

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

**In the Matter of:**

DELAWARE COUNTY MEMORIAL HOSPITAL

and

CROZER-CHESTER MEDICAL CENTER

and

PENNSYLVANIA ASSOCIATION OF STAFF  
NURSES AND ALLIED PROFESSIONALS

Case Nos. 04-CA-172296  
04-CA-172313

**REPLY BRIEF OF RESPONDENTS DELAWARE COUNTY MEMORIAL HOSPITAL  
AND CROZER-CHESTER MEDICAL CENTER IN SUPPORT OF THEIR  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

In accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), 29 C.F.R. § 102.46, Respondents Delaware County Memorial Hospital (“DCMH”) and Crozer-Chester Medical Center (“CCMC”) file the following Reply to the General Counsel’s Answering Brief in response to Respondents’ Exceptions to the decision of the administrative law judge (“ALJ”).

**I. INTRODUCTION**

The General Counsel’s Answering Brief repeats and embraces the flawed reasoning of the ALJ in issuing his decision. The General Counsel wrongly takes the position that the asset purchase agreement (“APA”) at issue here was relevant to bargaining. It was the government’s burden to establish relevance, and it adduced evidence showing nothing more than a fishing expedition for irrelevant information by the Pennsylvania Association of Staff Nurses and Allied Professionals (“PASNAP” or “the Union”). The General Counsel is also incorrect that the Union apprised Respondents of the reason for its information request – the record is clear that the Union

simply invoked “effects bargaining” and claimed that the absence of the information was a “material issue” to it in negotiations. These boilerplate statements are insufficient. Finally, the General Counsel is wrong that Respondents should have known from the circumstances why the Union was requesting the APA.

## **II. LAW AND ARGUMENT**

### **A. The General Counsel Failed to Establish the Relevance of the APA.**

The General Counsel incorrectly argues that the APA actually contained relevant information. The burden of proving relevance of requested information lies, at all times, with the government. *Allison Co.*, 330 NLRB 1363, 1367 fn.23 (2000). If the General Counsel fails to establish the actual relevance of the information, no violation of the Act may be found. *Id.* The General Counsel then points to cases involving sale agreements such as the APA, claiming that the Board “consistently” holds that an employer must turn over such documents to a union because they are relevant to bargaining. GC Ans. Br. at 14. Those cases, however, are distinguishable.

The General Counsel first relies upon *Compact Video Services*, 319 NLRB 131 (1995). In that case, the union requested information relating to the sale of the employer’s business because it needed to determine whether the buyer was an alter ego of the employer. *Compact Video Servs.*, 319 NLRB at 143. There also was evidence in the record that the information requested related to pending grievances and a pending WARN Act lawsuit. *Id.* Moreover, unlike here, the union actually apprised the employer of those facts when it requested the information. *Id.* The facts of two other cases relied upon by the General Counsel are similar. *Uniontown County Market*, 326 NLRB 1069 (1998) (sale agreement relevant because needed by union to assess employer’s WARN Act liability); *Southern Ohio Coal Co.*, 315 NLRB 836, 845 (1994) (sale agreement relevant because union needed it to process grievances). In both of these cases, too, unlike here, the unions apprised the employers of the facts underpinning the requests, and, unlike PASNAP, did not offer a mere “general avowal of relevancy, such as ‘to bargain

intelligently,” which would have been insufficient. *Uniontown County Market*, 326 NLRB at 1071.

Unlike the cases cited above, there are no facts in the record to suggest that Prospect Medical Holdings, the purchaser of Respondents, was a mere alter ego of respondents, nor did the General Counsel’s witnesses even make that suggestion at trial. There are no facts in the record to establish, nor was there even a contention at trial, that the APA allegedly was relevant to outstanding, or even potential, grievances. Likewise, there is no evidence in the record to show that there was a pending or potential WARN Act lawsuit. Thus, the above cases relied on by the General Counsel are inapposite.

Turning to the reason the Union did give to Respondents for why it allegedly needed the APA, effects bargaining, the General Counsel again cites cases that do not apply. For instance, in *Sierra International Trucks*, the employer, significantly, did not argue that the sale agreement was irrelevant, but raised only confidentiality as a defense. 319 NLRB 948, 950-51 (1995). The union there, concurrently with its request for the document, stated that the information was needed “in order to determine whether a continuing obligation to bargain exists and if not, to initiate bargaining for possible severance benefits...” *Id.* In *Transcript Newspapers*, the ALJ erroneously concluded that the sale agreement was presumptively relevant, a finding the Board expressly declined to rely upon. 286 NLRB 124, 124 fn.2 (1987). Rather, the Board found that “on the particular facts of [that] case,” the union had “demonstrated the relevance of the sales agreement.” *Id.* The “particular facts” of that case were as follows: the employer sold its assets, and as part of the sale was terminating its operations, a move which affected all bargaining unit employees. *Id.* at 126. The union requested a copy of the sale agreement both to determine whether financial reserves had been set aside to pay for items negotiated during effects bargaining and also whether the sale was contingent upon the buyer provided job protection for the existing workforce. *Id.* Moreover, the CBA contained a job guarantee “supplement,” and the union notified the employer that it needed the sale agreement to police whether that supplement would be complied with. *Id.* The union in *Transcript Newspapers* did not state simply that it

needed the information “to bargain,” which would have been insufficient to trigger an obligation to furnish the agreement. Finally, the General Counsel relied on a case where the union had a reasonable belief that a sale involved an alter ego entity, something that is absent from this record. GC Ans. Br. at 14; *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988).

The record evidence does not establish that the APA was relevant. The General Counsel relied on the testimony of two PASNAP officials, Bill Cruice (Executive Director) and Andrew Gaffney (Staff Representative). Their testimony establishes nothing more than a fishing expedition for irrelevant information, based upon suspicion. In this regard, Respondents refer to their *Brief In Support Of Their Exceptions To The Decision Of The Administrative Law Judge* (“R. Br.”) at pages 14-20. For example, Gaffney testified that the document would have given the Union an idea of the “overall financial picture” of Respondents, even though no claim of inability to pay for a proposal had been made. (Tr. at 57, 117, 124, 160.) Cruice testified that intellectual property data in the APA and its schedules might “theoretically” relate to Respondents’ possible intention in the future to expand their business into other areas. (*Id.* at 83.) The General Counsel’s brief points to Cruice’s testimony that “a lot of information” is often not forthcoming from an employer to a union in negotiations. GC Ans. Br. at 10, Tr. at 79. Likewise, the General Counsel relies on assertions Cruice made that the APA would have been relevant to the location of bargaining unit work, layoffs and hiring, and funding of a pension plan. GC Ans. Br. at 11, Tr. at 82-89, 119-127. Notably, however, the General Counsel did not point to the APA itself, which ultimately was entered, in unredacted form as an exhibit, to establish that these items allegedly were addressed in the sale document. Rather than rely upon evidence to establish that the APA had any actual relevance to bargaining, the General Counsel adduced at trial, and relied upon in its Answering Brief, testimony that, at best, constituted “a mere concoction of some general theory” and “mere suspicion” of relevance, which has been held to fall short of satisfying the General Counsel’s burden of showing relevance. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 868 (9<sup>th</sup> Cir. 1977); *Sheraton Hartford Hotel*, 289 NLRB 463 (1988). Unlike *Sierra International Trucks and Transcript Newspapers*, there is no

evidence in the record here to show that the union had a legitimate concern that provisions of existing CBAs might not be complied with, or that the information actually was needed for effects bargaining, much less that the Union put Respondents on notice of the alleged relevance of the APA. Thus, for the foregoing reasons, the General Counsel's attempts to defend the ALJ's wrong conclusion on this point fail.

**B. The Union Failed to Establish Relevance at the Time it Requested the APA.**

Even assuming, *arguendo*, that the APA did contain relevant information, the document unquestionably is not presumptively relevant. *Super Valu Stores*, 279 NLRB 22, 25 (1986). A union must ordinarily apprise an employer of facts supporting the relevance of its request for information that is not presumptively relevant, such as the APA. R. Br. at 11-14. The General Counsel argues that the Union adequately put Respondents on notice of the facts supporting the alleged relevance of the APA to its role as bargaining representative. These arguments simply fall flat.

Board law clearly requires that, where a union requests information that is not presumptively relevant, it apprise the employer with facts to support relevance. For example, in *Uniontown County Market*, the Board held that in establishing the relevance of information a union's "theory of relevance must be reasonably specific" and that "general avowals of relevance such as 'to bargain intelligently' and similar boilerplate are insufficient." 326 NLRB at 1071 (*quoting Super Valu Stores*, 279 NLRB 22, 25 (1986)). The Board, in fact, squarely rejected the General Counsel's argument in *Super Valu Stores*, upholding the ALJ's finding that a union's request for an asset purchase agreement so that it could "more effectively represent unit employees in effects bargaining" was "inadequate," falling short of apprising the employer of the facts underpinning its request for information that was not presumptively relevant. 279 NLRB at 25.

The General Counsel argues that the Union "articulated its reasons for requesting the APA" on January 18, 2016 by simply asking for the document and concurrently stating that

“Respondents should expect a request for effects bargaining.” GC Ans. Br. at 16. However, that is indistinguishable from a “boilerplate” claim that the information needed is “to bargain intelligently,” which the Board has held would be insufficient to trigger a duty to produce the information. *Uniontown County Market*, 326 NLRB at 1071. The General Counsel gives as another example of how PASNAP allegedly gave sufficient facts to support its request for the APA Bill Cruice’s bare claim at the bargaining table in April 2016 that “not having the [APA] is a material substantial problem for these negotiations.” *Id.* at 16-17. Again, Cruice’s assertion was not backed up by any facts that would have put Respondents on notice of why the Union allegedly needed the APA. The General Counsel’s argument might have merit if Cruice had explained why it was a “material substantial” problem for negotiations that PASNAP did not have the APA. However, he never did so. Simply put, these vague assertions by the Union conveyed absolutely nothing to Respondents and fell far short of putting Respondents on notice of the factual basis for the Union’s request for a document that did not relate directly to bargaining unit employees’ terms of employment. Thus, even if the General Counsel had proved relevance, Respondents were in compliance with the Act in refusing to turn over the APA to the Union after it repeatedly failed to supply the reasons why it allegedly needed the APA as well as all of its schedules and attachments, documents which are not presumptively relevant to bargaining.

**C. The Relevance of the APA Was Not Obvious to Respondents.**

The General Counsel argues as a fallback position that even if the Union failed to apprise Respondents of the facts underlying its demand for the APA and all schedules and attachments, the Union’s need for that information was somehow obvious under the circumstances. The General Counsel’s argument carries no water. The Board recently discussed this theory in *Piggly Wiggly Midwest LLC*, 357 NLRB 2344 (2012). In *Piggly Wiggly*, the Board held that the factual basis for the union’s request for a franchise agreement was “obvious from all the surrounding circumstances” and absolved the union from any duty to put the employer on notice

of the basis for its request. 357 NLRB at 2345. The union in that case told the employer that the reason for its request was a suspicion of an alter ego relationship between the employer and franchisees. *Id.* The reasons the request was obvious under the circumstances were the following: (1) the employer previously had told the union that one of the franchisees was a current employee of the employer and managed the store he was buying, (2) the employer had announced to the public that the store, after purchase, would continue to operate in the same manner and under the same trade name as in the past, (3) the employer had represented that the sale would be “seamless” and also that the store would continue to purchase goods from the employer, and (4) the union had observed one of the employer’s managers reviewing employment applications for a franchisee. *Id.* In those circumstances, the union did not have to spell out why it thought there was an alter ego relationship. *Id.*

There are no surrounding facts in this case to suggest that it would have been “obvious” to Respondents why the Union allegedly needed the APA for purposes of effects bargaining. As stated more fully in Section II.A. above, both Cruice and Gaffney testified at length in an attempt to establish why they thought they needed the APA, and they did nothing more but speculate as to intellectual property that might lead Respondents to enter new business ventures, the possibility – not based on any fact – that business units could be closed, and they claimed to be interested in knowing what bonuses or severance payments might be received by non-bargaining unit employees. These bases not only fail to establish relevance, they also clearly were not facts that made obvious the reasons that the Union claimed to need the APA and all attachments and schedules.

Further, Respondents submit that the holding in *Piggly Wiggly* should be limited to situations involving a suspected alter ego relationship, something that is not present here. To the extent facts actually exist to suggest there is such a relationship between two business entities, and to the extent that those facts are openly known, an employer is not put to an extraordinary burden in assessing whether a union is requesting the information for a legitimate reason. Effects bargaining is a different matter entirely. That process involves a panoply of matters,

including severance benefits, seniority issues, payout of accrued vacation or sick leave, bonuses, placement at another of the seller's facilities, or employment with the purchasing entity. For the Board to hold, on the facts presented here, that it was "obvious from the circumstances" where the Union simply invoked "effects bargaining" without specifying more, would leave an employer to guess at which of the many matters covered by its effects bargaining obligation was the basis for the union's request. At the same time, every asset purchase agreement will contain at least some provisions bearing some relationship to bargaining unit employees. Thus, from a practical standpoint, such a holding would effectively render sale agreements such as the APA presumptively relevant, which the Board has never held and should not now hold. *Uniontown County Market*, 326 NLRB at 1071; *Super Valu Stores*, 279 NLRB at 25; *Transcript Newspapers*, 286 NLRB at 124 fn.2 (expressly declining to rely on ALJ's erroneous conclusion that agreement for sale of business was presumptively relevant).

**D. The ALJ's Remedy Was Inappropriately Punitive.**

The General Counsel argues that the ALJ's remedy was appropriate, citing inapposite cases. The cases cited by the General Counsel dealt with information that was unquestionably relevant but that the employer carried a burden to show should not be supplied in full either because of a confidentiality concern or burdensomeness. *Postal Service*, 364 NLRB No. 27 (2016) (employer ordered to turn over all requested information, which was "plainly relevant," where it failed to carry burden to show confidentiality interest); *Allegheny Power*, 339 NLRB 585, 586 (2003) (employer failed to show undue burden stemming from disclosure of information and ordered to turn over all information).

The ALJ's decision does another thing entirely, as it orders Respondents to provide all of the information requested by the Union, including information the ALJ admits is not relevant. ALJD at 15, 1.34-37, 16, 1. 1-2. The ALJ ignored, and the General Counsel's brief ignores, the fact that Board's authority is remedial, rather than punitive. R. Br. at 28-29; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 208 (1941); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); *NLRB*

*v. Food Store Emps. Local 347*, 417 U.S. 1, 6 (1974). The General Counsel also is incorrect in suggesting that the ALJ did not issue a punitive remedy: he states in his Decision that to allow Respondents to only provide portions of the APA and its schedules and attachments would be to “place Respondents in a more advantageous position than they are now.” ALJD at 15, 1.34-37. In other words, in the ALJ’s view Respondents needed to be punished. This kind of remedy simply is not permitted by the Act, which empowers the Board only to order that a labor union be provided with relevant information. The ALJ simply had no power to order Respondents to produce irrelevant information to the Union.

### **III. CONCLUSION**

For the reasons explained above, the ALJ’s findings concerning alleged violations of Sections 8(a)(1) and (5) of the Act should be rejected and the allegations should be dismissed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 24th day of April 2017, a true copy of the foregoing was filed electronically with the Board. Additionally, electronic copies were sent to the following:

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