

**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

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**REPLY BRIEF OF RESPONDENT AT&T SERVICES, INC.**

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## **I. INTRODUCTION**

Both the General Counsel and Union's initial briefs demonstrate a lack of regard for the full scope of the stipulated factual record in this case and a fundamental failure to apply cogently relevant law to those facts.

## **II. THE GENERAL COUNSEL AND UNION IMPROPERLY DISREGARD RECORD EVIDENCE THAT DOES NOT SQUARE WITH THEIR POSITION.**

The Union and the General Counsel assert that the employer lacks an adequate justification for its claim of confidentiality. However, this assertion ignores the basis for the Employer's concern over confidentiality: the compromise of an earlier version of the test. The Employer historically kept test-taker and result information confidential because, in 2005, an earlier test was compromised, apparently by a local Union affiliate's reconstruction of the prior test from information gained through interviews with test-takers.<sup>1</sup> The record evidence also reflects that if an employee studies for the TMT III and related tests, memorizing "correct" answers, then the tests' ability to measure employees' and applicants' natural mechanical aptitude, personality, and overall job fit would be undermined. (See Stip. ¶ 14, Ex. 6, 7). Thus, the Union and General Counsel's assertion that the Employer does not have an adequate justification for its assertion of confidentiality is simply false when relevant facts are considered.<sup>2</sup>

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<sup>1</sup> While the conclusion that a union affiliate compromised the test may rely on hearsay, the fact that the test was compromised does not. Direct evidence reflects confiscation of a substantially identical version of the test then in effect. The Employer logically concluded that this had been done by a local union as neither the union nor the General Counsel offer an alternative explanation for the creation of such a document. (Stip. ¶ 14, Ex. 6, 7).

<sup>2</sup> Likewise inaccurate is the General Counsel's statement that the Employer presented no evidence that test-takers were given assurances of privacy. (GC Br. at 6). In fact, the record demonstrates that test-takers are assured that the test's developer, Aon Corporation, may use their results only after identifying information is removed. (Ex. 10). Further, the record establishes that the Employer generally keeps employee test scores confidential and does not share them either with the Union or among employees. However, as discussed in greater detail below, the Employer's assertion of confidentiality in this case is not primarily on behalf of test-takers but, instead, on its own behalf based on its cost to develop the relevant tests and the previous compromise of a prior version of the test, apparently by a local Union affiliate.

The General Counsel also states that “continued negotiations” between the Union and the Employer regarding the requested information “had been unsuccessful.” (GC Br. at 4). Likewise, the Union’s asserts that the Employer “fail[ed] to offer an accommodation that allowed the Union to verify the veracity of the pass/fail percentages.” (Union Br. at 4). Moreover, the Union and the General Counsel assert rationales for demanding the information in question that at best is subject to an accommodation and at worst is a pretext for an illegitimate purpose.

Record evidence demonstrates that the Employer repeatedly explored the reasons the Union wanted the information and approached the Union with proposed accommodations to allow the Union to verify the accuracy of the pass/fail rates on the relevant tests, but the Union repeatedly refused to bargain over an accommodation. (See, e.g., Stip. ¶¶ 36-41, 44-46, 49; Ex. 20, 25-26, 30). On April 8, 2016, the first time the Union requested the information at issue, the Union stated only that it needed the information to “properly represent [its] membership.” (Ex. 18). The Company explained its confidentiality objection and asked the Union to explain its need for the information so the Company could propose an accommodation. (Ex.19). The Union claimed it needed the information to determine the accuracy of the numbers provided and to determine which employees should be included in a grievance. (Ex. 20). However, the Union commonly files grievances “for the good of the union,” so identification of potentially injured members to file a grievance was not a legitimate concern. (Stip. ¶ 34). The Company again specifically explained that it wanted to balance the Union’s need to verify the numbers with the Company’s confidentiality interest and specifically asked the Union to propose “some mechanism for verification that would not undermine

the Company's confidentiality concerns." (Stip. ¶37).<sup>3</sup> In so doing, the Employer all but begged the Union to bargain over an accommodation of the parties' interests. In response, the Union expanded its demand for the information at issue by extending the period of the request. (Stip. ¶43, Ex. 24, 25).

The Company asked for a meeting to discuss the information request at which it reiterated its confidentiality concerns and offered an accommodation – it provided the Union with a list of test takers and test scores with the names redacted and offered to allow the Union to select two names for each quarter for which the Employer would provide the names of the test taker. (Stip. ¶46, 51, Ex. 42). The goal was to give the Union some confidence that the scores were accurate without revealing so many test takers that the test could be recreated. In response, the Union mischaracterized Hansen's offer and disingenuously claimed to "accept" the names of all employees taking the test on two dates per quarter, an accommodation that was inconsistent with -- and far more expansive than -- the employer's proposal. (Stip. ¶48-50, Ex. 29-31). The Employer promptly corrected the Union, explaining that its offer was for two names per quarter, not all names on two given dates, but offered to expand the period for which such names would be chosen. (Stip. ¶51, Ex. 32). Upon receiving the Employer's clarification as to the scope of its proposed accommodation, the Union simply reiterated its demand for the wholesale production of the Employer's confidential information without any counter-offer to address the Employer's confidentiality concerns or expression of willingness to negotiate. (See Ex. 50, 31). Thus, the General Counsel's indication that "continued negotiations . . . had been unsuccessful" is disingenuous. In

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<sup>3</sup> The Union disingenuously asserts that its demand for verification was based on the Employer's error of including IBEW data in its initial pass rate statistics. However, the demand for this information was first advanced on April 8, 2016 (Ex. 18), while the discovery of the error was not made until May 5, 2016. (Stip. ¶40).

fact, the Union never engaged in any meaningful negotiation but, instead, merely reasserted its request for information. Likewise, the Union's statement that the employer failed to offer an accommodation is also false. It was the Union, not the Employer, that refused to explore an accommodation to allow it to verify the pass/fail rate accuracy while also protecting the Employer's legitimate confidentiality interests.

**III. THE UNION RELIES ON IRRELEVANT ARGUMENTS IN AN APPARENT ATTEMPT TO BOLSTER ITS CASE.**

The Union devotes two pages of its initial brief to an argument that its interest in obtaining employee test results is "heightened" because it relates to employees' layoff protections. (Union Br. at 5-6). First, the Union provides no legal authority for a "heightened interest" in requested information, nor any basis upon which any "heightened" standard should be applied to review of the Employer's assertion of confidentiality or proposed accommodation. Second, this entire argument is moot. The Employer conceded from the start that the information requested is relevant. (See, e.g., Ex. 20 ("The Company is not challenging the relevance of the request, but asserts the information is confidential and has offered an accommodation that balances the Union's need for the information with the Company's confidentiality interests.")). Thus, this argument by the Union has no bearing on the application of germane case law.

**IV. A THOROUGH READ OF SUPREME COURT PRECEDENT ESTABLISHES UNAMBIGUOUSLY THAT THE EMPLOYER MET ITS OBLIGATIONS UNDER THE LAW.**

Ultimately, as is evident from the fact that this case was submitted upon a stipulated record, this case turns not on any factual issue but, instead, on issues of law. However, the Union consistently misapplies the law to the issues in this case.

*Detroit Edison* did not, as the Union apparently claims, turn on the sensitive nature of employee test information. Rather, before even addressing the issue of employee confidentiality, the Supreme Court found that the Board abused its discretion in ordering the employer to turn over test information directly to the union, as the Board failed to justify a remedy granting scant protection to the employer's "undisputed and important interests in test secrecy." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, syl. ¶ 1 (1979). These important interests in test secrecy had nothing to do with employee privacy but, instead, related to the employer's concern that the tests might "fall into the hands of employees who have taken or are likely to take them," which would undermine the tests' security and validity. *Id.* In fact, employees' interest in the confidentiality of their test results was cited by the Court only in support of its conclusion that the "minimal burden" that would be placed upon the union under the employer's proposed accommodation was justified. *Id.*, syl. ¶ 2.

The Union's other efforts to distinguish *Detroit Edison* are likewise unavailing. First, the Union correctly points out that the latest version of the Employer's tests are unproctored and, as the Union puts it, employees may take the test online at a time and place of their own choosing without supervision. (Union Br. at 8). Preliminarily, this does not mean that the Employer has not made efforts to maintain test confidentiality. Indeed, the Employer has taken several measures to that end, including: (1) implementation of a computer adaptive version of the test so that, to some extent, the test will almost never be exactly the same for any two test-takers; (2) limitation of employee access to only upon entry of an employee test-taker's first name, last name, and company email address or, in the case of applicants, by password protected login;

and (3) agreement by all test-takers that they will not copy, share, or reproduce the test, in whole or in part, with employee test-takers risking discipline up to and including termination for violation of this assurance under Employer policy. (Stip. ¶ 19; Ex. 10-11). Moreover, *Detroit Edison* made no mention of whether the employer's test was proctored or unproctored and, thus could not have turned on such a fact. Accordingly, this attempted distinction by the Union is unavailing.

The Union next attempts to distinguish *Detroit Edison* because, in this case, the Employer voluntarily disclosed to the Union an error in the scope of the data it had previously supplied and voluntarily supplied corrected data. (Union Br. at 8). According to the Union, this somehow undermines the Employer's assertion of or right to protect the confidentiality of its test. However, this fact merely goes to the relevance of the requested information, not the validity of the Employer's assertion of confidentiality. As already discussed, the relevance of the information requested by the Union is not in dispute. Moreover, in *Detroit Edison* the employer did, in fact, admit to some human error in the scoring of the tests at issue in that case. Thus, errors in employer data accuracy and an employer's efforts to address them had no impact in the outcome of *Detroit Edison* and should have no impact here. See *Detroit Edison Co.*, 218 NLRB 1024, 1027 (1975).

Finally, the Union attempts to distinguish *Detroit Edison* on the basis that that the test in that case involved a "psychological aptitude" test, "i.e., sensitive personal employee information." (Union Br. at 8). First, a close read of the Board case from which *Detroit Edison* was appealed reveals that the nature and purpose of test at issue was nearly identical to the TMT III and TMTF III: "These tests are not designed to test

the skills or knowledge of the applicant which may be related to the job, but the capacity or aptitude of the employee to be trained and to do the job efficiently.” *Detroit Edison*, 218 NLRB at 1026. Thus, there is no real basis for distinction.

In *Detroit Edison*, the Supreme Court found the Board had abused its discretion by ordering the employer to turn over test information **not** because of employees’ interest in keeping their results confidential, but because the Board order failed to ensure that the information could not be used to undermine the test. As such, it is directly on point and the same result must follow here.

**V. THE UNITED STATES POSTAL SERVICE CASES DO NOT APPLY TO THE FACTS OR ARGUMENTS IN THIS CASE.**

Both the Union and General Counsel rely on *U.S. Postal Service*, 359 NLRB No. 115 (2013), for the proposition that a union’s need for information outweighs employee confidentiality concerns. (Union Br. at 9; GC Br. at 6). Preliminarily, this case was issued at a time when the Board lacked a quorum. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2013). However, it was essentially reproduced in a second *United States Postal Service* case in 2017 that turned on many of the same facts. See 365 NLRB No. 92. The *USPS* cases both involved a union request for employee entrance exam results and an employer’s responding assertion that such results are confidential and, therefore, can be turned over to the union only upon the union taking some measure to ensure employee privacy rights are protected.

First, the fact upon which the *USPS* cases turned was not the employer’s efforts to maintain confidentiality but, instead, employees’ possible motivation to withhold consent for disclosure because of the matter at issue: the employer’s seniority ranking of employees. In the *USPS* cases, the union was challenging the employer’s seniority

rankings, insofar as they were affected by employees' performance on the test at issue. The Board reasoned that the seniority ranking benefited some employees to the detriment of others and, as a result, the employees with higher ranking would be motivated to withhold their consent to disclosure. Meanwhile, in order to assess whether the rankings were correct, the union required all of the test results so that it could compare them to one another. That is not the case in this matter, where the Union, purportedly, merely seeks to confirm the accuracy of the pass/fail rates reported by the Employer, presumably by speaking with local Union affiliates and/or bargaining unit members in order to determine if their passage or failure, as reported by the Employer, is accurate. The Union could do so by random sampling, sampling of a small number of the employees at issue (precisely what the Employer proposed as an accommodation), or by having a third party verify the results. Thus, the Union's need for all employees' test results in this case is neither as strong nor as comprehensive as that in the *USPS* cases.

Second, the Postal Service did not merely fail to assure employees that their test information would be kept confidential. Rather, test-takers were expressly notified that, under the Privacy Act, the employer could release test-related information to a labor organization as required by law. Although the Employer in this case did not issue such extensive privacy assurances to test-takers as the employer in *Detroit Edison*, it did assure test takers that the test developer would use their results for research only after identifying information had been removed. Further, the Employer makes a practice of not sharing employee test results. Thus, this case is a far cry from the *USPS* cases.

Third, and most importantly, the *USPS* cases are not applicable because they turned exclusively on employees' privacy interests, asserted by the employer in response to the union's request for information. The Postal Service never even argued that employee test results were protected based on concerns for the continued validity of the test at issue. By contrast, the confidentiality interest asserted in this case is not based primarily on employee privacy concerns (although the employer does not, as a matter of course, share employee test results either internally or with others). Instead, the Employer has asserted a confidentiality interest that is based upon the integrity of the tests at issue, and their previous compromise, apparently by a local Union affiliate. Thus, there is no basis upon which to disregard the controlling authority laid out in *Detroit Edison* in favor of the irrelevant analysis reflected in the *USPS* decisions.

## **VI. CONCLUSION**

The Employer has not violated the Act. The information requested by the Union is concededly relevant. However, the Employer demonstrated a legitimate and substantial confidentiality interest in the test data that outweighs the Union's need for the information. Accordingly, the Employer met its duty under the law to offer an accommodation to allow the Union to achieve its purported ends without compromising the integrity of the Employer's tests. In response, the Union failed and refused to negotiate in good faith and disputed the Employer's claimed confidentiality interest. Thus, the Employer has fulfilled its obligations under the Act and the Complaint should be dismissed.

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

Respectfully submitted,

*/s/ Meredith C. Shoop*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of October, 2017, a copy of the foregoing was electronically filed and served upon the following:

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