

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

**DELAWARE COUNTY MEMORIAL HOSPITAL,  
A DIVISION OF CROZER-KEYSTONE HEALTH  
SYSTEM**

**and**

**Case 04-CA-172313**

**CROZER-CHESTER MEDICAL CENTER, A  
DIVISION OF CROZER-KEYSTONE HEALTH  
SYSTEM**

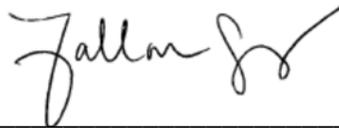
**and**

**Case 04-CA-172296**

**PENNSYLVANIA ASSOCIATION OF STAFF  
NURSES AND ALLIED PROFESSIONALS**

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS**

Dated: April 10, 2017



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## **PRELIMINARY STATEMENT**

In the instant matter, Respondents seek to deny the Union with its right to relevant information that the Union needs to make informed proposals on behalf of its members. Respondents argue that the Union did not establish the requested information was relevant, that they possessed a valid confidentiality interest in the information and that the ALJ's remedy is inappropriate. All of Respondents' arguments are without merit. The record clearly demonstrates that the requested information is relevant to the Union's representational duties, that Respondents failed to show any valid confidentiality interests, and to the extent any possible confidentiality concerns existed, failed to bargain over them. Therefore, the ALJ's remedy of requiring Respondents to provide the requested information in its entirety is wholly warranted by the facts of this case and supported by ample Board law. Accordingly, after more than one year of waiting for Respondents to provide the requested information, the ALJ's ruling should be affirmed.

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel submits this Answering Brief to Respondents' Exceptions to the Decision and Recommended Order of Administrative Law Judge Benjamin W. Green dated February 21, 2017, in the in the above-captioned matter.

### **I. FACTS**

#### **A. Background**

##### **1. The Respondents' Operations**

Crozer-Keystone Health System ("the Health System") owns four hospitals and a number of outpatient centers. (T 14, 35, 140-141).<sup>1</sup> Respondents, Delaware County Memorial Hospital

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<sup>1</sup> Throughout this brief, abbreviated references are as follows:

(“DCMH”) and Crozer-Chester Medical Center (“CCMC”), operate acute-care hospitals within the Health System. CCMC is located in Upland, Pennsylvania and DCMH is located in Upper Darby, Pennsylvania. (GC 1(e),(g),(k),(l)). The Pennsylvania Association of Staff Nurses and Allied Professionals (“the Union” or “PASNAP”) represents a total of four distinct bargaining units at CCMC and DCMH, discussed in more detail below. (T 14).

## 2. The Parties’ Collective-Bargaining Relationship

The Union and Respondent CCMC have had a longstanding collective-bargaining relationship expressed by a number of successive collective-bargaining agreements. (GC 1(e); T 15). The Union represents two units at CCMC. (T 14, 15, 141). Since a date in 2000, Respondent CCMC has recognized the Union as the exclusive collective-bargaining representative for a unit of nurses (“Unit A”). There are approximately 525 bargaining unit members in Unit A. (T 15). Unit A’s current collective-bargaining agreement is effective June 9, 2014 through June 8, 2019. (J 1;<sup>2</sup> GC 2). Additionally, on July 12, 2002, the Board certified the Union as the representative for a unit of paramedics, relief lead paramedics, and emergency medical technicians (“Unit B”). (GC 1 (e),(k)). The Union and CCMC entered into a collective-bargaining agreement for Unit B on December 22, 2011 that expired on December 21, 2014. (GC 3). Since its expiration, the

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Transcript.....	T (followed by page number)
General Counsel’s Exhibit.....	GC (followed by exhibit number)
Respondents’ Exhibit.....	R (followed by exhibit number)
Joint Exhibit.....	J (followed by exhibit number)
ALJ’s Decision.....	ALJD (followed by page and line numbers)

<sup>2</sup> Joint Exhibit 1 has three parts: (1) J 1 is the parties’ Stipulation; (2) J 1(A) is an email from the Pennsylvania Attorney General’s Office to the Union that attaches the Petition filed by the Health System. The Petition includes five exhibits (A, B, C, D and E). J 1(A)(A) is the Health System’s Amended and Restated Corporate Bylaws. J 1(A)(B) is the Health System’s Organizational Charts. J 1(A)(C) is the APA, without schedules or attachments. J 1(A)(D) is charts regarding grants. J 1(A)(E) is copies of proof of publication of the public hearing.; (3) J 1(B) is two schedules that the Health System sent the Union at the request of the Pennsylvania Attorney General’s office.

parties have operated under a Memorandum of Understanding, extending Unit B's collective-bargaining agreement until December 21, 2019. (GC 4; T 17). On January 8, 2016, the Board certified the Union as the representative for a unit of previously unrepresented PRN paramedics, emergency medical technicians and PRN clinical assistants and stated that the Union may bargain for these employees as part of Unit B. (GC 1 (e),(k)). The Union and CCMC are currently negotiating over terms for the newly-certified members of Unit B. (T 15-16, 33). Unit B is comprised of approximately 100 bargaining unit members, including the newly organized members. (T 15).

The Union also represents two units at DCMH. (T 14, 18, 141). On January 28, 2016, the Board certified the Union as the representative for a unit of nurses at DCMH. The bargaining unit is comprised of approximately 300 members. On March 1, 2016, the Board certified the Union as the representative for a unit of technical employees. This bargaining unit is comprised of approximately 100 members. (J 1; T 18). In March 2016, the Union and DCMH commenced bargaining for initial contracts for these two newly-certified units. At the time of the hearing, neither unit had a collective-bargaining agreement in place. (T 18-19, 33).

### **3. The Sale of the Health System to Prospect**

In the fall of 2015, the Health System informed the Union that it was looking to partner with another health system. (T 37-38, 78). On January 8, 2016,<sup>3</sup> the Health System, a nonprofit corporation, and Prospect Medical Holdings, Inc. ("Prospect"), a for-profit entity, entered into the Asset Purchase Agreement ("APA"). (J 1, J 1(A)). That same day, the Health System issued a letter to its employees announcing in pertinent part:

We have reached the next milestone in our partnership with Prospect: a Definitive Agreement for Prospect Medical Holdings, Inc. to acquire

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<sup>3</sup> All dates referenced herein are 2016 unless otherwise noted.

Crozer-Keystone Health System has been approved by Prospect and the Crozer-Keystone Board of Directors. . .

(GC 5). The letter also contained a six page FAQ addressing questions about the impact of the sale and certain changes that would occur or not occur as a result of the sale. One of the questions addressed in the FAQ concerns unionized Health System employees:

**What does this mean for unionized Crozer-Keystone employees?**

Unionized employees in good standing will be offered employment subject to initial terms and conditions set by Prospect. Prospect will meet with the various labor organizations that represent Crozer-Keystone employees and enter into appropriate recognition agreements with them.

The FAQ briefly mentions labor union relations, stating:

**What will happen to labor union relations under Prospect?**

Prospect will meet with the various labor organizations that represent Crozer Keystone employees and enter into appropriate recognition agreements with them.

In regard to benefits, the FAQ provides in part:

**Will Crozer-Keystone employees receive the same benefits?**

Crozer-Keystone employees will retain their existing health and welfare benefits until the next open enrollment period, for 2017, at which time the Prospect benefits will be offered. These existing benefits include medical, prescription, dental, vision, EAP, FSA, and Cobra.

There are currently no plans to change the following plans, other than potential carriers: life/ADD, short-term disability, long-term disability, travel and accident insurance, paid time off, and tuition reimbursement.

(GC 5). Also on January 8, Charles Reilly, the Health System's Human Resources Business Partner, forwarded a copy of the letter and the FAQ to PASNAP's Staff Representative Andrew Gaffney. (GC 5; T 20). After receiving notification that the Health System and Prospect reached a Definitive Agreement, the Union sent Respondents a series of information requests concerning the APA, including all schedules and attachments, addressed below.

## **B. The Union's Requests for Information and Respondents' Repeated Refusal to Provide the Information**

Bill Cruice has been PASNAP's Executive Director for 16 years. As Executive Director, Cruice is responsible for the overall leadership of the organization, collective-bargaining, strategy, supervising the negotiation of collective-bargaining agreements and negotiating collective-bargaining agreements. (T 77). Cruice testified that he primarily decides what information the Union needs and that he reviews all of the Union's information requests.

By email dated January 18, Gaffney sent Respondents' Human Resources Vice President Elizabeth Bilotta the Union's first request for the APA and all schedules and attachments. Gaffney's email explained that upon receipt and review of the sale agreement, Respondents should expect a request for effects bargaining shortly after. (GC 6; T 21-22). In his email, Gaffney also invited Bilotta to contact him if she has any questions about the request. (GC 6). Respondents did not respond so Gaffney renewed his request for the APA and all schedules and attachments to Bilotta by email on the morning of February 10. (GC 7; T 26-27). That evening, Bilotta, refusing to provide the APA, replied to Gaffney's email as follows:<sup>4</sup>

I am **unable to give you a copy of the APA** at this time because it is **confidential and proprietary**. Also, it is covered by the terms of a **confidentiality agreement**<sup>5</sup> to which Crozer is subject. Last, the **entire APA is not relevant for effects bargaining over the terms and conditions of employment of**

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<sup>4</sup> Bilotta testified that when a union asks for information that she believes is not directly related to the bargaining unit, she will sometimes provide all the information that is relevant, inform the union what she is not providing and why, and offer to continue having discussions about it. (T 144). That clearly did not happen here.

<sup>5</sup> According to Bilotta, the Health System and Prospect agreed that the APA is confidential. The Health System and Prospect set forth their agreement in the APA's Section 12.1 Confidential Information which outlines the scope of confidentiality. (J 1 at 119-120; T 145, 170). It provides in part: "Nothing in Section 12.1, however, shall prohibit the use of such Confidential Information for such governmental filings as in the opinion of Sellers' counsel or Buyers' counsel are required by law or governmental regulations or are otherwise required to be disclosed pursuant to applicable state law." The provision also provides that the APA and the documents associated with it could be provided if required by law.

**bargaining unit members.** We are open to considering any alternative requests you may have.

(emphasis added) (GC 8; T 27).

By email dated February 11 from Cruice to Bilotta, Cruice reiterated the Union's request for the APA and offered to bargain over confidentiality as follows:

We were hoping to avoid involving the Labor Board in our request for the APA but we intend to file a charge if Crozer Administration continues to refuse to provide the APA, including attachments and schedules. **If your email is intended as an offer to negotiate over confidentiality, the union is prepared to bargain over confidentiality, provided there is an understanding that the APA, with attachments and schedules, will be forthcoming.**

(emphasis added) (GC 9). When asked what prompted him to send this email, Cruice testified, "After it was clear that there was a sale agreement, [the Union] was very interested in learning as much as we could about the sale, [the] impact of the sale on our members, so we were interested in the asset purchase agreement." (T 78-79).

On March 17, the Union and the Health System began bargaining for first contracts for the newly-certified units at DCMH. During this bargaining session, the Union followed up with Bilotta concerning its repeated requests for the APA and all schedules and attachments. Cruice was the lead negotiator for PASNAP and Bilotta was the lead negotiator for DCMH. (T 30, 142). According to Gaffney, who was at the table, Cruice asked Bilotta for a copy of the APA. (T 30-31). Bilotta testified that Cruice asked her if the Health System's position had changed on whether or not it was willing to provide the entire APA. Bilotta responded that it had not. (T 150-151). Gaffney and Cruice similarly testified that Bilotta offered to provide the APA's relevant portions but stated that Respondents would decide what is relevant. (T 30-31, 92-92, 133).<sup>6</sup>

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<sup>6</sup> Gaffney testified that Respondents never told the Union what portions of the APA were relevant or irrelevant. (T 31, 70).

Cruice testified that Bilotta also stated that the APA was confidential and proprietary. (T 91). Cruice responded that the Health System could not decide what was relevant and that the Union was entitled to the entire APA, including its schedules and attachments, because the Union has the right to decide what portions are relevant. (T 30, 91-92). The discussion over the APA ended and the parties moved on to negotiations.

Finally, on March 18, after over five weeks from Cruice's offer to bargain over confidentiality, Bilotta responded by email with attached letter to Gaffney and Cruice to the Union's request for the APA and schedules and attachments. The letter provides in pertinent part:

**Your email suggests that PASNAP requests such information in order to prepare for effects bargaining regarding the acquisition.** As an initial matter, CKHS objects to the request on the basis that it is premature, overbroad and seeks irrelevant information. . . . We again renew that offer to discuss which portions of the documents are relevant to PASNAP's role as bargaining representative with respect to effects bargaining. Please let me know if you would like to have further discussions on this issue.

(emphasis added) (GC 10). Bilotta did not respond to Cruice's offer to bargain over confidentiality or offer any type of accommodation as to the confidential portions of the APA.

Bilotta further states in her letter the following:

CKHS further objects to the request on the basis that it seeks confidential and proprietary information that is subject to legal prohibitions on disclosure. . .the entire Asset Purchase Agreement is the subject of a confidentiality agreement between CKHS and Prospect that CKHS is legally obliged to follow. Therefore, **to the extent the parties were able to reach agreement on the production of any relevant portion of the Agreement,** before CKHS can turn over anything contained in the agreement, PASNAP must agree to the terms of a confidentiality agreement acceptable to CKHS and Prospect. . .

(emphasis added) (GC 10). The Union received no further response concerning its willingness to bargain over Respondents' claimed confidentiality concerns. (T 70, 92-93). Gaffney testified that he did not understand the above language in Bilotta's March 18 letter as an offer to discuss

confidentiality, rather he understood that Respondents were trying to limit the information that the Union has by selectively choosing what is relevant. (T 52, 69-70). Gaffney testified that Bilotta never explained why the APA was confidential outside of her representation in her February 10 email that the Health System was subject to a confidentiality agreement with Prospect. Respondents did not provide the Union with the confidentiality agreement between the Health System and Prospect. (T 31, 45). Bilotta did not provide any other written responses to the Union's information requests.

On April 29, the parties held another bargaining session for the DCMH nurses' unit's first contract. During the bargaining session, Cruice reiterated to Bilotta and Daniel Johns, Respondents' attorney prior to the sale, that he thought the Union was entitled to the APA in order to learn about the sales transaction, in particular how it would bear on the negotiations and how the information contained within the APA has a direct impact on the contract negotiations. Bilotta admitted on cross-examination that during this session, Cruice stated, "not having the purchase agreement is a material substantial problem for these negotiations." Bilotta informed Cruice that the Health System was not willing to change its position and it would not provide the entire APA. (T 110-112, 128-130, 151-154).

The parties held three effects bargaining sessions from late May through June. Because of Respondents' continued refusals to provide the APA, the Union was forced to engage in effects bargaining for the bargaining units at CCMC and DCMH without it. (T 31). Bilotta was Respondents' primary negotiator. Gaffney and Staff Representative Paul Muller were the Union's primary negotiators. (T 32, 157-159). Cruice was not involved in effects bargaining. (T 117). Gaffney testified that the purpose of the effects bargaining sessions was to determine immediately upon the takeover, what benefits the hospitals were going to terminate and what

changes the hospitals were going to make to vacation time or any other terms and conditions of employment. (T 32). The Union had to proceed through effects bargaining without the ability to verify Respondents' assertions and further could not fully evaluate the impact of the sale on bargaining unit members. (T 33).

On June 16, at the close of effects bargaining, the parties signed recognition agreements for all four units, including Unit B's newly-certified residual unit of paramedics at CCMC. (T 33, 38-41; R 1-R 5).

As a condition of the sale of a nonprofit corporation to a for-profit entity, the Health System had to get approval from the Office of Attorney General of the Commonwealth of Pennsylvania ("Attorney General's Office") and file a petition with the Delaware County Court of Common Pleas (Orphan Court Division) ("Court") under its nonprofit transaction protocol. (J 1; T 80, 111). Accordingly, on June 3, the Health System filed the APA with the Court, seeking approval of the sale of the Health System to Prospect. At that time, the APA became available for public review but it did not include the schedules or attachments. Consequently, on June 6, the Union obtained a copy of the APA for the first time – without schedules or attachments – from the Attorney General's Office. (J 1; T 80-81).

On June 22, the Health System sent the Union copies of schedules 4.13 and 4.18(a) at the direction of the Attorney General's Office. This was only two of about 66 schedules. On June 28, the Court entered a decree approving the sale of the Health System to Prospect. On July 1, Prospect's purchase of the Health System was completed. (J 1; J 1 (A)(C); J 1(B)). Despite this, Respondents have refused to provide the complete APA, including the remaining attachments and schedules, to the Union. (T 34, 55, 69, 94, 114, 154).<sup>7</sup>

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<sup>7</sup> A list of schedules and exhibits is included in the APA on pages 45-48. (J 1(A)(C)).

**C. The Union Needs the APA, Including its Schedules and Attachments, in Order to Effectively Perform Its Bargaining Duties**

Cruice testified that after learning of the sale, the Union requested the APA:

[K]nowing that at a minimum it would be useful for effects bargaining and then obviously after the Delaware County Memorial Hospital, the two bargaining units were successful in representation elections, it was going to be relevant for the substantive negotiations for those two contracts. (T 78).

Cruice explained that unions, including PASNAP, are often at a disadvantage in terms of information in contract negotiations. First, a lot of information is not forthcoming from employers. Additionally, at large organizations like the Health System, there are various moving parts that impact employees' terms and conditions of employment. (T 79). Cruice explained that there is nothing more critical for employees than when their employer sells its business. Therefore, there is a heightened duty on the part of the Union to have all the information it needs to effectively represent employees during the transition. (T 92). Gaffney testified that because this was the first time Respondents were being sold to a new entity, it opened up a whole new range of questions around the entire aspect of the sale that may differ from the Union's concerns when it negotiated previous collective-bargaining agreements at CCMC. (T 57-62, 64-66, 68, 73). Moreover, Bilotta admitted that a hospital sale could impact hospital employees and that she was aware that some items in the APA are relevant to the bargaining unit employees in this case. She further acknowledged that items included in an APA are generally relevant to contract negotiations. (T 167-168).

Outside of requesting the APA for effects bargaining and informing Respondents that the APA was critical for contract negotiations, the Union did not discuss with Respondents what specific portions of the APA or its schedules and attachments were relevant because the Union could not verify what was relevant without seeing the APA, including its schedules and

attachments. Cruice testified that as a fundamental principle, it is not up to Respondents to determine what is relevant for the Union to carry out its representational duties. (T 33, 46, 53, 73-74, 128).

Cruice has been personally involved in the sale of three or four hospitals, and as a result has reviewed their sales agreements. (T 80, 114-115). Based on his previous experience and his knowledge of prior hospital sales transactions, Cruice provided an overview as to why the schedules are relevant to the Union's bargaining obligations to its members. In particular, Cruice highlighted that the APA would be relevant to determining the availability and location of unit work, the potential for layoffs and hiring, whether the pension would be fully funded and whether non-unit employees were receiving pay or benefits the Union might want to negotiate on behalf of unit employees. (T 82-89, 119-127; ALJD 13:22-25). Likewise, Gaffney testified that he has reviewed asset purchase agreements for other hospital sales transactions. Gaffney explained that in his experience there is significant information in sales agreements that pertain to employees. This includes: information about whether or not the purchaser plans to keep the employees' existing terms and conditions in place; information regarding employee benefits such as payments to sick time; and whether the purchaser plans to fully fund employees' pension plans. (T 23-26).

In addition, Gaffney and Cruice testified that there is often language that is not directly related to employees but concerns issues that will impact them. There may be language concerning whether the Health System was going to open up departments that are outside the scope of the bargaining unit or close down services that are within the bargaining unit. Gaffney testified that many for-profit hospitals cut certain units that are not highly profitable. Gaffney further testified that it is important for the Union to know if Prospect planned to move maternity

units from CCMC and DCMH to a new maternity center off-site. This would directly impact bargaining unit members and the Union's bargaining obligations. (T 23-26, 68-69, 79).

Gaffney and Cruice both testified that because the Union did not actually see the schedules, it was difficult to determine what information they include based on their titles alone. Thus, the Union was adamant that it needed copies of all the schedules and attachments (T 68, 89, 117-118).<sup>8</sup>

## **II. ARGUMENT**

### **A. The ALJ Rightly Concluded that Respondents were Aware of the APA's Relevance.**

In Respondents' Brief in Support of its Exceptions, Respondents argue that the Union failed to establish the APA's relevance. This is contradicted by the plethora of record evidence. The Union provided overwhelming evidence establishing the APA's relevance. First, the Union communicated the APA's relevance to Respondents and Respondents acknowledged that at least portions of it were relevant. Second, the APA's relevance should have been apparent to Respondents because the sale would obviously have an impact on effects bargaining and contract negotiations. Finally, the Union established the relevance at the hearing.

#### **1. The Legal Standard**

An employer's duty to bargain encompasses an obligation to provide, upon request by the Union which represents its employees, information relevant to Union's performance of its representational functions. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967). When a union seeks information pertaining to employees within a bargaining unit, which goes to the core of the employer-employee relationship, the information is presumptively relevant to the union's

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<sup>8</sup> See the Transcript at 82-89, 119-127 for Cruice's complete explanation as to each schedule's relevance.

representational duties, and is all that is necessary to establish a violation of the Act. *Knappton Maritime Corp.*, 292 NLRB 236, 238 (1988), and cited cases. An employer violates Section 8(a)(1) and (5) of the Act by failing to provide information needed for contract negotiations or administration. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). The union is not obliged to make any special showing of need to secure such information, and the employer can avoid production only if it either proves the information is not relevant or demonstrates some reason why it cannot be provided. *Ormet Aluminum Mill Products Corporation*, 335 NLRB 788, 801 (2001); *A-Plus Roofing*, 295 NLRB 967, 970 (1989), *enfd.* 39 F.3d 1410 (9<sup>th</sup> Cir. 1994).

Where requested information, such as with an asset sales agreement, relates to matters outside the bargaining unit that might have a bearing on the terms and conditions of employment for the bargaining unit employees, the union must demonstrate that the information is relevant. *Knappton Maritime Corp.*, *supra* at 238-239. While it is the union's burden to show the relevance of information outside the bargaining unit, it is not a heavy burden. The Board uses a broad, discovery type standard in determining the relevance of an information request. It is sufficient to demonstrate the probable relevance of the information and that it would be of use to the union in carrying out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, *supra* at 437; *ATC/Vancom of Nevada Ltd.*, 326 NLRB 1432, 1434 (1998). Information that is potentially relevant and will be of use to the union in fulfilling its duties as bargaining representative must be provided. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104-1105 (1991). The requested information need not be dispositive of the issue for which it is sought, but need only have some bearing on it. *Id.* at 1105. An employer must furnish information of even probable or potential relevance to the union's duties. *Conrock Co.*, 263 NLRB 1293, 1294 (1982), *enfd.* 735 F.2d 1371 (9<sup>th</sup> Cir. 1984). The employer's obligation extends to information

involving labor-management relations during the term of an existing contract and in preparation for negotiations for a future contract. *Southern California Gas Co.*, 346 NLRB 449, 452 (2006).

The Board has consistently held that an employer has an obligation to furnish a union with information relating to a proposed or completed sale, including sales agreements. *Compact Video Services*, 319 NLRB 131, 142-143 (1995); *Super Valu Inc.*, 326 NLRB 1069 (1998) (respondent violated the Act by refusing to furnish copy of the sales agreement to the union so the union could assess the respondent's liability under the WARN Act); *Southern Ohio Coal Co.*, 315 NLRB 836, 845 (1994), remanded 87 F.3d 1309 (4<sup>th</sup> Cir. 1996)<sup>9</sup> (finding that union's request for a complete copy of the purchase and sale agreement was relevant and necessary to its processing employees' grievances and for employees' interests which may have been affected by the sale transaction); *In Piggly Wiggly Midwest, LLC.*, 357 NLRB 2344 (2012). When a union requests sales agreements in order to determine whether a continuing obligation to bargain exists, to initiate bargaining for possible severance benefits and other matters, or to determine whether financial reserves had been established to cover items negotiated during effects bargaining, the employer is required to provide the information. *Sierra International Trucks, Inc.*, 319 NLRB 948, 950-951 (1995); *Transcript Newspapers*, 286 NLRB 124, 124 fn. 2, 126 (1987), enfd. 856 F.2d 409 (1st Cir. 1988). Further, an employer has a duty to provide a sales agreement when the union has a reasonable belief that the two companies are possibly an alter-ego or single employer. *Knappton Maritime Corp.*, supra at 239.

In cases involving information requests, the Board does not consider the merits of a union's claims, but rather, acts only on "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."

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<sup>9</sup> The Fourth Circuit, in an unpublished opinion, remanded the case back to the Board for an *in camera* inspection of the sales agreement.

*Id.* at 238, citing *Acme Industrial Co.*, 385 U.S. at 437. An employer's unlawful refusal to provide the information precludes meaningful effects bargaining. *Miami Rivet of Puerto Rico*, 318 NLRB 769, 771 (1995).

In *Sierra International Trucks, Inc.*, *supra*, the employer announced that it was selling its vehicle dealership. The union requested information, including the sale's asset agreement, in order to determine whether a continuing obligation to bargain existed and, if not, to initiate bargaining for possible severance benefits and other matters. Additionally, the employer failed to engage in effects bargaining. The Board upheld the administrative law judge's decision finding the employer violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the union concerning the effects of the sale of its assets and by failing to furnish the union with the information necessary to perform its duties as the collective bargaining representative. *Sierra International Trucks, Inc.*, 319 NLRB at 950-951.

In *Westwood Import Co.*, 251 NLRB 1213 (1980), the union requested information regarding the sale and change of ownership of the company in order to determine the successorship obligations, if any, of the new owner. In finding that the employer had to furnish this information to the union, the administrative law judge, as affirmed by the Board stated:

. . .since the sale of the business vitally affected the employees' terms and conditions of employment, I am persuaded that information concerning the sale was relevant to the union's duty to intelligently represent the employees in the certified unit.

See also *RBH Dispersions*, 286 NLRB 1185 (1987) in which the employer was required to furnish the sales agreement in a successorship situation.

To demonstrate the relevance of the information request, the General Counsel must show either: (1) that the union demonstrated relevance of the non-unit information or (2) that the relevance of the information should have been apparent to the respondent under the

circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). The burden then shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason need not be furnished. *Harmon Auto Glass*, 352 NLRB 152, 153 (2008).

## **2. The Union Demonstrated the Relevance of the APA**

Based on the Union's direct representation to Respondents, the APA's relevance was clearly communicated. The Union demonstrated the relevance of the APA in its entirety to the performance of its role as collective-bargaining representative. There are ample facts in the record to establish this. The Union articulated its reasons for requesting the APA and its schedules and attachments at length as detailed above. In particular, the Union sought the information: (1) to engage in meaningful effects bargaining; and (2) for substantive contract negotiations for the three newly-certified units. On January 18, when the Union made its initial request, it informed Respondents that it should expect a request for effects bargaining. Furthermore, Respondents' two written responses to the Union's information request, dated February 10 and March 18, support the ALJ's finding that Respondents were aware of the APA's relevance. (ALJD 13:2-3, 30, n.8). In Respondents' February 10 response, Bilotta stated, "Last, the entire APA is not relevant for effects bargaining over the terms and conditions of employment of bargaining unit members." Bilotta's response suggests that Respondents' knew at least portions of the APA were relevant. Similarly, Bilotta stated in her March 18 letter, "Your email suggests that PASNAP requests such information in order to prepare for effects bargaining regarding the acquisition" and "We again renew that offer to discuss which portions of the documents are relevant to PASNAP's role as bargaining representative with respect to effects bargaining." Moreover, Cruice informed Bilotta at the April 29 bargaining session that the Union was entitled to the APA in order to learn about the sales transaction, in particular the impact it

would have on the contract negotiations. At the hearing, Bilotta admitted that during this session, Cruice stated, “not having the purchase agreement is a material substantial problem for these negotiations.”

In this context, the relevance of the APA is self-evident. The knowledge of the terms of the sale was a required foundation for the Union to make intelligent and informed proposals during effects bargaining and substantive contract negotiations for the newly-certified DCMH units and the residual unit of paramedics at CCMC. The APA strikes at the core of the employment relationship between Respondents and unit employees; it provides a clear picture of their future terms and conditions of employment and details what obligations Prospect is assuming. The APA clearly affects the Union’s status, as well as the employment conditions of unit employees and would show how employees’ working conditions or the Union’s status could be altered, extended modified, terminated, substituted, or remain the same. *Transcript Newspapers*, supra at 128-129.

As shown above, the record evidence supports the ALJ’s finding that the Union indicated a desire to obtain the APA with all attachments and schedules for use in bargaining over the effects of the sale and experienced bargaining parties, such as these, could reasonably expect the Union to use that information in connection with upcoming contract negotiations. (ALJD 13, n.8). Here, the Union stated its reasons for seeking the information. Further, Respondents were well aware of the importance of the APA for contract negotiations for the newly-certified units, as Bilotta admitted that a hospital sale could impact hospital employees and that at least portions of the APA are relevant to the bargaining unit employees in this case. She further acknowledged that items included in an APA are generally relevant to contract negotiations. Thus, relevance has been more than adequately demonstrated.

### **3. The Union's Need for the Information Requested was Apparent Under the Circumstances**

In *Piggly Wiggly Midwest*, supra, the Board held that where the relevance of non-unit information is apparent from the context, the union is under no obligation to spell it out further. The case arose from the employer's sale of two of its unionized grocery stores to franchisees. After learning about the sale, the union, without spelling out the reasons for its suspicions, requested the sales agreement to ascertain whether provision had been made or funds designated in the sale for the payment of severance or other benefits to employees and whether an alter-ego relationship existed. *Id.* at 2357. The Board concluded that where the factual basis of a request for non-unit information is obvious from all the surrounding circumstances, the union's failure to specifically describe its evidence in support of its claim does not absolve the employer of its obligations under the Act. The Board stated that the union must establish the relevance of the information and have an objective basis for requesting it, but the union is not obligated to disclose those facts to the employer at the time of the request. *Id.* at 2344.

As in *Piggly Wiggly Midwest*, it was readily apparent here that the Union's information requests directly related to its concerns about how the sale would impact the Union's bargaining obligations. The Union requested the APA almost immediately after learning that the Health System and Prospect reached a definitive agreement and explicitly stated in its request that it needed the APA and its schedules and attachments for effects bargaining. Additionally, concurrent with its information requests, the Union was certified as the exclusive-bargaining representative for three units within the Health System: two units at DCMH (January 28 for the nurses' unit and March 1 for the technical employees' unit) and on January 8, the residual unit of paramedics at CCMC. It is obvious that the APA would be relevant for the Union's bargaining obligations concerning these newly-certified units. Indeed, the Union requested the APA during

at least two bargaining sessions. For instance, on April 29, during a contract bargaining session for the DCMH nurses' unit, Cruice informed Bilotta that not having the APA was a material substantial problem for the negotiations. Likewise, Bilotta acknowledged in her testimony that items in asset purchase agreements are generally relevant to contract negotiations and at least some of the items in the APA are relevant to bargaining unit employees in this case.

In these circumstances, the relevance of the Union's information requests was apparent to Respondents. See *Brazos Electric Power*, 241 NLRB 1016, 1018 (1979), enfd. 615 F.2d 1100 (5<sup>th</sup> Cir. 1980) (where circumstances surrounding the union's request were reasonably calculated to put the employer on notice of the relevant purpose which the union has not specifically spelled out, the employer is obligated to provide information), cited with approval in *Disneyland Park*, supra and *Clear Channel Outdoor*, 347 NLRB 524, 529 (2006).

#### **4. The Union Established the Relevance of the Information Requested at the Hearing**

In addition to informing Respondents why the Union needed the APA at the time it made its information requests, the Union demonstrated the relevance of the APA and its schedules and attachments at the hearing. The Board has held a respondent can be apprised of the relevancy of requested information through the testimony of union officials at the unfair labor practice hearing. *Postal Service*, 364 NLRB No. 27 (2016); See also *National Grid USA Service Company Inc.*, 348 NLRB 1235, 1246-1247 (2006); *Ormet Aluminum Mill Products*, 335 NLRB at 802; *Barnard Engineering Co.*, 282 NLRB 617, 620 (1987); *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 363 fn. 40 (D.C. Cir. 1983); and *Ohio Power Co.*, 216 NLRB 987, 990-991 fn. 9 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976) (holding the adequacy of information requests to apprise a respondent of the relevancy of the information must be judged in the light of the entire pattern of facts available to the respondent). In *Ohio Power Co.*, the Board found that the

employer was, at a minimum, apprised of the relevancy of the requests by the testimony of the union officials, and the employer's continuing refusal to accede to those requests could no longer be attributed to inadequacy of communications. *Id.*

Prior to the hearing, the Union did not inform Respondents of its reasoning for wanting each individual schedule. Notably, at the time the Union made its information requests, it did not have a copy of the APA or the list of schedules. (T 68; J 1). However, at the hearing, the Union provided extensive testimony demonstrating the relevance of the APA and its schedules and attachments. Importantly, the Union is concerned with how the sale directly affects bargaining unit members, including: any changes to employees' terms and conditions of employment; changes to employee benefits; and whether Prospect plans to fully fund employees' pension plans. The Union also provided detailed testimony regarding how the sale could have an impact on bargaining unit members in the future. For instance, Cruice and Gaffney testified that the APA, including its schedules and attachments, may contain language concerning whether the Health System is going to open up departments that are outside the scope of the bargaining unit or close down services that are within the bargaining unit. As an example, Cruice testified that the Union learned secondhand that the Health System bought a strip mall where it was going to set up additional services. Those services could potentially involve work that bargaining unit members do. Based on his experience in the collective-bargaining process and in reviewing sales agreements, Cruice testified at length as to the relevance of the APA's schedules as detailed in Section C above. However, because the Union has not seen the schedules, it is difficult to determine what information they contain. Furthermore, while Respondents contend that the Union engaged in improper speculation about what portions of the APA might be relevant, the ALJ correctly found that this assertion is unwarranted because the Union was not given sufficient

information to help parse the appropriate production of a document that was understood to be at least partially relevant. (ALJD 13:36-39).

**5. The Union is Not Required to Take Respondents' Word as to the APA's Relevance**

The ALJ correctly found that the Union is entitled to the APA, including its schedules and attachments, in order to verify how the sale could affect employees and obtain additional details. (ALJD 13:25-28). The Union is not required to take Respondents' word as to what portions of the APA, including its schedules and attachments, are relevant. *Shoppers Food Warehouse*, 315 NLRB 258 (1994) (union is not required to take the respondent's word, but has a right to assess and verify for itself the accuracy of the respondent's claims in bargaining.); *Piggly Wiggly Midwest*, supra at 2358. In *Shoppers Food Warehouse*, supra, the union represented an employer's employees at a chain of retail food stores. The union heard rumors that the employer was going to open up a new store and requested the employer to furnish information concerning who owned, managed, and operated the new store. The employer refused to provide the information. The Board found, contrary to the judge, that the union established that the requested information was relevant to the union's grievance processing and collective-bargaining functions. *Id.* at 258-259. The Board further noted that the union was not required to accept the employer's response that its new store was a totally separate operation and not a food store within the meaning of the contract. Thus, the union was entitled to conduct its own investigation and reach its own conclusions about the applicability of the agreement. *Id.*

Further, the Board has found that an employer's refusal to provide a complete version of an asset purchase agreement, and provision of only an incomplete version of such agreement, is a violation of Sections 8(a)(1) and (5) of the Act. *Amersig Graphics, Inc.*, 334 NLRB 880, 885-886, 897 (2001) (employer's failure to include referenced schedules and attachments in asset

purchase agreement given to the union violated the Act); *St. Mary's Foundry Co.*, 284 NLRB 221, 232-233 (1987) (employer's failure to provide complete copy of asset purchase agreement and accounting of the proceeds realized from the sale and how they were distributed violated the Act). Keeping in mind that the Union is merely required to show that non-presumptively relevant information would have "some bearing" on the issues between the parties, it seems clear that Cruice and Gaffney's explanations are sufficient to compel production of the entire APA, including its schedules and attachments.

Moreover, the ALJ rightly concluded that Respondents were required to do more than vaguely assert that portions of the APA were irrelevant and then not produce any portion. (ALJD 13:4-7, 14:11-14). Bilotta testified that when a union asks for information that she believes is not directly related to the bargaining unit, she will sometimes provide all the information that is relevant, inform the union what she is not providing and why, and offer to continue having discussions about it. Although Respondents had ample opportunity to do so, Respondents never told the Union what portions of the APA they thought were relevant or irrelevant and never offered to provide any specific items in the APA.

In Bilotta's February 10 response to the Union's request for the APA, including its schedules and attachments, she stated, "the entire APA is not relevant for effects bargaining over the terms and conditions of employment of bargaining unit members." Respondents' bare assertions that the entire APA was not relevant for effects bargaining, does not suffice as a response since the Union does not have to simply accept such assertions by Respondents but, rather, has the right to "conduct its own investigation and reach its own conclusions" with respect to the matter. See *Shoppers Food Warehouse*, supra at 259. Bilotta also admitted at the hearing that some items in the APA are relevant to the bargaining unit employees in this case.

Indeed, Bilotta's March 18 response to the Union's request for the APA stated, "We again renew that offer to discuss which portions of the documents are relevant to PASNAP's role as bargaining representative with respect to effects bargaining." This offer was insufficient because the Union could not determine which exact portions of the APA and its schedules and attachments were relevant without examining them. The Union was entitled to the entire document. See *Olean General Hospital*, 363 NLRB No. 62, slip op. at 10 (2015) (the union's inability to identify specific relevant information in the patient care survey and report can hardly be held against the union, which has never seen the report).

### **B. The ALJ Properly Rejected Respondents' Confidentiality Defense**

The ALJ also correctly concluded that Respondents' defense in refusing to provide the information – that the information was privileged and confidential – was without merit. (ALJD 15:1-11, n. 11). It is well settled that in certain situations, confidentiality claims may justify a refusal to provide information. *Mission Foods*, 345 NLRB 788, 791-792 (2005). When a union requests relevant but assertedly confidential information, the Board balances the union's need for the information against any legitimate and substantial confidentiality interests established by the employer. *Id.* The party asserting confidentiality has the burden of proving that it has a legitimate and substantial confidentiality interest in the information sought, and that such interest outweighs its bargaining partner's need for the information. *Id.*; *Washington Gas Light Co.*, 273 NLRB 116 (1984). Blanket claims of confidentiality will not be upheld. *Pennsylvania Power Co.*, 301 NLRB at 1105; *Washington Gas Light Co.*, *supra* at 117. When a party is unable to establish confidentiality, no balancing of interests is required and it must disclose the information in full to the requesting party. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995); *Lasher Service Corp.*, 332 NLRB 834, 834 (2000). See generally *Iron Workers Local 207 (Steel Erecting Contractors)*,

319 NLRB 87, 91 (1995) (union that failed to establish that requested information on apprentices' wages and dues was proprietary was ordered to disclose information).

Finally, even if such conditions are satisfied, the party may not simply refuse to provide the requested information, but must instead seek an accommodation that would allow the requesting party an opportunity to obtain the information it needs while protecting the party's interest in confidentiality. *Mission Foods*, supra; *Tritac Corp.*, 286 NLRB 522, 522 (1987); See also *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004) (party asserting confidentiality bears burden of proposing reasonable accommodation); *Olean General Hospital*, supra at 6 (employer's asserted confidentiality interest "does not end the matter;" employer must also notify union in a timely manner and seek to accommodate the union's request and confidentiality concerns); *Howard Industries, Inc.*, 360 NLRB No. 111, slip op. at 3 (2014) (even assuming requested information was confidential, respondent violated the Act by failing to seek an accommodation).

In Respondents' Brief in Support of its Exceptions, Respondents state that they offered to bargain a confidentiality agreement. This assertion is false; rather, the record reflects that the Union was the only party to offer to bargain over confidentiality. The ALJ considered Respondents' unsupported assertion, properly rejected it, and found that Respondents failed to propose any confidentiality accommodations such as redactions or a confidentiality agreement. (ALJD 13:34-35).

The ALJ carefully considered Respondents' argument that they had a valid confidentiality interest in the APA and found that it lacked merit. (ALJD 15:1-2). As the party seeking to avoid production, the burden was on Respondents to establish a legitimate and substantial confidentiality interest in the APA and its schedules and attachments.

In support of its confidentiality claim, Respondents presented scant, unpersuasive evidence. Bilotta testified that the Health System and Prospect are subject to a confidentiality agreement, contained in Section 12 of the APA.<sup>10</sup> Further, Respondents argued that it informed the Union of their confidentiality concerns in their responses to the Union's requests for the APA. In Bilotta's February 10 email to Gaffney, she stated, "I am unable to give you a copy of the APA at this time because it is confidential and proprietary. Also it is covered by the terms of a confidentiality agreement to which Crozer is subject." (GC 8).

Bilotta did not offer to bargain over asserted confidential portions of the APA or offer any type of accommodation. Instead, Cruice, in his February 11 email to Bilotta responded, "If your email is intended as an offer to negotiate over confidentiality, the union is prepared to bargain over confidentiality, provided there is an understanding that the APA, with attachments and schedules, will be forthcoming." (GC 9). Although the Union was under no obligation to propose bargaining over confidentiality, it was the only party to do so. Subsequently, in Bilotta's letter dated March 18, she objected to the Union's request on the basis that it sought confidential and proprietary information, and stated, "to the extent the parties were able to reach agreement on the production of any relevant portion of the Agreement, before CKHS can turn over anything contained in the Agreement, PASNAP must agree to the terms of a confidentiality agreement acceptable to CKHS and Prospect..." (GC 10). Bilotta's offer fell short of an offer to negotiate confidentiality. She fails to offer any type of accommodation, does not propose terms or scope of

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<sup>10</sup> Respondents except to the ALJ's finding that the APA's confidentiality provision "allows for disclosure by the seller (Crozer) when, in its opinion, such disclosure is required by law." (ALJD 15:2-11). This exception is not supported by the record evidence. Section 12.1 of the APA states in pertinent part: "Nothing in Section 12.1, however, shall prohibit the use of such Confidential Information for such governmental filings as in the opinion of Sellers' counsel or Buyers' counsel are required by law or governmental regulations or are otherwise required to be disclosed pursuant to applicable state law." The provision also provides that the APA and the documents associated with it could be provided if required by law.

a confidentiality agreement or even mention which portions of the APA Respondents claim are confidential. Instead, Bilotta conditioned any discussions over confidentiality on the Union and Respondents reaching an agreement as to the relevant portions of the APA. However, as discussed in detail above, once the Union established that the APA was relevant, Respondents were obligated to provide it; there is no requirement that the Union engage in bargaining over relevance. Further, the Union could not effectively engage in conversations with Respondents about what portions of the APA were relevant, as it did not see any portion of the APA until June 6, when it was provided by the Attorney General's office.

The ALJ properly found that the confidentiality provision in a private agreement with a third party would not necessarily raise a recognizable confidentiality interest in that agreement. (ALJD 15, n. 11). The ALJ recognized that CCMC was particularly well situated to know this because in a recent case involving CCMC, an administrative law judge determined that the confidentiality clauses in certain third-party staffing agreements did not prevent the disclosure of those agreements to the bargaining representative of the employees of one of the contracting parties. *Id.* citing *Crozer Chester Medical Center*, 2015 L.R.R.M. 183027, 1830272-15 WL 2259320, slip op. at 26 (2015).

Even if Respondents had a valid confidentiality claim at one time, Board law is clear that once a sales agreement is signed, the employer's confidentiality claims are without merit. In *Sierra International Trucks, Inc.*, 319 NLRB at 949, the employer refused to give the union the asset sales agreement, claiming that it was confidential because the agreement between the employer and the purchaser needed approval from a third party, the franchisor. The administrative law judge, as affirmed by the Board, found that the confidentiality claim was only valid up until the date the two parties signed the sales agreement.

Additionally, *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990), involved an employer's failure to give the union adequate notice of a sale because it was waiting for some regulatory approvals. In *Willamette*, the Board observed that the complex and delicate nature of sales negotiations may compel confidentiality in arriving at a sales agreement, justifying the withholding of notice to a union until the agreement is signed; nevertheless even where significant contingencies remain, barring highly unusual circumstances, the employer is obligated to give timely notice to the union of the impending sale so that it may bargain over the effects on unit employees. Presumably, the *Willamette* rationale would justify the confidentiality of the sales agreement up until the APA was actually signed, but not afterwards. In the subject cases, the employers could only rely on the confidentiality argument until the sales agreements were signed, which here was January 8. Simply put, the Union's January 18 information request and the requests that followed were not premature, as Respondents could no longer hide behind confidentiality claims. See also *Compact Video Services Inc.*, 319 NLRB at 145 (employer obligated to furnish sales agreement as of the date it was executed).

### **C. The ALJ Issued a Proper Remedy and Order**

The ALJ correctly ordered that Respondents produce the entire APA with all schedules and attachments. (ALJD 15:31-32). The Board should adopt the ALJ's Remedy and Order. The ALJ's remedy is a typical Board remedy for similar cases. In a recent decision relied on by the ALJ, *Postal Service*, 364 NLRB No. 27 (2016), the Board found an equivalent remedy appropriate. The Board, in disagreeing with the judge's remedy, rejected the Postal Service's effort to impose confidentiality-based restrictions limiting the Union's use of the information. Instead the Board ordered immediate and unredacted production of all documents requested, without confidentiality agreements. The Board found that by failing either to timely assert a

confidentiality interest or propose an accommodation, the respondent waived its opportunity to raise those defenses. *Id.* slip op. at 2. See also *Allegheny Power*, 339 NLRB 585, 586 (2003) (The Board disagreed with the judge’s remedial order requiring the parties to bargain about the information to be provided and found instead that the appropriate remedy is to provide the information.).

The cases on which Respondents rely in excepting to the ALJ’s remedy are distinguishable. In both *International Protective Services, Inc.*, 339 NLRB 701 (2003) and *Roseburg Forest Products, Co.*, 331 NLRB 999 (2000), the Board ordered the employer to bargain with the union regarding the appropriate confidentiality safeguards after recognizing that respondents raised legitimate confidentiality concerns. Here, to the contrary, the ALJ properly found that Respondents never articulated a valid confidentiality interest. (ALJD 15:1-2). The record reflects that Respondents’ only explanation for its confidentiality concerns arises from the confidentiality provision of the APA itself, which, as discussed above, is a private agreement with a third party that allows for disclosure if required by law. The ALJ considered Respondents’ broad-based assertion, properly rejected it, and found that it was insufficient to justify Respondents’ refusal to provide the APA.

Even assuming that Respondents had made any effort to establish that it has a legitimate and substantial confidentiality interest, as would be required to make out this defense, Respondents may not simply assert the confidentiality concern and refuse to provide the information. *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). It is well-settled that even where an employer has a confidentiality interest, it “has the burden to seek an accommodation that will meet the needs of both parties.” *National Steel Corp.*, 335 NLRB 747, 748 (2001). Respondents did not even attempt to engage in such bargaining. In these

circumstances, the ALJ correctly found that Respondents are not now entitled to a second chance to assert objections to production that should have been raised in a timely manner when the request was initially made over a year ago. (ALJD 15:34-37). Respondents' refusal to provide the APA, with its schedules and attachments, frustrated the Union's ability for meaningful effects bargaining and contract negotiations on behalf of its members. Allowing Respondents to provide anything less than the full document would reward the Respondents for their baseless refusal to provide the information. Accordingly, the ALJ's remedy is appropriate.

### III. CONCLUSION

Based on the foregoing, General Counsel submits that the ALJ's decision is supported by the record and legal precedent. Respondents failed to provide relevant information to the Union, failed to make a valid confidentiality claim, and, even if they established a confidentiality claim, failed to seek any accommodation over their confidentiality concerns. Accordingly, it is urged that the Board reject Respondents' exceptions to the ALJ's decision, and adopt the ALJ's rulings, findings, conclusions, and Order.

Respectfully submitted,

  
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