

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

COLORADO SYMPHONY ASSOCIATION,

and

Case 27-CA-195026

**DENVER MUSICIANS ASSOCIATION,
AFM LOCAL 20-623**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS**

Submitted by:

Angie Berens
Counsel for the General Counsel
National Labor Relations Board
Region 27
1961 Stout St., Suite 13-103
Denver, Colorado 80294
(720)598-7399

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I. INTRODUCTION

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel submits this Answering Brief in response to Respondent's Exceptions to the ALJ's Decision and Recommended Order.

II. STATEMENT OF THE CASE

A hearing was held in this matter before Administrative Law Judge Jeffrey D. Wedekind (ALJ) on September 19, 2017. The ALJ's decision was issued on November 20, 2017. The ALJ found that Respondent's refusal to provide Denver Musicians Association, Local 20-623 (Union) with requested individual contracts of principal wind and brass players violated Sections 8(a)(5) and (1) of the Act as alleged in the Complaint. Respondent's attempt to confuse the issues and misplace the legal burdens in this case should be rejected. As discussed below, the ALJ's decision was factually and legally sound, and should be affirmed in its entirety.

III. ISSUES PRESENTED

Respondent filed 62 exceptions to the ALJ's 14 page decision.¹ Respondent takes exception to nearly all of the ALJ's factual and legal findings. The general issues presented by Respondent's exceptions are as follows:

- A. Whether the ALJ made proper credibility and factual determinations. (Exceptions 1-17, 19, 23 -27, 29-36, 45-47, 57)
- B. Whether the ALJ properly determined that Respondent unlawfully failed to provide requested information to the Union. (Exceptions 18, 20-22, 28, 37-44, 48-56, 58-62).

IV. FACTS

The Union has represented musicians of the Respondent since at least 1990. The most recent collective bargaining agreement was effective from July 1, 2013 through June 30, 2015.

¹ The numbering on Respondent's Statement of Exceptions is incorrect. Page 6 ends with exception no. 56, and page 7 begins with exception no. 55. To avoid confusion, I refer to the second exception no. 55 as exception no. 57, and continue numerically from there, ending with the final exception as no. 62.

(ALJD 1:3; GCX 1; Tr. 106:6-7).² Since its expiration, the parties have been engaged in negotiations for a new contract. (Tr. 36:8-9).

Under the contract, musicians can be compensated in two manners. They are paid a base rate provided for by Article 4 of the contract. (Tr. 36:22; JTX 1, p. 6). They can also negotiate individual contracts under Article 16 of the contract for overscale pay. (Tr. 36:12-19; 37:4; JTX 1, p. 35). Individual contracts are generally for a one year term, and automatically renew for the following contract year. (JTX 1, p. 35, Art. 16.2; Tr. 106:24). If either party desires changes, written notification that they wish to change the terms must be given to the other party by February 1. Thereafter, Respondent and the musician shall meet and negotiate in good faith to reach an agreement. (ALJD 2:9-14; JTX 1, p. 35, Art. 16.3(A) and (B)). Historically, the Union has not played a role in negotiating these individual contracts. (Tr. 39:15-16, 42:5-8). However, there is no language in the contract prohibiting the Union from assisting unit musicians in relation to such negotiations. (ALJD 9:15; Tr. 39:23; JTX 1).

On November 14, 2016, the Union's attorney Joseph Goldhammer (Goldhammer) and Local Union President Michael Allen (Allen) met with a bargaining unit member musician, principal flutist Brook Ferguson (Ferguson), in preparation for her meeting scheduled for the following day with management. (ALJD 3; Tr.45:7-12, 145:12-16). The meeting scheduled for November 15, 2016 was an investigative meeting called by CSA Personnel Director Larry Brezicka (Brezika) over an incident that occurred during a rehearsal, wherein Ferguson was accused of being aggressive and rude for asking the associate conductor to follow her in her flute solo. (Tr. 47-48; 143-144). During the preparatory meeting with Goldhammer and Allen, there

1. References herein are as follows: ALJD __:__ refers to the ALJ's Decision and corresponding pages and lines; "Tr.__:__" refers to the hearing transcript and corresponding page numbers and lines; "GCX ____" refers to General Counsel's Exhibit and the page number; "JTX ____" refers to Joint Exhibit and the page number; "RX" refers to Respondent's Exhibit and the page number; and R Br. __ refers to Respondent's Brief in Support of Exceptions.

was a discussion regarding Ferguson's treatment being related to the fact that Ferguson was female. (ALJD 3:16-25; Tr. 62:1-5). In this discussion, Ferguson raised the fact that she was in the process of trying to negotiate her individual contract under Article 16, and felt she was being treated unfairly in regard to pay compared with other musicians in similar positions (who are male) in the orchestra. (ALJD 3:16-25; Tr. 147:18-148:19). Ferguson told Goldhammer and Allen that she needed help with her contract from the Union because she felt it was unfair. (Tr. 153:23-24). Goldhammer recognized that the Union did not have sufficient data to evaluate whether Ferguson was being treated equitably under the contract, and that told her that the Union could help her by requesting that information. (ALJD 3:29-35; Tr. 50:1-5, 154:6-9). This would assist her in determining whether she was being treated equitably for purposes of negotiating her individual contract. (Tr. 154:6-9). The Union told her that they could not help her with an Equal Employment Opportunity Commission (EEOC) charge. (Tr. 51:1-5).³ Ferguson, Goldhammer and Brezicka met as scheduled on November 15, 2016. There was no pending information request at this time, nor was the issue discussed in the November 15 meeting. (Tr. 144:17-20).

Based upon concerns regarding possible wage inequities that were raised by Ms. Ferguson regarding her contract, on January 4, 2017, Union Attorney Goldhammer submitted an information request to Respondent's Counsel, Patrick Scully (Scully). This was the first and only request for this type of information. Specifically, the request was for:

1. Copies of the individual contracts executed between the CSA and all principal wind and brass players for the 2014/15, 2015/16 and 2016/17 seasons.
2. The original hire dates of all persons for whom copies of individual contracts are produced in response to request number one above.

³ It is undisputed that Ferguson did pursue an EEOC charge against Respondent. (RX 1, 3). However, the record makes clear that the Union did not play a role in this process and Goldhammer did not represent her in that matter. (Tr. 51:1-5, 154:10-15).

(JTX 2; ALJD 3:37-41). The information requested in #2 was provided, and is not at issue in this case.

Upon receipt of this request, Respondent's Attorney Scully replied by stating he would send the request along and asked to whom the Union usually sends information requests. Goldhammer replied that he did not recall them ever making an information request. Scully responded by asking on whose behalf he was requesting the information, to which Goldhammer replied, on behalf of the Union. Scully replied that Respondent would provide the hire dates, but asked Goldhammer if he knew that the Union agreed that Respondent had the right to deal directly with Respondent over individual contracts, and asked Goldhammer to explain the relevance of his request in writing. Respondent's CEO Jerry Kern (Kern) replied to this in an email stating that he required more than the relevance of the request. He asked for the legal basis on which the Union believed it had the right to the information. (JTX 3; ALJD 4:1-6).

In response to these emails, Union Attorney Goldhammer sent a letter to Respondent's Attorney Scully on January 9, 2017. Goldhammer explained that the information requested was presumptively relevant, as the individual contracts are part of unit employees' wages. He further explained that the information was "relevant to potential wage inequities and the policing and administration of the contract or those provisions that remain in effect after expiration at least until impasse." (JTX 4). In addition, he cited cases supporting the argument that personal services contracts including more favorable terms must be disclosed despite the fact that the union does not participate in the negotiations. (JTX 4; ALJD 4:8-42).

Scully replied to Goldhammer on January 16, 2017. In his response, Scully accused the Union of requesting the information at the behest of Ferguson to aid her in pursuit of litigation against Respondent, and denied the request. (JTX 5; ALJD 4:44-5:14).

On about May 15, 2017, Scully and Goldhammer had a telephone discussion regarding unit musician Ferguson and the information request from January 4, 2017. Scully raised the fact that Ferguson was pursuing an EEOC claim against Respondent for sex discrimination. Goldhammer informed Scully that while Brook Ferguson was the impetus behind the request for information, the information request was for the benefit of all employees in the bargaining unit because the Union had an interest in making sure that all those in the unit were being treated equitably; even though bargaining was done on an individual basis. Goldhammer further informed Scully that it was important that everybody have access to the information when they go in for individual bargaining. (ALJD 4:31-41; Tr.59:13-21). Goldhammer never represented that the Union was requesting the information in furtherance of Ferguson's EEOC claim. (Tr.59:24-60:2). Nor did the Union participate in any way in Ferguson's EEOC case. (Tr.155:6). She was initially represented by attorney John McKendree (McKendree), in her negotiations with Respondent for her individual contract and related discrimination. Ferguson later pursued the EEOC claim on her own. (ALJD 5:16-23; Tr.154:20-155:6).

In addition, around the time of the phone call in May 2015, Colorado Symphony CEO Kern contacted the "Orchestra Committee" about the Union's information request. The Orchestra Committee is provided for by Article 13.2 of the collective bargaining agreement, and consists of five tenured musicians elected by the Orchestra members to serve as an agent of the Union in the administration of the contract and as a liaison between the musicians and the Union. (ALJD 5: 43-44; JTX 1; p. 27). The Orchestra Committee informed Kern that the musicians did not want their individual contracts disclosed to the Union. (ALJD 6:1-2).

V. ARGUMENT

This is a straightforward case in which the ALJ properly found that Respondent refused to provide presumptively relevant wage information to the Union in violation of Sections 8(a)(5) and (1) of the Act. Respondent's arguments, both before the ALJ and now the Board, are a convoluted attempt at confusing the simple issue in this case.

A. **The ALJ's factual findings are supported by the record and his credibility determinations are sound.**

Respondent takes exception to several of the ALJ's factual determinations based upon assessments of credibility. There are no grounds for reversing any of the ALJ's findings. Regarding credibility, it is the Board's policy not to overrule an ALJ's credibility determinations unless the "clear preponderance of all relevant evidence" demonstrates that they are incorrect. *Standard Drywall Products*, 91 NLRB 544, 545 (1950), *enfd.* 188 F2d 362 (3d Cir. 1951). The Board gives great weight to a judge's determinations based on witness demeanor, as the judge, not the Board, had the advantage of observing the witnesses while testifying. *Id.* As noted in his decision, the ALJ considered all relevant factors in making credibility findings, including "the demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole." (ALJD 1: n. 2 (citing *Daikichi Corp.*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert denied* 522 U.S. 948 (1997)).

Specifically, Respondent argues that the ALJ's most "erroneous finding" was his failure to acknowledge the link between Ferguson's private EEOC litigation.⁴ Contrary to Respondent's assertions, the ALJ does not ignore the fact that the requested information could be used by

⁴ Respondent incorrectly calls it "Ms. Ferguson's private ligation against the EEOC." (R. Br. 7).

Ferguson to support her EEOC charge. Rather, he determined there was insufficient evidence that the Union requested the contracts *solely* to provide Ferguson with evidence to support her EEOC case. (ALJD 8:33-35). Accordingly, the ALJ's findings on this issue are not inconsistent. There is no dispute that the Union's request was prompted by Ferguson's claims of discrimination. (ALJD 10:11-20). The ALJ properly credited Goldhammer's testimony that the Union did not assist Ferguson with her EEOC claim; but that it did have an interest in making sure musicians, including Ferguson, were being treated equitably in their individual contract negotiations, and that employees should have access to such information. (ALJD 10:9-20). In fact, there is no evidence to the contrary in the record. As stated above, the ALJ used the proper considerations in assessing credibility and appropriately credited Goldhammer. To the extent Respondent disputes the finding of what was said in the two-party conversation between Goldhammer and Scully on May 15, 2017, the only evidence in the record regarding this conversation came from Goldhammer. (ALJD 10:9-20). While Respondent's Attorney Scully was in attendance at the hearing, he was not called to testify. Accordingly, there is no basis for discrediting the only witness to the conversation.⁵

Contrary to Respondent's assertions, the ALJ did recognize the fact that the requested information was for the same set of musicians that were the subject of her private discrimination claims. (ALJD 8:19-41, 9:1-11). The Union admits that the immediate concern was arming Ferguson with information that would be useful to her in attempting to negotiate an equitable

⁵ While the ALJ did not draw an adverse inference, he certainly could have. It is within an ALJ's "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 that witness is the party's agent and thus within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party." *Roosevelt Memorial Medical Center*, 348 NLRB 1016,1022 (2006).

individual contract.⁶ Goldhammer's uncontroverted testimony explains the situation. (Tr.54: 2-24). As he explained, the Union was sensitive to the fact that some musicians in the unit may not be comfortable with having their overscale information being made available. Thus, the Union limited its request accordingly, to have the least impact given these sensitivities by narrowing it to positions most similar to Ferguson's. The fact that these were the same positions she was concerned with for her private discrimination claims being addressed by Ferguson's own attorney McKendree does not diminish the Union's need for the information.⁷ If it is relevant for an EEOC type of discrimination claim, it is logically also relevant to Ferguson's claims of discrimination in negotiating her individual contract. As discussed throughout the ALJ's decision, the fact the requested information may be relevant for her EEOC claim does not negate its relevance in the collective bargaining situation. (ALJD 7, 8, 9) Moreover, the timing of the request from the Union on January 4, 2017 coincided with the approaching deadline by which Ferguson had to submit her negotiating demands for the upcoming season's contract on February 1, 2017. (ALJD 2:9-12; Tr.55:8-16). As the ALJ found, the record evidence fails to support a finding that the information was requested solely to assist Ferguson with her private discrimination case.

⁶ Respondent implies that the fact that the Union did not inform Respondent that it sought the information to assist Ms. Ferguson in her individual contract negotiations indicates bad faith. (R. Br. 24-25). There is no obligation of the Union to reveal all of its strategies to Respondent's counsel when making a valid request for presumptively relevant information. (Tr.66:4-23). The Union offered valid reasons, and Respondent has failed to rebut the presumption of relevance by proving bad faith.

⁷ There is no record evidence to support Respondent's contention that the Union's information request was somehow a continuation of a process started by Ferguson's attorney McKendree, during which discrimination was being asserted as a basis for unfairness in Respondent's contract proposal to her. Respondent's CEO Jerry Kern originally testified that he believed the individual contracts were previously requested by McKendree. However, when pressed for details, he admitted that there was no request to him for individual contracts from McKendree or Ferguson. He thought perhaps there was one to Scully, but had no specific recollection of such a request. (Tr.136:6-138:7). Importantly, no evidence of a written request was offered into evidence.

B. The ALJ properly determined that Respondent unlawfully failed to provide information to the Union.

The ALJ properly found that the requested information was presumptively relevant. Thereafter, it was Respondent's burden to present facts or circumstances to rebut this presumption, which it failed to do. (ALJD 6:21-26, 7:1-7, n.7). Respondent blatantly ignores the legal precedent cited by the ALJ, and improperly attempts to place the burden on the Union to prove specific relevance of the information.

1. The information requested by the Union is presumptively relevant.

As the ALJ found, information pertaining to wages, hours and working conditions of bargaining unit employees is presumptively relevant. (ALJD 6:21-26, 7:1-7). Such information goes to "the core of the employee-employer relationship." *Retlaw Broadcasting, Co.*, 324 NLRB 138, 141, (1997), *enfd.* 172 F.3d 660 (9th Cir. 1999); *King Broadcasting Co.*, 324 NLRB 322, 337 (1997); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). Specifically, individual employment agreements (sometimes referred to as Personal Service Contracts (PSCs)), are presumptively relevant as they pertain to the wages, hours and working conditions of bargaining unit employees. *King Broadcasting Co.*, 324 NLRB at 337. The fact that the Union does not participate in bargaining for individual contracts does not diminish their relevance. *Id.* at 337; citing *WCCO Radio, Inc.*, 282 NLRB 1199, 1204-1205 (1987), *enfd.* 844 F.2d 511 (8th Cir. 1988). (ALJD 6:21-26, 7:1-7, n.7). It is undisputed that the individual contracts held by CSA musicians provide for overscale wages and other terms and conditions of employment. As such, they are clearly presumptively relevant. Respondent's attempt to turn this burden upside down failed before the ALJ and should fail now before the Board.

Respondent further attempts to confuse the issue by stating that the ALJ "fails to distinguish between 'wages' and overscale 'contracts.'" (R. Br. P. 11, n. 5). The ALJ's

conclusions do not hinge on only overscale “wages.” A reading of the cases cited by the ALJ indicates, as stated above, that the type of individual contracts requested by the Union, and not just the wages provided therein, are presumptively relevant, as they pertain to “wages, hours and working conditions of employees in the bargaining unit.” *King Broadcasting Co.*, 324 NLRB at 337. The Union requested the contracts containing overscale wages and other terms and conditions of employment of unit employees, which are presumptively relevant, and were ordered produced by the ALJ. (ALJD 13:16-20). In fact, Respondent’s CEO Jerry Kern acknowledges in his testimony that the requested contracts are for individual benefits in excess of what is guaranteed by the CBA, including wages, time off and other terms of employment. (Tr.106: 19-25, 107:1-5). He and Respondent’s Counsel continually refer to these individual contracts as “overscale contracts in the record.” (Tr.107: 8, 108:1-25, 122:22-23). In addition, Article 4 of the contract provides that overscale wages are negotiated under Article 16 “Individual Contracts.” (JTX 1, pp. 6, 35). Based on the foregoing, Respondent’s attempt to split hairs and try to argue that the Union did not request “over-scale wages” fails.

2. The ALJ did not “invent” hypothetical reasons for the Union’s request.

Contrary to Respondent’s assertions, the ALJ did not “invent” hypothetical reasons for the Union’s request. First, there would be no need to do so, since he found the information is presumptively relevant. Thereafter, it was Respondent’s burden to show why the information should not be produced, which the ALJ correctly found it failed to do.

To the extent Respondent claims the ALJ improperly found that the Union requested individual contracts to investigate possible race or sex discrimination, the record makes clear that the initial motivation for requesting the information was Ferguson’s claim that she was being treated inequitably for purposes of negotiating her individual contract, in that she believed she was being paid less than her male counterparts. (ALJD 3:1-5; Tr. 50:1-5, 59:12-23). There is

no requirement, as Respondent appears to represent, that the data be relevant to every bargaining unit member. The Union has a duty to represent all unit employees with due diligence, and information that may demonstrate discrimination is therefore relevant and related to collective bargaining. *Westinghouse Electric*, 239 NLRB 106, 108 (1978). Against logic, Respondent argues on one hand that the Union sought the information solely to support Ferguson’s private sex discrimination case, and on the other hand that the ALJ incorrectly found the information was related to sex discrimination.

Respondent further argues that the ALJ’s finding that “the Union’s information request was related to ongoing negotiations,” stating that “the parties were engaged in ongoing negotiations for a collective bargaining agreement and if the information was provided the Union could have proposed a non-discrimination provision be included in the new agreement” was unsubstantiated. (ALJD 8:10-15; R. Br. 13).⁸ The flaw in Respondent’s argument is that the ALJ did not find that the “information request was related to ongoing negotiations.” (ALJD 8:10-16). He simply found that Respondent failed to meet its burden through a “failure to present any facts or circumstances to rebut the presumption of relevance.” (ALJD 6:25-7:6) In doing so, he found that Respondent failed to demonstrate that the Union requested information “solely to obtain evidence for Ferguson’s EEOC sex-discrimination/equal-pay case against the Symphony” as it could have also been relevant to contract negotiations and discrimination among unit employees. (ALJD 7: 9-14; 8:10-17). Again, in making its arguments, Respondent forgets that the burden is on Respondent to show that the information is not relevant due to “nefarious intent” on the part of the Union, not the other way around. (R. Br. 13, n. 8). Accordingly, as discussed

⁸ Respondent’s citation to the record is incorrect. The language quoted in Respondent’s Brief appears on page 8 of the ALJD, not page 9.

below, unless Respondent is able to prove that the only reason the information was requested was an improper one, the Union is entitled to the information as the ALJ found.

3. Respondent failed to rebut the presumption of relevance by failing to show that the only reason the Union requested the information was to assist Ms. Ferguson in her private litigation .

When requesting information, there is a presumption that a union acts in good faith until the contrary is shown. (ALJD: *Mission Foods*, 345 NLRB 788 (2005); *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987). The requirement that the information request be made in good faith is satisfied if at least one reason for the demand can be justified, even if the Union has other reasons for requesting it. *Prime Healthcare Services-Encino, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 14 (Oct. 17, 2016); *A-Plus Roofing*, 295 NLRB 967, 972 (1989); *Associated General Contractors of California*, 242 NLRB 891, 894 (1979), enfd. as modified, *NLRB v. Associated General Contractors of California*, 633 F.2d 766 (9th Cir. 1980); *Westinghouse Electric Corporation*, 239 NLRB 106, 110 (1978). This principle holds true even if “other reasons” for requesting the information include the pursuit of other litigation. *Westinghouse Electric*, 239 NLRB at 110. For example, in *Westinghouse Electric*, cited by the ALJ, the requested information that included statistical information related to Respondent’s employment practices by numbers of employees in certain wage categories, job classifications and promotions, broken down by race, sex and “Spanish surname.” (ALJD 7:15-8:3). One of Respondent’s defenses was that the union wanted the information to prosecute discrimination lawsuits against Respondent, and not for bargaining or administration of the contract. The Board held that the information was presumptively relevant and that it did not lose its relevance “merely because the union might additionally use it or intends to use it to enforce statutory and contractual rights before an arbitrator, the Board or a court” and “[t]he fact that other pending

litigation exists does not offer an employer a defense to providing information.” *Id.* at 110-111. Notably, the Board in that case also determined that information related to possible sex or race discrimination is relevant to the union’s role as collective bargaining representative, as the duty of fair representation extends to all employees in the unit. *Id.* at 108. This includes other possible Title VII discrimination charges and lawsuits. *Id.* at 111. (ALJD 7:8-8:17).

In the instant case, the Union made a good faith request for presumptively relevant information on January 4, 2017. (ALJD 3: 37-41; 6:21-25). In response to Respondent’s inquiries, the Union explained the relevance in writing on January 9, 2017. The Union informed the Employer that, in addition to being presumptively relevant, the information was relevant to “potential wage inequities and the policing and administration of the contract.” (ALJD 4:8-42). Clearly, the expressed reason is a relevant purpose pursuant to the case law discussed above. Moreover, it is undisputed that Ferguson was in the process of attempting to negotiate a new individual contract during the time the request was made, and believed she was being treated unfairly in that process. The Union had indicated that it could request information to aid her in those individual contract negotiations. (ALJD 3:28-35, Tr. 50:1-5).

Nonetheless, Respondent refused to provide the information, claiming that the Union sought it solely to further Ferguson’s litigation claims against it. As the ALJ found, there is insufficient evidence to support such a finding. (ALJD 8:19-21). Ferguson had not filed an EEOC charge at the time the request was made. (ALJD 8:21-22). The Union was not assisting Ferguson with her EEOC charge, and in fact told her they could not do so. (ALJD 8:25-26; Tr.51:1-11, 142:9-143:20, 154:20-155:6). She had a different attorney who was initially representing her, and then she filed an EEOC charge on her own. Accordingly, contrary to Respondent’s argument, the ALJ properly found that Ferguson filed her EEOC charge “without

the assistance of her personal attorney or the Union.” ALJD 5:17-18. Despite the fact that Ferguson may have requested the Union’s assistance, the record evidence indicates that the Union told her it could not assist her with her EEOC case, and did not assist her. (R. Br. 17; ALJD 8:25-26; Tr. 51:1-11, 142:9-143:20, 154:20-155:6). Accordingly, there is no valid argument that the Union was substituting an information request for discovery as contended by Respondent.⁹ (R. Br. 15).

Additionally, Respondent makes an issue out of the fact that Ferguson’s EEOC charge filed on June 27, 2017, mentions her “information request having to do with [her] allegations of discrimination.” (ALJD 6:4-12; RX 1). As the ALJ properly found, the amended EEOC charge merely stated that the request “had to do with [her] allegations of discrimination.” This is not the same as stating that the request only had to do with her *EEOC* allegations of discrimination. Indeed, the ALJ recognized that Ferguson was alleging discrimination in her contract negotiations and in an EEOC context, by also finding that the Union was aware that Ferguson might also use the requested information in support of her EEOC charge. However, he found that this was clearly insufficient to rebut the presumption of relevance. (ALJD 8:33-9:11). The testimony makes clear that Ferguson was not a union official and was not acting in any capacity as an agent or representative of the Union. (Tr. 155:7-12). Thus, as the ALJ found, the evidence fails to indicate that the Union sought the information solely to assist Ferguson with her EEOC claim.¹⁰

⁹ As the ALJ correctly found, the cases cited by Respondent in making this argument are inapposite, as they involve unfair labor practice charges, and hold that a Union cannot request information for a pending unfair labor practice charge in which there is no discovery mechanism in place. (R. Br. 15). The record indicates that there were no pending ULP cases between the parties other than the pending case. As for the EEOC case, they have their own discovery provisions, so there would be no need for the Union to request such information. (ALJD 9:24-29).

¹⁰ Contrary to Respondent’s assertions, the Union’s conduct and statements do not confirm that the only purpose of the request was to assist Ferguson in her pursuit of claims of discrimination, and that the Union admitted to this fact. Rather, the record confirms the opposite. (R. Br. 18, n. 11). As already discussed herein and as the ALJ found, the Union, through Goldhammer admitted that Ferguson was the instigation of the request for information,

4. The ALJ properly found that the requested information is not confidential, even if the Orchestra Committee did not want it released.

As the ALJ found, the fact that the Orchestra Committee did not want the contracts disclosed does not make them confidential. He correctly found that the Orchestra Committee did not express this concern until after the request was denied, the musicians were not promised confidentiality at the time of execution, the union's right to the information outweighs individual confidentiality and privacy interests, and Respondent did not propose any reasonable accommodation. (ALJD 12:21-32).

Respondent's assertion that "musicians' legitimate interest in keeping the contracts private was undisputed" is irrelevant. While it is true that some of the musicians may not have wanted such information released, since unit employee wages are presumptively relevant, the interests of certain individual employees regarding disclosure does not override the Union's right to obtain such information. See *WCCO Radio*, 282 NLRB at 1205 and cases cited therein.¹¹ Thus, the fact that the Orchestra Committee may have informed Respondent's CEO Kern that it did not want the contracts revealed is likewise irrelevant.¹² While the Orchestra Committee is an agent of the Union and liaison between the musicians and the Union pursuant to the contract, it is not the principal representative of the employees, and therefore cannot dictate the actions of the recognized bargaining agent Union. (JTX 1, Art. XIII, and recognition language p. 2).¹³

and that the request was for "the benefit of all people in the bargaining unit. Because we had an interest in making sure that all people were being treated equitably, even though the bargaining was done on an individual basis." (Tr.59:14-23). The Union never stated that it was requesting the information to aid Ferguson with her EEOC claim. (Tr.60:1-2).

¹¹ Notably, as the ALJ found, there is no assertion that employees were promised any type of confidentiality with respect to the individual agreements. (ALJD 12:25-26).

¹² Moreover, as the ALJ pointed out, the input from the Orchestra Committee came long after Respondent refused to provide the information. (ALJD 12:22-25).

¹³ Respondent fails to cite to anything specific in the ALJD to which it takes exception in making this argument on brief. ((R. Br. 21-22).

Finally, Respondent argues that it bargained in good faith for a reasonable accommodation based on confidentiality concerns. (R. Br. 18-21). There is simply no record evidence to support this assertion. The evidence merely indicates that some musicians did not wish to have this information revealed and that Kern asked for the Union's legal basis for the request. (ALJD 6:1-2; Tr.117). As evidenced by the record, there was no offer and no bargaining over an accommodation.¹⁴

5. The fact that individual contracts are a permissive subject of bargaining does not relieve Respondent of its duty to provide them.

It is undisputed that individual contracts provided for by Article 16 of the CBA are a permissive subject of bargaining. However, such a designation does not make the individual contracts any less relevant, in that they are part of unit employees' wages. *Retlaw Broadcasting Co.*, 324 NLRB at 141. The Union in this case does not seek to bargain Article 16 of the contract, which is the permissive subject. As the ALJ found, the Board in *Retlaw Broadcasting* and similar cases held that overscale contracts are "presumptively relevant and an employer must therefore provide them to the union upon request, notwithstanding that they were negotiated directly with employees pursuant to such provisions." (ALJD 11:2-5).

Thus, Respondent's arguments on this issue are without merit. *Midwest Television*, 343 NLRB 748 (2004), cited by Respondent, has no bearing on this case, as it did not involve an information request. Rather, it dealt with the issue of whether individual contracts were a permissive subject of bargaining in the context of unilateral change and 8(a)(3) discharge allegations. Another case cited by Respondent, *Pieper Electric, Inc.*, 339 NLRB 1232 (2003), is inapposite as well. It dealt with a request for names of members who had participated in or were solicited to participate in an employee stock purchase plan (ESPP), which was a permissive

¹⁴ To the extent Respondent relies upon GCX 1(o) to support its position, as the ALJ noted this document is part of the formal papers in this case, and were not offered or admitted as substantive evidence. (ALJD 6, n. 5).

subject of bargaining. However, importantly the Board also determined that the ESPP did not come within the scope of subjects made mandatory by Section 8(d) of the Act: wages, hours, or other terms and conditions of employment. *Id.* at 1236. In the instant case, there is no dispute that individual contracts, though a permissive subject, make up part of unit employees' wages, which is a mandatory subject.¹⁵

6. The Union did not waive its right to the requested information.

Contrary to Respondent's assertions, there is no "clear evidence" that the Union has waived its right to individual contracts. The ALJ's analysis on this issue is based on well-settled law that a waiver of collective-bargaining rights must be "clear and unmistakable." (ALJD 11:28-30); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Ohio Power Co.*, 317 NLRB 135, 136 (1995). A Union may waive a statutory right by express provision in the collective bargaining agreement; by the conduct of the parties (including past practice, bargaining history and action or inaction); or by a combination of the two. *King Broadcasting Co.*, 324 NLRB at 337.

There is no express waiver in the collective bargaining agreement. As the ALJ properly found based on the record evidence, there is nothing in Article 16 or elsewhere in the collective bargaining agreement that forbids the Union from assisting an employee in preparing to negotiate or in negotiating her own contract. (ALJD 2:14-16; Tr.39:23, JTX 1). Nor is there any record evidence regarding bargaining history on the Union's ability to access individual contracts. The only way an express waiver can be established is if the matter was "fully discussed and consciously explored during negotiations and the union has consciously yielded

¹⁵ Again, in making its argument, Respondent cites nothing in the ALJD to which it is specifically objecting..

or clearly and unmistakably yielded its interest in the matter. *Ohio Power Co.*, 317 NLRB at 136.

Further, the conduct of the parties does not indicate the existence of a waiver. As the ALJ recognized, “The Board does not lightly infer waiver based on past practice.” (ALJD 12: 4-5). The fact that the Union has not previously requested or received such information is irrelevant. In *WCCO Radio*, 282 NLRB 1199, 1205 (1987), the Union sought copies of PSCs, and the Employer argued in part that the information was not relevant because the employer had previously furnished the information and was withholding it now at the request of one employee. The ALJ’s decision (adopted by the Board), determined that it did not matter whether the information had been previously given and was now being withheld, or had always been withheld, and found a violation. *Id.* Accordingly, the ALJ correctly found that no waiver existed here.

7. The Union does not seek to modify the Collective Bargaining Agreement through use of an information request.

It is undisputed that the Union has not previously been involved in negotiations for individual contracts, and has not previously needed to request this type of information. Tr. 39:15-16, 42:5-8. The issue simply had not come up until it was raised by unit musician Ferguson. As discussed above, there is no contract language addressing the Union’s right to such information. Accordingly, making such requests could not logically “modify the CBA.” Article 16.1 C. gives musicians the right to negotiate individual contracts with more favorable terms and conditions than provided for in the Collective Bargaining Agreement (CBA). (JTX. 1, p. 35). The Union herein is requesting information that may aid employees in negotiating their individual contracts, which as discussed above is not prohibited by the CBA. There has been no attempt to modify the practice allowing musicians to negotiate on their own behalf. As also

discussed above, there has been no waiver of any right to such information. The fact that the Union has not historically participated in negotiations for individual contracts is irrelevant. *WCCO Radio*, 282 NLRB at 1205 . Requesting information that would be useful to an employee to determine whether she was being treated disparately in her contract negotiations, and actually giving the Union the right to negotiate individual contracts, are two completely different animals.

Moreover, Respondent's citation to *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017) is completely misleading. There is nothing in that case that comes close to standing for the proposition asserted by Respondent that "the CSA's past practice of keeping the individual contracts private and not providing to the union is a term and condition of employment." (R. Br. 25). Significantly, *Raytheon* is a unilateral change case involving modification of employee benefits and related costs. The case overrules *E.I du Pont Nemours*, 364 NLRB No. 113 (2016) and *Register-Guard*, 339 NLRB 635 (2001), in determining what a "change" is for 8(a)(5) purposes. *Id.* It is factually and legally distinct and has no bearing on the case at hand. In sum, Respondent's contract modification argument is baseless.

VI. CONCLUSION

Respondent's exceptions are unsupported both by the law and the record in this case. Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board affirm the decision of the ALJ in its entirety.

Respectfully submitted this 23rd day of January, 2018.



Angie Berens
Counsel for the General Counsel
National Labor Relations Board Region 27
1961 Stout St., Suite 13-103
Denver, CO 80294 (720)598-7399