

FirstEnergy Generation, LLC and International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO. Case 06–CA–121513

April 27, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND MCFERRAN

On January 23, 2015, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering 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,¹ findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, FirstEnergy Generation, LLC, Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Julie R. Stern, Esq., for the General Counsel.

James A. Prozzi, Esq. (Jackson Lewis P.C.), of Pittsburgh, Pennsylvania, for the Respondent.

Marianne Oliver, Esq. (Gilardi Oliver & Lomupo), of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a union's request during collective-bargaining negotiations that the employer provide it with retiree benefits costing information for the stated purpose of aiding the union in formu-

¹ The Respondent excepts to the judge's rejection of and failure to consider its proposed Exh. 5, the complaint in a class-action lawsuit filed against the Respondent on behalf of former union employees who retired on or after January 1, 1996, and before January 1, 2005. We find that the judge did not abuse his discretion in finding that this lawsuit, filed 8 months after the Union's information request, would not support the Respondent's claim that the Union's request was made in bad faith for purposes unrelated to bargaining.

² There are no exceptions to the judge's finding that the Respondent did not unreasonably delay in providing the Union with ownership information it requested on January 6, 2014.

The judge's decision referenced an earlier case involving these parties, *FirstEnergy Generation Corp.*, 358 NLRB 842 (2012). The United States Court of Appeals for the Third Circuit vacated the Board's decision in that case and remanded the matter for further proceedings consistent with the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The Board recently reconsidered de novo and affirmed this earlier decision in *FirstEnergy Generation Corp.*, 362 NLRB 585 (2015).

lating retiree benefits bargaining proposals for current employees. The Government alleges that the employer violated the National Labor Relations Act (the Act) by refusing to provide the Union with the requested retiree benefits information. The Employer defends, contending that the requested retiree information has not been shown to be relevant to the Union's representational duties. In addition, the Government alleges that the Employer unlawfully delayed providing a portion of requested company ownership information to the Union. The Employer contends that the information was furnished sooner than alleged and that there was no unreasonable delay.

As discussed herein, I find that the retiree benefits information is a relevant, indeed, an obviously relevant source of information for a union engaged in collective-bargaining negotiations that include as a mandatory subject of bargaining future retiree benefits for current employees. The Employer's refusal to provide such information violates the Act. As to the ownership information, I find that, as the employer contends, it was provided sooner than alleged by the Government. The short delay in furnishing all of the requested ownership information has not been shown to be unreasonable under all the circumstances, and, therefore, I dismiss that allegation.

Jurisdiction

FirstEnergy is and at all material times has been a corporation with an office and place of business in Shippingport, Pennsylvania, at which FirstEnergy is engaged as a public utility in the generation and distribution of electricity. In conducting its operations during the 12-month period ending March 31, 2013, FirstEnergy derived gross revenues in excess of \$250,000 and received at its Shippingport facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. At all material times, FirstEnergy has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

STATEMENT OF CASE

On January 29, 2014, the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO (the Union) filed an unfair labor practice charge alleging violations of the Act by FirstEnergy Generation, LLC (FirstEnergy), docketed by Region 6 of the Board as Case 06–CA–121513. Based on its investigation, on June 30, 2014, the Board's General Counsel, by the Acting Regional Director for Region 6 of the Board, issued a complaint alleging that FirstEnergy violated the Act. FirstEnergy filed an answer denying all alleged violations of the Act.

A trial was conducted in this matter on October 6, 2014, in Pittsburgh, Pennsylvania.¹ Counsel for the General Counsel

¹ At the commencement of the hearing, counsel for the General Counsel moved, without objection, to amend the complaint to correct the caption, to delete the date of an alleged information request (par.

and counsel for FirstEnergy filed posttrial briefs in support of their positions by November 10, 2014.²

On the entire record, I make the following findings, conclusions of law, and recommendations.

Unfair Labor Practices

Background

FirstEnergy is a multifacilities operation with plants across the Mid-Atlantic United States, numerous local unions, and perhaps 10,000 retirees. FirstEnergy operates the Bruce Mansfield plant in Shippingport, Pennsylvania. The Bruce Mansfield facility is composed of three units that generate electricity. For many years, the Union has been the recognized collective-bargaining representative of the production and maintenance employees at the Bruce Mansfield plant.³ As of the time of the hearing in this case, the union-represented bargaining unit at Bruce Mansfield was composed of approximately 272 employees.

The most recent collective-bargaining agreement covering the Bruce Mansfield unit of FirstEnergy employees was originally to be in effect from December 5, 2009, through February 16, 2013. In a memorandum of agreement dated August 16, 2012, the parties extended the collective-bargaining agreement by 1 year, until February 15, 2014, when the agreement expired.

Negotiations for a successor collective-bargaining agreement began with the “kickoff” meeting on December 19, 2013. Herman Marshman Jr., the Union’s president, was lead negotiator for the Union. Anthony Gianatasio was the Employer’s lead negotiator. During this initial December 19 meeting, Fred von Ahn, the vice president of the Bruce Mansfield plant, provided the Union with an overview of financial issues. He discussed the current condition of the Company generally, and the Bruce Mansfield facility specifically, with regard to matters such as the Company’s stock price, the price of electricity, EPA regulations, and other matters pertaining to the future prospects for operation of the facility.

At the December 19 meeting, FirstEnergy distributed a “Company Interests Discussion Document” which listed portions of the labor agreement it was proposing to modify in negotiations.

10), and to change an alleged refusal to provide requested information to an allegation of unlawful delay in providing information (par. 13). Further, at the commencement of the hearing the Respondent orally amended its answer to admit par. 11 of the complaint.

² Along with her brief, counsel for the General Counsel filed a motion to correct the transcript. No opposition to that motion was filed. In an order filed concurrently with this decision, the motion is granted to the extent set forth in the order.

³ The precise contours of the recognized bargaining unit are as follows:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

One issue listed on this document was the Employer’s proposal to “end the retiree medical box” in the successor agreement. This was a reference to the chart or box listed on page 61 of the labor agreement and that was part of the health insurance provisions (art. XVIII, sec. 3). The collective-bargaining agreement provided that employees who retired on or after February 16, 2008 (the date of the expiration of the previous agreement), were entitled to health care coverage from the Employer “in accordance with the terms and conditions of the plan in effect for active employees.” The box (and portions of art. XVIII, sec. 3) set forth the amount of the Employer’s contribution toward medical and prescription drug coverage for such employees who retire during the term of the collective-bargaining agreement and continue to participate in the health care plan available to active employees.

The Employer refers to employees retiring during the term of the current labor agreement (and as far back as February 16, 2008) as “in-the-box” retirees. The Employer refers to former employees who retired under a previous labor agreement (i.e., preceding the February 16, 2008 date) as “out-of-the-box” retirees. Such employees are not covered by the box on page 61 of the labor agreement, and the retiree health care subsidies applicable to current employees when they become “out-of-the-box” retirees is a matter of dispute between the parties.

The Employer’s proposal to eliminate the box for a successor labor agreement was understood by all parties as 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 under the successor labor agreement).

The Union’s January 6 request for information regarding ownership of the Bruce Mansfield units

The parties met again on January 6, 2014. At the end of this meeting, the Union made a written information request to FirstEnergy, which included the following:

IBEW Local 272 Information request:

What is the Company’s percentage of ownership of all three units at Mansfield? What percentage is owned by any capital investment group?

By letter to Union President Marshman dated January 20, 2014, FirstEnergy’s lead negotiator, Gianatasio, responded to the Union’s information request. His letter stated, *inter alia*:

In response to your correspondence of January 6, 2014, please find the following information:

1. What is the Company’s percentage of ownership of all three units at Mansfield?

Response: 93.825% of Unit 1 at Bruce Mansfield is owned by investment banks/trustees and is leased back to FE Generation, LLC; who is responsible for operating the same. This transaction does not impact the terms of your cba in any manner.

2. What percentage is owned by any capital investment groups?

Response: This information is proprietary and is not in any manner relevant to the negotiation or maintenance of the cba.

The Employer's response to the Union's request for ownership information about the three Bruce Mansfield units provided information only about unit 1. Gianatasio testified that Marshman made followup oral references to his requests for the "financial information" on both the January 21 and February 5 meetings and on February 5, specifically raised the issue of the ownership of units 2 and 3. According to International Union Representative Mike Welsh, when asked about the ownership information on February 5, the Employer told the Union that "we still don't have the information." Marshman testified that his February 11 email to the Employer complaining that "as of 2-11-14" the Employer had not provided requested information, "especially financial data concerning the Mansfield Plant specifically," would, in his view, have included the request for ownership information.

The parties' final meeting before a 5-month hiatus was on February 12. According to Gianatasio, at the February 12 meeting, Plant Director Rawlings and Gianatasio had a "very lengthy sidebar" discussion with Marshman and other union representatives, at which time "Mr. Rawlings and I talked to Herman [Marshman] and his group that he brought on sidebar, and we notified him that units that units 2 and 3" of the Bruce Mansfield plant "are owned by the Company, just to clarify."

However, on February 18, the Union wrote to a FirstEnergy representative at corporate headquarters in Akron, Ohio, and, among other items, stated that it was "still waiting for the following information: . . . What is the company's percentage of ownership of all three units at the Mansfield Plant?" By letter dated March 12, the Employer responded to the Union's February 18 letter, stating, in response to the questions regarding Bruce Mansfield's ownership that "As per the Company's response on January 20, 2014, unit 1 is 93.825 % owned by investment banks/trustees and is leased back to FE Generation, LLC. The Company has 100% ownership of units #2 and #3."

I credit Gianatasio's testimony with regard to the February 12th conversation with Marshman and the union representatives during the extensive sidebar on that date. It was offered with a credible demeanor. Moreover, it is essentially uncontradicted. Marshman appeared to agree on cross-examination that sometime before February 18 (the date of the Union's renewed request for ownership information) he had a sidebar discussion about the ownership issue with Gianatasio. (Tr. 87.) ("We talked about it. Yes sir.") Asked if Gianatasio "in fact, orally informed you at that sidebar about the ownership of units 2 and 3," Marshman stated: "I don't recall if that was the date of discussion, or whether he gave me the ownership, or it was Mr. Rawlings." This is vague, but more an admission than a denial, and tends to corroborate Gianatasio's testimony. Pressed on the issue, Marshman testified that before receiving the March 12 letter from the Employer, "I think some information was communicated" regarding the ownership for units 2 and 3, although Marshman said, "I'm not exactly sure by who or when." Given all this testimony, I credit Gianatasio and find that he (or

Rawlings) told the Union on February 12 that the Employer owned units 2 and 3.⁴

The Union's January 27 Information Request Regarding Retiree Health Care Costs

At the parties meeting on January 27, 2014, the Union gave the Employer a request for information regarding the cost and utilization of employee and retiree health insurance. The full request stated the following:

IBEW LOCAL 272 INFORMATION REQUESTS:

1. What is the Company's total cost for health insurance?
2. What is the Company's total cost for retiree health insurance?
3. What is the Company's cost for health insurance for hourly employees at the Bruce Mansfield Plant?
4. What is the Company's cost for health insurance for [Local] 272 retirees from the Bruce Mansfield Plant?
5. How many retirees from the Bruce Mansfield Plant are over the age of 65 using health insurance and what is the cost to the Company?
6. How many retirees from the Company are over age 65 and using health insurance and what is the cost to the company?
7. What are the 2014 First Energy Health Insurance Plan(s) descriptions and costs (total Company costs and employee costs)?

Items 2, 4, 5, and 6 of the requested information concerns retiree benefits. At the January 27 meeting, in response to the request, an employer representative told Marshman that he did not represent retirees. Marshman agreed, but told the Employer he needed this information to formulate proposals with regard to the future retirees (i.e., the current employees).

FirstEnergy provided a written response to the Union's request by letter from Gianatasio to Marshman dated February 7, 2014.

In response to the Union's request 2 ("What is the Company's total cost for retiree health insurance?"), the Employer responded:

Response: The union does not represent FirstEnergy retirees and as such this information is not relevant for bargaining purposes.

⁴ Counsel for the General Counsel argues on brief that the Union's February 18 letter to the Respondent stating that it was still waiting for information regarding, inter alia, ownership, demonstrates that the Union had not been previously told orally about the ownership of units 2 and 3. That is a plausible argument. However, in light of the credibly-offered testimony of Gianatasio, and Marshman's testimony, detailed above, I reject the General Counsel's argument. Perhaps the Union wanted the information formalized in writing (as it had been requested), or perhaps there was some confusion. However, I believe, and find, that the information was conveyed orally to the Union's lead negotiator, Marshman, on February 12.

In response to the Union's request 4 ("What is the Company's cost for health insurance for [Local] 272 retirees from the Bruce Mansfield Plant?"), the Employer responded:

Response: The in the box retirees are the only retirees that may be arguably covered by the Local 272 contract. See Attachment #1.

The union does not represent retirees who are "out of the box" and as such this information is not relevant for bargaining purposes.

Attachment 1 contained, inter alia, figures showing for "in-the-box" retirees only, the costs of coverage, retiree contributions, company contributions, and retiree opt out payments,⁵ for years 2012 and 2013.

In response to the Union's request 5 ("How many retirees from the Bruce Mansfield Plant are over the age of 65 using health insurance and what is the cost to the Company?"), the Employer responded:

Response: There are 27 "in the box" retirees age 65 or older who are enrolled in coverage. There are 64 "in the box" retirees under age 65.

The union does not represent retirees who are "out of the box" and as such this information is not relevant for bargaining purposes.

In response to the Union's request 6 ("How many retirees from the Company are over age 65 using health insurance and what is the cost to the Company?"), the Employer responded:

Response: The union does not represent retirees who are "out of the box" and as such this information is not relevant for bargaining purposes and has not been provided. The cost of local 272 "in the box" retirees is included in Attachment #1.

In subsequent sidebar meetings these issues were discussed by the parties. In the context of the Employer's proposal to end employer contributions toward ("in-the-box") retiree health care, Marshman explained that he wanted the requested retiree benefits information in order to better understand the overall costs and burdens on the Employer of providing retiree health care. At the hearing, Marshman testified that the Union was seeking both "site specific and company[wide]" retiree benefits information. Specifically with regard to his request for companywide retiree health care cost information, Marshman testified that the Union wanted to assess "What is the company's contribution towards healthcare? . . . [W]hat percentage of revenue does this actually stand for?" Marshman testified that the Union wanted to compare the cost of what the Employer is paying for retirees companywide to its costs for retiree healthcare at the Bruce Mansfield facility.

⁵ Under the collective-bargaining agreement, the Union can elect to have employees and "in-the-box" retirees withdraw from the FirstEnergy sponsored healthcare plan and obtain coverage from a union-selected plan. Under this arrangement, FirstEnergy contributes and forwards payment to the union-selected health care provider in an amount per employee and retiree equal to the contribution FirstEnergy would otherwise make if the employee or retiree participated in the Employer-sponsored plan.

In a February 11, 2014 letter to the Employer's headquarters in Akron, Ohio, the Union wrote:

The union understands that we do not represent retirees. However, the cost associated with current retirees' healthcare is important and necessary in making proposals for future retirees' healthcare. All information requests are relevant, and we would like the company to give a full response for items 2, 4, 5, and 6 from the February 7, 2014 letter.

The Union did not receive this information from the Employer. Some of the requests were renewed in a separate request made August 1, 2014, by the Union. The Employer's response limited the provision of health care benefits information to active and "in-the-box" retirees. At the hearing, Gianatasio testified that the Employer did not provide the Union with information regarding "out-of-the-box" retirees because "our proposal deals with future retirees and doesn't impact out-of-the-box retirees in any way or any manner." In addition, Gianatasio testified at the hearing that "we don't track out-of-the-box retirees by local." According to Gianatasio, "when you're in a different pool, you're in a broader pool . . . a company-wide pool, if you will."

Analysis

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5).⁶

"An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *NLRB v. Truitt Mfg., Co.*, 351 U.S. 149, 152-153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). An employer, on request, must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *Acme Industrial*, supra; *Dodger Theatricals*, 347 NLRB 953, 867 (2006).

Here, the General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested retiree healthcare information. Further, the General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying furnishing the Union with the requested ownership information for units 2 and 3 of the Bruce Mansfield facility. Below, I consider each of these allegations.

I. ALLEGED UNLAWFUL REFUSAL TO PROVIDE RETIREE INFORMATION

The Union seeks the Respondent's retiree health care spending with the number of and cost for retirees over age 65 broken out. The Union seeks this information for Bruce Mansfield retirees and for the Respondent companywide.

"Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is

⁶ In addition, it is settled that an employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant; rather, relevance must be shown." *A-1 Door & Building Solutions*, supra at 500 (citations omitted).

Where a showing of relevance is required—either because the presumption has been rebutted or because the request concerns nonunit matters, the burden is “not exceptionally heavy.” *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). “The Board uses a broad, discovery-type of standard in determining relevance in information requests.” *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006); *A-1 Door & Building Solutions*, supra. In accordance with this “discovery-type” standard, “potential or probable relevance is sufficient to give rise to an employer’s obligation to provide information.” *Disneyland Park*, 350 NLRB 1256, 1258 (2007). The information sought need not be dispositive of the issues between the parties but must have some bearing on it. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991). It need only be shown that it would be of use to the union in carrying out its statutory duties and responsibilities. *Wisconsin Bell Co.*, 346 NLRB 62, 64 (2005).

Notably, once this “discovery-type” standard has been shown for non-unit information, the duty to provide the information is the same as it is with presumptively relevant unit information. Depending on the circumstances and reasons for the union's interest, information that is not presumptively relevant may have “an even more fundamental relevance than that considered presumptively relevant.” *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969).

Thus, where a union is obligated to establish relevance, it need only demonstrate a reasonable belief, based upon objective facts, that the requested information is relevant. *Disneyland Park*, 350 NLRB at 1258 (2007); *Dodger Theatricals*, 347 NLRB at 967. Even absent a showing of probable relevance, an employer is obligated to furnish the requested information “where the circumstances put the employer on notice of a relevant purpose which the union has not spelled out.” *National Extrusion & Mfg. Co.*, 357 NLRB 127, 155 (2011) (quoting *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000)) enfd. 700 F.3d 551 (D.C. Cir. 2012).

It is settled by Supreme Court precedent that former bargaining unit employees who are currently retired are nonunit employees—indeed, they are not employees under the Act. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971) (holding “that retirees are neither ‘employees’ nor bargaining unit members”). Thus, a union’s request for retiree benefits information seeks nonunit information and requires a showing (or apparent notice through circumstances) of relevance.

At the same time, in considering whether the relevance showing has been made, it is not insignificant that with regard to retiree benefits the “broad discovery-like standard” of relevance (*Caldwell Mfg.*, supra) is being applied in a context where the importance of retiree benefits to current unit employees is well recognized and well settled. In ruling that retiree

were nonemployees, the Supreme Court nevertheless recognized that “[t]o be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.” *Pittsburgh Plate Glass*, 404 U.S. at 180; *Midwest Power Systems*, 323 NLRB 404, 407 (1997) (“current bargaining unit employees [] have an obvious direct interest in their future retirement benefits as an integral part of their compensation package”).

In this case, the General Counsel alleges that the Respondent’s refusal to provide the requested retiree information violates the Act. The Respondent refused to provide costing and other information as to “out-of-the-box” retirees, and contends that it has not been demonstrated to be relevant.

I do not agree with the Respondent’s assessment. Union President Marshman requested this retiree information in the midst of collective-bargaining negotiations and told the FirstEnergy negotiators he needed this information to formulate proposals with regard to the bargaining unit’s future retirees. This explanation was reiterated in the Union’s February 11 letter to the Employer.

The Union’s explanation of the need for retiree benefits cost and other information in order to collectively-bargain for the future retirement of current employees articulated and established the relevance of the Union’s request to its representational duties on a mandatory subject of bargaining.

It seems obvious—as much common sense as precedent—that in the midst of collective-bargaining negotiations for a labor agreement, as far as making decisions determining, informing, and shaping bargaining for future retiree benefits for current employees, the information most likely to be relevant is information on the benefits for current retirees. Such information enables the union to see the Respondent’s costs, costs per retiree and rate of retiree participation in employer-sponsored benefits. Information on Bruce Mansfield retirees provides the Union with the costs to the Employer associated with current retiree benefits, a figure that the Union may decide should be bargained up through benefit increases for future retirees or allowed to be bargained down for future retirees as a means of increasing the amount of compensation available for wages or other items. The age 65 breakdown provides the Union information about the willingness of the Medicare-eligible to participate, which is relevant to the bargaining position and demands of the Union with regard to future retiree benefits. The ability to compare Bruce Mansfield retiree costs to the cost of retiree benefits companywide offers the Union guidance on the relative burden of retiree benefits to Bruce Mansfield. The comparison of the age 65 costs and population between Bruce Mansfield and the entire company allows the Union some insight into whether the benefits at Bruce Mansfield are relatively costly or inexpensive as a component of the Respondent’s overall spending on retiree health care.

The relevance of such information has been recognized by the Board. See *Connecticut Light & Power Co.*, 220 NLRB 967, 967–968 (1975) (union entitled to requested explanation of amount and methodology of determining increases in pension benefits for past 5 years for current retirees in order for union to evaluate its pension proposal and/or formulate other pension

proposals for current unit members); *Union Carbide Corp.*, 197 NLRB 717 (1972) (information on the employer's experience as to pension and insurance costs and benefits received by retirees requested by union for upcoming negotiations and so it could better understand the plan must be provided so that union can bargain intelligently with respect to these matters for active employees); Cf. *Allison Corp.*, 330 NLRB at 1368 fn. 30 (requested subcontracting information relevant to negotiation for new contract, because "[f]or example, based on information regarding the nature, frequency and extent of subcontracting the Union may wish to propose modifications to the management-rights clause as it relates to subcontracting").

Contrary to the suggestion of the Respondent, the Union is not required to disclose some elaborate plan for its use of retiree benefits information in the negotiations. It need not "prove" how it can efficaciously use the information. It is relevant to bargaining about future retiree benefits, and that rationale is more than sufficient given the operative "discovery-like" standard. A request for current retiree information in order to bargain over future retiree benefits is a request tightly tethered to the rationale for it—as there is no more appropriate source of data to enable the Union to bargain intelligently for future retiree benefits than costs, burdens on the employer, and the demographics associated with current retiree benefits costs. To find that this information is not relevant to the Union's stated purpose of formulating retiree benefit proposals for future retirees would consign the Union to bargaining in the dark over this indisputably mandatory subject of bargaining.

Indeed, given the settled Supreme-Court and Board recognition that retiree benefits are an integral part of the active employee's overall compensation, a request for retiree information during the middle of collective-bargaining negotiations that involve the subject of retiree benefits would seem to be a situation "where the circumstances put the employer on notice of a relevant purpose" even if—unlike here—"the union has not specifically spelled out" its purpose in asking for the retiree information. *National Extrusion & Mfg. Co.*, 357 NLRB at 155 (quoting *Allison Co.*, 330 NLRB at 1367 fn. 23)); *Ohio Power Co.*, 216 NLRB 987, 990 fn. 9 (1975) ("The adequacy of the requests to apprise the Respondent of the relevancy of the information must be judged in the light of the entire pattern of facts available to the Respondent."), *enfd.* as modified 531 F.2d 1381 (6th Cir. 1976).

Notably, the distinction drawn by the Respondent between "in-the-box" retirees—for whom it was willing to provide the Union information, and "out-of-the-box" retirees—for whom it refuses to provide information—is a specious distinction in terms of what information is relevant to the Union.

While the 2009 labor agreement, and the Employer's proposal to change it, involved only subsidies for "in-the-box" retirees, the Union is entitled to bargain—and seek information to aid in that bargaining—for current employees' retirement benefits that will cover these future retirees long beyond "the box." These concepts—"in the box" and "out of the box" are contractual constructs developed by the parties. It is not a statutory distinction. Current employee retiree benefits are a mandatory subject of bargaining in or out of any box developed by the parties. The existing arrangements are subject to change for

future retirees through mandatory bargaining that could—should the parties agree—contractually extend future retiree employer-subsidized benefits well beyond the "in-the-box" period described in the current contract. In terms of the Union's right to information—and bargaining—it is irrelevant that the Employer asserts that it is not interested in extending contractual retiree benefits for future retirees. And, in fact, as all parties to this litigation know well, the subject of subsidies to future "out-of-the-box" retirees and the Respondent's duty to bargain over it, has in the past been very much an issue for these parties.⁷ The Employer's view that it need not bargain over "out-of-the-box" retiree benefits for current unit employees is not one shared by the Union. It is a subject that the Union has every right and reason to seek information about in order to formulate its bargaining demands—which is exactly the purpose for which Marshman told the Respondent the Union was seeking the information.

In fact, even if the Union intended only to bargain for maintenance of subsidies for future "in-the-box" retirees, the burden or lack thereof of cost to the Respondent in paying for "out-of-the-box" retirees, and their eligibility for Medicare (i.e., at age 65) would reasonably figure into the Union's assessment of the proper position to take regarding benefits for future "in-the-box" retirees. Thus, information sought on "out-of-the-box" retirees relates to and informs a proposal for "in-the-box" retirees.

It is also irrelevant that the specific employer bargaining proposal on the table in the current negotiations concerns only the future "in-the-box" retirees. It is the relationship of the retiree information to the Union's bargaining concerns that renders the information relevant and producible. In this regard, the Respondent appears to confuse the situation here with that in which the issue is whether an employer must provide information it would otherwise not have to provide because the employer's demands or statements in bargaining render the information relevant to the union's verification of the employer positions. See, e.g., *National Extrusion & Mfg. Co.*, 357 NLRB at 129; *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006); *Taylor Hospital*, 317 NLRB 991 (1995), review denied 82 F.2d 406 (3d Cir. 1996). But this line of cases does not limit the right of a union to request and receive nonunit information for which the union has explained the relevance, regardless of whether there is a bargaining proposal already on the table that justifies the union's information request.

Other objections of the Respondent are also without force. For instance, it is probative of nothing that the Union requested and was denied similar information in early 2009. That was not litigated and does not inform my decision. That the Respondent provided the Union with data limited to "in-the-box" retirees does not ameliorate the obligation to provide the Union with requested information about out-of-box retirees. As ex-

⁷ See *FirstEnergy Corp.*, 358 NLRB 842 (2012) (finding employer in violation of Act for unilaterally eliminating retiree subsidies that will affect current employees when they reach "out-of-the-box" retiree status) (petition to enforce dismissed by the Third Circuit Court of Appeals in light of *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), and returned to the Board at Board's request for further consideration).

plained above, the Employer misconceives its role in the information gate-keeping process when it asserts on brief, as its witness essentially did in trial (Tr. 121, 123), “that the Union received all that it needed to negotiate a Company proposal to ‘end the retiree medical box’ in a successor agreement” (R. Br. at 14). Within reason, it is for the Union, not the Employer to decide what information can be of use to it—and here, its request for retiree data was well within reason. Contrary to the Respondent’s argument (Br. R. at 15) the Union did explain with adequate “precision” why it wanted the retiree information: to formulate proposals for its unit members’ retiree benefits.

The Union’s right to knowledge-based bargaining is not a stingily-dispensed right, but rather, a right central to the Act, and part of the promise of union representation. It is a right intended to support the bargaining process: “The objective of the disclosure [of requested information] obligation is to enable the parties to perform their statutory function responsibly and to promote an intelligent resolution of issues at an early stage and without industrial strife.”⁸ *Clemson Bros.*, 290 NLRB 944, 944 fn. 5 (1988) (quoting *Monarch Tool Co.*, 227 NLRB 1265, 1268 (1977)). Once it was established—as I believe it was here—that the requested information was relevant to the Union’s bargaining interests, the information must be provided, without regard for the Employer’s opinion about what information was needed by the Union. There is no question here of the data being confidential or unrelated to the legitimate scope of concerns and representational duties of the Union. Its request for unit retiree information is fully justified by the explanation that it is needed to formulate bargaining proposals on the subject of future retiree benefits, a subject which is indisputably a mandatory subject of bargaining.⁸

II. ALLEGED DELAY IN PROVIDING REQUESTED OWNERSHIP INFORMATION

The duty to furnish information requires “a reasonable good-faith effort to respond to the request as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).” An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. “*Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). “Absent evidence justifying an employer’s delay in furnishing a union with rele-

vant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch ‘as the Union was entitled to the information at the time it made its initial request, [and] it was Respondent’s duty to furnish it as promptly as possible.’” *Woodland Clinic*, 331 NLRB 735, 737 (2000) (Board’s brackets), quoting, *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

The General Counsel alleges an unlawful delay by the Respondent in providing ownership information on Bruce Mansfield units 2 and 3 as requested by the Union.

The initial complaint issued by the General Counsel alleged that this information was requested by the Union on January 2, and again on January 6, and never provided by the Employer. However, at the outset of the hearing the claim was amended to delete the January 2 date and allege only that a January 6 information request was made, and that it was satisfied, but not until March 12.

However, the facts as I have found after hearing the evidence are that the Union’s January 6 request for information on Bruce Mansfield’s three units’ ownership was partially answered on January 20, and then, when the incomplete response was raised by the Union on February 5, the Employer stated that it did not yet have the information, and then fully answered (orally) on February 12. A subsequent February 18 union letter seeking the information was responded to by the Employer on March 12.

On these facts, I do not find a violation. On brief, the Respondent argues that Gianatasio intended that his January 20 answer regarding the majority ownership of unit 1 by an investment banks/trustee be understood as an implicit acknowledgment that the other units—2 and 3—were owned directly by the Respondent. Whether or not Gianatasio meant that, I do not think that the silence on units 2 and 3 reasonably conveyed that. Still, after the Union raised the lapse, the Respondent answered satisfactorily within one week’s time. Notably, there was no affirmative refusal to provide and no extended lapse. The parties stipulated that numerous other items of requested information were provided, which further suggests that there was no purposeful or bad-faith delay. Indeed, the testimony of Union Representative Welsh suggests that the Employer told the Union that it had not obtained the information on the ownership of units 2 and 3 as of February 5. But it was provided by February 12. The disputed information was provided before the contract’s expiration and there is no claim that this particular issue or information undermined the negotiations. Based on all the circumstances, I do not find an unreasonable delay in providing the ownership information.

CONCLUSIONS OF LAW

1. The Respondent, FirstEnergy Generation, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the designated collective-bargaining representative of the following bargaining unit of the Respondent’s employees:

⁸ At the hearing, Gianatasio testified that in reviewing the Union’s information request he learned from his benefits department that the Respondent “doesn’t track out-of-the-box retirees by local.” According to Gianatasio, “out-of-the-box” retiree information is maintained in a companywide pool. On brief the Respondent suggests (R. Br. at 15) that Gianatasio’s testimony is akin to an assertion that the requested information does not exist. It is not. Rather, the testimony confirms that the information exists—the issue suggested by Gianatasio’s testimony is one of burdensomeness. But that defense is unproven on this record and, in any event, untimely. There is no evidence it was ever raised with the Union. Rather, the Respondent simply refused to furnish the information. *H & R Industrial Services*, 351 NLRB 1222, 1224 (2007) (employer’s duty to raise issue of burdensomeness when it receives information request and to bargain about arrangements to satisfy the request); *Martin Marietta Energy Systems*, 316 NLRB 868, 868 (1995).

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide relevant information requested by the Union regarding retiree benefits.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall provide the Union with the information that it has to date failed and refused to provide that was requested by the Union in its January 27, 2014 information request to the Respondent, as described in the decision in this matter.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 2014. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, FirstEnergy Generation, LLC, Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish information requested by the Union that is relevant and necessary for the Union to fulfill

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

its role as the collective-bargaining representative of the unit employees.

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

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

(a) Provide the Union with the information requested January 27, 2014, regarding retiree benefits.

(b) Within 14 days after service by the Region, post at its facilities in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to furnish the Union with information requested by the Union that is relevant and necessary for the Union to fulfill its role as your collective-bargaining representative.

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

WE WILL provide the Union with the retiree benefits information requested in the Union's January 27, 2014 information request.

FIRSTENERGY GENERATION, LLC

The Administrative Law Judge's decision can be found at www.nlr.gov/case/06-CA-121513 or by using the QR

code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

