

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

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

and

Case 29-CA-181174

**NEW YORK CITY AND VICINITY DISTRICT
COUNCIL OF CARPENTERS**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

LIF Industries a/k/a Long Island Fireproof Door (Respondent) is a company that manufactures fire proof doors. Respondent has had a long collective bargaining relationship with the New York City and Vicinity District Council of Carpenters (the Union). On April 8, 2016, the Union requested information from Respondent relating to the bargaining unit members' terms and conditions of employment. Respondent, without establishing a legally sufficient defense, failed and refused to produce this relevant information to the Union.

The case was litigated before Administrative Law Judge Jeffrey Gardner on February 23, 2017 in Brooklyn, New York. (Tr. 1¹). On May 12, 2017, Judge Gardner issued his Decision. In his thorough and well-reasoned Decision, the ALJ found that Respondent violated Section 8(a)(5) and (1) the Act by failing to bargain in good faith. The ALJ correctly found, inter alia, that Respondent had a duty to produce the presumptively relevant information requested by the Union, that deferral to arbitration, as urged by Respondent, was inappropriate in this case, and therefore that Respondent unlawfully refused to provide relevant information to the Union and unreasonably delayed in providing the information it did produce, in violation of Sections 8(a)(5) and (1) of the Act. (ALJD 6-9).

On July 10, 2017, Respondent filed exceptions to all of the ALJ's findings, along with a Brief in support of its exceptions. In its brief, Respondent makes the same flawed arguments of irrelevance, burdensomeness and deferral to arbitration that it made in its post-hearing brief and which were soundly rejected by the ALJ. As discussed herein, the record evidence and applicable

¹ References to the official record of the hearing are abbreviated as follows: "GC Exh. denotes General Counsel's exhibits. "Resp. Exh." denotes respondent's exhibits. "Jt. Exh." denotes joint exhibits. Citations to the transcript will appear "Tr. _" with numbers specifying the particular page(s) cited in the transcript. References to the Administrative Law Judge's Decision will appear as "ALJD_" with the page number and line numbers referenced. References to Respondent's Brief in Support of Its Exceptions will be abbreviated as "Resp. Br."

Board law fully supports the ALJ's findings that the information requested by the Union was presumptively relevant and that deferral to the Arbitrator was inappropriate.

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits its Answering Brief in Opposition to Respondent's Exceptions and supporting brief. Counsel for the General Counsel respectfully requests that Respondent's exceptions to the ALJ's Decision be denied and that the Board affirm the ALJ's findings of facts and conclusions of law.

II. STATEMENT OF FACTS

a. Background: The Parties and the Contract

It is undisputed that Respondent and the Union have a long-standing collective bargaining relationship, most recently encapsulated in a collective bargaining agreement in effect from August 1, 2012 to July 31, 2017. (Jt. Exh. 1(C)).² The employees covered by this collective bargaining agreement manufacture parts for hollow metal doors and work out of Respondent's Port Washington, New York facility.

Article G(3) in the current collective bargaining agreement covering the bargaining unit of employees at issue in this case includes the following requirement:

When and if permission is granted by the District Council to allow the Employer to use its employees covered by this Agreement to perform any work in outside construction covered by the Agreement between the Building Trades Employers Association and the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, the wages and working conditions of these employees shall be governed by the terms and conditions of said Agreement between the Building Trades Employers association and Vicinity of the United Brotherhood of Carpenters and Joiners of America.

² For the purposes of collective bargaining, Respondent is a member of the Hollow Metal Buck and Door Association Inc., a multi-employer bargaining association. (Jt. Exh. 1¶2).

(Jt. Exh. 1(C) p. 13). The other collective bargaining agreement referenced in Article G(3), between the Union and the Building Trades Employers Association, provides for higher rates of pay and benefits. (See reference in the third paragraph of Jt. Exh. 1(P)).

The collective bargaining agreement is silent as to how the parties handle requests for information or whether to send any disputed requests to arbitration. (Tr. 57; Jt. Exh. 1(C)).

b. The Union Files Grievances and Arbitration Regarding Respondent's Failure to Pay Unit Members the Contract Rate for Performing Outside Work

Beginning in 2015, the Union's Inspector General learned that Respondent was assigning some bargaining unit members to work in the field, as opposed to in Respondent's shop, and that Respondent was not paying them according to the contract provision governing outside work. On February 11, 2015, the Inspector General filed the first of several grievances alleging that Respondent failed to pay bargaining unit employee Juan Oyola according to the contract for working in the field. (Jt. Exh. 1(D)). On May 11, 2015, the Inspector General filed a class action grievance regarding the issue, and then additional grievances for specific bargaining unit employees on August 3, 2015 and September 3, 2015. (Jt. Exh. 1(E, F, G)). After filing for arbitration on these grievances, the Inspector General contacted Union counsel, Lydia Sigelakis, regarding the issue of Respondent not properly paying bargaining unit employees for outside work and the upcoming arbitration.

c. The Union's April 8 and Subsequent Clarifying Requests for Relevant Information

After being alerted of Respondent's failure to pay unit employees the correct wage pursuant to the collective bargaining agreement, Union counsel Sigelakis made a written request to Respondent in order to determine the extent of the violation of the contract, prepare for the

upcoming arbitration, and be able to generally police the collective bargaining agreement. (Tr. 19, 34, 44).

By email and letter dated April 8, 2016, from Sigelakis to Respondent's counsel Jonathan Bardavid, the Union requested that Respondent furnish it with certain information, for the period February 23, 2009 to the present, including:

1. Certified payroll and internal payroll reports/records for all employees performing work for LIF in the District Council's jurisdiction.
2. Pay stubs, sign in sheets, time cards, and any and all other documents indicating names, job title(s), and dates and hours of work of employees working for LIF in the District Council's jurisdiction.
3. Logs or records of outside work assignments or installation jobs; work orders, job/work tickets, job assignment sheets, time reports, and any other record of outside, installation or maintenance work performed by LIF, including dates and hours of work, employees who performed the work, entity for whom the work was performed, and location of work.
4. Any and all documents indicating names and job titles of LIF employees who have or had use of a company van or vehicle and dates of such use.
5. Any and all expense reports or documentation concerning employees' out of pocket expenses, purpose of the expense, and reimbursement of such expense (if applicable).

(Tr. 19; Jt. Exh. 1(J)). Subsequently, Sigelakis and Bardavid had several phone calls and email exchanges regarding the Union's information request. (Tr. 22; Jt. Exh. 1(K, L)). In these conversations and email exchanges, Bardavid gave only blanket responses, testifying that he told Sigelakis that the document request was "overbroad, vague, and ambiguous, unduly burdensome, and irrelevant." (Jt. Exh. 1(K) (stating only that "the amount of materials requested is still overbroad" without any additional explanation or request for accommodation); Jt. Exh. 1(L) ("the request you made at the last minute besides being over broad and irrelevant is very burdensome")). Bardavid did not specify how the request was overbroad, nor did he explain the burden the document production would cause Respondent. (Id.). He also did not provide specific responses to each item in the request or offer any compromise. (Id.; Tr. 46). In these conversations, as credited

by the ALJ, Sigelakis agreed to limit the information request for the purposes of the upcoming arbitration only, but never agreed to limit the overall request based on the Union's other needs for the information. (ALJD 6:50-7:3; Tr. 22).

In a May 2, 2016 email to Scott Trivella, another attorney for Respondent, Sigelakis added more specificity to the Union's request by listing the specific types of documents that would be responsive. (Jt. Exh. 1(M)). After learning from some of the unit employees the names of certain other documents that Respondent uses to keep track of work in the field, Sigelakis then sent another e-mail to Trivella on June 7, 2016, requesting those documents and renewing her request for the unprovided information. (Tr. 23; Jt. Exh. 1(N)). Even after this email, Respondent failed to furnish the Union with any documents. (Tr. 24).

Instead, on June 7, 2016, Trivella sent a response to Ms. Sigelakis, setting forth for the first time Respondent's basis for refusing to produce any of the requested documents. (Jt. Exh. 1(O)). With respect to an asserted burden on Respondent, Trivella stated, "the request as drafted would require the production of tens of thousands of pages of documents." (Id.). With respect to the time span of the document request, he said that there is no basis in the contract for the Union's request to go back to 2009 because the time limitation for the Union to file a grievance is only 10 days. (Id.). Finally, he argued that the Union's information request regarding all of the employees in the unit was over broad because the grievances named specific employees, which completely ignores the class-action grievance. (Id.). Trivella did not offer a proposed compromise or suggest an alternative to the scope of the information request.

d. The June 10 Conference Call with the Arbitrator

In addition to needing the requested information for the Union's general duties as the collective bargaining representative of the bargaining unit employees, the Union also needed the

information specifically to prepare for the arbitration.³ To assist in preparing for the arbitration, Sigelakis requested a conference call with Arbitrator Gene Coughlin to discuss Respondent producing documents for that purpose. (Tr. 38, Jt. Exh. 1(P)). Sigelakis testified that the Union never requested that the Arbitrator make a ruling on Respondent's statutory obligation with respect to the overall information request, but sought to have the Arbitrator order Respondent to produce certain documents for the arbitration. (Tr. 57). In fact, there is no part of the collective bargaining agreement that governs production of information that the Arbitrator could have been asked to interpret. (Tr.57; Jt. Exh. 1(C)).

On June 10, Arbitrator Coughlin had a conference call with Sigelakis, Bardavid, and Trivella. (Tr. 38). The Arbitrator did not issue a written decision regarding the production of documents for the purposes of arbitration and both parties came away from the call with different understandings of what the Arbitrator ordered. As evidenced by Sigelakis's testimony and the exchange of correspondence between the Union and Respondent, the Union understood the Arbitrator to have ordered that Respondent to produce documents relating to any individual specifically named in the grievances or who would be testifying at the arbitration from the 90-day time period prior to the date of the grievance naming the individual. (Tr. 58; Jt. Exh. 1(T)). Respondent purportedly understood the Arbitrator to order the production of documents only for employees who were specifically named as grievants, for a period of 90 days prior to the conference call, and not in relation to the filing of the grievances. (Tr. 53-54; Jt. Exh. 1(W)). As credited by the ALJ, Sigelakis testified that at no point during this call, nor at any point since the

³ This arbitration was based on the grievances that the Union's Inspector General filed regarding Respondent's failure to pay unit employees the contractual wage rate when being assigned to do outside work. Because the arbitration is separate and apart from the issue of Respondent's statutory obligation to produce information in response to the Union's information request, Counsel for the General Counsel will not address that proceeding in any great detail.

original April 8 request for information, did the Union ever waive its right to or rescind its position that it was entitled to all of the information in its original request. (Tr. 25).

Also during the June 10 call with the Arbitrator, Trivella claimed that Respondent was not familiar with certain specifically entitled documents that the Union had requested. (Tr. 24). After the call, in an effort to address Trivella's claim and clarify the matter, Sigelakis sent Trivella an e-mail with redacted samples of Respondent's official work documents corresponding to certain documents specified in the Union's request to establish that such documents did exist. (Id.; Jt. Exh. 1(R)). Sigelakis received these sample documents from unit members. (Tr. 24-25).

e. Respondent Produces Limited Information to the Union On About October 13 and February 16

The next arbitration session occurred on about October 13, 2016. Prior to this session, on about October 6, the Union served on Respondent a subpoena to compel Respondent to produce certain documents for the arbitration. (Tr. 25). At that session, after producing a stack of unresponsive documents, Trivella gave Sigelakis charge orders and field reports for two employees, Carlos Alvarez and Juan Oyola Oquendo, from June through August of 2015, and January through April of 2016, respectively. (Tr. 26; Jt. Exh. 1(X)). These documents were partially responsive to paragraph three in the April 8 information request. Respondent did not provide any other documents at that time.

Sigelakis testified that she requested that Respondent turn over the remainder of the documents responsive to the request. Respondent failed to produce any additional documents until February 16, 2017, the week prior to the trial in this case, through discussions with Counsel for the General Counsel. (Tr. 27). These documents included three months of check view information and time card reports for three employees, Carlos Alvarez, Juan Oyola Oquendo, and Junior Reyes. (Jt. Exh. 1(Y)). These documents were partially responsive to paragraphs one and two of the April 8

information request. (Tr. 27). It is undisputed that this was the first time that Respondent provided the Union with these documents and that there were outstanding documents that Respondent had not produced by that time.

f. As of February 16, Respondent Had Not Produced Many of the Documents Responsive to Paragraphs 1-3 or Anything in Response to Paragraphs 4 and 5

As of the February 23 hearing, Respondent continued to withhold production of most of the documents sought in the Union's requests for information and failed to give any valid explanation for their non-production. (Tr. 28-30). The missing documents include:

- Paragraph 1 – the rest of the payroll documents for employees Alvarez, Oyola and Reyes going back to 2009, as well as all payroll documentation for the remaining the bargaining unit members;
- Paragraph 2 – additional time card information for employees Alvarez, Oyola and Reyes going back to 2009, as well as all time clock records or punch card information for everyone else in the bargaining unit;
- Paragraph 3 – the remainder of the charge orders and field reports for employees Alvarez and Oyola going back to 2009, as well as the daily reports, charge orders, field work forms, field labor expense reimbursement reports and other records of outside work assignments for all other unit members;
- Paragraph 4 – any records of bargaining unit employees who used company vehicles since 2009; and
- Paragraph 5 – any records of any bargaining unit members with expense reports or reimbursement for out of pocket expenses. (Id.).

III. ARGUMENT

Based on a thorough and detailed analysis of the factual record and the relevant law, it is clear that the ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act when it failed to produce certain requested information to the Union and unlawfully delayed in producing other requested information to the Union. The record evidence and applicable Board law fully supports ALJ Gardner's findings of fact and conclusions of law. Accordingly, Counsel for the General Counsel respectfully requests that Respondent's exceptions to the ALJ's Decision be denied and that the Board affirm the ALJ's recommended Order.

a. The ALJ Correctly Found that the Requested Information was Presumptively Relevant and Respondent had a Statutory Duty to Produce the Information to the Union

In its Exceptions and Brief, Respondent argues that Judge Gardner erred in finding that the information requested by the Union was presumptively relevant. (Resp. Br. 6). Respondent bases this argument on two premises: 1) that the requests made by the Union were not limited to bargaining unit employees, and 2) that the information was not relevant to any issues other than those raised in the pending arbitration. The evidence establishes that Respondent is wrong on both counts. Therefore, Respondent's argument that the information is not presumptively relevant fails.

1. The ALJ Correctly Found that the Information Requests were Limited to Bargaining Unit Employees

Initially, Respondent erroneously contends that the Union's request for information was not limited to bargaining unit employees. In furtherance of its argument, Respondent misrepresents the evidence, stating that the Union sought information related to "all employees performing work for LIF." (Resp. Br. 6). Exposing that Respondent is well aware that the requests were limited to bargaining unit employees, Respondent intentionally omitted the remainder of the written request from its brief, which actually reads "all employees performing work for LIF *in the District*

Council's jurisdiction.” (Jt. Exh. 1(J), emphasis added). Sigelakis confirmed that these requests are for information related to unit employees, testifying that the documents related to “bargaining unit employees. When I say bargaining unit employees I mean employees working for Respondent in the Union’s jurisdiction.” (Tr. 20). The ALJ credited Sigelakis’s testimony in this regard, as he specifically found that the requests were for presumptively relevant information. (ALJD 6).

Assuming that Respondent did not understand which employees were referred to in the request, it is not privileged to refuse to comply with the request. Rather, it is well-settled Board law that Respondent must request clarification and comply to the extent that the request encompasses necessary and relevant information. See *DIRECTV U.S. DIRECTV Holdings LLC*, 361 NLRB No. 124 (2014) (assertion that a request applied to non-unit employees as well as unit employees does not excuse respondent’s failure to comply with the request to the extent that it could be construed to pertain to unit employees); *Streicher Mobile Fueling, Inc.*, 340 NLRB 994, 995 (2003), *enfd.* 138 Fed. Appx. 128 (11th Cir. 2005) (failure to limit request to bargaining unit information did not excuse the employer’s noncompliance with the request as to unit employees.). Respondent did not claim at trial, nor in its Exceptions and Brief, that it did not understand that the phrase “in the jurisdiction of the District Council” to mean the bargaining unit, nor did Respondent claim that it requested any clarification of the issue. Rather, Respondent completely ignores the fact that the information request clearly includes information about bargaining unit members.

As the ALJ correctly noted, in addition to the requests being made for information about bargaining unit members, the requested information related to those bargaining unit employees’ terms and conditions of employment and is therefore presumptively relevant. Board law is clear that presumptively relevant information includes “wages, hours, and other terms and conditions of employment, such as pension and medical benefits, of bargaining unit employees represented by a

union.” *International Protective Services, Inc.*, 339 NLRB 701, 704 (2003). *See also Whitesell Corp.*, 355 NLRB 635 (2010), *enfd.* 638 F.3d 883 (8th Cir. 2011) (information about merit pay, vacation, and work assignments for unit employees is presumptively relevant). Presumptively relevant information must be provided when requested and requires no further showing of relevancy by the union. *Boston Herald-Traveler Corp.*, 110 NLRB 2097 (1954), *enfd.* 223 F.2d 58 (1st Cir.1955).

After presumptively relevant information has been requested, the burden is on the non-requester to either rebut the presumption of relevance or establish another defense to the requirement to produce the information. *Contract Carriers Corp.*, 339 NLRB 851, 858 (2003), *citing San Diego Newspaper Guild*, 548 F.2d 863 (9th Cir. 1977). This duty includes timely informing the requesting party if the requested information does not exist. *Endo Painting Service, Inc.*, 360 NLRB No. 61, slip op. at *2 (2014).

Respondent’s inaccurate interpretation of the evidence resulting in a belief that the Union’s information request sought information regarding *all* of Respondent’s employees leads it to an equally erroneous legal conclusion in Respondent’s Brief; namely that Counsel for the General Counsel has a burden to establish that the evidence is relevant before Respondent has a duty to respond. (Resp. Br. 6-7). However, the ALJ correctly found, the information requested by the Union was presumptively relevant because it was concerning terms and conditions of employment for the bargaining unit employees. Therefore, the Union needed to make no additional showing to establish relevancy. (ALJD 6:32-34).

2. The ALJ Correctly Found that the Purpose of the Information Requests was Not Limited to the Arbitration

In furtherance of its misplaced idea that the Union or Counsel for the General Counsel must make some showing of relevancy for the information requested, Respondent argues that relevancy

cannot be established because the Union's only purpose in requesting the information is for processing grievances. (Resp. Br. 7). Respondent goes on to conflate the time limits for filing grievances with the analysis of what constitutes relevant information, erroneously arguing that because there is a ten-day time period in the CBA for filing grievances, any information beyond that time limitation cannot be relevant. However, Sigelakis testified, and the ALJ found credible, that the information requests may have been prompted by the pending arbitration but were not solely limited to the evidentiary needs of the arbitration. (ALJD 6:40-41; Tr. 34, 44 (Sigelakis testifying, "Q. Were these grievances the only reason that you made your Information request? A. No, as I testified the grievances were that flags be issued [sic] for me that there was a need for this information to see what's going on in the field with the Shop Employees. But that was not the only reason."))).

Respondent incorrectly claims that because Sigelakis testified that all of the information requested was relevant to the grievances filed, therefore the information could only have relevance to those grievances and nothing else. Respondent's argument was expressly rejected by the ALJ when he said that it "is simply not true" that "the Union was only entitled to information for purposes of pursuing its pending arbitration." (ALJD 6:38-40).

Board law clearly establishes that the Board takes a broad, discovery-type standard when determining whether information is relevant to a union's role as exclusive collective bargaining representative of a bargaining unit. "The union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter." *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976). Further, necessity is not a guideline itself but, rather, is directly related to relevancy, and only the

probability that the requested information will be of use to the labor organization need be established. *Bacardi Corp.*, 296 NLRB 1220, 1223 (1989).

The Union made its request for information pursuant to its role as the exclusive collective bargaining representative of the bargaining unit. This includes the Union's duty to police the collective bargaining agreement, for example to ascertain and monitor what work Respondent is assigning to the bargaining unit employees and to monitor the wage rates the employees receive for that work, as well as processing the grievances about Respondent's failure to pay unit members the contractual wage rate. (Tr. 19, 34, 44). The information is also relevant to the Union for bargaining about issues such as a mechanism for identifying when its members are entitled to higher compensation for performing outside work in a successor collective bargaining agreement. The evidence adduced at trial clearly established that the requested information was relevant to the Union's broad role as employees' collective bargaining representative.

Respondent's grievance time limit argument fails because the requested information was not solely relevant to those grievances, but also as a matter of law. While Respondent attempts to conflate a creature of contract (grievance-filing time limits) with its statutory mandate (its obligation to produce relevant requested information to the Union), Board law is clear that the fact that any grievances may be time-barred under the parties' collective bargaining agreement does not excuse Respondent's non-production of the information. The Board will not consider the merits of a potential grievance or arbitration in evaluating a union's request for information. *See Endo Painting Serv., Inc.*, 360 NLRB No. 61 (2014) (employer required to provide information requested related to a class action grievance regardless of whether the CBA permitted class action grievances); *Southeastern Brush Co.*, 306 NLRB 884, 884 fn. 1 (1992) (rejecting employer's

argument that it did not have to comply with a union's information request where the underlying grievances were allegedly procedurally defective).

The ALJ correctly determined that the information requested by the Union was relevant and necessary to enable the Union to carry out its statutory obligation as the bargaining unit's exclusive bargaining representative because the information related to the terms and conditions of employment for the bargaining unit employees. Accordingly, the ALJ correctly concluded that Respondent has a statutory obligation pursuant to Section 8(a)(5) of the Act to provide that information to the Union. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *International Protective Services, Inc.*, 339 NLRB 701, 704 (2003). Thus, the ALJ correctly found that by refusing to furnish the requested information, Respondent violated Section 8(a)(5) of the Act. Respondent's Exceptions to the ALJ's finding that the information sought by the Union is presumptively relevant should be dismissed and the Board should find that Respondent had a duty to provide the requested information under Section 8(a)(5) of the Act.

b. The ALJ Correctly Determined that Deferral to the Arbitrator was not Appropriate

Respondent next takes exception to the ALJ's failure to defer to Arbitrator Coughlin's ruling to limit the scope of the information request. Respondent disagrees with the legal framework that the ALJ utilizes and instead argues that deferral is appropriate because of Respondent's view of the facts. Doubling down on its erroneous claim that the requested information is solely relevant to the pending arbitration, Respondent argues that it complied with the Arbitrator's Order⁴ and therefore anything that was not produced cannot possibly be relevant because it could not be used

⁴ There is a dispute between the Union and Respondent about the specific parameters of the Arbitrator's Order. (See discussion of the positions in Section II.d of this Brief, on page 6). However, the ALJ did not credit one version over the other or even discuss the specifics of the Order in his Decision because it is irrelevant to the determination of whether Respondent violated its statutory duty with respect to the request for information.

at the arbitration. (Resp. Br. 9). Respondent further advances the erroneous argument that it was exempt from producing the information because the Union was engaged in prohibited pre-trial discovery.

1. The ALJ Correctly Rejected Respondent's Claim that the Information's Sole Relevancy was for the Arbitration

As explained above, Respondent's argument for deferral is based on a flawed premise - that the Union had no other use for the requested information than at arbitration. Because the requested information was not solely for the arbitration, the case cited by Respondent, *Westinghouse Electric Corp.*, 304 NLRB 703 (1991), is inapposite. In *Westinghouse*, the union requested certain information about both unit and non-unit employees "in order for the union to prepare its case and process the [specific employee's] grievance." 304 NLRB at 704. Union representatives also testified at trial that the requested information was for processing the grievance. *Id.* at 706. In finding that the respondent violated Section 8(a)(5) by not producing the information about the non-unit employees, the ALJ, as affirmed by the Board, did not order the respondent to produce the information since the arbitration for the grievance had been completed and the Union had no other reason for that information. *Id.* at 709. Since the information requested by the Union here is relevant for reasons unrelated to the grievances and to enable the Union to fulfill its duty as the unit employees' collective bargaining representative and police the contract, as established above and as found by the ALJ, *Westinghouse* does not excuse Respondent from its duty to produce the information to the Union.

Unlike Respondent's flawed argument, the ALJ analyzed the question of deferral according to established Board law. It is well-established that the Board does not normally defer information request cases to arbitrators. *United Technologies Corp.*, 274 NLRB 504 (1985); *United States Postal Service*, 302 NLRB 918 (1991). This long-standing policy not to defer information requests

exists, in part, to aid arbitration and avoid “a two-tiered arbitration process [that] would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration. *General Dynamics Corp.*, 268 NLRB 1432, 1432 fn. 2 (1984). This policy applies whether the request is prior to arbitration or determining whether to seek enforcement of an arbitration award. *Shaw’s Supermarkets, Inc.*, 339 NLRB 871 (2003). *See also Ardsley Bus Corp.*, 357 NLRB 1009, 1015 (2011).

As noted by the ALJ, the only exception to the Board’s policy of non-deferral of information request allegations is when there are specific contract clauses agreed to by the parties concerning the production of information. *See Loral Electronic Systems*, 253 NLRB 851, 854 (1980) (following Board policy to refuse to defer the request for information “unless the collective-bargaining agreement between the parties provides that the employer need not furnish such information); *St. Joseph’s Hospital*, 233 NLRB 1116, 1119 (1977) (finding deferral inappropriate because “the contract’s terms do not authorize the action taken by the [employer], i.e., the withholding of information relevant to an issue to be arbitrated.”). It is undisputed that the parties’ collective bargaining agreement does not contain any language regarding the production of information, and the parties did not agree to put the issue of Respondent’s statutory duty before the Arbitrator. (Tr. 57; Jt. Exh. 1(C)). Since the exception to the Board’s non-deferral policy is not present here, the ALJ correctly determined that deferral is inappropriate.

2. The ALJ Correctly Rejected Respondent’s Claim that the Union’s Information Request Constituted Impermissible Pre-Trial Discovery

Respondent makes another flawed attempt to avoid its statutory obligation of producing the information to the Union by appealing to the arbitration and claiming that the Union is seeking impermissible pretrial discovery. However, this argument is specious as the Union did not make a request for impermissible pretrial discovery. There is a difference between information related to

the issues involved in the arbitration and actual pretrial discovery. As the Judge said in *Oncor Elec. Delivery Co.*, “at the prearbitration stage, a party can request substantive information pertaining to the issues but not information about the other parties’ planned presentation of its case before the arbitrator.” 364 NLRB No. 58, slip. op. at 21 (2016). Moreover, the Board has repeatedly held that the duty to provide information includes materials requested to prepare for arbitration. See *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1353 (2010) (“an employer's duty to furnish information relevant to the processing of a grievance does not terminate when the grievance is taken to arbitration”); *Fleming Cos.*, 332 NLRB 1086, 1094 (2000) (“Employer must furnish information that is necessary to property prepare for arbitration as long as the information is relevant to the grievance scheduled for arbitration.”); *Washington Gas Light Co.*, 273 NLRB 116 (1984) (Employer must provide information requested by the Union about a week prior to the arbitration because it was relevant to the grievance being heard at that arbitration).

Here, the Union was requesting substantive information that pertained, in part, to the issue being arbitrated before the Arbitrator, but the Union did not request any information of the nature that could be considered impermissible pretrial discovery, such as witness lists. Cf. *California Nurses Assn.* 326 NLRB 1362, 1367 (1998) (holding that a party is not required to produce the evidence on which it intends to rely or names of witnesses it intends to call at an upcoming arbitration hearing in response to an information request.) Therefore, Respondent cannot defend its failure to produce the relevant information by appealing to the concept of impermissible pretrial discovery.

Since the record clearly establishes that the Union did not solely request the information to be utilized at the arbitration, and the exception to the Board’s non-deferral policy is not met, and

Respondent unsuccessfully claimed that the Union impermissibly used its information request to seek pre-trial discovery, Respondent's argument for deferral to the arbitrator fails. The Board is urged to affirm the ALJ's conclusion that deferral is inappropriate in this case and does not excuse Respondent's failure to produce the requested information to the Union.

c. Respondent's Arguments Against the ALJ's Finding that it Failed and Refused to Furnish the Information Fail

Respondent takes exception to the ALJ's finding that it failed and refused to furnish the information to the Union citing the arguments already discussed above. Respondent states that it cannot be held to have violated Section 8(a)(5) of the Act if "it established a valid reason why it did not timely furnish the information." (Resp. Br. 11, quoting *Detroit Newspaper Agency*, 317 NLRB 1071 (1995)). Respondent asserts two additional arguments in this section of its Brief in an attempt to establish a valid reason for non-production. First, Respondent contends that its *belief* that the Union was requesting pretrial discovery justifies its refusal to produce said information. However, the standard for what constitutes pretrial discovery is not a subjective one. As discussed above, the Union was not actually requesting pretrial discovery, so this argument fails. Second, and as discussed below, Respondent argues that it attempted to reach an accommodation with the Union. The evidence establishes that this argument also fails.

1. Respondent's Unsupported Claim of a Proffered Accommodation Must Fail

Respondent argues that it attempted to reach a mutually acceptable accommodation to the Union's information request during the discovery process for the arbitration. While proposing an accommodation is a consideration the Board looks at when determining whether an employer has met its statutory duty after asserting a defense to production, the inquiry is not relevant here. See *Gruma Corp.*, 345 NLRB 788, 789 (2005) ("the onus is on the employer to show that production

of the data would be unduly burdensome, and to offer to cooperate with the union in reaching a mutually acceptable accommodation”); *Pratt & Lambert, Inc.*, 319 NLRB 529, 534 (1995) (“the burden in time and money necessary to fulfill a request for information is not a basis for refusing the request... the parties must bargain in good faith as to who shall bear such costs”). Because the information requested by the Union is presumptively relevant, the idea of accommodation does not come into play without some other asserted defense such as burdensomeness.

Even though not relevant in the analysis, Respondent, tellingly, utterly fails to substantiate its claim that it offered accommodations to the Union’s information request. In that regard, Respondent fails to identify any facts in its Brief or in the record that demonstrate that it actually attempted to reach a mutually acceptable accommodation with the Union. Quite to the contrary, in its April 12 response to the Union, Respondent wrote only that the request was “over-broad” and that it “simply cannot compile the information within the requested time period.” (Jt. Exh. 1(K)). Respondent provided no explanation as to why it could not comply within the requested time frame. Moreover, Respondent did not propose to the Union any other time frame in which it could comply with the request. In the April 14 response to the Union’s renewed request, Respondent stated – without substantiation – that the request was “over broad and irrelevant [and] is very burdensome.” Such vague, unsubstantiated claims do not satisfy Respondent’s burden to respond to requests for presumptively relevant information, nor do they rise to the level of valid attempts to reach a mutual accommodation.

Respondent’s June 7 objection to the information request was slightly more specific, stating that the request would require production of “tens of thousands of pages of documents.” (Jt. Exh. 1(O)). However, Respondent failed to make any showing of how it would be burdensome to produce that many documents, even assuming its estimate were accurate, or that such production

would at all meaningfully disrupt its normal business operations. *See e.g., NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996) (to establish a defense that a request is overly burdensome, a party must show that the production of the subpoenaed information “would seriously disrupt its normal business operations.”); *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 114 (5th Cir. 1982) (“the mere fact that a subpoena will require the production of a large number of documents is insufficient to establish that it is unduly burdensome.”). Further establishing that Respondent’s claim that it offered accommodations is false, it is plain from Respondent’s April 12 to June 7 replies to the Union that it made no proposal to limit the production that may be mutually agreeable.

Furthermore, at no time did Respondent offer to bargain with the Union about the scope of the request. At no time did Respondent offer a compromise, such as producing two years of responsive documents if the Union was willing to limit the request. Instead, the Union’s request was met with Respondent’s blanket rejection and refusal, which itself demonstrated the absence of good faith in attempting to resolve the issue with the Union. Had Respondent possessed a legitimate production-related concern and a good faith desire to comply with its bargaining obligation, it would have sought accommodation bargaining.

The ALJ correctly found that Respondent has failed to establish that it had any valid reasons for not timely furnishing the information to the Union, so the Board should reject Respondent’s exceptions and enforce the ALJ’s recommended Order requiring Respondent to produce the information to the Union.

d. The ALJ Correctly Found that Respondent Unreasonably Delayed in Providing the Limited Information to the Union

Respondent also excepts to the ALJ’s finding that Respondent unreasonably delayed in furnishing the information that it belatedly produced to the Union. This argument is based on the

already discredited premises that the information was not presumptively relevant and that the Board should defer to the arbitrator's ruling. Respondent does not address the case law governing unlawful delays. However, the ALJ correctly applied Board law that establishes that an unreasonable delay in furnishing relevant information is an independent violation of Section 8(a)(5). *See e.g., Valley Inventory Service, Inc.*, 295 NLRB 1163, 1166 (1989) (finding a 4-month delay in production unlawful, stating “[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all.”). Respondent's first limited production came about 6 months after the initial request by the Union. Respondent's second production was about 10 months after the Union's initial request. These extended periods of delay clearly fall within the Board's definition of an unlawful, unreasonable delay. *See Postal Service*, 332 NLRB 635, 638 (2000) (a delay of “several months” in producing requested relevant information is unlawful); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7-week delay unreasonable).

As found by the ALJ, Respondent's delay is clearly unreasonable pursuant to Board law, and Respondent violated its duty to bargain in good faith when taking so long to furnish the Union with the documents. The Board is urged to dismiss Respondent's exceptions and affirm the ALJ's fining of a violation of Section 8(a)(5).

IV. CONCLUSION

For the reasons cited above, Counsel for the General Counsel respectfully requests that the Board reject and dismiss each of Respondent's Exceptions. Counsel for the General Counsel further urges that the Board adopt each and every one of the ALJ's Findings of Fact, Conclusions of Law, and his Remedy and Order.

Dated at Brooklyn, New York, this 31st day of July, 2017.

Respectfully submitted,



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