UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

TDY INDUSTRIES, LLC d/b/a ATI SPECIALTY ALLOYS AND COMPONENTS, MILLERSBURG OPERATIONS	)	**Cases: 19-CA-227649 and 19-CA-227650**
Respondent	)	
and	)	
UNITED STEELWORKERS OF AMERICA, LOCAL 6163	)	
Charging Party	)	

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Ursula A. Kienbaum
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
222 SW Columbia Street, Suite 1500
Portland, OR 97201
Phone: 503-552-2140
Email: ursula.kienbaum@ogletree.com

Jean C. Kosela
Steuart Tower
One Market Plaza, Suite 1300
San Francisco, CA 94105
Phone: 415-310-3942
Email: jean.kosela@ogletree.com

Attorneys for Respondent ATI Specialty Alloys and Components

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

I. INTRODUCTION

Respondent ATI Specialty Alloys and Components ("ATI," the "Company," or "Respondent"), pursuant to Rule 102.46 of the National Labor Relations Board's ("NLRB's" or "Board's") rules, respectfully submits this brief in support of its contemporaneously filed Exceptions to the Decision of Administrative Law Judge ("ALJ") Eleanor Laws, dated September 25, 2019 ("ALJD").[1] The ALJ erred in concluding that Respondent engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act" or "NLRA") by (1) failing to provide information regarding the last 30 employees to pass away; (2) failing to provide information about death benefits in response to the Union's May 25, 2018 request once the confusion over the Union's request subsided *at the hearing*; and (3) failing to respond fully to the Union's June 12 information request relating to the qualifications of employee Marthaller for more than 3 months. (ALJD 8:5-11; ALJD 9:15-17.)

The Union's request regarding the last 30 employees to pass away was not alleged in the Complaint; it was not litigated at the hearing; and it was not addressed in either of the parties' post-hearing briefs to the ALJ. Moreover, the record evidence—including the testimony of the Union's grievance chairperson—establishes that the Union's inquiry about the last 30 employees to pass away was part of a claimed effort to *clarify* the Union's request for information about unspecified "death benefits." The ALJ correctly found (1) the Union failed to provide a meaningful response to the Company's prompt request for clarification about which "death benefits" the Union intended to reference; and (2) the confusion caused by the Union's failure in this regard did not dissipate until the day of the hearing. Despite finding the Union bore the sole responsibility for the Company's inability to provide information about "death benefits" up until

[1] The Administrative Law Judge's decision is cited as "ALJD" followed by the appropriate page and line numbers.

the day of the hearing, the ALJ held the Company liable for a violation of the Act based on the Union's request about "death benefits." The ALJ's findings and conclusions are unsupported by the facts of this case and relevant NLRB precedent.

Relating to the Union's request for information about the qualifications of an outside hire for an "A Machinist" position, the ALJ summarily concluded the requested information must be produced and had been "unnecessarily" delayed. The ALJ failed to address the Company's contentions that the information (1) was not actually relevant to the Union's duties as the collective bargaining representative; (2) the Union's requests were overbroad; and (3) the parties ultimately agreed to narrow the scope of the information produced—which the Company consistently maintained was not relevant in the first instance. The ALJ's determination that the Company violated the Act is inconsistent with longstanding Board law and should be reversed.

The ALJ's other findings are also unsupported by the record, contrary to law, and should be reversed. The Complaint should be dismissed in its entirety.

II. STATEMENT OF THE CASE

United Steelworkers of America, Local 6163 (the "Union" or "Charging Party") filed the underlying unfair labor practice charges against ATI on September 20, 2018. (ALJD 1.) The General Counsel issued a Consolidated Complaint ("Complaint") and Notice of Hearing on January 31, 2019. (ALJD 1; GC Ex. 1(e).) The Complaint alleges Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (the "Act") by its failure and refusal to furnish and/or unreasonable delay in furnishing information requested by the Union on the following dates: May 25, 2018 ("information about the records of death benefits paid out over the last ten years"); June 12, 2018 ("information about the 'A' Machinist qualifications of its employee Michael Marthaller"); and September 13, 2018 ("information about the 'A' Machinist qualifications of its employee Jessie Sanders"). (GC Ex. 1(e) pp. 3-4.) Respondent

filed its Answer and Affirmative Defenses to the Complaint on February 14, 2019. (GC Ex. 1(h).)

A hearing was held before Administrative Law Judge Eleanor Laws (the "ALJ") on June 3, 2019.[2] (ALJD 1.) At the hearing, the General Counsel withdrew those allegations of the Complaint relating to an alleged failure to provide information regarding the qualifications of employee Sanders. (Tr. 9:19 – 10:12.)

On September 25, 2019, the ALJ issued her decision finding that ATI violated the Act as alleged. Specifically, the ALJ concluded that ATI violated Sections 8(a)(1) and (5) of the Act by (1) failing to respond to a "follow-up request for the names of the last 30 employees to pass away" that was first made by the Union on September 5, 2018; (2) failing to provide information about "the death benefit" in response to the Union's May 25, 2018 request "once the confusion subsided" over said request—which the ALJ found did not occur until the hearing; and (3) failing "to respond fully to the Union's June 12 information request" regarding employee Marthaller's qualifications "for more than 3 months." (ALJD 8:5-11; ALJD 9:15-17.) The ALJ's decision should be overturned and the Complaint dismissed.

III. QUESTIONS INVOLVED

1. Did the ALJ err in finding that ATI violated Sections 8(a)(1) and (5) of the Act by failing to respond to a "follow-up request for the names of the last 30 employees to pass away?" (Exceptions 1, 2, 13, 16, 17.)
2. Did the ALJ err in finding that ATI violated Sections 8(a)(1) and (5) of the Act by failing to provide information about "the death benefit" in response to the Union's

[2] The hearing transcript is cited as "Tr." followed by the appropriate page number. General Counsel exhibits are referenced as "GC Ex. __." Respondent exhibits are referenced as "R. Ex. __." The parties' post-hearing briefs to the ALJ are cited as "Respondent Brief" and "GC Brief," respectively, followed by the appropriate page number(s).

May 25, 2018 request "once the confusion subsided" over the Union's request at the hearing? (Exceptions 3, 13, 16, 17.)

3. Did the ALJ err in finding that ATI violated Sections 8(a)(1) and (5) of the Act by failing "to respond fully to the Union's June 12 information request" regarding employee Marthaller's qualifications "for more than 3 months?" (Exceptions 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17.)

IV. STATEMENT OF FACTS

A. The Parties and the Collective Bargaining Agreement

ATI manufactures specialty alloys and components. (ALJD 2:5-6.) The Company operates 39 facilities in the United States, including a facility located in Millersburg, Oregon. (ALJD 2:18-20.) Ursula Kienbaum is an outside attorney who was retained by the Company around March 2018 to assist with labor relations matters, including communications with the Union relating to grievances. (Tr. 126:24 – 127:7.)

The Union is the collective bargaining representative of a unit of about 500 employees at the Millersburg facility. (ALJD 2:28-35; GC Ex. 6.) The current collective bargaining agreement between the Company and the Union (the "CBA") has an effective date of June 1, 2018. (ALJD 2:28-29; GC Ex. 6.)

B. The Union Requested Information About Unspecified "Death Benefits" in May 2018.

Pursuant to the CBA, employees are eligible for various benefits including a number of benefits that "survive the employee," as well as "a pre-retirement death benefit, which provides for a lump sum payment to a surviving spouse in the event a covered employee or former employee passes away." (ALJD 3:3-14.)

On May 25, 2018[3], the bargaining unit employee who serves as the Union's grievance chairperson (Aaron Watts) emailed the Company's process leader of benefits (Hilary Stephens) requesting to know whether there was "an easy way to get records on death benefits paid out over the last 10 years." (ALJD 3:18-24.) Stephens promptly responded that she would look into Watts's request; however, shortly thereafter Stephens went on an extended leave of absence to care for her terminally ill spouse. (ALJD 3:26-41.)

On July 12, Watts contacted the Company's director of benefits (Terrence Brown) regarding some outstanding issues Watts had been working on with Stephens, including information about "unpaid death benefits." (ALJD 4:1-5.) As the Company's corporate director of benefits, Brown is "responsible for the strategic design and plan management of all the different benefit and retirement plans" offered to ATI's workforce in the U.S., which comprises approximately 7,000 employees (Tr. 112:22 – 113:6.) Brown was aware that unit employees at Millersburg are potentially eligible for *at least nine different benefits that provide some sort of benefit or payout upon death, with each benefit being run by a different administrator.* (Tr. 116:8-21, 118:2-6.) On July 17, Brown explicitly asked Watts to clarify the "death benefit" about which he wanted information. (ALJD 4:22-25.) In response, Watts only reiterated the Union was "concerned eligible beneficiaries may not be getting their death benefits," and failed to provide the requested clarification regarding the term "death benefits." (ALJD 4:25-26.)

On cross examination, Watts admitted that although he was aware of multiple benefits that are available upon the death of an employee or retiree—including a medical insurance benefit for the spouse of a deceased retiree, a voluntary life insurance benefit, dependent life insurance, a long-term disability benefit, and an accidental death and dismemberment insurance

[3] All dates herein refer to 2018 unless otherwise specified.

policy—Watts never told Brown that the subject of the Union's information request was a certain death benefit that accrues under the pension plan. (Tr. 46:8 – 50:17; Tr. 69:21 – 70:15; *see also* Tr. 18:11 – 19:8; GC Ex. 7.)

On direct examination, when the General Counsel asked Eddings if he was "aware of whether Respondent provides anything you would call a death benefit to unit employees," Eddings promptly responded, "Yes. There's a life insurance benefit that's in the contract." (Tr. 104:16-20.) Eddings added, "And then there's an additional – I guess you'd call it additional death benefit," in reference to the pension plan. (Tr. 104:20 – 105:15.)On August 15, Watts emailed Brown to check the status of his request for information about unspecified "death benefits." (ALJD 4:28.) The same day, Brown replied, "I'm still unclear on the issue you mentioned on death benefits, but Hilary and I are happy to investigate further if you could provide more details." (ALJD 4:28-31.) On September 5, based on a claimed perception that Brown was "resistant to respond" regarding the death benefit information, Watts testified he "tried to be more clear" about his request by asking, "Who were the last 30 employees to pass away?" (ALJD 4:34-36; Tr. 29:25 – 30:4.)

Watts also testified the parties "were trying to work on the best way to do an audit" relating to "death benefits," but had not made a decision as to how an audit would be conducted. (Tr. 64: 14-15.) There is no record evidence indicating an audit was ever performed.

At the hearing, Brown testified he sought clarification rather than just providing the Union information regarding all of the various "death benefits" that could have been paid on behalf of employees because if he had tried to do so, "I would probably still be pulling that information just because it's so exhaustive of a search, and very comprehensive." (Tr. 116:2 – 120:24.)

C. The Union Requested Information About the Qualifications of an Outside Hire.

In relevant part, Article 10, Section 10.4(b) of the parties' CBA ("Awarding of Bids") provides that if there are no qualified bidders to fill a vacancy from within the unit, ATI "may fill the vacancy by hiring from the outside and assigning the new employee to the position." (GC Ex. 6, pp. 27-28.) Index U of the CBA "outlines the line of progression for machinists" in the bargaining unit. (Tr. 72:18-19; GC Ex. 6, pp. 151-152.)

The CBA does not contain *any* provisions relating to the qualifications of outside hires, or in any way limiting ATI's right to hire outside candidates on the basis of their qualifications. Critically, the CBA does not give the Union any right to challenge an outside hire on the basis that the outside hire is not "qualified." It only gives the Union the right to challenge the Company's determination that no *internal* candidates who bid for the position were qualified to fill it.

On June 12, Watts filed a grievance alleging ATI "denied promotional opportunities to bargaining unit employees by hiring under-qualified employees from outside the BU to perform machining duties" in claimed violation of Article 10 and Index U. (ALJD 4:40-42; GC Ex. 8.) Also on June 12, Watts emailed Kienbaum requesting "qualifications, resume, prior work experience, any pre-hire testing and results, interview Q&A, transcripts and any other information referenced during the hiring process" relating to "the recent machinist hired off the street (Michael Marthaller)." Watts further requested the job, area and shift Marthaller was hired for, and "the bid notice for the position which went vacant, resulting in hiring off the street." (GC Ex. 4, p. 4.) Kienbaum responded the following day by advising Watts she was out of state until the end of the following week, but she would turn to his request when she returned. (Tr. 76:12-77:9; R. Ex. 1.)

After Kienbaum returned, she promptly responded to Watts's request on June 27 by providing *all* of the information Watts had requested that was relevant to a claimed violation of Article 10 and Index U—*i.e.*, Marthaller's job, area and shift, and a copy of the original job posting. (GC Ex. 4, p. 3.) Kienbaum also informed Watts she was concerned "about the scope of your request for information relating to Marthaller's application and interview materials." (*Ibid*.) Consistent with the provisions in the CBA prohibiting the Company from hiring outside candidates where there are qualified unit employees who bid for a position—and the lack of any CBA provisions restricting the Company from hiring outside candidates based on such individuals' qualifications—Kienbaum specifically disputed the relevance of the requested information to the Union's grievance, stating:

> *If the Union is questioning the department's conclusion that there were no qualified internal bidders, we can discuss that and the Company's basis for going outside to hire an A Machinist*. What I can tell you is that Mr. Marthaller graduated with an AAS degree in Machine Tool Technologies from Linn Benton Community College. He did not undergo any pre-hire testing.
>
> Russ and I would be more than happy to sit down with you to discuss if you have any questions about the internal bidding process, but it would be helpful for me to have a better understanding of the basis for your request for Mr. Marthaller's application information before I respond further.

(*Ibid*. [Emphasis added.]) Watts never responded to Kienbaum's offer to discuss his request for Marthaller's application and interview materials. (Tr. 81:18 – 82:3.)

The parties discussed the information request at their next grievance meeting, on September 13. (Tr. 137:18-23.) Present were Kienbaum, Mike Bernard (the Company's VP of Operations for the Millersburg facility), Watts and Steve Eddings (the Union's president). (Tr. 137:24 – 138:4; *see also* Tr. 24:14-15, Tr. 134:25 – 135:1.) In that meeting, Kienbaum reiterated the concerns she had expressed to Watts regarding his request and particularly questioned how the qualifications of outside hires were relevant to a grievance regarding whether the Company

had violated the CBA by failing to hire qualified internal candidates. (Tr. 139:5 – 140:1.) Finally, Eddings asked whether the Company could just provide Marthaller's resume and cover letter, and Kienbaum responded in the affirmative.[4] (Tr. 140:2-16.) The next day, Kienbaum forwarded Watts the agreed-upon resume and cover letter, as well as some additional information that was beyond the scope of the parties' agreement relating to information about Marthaller's qualifications. (Tr. 140:24 – 141:11; GC Ex. 5, p. 5.)

On September 17, Watts responded to Kienbaum's provision of the remaining agreed-upon information regarding Marthaller by questioning whether the Company had provided "all of the employment information" for Marthaller, including transcripts. (GC Ex. 5, p. 5.) Kienbaum promptly reminded Watts the parties had narrowed the scope of the information that would be provided during the grievance meeting on September 14 and noted he had not asked for "transcripts" in that meeting. (*Id*., p. 4.) Watts followed up with two emails seeking "all" of Marthaller's qualifications—"[e]verything the company has on file including but not limited to, any interview Q&A, transcripts, previous work history, tests (that have not yet been provided), any communication with LBCC, letters of recommendation, etc." (*Id.*, p. 3.) That same day, Kienbaum followed up by providing letters of recommendation for Marthaller and Marthaller's final grades for his Machine Tool Technologies degree, all while continuing to dispute that the Company was obligated to provide such information. (GC Ex. 5.)

Notwithstanding his repeated requests for Marthaller's transcripts, on cross examination Watts testified he does not think the grades a person received in school are relevant to a determination of whether that individual is qualified to be an A Machinist. (Tr. 77:10-22.)

[4] Eddings testified at the hearing and did not dispute Kienbaum's account of the parties' September 13 meeting. (Tr. 101:4 – 110:16.)

V. THE ALJ'S DECISION

With regard to the Union's request for information about "death benefits," the ALJ correctly found "the Union failed to meaningfully respond to Brown's request for clarification about what 'death benefit' the Union was referring to in its information request, thwarting his attempts to comply." (ALJD 7:38-40.) The ALJ also found that "unique circumstances" established "a basis for negating the imputation of liability in the wake of Stephens' absence." (ALJD 8:2-3.) Yet, the ALJ improperly concluded the Company violated Sections 8(a)(1) and (5) of the Act by its failure "to provide information about the death benefit in response to Watts' May 25, 2018 request once the confusion subsided," where the ALJ found that "at least by the time of the hearing, the Respondent knew which death benefit was the subject of Watts' information request." (ALJD 8:6-11.)

The ALJ also incorrectly found the Company, "without any justification, failed to respond to Watts' follow-up request for the names of the last 30 employees to pass away," in violation of Sections 8(a)(1) and (5) of the Act. (ALJD 8:5-11.)

Regarding the Union's request for information about the qualifications of outside hire Marthaller, the ALJ summarily concluded the information was "clearly relevant to the grievance the Union filed alleging the Respondent had denied promotional opportunities to bargaining-unit employees by hiring underqualified employees from outside to perform machining duties." (ALJD 8:15-17.) The ALJ did not address the Respondent's arguments that neither Article 10 nor Index U gives the Union a right to challenge the qualifications of an outside hire; therefore, the requested information is *not* relevant to the Union's grievance. (Respondent Brief pp. 19 – 20.) The ALJ also failed to consider evidence that the parties had agreed to narrow the scope of the Union's information request. The ALJ incorrectly concluded the Company violated Sections

8(a)(1) and (5) of the Act "by failing to respond fully to the Union's June 12 information request for more than 3 months." (ALJD 9:15-17.)

As a remedy, among other things the ALJ ordered the Company to "provide to the Union an audit of the death benefits paid out over the last 10 years as well as surviving spouse benefits and earned pension benefits for both active and terminated, as well as retired employees." (ALJD 10:22-24.)

VI. SUMMARY OF ARGUMENT

The ALJ improperly found that the Company's failure to provide information about the last 30 employees to pass away constituted an unfair labor practice under the Act. The ALJ failed to consider evidence establishing that such a claim was neither alleged in the Complaint nor litigated by the parties at the hearing or in their respective post-hearing briefs. To the extent the issue of information about the last 30 employees to pass away was referenced in the record evidence, the Union's grievance chairperson only testified that his question about the last 30 employees to pass away represented an effort to *clarify* the Union's request for information about unspecified "death benefits." Therefore, the Union's question about the last 30 employees to pass away is not a proper basis upon which to find a violation of the Act.

The ALJ improperly found that the Company's failure to provide information about unspecified "death benefits" violated the Act, where the ALJ also found the Company promptly requested clarification regarding what the Union meant by "death benefits," and the Union failed to provide the requested clarification until the day of the hearing. The purposes of the Act are not served by permitting the Union to repeatedly refuse to clarify its vague request, while holding the Company liable for a violation of federal law simply because the confusion created by the Union was finally clarified during the hearing on the unfair labor practice charge.

The ALJ improperly found the Company unlawfully delayed in providing "presumptively relevant" information relating to the qualifications of an outside hire, where the ALJ failed to consider evidence that soundly rebutted any presumption of relevance that may have attached to such information. Critically, the CBA only provides the Company may hire outside applicants in the absence of bids from qualified unit employees. The CBA provides no vehicle for the Union to challenge the qualifications of outside hires. Therefore, information about the qualifications of an outside hire is irrelevant to the question of whether the Company has violated the CBA by passing over qualified internal candidates, and the Company had no duty to provide such information at all, much less on a "timely" basis.

The Board should reverse the ALJ's decision and dismiss the Complaint.

VII. ARGUMENT

A. The Board Should Reverse the ALJ's Findings That the Company Unlawfully Failed to Provide Requested Information Relating to Unspecified "Death Benefits."

Relating to an alleged failure to provide information regarding "death benefits," the Board should reverse the ALJ's findings that:

- "[T]he Respondent, without any justification, failed to respond to Watts' follow-up request for the names of the last 30 employees to pass away." (ALJD 8:5-6.)
- "The Respondent's failure to provide the information regarding the last 30 employees to pass away" violated Sections 8(a)(1) and (5) of the Act. (ALJD 8:8-11.)
- "[T]he Respondent's failure to provide information about the death benefit in response to Watts' May 25, 2018 request once the confusion subsided" violated Sections 8(a)(1) and (5) of the Act. (ALJD 8:9-11.)

(Exceptions 1, 2, 3, 4, 13, 16, 17.)

B. The ALJ's Finding That the Company Violated the Act Relating to the Provision of "Death Benefits" Information Is Contrary to Relevant Board Precedent.

The ALJ improperly found Respondent violated Sections 8(a)(1) and (5) of the Act by its failure to provide information regarding unspecified "death benefits," where the ALJ also found (1) the Union failed to meaningfully respond to the Company's request for clarification; and (2) the confusion caused by the Union's failure in this regard was not cleared up until "the time of the hearing." (ALJD 7:38 – 8:11.) The ALJ's findings are contrary to established NLRB precedent and should be reversed.

The Board has declined to hold an employer liable for failing to provide information where (1) the employer has been "generally forthcoming about information regarding" the subject of the request; and (2) "the parties had a misunderstanding about the scope of" the union's request. *Barnard College*, 367 NLRB No. 114 at fn. 1 (2019). The Board concluded, "Particularly in these circumstances, parties are more likely to obtain a satisfactory resolution of such misunderstandings through good-faith discussions between themselves rather than involving the Board through unfair labor practice litigation." *Ibid.*; *see also Dupont Dow Elastomers, LLC*, 332 NLRB 1071, 1085 (2000) (employer did not unlawfully delay in providing requested information where the delay resulted from a "good faith" misunderstanding and the union "failed to supply the needed clarification" to the employer.); *E.I. Du Pont & Co.*, 291 NLRB 759, 759 fn. 1 (1988) (An employer did not violate the Act by failing to provide requested information where the employer "made a reasonable, sufficient effort to comply in good faith with the Union's information request," but the union's failure "to adequately advise the Company of precisely what it wanted" created confusion and "made the Respondent's obligation unnecessarily difficult to carry out.")

Here, the record evidence establishes the Company was "forthcoming" about the production of information in response to other requests for clearly described, relevant information. ATI promptly responded to the Union's request about "death benefits" by immediately advising the Union that the Company needed clarification regarding precisely what information the Union sought.

The testimony of the Union's witnesses underscores the vagueness of the Union's request for information about "death benefits." Watts admitted he was aware of multiple benefits that are available upon the death of an employee or retiree, but failed to inform Brown the Union specifically sought information regarding a certain death benefit under the pension plan. (Tr. 46:8 – 50:17; Tr. 69:21 – 70:15; Tr. 18:11 – 19:8.) The Union's president, when questioned by the General Counsel as to what he "would call a death benefit," immediately referred to the *life insurance benefit*. (Tr. 104:16-20.) He then mentioned "an additional – I guess you'd call it additional death benefit," in reference to the pension plan benefit that was the subject of Watts's request. (Tr. 104:20 – 105:15.)

As the ALJ correctly found, the Union's ongoing failure to provide a meaningful response to the Company's requests for clarification created "confusion" that "thwarted" the Company's efforts to provide the information the Union sought. As the Board has held, such circumstances are properly addressed "through good-faith discussions" and not unfair labor practice proceedings.

Additionally, the Board has long held that "a union's proffered reasons for demanding the information, as well as [the employer's] motives for refusing that demand, must be examined as of the time of the demand and the refusal." *Kraft Foods N. Am., Inc.*, 355 NLRB 753, 755 (2010) citing *General Electric Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1990). The Board has affirmed an employer did not violate the Act by its failure to provide requested information,

where a valid reason for the union's request "was not presented to the employer during the time period that was the subject of the instant litigation," but was only introduced for the first time at the hearing. *Calmat Co.*, 283 NLRB 1103, 1106 (1987); *see also NLRB v. A.S. Abell Co.*, 624 F.2d 506, 513 fn. 5 (4th Cir. 1980) ("Reasons not brought to the attention of the Company at the time but later used to justify positions in administrative hearings should not be used to convict the Company of an unfair labor practice when these reasons were not brought to its attention contemporaneously, they being not apparent from the face of the request."); *United States Postal Serv.*, 364 NLRB No. 27 at fn. 3 (2016) (Member Miscimarra specifically declining to "rely on the judge's further finding that any doubt regarding relevance was removed by the testimony of union officials at the unfair labor practice hearing."). The same principles should apply where a union fails to clarify its vague and ambiguous request until the time of the hearing.

NLRB law does not support the ALJ's finding that the Company violated the Act under the circumstances of this case. The Board should reverse the ALJ.

C. The ALJ's Finding That the Company Violated the Act by Its Failure to Provide the Names of the Last 30 Employees to Pass Away Is Contrary to Relevant Board Precedent.

1. A Claimed Failure to Provide the Names of the Last 30 Employees to Pass Away Was Neither Alleged in the Complaint Nor Litigated at the Hearing.

As a preliminary matter, the Board should find the question of whether the Company unlawfully failed to provide the names of the last 30 employees to pass away was not alleged in the Complaint, nor was it litigated in the hearing or even discussed in the respective post-hearing briefs of the parties.

The Board regularly dismisses on due process grounds those allegations that are not pleaded in the complaint and/or fully litigated. *See, e.g., Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2345 (2012) (Reversing a finding that an employer unlawfully failed to provide

certain information where the Board found "[t]he failure to supply this information was not pleaded in the complaint, nor did the General Counsel move to amend the complaint to reflect this allegation at any time during or after the hearing.").

In *Piggly Wiggly*, the Board reversed the ALJ's finding that the employer had unlawfully failed to provide information relevant to other issues in the complaint, where the requests were not specifically alleged as violations in the complaint. The ALJ's finding was based on ample evidence adduced at the hearing, including "a full recounting by all parties, in the course of their description of the effects bargaining sessions, as to when this information was requested, why it was sought, what the problems were in providing it, and why it was not furnished." *Id*. at 2356.

The Board found such "extensive discussion" of the subject matter on the record was not a sufficient basis to hold the employer liable for an unalleged violation. The Board explained:

> It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. Whether a matter has been fully litigated rests in part on "whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." Here, because the Respondent was not on notice that it faced liability for this specific conduct, it had no reason at the hearing to attempt to substantiate the claim it made to the Union that problems with its payroll provider made it impossible to provide the information as requested. Whether or not new evidence would have changed the result, "[i]t is the opportunity to present argument under the new theory of violation, which must be supplied."

Id. at 2345; *see also United Mine Workers of Am.*, 308 NLRB 1155, 1158 (1992) (The mere introduction of relevant evidence does not meet the due process requirement that a claim has been fully and fairly litigated where the employer has not received notice that it may be held liable for the conduct in question.); *compare Am. Med. Response W.*, 366 NLRB No. 146 (2018) (Employer's failure to provide names of witnesses was "clearly was raised to the judge" where the complaint specifically alleged the employer unlawfully failed to provide witness names; "the

General Counsel clearly argued to the judge that the Respondent acted unlawfully by failing to provide this information to the Union;" and "in his posthearing brief to the judge, the General Counsel specifically argued that the Respondent acted unlawfully by failing to provide the Union with the names of the witnesses interviewed during its investigation.").

Here, the Complaint refers only to the Union's request of May 25, 2018 for "information about the records of death benefits paid out over the last ten years," which request the Complaint specifies was "renewed" by the Union on certain dates. (GC Ex. 1(e), p. 2.) The Complaint does not allege any post-May 25 request for additional information, nor does it allege an unlawful failure to provide the names of the last 30 employees to pass away.

The General Counsel did not amend the complaint prior to or during the hearing to allege that the Company violated the Act by failing to provide the names of the last 30 employees to pass away. Nor did the General Counsel assert a violation based on a failure to provide such information in her opening statement at the hearing. (Tr. 10:13 – 12:12.)

Neither the Company nor the General Counsel addressed an alleged unlawful failure to provide the 30 names in their post-hearing briefing to the ALJ. The General Counsel's brief only stated the *fact* that "Watts asked for the last 30 employees who passed away *because he felt resistance from Brown in responding to the information request and was trying to facilitate getting the information that the Union needed*." (GC Brief p. 7. [Emphasis added.]) The General Counsel's characterization of Watts's testimony on this point plainly indicates her view that the request for names was only part of the Union's overall attempt at clarifying its request for information about "death benefits"—which attempt was ultimately found by the ALJ to be unsuccessful—and not an independent request alleged to have been unlawfully denied in its own right. Tellingly, the proposed order submitted with the General Counsel's brief does not include

any proposal that the Company should be required to provide the names of the last 30 employees to pass away as a remedy. (GC Brief p. 18.)

Similarly, the ALJ found that "Watts perceived Brown was resistant to respond, *so he tried to be more clear*, and asked on September 5, "Who were the last 30 employees to pass away?" (ALJD 4:34-36. [Emphasis added.]) Therefore, the sum of the evidence only indicates the Union asked about the last 30 employees to pass away as part of a claimed effort to clarify its request for information about "death benefits"—an effort the ALJ found was unsuccessful as a direct result of the Union's failure to provide a meaningful response to the Company's request for clarification. (ALJD 7:38-40.) Significantly, the ALJ's order does not include a directive for the Company to provide the 30 names. (ALJD 10:5 – 11:4.)

2. Even if the Names Were Alleged as a Violation, the Evidence and Applicable Legal Precedent Fail to Support a Finding of an Unlawful Failure to Provide Them.

Even if a violation of the Act based on the Union's request for the last 30 employees to pass away were alleged and litigated—which it was not—no such violation should be found under the facts of this case.

As Watts's testimony and the General Counsel's brief make clear, the Union's inquiry about the last 30 employees to pass away was part and parcel of the Union's claimed effort to *clarify* its request for information relating to death benefits. On August 15, Brown repeated his request for clarification about which "death benefits" the Union meant. (ALJD 4:28-31.) Watts declined to provide any clarification at that time. (GC Ex. 3, p. 1.) Nearly *three weeks later*, on September 5, Watts testified he "*tried to be more clear*" about his request by asking Brown, "Who were the last 30 employees to pass away?" (ALJD 4:34-36; Tr. 29:25 – 30:4. [Emphasis added.])

As the ALJ properly found—and as the General Counsel effectively conceded at the hearing (Tr. 49:10-16)—"the term 'death benefit' is vague," and the Union never provided a meaningful response to the Company's prompt request for clarification of the term, thereby thwarting" the Company's efforts to comply with the request. (ALJD 7:26-40.)

There is no evidence to support a finding that the Union's "request" for the last thirty employees to pass away should be distinguished from its request for information about "death benefits," and the Company held liable for failing to separately provide that information. Even if the Company had immediately supplied the Union with the names of the last 30 employees to pass away, the names would not have given the Union the information it *actually* sought in connection with that request—*i.e.*, information about death benefits for such employees. Nor would the names have helped the Union clarify—or the Company understand—what the Union meant when it referred to "death benefits."

Moreover, the ALJ's findings relating to the alleged failure to provide information regarding undefined "death benefits" and/or the names of the last 30 employees to pass away create an unjust result that in no way serves the purposes of the Act, to the extent it effectively punishes the Company for the *Union's* conduct. The ALJ concluded the Union failed to provide a meaningful response to the Company's requests for clarification regarding "death benefits"—a term the General Counsel herself conceded was "vague and misleading" (Tr. 49:10-16). The overwhelming evidence supports a finding that the Union asked about the last 30 employees to pass away only as part of a claimed effort to "clarify" its request for information about death benefits, and not as an independent request for that information. All the while, the Union deliberately withheld from the Company the identity of specific employees for whom the Union had reason to believe "death benefits" may not have been paid to beneficiaries whose identities

were also known to the Union, and Watts repeatedly failed to point Brown to the SPD for the specific death benefit that was the subject of the Union's concern.

While Watts testified he "perceived" that Brown was somehow "resistant" to responding to his request about "death benefits," the General Counsel did not introduce any evidence to support such a perception. To the contrary, Brown responded to Watts's first email about "death benefits" less than an hour after Watts sent it. (GC Ex. 3, p. 5.) The evidence establishes the Company continued to communicate with the Union about its requests and attempted to seek clarification as to what information the Union sought, while providing the Union information in response to numerous other requests that the Company did not seek to clarify because clarification was not needed.

A holding that ATI should be held solely responsible for a misunderstanding about the scope of the Union's request—notwithstanding the Company's good-faith attempts to clarify and its responsiveness to other information requests, as well as the Union's culpability in failing to provide the requested clarification—improperly incentivizes unions to litigate matters that could easily be resolved through good-faith discussion, secure in the knowledge that as long as the union clears up any misunderstanding during the hearing, it can evade responsibility for a breakdown in communications while the employer is held liable for violating the Act.

Rewarding the Union's bad faith conduct by holding the Company liable for the confusion the ALJ found was a direct result of the Union's actions does not serve any purpose of the Act. No violation should be found based on any aspect of the Union's request or requests relating to information about "death benefits," including information about the last 30 employees to pass away.

D. The Board Should Reverse the ALJ's Findings That the Company Unlawfully Delayed in Providing a Full Response to the Union's Request for Information Relating to Marthaller's Qualifications.

As explained below, relating to the Union's request for information regarding the qualifications of outside hire Marthaller for the A Machinist position the Board should reverse the ALJ's findings that:

- "Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes a legitimate affirmative defense to the production of the information." (ALJD 6:44-46.)
- The requested information was "clearly relevant" to the Union's contractual grievance. (ALJD 8:15-17.)
- The issue with regard to the production of information about Marthaller's qualifications "is one of delay, thus arguments about whether the Respondent had good reason to withhold the information are inapposite." (ALJD 8:44 – 9:2.)
- "The presumptively relevant information was eventually produced, leading to the conclusion that any confidentiality, overbreadth, or concerns were not in the end legitimate justifications for withholding the information." (ALJD 9:2-5.)
- Watts[5] "was not required to repeat his request for the transcript at the subsequent meeting in order to keep it alive." (ALJD 9:7-8.)
- The Union was not required to discuss Respondent's concerns about the relevance and overbreadth of its request for information relating to Marthaller's qualifications. (ALJD 8:44 – 9:13.)
- The Union was not required to narrow the scope of its request. (ALJD 9:12-13.)

[5] The ALJ's decision erroneously refers to "Marthaller" instead of Watts. (ALJD 9:7-8.)

- The Company violated Sections 8(a)(1) and (5) of the Act "by failing to respond fully to the Union's June 12 information request for more than 3 months." (ALJD 9:15-17.)

(Exceptions 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17.)

E. The Company Rebutted Any Presumption that the Requested Information Was Relevant to the Union's Grievance.

The mere fact that information is presumptively relevant to a union's representational duties does not necessarily mandate a finding that it must be produced under federal labor law. The Board has explained:

> An employer, as part of its duty to bargain, must provide requested information to a union if that information is relevant to the union's duties as the employees' collective-bargaining representative, including the union's grievance-processing duties. Information that relates to unit employees' terms and conditions of employment is presumptively relevant. An employer must provide such information *unless it rebuts the presumption of relevance or establishes an affirmative defense.*

Michigan Bell Tel. Co., 367 NLRB No. 74, slip op. at 2 (2019) ("The presumption of relevance is a rebuttable presumption.") (Internal citations omitted; emphasis added.)

In *Michigan Bell*, the union filed a grievance under Article 5.02 of the parties' agreement, which provided that "if any union employees engage in a prohibited work stoppage 'without the authority and sanction of the [Union], the Parties shall cooperate to enable the [Respondent] to carry on its operations without interruption or other injurious effect.'" The grievance asserted the employer failed to notify the union that it had received a tip about a planned work stoppage, violating its obligation to cooperate with the union under Article 5.02. In claimed connection with its grievance, the union requested that the employer provide the name of the unit employee who informed the employer that a work stoppage was planned and a "distribution list" reflecting all individuals to whom the employer had communicated the tip. The employer did not dispute

that the requested information was presumptively relevant; however, the employer contended it was not actually relevant to the contractual grievance.

The Board found that "to pursue effectively" its grievance under Article 5.02, the union needed "to determine both whether the Respondent had information that would trigger its purported obligation to cooperate with the Union and, if so, the steps the Respondent took to comply with that obligation." *Id*. at 2. Because the identity of the informant and the distribution list were irrelevant to these determinations, the Board held the employer had rebutted the presumption of relevance. Therefore, the employer was not obligated to provide the disputed information.

Here, the record evidence establishes the Company promptly provided *all* of the requested relevant information regarding the position for which Marthaller was hired. The Company also promptly and repeatedly objected to the Union's request for information relating to the qualifications of outside hires as irrelevant to the Union's grievance. The ALJ's finding that Marthaller's qualifications were relevant to a grievance alleging the Company hired "underqualified employees from outside to perform machining duties" cannot stand in light of the indisputable fact that *the CBA does not give the Union the right to dispute or grieve the qualifications of outside candidates who are hired*. The CBA only requires that the Company hire qualified internal candidates before turning to outside sources. To prove its case, the Union only needs to show there were unit employees who bid on the A Machinist position, and that such employees were qualified to fill the disputed position. Marthaller's qualifications—or an asserted lack thereof—have no bearing whatsoever on the question of whether the Company passed over qualified internal candidates in violation of the CBA.

The ALJ incorrectly found that, "The presumptively relevant information was eventually produced, leading to the conclusion that any confidentiality, overbreadth, or concerns were not in

the end legitimate justifications for withholding the information." (ALJD 9:2-5.) The mere fact that information was ultimately produced as part of a good-faith compromise between Respondent and the Union regarding the disputed information is not sufficient to support a determination that the Company could not have had any "legitimate justifications for withholding the information"—such as the justified concerns regarding relevance and overbreadth that Respondent repeatedly asserted in this case—nor does the ALJ cite to any Board precedent in support of such a proposition. Moreover, to hold that an eventual agreement to provide disputed information *per se* establishes that an employer was never privileged to withhold it in the first instance would improperly incentivize employers to stand their ground and refuse to compromise with a union regarding the provision of such information, because doing so will create liability for an earlier refusal to furnish it.

As explained above, the Company has rebutted any presumption that Marthaller's qualifications are relevant to the Union's duties as the collective-bargaining representative of unit employees, and the Union cannot demonstrate actual relevance. Accordingly, the Board should reverse the ALJ and find that ATI had no obligation to produce the information relating to Marthaller's qualifications; therefore, the Company did not unlawfully delay in providing such information.

F. The ALJ Failed to Consider Evidence That the Parties Had Agreed to Narrow the Scope of the Requested Information.

Because the ALJ found the Union was not obligated to discuss or narrow the scope of its request for information about Marthaller's qualifications, the ALJ failed to consider evidence that (1) the parties met and agreed to narrow the scope of what was initially requested; and (2) the Company promptly provided the requested information to the Union after the Union agreed to narrow its request.

As explained above, the Company consistently objected to the Union's request on the grounds that it was not relevant to any grievance the Union could bring under the CBA. Indisputably, the CBA provides the Company can hire from outside where there are no qualified unit employees—and does not refer to the qualifications of the outside employees hired—so Marthaller's qualifications were wholly irrelevant to the Union's duty to police the contract. Nevertheless, the Company kept in regular contact with the Union in an effort to address its concerns, met with the Union in good faith, and ultimately agreed to provide certain information about Marthaller's qualifications *notwithstanding* its objections on the grounds of relevance and overbreadth.[6]

As Member Johnson aptly stated in rejecting an argument "that an employer has no right to make a good-faith inquiry about a union's need for presumptively relevant information prior to providing that information:"

> The duty to provide information, like the duty to bargain, is a two-way street, and thus good faith runs both ways. A good-faith interpretation of, and interaction with, the Respondent's response, rather than the tactical filing of an unfair labor practice charge, was what good faith required of the Union […].

The Finley Hosp., 362 NLRB 915, 929 (2015) (in dissent). The same is true here, where the ALJ should have upheld the result of the parties' good-faith interaction, rather than rewarding the unwarranted "tactical filing of an unfair labor practice charge" based on a claimed delay in providing information that, even if presumptively relevant—which the Company disputes—is not *actually* relevant, and therefore need not be produced in any fashion, much less a "timely" one.

[6] The Union's requests for "any other information referenced during the hiring process" and "all of the employment information" for Marthaller are especially overbroad, as a full response to these requests would potentially include sensitive information that has nothing to do with an employee's qualifications to perform a specific job.

VIII. REMEDY

The Respondent further excepts to the ALJ's remedy, to the extent it orders the Company to "provide to the Union an audit of the death benefits paid out over the last 10 years as well as surviving spouse benefits and earned pension benefits for both active and terminated, as well as retired employees." (ALJD 10:22-24.)

The ALJ's order is vague and ambiguous to the extent it fails to specify to which "death benefits" it refers, and potentially exceeds the scope of the Union's request. Additionally, as stated above the record evidence makes clear the parties had only discussed how an audit might be performed, and does not indicate the Company ever conducted an audit. Therefore, the ALJ's order would direct the Company to provide something that does not exist.

Accordingly, if the Board finds a violation of the Act based on the Respondent's failure to provide requested information—which the Company maintains the Board should not do—the Respondent respectfully requests that the Board modify the ALJ's order to provide for a remedy that (1) corresponds to the scope of the Union's request; (2) clarifies exactly what information is to be produced; and (3) does not direct the Respondent to provide information or documents that do not exist. *See, e.g.*, *Consumers Asphalt Co.*, 295 NLRB 749, 753 (1989) (ordering an employer to provide a union "with information necessary to conduct an audit of the Respondents' records to determine whether contractually required […] benefit payments have been made" during the term of the relevant collective bargaining agreement).

///

///

///

///

///

IX. CONCLUSION

WHEREFORE, for the reasons stated above and in Respondent's post-hearing brief to the ALJ, Respondent requests that the Board reverse the ALJ's decision and dismiss the Complaint in its entirety.

Respectfully submitted,

Dated: October 23, 2019

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

s/ Ursula A. Kienbaum

Ursula A. Kienbaum
222 SW Columbia Street, Suite 1500
Portland, OR 97201
Phone: 503-552-2140
Email: ursula.kienbaum@ogletree.com

Jean C. Kosela
Steuart Tower
One Market Plaza, Suite 1300
San Francisco, CA 94105
Phone: 415-310-3942
Email: jean.kosela@ogletree.com

Attorneys for Respondent ATI Specialty Alloys and Components

CERTIFICATE OF SERVICE

I certify that on October 23, 2019, a copy of the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** has been filed via electronic filing with:

Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

and served via email upon:

Aaron Q Watts
Grievance Chairperson
USW Local 6163
29040 Liberty Road
Sweet Home, OR 97386
Via Email: aqwatts33@gmail.com

Sarah Ingebritsen
Counsel for the General Counsel
National Labor Relations Board
Via Email: Sarah.Ingebritsen@nlrb.gov

Ronald K. Hooks
Regional Director
National Labor Relations Board, Region 19
Via Email: Ronald.Hooks@nlrb.gov

By: s/ Riki Johnson
Riki Johnson
riki.johnson@ogletreedeakins.com
503-552-2140

40409407.1
002428.000215