

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

AT&T SERVICES, INC.

and

COMMUNICATION WORKERS OF
AMERICA, AFL-CIO, CLC, DISTRICT 4

Case No. 13-CA-185708

INITIAL BRIEF OF RESPONDENT AT&T SERVICES, INC.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Communications Workers of America, AFL-CIO, CLC, DISTRICT 4 (the “Union”) filed an unfair labor practice charge (the “Charge”) against AT&T Services, Inc. (the “Employer” or “Respondent”) on October 6, 2016, in Region 13 of the National Labor Relations Board (the “Region” or “General Counsel”) alleging that the Employer had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“NLRA”). The Charge alleged that the Employer refused to provide information to the Union in a timely manner, had provided inaccurate information to the union in response to a request for information, and refused to provide the Union with employee names and test results. The Region issued a Complaint on February 22, 2017. The Parties forewent a hearing before an Administrative Law Judge and, instead, filed directly with the Board a Joint Motion to Submit Stipulated Record to the Board and Joint Stipulation of Facts on June 16, 2017.

The Employer has not violated Section 8(a)(5) or (1) of the Act because it has demonstrated a legitimate and substantial confidentiality interest in the test data the Union has requested, which outweighs the Union’s need for the information. Furthermore, the Employer has offered to bargain in good faith with the Union to determine if there was an accommodation that would provide the Union with the information it needs, but still protect the integrity of its employee tests, which the Employer developed at substantial cost. The Union did not negotiate over the Employer’s stated confidentiality concerns but, instead, disputed the Employer’s claimed confidentiality interest. The Employer has continuously expressed its willingness to negotiate such an accommodation, and continues to be willing to do so. Because the Employer’s confidentiality interest is legitimate and substantial, the

Employer has fulfilled its obligations under the Act and the Complaint should be dismissed.

Here, the Employer has demonstrated that it has a legitimate and substantial confidentiality interest in protecting the integrity of its tests, which includes the confidential test-taker data that the Union has requested. The Employer devoted substantial resources to the tests' development so that it would have a reliable method of assessing an employee's personality and aptitude for open positions. The integrity and validity of the tests depend on test-takers not having access to the questions in advance. Thus, keeping test data confidential is of the utmost importance to the Employer. This is why the Employer takes extensive measures to protect the confidentiality of its tests – particularly in light of the compromise of a similar related test by one of the Union's local affiliates.

The evidence clearly demonstrates that the Employer's confidentiality interest is justified and, moreover, outweighs any interest the Union may have in the test data. Indeed, the Union's purported justification for needing this sensitive test data is directly refuted by record evidence, while the Employer's interests in protecting the tests' confidentiality is well established. Thus, any interest the Union purportedly has in obtaining the information sought in its request for information is vastly outweighed by the Employer's substantial investment in the tests and its need to have a valid means of measuring employee aptitude.

The Employer offered an accommodation designed to give the Union assurance of the validity of its statistics without compromising its confidentiality interests. The Union failed to negotiate over an accommodation, on grounds that it disputed the

Employer's confidentiality interest. Thus, it is the Union that has refused to bargain in good faith in this instance.

Both the Supreme Court and the Board have found, in factually similar cases, that an employer has a legitimate and substantial confidentiality interest in proprietary tests such as the one at issue in this case, and that the employer's confidentiality interest outweighed the union's need for the information. These cases are applicable, and require that the Board dismiss the Complaint based on the Union's failure and refusal to bargain in good faith toward an accommodation that would protect the Employer's legitimate interest in confidentiality while still accommodating the Union's stated need for information.

By contrast, the authority relied upon by the Union and General Counsel is inapposite. Specifically, *U.S. Postal Service, 359 NLRB 1052 (2013)*, although similar insofar as it involved a union's request for test scores and an employer's assertion of confidentiality, turns on a completely different argument than the one presented by the Employer in this case. Specifically, in *U.S. Postal Service*, the employer's refusal to provide the union with employees' test scores was based on its assertion of confidentiality on behalf of test-taker employees. By contrast, the Employer in this case withheld test scores attributable to specific individuals in order to prevent the compromise of its test, which it invested significant sums in developing. Further, the employer in *U.S. Postal Service* was deemed to have failed to comply with its statutory duty to furnish information because it ***could have furnished the union with anonymous data***. In this case, the Employer offered to and did just that as a proposed accommodation. In response, the Union refused the Employer's offer and, rather than

proposing an alternative accommodation, ceased negotiating and filed the underlying charge.

The Employer has devoted substantial resources into developing the tests at issue, and protecting the secrecy of the tests is critical to their ongoing validity and integrity. Accordingly, the Employer has demonstrated that it has a legitimate and substantial confidentiality interest in the information the Union is seeking, and the Employer's confidentiality interest outweighs the Union's need for the information. As the Union does not claim that the Employer has failed to seek an accommodation -- indeed, in light of the fact that the Employer repeatedly sought just such an accommodation -- a violation of neither Section 8(a)(5) nor Section 8(a)(1) has been established, and the Complaint should be dismissed.

II. STATEMENT OF FACTS

A. Background

The Employer is a Delaware corporation engaged in the retail sale of home internet devices and related products, including in the Chicago, Illinois area. (Stip. ¶ 5). For many years, the Union has been the exclusive collective bargaining representative for bargaining unit employees who work in the Employer's telephone operations in the "Midwest" region of Indiana, Michigan, Ohio, Wisconsin, and Illinois. (Id. ¶ 10).

The current collective bargaining agreement, effective April 12, 2015 through April 14, 2018 (the "CBA") covers a bargaining unit of approximately 20,000 employees who work in various job titles and business units throughout the Midwest region. (Id.; see also Exhibit 5). Appendix A19 of the CBA addresses the use of the Employer's Technical Mechanical Knowledge Test, also referred to as the "TMT," as a requirement for newly hired employees and job transfers, and as the basis for employees' eligibility

for coverage under Memoranda of Agreement – Employee Security Commitment (“ESC”) and Extended Employment Opportunity Period – between the Union and the Employer. (See Ex. 5, pp. 141, 146, MOA A19, and MOA A20). These memoranda provide layoff protection to employees who pass certain tests and who are not otherwise disqualified from layoff protections due to performance or attendance issues. If a layoff is imminent, and an employee passes the test and is otherwise qualified, the Employer maintains their employment. Employees who fail the test or are otherwise unqualified for layoff protection can be denied continued employment. (Stip. ¶ 12).

B. Earlier Versions of the Employer’s Tests, One of Which was Compromised by One of the Union’s Local Affiliates.

The Employer previously administered tests called the Technical Knowledge Test (“TKT”), Technical Mechanical Test (“TMT”) and their successors, the Technical Mechanical Knowledge Test – Field (“TMTF”), TMT II and TMTF II tests. These tests were administered by the Employer in a proctored environment and could only be taken using pencil and paper. The Employer took efforts to secure the secrecy of these tests.

At least one prior test of this nature was compromised in 2005, requiring the Employer to discontinue its use and implement a new version of the test. The Employer reached this conclusion when a member of its HR Research Department was provided with a document that was substantially similar to the TKT, and was told by the Employer’s Labor Relations representative that it had been confiscated from a represented employee taking the test. The HR Research Department member was also told by Labor Relations that the employee from whom the test was confiscated told the test proctor that he had received the document “from the union.”

After conducting an analysis of the confiscated document, which was titled "Prep Test" against the version of the TKT then in use, the evidence suggested to the employer that someone (apparently the local Union affiliate according to the employee from whom the document was confiscated) had recreated the test using pieces and parts gleaned, sometimes imperfectly, from test-takers' memories. Specifically, 68.7% of the Prep Test questions were an exact match to questions found on the TKT. 9.6% of the Prep Test questions were not fully identical to questions on the TKT, but had identical question stems. 4.8% of the Prep Test questions were not fully identical to items on the TKT, but were substantially similar. Thus, up to 86.8% of the total questions on the TKT had apparently been compromised. The very fact that the apparent compromise was not 100% apparently indicated that a copy of the test had not been acquired but, instead, it had been recreated from partial knowledge of its components through conversation with test-takers. (See Ex. 6)

The Employer concluded a local Union affiliate had compromised the test. As a result, the Employer was forced to implement another version of the test in the Midwest region. (See Ex. 6, 7). By letter dated August 12, 2005, one of the Union's local affiliates actually contacted the Employer's Chairperson to complain of the effect suspending the prior version of the TKT had had on his members. (Stip. ¶ 14, Ex. 6, 7).

Since that time, to the Employer's knowledge and apart from the information requests at issue in this case, the Union has not otherwise requested names, work location, current title, Net Credited Service (NCS) for all employees taking the TKT or TMT test or their successor tests. (Stip. ¶ 15).

Before August 2015, the Employer administered the TMT, TMTF, TMT II, and TMTF II tests by pencil and paper in a proctored environment. Test materials were marked as “Restricted Proprietary Information.” They were restricted from release to internal or external parties. Test materials were kept locked up when not in use, and test-takers’ identities were verified before testing. Test-takers were observed throughout testing and were required to put away personal belongings while testing. Test materials were accounted for before test-takers were dismissed, and an inventory was kept of all test materials. Test materials were securely shipped when sent to a remote site, and protocols were in place for properly destroying used test materials and reporting any lost or missing tests. (Stip. ¶ 16).

C. The TMT III and TMTF III Tests Are Introduced in 2015.

Beginning in 2015 the Employer determined, to keep up with industry standards and attract the necessary pool of qualified job candidates, that it would be necessary to administer the tests over the Internet rather than in a physical location. Thus, the protections in place for paper and pencil tests became obsolete.

The new tests are un-proctored, computerized adaptive tests and, as a result, are protected by different means than the previous paper and pencil tests. Access to the new tests requires use of employee test-takers’ first name, last name, and company email-address. External candidate test-takers’ access to the test is password protected. (Stip. ¶ 19).

The new tests do not test job knowledge, but instead test an individual’s general mechanical aptitude, personality, and overall job fit. As such, it is not a test for which employees are encouraged to “study.” Rather, its purpose is to assess employees’ personality and aptitude. (Stip. ¶ 20).

The current versions, the TMT III and TMTF III were created by Respondent at great expense (well in excess of \$150,000 each when employee labor costs are added to contractor fees and expenses). The new tests are owned by the Employer's vendor, Aon/Hewitt. (Stip. ¶ 21).

Access to the copyrighted TMT III test requires users to agree that they will not copy, post, record, videotape, distribute, upload, modify, or otherwise reproduce any portion of the test for any purpose without written consent. By the same agreement, employees must acknowledge that Aon Corporation owns all copyrights and other rights in the test. (Ex. 10). Employees also acknowledge that Aon Corporation may use their testing data for research purposes, but that such data will first have identifying information removed. (Id.). Employer policy also prohibits the unlicensed use or copying of copyrighted information, and violation of that policy can result in discipline up to and including dismissal. (Ex. 11).

Employees are not informed that the test results are confidential and the Employer has provided the employees no assertions that test results will be kept confidential. However, employee test results are not shared by the Employer as a matter of course, either with the Union or among employees. (Stip. ¶ 23).

D. The Employer Notifies the Union and Responds in Good Faith to Requests for Information

On July 21 and 22, 2015, the Employer's Director of Labor Relations, Steve Hansen, informed Union Representative, Ron Honse, that it planned to implement the TMT III and TMTF III tests in August 2015. The Employer announced the new test would be un-proctored and would be taken online at a location of the employee's own choosing. (See Ex. 8, 9).

On July 23, 2015, Honse sent Hansen information requests concerning the new tests, seeking information regarding: (1) the geographic scope of the new tests' roll-out; (2) the reason for changing the tests; (3) whether test-takers will be notified immediately of their pass/fail; (4) internet browsers on which the test could be accessed; (5) whether the test automatically advanced from one section to the next, or if the test-taker must move it forward; (6) how the Employer determined how long employees would have to answer each question; (7) how many questions must be answered in the third section of the test for the test-taker to have "completed" the test and, thus, become test qualified; (8) how long employees with an existing test record on file would be exempted from the new test; and (9) whether there were any exemptions to the test. (Stip. ¶ 24, Ex. 12).

On July 28, 2015, Hansen supplied Honse with all of the information Honse had requested on July 23, as well as additional information explaining how adaptive testing, the methodology used in the TMT III and TMTF III, works and its effect on test-takers. (Stip. ¶ 24, Ex. 12).

On July 30, 2015, Honse submitted additional requests for the data, including the pass rates for the TMT II, TMTF II, TMT III and TMTF III tests. (Stip. ¶ 25, Ex. 13). Hansen responded to the requests in part on August 7, 2015, supplying information about how and where employees would access the test, how exemptions would work for employees grandfathered into layoff protection under the tests' prior versions, whether the customer service section on the TMT III was new, whether employees in customer service positions could be exempted from the customer service section of the TMT III, and whether the test could be navigated by both a keyboard and a mouse. (Ex.

13). By the same correspondence, Hansen also noted that he would work on a response to Honse's requests for test pass rates. (Stip. ¶ 25, Ex. 13).

On August 19, 2015, Hansen provided a response to Honse's request for information regarding passage rates on the TMT II, TMTF II, TMT III, and TMTF III tests. First, he noted the Employer's longstanding interest in maintaining confidentiality with regard to its aptitude tests, which it considers proprietary due to the significant investment put into their development. Hansen also noted that much of the data requested related to applicants for hire, and not Union members. Accordingly, Hansen maintained that such information was irrelevant to the Union's representation of its members. However, Hansen acknowledged the Union's greater need for information related to the Employer's tests when new versions were implemented. Accordingly, Hansen offered, on a one-time, non-precedent setting basis, to supply the union with pass/fail rates for the prior tests going back to 2014, and for the new tests for four quarters. (Ex. 14). In the body of this email exchange, Hansen supplied the historic pass rates for the TMT II and TMTF II, as requested by the Union. (Id.).

On August 24, 2015, Hansen followed up with Honse to note that the TMT III and TMTF III roll-out would be delayed by approximately one month, from August 3, 2015, until August 31, 2015, so that the Union's questions and information requests could be resolved prior to the new tests' implementation. (Stip. ¶ 28, Ex. 15).

On August 27, 2015, Hansen answered a few final Union questions regarding the new tests, including advising Honse that test-takers are not encouraged to study for the personality (customer service) assessment on the new tests, and those questions are best answered honestly and consistent with the instructions provided on the test. (Stip.

¶ 29, Ex. 16). The TMT III and TMTF III were rolled out at the end of August 2015. (Stip. ¶ 30).

On January 7, 2016, Hansen provided Honse with the requested quarter pass/fail rates, as offered in his August 17, 2015, email to Honse. In communicating the latest pass rate data, Hansen noted that the pass rate for the TMT III and TMTF III were consistent with the earlier tests' pass rates. (Ex. 17).

E. The Union Seeks Information Regarding Specific Test-Takers and Their Results and the Employer Seeks to Negotiate an Accommodation

On April 8, 2016, Honse sent Hansen another information request, this time seeking the names, titles, and work locations for all employees who took the TMT III test in the first quarter of 2016, stating the information was needed “to properly represent [the Union’s] membership. (Stip. ¶ 33, Ex. 18).

This information request was apparently the result of local Union affiliate reports that they believed employees were passing the TMT III at a lower rate than they had the TMT II, resulting in fewer employees receiving layoff protection.

On April 13, 2016, Hansen provided Honse with a substantive response to Honse’s information request. In it, he noted the proprietary nature of the Employer’s aptitude tests, including the TMT III and TMTF III, and explained that providing detailed information requested by Honse would undermine the tests’ confidentiality. As a result, Hansen asked that Honse explain the purpose for which the additional information was sought. (Ex. 19). By the same email, Hansen supplied the pass rates for the first quarter of 2016, per Hansen’s August 19, 2015, offer. (Id.).

On April 14, 2016, Honse replied, indicating that the information requested about test-takers’ identities was relevant “on its face . . . to the Union’s duties, obligations, and

rights under the CBA.” He also stated that the TMT III appeared to be impacting Union members in that employees who fail the test are excluded from layoff protections under the Employee Security Commitment Memorandum. Honse indicated he needed the information so that the Union could assess “whether a grievance may be necessary and, if so, which employees should be included in any such grievance.” (Ex. 20).¹ Honse also stated that the identities of test-takers were needed so that the Union could verify the accuracy of the pass rate figures supplied by the Company. (Stip. ¶ 36, Ex. 20).

On April 20, 2016, Hansen responded to Honse, explaining that the nature of the Union’s request was not under challenge, but that the Company sought to balance the Union’s interests against the Company’s need to maintain confidentiality. Hansen expressed that the Company’s offer to supply pass rates was designed to balance the parties’ competing interests. Hansen asked, given that he was not aware of any basis for questioning the reliability of the pass rates provided, that Honse propose some mechanism for verification that would not undermine the Company’s confidentiality concerns. Hansen also disputed the Union’s statement that the TMT III test had a negative impact on the bargaining unit members, as the TMT III pass rate had been equal to or higher than the TMT II pass rate in the prior year. Finally, Hansen noted that employees who failed the TMT (or its replacement tests) have always been excluded from layoff protection under the Employee Security Commitment. Thus, he concluded,

¹ In the past, on occasion the Union and/or its Local affiliates have filed grievances “for the good of the union,” in which individual grievants are not named. Instead, claims are pursued broadly on behalf of membership, with individuals being identified only in the event of a finding of substantive liability so that damages can be assessed. (Stip. ¶ 34). Thus, it is unclear why the Union felt it needed such information in order to determine on whose behalf a grievance should be filed when it could have simply pursued a grievance “for the good of the union.”

the implementation of a new version of the TMT would not result in any new basis for the requested information. (Stip. ¶¶ 36-37, Ex. 20).

On April 20, 2016, Honse replied to Hansen's email, clarifying that the Union was not challenging the objectivity or accuracy of the pass rates supplied by the Company only because it did not have the identities of test takers by which to challenge the information's accuracy. Honse stated that the Union would file a charge with the NLRB if the Employer refused to provide test-takers' names, test dates, and work locations per Honse's April 8, 2016, information request. (Stip. ¶¶ 38-39, Ex. 20)

Hansen responded on April 28, 2016, indicating that he was assessing, before responding further, whether the information requested was available to the Company. (Stip. ¶¶ 39, Ex. 21).

On May 5, 2016, Honse and Hansen attended a joint Employer-Union meeting in South Bend, Indiana. At the end of the meeting, Hansen approached Honse and volunteered that he had learned of a possible mistake in the data concerning both the TMT II and TMT III pass rates supplied previously. Hansen explained that he understood that the pass rates inadvertently included Midwest employees who were members of the International Brotherhood of Electrical Workers as well as CWA bargaining unit members. Hansen advised Honse that the data needed to be scrubbed to exclude IBEW members. (Stip. ¶¶ 40).

On June 17, 2016, Hansen emailed Honse the corrected pass rates, which removed the IBEW employees as well as some duplicate tests. (Stip. ¶¶ 41, Ex. 22).

On June 22, 2016, Honse responded, reiterating his request for names and locations of members who took the tests, as well as their results. (Stip. ¶¶ 42, Ex. 23).

On June 24, 2016, Hansen replied, asking Honse whether he intended, by his June 22 email, to expand his earlier request to include such information for all Union members who had taken the TMT II in 2014 or 2015 or the TMT III to date. (Stip. ¶ 43, Ex. 24). On July 6, 2016, Honse replied in the affirmative. (Stip. ¶ 43, Ex. 25).

On July 15, 2016, Hansen indicated he understood the Union's concerns regarding the information's accuracy but, in light of the Employer's concerns regarding the tests' integrity and confidentiality, requested a meeting to discuss the issue. (Stip. ¶ 44-45, Ex. 26). Honse offered available dates, and the two settled on July 28, 2016. (Id.).

On July 28, 2016, Hansen and Honse met at the Union's offices to discuss the issue. At this meeting, Hansen offered an accommodation -- to provide the requested information with the test-takers' names redacted. Hansen proposed that Honse could then randomly select two lines of data per quarter, for which the Employer would reveal all identifying information sought by the Union. In furtherance of this proposal, Hansen supplied Honse with a list detailing test dates, and results for all TMT III and TMTF III tests for which data was available at that time, with test-takers' names redacted. Honse responded he would need the weekend to consider Hansen's offer. Hansen said that the company still had concerns about maintaining the confidentiality and security of the test. Honse told Hansen that he did not understand the concerns. Honse explained that the Union was not seeking a copy of the test or the answers. (Stip. ¶ 46).

On August 4, 2016, Hansen supplied Honse with an updated list of all previously-agreed upon test results, updated to include the second quarter of 2016. (Stip. ¶ 47, Ex. 27).

On August 17, 2016, Honse contacted Hansen to indicate that he would accept a redacted list of test-taker data, with the ability “to submit dates for cross checking.” (Stip. ¶ 48, Ex. 28). Hansen replied the same day, seeking further conversation so that Hansen could clarify the Employer’s offer. (Stip. ¶ 48, Ex. 29).

On August 31, 2016, Hansen followed up with another email to Honse explaining the Employer’s July 28 offer was for the provision of two employees’ names per quarter for verification, not for all employees’ names for two test dates per quarter. Hansen also offered to extend the period for which results would be given to add an additional quarter. (Stip. ¶ 49, Ex. 30).

On September 6, 2016, Honse summarized the Union’s position in a letter to Hansen and made the request for the following information: (1) The names, work location, current title and Net Credited Service (NCS), quarterly reports of test results and test dates for all employees taking the test for the period 1/1/2014 through implementation of the TMT III test (TMTF II Results) and 10/1/2015 through 12/31/2018. (2) The percentage of those that passed the test by quarter for both periods in item 1 above. (3) The percentage of those that failed to pass the test by quarter for both periods identified in item 1 above. (4) The names of those taking [the] test as a result of being declared surplus or at risk of layoff. (Stip. ¶ 50, Ex. 31).

On September 23, 2016, Hansen answered Honse’s letter, summarizing the Employer’s position. In his response, Hansen also offered to add net credited service dates to the report and to extend the period for which statistics would be provided to an additional quarter. (Stip. ¶ 51, Ex. 32).

On October 5, 2016, the Union filed the Charge in this proceeding, a copy of which was served on the Employer on October 6, 2016. (See Ex. 1) On October 18, 2016, January 10, 2017, and April 13, 2017, Hansen sent Honse additional correspondence consisting of the pass rates for the TMT II and TMT III pass rates through those dates. (Stip. ¶ 53, Ex. 33).

The Employer has not provided the Union with the names, work location, current title, Net Credited Service (NCS), test date, and test result for all employees taking the TMT II test for the periods of 1/1/2014 through implementation of the TMT III and the TMT III test 10/1/2015 through the present. (Stip. ¶ 54).

III. LAW AND ARGUMENT

A. The Union's Right to Information is Not Absolute.

Generally, an employer has a statutory obligation to supply information that is potentially relevant and will be of use to the union in fulfilling its responsibilities as employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). This includes information that aids the arbitral process, regardless of whether it is at the grievance stage or after the parties have proceeded to arbitration. *Fawcett Printing Corp.*, 201 NLRB 964, 972 (1973).

However, a union's interest in information is not absolute. Indeed, it will not always predominate over other legitimate interests. *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1105 (1991). As stated by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), "a union's bare assertion that it needs information to process a grievance does not automatically obligate the employer to supply all the information in the manner requested." *Id.* at 314.

In *Detroit Edison*, the union requested information concerning job aptitude tests in connection with the pursuit of grievances alleging that the tests had been unfairly used to deny unit employee promotions. The employer refused to supply test questions, employee answer sheets, and test scores linked with the names of employees. It offered to turn over the score of any employee who waived confidentiality. However, the Union declined to seek waivers. The Board found the requested information relevant, rejected the employer's claim that its need to keep the information confidential outweighed the union's need for it, and ordered the employer to submit the information to the union, subject only to restrictions on disclosure of the test's contents to employees.

The Supreme Court refused to enforce the Board's order and was especially critical of its failure to accord proper weight to the employer's need to keep the information confidential and its failure to impose safeguards to adequately protect the information's security. With regard to the identities of test-takers and their scores, the Supreme Court ruled that the employer's refusal to produce and offer of compromise was warranted because of its "well-founded interest" in preserving employee confidence in the testing program and the "minimal burden" placed on the union in complying with company's offer of disclosing scores upon receipt of a consent form from the examinees. *Id.* at 319.

From this authority, the Board has observed "[i]t is clear . . . that in dealing with union requests for relevant information, but assertedly confidential information, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. *Pennsylvania*

Power & Light, 301 NLRB at 1105. Further, a party asserting confidentiality has the duty to bargain toward an accommodation between the union's information needs and the employer's justified interests. *Id.* at 1105-1106. The Employer has met these standards and, therefore, has engaged in no unfair labor practice.

B. The Union Is Not Entitled to Information that Would Undermine the Validity of the TMT III and Related Tests.

The Union has requested the names, work locations, current titles, Net Credited Service, test dates, and test results of all employees who have taken the TMT II test from 1/1/2014 through the implementation of the TMT III and the TMT III test from 10/1/2015 through the present. (Stip. ¶ 54; Ex. 31). In other words, it seeks a detailed list of all employees who have taken the TMT II or TMT III test since January 1, 2015.

However, the Employer has historically kept such information confidential due to an earlier, related test's compromise in 2005, apparently by a local Union affiliate's reconstruction of the prior test from information gained through interviews with test-takers. The record evidence reflects that the Employer developed the TMT III test and its predecessors at great expense, and that their compromise would render them ineffectual for the purpose for which they were developed. These are not tests for which an examinee can study. Rather, they assess employees' and applicants' natural mechanical aptitude, personality, and overall job fit. Thus, if employees were to memorize the optimal answers, the tests' purpose would be completely undermined, as results would instead reflect the test-takers' skills at memorization and recall.

The Employer expressed to the Union this legitimate confidentiality concern and sought to negotiate with the Union an accommodation that would meet the Union's needs while also protecting the tests' integrity. Specifically, Hansen offered Honse

redacted test results, from which Honse could sample two entries for data verification. Honse purportedly misunderstood this offer, responding with two test dates from which he sought all unredacted results. Hansen clarified his offer was only for two test results, not the results of two entire test dates. However, Hansen added offers to extend the period for providing results by another quarter and also agreed that the Company would offer the requested net credited service dates. Hansen tried repeatedly to encourage Honse to engage in a negotiation to provide information the Union desired while protecting the Employer's legitimate confidentiality interests. Instead of negotiating in good faith, the Union has continued to accept the Employer's supply of quarterly passage rates without comment and, upon rejecting the Employer's offer of two names per test date, proceeded directly to file the underlying charge. Thus, it is the Union, not the Employer, who has refused to bargain in good faith as required by the Act.

C. The Union's Attempts to Distinguish Detroit Edison are Unavailing.

The Union and the General Counsel both argue that *Detroit Edison v. NLRB*, 440 U.S. 301, is inapplicable because it was decided on the issue of test-takers' confidentiality interests. (Stip., p. 8-11). It was not. Rather, *Detroit Edison* turned first on the employer's undisputed and important interests in test secrecy, which justified the Employer's refusal to supply copies of the test and answer sheets directly to the Union. 440 U.S. at 312-317. As such, *Detroit Edison* stands for the proposition that an employer's interest in protecting the integrity of an employee test is legitimate and may form the basis of withholding from a union information that would undermine that interest.

With regard to the union's request for named employees' actual scores, Detroit Edison did not argue that their disclosure would undermine the test's integrity but,

instead, it argued solely that employee confidentiality interests in such information. *Id.* at 317. Thus, the issue of named employees' test scores was decided solely on the basis of whether employees' confidentiality interests outweighed the union's need for the requested information. Here, although the Employer does maintain that employees have a confidentiality interest in their test scores on the TMT III and related tests, this assertion does not form the basis of its argument. Rather, the Employer has clearly and consistently objected to providing the Union with individual employees' names and test results for the first reason asserted in *Detroit Edison*: because their disclosure puts at risk the integrity of the TMT III. For this reason, analysis under an employer's claim of employee confidentiality, such as that in the second portion of *Detroit Edison* and in *USPS*, 359 NLRB 1052 (2013), is inapposite.

Here, the Employer has demonstrated both the importance of maintaining the test's integrity and the basis for its concern that release of a list of potential interviewees from whom the TMT III's content could be reconstructed would actually compromise the TMT III's integrity.

IV. CONCLUSION

As the D.C. Circuit Court of Appeals cogently stated in *S. New Eng. Tel. Co. v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015), "Common sense sometimes matters in resolving legal disputes. This case is a good example." The employer spent substantial sums of money to develop and vet tests that, if recreated and put into the hands of test-takers, will have to be redeveloped anew. We know this because it has happened before. Throughout the test's roll-out, the Employer complied with numerous Union information requests that would not place the tests' integrity at risk. Moreover, since the Union's first request for individually-identifiable test-taker information, the Employer has

raised this concern and asked the Union to compromise, proposing reasonable accommodations in an effort to meet the Union's needs as well as possible while still preserving the tests' integrity. Rather than negotiate with the Employer in good faith, the Union has simply repeated its demands for the originally requested information. Thus, consistent with Supreme Court and Board precedent, the Employer has met its obligations under the Act.

Accordingly, and for all of the above reasons, the Complaint in this case is without merit and should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2017, a copy of the foregoing was electronically filed and served upon the following:

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