantive terms of the parties' collective-bargaining agreement by altering the effective dates. The agreement under consideration here is not a collective-bargaining agreement but a settlement agreement. All the same, I would feel uncomfortable reading into the body of the agreement words which the parties did not include.

Accordingly, I conclude that Respondent did not fail to comply with the terms of the settlement agreement as they were written.

However, even were I to assume that the Respondent had an obligation to give effect to this language in the notice, the Respondent made a good-faith effort to do so. It sent a letter asking the Union to recommend dates for the training, and it could not schedule the training without that information. After all, the training was for union officials, some of whom, like Driggers, were not Respondent's employees. Respondent needed to know when these individuals would be available before it could set a training date.

The Union had sought this training, claiming it was necessary for understanding the reams of documents it was requiring Respondent to produce. Then abruptly, inexplicably, union officials lost interest. In fairness, the Union's turning fickle should not put Respondent in a pickle. Because it was the Union's inaction which stalled the training plans, it would be both illogical and unjust to blame the Respondent.

Moreover, Thomas' testimony indicates that after March 23, 2012, the Respondent did not furnish records in a "non-native format" requiring interpretation, so the training was no longer needed. The absence of need for this training may well explain, or at least partially explain, the Union's failure to reply to the Respondent's request for available dates.

Further, the fact that the Respondent did not send the letter until April 4, 2012—8 business days after providing the documents rather than the specified 5 days—is at most a de minimis breach of the settlement agreement, and one which did not cause the Union prejudice or disadvantage. Indeed, the Union's failure to reply to Respondent's request for dates suggests a lack of concern about the short delay. Setting aside the settlement agreement because of this microscopic peccadillo—if it amounted even to that—would not be appropriate.

In sum, I conclude that there has been no failure to comply with the settlement agreement which would warrant setting it aside. Now, I turn to the second possible basis for doing so, the existence of postsettlement unfair labor practices.

For the reasons stated above, I have concluded that Respondent violated the Act by the conduct alleged in complaint paragraphs 10(a) and 12(a), 10(c) and 12(c), and 10(d) and 12(d). These violations took place before the settlement and were addressed by the settlement. However, the evidence does not establish that Respondent committed any unfair labor practices after executing the settlement agreement.

At the prehearing stage of an unfair labor practice case, the acting General Counsel, through the Regional Director, must make decisions using the information in witness statements rather than based on testimony tested by cross-examination. This necessary reliance on affidavits defers the resolution of credibility issues to the hearing stage. Based on such credibility determinations, I have concluded that the Respondent did not commit postsettlement violations. Accordingly, the settlement agreement should be reinstated.

Further, I conclude that the Respondent has complied fully with the settlement agreement. Because compliance with the settlement has remedied all pre-settlement violations, and because there are no postsettlement violations, I recommend that the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. The Respondent, United Parcel Service of America, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Teamsters, Local Union 373, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Charging Party has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of a bargaining unit of Respondent's employees, consisting of all feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), and car washers, excluding all guards, professionals and supervisors as defined in the Act. This unit is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

4. The Charging Party, in its capacity of exclusive bargaining representative, requested that Respondent furnish it with the information described in paragraphs 10(a), (c), and (d) of the order consolidating cases, third consolidated complaint and notice of hearing (the complaint) in this matter. This information was relevant to the Charging Party's performance of its duties as exclusive bargaining representative and necessary for that purpose. The Respondent failed and refused to furnish this requested information to the Charging Party in a timely manner, thereby violating Section 8(a)(5) and (1) of the Act.

5. On March 6, 2012, the Respondent and the Charging Party executed a settlement agreement in Cases 16-CA-028064, 16-CA-062316, and 16-CA-070588. On March 8, 2012, the Regional Director for Region 16 of the Board approved this settlement. This settlement agreement covered the violations described above in paragraph 4.

6. No basis sufficient in law exists to warrant setting aside the settlement agreement described above in paragraph 5.

7. Respondent has complied fully with the settlement agreement referred to above in paragraph 5, and such compliance has fully remedied the violations described above in paragraph 4.

8. Apart from the violations described in paragraph 4 above, the Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended<sup>1</sup>

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<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended

#### ORDER

The settlement agreement in Cases 16-CA-028064, 16-CA-062316, and 16-CA-070588, approved by the Regional Director on March 8, 2012, is reinstated and the complaint is dismissed.

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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.