

**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 Answering Brief filed by the Pennsylvania Association of Staff Nurses and Allied Professionals (“PASNAP,” “the Union,” or “Charging Party”) in response to Respondents’ Exceptions to the decision of the administrative law judge (“ALJ”).

I. INTRODUCTION

The Union’s Answering Brief repeats and embraces the flawed reasoning of the ALJ in issuing his decision. First, the Union wrongly suggests that all a union must do is indicate a bare reason to the employer to explain why it is requesting information that is not presumptively relevant. At that point, according to the Union, an employer is left to guess at whether there might be relevant data contained within a union’s information request. This is so, according to

the Union's argument, even where the employer would be required to fish through voluminous business records, almost all of which have absolutely no relationship to employees in the bargaining unit, and try to determine whether, under some circumstance that the union has failed to identify, the information might be of potential use to the union. The Board has never held this in any case, and should not do so now. PASNAP also wrongly suggests that Respondents failed to advance a legitimate confidentiality concern with respect to the APA. The Union's argument completely sidesteps the fact that it failed to engage in good faith discussions over confidentiality, and at all times demanded the entire APA (which Respondents correctly asserted was not relevant).

II. LAW AND ARGUMENT

A. The APA Is Not Relevant to Bargaining.

The Union is incorrect that the APA is relevant to its duties as employees' bargaining representative. In an attempt to obfuscate the current state of Board law, the Union suggests in its brief that a contract for the sale of a business such as the APA is, by definition, relevant to bargaining. The cases do not support this broad contention. For example, the Union cites *Compact Video Service*, 319 NLRB 131, 144 (1995) for this proposition. In that case, the ALJ makes a seemingly broad pronouncement regarding a union's right to a sale document, noting that an employer is "normally" required to provide it "upon request" so that the union may use it in connection with effects bargaining. *Id.* at 144. However, in making his actual conclusion, the ALJ in that case reviewed the record evidence and found that the sale document was relevant under the following circumstances:

to help the Union determine, at the threshold, whether or not the "sale" involved the substitution of a mere alter ego of the Respondent, and/or to help determine whether or not the sale would involve someone who owed a successor's duty to recognize and bargain with the Union. Indeed, the Union invoked these very reasons and others of seemingly equal validity, relating to pending grievances and a "WARN Act lawsuit" in its persistent correspondence with the Respondent's attorneys, after the Respondent had ignored the Union's initial demand for such information on July 29.

Id. at 143. In other words, the Board found that a contract for sale was relevant where (1) the union had evidence that there was an alter ego relationship,¹ (2) to help determine whether or not the buyer would have a duty to recognize and bargain with the union, (3) where the union specifically invoked those reasons when it requested the documents, and (4) where it had reasons of “seemingly equal validity” for asking for the information, including pending grievances and a pending WARN Act lawsuit. These circumstances are a far cry from a union simply having a right to demand a sale agreement such as the APA merely because it “might” be relevant to bargainable issues. *See, e.g., Brazos Elec. Co-Op, Inc.*, 241 NLRB 1016, 1024 (1979) (in order to entitle union to information that is not presumptively relevant, evidence more than a “mere concoction of some general theory” to establish relevance).

Contrary to the Union’s contentions, there is no record evidence to show that the APA or its schedules and attachments were relevant to bargaining. A review of Cruice’s and Gaffney’s testimony makes this clear, and it is worth briefly revisiting here. At one point, Gaffney speculated that there “might” be language in the APA establishing Prospect’s duty to bargain with it (nevermind the fact that both Crozer and Prospect had repeatedly made clear its intent to retain the workforce subject to initial terms set by Prospect – what question could PASNAP have had in this regard?); that the APA might also include provisions relating to capital improvements to the hospital, which in could have had some speculative effect on bargaining unit employees. (*Id.* at 22-26.) Further, when pressed on cross-examination about the relevance of the APA and attached schedules, Gaffney testified that the APA would have given the Union knowledge of the

¹ Indeed, the employer in *Compact Video Services* made admitted attempts to hide the business transaction from the union. 319 NLRB at 137.

“overall financial picture” of Crozer.² (*Id.* at 57). Gaffney continued on to claim that all of the schedules attached to the APA would be relevant to bargaining, including schedules governing Crozer’s graduate medical education programs, Crozer’s intellectual property, Crozer’s landlord/tenant lease property and real property, and retention bonuses. (Tr. at 65.)

Cruice’s testimony was no better. For example, he testified on direct examination that the intellectual property schedule was relevant, claiming that it “theoretically” could indicate that Respondents might widen their business into “biochemistry or pharmaceutical areas” and stating that “maybe” Respondents owned certain patents – although he did not explain how patents might be relevant to bargaining and admitted that “you never know” whether a review of the APA would evidence ownership of such patents. (Tr. at 83). Cruice also unconvincingly testified that a schedule dealing with joint ventures and for-profit affiliates was relevant because “it opens up possibilities for the expansion of the bargaining unit to other places.” (*Id.*) (emphasis added.) A schedule entitled “crozer assets, properties and rights” was relevant, according to Cruice, because it would lead to “understanding [of] maybe they own stuff that we don’t yet know about that we would learn about.” (*Id.* at 84.)

Thus, the testimony of both PASNAP officials who testified – which testimony Respondents submit was fabricated *post hoc* for the hearing in this matter – renders *Compact Video Service*, and other similar cases, distinguishable. For example, unlike that case, the Union did not have any reasonable basis to believe that Prospect would not have a duty to bargain with it upon Prospect’s assumption of operations. Both Prospect and Crozer had made clear at all times that it would not only retain the Crozer workforce but would assume existing collective bargaining agreements, which it ultimately did. (Tr. at 95; R. Exhs. 1-5.) Thus any “question”

² Of course, at the same time, Respondents never claimed an inability to pay for any proposal made by PASNAP, so the Union would not be entitled to information that gave the “overall picture” of Respondents’ finances. *Nielsen Lithographing Co.*, 305 NLRB 697, 700-701 (1991).

the Union allegedly had on this point was not a legitimate question, because the facts were crystal clear. The Union witnesses who testified at trial did not point to pending grievances or a lawsuit as the union did in *Compact Video Service*. Rather, Cruice and Gaffney engaged in page upon page of speculation about what information might be contained in the APA (which, in itself, did not relate to mandatory subjects of bargaining and could not reasonably be said to relate to the effects bargaining process). Simply put, the General Counsel did not meet the government's burden to establish that the APA and all of its attachments and schedules were relevant.

B. The Union Was Not Excused From Supplying Respondents With the Factual Basis for its Request for the APA.

PASNAP next argues that it did not have to apprise Respondents of the facts underlying its request for the APA. This argument fails. Although the Board does not have an absolute rule requiring a union to articulate relevance to the employer at the time of a request for information that is not presumptively relevant, it does not lightly let a union “off the hook” where it completely fails to do so. In fact, the Board cases have held that the General Counsel can only show the relevance of information such as the APA in one of two ways:

To demonstrate relevance, the General Counsel must present evidence 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 Respondent under the circumstances.

Disneyland Park, 350 NLRB 1256, 1257–58 (2007) (citing *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018-1019 (1979), enfd. in relevant part 615 F.2d 1100 (8th Cir. 1980)). “Absent such a showing,” the Board explained in *Disneyland Park*, “the employer is not obligated to supply the requested information.” 350 NLRB at 1258.³

³ The Union does cite a case for the proposition that a union does not need to apprise the employer of facts underlying its request for information that is not presumptively relevant, but need only give the reason for its request. *Carson & Gruman Co.*, 278 NLRB 329, 334 (1986). To the extent *Carson & Gruman* stands for this proposition, the Board should overrule it, as it is inconsistent with *Disneyland Park*.

The threshold question here, then, is whether the Union apprised Respondents of facts that would support relevance. It did not. Like the General Counsel, the Union points to the fact that PASNAP officials invoked “effects bargaining” when requesting the information, as well as a statement by Cruice at a bargaining session for a first collective bargaining agreement covering employees at DCMH that the fact that the Union did not have the APA was a “material” problem for the parties’ negotiations because PASNAP was “in the dark” and Respondents were “in the light.” U. Br. at 9-11. These averments by PASNAP officials constituted nothing more than “mere boilerplate,” such as a claim that the information was needed “to bargain intelligently,” which the Board has long found to be insufficient to constitute a valid claim to information that is not presumptively relevant. *Uniontown County Market*, 326 NLRB 1069, 1071 (1998); (*quoting Super Valu Stores*, 279 NLRB 22, 25 (1986)).

Nor is this a situation where it would have been obvious to Respondents under the circumstances why the Union allegedly needed the APA and all schedules and attachments. In this regard, Respondents re-incorporate as if set forth fully herein Section II.A. above. As Gaffney’s and Cruice’s testimony at trial made clear, the reasons they allegedly thought that the Union needed the APA and all of its schedules and attachments were full of conjecture and guesswork and constituted a fishing expedition. To accept the Union’s argument here – and to uphold the ALJ’s erroneous decision – would be to effectively render a contract for a sale of a business presumptively relevant. The Board has long held that such documents are not presumptively relevant. Rather, in all cases involving a request for a sale of a business, the Board has pointed to specific facts communicated to the employer justifying the request before finding relevance. *Wash. Star Co.*, 273 NLRB 391, 397 (1984) (Union affirmatively advised it needed document to administer the life-time guarantee and successorship provisions in the current CBA); *Super Valu Stores, Inc.*, 279 NLRB 22, 26 (1986) (Union stated the need to know which business entity in the transaction would be liable for pension contributions); *Transcript Newspapers*, 286 NLRB 124, 126 (1987), *enf’d*. 856 F.2d 409 (1st Cir. 1988) (Union expressed need to determine whether financial reserves had been established to cover items negotiated

during effects bargaining, such as severance pay); *Compact Video Sers.*, 319 NLRB 131, 142-44 (1995) (Union wrote demanding the information to see if Respondent was a “successor” to pending legal claims); *Sierra Intern, Inc.*, 319 NLRB 948, 950-51 (1995).

For the Board to hold that a union can obtain an asset purchase agreement simply by invoking “effects bargaining” and leaving an employer to deny the request at its peril simply is bad policy. Contracts for a sale of a business always contain many pages of absolutely irrelevant data, as well as confidential financial information. At the same time, in nearly every case such a contract will contain some data that conceivably could be relevant to a union’s role as bargaining representative. The Board should continue to hold that, in order to obtain such a document, a union must give specific facts identifying the alleged relevance of the document, and should reject the Union’s contention that a union must simply identify “the reason” (i.e., “because we need it for bargaining) for the request.

C. The Union’s Arguments Regarding Confidentiality Are Meritless.

The Union, amazingly, faults Respondents for not “explaining” its confidentiality concerns. U. Br. at 12. PASNAP ignores the fact that after Respondents raised their confidentiality concerns – in addition to their objection that the APA was irrelevant – the Union refused to discuss those concerns.

The Board has concluded that a union’s responsibility for obstructing confidentiality discussions regarding the scope of protective disclosure of confidential documents insulates the employer from a finding of bad faith. *Good Life Beverage Co.*, 312 NLRB 1060 (1993). In *Good Life*, the Union requested detailed confidential financial information. The Employer promised to bring the information and discuss its disclosure at the next session of ongoing contract negotiations. *Id.* at 1060. The union, however, refused to meet, filed a ULP, and broke off all negotiations conditioning bargaining on sessions being conducted at the union hall. *Id.* at 1061. The Board found that the employer was entitled to discuss confidentiality concerns regarding the requested information with the union so as to try to develop mutually agreeable

protective conditions for its disclosure. *Id.* Thus, given the employer's right to discuss the information request with the union, its indication of willingness to meet for such discussions, and the union's actions preventing the parties from meeting to deal with the confidentiality concerns the Board found no unlawful withholding of the requested information given the union's responsibility in obstructing the employer's good faith attempts to bargain about the issue. *Id.*; *see also BP Exploration, Inc.*, 337 NLRB 887, 889–90 (2002) (No violation where Respondent offered to discuss with the Union alternative ways of providing the Union with information and asked the Union if there was specific information that it could provide, but the Union refused to accept anything less than complete copies of the confidential reports).

In this case, Bilotta told PASNAP that the APA was confidential and covered by a confidentiality agreement to which Crozer was subject. (GC Exh. 8.) Cruice understandably took this to mean that the Respondents were offering to negotiate the terms of a nondisclosure agreement governing the confidential information that would be furnished. (GC Exh. 9.) However, instead of bargaining with Respondents when they asserted their legitimate right to protect the release of the sensitive information--which the APA prohibited from disclosing absent consent of Prospect--Cruice conditioned these negotiations on a promise that non-relevant information the Union had not established it was entitled to also be released, namely the entirety of the APA, with all attachments and schedules. (*Id.*) Respondents again attempted to negotiate the terms of a confidentiality agreement, GC Exh. 10, but PASNAP refused to change its position and engage in these discussions. This was a bad faith obstruction to reaching compromise on this issue by the Union. Therefore, just as the union's refusal to discuss the employer's confidentiality concern rendered a finding of bad faith impossible in *Good Life*, Respondents cannot be held in violation of Section 8(a)(5) given their repeatedly rejected attempts to even discuss a compromise within the law to furnish the information.

Thus, the Union's contention, as well as the ALJ's conclusion, that Respondents did not advance a legitimate confidentiality concern is erroneous and ignores the Union's misconduct in refusing and failing to discuss those concerns with Respondents in good faith.

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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