

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

CENTER LINE STUDIOS, INC.

And

Case 2-CA-185189

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, LOCAL 311**

Gregory Davis, Esq., for the General Counsel.
Ira Sturm, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. The charge was filed on September 26, 2016, and the complaint was issued on August 25, 2017. The complaint alleges Respondent violated Sections 8(a)(5) and (1) by failing and/or refusing to provide information requested by the Charging Party Union, and by unilaterally changing terms and conditions of employment, specifically, by ceasing to make benefit fund contributions required by the parties' collective bargaining agreement. (GC Exh. 1(c)).¹ Respondent filed a timely answer, denying the allegations that its actions were unlawful. (GC Exh. 1(e))

On November 29 and 30, 2017, I conducted a trial at the Board's Regional Office in New York, New York, at which all parties were afforded the opportunity to present their evidence. After the trial, the General Counsel and Respondent filed timely briefs,² which I have read and considered.

Upon consideration of the briefs, and the entire record, including the testimony of witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it is a New York corporation with its principal place of business at 112 Forge Hill Rd., New Windsor, New York, and has been engaged in the business of providing theatrical scene production services. Respondent further admits, and I find, that in conducting its business operations during the most recent 12-month period, it derived gross

¹ Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review, and are not necessarily exclusive or exhaustive.

² Charging Party was not represented by counsel at the hearing, and did not file a separate brief.

revenue in excess of \$50,000 from providing services to other enterprises directly engaged in interstate commerce.

Therefore, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I further find, that Roger Gray and his daughter, Alexis Gray, are agents of Respondent within the meaning of Section 2(13) of the Act.³ It is undisputed and I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent has been a scenic design company for the theater industry for over 30 years. Respondent's employees are represented for purposes of collective bargaining by the International Alliance of Theatrical Stage Employees, Local 311 (herein "the Union"), a labor organization within the meaning of Section 2(5) of the Act. Respondent and the Union have been parties to a series of collective bargaining agreements ("CBAs") dating back many years, the most recent of which has been in effect since January 1, 2014, and runs through December 31, 2018 (GC Exh. 2).⁴ It is undisputed that Respondent is bound by this most recent CBA.⁵

The Parties' CBA

Article 1.01 of the parties' CBA defines the classifications included in the bargaining unit as follows: "Foreman, Journeyman, Shopman, Mechanic and Apprentice, working as Scenic Carpenters and Scenic Ironworkers," and instructs that "the Employer shall establish and post a list of such employees." Article 1.02 specifies that the unit excludes "Casual per diem or casual part time employees, hired on a sporadic, temporary or interim basis as needed by the Employer."

However, Article 1.03 clarifies that "After no more than three consecutive months of employment as a casual per diem or casual part time employee performing duties similar in nature to those of Foreman, Journeyman, Shopman, Mechanic and Apprentice, or such earlier time as the Employer shall determine after consultation with the Union, such employees shall become regular employees."

Finally, Article 1.04 provides that Respondent can designate Apprentices to serve in its apprentice program, and recommend they receive a full union card, entitling them to fringe benefit contributions from Respondent, when they become regular employees upon completion of a 90-day probation period. Nowhere in the CBA is there any reference to a requirement for employees to work ninety consecutive days to qualify for inclusion in the bargaining unit.

Article 11 of the CBA requires Respondent to make payments to the Union's National Pension Fund, National Health and Welfare Fund, and the Annuity and Vacation Funds for each

³ Roger Gray has been Respondent's President for over 30 years. Alexis Gray is the General Manager and Account Executive for Respondent.

⁴ The complaint was amended at trial without objection to correct these dates, which appear in paragraphs 6 and 11, to conform to the documentary evidence. (Tr. 30-31; Tr. 50).

⁵ Roger Gray testified that Respondent ceased operations in May 2017, and no evidence to the contrary was presented by the General Counsel. Nor is there any allegation here that the cessation of operations was unlawful.

“covered employee.” Respondent signed a Trust Acceptance Agreement with the Union, which acknowledged Respondent’s obligation to make these contributions agreed to in the CBA directly to the International Alliance of Theatrical Stage Employees National Benefit Funds (collectively, “the Fund”), and set forth the calculations for these contributions based on employee work hours.

Indeed, there is no dispute that Respondent was obligated to make the contributions called for in the CBA on behalf of unit employees, and had historically done so in the past, albeit with occasional delinquencies. However, after Respondent ceased making these required contributions altogether, it raised the question whether there were any unit employees to which this obligation applied.

Respondent’s Failure to Make Fund Payments

Fund records indicate that Respondent had made payments on behalf of all its bargaining unit employees through 2013 and into 2014, but did not make contributions for 2015 or 2016. As a result of its failure to make the required contribution, by May 2016, Respondent owed \$42,138.00 to the Fund on behalf of bargaining unit employees for work performed during the period September 2014 through December 2015.⁶

When confronted with its delinquencies, and the threat of termination from participation in the Fund, in 2016, Respondent made contributions on at least 5 separate occasions – April 6, April 8, July 14, August 12 and September 13, 2016. (GC Exhs. 7 and 28). In addition, in July 2016, Respondent sent the Fund a fringe benefit remittance form indicating that there were no eligible employees for the weeks ending March 27, 2016 through June 30, 2016. (GC Exh. 7).

According to Union President Chad Phillips, who testified at the hearing, this July 2016 remittance was the first time Respondent had ever taken the position that none of its employees were in the bargaining unit, or that they were ineligible for Fund contributions. I found Phillips’s testimony throughout the hearing to be consistent with documentary evidence in the record, and found his demeanor to be candid and honest. In some instances when he was not sure of the answer, he paused to think, and acknowledged being uncertain as to certain facts.⁷ But, on this point, he was very clear that until that time, Respondent’s remittance forms had always indicated employees were eligible for Fund contributions, and I credit that testimony.

Up until that point, the Union had treated Respondent’s delinquency as a payment accounting issue. However, upon being notified of Respondent’s newly asserted position, the Union decided at its August 2016 meeting to investigate whether bargaining unit employees had worked for Respondent during the periods that the remittance report indicated no employees were eligible for benefits. Based on its investigation, the Union learned that at least some bargaining unit employees had in fact worked during that period, and were entitled to Fund contributions.⁸

⁶ Respondent made no contributions in 2015 at all, though at that time, there had not yet been any claim made by Respondent that employees were not entitled to Fund payments, and there was no dispute that employees had worked the hours upon which the Fund’s calculations were based.

⁷ In one instance, Phillips may have been mistaken when he testified that Respondent had stopped making payments as far back as 2013, but I do not find that error to have tainted his credibility in light of the extended period of Respondent’s delinquency.

⁸ In fact, at least four unit employees regularly worked during this period, as evidenced by Respondent’s having deducted and remitted Union dues for these employees for that period. (GC Exh. 24).

Indeed, employee Matthew Smith testified at the trial and confirmed that he was employed by Respondent, beginning in February 2015 as a stagehand, and had performed carpentry, welding and operation of a "C & C" cutting machine at Center Line Studios and at remote locations for installation and removal. He continued working for Respondent until September 2016. Mr. Smith appeared forthright and honest as a witness on both direct and cross examination, and I credit his testimony. Indeed, his pay stubs confirmed that he worked for Respondent during the relevant time, and that Union dues were being deducted from his checks. (GC Exh. 25).

Eventually, as Respondent's delinquency continued to grow, the Fund terminated Respondent's participation, effective April 6, 2017. At that time, having made the above mentioned partial contributions, Respondent still owed \$34,128.00 to the Fund. The General Counsel offered the testimony of Svletlana Nikitenko, the Collection Supervisor for the Fund, to explain how the delinquencies were calculated. She cogently explained the Fund's method of calculating an employer's financial obligations, and how she reached the amounts claimed to be owing from Respondent. I found her testimony to be credible.

The Union's Information Requests

Having received Respondent's July 2016 remittance form which stated that no employees were entitled to Fund contributions, and having come to believe based on its own investigation that this was not the case, the Union executive board determined that information was needed from Respondent on the subject of fund payments to employees. So, Phillips sent a letter on July 25, 2016 to Respondent's General Manager and Account Executive, Alexis Gray, requesting that Respondent furnish the Union with the following information by August 10, 2016:

"For the period January 1, 2013 to the present:

- a. Employee name
- b. Work history including dates and hours of employment
- c. Position/Title
- d. Description of work performed
- e. Wage rate paid for each hour worked
- f. Benefit contributions made for each day worked.

(GC Exh. 8).

Respondent provided no documents or reply in response to the Union's July 25, 2016 request. Accordingly, on August 29, 2016, the Union, through its counsel, Lydia Sigelakis, sent a letter by email and regular mail to Respondent's President, Roger Gray, renewing its request for information, and indicating that if the documents were not produced by close of business September 6, 2016, the Union would avail itself of its legal remedies, including filing an unfair labor practice charge. (GC Exh. 9).

Respondent did not produce documents in response to the Union's request, but in a voicemail from its counsel, Ira Sturm, Respondent advised the Union that their (the Union's) shop steward reports contain the information. Sigelakis replied by email to Sturm on August 31, 2016, indicating that the shop steward reports do not capture all of the information the Union was seeking, and that the Union needed the complete information it had requested from Respondent. (GC Exh. 10).

Again, Respondent did not produce the requested documents. Instead, by email later that day, Sturm wrote Sigelakis, requesting "exactly what information is not contained in the shop steward reports, which information is necessary for the union's investigation of the grievance." (GC Exh. 10).

On September 22, 2016, Sigelakis sent Sturm a letter by email explaining that the Union's shop steward reports do not include hours worked, wage rate paid per hour, or benefit contributions made for each day worked. She further explained that the Union did not have shop steward reports for all days worked because there were not shop stewards present for every day worked. And she argued that Respondent was not privileged to refuse to provide presumptively relevant information even if Respondent contended that the Union had an alternate means of gathering the requested information. (GC Exh. 11).

Thereafter, on September 26, 2016, the Union filed a formal grievance alleging Respondent was failing to recognize regular full time employees and subsequently had failed to make benefit payments on their behalf. (GC Exh. 12).⁹ Respondent denied the grievance, and on September 29, 2016, the Union requested to submit the grievance to Step Two (GC Exh. 13). On October 22, 2016, the Union wrote to Respondent to advise that it was pursuing the grievance to Step Three, arbitration. (GC Exh. 15).

Though the parties initially agreed to meet on November 3, 2016 at 10:00 a.m., the arbitration hearing was later postponed to December 7, 2016. In the meantime, on December 2, 2016, the Union made an additional information request to Respondent, specifically: "From January 1, 2012 to the present, any and all lists of IATSE Local 311 bargaining unit employees prepared by Center Line Studios in compliance with Article 1, Section 1.01 of the collective bargaining agreement." (GC Exh. 16). The Union requested that the information be provided by December 7, 2016, the newly scheduled arbitration hearing date. (GC Exh. 17).

On December 7, 2016, the parties met at the Union's attorney's office for the first day with the arbitrator. Phillips and Sigelakis were present for the Union, and both Roger and Alexis Gray, along with Sturm, were present for Respondent. At this meeting, Respondent did not produce any of the documents that had been specifically requested by the Union.

Instead, what Respondent produced, for the first time, was a monthly work chart for the period 2012 to 2016 purporting to show the names of employees and the dates they had

⁹ The Union also filed the within unfair labor charge that same date, September 26, 2016.

worked. (GC Exh. 18).¹⁰ Respondent informed the Union that some months of data were not included in the document because they were lost during a transition from one payroll company to another in 2015.

5 Also at that December 7, 2016 meeting, the parties discussed the standard for employee eligibility to fringe benefit contributions from Respondent. Respondent's position, which Roger Gray testified to at the hearing, was that employees had to work ninety consecutive days in order to be eligible, regardless of whether the employee had previously worked for Respondent in the past. The Union's position was that once an employee became a regular employee
10 beyond ninety days, the employee was entitled to contributions thereafter, regardless of the number of days worked.

15 I found Gray's testimony to be disingenuous on this point. Indeed, Gray conceded in his testimony that Respondent had previously paid for benefits through the Union to employees who did not meet the definition of bargaining unit employees it now maintains, i.e., three months of consecutive employment. He testified, without a credible explanation, that those were a different type of employee than those whom Respondent was now seeking to exclude.

20 That first arbitration meeting ended without a resolution of the bargaining unit. However, since the parties appeared to be proceeding with the arbitration process as to the matters at issue in the pending unfair labor practice charge, on February 28, 2017, the Regional Director issued a decision at that time deferring further processing of the charge, pending the outcome of the arbitration. (GC Exh. 19).

25 On March 8, 2017, the parties were scheduled to meet for a second day with the arbitrator, although no proceedings took place. Instead, the arbitrator met initially with the parties separately, but after meeting with Respondent, declined to continue with the proceeding. No arbitration hearing was ever held.

30 Phillips testified that when the Union met with the arbitrator, he specifically told the Union that Respondent had informed him that it would not pay its share of the arbitration fees, and for that reason, the arbitration could not go forward. Gray testified that Respondent had only said to the arbitrator that it was not in the financial position to be able to make a payment at that point. Gray did not offer an account of what the arbitrator's response to that assertion was or
35 how Respondent proposed to continue with an arbitration absent payment.

40 On this point, again, I credit Phillips, who was straightforward and clear on what he had been told, which is consistent with the arbitrator's immediate cancellation of the hearing. I do not credit Gray, who appeared to be carefully wording his description of what he said to the arbitrator, before then answering counsel's leading question about whether he told the arbitrator that Respondent would never pay.

¹⁰ It is undisputed that Respondent did not provide any documents responsive to any of the Union's information requests, the first of which was made on July 25, 2016, until this December 7, 2016 meeting.

As a result of the cancellation of the arbitration proceeding, on April 13, 2017, the Regional Director revoked deferral, and hence, this matter proceeded. (GC Exh. 20).

ANALYSIS

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A. Respondent unlawfully failed and refused to make fringe benefit payments required by the parties' collective bargaining agreement by unilaterally changing the eligibility requirements for fringe benefit payments for unit employees

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This case involves Respondent's cessation of payments to the Union's benefit funds, which it was indisputably under a contractual obligation to make, and which it ceased making without giving the Union notice or an opportunity to bargain. I find that Respondent's actions constitute an unlawful unilateral change in violation of Section 8(a)(5) and (1) of the Act.

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Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of [its] employees." In general, an employer violates Section 8(a)(5) if it makes a unilateral change to an existing term or condition of employment, without bargaining to impasse with its employees' collective bargaining representative over the proposed change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

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In cases where a collective bargaining agreement is in effect, an employer's modification of a contractual provision which relates to a mandatory subject of bargaining without the union's consent violates 8(a)(5). *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass*, 404 U.S. 157, 185 (1971); *St. Vincent Hospital*, 320 NLRB 42 (1995). Even where the change does not involve a violation of specific terms of the parties' agreement, the Board will consider whether it is a departure from the employer's past practices. *Bath Iron Works Corp.*, 345 NLRB 499, 501-502 (2005), *affd. sub nom. Bath Marine Draftmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

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There is no assertion by Respondent here that employer contributions to fringe benefit plans are not mandatory subjects of bargaining, and indeed, the Board has long held that such contributions are mandatory subjects. *Inland Steel Co.*, 77 NLRB 1, 8 (1948), *enfd.* 170 F.2d. 247 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1949). Nor does Respondent assert that the Union consented to its ceasing to make contractually required contributions in the manner Respondent had done in the past. And Respondent does not dispute the fact that it did not make contributions on behalf of employees who worked during the relevant period.

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Instead, Respondent offered an evolving explanation for its actions, first claiming there were no eligible employees working during the relevant times, and then later arguing that it was its financial circumstances which justified the failure to make its required contributions. I do not find either explanation compelling in its own right, and the apparent shifting of Respondent's explanation for its actions only further weakens its position.

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Respondent's claim that there were no eligible employees under the contract is belied by its own actions when it withheld Union dues from the pay of employees it now seeks to argue were not members of the bargaining unit. It is further undermined by Respondent's having previously made the required contributions to similarly situated employees in the past. Its sudden claim that employees were only members of the bargaining unit if they worked ninety consecutive days was a unilateral change of the parties' practice of who was included in the bargaining unit. That position also finds no support in the language of the parties' CBA.

Respondent's alternative claim that its financial circumstances privileged it to cease making the required contributions also fails to justify its unilateral change. As an initial matter, this argument had not been Respondent's explanation for its actions during the parties' meetings with the arbitrator. Nor was this explanation communicated to the Union when Respondent first asserted in July 2016 that the reason for its failure to make contributions was because there were no eligible employees.

As to the merits of Respondent's argument that it failed to make contractually required contributions due to an inability to pay, it is well established that, as a general matter, "an employer's economic necessity is not a defense to the unilateral repudiation of the monetary provisions of a collective-bargaining agreement." *Kelly & Stewart Environmental Service*, 301 NLRB 91 (1991); *Morelli Construction Co.*, 240 NLRB 1190 (1979). Although Respondent argues that it did not repudiate its obligations, its own actions in claiming that there were no eligible employees during the relevant period demonstrate that it did not merely claim financial inability to pay, but rather, affirmatively sought to avoid its obligations under the contract. Under those circumstances, its financial circumstances are no defense to its unlawful conduct.

As such, I find that Respondent did make a unilateral change when it ceased making contributions to the Union funds on behalf of bargaining unit employees, and that neither of Respondent's explanations for its actions justify that unilateral change.

B. Section 10(b) Affirmative Defense

Respondent also asserts a Section 10(b) Affirmative Defense that the underlying charge in this matter was not timely filed, and requests that the Board should therefore dismiss the complaint. This argument falls short for multiple reasons.

Section 10(b) of the Act is a statute of limitations. Generally speaking, it "extinguishes liability for unfair labor practices committed more than 6 months prior to the filing of the charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 n. 9 (1959). The Section 10(b) period commences only when a party has "clear and unequivocal notice of a violation" and the burden of showing notice is on the party raising the 10(b) affirmative defense. *Leach Corp.*, 312 NLRB 990, 991–992 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995).

The requisite notice may be actual or constructive, i.e., sufficient notice may be found if the party should have become aware of a violation in the exercise of reasonable diligence. See, e.g., *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010); and *Moeller Bros. Body Shop*, 306 NLRB 191, 192 (1992). However, constructive notice will not be found where a delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct. *A & L Underground*, 302 NLRB 467, 469 (1991). See also *Cab Associates*, 340 NLRB 1391, 1392 (2003).

Similarly, if the employer simply fails to abide by certain contract provisions, without repudiating the contract, each successive contract breach constitutes a separate unfair labor practice. However, if the charging party had received clear and unequivocal notice of the total contract repudiation before the 10(b) cutoff date, it would be time barred from subsequently alleging contract violations within the 10(b) period. See *Vallow Floor Coverings, Inc.*, 335 NLRB 20 (2001); and *A & L Underground*, 302 NLRB 467, 468–469 (1991).

Here, I find no support for the argument that the Union had clear and unequivocal notice of a violation outside the 10(b) period. To the contrary, I credit Phillips's testimony that Respondent's July 2016 remittance report was the first time Respondent had ever taken the position that none of its employees were in the bargaining unit, or that they were ineligible for Fund contributions. Prior to that, Respondent's remittance forms had always indicated employees were eligible for Fund contributions, and the Union, quite reasonably, had treated Respondent's delinquency as no more than a payment accounting issue.

Indeed, Respondent's own action in making partial payments of the delinquency during 2016 bolstered the Union's understanding that no change had occurred. At best, Respondent's continued acknowledgement of its outstanding liability sent the Union conflicting signals and constitutes otherwise ambiguous conduct that failed to put the Union on notice of Respondent's intent to modify its obligations under the contract.

Upon being notified of Respondent's newly asserted position in July 2016, the Union promptly investigated the matter, and shortly thereafter, filed this timely charge in September 2016, well within the 10(b) period. As such, I reject Respondent's affirmative defense that the charge was time-barred.

Accordingly, as Respondent has offered no factually supported or legally sufficient defense to the unilateral change allegation, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to make the contractually-required contributions to the Union's benefit funds set forth in the collective bargaining agreement on behalf of employees it unilaterally removed from the bargaining unit.

C. Respondent unlawfully refused to provide information requested by the Union on July 25, 2016 and December 2, 2016.¹¹

The Supreme Court has long held that an employer must provide a union, on request, with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). Indeed, the Supreme Court has held that an employer's duty to bargain collectively extends beyond periodic contract negotiations and includes its obligation to furnish information that allows a union to decide whether to process a grievance under an existing contract. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967).¹²

"A labor organization's right to information exists not only for the purpose of negotiating a collective-bargaining agreement, but also for the proper administration of an existing contract, including the bargaining required to resolve employee grievances." *Southern California Gas Co.*, 344 NLRB 231, 235 (2005) (citing *Hobelmann Port Services*, 317 NLRB 279 (1995); *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978).

Accordingly, the Board has long held that Section 8(a)(5) of the Act obligates an employer to furnish requested information which is potentially relevant to the processing of grievances. "An actual grievance need not be pending nor must the requested information clearly dispose of the grievance." *United Technologies Corp.*, 274 NLRB 504 (1985). However, if there does exist a pending grievance, "an employer's duty to furnish information relevant to

¹¹ The Union renewed its July 25, 2016 information request on August 29, 2016, August 31, 2016 and September 22, 2016.

¹² This is often referred to as "policing the contract." See, e.g., *United Graphics, Inc.*, 281 NLRB 463, 465 (1986).

the processing of a grievance does not terminate when the grievance is taken to arbitration.” *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1353 (2010).

5 Information requests regarding bargaining unit employees’ terms and conditions of employment are “presumptively relevant” and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 649 (2010), enfd. 638 F.3d 883 (8th Cir. 2011). There is no burden on the part of the Union to prove the relevance of or explain the need for this type of presumptively relevant information.

10 By contrast, where the requested information is not directly related to the bargaining unit, the information is not presumptively relevant, and the requesting party does have the burden of establishing the relevance of the requested material. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Earthgrains Co.*, 349 NLRB 389 (2007). Even in those situations where a showing of relevance is required, whether because the presumption has been rebutted or because the
15 information requested concerns nonunit matters, the standard for establishing relevancy is the liberal, “discovery-type standard.” *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).

20 1. The information sought by the Union is presumptively relevant, and has not been provided by Respondent.

25 Based on my review of the Union’s requests, I find that they all relate directly to terms and conditions of employment of unit employees and/or employees covered by the CBA and in the Union’s jurisdiction. Indeed, all of the information sought by the Union – dates and hours of employment, position/title, work performed, wage rate, benefit contributions made and bargaining unit status - was of the most patently relevant type. As such, the information is unquestionably presumptively relevant, and the Act requires that it be furnished without the need for the Union to establish relevance.

30 Respondent does not address the Board’s “presumptively relevant” standard, but nevertheless argues that the requested information is not necessary because it relates to the Union’s allegations regarding cessation of payments to the Fund, which Respondent maintains are untimely. For the reasons discussed above, I have rejected Respondent’s timeliness defense, and therefore, this argument is misplaced.

35 Respondent alternatively argues that the Union had an affirmative obligation to confer with Respondent in trying to reach an accommodation of the Union’s request due to Respondent’s assertion that certain months’ worth of information were not retrievable because of an issue with Respondent’s payroll providers, and that it failed to do so. I find this argument unpersuasive.

40 By Respondent’s own admission, its payroll issue affected only certain months of the period for which the Union had requested the presumptively relevant information. It does not explain or excuse Respondent’s failure to provide that information for the periods when there was no such issue. The fact that Respondent refused to provide the requested information for
45 any period at all renders disingenuous its purported claim that it was trying its best to lawfully comply.

50 The General Counsel alleges, and I find, that Respondent violated Section 8(a)(5) and (1) of the Act when, since about July 25, 2016, Respondent failed or refused to provide the Union with presumptively relevant information, which it requested and is entitled to as the exclusive collective-bargaining representative of the unit.

Indeed, Respondent failed to furnish the Union with any documents at all for over 4 months from the date of the Union's initial July 25, 2016 request for information. The burden is on an employer, once relevance is established, to provide an adequate explanation or valid defense to its failure to provide the information in a timely manner. *Woodland Clinic*, supra, *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993). Respondent has not met that burden.

Therefore, because the information requested was presumptively relevant, and that presumption has not been rebutted, I find Respondent violated Section 8(a)(5) and (1) of the Act.

2. Respondent unreasonably delayed in providing the Union with any of the requested information.

The failure to *timely* provide relevant information requested is a separate 8(a)(5) violation of the Act. An employer must timely respond to a union's request seeking relevant information even when the employer believes it has grounds for not providing the information. *Regency Service Carts*, 345 NLRB 671, 673 (2005) ("When a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished"); *Kroger Co.*, 226 NLRB 512, 513– 514 (1976). Absent evidence justifying an employer's delay in furnishing such information, such a delay is violative of the Act.

Because, I have found that the Union was entitled to all the information sought at the time it made its initial request, it was the employer's duty to furnish it as promptly as possible. *Monmouth Care Center*, 354 NLRB 11, 41 (2009); *Woodland Clinic*, 331 NLRB 735, 737 (2000). Here, the Union received no information at all from Respondent until December 7, 2016, when Respondent produced a monthly work chart at the parties' first meeting with an arbitrator.

To the extent the document was responsive to the Union's information request at all, I find that to have been an unreasonable delay in furnishing such information, which is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all. *Monmouth Care*, supra; *Woodland Clinic*, supra; *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

In addition, based on the factors that are considered in evaluating whether Respondent exhibited a reasonable good-faith effort to respond to the information requests, I find that Respondent's arguments fail. It is clear that Respondent's actions, given the totality of the circumstances, do not meet the definition of reasonable promptness as set forth in *West Penn Power Co.* and see *Allegheny Power*, 339 NLRB 585 (2003) (factors to consider in assessing the promptness of the response are complexity and extent of the requested information, its availability, and difficulty in accessing the information.)

Respondent's witness did not testify, nor is it otherwise apparent, that the Union's requests for information were overly complex or voluminous. Indeed, the requests were of a routine nature, which should have met with little resistance. Respondent's repeated requests for shop steward reports from the Union had no bearing on what Respondent was required to provide, particularly following the Union's clear explanation to Respondent as to why the shop steward's reports were insufficient for its needs.

The General Counsel correctly observes that the monthly work chart which Respondent provided at the December 7, 2016 arbitration session did not show the information requested by the union, including hours worked, titles or positions, description of work performed, wage rates, benefit contributions, or lists of bargaining unit employees. These were items which had been specifically identified for Respondent by counsel for the Union in response to Respondent's request for an explanation of what the Union was requesting.

I find that limited response, which came over 4 months after the Union's initial request for information, clearly constitutes an unreasonable delay. *Regency Service Carts, Inc.*, 345 NLRB 671, 674 (2005) (the Board found a 16-weeks delay in providing information unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (the Board found a 6-weeks delay in providing information unreasonable); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (the Board found a 7-weeks delay in furnishing information unreasonable); *Postal Service*, 332 NLRB 635 (2000) (the Board found that a 5-weeks delay in furnishing information unreasonable); *Postal Service*, 354 NLRB 412 (2009) (the Board found that a 28-day delay in providing information unreasonable).

For the reasons discussed above, Respondent had no reasonable basis for delaying the furnishing of even that limited information until the parties' first meeting with an arbitrator, over 4 months after the Union's initial request. I find that the delay was just an extension of its initial refusal to provide any documents whatsoever to the Union.

Accordingly, I find Respondent's delay in providing what limited response it did to the Union's request for information was unreasonable and thus additionally violates Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Respondent, Center Line Studios, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, International Alliance of Theatrical Stage Employees, Local 311, is a labor organization within the meaning of Section 2(5) of the Act and represents a bargaining unit comprised of workers employed by the Respondent.
3. Since March 29, 2016, and continuing through April 5, 2017, Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union by failing and refusing to make contributions on behalf of all unit employees to the Union benefit funds.
4. Since on or about July 25, 2016, Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union by failing and refusing to furnish it with information it requested on July 25, 2016, August 29, 2016, August 31, 2016, September 22, 2016 and December 2, 2016, that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of Respondent's unit employees.
5. Since on or about July 25, 2016, Respondent has violated Section 8(a)(5) and (1) of the Act by its unreasonable delay in providing the Union with relevant and necessary information the Union requested.

6. The Respondent's above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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Remedy

Having found that the Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist from engaging in such conduct and take certain affirmative action designed to effectuate the policies of the Act.

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Specifically, I shall recommend that Respondent make all required benefit funds contributions, including any additional amounts applicable to such funds as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, Respondent shall reimburse unit employees for any expenses resulting from Respondent's failure to make the required contributions to the funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2(1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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In addition, I shall recommend that, to the extent it has not already done so, Respondent shall timely furnish the following information to the Union: all of the information in the Union's July 25, 2016, August 29, 2016, August 31, 2016, September 22, 2016 and December 2, 2016 information requests.

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I shall also recommend that Respondent be required to notify its employees that the Union is entitled to request and receive information related to its role as collective-bargaining representative, and Respondent will not withhold from, nor unreasonably delay providing to, the Union information which the Union is lawfully entitled to request and receive.

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Therefore, Respondent will be ordered to post and communicate by electronic post to employees the attached Appendix and Notice. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

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ORDER

Respondent, Center Line Studios, Inc., its officers, agents, and representatives, shall

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1. Cease and desist from

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(a) Failing and refusing to bargain with the Union, International Alliance of Theatrical Stage Employees, Local 311, as the exclusive collective-bargaining representative of the employees in the bargaining unit by unilaterally ceasing to make contributions to the Union's National Pension Fund, National Health and Welfare Fund, National Vacation Fund, and the Annuity Fund for bargaining unit employees, and unilaterally implementing a new definition of bargaining unit employee.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Refusing to bargain collectively with the Union by failing and refusing to and/or unreasonably delaying in providing the Union information requested that is necessary and relevant to its role as the exclusive representative of the Respondent's unit employees at its New Windsor, New York facility.

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(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Upon request of the Union, rescind the unilaterally implemented change in the definition of bargaining unit employees.

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(b) Make whole all bargaining unit employees to the extent they have suffered any losses as a result of Respondent's unlawful conduct in the manner set forth in the remedy section of this decision.

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(c) Furnish to the Union, in a timely manner, all of the information in the Union's July 25, 2016, August 29, 2016, August 31, 2016, September 22, 2016 and December 2, 2016 information requests.

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(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(e) Within 14 days after service by the Region, post at its New Windsor location copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 29, 2016. *Excel Container, Inc.*, 325 NLRB 17 (1997).

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¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

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Dated, Washington, D.C. July 2, 2018

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A handwritten signature in black ink, appearing to read "Jeffrey P. Gardner", written over a horizontal line.

Jeffrey P. Gardner
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union, International Alliance of Theatrical Stage Employees, Local 311, by unilaterally ceasing to make contributions to the Union's pension, health and welfare, vacation and annuity funds, and unilaterally implementing a new definition of eligible bargaining unit employee.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union by failing and refusing to furnish it with requested information in a timely manner that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL upon request of the Union, rescind the unilaterally implemented change in the definition of bargaining unit employees.

WE WILL make whole all bargaining unit employees to the extent they have suffered any losses as a result of our unlawful conduct, with interest.

WE WILL furnish to the Union in a timely manner the information it requested in its July 25, 2016, August 29, 2016, August 31, 2016, September 22, 2016 and December 2, 2016 information requests.

Center Line Studios, 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. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies 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. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Room 3614, New York, NY 10278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/02-CA-185189 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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, (212) 264-0344.