

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

Global Contact Services,
Respondent,

and

**Transport Workers Union, AFL-CIO
Local 100**
Charging Party

**Case Nos. 29-CA-211765
29-CA-216547
29-CA-218276
29-CA-218816**

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

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I. STATEMENT OF THE CASE

Global Contact Services (“Respondent”) has violated Sections 8(a)(1) and (5) of the National Labor Relations Act (“Act”) by engaging in the following conduct:

- A. Since about December 7, 2017, Respondent has failed and refused to provide to Transport Workers Union, AFL-CIO, Local 100 (“the Union”) information pertaining to employee Danika Downey that is relevant to and necessary for collective bargaining, including: (a) the audio recordings of the two phone calls relied upon by Respondent in suspending employee Danika Downey, (b) the audio recordings of the phone calls relied upon by Respondent in terminating Downey, and (c) the documentary records of all calls by Downey for the period reviewed by Respondent in deciding to terminate Downey.
- B. Since about March 2, 2018, Respondent has failed and refused to provide to the Union information pertaining to employee Minkaru Kaira that is relevant to and necessary for collective bargaining, including the audio recording of Kaira’s phone call to Respondent on or about January 17, 2018 reporting that he was ill and would not be at work.
- C. Since about March 30, 2018, Respondent has failed and refused to provide to the Union information pertaining to employee Lorraine Williams that is relevant to and necessary for collective bargaining, including audio recordings of the alleged call avoidance calls relied upon by Respondent in terminating Williams.

This brief will first set forth the relevant record evidence of the case, and then analyze the facts under case law to show that Respondent violated the Act as alleged.

II. PROCEDURAL HISTORY

On December 18, 2017 the Union filed an unfair labor practice charge against Respondent in Case No. 29-CA-211765. GC 1(A). On March 13, 2018, the Union filed a second charge against Respondent in Case No. 29-CA-216547. GC 1(E). On April 9, 2018, the Union filed a third unfair labor practice charge against Respondent in Case No. 29-CA-218276. GC 1(I). On April 19, 2018, the Union filed a fourth charge against Respondent in Case No. 29-CA-218816. GC 1(M).

On May 21, 2018, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Nos. 29-CA-211765 and 29-CA-216547. GC 1(Q). On June 27, 2018, the Regional Director issued an Order Further Consolidating Cases Amendment to Consolidated Complaint, and Order Rescheduling Hearing in Case Nos. 29-CA-211765, 29-CA-216547, and 29-CA-218276. GC 1(T). On July 24, 2018, the Regional Director issued a Complaint and Notice of Hearing in Case No. 29-CA-218816¹, and on the same day, issued an Order Further Consolidating Cases in 29-CA-211765, 29-CA-216547, 29-CA-218276, and 29-CA-218816. On September 17, 2018, the case was litigated before Administrative Law Judge Jeffrey Gardner.

III. THE FACTS

(A) **Respondent's Operations and its Relationship with Transit**

Respondent operates a call center in Long Island City, New York, where it fields calls from passengers who use the Access-A-Ride program, which is a paratransit program that provides rides in cars and vans for people who cannot access public transportation. Tr. 55. Respondent provides these services under a contract with the New York City Metropolitan Transit Authority (“Transit,”

¹ At the opening of the hearing, Counsel for the General Counsel moved to amend the Consolidated Complaint by withdrawing all allegations pertaining to Case No. 29-CA-218816, and ALJ Gardner granted the motion.

also referred to as “NYCTA,” “MTA,” or “TA” in various exhibits) valued at one hundred fifty million dollars. Tr. 40. Respondent employs about 800 associates, of which about 725 answer phone calls from Access-A-Ride customers. Tr. 289. Respondent’s employees answer between eight and nine million phone calls per years. Tr. 289.

The building that houses Respondent’s call center, as well as most equipment that Respondent’s employees operate, are owned by Transit. Tr. 219. Employees use phones and computers that operate the Adept software system (which manages Access-A-Ride reservations) as well as NICE software (which records phone calls), all of which are owned by Transit. Tr. 291-292. Some administrative and management employees, such as Project Manager Frank Camp, use computers that are owned by Respondent, in addition to the equipment that is owned by Transit. Tr. 291; Tr. 313.²

Camp has access to folders on Transit’s computer network that contain Transit-related information. Tr. 292. Using the NICE software, Camp can search for and access information related to specific associates, as well as specific phone calls. Tr. 293. Camp can access audio recordings of employee phone calls and play them out loud. Tr. 293. While Camp cannot save a copy of an audio recording himself, he can ask Transit to do so. Tr. 293. Camp has requested that Transit provide copies of audio recordings to him, and Transit has provided him with such copies, for purposes of playing the audio aloud at grievance hearings in the conference room in Respondent’s facility. Tr. 311. In instances such as these, Camp plays the audio recordings on a portable device owned by Respondent, not a device owned by Transit. Tr. 312. Typically, 24 to 48 hours is sufficient lead time to request a copy of an audio recording from Transit. Tr. 315.

² Although Camp initially testified that he uses two desktop computers (one owned by Transit and one owned by Respondent), he later recanted his testimony and said that he uses one desktop computer (owned by Transit) and one portable Microsoft Surface with a docking station (owned by Respondent). Tr. 291; Tr. 313.

Respondent's contract with Transit contains language pertaining to nondisclosure and confidentiality. One provision of Respondent's contract with Transit, entitled "Nondisclosure Agreement for Contractor," requires Respondent to agree that it has acquired no rights to certain proprietary software, stating *inter alia*:

In consideration of the New York City Transit Authority ("NYCT") permitting access to confidential and proprietary information of the Paratransit Command Center Operations and StrataGen software and other proprietary information disclosed to the Contractor by NYCT in connection with this Contract (collectively referred to as the "Paratransit Information"), we agree that we shall have acquired no rights to the Paratransit Information except to use it in connection with respect to Work under this Contract. R. Ex. 8.

Another provision, entitled "Article 128 - Confidentiality of Personal Information and Compliance with Personal Privacy Protection Laws," restricts Respondent from sharing callers' personal information with people other than Respondent's personnel, agents and subcontractors, stating *inter alia*:

If during its performance of this Contract, the Contractor, (which, for purposes herein shall be deemed to mean and include its directors, officers, principals, employees, agents, and subcontractors) has access to or is exposed to any personal information (which for purposes herein shall be deemed to mean and include all personal identifiable information, including but not limited to name, address, telephone number, social security number, pass number, date of birth, marital status, etc., and whether in hardcopy, electronic format or any other form or medium) of the Authority's Customers ("Personal Information"), the Contractor shall use the Personal Information solely for the performance, and for the purposes, of this Contract. The Contractor shall not disclose the Personal Information to anyone other than Authorized Users, as defined below, and the Contractor's performance of this Contract shall be in compliance and be consistent with the terms contained herein. Access to the Personal Information shall be restricted to Contractor's personnel and that of its agents and subcontractors whose duties or responsibilities justify the need for such access, and who in fact have a need to know or be exposed to the Personal Information ("Authorized Users"). R. Ex. 8.

Despite the contract's restrictions on Respondent disclosing callers' personal information, including names and phone numbers, Respondent has shared such information with the Union. For example, Respondent has sent call logs to the Union that list a "participant phone number," such as R. Ex. 2, which lists 57 phone numbers. Camp admitted that the participant phone number is

the number that an Access-A-Ride passenger calls from, and could be their personal phone number. Tr. 339-341. In addition, Camp admitted that Respondent “traditionally” provides corrective action notices to the Union that contain customer names, and that this has occurred somewhere between ten and fifty times. Tr. 341-342. Camp admitted that such disclosures violate the above-quoted “Article 128.” Tr. 341.

In addition to language about confidentiality and nondisclosure, Respondent’s contract with Transit also contains language pertaining to audio recordings of phone calls. One provision, “call recording,” describes how recorded calls are stored, stating:

All trunk side and station-to-station calls within the Call Center are recorded using the NICE Perform 3.1 system. Recordings are kept for a minimum of 7 years and are owned by NYCT. The system allows for supervision/management to listen to live actual calls and previously recorded calls for periodic quality assurance. NICE Perform 3.1 is a web-based application.” R. Ex. 8.

However, Camp clarified that calls are actually kept for an infinite time period, not only seven years. Tr. 305. Each call is assigned a series of identifiers, and is stored in a database that can be searched by time, date, or associate name. Tr. 305-306. Transit provides passwords and determines access privileges for the people who use its computer systems, including Respondent managers. Tr. 307.

(B) Respondent’s Relationship with the Union

The Union represents Respondent’s employees at the call center for purposes of collective bargaining. R. Ex. 11. Respondent and the Union are parties to a Collective Bargaining Agreement which is in effect from August 23, 2016 through March 31, 2020 (“CBA”). *Id.* The CBA includes a three-step grievance procedure, which provides for “step hearings” at steps one and two, and culminates in arbitration at step three. *Id.*; Tr. 59. The parties’ primary bargaining representatives

are Attorney Toni Currie (“Currie”) for Respondent and Attorney Laine Armstrong (“Armstrong”) for the Union. Tr. 54, 63.

At the Long Island City call center, Respondent’s employees operate phones and computer software that record and store all calls that the employees answer. Tr. 41. Respondent relies upon these recordings in disciplining its employees, and consequently, the Union regularly requests access to the recordings. Tr. 64. The nature of the Union’s request turns on how far along the grievance procedure has progressed. Tr. 64. In that regard, during a step hearing (either step one or step two), the Union often requests to listen to recordings. Tr. 64. Employees must sometimes attend step hearings during their unpaid lunch hour or day off, and other times use their paid break time to attend step hearings. Tr. 344-345.

Whereas step hearings happen with great frequency – about five to ten each week – the grievance process has proceeded through to an arbitration award in only about twenty instances. Tr. 55, 62. When the Union decides to elevate a grievance to arbitration, the Union has gone beyond listening the phone calls and has instead requested that Respondent provide the Union with a copy of pertinent audio recordings. Tr. 64. This has happened on approximately five occasions. Tr. 368.

There is no dispute that Respondent has never provided such recordings to the Union. The Union had never filed for arbitration, and therefore had never requested that Respondent provide audio recordings, until after Union Attorney Armstrong began representing the bargaining unit in April 2017. Tr. 367-368. When asked if any Union representative had ever said that they understood that Respondent would never provide audio recordings to the Union, or said that the Union waived its right to obtain audio recordings, Camp testified, “no, it just never came up.” Tr. 348.

The audio recordings are necessary for the Union in representing the employees in disciplinary grievances because it allows the Union to prepare meaningfully for arbitration by listening to and reviewing calls with the employee, stopping the recording where necessary for discussion, and comparing the recording to Respondent's written discipline notices, which "sometimes do not accurately reflect what was said in the call," or contain "a characterization of tone of voice or a presentation of the associate" that cannot be reflected in writing. Tr. 64-65. Additionally, in some instances, there are a great quantity of calls that must be reviewed. Tr. 86. For example, Respondent terminated one employee, Lorraine Williams, on the basis of fifty to seventy instances of call avoidance. Tr. 86. Attempting to review that many calls with an employee is impractical, especially in the presence of the employee's manager. Tr. 86. Even where no one speaks on a call, arbitrators have relied on their content in ruling on employee grievances. G.C. Ex. 5, 6. For all these reasons, the Union has asked Respondent to provide copies of audio recordings in advance of arbitration, but Respondent has refused to provide them.

(C) **On Many Occasions Before the Union Requested Audio Recordings of Certain Employee Phone Calls In Connection With Discharge Grievances, Respondent Repeatedly Distributed Such Recordings to the NLRB.**

Despite Respondent's claims that the audio recordings are confidential and that it is not authorized to disclose them because they are owned by Transit, the evidence establishes that on at least four separate occasions in 2015, Respondent sent by email audio recordings of employee phone calls to the NLRB.

First, on February 18, 2015, Counsel for Respondent sent six audio recordings of employee Patricia Edwards' phone calls to a Region 29 Board Agent in defense of unfair labor practice allegations. G.C. Ex. 7 at 2. Although the General Counsel requested in its subpoena documents

showing that Respondent sought Transit's permission before distributing these audio recordings, Respondent did not locate any such evidence. Tr. 280-281.

Second, on May 13, 2015, a Region 29 Board Agent requested copies of audio recordings of employee Jerald Montgomery. G.C. Ex. 7 at 5. At 2:55 PM on the same day, May 13, 2015, Counsel for Respondent responded, "I will let client know that we need to get the recordings asap." *Id.* The following day, at 1:40 PM on May 14, 2015, Counsel for Respondent sent recordings of two calls to the Board Agent. G.C. Ex. 7 at 4-5. The calls included both Montgomery's voice and at least one customer's voice. *Id.* Counsel wrote, "I am still attempting to obtain the remaining two recordings referenced in Montgomery's termination notice." *Id.* The following morning, at 10:08 AM on May 15, 2015, Counsel for Respondent sent the final two audio recordings to the Board Agent. G.C. Ex. 7 at 4. Although the General Counsel requested in its subpoena documents showing that Respondent sought Transit's permission before distributing these audio recordings, Respondent did not locate any such evidence. Tr. 280-281.

Third, on June 4, 2015, Counsel for Respondent filed with a Region 29 Board Agent a position statement pertaining to an employee named Penalver, and attached audio recordings of two phone calls. G.C. Ex. 7 at 7. Although the General Counsel requested in its subpoena documents showing that Respondent sought Transit's permission before distributing these audio recordings, Respondent did not locate any such evidence. Tr. 280-281.

Fourth, on June 22, 2015, Counsel for Respondent filed with a Region 29 Board Agent a position statement pertaining to an employee named Lennon, and attached audio recordings of three phone calls. G.C. Ex. 7 at 8. Although the General Counsel requested in its subpoena documents showing that Respondent sought Transit's permission before distributing these audio recordings, Respondent did not locate any such evidence. Tr. 280-281.

In fact, Project Manager Frank Camp admitted that, with one exception, “there are no documents” showing that Respondent ever sought authorization from Transit to disclose any audio recordings to any third parties. Tr. 281. The only exception, as Camp testified, is when the Union subpoenaed Transit in June 2017 for an audio recording of employee Sabrina Jackson’s phone call, and Camp sent an email to Transit with a copy of the recording attached. Tr. 281; G.C. Ex. 2.

(D) **The Union Was Forced to Subpoena An Audio Recording of Employee Sabrina Jackson’s Phone Calls from Transit As a Result of Respondent’s Refusal to Provide the Recording Directly To the Union.**

Although it is not alleged as a violation in the instant case, Respondent’s refusal to provide an audio recording of employee Sabrina Jackson’s phone call, and the Union’s pragmatic response, is important to understand later events. In June 2017, the Union sought to prepare for an arbitration regarding Ms. Jackson’s termination for poor job performance, including a specific call that Respondent relied on in deciding to terminate her Tr. 65-66. In advance of the arbitration, the Union requested an audio recording of the call, as well as a related call between Jackson and her supervisor. Tr. 67. Respondent Project Manager Frank Camp admitted that the Union had never requested an audio recording before this instance. Tr. 331.

Respondent refused to provide the Sabrina Jackson audio recordings to the Union. Tr. 67. As arbitration approached, when it became clear that Respondent would not produce the recordings, the Union issued a subpoena to Transit requesting the information. Tr. 67; R. Ex. 3. After the Union issued its subpoena, Respondent Project Manager Frank Camp sent an audio recording of Jackson’s phone call by email to his contacts at Transit, Patricia Ibarguen (Project Manager at Transit) and Tom Chin (Director of Reservations at Transit). Tr. 310; G.C. Ex. 2. From the time that Transit received this email from Camp on June 20, 2017 at 12:50 PM, less than six

hours passed before Transit emailed the recording to the Union at 6:22 PM. G.C. Ex. 2. In addition to the recording that Transit provided to the Union, Transit also provided a screen shot showing the duration of the recording. G.C. Ex. 3.

However, obtaining recordings directly from Transit proved to be insufficient, as the entire audio recording was not provided to the Union. The audio recording provided by Transit lasted approximately three minutes and seventeen seconds, whereas the screen shot showed that it should have lasted over six minutes and thirty seconds. *Id.*, Tr. 74-75. Thus, the Union had to proceed to arbitration without the complete recording. *Id.* In its communications with Transit, the Union raised a concern that, while Respondent “has repeatedly represented to the Union that they cannot provide recordings to [the Union] because they are in the custody of Transit,” the materials that Transit provided to the Union showed “that [Respondent] is nevertheless providing Transit incomplete copies of audio files and requesting that these be certified.” G.C. Ex. 2. In order to avoid hamstringing itself by receiving incomplete recordings from Transit, an entity who owes the Union no duty to provide information under the Act, the evidence establishes that the Union did not come to any agreement with Respondent that the Union would follow this procedure of obtaining audio recordings of employee phone calls from Transit, instead of from Respondent. Tr. 75.

(E) The Union Requests Information Pertaining to Danika Downey’s Discharge Grievance, and Respondent Refuses to Provide It.

Danika Downey is a bargaining unit employee whom Respondent decided to terminate in October 2017. Tr. 75. On or about October 10, 2017, the Employer suspended Downey for an alleged job performance policy violation (i.e., a call of concern on October 6, 2017), and while Downey was suspended, Respondent decided to terminate her for an alleged job performance

policy violation that occurred prior to the call of concern (i.e., call avoidance from October 2-6, 2017). Tr. 76. Upon learning of Respondent's decision to terminate Downey, the Union filed a grievance. *Id.*

On or about October 23, 2017, the parties held a step hearing in Project Manager Camp's office at Respondent's facility. Tr. 77. At the step hearing, the Union orally requested documents substantiating Respondent's claim of alleged call avoidance. Tr. 77. After the hearing, on October 24, 2017, the Union followed up with a written request by email to Respondent Attorney Currie:

At yesterday's Step Hearing for Ms. Downey, the Union requested that the Company provide records of the multiple occurrences noted in her termination notice of avoiding calls, never responding to clients, disconnecting calls, and not returning to customers on hold. In addition, the Union is requesting the opportunity to listen to the call that was the basis of Ms. Downey's suspension and the her [sic] call to her supervisor, Denise, for assistance with the call. Jt. Ex. 1-A.

At this point in time, the Union did not request copies of any audio recordings because, as Union Attorney Armstrong testified, "it's possible that once we hear the calls it's something that would be easily resolved between the Union and the Company. And it doesn't seem necessary to require the Company to provide us a recording of a call [at this stage.]" Tr. 78-79. Although the Union did get the opportunity to listen to Downey's calls after making its request, this was not an instance in which the parties could easily resolve the issue. Tr. 78; 81.

On November 1, 2017, Respondent Attorney Currie sent an email to the Union that stated, "Enclosed please find the call avoidance information for the above referenced associate." G.C. Ex. 3. Attached to that email was a list of phone calls in which Respondent alleged Downey engaged in call avoidance, with a handwritten note stating, "4 Day Sample." G.C. Ex. 4. The handwritten note already appeared on the document when the Union received it. Tr. 81.

On Thursday, December 7, 2017, Armstrong sent an email to Currie, requesting information necessary to represent Downey at her arbitration, including audio recordings:

In advance of Monday's Arbitration, the Union is requesting the following:

Danika Downey: (1) audio recording of "bad" call; (2) audio recording of Ms. Downey's call to Supervisor Denise requesting assistance; (3) records demonstrating Ms. Downey's alleged call avoidance (previously the company provided a "sample"). I have been in contact with Ms. Downey regarding a possible settlement proposal plan to send it to you this afternoon. Jt. Ex. 1-A.

On the morning of Friday, December 8, 2017, Currie sent an email to Armstrong, refusing to provide any audio recordings, encouraging the Union to seek the information from Transit, rather than from Respondent, and stating that Respondent had already provided a "sampling" displaying call avoidance:

As you are aware, GCS does not own the recordings of the calls and therefore cannot provide them to you. I know in the past you have subpoenaed information from NYCT. In the immediate instance, the Union and Ms. Downey have listened to the recordings and have had time to discuss them. As you have stated, the company has provided you with the requested sampling of calls displaying call avoidance upon an earlier request. No settlement plan was received by the company yesterday afternoon... Jt. Ex. 1-A.

On the afternoon of Friday, December 8, 2017, Armstrong sent an email to Currie, which clarified the information that the Union sought, and explained that the Union's past attempt to accommodate Respondent had resulted in Transit providing the Union with incomplete information:

As you know, the Company is required by law to provide the Union with all information relevant to grievances, which includes all information we need to prepare for an arbitration hearing. When the Union last subpoenaed the audio of a call for arbitration it was done because GCS refused to comply with the law. It is GCS's, not the Union's, responsibility to request the information from MTA. Since, in response to our past subpoena, the MTA just forwarded us an email from Frank Camp with the audio attached, it appears that these audios are in GCS's possession and can be readily provided. GCS must provide the audio of the two calls relied upon in suspending Ms. Downey, and the calls relied upon in making the decision to terminate her. In addition, we are entitled to the documentary records of all calls by Ms. Downey for the period reviewed by the Company in deciding on her termination. I would prefer to handle this issue without involving the NLRB.

[...] Jt. Ex. 1-A.

Later in the afternoon of Friday, December 8, 2017, Currie sent an email to Armstrong with an offer to settle the grievance, but did not address the Union's information request, except to state,

“we can discuss your last minute request on Monday.” Jt. Ex. 1-A.

On the afternoon of Wednesday, December 13, 2017, Armstrong sent an email to Currie, which reiterated that the Union still sought the information it had previously requested:

As arbitration was adjourned for 10 days^[3], the employer has more than enough time to respond to our information requests. I look forward to receiving the information. Jt. Ex. 1-A.

On the afternoon of Thursday, December 14, 2017, Currie sent an email to Armstrong, which informed the Union, for the first time, of the title of the contractual provision that Respondent relies upon in refusing to provide the Union with audio recordings:

This letter responds to your request for physical copies of recordings of phone calls conducted by GCS associates during their employment at the Call Center. Specifically, phone calls with citizens of New York City and others. Frankly, I am surprised that you are raising this issue again. As you know, the Union was specifically advised at the first arbitration regarding job performance, that GCS does not own the equipment at the Call Center. Furthermore, GCS does not own the recordings. To the contrary, you are aware that MTA owns the equipment and all recordings. Based upon this understanding you agreed to, and in fact issued subpoenas to MTA seeking this information. Based upon the above we assumed you would follow the established procedure.

Aside from the above, and as you have been advised previously, GCS considers the actual recordings confidential information. The calls contain the personal information of New York City residents and we are strictly prohibited by our contract with MTA from providing copies of calls to anyone pursuant to Article 128 CONFIDENTIALITY OF PERSONAL INFORMATION AND COMPLIANCE WITH PERSONAL PRIVACY PROTECTION LAWS, wherein it specifically states, “All Personal Information shall be appropriately safeguarded and kept in a secure environment that is not shared with, or made accessible to, anyone or any entity other than Authorized Users.”

Nevertheless, we have sought to reasonably accommodate the Union’s request by: 1) Playing the calls for the involved employee as well as the designated Union representative at the Call Center, 2) Playing the calls for you and other union representatives (and the involved employee) at the various grievance meetings, 3) Making the recordings available to be listened to, upon request, at other mutually convenient times, 4) Making the recordings available at the arbitration hearings. To the extent you have some other suggestion that does not involve providing a “hard copy” please let us know so we can consider your request.

³ Downey’s arbitration, which had previously been scheduled to take place on December 11, 2017, was postponed to December 20, 2017.

In closing, the Union has always had access to associate phone calls. There has never been any issue during the grievance procedure or in arbitration regarding the Union's access to physical copies of the calls and several arbitrations have proceeded under the procedure that has been established now for some time.

We look forward to continuing to work with you and to reasonably accommodate your requests. Jt. Ex. 1-B.

Armstrong testified that Currie's offer to play the calls for the Union representatives is insufficient because Project Manager Camp or Currie (or both) were always present when she sought to listen to calls with employees, and Respondent never permitted the Union any time to listen to calls without a Respondent representative present. Tr. 85. Armstrong expressed this concern to Respondent in subsequent correspondence.

The following day, on Friday, December 15, 2017, Armstrong sent an email to Currie, which corrected Respondent's misstatement that the Union had waived its right to seek audio recordings from Respondent, explained why Respondent's accommodation offer is unworkable for the Union, and offered to instead accommodate Respondent's concerns by entering into a confidentiality agreement:

I have seen the attached correspondence [in reference to Currie's December 14 letter].

As you are well aware, federal law requires GCS to respond to the Union's reasonable information requests, and the employer must make diligent efforts to acquire requested information and evidence from third parties. Although you seek to create one now, and as always I find your revisionist history delightfully whimsical, there is no "established procedure" regarding the audio recordings of phone calls that are the basis for union member discipline. On a single occasion, prior to arbitration of Sabrina Jackson's grievance, the Union was forced to subpoena the audio recording of her "bad call" from MTA because of GCS's utter defiance of the law. GCS continues this obstructionism.

The rest of your correspondence is misleading. Whether GCS considers the audio calls confidential is immaterial to whether the company has an obligation to produce them. Providing access to the Union to listen to the calls at GCS's facilities with GCS employee(s) present at times that GCS will permit is entirely insufficient for the Union to participate meaningfully in the grievance process with our members. Providing access the day of an arbitration hearing is insufficient and appears calculated to cause delay. The Union did not receive a response to our subpoena from MTA until over a month after Ms. Jackson's arbitration hearing. Prior to that time, the only audio of the call provided was an email from

Frank Camp forwarded to us by the MTA. The audio attached to that was incomplete and/or altered, and did not include relevant information (the call between Ms. Jackson and her Supervisor.)

In order to help facilitate the process that Union is happy to agree to keep any calls confidential, and share them only with the Union Representative, counsel and counsel's staff, and the member who took the call. Jt. Ex. 1-A.

Respondent never responded, either in writing or orally, to the Union's offer to keep the calls confidential. Tr. 87.

Later in the day on Friday, December 15, 2017, Currie sent an email to Armstrong, which ignored the Union's offer of confidentiality, admitted that at least some of the requested calls contained no confidential information, and insisted upon the same accommodation that Respondent had previously offered:

Your December 15, 2017 email regarding physical copies of recordings of phone calls conducted by GCS associate Danika Downey has been received. Unfortunately, you continue to ignore the fact that GCS does not own the recordings, our MTA contract prohibits disclosure, and the information (including but not limited to the identity of MTA customers) is confidential.

You have likewise failed to indicate why the established procedures are now inadequate for your purpose, or why you even need a "copy" of the recordings. We did previously furnish to you a list of the calls (including date, time, duration and description) that lead to Ms. Downey's discharge. There is no dispute regarding the content of the subject calls or the fact that Ms. Downey is the agent who participated in the calls.

You are well aware that Ms. Downey was discharged for "call avoidance" (essentially hanging up on customers and/or not performing her responsibilities) so a "copy" of the (short) recordings would be of, at best, limited value. Thus, nearly all of the calls do not even contain Ms. Downey's voice. For example, the call log provided to you states with regard to the calls: "no sound from agent or client", "no sound from agent but client was on the line", "client was on the line waiting for the agent", "silence on the line", etc. You have not provided any rationale explaining why allowing the Union additional access to the recordings is "insufficient". All of the above, as well as the tone of your email and refusal to consider GCS' proposed compromise, suggests that your position is not taken in good faith.

In these circumstances, we have attempted to reasonably accommodate the Union's request by: 1) Playing the calls for Ms. Downey as well Judy Meyers, the designated Union representative at the Call Center, 2) Playing the calls for you and other union representatives (and Ms. Downey) at the various grievance meetings, 3) Making the

recordings available to be listened to again, upon request, at a mutually convenient time, 4) Making the recordings available at the arbitration hearings, as is customary and is the procedure we used in several prior cases with the approval of Arbitrator Licata.

Please let us know if you would like to have the recordings played again for you at a convenient time prior to the hearing. At such time you or another Union representative could take notes of the calls, if desired.

Once again, if you have other suggestions that do not involve receiving a "hard copy" of the recordings please let us know so we can consider your request. Jt. Ex. 1-C.

On the afternoon of Monday, December 18, 2017, Armstrong sent an email to Currie, which again corrected Respondent's mischaracterization of the parties' past practice, and again explained why Respondent's accommodation offer is unacceptable to the Union:

Thanks for your letter dated December 15, 2017 on the issue of audio recordings of calls. Again, there are no "established procedures" for provision of audio recordings of calls in preparation for arbitration hearings, though it is fun how you keep pretending there are as if your wishing will make it true. Perhaps you can explain why you believe the employer has no obligation to respond to the Union's reasonable request for relevant information.

There is indeed a dispute regarding the content of the call, and that is why we are on our way to arbitration. As you know, GCS management frequently misquotes calls and freely mischaracterizes tone and content of these calls in the discipline documents. There are objective and subjective components to call quality that the Union must be able to review and assess with the associates to prepare for arbitration.

I did not see any compromise offered by GCS. If GCS's solution is that the Union can listen to calls with a member at Frank Camp's convenience, with him present until the day of arbitration at which point Frank Camp will play the call for us again then, I am sure you can understand that is not sufficient access to the information for the Union to reasonably prepare representation of clients.

With respect to Ms. Downey specifically, as you are aware, she was not terminated for call avoidance, the first issue with job performance stated in her notice of termination is the call on October 6, 2017 and Ms. Downey's performance on that call.

You refer to "several prior cases with the approval of Arbitrator Licata." Please let me know the cases to which you refer, and what Arbitrator Licata allegedly approved. Jt. Ex. 1-A.

Currie did not reply to Armstrong's December 18, 2017 e-mail.

(F) **The Parties Arbitrate Downey’s Grievance; the Arbitrator Relies Upon the Substance of the Audio Recordings in Awarding Downey Reinstatement.**

Downey’s arbitration hearing took place on December 20, 2017. At the arbitration, Respondent played most of the calls on the “4 Day Sample” of call avoidance (i.e. G.C. Ex. 4). Tr. 88. Although Armstrong had heard Downey’s call of concern prior to the arbitration, she had never heard any of the alleged call avoidance calls prior to the arbitration. Tr. 88. On December 27, 2017, Arbitrator Licata issued an Award and Opinion awarding Downey reinstatement and backpay. G.C. Ex. 5.

Arbitrator Licata’s reliance upon the substance of the audio recordings demonstrates their relevance. In his Award and Opinion, Arbitrator Licata analyzed the merits of nineteen allegations of call avoidance infractions. *Id.* Of those nineteen alleged infractions, the arbitrator set aside two calls based on the content of the audio recordings. *Id.* In one case, the audio recording showed that Downey answered the call, placed the customer on hold, and then the customer hung up. *Id.* In the second case, the audio recording showed that the customer informed Downey that his ride had arrived before the call ended. *Id.* Of the remaining seventeen calls, the arbitrator set aside seven based on Downey’s testimony that she was on her lunch break when the calls came in. *Id.* The arbitrator concluded that the remaining ten calls, which equal approximately three minutes and thirty seconds of lost service over a forty hour workweek, were insufficient to warrant discharge. *Id.*

(G) **On March 2, 2018, The Union Requests Information Pertaining to Employee Minkaru Kaira’s Discharge Grievance, and Respondent Refuses to Provide The Requested Information.**

In or around January 2018, the Union learned that Respondent had decided to terminate

bargaining unit employee Minkaru Kaira. Tr. 90. Respondent's stated reason for Kaira's termination was a "no call no show." Tr. 90. The Union filed a grievance on Kaira's behalf. Tr. 91.

In or around late January or early February, Union and Respondent representatives attended a step hearing pertaining to Kaira's grievance in the conference room at Respondent's facility. Tr. 91. At the step hearing, Kaira gave testimony, and the parties listened to a phone call from Kaira. Tr. 92. While the Union representatives believed that the audio recording showed that Kaira said he would be out that day and the next day, Respondent representatives disagreed. Tr. 92. The parties were not able to resolve the grievance at the step hearing, and the Union subsequently filed for arbitration, which took place on March 8, 2018. Tr. 93.

On March 2, 2018, Union Attorney Armstrong sent an e-mail to Respondent Attorney Currie, requesting information relevant to the Union's representation of Kaira at the upcoming arbitration hearing, stating:

In advance of the arbitration hearing scheduled for 3/8/2018, the Union requests the following information regarding Minkaru Kaira's case:

(1) audio recording of Mr. Kaira's call to GCS on or about January 17, 2018 reporting that he was ill and would not be at work.

Thanks. Jt. Ex. 2.

Later in the day on March 2, 2018, Currie sent an e-mail to Armstrong, which refused to provide the requested information, again asked the Union to obtain the information from a source other than Respondent, and questioned the information's relevance:

In connection with the discharge of Minkaru Kaira for No Call/No Show and violation of the Attendance Policy contained in GCS Associate handbook you requested on March 2, 2018 via email:

"(1) audio recording of Mr. Kaira's call to GCS on or about January 17, 2018 reporting that he was ill and would not be at work".

As we have repeated on many occasions in response to similar requests, GCS does not own the recordings taken at the Call Center. In fact, and as you know, our contract with the MTA specifically prohibits the distribution of any such recordings. In recognition of this, you have in the past issued a subpoena to MTA for copies of recordings and it is requested that if you believe the recording is relevant, you follow that practice here.

In addition to the above, we do not understand why a copy of Mr. Kaira's call out is even relevant to the upcoming arbitration. As you also know, Mr. Kaira called out for this work shift on January 16. He did not indicate that "he was ill" and any such representation by the Union is inaccurate and misleading. In fact, the Union does not dispute that Mr. Kaira also failed to report to work on January 16, 17 and 18 2018, was no call/No Show under the Attendance Policy and that he was charged with absences under the (no fault) policy. In addition, and as you know, GCS played the recording for both you and Mr. Kaira at the step 2 grievance hearing. Again, there is no question that Mr. Kaira called out of work on January 16, and was No Call /No Show on January 17 and January 18.

In light of the above, please let me know: 1) if the Union disputes the content of Mr. Kaira's call and, 2) explain the relevance of your request.

As we have offered in response to your prior similar requests, GCS is happy to play the short recording again for you at a mutually convenient time. You may take notes of the recording, if you wish. The short recording will be available at the arbitration and can be played over and over subject, of course, to arbitrator Siegel's rulings. Again, the relevant facts are not, and cannot be, in dispute and we therefore do not understand the purpose of your request. We sincerely hope it is not designed to simply create unnecessary issues and disputes.

Please let us know your thoughts so we can productively work out any differences. Jt. Ex. 2.

Still on March 2, 2018, Armstrong sent an e-mail to Currie, which again explained why the only accommodation offered by Respondent is unacceptable to the Union, explained that the audio recording is relevant to the factual dispute that was discussed with Currie at the step hearing, and pointed out that the recording contains no confidential information:

It is entirely inappropriate and without any force and effect for you to decide what the Union's position is, and tell us. In addition, of course the relevant facts are in dispute, otherwise the parties would not be moving forward to an arbitration. The questions as to these facts were discussed at the Step Hearing while you were present.

In any event, according to your past representations, GCS is contractually prohibited from providing the Union with customer calls because there are customer confidentiality issues.

While the Union does not believe that this relieves GCS of its legal obligation to provide the Union with information relevant to employee grievances, that issue need not be addressed here. There is no dispute that the call we request is not a customer call and does not contain any confidential information. There is a single voice on the call, the Grievant's. Thus, there should be no bar to GCS providing the audio recording to us.

Also, the Union did not subpoena any recordings from MTA "[i]n recognition of" GCS's spurious claim that answering information requests amounts to a contractually prohibited "distribution" of MTA property. As you know, the subpoena was issued in the face of GCS brazen refusal to comply with the law and only because arbitration was imminent.

In response to your offer to play the audio for us at a mutually convenient time, we again note that this offer does not appear to be a good faith attempt by GCS to comply with its legal obligations with respect to information requests, but instead seems intended to disadvantage the Union at arbitration. As common sense dictates, we cannot meaningfully prepare for arbitration with our client in GCS's offices with you and Frank Camp present. There being no confidentiality at issue, we look forward to receiving the requested audio. Thank you.

Have a great weekend. Jt. Ex. 2.

On March 5, 2018, Currie sent an e-mail to Armstrong, which reiterated Respondent's request for an explanation of the information's relevance, and once again insisted on the only accommodation that Respondent ever offered:

This responds to your March 2, 2018 email.

As you know, we have requested that the Union explain why the content of Mr. Kaira's January 16, 2018 phone call is relevant to the Union's claims in arbitration and whether the Union disputes the content of the call, which was played for you (and Mr. Kaira) at the Step 2 grievance hearing. These are reasonable requests and the Union's refusal to provide information or engage in any type of dialogue on the issues speaks volumes. We have pointed out before that the Union's duty to provide information to GCS and discuss information requests is an obligation imposed under the National Labor Relations Act Relations Act. To be clear, we are reiterating our requests again here.

Rather than explain in a transparent manner the sum and substance of the Union's claims on behalf of Mr. Kaira and why a copy of Mr. Kaira's January 16, 2018 phone call is relevant to such claims, you have once again attempted to create a cloud of confused pandemonium to distract from Mr. Kaira's violations of GCS' Attendance Policy. To repeat, Mr. Kaira called out for his work shift on January 16. You know from listening to the recording that he did not indicate that "he was ill". If you have forgotten the content of the call, please let us know if you would like to hear it again.

Aside from the January 16 absence, Mr. Kaira also failed to report to work on January 17 and 18, 2018 and was No Call/No Show under the Attendance Policy. Again, there is no dispute that Mr. Kaira called out of work on January 16, and was No Call /No Show on January 17 and January 18. These are the simple undisputed facts, regardless of the Union's efforts to create irrelevant issues for arbitration. In order to prevent any confusion at the arbitration please let us know immediately what facts, if any, are in dispute.

To repeat, GCS is happy to play the short recording again for you at a mutually convenient time. You may take notes of the recording, if you wish. Your discussions with Mr. Kaira regarding the January 16 call and preparation for arbitration should of course take place at your office or some other location outside the Call Center.

In closing, much more can be accomplished if the Union is transparent regarding its claims, focuses on the relevant facts and expends less energy creating issues and diversionary disputes.

We look forward to your response so the parties can productively work out any differences regarding Mr. Kaira and the related information requests. Jt. Ex. 2.

Later on March 5, 2018, Armstrong sent an e-mail to Currie, which spelled out that the audio recording is relevant to proving which days Kaira called out sick:

There is a dispute as to the facts, and you know it as you were present at the Step Hearing furiously taking notes. Your paragraphs-long email is simple [sic] an attempt to create the appearance of Union misfeasance where there is none. Mr. Kaira stated on the recording on January 16 he would be out the 16th and 17th. We all heard it and there was disagreement about what was actually said on the recording at the time.

As for your continued attempts to cast the Union as obstructionist, difficult, and the problem in building any meaningful negotiating relationship, it is a misrepresentation. Any hyperbolic clouds of confusion and pandemonium are the result of GCS. If the Union will not acquiesce to terms that GCS has decided are adequate (without discussion with the Union), GCS refuses to participate in negotiations or meaningful dialogue. For example, I notice you have not reiterated your claim that Mr. Kaira's call is confidential and therefore you are barred from producing it by contractual obligations. As this is the case, there should be no reason for your continued refusal to provide the audio recording. Nevertheless, you continue to refuse. As the call is indisputably relevant, and not confidential, please produce it. Jt. Ex. 2.

Currie did not reply to Armstrong's March 5, 2018 e-mail. *Id.*

Kaira's arbitration was scheduled to take place on March 8, 2018, but the Union withdrew the grievance because Kaira could not attend arbitration (due to training for another job), and

because Kaira decided that he would rather pursue a claim against Respondent for unpaid sick time with the New York City Department of Consumer Affairs. Tr. 94. Nonetheless, the Union still sought the audio recording from Respondent and informed Respondent accordingly. On March 20, 2018, Armstrong sent an e-mail to Currie, which informed Respondent that the Kaira recording continues to be relevant to his claim before the Department of Consumer Affairs:

The Union is still seeking production of the audio recording of Mr. Kaira's "call out". He has brought a complaint through New York State Consumer Affairs, and the audio recording is relevant and necessary for him to proceed with his complaint.

We look forward to receiving the information. Jt. Ex. 2.

Currie did not respond to Armstrong's March 20, 2018 e-mail. *Id.*

By email dated April 26, 2018, an agent of the Department of Consumer Affairs informed Respondent that it was closing its investigation. R. Ex. 9. However, the letter also explained that subsequently discovered evidence could result in a renewed investigation, stating, "if in the future the Department comes into receipt of information that Global Contact Services may be in violation of the Earned Sick Time Act, a new investigation will be opened at that time." R. Ex. 9.

Although Respondent has expressed concern about sharing audio recordings with the Union that include personal information of Access-A-Ride customers, in this instance, only employee Kaira's voice could be heard on the recording, and Kaira did not mention any information of any Access-A-Ride customers on the recording. Tr. 92. Nonetheless, Respondent never provided Kaira's audio recording to the Union. Tr. 93.

(H) **In March 2018, The Union Requests Information Pertaining to Employee Lorraine Williams' Discharge Grievance, and Respondent Refuses to Provide The Requested Information.**

In or around February 2018, the Union learned that Respondent had decided to terminate bargaining unit employee Lorraine Williams for poor job performance, including purported call

avoidance. Tr. 95-96. The Union filed a grievance on Williams' behalf. Tr. 96. Soon thereafter, Union and Respondent representatives attended a step hearing in the conference room at Respondent's facility. Tr. 96. At the step hearing, the parties reviewed Williams' termination notice, which contained approximately 50 alleged instances of call avoidance from January 16, 2018 through January 31, 2018. Tr. 97; G.C. Ex. 6. However, no audio recordings of any phone calls were played at the step hearing. Tr. 97. The parties were not able to resolve Williams' grievance at the step hearing, and the Union filed for arbitration. Tr. 97.

To enable the Union to prepare for arbitration, the Union requested information from Respondent, including audio recordings. On March 30, 2018, Armstrong sent an email to Currie requesting, *inter alia*, "audio recordings of the alleged 'call avoidance' calls." Jt. Ex. 3-A.

On April 3, 2018, Currie replied to Armstrong's request by email. In pertinent part, Currie refused the request, stating:

As GCS has stated on numerous occasions we do not own, nor are we permitted pursuant to our Contract with NYCT to distribute audio records, however, since you will be here for grievance hearings on Thursday of this week, please let me know if you would like to come in early to hear these calls. Jt. Ex. 3-B.

Later in the day on April 3, 2018, Armstrong replied to Currie's email. In pertinent part, Armstrong reiterated the request, stating:

GCS's contract with NYCT does not relieve it of the legal responsibility to respond to the Union's reasonable information request. Also, as the Union has previously explained, it is not reasonable to expect the Union to prepare with its members at GCS's offices with Frank Camp present, especially in the circumstance here, where GCS has identified over 50 calls it deems as evidence of call avoidance by Ms. Williams. Jt. Ex. 3-C.

On April 4, 2018, Currie replied to Armstrong's email. In pertinent part, Currie wrote, "As there are now 2 open NLRB charges regarding this issue outstanding, plus two grievances, the Union has been apprised of the Company's position." Jt. Ex. 3-D. Respondent never provided the Union with any audio recordings of Williams' phone calls. Tr. 99.

On April 6, 2018, the parties conducted the arbitration hearing pertaining to Williams' termination. G.C. Ex. 6. At the hearing, Respondent played all of the calls listed on Williams' termination notice as instances of call avoidance. Tr. 100. Union Attorney Armstrong had not heard any of the recordings prior to the arbitration. Tr. 100. On April 14, 2018, Arbitrator Licata issued an Opinion and Award denying the Union's grievance and upholding Williams' termination on the basis of call avoidance. G.C. Ex. 6. Much like in his Downey decision, Arbitrator Licata explicitly relied upon the content of Williams' calls in both dismissing non-meritorious allegations of call avoidance, as well as in finding meritorious allegations. *Id.*

(I) **In or about April 2018 - Months After the Union Made the Information Requests At Issue and In Anticipation of Litigation - Respondent Solicits an Advisory Opinion from Transit Regarding Respondent's General Ability to Provide Audio Recordings to the Union.**

By letter dated April 24, 2018, James Kerwin, Executive Agency Counsel for Transit, sent by email a letter to Respondent Attorney Currie "... in response to [Respondent's] request to set forth the policies and practices of the New York City Transit Authority ("NYCT") with respect to distributing copies of Access-A-Ride ("AAR") call center audio recordings." R. Ex. 10. Respondent Attorney Currie admitted under oath that she had requested written guidance from Transit "so I could provide it as evidence in this case to show that we had made attempts to get the information." Tr. 359.⁴

⁴ Respondent did not enter its initial request, which triggered Transit's reply, into evidence because there was no written request. Tr. 360. Rather, Currie testified that she called Transit to request that they write a letter. Tr. 358. Currie was "not quite sure exactly when," but stated that "it was probably maybe February of [2018]." Tr. 358.

In its letter, which was prepared for the explicit purpose of litigation, Transit counsel admitted that audio recordings may be shared with third parties under certain circumstances, subject to redaction at Transit's discretion, stating:

Please be advised that call center recordings are NYCT's property and should not be distributed by GCS to third parties. While there may be circumstances under which NYCT will directly provide copies of call center recordings to third parties; such as in response to a duly authorized subpoena, determinations as to whether production is warranted and, if so, whether certain information is subject to redaction or withholding under the PPPL or other law should be made by NYCT, not GCS. R. Ex. 10.

Transit's letter does not mention any specific information requests or the names of any of Respondent's employees. *Id.* Although Currie admitted that Transit is willing to provide audio recordings to the Union, Tr. 383, and that nothing prevents Respondent from asking Transit which recordings (or portions thereof) may be shared with the Union, Tr. 383-384, Respondent introduced no evidence that it ever sought Transit's permission to share audio recordings of Downey's, Kaira's, or Williams' phone calls with the Union.

IV. ARGUMENT

It is well settled that Respondent has a statutory obligation to provide the Union, on request, information that is relevant and necessary to enable the Union to intelligently and effectively carry out its statutory obligations as the employees' exclusive bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149,152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *American Benefit Corporation*, 354 NLRB No. 129 (2010); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Requests for information concerning the terms and conditions of bargaining unit employees are presumptively relevant. *Postal Service*, 359 NLRB 56, 56 (2012). Respondent must furnish presumptively relevant information on request unless it establishes legitimate affirmative defenses to production. *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995).

Respondent's obligation includes the duty to furnish the Union with information that the Union requests in order to properly administer a collective-bargaining agreement, and to process and evaluate grievances pursuant to the agreement. *New York & Presbyterian Hospital*, 355 NLRB 627 (2010) *enfd.* 649 F.3d 723, 729 (D.C. Cir. 2011). When a grievance proceeds to arbitration, "substantive information pertaining to the issues" raised by the grievance must be produced, as opposed to prearbitral discovery that delves into litigation strategy, which need not be produced. *Oncor Electric*, 364 NLRB No. 58, slip op. at 17 (2016); vacated and remanded on other grounds *Oncor Elec. Delivery Co. LLC v. Nat'l Labor Relations Bd.*, 887 F.3d 488, 500 (D.C. Cir. 2018) ("we do not find that the Board was unreasonable in its decision to sanction Oncor's failure to produce Union-requested information").

The analysis of the facts in the cases of Danika Downey, Minkaru Kaira, and Lorraine Williams makes clear that Respondent violated the Act by refusing to provide the Union with

requested information that substantively pertains to the issues raised by each employee's grievance.

(A) **Since about December 7, 2017, Respondent has failed and refused to provide to the Union information pertaining to employee Danika Downey that is relevant to and necessary for collective bargaining, in Violation of Sections 8(a)(1) and (5) of the Act.**

In the case of Danika Downey, the evidence clearly shows that the Union requested information that is directly relevant to the substantive issues raised by Downey's discharge grievance, namely, audio recordings of the phone calls relied upon by Respondent in deciding to first suspend and then terminate Downey, as well as documentary records of those calls. By email dated December 7, 2017, Union Attorney Armstrong made her initial prearbitral request for "(1) audio recording of 'bad' call; (2) audio recording of Ms. Downey's call to Supervisor Denise requesting assistance; (3) records demonstrating Ms. Downey's alleged call avoidance (previously the company provided a 'sample.'" Jt. Ex. 1-A.⁵ In her email reply to the Union's information request, Respondent Attorney Currie flatly refused to provide any audio recordings. *Id.* With regard to the call avoidance records, Currie wrote that Respondent had already provided a "sampling of calls displaying call avoidance." *Id.* Notably, Currie's reply did not state that the previously provided "sample" (or "sampling") constituted all the documents demonstrating Downey's call avoidance, or that no further records existed.

Armstrong immediately sought to clarify her request by email dated December 8, 2017. First, she reiterated her request for audio recordings, writing, "GCS must provide the audio of the two calls relied upon in suspending Ms. Downey, and the calls relied upon in making the decision

⁵ Armstrong's use of the word "sample" is a clear reference to the document that Respondent had provided at the step hearing stage of the grievance procedure, which Respondent labeled "4 Day Sample." G.C. Ex. 4.

to terminate her.” *Id.* With regard to the documents, Armstrong wrote, “in addition, we are entitled to the documentary records of all calls by Ms. Downey for the period reviewed by the Company in deciding on her termination.” *Id.*

The record evidence is crystal clear that in all of Currie’s subsequent communications to the Union, including her emails on December 8, December 14, and December 15, 2017, Respondent repeatedly refused to provide the requested audio recordings. Jt. Ex. 1-A, 1-B, 1-C. Additionally, Currie never again even mentioned the Union’s request for documentary records. *Id.*

The Union’s information requests pertain directly to the substantive issues that were addressed at Downey’s arbitration, specifically, the allegations that Downey committed “numerous ‘call avoidance’ violations from October 2-6, 2017,” and “improperly treat[ed] a customer during a call that began at 7:35 a.m. on October 6, 2017.” G.C. Ex. 5. At 3-4. In fact, the arbitrator explicitly relied on the audio recordings that the Union had requested, and that Respondent played at the arbitration hearing, in setting aside two allegations of call avoidance. G.C. Ex. 5 at 10. Thus, the Union’s requests fall well within the scope of information that Respondent was obligated to provide.

While Respondent’s refusal to provide Downey’s audio recordings will turn on their affirmative defenses, which are refuted below, Respondent has no defense to its refusal to provide the documentary records requested by the Union. In responding to the Union’s request for “records demonstrating Ms. Downey’s alleged call avoidance,” Respondent failed to disclose that no information exists other than the “sample” that it had already provided. Such failures to disclose violate Section 8(a)(5). *Graymont Pa, Inc.*, 364 NLRB No. 37 (June 29, 2016) (violation where employer failed to tell union that responsive information did not exist; reversing ALJ who dismissed generically pled refusal to provide information allegation). Union Attorney Armstrong’s

request made clear that she sought whatever documents exist beyond the “sample” that Respondent had already provided. Instead of simply informing Armstrong that no additional documents exist beyond the sample, Respondent Attorney Currie glibly replied that a “sampling” of call avoidance of records had already been provided. Thus, Currie told Armstrong nothing that Armstrong did not already know and had not already written to Currie. When Armstrong clarified that she sought “records of all calls by Ms. Downey for the period reviewed by the Company,” Currie simply ignored the request. Thus, Respondent blatantly failed to meet its statutory obligation to disclose that no information exists responsive to the Union’s request for documentary records.⁶

The evidence is clear that Respondent refused to provide to the Union information that is directly relevant to the substantive issues raised by Downey’s discharge grievance. Thus, Respondent’s refusal and failure to provide information that is relevant and necessary to enable the Union to intelligently and effectively represent employee Downey in the matter of her discharge grievance violates Section 8(a)(1) and (5) of the Act.

(B) Since about March 2, 2018, Respondent has failed and refused to provide to the Union information pertaining to employee Minkaru Kaira that is relevant to and necessary for collective bargaining, in Violation of Sections 8(a)(1) and (5) of the Act.

In the case of Minkaru Kaira, the evidence clearly shows that the Union requested information that is directly relevant to the substantive issues raised by Kaira’s discharge grievance,

⁶ Although the Consolidated Complaint does not specifically allege an 8(a)(5) violation based on Respondent’s failure to disclose that no information exists responsive to the Union’s request for documentary records of all calls by Downey for the period reviewed by Respondent in deciding to terminate Downey, “the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). Just like in *Graymont Pa, Inc.*, the Consolidated Complaint alleges a very closely connected violation: Respondent’s failure to provide “documentary records of all calls by Downey for the period reviewed by Respondent in deciding to terminate Downey.” *See* 364 NLRB No. 37. Additionally, there is no doubt that the issue has been fully litigated, as evidenced by a joint exhibit, Jt. Ex. 1-A, which contains all of the written evidence pertaining to the violation, as well as the testimony of both Respondent witnesses on the issue, Frank Camp (Tr. 317-321) and Toni Currie (Tr. 364-366).

namely, the “audio recording of Mr. Kaira’s call to Respondent on or about January 17, 2018 reporting that he was ill and would not be at work.” Jt. Ex. 2. Among the three information requests at issue, the request pertaining to Kaira’s audio recording is unique in that it is the only instance in which Respondent called into question the information’s relevance at the time the Union made its request. As shown here, the Union satisfied its duty to explain the relevance of the audio recording, but Respondent willfully disregarded that explanation and refused to provide the information, anyway.

In response to the Union’s March 2, 2018 information request for Kaira’s audio recording, Respondent Attorney Currie questioned the information’s relevance, writing, “we do not understand why a copy of Mr. Kaira’s call out is even relevant to the upcoming arbitration [...] explain the relevance of your request.” Jt. Ex. 2. Armstrong wrote back, “of course the relevant facts are in dispute, otherwise the parties would not be moving forward to arbitration. The questions as to these facts were discussed at the Step Hearing while you were present.” *Id.* As Armstrong testified, the dispute over the substance of Kaira’s call was central to the step hearing:

Testimony from Mr. Kaira was presented and we listened to his call to the telephone number that associates are supposed to call if they're going to be out, saying that he would be out that day and the next day, we believe [...] On the call he says that he's going to be out today and tomorrow, that's what everyone on the Union side of the table heard, but there was a disagreement as to what was actually said. Tr. 91-92.

By email dated March 5, 2018, Currie willfully ignored the factual dispute that she had witnessed first-hand at the step hearing, and that Armstrong had recounted for her by email. Instead of providing the information, Currie doubled down on her professed ignorance and repeated her request for Armstrong to explain the relevance of the information request. Jt. Ex. 2. In her reply of the same date, at 11:00 AM, Armstrong again explained the relevance:

There is a dispute as to the facts, and you know it as you were present at the Step Hearing furiously taking notes. Your paragraphs-long email is simple [sic] an attempt to create the

appearance of Union misfeasance where there is none. Mr. Kaira stated on the recording on January 16 he would be out the 16th and 17th. We all heard it and there was disagreement about what was actually said on the recording at the time. Jt. Ex. 2.

Respondent neither replied to Armstrong's March 5, 2018 email, *id.*, nor did it provide Kaira's audio recording to the Union, Tr. 93.⁷

The evidence is clear that the Union requested presumptively relevant information pertaining to a bargaining unit employee, and repeatedly explained the information's relevance when asked by Respondent. Despite the Union fulfilling its duty to bargain in good faith, Respondent obstinately refused to provide Kaira's audio recording. Respondent's refusal to provide an audio recording that is relevant and necessary to enable the Union to intelligently and effectively represent employee Kaira in the matter of his discharge grievance violates Section 8(a)(1) and (5) of the Act.

(C) **Since about March 30, 2018, Respondent has failed and refused to provide to the Union information pertaining to employee Lorraine Williams that is relevant to and necessary for collective bargaining, in Violation of Sections 8(a)(1) and (5) of the Act.**

In the case of Lorraine Williams, the evidence clearly shows that the Union requested information that is directly relevant to the substantive issues raised by Williams' discharge grievance, namely, "audio recordings of the alleged 'call avoidance' calls." Jt. Ex. 3-A. The relevance of the recordings is laid bare by Arbitrator Licata's decision, which explicitly relied upon the substance of Williams' calls in analyzing the merits of Williams' grievance. G.C. Ex. 6.

⁷ The Union's request remained outstanding through at least March 7, 2018, when the Union withdrew its grievance. Jt. Ex. 2. Then, the request was revived by Armstrong's email on March 20, 2018, stating that the Union was still seeking production of the audio recording in order to pursue a claim with the Department of Consumer Affairs pertaining to Respondent's failure to pay Kaira for sick time he was owed. Tr. 94. Respondent did not reply to Armstrong's March 20, 2018 email, either. Jt. Ex. 2.

The arbitrator analyzed the substance of the audio recordings in dismissing non-meritorious allegations of call avoidance. While Respondent relied upon fifty instances of call avoidance from January 16 through January 31, 2018, G.C. Ex. 6 at 3, Arbitrator Licata found that only thirty-seven of those calls “depict[ed] improper call avoidance activities.” G.C. Ex. 6 at 10. Arbitrator Licata dismissed the remaining thirteen allegations due to the extreme brevity of the call, or because Respondent was unable to produce any audio recording that coincided with the allegation. G.C. Ex. 6 at 11 n.2. If Respondent had provided the requested information to the Union, as the Act requires, the Union would have uncovered these serious faults in Respondent’s case and been better prepared for arbitration.

In addition to dismissing allegations on the basis of audio recordings (or lack thereof), the arbitrator also analyzed the substance of the audio recordings in finding meritorious allegations of call avoidance. Among the thirty-seven calls that warranted Williams’ termination, Arbitrator Licata found impermissible conduct based on the substance of the call in each case. G.C. Ex. 6 at 11-14. The types of impermissible conduct included lingering (keeping the line open after service is completed), prolonged silence causing a caller to hang up, and the employee hanging up in the midst of conversation. G.C. Ex. 6 at 11-14. If Respondent had provided the requested information to the Union, as required by the Act, the Union would have been better equipped to evaluate the likelihood of success at arbitration, and might not have elevated the grievance to arbitration.

The evidence is clear that Respondent refused to provide to the Union audio recordings that are directly relevant to the substantive issues raised by Williams’ discharge. Thus, Respondent’s refusal to provide audio recordings that are relevant and necessary to enable the Union to intelligently and effectively represent employee Williams in the matter of her discharge grievance violates Section 8(a)(1) and (5) of the Act.

(D) **Respondent's Defenses Must Be Rejected.**

Respondent has attempted to lay the groundwork for a number of arguments to defend against its unlawful conduct. Respondent will likely argue that (1) the information is confidential and therefore Respondent has fulfilled its statutory duty to provide information to the Union by offering to play the relevant phone calls for Union representatives; (2) Respondent cannot provide audio recordings to the Union because they are the property of Transit and are therefore unavailable; (3) the information requests are moot because the underlying grievances have been resolved; and (4) the charge is time-barred pursuant to Section 10(b) of the Act. It must be remembered that the Act requires Respondent to carry the burden of proof with regard to each affirmative defense. *Heavy Lift Servs., Inc.*, 234 NLRB 1078, 1079 (1978). Especially in this light, all of Respondent's defenses are wholly without merit and must be rejected in their entirety.

(1) **Respondent's Blanket Confidentiality Claim Does Not Allow It to Fulfill Its Statutory Duty to Provide Information By Insisting on A Single Accommodation.**

Counsel for the General Counsel expects Respondent to claim that the requested information is confidential and, therefore, Respondent has fulfilled its statutory duty to provide information to the Union by offering to play the relevant phone calls for Union representatives in lieu of providing the existing audio recordings, and insisting on that accommodation thereafter. This defense fails for two reasons. First, the requested information is not confidential, and consequently, the Union need not accept any accommodation offered by Respondent. Second, even if the requested information was confidential, Respondent has failed to engage in the good faith accommodational bargaining that is required by the Act by insisting on a single accommodation and ignoring the Union's counter-proposal.

Controlling Board law states that only a legitimate and substantial claim of confidentiality triggers accommodational bargaining, and that “blanket claims of confidentiality” will not be upheld as a defense to a refusal to provide information.

It is clear from the foregoing that in dealing with union requests for relevant, but assertedly confidential, information, the Board is required to balance a union's need for the information against any “legitimate and substantial” confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests. *Metro. Edison Co.*, 330 NLRB 107, 118 (1999).

In contrast to the “blanket claims of confidentiality” that will not be upheld, the Board has found that substantial claims of confidentiality may justify a refusal to furnish relevant information. *See, e.g., Postal Service*, 306 NLRB 474 (1992) (names of witnesses to drug transactions); *General Dynamics Corp.*, 268 NLRB 1432 (1984) (study made in preparing for pending litigation); *Minnesota Mining & Mfg. Co.*, *supra* at 27 (trade secrets); and *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980) (individual medical records and disorders). In stark contrast to these types of legitimately confidential information, Respondent’s blanket claim that all of its audio recordings are confidential falls woefully short.

Here, in all its communications with the Union, Respondent never specified which calls contain confidential information, and never specified the nature of the confidential information. Rather, in an apparent reference to its contract with Transit⁸, Respondent merely informed the

⁸ Article 128 of Respondent’s Employer’s contract with the NYCTA states that all “personal identifiable information, including but not limited to name, address, telephone number, social security number, pass number, date of birth, marital status, etc.” shall be used “solely for the performance, and for the purposes, of this Contract.” Furthermore, under the terms of the contract, Respondent shall “not disclose the Personal Information to anyone other than [...]

Union that “the calls contain the personal information of New York City residents,” Jt. Ex. 1-B, and “the identity of MTA customers,” Jt. Ex. 1-C, is confidential. These explanations ignore Respondent’s own admission that a number of the calls contain no confidential information at all, because (in Respondent’s words) there was “no sound from agent or client” or “silence on the line.” Jt. Ex. 1-C. Even when calls do contain personal information of Access-A-Ride customers, Respondent’s offer (repeated *ad nauseum*) to play the recordings for Union representatives exposes its confidentiality claim as disingenuous.

Beyond what Respondent communicated to the Union, the record evidence demonstrates that Respondent cannot meet its burden of proving a legitimate and substantial claim of confidentiality. Record evidence establishes that Respondent has disclosed so-called confidential information to the NLRB on numerous occasions, including providing multiple audio recordings less than twenty-four hours after requested by the Board Agent. G.C. Ex. 7. Respondent has even provided so-called confidential “personal information” to the Union on multiple occasions, including Access-A-Ride customer names and phone numbers. R. Ex. 2; Tr. 339-341. Respondent’s conduct proves that the information sought the Union is not confidential; Respondent invokes confidentiality for all audio recordings of all calls (the definition of a “blanket claim”) only when it would disadvantage the Union. *See Metro. Edison Co.* 330 NLRB at 118.

The analysis of Respondent’s defense properly ends here because Respondent cannot meet its burden to prove a legitimate and substantial claim of confidentiality. *Resorts Int’l Hotel Casino*, 307 NLRB 1437, 1438 (1992) (“In order to have a defense of accommodation, the respondent must first prove its claim of confidentiality. Only then is there triggered the balancing of the union’s needs against the confidentiality concerns.”) However, even if Respondent’s confidentiality claim

[Respondent’s] personnel and that of its agents and subcontractors whose duties or responsibilities justify the need for such access, and who in fact have a need to know or be exposed to the Personal Information (‘Authorized Users’).”

was legitimate, Respondent had a duty to engage in accommodational bargaining with the Union before refusing to provide the requested information. *See Metro. Edison Co.*, 330 NLRB at 118. Insisting on one accommodation offer, and ignoring the Union's counter offer, does not qualify.

Respondent did not ignore its obligation to engage in accommodational bargaining entirely, rather Respondent Attorney Currie offered in a December 14, 2017 e-mail (and subsequent emails) to play the Downey recordings for the Union at Respondent's facility, and in the presence of its managers. Jt. Ex. 1-B. However, the Union responded by e-mail the next day, December 15, 2017, and offered to enter into a confidentiality agreement in order to ease Respondent's concern about providing the Union with audio recordings. The Union wrote:

In order to help facilitate the process that [sic] Union is happy to agree to keep any calls confidential, and share them only with the Union Representative, counsel and counsel's staff, and the member who took the call. Jt. Ex. 1-A.

In the myriad communications that follow, Respondent never responded to the Union's offer to enter into a confidentiality agreement. Instead, by email dated December 15, and by many emails thereafter, Respondent obstinately insisted upon its prior accommodation offer. Jt. Ex. 1-C. The evidence shows that Respondent never backed off its sole accommodation proposal, even when the Union explained why it would be impractical. Jt. Ex. 1-A. Moreover, Respondent never addressed the Union's offer of confidentiality. This type of stonewalling falls far short of the accommodational bargaining required by the Act. *See Metro. Edison Co.* 330 NLRB at 118; *Howard Indus., Inc.*, 360 NLRB 891, 893 (2014) (union not obligated to accept respondent's unreasonable accommodation offer that does not address union's need for information; parties must bargain).

Respondent's sole offer to accommodate the Union is insufficient under the Act. The Board has held that a "union is under no obligation to utilize a burdensome procedure of obtaining desired

information where the employer may have such information available in a more convenient form.” *Kroger Co.*, 226 NLRB 512, 513 (1976). Especially in light of the fact that Respondent relied on numerous phone calls – nineteen in discharging Downey, fifty in discharging Williams – Respondent’s offer to play the recordings of the calls for the Union at Respondent’s facility and in the presence of management, rather than simply providing the recordings, appears calculated to impose an unnecessary burden on the Union. That Respondent intended to impose unnecessary burdens on the Union is readily apparent when one considers that Respondent easily provided an audio recording to Transit in the Sabrina Jackson case, and quickly provided at least eight audio recordings to the NLRB in multiple other cases. Perhaps most significantly, the fact that Respondent never answered the Union’s reasonable offer to maintain the recordings’ confidentiality highlights Respondent’s failure to engage in good faith bargaining to arrive at a mutually agreeable accommodation. *See In Re Rods*, 340 NLRB 195, 197 (2003) *enfd.* 417 F.3d 1161 (10th Cir. 2005) (violation where union requested doctors’ notes granting sick leave and proposed that medical information should be redacted, but respondent refused request without explaining why proposed accommodation would not address confidentiality concern and without seeking to discuss further with union).

Respondent has not met its burden to prove a legitimate and substantial claim of confidentiality, and has instead invoked a blanket claim of confidentiality that will not be upheld by the Board. Thus, the Union was under no obligation to accept an accommodation. Even if the Union were obligated to engage in accommodational bargaining, it fulfilled its duty by making a proposal to which Respondent never responded. For these reasons, Respondent’s asserted confidentiality defense must be rejected.

(2) Respondent’s Claim That Transit Owns the Audio Recordings Does Not Permit Respondent to Refuse the Union’s Information Requests Without Making Reasonable Efforts to Secure the Information.

Beyond Respondent’s blanket confidentiality claim, Respondent also argues that it cannot provide audio recordings to the Union because they are the property of a third party with whom Respondent has a business relationship, Transit, and Respondent is prohibited from providing the recordings pursuant to a Non-Disclosure Agreement with Transit. This defense also fails because Respondent failed to fulfill its obligation to make reasonable efforts to secure the information.

In a closely analogous situation, the Board has held that where an employer asserts that it cannot provide requested information because the information is in the possession of a third party and therefore unavailable, the employer has an obligation to make reasonable efforts to secure the information. *United Graphics*, 281 NLRB 463, 466 (1986); *see also Arch of W. Virginia, Inc.*, 304 NLRB 1089, 1089 (1991) (union “need not accept [employer’s] conclusionary statement that such information is unavailable”). If the information remains unavailable after reasonable efforts have been made, the Act requires the employer to communicate with the union to explain or document the reasons for its continued unavailability. *Id.*

Here, Respondent asserts that all three employees’ audio recordings are unavailable because they are the property of Transit.⁹ However, there is no evidence to show that Respondent has made any effort at all to obtain Transit’s permission to provide any of the recordings. Further, there is no evidence that Respondent has explained or documented any of those efforts in communication with the Union.

Quite the opposite. The record evidence conclusively shows that Respondent exerted zero

⁹ Frank Camp admitted that Respondent has the technological capability of quickly and easily acquiring a copy of audio recordings from Transit. Tr. 311.

effort to obtain Transit’s permission to provide the Downey, Kaira, and Williams audio recordings to the Union – even though Respondent admitted that nothing prevents it from trying to obtain the recordings from Transit. Counsel for the General Counsel asked Respondent Attorney Currie “what reason, if any, prohibits GCS from simply asking the TA, this is the information that the Union seeks, what can we provide and what can we not?” Tr. 383. In that regard, Currie admitted that “there is nothing that prevents it.” Tr. 384. Currie attempted to cover her tracks by claiming that Respondent has asked Transit for guidance on what Respondent can provide, but then admitted that R. Ex. 10 is the only record evidence showing that Respondent ever made such a request. Tr. 384-385.

R. Ex. 10 is a letter from Transit to Respondent. It does not specifically mention the Downey, Kaira, or Williams audio recordings. *Id.* It is dated April 24, 2018, months after the NLRB had begun investigating the instant allegations. *Id.* Respondent did not solicit it in a good faith effort to fulfill the Union’s information requests, but only for the purpose of defending unfair labor practice allegations, as Respondent Attorney Currie conceded.¹⁰ Tr. 359. Additionally, and contrary to Respondent’s position, in its letter, Transit does not state that no audio recording shall be distributed to the Union. *Id.* Rather, Transit states that production of call center recordings to the Union might be warranted, “subject to redaction or withholding,” but that those determinations “should be made by NYCT, not GCS.” *Id.* When pressed, Currie admitted that Transit is willing to share audio recordings with the Union. Tr. 383.

This evidence comports with the evidence pertaining to the Sabrina Jackson case. There, after the Union had issued a subpoena to Transit, employees of Respondent and Transit worked

¹⁰ By making its request to Transit orally, rather than in writing, Respondent attempted to ensure that its motivation would be concealed or, at least, not documented. Currie’s testimony reveals that Transit’s letter is nothing more than Respondent’s (failed) litigation strategy.

together in an attempt to provide the Union with the requested audio recording. G.C. Ex. 2. Like R. Ex. 10, this evidence suggests that Transit would have no problem making audio recordings available to the Union if only Respondent would ask.

The evidence conclusively shows that Respondent failed to prove that it made reasonable efforts to provide any of the requested audio recordings to the Union. Because Respondent failed to make efforts to provide the information, Respondent necessarily failed to document those efforts for the Union, as required by the Act. For these reasons, Respondent's claim, that it could not provide the recordings to the Union because they were Transit's property, must be rejected.

- (3) The information requests are not moot because the Union continues to need the requested information and will need the same type of information in the future.

Counsel for the General Counsel expects Respondent to argue that all three information requests are moot because the underlying grievances have been resolved. While it is true that an employer can be relieved of its duty to respond to some information requests that are rendered moot by certain subsequent events, the doctrine does not apply to the instant case. For example, in *Glazers Wholesale Drug Co.*, an employer who employed non-unit strike replacements refused to provide their names and addresses to the union. 211 NLRB 1063, 1066 (1974). The Board held that the union failed to demonstrate why the information was necessary and relevant after the striking unit members had returned to work, and therefore dismissed the 8(a)(5) allegation. *Id.* *Glazers Wholesale Drug Co.* is inapposite to the instant case because the information requests here are clearly relevant to the Union's present and future administration of its contract.

Controlling Board law holds that a union's information requests are not rendered moot by the resolution of the underlying grievances because information necessary for the processing of grievances retains "present and continuing relevance" to a union's enforcement of its collective

bargaining agreement. *Chapin Hill at Red Bank*, 360 NLRB 116, 116 (2014); *see also McKenzie-Willamette Reg'l Med. Ctr. Assocs., LLC*, 362 NLRB No. 20, slip op. at 1 (2015) (parties' agreement to successor contract is not probative of whether requested information was necessary in the first instance); *Finn Indus., Inc.*, 314 NLRB 556, 558 (1994) (information requests that are relevant at the time they are made not rendered moot by later arbitration decision).

Here, the Board's rationale makes sense because the Union could use audio recordings of Downey's, Kaira's¹¹, and Williams' phone calls as comparators in evaluating and/or litigating future discharge grievances. Indeed, in his decision regarding Downey's discharge, Arbitrator Licata relied upon the precedent of two prior arbitrations: employee Thomas and employee Johnson. G.C. Ex. 5 at 8. Then, in his later decision regarding Williams' discharge, Arbitrator Licata relied upon the Thomas, Johnson, and Downey decisions as precedent. G.C. Ex. 6 at 10. These decisions demonstrate that the Union will be hampered in its future enforcement of its collective bargaining agreement unless it obtains the audio recordings to which it is entitled.

The Board's "normal practice where a party has withheld information in violation of Sec. 8(a)(5) and (1) of the Act" is to "order the Respondent to furnish the requested information despite the conclusion of the grievance procedure for which the Union originally requested it." *Bloomsburg Craftsmen*, 276 NLRB 400, 400 (1985) (reversing ALJ holding that previously relevant information requests became moot when the underlying disciplinary issue had been resolved at arbitration). This procedure should be followed here. The alternative, lending credence to Respondent's mootness defense, would effectively allow Respondent to circumvent its duty to provide information by proceeding to arbitration before the Union can enforce its right to obtain

¹¹ There is an additional present and continuing relevance to Kaira's audio recording, in that it could be used to pursue his claim before the Department of Consumer Affairs for unpaid sick time that Respondent allegedly owes him. R. Ex. 9 ("if in the future the Department comes into receipt of information that Global Contact Services may be in violation of the Earned Sick Time Act, a new investigation will be opened at that time.")

the information. *See Mary Thompson Hosp.*, 296 NLRB 1245, 1250 (1989), *enfd.* 943 F.2d 741 (7th Cir. 1991) (“The right of the Union to the information requested must be determined by the situation which existed at the time the request was made, not at the time the Board or the courts get around to vindicating that right. Otherwise, important rights under the Act would be lost simply by the passage of time and the course of litigation.”) Controlling Board law avoids this obviously inequitable result by holding that the Union’s information requests are not rendered moot by the resolution of the underlying grievances. *See Chapin Hill at Red Bank*, 360 NLRB at 116. Thus, Respondent’s mootness defense must be rejected.

(4) The charge is not time-barred.

“It is well settled that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. Further, as is the case with the 10(b) defense generally, the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent.” *Oliver Insulating Co.*, 309 NLRB 725, 726 (1992) (citing *Strick Corp.*, 241 NLRB 210 fn. 1 (1979)) (ALJ erred in finding employer’s letter, which repudiated relationship with union, constituted clear and unequivocal notice that employer would not respond to subsequent requests for information).

Here, there is no dispute that prior to the Union’s December 7, 2017 request for information pertaining to Danika Downey, the Union requested similar information – audio recordings of employee Sabrina Jackson’s phone calls – in May 2017 and subpoenaed such information from Transit in June 2017. Although Respondent did not provide the Union with the audio recordings of Jackson’s phone calls at that time, a successful 10(b) defense would require Respondent to show that it gave the Union “clear and unequivocal notice” that Respondent would not provide any audio recordings of any phone calls requested by the Union. *See id.*

There is no record evidence to support Respondent's claim that it gave Union unequivocal notice of its refusal to provide all audio recordings of all phone calls. Respondent might attempt to argue that the emails constituting R. Ex. 1 show that the Union had acquiesced to merely listening to employee phone calls, rather than obtaining the audio recordings, as early as September 2016. However, those emails are consistent with the undisputed fact that the Union had no problem listening to employee phone calls during step hearings, and only requested the audio recordings for certain arbitrations. The testimony of all three witnesses is consistent in that the Union never requested any audio recordings until it filed for arbitration for the first time, at some point after April 2017.¹²

Rather than showing that the Union had acquiesced to Respondent's refusal to provide any audio recordings, the evidence shows that in a single scenario in June 2017 (the case of Sabrina Jackson), Respondent's intransigence forced the Union to circumvent Respondent and attempt to acquire the audio recordings of Jackson's phone calls directly from Transit. This is evidence of the Union's good faith, not evidence that the Respondent gave notice of its unlawful conduct to the Union. *See Oliver Insulating Co.*, 309 NLRB at 729 (documentary evidence that employer informed union that it repudiated "any obligation to recognize or bargain with [union]" insufficient to prove clear and unequivocal notice employer would not provide information). Because Transit failed to provide the Union with the complete audio recordings of Jackson's phone call before the arbitration hearing, the next time that the Union needed audio recordings of employee phone calls (Downey's), the Union insisted that Respondent fulfill its statutory duty to provide the requested

¹² Currie testified that the Union never sought to obtain audio recordings until it filed for arbitration for the first time, after Armstrong began representing the bargaining unit. Tr. 367-368. Armstrong began representing the unit in April 2017. Tr. 55. When asked if any Union representative had ever said that they understood that Respondent would never provide audio recordings, or said that they waived their right to obtain audio recordings, Camp testified, "no, it just never came up." Tr. 348.

information. It was only when Respondent refused to provide Downey's audio recordings, by Currie's December 10, 2017 e-mail, that the Union had clear and unequivocal notice of the Employer's refusal to provide information. The Union filed the first charge, Case No. 29-CA-211765, on December 18, 2017, just eight days later and well within the 10(b) period.¹³ For these reasons, Respondent's 10(b) defense must be rejected.

V. CONCLUSION

As discussed above, the facts and law demonstrate that Respondent violated Sections 8(a)(1) and (5) of the Act. The General Counsel requests that Your Honor find the appropriate violations.

Dated at Brooklyn, New York, January 9, 2019.

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¹³ The Union filed the charge pertaining to Minkaru Kaira's audio recordings, Case No. 29-CA-216547, on March 13, 2018, eleven days after Currie's March 2, 2018 email refusing to provide Kaira's calls. GC 1(E). The Union filed the charge pertaining to Lorraine Williams' audio recordings, Case No. 29-CA-218276, on April 9, 2018, six days after Currie's April 3, 2018 email refusing to provide Williams' calls. GC 1(I).