

MALLERY & ZIMMERMAN S.C.

A Limited Liability Service Corporation

Thomas P. Krukowski
Direct Telephone: 414-727-6283
Email: tkrukowski@mzmilw.com

August 10, 2016

Farah Z. Qureshi
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dear Farah:

RE: IronTiger Logistics, Inc. v. NLRB –
Board Case No. 16-CA-027543

Enclosed please find our Memorandum in Support of IronTiger's Statement of Position regarding the above referenced matter.

Please note that the mailing address you have listed for me is incorrect. Due to this error I was delayed in receiving the correspondence dated July 28, 2016. Please provide all further correspondence to Mallery & Zimmerman, S.C. at the address below.

Please call or email me if you have any questions.

Thank you.

Yours Very Truly,


Thomas P. Krukowski

TPK:tr

Enclosure

cc: Martha Kinard, Esq.
William H. Haller, Esq.

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NLRB
ORDER SECTION

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

IRONTIGER LOGISTICS, INC.

v.

823 F.3d 696 (D.C. Cir., decided May 20, 2016),
2016 WL 2941962, *remanding* 362 N.L.R.B. No.
45 (March 25, 2015) Board Case No. 16-CA-
027543

N.L.R.B.

**MEMORANDUM IN SUPPORT OF IRONTIGER'S STATEMENT OF POSITION
PURSUANT TO SECTION 102.46**

Dated this 10th day of August, 2016.

MALLERY & ZIMMERMAN, S.C.
Thomas P. Krukowski, Esq.
Jonathan E. Sacks, Esq.
731 N. Jackson Street, Suite 900
Milwaukee, WI 53202
Attorneys for IronTiger Logistics, Inc.

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INTRODUCTION

The United States Court of Appeals District of Columbia Circuit in *IronTiger Logistics, Inc. v. N.L.R.B.*, 823 F.3d 696 (D.C. Cir. 2016) (“*IronTiger*”), in its remand, convincingly suggested that the information requested by the union is not presumptively relevant, because it is not predicated upon a legitimate dispute grounded on a mandatory subject of bargaining, and as important, the purpose behind the request was in furtherance of the union’s harassment. Both the requirements of a predicate and the harassment were ignored, and therefore, the case was remanded.

The inescapable conclusion based on the uncontested record before the Board is that the requested information was not presumptively relevant and the Circuit Court is giving the Board an opportunity to review the uncontested facts and the conclusion that the information was irrelevant as everyone, including the union, concedes. This and the Circuit Court’s citing to *Disneyland Park*, 350 N.L.R.B. 1256 (2007) (“*Disneyland*”), also supports the conclusion that the information requested was not presumptively relevant.

DISCUSSION

I. THE INFORMATION REQUESTED BY THE UNION IS NOT PRESUMPTIVELY RELEVANT BECAUSE IT HAS NO NEXUS TO A LEGITIMATE DISPUTE.

To create a presumption of relevancy, there must be a link to something that is a legitimate labor dispute and grounded as an unambiguous subject of bargaining under the National Labor Relations Act, as amended, (the “Act”), 29 U.S.C. §§ 151, *et seq.* The Board’s decision simply states without any explanation that because the union’s request involves bargaining unit employees, it is presumptively relevant, and is so, regardless of the link to the context of the request and its bridge to the employer’s data. What was the union seeking?

There was no pending grievance to support a request for information. The Union's earlier grievance expired and it is uncontested that the basis for the request for information was forfeited on May 5, 2010 and the request for information was made six days later on May 11, 2010. (App. 193-194, CBA Art 22, Sec. 1(c) and 3.)

The position that irrelevant information is presumptively relevant if it has any mention of bargaining unit employees is flawed. The information requested by the union had absolutely no meaningful application or linkage to disputed fact involving the bargaining unit employees. None. More specifically, the uncontroverted finding of the ALJ, adopted by the Board, that the information requested was irrelevant to the grievance relating to the unsubstantiated and non-existent subcontracting dispute and expired grievance is the opposite of the holding that such irrelevant information is somehow "presumptively relevant."

In discussing the ALJ's decision, Judge Silberman, writing for the panel, stated that the ALJ

thought the last three items were irrelevant; they had nothing to do with 'the grievance relating to failure to place all loads on the Iron Tiger kiosk.' Moreover, he concluded that information relating to assigned Iron Tiger driver destinations and distances was not relevant. He pointed out that Anderson's concession to Jones (the company's lawyer) that the information sought was 'bullshit' and 'absent an explanation regarding why the information was needed, confirms my finding that the information requested was irrelevant.'

IronTiger, 823 F.3d at 699. Although the ALJ, and the Board, concededly found that the information requested was irrelevant, nonetheless, held that this irrelevant information was "presumptively relevant" because the information was somehow related to "unit employees." *Id.*

The inadequate position that its presumptively relevant and that any request for information, no matter how irrelevant, is "presumptively relevant" if it has any label connecting to a unit employee, was explicitly questioned and refuted by Judge Silberman, who makes the

concept clear that there was no connection or linkage of the union's request to a legitimate dispute:

There remains the question whether the union's request for information – specifically the last three items in the May 11 letter – was presumptively relevant. There appears to us to be an obvious defect in the ALJ and Board's reasoning, even if one accepts the breadth of its legal proposition that any information relating to the bargaining unit employees is presumptively relevant. The ALJ never discusses the last request for communications between Iron Tiger and their customer(s) (presumably TruckMovers). *We cannot imagine why such information could be considered presumptively relevant since it does not at all relate by any stretch, to bargaining unit employees.* Neither the ALJ nor the Board answers that question.

Id. at 700 (emphasis added).

Furthermore, Judge Silberman stated that even though

the Board has held that a request for presumptively relevant information can be included with presumptively irrelevant information the request must have seemed fishy to the Petitioner because not only did those items have no connection with the TruckMovers information, *it did not seem to have any connection to any issue between the company and the union.*

Id. at 700. Judge Silberman reasoned that the union needed to indicate a need for the information to make it presumptively relevant. He stated “when the company's lawyer described the letter as ‘bullshit,’ Anderson, the union representative, agreed, and although he insisted he wanted it, he did not suggest *why* he wanted the information.” *Id.*

Indeed, the ALJ relied on that conversation to bolster his conclusion that the last three items were, in fact, irrelevant; i.e., that the union had not indicated any need for it. In other words, the ALJ, faced with exactly the same information the company had on May 13, concluded that the union's request was irrelevant. The Board should explain why, then, that request should be regarded as presumptively relevant.

Id.

The presumption analysis under the Federal Rules of Evidence supports IronTiger Logistics, Inc. (“IronTiger”) and the Circuit Court's position that a presumption of relevance is created only when sufficient basic facts are established. It is a longstanding principle of the law

of evidence that presumptions do not create their own foundations. *Mast v. Illinois Cent. R. Co.*, 79 F. Supp. 149, 168 (N.D. Iowa 1948), *aff'd*, 176 F.2d 157 (8th Cir. 1949); *see also In re Calvert*, 227 B.R. 153, 158-59 (B.A.P. 8th Cir. 1998) (“A true presumption is a device whereby an ultimate fact (the presumed fact) may be assumed *through the proof of one or more other facts* (the basic facts)”, *citing* G. Michael Fenner, *About Presumptions in Civil Actions*, 17 CREIGHTON L. REV. 307, 314 (1984) (emphasis added); Morgan, *Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906 (1931) (providing an approach to presumptions that requires the proponent to bring forth reasons to support the underlying information to be presumed).

Here, the information that the union requested cannot enjoy a presumption of relevance as the union did not show a reasonable belief, supported by objective evidence, that the requested information is relevant. *See Disneyland*, 350 NLRB at 1257-58; *see also* General Counsel’s “Advice Memorandum” dated 2/24/2010 in PPL Montana LLC 27-CA-21327 (the explanation for relevance must be sufficiently formulated as necessary before it triggers an obligation to furnish the requested information). *Disneyland*, which concerns the same issue and information requests as in this case, holds that information about subcontractors, including bargaining units, employees’ conditions of employment, are not presumptively relevant, and then instructs that the union has the burden of proof to establish relevance. As set forth in *Disneyland*, there is no rebuttable presumption of relevance, but rather, there is only the union’s burden to prove relevance.

In deciding whether the information at issue was necessary, the Board should look to the reason for the request at the time of the request. *See Inre Calvert*, 227 B.R. at 158-59. Specifically, what is the union’s purpose at the time that it made the request?

The issue of presumptive relevance is more than a mere request for bargaining unit information. The test is whether the union can perform its duties as an agent of the employees without such information.

The Board, in *Chrysler, LLC*, cited *Disneyland* for the proposition that subcontracting information is not presumptively relevant-implying that the union can perform its bargaining duties without such information-and determined that an employer did not commit an unfair labor practice by failing to provide information about a particular car manufacturing program because the General Counsel failed to present evidence at the hearing either “(1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the defendant under similar circumstances.” *Chrysler, LLC*, 354 NLRB 1032, 1033 (2010) (*citing Disneyland*, 350 NLRB at 1258) (footnote omitted).

Paragraphs H, I, and J of the May request after the grievance expired are not needed for the union to do its job in resolving a subcontracting issue because knowing what bargaining unit employees did is irrelevant to whether a violation of a subcontracting provision occurred. Bargaining unit employees were doing bargaining unit work. The information does not advance the resolution of any issue. It is work done, and it is work properly performed under the CBA. It only shows one thing: compliance with the CBA.

Here, the basic fact merely lets us know that IronTiger complied with the CBA. This has nothing to do with the underlying grievance of putting the loads on IronTiger’s kiosks. The grievance that gave rise to the information request merely demands that all loads be placed on IronTiger’s kiosk, and paragraphs H, I, and J say nothing and create nothing. They do not provide basic facts for a presumption to exist regarding IronTiger’s employees is not

presumptively relevant because Iron Tiger's loads were on the kiosk, and therefore not presumptively relevant, again, because such information shows only compliance with the CBA.

Merely saying that, if the union requests any kind of bargaining unit information then it is presumptively relevant, would paint with too broad of a brush. If the union, here, had asked for information about the age or minority status of bargaining unit employees, could the union contend that the information is presumptively relevant because the request involves bargaining unit employees. The answer is no.

Again, the expired underlying grievance giving rise to the request for information in dispute pertains to work not given to bargaining unit employees-not how work was given to bargaining unit employees. The presumption must relate to the issue in dispute, not to information that is not in dispute. This grievance deals with what is not on the kiosk, not what was on the kiosk and is not presumptively relevant.

II. THE BOARD MUST CONSIDER THE UNCONTOVERTED FACT THAT THE PURPOSE BEHIND THE UNION'S REQUEST WAS IN FURTHERENCE OF THE UNION'S HARASSMENT.

Judge Silberman recognized the company's defense of harassment and states:

The company claimed, then and before the ALJ and Board, that the union was seeking to harass the company by asking for obviously burdensome and irrelevant material. It appears to us that the company's complaint may have been justified, yet neither the ALJ nor the Board ever squarely responded to Petitioner's contention.

IronTiger, 823 F.3d at 700. "[T]he union's follow-up inquiry on May 11, particularly directed to the massive list in paragraph 5 of units dispatched could be thought transparently irrelevant and harassing." *Id.* (emphasis added). Judge Silberman concluded that the Court thinks

the Board must consider both the Petitioner's defense and the implication of a rule that would permit a union to harass an employer by repeated and burdensome

requests for irrelevant information only because it can be said to somehow relates to bargaining unit employees – without even a union’s statement of its need.

Id. at 700-01.

The uncontroverted evidence set forth in the record substantiates that the union’s information request was part of a pattern of ongoing harassment and served no legitimate purpose. This pattern of harassment is exemplified by the following facts:

1. Anderson’s uncontested threat to destroy “labor peace” and make “life a living hell” five (5) days before he filed the March 29, 2010 grievance. (App. 12, ALJ Decision.)
2. Refusal to disclose even one violation of the CBA, and telling IronTiger, without any information, “Bullshit you WILL abide by the contract” after IronTiger made at least six (6) requests for information to the union. (*Id.* at 11-12.)
3. Anderson’s refusal to “meet and confer” at least five (5) times after IronTiger requested to do so, once as early as April 5, 2010. (*Id.* at 8-12.)
4. Not a shred of evidence of a violation of the (*Id.* at 8, 10-11.)
5. IronTiger provided 29 pages of answers to the first information request of April 12, then to the second request for irrelevant information, dated May II, which required the review of 10,500 units involved. (*Id.* at 9, II.)
6. Threat to rescind the CBAs and strike IronTiger two days after the request for information of May 11. (*Id.* at 11.)
7. The finding of the Regional Director-the same Regional Director who prosecuted IronTiger here for the alleged “bad faith”-that these threats were illegal and finding that Anderson was not bargaining in good faith from at least May 24 through March 9, 2011. (*Id.* at 11.)
8. A bogus grievance filed on March 29, 2010. (*Id.* at 10, 12.)
9. In addition to Anderson’s claim that there was no CBA at Springfield and Garland, the underlying grievance had expired and was forfeited, and therefore, no grievance was pending on May 11. (*Id.* at 11-12.)
10. An uncontested fact that Anderson’s May 11 request included a request for information, admittedly, to organize a non-union company, TruckMovers. (App. 144, 147, 167, Transcript.) This request is inappropriate under *Excelsior Underwear*, 156 NLRB 1236 (1966) and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

11. No evidence that the September 27 answer of irrelevancy and harassment caused, or could it ever cause, the union any harm or prejudice. (App. 1, Amended Charge; App. 30, Kinard Letter.)
12. Finding that the information requested was irrelevant; irrelevant on May 11, September 27 and on the day of the trial, March 28, 2011. (App. 6, ALJ Decision.)
13. Agreeing that the request for information was “bullshit”; agreeing it was “bullshit” he wanted. (App. 168, Transcript; App. 12, ALJ Decision.)
14. Ultimately agreeing that the assignments were, in fact, restricted, and then conceding that it did not need any of the information requested on May 11, and that IronTiger had not violated the CBA. (App. 217, Email.)

The Board on remand must consider the uncontested facts as outlined above. The uncontroverted testimonies presented at the hearing before the ALJ and reported on the transcript are undisputed facts that cannot be disregarded. Iron Tiger reached out to the union on five occasions, in its efforts to “bargain collectively,” but was met with utter refusal every single time. (App. 11, ALJ Decision; App. 106-08, Transcript; App.211-13, 226, 229-30, 276, Emails.) The totality of the union’s conduct supports the conclusion that it refused to bargain collectively, and this refusal coupled with its “bull shit” information request can only be viewed as “transparently irrelevant and harassing.” *IronTiger*, 823 F.3d at 700.

III. THE BOARD FAILED TO CONSIDER THE CLEAR PRECEDENT OF *DISNEYLAND*.

Judge Silberman maintained that the Court could not imagine why the union’s information request could be considered presumptively relevant since it does not at all relate, by any stretch, to bargaining unit employees. *IronTiger*, 823 F.3d at 700. The Court invited the Board to compare the essential holding in *Disneyland*, 350 N.L.R.B. at 1258, that that a union is not presumptively entitled to subcontracting agreements “even those relating to bargaining unit employees’ terms and conditions of employment.” *Id.* at 700 n.3; *see also Equitable Gas Co. v.*

N.L.R.B., 637 F.2d 980, 993 (3d Cir. 1981) (“Information directly relevant to mandatory subjects of bargaining is regarded as “presumptively relevant”, and must therefore be disclosed unless it is plainly irrelevant. No obligation to provide information exists however, unless there is an obligation to bargain over the subject matter.”).

Here, the requested information is not presumptively relevant. To find a presumption of relevance cannot occur because *Disneyland* is the proper legal standard, and would require departure from established precedent without reasoned justification. *Disneyland* held that the information sought, as in our case, is not presumptively relevant.

Indeed, the Board’s precedent states: “Information about subcontracting agreements, even those relating to bargaining unit employees’ terms and conditions of employment, is not presumptively relevant. Therefore, a union seeking such information must demonstrate its relevance.” *Disneyland*, 350 NLRB at 1258 (internal citations omitted). The union sought information regarding an alleged subcontracting violation of the CBA. Specifically to support its grievance, the union requested information regarding subcontracting and information “relating to bargaining unit employees’ terms and conditions of employment.” *Id.* This, *Disneyland* says, is not presumptively relevant. The Board’s analysis cannot be reconciled with the holding of *Disneyland*. 350 NLRB at 1258.

The Board’s concession that the union’s request was “rather, for presumptively relevant information about the loads assigned to bargaining unit employees” was exactly the same information requested in *Disneyland*, “Information about subcontracting agreements, even those relating to bargaining unit employees’ terms and conditions of employment.” *Id.*

Why the information about bargaining unit employees in a subcontracting dispute is not presumptively relevant is easy to understand. What bargaining unit employees do has no relevance, remotely or tangentially, to a claim of unlawful subcontracting. They are doing bargaining unit work, and their work sheds no light on any potential subcontracting issue that bargaining unit work is being performed by non-bargaining unit employees.

The Board ignores the conclusion in *Disneyland* that such information is not presumptively relevant. Therefore, the union had the burden of establishing relevance. Clearly, the union failed to do so, and as everyone agrees the information is irrelevant, and as in *Disneyland*, the union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information. 350 NLRB at 1258 n.5. *See also Island Creek Coal Co.*, 292 NLRB 480, 490 n.19 (1989); *In Re Schrock Cabinet Co.*, 339 NLRB 182 n.6 (2003).

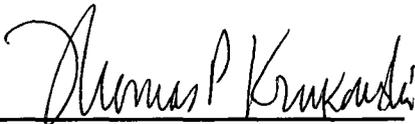
CONCLUSION

For each and all of the foregoing reasons, IronTiger respectfully requests that all claims against it be dismissed.

Dated this 10th day of August, 2016.

MALLERY & ZIMMERMAN, S.C.

Attorneys for Defendant Hormel Foods Corporation

By: 
Thomas P. Krukowski, Esq.
State Bar No. 1013222
Jonathan E. Sacks
State Bar No. 1103204

MALLERY & ZIMMERMAN, S.C.
731 N. Jackson Street, Suite 900
Milwaukee, WI 53202
414-271-2424
tkrukowski@mzmilw.com
jsacks@mzmilw.com

AFFIDAVIT OF MAILING

(IronTiger Logistics, Inc. v. NLRB - Board Case No. 16-CA-027543)

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

I, Tanya Rubio, being first duly sworn, on oath, depose and state that:

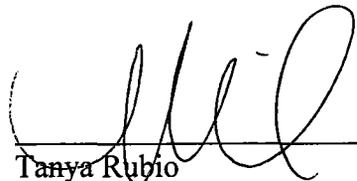
1. I am a legal assistant at the law firm of Mallery & Zimmerman, S.C. and an adult resident of the State of Wisconsin, Milwaukee County.

2. On August 10, 2016, I mailed a Memorandum in Support of IronTiger's Statement of Position from Thomas P. Krukowski, dated August 10, 2016, in an adequately stamped envelope via U.S. mail, addressed to each of the following:

William H. Haller, Esq.
International Association of Machinists
and Aerospace Workers, AFL-CIO
9000 Machinists Place
Upper Marlboro, MD 20772-2687

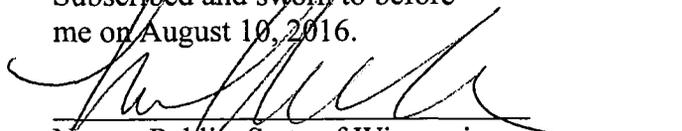
Martha Kinard, Esq.
National Labor Relations Board
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6107

Dated August 10, 2016.

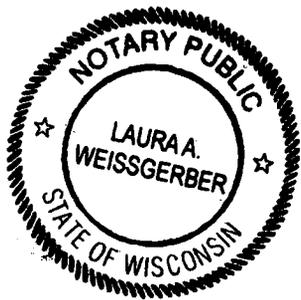


Tanya Rubio

Subscribed and sworn to before
me on August 10, 2016.



Notary Public, State of Wisconsin
My commission expires: 7-20-2020





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