

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JACK COOPER HOLDINGS D/B/A JACK
COOPER TRANSPORT CO.

and

Case 09-CA-150482

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS LOCAL UNION NO. 89

Eric Brinker, Esq. and
Daniel Goode, Esq.,
for the General Counsel.
Kenneth W. Zatkoff, Esq.,
for the Respondent.
David O. Suetholz, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Louisville, Kentucky, on November 17, 2015. General Drivers, Warehousemen & Helpers Local Union No. 89 (Union) filed the charge on April 21, 2015,¹ and the General Counsel issued the complaint on August 31 and an erratum on September 4. GC Exh. 1(c), (g). The complaint alleges that Jack Cooper Holdings d/b/a Jack Cooper Transport Co. (Respondent)² violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to provide requested and relevant information to the Union.³ GC Exh. 1(c). Respondent timely filed an answer to the complaint denying the alleged violation of the Act and asserting several affirmative defenses. GC Exh. 1(i). The parties were given a full opportunity to participate, to introduce relevant

¹ All dates are in 2015 unless otherwise indicated.

² Respondent Transport and Respondent Holdings will be referred to collectively as “Respondent” herein.

³ Abbreviations used in this decision are as follows: “Tr.” for transcript; “R. Exh.” for Respondent’s Exhibit; “CP Exh.” for the Charging Party Union’s Exhibit; “GC Exh.” for General Counsel’s Exhibit; “R. Br.” for Respondent’s brief; “CP Brief” for the Union’s brief; and “GC Br.” for the General Counsel’s brief.

evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,⁴ and after considering the briefs filed by the parties, I make the following

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FINDINGS OF FACT

I. JURISDICTION

Respondent Jack Cooper Holdings (Holdings), a corporation, is engaged in the interstate transportation of freight from its facility in Kansas City, Missouri, where it annually derives gross revenues in excess of \$50,000 as an agent for various common carriers, which operate in and between various states other than the State of Missouri. Respondent Jack Cooper Transport Co. (Transport), a corporation, is also engaged in the interstate transportation of freight from its facility in Louisville, Kentucky, where it annually derives revenues in excess of \$50,000 for services performed in states other than the Commonwealth of Kentucky. The parties have stipulated, and I find, that Respondent Holdings and Respondent Transport are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondents have further admitted, and I find, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Union is the largest automobile transport (carhaul) local union in the United States. Fred Zuckerman has served as the Union's president since January 2000. Zuckerman also has 35 years of experience as a driver in the carhaul industry.

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II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations

Respondent Transport is a controlled subsidiary of Respondent Holdings. Respondent is engaged in the transportation of automobiles throughout the United States. In Louisville, Kentucky, Respondent serves three automobile plants: Ford Louisville Assembly Plant; GM Kentucky Truck Plant; and the Bowling Green Corvette Plant. Respondent also serves two railheads. Curtis Goodwin is the Senior Vice President/Labor Relations for Respondent. Respondent admits, and I find, that Goodwin is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

Respondent is signatory to the National Master Automobile Transporters Agreement (NMATA). This agreement is negotiated between the Teamsters National Automobile Transporters Industry Negotiating Committee (TNATINC)⁵ and signatory employers. GC Exh. 2; R. Exh. 1. Article 33 of NMATA concerns work preservation and outlines a special procedure

⁴ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

⁵ TNATINC negotiates NMATA on behalf of itself and local unions affiliated with the International Brotherhood of Teamsters.

for filing grievances regarding work preservation. R. Exh. 1. Section 4 of Article 33 of NMATA concerns information requests made pursuant to work preservation grievances and states, inter alia:

5 In the event that a Work Preservation Grievance is submitted, the Employer or Union may request, in writing, specific relevant information, documents or materials pertaining to such grievance and the other party shall respond to such request within fifteen (15) days of the receipt of such request.

10 R. Exh. 1. The NMATA goes on to state that if a party fails to comply with such a request for information, the other party may request a subpoena duces tecum from the Board of Arbitration. If a party fails to comply with the subpoena duces tecum, the other party may seek enforcement of the subpoena in federal court pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended. A party may also argue that the Board of Arbitration should draw an
15 adverse inference concerning the subject matter of the information that the other party failed to provide.

 Respondent is also signatory to the Jack Cooper Work Preservation Agreement (WPA). GC Exh. 2. The WPA prohibits Respondent from subcontracting, transferring, or leasing unit work.
20 The WPA further prohibits Respondent Holdings from permitting any controlled affiliate, other than Respondent Transport, from performing unit work. Moreover, Respondent agreed that it would not engage in any scheme, transaction, restructuring, or reorganization that permits it or any controlled affiliate to evade the protection of carhaul work or to assign or permit the performance or assignment of carhaul work outside the terms of the WPA.

25 On January 19 or 20, the Union learned through one of its members that Respondent may have been diverting unit work to non-union carriers. Tr. 17; 19. The Union immediately began investigating the alleged diversion of unit work and reached the conclusion that Respondent had violated NMATA and the WPA. Tr. 19. Thereafter, the Union filed a grievance against
30 Respondent for these alleged violations on February 11.⁶ GC Exh. 3.

 On February 11, the same day as the Union filed its grievance, Zuckerman sent a letter to several senior managers of Respondent, including Goodwin. GC Exh. 4. In his letter,
35 Zuckerman sought various pieces of information, including:

- 35 (3) The number of employees associated with Jack Cooper Transport that Jack Cooper Logistics, LLC has utilized since January 1, 2013 to engage in its carhaul operations;
- 40 (4) A list of all trips Jack Cooper Logistics has pulled or leased since January 1, 2013, and the names of the drivers or contractors who pulled those trips;
- (5) With respect to the request set forth above in Paragraph 4, please provide a separate list of all trips (including the dates of those trips, along with a complete account of the vehicles being hauled) Jack Cooper Logistics has pulled or leased since January 1, 2013, which Jack Cooper Logistics has reason to believe is
45 bargaining unit work under the NMATA;

⁶ Local unions are permitted to police NMATA and file grievances under NMATA. Tr. 18-19.

(11) Explain whether Jack Cooper Logistics, LLC bid on any new car traffic with any manufacturer or other entity since they have been in business whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings;

5 (12) If Jack Cooper Logistics, LLC has bid on work as outlined in paragraph 11 above please identify the new car traffic/manufacturer-entity/locations/dates that Jack Cooper Logistics, LLC bid whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings;

10 (13) If Jack Cooper Logistics, LLC has bid on work as outlined in paragraph 11 above and Jack Cooper Logistics, LLC was awarded new car traffic from a manufacturer or other entity please provide copies of the contracts with the manufacturers or any other entities who awarded the contract. Please redact any information that is confidential or proprietary;

15 (15) Does Jack Cooper Transport Company have any Article 2 Section 8 agreements with any Local Union regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars;

(16) If the answer to number 15 above is “yes”, please provide copies of those agreements with the approvals from the National Automotive Transporters Joint Arbitration Committee;

20 (17) Does Jack Cooper Transport haul used cars, auction cars, secondary market cars, and/or rental cars (now or in the past) not covered by an Article 2 Section 8 Agreement;

(18) If the answer to number 17 above is ‘yes’ please identify the traffic in question;

25 (19) Please provide a list of all trips leased by Jack Cooper Logistics, LLC out of the Manheim New Jersey terminal, the name of the company to which the load was leased and a list of the vehicles transported.

30 GC Exh. 4.

At the hearing, Zuckerman explained the Union’s need for the information sought in his February 11 letter. The Union sought the information in items 3 and 4 to see if Respondent was, in fact, diverting unit work to other carriers in violation of NMATA and the WPA. Tr. 20-21. In addition, the Union required this information to determine which entities were diverting work and to which entities the work was being diverted. Thus the information sought in items 3 and 4 was necessary for the Union to enforce NMATA and the WPA on behalf of its members. Zuckerman further testified that, based on his 35 years in the industry, this information would be needed for arbitration of the Union’s grievance. Zuckerman further testified that, based on his experience as a carhaul driver, Respondent would maintain vehicle transit orders identifying the drivers or contractors who pulled trips for Respondent. CP. Exh. 1; Tr. 50-51.

The information requested in item 5 was also needed for arbitration, according to Zuckerman. This information would identify wage disparities and standards needed to present the Union’s grievance to an arbitrator. He testified that this information would further be needed to refute any argument Respondent might raise as to whether the work in question was covered under the WPA.

Zuckerman further testified that the Union needed the information requested in items 11, 12, and 13 to prove the Union's theory that Respondents violated the WPA by diverting new carhaul work to a non-union carrier to an arbitrator. Tr. 25-26. In item 13, the Union advised Respondent that it could redact any confidential or proprietary information from its response.

5 Zuckerman testified that although the Union needed the information it was seeking for arbitration, it did not want confidential or proprietary information. Tr. 26.

10 Zuckerman requested the information in item 15 to dispute Respondents' potential argument that the vehicles listed in item 15 were not covered by the WPA. Tr. 26. Zuckerman explained that over the years Respondent has taken the position that auction cars, used cars, secondary market cars, and rental cars are not covered under the WPA. The Union wanted to establish that Respondent has been hauling these types of cars for years and that any position Respondent might take that these cars were not covered under NMATA and the WPA was wrong. Tr. 26-27. The Union sought the information in item 16 for the same reasons.

15 In addition, Zukerman testified that Article 2, Section 8 has not always been a part of NMATA. It was added in 1989 to allow local unions and union companies to negotiate lower wage rates and remain competitive. Under an Article 2, Section 8 agreement, local unions may, with the approval of their members, negotiate lower wage rates. Thus, cars may be hauled under an Article 2, Section 8 agreement or under a full-rate agreement. The Union requested the information in items 17 and 18 to establish whether some of the diverted work had been done under full-rate agreements. The Union would further need this information to establish at arbitration that Respondent was diverting unit work in violation of the WPA.

25 The Union sought the information requested in item 19 because Manheim, New Jersey was the specific location where Respondent had allegedly violated the WPA as alleged in the grievance. The Union had been made aware by one of its members that Respondent used a company called Virginia Auto Transport to move traffic from Manheim, New Jersey. Thus, the Union sought this information to establish how many loads Respondent may have diverted from union carriers.

30 Under NMATA, Respondent had 15 days to respond to the Union's information request. Respondent did not reply within 15 days. As of the date of the hearing, Respondent had not provided the information requested by the Union in Zuckerman's February 11 letter.

35 On February 27, the parties held a local level hearing via telephone on the Union's grievance. Tr. 32. During the hearing, Goodwin stated that Mike Cunningham⁷ had been in Kansas City in August to do an audit. Goodwin did not offer any further detail regarding this audit.

40 On March 3, the Union sent a second information request to Respondent. GC Exh. 5. This second request sought additional information and served to clarify some of the Union's earlier information requests. In the March 3 letter, the Union sought:

45 (2) Any documentation, memorandum or evidence supporting Jack Cooper's position that "used car traffic is not considered carhaul work";

⁷ Cunningham is an economist employed by the International Brotherhood of Teamsters (IBT).

(3) Any audit finding from the International Brotherhood of Teamsters concerning Jack Cooper Logistics or one of its subsidiaries.

GC Exh. 5.

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Zuckerman testified that the Union needed the information sought in items 2 and 3 above based upon Respondent's position at the local hearing that used car traffic is not considered carhaul work under the WPA. Tr. 31. The Union was seeking any information Respondent may have had to rebut Respondent's theory that what it was doing did not violate NMATA and the WPA. Regarding the audit, Zuckerman believed that it was important to discover the importance of what Goodwin was talking about during the local hearing in order to properly process the grievance.

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Again, under NMATA, Respondent had 15 days to respond to the Union's information requests. As of the date of the hearing, Respondent had not yet provided the information requested on March 3.

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On March 13, Respondents sent a letter signed by Goodwin to Zuckerman. GC Exh. 6. This letter indicated that it was a response to the Union's February 11 information request. In the letter, Respondent disputed the relevance of the information sought by the Union. Elsewhere the letter stated that Respondent was searching for the information, but was unsure when it would be able to respond. Respondent also claimed that one of the Union's requests (item 3) was too vague or ambiguous for it to formulate a response. The letter did not provide any information responsive to the Union's information requests. In addition, Respondent's March 13 letter demanded that the Union execute a confidentiality agreement. However, the letter did not provide any such agreement for the Union to sign.

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On March 18, Respondent sent a letter to the Union responding to Zuckerman's March 3 information request. GC. Exh. 7. This letter disputed the relevance of the Union's request for information regarding its position that used car work is not carhaul work. Respondent asked the Union to provide it with a "sufficient factual basis" to establish the relevance of this request. Respondent further stated that the Union's request for an "audit finding" was too vague and ambiguous to determine what the Union was seeking. Respondent again demanded that the Union enter into a confidentiality agreement before it would provide any information regarding an audit finding. Respondent did not provide any documents or information responsive to the Union's February 11 or March 3 request.⁸

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On March 26, the Union sent a renewed request for information to Respondent.⁹ GC Exh. 8. Zuckerman also responded to the concerns raised by Respondent in its March 13 and 18 letters. Tr. 39. He indicated that the Union was willing to sign a non-disclosure agreement. He also discussed the relevance of certain information sought. In addition, Zuckerman clarified some of his earlier requests. He testified that by his use of certain terms (i.e. "trip lease" or "leased")

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⁸ The remainder of the information requests from March 3 and Respondent's responses in its March 18 letter are not at issue in this case.

⁹ The March 26 letter also responded to information requests that had been made by Respondent, which are not at issue.

Respondent responded that it did not “lease,” and thus was arguing over semantics. Tr. 50. Therefore, Zuckerman amended his earlier requests to use more modern terms, i.e. “brokered.”

5 Goodwin sent a response to Zuckerman on April 10. GC Exh. 9. Respondent continued to object to the relevance of the Union’s requests. Respondent did not provide any documents to the Union regarding the information requests contained in the complaint.¹⁰

10 On April 27, the Union’s attorneys sent a letter to Respondent regarding the information requests. GC Exh. 10. The letter indicated that the Union had agreed to sign a confidentiality agreement and that Respondent never provided any of the requested information.

15 Respondent offered as evidence four Memoranda of Agreement between the Union and Respondent. R. Exhs. 2, 3, 4, 5. These agreements allow for carhaul work to be performed at a reduced rate under Article 2, Section 8 of NMATA. Respondent’s counsel argued that the Union did not need copies of Article 2, Section 8 agreements with any other local unions regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars (item 15 of the February 11 request) because the Union had 4 such agreements in its possession. Tr. 69-71.

20 DISCUSSION AND ANALYSIS

A. *Witness Credibility*

25 A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

30 Only one witness testified at the hearing: Union President Kenneth Zuckerman. Most of Zuckerman’s testimony concerned the Union’s jurisdiction and the Union’s collective-bargaining agreements; all topics which fall squarely within his sphere of knowledge as the Union’s president. I found Zuckerman to be a credible witness. His testimony was consistent with the documentary evidence presented at the hearing and he appeared sure and knowledgeable when giving his testimony. He testified in a direct and forthright manner and his testimony did not waver on cross-examination. Therefore, I credit Zuckerman’s testimony.

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¹⁰ The information attached to Respondent’s April 10 letter was related to information requests that are not at issue in this case.

B. *Respondent Violated the Act by Failing and Refusing to Provide Requested Information to the Union*

5 In its information request, the Union sought information regarding: the number of employees
 used by Respondent in its carhaul operation; a list of trips pulled or leased (or brokered or in any
 way transferred) by Respondent and the names of drivers or contractors who pulled those trips; a
 separate list of trips pulled or leased (or brokered or in any way transferred) that Respondent
 believes are bargaining unit work under NMATA; whether Respondent Logistics has bid on (or
 10 been awarded any spot buys for) any new car traffic directly or through any affiliate and, if so, a
 list of new car traffic bid (or awarded) and copies of the contracts for these bids (or awards) with
 any confidential or proprietary information redacted; whether Respondent has any Article 2,
 Section 8 agreements with any local union regarding the transportation of used cars, auction cars,
 secondary market cars, and/or rental cars, and, if so, copies of those agreements; whether
 Respondent hauls used cars, auction cars, secondary market cars, and/or rental cars not covered
 15 by an Article 2, Section 8 agreement and, if so, information regarding such traffic; a list of all
 trips leased by Respondent out of the Manheim, New Jersey terminal, the company to which the
 load was leased, and a list of the vehicles transported; any documentation or evidence supporting
 Respondent's position that used car traffic is not carhaul work; and any audit finding from the
 IBT concerning Respondent or one of its subsidiaries. GC Exhs. 4; 5; 8.

20 In dealing with a certified or recognized collective-bargaining representative, one of the
 things which employers must do, on request, is to provide information that is needed by a
 bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.*,
 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of
 25 relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal*, 224
 NLRB 1506 (1976). In each case, the inquiry is whether or not both parties meet their duty to
 deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149
 (1956).

30 The information sought by the Union in this case is not presumptively relevant. When a
 union seeks information concerning employees outside of the bargaining unit, there is no
 presumption of relevance and the union has the burden to show relevance in such circumstances.
E.I. DuPont de Nemours and Co., 744 F.2d 536, 538 (6th Cir. 1984). The test for relevancy is
 whether the information assists in evaluating the merits of a grievance and the propriety of
 35 pursuing the grievance to arbitration. *United Technologies Corp.*, 274 NLRB 504, 508 (1985). If
 a union's information request is ambiguous or concerns non-unit employees, this does not excuse
 an employer's blanket refusal to comply. *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990). It
 is well-settled that an employer may not simply refuse to comply with an ambiguous or overly
 broad information request, but must instead request clarification or comply with the request to
 40 the extent it encompasses necessary and relevant information. *Id.*

45 Processing grievances is, as argued by the General Counsel and the Union, clearly a
 responsibility of a union, and an employer must provide information requested by the union for
 the purposes of handling grievances. *TRW, Inc.*, 202 NLRB 729 (1973). The legal standard
 concerning just what information must be produced is whether or not there is "a probability that
 such data is relevant and will be of use to the union in fulfilling its statutory duties and
 responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc.*, 272

NLRB 1128 (1984). The Board uses a broad, discovery-type standard in determining relevance in information requests and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). The Board, in determining that information is producible, does not pass on the merits of a grievance underlying an information request. *W. L. Molding Co.*, 272 NLRB 1239 (1984).

I find that the information sought by the Union is relevant and necessary to its performance of its duties as the exclusive collective-bargaining representative of its members. As the exclusive bargaining representative for the unit, the Union had a statutory duty to investigate its member's claim that Respondent was violating the terms of NMATA and the WPA. The Board has found that information related to subcontracting of unit work is necessary and relevant to a union's function as collective-bargaining agent. *Schrock Cabinet Co.*, 339 NLRB 182, 187 (2003). Similarly, in the instant case, the Union seeks information regarding the alleged diversion of unit work to non-union carriers. Examining agreements Respondent had with other carriers and other local unions, lists of trips, and lists of drivers or contractors Respondent used to perform carhaul work would allow the Union to determine Respondent's compliance or non-compliance with NMATA and the WPA. Information concerning Respondent's anticipated position at arbitration that certain work was not carhaul work, a position it raised at a local hearing on the grievance, would be relevant to whether or not Respondent violated NMATA and the WPA. Thus, I find that the information sought by the Union was necessary to ascertain the nature, scope, and extent of the alleged contract violation underlying the Union's February 11 grievance and was relevant and necessary to its function as collective-bargaining agent.

After the Union demonstrated the relevancy of the requested information, the burden shifted to Respondent to establish that the information was not relevant, did not exist, or for some other valid and acceptable reason could be furnished to the requesting party. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992) and *Postal Service*, 276 NLRB 1282 (1985). Respondents elected not to call any witnesses at the trial. It is well-settled that the statements and arguments of counsel are not evidence. In re *Kellogg Company*, 2015 WL 5081426 (2015); see also *U.S. v. Fetlow*, 21 F.3d 243, 248 (8th Cir. 1994). Thus, Zuckerman's testimony regarding the relevance of the information sought by the Union stands un rebutted.

I find that Respondent here failed to timely respond to the Union's request for information. Respondent did not reply to the Union's February 11 request until March 13, almost a full month later. Respondents have a duty to timely respond to information requests, even if they are later able to provide a justification for not ultimately providing the requested information. *Dover Hospitality Services, Inc.*, 361 NLRB No. 90, slip op. at 1, fn. 1 (2014), citing *Columbia University*, 298 NLRB 941, 945 (1990) (an employer must respond to a union's request for relevant information within a reasonable time, either by complying with it or by stating its reason for non-compliance). As of the date of the hearing, 9 months after the Union's initial information request, Respondent had not yet provided the requested information. I find this delay violative of the Act.

I note that Respondent did not argue that the information sought by the Union was confidential or proprietary in its brief, however, the subject of a non-disclosure agreement was brought up numerous times during the trial. To the extent that Respondent claimed that some of

the information sought was confidential or proprietary in nature, the Board has held that if an employer is concerned about confidentiality, it cannot simply raise this concern, but must instead come forward with an offer to accommodate both its concern and bargaining obligation. *Tritac Corp.*, 286 NLRB 522, 522 (1987).

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The Board balances a union's need for information against any legitimate and substantial confidentiality interest established by the employer. *Earthgrains Baking Cos., Inc.*, 327 NLRB 605, 611 (1999). As part of the balancing process, the party asserting the claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information. *Jacksonville Area Assn.*, 316 NLRB 338, 340 (1995). Where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged and the employer has a duty to furnish the information. *A-Plus Roofing*, 295 NLRB 967, 970 (1989). It was thus Respondent's duty, upon asserting its confidentiality concerns, to promptly offer an accommodation. See *The Finley Hospital*, 362 NLRB No. 102, slip op. at 11-12 (2015) (employer's failure to offer an accommodation for 2 months found violative of the Act).

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I find that Respondent did not satisfy its duty to come forward with an appropriate accommodation. Respondent presented no evidence at the hearing regarding the alleged confidential or proprietary nature of the information sought. However, examining the documentary evidence in this case, I find that Respondent asserted confidentiality claims in its letters of March 13, March 18, and April 10. Respondent did not provide the Union with a confidentiality agreement to sign until shortly before the hearing. I find that this belated gesture did not satisfy Respondent's duty to bargain with the Union in good faith over an appropriate accommodation.

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Ultimately, Respondent has failed to elucidate a reason why it should be excused from providing the information requested by the Union on February 11 and March 3, as modified on March 26. Respondent's argument that the Union had certain of the requested information available to it through other means is without merit. The fact that a union may obtain information by other means or from another source does not alter or diminish the obligation of an employer to furnish relevant information. *Holyoke Water Power Co.*, 273 NLRB 1369, 1373 (1985). The Union admits that it had certain Article 2, Section 8 agreements in its possession that would establish that Respondent applied NMATA and the WPA to secondary traffic, rental and leased vehicles, and auction cars. R. Exhs. 2, 3, 4, 5. However, the Union was not aware of whether other, similar agreements existed. The Union's request was relevant and necessary both to rebut a defense Respondent might raise at arbitration, as it did at the local hearing, and to ascertain the nature and scope of Respondent's alleged violations of NMATA and the WPA. Thus, Respondent's argument that it did not need to provide further Article 2, Section 8 agreements or full-rate agreements because the Union had such agreements in its possession lacks merit.

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Respondent cites *Detroit Edison Co.*, 314 NLRB 1273 (1994), for the proposition that, "information that is not on its face directly related to unit employees must be produced only if the [u]nion can make a showing of relevance to the collective bargaining process." R. Br. at p. 11. In *Detroit Edison Co.*, the Board overturned a judge's decision finding that an employer violated Section 8(a)(5) and (1) of the Act. The *Detroit Edison* Board noted that the Union was

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not in the process of processing or formulating any particular grievance at the time of the information request. 314 NLRB at 1274. Furthermore, the Board in that case noted that the union did not even suspect that the employer was in violation of any agreements negotiated between the parties. *Id.* However, in the instant case, the Union had already filed a grievance
 5 alleging that Respondent violated two agreements at the time of its information requests. Thus, I find this case distinguishable from *Detroit Edison Co.*

C. Respondent's Affirmative Defenses Lack Merit

10 Respondent raised four affirmative defenses in its answer to the complaint. It is well established that the burden of proof of proving an affirmative defense lies with the party asserting it. *Marydale Products, Company, Inc.*, 133 NLRB 1232 (1961) and *Sage Development Co.*, 301 NLRB 1173, 1189 (1991).

15 Respondent first alleged that the complaint failed to state a claim upon which relief could be granted. As found above, the General Counsel has established that Respondents violated Section 8(a)(5) and (1) of the Act and has, therefore, stated a claim upon which relief can be granted. Moreover, Respondent has cited no authority and presented no evidence in support of this bare
 20 assertion. As such, I find no merit to Respondent's first affirmative defense.

Second, Respondent asserted that the complaint should be dismissed and the matter deferred to the parties' grievance-arbitration policy. The Board has long held that deferral is inappropriate in Section 8(a)(5) information request cases. See e.g. *United Technologies Corp.*, 274 NLRB 504, 505 (1985); *Daimler Chrysler Corp.*, 331 NLRB 1324, 1324 fn. 2 (2000) *enfd.* 288 F.3d 434 (D.C. Cir 2002); *Chapin Hill at Red Bank*, 360 NLRB No. 27, fn. 2 (2014). Respondent has cited no contrary support for this affirmative defense and, as such, I find it is
 25 without merit.

30 Third, Respondent asserted that the Charging Party's bargaining representative, TNATINC, investigated Respondents' use of Jack Cooper Logistics for brokering used car traffic and found no violation of the parties' collective-bargaining agreement. Respondent did not produce any evidence in support of this contention. Moreover, the alleged findings of the Charging Party's bargaining representative have no relevance to this proceeding. As such, I find no merit to Respondent's third affirmative defense.

35 Finally, Respondent asserted that the complaint was time-barred under Section 10(b) of the Act. Section 10(b) reads in pertinent part: "Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ." 29 U.S.C. § 160(b). Pursuant to Section 10(b), a violation of the Act cannot be found, "which is
 40 inescapably grounded in events predating the limitations period." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 422 (1960). The evidence at trial established that the charge was filed on April 20, 2015. GC Exh. 1(a). The evidence further established that the information requests underlying the charge were made on February 11 and March 3, 2015, within 2 months of the
 45 filing of the charge. GC Exhs. 4; 5. As the uncontroverted evidence established that the information requests were made within 6 months of the filing of the underlying charge, I find that the charge was not time-barred under Section 10(b) of the Act.

In sum, I found no merit to any of Respondent's affirmative defenses. Moreover, I have found that the General Counsel has established that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

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CONCLUSIONS OF LAW

By failing and refusing to provide the Union with relevant information as requested in the Union's February 11, 2015, and March 3, 2015 letters, and as amended by its March 26, 2015, letter, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

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REMEDY

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

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Respondent is hereby ordered bargain with the Union as the exclusive collective-bargaining representative of all employees in the classification of work covered by the National Master Transporters Agreement, effective June 1, 2011 to August 31, 2015, and Supplements thereto, but excluding supervisory, managerial, guard, and confidential employees, by providing the Union with the information it requested on February 11, 2015, and March 3, 2015, and as modified on March 26, 2015, as set forth in the complaint and erratum: (1) The number of employees associated with Jack Cooper Transport that Jack Cooper Logistics, LLC has utilized since January 1, 2013, to engage in its carhaul operations; (2) A list of all trips Jack Cooper Logistics has pulled or leased or brokered or in any way transferred to Jack Cooper Transport since January 1, 2013, and the names of the drivers or contractors who pulled those trips; (3) With respect to the request set forth in [number (2)], please provide a separate list of all trips (including the dates of those trips, along with a complete account of the vehicles being hauled) Jack Cooper Logistics has pulled or leased brokered or in any way transferred to Jack Cooper Transport since January 1, 2013, which Jack Cooper Logistics has reason to believe is bargaining unit work under the NMATA; (4) Explain whether Jack Cooper Logistics, LLC bid on any new car traffic with any manufacturer or other entity or been awarded any spot buys for new car traffic since they have been in business whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings; (5) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)], please identify the new car traffic/manufacturer-entity/locations/dates that Jack Cooper Logistics, LLC bid whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings or any loads awarded and any spot buys; (6) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)] and Jack Cooper Logistics, LLC was awarded new car traffic from a manufacturer or other entity please (to include any spot buys for new car traffic) provide copies of the contracts with the manufacturers or any other entities who awarded the contract. Please redact any information that is confidential or proprietary; (7) Does Jack Cooper Transport Company have any Article 2 Section 8 agreements with any local union regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars; (8) If the answer to [number (7)] is "yes" please provide copies of those agreements with the approvals from the National

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Automotive Transporters Joint Arbitration Committee; (9) Does Jack Cooper Transport haul used cars, auction cars, secondary market cars, and/or rental cars (now or in the past) not covered by an Article 2 Section 8 Agreement; (10) If the answer to [number (9)] is “yes” please identify the traffic in question; (11) Please provide a list of all trips leased by Jack Cooper Logistics, LLC out of the Manheim, New Jersey terminal, the name of the company to which the load was leased and a list of the vehicles transported; (12) Any documentation, memorandum or evidence supporting Jack Cooper’s position that “used car traffic is not considered carhaul work” and; (13) Any audit finding from the International Brotherhood of Teamsters concerning Jack Cooper Logistics or one of its subsidiaries.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

Respondent, Jack Cooper Holdings, Kansas City, Missouri and Jack Cooper Transport Co., Louisville, Kentucky, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union, General Drivers, Warehousemen & Helpers Local Union No. 89, by failing and refusing to furnish it with requested information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent’s employees in the classification of work covered by the National Master Transporters Agreement, effective June 1, 2011 to August 31, 2015, and supplements thereto, but excluding supervisory, managerial, guard, and confidential employees.

(b) In any like or related manner interfering with, restraining, or coercing employees 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) Furnish the Union with the following information it requested in its February 11, 2015, and March 3, 2015 letters, and as modified in its March 26, 2015 letter: (1) The number of employees associated with Jack Cooper Transport that Jack Cooper Logistics, LLC has utilized since January 1, 2013, to engage in its carhaul operations; (2) A list of all trips Jack Cooper Logistics has pulled or leased or brokered or in any way transferred to Jack Cooper Transport since January 1, 2013, and the names of the drivers or contractors who pulled those trips; (3) With respect to the request set forth in [number (2)], please provide a separate list of all trips (including the dates of those trips, along with a complete account of the vehicles being hauled) Jack Cooper Logistics has pulled or leased brokered or in any way transferred to Jack Cooper

¹¹ 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.

Transport since January 1, 2013, which Jack Cooper Logistics has reason to believe is bargaining unit work under the NMATA; (4) Explain whether Jack Cooper Logistics, LLC bid on any new car traffic with any manufacturer or other entity or been awarded any spot buys for new car traffic since they have been in business whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings; (5) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)], please identify the new car traffic/manufacturer-entity/locations/dates that Jack Cooper Logistics, LLC bid whether directly or through Jack Cooper Transport, Jack Cooper Holdings, or any affiliate of Jack Cooper Holdings or any loads awarded and any spot buys; (6) If Jack Cooper Logistics, LLC has bid on work as outlined in [number (4)] and Jack Cooper Logistics, LLC was awarded new car traffic from a manufacturer or other entity please (to include any spot buys for new car traffic) provide copies of the contracts with the manufacturers or any other entities who awarded the contract. Please redact any information that is confidential or proprietary; (7) Does Jack Cooper Transport Company have any Article 2 Section 8 agreements with any local union regarding the transportation of used cars, auction cars, secondary market cars, and/or rental cars; (8) If the answer to [number (7)] is “yes” please provide copies of those agreements with the approvals from the National Automotive Transporters Joint Arbitration Committee; (9) Does Jack Cooper Transport haul used cars, auction cars, secondary market cars, and/or rental cars (now or in the past) not covered by an Article 2 Section 8 Agreement; (10) If the answer to [number (9)] is “yes” please identify the traffic in question; (11) Please provide a list of all trips leased by Jack Cooper Logistics, LLC out of the Manheim, New Jersey terminal, the name of the company to which the load was leased and a list of the vehicles transported; (12) Any documentation, memorandum or evidence supporting Jack Cooper’s position that “used car traffic is not considered carhaul work” and; (13) Any audit finding from the International Brotherhood of Teamsters concerning Jack Cooper Logistics or one of its subsidiaries

- (b) Within 14 days after service by the Region, post at its facilities in Kansas City, Missouri, and Louisville, Kentucky, copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or

¹² 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.”

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 11, 2015.

- 5 (c) Within 21 days after service by the Region, file with the Regional Director for Region 9 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.

10 Dated, Washington, D.C., January 27, 2016

Melissa M. Olivero

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Melissa M. Olivero
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to bargain collectively with General Drivers, Warehousemen & Helpers Local Union No. 89, as the exclusive collective bargaining representative of employees in the Kansas City, Missouri, and Louisville, Kentucky, bargaining units, by refusing to furnish the Union with requested information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

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

WE WILL furnish the Union with the information it requested on February 11, 2015, and March 3, 2015, as modified on March 26, 2015.

**JACK COOPER HOLDINGS D/B/A JACK
COOPER TRANSPORT CO.**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-150482 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.