

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

DEX MEDIA, INC.

and

Case 27-CA-196726

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1269

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE¹

On September 26, 2017, the Regional Director for Region 27 of the National Labor Relations Board (Board) issued the Complaint and Notice of Hearing in Case 27-CA-196726 (Complaint), based on a charge filed by the International Brotherhood of Electrical Workers, Local 1269 (Union) on April 12, 2017, and served on April 13, 2017, alleging that Dex Media, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). (GC Ex. 1(a), (b), and (c)). The Complaint alleges Respondent has failed and refused to provide the Union with requested information relevant to its duties as collective-bargaining representative of Respondent's employees. (G.C. Ex. 1(d)). Specifically, the Complaint alleges that since about November 3 and 30, 2016 and February 2017, the Union has requested and Respondent has failed to furnish: "PIP 'Notification of Action Steps' for everyone in the entire IBEW area, from the initiation of the PRR/PIP to present." (GC Ex. 1(d)). The Complaint further alleges that since about March 22 and April 6, 2017, the Union has requested and Respondent has failed to furnish:

[T]he data for all IBEW represented employees who are on a step of discipline or entering steps of discipline per the PIP. On what step of discipline our members are currently on and what the next steps are going to be moved to or retreated in consideration of the latest findings from the PRR report(s).

(GC Ex. 1(d)).

On October 6, 2017, Respondent filed its Answer to Complaint and Notice of Hearing (Answer), denying some of the allegations in the Complaint and admitting others. Respondent admits that it did not provide the Union with the requested Notification of Action Steps

¹ References to the transcript in this matter are identified as "Tr.," followed by the appropriate page number and line number(s). References to the General Counsel's Exhibits are identified as "G.C. Ex. __." References to the Joint Exhibits are identified as "Jt. Ex. __," and references to Respondent's Exhibits are noted as "R. Ex. __."

documents. However, Respondent denies that it violated Section 8(a)(1) or (5) of the Act in any manner and raises several affirmative defenses.

The trial in this matter was held on November 30, 2017, in Denver, Colorado, before The Honorable Dickie Montemayor, Administrative Law Judge (Judge).

II. FACTS

A. Respondent's Business and Bargaining Unit Background

The facts of this case are not in dispute. At all material times since at least January 1, 2016, Respondent, a corporation with offices and places of business throughout the United States, including an office and place of business in Greenwood Village, Colorado (Respondent's Greenwood Village facility), has been engaged in the business of providing digital and non-digital marketing and advertising services. In conducting its operations described above, during the 12-month period ending December 31, 2016, Respondent performed services valued in excess of \$50,000 in states other than in the State of Colorado. Respondent stipulated that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act). (Jt. Ex. 1).

Respondent also stipulated that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. Furthermore, the following employees of Respondent (Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Senior Telephone Marketing Consultants, Telephone Marketing Consultants — Win-Back, Telephone Marketing Consultants, and Telephone Sales Associates working in Respondent's Greenwood Village facility, as well as all Senior Marketing Consultants and Premise Marketing Consultants working in the Rocky Mountain area and Southwest area described in Appendix A of the collective-bargaining agreement effective from June 12, 2015 to May 11, 2018; excluding all managers, professional employees, office clerical employees, guards and supervisors as defined by the Act.

(Jt. Ex. 1). At all material times since at least June 2015, Respondent has recognized the Union as the exclusive collective-bargaining representative of all employees in the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from June 12, 2015 to May 11, 2018 (CBA). (Jt. Ex. 1, 2). Thus, at all material times since at least June 2015, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit. (Jt. Ex. 1).

There are approximately 200 employees in the Unit. (Tr. 14:14). The Unit consists of two general groups of employees referred to as telephone representatives and “premise” employees. (Tr. 14:23-25; 15:1-5). The telephone representatives work in Respondent’s telephone hub in Greenwood Village, Colorado. (Tr. 15:6-14). There are about 50 to 60 of these employees in the Unit. (Tr. 15:11). They work under the job titles of senior telephone marketing consultant, telephone marketing consultant, and telephone sales associate. (Jt. Ex. 2; Tr. 20:10-16). The Unit employees in the telephone hub sell print media, primarily the telephone directory and digital media, such as online advertising, websites, banners, and a variety of other digital products. (Tr. 15:25; 16:1-3). The premise employees in the Unit work across several regions in Colorado, New Mexico, Wyoming, Montana, Oregon, Idaho, Utah, and Arizona, and work primarily work out of their homes, except when they are visiting customers. (Jt. Ex. 2; Tr. 16:6-10). Their geographic work areas are divided into regions that each report to a Regional Vice President (RVP). (Tr. 20:21-15; 21:1-9). The premise employees work under the job titles senior marketing consultant or premise marketing consultant. (Jt. Ex. 2, page 19; Tr. 19:18-24). The senior marketing consultants usually represent larger clients than the premise marketing consultants. (Tr. 20:2-5). All employees in the Unit are referred to as Marketing Consultants (MCs) or sales representatives. (Tr. 16:19-22).

The Union has about four to six chief stewards representing the Unit, as well as several other stewards that help. (Tr. 17:1-4). The stewards are located in various states and attend disciplinary and performance review meetings with Unit employees. (Tr. 17:6-24). The Union stewards report to the Union Vice President of the Executive Board and Director of Operations Harry Esquivel (Esquivel) and, ultimately, to Union Business Manager Karen Gowdy (Gowdy). (Tr. 18:4-7). Esquivel has been the Union's Vice President of the Executive Board and Director of Operations since June of 2014. (Tr. 13:6-11). As VP of the E-Board, he chairs the dispute resolution committee, routinely files grievances, prepares for arbitration, and reinforces the contract. (Tr. 13:20-23).

The parties' CBA contains some typical provisions. For example, Article 1.4 of the CBA prohibits discrimination against employees on the basis of their race, national origin, religion, age, sex, sexual orientation, marital status, union activities, disabilities, or military/veteran status. The CBA also specifies that a dismissal, discipline, or suspension will not stand if it "was effected [sic] without just cause." (Jt. Ex, 2).

The parties' grievance procedure under Article 2, Section 2.3 of the CBA specifies that a grievance shall be presented at the first step within 28 days after "the date the employee reasonably first had knowledge of the circumstances that led to the grievance." There are three steps in the grievance process and a party cannot elevate a grievance to arbitration before the other party's Step 3 response. (Jt. Ex. 2; Tr. 131:5-10).

B. Respondent's Performance and Disciplinary System

Since about January 2016, Respondent has recorded performance information for Unit employees in a document called the Performance Rank Report (PRR). (Tr. 22:17-23). Unit employees in each region and job title are ranked on separate PRRs. (Tr. 22:24-25; 23:1-3; 25:20-22; 26:6-14). Each PRR is a spreadsheet that lists all of the employees in the applicable

region and job title, along with their sales performance scores in several different performance metrics, such as new customer retention, new customer acquisitions, how well they performed on the money originally assigned to their accounts. (Jt. Ex. 4; Tr. 29:13-25; 30:1-13; 31:1-18). Based on these performance scores, the PRR also lists each employee's rank amongst the rest of the group, and what quintile of the group they fall in based on that rank. (Tr. 27:1-25; 32:6-9). The PRR is a form of stacked ranking. (Tr. 27:17-19).

The PRR is generated, or become "actionable," every four weeks, or two pay periods. However, each time the PRR is generated, it is based on the employees' underlying sales data from the entire year to date, as opposed to just the most recent two pay periods. (Jt. Ex. 3; Tr. 32:10-12, 38:1-11). For example, the PRR generated at pay period 22 is based on employees' sales performance data from pay periods 1 through 22, and the PRR generated four weeks later at pay period 24 is based on employees' sales performance data from pay periods 1 through 24. (Jt. Ex. 4; Tr. 31:23-15, 32:1-5, 37:17-20, 58:8-10). The PRR does not show employees' performance data for the discreet period of four weeks between actionable PRRs, such as the period between pay periods 22 and 24. (Tr. 58:11-13).

Unit employees are assigned to accounts on campaigns. If an employee is separated from Respondent during a campaign, their accounts are assigned to another MC, and for the person who receives the account it is considered a "reassigned" account. (Tr. 44:2-12). The Letter of Agreement on Reassigned Accounts in the CBA (LOA) specifies that "re-assigned accounts will not be used in the individual's performance measurements." However, the PRR does not distinguish between performance data based on original account assignments and reassigned accounts. (Tr. 44:16-19, 45:2-5). The PRR does not identify if any Unit employee has reassigned accounts. (Tr. 47:3-5).

In about July 2016, Respondent implemented a performance evaluation and disciplinary system that is based on the PRR results. It is called the “Performance Improvement Plan,” and is generally referred to by the parties as the PIP. (Tr. 43:2-6). Before rolling out the PIP, Respondent reviewed the details of the plan with Esquivel and other Union representatives in the form of PowerPoint presentations and discussions. (Jt. Ex. 3; R. Ex. 1; Tr. 34:1-25, 35:1-25, 36:1-8). According to the PIP, if an employee ranks in the bottom fifth quintile of the PRR on two successive reports, then the employee is subject to being placed on a performance improvement plan. (Jt. Ex. 3; R. Ex. 1; Tr. 38:20-22, 39:4-6). The employee will first receive a written warning. The employee is then given some discreet performance objectives for the following discreet pay periods. If the employee moves out of the bottom fifth quintile for two successive PRRs following the warning, or meets the discreet performance objectives for two discreet periods, the employee will be removed from the performance plan. (Jt. Ex. 3; R. Ex. 1; Tr. 40:17-25, 41:1-17, 105:13-21). An employee can meet the discreet performance objectives in a discreet period of time, even if they remain in the bottom fifth quintile of the PRR. (Jt. Ex. 3; R. Ex. 1; Tr. 41:1-3). If the employee does not move out of the bottom fifth quintile or meet the discreet objectives, the employee will receive a final warning. Thereafter, the same standards for successfully completing the improvement plan apply. The employee must move out of the bottom fifth quintile on the next two PRRs or meet discreet performance objections for two discreet periods. If the Unit employee does not accomplish one of these goals, they are eligible for termination. (Jt. Ex. 3; R. Ex. 1; Tr. 42:4-19).

Written warnings, final warnings, and terminations are all subject to the CBA grievance procedures. (Jt. Ex. 2; Tr. 42:1-3, 20-22). The delivery of disciplinary actions under the PIP corresponds with actionable PRR generated every four weeks. Respondent’s PowerPoint

presentations to the Union about the PIP each include a sample schedule, showing the date of actionable PRRs and the corresponding window periods for implementing discipline under the PIP. (Jt. Ex. 3; R. Ex. 1).

Although the PIP is formulaic in terms of how employees become eligible for various levels of discipline or successfully move off of a performance improvement plan, Respondent may use some discretion in applying the PIP to unusual individual situations as business circumstances warrant. (R. Ex. 1; Tr. 100:15-25, 130:5-11). The PIP can be accelerated if a manager determines that an employee has demonstrated an unwillingness to improve. (R. Ex. 1; Tr. 129:15-22). Moreover, according to the LOA, once a Unit employee reaches the “Final Warning/Termination step of disciplinary action for performance,” the employee can identify any reassigned accounts they have and “[Respondent] agrees to review the effect that the results of reassigned accounts may have had on an employee’s stacked-ranking.” (Jt. Ex. 2; R. Ex. 1; Tr. 44:13-15; 128:3-8).

Although the PRRs are used as the primary basis for determining a Unit employee’s eligibility for discipline under the PIP, the PRRs do not include information about any consequent discipline. Although each PRR indicates which employees are in the bottom fifth quintile, the PRRs do not indicate if an employee has been placed on a performance improvement plan, received a written warning on the PIP, received a final warning on the PIP, or is eligible for termination under the PIP. (Tr. 46:1-8-20). The PRR does not indicate if an employee in the bottom fifth quintile has successfully moved off of a PIP. (Tr. 47:1-2). The PRR also does not show if an employee in the bottom fifth quintile has met discreet performance objectives in any discreet period of time. (Tr. 46:21-24). Each PRR is based on cumulative year-to-date information. Moreover, the PRR does not indicate if an employee has identified

reassigned accounts for consideration at the final warning or termination stage of the PIP. (Tr. 44:16-19). There is no requirement that Respondent issue a new PRR after accounting for the reassigned accounts. (Tr. 98:5-12). Finally, the PRRs do not indicate if Respondent has exercised any discretion in placing employees on the PIP where there are unusual circumstances or an employee demonstrates an unwillingness to improve. (Tr. 129:16-18, 130:5-8).

By email on November 2, 2016, Esquivel requested that Respondent provide PRRs, and the following day Respondent provided Esquivel with copies of the PRRs for pay period 2016-01 through 2016-22, broken out by Unit employees' region and job classification. Respondent has regularly provided the Union with updated PRRs since then. (Jt. Ex. 4).

Respondent's Director of Labor Relations and Assistant Vice President — Labor Relations Elizabeth Dickson (Dickson)² testified that every four weeks Respondent's HR Business Partners transmit the actionable PRRs to Sales Managers and RVPs for administration of the PIP to employees in their assigned areas. The transmittal email itself is called a Notification of Action Steps. (Tr. 144:13-17, 148:18-21). Dickson testified that the Notification of Action Steps emails contain recommendations to the managers about what PIP actions need to be taken for specifically named employees. (Tr. 144:21-24). Dickson testified that the HR Business Partners use the PRRs as the starting point for putting together the Notification of Action Steps emails, but she did not know for sure what other documents or information they use. (Tr. 151:1-11).

Dickson testified that the Notification of Action Steps emails are used to start a dialogue with the managers about whether Respondent needs to take any PIP actions, such as elevating an employee to a level of discipline. (Tr. 145:9-13, 150:3-7). In her testimony, Dickson asserted

² Respondent stipulated that at all material times from June 1, 2016 to the present, Elizabeth Dickson held the positions of Respondent's Director of Labor Relations or Assistant Vice President — Labor Relations and has been an agent of Respondent within the meaning of Section 2(13) of the Act. (Jt. Ex. 1; Tr. 143:20).

that the Notification of Actions Steps emails are not determinative of what discipline will be issued. (Tr. 145:18-21). However, she also testified that she did not know if the managers ever provided feedback as to the recommendations in the Notification of Action Steps emails, or if they implemented the recommendations without providing feedback. (Tr. 150:3-7). Dickson was also unsure if the HR Business Partners send separate Notification of Action Steps emails for Unit and non-Unit employees subject to the PIP. There is no record evidence about what non-Unit employees may be subject to Respondent's PIP. Dickson noted that there are separate PRRs for Unit and non-Unit employees and admitted that managers could distinguish between the Unit and non-Unit employees listed in a Notification of Action Steps email by name. (Tr. 149:14-20; 151:1-10). Respondent did not proffer any samples of the Notification of Action Steps emails as evidence in this matter.

Since the implementation of the PIP in about July 2016, the Union has filed several grievances related to Respondent's application of the PIP to Unit employees. For example, on about September 2, 2016, the Union filed a grievance asserting that Respondent failed to meet the terms of the LOA by advancing employees on the PIP with incorrect reassigned account information on the PRR. (GC Ex. 2; Tr. 71:14-24, 72:7-13). This grievance was labeled as the FTGU (For the Good of The Union) grievance. (Tr. 71:2-5). Respondent provided its Step 3 denial of this grievance on February 13, 2017. (GC Ex. 3; Tr. 73:12-22). The Union advanced the grievance to arbitration on February 28, 2017. (GC Ex. 4; Tr. 74:17-25). Also, on about November 30, 2016, the Union filed a grievance alleging that Respondent separated employee Lucas Storey and used incorrect information on the PRR to administer the PIP. (GC Ex. 5; Tr. 76:2-11). On February 13, 2017, Respondent sent the Union its Step 3 denial of this grievance. (GC Ex. 6; Tr. 78:11-17, 79:3-5). The Union did not refer the grievance to arbitration or take

any further actions on the grievance. (Tr. 79:17-25, 80:1-6). Finally, on about November 30, 2016, the Union filed a grievance alleging that Respondent separated employee Andrew Thompson and used incorrect information on the PRR to administer the PIP. (GC Ex. 8; Tr. 82:5-14). On February 15, 2017, Respondent sent the Union its Step 3 denial of this grievance. (GC Ex. 11; Tr. 85:14-25). After the Step 3 denial, the Union did not refer the grievance to arbitration or take any further actions on the grievance. (Tr. 87:2-9).

C. The Union's Repeated Requests for Relevant Disciplinary Information

On November 3, 2016, Esquivel emailed Respondent's Senior Staff Consultant Marie Celona (Celona)³ and Director of Labor Relations Elizabeth Dickson stating: "The Union is formally requesting the PIP 'Notification of Action Steps' for everyone in the entire IBEW area, from the initiation of the PRR/PIP to present." (Jt. Ex. 5). Esquivel was prompted to request the Notification of Action Steps after a steward informed him that, in the course of representing an employee, Respondent advised the steward of the existence of the document and its contents. The steward suggested that Esquivel request the document and so he did. (Tr. 48:5-9). Esquivel testified that he requested the Notification of Action Steps from the initiation of the PIP to determine if Respondent was administering the PIP correctly, for example, whether employees had been allowed to introduce factors that could possibly mitigate progressive discipline under the PIP. (Tr. 49:1-25, 50:1-3).

On November 9, 2016, Celona emailed Esquivel in response to the request. She did not provide the requested Notification of Action Steps. Instead, Celona asserted that the request did not fall within the negotiated parameters of Section 9.5 of the CBA, that the request was broad and unduly burdensome, and she demanded to know the relevance. (Jt. Ex. 6). Section 9.5 of the

³ Respondent stipulated that at all material times between June 1, 2016 and December 31, 2016, Marie Celona held the position of Respondent's Senior Staff Consultant for Labor Relations and was an agent of Respondent within the meaning of Section 2(13) of the Act. (Jt. Ex. 1).

CBA states: “An employee may, upon reasonable notice, inspect records contained in the employee's personnel file. For purposes of this Article, personnel file is defined as those records normally in the custody of the employee's supervisor retained at the work location.” (Jt. Ex. 2). Before Celona’s November 9, 2016 email, Respondent had never cited to Section 9.5 of the CBA as a reason for refusing to provide the Union with information. (Tr. 51:16-20).

About a few days after Celona’s November 9, 2016 email, Esquivel called Celona about the request. He told her that her reference to Section 9.5 of the CBA made no sense and he did not understand what it had to do with the requested documents; it was simply about employees requesting personnel files. Celona suggested that MCs would not want people to know about their discipline and might be embarrassed. Esquivel replied that the Union needs to know. Esquivel and Celona had a discussion about how Respondent had not been administering discipline for a while, had just started to in September 2016, and employees might not fully understand the implications or the gravity of the situation. (Tr. 54:3-17). During the call, Celona asserted the information request might be burdensome. Esquivel stated that the documents are already generated so all Respondent has to do is to forward them to the Union when they send them out. Celona claimed the documents were not delineated by Union and non-Union employees. Esquivel challenged her that the documents go to the individual managers and so they had to be delineated. Celona did not respond. (Tr. 54:18-25). During the call, Celona made no claims about the confidentiality or proprietary nature of the requested documents. (Tr. 55:20, 56:2). She also did not make any assertions that they contained only recommendations for discipline. (Tr. 56:3-6).

On November 30, 2016, Esquivel emailed Celona and Dickson again, formally requesting the PIP information for a second time. This time he framed his request as a request for

“Notification of Action Steps sent out to the local offices for administering the progressive steps under the PIP.” He further explained in the email that the documents were already generated so the request is not unduly burdensome. Esquivel asserted the relevance of the request, stating: “the request is relevant to all our represented members, the Union intends to be available to represent our members and it has become clear that many of the employees/members are not fully aware to what level of progressive steps they might be in.” (Jt. Ex. 7). Esquivel testified that he made this claim of relevance at the time based on the fact that his chief stewards had been contacting him and advising him that certain employees were at serious steps of the performance improvement plans and that they did not fully comprehend the severity of the situation. (Tr. 56:21-25).

On December 2, 2016, Celona responded in email to Esquivel’s second request for the Notification of Action Steps. Celona again refused to provide the requested information, stating: “we will not provide detailed reports of PIP activity for every employee in the bargaining unit.” This time, she merely claimed that employees can reach out to the Union individually if they so choose. She did not renew her claim that the request was outside the negotiated parameters of Section 9.5, or that it was broad and unduly burdensome, and she did not question the relevance of the request. (Jt. Ex. 8).

After Celona’s December 2, 2016 email, and before Celona retired for employment with Respondent at the end of the year, Esquivel spoke to her again on the phone. He requested the documents again and Celona denied the request. (Tr. 61:22-25, 62:1-7).

Around the same time, in about December 2016, Respondent announced its 2017 goals and initiatives, which included changing the underlying criteria measured in the PRR. (R. Ex. 2; Tr.115: 11-20, 116:8-10). Specifically, Respondent changed how the various performance

metrics on the PRR were weighted to determine an employees' overall performance score. (R. Ex. 2, Tr. 132:5-7). Respondent also explained that for a period of time, employees would be measured under two sets of PRRs, one with the 2016 weighted measurements and one with the newer 2017 weighted measurements. (R. Ex. 2; Tr. 116:14-18). Around this time, the Union requested to know everybody who was in jeopardy under the PIP during the transition from the 2016 PRR version to the 2017 PRR version. In response to that request, by email on February 15, 2017, Dickson provided Esquivel with the names of the Unit employees who were in some stage of the PIP at the time. (R. Ex. 3; Tr. 119:2-4, 133:6-25, 134:1). The email listed seven employees, along with a city or state next to each. The email did not specify the particular PIP step applicable to each employee. In the email, Dickson stated: "As we previously described, these employees will be reviewed based on their performance/standings under the metrics in place for 2016. During the transition through March, new PIPS will be based on bottom quintile ranking on both the 2016 and 2017 metric evaluations as previously discussed." (R. Ex. 3).

In about the end of February or early March 2017, Esquivel called Dickson. He reiterated his request for the Notification of Actions Steps and Dickson responded by asking if he had settled that request with Celona. (Tr. 65:1-10). Esquivel said no, and that he needed the information. Dickson said it was under consideration. Esquivel thanked her for the consideration and said the Union needed the information. Dickson replied that "providing that information may lead to many, many grievances." (Tr. 65:12-18). Esquivel told her that not having the information may lead to more grievances for terminations that perhaps were not warranted. (Tr. 65:18-21). During the call, Dickson stated that the Notification of Action Steps is a management document and that it is proprietary. (Tr. 66:9-25). Dickson did not specify

what about the document is proprietary. (Tr. 67:5-7). Dickson did not testify about this conversation.

On March 21, 2017, Esquivel emailed Dickson requesting the PIP information in writing for a third time. He requested “a copy of the report(s) ‘Notification of Action Steps’ sent out to the local offices for administering the progressive steps under the PIP.” (Jt. Ex. 9). Dickson responded the following day, refusing to provide the information by stating simply that she has “answered that question before,” which Esquivel understood as a denial. (Jt. Ex. 9; Tr. 67:25, 68:1-3).

On March 22, 2017, Esquivel followed up on the request again in email and, in an attempt to address Respondent’s previously articulated position that the Notification of Action Steps are management documents, he stated:

If the issue is copy of the actual report ‘Notification of Action Steps’ then the Union is requesting [Respondent] provide the data for all IBEW represented employees who are on a step of discipline or entering steps of discipline per the PIP.

On what step of discipline our members are currently on and what the next steps are going to be moved to or retreated in consideration of the latest findings from the PRR report(s)

(Jt. Ex. 10; Tr. 121:22-25, 122:1-2). About two weeks later, having not received the information, Esquivel followed up in an April 6, 2017 email to Dickson noting that the Union had not received the requested information. (Jt. Ex. 11).

Dickson promptly responded by email on April 6, 2017, but still refused to provide the Notification of Action Steps or the underlying data about what level of discipline was being applied to Unit employees under the PIP. Instead, in her email, she initially asked what was different about the Union’s request. She immediately followed this question with a statement that she has “already responded on the issue.” She asserted that Respondent has provided the

PRR, which gives the Union the information it needs. Dickson also revived Celona's argument that the Union's request falls outside the parameters of Section 9.5 of the CBA. Finally, Dickson asserted the document is a management document with recommendations and that it is not the final authority on what discipline actually occurred. Dickson closed her email by stating: "If you have individual employee grievances for which you need additional information, please let me know who they are." (Jt. Ex. 12). Esquivel did not respond to Dickson's April 6, 2017 email before filing the charge in this matter. (Tr. 123:21-22).

Esquivel testified that, contrary to Dickson's claim, the PRR alone is insufficient for the Union's purposes because it does not provide the information necessary to determine what disciplinary step of the PIP might apply to each Unit employee at risk. He also explained that the PRR not does show reassigned accounts. It does not take into consideration other possible mitigating factors, such as attendance and whether someone is on FMLA. The PRR does not show how long someone has been in the bottom fifth quintile, or if they have met discreet objectives. (Tr. 52:5-18).

Since its initial request for Notification of Action Steps on November 3, 2016, Respondent has not provided the Union with any Notification of Actions Steps documents. Respondent has not provided any other information in response to the Union's March 22, 2017 request for raw data about where Unit employees stand on the PIP. (Tr. 70:6-16). Esquivel explained that, beyond filing individual grievances over PIP discipline, the Union needs the requested information to understand how employees were disciplined, at what step, whether Respondent actually followed the disciplinary measures, and whether there was any disparate treatment. (Tr. 126:14-25, 127:1). Moreover, if Respondent had provided the Union with the Notification of Action Steps and related information in a timely manner, the Union could have

tracked down whether there were any mitigating circumstances for employees, such as closed accounts or FMLA leave, and obtained information for the employees to see if they could mitigate their disciplinary circumstances. (Tr. 127:5-14).

III. ISSUE PRESENTED

The issue to be decided in this case is whether Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested Notification of Action Steps and information about the level of discipline Unit employees received under the PIP.

IV. ARGUMENT

A. RESPONDENT VIOLATED SECTION 8(A)(1) AND (5) OF THE ACT BY FAILING AND REFUSING TO PROVIDE THE UNION WITH REQUESTED INFORMATION THAT IS RELEVANT AND NECESSARY TO ITS DUTIES AS EMPLOYEES' COLLECTIVE-BARGAINING REPRESENTATIVE.

Under Section 8(a)(5) of the Act it is an unfair labor practice for an employer to refuse to bargain in good faith with the collective-bargaining representative of its employees. It is well settled that an employer's obligation to bargain in good faith includes the obligation to furnish the union, upon request, information necessary to enable the union to perform its duties as employees' collective-bargaining agent. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). This obligation is a continuing one, extending beyond contract negotiations and "applies to labor-management relations during the term of an agreement." 385 U.S. at 435-436. During the term of an existing collective-bargaining agreement, a union's representational duties include monitoring compliance and effectively policing the agreement, enforcing provisions of the agreement, processing grievances, and communicating with bargaining unit members.

1. The Union requested presumptively relevant information.

The standard for determining relevance of requested information is a liberal one, and it is necessary only to establish “the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” 385 U.S. at 437; *Jack Cooper Transport Company, Inc.*, 365 NLRB No. 163, slip op. 2 (2017). Moreover, the law is clear that information pertaining to wages, hours, and working conditions of bargaining unit employees is “so intrinsic to the core of the employer-employee relationship that such information is considered presumptively relevant.” *York International Corp.*, 290 NLRB 438 (1988) (quoting *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977)).

The Board has repeatedly held that information related to the discipline of bargaining unit employees is presumptively relevant. *See e.g., Grand Rapids Press*, 331 NLRB 296 (2000) (personnel files, including management’s disciplinary memoranda, for 22 bargaining unit employees is presumptively relevant information); *In re Dish Network Service Corp.*, 339 NLRB 1126 (2003) (written consultation form completed by management for a bargaining unit employee’s discipline is presumptively relevant information); *Lansing Automakers Federal Credit Union*, 355 NLRB 1345 (2010) (internal management report that detailed which bargaining unit employees were engaged in a “gifting circle,” and was used as the basis to determine which of them to discharge, is presumptively relevant information); *see also, Security Walls, LLC*, 361 NLRB 348 (2014) (information relating to the discipline of a bargaining unit employee, even where the parties had not established a grievance-arbitration mechanism applicable to the discipline, is presumptively relevant information).

The Union repeatedly requested the Notification of Action Steps documents that contain this type of presumptively relevant information related to unit employees’ discipline status under

the PIP. The Union requested these documents by email on November 3 and 30, 2016, verbally by telephone in November and December 2016 and about late February/early March 2017, and then again by email on March 21, 2017. The precise contents of the Notification of Action Steps are unknown, because Respondent neither provided a copy of one to the Union in response to its repeated requests, nor to the tribunal for evaluation of its contents in deciding the merits of this case. However, the record evidence clearly establishes that the Notification of Action Steps documents, include, in the very least, information about bargaining unit employees' disciplinary statuses under the PIP every four weeks, and, likely, include detailed information of such.

Dickson testified that the Notification of Action Steps documents are emails that are routinely sent from HR Business Partners to Sales Directors and RVPs every four weeks, along with the actionable PRR reports for that period. Dickson's testimony further establishes that the Notification of Action Steps emails contain information about the named Unit employees who need to be elevated to some level of action under the PIP. In denying the Union's requests for the documents in her December 2, 2016 email, Celona asserted that Respondent would not provide "detailed reports of PIP activity for every employee in the bargaining unit." By referencing "detailed reports of PIP activity" in response to the request for Notification of Action Steps, Respondent signaled that the documents are just that - detailed reports of activity.⁴ Thus, even without a sample of a Notification of Action Steps document, the record establishes that

⁴ This type of routine email with detailed information on the disciplinary status of Unit employees makes sense in light of the fact that every four weeks, on the actionable dates for the PRR reports, the entire bottom quintile of the Unit is potentially subject to some level of discipline under the PIP and yet the particular group of Unit employees who should receive a disciplinary action, and at what level, is constantly changing. Moreover, the PIP system, by the terms outlined by Respondent in its presentations to the Union, provides only a brief window period every four weeks for the implementation of such disciplinary actions.

such documents contain information related to Unit employees' discipline statuses under the PIP.⁵

In its repeated requests for the Notification of Actions Steps, as well its related request for the underlying data about where Unit employees stand on the PIP, the Union sought presumptively relevant information. This information is particularly germane to the employer-employee relationship here, because an employee's change of status on the PIP every four weeks could possibly and predictably result in the termination of their employment.

2. Respondent cannot rebut the relevance of the Union's requests.

Respondent asserts that the information requested by the Union is not relevant, and that Respondent inquired about the relevance of the information, but the Union's responses were inadequate or nonexistent. (GC Ex. 1(h); Tr. 142:9-12). In response to the Union's initial November 3, 2016 request for the Notification of Action Steps, Celona responded, in part, by demanding to know the relevance of the request. However, where the requested information is presumptively relevant, the employer has the burden of proving lack of relevance. *Prudential Insurance Co. v. NLRB*, 412 F.2d 77, 78 (2d Cir. 1969), cert. denied 396 U.S. 928 (1969); *Hofstra University*, 324 NLRB 557, 557 (1997). A union is not required to make a specific showing of relevance unless the employer has submitted evidence to rebut the presumption. *Living and Learning Center, Inc.*, 251 NLRB 284, 288 fn. 3 (1980), enf'd. 652 F.2d 209 (1st Cir.

⁵ Moreover, to the extent that the record is unclear that the Notification of Actions Steps contain precisely this type of presumptively relevant information, as of March 22, 2017, the Union requested:

data for all [Union] represented employees who are on a step of discipline or entering steps of discipline per the PIP... On what step of discipline our members are currently on and what the next steps are going to be moved to or retreated in consideration of the latest findings from the PRR report(s).

It is clear that, in this manner, the Union explicitly requested presumptively relevant disciplinary information for Unit employees.

1981). In this case, Respondent has not established that the Union's information requests lacked relevance such that it triggered an obligation for the Union to specifically demonstrate their relevance. Even so, throughout its exchanges with Respondent, the Union communicated the particular relevance of the requests and, by at least February 2017, it was admittedly known to Respondent.

Respondent may assert that the Notification of Action Steps documents are irrelevant because the Union already has access to the PRR issued every four weeks, and it can track which employees are in and out of the bottom fifth quintile on successive PRRs to determine where the employees likely stand on the PIP. This assertion is demonstrably false. While it is true that Respondent has provided the Union with the underlying PRRs, these documents do not contain nearly all the information the Union needs to determine where Unit employees stand on the PIP every four weeks, such as at a warning stage, closer to termination, or eligible to be moved off the PIP. In particular, the PRR does not show whether Respondent has actually placed an employee who is in the bottom fifth quintile on the PIP. It does not show if an employee has met discreet performance objectives in a discreet period of time and is eligible to be removed from a PIP even if they remain in the bottom fifth quintile of successive PRRs. The PRR does not show whether an employee has identified reassigned accounts that factored into their performance data, which, when considered by Respondent at the final warning or termination stage, mitigates discipline under the PIP. The PRR does not show whether management has exercised any discretion to place or advance employees on the PIP where there are unusual circumstances or an employee has demonstrated an unwillingness to improve. Without this information, the Union cannot easily or accurately predict where all Unit employees stand on the PIP every four weeks

from the PRRs alone. The Notification of Action Steps documents that contain this information are relevant and necessary.

Respondent may also assert that the Notification of Action Steps is not relevant because the emails contain only recommendations for discipline and is not the final authoritative document on what discipline is actually issued to employees. Because Respondent did not proffer a sample of the documents to illustrate their content, it has only Dickson's testimony about the content to support this assertion, and her testimony is not convincing in this regard. Dickson testified that the Notification of Action Steps emails are recommendations from HR Business Partners to Sales Managers and RVPS, but that she did not know if the managers ever provided feedback on the recommendations or if they implemented the recommendations without providing feedback. Additionally, other facts contradict the bald assertion that the documents contain mere recommendations. First, the name of the document is notification of *actions*, and not notification of *recommendations*. Second, the timing of the Notification of Action Steps corresponds with the actionable PRR dates every four weeks and precedes the limited window periods Respondent has designated for implementing action steps under the PIP, which suggests there is not much time for managers to deliberate over mere recommendations. Third, in refusing to supply the documents, Respondent repeatedly referred to Section 9.5 of the CBA and suggested that employees could obtain the information in their personnel files, which appears to suggest that the information from the Notification of Action Steps is final enough that it makes it into employee personnel files.

Even if the Notification of Action Steps documents only contain recommendations for discipline, Respondent has not demonstrated that these types of recommendations lack relevance. In *Lansing Automakers*, the Board found that internal management investigative reports about

employee conduct are presumptively relevant to the Union because it was used as a basis to determine which bargaining unit employees would be disciplined. 355 NLRB at 1351. Similarly, as Dickson testified, the internal Notification of Actions Steps emails and any encompassed recommendations are developed by HR Business Partners and sent to Sales Managers and RVPs every four weeks to be used as a starting point for determining whether any PIP actions need to be taken for Unit employees. It is also possible the discipline recommendations are the ending point in some cases as well, and are implemented without any further feedback from managers. Dickson did not dispute this possibility.

Finally, Respondent's arguments that the Notification of Action Steps contain mere recommendations completely ignores the fact that on March 22, 2017 the Union clarified that it was requesting underlying data about where employees actually stand on the PIP. Respondent has not attempted to address how this clarified request, which on its face does not refer to mere recommendations of discipline, lacks relevance.

Respondent does not have a substantiated argument to rebut the presumptive relevance of the Union's information requests. Even without any obligation to do so, the Union did, in fact, demonstrate the particular relevance of its requests.

Respondent started disciplining employees under the PIP in about September 2016. On November 30, 2016, in making his second written request for the Notification of Action Steps, Esquivel explained that "the request is relevant to all our represented members, the Union intends to be available to represent our members and it has become clear that many of the employees/members are not fully aware to what level of progressive steps they might be in." Thereafter, Respondent never disputed that the documents might be relevant to the Union for this reason. Additionally, in a telephone call in about late February 2017, Dickson stated to Esquivel

that if Respondent provided the requested documents it “may lead to many, many grievances.” Esquivel responded that *not* having the information might lead to more grievances over employees who are unfairly terminated.⁶ By this point in time the Union had in fact filed two grievances alleging that employees Lucas Storey and Andrew Thompson were unfairly terminated under the PIP. This exchange demonstrates that it was obvious to Respondent that the requested information might be relevant to the Union for evaluating potential grievances. The Board has determined that this is also a relevant purpose for requesting information. *Jack Cooper Transport Company, Inc.*, 365 NLRB at slip op. 2.

In conclusion, Respondent has not sufficiently rebutted the presumptive relevance of the Union’s requests for the Notification of Action Steps and underlying information about where Unit employees stand on the PIP. Moreover, in the course of making the requests the Union communicated, and Respondent knew, the particular relevance of the requested information for purposes such as grievances over the PIP. Therefore, the record establishes that the requested

⁶ Esquivel’s testimony about his late February/early March 2017 telephone discussion with Dickson is uncontested, because Dickson, the only other party to the conversation, did not testify about the conversation in any regard, such as whether it did or did not take place, when it took place, or what was said. Dickson was available to testify at the trial and did in fact testify on other facts, but inexplicably, Respondent did not elicit any testimony from Dickson about this relevant telephone discussion regarding the Union’s information requests. The General Counsel respectfully requests that the Judge draw an adverse inference against Respondent based on Dickson’s lack of testimony about the discussion, and find that any such testimony would have corroborated Esquivel. “Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would normally be to provide it, and he fails to do so without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him.” 29 Am. Jur.2d §178. An administrative law judge has the discretion to draw an adverse inference based on a party’s failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party’s agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). An adverse inference is also warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the “strongest possible adverse inference” regarding such fact). General Counsel submits that an adverse inference is appropriate here, where Dickson testified at trial but Respondent, without explanation, failed to examine her on the telephone conversation with Esquivel, a fact that she obviously would have knowledge of.

information is indisputably relevant to the Union's duties as employees' collective-bargaining representative.

3. Respondent expressly and repeatedly refused to provide the relevant requested information.

Once relevance is determined, an employer's refusal to honor an information request is a *per se* violation of Section 8(a)(5) and (1) of the Act. *See National Extrusion and Manufacturing Company*, 357 NLRB 127, 160 (2011), *enfd.* 700 F.3d 551 (D.C. Cir. 2012); *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975). In its Answer, Respondent admits that it did not provide the requested Notification of Action Steps documents. (GC Ex. 1(h)). This is also evident from Respondent's November 9, 2016, December 2, 2016, and March 22, 2017 email responses to the Union's requests for the Notification of Action Steps, in which it expressly refuses to provide the documents. Moreover, when the Union requested the underlying PIP information by email on March 22, 2017, and followed up on April 6, 2017, Respondent again refused to provide the requested information. Instead, Dickson responded in email on April 6, 2017, stating that she had already addressed the issue, asserting some of the same reasons for not providing the information that Respondent had previously raised with respect to the Notification of Action Steps.

Respondent may assert that it satisfied its bargaining obligation by providing the Union with the PRRs issued every four weeks, which it asserts is all the Union was really requesting and all the Union needs to determine where employees are placed on the PIP. (Tr. 142:13-16). As demonstrated above, the PRRs are woefully inadequate to determine where Unit employees may fall on the PIP disciplinary spectrum every four weeks. Thus, Respondent's production of the PRRs did not satisfy the Union's requests for the Notification of Action Steps and related information about where all Unit employees stand on the various steps of the PIP.

Respondent may also assert that it satisfied the Union's information requests when, on February 15, 2017, Dickson emailed Esquivel a list of Unit employees who were on some level of the PIP at that time. However, the record evidence establishes that this information was not sent to the Union in response to its requests for Notification of Action Steps up to that point, but rather, in response to a separate isolated request for information about employees affected by the transition from the 2016 PRR performance measurements to new 2017 PRR performance measurements. The email contains limited information about employees on the PIP during the transition period between the 2016 and 2017 PRRs, and it does not contain the requested Notification of Action Step going back to the implementation of the PIP, which was in July 2016. This email is not responsive to the Union's requests for the Notification of Action Steps.

It is evident that Respondent failed and expressly refused to provide the Union with the requested Notification of Actions Steps documents for all Unit employees going back to the implementation of the PIP, and the related information requested on March 22, 2017 about the placement of Unit employees on the various steps of the PIP. None of the other information that Respondent provided to the Union between November 3, 2016 and April 6, 2017 satisfies these requests. Respondent's failure and refusal amounts to a clear violation of Section 8(a)(5) and (1) of the Act.

4. Respondent has no legitimate and substantiated defense for its refusal to provide the relevant requested information.

From November 9, 2016, when Respondent first refused the Union's request for Notification of Action Steps, through the unfair labor practice trial in this case, Respondent has raised a series of shifting defenses to its failure to provide the Union with requested information. All of Respondent's defenses are individually and cumulatively inadequate to relieve

Respondent of its obligation to provide the requested information under Section 8(a)(5) and (1) of the Act.

i. Clear and Unmistakable Waiver

Respondent's initial defense to providing the Notification of Action Steps, as provided by Celona in her November 9, 2016 email to Esquivel, was that the Union's request falls outside the scope of Section 9.5 of the CBA, which provides that employees may inspect records contained in their personnel files. In this vein, Respondent may assert that its actions comport with a reasonable interpretation of the parties' CBA and/or past practice, and that the Union has waived its right to information. (GC Ex. 1(h); Tr. 142:16-19). However, the Board has long held that it will not find a waiver of a statutory right unless there is "a clear and unmistakable manifestation of an intent to waive the right." *New York Telephone Co.*, 299 NLRB 351, 352 (1990). This standard applies to a union's waiver of the statutory right to information.

Here, the CBA is completely silent as to the Union's right to the Notification of Action Steps, information about the level of discipline employees receive under the PIP, or any other information about Unit employees' terms and conditions of employment. Silence in a collective-bargaining agreement on the issue of whether information shall be provided to a union does not constitute a clear and unmistakable waiver of the statutory right to relevant information. *See, e.g., King Broadcasting Company*, 324 NLRB 332 (1997) (although the collective-bargaining agreement was silent as to whether respondent would produce a certain type of relevant information to the union, such silence did not constitute a waiver of the union's statutory right to the information, even where the contract affirmatively specified that respondent would provide other kinds of information); *Grand Rapids Press*, 331 NLRB at 298 (union has a right to examine personnel files, even though the parties' collective-bargaining agreement contained no

provision permitting access to the files). Moreover, provisions like Section 9.5 that provide a contractual right to *employees* to receive or inspect certain information do not act as a clear and unmistakable waiver of the *union's* statutory right to information. *Centura Health St. Mary-Corwin Medical Center*, 360 NLRB 689 (2014) (contract provision stating that an employee may request a copy of their performance appraisal did not constitute a clear and unmistakable waiver of the union's right to information about the performance scores for all bargaining unit employees).⁷ Even in cases where the parties' collective-bargaining agreement expressly references a union's right to certain information, the Board will not automatically find that the language constitutes a clear and unmistakable waiver of the union's right to obtain the information outside the scope of the contract terms. *See New York Telephone Co.*, 299 NLRB at 352-53 (provision granting the union the right to inspect employee attendances records on reasonable notice and at reasonable times with the employee's written consent did not clearly and unmistakably waive the statutory Union's right to obtain such information, but rather expanded the union's right to information in situations where it might not otherwise be relevant to their duties as collective-bargaining representative).

Based on the foregoing, there is no basis to find that Section 9.5 of the CBA is a waiver of the Union's right to the Notification of Action Steps and other related information about the level of discipline Unit employees are receiving under the PIP.

ii. Overbroad or Unduly Burdensome

In her November 9, 2016 email to Esquivel, Celona made blanket assertions that the Union's request for Notification of Action Steps was overbroad and unduly burdensome. The

⁷ The Board in *Centura Health* also determined that the union had not waived its right to information even under a contract coverage standard, as argued by respondent in that case. 360 NLRB at 689 fn. 4. A similar conclusion is warranted here should Respondent argue that the contract coverage standard applies instead of the "clear and unmistakable" waiver standard.

Board has held that “an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification or comply with the request to the extent that it encompasses necessary and relevant information.” *Mission Foods*, 345 NLRB 788, 789 (2005) (quoting *Superior Protection Inc.*, 341 NLRB 267, 269 (2004), *enfd.* 401 F.3d 282 (5th Cir. 2005)); *see also Keauhou Beach Hotel*, 298 NLRB 702 (1990). Additionally, “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.” *Mission Foods*, 345 NLRB at 789.

In her November 9, 2016 email Celona did not request any clarification about the scope of the Union’s information request. When Esquivel called Celona in November 2016 to follow up on his request, Celona asserted that the Notification of Action Steps could not be delineated between Union and non-Union employees. The fact that the responsive documents happen to contain information about non-Unit employees does not make the Union’s request overbroad. At the time of the initial request, having not seen a Notification of Action Steps document, Esquivel had no reason to believe that the requested documents contained information about non-Unit employees. Once Celona alerted Esquivel to the issue, he suggested that Respondent could simply sort the information in Excel and sort out the non-Unit information. In doing so, he clarified that the scope of his request was limited to Notification of Action Steps information for Unit employees. Subsequently, Respondent did not make any attempt to provide the Union with the responsive information about Unit employees, and dropped the assertion that the Union’s request was overbroad.

Similarly, Respondent did not pursue the burdensome argument. Celona never provided any detail to the Union as to how specifically Respondent would be burdened in providing the

Notification of Action Steps. She would be hard pressed to do so in light of the Dickson's testimony that the Notification of Action Steps are emails that the HR Business Partners generate and send to Sales Managers and RVPs every four weeks. In the November 2016 telephone conversation between Esquivel and Celona, Esquivel challenged Celona's blanket claim that his request was burdensome by asserting that the Notification of Actions Steps documents were already generated and Respondent need only forward them to the Union. Celona did not contest this assertion and Respondent did not raise the burdensome defense in subsequent communications about the request.

The evidence demonstrates that Respondent cannot substantiate its short-lived boilerplate claims that the Union's request for Notification of Action Steps was overbroad and unduly burdensome.

iii. Proprietary Management Documents

After the Union had already requested the Notification of Actions Steps in writing on November 3 and 30, 2016, by telephone calls with Celona in November and December 2016, and in a late February or early March 2017 telephone call with Dickson, Respondent raised a new defense that the requested documents were proprietary management documents. Dickson made this new blanket assertion in the telephone call with Esquivel, and later referenced it in her April 6, 2017 email. Board law is clear that the party claiming that relevant requested information is proprietary bears the burden of demonstrating that it has a legitimate and substantiated confidentiality interest in withholding the information. *Howard Industries, Inc.*, 360 NLRB 891 (2014) (employer claiming that information about the coil wire standards that it used to evaluate unit employees' work was proprietary did not demonstrate a substantial and legitimate confidentiality interest so as to privilege withholding the information from the union).

Respondent never expounded on Dickson's claim to Esquivel that the Notification of Action Steps are proprietary management documents and, based on the record evidence, it is difficult to conceive of how they could constitute proprietary information. The Notification of Action Steps are emails from HR Business Partners to Sales Managers and RVPs that contain information about what level of discipline Unit employees should be given under the PIP. Respondent has already provided the Union with multiple PowerPoint presentations about the exact parameters and processes involved in administering the PIP, so it is no secret to the Union that employees are eligible for increasing levels of discipline, up to and including termination, every four weeks based on their ranking on the PRRs. Respondent cannot possibly suggest it has a legitimate and substantial confidentiality interest in withholding information from the Union about its actual application, or recommendation, of the PIP disciplinary steps to Unit employees.

To the extent that Dickson was attempting to assert that any internal management document, regardless of its proprietary nature or relevant content, constitutes a confidential document that an employer is privileged to withhold from a union, the Board does not recognize any such categorical confidentiality privilege. In support of this argument, Respondent may cite to the case of *Ohio Power Co.*, 216 NLRB 987 (1975) for the proposition that management communications are confidential. However, that case does not stand for the proposition. In *Ohio Power*, the union requested contract information about the employer's subcontracting of work to non-unit employees. The Board determined that the union adequately demonstrated the relevance of this request and the employer was obligated to provide the information. 216 NLRB at 987, 995.

The Board only recognizes a few categories of confidential information that an employer may legitimately withhold from a union, those being information:

which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.

Detroit Newspaper Agency, 317 NLRB 1071, 1073 (1995). The Notification of Action Steps do not fall into any of these categories, and Respondent has not proffered any other basis to substantiate a legitimate confidentiality concern.⁸ The Board has ordered employers to produce similar types of internal management documents that include relevant information about bargaining unit employees' terms and conditions of employees. *See, e.g., Grand Rapids Press*, 331 NLRB 296 (2000) (personnel files, including management's disciplinary memoranda, for 22 bargaining unit employees); *In re Dish Network Service Corp.*, 339 NLRB 1126 (2003) (written consultation form completed by management for a bargaining unit employee's discipline); *Lansing Automakers Federal Credit Union*, 355 NLRB 1345 (2010) (internal management investigative report about bargaining unit employees' conduct).

Finally, none of Respondent's assertions about the proprietary and confidential nature of the Notification of Action Steps emails addresses the Union's March 22, 2017 request for the bare data about what level of discipline Unit employees were receiving under the PIP. This defense is

⁸ In her November 2016 telephone conversation with Esquivel, Celona suggested that employees might be embarrassed about the disciplinary information and not want anyone, presumably including their Union representative, to know about their disciplinary status. To the extent that Celona's isolated statement speculating about employees' privacy concerns was an assertion that Respondent has a legitimate and substantial confidentiality interest in withholding the Notification of Action Steps, the assertion is baseless. The Board does not consider this type of performance and disciplinary information to be confidential from employees' collective-bargaining representative. *See, e.g., The Aerospace Corporation*, 314 NLRB 100 (1994) (supervisors' ratings of employees' employment attributes and on-the-job performance is not private and can be readily observed by coworkers). This is especially true where, as here, there is no record evidence that employees had any expectation of privacy of the disciplinary information under the PIP. *Accord Boston Herald-Traveler Corp.*, 110 NLRB 2097 (1954) (employer's confidentiality claim rejected because the argument that some employees might prefer financial anonymity rested on a speculative basis, and, in any event, such individual desires must yield to the interests of the great majority of workers represented in the unit); *The Aerospace Corporation*, 314 NLRB 100 (1994) (no evidence that employer promised employees that evaluations would be confidential, therefore, they are not confidential and respondent not privileged to withhold them).

patently insufficient to relieve Respondent of its duty to supply the information under Section 8(a)(5) and (1) of the Act.

iv. Pre-arbitration Discovery

In its Answer, Respondent raised a new defense for the first time that the Union's information requests were made for improper purposes, such as to engage in pre-arbitration discovery. (GC Ex. 1(h)). "[I]t is well settled that there is no general right to pretrial discovery in arbitration proceedings," and a party is not required under the Act to fulfill an information request that is merely a substitute for pre-arbitration discovery. *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362, 1362 (1998) (union not obligated to supply the employer with requested names of witnesses and documents that the union intended to put on at arbitration). However, this exception to the statutory duty to furnish relevant information is limited to information about the other parties' planned presentation of its case before the arbitrator. Even at the pre-arbitration stage, a party can still request substantive information pertaining to the issues. *See Oncor Electric*, 364 NLRB No. 58 (2016); *Hamilton Park Healthcare Center*, 365 NLRB No. 117 (2017). Moreover, the limited defense does not apply where the request for information was made before a grievance is referred to arbitration. *Ormet Aluminum Products Corp.*, 335 NLRB 788, 789 (2001) (information request made a third step of the grievance procedure, before the grievance was denied and referred to arbitration, does not constitute pre-arbitration discovery). The Board has stated that to find otherwise, "would simply make the arbitration procedure a safe harbor for parties that unlawfully refuse to furnish requested information during the grievance process." 335 NLRB at 789 (2001).

Here, the only grievance that proceeded to the arbitration stage of the parties' grievance-arbitration procedures was the Union's FTGU grievance filed in September 2016. However, that grievance did not reach the pre-arbitration stage, pursuant to the terms of the CBA, until the

Respondent issued its Step 3 denial on February 13, 2017 and the Union referred the grievance to arbitration on February 28, 2017. By that time, the Union had already requested the Notification of Action Steps approximately four times, twice by emails on November 3 and 30, 2016, and twice by telephone calls with Celona in November and December 2016. This fact alone defeats Respondent's defense that the Union's requests constitute impermissible pre-arbitration discovery. Moreover, the Union's requests for the Notification of Action Steps and the underlying data are clearly substantive requests for information on the issue of Respondent's application of the PIP to Unit employees. Nothing on the face of the written requests or in the Union's verbal communications about the requests suggests that the Union sought information about Respondent's arbitration strategy for the FTGU grievance, or any other grievance.

Respondent's belated defense that the Union's information requests constitute pre-arbitration discovery is inapplicable and does not privilege Respondent to withhold the requested information.

v. Mootness

In its Answer, Respondent also asserts for the first time that it should not be required to produce the requested information because the issues for which the requests were made are now moot. (GC Ex. 1(h)). In this regard, Respondent may assert that the requested Notification of Action Steps and related information in about Unit employees who received discipline under the PIP is moot or no longer relevant to the Union, because the contractual grievance timelines for filing grievances over particular instances of discipline have passed. This essentially amounts to an argument that because Respondent has delayed in providing the information long enough that the Union may not be able to effectively use it to file timely grievances for some Unit employees, Respondent should be relieved its duty to provide the information. Respondent is not

raising a defense to unlawful conduct. Respondent is asking for a reward for unlawful conduct, and for the Judge to cement the damage to the Union's ability to effectively act as employees' collective-bargaining representative.

The Board judges the relevance of an information request by evaluating the circumstances present at the time the request was made. *See Lansing Automakers Federal Credit Union*, 355 NLRB 1345 (2010). Here, the Union requested the Notification of Action Steps in November and December 2016 and again in February and March 2017. If Respondent had promptly provided the requested information at that time, as the Act requires, the Union could have used it to evaluate the merits of potential grievances for Unit employees who were disciplined during those timeframes, and timely filed the grievances within 28 days from when the employees reasonably had notice of the discipline, as specified in the CBA.

Even now, if and when Respondent produces the requested Notification of Action Steps, the Union could still review the information and file grievances over Unit employees' discipline from 2016 and 2017. Whether or not an arbitrator might ultimately determine that any such grievance is timely filed under the grievance-arbitration procedures of the CBA does not bear on the relevance of the requested information. It is well established that information must be turned over to the union so that it may determine for itself whether there is merit to a potential grievance, before any decision on a grievance's arbitrability is made. *See O & G Industries*, 269 NLRB 986, 987 (1984) (an employer's assertion that a grievance is not arbitrable is not a basis for denying a related information request); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (the Board is not concerned with whether a potential grievance is ultimately arbitrable under the parties' contract).

To the extent that Respondent's refusal to provide the requested information to date has successfully damaged the Union's ability to effectively evaluate and timely file grievances for Unit employees, Respondent should not be doubly rewarded for causing that damage. Respondent must provide the information now as required by Section 8(a)(5) and (1) of the Act.

vi. Section 10(b)

In its Answer, Respondent asserts that the Complaint is barred by Section 10(b) of the Act. GC Ex. 1(h). Section 10(b) of the Act states that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." 29 U.S.C. §160.

The Complaint is based on a charge filed by the Union on April 12, 2017, and served on Respondent on April 13, 2017, alleging that Respondent failed and refused to provide relevant requested information in violation of Section 8(a)(5) and (1) of the Act. The Union made the underlying information requests starting on November 3, 2016, which is clearly within the six-month period prior to the filing of the charge. This defense is clearly baseless.

Each and every one of Respondent's affirmative defenses is unsubstantiated and insufficient to relieve Respondent of its duty to provide the Union with the Notification of Action Steps and related data about what level of discipline Unit employees are receiving under the PIP. Cumulatively, Respondent's shifting boilerplate defenses exposes the fact that Respondent has no real concern in providing the requested information, other than it will be eminently useful to the Union to represent Unit employees who are disciplined under the PIP, and may lead to "many, many grievances."

V. CONCLUSION

Based on the foregoing, the record clearly demonstrates that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested Notification of Action Steps and related information, as alleged in the Complaint. The General Counsel respectfully requests that the Judge make appropriate findings of fact, conclusions of law, and such recommendations to the Board as will properly remedy Respondent's unfair labor practices.

DATED at Denver, Colorado, this 5th day of January, 2018.

Respectfully submitted,



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VI. PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain collectively with the International Brotherhood of Electrical Workers, Local 1269 (Union) by refusing to provide the Union with information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL provide the Union with the information it requested primarily by emails on November 3 and 30, 2016, and March 21 and 22, 2017.

Dex Media, Inc.

(Employer)

Dated:

By:

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Byron Rogers Federal Office Building

Telephone: (303)844-3551

1961 Stout Street, Suite 13-103
Denver, CO 80294

Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Brief to the Administrative Law Judge**, together with this Certificate of Service, was E-Filed, E-mailed, or sent by Regular Mail, as indicated below, to the following parties on January 5, 2018.

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