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**The Permanente Medical Group, Inc., Northern California Region and National Union of Healthcare Workers.** Case 32-CA-226909

December 11, 2019

ORDER<sup>1</sup>

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

On July 25, 2019, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union in a timely manner with information regarding: (a) the total expenditure, for each calendar year 2016 and 2017 and 2018, of subcontracting/referring out of Health Plan members for mental health services (Category 9(b)--subcontracting information); and (b) the number of patients presenting at Kaiser Emergency Departments (Category 10(e)--Emergency Department information). The judge recommended that the Respondent take specific action to remedy such unfair labor practices which included providing this information.

On September 23, 2019, the Respondent filed exceptions to the Administrative Law Judge's decision. The Respondent excepted to the judge's conclusion regarding the subcontracting information but not to the judge's conclusion regarding the Emergency Department Information.<sup>2</sup>

Subsequently, on November 5, 2019, Counsel for the General Counsel (General Counsel) filed a Motion to Remand to Approve Charging Party's Withdrawal Request.<sup>3</sup> In its motion, the General Counsel states that, on October 15, 2019, the Charging Party advised the General Counsel that, due to changed circumstances since the information was initially requested, it no longer needs the subcontracting information at issue and requested withdrawal of that allegation. The General Counsel further represents that the Respondent does not oppose this motion.

The General Counsel's motion to remand to approve withdrawal of the allegation regarding the failure to provide the subcontracting information is **GRANTED**.

<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> Indeed, the judge noted in his decision that the Respondent did not contest its liability regarding information regarding the number of patients presenting at Kaiser Emergency Departments.

<sup>3</sup> Sec. 102.9 of the Board's Rules and Regulations provides that, after a case has been transferred to the Board, a charging party may withdraw its unfair labor practice charge only with the Board's consent.

Accordingly, that allegation is severed and remanded to the Region for further appropriate action on that allegation.

Our granting of the General Counsel's motion to remand on the subcontracting issue renders the Respondent's exceptions, which were limited to that issue, moot. In the absence of exceptions to the judge's conclusion of law regarding the remaining Emergency Department information, the Board adopts that conclusion<sup>4</sup> and adopts the judge's recommended Order as modified.<sup>5</sup>

AMENDED CONCLUSIONS OF LAW

Delete subparagraph (a) in paragraph 3 of the administrative law judge's conclusions of law.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, the Permanente Medical Group, Inc., Northern California Region, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Promptly provide the Union with the number of patients presenting at Kaiser Emergency departments.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 11, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>4</sup> We have amended the judge's conclusions of law consistent with our partial remand to the Region to approve the withdrawal of the Category 9(b) subcontracting allegation.

<sup>5</sup> We have modified the judge's recommended Order consistent with our partial remand to the Region and in the absence of exceptions to the remainder of the judge's recommended Order. We shall substitute a new notice to conform to the Order as modified.

APPENDIX  
 NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD  
 An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail and refuse to bargain with the National Union of Healthcare Workers (Union), the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

All employees in the classifications set forth in the Collective Bargaining Agreement between the Union and the Employer effective December 5, 2015 through September 30, 2018 for the Integrated Behavior Health Services bargaining unit.

WE WILL NOT refuse and fail to provide the Union with the information it requested that is relevant and necessary to its role as your bargaining representative, including bargaining a successor collective-bargaining agreement.

WE WILL NOT unreasonably delay in responding to the Union's information requests or otherwise unreasonably delay in providing the Union with information it requests that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, to the extent we have not already done so, provide the Union with the information it requested as described in Category 10(e) of the Union's June 1, 2018 information request.

THE PERMANENTE MEDICAL GROUP, INC.,  
 NORTHERN CALIFORNIA REGION

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/32-CA-226909](http://www.nlrb.gov/case/32-CA-226909) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Judith J. Chang*, for the General Counsel.  
*Alicia C. Anderson*, for the Respondent.  
*Florice Hoffman*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried on March 18, 2019, in Oakland, California. Closing briefs were submitted by the General Counsel and the Respondent on May 28, 2019.

The National Union of Healthcare Workers (the Union or Charging Party) filed the charge on September 5, 2018,<sup>1</sup> and the General Counsel issued the complaint on December 27. The complaint alleges that the Permanente Medical Group, Inc., Northern California Region (Respondent or TPMG) violated Section 8(a)(5) and (1) of the Act by unreasonably delaying production of certain portions and failing and refusing to provide the remaining portions of the Union's June 1, 2018 information request concerning the parties' negotiations for a successor collective-bargaining agreement (CBA). The Respondent filed its answer on January 14, 2019, denying that it unreasonably delayed in furnishing the requested information.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that the Permanente

<sup>1</sup> All dates are in 2018 unless otherwise indicated.

Medical Group, Inc. is a corporation engaged in the operation of medical offices and provision of healthcare services for Kaiser Permanente members in northern California and has its headquarters in Oakland, California. (GC Exh. 1(e) at 1.)<sup>2</sup> During the calendar year ending November 30, Respondent derived gross revenues in excess of \$250,000 and received at its California facilities goods valued in excess of \$5,000 that originated from points outside the State of California. (GC Exh. 1(c) at 1–2.) Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background Facts and the Information Request

Since its certification in November 2010, the Union has represented a bargaining unit of approximately 1,700 outpatient mental health employees working in 23 medical centers throughout northern California. (Tr. 23.) The parties signed a 3-year CBA operative from December 5, 2015 to September 30, 2018. (GC Exh. 2.) Before the CBA expired, the parties conducted four prebargaining sessions in June 2018. (Tr. 57.)

On June 1, in preparation for successor bargaining agreement, Gregory Tegenkamp (Tegenkamp), the primary negotiator for the Union and Director of the Kaiser Division of the Integrated Behavioral Health Services bargaining unit, sent Deborah Glasser (Glasser), chief negotiator for the Respondent and its Senior Labor Relations Consultant, an information request (the June 1 info request). (GC Exh. 3.)

The June 1 info request sought ten categories of information, comprising 40 different subparts. Categories 1 through 6 pertained to the bargaining unit employees' terms and conditions of employment. *Ibid.* Category 7 requested information on employee turnover, and Category 8, which the Union later withdrew, requested Respondent's financial information. *Ibid.* Category 9 sought figures on subcontracting and outside referrals, and Category 10 requested information on patient access and utilization. *Ibid.*

As of the time of the hearing, Category 9(b), which requested “[t]he total expenditure, for each calendar year 2016 and 2017 and year-to-date 2018, of subcontracting/referring out of Health Plan members for mental health services,” and Category 10(a)(7), which sought the “number of return visits scheduled within fourteen days of the initial visit,” had not yet been provided to the Union. *Id.* at 2, 3.

Glasser previously stated that information relevant to Category 10(e), which requested information on the number of patients, by service area, who presented to a Kaiser Emergency

department, did not exist. (GC Exh. 15; Tr. 19.) However, Respondent first produced documents responsive to Category 10(e) at the March 18 hearing and no longer contests its liability as to this category. (Tr. 7–8, 19–21, 138.)<sup>3</sup>

### B. Categories 1 Through 7

Glasser convincingly testified that upon receiving the June 1 info request, she divided it by category and sent portions to the relevant departments for assistance in compiling the information. (Tr. 96–97.) Glasser was confident in her testimony and I credit her assertion that she did not delay in sending out these requests for assistance. I further credit Glasser's statement that the requested information required vetting by both her department and TPMG, in a process that she estimated generally lasts at least 1 month. (Tr. 124–125.)

Elaine Huang, TPMG Regional Mental Health Administrative Director, also testified persuasively that the June 1 info request was comprehensive and required “a lot of data.” (Tr. 136.) Huang further recalled that she sought an extension from her supervisor Agnes Amistoso to compile the information but was told there was “pressure to get it done as soon as [the department] can.” (Tr. 155.)

At a prebargaining session on June 26, Respondent provided Category 7 at the bargaining table. (Stip. Fact #5, Jt. Exh. 1.)

In a July 6 email, Tegenkamp asked Glasser for an update on the status of the information request. (GC Exh. 4.) On July 11, Glasser supplied Tegenkamp with the information requested in Categories 1 through 6. (GC Exh. 5.) I credit Glasser's testimony that she waited until all Categories 1 through 6 were ready to compile into a single package before sending it to Tegenkamp on July 11. (Tr. 120.)

Bargaining for a successor agreement began on or about July 12. (Tr. 67.)

### C. Category 9

In her July 11 email to Tegenkamp, Glasser stated that Respondent objected on relevance grounds to the Union's request under Category 9 for subcontracting information and asked the Union to explain the relevance of its request. (GC Exh. 5.) In a July 24 email to Glasser, Tegenkamp explained that the information requested in Category 9 was relevant to the Union in formulating its bargaining position in relation to Article XXVIII, Section 4 of the existing CBA and in response to new subcontracting language proposed by Respondent on July 23 under Article VII. (GC Exh. 6.)<sup>4</sup> Respondent later stopped seeking and withdrew the proposed Article VII language. (Tr. 37.)

Tegenkamp further stated that as part of an agreement resulting from a previous Unfair Labor Practice (ULP) charge filed by

good faith effort to search its records in a timely manner. However, because Respondent conceded its liability as to this category, I will not include findings of fact related to this portion of the information request.

<sup>4</sup> Article XXVIII, Sec. 4 of the agreement provides:

In order to meet the needs of our patients, the Employer may, at its discretion, assign patients to outside providers when appointments are not available within timeframes consistent with appropriate psychiatric care and/or as required by law. The use of any such outside assignment of patients will not result in the elimination of bargaining unit positions. GC Exh. 2 at 46.

<sup>2</sup> Abbreviations used in this decision are as follows: “Jt. Exh.” for the joint exhibit; “Tr.” for the transcript; “GC Exh.” for the General Counsel's exhibit; “GC Br.” for the General Counsel's brief; “R. Br.” for the Respondent's brief; and “Stip. Fact #” for stipulated facts in the joint exhibit. Although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

<sup>3</sup> Producing documents at a hearing where delayed production is at issue may point to an Act violation if the Respondent did not make a

the Union, Respondent had committed to routinely providing information on the number of outside referrals. (GC Exh. 6.)<sup>5</sup> In an August 9 email, Glasser asked Tegenkamp for further clarification on the relevance of Category 9, which Tegenkamp provided on the same day. (GC Exh. 9.)

In an August 20 email, Tegenkamp stated that Respondent's non-responsiveness to the Union's information request was "unacceptable" and advised Glasser that the Union was preparing to file a ULP charge for a failure and refusal to provide information necessary and relevant to the collective-bargaining process. (GC Exh. 11 at 2.) Glasser responded later on August 20 by providing information responsive to Categories 9(a), 10(a)(1), (2), (3), (4), (9), and (10), 10(b), 10(c), and 10(d), noting that the categories had "necessitated additional review and time to compile the data" before stating that the provided material "completes all of the requested information in this [June 1] RFI." *Id.* at 1.

On August 23, Tegenkamp reiterated the Union's request for subcontracting information pertinent to Category 9(b) (the total expenditure on subcontracting services) and emphasized the information's relevance to the Union's representational duties in collective bargaining. (GC Exh. 12 at 1.) Tegenkamp further added that the data was relevant to enforcing Article XXVIII, Section 3 of the existing CBA, which requires Respondent to increase the size of staff based on the level of outside referrals. *Ibid.*<sup>6</sup>

In documents provided during a bargaining session on August 27, Respondent objected to providing information responsive to Category 9(b) for the first time since receiving the June 1 info request on the grounds that such information was confidential and proprietary data. (GC Exh. 15.) On August 29, Tegenkamp requested that Respondent explain the basis for this confidentiality claim. (GC Exh. 14.) The Respondent did not.

Furthermore, at the March 18 hearing, Glasser did not recall ever explaining why the information was confidential or proprietary. (Tr. 125–126.) She also admitted that Respondent did not offer accommodations in the form of a confidentiality agreement but opined that it is implied in the agreement to provide information that such data will remain confidential. (Tr. 111–112.)

#### D. Category 10

In her July 11 email to Tegenkamp, Glasser stated that Respondent was still in the process of compiling the pertinent information for Category 10. (GC Exh. 5.) In his July 24 response,

Tegenkamp stated that the June 1 info request had been made almost 2 months ago and that the Union expected the requested information to be provided within the next 2 business days. (GC Exh. 6.) On July 30, Glasser responded to Tegenkamp and stated that Category 10 was still under review and that she hoped to have further information for him soon. (GC Exh. 8.)

In an August 23 email, Tegenkamp wrote Glasser that the documents Respondent provided on August 20 "omitted critical information" responsive to Categories 10(a)(5) through (8) and 10(f). (GC Exh. 12 at 1.) Tegenkamp requested that Glasser provide the information that day to give the Union time to prepare a proposal addressing access and provider profiles for bargaining on August 27. *Ibid.*

On August 24, Glasser informed Tegenkamp that Respondent was working on compiling the relevant data and anticipated providing the information to him on August 27. (GC Exh. 13.) At a bargaining session on August 27, Respondent produced information responsive to Categories 10(a)(6), (8), and 10(f) of the June 1 info request. (GC Exh. 15.)

In the documents, Respondent offered explanations for the information Tegenkamp noted in his August 23 email had been omitted. *Ibid.* Regarding Categories 10(a)(5) and (7), Respondent provided data for (a)(5) but stated that it does not measure the number of follow-up visits scheduled within 14 days and that "therefore no data is available" for Category 10(a)(7). *Id.* at 2. On this point, Huang convincingly testified that Respondent does not track return visits within 14 days, making it difficult to obtain the requested data. (Tr. 138.)<sup>7</sup>

In his reply to Glasser on August 29, Tegenkamp questioned the plausibility of Respondent's assertion that data pertinent to Category 10(a)(7) did not exist, stating that the California Department of Managed Health Care had instructed Respondent to maintain return appointment records. (GC Exh. 14.) However, the instruction Tegenkamp references mandates only that Respondent track the "availability and timeliness of follow-up appointments." *Id.* at 1.

The instruction focuses on the number of appointments available to patients, not the number of return visits scheduled, which was the specific information requested in Category 10(a)(7). Furthermore, I credit Huang's statement that her understanding of the regulatory standard is that only tracking initial appointments, not return visits, is required. (Tr. 139, 153.)

Tegenkamp also asserted that Respondent had provided

The proposed addition to Article VII reads in relevant part:

The Employer retains, solely and exclusively, all rights and powers and authority that it exercised or possessed prior to the execution of this Agreement, except as specifically abridged by any expressed provision(s) of this Agreement. . . . This includes the right to determine the methods, processes, means and places of providing services, to include subcontracting. GC Exh. 10 at 1.

<sup>5</sup> The examples the General Counsel provides in Exhibit 7 of information previously disclosed to the Union in 2017 by Glasser's predecessor Mark Hollibush relate to the number of outside referrals (requested under Category 9(a) of the information request at issue here), not the aggregate cost of these referrals (requested under Category 9(b)). On July 30, Respondent ultimately did provide information responsive to Category 9(a). GC Exh. 9.

<sup>6</sup> Article XXVIII, Sec. 3 of the agreement provides:

To ensure ongoing adequate access, when a ratio of 4:1 cannot be

maintained for greater than one (1) month, the Employer's intent will be to refer patients to providers outside the bargaining unit, including, at the Employer's sole discretion, non-KP providers, in order to return to a 4:1 ratio, as needed, by facility. If it is necessary to refer out for longer than three (3) months in a department, the Employer will adjust staffing in the department as needed in order to return to a 4:1 ratio, except in cases where the need to refer out is temporary, for example where it is due to employee leaves. While the Employer's intent is as stated above, the Union recognizes that circumstances may require modification of new to return ratios in order to maintain appropriate access for new patients. GC Exh. 2 at 45.

<sup>7</sup> The General Counsel argues that the data on return visits does in fact exist because Huang failed to definitively rule out this possibility. GC Br. 11. However, I credit Huang's testimony that even if this data did exist, her team lacked the capability to access and compile it. Tr. 148.

similar information in the past in response to information requests from the Union. (GC Exh. 14.)<sup>8</sup> However, the data to which Tegenkamp referred, and which he sought under Category 10(a)(7), was seen-to-seen data. *Ibid.*<sup>9</sup> The phrasing “seen-to-seen” was not used in the initial June 1 info request and this August 29 reply was the first time Tegenkamp clarified the meaning of Category 10(a)(7).

Huang credibly explained that the metric of “seen-to-seen” data had previously been used to track return visits within 14 days on Respondent’s Legacy Report system, which Respondent phased out in 2013 following a regulatory change. (Tr. 140–141.) Respondent now uses the Access Report system, which no longer tracks return visits. (Tr. 143.)

While the Access Report system utilizes Windows, the Legacy Report system runs on a DOS computer system and Huang’s team lacked the capacity to extract information from it. (Tr. 149, 161.) Huang credibly testified that “it didn’t click” to her that Tegenkamp’s initial June 1 info request was seeking “seen-to-seen” data because the metric extends beyond individual psychiatric therapy visits to include information on all appointment types. (Tr. 140–142.) Huang further testified that there is no way to filter out data specifically relating to bargaining unit employees. (Tr. 163.)

In a September 13 email, Tegenkamp again stated that the information requested in 10(a)(7) and 10(e) was relevant to the Union’s bargaining proposals and noted that the information had the potential to persuade the Union’s committee to provide a scheduled management proposal more quickly before September 19. (GC Exh. 18.)

On September 19, Glasser provided further documentation and corrected certain information to fulfill Categories 10(a)(4), (6), and (8) of the request. (GC Exh. 20.)

To date, the parties continue to bargain for a successor contract.

#### Analysis

##### *A. Respondent Did Not Unreasonably Delay in Providing Categories 1 Through 7, 9(a), and 10(b), (c), (d), and (f)*

Section 8(a)(5) requires that an employer provide potentially relevant information necessary for a union to perform its statutory duties as the employees’ exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 434 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). The employer’s obligation applies with equal force to information relevant to enforcing existing collective-bargaining agreements and to formulating proposals for new CBAs. *Leland Stanford Junior Univ.*, 262 NLRB 136, 138 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983). An employer must provide information regarding bargaining unit employees’ terms and conditions of employment as it is presumptively relevant to a union’s collective-bargaining duties. *Southern California Gas. Co.*, 344 NLRB 231, 235 (2005). Here, the information requested in Categories 1 through 6 is presumptively relevant. The Respondent does not dispute,

and I find, that Categories 7, 9(a), 10(b), (c), (d), and (f) are also relevant.

To determine whether an employer unlawfully delayed in producing a response to an information request, the Board considers the totality of the circumstances, including the complexity and extent of information sought, its availability, and the difficulty of retrieval. *West Penn Power, Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)) *enfd.* in rel. part 394 F.2d 233 (10th Cir. 1968). The duty to furnish information requires a “reasonable good faith effort to respond to the request as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062, fn. 9 (1993).

On June 26, the Respondent provided information responsive to Category 7 of the June 1 info request. It provided information responsive to Categories 1 through 6 on July 11, 5 weeks after the June 1 info request, and to Categories 9(a), and 10(b), (c), (d), and (f) on August 20 and August 27, 11 to 12 weeks after the initial request.

I find that the totality of the circumstances weighs in favor of holding that Respondent did not act unlawfully. In *West Penn Power*, the Board held that the respondent did not unreasonably delay in responding to the union’s information request seeking data regarding two service centers. 339 NLRB at 587. Though the respondent delayed up to 7-1/2 months, the Board held that the employer did not act unreasonably under the circumstances, including that the employer periodically advised the union it was compiling the requested data; five full-time staff worked on gathering the information; and the specific request had been made alongside other information requests, requiring substantial time to address. *Ibid.*

Similarly, here, Glasser periodically updated Tegenkamp on Respondent’s progress in compiling Categories 9 and 10. (GC Exh. 5, 8, 11, 13.) The June 1 info request was also voluminous and required coordination among Respondent’s various departments. As noted above, Huang even sought an extension but was informed that there was pressure to complete it as soon as possible. Given these circumstances, I find it reasonable that Respondent took the amount of time it did to comply with the June 1 info request. Furthermore, much of the information requested (Categories 1 through 7) was provided by July 11, prior to the start of bargaining on July 12.

General Counsel cites *International Credit Service, United States Postal Service*, and *Monmouth Care Center* as examples that 4- to 6-week delays in information request responses have been found unreasonable. These cases are distinguishable on the facts. In *International Credit Service*, the union requested only the names and wage rates of employees working at the respondent’s sole business location. 240 NLRB 715, 718 (1979). In contrast, the Respondent here is a large medical group employing thousands of employees in various departments, housed in 23 medical centers with over 100 physical locations across northern California. (Tr. 29.) In *United States Postal Service*, the information that was provided after a 4-week delay “ha[d] not

<sup>8</sup> The data Tegenkamp had previously received in 2017 indicated the number of provider appointments available to patients, not the number of return appointments ultimately booked. As such, the Union’s June 1

info request sought data different from that provided in 2017. Exh. 17; Tr. 71–73.

<sup>9</sup> “Seen-to-seen” refers to the percentage of patients who have an initial visit and a second visit within a certain timeframe. R. Br. 8.

been shown to be complex or difficult to retrieve: the information consist[ed] of only a few documents.” 308 NLRB 547, 551 (1992). Here, the union bargaining unit alone comprises approximately 1,700 employees, requiring Respondent to produce far more than “a few documents.” In *Monmouth Care Center*, the respondent failed to provide any explanation for its 6-week delay in information provision. 354 NLRB 11, 51 (2009). The instant case is not analogous. Glasser expressly testified that Respondent’s delayed response was due to the comprehensive nature of the request and a vetting process performed by multiple departments that typically lasts 1 month.

Based on the totality of the circumstances here, I find that, considering its large size and the comprehensive nature of the June 1 info request, Respondent provided Categories 1 through 7, 9(a), and 10(b), (c), (d), and (f) in a timely manner. Accordingly, with respect to those June 1 info requests, Respondent did not unreasonably delay in violation of Section 8(a)(5) and (1) of the Act.

*B. Category 9(b) is Relevant and Respondent Failed to Assert Confidentiality*

Information relating to nonunit employees, including information on subcontracting agreements, is not presumptively relevant. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). The burden is on the union to demonstrate relevance. *Ibid.* The Board applies a liberal, discovery-type standard to determine relevance, under which the union must show “a reasonable belief, supported by objective evidence, that the requested information is relevant.” *Disneyland Park*, 350 NLRB at 1258. The union’s explanation of relevance “need not be necessarily dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities.” *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), quoting *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997), *enfd.* 172 F.3d 57 (9th Cir. 1999).

The Respondent asserts that the Union failed to meet its burden of demonstrating the relevance of the information requested in Category 9(b) regarding total subcontracting expenditures. The Respondent relies on *Disneyland Park*, where the Board held that the employer did not violate the Act by denying the union’s requests for subcontracting information because the union failed to meet its burden of demonstrating relevance. 350 NLRB at 1256. The union in *Disneyland Park* merely cited a provision of the CBA that prohibited any subcontracting resulting in a termination, layoff, or a failure to recall unit employees from layoff. *Id.* at 1258. The union made no claim that any of these violations had occurred. *Ibid.* The Respondent here asserts that the Union has merely cited a similar provision in the existing CBA (Article XXVIII, Section 4) without setting forth support for a contract violation claim.

However, Respondent fails to mention that the Union also stated that it needed the information to formulate its own subcontracting proposals and that it pointed to another provision of the CBA to demonstrate the request’s relevance. In his August 23 email, Tegenkamp stated that subcontracting information was relevant to enforcing Article XXVIII, Section 3 of the CBA, which mandates an increase in bargaining unit staffing if the

need to subcontract lasts for longer than 3 months. (GC Exh. 12.) Tegenkamp put forth some facts to support the Union’s concern. The number of outside referrals had “increased significantly” in the past 2 years, and though Respondent had represented to the Union that it preferred not to subcontract and intended to increase staffing, subcontracting had occurred “in place of” hiring new staff. *Ibid.* These concerns constitute objective evidence supporting the Union’s reasonable belief that the requested information is relevant to enforcing a provision of the current CBA.

The Respondent further asserts that the Union did not provide an adequate explanation for why costs (requested under Category 9(b)), as opposed to the level of outside referrals (requested and provided under Category 9(a)), is relevant. The Respondent draws a distinction between the two types of information that the Board, when considering information requests also related to subcontracting, has not. The Board has held that information relating to expenditures on subcontracting, including wages, overhead costs, and bills submitted by subcontractors, are relevant to a union’s collective-bargaining responsibilities. See *Marathon Petroleum Co.*, 366 NLRB No. 125, slip op. at 2 (2018) (overhead costs of subcontractors are relevant information); *Teachers College, Columbia University* 365 NLRB No. 86, slip op. at 1 (2017) (subcontractor wages are relevant); *Murray Am. Energy, Inc.*, 366 NLRB No. 80, slip op. at 6 (2018) (bills submitted by subcontractors are relevant).

The specific circumstances here further indicate that total expenditure on subcontracting is relevant information. The Respondent previously represented to the Union that it preferred not to subcontract because of higher costs; however, this is at odds with the figures indicating an increase in subcontracting. Subcontracting costs information could be useful to the Union in evaluating this discrepancy. The information would also be useful to the Union in formulating its own subcontracting proposals, particularly since subcontracting remains an open issue in the ongoing bargaining. (Tr. 37.) Accordingly, I find that the Union satisfied its burden to demonstrate the relevance of its request in Category 9(b).

I further find that Respondent failed to demonstrate, other than through its bare assertions, that the requested subcontracting information is confidential and proprietary. See *Lasher Service Corporation*, 332 NLRB 834, 834 (2000). It was not until August 27 that Respondent even raised its claim of confidentiality. If Respondent had a legitimate confidentiality interest, it should have stated its concern earlier. Furthermore, even if Respondent was able to establish a confidentiality interest, it offered no accommodations to alleviate its confidentiality concerns, such as by producing the information in a redacted form or under a confidentiality agreement. See *National Steel Corporation*, 335 NLRB 747, 752 (2001). The Respondent also failed to consider Tegenkamp’s clarification that the Union was not seeking specific details of the Respondent’s contractual relationships with outside providers, which would strengthen a confidentiality claim, but, instead, the Union was merely seeking the aggregate annual costs of subcontracting. I find that the Respondent made no showing of confidentiality and failed and refused to furnish the information requested in Category 9(b) in violation of

Section 8(a)(5) and (1) of the Act. The information requested in Category 9(b) shall be provided.

*C. Respondent Does Not Possess Information Pertinent to Category 10(a)(7)*

An employer cannot violate Section 8(a)(5) and (1) by failing to provide information that it does not have. See *Vanguard Fire & Supply Co.*, 345 NLRB 1016, 1041 (2005), enf.d., 468 F.3d 952 (6th Cir. 2006). I find that Respondent no longer maintains records on follow-up visits scheduled within 14 days and that it is not required by regulatory standards to do so. The data, even if it exists, is stored on a phased-out Legacy Report System that is not accessible and that operates on a computer system Respondent no longer uses or maintains—DOS versus Windows.

The General Counsel asserts that Respondent's representation to the Union on August 29 that the information requested in Category 10(a)(7) does not exist constitutes an unpled delay violation. However, I find that Respondent did not delay in informing the Union because Respondent was not aware that the Union sought "seen-to-seen" data until Tegenkamp clarified the language of Category 10(a)(7) on August 29. The Board has held that an employer's lack of certainty about what precisely the union sought in its information request can provide a reasonable basis for a failure to provide the requested information. *E.I. Du Pont & Co.*, 291 NLRB 759, 761 (1988). Accordingly, I find that Respondent does not possess the information requested in Category 10(a)(7) and that it did not violate Section 8(a)(5) and (1) of the Act as to this part of the June 1 info request.

*D. Respondent Concedes Liability as to Category 10(e)*

The Respondent does not contest its liability as to Category 10(e) regarding information on the number of patients presenting at Kaiser Emergency departments. It previously asserted that the information did not exist before admitting at the March 18 hearing that it does in fact possess the relevant data. Accordingly, I find that Respondent unreasonably delayed in providing information pertinent to Category 10(e), in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, the Permanente Medical Group, Inc., is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The National Union of Healthcare Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union in a timely manner with information regarding: (a) the total expenditure, for each calendar year 2016 and 2017 and 2018, of subcontracting/referring out of Health Plan members for mental health services; and (b) the number of patients presenting at Kaiser Emergency departments, Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

4. The Respondent's above-described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent, the Permanente Medical Group, Inc., has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, it shall be ordered to produce the information and post and mail a notice to employees attached as the Appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

ORDER

The Respondent, the Permanente Medical Group, Inc, Northern California Region, Oakland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Refusing to provide the Union, the National Union of Healthcare Workers, with requested information that is relevant and necessary to the Union's performance of its duties as collective-bargaining representative of the Respondent the Permanente Medical Group's bargaining unit employees.

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

(c) Take the following affirmative actions necessary to effectuate the policies of the Act.

Promptly provide the Union with: (i) the total expenditure, for each calendar year 2016 and 2017 and 2018, of subcontracting/referring out of Health Plan members for mental health services requested by the Union; and (ii) the number of patients presenting at Kaiser Emergency departments.

Within 14 days after service by the Region, post at its Oakland, California facility copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2018.

Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington D.C. July 25, 2019

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail and refuse to bargain with the National Union of Healthcare Workers (Union), the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

All employees in the classifications set forth in the Collective Bargaining Agreement between the Union and the Employer

effective December 5, 2015 through September 30, 2018 for the Integrated Behavior Health Services bargaining unit.

WE WILL NOT refuse and fail to provide the Union with the information it requested that is relevant and necessary to its role as your bargaining representative, including bargaining a successor collective-bargaining agreement.

WE WILL NOT unreasonably delay in responding to the Union's information requests or otherwise unreasonably delay in providing the Union with information it requests that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, to the extent we have not already done so, provide the Union with the information it requested as described in Categories 9(b) and 10(e) of the Union's June 1, 2018 information request.

THE PERMANENTE MEDICAL GROUP, INC., NORTHERN CALIFORNIA REGION

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/32-CA-226909](http://www.nlr.gov/case/32-CA-226909) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

