UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALCOA CORPORATION

and Case 25-CA-219925

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS LOCAL 104

Raifael Williams, Esq.,
for the General Counsel.
Sarah Rain, Esq.,
(Ogletree Deakins, Nash,
Smoak and Steward, P.C.)
Indianapolis, Indiana,
for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Evansville, Indiana, on February 5, 2019. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Charging Party or the Union) filed the original charge on May 9, 2018, and an amended charge on August 28, 2018. The Regional Director for Region Twenty-Five of the National Labor Relations Board (the Board) issued the Complaint on September 27, 2018. The Complaint alleges that Alcoa Corporation (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act) on March 19, 20 and April 3 and 5, 2018, by instructing employees who it interviewed during an investigation of a co-worker's conduct not to discuss the interviews with other employees. The Complaint further alleges that the Respondent violated Section 8(a)(5) by refusing, since April 23, 2018, to provide the Union with information requested on April 16 and again on April 26, and by unreasonably delaying the delivery of other information the Union requested on those dates. The Respondent filed a timely Answer in which it denied committing the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law
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FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures aluminum and aluminum products at its facility in Newburgh, Indiana, from which it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The events at-issue in this case took place at the Respondent's Warrick Operations facility, in Newburgh, Indiana. Approximately 1600 persons work at that facility, of whom between 1100 and 1200 are represented by the Union. The most recent collective bargaining agreement between the Respondent and the Union went into effect on May 16, 2014, and sets forth an expiration date of May 15, 2019.

On April 6, 2018, the Respondent issued a 3-day suspension, pending further disciplinary action, to Ronald Williams, a bargaining unit employee who worked in the shipping department at the loading dock. The disciplinary notice states that the action was taken because Williams had been "creating a hostile work environment." The Respondent's records indicate that, beginning no later than March 8, 2018, the Respondent received reports that Williams had repeatedly directed offensive racial and national origin-based slurs at contract truck drivers, had exploited his position by unfairly forcing some drivers to wait inordinately long to load their trucks, and had otherwise subjected people to disrespectful treatment. On March 8, 15, and 19, Terrence Carr, labor relations specialist,[1] interviewed three contract truck drivers who interacted with Williams at the loading area about Williams' conduct. A fourth contract employee, who was not a driver, was interviewed by Carr on March 13. Carr then interviewed six hourly employees about the alleged misconduct by Williams. Only Carr and the interviewee were present for these interviews, which took place on March 19 and 20, and April 3 and 5, 2018. Carr told each of the six hourly employees that the interviews were confidential and he directed them not to discuss the interviews with employees or supervisors, and to decline to answer any questions that others asked them about the interviews. Carr testified that he did this because "historically hourly employees did not write out statements on other hourly employees." When testifying at trial, Carr did not claim that any of the employees he interviewed had, in fact, expressed reservations about giving statements. Indeed the parties stipulate that not a single one of the six hourly employees had requested confidentiality. Transcript at Page(s) (Tr.) 54-55. The Respondent does not claim that Carr directed human resources staffers, supervisors, managers, and others who came into possession of information about an interview that such information was confidential.

In an April 7, 2018, email, Bruce Price, a union representative for the shipping department, asked Carr to provide a variety of types of information relating to the discipline against Williams, including "all interview notes or video or anything else the company is using during this investigation on this supposed hostile work environment, that you are using against Mr. Williams." During the period of the suspension, the Union was preparing to represent

[1] Carr is an acknowledged supervisor and/or agent of the Respondent within the meaning of Section 2(11) and Section 2(13) of the Act. General Counsel Exhibit Number (G Exh.) 1(g), paragraph 4.

Williams in an internal process during which the Union is given an opportunity to present facts relevant to the disciplinary decision. Carr provided a response to Price on April 8. That response included Carr's summaries of his interviews with 10 individuals. With respect to the four contractors who were interviewed, the Respondent provided the name of the individual. With respect to the six hourly employees who were interviewed, Carr withheld the interviewee's name and the date of the interview.

In a letter dated April 9, the Respondent informed Williams that his employment was terminated effective April 10, 2018.[2] On April 9 or 10, the Union submitted a grievance challenging Williams' termination. Subsequently, on April 16, Tim Underhill – the Union's business agent and grievance committee chairman – submitted a request to Carr for information relating to that grievance. The request included eleven paragraphs seeking various types of information. The General Counsel only alleges that the Respondent unlawfully failed to provide and/or unreasonably delayed providing information in response to one of those paragraphs. That paragraph requested:

> Information pertaining to the interviews of the one Dayshift Hourly employee and five afternoon shift hourly employees that were provided by the Company per the information request by Bruce Price on or about 4/7/2018. Information should include Name that coincides with each interview, the date the interview took place, the location w[h]ere the interview took place and a list of names of who was present when the interviews took place.

General Counsel Exhibit Number (GC Exh.) 9, Para. 6. Underhill testified that the Union needed this information in order to "investigate whether or not the interviews and the actual process was done, and also to allow us to do an internal investigation and to check up on the facts."

On April 23, Carr responded to Underhill's April 16 request. In his response, Carr refused to provide the names of the hourly employees who were interviewed about Williams' conduct. Carr stated:

> Based on confidentiality request of employee's names will not be shared at this time. Attached we have provided 4 sworn statements from hourly employees that were interviewed. All employees declined union representation. Terrence Carr interviewed all employees with 2 of the interviews taking place in Building 1 and 4 interviews in the Pack/Ship conference room.

GC Exh. 10. Despite Carr's claim to the Union that the six hourly employees who were interviewed had requested confidentiality, at trial the Respondent stipulated that not a single one of those individuals had, in fact, requested confidentiality. Tr. 54-55. In addition to withholding the names of the bargaining unit employees who were interviewed, this response from Carr withheld the dates when those interviews took place. Carr provided four handwritten statements to Underhill; however, Carr redacted the name of the employee giving the statement and any information showing the date of the statement.

[2] Neither Williams' suspension nor his subsequent discharge is alleged to be unlawful in this proceeding.

On April 26, Underhill wrote to Carr stating, inter alia, that the Union still needed the names of the hourly employees who were interviewed and also the dates of the interviews. Underhill stated that the Union had a legal right to this information, and asked that "if the Company is refusing to provide the information, please state in writing." Underhill informed the Respondent that the Union "need[ed] the information in order to properly investigate this grievance."

Carr responded to that correspondence on April 30. On the subject of the names of the hourly employees who were interviewed, Carr stated:

> It is the Company's position that keeping the identities of the witnesses confidential prior to the arbitration outweighs the union's right to know their identities. This position is based on the fact that the employees requested and were given, an assurance of confidentiality at the time they gave their statements, and there is a significant risk that intimidation or harassment of witnesses will occur as demonstrated by a recent incident of misconduct reported to management. Furthermore, it is the Company's position that it has accommodated the Union's request for information by providing redacted copies [of] the witness statements that contain the facts used by the Company to make the disciplinary decision. The information contained in the statements will allow the Union to effectively represent Mr. Williams during the grievance process.

GC Exh. 12. Although, in this communication, Carr repeated the claim that the interviewees requested confidentiality at the time of the interviews, the Respondent stipulates that not one of those interviewees did, in fact, request confidentiality. The Respondent did not offer to accommodate the Union's request for the names of the hourly employees by providing the names subject to a confidentiality agreement or some other safeguard.

Regarding Carr's claim, in the April 30 communication, that a "recent incident of misconduct" demonstrated that revealing the names of interviewees would create "a significant risk" of "intimidation or harassment of witnesses," the record shows the following. On April 26, Carr received an email from a shipping department supervisor, Wade Shanks, regarding a complaint he reported receiving from John Taborn, a bargaining unit employee and union steward. According to Shanks, Taborn stated that in the past he had stored his boots in a cabinet in the break room rather than in the employee locker room. Taborn heard that the recently elected union representative, James Cameron, had recently posted a note stating "no boots in the cabinets" of the break room. Shanks stated that Taborn told him that the employee who cleans the break room had recently removed his boots from the break room and put them "out in the aisle way outside of the break room filled with garbage." Respondent Exhibit Number (R Exh.) 1.[3] Shanks did not report that Taborn claimed to know why this had happened. Shanks did not testify, but in his email he speculated to Carr that "we can read between the lines on this issue and have an educated guess on why this behavior is happening toward Mr. Taborn." Shanks went on to hypothesize that Taborn's boots were treated in this manner: because Taborn had unsuccessfully run against Cameron in the recent union representative election; and because Taborn had opposed the alleged harassment by Williams and provided

[3] Neither Taborn nor Shanks were called to testify. I received Shanks' email regarding Taborn as an exhibit over the hearsay objection of counsel for the General Counsel, but do not consider the email for the truth of the matters asserted regarding either the treatment of Taborn, or what Taborn communicated to Shanks. I do, however, consider the email as evidence that, on April 26, Carr received Shanks' account of a report from Taborn.

information to the Respondent about it.[4] The Respondent concedes that, prior to April 26, it did not have any belief or knowledge that the Union or an employee had retaliated against any employee for cooperating in the Respondent's investigation of Williams' conduct. Tr. 54-55. The record does not show that the Respondent investigated the report regarding Taborn's boots.

Underhill, in an email, dated May 1, 2018, to Carr, again referenced the Union's request for information regarding the interviews that were conducted with bargaining unit employees about Williams' alleged misconduct. Two months later, Carr, in a communication dated July 2, 2018, informed Underhill of the dates when hourly employees were interviewed and gave statements. At trial, Carr testified, "I think" the Respondent's previous failure to provide the dates "was merely an oversight." Tr. 63-64. The July 2 communication still did not disclose the names of any of the hourly employees who Carr interviewed.

On January 24 and 25, 2019, the Union and the Employer participated in an arbitration of the grievance regarding Williams' discipline. During the arbitration, the Respondent continued to withhold the names of the bargaining unit employees who were interviewed or gave statements during the Respondent's investigation of Williams' conduct. The Union argued to the arbitrator that no weight should be given to the interviews and statements of these employees since the Respondent refused to provide the Union with information about them. In his testimony before me, Underhill stated that the Union currently has approximately 18 pending grievances that are scheduled for arbitration.

DISCUSSION

I. CARR'S DIRECTION THAT EMPLOYEES KEEP INTERVIEW CONFIDENTIAL

The General counsel alleges that the Respondent violated Section 8(a)(1) of the Act when Carr told the employees he interviewed about Williams' conduct that the conversations were confidential, should not be disclosed to supervisors or employees, and directed the interviewees to decline to answer any questions about the conversations.[5] Where a violation of Section 8(a)(1) is alleged, the first question is whether the employer's conduct interferes with the employee's rights under Section 7 of the Act. If it does, the employer may escape a finding of violation by demonstrating a legitimate and substantial business justification that outweighs the employee's interests under Section 7. See, e.g., *Verizon Wireless*, 349 NLRB 640,640 fn.5 and 658 (2007); *Ang Newspapers*, 343 NLRB 564, 565 (2004); *Caesar's Palace*, 336 NLRB 271, 272 fn.6 (2001).

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[4] On May 18, 2018, about 4 weeks after Carr refused to provide the Union with the names of hourly employees he interviewed, Carr received an email from Taborn stating that the Union had removed Taborn from his position as a union steward. Taborn reported that Underhill told him the reason for this action was that Taborn had given the Respondent information about Williams' conduct, and that Underhill "couldn't get past a steward doing that to another member." Taborn did not testify, or otherwise provide sworn testimony, regarding any statement made to him by Underhill or how he came to contact Carr on May 18. Underhill appeared as a witness, but was not questioned about, and did not testify regarding, the statements Taborn attributed to him in the May 18 email.

[5] In its brief the Respondent contends that Carr "requested (not demanded) confidentiality." Brief of Respondent at Page 12. Respondent's counsel strays into the vicinity of bad faith by making this argument. At trial, the Respondent *stipulated* that Carr told the employees "that their conversations were confidential, that employees should keep the conversations confidential, including from supervision and other employees, and if others asked about the conversations, to decline to answer." Tr. 54. This was a directive from the Respondent's acknowledged supervisor and/or agent, not a mere "request."

It is well-established that an employer interferes with Section 7 rights by prohibiting employees from discussing workplace concerns, particularly if, as here, they relate to discipline or potential discipline. See *Fresenius USA Mfg., Inc.*, 358 NLRB 1261, 1261 fn.1 (2012), affd. in relevant part after remand at 362 NLRB 1065 (2015); *Verizon Wireless*, 349 NLRB at 640 fn.5 and 658; *SNE Enterprises, Inc.*, 347 NLRB 472 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). Moreover, the Board has recognized that an employer's restriction on employee communications regarding an investigation is overbroad when, as here, that restriction is not limited by time or place. See, e.g., *SNE Enterprises*, 347 NLRB at 472 and 492-493, *Westside Community Health Center*, 327 NLRB at 666. In this case, Carr interfered with employees' Section 7 rights by prohibiting them from discussing a workplace matter relating to discipline. That interference is particularly profound because Carr's directive was unlimited in terms of both duration and place. Carr's directive to the employees did not include a mitigating statement that the employees could discuss the interviews with others once the employer's investigation was over or at any other time. Thus the restriction cannot be justified, and the Respondent does not claim it was justified, by the need to complete its investigation without witnesses influencing one another's accounts. Cf. *SNE Enterprises*, 347 NLRB at 472 fn.4 and 493 (confidentiality rule was enforced after the investigation was completed and therefore cannot be justified as necessary to "to protect the sanctity of an ongoing investigation"). Moreover, Carr's confidentiality directive extends, on its face, to prohibit any discussions the interviewees might want to have with anybody at all, including their collective bargaining representative.

Given that Carr's confidentiality directive interfered with the employees' Section 7 rights, it violated the Act unless the Respondent can demonstrate a legitimate and substantial business justification that outweighs the employees' Section 7 rights. *Verizon Wireless*, supra; *Caesar's Palace*, supra; *Westside Community Health Center*, supra. The Respondent has failed to do that. The only justification offered for the confidentiality directive is Carr's assertion that "historically hourly employees did not write out statements on other hourly employees." Carr's conclusory assertion about the historical reticence of hourly employees is not supported by evidence of specific examples, or even the mention of specific examples. Moreover, although Carr falsely claimed to the Union that the interviewees themselves requested confidentiality, the Respondent concedes that *not one* of the employees interviewed actually requested confidentiality. In fact, the testimony did not show that any of the interviewees demonstrated discomfort or reticence about reporting on Williams' conduct.

In addition to being unsupported from an evidentiary perspective, Carr's claim that he imposed the confidentiality directive to protect the interviewees themselves is unsupported from a logical perspective. Specifically, I note that Carr's directive was not that 3rd parties – either other employees, human resources staffers, supervisors or managers – were prohibited from discussing the interviewee's disclosures. If that were the case, then arguably it would provide some reassurance to any interviewees who might be worried that others would find out what they said to Carr. However, the prohibition was imposed on the interviewees themselves, not on third-parties, and therefore does not provide that reassurance, but merely interferes with the interviewees' own freedom to decide under what circumstances to discuss a workplace issue with co-workers and others.

I find that the Respondent violated Section 8(a)(1) on March 19 and 20, and April 3 and 5, 2018, when Carr directed employees who he interviewed as part of the investigation of Williams' conduct that the interviews were confidential and should not be disclosed to other employees and that the interviewees should decline to answer any questions about the conversations.

II. INFORMATION REQUEST

A. RESPONDENT'S REFUSAL TO PROVIDE THE NAMES OF EMPLOYEES IT INTERVIEWED REGARDING WILLIAMS' CONDUCT

On April 16, 2018, the Union requested that the Respondent supply the names of the six hourly employees who the Respondent interviewed as part of the investigation that led to the suspension and termination of bargaining unit employee Williams. In an April 23 correspondence, the Respondent informed the Union that it would not provide the names. On April 26, the Union repeated its request that the Respondent supply the names and, on April 30, the Respondent again expressly refused to do so. The Respondent has continued to withhold the names, including during the arbitration of the Williams grievance.

An employer's obligation to bargain in good faith under Section 8(a)(5) of the Act, includes the obligation to furnish the employees' bargaining representative, upon request, with information relevant to and necessary for the performance of the Union's statutory duty as the employees' bargaining representative. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967). In this case, in order to evaluate the merits of the grievance and/or to challenge the Respondent's claim that Williams engaged in conduct warranting his discharge, the Union needed to identify, and likely interview, the employees whose accounts the Respondent obtained in the course of its investigation. As the Board recently recognized, "Board law is clear that a union's request for witness names made in connection with a grievance constitutes a request for relevant and necessary information." *American Medical Response West*, 366 NLRB No. 146, slip op. at 2 (2018); see also *Transport of New Jersey*, 233 NLRB 694, 694-695 (1977). "As a result, the Respondent had an obligation under Section 8(a)(5) and (1) to provide the names to the Union unless it could establish a valid defense for not doing so." *American Medical Response West*, supra. In the present case the Respondent asserts that it has a defense because it can establish a legitimate interest in confidentiality that outweighs the Union's need for the information. See *Detroit Edison v. NLRB*, 440 U.S. 301, 319-320 (1979); *Piedmont Gardens*, 362 NLRB 1135 (2015), enfd. in relevant part by 858 F.3d 612 (D.C. Cir. 2017): *Northern Indiana Public Service*, 347 NLRB 210, 211 (2006). The Respondent, as the party asserting this defense, bears the burden of proving that it had a legitimate and substantial confidentiality interest that outweighs the Union's need for the information. *Northern Indiana Public Service,* supra; *Lasher Service Corporation*, 332 NRLB 834, 834 (2000); *Geiger Ready Mix Co.*, 315 NLRB at 1021, 1021 fn.2 (1994). Even if the Respondent is able to prove that it has a legitimate and substantial confidentiality interest that outweighs the Union's need for the information, it violates the Act by withholding the names without offering the Union an accommodation. *Borgess Medical Center*, 342 NLRB 1105, 1105-1106 (2004).

The Respondent has failed to establish a legitimate interest in confidentiality, much less one that outweighs the Union's need for the information. On April 23, when the Respondent announced its refusal to supply the names of the six hourly employees, *the only reason* the Respondent gave was that the employees themselves had requested that the interviews be kept confidential. Now the Respondent admits that that stated justification was simply false. At trial, the Respondent stipulated that, contrary to the confidentiality interest it claimed when it announced its refusal to provide the information, not a single one of the six hourly employees had, in fact, requested confidentiality.

Subsequent to the April 23 announcement that it was refusing to provide the names, the Respondent asserted a different "interest in confidentiality" – i.e., that a recent incident showed "there is a significant risk" of "intimidation or harassment of witnesses." However, it is undisputed that this concern about retaliation was *not* a legitimate confidentiality interest on

April 23 when the Respondent announced that it would not provide the information. During the trial, the Respondent admitted that at the time of its April 23 refusal it had no knowledge, or even a belief, that the Union or employees were retaliating against employees for cooperating with the investigation. The Respondent has failed to meet its burden of showing that when it refused to provide the names of interviewed employees on April 23 it had any legitimate confidentiality interest, much less that it had a confidentiality interest that was so substantial that it outweighed the Union's well-recognized need for witness names sought in connection with representing an employee in a grievance proceeding. *American Medical Response West*, supra, *Transport of New Jersey*, supra. For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act on April 23, 2018, when it refused the Union's April 16, 2018, request for the names of hourly employees who provided statements to the Respondent as part of the investigation of Williams' conduct.

The Complaint alleges that the Respondent unlawfully refused to provide the requested names not merely on April 23, but *since* April 23. The violation that began when the Respondent unlawfully failed to provide that information on April 23 has not been remedied. The information unlawfully withheld is still being withheld and the Respondent has not posted an appropriate notice informing employees that it would not unlawfully withhold information from the Union in the future. To the extent that the Respondent has identified later-discovered concerns that it claims would have justified withholding the information at time subsequent to when it announced its refusal to provide the information, those later-discovered concerns cannot absolve the Respondent either of its earlier-committed violation or of the obligation to remedy that violation by, at a minimum, posting an appropriate notice to employees.

Even assuming that the information the Respondent obtained on April 26 and May 18 relating to Taborn bears on the extent to which the April 23 violation is continuing, I find that the reports regarding Taborn do not, in fact, show that the Respondent had a legitimate confidentiality interest. I note that Carr did not testify that the Respondent performed even the most cursory investigation of what Shanks reported regarding Taborn's claim about the treatment of his boots. Carr did not testify that he talked to Taborn about the boot incident or identified the date when incident is supposed to have occurred. There is no evidence that the Respondent delved into the matter further or otherwise treated the allegations about Taborn's boots as a serious or persistent issue. Given that it is the Respondent's burden to establish the defense based on a legitimate interest in confidentiality, *Lasher Service Corporation*, supra, and given that the Respondent has presented nothing beyond hearsay statements in the April 26 email from Shanks regarding the purported treatment of Taborn's boots, and nothing beyond speculation to tie any such treatment to the investigation, the Respondent's defense cannot be accepted. Moreover, given that the Respondent has not shown, or even claimed, that it treated the report regarding Taborn's boots as consequential enough to warrant investigation, it cannot persuasively argue that the report was so consequential as to override the Union's right to obtain information needed to represent a discharged employee in a grievance proceeding.

On May 18, Carr received an email from Taborn stating that the Union had removed him from his position as a union steward because Underhill "couldn't get past a steward" providing information against "another member," i.e., Williams. As with the Shanks email, Carr received this email from Taborn *after* he announced the Respondent's refusal to provide interviewees' names. And once again with respect to this matter, Carr did not testify that he investigated to determine the veracity or circumstances regarding this report from Taborn or otherwise handled it as one would a serious matter. At any rate, the Union's decision about who can best serve as a union steward to deal with the employer is an internal union matter that has no effect on the steward's employment relationship with the employer. An employer has very limited, if any, legitimate interest in a Union's decision regarding a purely internal union matter of this kind. See

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 195 (1967) ("Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status."); *Office and Professional Employees International Union, Local 251*, 331 NLRB 1417 (2000) (same); *Laborer's Local No. 721*, 246 NLRB 691, 693 (1979) (same), enfd. 649 F.2d 33 (1st Cir. 1981); see also *Local 254, Service Employees Intern. Union, AFL-CIO*, 332 NLRB 1118, 1124 (2000) (a large number of internal union disputes could fairly be characterized as disputes about how best to deal with employers). Given the above, hearsay about the reasons for the Union's internal decision about who should serve as a union steward, does not provide the Respondent with a legitimate basis for withholding the witness names that the Union needed to represent Williams in the grievance proceeding regarding his discharge.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) since April 23, 2018, when it refused the Union's April 16, 2018, request for the names of the hourly employees who provided statements to the Respondent as part of the investigation of Williams' conduct.

B. Respondent's Delay In Providing Union with the Dates of Employee Interviews

The Complaint alleges that, in addition to violating Section 8(a)(5) by refusing to provide the Union with the names of the interviewed hourly employees, the Respondent violated Section 8(a)(5) because it unreasonably delayed providing the Union with the dates of those interviews. The record shows that the Union requested the dates on April 16 and that the Respondent failed to provide that information until over 2 ½ months later on July 2, 2018. An employer's "unreasonable delay in furnishing … information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Naperville Jeep/Dodge*, 357 NLRB 2252, 2252 n.5 and 2272-2273 (2012), enfd. 796 F.3d 31 (D.C. Cir. 2015), cert. denied 136 S.Ct. 1457 (2016); *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001).

Although the Respondent denies that the delay violated the Act, it does not claim either that the dates of the interviews were not relevant and necessary to the Union's representation of Williams in the grievance process or that the delay in providing the dates was justified by legitimate confidentiality concerns. Nor does the Respondent claim that gathering the information was so difficult or burdensome that 2 ½ months was a reasonable amount of time in which to respond. Rather it argues that the delay was too short to constitute a violation, that its failure to promptly supply the information was an "oversight," and that the delay caused no prejudice to the Union. As is discussed below, none of the Respondent's arguments have merit.

Regarding the Respondent's argument that the delay here was too short in duration to constitute a violation, Board caselaw shows that, to the contrary, where, as here, the information requested by a union is not voluminous or difficult to gather, delays of 2 ½ months or less are unreasonable and violate the Act. In such circumstances the Board has found delays of 2 ½ months, 2 months, 7 weeks, and even a mere 6 weeks to be unreasonable and violative of the Act. *Dodge of Naperville Jeep/Dodge*, supra (2 months); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7 weeks); *House of the Good Samaritan*, 319 NLRB 392 (1995) (2.5 months); *Bundy Corp.*, 292 NLRB 671, 672(1989) (6 weeks). Given how minimal the information sought by the Union was, there is no apparent reason why the Respondent should not have been able to easily gather the dates of the six interviews in a day or less and the Respondent has not suggested otherwise. Under the circumstances, and Board precedent, the Respondent's delay of over 2 ½ months was unreasonable and a violation of the Act.

As for the Respondent's contention that there was no violation because the delay was unintentional[6] and was not shown to have resulted in prejudice to the Union, I begin by noting that the precedent cited above does not require either improper intent or prejudice to establish a violation. Rather where, as here, a union requests information that is relevant and necessary to its representation of the bargaining unit and the employer unreasonably delays providing that information, a violation of Section 8(a)(5) is shown. *Naperville Jeep/Dodge*, supra; *Amersig Graphics,* supra; *Woodland Clinic*, supra. The Respondent seizes on an administrative law judge's passing reference to the absence of evidence of prejudice in *Union Carbide Corp.*, a case in which the Board found that the employer's delay in supplying information was not a violation. 275 NLRB 197, 200-201 (1985). However, that decision does not find that Union Carbide unreasonably delayed providing information, but escaped a finding of violation because there was no prejudice. Rather Union Carbide's delay was not a violation because the delay *was reasonable*. Specifically, the delay in that case resulted because the information was "complex," "most difficult, time consuming, and expensive" to gather. Ibid. Unlike the Respondent in this case , the employer in *Union Carbide* began to gather the voluminous data at-issue within days of the Union's request and continued that effort without interruption until the information was provided. "There was simply no showing" that Union Carbide's effort to provide the information was "not reasonable or that [Union Carbide] could have done anything else to produce a faster result." Ibid. The relevant circumstances in the instant case could hardly be more different than those in *Union Carbide*. Here the information the Union sought was minimal, simple, and easily gathered. Indeed, withholding that information actually required the Respondent to expend additional effort by affirmatively redacting the dates from the information supplied on April 23 and April 30. The Respondent, unlike the employer in *Union Carbide*, could have "produce[d] a faster result" by immediately providing the simple, minimal, information at-issue.

The Respondent violated Section 8(a)(5) and (1) of the Act because it unreasonably delayed providing the Union with the dates of the employee witness interviews that the Union requested on April 16, 2018, and again on April 26, 2018.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on March 19 and 20, and April 3 and 5, 2018, when it directed employees interviewed as part of an investigation of a bargaining unit employee's conduct that the interviews were confidential and should not be disclosed to other employees and that the interviewees should decline to answer questions anyone posed to them about the interviews.

[6] I do not make a finding regarding whether or not the delay was the result of a mere "oversight" as Carr testified that he "thinks" it was. I do, however, note that the claim that the delay was simply an oversight is suspect given that that when Carr failed to provide that information in his initial response to the Union's April 16 request, the Union followed-up on April 26 with a more focused request that reiterated to Carr that the Union needed the interview date information it previously requested.

4. The Respondent violated Section 8(a)(5) and (1) of the Act since April 23, 2018, when it refused the Union's April 16, 2018, request for the names of the hourly employees who provided statements to the Respondent as part of the investigation of a bargaining unit employee's conduct.

5. The Respondent violated Section 8(a)(5) and (1) of the Act when it unreasonably delayed providing the interview dates that were requested by the Union on April 16, 2018, and again on April 26, 2018.

6. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent contends that even if it violated the Act by refusing to provide the Union with the names of hourly employees who Carr interviewed, I should relieve it of the obligation to provide the unlawfully withheld information because the Union no longer needs it. The Respondent reasons that because the arbitral hearing regarding the Williams grievance was held on January 24 and 25, 2019, the Union's need for the information has passed. In *Boeing Company*, 364 NLRB No. 24, slip op. at 4 (2016), the Board held that if an employer establishes that the union no longer has any need for requested information, "the Board will not order the employer to produce it, despite finding the violation." The Boeing decision notes that "the employer bears the burden of proof of establishing that the union has no need for the requested information." Ibid.

I find that the Respondent in this case failed to meet its burden of establishing that the Union no longer has any need for the unlawfully withheld information. While it is true that the arbitral hearing regarding the Williams grievance has been held, the Respondent has not established that the arbitrator has issued a decision, that no appeal has been taken from any such decision, and that the arbitrator has no authority to reopen the matter. Tellingly, in *Borgess Medical*, the one case that the Respondent cites where the Board relieved an employer of the obligation to provide unlawfully withheld information sought in connection with a grievance, the Board specifically relied on the fact that, not only had the arbitration been held, but that the arbitrator had already issued a decision and no appeal was taken from that decision. 342 NLRB at 1106, citing *Westinghouse Electric Corp.*, 304 NLRB 703, fn.1, 709 (1991) (employer not ordered to produce withheld information that was only relevant to an arbitration and that arbitration had closed and could not be reopened). In the instant case, by contrast, the Union still needs the information in order to evaluate how to proceed regarding the pending grievance, and possibly in order to represent Williams in an appeal, request for reopening, or other avenue that either party may choose to pursue before or after the arbitrator's decision. Therefore, I find that the Respondent has failed to meet the burden, under *Boeing*, "of establishing that the union has no need for the requested information" and I deny its request to be relieved of the obligation to provide the information it unlawfully withheld from the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[7]

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the

ORDER

The Respondent, Alcoa Corporation, Newburgh, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully instructing employees not to discuss investigatory interviews with other employees and/or the employees' collective bargaining representative.

(b) Refusing to provide the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) with requested information that is relevant and necessary to the Union's statutory duty as collective bargaining representative.

(c) Unreasonably delaying the provision of information, requested by the Union, that is relevant and necessary to the Union's statutory duty as collective bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately provide the Union with the interviewee names it requested on April 16, 2018.

(b) Within 14 days after service by the Region, post at its facility in Newburgh, Indiana, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2018.

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findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

8 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 27, 2019

PAUL BOGAS
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully instruct you not to discuss investigatory interviews with other employees or with your collective bargaining representative.

WE WILL NOT refuse to provide the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) with requested information that is relevant and necessary to the Union's statutory duty as collective bargaining representative.

WE WILL NOT unreasonably delay providing the Union with requested information that is relevant and necessary to the Union's statutory duty as collective bargaining representative.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately provide the Union with the interviewee names that the Union requested on April 16, 2018.

ALCOA CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577

(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-219925 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 991-7644.