UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 29

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In the Matter of:

L.I.F. INDUSTRIES A/K/A LONG ISLAND FIRE PROOF DOOR

Respondent,

And

Case No. 29-CA-181174

New York City and Vicinity District Council of Carpenters

Charging Party.

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RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATE LAW JUDGE

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PRELIMINARY STATEMENT

L.I.F. Industries a/k/a Long Island Fire Proof Door., the Respondent (hereinafter referred to as "LIF" or "Respondent") by and through its attorneys, Trivella & Forte, LLP, respectfully submits this brief in support of its exceptions to the Decision of Administrative Law Judge Jeffrey P. Gardner (the "ALJ"), dated May 12, 2017. As set forth herein, LIF respectfully submits that the ALJ erred in finding that LIF committed any unfair labor practices. Specifically, it is Respondent's position that the Amended Complaint filed by Region 29 sought to usurp the power of the arbitrator in violation of Board law. Further, the record clearly established that the information sought by the Union was requested solely in furtherance of certain grievances that were submitted to binding arbitration before Arbitrator Eugene Coughlin. Inasmuch as Arbitrator Coughlin narrowed the requests and LIF complied with the order of the Arbitrator, LIF respectfully submits that information other than that which was provided is irrelevant and the finding to the contrary by the ALJ was in error. Lastly, LIF submits that the information sought was overbroad, vague, and ambiguous and sought information regarding non-bargaining unit members and that Respondent was correct to object to said requests such that the ALJ incorrectly found that Respondent unreasonably delayed in producing information to the Union.

STATEMENT OF FACTS

LIF is a contractor which operates out of Port Washington, New York. LIF is a signatory to the Hollow Metal Buck and Door Association Agreement with the Union (hereinafter the "CBA")[1]. The CBA contains a broad grievance and arbitration provision that provides in relevant part "[t]he grievance shall be submitted in writing by the aggrieved employee's shop steward and shall be presented to the Employers representative no later than ten (10) calendar days after the employee knew or should have known of the occurrence of the matter being grieved[2]."

On or about February 11, 2015; May 11, 2015; August 3, 2015 and September 3, 2015 the Union submitted grievances alleging that LIF failed to pay certain employees the proper wage and benefit rate provided in the CBA[3]. The grievances were brought on behalf of three employees Juan Oyola a/k/a Juan Oquendo, Junior Reyes and Carlos Alvarez[4]. LIF and the Union were unable to resolve these grievances and pursuant to the CBA, the grievances were submitted to arbitration by the Union on January 12, 2016 to Arbitrator Eugene T. Coughlin[5].

Prior to filing the grievances and the demand for arbitration the Union did not make any requests for information from LIF[6]. On or about April 8, 2016 the Union, through counsel, made a request for information regarding all employees of LIF[7]. The request sought information dating back to February, 2009. LIF objected to the request as

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[1] Joint Exhibit 1-C.
[2] Joint Exhibit 1-C at Article S.
[3] Joint Exhibits 1-D; 1-E; 1-F and 1-G.
[4] *Id.*
[5] Joint Exhibit 1-H.
[6] Joint Exhibit 1-J.
[7] *Id.*

vague, ambiguous, overbroad and irrelevant[8]. All of the correspondence regarding the information requests from the Union referenced the grievances pending before Arbitrator Coughlin[9].

On or about June 7, 2016, the Union sought to have Arbitrator Coughlin compel the Respondent to comply with the information requests that are the subject of this proceeding[10]. LIF responded to the Union's application and a telephonic hearing was held on or about June 10, 2016 before Arbitrator Coughlin[11]. On June 10, 2016 Arbitrator Coughlin denied the Union's request for information in part and limited the request to a) the three individuals who were the actual subjects of the grievances *i.e.* Juan Oyola, Junior Reyes and Carlos Alvarez and b) the time period of 90 days prior to June 10, 2016[12]. Thereafter, LIF provided the documents ordered by Arbitrator Coughlin[13]. In light of the fact that most if not all of the Grievants were not employed by LIF on or about June 10, 2016, LIF provided documents for the 90 day period prior to the Grievants last day of employment to ensure that the Union received 90 days' worth of records[14].

Apparently not satisfied by the Arbitrator's ruling, on or about July 28, 2016 the Union filed the Charge that is the subject of the instant action[15]. On May 12, 2017 ALJ Gardner issued the Decision and concluded that Respondent violated Sections 8(a)(5) and

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[8] Joint Exhibits 1-J; 1-K; 1-L and 1-O.
[9] Joint Exhibits 1-J; 1-K; 1-L and 1-O; Transcript, p. 35, ll. 10-16; p. 50, ll. 3-11.
[10] Joint Exhibit 1-P; transcript; p. 38, ll. 3-13.
[11] Joint Exhibit 1-Q; Transcript, p. 51, ll. 5-13, 19-25. References to "Transcript" in this Memorandum of Law refer to the Trial Transcript before NLRB Administrative Law Judge Gardner on February 23, 2017.
[12] Transcript, p. 53, ll. 13-23.
[13] Joint Exhibits 1-X and 1-Y.
[14] Transcript, p. 54, ll. 2-16.
[15] Transcript, p. 54, ll. 2-22; p. 55, ll. 2-8.

(1) of the Act by failing to provide information to the Union and unreasonably delaying in providing requested information to the Union[16].

ISSUES PRESENTED

1. Whether the ALJ erred in concluding that the information sought by the Union was presumptively relevant.

2. Whether the ALJ erred in failing to defer to the ruling of Arbitrator Coughlin narrowing the scope of the Union's information request.

3. Whether the ALJ erred in concluding that Respondent failed and refused to furnish the Union with presumptively relevant information.

4. Whether the ALJ erred in concluding the Respondent unreasonably delayed in furnishing the Union with the requested information.

[16] Decision at p. 10.

LEGAL ARGUMENTS

I. THE ALJ ERRED IN CONCLUDING THAT THE INFORMATION SOUGHT BY THE UNION WAS PRESUMPTIVELY RELEVANT (EXCEPTION NOS. 1-3, 14, 16-17)

The ALJ first erred in concluding that the information requested by the Union was presumptively relevant. In making this decision the ALJ, respectfully, ignores two salient facts. First, the ALJ does not address the fact that the requests by the Union were not limited to bargaining unit employees. Rather, the Union sought documents related to "*all* employees performing work for LIF" and thus seeks information on employees outside of the bargaining unit. "Where, as here, requested information is not presumptively relevant because it pertains to a non- unit employee, the [charging party] 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 [employer] under the circumstances.'" *Oncor Elec. Delivery Co., LLC*, 364 NLRB No. 58 (July 29, 2016), *citing Disneyland Park*, 350 NLRB 1256, 1258 (2007) (*citations omitted*); *Chapin Hill at Red Bank & Local 707 Health Employees Alliance Rights & Trade (Heart)*, 360 NLRB No. 27 (Jan. 10, 2014) (holding that for requests pertaining to non-bargaining unit employees "the union must offer more than mere suspicion for it to be entitled to the information"). Thus, LIF's duty to respond was conditioned on the Union's disclosure of facts sufficient to demonstrate relevance. *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997).

Here, Counsel for the General Counsel failed to meet its burden of proving how the information requested is relevant. The conclusory averment that all of LIF's financial and operational records for the last seven years is relevant to the Union's representation

of the bargaining unit *in general* is insufficient. Counsel for the General Counsel's burden may only be satisfied by showing that a logical foundation and a factual basis exist for such an information request. That burden is satisfied by a showing that there is a probability that the requested information is relevant and would be of use to a bargaining representative in carrying out its responsibilities. *Postal Service*, 310 NLRB 391, 391-392 (1993). The Union's request at issue sought information which had no apparent nexus with the Union's statutory duties, nor did the Union articulate any cognizant reason for its request except for its pursuit of the grievances, discussed *herein*. For instance, there is no value to the Union in having a listing of all LIF employees who used *any* company vehicle over the last 7 years, or being provided with copy of expense reports for *every* LIF employee over the last ten years. Thus, the conclusory and nonspecific nature of the Union's request renders it null and void and the ALJ's conclusion that the information was presumptively relevant was incorrect.

The ALJ's reliance on *United Graphics, Inc.*, 281 NLRB 463, 465 (1986) for the proposition that the information sought was "presumptively relevant to the union's role as bargaining agent [and] must be provided to the union as it 'relates directly to the policing of contract terms'" is misplaced[17]. Indeed, given that the statute of limitations for an unfair labor practice charge is six months and the time period for filing a grievance under the CBA is ten days after the Union knew or should have known of the matter being grieved[18], information dating back beyond the ten days prior to the filing of the specific grievance is overbroad and could not be used in any fashion by the Union to "police" the CBA. *See* Westinghouse *Elec. Corp., et al*, 304 NLRB at 709.

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[17] Decision at p. 6.
[18] Joint Exhibit 1-C at Article S.

Second, the ALJ's conclusion that the information sought by the Union related to issues other than the pending arbitration is contrary to the record in the case, including the testimony elicited by Counsel for the General Counsel. It is undisputed that the grievances were filed between February and September of 2015 and that the request for information was served in April 2016. The initial request for information as well as all of the follow up communications contained a reference to the grievances by number pending before the Arbitrator[19]. Tellingly, when the Respondent objected to the information sought and did not respond to the information request the Union did not file a Charge with the NLRB, rather the Union sought relief from Arbitrator Coughlin[20]. It was only after Arbitrator Coughlin limited the Union's request for information that the Union filed the instant Charge.

Likewise, a review of the testimony of Lydia Sigelakis, the only witness presented by Counsel for the General Counsel, makes clear that all of the information sought related to the grievances filed by the Union[21]. In her testimony, Ms. Sigelakis first explained the nature of the grievance *i.e.* that LIF was allegedly using shop employees to perform work in the field without paying the proper rate. She then went on to explain how each of the requests at issue in this proceeding were designed to establish that shop employees were performing work in the field[22]. In light of this testimony it was, respectfully, incorrect of the ALJ to conclude that the Union's request was relevant to anything other than the pending arbitration[23].

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[19] Joint Exhibits 1-J; 1-L; 1-M and 1-N.
[20] Joint Exhibit 1-P.
[21] Transcript p. 17, ll. 21-25; p. 18, l. 1; p. 19, ll.23-25; pp. 20-21.
[22] *Id.*
[23] That Ms. Sigelakis in follow up communications with Respondent's counsel, preserved the Union's right to seek all of the information set forth in her initial information request

II. THE ALJ ERRED BY FAILING TO DEFER TO THE RULING OF ARBITRATOR COUGHLIN NARROWING THE SCOPE OF THE UNION'S INFORMATION REQUEST (EXCEPTION NOS. 4-5, 14, 16-17)

The ALJ erred in concluding that the ruling of Arbitrator Coughlin narrowing the scope of the Union's information request was not entitled to deference[24]. In support of his Decision the ALJ asserts that the parties did not agree to submit the issue of the Respondent's statutory duty under Section 7 of the Act to arbitration and cites to a series of cases where the Board held that deferral to the arbitrator under Section 8(a)(5) is improper[25]. These cases, respectfully, have no bearing on the instant matter and the ALJ's conclusions based upon these cases misconstrues the arguments asserted by the Respondent. Respondent has never asserted that the Arbitrator explicitly ruled on the issue of its statutory duty to produce relevant information. Rather, Respondent asserts that given that the only articulated basis for the information sought by the Union was for use in prosecuting the pending grievances, coupled with the fact that Respondent complied with the Arbitrator's order, establishes that the additional information sought is irrelevant, as it could not be used in the Arbitration. Indeed, under analogous circumstances, the Board has held "[i]t would be inappropriate to order Respondent to furnish that information to the Union because the information has no current relevancy for the sole purpose for which the Union sought the information, namely, to process [a Member's] grievance." *Westinghouse Elec. Corp., et al*, 304 NLRB 703, 709 (1991). In *Westinghouse*, the grievance was already determined and the information request would

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does not, as suggested by the ALJ, alter the facts and testimony outlined above *to wit* all of the communications regarding the information request identified the grievances by number.

[24] Decision at p. 7.

[25] Decision at p. 7.

serve no purpose but to seek to have the arbitrator reopen the case, which he did not have the power to do. Similarly, here, any information divulged in response to the request would be useless to the Union as any future grievance predicated thereon would be untimely under the CBA.

Moreover, the Decision ignores Board precedent *to wit* that Section 8(a)(5) is not to be used as a device to secure pretrial discovery in arbitration proceedings. As recently affirmed, "[t]he Board has held that there is no right to pretrial discovery when a grievance has been referred to arbitration." *Oncor Elec. Delivery Co.*, LLC, 364 NLRB No. 58 (July 29, 2016). Any other result, "would intrude upon the authority of the arbitrator to establish the rules for discovery preceding the arbitration hearing and violate the Board's own admonition that 'there is ... no statutory obligation on the part of [each party] to turn over to the other evidence of an undisclosed nature that the possessor of the information believes relevant and conclusive with respect to its rights in an arbitration proceeding.' " *Tool & Die Makers' Lodge 78, IAM*, 224 NLRB 111 at 111 (1976) (*internal citations omitted*).

> An important reason for this rule against pretrial discovery in arbitration is that arbitration is intended to be a speedier, more efficient alternative to litigation. Thus, to allow prearbitral discovery would unduly clog the process, thereby defeating its purpose. Therefore, unless the arbitrator himself determines otherwise, the parties should adhere to these strictures. Nor should the Board, which itself eschews pretrial discovery, add more rules to the system. If a party desires prearbitral discovery, he should direct his request to the arbitrator, just as he would if he seeks evidence at the arbitral hearing itself...

Ormet Aluminum Mill Prod. Corp., et al, 335 NLRB 788, 791 (2001) (Chairman Hurtgen, *dissenting in part*); *accord California Nurses Assn.*, *supra* (finding that the

union was not required to provide the employer with the names of witnesses it intended to call, and the evidence on which it intended to rely, at the upcoming arbitration hearing).

Here, the instant grievances were submitted to arbitration on January 12, 2016 and the first information request identified is dated April 8, 2016 – clearly after the matter was referred to arbitration. Notably, the Union made a request to compel the information sought at issue in this proceeding and that motion was ruled on by the Arbitrator. After briefing and oral argument, the Arbitrator ruled that only a subset of the information sought by the Union was relevant to the grievances. It is respectfully submitted that such ruling is entitled to deference and the Union is not entitled to the pretrial discovery, which was already denied. *See California Nurses Ass'n*, 326 NLRB 1362, 1367 (1998). For this reason alone, the ALJ should have dismissed the Amended Complaint.

III. THE ALJ ERRED IN CONCLUDING THAT RESPONDENT FAILED AND REFUSED TO FURNISH THE UNION WITH PRESUMPTIVELY RELEVANT INFORMATION (EXCEPTION NOS. 6 – 8, 14, 16-17)

The ALJ's finding that the Respondent failed and refused to furnish the Union with presumptively relevant information is simply duplicative of the findings and conclusions discussed *supra*. For the reasons set forth *supra* the ALJ's conclusion that the information requested was presumptively relevant should be overturned. Moreover, it is well-settled that an employer cannot be found to be in violation of Section 8(a)(5) and (1) of the Act if "it establishes a valid reason why it did not timely furnish the information." *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). The fact that the information request came after this matter was referred to arbitration, *ipso facto*, provided Respondent with a valid reason to believe the Union was engaging in impermissible

pretrial discovery, thereby warranting Respondent's refusal to turn over the demanded documents. This, coupled with the lengthy period sought and the request for information unrelated to the pertinent bargaining unit, bolsters Respondent's decision to not furnish the documents to the Union. Through the discovery process in the Arbitration, Respondent made "an effort to reach a mutually acceptable accommodation" with the Union. *Gruma Corp. d/b/a Mission Foods & United Food & Commercial Workers Union, Local 99*, 345 NLRB 788, 789 (2005). The Union's disagreement with the Arbitrator's decisions in limiting the production period and limiting the request to relevant employees is not a basis to find Respondent in violation of the Act. The Arbitrators' decision further justifies LIF's rational for objecting to the information request *ab initio* and provides an additional basis to overturn the Decision and the finding that Respondent did not have a valid defense to producing information was in error[26].

IV. THE ALJ ERRED IN CONCLUDING THAT RESPONDENT UNREASONABLY DELAYED IN FURNISHING THE UNION WITH THE REQUESTED INFORMATION. (Exception Nos. 9-13, 15-16)

The Respondent also objects to the Decision and the conclusion that Respondent unreasonably delayed in furnishing the Union with the requested information. This conclusion is again based upon the ALJ's incorrect findings that the information sought by the Union was presumptively relevant and that the ruling of the arbitrator was irrelevant to these proceedings[27]. For the reasons set forth above, these rulings were improper and support Respondent's exception to the delay finding as well. Likewise, contrary to the ALJ's ruling, as set forth above, Respondent had valid defenses to failing to produce the requested information which warrant overturning this delay finding.

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[26] Decision at p. 8.
[27] Decision at pp. 8-9.

Gruma Corp. d/b/a Mission Foods & United Food & Commercial Workers Union, Local 99, 345 NLRB at 789.

CONCLUSION

For the above-stated reasons, the Respondent respectfully requests that its exceptions to the Administrative Law Judge's Decision be sustained and that the Board direct that the Amended Complaint against it be dismissed in its entirety.

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NEW YORK CITY AND VICINITY DISTRICT COUNCIL OF CARPENTERS

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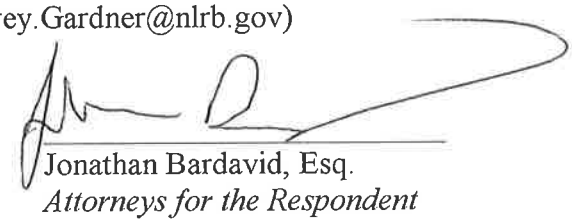
CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, I caused the foregoing RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION and RESPONDENTS' BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION to be served by electronic mail as follows:

Kimberly Walters, Esq. (Kimberly.Walters@nlrb.gov);
Lydia Sigelakis, Esq. (lsigelakis@spivaklipton.com); and
ALJ Jeffrey Gardner (Jeffrey.Gardner@nlrb.gov)



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