

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

MCLAREN MACOMB

Respondent

and

Case 07-CA-232056

**LOCAL 40, OFFICE OF PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION (OPEIU),
AFL-CIO**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
REPOUDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION**

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Counsel for the General Eric S. Cockrell pursuant to Section 102.46 (b)(1) of the Board's Rules and Regulations files this Answering Brief in response to Counsel for Respondent McLaren Macomb's Exceptions to the Administrative Law Judge Decision. **Counsel for the General Counsel respectfully requests that the Board fully affirm the ALJ's decision, and in support of said request states as follows¹:**

I. PROCEDURAL HISTORY

On July 8, 2019, Administrative Law Judge Donna N. Dawson (ALJ) conducted a hearing in the above matter. On September 30, 2019, ALJ Dawson issued her Decision finding that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by unreasonably delaying, from September 19, 2018 to January 10, 2019, in providing Charging Party with relevant and necessary information, including "dobutamine, persantine, and thallium stress tests [that] have been done since May 1, 2018" and "how many times [that] an RN [Registered Nurse] [has] been needed to perform/monitor the stress tests since May 1, 2018.". (ALJD P 4, L 4- 7, 23; ALJD P 13, L 19-25; Tr 66-68, 103; Jt 3).

On November 1, 2019, Respondent served upon the Board Counsel for Respondent McLaren Macomb's Exceptions to the Administrative Law Judge Decision and Counsel for Respondent McLaren Macomb's Brief in Support of Exceptions to the Administrative Law Judge Decision. Counsel for the General Counsel respectfully requests that Respondent's Exceptions be denied in their entirety and responds in opposition as follows.

¹ References to the Administrative Law Judge are indicated by ALJ Dawson; to the Administrative Law Judge's Decision – ALJD (followed by page and line number); to the transcript – Tr (followed by page number); to General Counsel Exhibits –GC (followed by page number); to Joint Exhibits - Jt (followed by page number); to Respondents Exhibits – R; to Respondent's Exceptions - R EX (followed by page number); to Respondent's Supporting Brief – R Brief

II. RESPONDENT'S EXCEPTIONS

- (1) The ALJ failed to take judicial notice and/or find issue or claim preclusion based on the the Region's prior dismissal of Charging Party's unfair labor practice charge, Case 07-CA-23080, whereby Charging Party alleged that Respondent unilaterally implemented its decision regarding the reassignment of stress testing duties, at ALJD P 12, L 37, through P 13, L 3, is contrary to the record and applicable law.
(Respondent Exception 1)
- (2) The ALJ's ruling limiting Respondent's testimony and/or evidence pertaining to **Case No. 07-CA-23080, at ALJD P 12, L 37 through P 13, L 3, was contrary to the record and the law.**
(Respondent Exception 2)
- (3) The ALJ's finding the scope of Charging Party's grievance was not limited to Respondent's alleged failure to provide 30-days advance notice, at ALJD P 9, L 35-47, and accompanying findings and analysis, ALJD P 9, L 23 through ALJD P 10, L 2, is contrary to the record and the law.
(Respondent Exception 3)
- (4) The ALJ's finding that Respondent was notified that unit RNs would be "replaced" by non-bargaining unit RNs and exercise physiologists, ALJD P 3 L 15-16 and P 5, fn 8, is contrary to the record.
(Respondent Exception 4)
- (23) The ALJ's complete failure to analyze Respondent's various arguments and apply applicable law was erroneous, including but not limited to with respect to Respondent's following arguments.
(Respondent Exception 23)
- (24) To the extent the ALJ's findings and conclusions are not contrary to the law, Respondent respectfully requests this [sic] this the current Board adopt a new standard that:
(Exception 24)
 - i. Precludes a party from being able to obtain information solely for pre-arbitrate [sic] discovery after the requesting party has already advanced its grievance to arbitration;
 - ii. Requires a party, requesting non-unit information pertaining to grievance/arbitration, to clearly specify the relevance of such information to trigger any duty to provide responsive information;

- iii. Precludes a party from relitigating the same or substantially similar issues which were decided in a previous proceeding.

Respondent contends in Exception 1 that the ALJ Dawson failed to give preclusive effect to the Region's dismissal of Case 07-CA-230280. (R EX 1; R Brief 18-25). Also, ALJ Dawson considered and rejected all of Respondent's defenses presented in this case as lacking merit, including but not limited to, Exceptions 2-4, 23, and 24, along with those defenses not specifically addressed in the ALJD. (ALJD P 6, L 1-39; ALJD P 10, L 23-43; ALJD P 11, L 37-44; ALJD P 12, L 1-4; ALJD P 12, L 8-47; ALJD P 13, L 1-17). Contrary to Respondent's contention, the ALJ found that Respondent's reliance upon *FirstEnergy Generation, LLC*, 366 NLRB No. 87 (2018), remanded in *FirstEnergy Generation, LLC v. NLRB*, 929 F.3d 321, 334 (6th Cir. 2019), is misplaced. (ALJD P 12, L 37-40; R EX; R Brief 24-25). ALJ Dawson found that the Court of Appeals reversed the Board's decision and found that the transfer of work historically performed by unit employees to nonunit employees was not a mandatory subject of bargaining and therefore, the employer had no duty to provide information pertaining to the transfer. (ALJD P 12, L 40-44). Further, the ALJ properly concluded that in the instant case, there was no evidence to establish that the transfer was not a mandatory subject of bargaining. (ALJD P 12, L 44-45).

- (5) The ALJ's finding that Charging Party had a "reasonable belief and suspicion that Respondent continued to violate the CBA," at ALJD P 10, L 7-8, and accompanying findings and analysis, ALJD P 9, L 2-25, is contrary to the record and the law.
(Respondent Exception 5)

Contrary to Respondent's contention, ALJ Dawson decided that Charging Party did, in fact, have a "reasonable belief and suspicion" that Respondent continued to violate the parties' collective bargaining agreement based upon its internal email

communications about the subject information request. (ALJD P 10, L 4-21; Tr 98-99; Jt. 1 - 3; R 2-3 R EX 5).

- (6) The ALJ's finding that Charging Party's requested information "involved and affected the terms of its member RNs' employment and related to a pending arbitration," at ALJD P 9, L 31-34, is contrary to the record and the law.
(Respondent Exception 6)

Contrary to Respondent's contention, ALJ Dawson found that the information requested by Charging Party was relevant because such involved and affected the terms and conditions of its member RNs' employment and related to a pending arbitration.

(ALJD P 9, L31-34; ALJD P 9, L 31-47; ALJD P 10, L 1-2; ALJD P 10, L 32-33; ALJD P 10, L 42-43; R EX 6; R Brief 26-27; Tr 48-50, 54-57, 58-66, 79-80, 84-85, 98-99, 109-110; GC 2; Jt. 1-2; GC 2-3; R 1).

- (7) The ALJ's findings that Charging Party's requested information was "necessary for" a "pending" arbitration, at ALJD P 5, L 33-35, ALJD P. 3 L 37-38, P 3, fn 7, L 22-25, were contrary to the record and the law.
(Respondent Exception 7)

Contrary to Respondent's contention, ALJ Dawson found that the information requested by Charging Party was necessary for a pending arbitration. (ALJD P. 5, L 33-35; R EX 7; R Brief 26-29; Tr 64, 65,79-80, 84-85, 109-110; GC 2-3; R 1). In this regard, ALJ Dawson properly credited the testimony of General Counsel's Witnesses, including Charging Party president/Union steward/Bargaining committee member/RN Jeffrey Morawski; and Charging Party Vice president/RN Dina Carlisle. (ALJD P 5, L 25-40; Tr 40, 42, 44, 68-70, 96, 103-104, 110-113).

Also, ALJ Dawson properly applied the Court's holding in *Acme Industrial Co.*, 385 U.S. 432 (1967) in concluding that the requested information was relevant to Charging Party's processing of Grievance No. 18-49 to arbitration. (ALJD P 5, L 33-34; ALJD P 8, L 12-32; ALJD P 9, L 7-24; R Brief 28-29; Tr 58-59, 62, 66, 79, 84-85, 98, 109, Jt 1-2; GC 2; R 1). Furthermore, ALJ Dawson properly applied and relied upon the Board's holding in *Racetrack Food Services, Inc.*, 353 NLRB 687, 699-700 (2008) (citation omitted), reaff'd. 355 NLRB 1258, 1258 (2010) (ALJD P 8; L 42-47; ALJD P. 9, L 1; ALJD P 9, L 7-9; R EX; R Brief 28). That is, the Board employs a broad discovery-type standard which requires that a union show more than a mere suspicion of the subject matter for which the information is sought. (ALJD P. 8, L 42-47; ALJD; P 9, L 1; ALJD P 9, L 7-21).

- (8) The ALJ's finding that Respondent Witness Laura Gibbard was "unbelievable" at ALJD P 10, L 34-35, when she testified that she had no idea as to the relevance of the information request is contrary to the record. (Respondent Exception 8)
- (9) The ALJ's finding that Respondent's witness Laura Gibbard was not credible when she testified that that Charging Party's request "inadvertently fell through the cracks" or that she otherwise did not realize she did not respond to the request, at ALJD P 11, L 23-35, is contrary to the record. (Respondent Exception 9)
- (10) The ALJ's finding that Respondent witness Laura Gibbard provided "speculative" explanations for the delay in responding to Charging Party's information requests, at ALJD P 11, L 37-40 and fn. 11, is contrary to the record. (Respondent Exception 10)
- (12) The ALJ's conclusion that the "relevance of the requested information should have been apparent to Respondent under the circumstances," at ALJD P. 10, L 32-40 is contrary to the record and the law. (Respondent Exception 12)

- (13) The ALJ's finding that the "General Counsel has...demonstrated relevancy," at ALJD P 10, L 32-35 is contrary to the record and the law. (Respondent Exception 13)
- (14) The ALJ's conclusion that Respondent had a duty to provide the requested information under the circumstances, at ALJD, P 10, L 41-42 is contrary to the law. (Respondent Exception 14)

ALJ Dawson properly concluded that the relevancy of the requested information should have been apparent to Respondent's Vice President of Human Resources Laura Gibbard under the circumstances. (ALJD P 10, L 32-43; ALJD P. 12, L 35; R EX 8-10, 12-14, R Brief 30-32, 34-35; Tr 119-134). Respondent discredited Gibbard's testimony that she had no idea why Charging Party requested the information and that she did not realize that she had not responded to Charging Party's information request. (ALJD P 10, L 32-35; ALJD P 11, L 19-32; Tr 122-125). Also, ALJ Dawson properly concluded that Gibbard's testimony included several speculative and unsubstantiated explanations for Respondent's delay in providing the requested information. (ALJD P 11, L 37-40).

- (11) The ALJ's failure to find Charging Party's requested information was not presumptively relevant, at ALJD P 9, L 30, is contrary to the record and the law. (Respondent Exception 11)

Contrary to Respondent's contention, ALJ Dawson properly concluded that the requested information pertaining to nonunit nurses "arguably" would not be presumptively relevant, Counsel for the General Counsel satisfied the obligation to show that the requested information involved and affected the terms and conditions of its bargaining unit RNs' employment and related to a pending arbitration such that the

requested information was, in fact, relevant. (ALJD P 9, L 26-47; ALJD P. 10, L1-2; ALJD P 12, L 35; R EX 11f). The ALJD properly concluded that Charging Party demonstrated “more than a mere suspicion of the matter for which the information is sought.” *Racetrack Food Services*, supra. (ALJD P 10, L 26-47; ALJD P 11, L 1-2).

- (15) The ALJ’s conclusion that Respondent could not contest relevancy of Charging Party’s information at the hearing because Respondent did not notify Charging Party that its request was irrelevant until January 10, 2019, and/or because Respondent “showed no internal concerns of relevancy ... prior to January 10[, 2019],” at ALJD P 12, L 30-35, is contrary to the law. (Respondent Exception 15)

Contrary to Respondent’s contention, ALJ Dawson properly concluded that Respondent failed to demonstrate that it had genuine concerns about whether the requested information was relevant before January 10, 2019 when Respondent finally provided the same as far back as September 19, 2018. (ALJD P 12, L 32-35; R EX 15). The ALJ concluded that Respondent exhibited no internal concerns about the relevancy of the requested information. (ALJD P. 12, L 33-35). The ALJ further concluded that there is no evidence that Respondent notified Charging Party as to its asserted inadvertent delay until the information was provided actually on January 10. (ALJD P. 11, L 32-35).

- (16) The ALJ’s conclusion that Respondent’s good faith efforts to comply with Charging Party’s September 19, 2018, information request and its good faith efforts to comply with other Charging Party information requests because they were irrelevant to determining if it violated the NLRA, at ALJD P 11, L 4-17, is contrary to the record and the law. (Respondent Exception 16)
- (18) The ALJ’s finding that Respondent violated Section 8(a)(5) and (1) of the NLRA when it delayed in furnishing Charging Party with the requested Information, at ALJD P 12, L 5-6, is contrary to the record and the law. (Respondent Exception 18)

- (20) The ALJ's conclusion that Respondent has an affirmative duty to notify Charging Party that its request for information was irrelevant, or not presumptively relevant, to preserve Respondent's right to contest relevancy or presumptively relevancy at the hearing, at ALJD, P 12, L 30-35 and P 7, L 37-39, is contrary to the law.
(Respondent Exception 20)

Contrary to Respondent's contention, ALJ Dawson properly concluded that Respondent failed to respond to the September 19, 2018 information request in a timely manner. *Woodland Clinic*, 331 NLRB 735, 736 (2000). (ALJD P 11, L 4-5; R EX 20; R Brief; 35-36; Tr 76-77). Also, the Board considers the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *Endo Painting Service, Inc.*, 360 NLRB No. 61, slip op. at 2 (2014) citing *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in pertinent part 394 F.3d 233 (4th Cir. 2005). (ALJD P. 11, L 10-14; Tr 107). Further, the ALJ properly concluded that the analysis is objective and turns not upon "whether the employer delayed in bad faith. . .but on whether it supplied the requested information in a reasonable time." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018). (ALJD P 11, L 14-17; R EX 20; R Brief 35-36; Tr 132-133). ALJ Dawson concluded that a respondent violated the Act even where respondent inadvertently forgot to provide the requested information when it was received and subsequently supplied 3.5 months after the initial request. (ALJD P 11, L 40-44; ALJD P 12, L 1-6; Tr 76-77, 107, 132-133).

- (17) The ALJ's finding that the Parties' meeting of November 29, 2018, and prior communications were irrelevant to whether Respondent violated the NLRA, P 5, L 2-25, was irrelevant and contrary to the law.
(Respondent Exception 17)

Contrary to Respondent's contention, ALJ Dawson properly concluded that Respondent's email of January 10, 2019 was the first and only communication between Respondent and Charging Party wherein Respondent asserted that the information request was not relevant or necessary to Charging Party's representational duties because such was initially submitted on September 19, 2018. (ALJD P 5, L 19-23; Tr 71-72, 147-148); Jt. 3; R EX 17).

- (19) The ALJ's conclusion that Respondent did not waive its right to the requested information under the circumstances, at ALJD P 12, L 17-28, is contrary to the record and the law.
(Respondent Exception 19)

Contrary to Respondent's contention, ALJ Dawson properly concluded that Respondent failed to show that Charging Party clearly and unmistakably waived its right to the requested information under *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). (ALJD P. 12, L 17-28; R EX 19). The ALJ further concluded that after Respondent received notice that Charging Party filed the Charge Against Employer in Case 07-CA-232056, on December 4, 2018. Respondent continued to delay in providing the information until January 10, 2019. (ALJD P 12, L 26-28; Tr 78, 108, 123, 125, 139; GC 1(a), 1(b)).

- (21) The ALJ's finding that Respondent had "shift[ing]" defenses, at ALJD, P. 12, L 30-35, is contrary to the record and the law.
(Respondent Exception 21)

Contrary to Respondent's contention, ALJ Dawson properly concluded that Respondent initially asserted that Respondent's delay in providing the requested information was inadvertent and such argument was shifted to the assertion that Charging

Party was not entitled to such information in the first place. (ALJD P 12, L 30-35; R EX 21). The ALJ properly concluded that Respondent has not rebutted Counsel for the General Counsel's showing of relevancy. (ALJD P. 12, L 35).

- (22) The ALJ's reliance on General Counsel's purported evidence of prior violations by Respondent, at P 7, fn.9, P 10, L 17-21, and P 10, fn. 10, was erroneous because it relied upon facts not in evidence and/or should have been excluded as irrelevant and/or its evidentiary value did not outweigh the prejudice to Respondent.
(Respondent Exception 22)

Contrary to Respondent's contention, ALJ Dawson did not rely upon Respondent's conduct with respect to its responses to other Charging Party information requests. (ALJD P 7, fn. 9; ALJD P. 10, L 17-21; ALJD P 10, fn.10; R EX 22; R Brief 38-39). In fact, ALJ Dawson explicitly declined to conclude that Respondent violated the Act in the instant case based upon a prior finding that Respondent either unlawfully failed to provide or delayed in providing Charging Party with requested information. (ALJD P 10, fn. 10). In citing *Mt. Clemens Gen. Hospital*, 344 NLRB 450, 463 (2005), ALJ Dawson employed such case only for the holding that a generic respondent violated Section 8(a)(5) of the Act by refusing to furnish a generic union with necessary and relevant information where the union had a reasonable basis to believe that nonbargaining unit employees performed unit work. Respondent has not presented any evidence to establish that ALJ Dawson's reliance upon *Mt. Clemens Gen. Hospital*, supra, prejudiced Respondent's case in any way. (ALJD P 10, L 4-21).

III. CONCLUSION

Based upon the above and the record as a whole, Counsel for the General Counsel respectfully requests that the Board find that Respondent violated Sections 8(a)(1) and (5) of the Act as found by ALJ Dawson and Order appropriate remedies.

Respectfully submitted this 26th day of November 2019.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of November 2019, I E-filed a **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**, and served a copy electronically on the following parties of record:

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