United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 19, 2018

TO: Garey E. Lindsay, Regional Director
Region 9

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: First Transit, Inc. 530-6067-6001-3700
Case 09-CA-219680 530-6067-6001-3755

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act by failing and refusing to provide all of the information requested by the Union regarding vehicle repair. We conclude that the Employer did not violate Section 8(a)(5) where the Employer provided some information, disputed the relevance of the remaining aspects of the information request, and the Union failed to make any showing of relevance to the Employer. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

First Transit, Inc., ("the Employer") provides para-transit services (transportation for people with disabilities) from its facility in Louisville, Kentucky. The Charging Party, Amalgamated Transit Union, Local 1447 ("the Union") represents drivers in the transportation department and technicians in the maintenance department employed at the Employer's facility. The Employer and Union are signatories to a collective-bargaining agreement effective October 1, 2015 through September 30, 2018.

On November 14, 2017, the Employer and Union entered into a Memorandum of Understanding (MOU) that addressed the issue of non-bargaining unit lead technicians performing vehicle repairs. This MOU settled the Union's November 10, 2016 grievance, alleging that vehicle repair has traditionally been bargaining unit work, which the parties were preparing to arbitrate. The MOU provided that, beginning January 1, 2018,[1] lead technicians would not spend more than 50 percent

[1] All further dates are in 2018.

of their total hours worked per calendar year quarter performing vehicle repairs. While this calculation was based on the five bargaining-unit technicians currently employed, the MOU accounted for future hires by stating that the percentage of total hours that a lead technician could perform vehicle repairs would be reduced to 45 percent when a sixth unit technician was hired.[2] In compliance with this MOU, the Employer provided the Union a summary of the hours spent on vehicle repairs by lead technicians on a monthly basis.

On April 24, after learning that a lead technician had performed eight hours of vehicle repair work the previous day, the Union President hand delivered a written information request to the Employer's General Manager requesting that the Employer provide "All documents up to and including emails, written statements, video and audio recordings by the company, and work orders on all coaches that were repaired on April 23, 2018" no later than 4:00 p.m. on April 30. The Union did not say anything to the Employer about its reasons for the request.

On May 15, the Employer responded to the Union and provided the work orders for coach repairs performed on April 23, stating in the cover letter that the work orders constituted "all relevant information in response to the Union's Information Request dated April 24, 2018."[3] The Employer did not specifically reference emails, written statements or video and audio recordings concerning coaches that were repaired on that day. The Union did not respond to this production of information or contest the adequacy of the Employer's response. Instead, it filed the instant unfair labor practice charge.

On July 23, in response to the Regional investigation of this charge, the Employer sent the Union a letter stating that only the work orders were relevant and that the requested email, written statements, and/or video camera footage was not relevant to the administration of the collective-bargaining agreement. In addition to contesting their relevance, the Employer asserted the emails and/or written statements did not exist. As to the video camera footage, the Employer asserted that it could not provide it because doing so would implicate employee privacy issues, particularly of non-bargaining unit employees, and the Employer does not have the ability to retrieve past footage without intervention from the camera's manufacturer. The Employer also contested the reasonableness of the video request, stating that the request covered twenty hours of footage from six cameras, totaling 120 hours of video.

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[2] A sixth technician was hired on March 5, 2018.

[3] The Region determined that this three-week delay in providing the work orders did not amount to an unreasonable delay in violation of Section 8(a)(5) of the Act.

Finally, the Employer claimed that the footage no longer exists due to its policy of retaining video footage only for a period of approximately thirty days.

The Union has argued to the Region during the investigation of the charge that it needs the remaining information to consider whether to file a grievance over the MOU. Specifically, the Union asserted to the Region that the work orders alone are insufficient to confirm the amount of time that lead technicians perform bargaining work. Rather, the Union explained to the Region its need to observe the non-bargaining unit employees repairing coaches on the security cameras to verify the work and confirm the accuracy of the work orders. The Employer argued to the Region that the Union's request was not a good faith demand for relevant information to ensure compliance with the MOU because no single day's records could establish a violation of the MOU requirement that is based on total hours calculated on a quarterly basis. Thus, the Employer argued that, even with all of the video footage, the Union would not be able to assess whether the lead technicians exceeded their allowed time repairing vehicles until the quarter had ended. The Employer also said that it provides the Union with a report detailing lead technicians' work hours at the end of each month for the Union to be able to assess compliance with the MOU.

ACTION

We conclude that the Employer did not violate Section 8(a)(5) because the Union did not establish the relevance of the remaining elements of its information request that the Employer failed to produce. The Region should therefore dismiss the charge, absent withdrawal.

A collective-bargaining representative is entitled to information relevant and necessary to carrying out its statutory duties and responsibilities, including negotiating over mandatory bargaining subjects and policing a collective-bargaining agreement.[4] When the requested information deals with the terms and conditions of employment of bargaining unit employees, the Board will deem the information presumptively relevant and necessary to the union's performance of its statutory duties.[5] In seeking presumptively relevant information, a union is not required to demonstrate its precise relevance unless the employer rebuts that presumption.[6]

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[4] *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979) (citing *NLRB v. Acme Indus. Co.,* 385 U.S. 432, 435-36 (1967), and *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152 (1956)).

[5] *See, e.g., Pennsylvania Power Co.,* 301 NLRB 1104, 1105 (1991) (citing *Curtiss-Wright Corp.,* 145 NLRB 152 (1963), *enfd.,* 347 F.2d 61 (3d Cir. 1965)); *see also Fleming Cos.,* 332 NLRB 1086, 1086-87 (2000) (finding employer should have

Where the information requested is not presumptively relevant, the burden is on the party requesting the information to demonstrate its relevance.[7] Information about employees or operations other than those represented by the union is not presumptively relevant.[8] The Board applies a liberal discovery-type standard in determining whether information is relevant to a union's statutory functions.[9] Potential or probable relevance is sufficient to trigger a duty to furnish information.[10] To demonstrate relevance, the General Counsel must present evidence that (1) the party requesting the information demonstrated relevance of the non-presumptively relevant information, or (2) that the relevance of the information "should have been apparent" to the respondent under the circumstances.[11]

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provided union with grievant's personnel file, work rules, other disciplinary actions taken, and a list of names and contact information for all unit employees employed by respondent's predecessor).

[6] *Fleming Cos.*, 332 NLRB at 1087 (citing *Mathews Readymix*, 324 NLRB 1005, 1007 (1997), *enfd. in relevant part*, 165 F.3d 74 (D.C. Cir. 1999)).

[7] *Disneyland Park*, 350 NLRB 1256, 1257 (2007) (although contract term prohibited the employer from subcontracting work to evade bargaining obligation, union never made claim that any subcontracting had that evasive purpose, and union must do more than cite contract provision to prove relevance of subcontracting agreements); *Schrock Cabinet Co.*, 339 NLRB 182, 182 fn.6 (2003) (relevance burden exists "whether or not a company requests an explanation of the relevance of the request").

[8] *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 2 (July 25, 2018) ("there is no presumption of relevance for information that does not pertain to unit employees; rather the potential relevance must be shown"); *Duquesne Light Co.*, 306 NLRB 1042, 1043 (1992) (information requested about employees outside of the bargaining unit who may be performing bargaining unit work not presumptively relevant).

[9] *Acme Indus. Co.*, 385 U.S. at 437.

[10] *Disneyland Park,* 350 NLRB at 1258.

[11] *Id.*, citing *Allison Corp.*, 330 NLRB 1363, 1367 fn.23 (2000). As explained below, it is the General Counsel's view that the requesting party cannot simply argue that relevance should have been "apparent" under *Disneyland*, without further explanation, once relevance has been contested. Rather, the parties have an obligation to engage with each other over whether and how the information is

Although the Board has not clearly articulated the scope of the requestor's obligation to demonstrate the relevance of information once relevance has been called into question, the Board has required a union to respond and establish relevance when an employer effectively disputed the relevance of the requested information, even if the information was otherwise presumptively relevant.[12] Requiring parties to engage in an interactive process regarding disputes over requested information comports with the Act's Section 8(d) mutual obligation requirement that an employer and union "meet at reasonable times and confer in good faith." The Board requires the parties to promptly engage in discussions or bargaining over concerns about other aspects of information requests, including ambiguous requests,[13] format of the information,[14] claims of confidentiality,[15] burdensomeness,[16] adequacy of the

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relevant, instead of simply litigating before the Board whether the relevance of the information should have been apparent. *See* note 20, below.

[12] *United Parcel Service of America*, 362 NLRB No. 22, slip op. at 3 (Feb. 26, 2015) (if an employer has effectively rebutted the presumption of relevance of requested documents, the union must respond and "may not ignore the employer's concerns or refuse to discuss a possible accommodation, even when the requested information is presumptively relevant"). *See also IGT d/b/a International Game Technology*, 366 NLRB No. 170, slip op. at 2 & fn.7 (Aug. 24, 2018) (employer not required to provide union with information about all locations because the union failed to respond to the employer's request for an explanation of relevance of the other locations).

[13] *See Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990) ("[E]ven if the Union's request was ambiguous and/or intended to include information regarding nonunit employees when made, this would not excuse the Respondent's blanket refusal to comply. It is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information"); *Yeshiva University*, 315 NLRB 1245, 1248 (1994) (the employer failed to ask for clarification to the union's request for information so its refusal to comply was not excused).

[14] *See Yeshiva University*, 315 NLRB at 1248 (if an employer possesses the requested information but not in the form that the union requested, the employer must inform the union so that the union can modify its request or offer to provide the information in an alternative form); *Postal Service*, 276 NLRB 1282, 1287 (1985) (same).

[15] *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 317-20 (1979). *See also Finch, Pruyn & Company, Inc.*, 349 NLRB 270, 276 (2007) (employer failed to accommodate union's request for contracts, including ignoring the union's proposal to redact confidential

response,[17] and the non-existence of the information.[18] The obligation to engage has been recognized for both the party requesting the information and the party possessing the information.[19] The same kind of discussion should be required with regard to disputes over relevance.[20]

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financial terms), *enfd*. 296 F. App'x 83 (D.C. Cir. 2008); *Allen Storage & Moving Co.,* 342 NLRB 501, 503 (2004) (employer established a legitimate and substantial claim of confidentiality about customer information and met its obligation to bargain towards an accommodation of its interests and the union's need by offering the union an opportunity to review its books, which the union refused without explanation).

[16] *See Mission Foods*, 345 NLRB 788, 789 (2005) ("the onus is on the employer to show that production of the data would be unduly burdensome, and to offer to cooperate with the union in reaching a mutually acceptable accommodation"); *Pratt & Lambert, Inc.*, 319 NLRB 529, 534 (1995) ("the burden in time and money necessary to fulfill a request for information is not a basis for refusing the request… the parties must bargain in good faith as to who shall bear such costs").

[17] *See Day Automotive Group*, 348 NLRB 1257, 1262-63 (2006) (finding no violation where the employer had reason to believe it had satisfied the union's request for information and the union never said the information provided was insufficient or requested additional information).

[18] *See Endo Painting Service, Inc.*, 360 NLRB at 486 (a party must timely disclose that requested information does not exist).

[19] *See e.g.*, *Yeshiva University*, 315 NLRB at 1248, *quoting Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1098 (1st Cir. 1981) ("When the employer presents a legitimate, good faith objection on grounds of burdensomeness or otherwise, and offers to cooperate with the union in reaching a mutually acceptable accommodation, it is incumbent on the union to attempt to reach some type of compromise with the employer as to the form, extent, or timing of disclosure."); *GTE California Inc.*, 324 NLRB 424, 427 (1997) (the parties bargained for an accommodation to the requested confidential customer information and the union never claimed that the accommodation was inadequate).

[20] It is the General Counsel's view that the above-described interactive process should apply with regard to presumptively-relevant information, where the employer has effectively disputed relevance, as well as for information that, while not presumptively relevant, was apparently relevant as asserted by the union under *Disneyland Park* prong 2, but for which the employer has effectively disputed the relevance. *See* note 11, above.

Requiring parties to engage in this interactive process with respect to information request disputes has additional benefits beyond complying with Board law. It encourages the parties to resolve among themselves their disputes about requested information by articulating to each other, rather than simply to the Region and/or Board, their relative interests in the information. The parties will then have a greater understanding of where they stand and where compromise may be found. And, should the parties fail to resolve the dispute themselves, the Board will be better able to evaluate whether the information should have been produced without having to engage in speculation about the requester's actual need for the information and the other party's real reason for not producing it.

Here, the Employer replied to the Union's request for information without unreasonable delay. When the Employer provided the requested work orders, it told the Union that it only considered the work orders to be relevant and that the remaining portions of the Union's request, i.e., emails, written statements, and video camera footage, were not relevant.[21] While the Union could argue that the relevance of these other items should have been apparent to the Employer from the circumstances, including the existence of the MOU, the Employer instead made a good-faith challenge to the perceived relevance of those items, thus putting the onus on the Union to respond.[22] The Union did not explain in any way to the Employer why it needed additional information, e.g., why potential surveillance footage of nonunit employees performing bargaining unit work was relevant to the Union's claim that the Employer is violating the MOU.[23] The Union thus failed to engage in

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[21] The information was not presumptively relevant. The request was for information about non-unit lead technicians, not bargaining unit employees; the Union acknowledged, through the MOU, that vehicle repair work was not just bargaining unit work; and even if vehicle repair was bargaining unit work, the Union would need to establish the relevance of information about non-unit employees that allegedly are performing bargaining unit work. *See Duquesne Light Co.*, 306 NLRB at 1043.

[22] *See International Game Technology*, 366 NLRB No. 170, slip op. at 2 fn.7; *United Parcel Service of America*, 362 NLRB No. 22, slip op. at 3.

[23] Moreover, even if the Union had asserted to the Employer, and not just to the Region, that the video was needed to verify the actual hours lead technicians repaired vehicles because the Union believed that the work orders were inaccurate, the Union would need objective evidence of the inaccuracy of the work orders to support a reasonable belief that the video was relevant. *See Disneyland Park*, 350 NLRB at 1258; *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984) (the union did not establish the relevance of information about non-unit employees at a different facility because the

an interactive process with the Employer regarding the remaining elements of its information request.

Since the employer effectively disputed the relevance of the information and the Union did not explain why it needed the information in response, the Employer did not violate its duty to bargain by failing to provide additional information.[24] Accordingly, the Region should dismiss the charge, absent withdrawal.

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union only had a suspicion that bargaining unit work was being transferred and no objective basis for that belief).

[24] Therefore, the Employer's other objections to producing additional information, including those based on the merits of the Union's interpretation of the MOU, the privacy interests of non-unit employees, and the burdensomeness of the request, need not be addressed.