

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
JD(SF)-01-19**

**ST. MARY-CORWIN MEDICAL CENTER**

**and**

**Case No. 27-CA-216441**

**COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 7774**

---

**RESPONDENT'S REPLY IN SUPPORT OF STATEMENT OF EXCEPTIONS**

---

SHERMAN & HOWARD L.L.C.

Patrick R. Scully  
Joseph H. Hunt  
633 17th Street, Suite 3000  
Denver, Colorado 80202  
[pscully@shermanhoward.com](mailto:pscully@shermanhoward.com)  
[jhunt@shermanhoward.com](mailto:jhunt@shermanhoward.com)

## PRELIMINARY STATEMENT

Notwithstanding General Counsel's attempts at obfuscation, the Decision remains based on a false premise. There has never been a definition of "bargaining unit work" between these parties, and this Agency has no authority to impose such a term upon them. In any case, Respondent has provided the same answer to the request for a list of PRN employees who perform bargaining unit work multiple times: There are no such PRN employees. Unsatisfied, both General Counsel and Judge Anzalone declare Respondent's response an act of cynicism or "gamesmanship." Yet, they do not dispute that "bargaining unit work" has no meaning between the parties. Judge Anzalone does not even explain what bargaining unit work means, nor does the Decision use the term bargaining unit work (except when citing Charging Party's request). Moreover, it is undisputed that PRN employees are not subject to layoff nor entitled to severance. Accordingly, the request for a list of PRN employees who perform so-called bargaining unit work has no connection whatsoever to the layoff and severance provisions in Articles 5.1 and 11 of the collective bargaining agreement. Both Judge Anzalone and General Counsel ask the Board to infer something from the manner of Respondent's response, but it cannot be disputed that Respondent answered Charging Party's information request and complied with the law.

Because the second and third requests for information concern non-unit employees, the only issue before the Board is whether Charging Party articulated a reasonable belief supported by objective evidence for requesting the information. *Knappton Mar. Corp.*, 292 NLRB 236, 238-39 (1988). Judge Anzalone found that, at the time of the requests, Respondent had not laid off or made severance payments to any employee, and Mr. Jordan "had no factual basis to conclude that Respondent planned to pay any unit employee less severance than any nonunit employee." (5 ALJD 27-29). As General Counsel concedes, "the Union did not articulate facts that the layoff

and severance provisions were or would be disparately applied.” (Answering Brief at 16-17). These statements cannot coexist with a finding of a violation of Section 8(a)(5). The Decision renders an erroneous new presumption of relevance with respect to so-called “contractual parity provisions” and incorrectly imposes a burden on Respondent to rebut that presumption. The Board should reverse the Decision in its entirety.

**THE REQUEST REGARDING “BARGAINING UNIT WORK”  
IS ILLUSORY BECAUSE THE TERM HAS NO AGREED-TO MEANING,  
AND THE REQUEST HAS NO CONNECTION TO LAYOFFS OR SEVERANCE**

Judge Anzalone erred determining that Respondent failed and refused to provide a list of PRN employees who “otherwise perform bargaining unit work.” (13 ALJD 21-26). By way of explanation, PRN employees are not members of the bargaining unit nor subject to the collective bargaining agreement. (Answering Brief at 2). PRN employees work on a “per requested need” basis, depending on Respondent’s patient care volume and availability of full-time employees. (Tr. 131:11-14). PRN employees are not subject to layoff.<sup>1</sup> (Tr. 136:22-23). While Judge Anzalone found (with no supporting evidence) that PRN employees “perform the same type of work as bargaining unit employees” (3 ALJD 19-23), the labor contract does not define what work is performed by bargaining unit and non-unit employees. As Mr. Jordan testified, unit recognition is based on job classification. (Tr. 107:24-108:1).

General Counsel argues that the request for a list of PRN employees who otherwise perform bargaining unit work *actually* means a list of PRN employees “who perform the same

---

<sup>1</sup> Despite the language in the labor contract, Mr. Jordan testified that he had “no idea” whether PRN employees are subject to layoff. (Tr. 127:1-10). Mr. Jordan did not negotiate the contract’s provisions concerning PRN employees and, accordingly, Judge Anzalone found that Mr. Jordan could not “speak to the meaning of the terms as they were negotiated.” (Tr. 32:22-33:19). In any event, Mr. Jordan has never identified any PRN employee whom he believes “should” have been laid off under the contract. (Tr. 110:20-23).

type of work” as bargaining unit employees. (Answering Brief at 11). General Counsel’s semantic argument about the meaning of bargaining unit work is beside the point. The parties have no agreed-to definition of the term “bargaining unit work,” and the parties have never negotiated that term. (Tr. 107:12-23). Also, bargaining unit work has no definition under the National Labor Relations Act.<sup>2</sup> Work that is performed by bargaining unit members “would not be viewed as bargaining unit work merely because they were members of the bargaining unit.” *See NLRB v. Int’l Union of Operating Eng’rs Local 501*, 806 F.2d 1405, 1408 (9th Cir. 1986).

No factual evidence was offered by Charging Party or General Counsel that PRN employees actually performed bargaining unit work according to General Counsel’s definition. In fact, Charging Party’s only representative and sole witness, Mr. Jordan, denied ever observing PRN employees performing what was alleged to be bargaining unit work. (Tr. 116:15-23). Additionally, Mr. Jordan admitted that he had had no correspondence with any representative of Respondent who used that term. (Tr. 107:15-21). While General Counsel opines that Mr. Jordan “knows” that PRN employees perform so-called bargaining unit work because he has seen PRN employees listed on work schedules (Answering Brief at 10), the term “bargaining unit work” is meaningful only to Mr. Jordan. (*See also* Tr. 119:19-120:15) (Mr. Jordan could not remember whether he had seen PRN employees listed on work schedules before or after he made the information requests).

Again, Judge Anzalone does not describe what is, and what is not, “bargaining unit work” in the Decision. And, aside from citing Charging Party’s request for information about bargaining unit work, Judge Anzalone fails to explain what the term means or how Respondent failed to

---

<sup>2</sup> *E.g., Durham Sch. Servs., L.P. v. Gen. Drivers, Warehousemen & Helpers, Local Union No. 509*, 90 F. Supp. 3d 559, 568-569 (D.S.C. 2015) (in the context of a work preservation defense, the court looks to the scope of “bargaining unit work” as defined by the labor contract).

comply with the request. (*See* 14 ALJD 30-35) (recommending an order that Respondent must inform the Charging Party to the extent such information does not exist). Additionally, even if the Decision attempted to explain the meaning of bargaining unit work, Judge Anzalone is not in a position to adjudicate its meaning. *See UPS of Am., Inc.*, 362 NLRB No. 22, \*10 (2015) (the Board does not pass on the merits of the underlying grievance). In short, even if the Board affirms Judge Anzalone's recommendations, Respondent's response to the request for information remains the same: There are no such PRN employees.

Additionally, the request for PRN employees who allegedly perform bargaining unit work had no connection to Respondent's announced layoff or the contract's severance provision. The burden is on a union to demonstrate the reasonable and probable relevance of the requested information concerning non-unit employees. *S. Nev. Home Builders Assn., Inc.*, 274 NLRB 350, 351 (1985). Notwithstanding that "bargaining unit work" has no agreed-to definition, Charging Party cannot demonstrate the requested information has any relevance to the order of layoffs or severance amounts. Charging Party has never identified what objective the request is meant to achieve with respect to any specific provision in the contract. In fact, PRN employees are not subject to layoff nor entitled to severance. Thus, the question of whether PRN employees perform bargaining unit work is immaterial to the administration of the contract and Charging Party's role as bargaining representative. Even assuming "bargaining unit work" is a meaningful term between the parties, there is no reasonable or probable relevance to the requested information.

General Counsel faults Respondent for not asking follow up or clarifying questions regarding Charging Party's request about PRN employees performing "bargaining unit work." (Answering Brief at 11) (*citing Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990), that "an employer may not simply refuse to comply with an ambiguous and/or overbroad information

request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.”). But that is precisely what Respondent did here. Respondent advised Charging Party that it did not understand Charging Party’s concern about PRN employees and offered Mr. Jordan to “hear [him] out” (5 ALJD 4-6), explained PRN employees are non-unit employees (5 ALJD 36-41), asked for Charging Party’s claim to information about non-unit employees and sought a legal basis for the request (6 ALJD 10-12), and met to discuss the topic (*see also* G.C. Exs. 5, 8, and 18). At no point did Charging Party seek information about PRN employees who perform the “same type” of work as bargaining unit employees (as the Decision wrongly interprets the request).<sup>3</sup> Respondent provided the requested information (there are no such PRN employees who perform bargaining unit work) to the extent the information encompassed necessary and relevant information.

**THE REQUESTS REGARDING LAYOFFS AND SEVERANCE  
OF NON-UNIT EMPLOYEES IS BASED PURELY ON SPECULATION**

General Counsel contends that Judge Anzalone properly concluded Respondent’s “refusal to supply the information amounted to ‘gamesmanship’ and served as additional evidence that the Respondent” might not comply with the labor contract.” (Answering Brief at 19). In deciding whether information is relevant or necessary in the context of an information request, the Board looks to the reason for the request *at the time* of the request. *UPS of Am.*, 362 NLRB at \*49-50,

---

<sup>3</sup> The Decision does not recommend an order requiring Respondent to provide a list of PRN employees who perform the “same type” of work as bargaining unit employees. That was not the subject of Charging Party’s request. Respondent notes, however, that Judge Anzalone changed Charging Party’s request in other ways. Namely, Charging Party requested “a list of all PRN employees who perform work that would *otherwise* be bargaining unit work.” (G.C. Exs. 5 and 17) (emphasis added). Judge Anzalone ordered Respondent to provide “a list of PRNs that *otherwise* perform bargaining unit work.” (14 ALJD 30-35) (emphasis added). Judge Anzalone’s misplacement of “otherwise” likely changes the meaning of Charging Party’s request but would not have changed Respondent’s response.

*citing Allison Corp.*, 330 NLRB 1363 (2000). Respondent's conduct following the requests for information, therefore, is irrelevant to the Board's analysis:

By itself, the word 'necessary' has no meaning, but attains significance in relation to an objective. It states the obvious to observe that if a question merely asks whether something is 'necessary,' the only appropriate answer is another question: 'For what?' In evaluating the necessity of an information request, the 'what' is the Union's purpose at the time it made the request, not some other objective it may have thought of later.

*Id.* Charging Party's express objective was to ensure the collective bargaining agreement was "honored." (G.C. Ex. 5). Mr. Jordan's post-hoc testimony and Judge Anzalone's distaste for Respondent's responses are not germane in this case and could not have "served as additional objective evidence" that Respondent would not comply with the contract. (Answering Brief at 19).

In this regard, a few facts bear repeating. At the time of the information requests, no layoffs of bargaining unit employees had occurred. (Answering Brief at 9). At the time of the information requests, Mr. Jordan "had no factual basis to conclude that Respondent planned to pay any unit employee less severance than any nonunit employee." (5 ALJD 27-29). Charging Party's requests were based on mere suspicion that Respondent would not abide by the severance pay or layoff provision in the labor contract and were intended to "police" those provisions. (5 ALJD 23-32). According to General Counsel, "the Union did not articulate facts that the layoff and severance provisions were or would be disparately applied." (Answering Brief at 17). None of these findings about Charging Party's motivations, and what Charging Party did at the time of its requests and communicated to Respondent, can be reconciled with standing precedent requiring a requesting party to establish a reasonable belief supported by objective evidence for requesting the information. *Knappton*, 292 NLRB at 238-39.

General Counsel's contention that Respondent's announcement of impending layoffs is "objective evidence" that extra-unit information would be relevant to Charging Party's role as bargaining representative is a canard. (See Answering Brief at 16-17). Respondent's announcement of impending layoffs is objective evidence only that Respondent intended to lay off bargaining unit employees. It is not objective evidence useful for Charging Party to determine whether Respondent has committed some unknown contract violation. See *S. Nev. Home Builders*, 274 NLRB at 351-52. Charging Party fails to set forth any facts to support a claim that a specific provision of the contract was being breached. See *Disneyland Park*, 350 NLRB 1256, 1259 (2007). As Mr. Jordan admitted, despite the language in the contract, he had "no idea" whether PRN employees are even subject to layoff. (Tr. 127:1-10). General Counsel's claim that the announcement of impending layoffs served as objective evidence of a contract violation must not be countenance in light of the fact that PRN employees are not subject to layoffs. Charging Party admittedly had no reasonable basis to conclude the layoff and severance provisions would be disparately applied.

General Counsel opines that Judge Anzalone 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." (Answering Brief at 15). However, Judge Anzalone's novel standard is directly contrary Board precedent, which permits an employer to refuse to provide extra-unit information, unless the union can sustain its burden demonstrating reasonable and probable relevance of the requested information supported by objective evidence. *S. Nev. Home Builders*, 274 NLRB at 351; *Knappton*, 292 NLRB at 238-39. The Board has consistently held that labor organizations bear the burden articulating a reason that non-bargaining unit information is relevant to the union's role of collective bargaining, even when considering labor

contract provisions concerning unit and non-unit members. *See also U.S. Postal Serv.*, 307 NLRB 429, 431-432 (1992). Judge Anzalone's rejection of this standard tramples well-settled law.

While General Counsel broadly denies that Judge Anzalone created a new presumption of relevance for so-called "contractual parity provision" (Answering Brief at 15), that is precisely what Judge Anzalone did here. Judge Anzalone incorrectly concludes that Charging Party need not set forth a reasonable belief supported by objective evidence for requesting the information when an employer places non-unit terms and conditions at issue. (9 ALJD 17-45). The Decision states that, where a contract provides for equal treatment between unit and non-unit employees,<sup>4</sup> Charging Party is entitled to information which would enable it to examine whether the contract is being obeyed. (11 ALJD 10-17). According to Judge Anzalone, there is nothing conditional on Charging Party's entitlement to that information. As Judge Anzalone found, and Charging Party concedes, Charging Party never identified any facts suggesting that Respondent would evade its contractual obligations (except Respondent's purported "gamesmanship" *after* the requests for information were made).

General Counsel further contends that Charging Party can "link" its request for extra-unit information to Articles 5.1 and 11. (Answering Brief at 18). But the "link" is merely a purported contractual parity provision; it does not nullify the need to establish a reasonable belief supported by objective evidence of a violation of the labor contract. Neither the Decision nor General Counsel cites to any non-speculative evidence that Respondent would not abide by its contractual

---

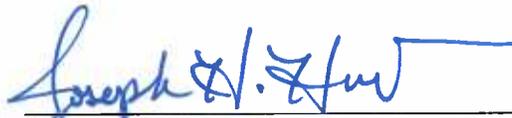
<sup>4</sup> Contrary to Judge Anzalone's conclusion, there is no record evidence that unit and non-unit personnel are subject to such equal treatment. First, it is undisputed that PRN employees are not covered by the severance policy. Secondly, other non-unit personnel do not enjoy the other benefits of the collective bargaining agreement, including but not limited to the right to grieve purported misapplications of the severance policy and the sole right to bump other employees via seniority.

obligations with respect to layoffs and severance. Indeed, General Counsel goes so far as to claim that Charging Party “was not legally obligated to demonstrate or articulate a possible contractual violation at the time” it made the information requests. (*Id.* at 20). Fundamentally, Charging Party’s requests were based on mere suspicion that Respondent would not abide by the layoff or severance provision and were intended to police those provisions. That is not a legitimate basis for requests for information of non-unit employees.

### CONCLUSION

For the reasons set forth above and in Respondent’s prior submissions, Judge Anzalone’s Decision must be reversed in its entirety.

Dated: March 6, 2019



---

Joseph H. Hunt  
Patrick R. Scully  
SHERMAN & HOWARD L.L.C.  
633 17th Street, Suite 3000  
Denver, Colorado 80202  
Email: pscully@shermanhoward.com  
jhunt@shermanhoward.com

*Attorneys for Respondent*

