

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

**MICHIGAN BELL TELEPHONE
COMPANY**

and

**LOCAL 4034, COMMUNICATIONS
WORKERS OF AMERICA (CWA), AFL-
CIO**

CASE NO. 07-CA-150005

**RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL
COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On the morning of Saturday, January 10, 2015, an employee of Michigan Bell Telephone Company's ("Company" or "Respondent") Grand Rapids, MI garage informed one of the Company's managers there may be a work stoppage, also known as a "family night," that day. That afternoon, 19 employees returned to the Grand Rapids garage prior to the end of their shift. Each employee was questioned regarding why they had returned to the garage prior to the end of the shift, and not one employee stated that they were engaging in any kind of job action or concerted activity. Each of the employees was then instructed to return to work, and all but five employees complied. Those five employees were later disciplined for insubordination because they failed to follow a management instruction to return to work. None of the other 14 employees who agreed to return to work were disciplined. These facts are undisputed.

Less than 48 hours after this incident – before any discipline had been imposed or any grievances had been filed – Brian Hooker, the Administrative Assistant of Charging Party Local 4034, Communications Workers of America, AFL-CIO ("Local 4034"), asked the Company for the identity of the "informant." Respondent declined to provide Mr. Hooker the informant's identity that day, and, after identical subsequent requests, continued to withhold that information due to its complete irrelevance to any of Local 4034's duties to administer the collective bargaining agreement ("CBA"), and because of the likelihood that divulging the identity to Mr. Hooker would lead to retaliation and harassment.

Despite the General Counsel's attempt to cloud the record, the issue in this case is very simple: was the identity of the informant relevant to Local 4034's duties to administer the CBA? Administrative Law Judge Arthur Amchan ("ALJ" or "ALJ Amchan") found that the identity of the informant was not relevant, and that the presumption of relevance of this information was rebutted. ALJ Amchan provided a simple and compelling basis for his holding. The identity of

the informant, what he told the Company, and the extent of the message's dissemination has no relevance to Local 4034's duties in administering the CBA because: (1) no employee was disciplined as a result of any information the informant provided the Company; (2) this information has no bearing on whether there was just cause for the discipline of five employees who refused to return to work; (3) there was no nexus between the identity of the employee and any dispute between Local 4034 and the Company regarding overtime; and (4) the identity of the informant had no relevance to any grievance Local 4034 did file or could have filed.

In making his decision, ALJ Amchan rejected all of Local 4034's proffered reasons for the relevance of the informant's identity. First, no employee was disciplined as a result of what the informant said, so the identity of the informant was irrelevant to the grievances filed by the five disciplined employees. Second, Local 4034's claim that it needed the informant's identity to "investigate" why unit members thought there may have been a "family night" on January 10, 2015 made no sense. As ALJ Amchan put it, "if the Union wanted to know why 19 employees returned to the Grand Rapids garage when the scheduled shift ended, it should ask those employees, not the informant, who assumedly was not one of the 19. What the informant thought is completely irrelevant to the question of why 19 unit employees thought they were justified in returning to the garage." Finally, Local 4034 did not need the name, as it claimed, to communicate to its membership that it does not condone work stoppages.

The Counsel for the General Counsel ("General Counsel") now files exceptions to the ALJ's holding, first arguing he erred by not finding that Respondent "unlawfully and unreasonably delayed" in responding to Local 4034's January 12, 2015, information request. This argument has no merit. The January 12, 2015 written information request referred to by General Counsel is nothing more than a restatement of the information request Mr. Hooker first

made by telephone call to a Company manager earlier that day. The manager refused to provide the information at that time, and the Company continued to maintain this position throughout the relevant time period, including in its March 3, 2015 written response to Local 4034's written information request of February 20, 2015. Furthermore, even assuming Respondent did "delay" its response to Local 4034's information request, there has been no showing this delay was unreasonable under the circumstances.

The General Counsel also argues ALJ Amchan erred by: (1) not considering the relevance of the information at the time it was requested; (2) not considering the relevance of the information as it related to the parties' CBA or grievances that were later filed; (3) finding that the presumption of relevance had been rebutted; and (4) finding that Local 4034 could have obtained the requested information from other sources to support his conclusion that the information was irrelevant. None of these arguments have any merit.

At the time the information request was first made on January 12, 2015, there is no evidence of what, if any, relevance the informant's identity had at that point. Indeed, the Union did not request any other information about the events of that day other than the identity of the informant, and there had been no discipline imposed or grievances filed by that date. Thus, it is clear that, on January 12, Local 4034 was not concerned about any pending grievances or other contractual considerations; only retribution. Even when grievances were later filed, Local 4034 still could not articulate the relevance of the informant's identity, and there is an absence of any evidence that the identity became relevant at that time. Finally, as described in detail below, the General Counsel is simply wrong that the presumptive relevance of the information has not been rebutted.

Finally, ALJ Amchan never suggested that Local 4034 could have obtained the identity of the informant from another source. Rather, he found that Local 4034's stated reasons for needing the informant's identity did not make sense. Specifically, ALJ Amchan found that the identity of the informant was not needed for Local 4034 to find out why 19 employees returned to work early, because only those 19 employees would know that answer. ALJ Amchan also found that the identity was unnecessary for Local 4034 to communicate to its membership that it does not condone work stoppages, since it could communicate this information regardless of whether it had the informant's identity.

ALJ Amchan conducted a thorough analysis of the record evidence, including the testimony at hearing and the credibility of the witnesses, and made a thorough and reasoned determination that the facts and circumstances of this case rebut any presumption of relevance. Accordingly, for these reasons and the reasons set forth in detail below, the Board should overrule the General Counsel's Exceptions and affirm ALJ Amchan's decision in its entirety.

II. RELEVANT FACTS

A. Background regarding the parties

For many years, the Communications Workers of America, AFL-CIO ("CWA") has been the collective bargaining representative for bargaining unit employees who work in the Company's operations throughout Michigan. (Tr. 7).¹ The Company and the CWA have been parties to a series of collective bargaining agreements throughout the years. (*Id.*). The current Collective Bargaining Agreement ("CBA") is effective April 12, 2015 through April 14, 2018. (*Id.*; GC Ex. 2). The predecessor CBA between the parties was effective April 8, 2012 through April 11, 2015. (Tr. 7; GC Ex. 3). CWA (acting through its administrative unit, District 4) is the

¹ References to the hearing transcript are designated "Tr.," references to Respondent's Exhibits are designated "R. Ex.," references to the General Counsel's exhibits are designated "GC Ex.," and references to ALJ Amchan's Decision are designated as "ALJD."

union-signatory to the CBA. (Tr. 26). Consequently, the Company's bargaining obligation is with CWA District 4, except for certain issues that may be bargained at the local level, as referenced in the CBA. (*Id.* at 59).

Local 4034 represents Respondent's bargaining unit employees in the greater Grand Rapids and Lansing, Michigan areas. (Tr. 8, 26). The president of Local 4034 is Ryan Letts, and its administrative assistant is Brian Hooker. (*Id.* at 24). As administrative assistant, Mr. Hooker oversees first-step grievances, chairs second-step grievance appeals, and assists the president on third-step grievance appeals and arbitration. (*Id.*). Mr. Hooker also trains and mentors union stewards. (*Id.* at 24-25).

B. Relevant provisions of the CBA between the Company and CWA

1. Overtime provisions

The Company's scheduling and overtime practices are not at issue in this case. However, the following brief discussion provides some background and context for the events of January 10, 2015, discussed in more detail below.

There are two main categories of employees who install the Company's products and services in customers' premises. The "core" technicians ("Core Techs") install and service the Company's traditional landline-based telephone services. (ALJD 2:14-17; Tr. 53). Premises Technicians ("Prem Techs"), a relatively new position created after the Company launched its "U-verse" business in approximately 2007, install and service U-verse products and services in customers' premises. (ALJD 2:14-17; Tr. 52).

The CBA between Respondent and CWA contains a separate memorandum of agreement that governs the terms and conditions of Prem Techs' employment, which became known as "Appendix F" to the parties' CBA. (Tr. 53; GC Ex. 3 at 201). Appendix F contains an overtime provision (Section 5.06) applicable only to Prem Techs, which differs from the overtime

provisions applicable to Core Techs. (ALJD 2:14-19; GC Ex. 3 at 208).² This provision provides, in relevant part, that:

Employees may be required to work up to seventeen (17) hours of overtime per week subject to the needs of the business, except that this limitation will not apply in cases of emergency. (*Id.*).

2. The Contractual No-Strike Provisions

The parties' CBA also contains a "no-strike" clause, which is located at Article 5 of the CBA, and which is applicable to all employees. (ALJD 2:13; GC Ex. 3 at 6-7). This provision states that:

- 5.01 It is understood between the parties that the services to be performed by the employees covered by this Agreement are essential to the operation of the Company and to the health, safety, and welfare of the public, and the Union agrees that it will not authorize or promote any strike, slowdown, picketing or other interference with the normal operations of the business during the life of this Agreement. It is understood that the Union will not condone employee participation in a sympathy strike in conjunction with personnel outside of the Bargaining Unit. The Company agrees that it will not intentionally prevent the performance of its employees' services insofar as the services are required in the operation of the business.
- 5.02 Should any employee or employees engage in any of the above prohibited activities, without the authority and sanction of the Union, the Parties shall cooperate to enable the Company to carry on its operations without interruption or other injurious effect. It is also understood that the Union will cooperate with the Company in the establishment and enforcement of a lawful reserved or neutral entrance where Company employees are performing or directed to perform work at a picketed or struck location.

C. The January 10, 2015, Incident at the Grand Rapids Garage

On the morning of Saturday, January 10, 2015, approximately 45-50 Prem Techs in the Grand Rapids garage were scheduled to work from 8:00 a.m. to 4:30 p.m. (ALJD 2:45-47; Tr. 147). Following a morning meeting with all Prem Techs, manager Andrew Maki went to the managers' office, which is locked from the outside. A bargaining unit employee who he knew

² ALJ Amchan's opinion states that the overtime provision is in Section 5.06 of Appendix F, but this appears to be a typographical error.

knocked at the door and asked to speak with Mr. Maki. (ALJD 3:5-8; Tr. 146, 149). The Local 4034 member told Mr. Maki that he had heard there was the “potential for a family night” that evening. (ALJD 3:6-7; Tr. 150).³ Mr. Maki called his supervisor, Area Manager Michael Ten Harmsel, and relayed the information to him. (ALJD 3:9-10; Tr. 152).

Around 4:00 p.m., a number of Prem Techs began to arrive at the garage while there was still work available to be performed. (Tr. 177). A total of 19 Prem Techs would return to the garage early that day. (ALJD 3:14-15; Tr. 178). Company managers questioned each employee in the presence of a union steward and instructed each to return to work since there was additional work to be performed. (Tr. 178-79). All but five of the Prem Techs agreed to return to work, but none of the five who refused to return to work gave any indication that they were engaging in a concerted job action. (ALJD 3:14-16; Tr. 179).

Each of the five Prem Techs who refused to return to work were later disciplined for insubordination, because they refused to comply with a management directive to return to work. (Tr. 79-80; GC Ex. 5). Notably, no employee was disciplined simply because they returned to the garage while there was work still available. Rather, the discipline was only given to those employees who refused to return to work.⁴

D. Local 4034’s Request for the Name of the “Informant”

On January 12, 2015, before the dust had settled from the events of January 10, 2015, Mr. Hooker called Mr. Maki and asked him for the name of the individual who told Mr. Maki that there may be a “family night” planned for January 10. (ALJD 3:23-24; Tr. 153). Mr. Maki

³ According to Mr. Hooker, “family night” is a code word he previously used in to mean that employees should refuse to work “voluntary” overtime (even though, under Appendix F, there is no such thing as “voluntary” overtime). (Tr. 31-32).

⁴ In the underlying ULP Charge filed in this case, Local 4034 alleged that the discipline was an unfair labor practice, but the Acting Regional Director dismissed this allegation, and the dismissal was not appealed. (Tr. 114; R. Ex. 2). Thus, the question of whether the five disciplined Prem Techs had acted independently or in concert was not a contested issue at hearing, and is immaterial to the legal issues in dispute.

responded that he was not comfortable providing that information, and that he wanted to talk to the individual and Mr. Ten Harmsel. (*Id.*).

Mr. Hooker reduced his request to writing that same day via email to Mr. Maki and Mr. Ten Harmsel for the identity of the employee, and also requested a description of what the employee said and a list of people to whom Mr. Maki disclosed the information. (ALJD 3:28-43, 4:1-25; GC. Ex. 4). Although Mr. Hooker's email was titled "Relevant Data Request," there was no specific description of the relevance of such information, especially considering that Mr. Hooker's initial request *did not request any other information about the events of January 10, 2015.* (*Id.*). In fact, the purported relevance of the information request was "boilerplate" language that the information was needed "[i]n order to make a determination as to whether a valid grievance exists, or if an existing grievance should be elevated to the next step and/or to bargain terms and conditions of employment on behalf of our members[.]" (ALJD 4:6-7).

After Mr. Maki maintained the position he had previously told Mr. Hooker, *i.e.*, that he would not disclose the individual's name, Mr. Hooker made another request for this information on February 20, 2015, along with other information regarding the events of January 10, 2015. (ALJD 4:31-35; GC Ex. 7). This information request was made to another manager, Dionje Evans, and inexplicably not sent to Mr. Ten Harmsel. (GC Ex. 7). Once again, Mr. Hooker made no effort to explain the relevance of the request for the identity of the employee, simply stating (in more boilerplate language) that the information was necessary "in order to make a determination as to whether a valid grievance exists, or if an existing grievance should be elevated to the next step[.]" (*Id.*). Mr. Evans referred the information request to Mr. Ten Harmsel. (R. Ex. 8).

On March 3, 2015, Mr. Ten Harmsel provided a written response to Mr. Hooker's information request. Mr. Ten Harmsel informed Mr. Hooker that the Company was not considering what happened on January 10, 2015 as a job action. Accordingly, the identity of the individual was not relevant. (ALJD 4:40-43; GC Ex. 8). As Mr. Ten Harmsel testified, the employees who refused to return to work on January 10, 2015, all said that they were not acting in concert with anyone else, so each was individually disciplined for insubordination. (Tr. 191). Thus, the name of the employee who informed the company that there might be a job action on January 10 was irrelevant, since none of the discipline was predicated on there being any kind of job action or "family night" on January 10. (*Id.*).

Apparently unsatisfied with this response, Mr. Hooker responded the next day. (ALJD 4:45-46; GC Ex. 9). However, rather than articulating the relevance of the name of the employee, Mr. Hooker simply wrote that "[t]he Union insists on receiving this information as it has determined that the information is relevant to the grievance." (*Id.*). In other words, the only relevance that Mr. Hooker could articulate for the information was that Local 4034 said it was relevant. Unsurprisingly, Mr. Ten Harmsel was not convinced by this non-showing of relevance, and the next day informed Mr. Hooker that his initial response would stand. (GC Ex. 10).

On March 27, 2015, Mr. Hooker made another information request to Mr. Ten Harmsel for the identity of the employee, this time writing that the information was relevant because "management admitted on different occasions that it did consider the events of 1-10-15 to be a job action, which view ultimately lead to injurious effect. The Union again insists on receiving this information." (GC Ex. 11). Predictably, there was no evidence to support this conclusion, since no one was disciplined for participating in a "job action" on January 10, and each of the employees who were disciplined disclaimed any participation in any job action. Moreover, even

if, as Mr. Hooker claimed, the Company initially suggested the work stoppage had been concerted, Mr. Hooker's request provided no explanation as to why the Union needed to know the name of the individual who said there might be a "job action." (*Id.*).

On April 1, 2015, Local 4034's President, Ryan Letts, emailed Mr. Ten Harmsel and wrote that the Company's Labor Relations representative, Chad Perras, reiterated that the Company would not be providing the identity of the individual because it was not relevant. (R. Ex. 9). Mr. Letts wrote that he would let the Company know whether he would be "pursuing" this information, but he never did let the company know. (Tr. 193). Thus, as of April 1, 2015, Local 4034 had still not demonstrated why the individual's name was relevant, and Mr. Letts email had mooted the Union's request for his identity.

F. Local 4034's Unfair Labor Practice Charge (Case No. 7-CA-150005)

On or about April 13, 2015, Local 4034 filed a comprehensive ULP Charge in this case alleging, in relevant part, that the Company committed an unfair labor practice by refusing to provide the identity of the employee who informed the Company that there may be a "family night" on January 10, 2015. (GC Ex. 1(a)). Also included in Local 4034's Charge were the following allegations: 1) the Company disciplined Prem Techs for the January 10 incident because it "mistakenly believed they were engaging in a refusal to work overtime that was coordinated by the Union, when in fact they were exercising their contractual right to not work overtime that was not mandated"; 2) that the Company "renege[d]" on a settlement agreement when it issued "enhanced" discipline to certain employees after the January 10 incident; 3) the Company engaged in "direct dealing" with bargaining unit members over the terms of grievance settlements and adjustments; and 4) the Company "unilaterally changed the negotiated grievance procedure with respect to meeting times and who may be present for meetings." (GC Ex. 1(a)).

On June 30, 2015, the Acting Regional Director for Region 7 dismissed all of the allegations of the charge, except for the allegation relating to Local 4034's January 12, 2015, request for the identity of the employee. (R. Ex. 2). Local 4034 did not appeal the dismissal of the other allegations in its Charge. Thus, the only dispute in this case is whether Respondent violated the Act when it refused to provide Local 4034 with the identity of the informant.

E. ALJ Amchan Did Not Err By Failing to Make the Factual Findings in Exception Nos. 1-11

In Exception Nos. 1-11, the General Counsel claims that the ALJ erred by failing to make a variety of factual findings and failing to consider "crucial" record evidence. There is no merit to these Exceptions because none of the facts or "crucial record evidence" identified in Exception Nos. 1-11 bear any relevance to the sole issue in this case, which is whether Respondent violated the Act when it refused to disclose the identity of the informant to Local 4034. Indeed, all of the facts and record evidence necessary to make that conclusion were set forth throughout ALJ Amchan's decision.

The General Counsel first argues that ALJ Amchan should have made findings of fact regarding the internal structure of Local 4034 and CWA. (Exception No. 1; General Counsel's Brief in Support of Exceptions ("Exceptions Brief") at 4). However, the General Counsel does not explain why this factual finding has any bearing on the sole issue in this case. That is because it does not. The information request at issue in this case came solely from Local 4034. Local 4034's internal structure, or that of the CWA, does not make any difference in this case.

The General Counsel next argues that ALJ Amchan should have made findings of fact regarding a "long-standing dispute regarding the method of the assignment of overtime," a work stoppage that occurred on September 19, 2014, and "negotiations" regarding the work stoppage.

(Exception Nos. 2-5; Exceptions Brief at 4). Once again, these alleged facts have no bearing on the ALJ's decision in this case, or the legal issues in dispute.

By way of background, on September 19, 2014, a number of the Company's employees in states represented by District 4 of the CWA (Michigan, Indiana, Ohio and Wisconsin) engaged in a work stoppage in violation of the CBA. (Tr. 165-67). Following the September 2014 work stoppage, the Company and CWA engaged in a series of discussions regarding the imposition of discipline as a result of individual employee's participation in the September 19, 2014 incident. (Tr. 8). As a result of these discussions, the Company and the CWA reached an agreement regarding the discipline to be meted out to employees who participated in that unprotected job action (the "Settlement Agreement"). (R. 1). The Settlement Agreement provided that the Company could discipline employees who participated in the work stoppage, but hold that discipline in abeyance. (*Id.*). In exchange, CWA agreed to "settle any current or future grievances, NLRB charges or other challenges on behalf of the CWA or its affiliates concerning the September 19th incident[.]" (*Id.*). Notably, there was no "carve-out" for any employees represented by Local 4034.

The Company also had evidence that certain union officials had authorized and supported the September 19, 2014, work stoppage. Indeed, according to Mr. Hooker, Jerry Schaeff, the administrative assistant for CWA District 4 who executed the Settlement Agreement on CWA's behalf, stated in a telephone call with Local Unions within District 4 that the Company had "ironclad" evidence of misconduct by certain CWA officials. (Tr. 65). Consequently, the Company and CWA District 4 agreed that the Company would provide CWA District 4 the opportunity to correct the behavior, and that the Company would not discipline the Union officials for coordinating the incident. (R. Ex. 1).

The events of September 19, 2014 have nothing to do with the events of this case. Indeed, Local 4034's Charge made several allegations regarding the settlement agreement reached after the work stoppage of September 19, 2014, and subsequent grievances related to the discipline imposed pursuant to the same. Putting aside the fact that the Acting Regional Director dismissed all of Local 4034's allegations relating to the events of September 19, 2014, there is nothing about that day that has any bearing on this case. Mr. Hooker even testified that no members of Local 4034 even participated in the September 19, 2014, work stoppage. (Tr. 28). Thus, the General Counsel's attempt to tie the events of January 10, 2015 – which only involved Prem Techs in Respondent's Grand Rapids garage – to the events of September 19, 2014, which involved hundreds of employees across five states, is nothing more than an attempt to cloud the record in this case. As a result, Exception Nos. 2-5 should be denied.

Finally, the General Counsel argues that ALJ Amchan erred by failing to make a series of additional findings of fact leading up to and following the events of January 10, 2015. (Exception Nos. 6-11; Exceptions Brief at 5-6). Once again, the General Counsel has not demonstrated how any of these alleged facts could possibly have any bearing on the issue in this case. Rather, the General Counsel simply sets forth the alleged "facts," and then makes a general claim that the alleged facts would have had some bearing on whether Local 4034's information request was relevant. This argument is misguided.

Local 4034 has offered a number of different theories to explain the relevance of the informant's identity. However, none of these shifting theories have ever provided a logical reason for why the identity of the informant is in any way relevant. The alleged facts and "crucial record evidence" set forth in Exception Nos. 6-11 are just more post hoc explanations the General Counsel is now asserting in a futile attempt to establish relevance after the fact.

However, as ALJ Amchan explained in his decision, the information request was never relevant, no matter what additional theories the General Counsel has put forth. Consequently, there is no merit to Exception Nos. 1-11, and they should be denied.

III. LAW AND ARGUMENT

A. Applicable Legal Principles

It is well established that “[t]he duty to bargain in good faith requires an employer to furnish information requested and needed by the employees’ bargaining representative for the proper performance of its duties to represent unit employees of that employer.” *Coca-Cola Bottling Co. of Chicago*, 311 NLRB 424, 425 (1993) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)).

Despite this duty to furnish information requested and needed by a union, “an employer’s statutory obligation to provide information presupposes that the information is relevant and necessary to a union’s bargaining obligation vis-a-viz its representation of unit employees of that employer.” *Id.* Whether an employer is required to supply information is “determined on a case-by-case basis,” and “depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it.” *Id.* Consequently, even if an information request is presumptively relevant, that relevance may be rebutted. *Armstrong World Industries, Inc.*, 254 NLRB 1239, 1245 (1981).

B. ALJ Amchan Correctly Found that Local 4034’s Information Request was for Information that was Irrelevant

1. ALJ Amchan’s Decision

ALJ Amchan correctly decided that Respondent did not violate Sections 8(a)(5) and 8(a)(1) because the identity of the informant was irrelevant to Local 4034’s duties as the

bargaining unit employees' collective bargaining representative, and that any presumption of relevance was rebutted. (ALJD 7:12-19). His decision should be affirmed and the General Counsel's Exceptions should be denied.

ALJ Amchan succinctly stated the reasons why the identity of the informant was not relevant to Local 4034's duties to administer the CBA:

[T]he identity of the informant, what he told Maki and the extent of the message's dissemination has no relevance to the Union's duties in administering its collective bargaining agreement with Respondent. The identity of the informant does not have any relevance to the discipline of the 5-7 bargaining unit members. These employees were not disciplined as the result of any information that the informant gave to Andrew Maki. They were told to return to work and refused to do so. The identity of the unit employee who alerted management to the possibility that employees might return to the garage at the end of their scheduled shift has no relevance to whether these employees were disciplined for just cause.

(ALJD 7:25-32). Put another way, "the identity of the informant has no relevance to any grievance the Union did file or could have filed." (ALJD 7:n.4).

Not only did ALJ Amchan find that the identity of the informant had no relevance to Local 4034's duties to administer the CBA, he also rejected its other arguments for the relevance of this information. Regarding the alleged "long-standing dispute" between the Company and Local 4034 regarding overtime, ALJ Amchan found there was "no nexus between the identity of the informant and the contrasting views of the Union and management[.]" (ALJD 8:1-2).

As for Local 4034's claim it needed the informant's identity to "investigate" why unit members thought there may have been a "family night" on January 10, 2015, ALJ Amchan held:

if the Union wanted to know why 19 employees returned to the Grand Rapids garage when the scheduled shift ended, it should ask those employees, not the informant, who assumedly was not one of the 19. What the informant thought is completely irrelevant to the question of why 19 unit employees thought they were justified in returning to the garage.

(ALJD 8:32-35). The ALJ also rejected Local 4034's claim that it needed the name of the informant to communicate to its membership that it does not condone work stoppages. Local

4034 could easily have communicated this message to its membership regardless of whether or not it had the identity of the informant. (ALJD 8:35-37).

ALJ Amchan's conclusion is well supported by the record evidence, and there is no reason to disturb his decision.

2. Local 4034's Shifting and Disingenuous Efforts to Explain Relevance are Pretextual and Prove the Utter Lack of Relevance

From the time that the information request was first made, and continuing through the General Counsel's Exceptions Brief, there have been a number of self-serving and disingenuous theories advanced to explain the relevance of the informant's identity. However, the fact that Local 4034 and the General Counsel have offered these shifting theories demonstrates the utter lack of relevance of the informant's identity. Indeed, if the information was relevant, then Local 4034 and the General Counsel would not have such difficulty in expressing the relevance. Since neither Local 4034 nor the General Counsel have been able to consistently articulate a coherent reason for the relevance of the informant's identity, it is not surprising that ALJ Amchan could not either. As a result, the ALJ's decision should be affirmed.

When Local 4034 first made its written request for the identity of the informant, the email request contained a boilerplate explanation that the information was needed "[i]n order to make a determination as to whether a valid grievance exists, or if an existing grievance should be elevated to the next step and/or to bargain terms and conditions of employment on behalf of our members[.]" (GC. Ex. 4). When the Company responded that the identity of the employee was not relevant, Local 4034 responded by making the self-serving statement that "[t]he Union insists on receiving this information as it has determined that the information is relevant to the grievance." (GC Ex. 9).

Although he never said this previously, at hearing Mr. Hooker testified that he was concerned Local 4034 may have inadvertently communicated at a membership meeting on January 5, 2015, that a job action should take place. (Tr. 50). Mr. Hooker claimed he needed the identity of the informant to “interview the person to see why [he or she thought] there was a family night coming out.” (*Id.*). Putting aside that Local 4034 never articulated this theory previously, the explanation makes no sense. A total of 19 Prem Techs returned to the Grand Rapids garage prior to end of their shift on January 10, 2015. Local 4034 could have interviewed any one (or all) of those employees to find out why they had returned to the garage, or whether they believed Local 4034 had authorized a family night. Moreover, Local 4034 could have interviewed anyone (and everyone) present at the membership meeting to find out if they believed Local 4034 had authorized a family night during that meeting. However, there is no evidence that Local 4034 ever did either of those things, demonstrating that this theory was nothing more than a disingenuous attempt at explaining the relevance of the information request months after it was made.

Mr. Hooker also testified that Local 4034 “needed to know that name, because we need to explain to the membership that during the times that we are not bargaining, we do not do work stoppages.” (Tr. 50). On its face, this explanation is nonsensical. If Local 4034 wanted to explain to the membership that it does not condone work stoppages except during bargaining, it could do that at any time, regardless of whether it has the identity of the informant. Again, this newly advanced theory of relevance is pretextual and demonstrates that the information request had no relevance.

Finally, Mr. Hooker testified for the first time at hearing that:

Another reason that we needed it was because discipline had resulted from the information that this person had provided to the Company. Under the Act, we

have a DFR, a duty of fair representation, and it was necessary to get all the information possible together about the events that surrounded that day so that I could adequately represent the members or direct the representation of the members at the first-step grievance meeting.

(Tr. 50). This belated explanation was both self-serving and false. None of the 19 employees who returned to the garage early on January 10, 2015, were disciplined based on anything the informant said. In fact, the only employees who were disciplined were the five employees who were disciplined for insubordination, and their discipline was based solely on their refusal to return to work, not anything that the informant said or did. Mr. Hooker could have fully and adequately investigated the reasons for that discipline (and, in fact, did so) without knowing the name of the “informant” and without violating its duty of fair representation.

In sum, Local 4034 has never stated the relevance of the informant’s identity, and its shifting and disingenuous attempts at doing so demonstrates how utterly irrelevant the information is. Accordingly, there is no evidence that the identity of the informant is relevant, and ALJ Amchan’s opinion should be affirmed and the General Counsel’s exceptions denied.

C. The ALJ Did Not Err in Not Finding that Respondent Unreasonably Delayed in Responding to the Information Request

The General Counsel’s primary argument in its Exceptions Brief is that ALJ Amchan erred by not finding that Respondent unreasonably delayed in responding to Local 4034’s information request. (Exception Nos. 12 and 18; Exceptions Brief at 6). However, these Exceptions are based on the faulty premise that Respondent did not respond to Local 4034’s information request for seven weeks. This is inaccurate.

The evidence shows, and the ALJ found, that Mr. Hooker first asked Mr. Maki for the identity of the informant during a telephone call on January 12, 2015. (ALJD 3:20-24). During that call, Mr. Maki told Mr. Hooker he would not disclose the name of the informant without the individual’s permission. (*Id.*). Mr. Hooker then followed up his telephone conversation by

sending the information request in an email that day. (ALJD 3:28-29). On February 20, 2015, Mr. Hooker made another information request, which also asked for the identity of the informant, along with other information regarding the events of January 10, 2015. (ALJD 4:31-35). Respondent responded to this information request on March 3, 2015. (*Id.* at 4:36-37).

“In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident.” *West Penn Power Co.*, 339 NLRB 585, 587 (2003). “[T]he duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow.” *Id.*

Here, Mr. Maki verbally informed Mr. Hooker on January 12, 2015, that he would not disclose the identity of the employee who informed the Company of the potential “family night.” As the General Counsel notes in her Exceptions Brief, some response to an information request is required within a timely manner, which is what Mr. Maki did on January 12, 2015.

Furthermore, even assuming that there was a seven week delay between the information request and the Company’s response, there is no evidence that the purported delay was unreasonable or that Local 4034 was prejudiced in any way. On January 12, 2015, there had been no grievances filed regarding the events of January 10, 2015, and no one had even been formally disciplined yet. In fact, at the time of the information request, less than 48 hours had passed since the events of that day (a fact which, by itself, casts even more doubt on the claim that such information was ever relevant to any investigation or grievance processing). When grievances were actually filed in February 2015, and another information request was made for information regarding the events of January 10, 2015 (including the identity of the informant), Respondent responded in less than two weeks.

Under these circumstances, it cannot be said that Respondent unlawfully delayed in responding to Local 4034's information request. Local 4034 had knowledge on the day it made its information request that Respondent would not provide the identity of the informant as requested by Local 4034. Accordingly, Exception Nos. 12 and 18 should be denied.

D. Because ALJ Amchan Correctly Found that the Identity of the Informant was Irrelevant, Exception Nos. 13-18 Are Without Merit

The General Counsel has attempted to cloud the record in this case by advancing alternate theories for why ALJ Amchan's decision should be overturned. First, the General Counsel claims that the ALJ failed to assess the relevance of the information request at the time it was made. The General Counsel also accuses the ALJ of failing to consider the relevance of the informant's identity as it related to the CBA or grievances that were later filed. Third, the General Counsel argues the ALJ erroneously found that the presumption of relevance was rebutted. Finally, the General Counsel claims the ALJ mistakenly found that Local 4034 could have obtained the information it requested from other sources, and used this finding to support his conclusion that the informant's identity was not relevant. As explained in more detail below, these arguments are without merit, and ALJ Amchan's conclusion that the informant's identity was irrelevant to any of Local 4034's duties to administer the CBA is correct. Accordingly, Exception Nos. 13-18 should be denied.

1. The Identity of the Informant was Not Relevant at the Time It Was Requested

The General Counsel first argues that the ALJ erred by failing to assess the relevance of the information at the time it was requested. (Exception No. 13; Exceptions Brief at 7-8). In making this argument, the General Counsel is attempting to tie Local 4034's information request to the unlawful work stoppage from September 19, 2014, and purported "anger" about an alleged "overtime situation." However, the events of September 19, 2014, and any subsequent dispute

about overtime are wholly unrelated to the information request at issue in this case, which solely related to what occurred on January 19, 2015.

The General Counsel's invocation of the prior work stoppage and purported dispute about overtime is nothing more than an attempt to obfuscate the record by focusing on incidents wholly irrelevant to the case at bar. Indeed, Local 4034 never said anything about the events of September 19, 2014, or any ongoing overtime dispute, when the information request was made. Moreover, Mr. Hooker did not mention either of these things when he testified about the relevance of the information request. (ALJD 8:5-30). Consequently, ALJ Amchan correctly assessed the relevance of the information request at the time it was made, less than 48 hours after the events of January 10, 2015, and before any grievances were filed or any employees were disciplined, and correctly found that the information request was not relevant to Local 4034's duties to administer the CBA. Therefore, Exception No. 13 should be denied.

2. The Identity of the Informant Was Not Relevant to Any Part of the CBA or any Grievances

The General Counsel next argues the ALJ erred by failing to consider the relevance of the information request as it related to Article 5 of the CBA or grievances that were filed after the information request was made. (Exception Nos. 14 and 15; Exceptions Brief at 8-10). These exceptions should be rejected.

Contrary to the General Counsel's assertion, ALJ Amchan did consider the relevance of the information request as it related to Local 4034's duties to administer the CBA, including Article 5. He found that "in this case, the identity of the informant, what he told Maki and the extent of the message's dissemination has no relevance to the Union's duties in administering its collective bargaining agreement with Respondent." (ALJD 7:25-27).

ALJ Amchan also considered the relevance of the information requests as they related to the grievances filed February 20 and March 25, 2015, and found that “the identity of the informant has no relevance to any grievance the Union did file or could have filed.” (ALJD 7:n.4). As it relates specifically to the grievances filed by the five employees disciplined for insubordination, ALJ Amchan found “no relationship to the Union’s grievances on behalf of the disciplined employees and the identity of the informant.” (ALJD 8:39-40). That is because the bargaining unit members “were not disciplined as the result of any information that the informant gave to Andrew Maki. They were told to return to work and refused to do so. The identity of the unit employee who alerted management to the possibility that employees might return to the garage at the end of their scheduled shift has no relevance to whether these employees were disciplined for just cause.” (ALJD 7:27-32).

Thus, the General Counsel incorrectly claims the ALJ erred by failing to consider the relevance of the information request as it related to Article 5 of the CBA or to the grievances filed after the information request was made. The ALJ did consider the relevance of the information request in relation to these things, and found that the identity of the informant was not relevant to any of them. Exceptions 14 and 15 must therefore be denied.

3. The ALJ Correctly Held that Respondent Rebutted The Presumptive Relevance of the Identity of the Informant

The General Counsel also disagrees with ALJ Amchan’s conclusion that any presumption of relevance was rebutted. (Exception Nos. 16 and 18). The General Counsel first argues that Respondent only raised one affirmative defense, confidentiality, and that since “there was no other defense proffered, the ALJ erred in finding that the Respondent rebutted the presumption of relevancy.” (Exceptions Brief at 10). It is unclear why the General Counsel is advancing this argument. Paragraph 9 of the General Counsel’s Amended Complaint alleged that “[t]he

information requested by the Charging Party...is necessary for and relevant to the Charging Party's performance of its duties as the servicing representative of the exclusive collective-bargaining representative of the Unit." In its Answer to the Amended Complaint, Respondent denied the allegations in this Paragraph in their entirety. Thus, there was no question that the relevance of Local 4034's information request was at issue in this case. Furthermore, in its Answer to the Amended Complaint, Respondent's fifth affirmative defense was that the information was not relevant and, under *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) and its progeny, Respondent was not required to provide the requested information. Therefore, the General Counsel's claim that Respondent did not advance a relevance defense is without merit.

The remainder of the General Counsel's argument in support of these exceptions consists of general conclusions that the information was relevant, without any actual specific explanation of how the identity of the informant was relevant to Local 4034's duties to administer the CBA. However, the General Counsel also claims that ALJ Amchan did not consider "extant Board precedent," (Exceptions Brief at 11), but the cases she cites are inapplicable. First, the General Counsel argues the ALJ did not correctly apply the reasoning of *Alcan Rolled Products-Ravenswood, LLC*, 358 NLRB No. 11 (Feb. 27, 2012), which the ALJ cited for the simple proposition that "[t]he identity of a bargaining unit informant may be relevant in some cases[.]" (ALJD 7:21-22). Putting aside that the ALJ cited this case for a proposition of law, not because it was determinative here, the General Counsel's characterization of *Alcan* is misplaced.

In *Alcan*, two employees informed a supervisor that a third employee was unsafe to work with and needed "help" with substance abuse issues. The third employee was disciplined and, during the discipline meeting, the supervisor mentioned that two employees had complained about the third employee. *Id.* at 10. Although the respondent later argued it did not intend to

rely on these statements in any future grievance or arbitration, the respondent did not state this during the discipline meeting. *Id.* In other words, the disciplined employee and the union were under the impression that the employee was being disciplined because of what was said by the two employees. The ALJ found the identity of the two employees was relevant because the union would want to interview the employees to verify the truth of the employer's claim that the employees who complained felt it was unsafe to work around the third employee. *Id.* at 11.

In *Alcan*, the employer disciplined an employee partly based on what the two employees had said about him. Clearly, if the basis for discipline was the two employees' statements about the third employee, their identities would be relevant. This is plainly different than what happened here. The discipline meted out to five employees (out of 19 who returned to the garage) was based on their refusal to return to work despite being instructed to do so. They were not disciplined because of anything the informant said. If, for example, the informant identified specific employees who were planning to participate in a "family night" on January 10, 2015, and Respondent disciplined those employees based solely on the informant's statement, then *Alcan* would be applicable. Because that plainly is not what happened, *Alcan* does not apply.

The General Counsel also claims ALJ Amchan should have considered *Metropolitan Edison Co.*, 330 NLRB 107 (1999). But *Metropolitan Edison* is inapposite and does not support the General Counsel's argument. In *Metropolitan Edison*, two employees informed the employer that a third employer was stealing food. As a result, the company placed the employee under surveillance and later discharged him after confirming that the employee was stealing food. *Id.* at 107. However, there was evidence that the employer targeted the employee who was stealing food because of his union activities. *Id.* at 119. As a result, the ALJ found that the identity of the informants was relevant because it would be useful "in an arbitration if the Union could use it

to show that the surveillance was based on the union activism of [the terminated employee] or was otherwise invidiously selective.” *Id.*

In affirming the ALJ’s decision, the Board wrote:

In affirming the judge’s finding that the requested information was relevant to the Union’s representative duties, **we rely solely on evidence that the Union had reason to believe that the Respondent selectively targeted [the discharged employee] for investigation because of his protected union activities.**

Id. at n. 1 (emphasis added). Thus, *Metropolitan Edison* is unlike the present case. Here, there is no evidence Respondent was targeting any of the five Prem Techs who were disciplined based on their union activities. Indeed, Respondent had no way of knowing that the five employees who were eventually disciplined were going to refuse to return to work, making it impossible for Respondent to have targeted these employees.

Additionally, in *Metropolitan Edison* the employer began an investigation of a specific employee based on information it received about that employee’s alleged misconduct. In contrast, here the informant merely told a manager that there may be a “family night” on January 10, 2015. Company managers did not begin an investigation of any employee as a result of this information. Rather, they simply prepared in the event that employees did, in fact, return to the garage early. Moreover, the 5 out of 19 employees who were disciplined were not disciplined based on what the informant said, but because they refused to return to work after being instructed to do so. The information provided by the informant played no part in whether the employees were disciplined.

If the facts here were that an informant tipped off a Company manager that specific employees were planning a “family night” and, based solely on that tip, the Company began an investigation of those employees and later disciplined them for planning a “family night,” then

Metropolitan Edison may be applicable. But those are not the facts. Therefore, *Metropolitan Edison* is inapplicable.

Finally, the General Counsel alleges ALJ Amchan failed to consider *Transport of New Jersey*, 233 NLRB 694 (1977). Once again, this case does not advance the General Counsel's argument. In *Transport of New Jersey*, the Board held an employer is only obligated to respond to an information request for "information relevant and necessary to enable [a union] to intelligently carry out its statutory obligations as the employees' exclusive bargaining representative." *Id.* at 694. Further, "under the standard of relevancy as applied by the Board and the courts, it is sufficient that the union's request for information be supported by a showing of 'probable' or 'potential' relevance." *Id.* Neither Local 4034 or the General Counsel have ever made a showing of the probable or potential relevance of the identity of the informant.

Additionally, in *Transport of New Jersey*, the employer refused to turn over to the union the "names and addresses of passenger witnesses to a bus accident involving one of the operators in the unit." *Id.* at 694. The employer argued that it did not have to turn over the names because it disciplined the operator "because its determination that the operator was 'at fault' in the accident was based solely on his version of the incident and the physical circumstances, and not upon any information obtained from the witnesses whose identity is sought by the Union." *Id.*

Transport of New Jersey is fundamentally different than this case. In *Transport of New Jersey*, the identity of the passengers was necessary because they were direct witnesses to the events that led to the termination of the operator, and could have provided eyewitness accounts of those events. That is nothing like what occurred here. The informant was not an eyewitness to the misconduct that led to the five Prem Techs being disciplined, which was their refusal to return to work. The informant would have added nothing to the grievances filed by these

employees. Thus, ALJ Amchan was correct in not following *Transport of New Jersey* in this case.

The common theme of the cases cited by General Counsel is that, in each case, the relevance of the information requested was articulated in a coherent fashion based on the actual events underlying the information request. In contrast, no such relevance has ever been established here. Thus, based on the record, ALJ Amchan correctly determined that any presumption of relevance had been rebutted. This holding was not in error, and should be affirmed. Accordingly, Exception Nos. 16 and 18 should be denied.

4. The ALJ Did Not Hold that the Union Could Have Obtained the Identity of the Informant From Other Sources

In support of Exception No. 17, the General Counsel argues that the ALJ erred in “relying on the fact that [Local 4034] could have obtained the information from other sources to support his conclusion that the information was not relevant.” (Exception No. 17; Exceptions Brief at 13). The General Counsel is apparently referring to ALJ Amchan’s finding that:

[i]f the Union wanted to know why 19 employees returned to the Grand Rapids garage when the scheduled shift ended, it should ask those employees, not the informant, who assumedly was not one of the 19. What the informant thought is completely irrelevant to the question of why 19 unit employees thought they were justified in returning to the garage. Also, the Union does not need the name of the informant in order to explain to the Union’s membership that when the Union is not bargaining that, “we do not do work stoppages.”

(ALJD 8:32-37).

The information request at issue in this case is Local 4034’s request for the identity of the informant and the information shared by the informant, although Mr. Hooker already knew the latter information and included it in his written information request on January 12, 2015. (ALJD 3:33-41). ALJ Amchan in no way suggested that Local 4034 could have obtained this information from other sources. Rather, the passage cited above from ALJ Amchan’s opinion

was a response to one of Mr. Hooker's many purported justifications for the relevance of the information request.

In Mr. Hooker's words, he was concerned Local 4034 may have inadvertently communicated at a membership meeting, that a job action should take place, and Mr. Hooker wanted to "interview the person to see why [he or she thought] there was a family night" on January 10, 2015. (Tr. 50). Furthermore, Mr. Hooker also testified that Local 4034 "needed to know that name, because we need to explain to the membership that during the times that we are not bargaining, we do not do work stoppages." (Tr. 50).

ALJ Amchan correctly found that these explanations were illogical because, if Mr. Hooker truly wanted to find out if any bargaining unit members believed there was a family night scheduled for January 10, 2015, the only place to obtain this information was from the 19 employees who did, in fact, return to the garage early. In addition, if Mr. Hooker wanted to communicate to his membership that they "do not do work stoppages," he simply could have communicated that information to his membership. Mr. Hooker did not need the identity of the informant to make that communication, and his claim that he needed the name to do so is simply disingenuous.

Simply put, ALJ Amchan did not "rely" on the fact that Local 4034 could have obtained information from other sources to support his conclusion that the identity of the informant was not relevant. Indeed, there is no evidence that Local 4034 could obtain the identity of the informant from anyone but Respondent. Accordingly, Exception No. 17 is wholly without merit, and should be denied.

IV. CONCLUSION

To this day, Local 4034 has never established the specific relevance of the identity of the employee who informed the Company that a “family night” may take place on January 10, 2015, and any presumptive relevance to which the request was entitled has been firmly rebutted. That is what ALJ Amchan found and, based on the record, that is the correct conclusion. Accordingly, for all of the above reasons, the Exceptions should be denied and ALJ Amchan’s decision should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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