

Nos. 18-1640, 18-1973

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**CROZER-CHESTER MEDICAL CENTER; DELAWARE COUNTY MEMORIAL
HOSPITAL**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This unfair-labor-practice case is before the Court on the petition of Crozer-Chester Medical Center (“CCMC”) and Delaware County Memorial Hospital (“DCMH”) (collectively, “Crozer”) to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Crozer. The Board found that Crozer violated the National

Labor Relations Act (“the Act”) by refusing to provide the Pennsylvania Association of Staff Nurses and Allied Professionals (“the Union”) with a copy of the sales agreement regarding the sale of Crozer to a third party.

The Board’s Decision and Order issued on March 7, 2018, and is reported at 366 NLRB No. 28. (JA 30-40.)¹ The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties.

The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices occurred in Pennsylvania. Crozer’s petition for review and the Board’s cross-application for enforcement were timely filed because the Act places no time limit on such filings. The Union, the Charging Party before the Board, has intervened on behalf of the Board.

STATEMENT OF THE ISSUES

I. Whether substantial evidence supports the Board’s finding that Crozer violated the Section 8(a)(5) and (1) of the Act by refusing to provide

¹ “JA” references are to joint appendix, and “Br.” refers to Crozer’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

the Union with requested information—a copy of the sales agreement regarding the sale of Crozer to a third party—that was relevant to its bargaining duties.

II. Whether the Board acted within its broad remedial discretion by ordering Crozer to provide the sales agreement in its entirety without redaction.

STATEMENT OF THE CASE

This case arises from the sale of Crozer to Prospect Medical Holdings, Inc. (“Prospect”). When the Union that represented Crozer’s employees learned that the sale would likely impact the employees’ working conditions, it requested a copy of the sales agreement so that it could meaningfully participate in bargaining over the effects of the sale. Despite acknowledging that portions of the agreement would be relevant to bargaining, Crozer refused to produce any part of it, providing only unsubstantiated claims that the agreement contained irrelevant or confidential information.

After Crozer refused to provide the requested information, the Union filed unfair-labor-practice charges, and the General Counsel issued complaints alleging that Crozer’s refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) & (1). (JA 31.) After a hearing, the administrative law judge found that Crozer had violated the Act as alleged.

(JA 39.) On review, the Board, with one member dissenting in part, found no merit to Crozer's exceptions and adopted the judge's findings and recommended order. (JA 30 & nn.1-2.) The following subsections summarize the Board's factual findings and its Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background: Crozer's Operations and the Parties' Collective-Bargaining Relationship

The Crozer-Keystone Health System ("Crozer-Keystone" or "Health System") is a non-profit entity that includes four hospitals as well as ambulatory care facilities and medical offices. DCMH and CCMC operate two of the hospitals within the Health System. (JA 32; 48, 55, 76-78, 287-88.)

The Union has had a bargaining relationship with Crozer for at least 18 years, and the parties have entered a series of collective-bargaining agreements. The Union represents two units of employees at CCMC, and two other units at DCMH. At CCMC, the Union has represented a unit of about 525 nurses since 2000, and a unit of about 100 paramedics since 2002. The current contracts for the CCMC units are effective into 2019. (JA 32; 56, 76-78, 193-96.) At DCMH, the Union has since early 2016 represented a unit of about 300 registered nurses, and a unit of about 100 technical employees. In March 2016, the Union and DCMH commenced bargaining

for initial contracts for these newly certified units. Neither unit had a contract in place as of the hearing. (JA 32; 56, 76-78, 193, 197-99, 209.)

B. Crozer Informs the Union that the Sale of the Health System May Impact Employee Working Conditions

In the fall of 2015, the Union first heard rumors about a possible sale of the Health System, a non-profit entity, to Prospect, a for-profit entity. (JA 32; 240.) Thereafter, the Union had meetings with Prospect's attorney who indicated that Prospect would recognize the Union as bargaining representative of the aforementioned Crozer employee units. (JA 32; 257.)

Union Executive Director William Cruice and Staff Representative Andrew Gaffney had reviewed asset purchase agreements in connection with prior sales of other entities whose employees were represented by the Union. In their experience, purchase agreements often contain information relevant to changes in employees' terms and conditions of employment, such as the continuation of employee pension plans, and whether the purchaser was a successor obligated to bargain with the Union over such terms and conditions. (JA 32; 202-05, 268-69.)

On January 8, 2016, the Crozer Health System and Prospect entered into an Asset Purchase Agreement ("APA" or "Purchase Agreement"). (JA 32; 87.) That same day, Crozer emailed the Union a draft letter to be sent by Crozer to all its physicians and employees. (JA 32; 59-66, 199-200.) The

letter indicated that Prospect had signed a “Definitive Agreement” to acquire the Health System and stated that some things “will *not* change” as a result of the sale, including:

- Crozer hospitals and facilities will continue to operate under their current names.
- Prospect will offer to hire active non-union employees in good standing at the rate of pay, title and seniority level at time of close, subject to standard pre-employment screening processes.
- Crozer-Keystone unionized employees in good standing will be offered employment subject to initial terms set by Prospect. Prospect will meet with the unions that represent Crozer Keystone employees and enter into appropriate recognition agreements with them.
- Critical service lines such as trauma, maternity and pediatrics will stay in place or be expanded.
- The Health System will provide health education and other community programs at similar levels, some through a new Foundation.

(JA 32; 59) (emphasis in original.)

The letter also stated that some things “*will* change” as a result of the sale, including:

- All properties, plants and equipment owned or used by Crozer-Keystone will be acquired by Prospect.
- Prospect will make capital investments of at least \$200 million in the Crozer-Keystone system, which will dramatically increase the system’s ability to modernize and expand service to the community.
- Prospect will assume Crozer-Keystone’s outstanding pension liability, funding \$100 million of the obligation at closing and providing distributions to pay all benefits owed to pension participants. The letter also notes that the transition from a non-profit to for-profit entity will require a change in pension plan.

(JA 32-33; 60, 62-63) (emphasis in original.)

Crozer's letter also contained a FAQ that reiterated the above statements regarding the impact of the sale on unionized employees and labor relations. The FAQ stated:

What does this mean for unionized Keystone-Crozer employees?

Unionized employees in good standing will be offered employment subject to initial terms set by Prospect

Id. (emphasis in original.) With respect to labor relations, the FAQ stated:

What will happen to labor union relations under Prospect?

Prospect will meet with the various labor organizations that represent Crozer Keystone employees and enter into appropriate recognition agreements with them.

Id. (emphasis in original.) Finally, in regard to employee benefits, the FAQ stated in relevant part:

Will Crozer-Keystone employees receive the same benefits?

Crozer-Keystone employees will retain their existing health and welfare benefits until the next open enrollment period, for 2017, at which time the Prospect benefits will be offered

There are currently no plans to change the following plans, other than potential carriers: life/ADD, short-term disability, long-term disability, travel and accident insurance, paid time off, and tuition reimbursement.

Id. (emphasis in original.)

C. The Union Requests a Copy of the Purchase Agreement to Prepare for Bargaining over the Effects of the Sale; Crozer Repeatedly Withholds the Entire Agreement Without Identifying Which Portions Should Be Withheld and the Reasons Why

This was the first time that the Health System was being sold to a new entity, giving rise to a host of questions about the sale and its effect. (JA 228, 230-32, 234.) Accordingly, on January 18, Union Staff Representative Gaffney emailed Elizabeth Bilotta, Crozer's Vice President of Human Resources and Crozer's lead labor negotiator, to request the APA and all attachments and schedules. (JA 33; 67.) The Union specifically did so in anticipation of bargaining over the effects of the sale, because Cruice's and Gaffney's prior experience had shown that such agreements were relevant to employees' terms and conditions of employment. The information request stated:

Now that the Crozer-Keystone and Prospect Medical have finalized their agreement, the union is requesting the complete Asset Purchase Agreement and all attachments and schedule[s] of the agreement. Upon receipt of the agreement, we will review and you can expect a request for effects bargaining shortly after. As always, if you have questions about this request feel free to contact me.

(Id.)

On February 10, having received no response to his email of January 18, Gaffney emailed Bilotta again to reiterate the Union's request for the APA. (JA 33; 68.) Bilotta's asserted practice when receiving union

information requests was to “provide all the information that is relevant,” explain “what [she is] not providing and why [she does not] view it to be relevant,” and offer “to have discussions about it.” (JA 32; 290-91.) That day, Bilotta responded to the Union’s request by refusing to provide any portions of the APA. Specifically, she replied by email:

I am unable to give you a copy of the APA at this time because it is confidential and proprietary. Also, it is covered by the terms of a confidentiality agreement to which Crozier is subject. Last, the entire APA is not relevant for effects bargaining over the terms and conditions of employment of bargaining unit members. We are open to considering alternative requests you may have.

(JA 33; 69.)

The next day, Union Executive Director Cruice responded by email that the Union intended to file an unfair labor practice charge with the Board if Crozer continued to refuse to provide the APA. Cruice also indicated a willingness to bargain over confidentiality, stating that “[i]f your email is intended as an offer to negotiate over confidentiality, the [U]nion is prepared to bargain . . . provided . . . that the APA, with attachments and schedules, will be forthcoming.” (JA 33; 70.)

D. Crozer Continues To Fail To Provide the Union With Any Portion of the APA—Thereby Placing the Union at a Disadvantage During Bargaining—Yet Provides Redacted Versions to Other Unions

On March 17, the parties held a previously scheduled bargaining session regarding the DCMH nurses unit. (JA 33; 206-07, 253-54, 262-63, 294-95.) The Union inquired about the status of its request for the entire APA and Bilotta indicated that Crozer's position had not changed. Rather, she asserted that portions of the APA were irrelevant and asked whether the Union would accept only the relevant portions. Cruice reiterated that the Union wanted the entire document. (JA 262-63, 296.) Bilotta acknowledged that Cruice felt that he was in dark about bargaining, and Crozer was in the light, because they had the APA and he did not. She also acknowledged being aware at the time that a hospital sale could impact employees, and that portions of the APA were relevant to unit employees' working conditions or contract negotiations on their behalf. (JA 33; 295, 308-09.)

On March 18, Bilotta emailed the Union again about Crozer's position on the information request. (JA 34; 71-73.) Bilotta again acknowledged the Union's claim that it needed the complete APA "in order to prepare for effects bargaining," but stated that Crozer "objects to the request on the basis that it is premature, overbroad and seeks irrelevant information." *Id.* Bilotta also renewed Crozer's offer to "discuss which portions" of the APA are

relevant to the Union's "role as bargaining representative with respect to effects bargaining." *Id.* She still did not, however, identify which portions of the APA were relevant or irrelevant, nor did she produce any portion of the APA. Instead, Bilotta objected that the Union's request for the APA "sought proprietary information," which she also did not identify, and claimed that "the entire [APA] is the subject of a confidentiality agreement" between Crozer and Prospect. As in her February 10 email, Bilotta's March 18 letter did not explain how the third-party "confidentiality agreement" required Crozer to withhold the entire APA or any portions of it. *Id.* The letter concluded that no "relevant portion" of the APA or "anything in the agreement" would be produced until the Union first "agree[d] to . . . a confidentiality agreement acceptable to [Crozer] and Prospect." *Id.*

On April 29, the parties met again to bargain over the DCMH nursing unit. Bilotta asked if the Union had changed its position and would accept less than the entire APA. The Union said it would not. Bilotta still did not identify which portions of the APA Crozer deemed irrelevant or confidential. Cruice reiterated that the Union was entitled to the APA in order to learn about the sales transaction, in particular how information in the APA has a direct impact on contract negotiations. He stated that "not having the purchase agreement is a material substantial problem for these negotiations."

Bilotta remained steadfast that Crozer was unwilling to change its position and would not provide the entire APA. (JA 34; 264-66, 282-84, 295-98, 309.)

In about late May, two other unions requested that Crozer provide them with portions of the APA, including those that “say what Prospect is going to assume and not assume relative to employees.” Crozer complied and provided those unions with what it deemed “relevant redacted” copies of the APA “that are specifically related to the employees.” (JA 34; 74-75, 306.)

In late-May and June, the parties and Prospect bargained over the effects of the sale. The Union did not have any portion of the APA before or during these bargaining sessions. The Union agreed to switch the unit employees’ health insurance plan from the Crozer plan to the Prospect plan. Prospect agreed to recognize the Union as the representative of the DCMH bargaining units and to negotiate for initial contracts. Otherwise, the sessions consisted mostly of Bilotta fielding questions regarding changes in benefits. (JA 34-35; 208-09, 270-71.)

As a condition of the sale of a non-profit to a for-profit entity, Crozer needed the approval of the Pennsylvania Attorney General’s Office. Accordingly, on June 3, Crozer filed a petition with a state court to seek such

approval. The petition included a copy of the APA, without schedules or attachments. Consequently, on June 6, the Union was able to obtain a copy of the APA for the first time—without schedules or attachments—from the state attorney general’s office. (JA 35; 87, 242-43, 265.)

While the APA contained a list of 66 schedules by number and title, the Union had not received any of the schedules. *See* JA 35; 95-97 (reproducing the entire list). The titles of many schedules refer—either implicitly or explicitly—to collective-bargaining or employee working conditions and benefits. *See, e.g., id.* at 1.1(s) (Crozer Assumed Benefit Plan Assets); 4.13 (Crozer Disclosure Schedule—employee benefits); 4.18(a) (Crozer Disclosure Schedule—Labor, Unions, Collective-Bargaining Agreements); 11.10(a) (Prospect Post-closing employee benefits).

On June 16, Prospect recognized the Union as the bargaining representative of the DCMH and CCMC units. Prospect also adopted the Union’s collective-bargaining agreements with CCMC (except for a modification of the health care provision). (JA 36.)

On June 22, at the request of the Pennsylvania Attorney General’s Office, Crozer provided the Union with copies of 2 of the 66 schedules in the APA: schedules 4.13 (Crozer Disclosure Schedule – Employee Benefits Plan) and 4.18(a) (Crozer Disclosure Schedule – Labor, Unions, Collective

Bargaining Agreements). (JA 36; 78-85, 298-99.)

The state approved the sale of the Crozer Health System to Prospect on June 28. On July 1, Prospect formally purchased the Health System. Even after finalizing the sale, Crozer failed to provide the complete APA, including the remaining attachments and schedules, to the Union. (JA 36.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Pearce, McFerran and Emanuel) found, in agreement with the judge, that Crozer violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested information relevant to its duty to bargain over the effects of the sale of the Crozer Health System. (JA 30-31.) As a remedy, the Board ordered Crozer to cease and desist from the violations found. (JA 30 n.2, 39.) Affirmatively, the Order (Member Emanuel, dissenting in part) directs Crozer to produce the entire APA, including all schedules and attachments, and to post a remedial notice. (*Id.*)²

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

² Member Emanuel would order Crozer to provide the relevant and non-confidential portions of the APA and engage in accommodative bargaining over any remaining confidential portions. (JA 31.)

STANDARD OF REVIEW

The scope of the Court's inquiry in reviewing a Board order is quite limited. The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1151-52 (3d Cir. 1993). The Board's factual findings, and the reasonable inferences drawn from those findings, are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it *de novo*. *Universal Camera*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Further, the Board's legal conclusions must be upheld if based on a "reasonably defensible" construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)). In particular, a Board determination that requested information is relevant (and must be furnished to the union) is entitled to considerable deference. *NLRB v. Public Serv. Elec. & Gas*, 157 F.3d 222, 230 (3d Cir. 1998); *Resorts Intl. Hotel Casino v. NLRB*, 996 F.2d 1553, 1556-57 (3d Cir. 1993); *NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 146-48, 150 (3d Cir. 1991). *Accord West Penn Pwr. Co. v. NLRB*, 394 F.3d 233, 243 (4th Cir. 2005).

Finally, the Board's authority in formulating remedies "is a broad discretionary one, subject to limited judicial review." *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Thus, the Board's choice of remedy must be enforced unless it "is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Fibreboard Corp.*, 379 U.S. at 216 (citation omitted).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Crozer violated Section 8(a)(5) and (1) of the Act by failing to provide the Asset Purchase Agreement, which was relevant to the Union's duty to bargain over the effects of the sale. Indeed, the Union's request informed Crozer that the APA was needed for effects bargaining. And if the Union's request was not sufficiently clear, the APA's relevance was apparent to both parties given the context—the Union requested the APA after Crozer notified it that the sale may impact employees' terms and conditions of employment and labor relations. Further, both parties were represented by experienced negotiators who understood that an agreement to sell a hospital would likely contain information relevant to bargaining over the effects of the sale on hospital employees. Moreover, Crozer repeatedly acknowledged that this document was relevant, at least in part, in its responses to the information request.

Crozer cannot escape its obligation to provide relevant information by claiming the Union failed to explain the very relevance that Crozer had admitted and that the context had made apparent. In these circumstances, Crozer was not entitled to withhold a relevant document based on a broad, unsubstantiated claim that unspecified portions of the document were irrelevant.

The Board also reasonably found that Crozer unlawfully refused to produce the APA based on an unsupported claim that it contained confidential information. It is incumbent on the party making such a claim to substantiate it, and that burden is not met through a blanket assertion of confidentiality. Yet, in refusing to provide any portion of the agreement, Crozer never specified which portions were purportedly confidential or explain why. By failing to support its confidentiality claim, or to offer the Union any accommodation such as redactions, Crozer waived its confidentiality defense. It is of no moment whether the Union declined Crozer's invitation to discuss which portions were confidential, or make a narrower request, because the Union was already entitled to receive relevant information, and Crozer was not entitled to withhold it based on an unsupported claim. Thus, Crozer cannot blame the Union for Crozer's failure to meet its own bargaining obligations.

In these circumstances, the Board acted within its broad remedial discretion by ordering Crozer to provide the entire Asset Purchase Agreement, unredacted and without bargaining over a confidentiality agreement. Far from abusing its discretion as Crozer contends, the Board followed precedent awarding similar remedies in similar circumstances, and furthered statutory policies favoring collective bargaining. If, as Crozer claims, it must be afforded another opportunity to commence accommodation negotiations, despite having already waived that opportunity, then there would be little incentive for it to engage in such negotiations at the time it asserts a confidentiality claim in response to an information request. The resulting delay would reward Crozer for violating its statutory obligations.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CROZER UNLAWFULLY FAILED TO PROVIDE THE UNION WITH RELEVANT INFORMATION

A. An Employer Violates the Act by Refusing To Provide the Union with Information Relevant to Its Duty to Bargain

Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of [its] employees” An employer’s duty under this section includes the obligation “to provide information needed by the bargaining representative for the proper performance of its duties,” and these duties include bargaining over the effects of an employer’s sale of its business where the union represents the seller’s employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 413 (1st Cir. 1988); *Sierra Int’l Trucks, Inc.*, 319 NLRB 948, 950 (1995). *Accord NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 150 (3d Cir. 1991). Accordingly, an employer’s failure to provide relevant information constitutes a breach of the employer’s duty to bargain in good faith and therefore violates Section 8(a)(5) and (1) of the Act

(29 U.S.C. 158(a)(5) and (1)).³ *Acme Industrial Co.*, 385 U.S at 436-39.

The first question in assessing an employer's duty to provide information is one of relevance. An employer must provide information that is "presumptively relevant" to the union's role as bargaining representative, such as information concerning wages, hours, benefits and other terms and conditions of employment of unit employees. *NLRB v. U.S. Postal Service*, 18 F.3d 1089, 1100-01 (3d Cir. 1994).

Where the union requests information that is not presumptively relevant, it must establish its relevance. The burden of establishing relevance is not a heavy one. This is so because a "broad disclosure rule is crucial to full development of the role of collective bargaining contemplated by the Act," for "[u]nless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiation cannot occur." *Local 13. Detroit News Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979) (citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 68 (3d Cir. 1965)).

³ Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) of the Act results in a "derivative" violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Accordingly, the Supreme Court has adopted a liberal, discovery-type standard governing the employer's obligation to furnish requested information that is not presumptively relevant. *Acme Industrial Co.*, 385 U.S. at 437 & n.6. In applying that standard, the Board need only find a "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." *Acme Industrial Co.*, 385 U.S. at 437. *Accord New Jersey Bell Telephone Co.*, 936 F.2d at 150. *See Public Serv. Elec. & Gas*, 157 F.3d at 229-30 (sufficient that union "reasonably believed" that requested information was relevant); *NLRB v. J. P. Stevens & Co., Inc.*, 538 F.2d 1152, 1164-65 (5th Cir. 1976) ("requested data must be supplied unless it is plainly irrelevant"); *Curtiss-Wright Corp.*, 347 F.2d at 70 (sufficient that information sought has "potential value . . . to assist" union in carrying out its representational duties).

The union usually must apprise the employer of the basis for the information's relevance when it requests non-presumptively relevant information. *Hertz Corp. v. NLRB*, 105 F.3d 868, 874 (3d Cir. 1997). In some cases, however, the relevance of the requested information is "readily apparent," and "[w]hen it is clear that the employer should have known the reason for the union's request for information, a specific communication of

the facts underlying the request may be unnecessary.” *Id. Accord West Penn Pwr. Co.*, 394 F.3d at 243-44 (immaterial that union might not have fully stated the relevance of the information when “relevance was apparent from the face of the requests”); *U.S. Testing Co., Inc. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (relevance of information may be apparent from circumstances surrounding request); *Brazos Elec. Pwr. Co-op., Inc.*, 241 NLRB 1016, 1018-19 (1979) (“Where the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, the employer is obligated to divulge the requested information”), *enforced* 615 F.2d 1100, 1101 (5th Cir. 1980).

Once the union’s need for the requested information is established—that is, the information is relevant under a broad discovery-type standard—it must be produced unless the employer can demonstrate, for example, a legitimate and substantial countervailing confidentiality interest that might be compromised by disclosure. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315, 318-320 (1979); *Resorts Int’l Hotel Casino*, 996 F.2d at 1556. The party asserting confidentiality also bears the burden of proving that its interest outweighs its bargaining partner’s need for the information. *Resorts Int’l Hotel Casino*, 996 F.2d at 1156; *Wash. Gas Light Co.*, 273 NLRB 116, 117

(1984). When a party is unable to thus establish confidentiality, however, no balancing of interests is required and it must disclose the information in full to the requesting party. *Resorts Int'l Hotel Casino*, 996 F.2d at 1156 (citing *Mary Thompson Hosp. v. NLRB*, 943 F.2d 741, 747 (7th Cir. 1991)).

Further, blanket or generalized claims of confidentiality are insufficient to justify withholding relevant information. *Id.*; *Watkins Contracting, Inc.*, 335 NLRB 222, 226 (2001); *Wash. Gas Light Co.*, 273 NLRB at 117. *See generally Oil Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 362 (D.C. Cir. 1983) (trade secrets defense that only applied to portion of requested information could not justify employer's total non-compliance with union's requests). Rather, the employer must, when asserting a confidentiality interest, timely produce any requested information that is relevant and non-confidential, and identify which portions of the information are being withheld and explain why. *U.S. Postal Service*, 364 NLRB No. 27 (2016), slip op. at 1-3, 2016 WL 3348801, at *1-3 (2016), *enforced*, No. 16-1313 (D.C. Cir. Jul. 17, 2017) (unpublished decision on stipulation for consent judgment). The party invoking confidentiality must also offer to accommodate both its concern and its bargaining obligations, such as through redactions or a confidentiality agreement. *U.S. Testing Co., Inc.*, 160 F.3d at 20-22; *Postal Service*, 364 NLRB No. 27, slip op. at 1-2,

2016 WL 3348801, at *1-2. An employer that fails to timely take the foregoing steps waives the opportunity to claim confidentiality as a defense, and, in those circumstances, the union need do no more to be entitled to relevant, requested information. *Postal Service*, 364 NLRB No. 27, slip op. at 1-2, 2016 WL 3348801, at *1-2. See *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109, 109 (1977) (once the request for relevant information is received by the employer, the union is “not required to do more as a precondition to establishing the right to have the information produced”).

B. The Union Met Its Burden of Demonstrating Relevancy, and Crozer Violated the Act by Failing To Provide the Union with Relevant Requested Information

1. The Union demonstrated relevance and the Board properly rejected Crozer’s challenges

To prepare for bargaining over the effects of Crozer’s sale to Prospect, the Union requested production of the APA governing the sale. The Union’s information request, the context surrounding that request, and Crozer’s own concessions support the Board’s finding that the Union met its burden of demonstrating the APA’s relevancy to bargaining over the effects of the sale. Crozer attempts to dispute that finding by faulting the Union’s request as insufficient and criticizing the Board’s decision for wrongly placing the relevancy burden on Crozer. But the facts and settled law refute those claims.

a. The Union’s request, the surrounding context, and Crozer’s own admissions demonstrate the APA’s relevancy

First, the Union’s information request established relevancy by explicitly informing Crozer that it sought the APA “for effects bargaining.” *See* p. 8. Thus, as the Board noted, “the Union indicated a desire to obtain the APA with all attachments and schedules for use in bargaining over the effects of the sale.” (JA 37 n.8.) The Union thereby satisfied its “minimal obligation” to “communicate some reasonable basis” for needing the requested information. *Hertz*, 105 F.3d at 874. Moreover, the Board has, with court approval, ordered the production of sales agreements where, as here, the agreements were requested by unions that represent the seller’s employees. *See, e.g., Sierra Intern., Inc.*, 319 NLRB 948, 950-51 (1995); *Transcript Newspapers*, 286 NLRB 124, 128 (1987), *enforced*, 856 F.2d 409 (1st Cir. 1988).

Second, the relevance of the APA to effects bargaining was apparent to Crozer given the context surrounding the Union’s request. As a background matter, because of the Union’s prior experience in reviewing purchase agreements relating to other employers, it knew the APA would likely contain information relevant to bargaining over the effect of the sale. Moreover, this was the first time that Crozer was being sold to another entity,

raising a host of questions regarding the effect of the sale on unit employees' terms and conditions of employment. As the Board explained, the Union therefore had good "reason to believe that the APA contained relevant information." (JA 37.)

Further, as shown (pp. 5-8), the Union requested the APA in response to Crozer's January 8 letter to the Union, which indicated that the APA contained information about how the operation would and would not change under new management. The letter highlighted how those changes may impact labor relations and unit employees' terms and conditions of employment, such as the hiring of unit employees, the continuation and funding of employee benefit plans, the continuation or expansion of service lines, as well as the hiring, pay, and benefits of non-unit employees. As the Board observed (JA 37), some of this information would be presumptively relevant, such as the continued employment of unit employees and what wages, benefits and other terms and conditions they would have. Some other information would be of apparent relevance to the availability and location of unit work, such as capital investments or the expansion or contraction of services, or to whether non-unit employees were receiving pay or benefits the Union might want to negotiate on behalf of unit employees. *See, e.g., Ohio Power Co.*, 216 NLRB 987, 992 (1975) (information regarding the nature and

availability of employment opportunities for unit employees is relevant); *Brazos Elec. Power Cooperative, Inc.*, 241 NLRB 1016, 1018 (1979) (information regarding the compensation of non-unit employees is relevant where the information may be used to obtain parity for unit employees), *enforced*, 615 F.2d 1100 (5th Cir. 1980). In these circumstances, the Board reasonably observed that “experienced bargaining parties, such as these, could reasonably expect the Union to use [the requested APA and its schedules and attachments] in connection with the upcoming contract negotiations.” (JA 37 n.8.)

The Board’s observation is perfectly consistent with the precedent of this Court and other courts. Thus, this Court has explained that there are situations where, as here, a union’s need for the requested information “will be readily apparent,” and “[w]hen it is clear that the Employer should have known the reason for the union’s request for the information, a specific communication of the facts underlying the request may be unnecessary.” *Hertz*, 105 F.3d at 874. *See also West Penn Pwr. Co.*, 394 F.3d at 244 (immaterial that union might not have fully stated the relevance of requested information when “relevance was apparent”), and cases cited at pp. 21-22.

Finally, substantial evidence supports the Board’s finding that Crozer conceded relevancy, and the Board properly determined that given this

concession, it was not even “necessary to determine whether the Union placed [Crozer] on notice of the relevance of the APA.” (JA 37 n.8.) As the Board explained, Vice-President Bilotta “admit[ted] that, upon her own evaluation of the requested information, she determined that it was at least partially relevant.” *Id.* Specifically, Bilotta, agreed as early as February 10 that at least portions of the APA were potentially relevant to effects bargaining and subject to production. Thus, the Board reasonably concluded that her February 10 letter disputing whether the “entire” APA is relevant to effects bargaining suggests an acknowledgment that portions of it are relevant. Bilotta’s statements during bargaining on March 17, and in her March 18 letter, removed any doubt as she acknowledged that portions of the APA were relevant and asked if the Union would accept only relevant portions. (JA 34, 37; *see* pp. 10-11.) Indeed, Bilotta acknowledged being aware during bargaining that a hospital sale could impact hospital employees, and that portions of the APA were relevant to unit employees or contract negotiations on their behalf. (*See* p. 10.) The record, therefore, fully supports the Board’s finding that by February, and certainly by March, “it was clear to both parties that the APA contained relevant information and needed to be produced in whole or in part.” (JA 37.)

Crozer contests (Br. 22 n.2) the Board's finding that it conceded relevancy, and claims the Board erred in stating (JA 37 n.8) that, given this concession, it was immaterial whether the Union put Crozer on notice of the relevance. Crozer, however, myopically focuses on only two pieces of evidence, which it wrongly takes out of context, and thereby fails to confront the totality of the evidence supporting the Board's finding. It contends (Br. 22 n.2), for example, that Bilotta's February 10 letter merely states that Crozer "is open to considering alternative requests," without conceding relevance. Yet, as shown (p. 9), this same letter suggested that portions of the APA were relevant, and Bilotta directly acknowledged that relevance in March. Further, by admittedly providing "relevant redacted" versions of the APA a few months later to other unions who had requested the agreement to prepare for bargaining, Crozer conceded that at least those portions were relevant. While Crozer claims (Br. 22 n.2) this was merely the same "compromise" it offered the Union, not a "concession of relevance," it ignores its admission that it was providing "relevant" information.

Thus, however one parses it, Crozer was on notice of the relevance of the requested information. In this Court's words, the Union's need for the requested information "was readily apparent," Crozer either knew or "should have known the reason for the union's request for the information," and,

therefore, “a specific communication of the facts underlying the request [was]. . . unnecessary.” *Hertz*, 105 F.3d at 874.

b. Crozer failed to show the Union did not meet its relevancy burden

In response, Crozer raises several challenges the Board’s finding that the Union demonstrated relevancy. Specifically, it claims that the Union’s request was not sufficiently specific, the Board erred in relying on *post hoc* claims of relevance adduced for the first time at trial, and the Board erroneously placed the burden of proving irrelevance on Crozer. These claims misconstrue the Board’s findings and ignore the record evidence and applicable precedent.

Given the Board’s well-supported relevancy findings, Crozer misses the mark with its claim (Br. 20-21) that the Union’s request was not sufficiently specific to put Crozer on notice of the APA’s relevancy. As shown, the Union’s request sufficiently placed Crozer on notice that it needed the APA “for effects bargaining” regarding the sale, and notably, the Board found that the record contained “no evidence that the . . . request was . . . ambiguous.” (JA 37.) But even if the request was not sufficient, the surrounding context certainly made that relevance apparent. Crozer’s claim that the Union had to make a more specific request ignores this Court’s teachings in *Hertz* (*see* pp. 21-22, 27) that an employer is obligated to

provide information where, as here, its relevance was apparent, and that in such circumstances it may be unnecessary for the union to communicate the specific facts underlying that relevance. Thus, even if it were true (Br. 16) that “the Union never communicated the specific relevance” of the requested information—which it is not—*Hertz* cuts off any claim that Crozer had no obligation to furnish the information where its relevance was both admitted and apparent. Crozer’s argument not only ignores that it repeatedly acknowledged that relevance to the Union, but it also contradicts *Hertz* in claiming (Br. 22) that the Board may never rely on the “obviousness” of the relevance of requested information when *Hertz* says it may do exactly that.

Nor is Crozer correct in claiming that the Board improperly relied on *post hoc* claims of relevance adduced for the first time at trial. (Br. 24). The Board did no such thing. Instead, as shown, the Board focused on the facts presented to and known to Crozer at the time of the request and shortly thereafter, including its own admissions, showing that the relevance of the APA was apparent to both parties by February or March.

Undeterred, Crozer claims (Br. 18-19) the Board “got the law precisely backwards” and placed the burden on Crozer “to indicate what portions they deemed irrelevant and why.” This claim misconstrues the Board’s decision and precedent and rests on the fallacy that the Union did not demonstrate

relevance, which it did. Under applicable law (*see* cases cited at pp. 22-24), once relevance was thereby demonstrated, it was incumbent on Crozer, as the party with custody of the document, to provide what was relevant, and explain why it was withholding the remaining portions.

Putting this burden on Crozer is appropriate and consistent with precedent. As the Board cogently explained (JA 38), Crozer “should have produced those portions of the APA they deemed relevant along with an explanation of what they were withholding so the parties could engage in meaningful discussions about the proper scope of production.” Thus, once the Union established relevance, “the only issue was what portion (if any) would be withheld and [Crozer was] best situated to initiate a discussion of that issue because they were in possession of that information.” (JA 37 n.8.) Accordingly, as the D.C. Circuit has clearly explained, “the onus is on the employer because it is in the better position to propose how it can best respond to a union request for information,” and therefore the “union need not propose the precise alternative to providing the information unedited.” *U.S. Testing v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998).

Crozer continues to ignore this settled law when it claims (Br. 25) that the Union was engaging in improper speculation about which portions of the APA may be relevant. This claim turns a blind eye towards the obligation

that Crozer failed to fulfill and ignores that because of Crozer's own intransigence, "the Union was not given sufficient information to help parse the appropriate production of a document that was understood to be at least partially relevant." (JA 37.) Yet, rather than comply with its duty to provide what was relevant and explain why it was withholding the remaining portions, Crozer instead chose to "avoid or delay production of those portions of the APA they deemed relevant by soliciting alternative requests . . . or offering to discuss the information request." (JA 38.) Crozer, however, was not entitled to withhold information it deemed relevant to get the Union to accept less than it was entitled to receive by having further discussions over relevance.

Crozer further faults the Board's decision because the Board purportedly "failed to identify a single provision or schedule of the APA" that is relevant to the Union's bargaining duties. (Br. 24). As discussed, once Crozer acknowledged that the APA was relevant in part, it was required to timely provide the relevant portions, and was not privileged to withhold the entire document. The Board correctly determined that the Union did not have the burden to pinpoint the exact relevance of particular provisions and schedules. It only had to show that they are potentially relevant under the liberal discovery-type standard, and it met that minimal burden. *See Curtiss-*

Wright Corp., 347 F.2d at 70 (sufficient that information sought has “potential value . . . to assist” union in carrying out its representational duties), and cases cited at p. 21. In any event, the Board and the Union did explain how the APA and its schedules appeared likely to contain information relevant to effects bargaining. (JA 35-36; 241-52.)

Crozer likewise fails to cite precedential support for its position that the Union failed to show relevancy. Contrary to Crozer (Br. 19-20), the three cases cited by the Board (JA 37 n.8)—*Columbia College Chicago*, 363 NLRB No. 154, 2016 WL 1168605 (2016), *vacated in part on other grounds*, 847 F.3d 547, 551 n.3 (7th Cir. 2017); *National Steel Corp.*, 335 NLRB 747, 748 (2001), *enforced*, 324 F.3d 928 (7th Cir. 2003); and *Keauhou Beach Hotel*, 298 NLRB 702 (1990)—fully support the Board’s findings in this case. These cases stand for the well-established principle, relied on by the Board here, that “an employer may not simply refuse to comply with an ambiguous and/or overbroad request information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.” *Keauhou Beach Hotel*, 298 NLRB at 702. *Accord National Steel Corp.*, 335 NLRB at 748 (employer may not completely refuse to comply with request for relevant information based on blanket assertion of confidentiality); *Columbia College Chicago*, 363 NLRB

No. 154, slip op. at 49-50, 2016 WL 1168605, at 56 (employer may not avoid its obligation to provide requested information that is relevant to bargaining simply by asserting a confidentiality interest, but must attempt to work out an accommodation).⁴

Finally, Crozer fails to show the Board erred in relying on *Ohio Power* and *Brazos Elec. Power*, supra, pp. 26-27. Contrary to Crozer (Br. 28), nothing in *Ohio Power* requires that the relevance of information about the nature and availability of employment opportunities for unit employees be precisely limited to where, as there, it arose from employer's obligation to preferentially hire union members who had been replaced during a strike. Nor did the Board in *Brazos* declare (Br. 28) a bright-line rule whereby the relevance of non-unit compensation information could only arise where the employer maintained a "wage parity" policy. Instead, the Board in *Brazos* more broadly stated that such information should be provided where, as here, "the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose," even if it is a purpose that the union has "not specifically spelled out." 241 NLRB at 1018-19. *Accord*

⁴ As shown in the next section, moreover, like the employers found to have violated the Act in *National Steel* and *Columbia College*, Crozer also wrongfully withheld relevant information based on a blanket assertion of confidentiality and failed to meet its burden of working towards an accommodation with the Union.

Ohio Power, 216 NLRB at 995 (information request was adequate where “circumstances were such as to inform” employer of relevance of information). In sum, the cited cases do not contain the relevancy limitations that Crozer would impose on them. Indeed, Crozer’s unsupported and circumscribed view runs contrary to the liberal discovery-type standard that the Board applied in those cases (and here) to determine relevance. *See Brazos*, 241 NLRB at 1018; *Ohio Power*, 216 NLRB at 991.

2. Crozer failed to establish a legitimate and substantial confidentiality interest in the requested information

The Board also properly found that Crozer failed to take the steps required to support a claim of confidentiality and therefore waived its claim. As the Board found (JA 37; *see pp. 27-28*), Crozer admitted that portions of the APA were relevant and subject to production. Therefore, settled law (*see pp. 23, 34*) required, at that point, that Crozer do more than “vaguely assert” in blanket form (*id.*), as it did, that unspecified portions were irrelevant and confidential. Rather, it was required to promptly provide the portions that it deemed relevant and non-confidential, identify the portions it is unwilling to produce and explain why, and propose an accommodation such as redactions or a confidentiality agreement with the Union. As the Board explained, Crozer’s failure to do so prevented the parties from engaging in “meaningful discussions about the proper scope of production.” (JA 38.)

Substantial evidence supports the Board’s finding that Crozer “never identified portions of the APA they wanted to keep confidential from the Union and never proposed a confidentiality agreement restricting disclosure of the APA to third parties.” (*Id.*) Indeed, Bilotta testified that doing so was Crozer’s standard procedure in response to information requests, but did not explain why that procedure was not followed here. Instead, Crozer withheld the entire APA based on a blanket claim of confidentiality. *See* pp. 9-12. Thus, Crozer broadly claimed the “entire APA” was subject to a confidentiality agreement with Prospect, without providing the Union with the language of that agreement or explaining why it required Crozer to withhold the entire agreement or certain portions of it. In Bilotta’s February 10 letter, for example, she simply stated that the APA is “covered by the terms of a confidentiality agreement to which Crozer is subject.” Similarly, Bilotta’s March 18 letter contained the equally conclusory claim that the APA is “subject to a confidentiality agreement” with Prospect. *See* pp. 10-11. Such claims fall well short of the clear identification of confidential information required to support a claim of confidentiality. *See Lasher Serv. Co.*, 332 NLRB 834, 836 (2000) (“naked” or generalized claim of confidentiality insufficient), and cases cited at pp. 23, 34.

Regardless, Crozer’s claim (Br. 32) that the APA was subject to a strict confidentiality provision falls short of demonstrating a valid confidentiality concern. Notably, Crozer did not even reveal the specific basis for this claim until trial, where Crozer asserted that Section 12.1 of the APA, in particular, prohibited it from disclosing the document without Prospect’s consent. As the Board noted (JA 38), however, that section arguably allows for disclosure by the seller (Crozer) when, in its opinion, such disclosure is required by law.⁵ Moreover, the Union was not a party to the APA and was not consulted before the confidentiality provision was agreed upon. As the Board explained, “the fact that Crozer may have put itself between a legal rock and a hard place by agreeing to keep the APA confidential despite its statutory obligation to produce information under the Act is not the Union’s concern.”⁶

(*Id.*)

⁵ Thus, the relevant portion of Section 12 states:

Nothing in this Section 12.1, however, shall prohibit the use of such Confidential Information for such government filings as in the opinion of Sellers’ counsel or Buyers’ counsel are required by law or government regulations or are otherwise required to be disclosed pursuant to applicable state law.

(JA 38; 169.)

⁶ Indeed, CCMC was particularly well situated to know that the confidentially provision in a private agreement with a third party would not necessarily raise a cognizable confidentiality interest in that agreement. In a

The Board also properly found that “the record contains no explanation why either Crozer or Prospect believed that certain portions of the APA were confidential or proprietary.” (JA 38.) Bilotta indicated that she may have produced the entire APA if she could have obtained Prospect’s permission, giving rise to the reasonable inference that Crozer had no independent confidentiality interest in the document. (JA 38; 292, 295, 308, 312.) Notably, the record is void of any reason why Prospect desired confidentiality. (JA 38.)

Crozer (Br. 32-33) also fails to explain how any cited case excuses its failure to support its confidentiality claim and apprise the Union of which portions of the APA were covered by the confidentiality provision or why. For example, it gains no ground (Br. 32) by citing *West Penn. Pwr. Co. v. NLRB*, 394 F.3d 233 (4th Cir. 2005), which did not even address the issue of whether an employer had adequately supported a confidentiality claim. Rather, the court remanded to the Board the issue of whether the union had demonstrated the relevance of certain cost data that it had requested from the employer—an issue that does not apply here, where Crozer admitted that at

prior case, involving Crozer, a Board administrative law judge determined that the confidentiality clauses in certain third-party staffing agreements did not prevent the disclosure of those agreements to the bargaining representative of the employees of one of the contracting parties. *Crozer Chester Medical Center*, slip op. at 26, 2015 WL 2259320, p. 14 (2015).

least some of the requested information that it withheld was relevant. *Id.* at 244. The court also affirmed the Board’s finding that the employer failed to adequately respond to the union’s request for other information, including contract information, the relevance of which—like the information requested here—was “apparent” from the context of the request. *Id.*

The other cases cited by Crozer likewise do not condone an employer relying on a blanket confidentiality claim to withhold relevant information. Rather, many of them address the distinct issue of whether an employer claimed an inability to meet the union’s wage or other economic demands, so as to justify a very broad request for extensive profit data or for the employer to open its financial books or provide several years of tax returns. *See, e.g., SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281, 288-89 (2d Cir. 2013); *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1439-44 (D.C. Cir. 1997); *Teleprompter Corp. v. NLRB*, 579 F.2d 4, 8-10 (1st Cir. 1977); *United Furniture Workers of Am. v. NLRB*, 388 F.2d 880, 882 (4th Cir. 1967); *Nielson Lithographing Co.*, 305 NLRB 697, 699 (1991); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984). *See also West Penn Pwr.*, 394 F.3d at 244 (also addressing inability-to-pay issue). No such “inability to pay” or plea-of-poverty issue is raised in the instant case, nor did the Union seek extensive financial data or years of tax returns or the like, but only a single

document—a sales agreement that Crozer admitted was relevant at least in part to bargaining over the effects of the sale.⁷

Crozer’s conduct is also unlike that presented in *No. Indiana Publ. Serv. Co.*, 347 NLRB 210, 211-14 (2006), where the employer raised specific confidentiality and safety concerns in refusing to release its notes from an investigation into alleged threats of workplace violence, and accommodated the union by providing sufficient information to address concerns raised in a grievance regarding work-place safety. Crozer, in stark contrast, withheld all requested information based on a blanket assertion of confidentiality.

In addition to failing to offer more than an unsubstantiated blanket claim of confidentiality, Crozer did not, contrary to its assertion (Br. 29), meet its obligation to propose an approach to releasing the information that would accommodate both its confidentiality concern and the Union’s need for the information. All Crozer needed to do was “at any time, sen[d] an email to the Union with a redacted version of the APA, including the list of schedules, along with a draft confidentiality agreement and an explanation as to why certain information was being withheld.” (JA 38.) But Crozer did not

⁷ And, unlike the employers in the cited cases who provided a substantial amount of the requested information, Crozer withheld it all based on a blanket claim of confidentiality. *See SDBC Holdings, Inc.*, 711 F.3d at 292-93; *United Furniture Workers*, 388 F.3d at 882; *Teleprompter Corp.*, 579 F.2d at 7-8.

make any such offer, despite having provided a redacted version of the APA to two other unions. (JA 37.) Instead, Bilotta broadly claimed, in her March 18 letter, that the Union has requested unspecified “confidential and proprietary information.” She also indicated that Crozer would turn nothing over, not even those portions it deemed relevant, until the Union agreed to a confidentiality agreement, and offered “to discuss which portions of the APA are relevant.” *See* p. 11, above. Such an “offer” fell well short of an offer to negotiate over confidentiality and bargain over an accommodation. *See U.S. Testing, Inc.*, 160 F.3d at 21-22.

The record simply does not support Crozer’s claim (Br. 29) that it “repeatedly offered to accommodate the Union” and met its burden in that regard. Rather, as the Board found, “Bilotta’s testimony and internal emails indicate that [Crozer was] withholding information “specifically related to employees” as “a compromise” to “producing the entire document.” (JA 38.) Thus, as opposed to seeking a lawful accommodation, Crozer was instead “withhold[ing] information [Crozer] already had an obligation to provide as leverage in asking the Union to accept less than it may otherwise be entitled to receive.” (*Id.*) Crozer was not, therefore, entitled to avoid or delay production of those portions of the APA that they deemed relevant by soliciting alternative requests (as Bilotta did by email on February 10, *see* p.

9, above) or offering to discuss the information requests (as Bilotta did by letter on March 18, *see* pp. 10-11). As the Board aptly summarized it: “By failing to explain the basis for their claim of confidentiality, which the judge found unclear even as of the hearing, and by failing to offer an accommodation to the Union’s request for the entire APA and its attachments, [Crozer] waived its confidentiality defense.” (JA 30 n.2). *See Postal Service*, 364 NLRB No. 27, slip op. at 1-3, 2016 WL 3348801, at *2-3 (2016).

In response, Crozer offers nothing else that warrants disturbing the Board’s well-supported finding that Crozer waived its confidentiality claim. It claims that the Union’s “intransigence” and refusal to bargain to an accommodation is being held against Crozer. The Board soundly rejected that argument, stating that “[f]or its part, the Union did not defeat or interfere with [Crozer’s] ability to comply with their bargaining obligation by not calling to schedule discussions of the APA in response to Bilotta’s letter of March 18.” (JA 38.) Crozer parts company with the record evidence in claiming (Br. 29-30) that it “identified its confidentiality interest” and “offered to seek an accommodation,” but that the Union refused to even discuss the matter unless Crozer waived its statutory right to withhold confidential information. (Br.29.) As the Board explained in rejecting this

claim (JA 37), the parties could not meaningfully discuss the scope of production—e.g., to protect confidentiality—because Crozer failed to fulfill its duty to indicate which portions it deemed irrelevant or confidential or explain why.

Moreover, Crozer’s willingness to give redacted versions of the APA to the other unions—it did not withhold that information, which concerned the portions of the APA that were specifically related to the employees—supports rejecting the claim that the Union prevented Crozer from proposing a meaningful accommodation. As shown, Crozer could have, at any time, provided the Union with the redacted version of the APA, along with a draft confidentiality agreement and an explanation as to why certain information was being withheld. (JA 38 & n.9.) Crozer simply chose not to do so.

The Board also flatly rejected Crozer’s claim (Br. 30) that the Union was wrong to ask for the entire APA. Instead, the Board found that Crozer’s asserted defense was not “significant” or “valid” because Crozer “never identified specific portions they wanted to withhold and never offered more than a conclusory assertion that certain unidentified portions were not relevant.” (JA 38.) As the Board explained, Crozer’s failure to meet that obligation means that “the Union was not put to the test of altering its position.” (*Id.*)

Further, Crozer gains no ground by likening the Union's behavior here to the union's conduct in *Good Life Beverage Co.*, 312 NLRB 1060, 1061-62 (1993). (Br. 30.) In contrast to the instant case, the Board found in *Good Life Beverage* that the employer, unlike Crozer, had met its burden of specifying the information it sought to keep confidential. *Id.* The Board also found the employer committed no violation when it withheld the confidential information after the union commenced a lengthy "imbroglio" over where to meet to discuss how to accommodate the employer's confidentiality concerns. *Id.* The Union engaged in no such misconduct here. Nothing in that case, moreover, privileges Crozer to withhold information that it deemed relevant based on a blanket confidentiality concern.

Finally, Crozer's case is not advanced by citing (Br. 34) *National Steel Corp.*, 335 NLRB 747, 747-48 (2001), where the Board rejected the idea, echoed by Crozer here, that an employer meets its obligations "by simply asserting a confidentiality interest" in blanket form. Such a policy, the Board explained, would reverse precedent and improperly shift any burden to seek an accommodation from the employer to the union. *Id.*

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY ORDERING CROZER TO PROVIDE THE ENTIRE APA WITHOUT REDACTION

Crozer contends (Br. 35-36) that even if it violated the Act by withholding the APA, the Board erred by requiring it to provide the entire document. Crozer, however, fails to meet its heavy burden in challenging the Board's chosen remedy.

Section 10(c) empowers the Board to order the labor-law violator "to take such affirmative action . . . as will effectuate the purposes of the Act." 29 U.S.C. § 160(c). The Board's authority in formulating remedies "is a broad discretionary one, subject to limited judicial review." *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Thus, the Board's order directing Crozer to produce the entire APA, including all schedules and attachments, without granting Crozer another—and belated—opportunity to support its confidentiality claim and bargain over an accommodation, must be enforced unless Crozer shows that it "is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Fibreboard Corp.*, 379 U.S. at 216 (citation omitted). Crozer fails to meet this heavy burden.

As shown, to prepare for effects bargaining over Crozer's sale to a third-party, the Union requested production of the APA governing the sale.

Crozer unlawfully refused the Union's request (even as to the portions it deemed relevant) based on an unsupported claim of confidentiality. By failing to explain the basis for its claim of confidentiality—which remained unclear even as of the hearing (*see* pp. 38-39)—and by failing to offer an accommodation to the Union's request for the entire APA and its attachments, Crozer waived its confidentiality defense.

In these circumstances, the Board properly ordered Crozer to produce the entire APA, including all schedules and attachments, without granting Crozer another opportunity to substantiate its confidentiality claim and bargain with the Union over an accommodation, if such a claim were substantiated after the fact. Such a remedy accords with Board precedent. *See Postal Service*, 364 NLRB No. 27, slip op. at 2-3, 2016 WL 3348801, at *2-3 (2016) (ordering employer to immediately produce all requested documents, unredacted, and without a confidentiality agreement, as employer, by failing to timely assert confidentiality interest or propose an accommodation, waived its opportunity to raise those defenses). *Accord Watkins Contracting, Inc.*, 335 NLRB 222, 226 (2001); *Lasher Service Corp.*, 332 NLRB 834, 834 (2000).

Ignoring this precedent, Crozer (Br. 35-36) claims that requiring disclosure of the entire APA is punitive and exceeds the Board's authority. It

repeats its false claim (Br. 36) that it is being unfairly blamed for the Union's refusal to bargain, not its own. While the Board acknowledged that neither party's conduct was exemplary, Crozer was required to engage in accommodative bargaining at the time it first asserted a confidentiality interest. By not doing so, Crozer unfairly imposed, and unjustly reaped the benefit of, an additional year of delay upon an uninformed bargaining partner. (JA 30 n.2.) Crozer indisputably failed to fulfill the obligations attached to its asserted confidentiality defense. (*Id.*) Accordingly, contrary to Crozer (Br. 35-36), the Board's remedy is not punitive. Rather, it comports with precedent and the Act's purpose to promote collective bargaining. *Postal Service*, 364 NLRB No. 27, slip op. at 2-3, 2016 WL 3348801, at *2-3; *Midwest Division d/b/a Menorah Medical Center*, 362 NLRB No. 193, slip op. at 3-7, 2015 WL 5113235, *4-8 (2015), *enfd. in relevant part*, 867 F.3d 1288 (D.C. Cir. 2017); *Howard Industries*, 360 NLRB 891, 891-92 (2014); *West Penn Power Co.*, 339 NLRB 585, 585-586 (2003), *enfd. in relevant part* 394 F.3d 233 (4th Cir. 2005).

Moreover, as the Board explained, Crozer's approach would frustrate collective bargaining. (JA 30 n.2.) If, as Crozer contends, it must be afforded the opportunity to commence accommodation negotiations at the remedial stage, there is little incentive for it to engage in such negotiation at

the time it asserts a confidentiality claim in response to the information request. The resulting lengthy delay rewards the party that has violated its statutory obligation. *See Postal Service*, 364 NLRB No. 27, slip op. at 2-3, 2016 WL 3348801, at *2-3 (allowing employer a belated opportunity to support its confidentiality claim would reward party for its delay); *NLRB v. Hartman*, 774 F.2d 1376, 1388 (9th Cir. 1985) (Board remedy should remove from the wrongdoer the benefit of its wrongdoing to deter future misconduct).

Crozer otherwise fails to show any abuse of remedial discretion. It suggests (Br. 35) that requiring disclosure of the entire APA went beyond the remedial goal of restoring, as nearly as possible, what would have occurred absent the violation. It claims that this is so because the Board ordered receipt of confidential information that the Union was otherwise not entitled to receive. (Br. 35.) However, this simply assumes what Crozer failed to prove; that is, it ignores how Crozer failed to substantiate its confidentiality claim when it had the chance, and, therefore, the Union was at that point entitled to receive relevant information without engaging in further negotiations. Any uncertainty as to what information the Union would have received had Crozer met its bargaining obligations and supported its confidentiality claim, should be weighed against Crozer, not the Union. *See*

TNT USA Inc. v. NLRB, 208 F.3d 362, 368 n.3 (2d Cir. 2000) (citing *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)).

Finally, Crozer gains no ground by citing factually distinguishable cases (Br. 35-36) where the employer had supported its confidentiality claim and, therefore, the Board found it appropriate to give the parties another opportunity to bargain over the conditions for releasing conditional information. *See GTE Sw., Inc.*, 329 NLRB 563, 564 & nn.4, 9 (1999), and cases cited therein. Board precedent, however, explicitly holds that such an order is inappropriate where the employer withheld relevant information based on an unsupported claim of confidentiality, as Crozer did here. *See Watkins Contracting, Inc.*, 335 NLRB at 226 (distinguishing cases affording further accommodative bargaining; ordering employer to provide relevant information, rather than bargain over its confidentiality, where employer “merely stated that the information is confidential without explanation”); *Lasher Service Corp.*, 332 NLRB at 834 (noting that “merely raising a naked confidentiality claim” is insufficient; ordering employer to supply requested information rather than afford it 30 days to bargain for confidentiality agreement because employer had not met its burden of establishing that the information was confidential). Thus, the Board did not abuse its discretion by ordering Crozer to provide the APA in its entirety.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Crozer's petition for review and enforce the Board's Order in full.

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National Labor Relations Board
August 2018

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

CROZER-CHESTER MEDICAL CENTER;	*	
DELAWARE COUNTY MEMORIAL HOSPITAL	*	
	*	
Petitioners/Cross-Respondents	*	Nos. 18-1640
	*	18-1973
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	4-CA-172296
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF BAR MEMBERSHIP

In accordance with the Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Greg Lauro certifies that he is a member in good standing of the bar of the District of Columbia. He is not required to be a member of this Court's bar because he is representing the federal government in this case.

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Dated at Washington, DC
this 31st day of August, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,017 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 (12.1.RU6 MP5) and is virus-free according to that program.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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this 31st day of August, 2018