UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

AMERICAN MEDICAL RESPONSE WEST

and Case 20-CA-234200

UNITED EMS WORKERS, AFSCME LOCAL 4911

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I. STATEMENT OF THE CASE

This case is before the Administrative Law Judge upon a Complaint alleging that American Medical Response West (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to furnish, and unreasonably delaying in furnishing, information requested by United EMS Workers, AFSCME Local 4911 (Union) that was relevant to and necessary for the Union's effective performance of its statutory duties as the exclusive collective-bargaining representative of Respondent's employees.

The case primarily involves a question of law, as the facts are largely undisputed. On November 6, 2018, Respondent terminated Karis Arce, a bargaining-unit employee with no prior written discipline, based on comments she posted on the social media website Facebook.[1] On November 18, the Union filed a grievance over Ms. Arce's termination and at the same time requested information from Respondent, including Ms. Arce's disciplinary history, evidence gathered by Respondent before and during the investigation that led to her termination, and similar discipline involving social media issued by Respondent to other employees. Later, in separate correspondence, the Union also requested Ms. Arce's personnel file. It is undisputed that from November 18 to January 24, 2019, the Union repeated its requests for the information numerous times. It is also undisputed that nearly a month after the initial request Respondent finally provided the Union with Ms. Arce's termination notice. Lastly, it is undisputed that, despite the Union's repeated requests, Respondent has flatly refused to provide nearly all of the information, and asserts, based on its own interpretation of the collective-bargaining agreement, that the information is not relevant or necessary because the Union withdrew its grievance.

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[1] All dates, unless otherwise stated, occurred in 2018.

The issues in dispute are whether the information the Union requested is relevant and necessary for the Union's performance of its duties as the collective-bargaining representative of Respondent's employees and, accordingly, whether Respondent was obligated to provide the information. Simply put, the answer is yes. The Supreme Court has long held that an employer, as part of its duty to bargain, must provide information that is potentially relevant and of use to the union in fulfilling its duties as the collective-bargaining representative of employees, which includes the duty to administer and police the collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Information directly involving a bargaining-unit employee, such as information regarding an employee's termination, is presumptively relevant to a union's duties as the collective-bargaining representative. *See Ryder Distribution Resources, Inc.*, 302 NLRB 76 (1991). The information requested by the Union here directly involved bargaining-unit employee Karis Arce and Respondent's termination of her employment. Thus, the information is presumptively relevant to the Union. Moreover, the information regarding Respondent's abrupt termination of Arce's employment is clearly relevant and necessary for the Union's enforcement of the collective-bargaining agreement. The Respondent's defenses, based on its own, unilateral interpretation of the collective-bargaining agreement, have no merit.

II. STATEMENT OF FACTS

A. THE UNION IS THE COLLECTIVE-BARGAINING REPRESENTATIVE OF RESPONDENT'S EMPLOYEES.

Respondent is a California corporation, with an office and place of business in San Francisco, California, providing ambulance and wheelchair van transportation services. (GC

Exh. 1(f), pg. 1).[2] At all times since about January 1, 2015, and at all material times, Respondent[3] has recognized the Union,[4] under Section 9(a) of the Act, as the exclusive collective-bargaining representative of all Emergency Medical Technicians (EMTs) working for Respondent within Northern California (Unit Employees). (Stip. Fcts. 1). This recognition has been embodied in successive collective-bargaining agreements between Respondent and the Union, including the collective-bargaining agreement effective by its terms from January 1, 2015 to June 30 and extended by the parties to August 31 (Collective Bargaining Agreement or CBA). (GC Exh. 1(f); Stip. Fct. 2; Jt. Exhs. 2 and 3). On about March 25, 2019, well after the current charge was filed, Respondent and the Union entered into a new collective-bargaining agreement effective by its terms from September 1 to August 31, 2022. (R. Exh. 1, pg. 65-66). From August 31 to March 25, 2019, when Respondent refused to furnish and delayed in furnishing the information at issue herein, there was no collective-bargaining agreement in effect between the parties.

B. RESPONDENT TERMINATES BARGAINING-UNIT EMPLOYEE KARIS ARCE.

Respondent terminated Karis Arce, an EMT at its San Francisco facility, on November 6. (Jt. Exh. 1, par. 4). Respondent did not base its termination of Ms. Arce on progressive

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[2] All references to the General Counsel's Exhibits are noted as "GC Exh." followed by the exhibit letter(s) and the page number(s). All references to the Joint Exhibits are noted as "Jt. Exh." followed by the exhibit letter(s) and the page number(s). All references to Respondent's Exhibits are noted as "R Exh." followed by the exhibit letter(s) and the page number(s). All references to Stipulations are noted as "Stip. Fct." followed by the paragraph number(s). All references to the Transcript are noted as "Tr." followed by the page number(s) and, if relevant, line numbers. All references to the Administrative Law Judge are noted by "ALJ."

[3] "Respondent" will refer to all of its agents and officers, including Rodney Brouhard, Respondent's Operations Manager. (GC. Exh. 1; Stip. Fct. 5).

[4] "Union" will refer to all of its officers and agents, including Labor Representative Casey Vanier and Shop Steward Nick Cheatham. (Stip. Fct. 5).

disciplinary actions. (Tr. 130:18-131:22). Rather, Respondent terminated Ms. Arce based on the purported severity of her offense, posting offensive comments on the Facebook page of a community member not employed by Respondent.[5] (R. Exh. 2; Tr. 130). In its termination notice, Respondent alleged that Ms. Arce had violated policy found in Section 2.4 "Standards of Conduct" in the AMR Employee Handbook, and Respondent's "Blogging and Social Networking Policy." (R. Exh. 2, pgs. 1-2).

C. UNION FILES GRIEVANCE AND REQUESTS INFORMATION REGARDING ARCE'S TERMINATION (ITEMS 1-5).

By email dated November 18, the Union filed a grievance on behalf of Karis Arce regarding her termination. (Jt. Exh. 4, pg. 1). On the grievance form, the Union stated that the "discipline issued to the Grievant was without Just Cause" and explained that the absence of any "precedent, progressive discipline, or adequate warning of probable consequences for their conduct" was evidence of a lack of just cause. *Id.* at 2. The form further identified that the "applicable contract provisions include, but are not limited to, section(s): Article 5.1 Just Cause, Article 5.2 Procedure." *Id.* No other CBA sections were cited. At the bottom the grievance form, the Union added:

> "Pursuant to the employer's duty to bargain in good faith, the Union hereby requests the following information and/or documents that are necessary and relevant to process this grievance.
>
> - Copy of Discipline given to Grievant,
> - Evidence relied upon during the investigation,
> - Other Acts of Discipline involving social media with regards to Employer,
> - History of previous Disciplines to Grievant prior to current Grievance,
> - All interviews or statements/evidence collected during investigation of person filing complaint and employee." (Jt. Exh. 4, pg. 2).

[5] Ms. Arce's comment, as described by termination notice, included, "You're absolutely disgusting!!! Go vote YES on a diet for yourself and NO on stop stuffing your face!!!!" and "go ahead with your fluffy ass." (R. Exh. 2, pg. 1). The person who was subject to the comments was not employed by Respondent, and had publicly posted her support of Proposition 11, which sought to exclude EMTs from rest break protections found in the state labor code.

About 10 days later, receiving no response from Respondent, the Union, by email from Shop Steward Nick Cheatham, requested the information from Respondent again. (Jt. Exh. 5 pg. 2). That same day, Respondent's Operations Manager Rodney Brouhard responded to Cheatham that he was out of the office, but that he would "scan everything to [Cheatham's] email" when he returned. (Jt. Exh. 5, pg. 1).

At 4:46 PM on November 28, Respondent received a fax from Karis Arce's attorney, Bruce Bernstein, attaching an intake that initiated a claim with the California Division of Labor Standards Enforcement (DLSE). (Jt. Exh. 6). The intake alleged that Respondent discriminated against her because of her disability, and also retaliated against her for requesting family care or medical leave. *Id.*

The following day, November 29, after receiving Brouhard's response to his email, Cheatham requested to meet with Respondent regarding Ms. Arce's grievance, at that time, Respondent did not provide any of the information requested. (Jt. Exh. 7 pg. 2). Accordingly, on December 3, Cheatham again renewed the Union's information request. (Jt. Exh. 7).

D. RESPONDENT REFUSES TO PROVIDE INFORMATION.

On December 4, Respondent flatly refused to provide the information, stating:

> "AMR received notice from a lawyer representing Karis Arce. He filed civil complaints with both state and federal agencies on behalf of Karis regarding her termination and another matter." (Jt. Exh. 7 pg. 2).

Respondent quoted a selection of Section 18.3 of the collective-bargaining agreement:

> "The initiation or filing of a complaint or legal action alleging unlawful discrimination or harassment with a federal, state, or local agency or court shall waive the employee's and/or Union's right to pursue the same matter as a grievance pursuant to this Agreement. Any grievance alleging unlawful discrimination or

> harassment shall be deemed withdrawn at any step of the grievance and arbitration procedure upon the filing of such a complaint or legal action."[6] *Id.*

Without further explanation Respondent asserted that "the grievance has been withdrawn." *Id.* However, Union Representative Casey Vanier disagreed with that assessment and replied to Respondent on December 6 that "the Union has made no mention of withdrawing of [sic] our grievance." (Jt. Exh. 7 pg. 1). Vanier then renewed the Union's request for the information and affirmed that "[r]egardless of the Company's position on the [grievance] meeting, whatever that maybe [sic], we are still entitled to the information." *Id*. In its reply that same day, Respondent explained that "it is very clear that section 18.3 of the CBA applies and thus 'the grievance is deemed withdrawn'…when Ms. Arce filed her DFEH complaint." *Id.* Respondent concluded: "AMR respectfully declines to provide the other requested information because it is no longer relevant to any pending grievance." *Id*.

E. UNION REQUESTS KARIS ARCE'S PERSONNEL FILE (ITEM 6)

Shortly thereafter, still on December 6, Union Representative Vanier, in a separate email, requested a "complete copy of Ms. Karis Arce's personnel file." (Jt. Exh. 8, pg. 1). Enclosed in Vanier's correspondence was a letter signed by Ms. Arce authorizing the Union to obtain a full employee file on her behalf. (Jt. Exh 8, pgs. 1-2). In addition, on December 10, the Union, by Shop Steward Cheatham, requested the "termination notice for the grievant." (Jt. Exh. 9 pg. 4).

F. UNION AND RESPONDENT MEET TO DISCUSS ARCE'S GRIEVANCE.

Despite Respondent's contention that the grievance was withdrawn, the parties proceeded with the Step 1 grievance meeting. On December 14, Cheatham and Vanier met with Brouhard

[6] Respondent notably fails to quote the first sentence of Section 18.3, which identifies the types of grievances waived as those "alleging discrimination or harassment." (Jt. Exhs. 7 pg. 2; 2 pg. 48.)

at Respondent's San Francisco office, where it is undisputed that they discussed M s. Arce's termination and the Union's related grievance. (Tr. 33-34). It is undisputed that Vanier explained to Respondent that the grievance claims Respondent terminated Ms. Arce without just cause, as is stated on the grievance form itself. (Tr. 33-34, 37, 46, 61, 97-98, 102). Brouhard reiterated the Respondent's position that Ms. Arce had waived her grievance because of Section 18.2 and 18.3. (Tr. 34).[7] The Union stated that its position was that Respondent failed to comply with the just cause provisions of the collective-bargaining agreement and that the Union had nothing to do with the complaints Ms. Arce filed with her private attorney. (Tr. 133, 134) . The Union insisted that it still needed the information that it requested earlier and renewed its request. *Id*. At that meeting, Respondent provided the Union with Ms. Arce's termination notice, but nothing else. *Id*.

G. UNION RENEWS REQUESTS FOR INFORMATION. (ITEMS 1-6).

On December 21, Union Representative Vanier asked for an update on the information requests and renewed the Union's requests again, including the request for Ms. Arce's personnel file. In an email to Operations Manager Brouhard, Vanier wrote, "I appreciate your help on these items and hope to receive them both very shortly, as well [sic] look forward to your step 1 response to our meeting." (Jt. Exh. 9, pg. 2) Brouhard responded "I am still working on both questions . . . I will let you know as soon as I get the gears moving." *Id*. Receiving nothing further from Brouhard, on January 4, 2019, Vanier again renewed the Union's requests for information and again asked for Respondent's "step 1 grievance meeting response." (Jt. Exh. 9, pg. 1). Brouhard responded, "I am working on her grievance today and I should have an

[7] As explained further below, Section 18.2 identifies the various grounds of discrimination or harassment covered by the CBA. (Jt. Exh. 2 pg. 48). Respondent's witness Rodney Brouhard stated that Respondent's position was that Ms. Arce was alleging violations of Section 18.2. (Tr. 96:20-25).

answer Monday." (Jt. Exh. 9, pg. 1).

H. RESPONDENT REFUSES TO PROVIDE OUTSTANDING INFORMATION. (ITEMS 2-6).

On January 7, 2019, Brouhard sent the Union a letter stating, "Per section 18.3 of the CBA, Ms. Arce's decision to act civilly withdraws any grievance." (Jt. Exh. 10, pg. 1). It continued, "[t]he union has received a copy of Ms. Arce's termination on December 14, 2018. Ms. Arce is free to request an in-person review of her employee file at AMR San Francisco per section 23.8 of the CBA." (Jt. Exh. 10, pg. 1). Apart from Ms. Arce's personnel file, which the letter implies Ms. Arce must request for herself, Respondent does not address any of the information requested by the Union. Respondent does not state whether it will or will not provide the remaining items of information. Nor does Respondent specifically state reasons for declining to provide the requested items of information. With no further explanation than its unilateral conclusion that Ms. Arce's grievance was withdrawn, Respondent continues to withhold the information.

I. UNION PURSUES ARCE'S TERMINATION GRIEVANCE.

On January 8, 2019, Vanier responded to Brouhard that the Union would "reach out for scheduling of a step 2 meeting in the very near future." He then renewed the Union's information requests:

> "We are still waiting for all the information requested at the bottom of the grievance form as well as my separate request sent with a release from Ms. Arce to obtain her personnel file, please update me on both items? It has been more than sufficient time to provide these items, please do so as soon as possible to avoid us having to use other avenues to pursue it." (Jt. Exh. 11, pg. 1).

Still receiving no information from Respondent, on January 15, 2019, the Union filed the charge

at issue here.[8] (GC Exh. 1(a), pg. 1; 1(f), pg. 1). On January 24, 2019, Shop Steward Cheatham renewed the Union's information request, which Respondent refused, citing again to CBA Section 18.3 and asserting that the grievance was withdrawn. (Jt. Exh. 13). In his response to Cheatham, Brouhard states, "Since there will be no grievance in this matter, there is no further information to share with the union." *Id*.

J. THE COLLECTIVE-BARGAINING AGREEMENT

Sections 5.1 and 5.2 of the CBA, which the Union cited in Arce's termination grievance, are found under Article 5, "Corrective Action and Discharge." Section 5.1 states: "The Employer shall have the right to issue corrective action and discharge employees for just cause." (Jt. Exh. 2, pg. 5). Section 5.2, entitled "Procedure," states the following:

> "The Employer and the Union recognize the intent of corrective action is to remedy performance problems and modify behavior. While the Employer will attempt to accomplish those objectives through training and progressive corrective action, Employer reserves the right to issue corrective action, up to and including discharge, based on just cause and the circumstances of each case. Serious or repeated offenses may call for corrective action commensurate with the offense or totality of the circumstances and not necessarily based upon the premise of progressive corrective action." (Jt. Exh. 2, pgs. 5-6).

No other provisions in the CBA cover just cause[9] and progressive corrective action. (Jt. Exhs. 2 R. Exh. 1). Sections 18.2 and 18.3 of the CBA are found under Article 18, "No Discrimination/Harassment." (Jt. Exh. 2, pg. 48). Section 18.2 states that the parties agree:

> "neither party shall discriminate, harass, or retaliate against any person because of race, color, sex, religion, age, disability, national origin, citizenship, veteran status, sexual orientation, or any other status protected by federal, state or local law." (Jt. Exh. 2, pgs. 48-49).

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[8] Jt. Exhs. 14 and 15 pertain to charge 20-CA-234863, not charge 20-CA-234200 at issue here pertaining to information requests. Therefore, those joint exhibits are of little, if any, relevance to the information requests at issue here.

[9] Sections 11.5 (loss of seniority) and 26.1 (National Disasters) reference just cause but are limited to their respective contexts (seniority and national disasters).

Section 18.3, entitled "Grievance/Arbitration Election and Waiver," begins with the following:

> "Grievances alleging unlawful discrimination or harassment in violation of this Agreement may be pursued and resolved through the grievance and arbitration procedure contained in this Agreement, provided that all requirements for the filing and maintenance of a grievance through arbitration are satisfied and that the employee and/or Union have not initiated or filed a complaint or legal action based on the same event(s) with a federal, state or local agency or court. The initiation or filing of a complaint or legal action alleging unlawful discrimination or harassment with a federal, state, or local agency or court shall waive the employee's and/or Union's right to pursue the same matter as a grievance pursuant to this Agreement. Any grievance alleging unlawful discrimination or harassment shall be deemed withdrawn at any step of the grievance and arbitration procedure upon the filing of such a complaint or legal action." (Jt. Exh. 2, pgs. 49).

Although the Union cited CBA Sections 5.1 and 5.2 in its grievance over Ms. Arce's termination, and Respondent cited CBA Sections 18.2 and 18.3 in supporting its assertion that Ms. Arce's grievance was withdrawn, the CBA was not in effect at the time the parties cited it. The parties' agreement extending the terms of the CBA beyond the June 30 expiration date expired on August 31. The CBA was not in effect when Respondent subsequently terminated Ms. Arce on November 6, when the Union filed its grievance and information request on November 18, and when Respondent repeatedly refused to provide the information requested by the Union. The parties did not reach a new contract until March 25, 2019.[10]

III. ARGUMENT

A. CREDIBILITY

Nearly all of the facts in this case are undisputed. Accordingly, the parties presented at trial numerous factual stipulations and joint exhibits, which are sufficient in themselves to

[10] The parties' new contract, effective by its terms from September 1, 2018 to August 31, 2022, applies retroactively to the time of Ms. Arce's termination, the Union's grievance and information requests, and Respondent's refusals to provide the information. Thus, if the parties' contract were controlling, it would be the terms of the new contract, not the terms of the CBA cited by Respondent, that would control.

establish Respondent's violation. Specifically, it is undisputed that the Union requested information related to the termination of Karis Arce, a bargaining-unit employee, that Respondent furnished only the termination notice and did not furnish it until December 14, and that Respondent has refused to furnish the remaining information requested. Even the parties' discussion at the Step 1 grievance meeting on December 14 is largely undisputed. (Tr. 97).[11] Thus, the questions before the ALJ are primarily questions of law and not of fact.

B. RESPONDENT IS OBLIGATED TO FURNISH INFORMATION THE UNION REQUESTS THAT IS RELEVANT FOR THE UNION TO FULFILL ITS REPRESENTATIVE DUTIES

It is a matter of well-established law that an employer has a statutory obligation to provide, on request, to a union representing the employer's employees, information that is relevant and necessary to the union's performance of its duties as the collective-bargaining representative, including the duties of administering a collective-bargaining agreement and processing grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), *enfd.* 39 F.3d 1410 (9th Cir. 1994). Relevant information includes information necessary to decide whether to pursue contractual grievances on behalf of unit employees (*Acme Industrial*, 385 U.S. at 435-439), to monitor compliance with the collective-bargaining agreement (*Washington Beef, Inc.*, 328 NLRB 612, 617-618 (1999)), and to enforce provisions of the collective-bargaining agreement (*In re Amersig Graphics Inc.*, 334 NLRB 880, 885 (2001)). An actual pending grievance is not necessary to establish that the information is relevant to a grievance or a potential grievance; nor is it necessary for the

[11] Respondent's witness Operations Manager Rodney Brouhard stated in his testimony, "I was here for Mr. Vanier's testimony, and I think I remember it almost identically." (Tr. 97).

information requested to clearly dispose of a grievance. *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381(6th Cir. 1976). The Board does not consider the merits of a potential grievance or arbitration in evaluating a union's request for information. *Endo Painting Serv., Inc.*, 360 NLRB No. 61 (2014) (employer required to provide information regardless of whether the pending grievance was permitted under the parties' agreement). Moreover, requested information that pertains to bargaining-unit employees and that goes to the core of the employer-employee relationship is presumptively relevant to the union's performance of its statutory duties. *Stahl Specialty Co.*, 175 NLRB 129, 130 (1969); *Kansas Education Assn.*, 275 NLRB 638, 640 (1985). *Cf. Coca Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

The union is also entitled to information pertaining to non-unit employees when the union demonstrates the relevance of the non-unit information to its representation of unit employees or when such relevance should be apparent to the employer. *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018-1019 (1979), *enfd. in relevant part* 615 F.2d 1100 (8th Cir. 1980); *Cf. Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). Furthermore, the burden to prove relevance is not severe. *Acme Industrial*, 385 U.S. at 437. The relevance standard is a liberal, "discovery-type standard," and the union can meet its burden by showing a *probability* that the desired information is relevant and *would be* useful to the union to carry out its statutory duties and responsibilities. *Id.*; *Quality Building Contractors, Inc.*, 342 NLRB 429 (2004); *Worcester Polytechnic Institute*, 213 NLRB 306 (1974) (affirming finding of violation where information requested by the union was at least potentially relevant to its statutory duties).

1. Union Requested Information that is Presumptively Relevant.

The information sought by the Union in Items 1 to 6 is presumptively relevant to the

Union's duties as the collective-bargaining representative of Respondent's employees. Simply stated, the Board treats information that pertains directly to bargaining-unit employees and that goes to the core of the employer-employee relationship as presumptively relevant. *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993) (noting that information at the core of the employer-employee relationship is presumptively relevant and needs to be provided). In particular, it is well established that information pertaining to the termination of bargaining-unit employees, as is the case here, is presumptively relevant. *See Ryder Distribution Resources, Inc.*, 302 NLRB 76, 91 (1991) (finding that information concerning the discharge or termination of a bargaining unit employee is presumptively relevant.); *United Electrical Contractors Assn.*, 347 NLRB 1, 15 (2006), citing *Maple View Manor*, 320 NLRB 1149, 1150-1151(1996); and *Yeshiva University*, 315 NLRB 1245, 1248 (1994) (information sought by a union relating to the union's investigation of a potential grievance, or to the policing and/or proper application of the terms of a collective-bargaining agreement, relates to employees in the bargaining unit and is presumptively relevant).

In the Union's information request at issue here, Items 1, 2, 4, 5, and 6 request a copy of the discipline given to Ms. Arce, the evidence Respondent relied upon during the investigation, the history of previous discipline issued to Ms. Arce, all statements and evidence collected during the investigation of Ms. Arce and the person filing the complaint, and Ms. Arce's personnel file. Thus, in addition to directly involving a bargaining-unit employee, Karis Arce, each item is also clearly related to events leading to and surrounding her termination, which is an event at the core of the employer-employee relationship. Because the information requested in Items 1, 2, 4, 5, and 6 relates to bargaining-unit employee Karis Arce and her termination, it is presumptively relevant to the Union's performance of its statutory duties.

Item 3, which requests other disciplines involving social media issued by Respondent, may potentially encompass information concerning non-bargaining-unit employees, but even here, the relevance to Ms. Arce's termination is clear. The Union repeatedly stated in its grievance, emails and meeting with Respondent that it is challenging whether Respondent had just cause to terminate Ms. Arce. The Union explained that the lack of "precedence" and the "severity" of the discipline are evidence that Respondent acted without just cause. Other disciplinary actions pertaining to social media issued by Respondent to other employees are necessary for the Union to determine whether there was, indeed, a lack of precedence for such discipline and or whether the severity of the discipline, termination, was out of the ordinary.

The Union has consistently maintained that the information is relevant to its duties as the collective-bargaining representative of Respondent's employees. For example, after the first time Respondent claimed the grievance was withdrawn and the information no longer relevant, Union Representative Vanier responded, "[r]egardless of the Company's position on the [grievance] meeting, whatever that maybe [sic], we are still entitled to the information." (Jt. Exh. 7, pg. 1). Whether or not CBA Section 18.3 would affect the withdrawal of Ms. Arce's grievance by operation of the contract, the information related to Ms. Arce and her termination is still presumptively relevant to the Union.

2. Union Requested Information Relevant to the Terms of Employment Stated in Sections 5.1 and 5.2 of the CBA.

The Union has the right to information necessary to police and enforce provisions of its collective-bargaining agreement, in this case, Sections 5.1 and 5.2 of the CBA. Although the CBA was expired at the time of Karis Arce's termination and the Union's related information request, the "just cause" provisions of Sections 5.1 and 5.2 survived the expiration of the CBA and remained in place as terms and conditions of employment of the bargaining-unit employees.

See e.g. Litton Financial Printing Division v. NLRB, 501 U.S. 190, 198 (1991) (holding that, with some limited exceptions, in the post-contract expiration context, the status quo consists of the terms and conditions of employment existing on the expiration date of the parties' collective-bargaining agreement until the parties bargain to agreement or impasse on new terms and conditions); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988) (same); *E.I. Du Pont De Nemours and Co.*, 364 NLRB No. 113 (2016) (same). The Union clearly demonstrated the information's relevance to protecting "just cause" as a term of employment, stating specifically in its grievance that it believed that the "discipline [Respondent] issued to the Grievant was without Just Cause." (Jt. Exh. 4, pg. 2).[12] The grievance further explained that the absence of "precedent, progressive discipline, or adequate warning of probable consequences for their conduct" was evidence of a lack of just cause. (Jt. Exh. 4, pg. 2). Additionally, the Union expressly identified the applicable CBA provisions as Sections 5.1 and 5.2. *Id*.

Here, the information requested is clearly relevant to enforcing the terms of the just cause provision in Section 5.1 and the corrective action procedure in Section 5.2. Item 1 seeks the disciplinary action against Ms. Arce, without which the Union could not identify Respondent's official reason for terminating Ms. Arce and thus could not evaluate whether there was just cause for the termination. Items 2 and 5 seek the evidence relied on and collected by Respondent in the investigation of Ms. Arce, which is also necessary to determine whether the investigation into Ms. Arce and her termination were based on just cause (Section 5.1) and whether her termination would fall under progressive discipline or under "serious or repeated offenses" in Section 5.2. Item 3 seeks other discipline involving social media issued by Respondent. The Union requires

[12] Respondent's witness Rodney Brouhard admitted to as much in his testimony, stating, "you know, they were telling me that this was just cause." (Tr. 102:5-6).

Item 3 to determine whether Respondent had previously enforced the social networking policies that Respondent alleges Ms. Arce violated in a similar manner, because information showing that Respondent previously enforced the social networking policy with discipline less than termination would indicate that Respondent lacked just cause to terminate Ms. Arce. Item 4 and Item 6, which respectively seek Ms. Arce's disciplinary history and her personnel file, are relevant and necessary for the Union to intelligently determine whether her termination would fall within the scope of "repeated offenses" that may warrant discipline outside of the progressive corrective action described in Section 5.2.

Aside from the Union's grievance, the relevance of each item to the terms of employment set forth in the expired CBA is clearly apparent and should have been apparent to Respondent. Respondent's witness Operations Manager Brouhard admitted that Karis Arce was not terminated using progressive discipline and that she had never received a prior written discipline. (Tr. 130-132). Therefore, it is clear, not only from the CBA provisions cited on the Union's grievance form and the Union's repeated explanation that its grievance concerned just cause, but also from the circumstances of Ms. Arce's termination outside of the progressive discipline structure, that terms and conditions of employment and provisions of the CBA other than Sections 18.2 and 18.3 were implicated by her termination.[13]

[13] During the hearing Respondent spent significant time trying to establish that the Union had not disavowed Section 18.2 or 18.3 when it sought to enforce and police Section 5.1 and 5.2 of the CBA (Tr. 40-44, 46-49, 57-63.) Respondent argues that Section 5.2 can theoretically encompass almost any termination including allegations under Section 18.2 and 18.3, and therefore, because Section 5.2 might include section 18.2 violations it triggers section 18.3. (Tr. 102:5-12). First, there is no evidence that Section 18.3 covers non-discrimination related grievances, such as just cause. Second, even if just cause included potential 18.2 violation, there are no other provision pertaining to progressive corrective action besides Section 5.2. Therefore, if the Union sought to enforce the progressive corrective action policy, Section 5.2 was the only avenue. Third, Respondent admits that the Union never sought to enforce Section 18.2 or 18.3 through its grievance, that the grievance was never amended to include Section 18.2 or 18.3, that the Union never filed any additional grievance pertaining to Sections 18.2 or 18.3, and that the Union has always maintained its position that the grievance at issue was focused on Section 5.1 and 5.2. (Tr. 111:21-112:4).

C. RESPONDENT IS OBLIGATED TO TIMELY FURNISH INFORMATION THAT IS RELEVANT FOR THE UNION TO FULFILL ITS STATUTORY DUTIES

The duty to furnish requested information requires "a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989), *enfd.* 943 F.2d 741 (7th Cir. 1991). The information must be timely provided absent a valid defense. 296 NLRB at 1245 fn. 1. "In evaluating the promptness of the employer's response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information." *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), *enfd. in relevant part* 394 F.3d 233 (4th Cir. 2005) ; see *Valley Inventory Service*, 295 NLRB 1163 (1989) (4 month delay unlawful); *Bundy Corp.*, 292 NLRB 671 (1989) (2.5-month delay unlawful); *Woodland Clinic*, 331 NLRB 735, 736 (2000) (7-week delay unlawful). "[A]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (citations omitted), *affd.* 356 NLRB 152 (2010), *enfd.* 672 F.3d 1085 (D.C. Cir. 2012).

It is undisputed that Respondent here provided only one of the six items of requested information nearly a month after the Union's request on November 18. The information Respondent delayed in furnishing was the termination notice that Respondent had provided Ms. Arce on November 6. It took Respondent nearly a month to provide a document that Respondent

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Even if the information encompassed by enforcing sections 5.1 and 5.2 can be used for other allegations, as Respondent will likely argue, the Board has held that if, as here, "information is relevant to collective bargaining, it loses neither its relevance nor its availability merely because a union additionally might or intends to use [the information] to attempt to enforce statutory and contractual rights before an arbitrator, the Board, or a court." *Westinghouse Electric Corp.*, 239 NLRB 106, 111-112 (1978).

had readily available since November 6.[14] Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5). *Pennco, Inc.*, 212 NLRB 677, 678 (1974) (finding 10-day delay unlawful). Because Ms. Arce's termination notice was a simple document, readily available to Respondent and easy to transmit, and Respondent has offered no evidence justifying its delay, Respondent's delay in providing the termination notice to the Union was unreasonable and violated Section 8(a)(5).

None of the information sought by the Union was complex, and there is no evidence that Respondent, who operates offices that cover nearly 2,200 bargaining unit employees, was incapable of promptly retrieving the information. Respondent has presented no evidence that the requests were complex, voluminous, or burdensome to provide. To the contrary, Operations Manager Brouhard stated in his email messages to the Union that the information just needed to be scanned and emailed, implying that the information was readily available.[15] (Jt. Exh. 5, pg. 3). Accordingly, Respondent was obligated to provide the information expeditiously, and its failure to do so violated Section 8(a)(5) of the Act.

D. RESPONDENT'S DEFENSES HAVE NO MERIT

Respondent's defenses center on its interpretation of CBA Section 18.3, which: 1) is not a

[14] Indeed, Respondent's Witness Rod Brouhard admits that it was "surprised" that the Union had not receive the termination notice. (Tr. 97:21-24). While Respondent appears to suggest that it had no time to provide the information to the Union, it is unclear how it would be difficult for Respondent to provide something it already provided to Ms. Arce's attorney. Rather, the record makes clear that Respondent's refusal to furnish information was not as a result of any difficulty, personal or otherwise, rather Respondent's steadfast and mistaken understanding of Section 18.3 of the CBA. As Respondent's witness phrases it, "it was the lawyers." (Tr. 117).

[15] Additionally, Respondent Witness Brouhard's personal matters involving the death of his adopted and biological mothers do not excuse the delay of information that was readily available. (Jt. Exh. 5, pg. 1; Tr. 97:21-24). First, despite the relative personal details Brouhard was willing to provide in communications with the Union (Jt. Exh. 5 "bad respiratory infection"; Jt. Exh. 9, pg. 1 "dad fell."), Brouhard mentions the deaths of his mothers for the first time during hearing. Respondent's only defense has consistently been that it has no duty to provide the information, which, as argued herein, has no merit.

clear and unmistakable waiver of the Union's statutory right to information regarding a bargaining-unit employee; 2) does not plainly apply to Karis Arce's termination grievance, since the grievance does not allege discrimination or harassment; and, in any event, 3) was an unenforceable contract provision at the time Respondent invoked it to justify its refusal to provide information, as the CBA was then expired. [16]

1. Section 18. 3 is Not a Clear and Unmistakable Waiver of the Union's Right to Information

The duty to provide information, which is encompassed by the obligation to bargain in good faith, is a statutory duty, not a contractual duty. *General Dynamics Corp.*, 268 NLRB 1432, 1438 (1984). To prove the waiver of a statutory right, the respondent bears the heavy burden of showing that the waiver was "clear and unmistakable." *United Technologies Corp.*, 274 NLRB 504, 505 (1985); *American Broadcasting Co.*, 290 NLRB 86, 88 (1988); *Tritac Corp.*, 286 NLRB 522, 529 (1987), citing *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1317-1318 (9th Cir. 1979), enfg. 237 NLRB 747 (1978). Given the gravity of waiving a statutory right, the respondent must demonstrate "a conscious relinquishment by the Union, clearly intended and expressed to give up the right[.]" *American Tel. & Telegraph Co.*, 250 NLRB 47, 55 (1980) (quoting *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1318 (1979)) (union did not waive statutory right to photocopies of documents relevant to grievance processing despite discussing subject with employer during negotiations and agreeing to a zipper clause), enfd. sub nom. *Communication Workers of America AFL-CIO, Local 1051 v. NLRB*, 644

[16] It is undisputed that despite the expiration of the CBA, Respondent and Union mutually agreed to continue processing grievances, short of arbitration – Respondent accepted the Union's grievance, scheduled dates for a grievance meeting, met on Step 1 of the grievance and provided a response to the Step 1 grievance meeting. (Jt. Exhs 5, 7 pg. 2; Tr. 83:16-20). Indeed, as late as January 4, 2019, Operations Manager Brouhard refers to Ms. Arce's "grievance." (Jt. Exh. 9 pg. 1).

F.2d 923 (1st Cir. 1981). To establish a waiver of a statutory right, "either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter." *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999). *See also United-Carr Tennessee*, 202 NLRB 729 (1972) (finding a violation where respondent's interpretation of a waiver to information was not clear and unequivocal); *Worcester Polytechnic Institute*, 213 NRLB 306 (1974) (same). Thus, for Respondent's argument to have any traction at all, the language of the CBA would have to specifically waive the Union's right to information or Respondent would have to present evidence sufficient to establish that the Union's waiver of its statutory right to information was fully discussed, explored and consciously agreed upon at the bargaining table. Here, neither the language of the CBA nor Respondent's evidence meet that burden.

Respondent has not presented any evidence, much less any convincing evidence, supporting that the Union waived its statutory right to information.[17] The parties' collective-bargaining agreements contain no language stating that the Union, when it agreed to Section 18.3, waived its right to request presumptively relevant information or information relevant to policing and enforcing the terms and conditions of employment set forth in the collective-bargaining agreements. Rather, Respondent asserts that the language of Section 18.3, based on Respondent's interpretation of it, operates to waive the Union's right to information, even though no waiver to information is expressly stated.[18] Respondent's assertion fails, because "the

[17] During the hearing, Respondent's witness testified to the interpretation of Section 18.3, however it is clear from his testimony that his interpretation pertained to a different collective-bargaining agreement related to a different union, and is therefore irrelevant. (Tr. 104).

[18] During the hearing, Respondent referred to a prior grievance pertaining to the termination of Robert Masters, which Respondent elicited as an example of the Union waiving its right to information under

contract language relied upon must be specific." *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998). At best, Section 18.3 is ambiguous whether it encompasses only grievances alleging discrimination and harassment, or, as Respondent asserts, encompasses all employment action that is related to the allegations of discrimination and harassment.[19] This uncertainty falls well below Respondent's burden to show that the waiver of the Union's right to information was clear and unmistakable.

Moreover, the Board has consistently held that an employer cannot avoid its obligation to furnish relevant information simply by its own contractual interpretation of a waiver. *See United-Carr Tennessee*, 202 NLRB 729 (1972); *Worcester Polytechnic Institute*, 213 NRLB 306 (1974); *Endo Painting*, 360 NLRB (2014) (finding that "whether or not the parties' agreement permitted the filing of a class grievance, the respondent acted unlawfully by failing and refusing to provide the requested information" necessary to determine whether to file or process grievances on behalf of unit employees.)

It is undisputed that the Union has maintained its position that Respondent's interpretation of Section 18.3 is not correct. The Union never withdrew Karis Arce's grievance,

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CBA Section 18.3. (Tr. 41, 42). However, Respondent failed to produce any evidence showing that the Masters grievance claimed violations of the "just cause" provisions of Section 5.1 and 5.2, like Karis Arce's grievance, or whether the Masters grievance alleged discrimination and harassment and thereby implicated Section 18.3. Moreover, Respondent's evidence fails to indicate whether the Union conceded that, by Section 18.3, it waived its right to information about any bargaining-unit employee's termination or, alternatively, whether the Union simply decided not to pursue the information in Masters' case.

[19] The contract language is clear that Section 18.3 applies only to grievances alleging discrimination or harassment. For one, the context of Section 18.3 clearly points to the limits of the waiver. Article 18 is entitled "No Discrimination/Harassment;" Section 18.2 "Non-Discrimination/Harassment/Retaliation" directly precedes the alleged waiver. The very beginning of Section 18.3 is even more instructive. The very first words of Section 18.3 -- "Grievances alleging discrimination or harassment in violation of this Agreement" -- clearly identify that the section applies only to grievances alleging violations of section 18.2. This is emphasized through repetition in the third sentence, which also expressly identifies that the waiver applies to "[a]ny grievance alleging unlawful discrimination or harassment."

and it consistently asserted that the grievance was not withdrawn by operation of Section 18.3.[20] (Jt. Exh. 4, pg. 2; Tr. 32:25 to 34:12; 102:5-6). There is no evidence, that by Section 18.3, the Union agreed to waive its rights to grieve other violations of the collective-bargaining agreement, here Section 5.1 and 5.2 pertaining to just cause, or for that matter waive its statutory right to presumptively relevant information. Neither the plain language of the CBA, nor the other facts in evidence, nor Board law support such a sweeping conclusion.

2. Assuming, Arguendo, that Section 18.3 Constituted a Waiver, It Did Not Survive the Expiration of the CBA.

Even assuming, arguendo, that Section 18.3 somehow constituted a waiver of the Union's statutory right to information, which it did not, that waiver was only effective for the life of the contract. Contractual waivers of statutory rights do not survive the expiration of a collective-bargaining agreement unless the contract language specifically states the waiver survives. *See, e.g., The American National Red Cross*, 364 NLRB No. 98 (2016) (holding that a union's waiver in an expired contract is not clear and unmistakable and does not survive contract-expiration if the waiver's language makes no reference to the period beyond the contract's expiration). Thus, even if Section 18.3 constituted a waiver of the Union's statutory right to information, the waiver, which did not express any intent to extend the waiver beyond the expiration of the CBA, did not survive the expiration of the contract on August 31.[21]

3. Respondent's Other Defenses Fail

[20] Indeed, the Union has consistently maintained that it was seeking to enforce "just cause" and "progressive corrective action" provisions, which could not have been grieved under any other provision of the CBA. (Jt. Exh. 2, R. Exh. 1).

[21] Respondent appears to suggest that if the collective-bargaining agreement had expired, there would be no right to arbitrate, rendering the information requests irrelevant. The Board has consistently rejected similar arbitrability arguments. *See United-Carr Tennessee, supra*, 202 NLRB 729; *Worcester Polytechnic Institute, supra*, 213 NRLB 306 .

To the extent Respondent suggests that it is not obligated to provide the requested information to the Union because the Union did not avail itself of Section 23.8 of the CBA to access Ms. Arce's personnel file or because it failed to get the information from Ms. Arce or her attorney, it is well-established Board law that the respondent's duty to furnish information is not excused by an alternative means of obtaining the information. *See River Oak Center for Children, Inc.*, 345 NLRB 1335, 1335 fn. 6 (2005), enfd. 273 Fed. Appx. 677 (9th Cir. 2008) (alternative means of retrieving requested information does not excuse respondent's noncompliance); *Kroger Co.*, 226 NLRB 512, 513 (1970) (union not required to resort to burdensome alternative methods of acquiring information); *Hospitality Care Center*, 307 NLRB 1131, 1135 (1992) (employer may not refuse to provide requested relevant information on the grounds that the union may have alternative means to obtain it, even if through a contractual right), *enf. denied on other grounds* 35 F.3d 828 (3d Cir. 1994).

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IV. CONCLUSION

The evidence and law support that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to furnish, and failing to timely furnish, the Union with the information it requested. The evidence demonstrates that the requested information is relevant to the Union's duties as the exclusive collective-bargaining representative of Respondent's employees, and Respondent has offered nothing in defense of its refusal to provide the information other than its unilateral interpretation of a single, ambiguous provision of an expired, unenforceable contract, a defense that fails for the reasons set forth above. Accordingly, Counsel for the General Counsel respectfully requests that the ALJ find that Respondent violated the Act as alleged and issue an order requiring Respondent to provide the Union with the requested information and granting all other relief appropriate to remedy Respondent's unfair labor practices.

Dated: July 23, 2019

Respectfully submitted,

/s/ Min-Kuk Song
Min-Kuk Song
Counsel for General Counsel

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

AMERICAN MEDICAL RESPONSE

and **Case 20-CA-234200**

UNITED EMS WORKERS, AFSCME LOCAL 4911

AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 23, 2019, I served the above-entitled document(s) by **electronic mail,** as noted below, upon the following persons, addressed to them at the following addresses:

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