

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

FIRSTENERGY GENERATION, LLC

and

Case 06-CA-121513

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION NO. 272, AFL-CIO

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Submitted by:

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**NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
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Pittsburgh, Pennsylvania 15222**

Dated at Pittsburgh, Pennsylvania,

this 20th day of March 2015

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I. PRELIMINARY STATEMENT

Counsel for the General Counsel hereby files and respectfully requests that the Board consider this Answering Brief in Opposition to FirstEnergy Generation LLC's Exceptions to the Decision of Administrative Law Judge David I. Goldman in the above-captioned matter, which issued on January 23, 2015. Counsel for the General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments made by Respondent in its Exceptions, including those which are not specifically addressed herein.¹

¹ Counsel for the General Counsel notes that Respondent's Exceptions Nos. 1 through 10 in this matter do not conform with the Board's Rules and Regulations, Sec. 102.46(b)(1)(iii), as they do not ". . . designate by precise citation of page the portions of the record relied on"; and Respondent's Exception No. 11 does not conform with Board's Rules and Regulations, Sec. 102.46(b)(1)(ii), as it does not ". . . identify that part of the administrative law judge's decision to which objection is made". Counsel for the General Counsel requests that the Board address these deficiencies in the manner that it deems appropriate.

The Administrative Law Judge correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide to the Union information it requested concerning the costs of retiree benefits (ALJD, pp. 1, 13).² Examination of Respondent's Exceptions reveals that Respondent has chosen to attack many of the conclusions of law and credibility resolutions reached by the Administrative Law Judge. Respondent's Exceptions in this regard are, in many instances, a repetition of arguments made in Respondent's Brief to the Administrative Law Judge. Respondent's arguments and authorities presented in support of its Exceptions have previously been cogently considered and correctly rejected by the Administrative Law Judge. The Administrative Law Judge's opinion carefully analyzes appropriate precedent and applies it to the facts. Respondent's request that the Board not adopt the Administrative Law Judge's recommendations in this matter should be denied.

It is submitted that the well-reasoned Decision of the Administrative Law Judge fully supports all of the conclusions of law and adverse credibility determinations therein and should be adopted by the Board.³ Respondent's Exceptions are thus without merit and its request for reversal of the Administrative Law Judge's Decision should be denied. Certain statements and arguments advanced in Respondent's Brief,⁴ however, deserve further comment.

² "ALJD, p." refers to the page of the Decision of the Administrative Law Judge; JX refers to Joint Exhibits; GCX refers to General Counsel's Exhibits; RX refers to Respondent's Exhibits; and numbers in parentheses refer to pages of the official trial transcript.

³ Counsel for the General Counsel notes that the Administrative Law Judge concluded that the allegation that Respondent delayed in providing certain ownership information to the Union was not supported by the evidence, and the Administrative Law Judge, therefore, recommended that the Board dismiss that allegation. Counsel for the General Counsel has not filed any exceptions with respect to that conclusion, and does not seek any review by the Board of the Administrative Law Judge's conclusion regarding that allegation.

⁴ Unless otherwise noted, references herein to "Respondent's Brief" refer to FirstEnergy Generation LLC's Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge dated February 20, 2015.

II. FINDINGS OF FACT⁵

The Administrative Law Judge's Statement of the Case accurately describes the facts underlying the allegations in this case, so they will merely be summarized herein. Many of the Administrative Law Judge's findings are based upon his determinations regarding the credibility of the witnesses. As such, his findings should be upheld.⁶

A. Background

Respondent and the Union have a collective bargaining relationship that dates back over twenty years. The most recent collective bargaining agreement between Respondent and International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO (the "Union") was effective by its terms from December 5, 2009 through February 16, 2013, and covers bargaining unit employees at Respondent's Bruce Mansfield plant in Shippingport, Pennsylvania (ALJD, p. 3; 19-20, 106-107). By written Memorandum of Agreement between Respondent and the Union dated August 16, 2012, the collective bargaining agreement was amended and extended to February 15, 2014 (ALJD, p. 3; JX-1, GCX-2, GCX-3).

The most recent round of negotiations for a successor collective bargaining agreement began in December 2013 (ALJD, p. 3; 107). During the course of these negotiations, Herman Marshman, President of the Union, served as the Union's lead negotiator and chief spokesman (ALJD, p.3; 21, 106). Anthony Gianatasio, Chief Negotiator for Respondent, served as

⁵ Respondent's Exceptions Nos. 1-10 generally concern the Administrative Law Judge's findings and conclusion regarding Respondent's failure to provide information requested by the Union. These Exceptions will not be addressed separately, but are addressed as a whole in this section of this Answering Brief. As noted above, however, Counsel for the General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments made by Respondent in its Exceptions, including those which are not specifically addressed herein.

⁶ "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, p. 1, n. 1 (Aug. 26, 2011), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (1951). Counsel for the General Counsel submits that, in the instant case, the Administrative Law Judge's credibility resolutions are amply supported by the evidence presented at the hearing, and should be adopted by the Board.

Respondent's lead negotiator and chief spokesman during these meetings (ALJD, p. 3; 21-22, 103-104, 105).

B. January 27, 2014 Request for Information

During the first bargaining session, on December 19, 2013, Respondent presented to the Union a document titled "Company Interests Discussion Document" (ALJD, p. 3; GCX-11; 22, 107). Among the items listed on this document was item number three, which reads, in part, "end the retiree medical box" (ALJD, p. 3; GCX-11).⁷ As the Administrative Law Judge found, all parties understood this as a ". . . proposal to end employer subsidies toward retiree health care coverage for 'in-the-box' employees under the new agreement (i.e., for current employees who would retire during the term of the successor labor agreement)" (ALJD, p. 4; 23, 71-72, 109-110).

Because of Respondent's stated intention to propose changes to retirement benefits, the Union submitted to Respondent, at the January 27, 2014 bargaining session, a request for information concerning the existing costs to Respondent for providing retirement benefits (ALJD, pp. 5-6; GCX-6; 30, 50, 71, 119).⁸ When he provided this request to Respondent, Marshman explained that the Union needed the requested information to intelligently formulate proposals in light of Respondent's stated intention to propose changes to benefits provided to retirees (ALJD, p. 6; 30-31). At this meeting, Respondent argued that the Union did not represent retirees (ALJD, p. 6). Marshman responded that the Union was seeking this information because it

⁷ The retiree "box" refers to a chart in the collective bargaining agreement which describes retirement benefits (ALJD, p. 3; GCX-2, p. 61; 48, 108-109). Retirees who continued to participate in the active employees' health care coverage until the expiration of the collective bargaining agreement are sometimes referred to as being "in the box" retirees (ALJD, p. 3; 49, 109).

⁸ Only the paragraphs numbered two, four, five and six are at issue in this proceeding [GCX-1(c), par. 11; GCX-6; 30, 58]. International Union Representative Mike Welsh testified that this information was orally requested at the January 17, 2014 bargaining session, and later reduced to writing (97-98). Welsh's testimony in this regard is uncontradicted.

affected current employees who will retire in the future, who the Union does represent (ALJD, p. 6; 31-33, 77).

At the bargaining session held on February 5, 2014, Marshman asked about the status of the January 27 information request (99). Respondent merely replied that there was nothing to provide at that time (99). There was no inquiry from Respondent at this meeting as to the Union's reasons for requesting this financial information (99). In addition, Respondent did not suggest at this meeting that it could not provide the requested information (99-100).

Respondent provided a written response to the Union's request by letter dated February 7, 2014 (ALJD, p. 6; GCX-7; 33-34, 56, 64).⁹ In relevant part, Respondent refused to provide to the Union the information it requested concerning the costs to Respondent of providing retirement benefits, arguing that the Union does not represent retired employees (ALJD, pp. 6-7; GCX-7).

After receiving this response, the Union discussed the issue with Respondent at the meeting held on February 12, 2014.¹⁰ Marshman explained that the Union was seeking this information in response to Respondent's proposal to end certain retirement benefits (ALJD, p. 7). The Union wanted information concerning the current cost to Respondent for providing the existing benefits to better prepare counterproposals (35, 60, 76).

In addition to the discussions at negotiations, the Union reiterated its request for this cost information by letter dated February 11, 2014 (ALJD, p. 7; GCX-8; 36). In that letter,

⁹ Again, it is noted that only responses numbered two, four, five and six are relevant to this proceeding (34).

¹⁰ In Marshman's direct testimony, he stated that he believed that this meeting occurred on February 13, 2014, although he was unsure of the exact date (34-35). Under cross-examination, however, Marshman confirmed that there was no meeting held on February 13, 2014, and that the meeting he described occurred on February 12, 2014 (79). Counsel for the General Counsel submits that this date discrepancy makes no difference in the determination of the merits of the allegations of this case, a position with which the Administrative Law Judge apparently agreed, as this discrepancy is not mentioned in his Decision. There is still no question that Respondent failed to provide the requested information at issue herein.

Marshman, on behalf of the Union, explained again the reason that the Union sought this information (ALJD, p. 7; GCX-8).¹¹

The record evidence shows that Respondent never asked for any additional explanation from the Union as to why it had requested the information concerning Respondent's costs associated with health benefits provided to current retirees (36). While Gianatasio testified vaguely that there were conversations between the parties about the Union's information requests, he was unable to provide any specific details (124). Respondent also never represented to the Union that the information it had requested was unavailable (36-37).¹² Moreover, it is undisputed that the information that the Union requested concerning the costs to Respondent for retiree health benefits, as described in paragraphs two, four, five and six of the January 27, 2014 information request, was never provided to the Union (37, 69, 89, 121).¹³

III. THE ALJ CORRECTLY FOUND THAT RESPONDENT VIOLATED THE ACT BY REFUSING TO PROVIDE TO THE UNION INFORMATION CONCERNING RESPONDENT'S COSTS OF PROVIDING HEALTH BENEFITS TO RETIREES

The Act imposes a basic duty upon employers to provide information to a union, upon request, which is relevant and necessary to the union's role in the bargaining process.¹⁴ The Board and the courts have long held that information concerning wage rates, job descriptions

¹¹ At the hearing, Respondent introduced into evidence an exchange of correspondence between the parties from August 2014 (ALJD, p. 7; RX-2, RX-3; 90-91). These letters show that the Union again asked for information concerning the cost to Respondent of retiree healthcare benefits, and that Respondent again failed to fully respond to the Union's request. This exchange of correspondence, more than six months following the Union's request for cost information, does not change the conclusion that Respondent unlawfully failed to provide requested information. In addition, it should be noted that while Respondent introduced these documents, it failed to elicit any testimony at all about them.

¹² While Gianatasio stated at the hearing that Respondent does not keep information concerning benefits costs "by local" (ALJD, p. 7; 121-122), there is no evidence that this limitation was ever conveyed to the Union.

¹³ In questioning Marshman, Respondent's counsel suggested that Respondent provided additional information to the Union in September, 2014 that was responsive to the January 27, 2014 request. Marshman denied receiving additional responsive information, however, and no evidence was presented to establish that Respondent provided the Union with additional information (66-68).

¹⁴ As with his Statement of Facts, the Administrative Law Judge's recitation of applicable Board precedent is thorough and clear, so will not be repeated herein, except in summary form. See ALJD, pp. 8-9.

and other information pertaining to employees within the bargaining unit is presumptively relevant. *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enfd.* 347 F.2d 61 (3rd Cir. 1965). Moreover, the standard for relevancy is a liberal, discovery type standard. *NLRB V. Acme Industrial Co.*, 385 U.S. 432 (1967); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991).

When, as here, information is requested concerning individuals outside the bargaining unit, the Administrative Law Judge correctly noted that the burden is still “not exceptionally heavy” [ALJD, p. 8, citing *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983)]. The Board requires only that the party requesting the information show “potential or probable relevance”, which then triggers the employer’s obligation to provide the requested information. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). See also, *Wisconsin Bell Co.*, 346 NLRB 62, 64 (2005).

It is undisputed that on January 27, 2014, the Union submitted to Respondent a request for information concerning Respondent’s costs for providing health benefits to several groups of employees and retirees. Furthermore, Respondent admits that it refused to provide to the Union the information described in paragraphs 2, 4, 5 and 6 of the January 27, 2014 request, arguing that it is not obligated to do so.

The issue presented by these requests is whether Respondent is obligated to provide to the Union information concerning its costs related to the provision of health benefits to retirees, as the Union does not represent retired employees. Under the circumstances presented herein, as the Administrative Law Judge correctly found, the Union was entitled to the information it requested because it needed the information to prepare an adequate response to Respondent’s stated intention during collective bargaining negotiations to propose that retiree health benefits be altered in a manner that would affect current employees when they retire (ALJD, p. 9).

The United States Supreme Court has long held that retired employees are not “employees” within the meaning of the Act, and therefore are not members of a collective bargaining unit. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971). In

that same decision, however, the Supreme Court noted that “. . . the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.” *Id.* at 180. See *Mississippi Power Co.*, 332 NLRB 530 (2000), *enfd. rel. part* 284 F.3d 605 (5th Cir. 2002); *Georgia Power Co.*, 325 NLRB 420 (1998), 176 F.3d 494 (11th Cir. 1999), *cert. den.* 528 U.S. 1061 (1999).

In this case, the Union explained that it was seeking information about Respondent’s costs of providing health benefits to existing retirees in order to adequately bargain over proposed changes to those benefits which would affect future retirees, i.e., employees currently in the bargaining unit. The Board has held that an employer is obligated to provide such information, which would then allow the union to “. . . more intelligently bargain for the active employees . . .” *Union Carbide Corporation*, 197 NLRB 717 (1972). See also *Connecticut Light & Power Co.*, 220 NLRB 967, 968 (1975), *affd.* 583 F.2d 308 (2d Cir. 1976).

As the Administrative Law Judge correctly noted, the distinction between these two types of retirees - “in” and “out” of the “box” - was drawn by Respondent. This distinction does not determine the relevance of the information requested by the Union (ALJD, p. 10). The Union is entitled to information it has requested concerning costs incurred by Respondent for “out of the box” retirees as it is relevant and necessary to the Union’s ability to formulate proposals concerning benefits for current employees who will retire in the future (ALJD, p. 11). “It is the relationship of the retiree information to the Union’s bargaining concerns that renders the information relevant and producible.” (ALJD, p. 11)

The Union made clear at the time it requested the information, and again when it reiterated the request in its February 11, 2014 letter, that it sought this information for bargaining purposes. While Respondent now contends that this justification for the Union’s request is somehow insufficient, the Administrative Law Judge correctly applied Board precedent - not “his

own general view”¹⁵ - in finding that the Union’s stated reasons sufficiently supported its request for information.

As the Board has held, relevance is shown either by the justification provided by the Union, or because “. . . the relevance of the information should have been apparent to the Respondent under the circumstances” *Disneyland Park*, 350 NLRB at 1258. In this case, the Administrative Law Judge correctly found that not only was the justification provided by the Union sufficient, but that it was obvious from the circumstances of the request that the information was relevant to the Union’s responsibility to respond to the Employer’s proposals concerning changes to retiree benefits (ALJD, p. 9).

Moreover, Respondent never asked for any additional explanation; it merely refused to provide to the Union what was requested (ALJD, p. 11). Once it is determined that the information is relevant to the Union’s right to collectively bargain, the Employer’s opinion as to the Union’s need for the information is of no consequence. The information should be provided (ALJD, p. 12).

When cross examining Marshman, and again during questioning of Gianatasio, Respondent’s counsel suggested that the information that the Union requested would require Respondent to provide records to the Union covering thousands of employees (54-55, 60, 62, 76). While this assertion was not supported by any record evidence at the hearing, this suggestion - that the information sought by the Union was too voluminous to produce - was never made by Respondent to the Union as a response to the Union’s request for information. If this was a valid concern, Respondent should have raised it at the time it received the Union’s request so that the Union could address this concern (ALJD, p. 12, n. 8). To imply at the hearing, without any definitive evidence, and several months after the request was made, that Respondent was somehow justified in failing to provide this information due to the volume of

¹⁵ See Respondent’s Brief, p. 9.

information requested, is simply an invalid defense, and one that the Administrative Law Judge correctly rejected (ALJD, p. 12, n. 8). See *H&R Industrial Services, Inc.*, 351 NLRB 1222, 1224 (2007).

In addition, Respondent's argument that it denied the Union's request for similar information in 2009 supports its current refusal to provide the information was correctly rejected by the Administrative Law Judge. As he appropriately pointed out, that issue was not litigated, and has no bearing on his findings in the instant matter (ALJD, p. 11).

With respect to the information requests at issue in this case, the Administrative Law Judge correctly found that the information requested was necessary and relevant for the Union to fulfill its responsibilities as the employees' exclusive bargaining representative, particularly in connection with the negotiations for a successor collective bargaining agreement (ALJD, p. 9).

In sum, the evidence in the record, and as described above, supports a finding that Respondent violated Section 8(a)(5) of the Act by failing to provide to the Union the information it requested on January 27, 2014, as alleged.

IV. THE ALJ CORRECTLY REJECTED RESPONDENT'S EXHIBIT NO. 5

In its Exception No. 11, Respondent excepts to the Administrative Law Judge's rejection of a document that was marked at the hearing as Respondent's Exhibit No. 5. This proposed exhibit is a complaint filed in a lawsuit brought in September 2014 by an individual against Respondent and related benefit plan entities in the United States District Court for the Northern District of Ohio. The Union is not a party to that action (129-130). Counsel for the General Counsel submits that the Administrative Law Judge properly rejected Respondent's proposed Exhibit No. 5 as it is wholly unrelated to the issues presented by the Complaint in this matter [GCX-1(c); 129-130].

In its Brief, Respondent argues that the information which is at issue in the instant matter was sought by the Union in preparation for the federal court lawsuit referenced above (Respondent's Brief, p. 12). Following a relevance objection raised by the Counsel for the

Union when Respondent attempted to introduce this exhibit into the record, the Administrative Law Judge appropriately allowed Respondent to make an offer of proof concerning this proposed exhibit (130).

In his offer of proof, Counsel for Respondent represented to the Administrative Law Judge that the basis of Respondent's belief that the information at issue herein was sought for use in the federal court litigation was based merely on the fact of the lawsuit, which had been filed by retirees against Respondent (130). Respondent offered no further information to support its position that the federal court lawsuit was in any way related to the allegations of the Complaint herein. Under these circumstances, the Administrative Law Judge correctly rejected the exhibit as unrelated to the issues presented in the instant case.

The cases cited by Respondent in its Brief involve matters in which there was no question that the union sought the information at issue for purposes unrelated to its role as a collective bargaining representative. See, e.g., *Southern California Gas Co.*, 342 NLRB 613, 615 (2004). As detailed more fully above, and in the Administrative Law Judge's well-reasoned decision, the Union in the instant case sought information for use in negotiations for a successor collective bargaining agreement, not for any other use, including for use in litigation in another forum.

In sum, Counsel for the General Counsel urges the Board to reject Respondent's Exception No. 11, and affirm the Administrative Law Judge's rejection of Respondent's proposed Exhibit No. 5.

V. CONCLUSION AND REQUESTED REMEDY

It is respectfully submitted that the record evidence amply supports all of the conclusions of law and resolutions of credibility made by the Administrative Law Judge to which Respondent takes exception. Counsel for the General Counsel respectfully requests that the Board adopt the recommendation of the Administrative Law Judge and issue an order requiring Respondent

to cease and desist from the unlawful conduct alleged; to post an appropriate notice; and to take any other appropriate action.

Dated at Pittsburgh, Pennsylvania, this 20th day of March, 2015.

Respectfully submitted,

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