

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

**CENTURA HEALTH/ST. MARY-CORWIN
MEDICAL CENTER,**

and

Case 27-CA-216441

**COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 7774**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S STATEMENT OF EXCEPTIONS AND BRIEF IN SUPPORT OF
STATEMENT OF EXCEPTIONS**

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I. STATEMENT OF THE CASE

On January 9, 2019, Administrative Law Judge Mara-Louise Anzalone (ALJ) issued a Decision and Order. The ALJ found that Centura Health/St. Mary-Corwin Medical Center (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by failing and refusing to provide the Communications Workers of America, Local 7774 (Union) with the following requested non-unit information:

- (a) a list of any PRN employees who perform work that would otherwise be bargaining unit work;
- (b) a list of non-unit employees that are being laid off; and
- (c) a list of amounts of severance each non-bargaining unit member received.

(13 ALJD 1-45.).¹ The ALJ's Order requires Respondent to cease and desist from failing to provide the Union with information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its unit employees, and that it provide the Union with the foregoing requested information, or, to the extent the information does not exist, to so inform the Union. (14 ALJD 1-43; 15 ALJD 1-15.)

II. ISSUES PRESENTED

1. Whether the ALJ properly concluded that Respondent failed to supply the Union with the requested list of PRN employees who otherwise perform bargaining unit work. (Exceptions 1-5, 14.)

¹ Citations in this answering brief are as follows: “_ ALJD _” refers to page and line numbers, respectively, of the ALJ's Decision and Order; “Tr. _” refers to the hearing transcript's page; “GC Exh. _:_” refers to the Counsel for the General Counsel's exhibits and page number, respectively; “R. Exc. _” refers to Respondent's exception; and “R. Br. _” refers to Respondent's Brief in Support of Statement of Exceptions' page.

2. Whether the ALJ properly concluded that the Union demonstrated the relevance of the requested list of non-unit employees scheduled for layoffs and the amounts of severance that each non-bargaining member received. (Exceptions 6-13, 15-24.)

3. Whether the ALJ properly concluded that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested information. (Exceptions 25-28.)

III. RELEVANT FACTS

A. General Background

Respondent is a nonprofit organization that operates a hospital in Pueblo, Colorado. (GC Exh. 1(g), 1(i).)

The Union, a local charter of the Communications Workers of America (CWA or International Union), represents certain of Respondent's employees working at its hospital and its adjunct facility (the bargaining unit) as expressly defined in the parties' collective-bargaining agreement (CBA). (GC Exh. 1(g), 1(i); GC Exh. 2:1; Tr. 26-27; Tr. 31-32.) It is undisputed that PRN employees are not in the bargaining unit represented by the Union.² (GC Exh. 1(g), 1(i); GC Exh. 2:1; Tr. 36; Tr. 131.)

The CWA assists the Union with contract bargaining, contract enforcement, and processing of grievances. (Tr. 23-32; Tr. 43.) Since January 2016, Garry Jordan (Jordan), a staff representative for the CWA, has been tasked with assisting the Union in representing the bargaining unit. (Id.)

² Unlike bargaining unit employees, PRN employees are not full-time employees but work on an as-needed, sporadic basis. (Tr. 36; Tr. 131.) They fill in whenever a regular full-time unit employee is on a leave of absence. (Tr. 36; 38-39; Tr. 115-116; Tr. 131.) PRN employees float across the hospital to adapt to volumes of Respondent's business in its patient care areas and are not guaranteed any work hours. (Tr. 131.)

At the time of the events at issue, the parties' CBA for this bargaining unit was in effect until September 30, 2020. (GC Exh. 2:32.)

The CBA contains layoff and recall provisions, of which two are relevant to this case. First, article 5.1 requires that "PRN, temporary and special part-time positions will be laid off before any regular part-time or regular full-time employees." (GC Exh. 2:5; Tr. 36-38.) Second, article 11 states that, "[u]nion employees will receive the same severance as other regular non-bargaining unit employees of the Hospital capping at twelve (12) weeks. . . . Severed employees will be required to sign a waiver and release form." (GC Exh. 2:14; Tr. 41.)

B. Respondent's Notice of Layoffs

On March 7, 2018,³ Respondent sent the Union a notice, pursuant to the Worker Adjustment and Retraining Notification Act (WARN), of Respondent's intention to eliminate certain positions at the hospital. (GC Exh. 3; Tr. 41-46; Tr. 128.) Respondent's WARN notice essentially informed the Union that it planned to lay off approximately 87 bargaining unit employees. (GC Exh. 3:9-11.) The WARN notice identified the names and job titles of the affected unit employees and their scheduled date(s) of layoff, beginning on May 7, May 14 and May 21 or within the 13-day periods thereafter. (GC Exh. 3; Tr. 41-46.) Additionally, Respondent's WARN notice informed the Union that the Respondent planned to lay off non-unit employees, with layoffs slated to begin on March 15, and then March 30, May 7, May 14, May 21, June 30 and September 30. (GC Exh. 3:3; Tr. 101-102.) Respondent's WARN notice did not identify any PRN employee(s) subject to layoffs. (GC Exh. 3; Tr. 136.) The notice invited the Union to engage in effects bargaining. (GC Exh. 3:2.)

³ All dates refer to 2018 unless specified otherwise.

Beginning on March 9, CWA Staff Representative Jordan and Respondent's counsel, Patrick Scully (Scully), exchanged e-mail correspondence for the purposes of scheduling a meeting to discuss any issues regarding the impending layoffs of bargaining unit employees. (GC Exh. 4:1-2.) During this exchange, Jordan alerted Scully to article 5.1 of the CBA providing that PRN employees will be laid off prior to regular part-time and full-time unit employees. (Id.) Referring to the WARN notice, Jordan added that "[t]hey have bargaining unit employees on the layoff list and they[] have PRN employees who are not on the list." (GC Exh. 4:1; Tr. 49-50.) In response, Scully explained that there are "no PRNs in the bargaining unit." (GC Exh. 4:1.) As Jordan testified to at trial, he was looking for a list of PRN employees who were going to be scheduled for layoffs (in accordance with article 5.1). (Tr. 50-51; Tr. 126.)

C. The Union's March 12 Information Request and Respondent's Initial Response

The parties agreed to meet to discuss the layoffs on March 14. In anticipation of their meeting, in an e-mail to Scully dated March 12, Jordan explained that he wanted to discuss Respondent's plan to follow article 5.1 of the CBA, "by ensuring that PRN, temporary employees and special part-time positions will be laid off before any regular part-time or regular full-time unit employees," in addition to other topics. (GC Exh. 5:6; Tr. 53-55.) In response, Scully stated that he did not understand the "PRN issue" because "there are no PRNs in the bargaining unit (to my knowledge)." (GC Exh. 5:5.)

In that same e-mail exchange, Jordan first made the requests for the non-unit information in dispute. More specifically, Jordan asked Respondent to provide the Union with the following information: "a list of all PRN employees who perform work that would otherwise be bargaining unit work"; and "a list of all non-bargained for employees who are to be laid off and the amounts of severance that each will receive." (GC Exh. 4:5; Tr. 55-56.)

Scully refused, arguing that the Union had no “right to non-bargaining unit employee information[.]” (GC Exh. 5:4-5; Tr. 56-57.) As for the requested list of PRN employees, Scully argued that “[article 5.1’s] language would apply if [the Union] had PRNs in the unit, which you don’t.” (GC Exh. 5 at 4-5.) In response, Jordan explained that “[i]n order to police article 11, paragraph 2, the union respectfully requests a list of all non-bargained for employees who are to be laid off and the amounts of severance that each will receive.” (GC Exh. 5:4.) Jordan further stated that article 5’s reference to PRNs (who are to be laid off first) did not specify that they are in the bargaining unit.⁴ (Id.)

Respondent’s counsel Scully continued to refuse to provide the requested information. (GC Exh. 5:3-4.) He requested that Jordan provide “the SPECIFIC [*sic*] legal basis for [his] request.” (GC Exh. 5:3-4.) Jordan explained that “[t]he requested information will allow the union to ensure that financial benefits spelled out in article 11 of the CBA[] are honored.” (GC Exh. 5:3; Tr. 57.) Jordan further stated that “[t]here [was] no other way for the union to effectively carry out [its] statutory duty to represent those within the bargaining unit[] without the requested information.” (GC Exh. 5:3.) Respondent disagreed and impliedly requested that Jordan provide case citations supportive of his claim of relevance for non-unit information. (Id.)

The next morning on March 13, Respondent’s Director of Human Resources and Volunteer Services, Timea Kennedy (Kennedy) provided Jordan and Scully with Respondent’s Centura Health Workforce Reduction and Restructuring Policy (the Severance Policy) effective July 30, 2014. (GC Exh. 6:1; Tr. 58-59.) Scully replied and told Jordan that “[t]he calculation of

⁴ At footnote 6 of its brief (R. Br. 8), Respondent mischaracterizes the evidence, specifically that Jordan instructed Vice President of Total Rewards James Humphrey (Humphrey) to cease instructing bargaining unit employees to direct questions about their rights under the CBA to the Union President. (Tr. 108: 20-23; 109:10-12). While Jordan admitted that he did instruct Humphrey to stop sending people to the Union President, he did not do so because employees had questions about their rights under the CBA. (Tr. 109:10-25; Tr. 100.) Rather, as Jordan clarified on re-direct examination, his issue was that the Union President’s manager instructed her to go on union time (go off-the-clock) to answer unit employees’ questions. (Tr. 118.)

severance” set forth in the Severance Policy was a response to his earlier request for information. (GC Exh. 6:1.)

D. The Parties Meet to Discuss the Impending Layoffs

On March 14, the parties met to discuss the impending layoffs of unit employees. (Tr. 60-61.) Scully and Kennedy were present on behalf of Respondent. (Id.) Jordan, Union counsel Will Reinken (Reinken), and Union President Marcy Harris (née Vegas) were present on behalf of the CWA and the Union. (Tr. 31; Tr. 60-61.) The parties discussed severance, application of the contract, the impending layoffs, and Jordan’s request for non-unit information. (Tr. 61-68.) Jordan testified that he told Respondent that Respondent was in breach of article 5 of the CBA, namely by not laying off PRNs before unit employees. (Tr. 62-64.) Scully disagreed and further stated that the Union did not have a right to the requested list of PRN employees because PRNs were not part of the union. (Tr. 62-64; Tr. 67-69.) During the meeting, the parties also discussed which version of the Severance Policy would apply to unit employees because the Union President had brought with her an updated version of the Severance Policy effective January 9, 2018 (GC Exh. 7), whereas Respondent had previously provided Jordan with a 2014 version of the same policy (GC Exh. 6).⁵ (Tr. 65-66.) The record is unclear which version of the Severance Policy Respondent asserted would apply; nevertheless, both versions of the Severance Policy state that “if an associate has a qualifying separation, he/she may be offered severance benefits” in exchange for a release of claims against Respondent and contain the same severance formula. (GG Exh. 6:3; GC Exh. 7:1.) Scully replied that Respondent would follow the severance policy and that the policy answered the request for information about severance. (Tr. 68.) Jordan replied

⁵ The ALJ incorrectly found that a “Respondent official provided Jordan with an updated copy of the workforce reduction policy” (7 ALJD 15-17.)

that the policy was discretionary because “the policy says employees [‘]may[’] receive severance.” (Tr. 68:6-15.)

After the parties’ meeting, Scully e-mailed a letter dated March 14 to Jordan and Union counsel Reinken. (GC Exh. 8; Tr. 71-72.) In his letter, Scully confirmed that Respondent’s severance policy would apply to unit employees. (GC Exh. 8:1.) He also asserted that “[this] information [was] a complete response to [Jordan’s] prior information requests regarding the restructuring.” (Id.) At page 2 of the same letter, Scully further stated:

We are aware that you seek information regarding non-bargaining unit employees, which, as we have informed you, are not subject to a common set of layoff criteria. Further, non-bargaining unit employees are not subject to the collective bargaining agreement. We have yet to hear any credible explanation for why you believe non-bargaining unit employee information is relevant to the Union’s role. If you wish to present such an explanation, we will consider your argument.

(GC Exh. 8:2.)

E. The Union Renews Its Information Requests and Respondent’s Final Correspondence

On March 28, Union counsel Reinken e-mailed Scully a response to his correspondence dated March 14. (GC Exh. 17; Tr. 112-113.) Reinken asserted that “the Union does not agree that the Company has the right to pursue the proposed layoffs and has expressly reserved its rights to challenge such actions in any appropriate for a [sic], including through the existing collective bargaining agreement’s grievance and arbitration procedures.” (GC Exh. 17:1.) He also renewed Jordan’s request for non-unit information first made on March 12. (Id.) In so doing, Reinken explained that the “requests arise out of the rights and obligations expressly set forth in the parties’ collective bargaining agreement (e.g., Articles 5 & 11)” (GC Exh. 17:2.)

On March 29, Scully responded to Reinken’s March 28 letter. (GC Exh. 18.) Scully affirmed that Respondent’s decision to re-organize and restructure service lines entailed the

“workforce reductions of both bargaining unit and non-bargaining unit personnel” and that the notice of layoffs was unequivocal. (GC Exh. 18:1.) Scully further asserted that the Union’s position concerning Respondent’s failure to comply with article 5 of the CBA was “unsubstantiated and false” and that the Union failed to specifically articulate how article 5 had been violated. (GC Exh. 18:2.) He averred that “there are no ‘PRN, temporary, or special part-time positions’ in the bargaining unit”; that “no article of the CBA applies to employees outside the bargaining unit”; and that the Union has “presented no evidence or authority suggesting otherwise.” (GC Exh. 18:2.) Scully then provided the following responses to the requests for information:

In summary, our response to your numbered requests are as follows:

(1) A list of all PRN employees who perform work that would otherwise be bargaining unit work:

Response: There are no such PRN employees. SMC further objects insofar as the Union is seeking information regarding non-bargaining unit employees without basis.

(2) A list of all non-bargained for employees who are to be laid off.

Response: Please define the term “non-bargained for employees”. SMC objects insofar as the Union is seeking information regarding non-bargaining unit employees without basis.

(3) The amounts of severance that each laid off, non-bargained for employee will receive.

Response: See response to Request 2. Additionally, this information was provided to the Union.

...

(GC Exh. 18:2-3.)⁶

⁶ In its brief, Respondent misstates its actual response to the Union’s request for the list of PRN employees in its March 29 correspondence. (R. Br. 6.) At no point in its correspondence did Respondent assert that: “The CBA does not define ‘bargaining unit work.’ The Union is not entitled to non-unit employee information in the absence of

On May 1, Reinken sent Scully an e-mail responding to his letter dated March 29. (GC Exh. 9.) Reinken disagreed with “the Company’s contention regarding Article 5 of the parties’ [CBA]”; that “[i]n [the Union’s] view, the plain language of Section 5.1 speaks for itself[.]” (Id.) Reinken also elaborated that the “Union [sought] information regarding employees subject to layoff before any regular part-time or regular full-time employees – namely, PRNs, temporary and special part-time employees” in order “to determine whether the Company is in compliance with the parties’ CBA.” (Id.) Citing to the WARN Notice (GC Exh. 3), Reinken stated that the Union reasonably concluded that Respondent intended to layoff unit employees before laying-off PRN positions, among others. (GC Exh. 9:2.) Reinken also reiterated his prior requests for non-unit information. (Id.)

As of the date of the hearing, the Union has not received the requested information involved in this matter. (Tr. 92.)

It is undisputed that Respondent has employed PRN positions at all relevant times. In this regard, Respondent employed PRN employees at all times prior to the issuance of the WARN notice on March 7, during the dispute regarding the requests for non-unit information, and well up until the date of the hearing. (Tr. 136.) Finally, it is undisputed that Respondent did not layoff any PRN employees. (Tr. 136.)

At the time the Union first requested the non-unit information on March 12, no employee had been laid off. (Tr. 100.) Moreover, at the same time, the Union was not aware of any employee, unit and non-unit alike, scheduled for layoff who had received a severance payment, let alone the wrong amount of severance. (Tr. 100-103; Tr. 114.) It is undisputed that Jordan did

objective evidence for requesting the information. Without waiving these defenses, there are no such PRN employees.” (R. Br. 6.)

not define what he meant by “bargaining unit work” when he asked for the requested list of PRN employees nor did Respondent ask for a definition of “bargaining unit work.” (Tr. 107; Tr. 117.)

IV. ARGUMENT

A. The ALJ Properly Concluded that Respondent Failed to Supply the Union with the Requested List of PRN Employees Who Perform Work that Is Otherwise Bargaining Unit Work (Exceptions 1-5 and 14)

Respondent takes issue with the ALJ’s conclusion that Respondent failed to supply the Union with its requested list of all PRN employees who perform work that is otherwise bargaining unit work. (R. Exc. 1-5, 14; R. Br. 14-15). More specifically, Respondent takes exceptions to the ALJ’s alleged implicit finding that the parties have a definition of what is “bargaining unit work”; her alleged finding that PRN employees perform “so-called ‘bargaining unit work’”; her alleged failure to consider that CWA Staff Representative Jordan denied ever observing PRN employees perform “bargaining unit work”; and her alleged failure to consider that the parties have not negotiated or agreed to what is “bargaining unit work.” (R. Exc. 1-4). Through these exceptions, Respondent tacitly argues that the Union’s request for information was ambiguous or vague because neither the CBA nor the parties has defined what “bargaining unit work” is. While there might be no explicit definition of the term “bargaining unit work,” the record evidence supports the ALJ’s implicit finding that the request for information was sufficiently articulated. In this regard, the ALJ correctly found that PRN employees perform the same type of work as unit employees but on “as needed basis.” (3 ALJD 15-22.) In so doing, the ALJ cited to Jordan’s credited testimony that while he has not observed PRN employees perform work, he knows that they fill in when unit employees are on vacation based on the work schedules he has seen. (Tr. 36; Tr. 38-39; Tr. 119.) That PRNs fill in whenever unit employees are absent, or fill in to support unit employees when the work demands, is further corroborated

by Respondent's sole witness. (Tr. 131.) Without explicitly addressing that there is no definition of the term "bargaining unit work," the ALJ properly concluded that the requested information was unambiguous: the Union requested a list of PRN employees who perform the same type of work as full-time and part-time unit employees.

Respondent's responses to the Union's request further support a finding that the requested list of PRNs was abundantly clear. In this regard, at no point did Respondent's counsel ask Jordan to define what he meant by "bargaining unit work" contrary to Respondent's mischaracterization of the evidence. (Compare GC Exhs. 4-5, 8, 18 with R. Br. 6.) Instead, Respondent categorically denied the requested information, arguing that it was irrelevant because it sought non-unit information and, for the first time at trial, asked Jordan what he meant by "bargaining unit work." (Tr. 115-116.) Respondent cannot argue for the first time that its refusal to comply with the Union's request was excused merely because there is no definition of the term "bargaining unit work." As the Board has stated, "an employer may not simply refuse to comply with an ambiguous . . . information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990). Respondent failed to do so when the dispute over the request first arose and, without explicitly arguing so, now attempts to excuse its failure to provide the information by a claim of ambiguity. Respondent's argument in this regard should be rejected.

Respondent also takes exception to the ALJ's alleged refusal to consider that PRN employees are not part of the bargaining unit and are not subject to layoff. (R. Exc. 5.) This exception is meritless on two grounds. First, the ALJ did conclude that the PRN employees are excluded from the bargaining unit and relied on the CBA's recognition clause in doing so. (3

ALJD 19-20 fn. 4.) Two, the ALJ properly refused to conclude that PRN employees are not subject to layoff under article 5.1 of the CBA. (11 ALJD 31-41.) The ALJ did so understanding that the dispute over the requested list of PRNs directly related to the parties' conflicting interpretation of article 5.1, namely whether the article's reference to PRNs applied to non-unit PRN employees, as the Union argues, or to unit PRN employees, as Respondent argues. By failing to conclude that PRN employees were not subject to layoff, the ALJ reached a conclusion on the merits of the complaint's allegations in accordance with Board law holding that the Board must not pass on the merits of the underlying contractual dispute when deciding if the requested information is relevant. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437-38 (1967).

Additionally, Respondent takes exception to the ALJ's alleged failure to find that Respondent responded to the Union's request for a list of PRN employees. (R. Exc. 14; R. Br. 14-15.) Respondent argues that its March 29 answer that "there are no such PRN employees" satisfied its duty to provide information. (R. Br. 15.) Quite the contrary, the ALJ considered whether Respondent's March 29 answer satisfied its statutory duty: it did not. (12 ALJD 31-41). In so concluding, the ALJ considered all of Respondent counsel Scully's responses and his subsequent course of conduct, including the March 29 response in its entirety. Specifically, the ALJ determined that:

Respondent's counsel Scully obfuscated, appearing to maintain that [PRN employees] did not apply and thus the Union was not entitled to extra-unit information it requested. Specifically, Respondent—at least in its correspondence to the Union—appears to claim that the reference to 'PRN' employees in arts. 5 and 11 meant only those PRNs who were represented by the Union, *that no such employees existed*, and therefore that the articles had no application to the upcoming layoff, rendering the non-unit employee information irrelevant.

(11 ALJD 34-39) (own emphasis added).

Thus, the ALJ implicitly determined that Respondent's answer was not responsive to the Union's specific request for a list of *non-unit* PRNs doing the same work as unit employees on as-need basis. The ALJ implicitly found that Respondent's answer referred to unit PRN employees (which do not exist), consistent with Respondent's argument that article 5.1 applies only to PRN employees represented by the Union. The ALJ's finding is further supported by the surrounding circumstances in which the answer was made. In the same breath that Respondent replied that "[t]here are no such PRN employees" (GC Exh. 18:2), Respondent *further* objected to the request because it sought non-unit information. Where Respondent's sole witness admitted that non-unit PRN employees were employed by Respondent at all relevant times (Tr. 132-136), the ALJ correctly determined that Respondent failed to supply the Union with the requested list of non-unit PRN employees doing the same work as bargaining unit employees.

For the foregoing reasons, Respondent's exceptions are without merit. Accordingly, the ALJ properly concluded that Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply the Union with the requested list of PRN employees who perform work that is otherwise bargaining unit work.

B. The ALJ Properly Concluded that the Union Demonstrated the Relevance of the Requested Non-Unit Information (Exceptions 5-13, 15-24)

Respondent argues that the requested non-unit information is irrelevant to the Union's role in collective bargaining. (R. Br. 15-16.) Respondent concedes that the ALJ recited the correct relevance standard regarding the Union's request for non-unit information; however, Respondent argues that the ALJ incorrectly applied it to the facts of this case, including relying on inapplicable Board cases. (Id.) Respondent's contentions are meritless for several reasons.

i. *The ALJ Properly Relied on Applicable Case Law to Determine that the Union Established the Relevance of the Requested Extra-Unit Information*

In any case alleging bad-faith bargaining, including this matter, the inquiry is whether or not both parties met their duty to deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-154 (1956). Under the particular facts of this case, the ALJ's reliance on *Harmon Auto Glass*, 352 NLRB 152 (2008), reaff'd 355 NLRB 364, 364 fn. 3 (2010), *E. Tenn. Baptist Hosp.*, 304 NLRB 872 (1991), enf. denied in relevant part on other grounds 6 F.3d 1139 (6th Cir. 1993), and *Fla. Steel Corp.*, 235 NLRB 941 (1978) was appropriate notwithstanding Respondent's argument to the contrary. (9 ALJD 33-45; 11 ALJD 10-29; R. Br. 16-19.) While the cited cases are distinct to the instant matter, they nevertheless support the ALJ's conclusion that the request for non-unit employee information was relevant to the Union's role in effects bargaining, including assessing Respondent's compliance with the CBA's layoff and severance pay provisions.

The ALJ relied on several cases supporting her conclusion that non-unit employee information may be relevant when the employer places such information at issue and, therefore, is appropriate for bargaining. (9 ALJD 33-45.) For instance, in *Harmon Auto Glass*, the employer placed the dollar amount that non-unit employees contribute to a health care insurance plan at issue during contract negotiations by proposing that unit employees pay the same amount. 352 NLRB at 153. Consequently, the Board held that the employer violated the Act by failing to provide the union with the requested non-unit employees' health care contributions to substantiate its proposal. *Id.* at 153-154. In this case, the ALJ properly concluded that Respondent placed non-unit employees' terms and conditions at issue when it bargained for the layoff protections and severance parity provisions under articles 5.1 and 11, respectively. In *E. Tenn. Baptist Hosp.*, the Board determined that where an employer has agreed to place non-unit

employees' wages at issue under a contractual wage parity provision, the union was entitled to review non-unit information to verify the employer's compliance with that contract provision. 304 NLRB at 872. The ALJ did not summarily conclude that "non-unit information related to an alleged 'contractual parity provision' is presumptively relevant." (R. Exc. 15.) Rather, the ALJ relied on *E. Tenn. Baptist Hosp.* to conclude that Respondent's severance parity provision, much like the contract wage parity provision in the cited case, rendered the Union's request for non-unit employee's severance information relevant.

Relying on these cases, the ALJ properly concluded that an "employer may not refuse to furnish extra-unit requested information *solely* on the basis that it concerns matters outside the scope of the bargaining unit." (R. Exc. 16.) As the cited cases illustrate, non-unit employee information may be relevant given the particular facts of the case. For this reason, Respondent's exception numbers 15 and 16 are without merit. Having concluded that the requested extra-unit information is relevant, the ALJ properly relied on *Fla. Steel Corp.*, 235 NLRB 941, to illustrate under what other circumstances the Board has found an employer's refusal to provide non-unit information unlawful in the context of effects bargaining once layoffs are pending. Like *Fla. Steel Corp.*, an employer cannot simply announce layoffs and then refuse to provide extra-unit information once the relevance of that information has been demonstrated and placed at issue for bargaining.

- ii. *The ALJ Properly Concluded that the Union Had a Reasonable Belief Based on Objective Evidence that the Extra-Unit Information Was Relevant for Upcoming Effects Bargaining*

The Board has held that a "union has satisfied its burden [of establishing relevance of extra-unit information] when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant." *Knappton Maritime Corp.*, 292 NLRB 236,

238-239 (1988). The ALJ adhered to Board law in concluding that Respondent's notice of impending layoff served as the objective evidence necessary to establish why the requested extra-unit information was relevant: to aid the Union in meaningful effects bargaining, including Respondent's intentions to comply with the layoff and severance pay provisions. (11 ALJD 21-47.) For this reason, Respondent's 19th exception alleging that the Union failed to meet its burden of establishing the relevance of the non-unit information in absence of any objective factual basis for such request is baseless.

Respondent takes exception to the ALJ's failure to consider that the Union allegedly refused to engage in effects bargaining and that it failed to make such a claim that the requested extra-unit information would help in that regard. (R. Exc. 17.) Respondent ignores that the Union's alleged refusal to bargain was not at issue in this proceeding. The exception further ignores the uncontroverted record evidence to the contrary. In this regard, the record establishes that Jordan expressly communicated to Respondent's counsel that he wanted to "discuss the Company's plan to follow by the CBA, by ensuring PRN . . . positions will be laid before any [unit employees] . . . as well as other effects that may affect members" directly in response to Respondent's invitation to engage in effects bargaining. (GC Exh. 5:6.) Because the evidence refutes Respondent's exception, it is without merit.

Respondent contends that the Union could not establish relevance of the requested non-unit employee information because the Union was motivated by mere suspicion that Respondent would not adhere to its contractual commitments. (R. Exc. 7-11, 13, 18-24; R. Br. 15-19.) Respondent's contention misstates Board law and ignores the relevant facts of this case. For the reasons previously discussed, Respondent's announcement of impending layoffs served as the "objective evidence" that the requested extra-unit information would be relevant to the Union's

role in effects bargaining. This is so even though the Union did not articulate facts that the layoff and severance provisions were or would be disparately applied. (R. Br. 19.) The Board has dismissed allegations involving a party's failure to supply requested extra-unit information because the requesting party was motivated by mere suspicion that the information was relevant. See, e.g., *Int'l Union of Operating Eng'rs, Local 501*, 366 NLRB No. 62 (Apr. 20, 2018); *Disneyland Park*, 350 NLRB 1256, 1258-59 (2007). However, in those cases the Board found that the requesting party was *solely* motivated by speculation; that there was no objective evidence giving the requesting party a reasonable basis linking the requested information to any bargain-able issue. This is not the case here.

For instance, in *Disneyland Park*, 350 NLRB at 1258-59, the parties' CBA permitted the employer to subcontract work except where the subcontracting resulted in the termination or layoff of, or resulted in the failure to recall, a unit employee that would otherwise be qualified to perform the subcontracted work. The Board held that the union failed to demonstrate the relevance of the requested extra-unit subcontracts because it did not have a reasonable belief that any unit employee had been terminated, laid-off, or had not been recalled due to subcontracting. *Id.* at 1258. The union did not even make such an argument. *Id.* Correspondingly, the Board determined that the requested subcontracts were not relevant to a bargaining-able issue, namely whether the employer had violated the subcontract provision.

Similarly, in *Int'l Union of Operating Eng'rs, Local 501*, 366 NLRB slip op. at 1, fn. 1, a case cited by Respondent, the employer requested that the union provide grievances and arbitration documents of extra-unit employees after the union asserted that its grievance proposal contained language similar to grievance procedures the union had with other employers. The general counsel asserted that the requested extra-unit documents were relevant to assessing

whether the union's proposed grievance language was grievance-prone. Id. The general counsel also asserted that the requested information would help the employer to formulate counter-proposals. Id. The ALJ, with the Board's affirmation, found that the employer failed to state a factual basis as to why the requested information was relevant in the absence of any claim (objective evidence) by the union that the proposed grievance language was prone to grievances under similar grievance procedures it had with other employers. Id. In short, there was no link between the requested extra-unit information and any objective evidence (union claim) that could give rise to a reasonable belief that the extra-unit information was relevant.

Unlike *Disneyland Park* and *Int'l Union of Operating Eng's, Local 501*, the Union in this matter was able to link its request for extra-unit information to Respondent's assertions that it would lay-off PRN employees before any bargaining unit employees (article 5) and that it would treat unit and non-unit employees equally with regards to severance benefits (article 11) once layoffs were impending. And the record establishes that layoffs were impending as of March 7, well before the requests for information were first made. While it might be true that no layoffs had occurred at the time the Union made its request on March 12 and 28, and that no severance benefits had been paid to either non-unit or unit employees, that does not necessarily mean that the Union had no reasonable belief based on any evidence that the information was relevant. (R. Exc. 9.) The Union was not merely trying to investigate a potential contractual violation or to otherwise rectify a contractual violation; the Union was attempting to represent the affected unit employees' interest in their contractual layoff protections and severance pay that they are entitled to. Moreover, the Union communicated this interest to Respondent when Jordan asserted that the "union wanted to ensure that the fanatical benefits spelled out in article 11 . . . are honored." (GC Exh. 5:3; R. Exc. 8.) The Respondent does not argue to the contrary.

Respondent essentially argues that the Union could only establish relevance of the extra-unit information if the request was based on some evidence that the contract was possibly violated. However, the record evidence establishes that the Union had a reasonable belief based on the WARN notice that Respondent would not adhere to article 5.1's layoff protections. (R. Exc. 13, 18.) Contrary to Respondent's assertion, the ALJ did not find that "Respondent's WARN notice was possibly inconsistent with article 5.1" of the CBA. (R. Exc. 6.) Rather, in finding that Respondent failed to "address[] the potential inconstancy between Respondent's WARN Notice and article 5.1" (4 ALJD 30-35), the ALJ merely described the Union's concern that the WARN notice indicated that Respondent would not layoff any PRN employees in accordance with article 5.1. Indeed, Jordan informed Respondent's counsel of this exact concern on March 9, three days before the request for non-unit information was first made on March 12. (GC Exhs. 4-5.) Instead Respondent's counsel refused to provide the information solely because it concerned non-unit employees, even after Jordan communicated that a plain reading of article 5.1 required non-unit PRNs to be laid off first.⁷ Instead of providing the information, Respondent's counsel demanded that the Union provide evidence to substantiate its claim that article 5.1 applied to non-unit PRNs and again categorically denied the information solely because it pertained to non-unit employees. (GC Exhs. 5:4-5.) The Union did not need to substantiate its claim to convince the Respondent once it demonstrated why the information sought was relevant. (R. Exc. 13, 21.) Correspondingly, the ALJ properly concluded that Respondent's categorical refusal to supply the information amounted to "gamesmanship" and served as additional objective evidence that the Respondent might not comply with article 5.1. (R. Exc. 20-21.) (11 ALJD 20-21; 31-32.)

⁷ The Union's interpretation is reasonable considering that PRNs are explicitly excluded from the bargaining unit as set forth in the CBA's recognition clause.

Additionally, the Union had a reasonable belief based on Respondent's own conduct that it might not comply with article 11. In this regard, at the parties' March 14 meeting, Respondent asserted that its severance policy would apply to unit employees. But after the Union expressed concern over the discretionary aspect of the policy, Respondent did nothing to dispel or assuage those concerns. Instead, Respondent stated that the severance policy's severance formula applied to unit employees and that the policy was responsive to the Union's prior request, which is patently untrue. (R. Exc. 12.) While the Union could use the policy's formula to verify whether Respondent adhered to it with regards to the amounts of severance pay offered to laid-off unit employees, it does not aid the Union with verifying that they are treated equally as laid-off non-unit employees—for Respondent may unilaterally offer them other compensation in addition to pay consistent with the severance policy's formula. Respondent's uncooperative conduct, coupled with the discretionary aspect of the policy, caused the Union to doubt that Respondent would honor article 11's severance parity provision. Provided that severance pay is conditioned on the execution of a release of claims, how can the Union effectively counsel its unit employees (and thereby how can unit employees give *informed* consent) to release all claims against Respondent, including claims arising under article 11, without ensuring that their severance pay offer complied with article 11? For this reason, the Union was not legally obligated to demonstrate or articulate a possible contractual violation at the time it requested a list of laid-off unit employees and the amounts of severance they would receive. (R. Exc. 18, 23-24.)

Indeed, in *E. Tenn. Baptist Hosp.*, the Board found that the union did not need to articulate how the CBA's wage parity provision was violated to establish the relevance of its request for extra-unit information. 304 NLRB at 872. The Board required an employer to provide the union with non-unit wage information to verify compliance with a contract provision

requiring the employer to pay unit employees an equal wage increase as non-unit employees. *Id.* at 872, 882. Respondent argues that, unlike the Union in this matter, the union in *E. Tenn. Baptist Hosp.* had a reasonable basis for making a request for non-unit wage information because, as the requesting union agent testified, there had been a history of non-unit employees receiving greater wage increases than unit employees. (R. Br. 18). However, Respondent's argument ignores that in that case, the Board found that there was no evidence suggesting that the employer failed to comply with the CBA's wage parity provision for which the disputed request for extra-unit information directly related to, 304 NLRB at 882—evidence that Respondent contends the Union in this matter did not present and, therefore, failed to establish the relevance of the requested extra-unit information. (R. Exc. 18, 23-24.)

For the reasons discussed above, the Union had reasonable belief based on objective evidence that the requested list of extra-unit information was relevant to its role as the exclusive-bargaining representative.

C. The ALJ's Findings, Conclusions of Law and Recommended Order Are Warranted (Exceptions 25-28)

Respondent takes exception to the ALJ's conclusions that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the requested non-unit information. (R. Exc. 25-26.) For the reasons discussed above, the ALJ properly concluded that the requested non-unit information was relevant; that the Union demonstrated that the information was relevant to its role to engage in meaningful effects bargaining, including verifying Respondent's compliance with its contractual commitments; and that Respondent failed to supply the Union with the requested information. Accordingly, Respondent's exception numbers 25 and 26 lack merit.

Finally, having properly concluded that the Respondent violated Section 8(a)(5) and (1) as alleged, the ALJ's recommended Order is warranted and appropriate in this case. Therefore, the Respondent's exception numbers 27 and 28 similarly lack merit.

V. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully requests that the Board affirm the ALJ's finding of a violation.

Dated: February 20, 2019

Respectfully submitted by:



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

**CENTURA HEALTH/ST. MARY-CORWIN
MEDICAL CENTER**

and

**Case 27-CA-216441
JD(SF)-01-19**

**COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 7774**

**CERTIFICATE OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S STATEMENT OF EXCEPTIONS AND BRIEF
IN SUPPORT OF STATEMENT OF EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **February 20, 2019**, I served the above-entitled document(s) to the following named persons via the NLRB E-filing System or by e-mail in the manner described below:

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