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**Safeway, Inc. and United Food and Commercial Workers, Local 5, United Food and Commercial Workers, AFL-CIO.** Case 20-CA-221482

February 13, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 9, 2019, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the judge's recommended Order as modified and set forth in full below.<sup>3</sup>

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 3.

"3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information requested since April 26, 2018, which was necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of the unit employees, or failing and refusing to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that the Respondent considers confidential."

2. Substitute the following for paragraph 4.

"4. By delaying in providing responses to the Union's April 26, 2018 request until June 26, 2018, the Respondent has violated Section 8(a)(5) and (1) of the Act."

<sup>1</sup> The Respondent excepts to the judge's statement that in its April 23, 2018 email to the Union, it told the Union that the witness evidence did not support the Union's information request. The judge's statement does not affect the result, and we do not rely on it.

<sup>2</sup> In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to provide the Union a vendor service contract and unreasonably delaying in informing the Union that two other vendor contracts did not exist, we find that the Union established relevance with its April 26, 2018 request. In that request, the Union explained that it needed the contracts in its investigation of whether the Respondent was using the vendors to perform bargaining-unit work, which, we note, is broadly defined in the parties' collective-bargaining

ORDER

The National Labor Relations Board orders that the Respondent, Safeway, Inc., Eureka, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Food and Commercial Workers, Local 5, United Food and Commercial Workers, AFL-CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees, or failing to seek an accommodation in response to the Union's request for relevant information that the Respondent considers confidential.

(b) Refusing to bargain collectively with the Union by unreasonably delaying in responding to requests for relevant information by the Union.

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

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

(a) Furnish to the Union, in a timely manner, the information requested by the Union since April 26, 2018, or bargain in good faith with the Union to reach an accommodation of interests in response to the Union's request for relevant information that the Respondent considers confidential.

(b) Within 14 days after service by the Region, post at its Northern California facilities where the Union represents its employees, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an

agreements. Accordingly, we find that the Respondent's violations date from April 26, 2018.

<sup>3</sup> We have amended the judge's conclusions of law and modified the judge's recommended Order consistent with our findings herein and to conform to the Board's standard remedial language. We shall further modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

<sup>4</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."

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. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at its Northern California stores at any time since April 26, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 13, 2020

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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

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 refuse to bargain collectively with United Food and Commercial Workers, Local 5, United Food and Commercial Workers, AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of our employees, or failing to seek an accommodation in response to the Union’s request for relevant information that we consider confidential.

WE WILL NOT refuse to bargain collectively with the Union by unreasonably delaying in responding to requests for relevant information from the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union since April 26, 2018, or WE WILL bargain in good faith with the Union to reach an accommodation of interests in response to the Union’s request for relevant information that we consider confidential.

SAFeway, INC.

The Board’s decision can be found at <https://www.nlr.gov/case/20-CA-221482> 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.



*Yaromil Ralph, Esq.*, for the General Counsel.

*John Zenor, Esq.*, for Respondent.

*Andrew Baker, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, ADMINISTRATIVE LAW JUDGE. This case was tried based on a joint motion and stipulation of facts approved by Associate Chief Judge Gerald M. Etchingham; I independently also approve the joint motion and stipulation of facts.

The United Food and Commercial Workers Union, Local 5, United Food and Commercial Workers, AFL–CIO (the Union or

the Charging Party) filed the original charge on June 1, 2018.<sup>1</sup> The General Counsel issued the complaint on September 19, 2018. Safeway, Inc. (Respondent) filed a timely answer denying all material charges.

The complaint alleges Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing and unreasonably delaying providing the Union with requested information relevant and necessary for the Union to discharge its duties.

On the entire record, and after considering the briefs filed by the General Counsel and Respondent,<sup>2</sup> I make the following

#### FINDINGS OF FACTS

##### I. JURISDICTION

At all material times, Respondent, a Delaware corporation, is part of a corporate family that operates supermarkets and other types of food stores in Northern California. Respondent Safeway and Albertsons share the same parent company. Respondent has a place of business in Eureka, California (Respondent's facility). During the 12-month period ending August 31, Respondent in conducting its business operations received gross revenues in excess of \$500,000, and purchased goods valued in excess of \$5000 which originated from points outside the State of California. The parties admit and I find that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Union and the Relevant Collective-Bargaining Agreement Provisions*

Since at least 2011, Respondent has recognized the Union as the exclusive collective-bargaining representative of the employees covered by the unsigned North Coast collective-bargaining agreement (North Coast CBA) and the unsigned Local 5 Northern California collective-bargaining agreement (Northern California CBA) (collectively, "the Units"). The recognition has been embodied in the collective-bargaining agreements between Respondent and the Union concerning the terms and conditions of employment of the Units' employees.

The North Coast CBA, dated October 12, 2014, to October 13, includes relevant provisions of Sections 1 and 18 and Appendix E, as stipulated by the parties. Section 1 (Recognition and Contract Coverage) of the North Coast CBA identifies Respondent's employees who constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Section 1.1 (Recognition) identifies the bargaining unit as:

All employees working in the Employer's retail food stores within the geographical jurisdiction of the Union covering Del Norte and Humboldt counties, excluding meat employees and supervisors.

(Jt. Exh. F.)

The Northern California CBA, dated October 12, 2014, to October 13, includes relevant provisions of Sections 1 and 18 and Appendix F, as stipulated by the parties. Section 1 (Recognition and Contract Coverage) of the Northern California CBA identifies Respondent's employees who constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Section 1.1.1 and 1.4 identify the bargaining unit as:

All employees working in the Employer's retail food stores within the geographical jurisdiction of the Union, except supervisors within the meaning of the National Labor Relations Act, as amended.

(FOOD): Alameda County; Contra Costa County; Marin County; Monterey/San Benito/Santa Cruz Counties; Napa/Solano County; San Mateo County; Santa Clara County.

All Head, Journey, and Apprentice Meat Cutters working within the following geographical jurisdiction of the Union:

(MEAT): Alameda County, including meat in the cities of El Cerrito, El Sobrante, Kensington, Richmond and San Pablo of Contra Costa County; Humboldt/Del Norte Counties; Lake/Mendocino/Sonoma & Marin Counties south to and including Novato; Marin County north to Novato; San Francisco County and the cities of Daly City, Colma, Brisbane, South San Francisco and Pacifica; The Retail Markets and Frozen Food Locker Plants of the Employer in Santa Clara/San Benito/Monterey/Santa Cruz Counties.

(Jt. Exh. G.)

In addition, Section 1.2 of both the North Coast CBA and the Northern California CBA states, "The work covered by the Agreement shall be performed only by members of the appropriate unit as defined in Section 1 hereof and such work shall consist of all work and services connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employer's retail food stores including the demonstration of such products [...]" (Jt. Exh. F and G.)

Section 18 of both the North Coast CBA and the Northern California CBA (Adjustment and Arbitration of Disputes) contains the parties' dispute resolution process. Also, Appendix E of the North Coast CBA and Appendix F of the Northern California CBA (both titled, "Order Selectors (Safeway.com)"), which applies to on-line order selection employees, are provisions applicable to this proceeding and in arbitration proceedings concerning multiple pending grievances the Union filed against Respondent, alleging that vendors (Boar's Head, DSD, and InstaCart) are performing work falling within the exclusive jurisdiction of the Units' employees.

###### B. *Union's Grievances*

On March 5, the Union sent Respondent's labor relations manager Mike Leary (Leary)<sup>3</sup> a letter demanding that Respondent

<sup>1</sup> All dates hereinafter are in 2018, unless otherwise noted.

<sup>2</sup> Abbreviations used in this decision are as follows: "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

<sup>3</sup> The parties stipulated that Leary is an agent of Respondent within the meaning of Section 2(13) of the Act.

comply with Section 1.2 of the parties' North Coast CBA, cease utilizing nonbargaining unit persons (InstaCart workers)<sup>4</sup> to perform clerks' work and post the order selector positions as outlined in the CBA; the letter also served as notice of intent by the Union to refer the matter to the parties' dispute resolution process (Jt. Exh. H).<sup>5</sup> The letter included attachments of photos: one photo shows a store display indicating that customers could order groceries via Respondent's website with delivery in as little as two hours, and two other photos are of the InstaCart website which shows that InstaCart partners with Respondent and deliveries may be made in as little as an hour. In addition, Respondent's website offers various ways for customers to order groceries including receiving flexible delivery, driving up to the store to pick up pre-ordered groceries, and rush delivery "powered by InstaCart" (Jt. Exh. N).

From March 30 onwards, the Union filed against Respondent multiple, pending grievances, which alleged that Boar's Head, DSD,<sup>6</sup> and InstaCart performed work that fell within the exclusive jurisdiction of the Units' employees. Regarding the allegation that Boar's Head is performing bargaining unit work, an arbitrator heard the dispute on October 8, and no award has been yet made. The disputes concerning DSD and InstaCart have not yet been heard by an arbitrator.

### *C. Timeline of Events Regarding the Union's Information Request*

After filing the aforementioned grievance on March 5, on March 30, John Frahm (Frahm), the Union's North Coast Director and agent, requested via email that Respondent provide it with the following information: The contracts between Respondent and Boar's Head, DSD, and InstaCart. The Union requested this information "in connection with the many grievances pending regarding Safeway's use of vendor employees to perform work in stores under Local 5's jurisdiction" (Jt. Exh. I). The Union stated that to the extent Respondent claimed the requested information to be confidential, the Union was prepared to enter discussions to address any legitimate concerns.

Penny Schumacher (Schumacher), Respondent's Director of Labor Relations,<sup>7</sup> via an April 23 email refused to furnish the information request by the Union on March 30. Schumacher stated that Respondent was not obligated to furnish the information as the Union had not demonstrated relevance by objective evidence (Jt. Exh. K). Schumacher further stated that the work performed by the vendors pertains to the "type of product" and the contracts have no bearing on whether the work should be performed by bargaining unit employees (Jt. Exh. K).

On April 26, Frahm responded via email reiterating the Union's need for the requested information. Frahm wrote,

The Union currently has grievances pending regarding the alleged performance of bargaining unit work by each of these vendors. Our evidence in this regard to date is anecdotal, based

on witness observations. The vendor contracts requested are relevant to the Union's continuing investigation of these grievances in that vendor contract may well (a) corroborate our anecdotal, witness observations; and (b) establish that the anecdotal violations are not accidental or isolated, but instead the result of a deliberate business plan engaged in by [Respondent]. The later point, relevant in and of itself, is also relevant insofar as an appropriate remedy is concerned.

(Jt. Exh. K.)

Thereafter, on June 26, Schumacher again refused to furnish the Union with its requested information alleging that Respondent was not obligated to furnish the information. Respondent claimed that the Union had not demonstrated relevance. Of pertinence, the email from Respondent to the Union states,

[I]t is the collective bargaining agreement that controls all grievance issues. Vendor contracts cannot in any way "corroborate" witness observation of alleged collective bargaining agreement violations. [Respondent] does not dispute that Boar's Head and DSD are vendors who stock products at its stores. Its position is that the collective bargaining agreement gives these particular vendors the contract right to stock product. So no "corroboration" of this fact is needed.

Whatever the vendor contracts say about vendor rights will not serve to excuse any collective bargaining agreement violations. Likewise, whether or not [Respondent's] allowing vendor performance of unit work is intentional, negligent, or otherwise is not relevant to determining a contract violation or appropriate remedy. Either way, what a vendor contract may say on vendor rights and services is completely irrelevant.

(Jt. Exh. K.) Also on June 26, Respondent stated that no contract exists between Boar's Head and Respondent, or between DSD and Respondent. Respondent claimed that InstaCart retains individuals to shop on behalf of customers, and "is not any different than any other customer buying groceries" (Jt. Exh. K.) Finally, Respondent stated that a contract exists between Albertsons Companies, which shares a parent company with Respondent, and InstaCart but claimed confidentiality and proprietary interests and was "not willing to disclose it" (Jt. Exh. K.)

On July 2, the Union again asked for the requested information. Frahm stated that the Union was entitled to the information due to its pending grievances regarding the InstaCart, Boar's Head, and DSD contracts. The Union clarified that it sought copies of any documents, including electronic and/or stored documents, that reflect the nature and/or details of the agreement or arrangement between Respondent and Boar's Head (including Boar's Head purveyors and Golden Bear Provisions) as well as with DSD Merchandisers Inc. (Jt. Exh. K). The Union expressed disbelief that no documentation existed between Respondent and Boar's Head and DSD (Jt. Exh. K). The Union sought the InstaCart contract to determine whether the work

<sup>4</sup> InstaCart in-store shoppers receive customer orders via an application on their smartphone and thereafter, shop for and bag these customer orders for pick up (Jt. Exh. O).

<sup>5</sup> On April 3, the Union revised its grievance letter to include the allegation that Respondent allowed InstaCart to perform bargaining unit work "jurisdiction wide" (Jt. Exh. J).

<sup>6</sup> Boar's Head and DSD are vendors that stock products at Respondent's stores (Jt. Exh. K).

<sup>7</sup> The parties stipulated that Schumacher is an agent of Respondent within the meaning of Sec. 2(13) of the Act.

InstaCart was performing violated the parties' CBA (Jt. Exh. K). The Union again offered to bargain with Respondent as to any confidentiality claims.

On July 31, Frahm sent an email to Schumacher, informing her that InstaCart employees purchasing alcohol on behalf of customers were requesting that Respondent's employees verify that the customers were legally permitted to purchase alcohol per the vendor contract between Respondent and InstaCart (Jt. Exh. L). As a result, Frahm again requested a copy of all agreements between Respondent and InstaCart (Jt. Exh. L).

On August 27, Leary responded, denying that any documents existed regarding Boar's Head and DSD work and supplying of products to Respondent (Jt. Exh. M).

Since March 30 through the present, Frahm has taken the position that the requested information will enable the Union to carry out its representational duties in the pending grievances it has relating to InstaCart performing bargaining unit work. The parties stipulated that if Frahm were called to testify, he would testify as follows:

- Frahm believes that the parameters of any direction or control Respondent has with respect to InstaCart in-store shoppers, and any relationship Respondent has with InstaCart will be revealed in the requested information.
- Frahm believes that the scope of the InstaCart in-store shopper activities—both geographically and in frequency—within the stores covered by the North Coast CBA and Northern California CBA will be revealed by the requested information.

Respondent has not provided any of the documents or information requested (the contracts between Respondent and Boar's Head, DSD, and InstaCart). Moreover, Respondent has not offered to bargain an accommodation over its assertion of confidentiality of the InstaCart contract.

#### ISSUES PRESENTED

The parties stipulated as to the following:

1. Whether Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish the Union with the information it requested beginning on March 30, identified in subparagraphs 7(a) and 7(d) of the complaint, and as follows:
  - 7(a) About April 26, the Union, by email, has requested that Respondent furnish it with the following information: the contracts between Respondent and Boar's Head, DSD, and InstaCart.
  - 7(d) Since about April 26, Respondent has failed and refused to furnish the Union with the Safeway-InstaCart contract or to bargain over an accommodation.
2. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying in furnishing the Union with the information it requested beginning on March 30, identified in

subparagraphs 7(a) and 7(c) of the complaint pertaining to DSD and Boar's Head, and as follows:

- 7(a) About April 26, the Union, by email, has requested that Respondent furnish it with the following information: the contracts between Respondent and Boar's Head, DSD [...]
- 7(c) From about April 26 through June 26, Respondent unreasonably delayed in responding to the Union's request for the Boar's Head and DSD contracts.

#### DISCUSSION

##### *A. Respondent Failed to Provide Relevant and Necessary Information to the Union in the Performance of Its Duties as the Collective-Bargaining Representative of the Unit Employees*

The General Counsel argues that Respondent violated the Act by failing to provide the Union information it requested in connection to grievances regarding the Units. Specifically, the Union requested information as to the Boar's Head and DSD contracts due to the Union's grievance allegation that these vendors performed bargaining unit work. The General Counsel also argues that the Union requested the InstaCart contract due to the Union's grievance allegation that Respondent violated Sections 1.2 and Appendix E and F of the North Coast CBA and Northern California CBA (GC Br. at 11–12). In contrast, Respondent argues that the Union failed to provide objective evidence to support its claim for the requested relevant information (R. Br. at 9).

Each party to a bargaining relationship is required by Section 8(a)(5) of the Act to bargain in good faith. An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations as well as administration of the contract. In addition, an employer is required to furnish the union representing its employees with information that is relevant to the union in the performance of its collective-bargaining duties. *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). This also includes information necessary to decide whether to file or process grievances on behalf of unit employees. *Acme Industrial*, supra at 435–439; *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

Generally, a union's request for information pertaining to employees in the bargaining unit is presumptively relevant and an employer must provide the information. *CVS Albany, LLC*, 364 NLRB No. 122, slip op. at 2 (2016), enfd. 157 F.3d 222 (3d Cir. 1998). However, where the information requested concerns non-unit employees, the union bears the burden of establishing relevancy. *Disneyland Park*, supra; *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998). A union satisfies its burden to do so, if it demonstrates either "a reasonable belief, supported by objective evidence, that the requested information is relevant,"<sup>8</sup> or "a 'probability that the desired information was relevant, and that it would be of use to

<sup>8</sup> *Disneyland Park*, supra at 1257–1258.

the union in carrying out its statutory duties and responsibilities,”<sup>9</sup> The required showing is subject to a liberal, “discovery-type standard” and is not an exceptionally heavy one. *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. 1, fn. 2 (2018), mot. to intervene denied 366 NLRB No. 141 (2018), enf. 925 F.3d 1272 (D.C. Cir. 2019). The union need only show a probability that the desired information was relevant, and would only be used by the union to carry out its statutory duties and responsibilities. But “[t]he union’s explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information.” *Disneyland Park*, supra at 1258, fn. 5 (2007). The determination of relevance “depends on the factual circumstances of each particular case.” *San Diego Newspaper Guild, Local No. 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

I find that Respondent violated Section 8(a)(5) and (1) of the Act when it failed to provide the Union with the requested information. In this matter, the Union filed grievances against Respondent alleging that Respondent violated the CBA by permitting specific vendors to perform bargaining unit work. Thereafter, the Union sought the contracts between Respondent and vendors Boar’s Head, DSD, and InstaCart. Since the information request does not concern subjects directly related to the bargaining unit, the Union must establish relevance, which it has. The Union repeatedly explained that it sought the vendor contracts to corroborate anecdotal witness observations as well as to establish that Respondent engaged in a “deliberate business plan” rather than an accidental or isolated violation of the parties’ CBA which could affect any remedy sought in arbitration (Jt. Exh. K). The Union is not required to show that the information triggering its request was accurate or ultimately reliable and may be based on hearsay. *United States Postal Service*, 337 NLRB 820, 822 (2002). “Even rumors may be pursued, providing that there is at least some demonstration that the request for information is more than pure fantasy.” *Cannelton Industries, Inc.*, 339 NLRB 996, 1005 (2003).

In addition, as to the InstaCart contract, the Union clearly explained that it sought such information to determine whether the work performed by InstaCart violated Section 1.2 and Appendix E of the North Coast CBA, and Section 1.2 and Appendix F of the Northern California CBA. The Union explained the relevancy of such information to its statutory duties and responsibilities via written correspondence with Respondent from April to

August. The Union continued to support its request by providing photographs of Respondent’s advertisements and connections to the InstaCart service. The Union provided Respondent with an example as to how the InstaCart agreement with Respondent affected its bargaining unit employees. The General Counsel also presented Frahm’s stipulated testimony regarding additional reasons the Union needed the information.<sup>10</sup>

Throughout the written exchanges between the Union and Respondent, Respondent declined to provide any information, claiming that the vendor contracts had no bearing on whether Respondent violated the parties’ CBA. Respondent claimed that these vendor contracts only related to the type of product. Respondent also rejected the Union’s claim that it had anecdotal witness evidence as this evidence was not objective. Two months after its initial response to this information request, Respondent again declined to provide any information sought—specifically, Respondent declined to provide the InstaCart contract and stated for the first time that no contract existed between Respondent and Boar’s Head or DSD. Respondent stated that the Union failed to provide any valid reasons for the information. The vendor contracts could not corroborate witness observations and would not have any effect on whether Respondent violated the CBAs.

Based on the parties’ stipulated record, I find that the Union has satisfied its burden by showing a probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. Again, the Union’s burden is “not an exceptionally heavy one.” *SBC Midwest*, 346 NLRB 62, 64 (2005). The vendor contracts are relevant to the Union’s duties to determine whether the CBA was being violated by bargaining unit work being performed outside the unit. The Union cannot reasonably be expected to determine whether bargaining unit work is being performed outside the unit without reviewing the contracts between the vendors and Respondent; these contracts could shed light on what actual work is to be performed by the vendor. In addition, Respondent continually rejected the Union’s reasoning for the information, insisting that the Union must provide objective evidence and the anecdotal evidence was not enough. However, as explained previously, the Union could provide objective evidence or a probability that the information is relevant, but in either circumstance the burden is not heavy.<sup>11</sup>

Moreover, in anticipation of any claim by Respondent that the

<sup>9</sup> *Kraft Foods North America, Inc.*, 355 NLRB 753, 754 (2010) (quoting *NLRB v. Acme Industrial Co.*, supra at 437).

<sup>10</sup> Respondent argues that it would have objected to Frahm’s stipulated testimony at a hearing as his additional relevancy arguments were not raised at the time of the Union’s information requests (R. Br. at 13–14). However, the Board has held that a union is not obligated to disclose at the time of the information request the underlying facts establishing its belief that the requested information is relevant. *Cannelton Industries*, supra at 997. It is enough that the General Counsel demonstrate at the hearing that the Union had a reasonable belief during the time it requested the information. *Id.* The General Counsel has provided these additional reasons via the stipulated record, and further established that the Union had a reasonable belief for the vendor contracts. But even if I disregarded Frahm’s stipulated testimony, I find that the Union met its burden to establish why the information requested was relevant.

<sup>11</sup> Respondent cites to two Board decisions to support its position that requests for contracts are not presumptively relevant (R. Br. at 9). However, in *Station GVR Acquisition*, 366 NLRB No. 175, slip op. at 2 fn. 6 (2018), the Board specifically denied summary judgment on the requests for contract agreements and covenants and remanded the issues to the Regional Director. In addition, in contrast to the facts presented in this matter, in *Ethicon, A Johnson & Johnson Co.*, 360 NLRB 827, 832 (2014), the Board affirmed the administrative law judge’s decision that the Union failed to establish relevancy for information concerning subcontracting where the parties’ collective-bargaining agreement permitted subcontracting, and other information as to the work being performed by the subcontractors was provided to the Union. Here, the Union satisfied its burden by setting forth the CBA provisions Respondent appeared to violate (which cover on-line order selectors) but needed the contracts to corroborate witness evidence it had received.

information requested by the Union was confidential, the Union, on March 30, offered to enter negotiations with Respondent to address any concerns. Under *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979), the Board is required to balance a union's need for information against any "legitimate and substantial" confidentiality interest established by the employer. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991). When an employer refuses to provide information on confidentiality grounds, the employer has a duty to seek to bargain toward an accommodation between the union's information needs and the employer's justified interests. *Id.* at 1105–1106. However, Respondent simply refused to engage in such bargaining.

For these reasons, Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused since March 30 to provide the InstaCart contract to the Union, or bargain over an accommodation to address its confidentiality concerns.<sup>12</sup>

#### *B. Respondent Unreasonably Delayed Providing Information to the Union*

The General Counsel argues that Respondent violated Section 8(a)(5) of the Act when it failed to timely respond to the Union's request for the Boar's Head and DSD contract (GC Br. at 18–20). Specifically, on June 26, Respondent informed the Union that no responsive documents existed between Respondent and Boar's Head or DSD. Respondent argues that its delay in informing the Union that no Boar's Head or DSD contracts existed was *de minimis* (R. Br. At 15).

"[A]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), *enfd.* 672 F.3d 1085 (D.C. Cir. 2012). "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a *per se* rule. What is required is 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). "In evaluating the promptness of the employer's response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information." *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), *enfd.* in relevant part 394 F.3d 233 (4th Cir. 2005).

To determine whether an employer has failed to furnish information in a timely manner, the Board considers a variety of factors, including the nature of the information sought (including whether the requested information sought is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party. *West Penn Power Co.*, 339 NLRB 585, 587 & *fn.* 6, 588 & *fn.* 9. See also *Postal Service*, 308 NLRB 547, 551 (1992); *Valley Inventory Service Inc.*, 295 NLRB 1163, 1166

(1989).

On March 30, after filing several grievances, the Union requested Respondent's contracts with Boar's Head and DSD. On April 23, Respondent refused to provide these contracts, claiming that the Union failed to provide any relevance by objective evidence. The Union promptly replied on April 26 to Respondent's refusal, providing more reasons for its request. Two months later, Respondent replied to the Union's April 26 request. In this correspondence, Respondent claimed that no contracts existed between Respondent and Boar's Head or DSD. On July 2, the Union clarified its request regarding the Boar's Head and DSD contracts to ensure that Respondent knew what information it sought. But again, a little less than two months later, on August 27, Respondent again denied any responsive documents existed. The Union's request for the Boar's Head and DSD contracts was simple, and not complex, and the nonexistence of these contracts could not have been difficult to determine. Respondent claims that the Union was not harmed by its delay in informing the Union of the nonexistence of these documents (R. Br. at 15–16). Again, Respondent relies upon its arguments that the Union failed to sustain its burden of proof and so any delay in responding would be *de minimis*. I disagree. The Union sought these documents after it filed several grievances concerning whether nonbargaining unit persons were performing bargaining unit work. Such a delay in informing the Union that the requested documents do not exist prejudices the Union in its representational duties. The Board has found that even a 4-week delay in providing information to a union has been found to be untimely. *Postal Service*, 308 NLRB 547, 551 (1992) (unreasonable to delay 4 weeks in providing information that was not shown to be complex or difficult to retrieve); see also *Capitol Steel & Iron Co.*, 317 NLRB 809, 813 (1995) (finding a 2-week delay unreasonable), *enfd.* 89 F.3d 692 (10th Cir. 1996); *Linwood Care Center*, 367 NLRB No. 14, slip op. at 5 (2018) (finding 6-week delay unreasonable). Although the Boar's Head arbitration was held on October 8, Respondent still had an obligation to timely advise the Union that no responsive documents existed.

Based on the foregoing, Respondent violated Section 8(a)(5) and (1) by unreasonably delaying in furnishing the Union from March 30 to June 26 the Boar's Head and DSD contracts.

#### CONCLUSIONS OF LAW

1. Safeway, Inc. (Respondent) is, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Local 5, United Food and Commercial Workers, AFL-CIO (Charging Party or the Union) is, has been at all times material, a labor organization within the meaning of Section 2(5) of the Act, and represents the following bargaining units:

All employees working in the Employer's retail food stores within the geographical jurisdiction of the Union covering Del

<sup>12</sup> As Respondent stated that no Boar's Head or DSD contract exists with Respondent, the delay in informing the Union that no responsive information exists will be discussed in the following section.

Norte and Humboldt counties, excluding meat employees and supervisors.

All employees working in the Employer's retail food stores within the geographical jurisdiction of the Union, except supervisors within the meaning of the National Labor Relations Act, as amended.

(FOOD): Alameda County; Contra Costa County; Marin County; Monterey/San Benito/Santa Cruz Counties; Napa/Solano County; San Mateo County; Santa Clara County.

All Head, Journey, and Apprentice Meat Cutters working within the following geographical jurisdiction of the Union:

(MEAT): Alameda County, including meat in the cities of El Cerrito, El Sobrante, Kensington, Richmond and San Pablo of Contra Costa County; Humboldt/Del Norte Counties; Lake/Mendocino/Sonoma & Marin Counties south to and including Novato; Marin County north to Novato; San Francisco County and the cities of Daly City, Colma, Brisbane, South San Francisco and Pacifica; The Retail Markets and Frozen Food Locker Plants of the Employer in Santa Clara/San Benito/Monterey/Santa Cruz Counties.

3. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information requested since March 30, which was necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of the unit employees, or to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that Respondent considers confidential.

4. By delaying in providing responses to the Union's March 30 request until June 26, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has violated the Act by failing and refusing to furnish the Union with the information requested, and delaying providing other information, and thereby engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and conclusions of law, and the entire record, I issue the following recommended<sup>13</sup>

#### ORDER

Respondent, Safeway, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish United Food and Commercial Workers Local 5, United Food and Commercial Workers, AFL-CIO with information requested since March 30, that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of Respondent's unit employees, or refusing to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that Respondent considers confidential.

(b) Unreasonably delaying from March 30 to June 26 in providing responses to requests for relevant information by the Union.

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

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

(a) Furnish to the Union, in a timely manner, the information requested since March 30, or bargain in good faith with the Union to reach an accommodation of interests in response to the Union's request for relevant information that Respondent considers confidential, described as follows: the InstaCart contract.

(b) Within 14 days after service by the Region, post at its facility in Eureka, California, copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since March 30, 2018.

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

Dated, Washington, D.C. July 9, 2019

#### APPENDIX

#### NOTICE TO EMPLOYEES

"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."

<sup>13</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>14</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading

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 fail and refuse to furnish the United Food and Commercial Workers Local 5, United Food and Commercial Workers, AFL-CIO (the Union) with information requested since March 30, 2018, which is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of our employees in the following bargaining units:

All employees working in the Employer's retail food stores within the geographical jurisdiction of the Union covering Del Norte and Humboldt counties, excluding meat employees and supervisors.

All employees working in the Employer's retail food stores within the geographical jurisdiction of the Union, except supervisors within the meaning of the National Labor Relations Act, as amended.

(FOOD): Alameda County; Contra Costa County; Marin County; Monterey/San Benito/Santa Cruz Counties; Napa/Solano County; San Mateo County; Santa Clara County.

All Head, Journey, and Apprentice Meat Cutters working within the following geographical jurisdiction of the Union:

(MEAT): Alameda County, including meat in the cities of El Cerrito, El Sobrante, Kensington, Richmond and San Pablo of

Contra Costa County; Humboldt/Del Norte Counties; Lake/Mendocino/Sonoma & Marin Counties south to and including Novato; Marin County north to Novato; San Francisco County and the cities of Daly City, Colma, Brisbane, South San Francisco and Pacifica; The Retail Markets and Frozen Food Locker Plants of the Employer in Santa Clara/San Benito/Monterey/Santa Cruz Counties.

WE WILL NOT unreasonably delay in providing responses to requests for relevant information from the Union since March 30, 2018.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL, in a timely manner, furnish the Union with the information requested since March 30, 2018, or will bargain in good faith with the Union to reach an accommodation of interests in response to the Union's request for the following relevant information that Respondent considers confidential: the Insta-Cart contract.

WE WILL bargain in good faith with the Union and timely provide it with information that is relevant and necessary to its role as your bargaining representative.

SAFEWAY, INC.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/20-CA-221482](http://www.nlr.gov/case/20-CA-221482) 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.

