



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

UNITED STATES POSTAL SERVICE

Respondent

and

Case 07-CA-232299

**CENTRAL MICHIGAN AREA LOCAL 300,
AMERICAN POSTAL WORKERS UNION
(APWU), AFL-CIO**

Charging Party

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

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

I. PROCEDURAL HISTORY

On July 29, 2019, Administrative Law Judge Donna N. Dawson (ALJ Dawson) conducted a hearing in the above matter. On December 23, 2019, ALJ Dawson issued her Decision finding that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act because of the unreasonable delay, from on about November 29, 2018 and December 27, 2018 to about January 10, 2019, in providing Charging Party with requested information, including all documents, records and questions to be used in an investigative interview of bargaining unit employee and part-time flexible clerk Charlotte Barker related to Respondent's disciplinary action against her, which information is necessary to the performance of the Charging Party's function as the exclusive collective-bargaining representative of Respondent's employees. (ALJD P 3, L 22- 39; ALJD P 4, L

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

8-45; ALJD P 5, L 1-33; ALJD P 6, L 1-2; ALJD P 13, L 21-47; ALJD P 14, L 1-45; ALJD P 15, L 1-43; ALJD P 16, L 1-41; ALJD P 17, L 1-25; Jt EX 1-2).

On January 16, 2020, Respondent served upon the Board Exceptions and supporting brief to ALJ Dawson's Decision. (R EX; R Brief). Counsel for the General Counsel requests, respectfully, that the Board deny Respondent's Exceptions in their entirety and responds in opposition as follows.

II. RESPONDENT'S EXCEPTIONS AND COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE

- (1) The ALJ erred when she determined that the Union's request for information relating to a future pre-disciplinary interview was presumptively relevant

Contrary to Respondent's contention that Charging Party's information requests were premature on the asserted ground that Respondent had not yet issued discipline to bargaining unit employee Charlotte Barker, ALJ Dawson correctly decided that the information requested by Charging Party, including all documents, records and questions to be used in an investigatory interview of Barker, pertained to discipline and a potential grievance about her time and attendance and other terms and conditions of her employment, is presumptively relevant. (ALJD P 4, L 40-45; ALJD P 8, L 10-13; R EX 1; R Brief 3-4; Tr 93-94; Jt. EX 2-3, R 2). Charging Party, in the form of Union Steward John Greathouse, required the information before Respondent's investigative interview of Barker on December 4, 2018 in order to better understand the away-without-leave (AWOL) charges, which Respondent had leveled against her, so that Greathouse could prepare to represent her, including the provision of counselling services. (ALJD P 2, L

34-36; ALJD P 6 L 4-13; ALJD P 8, L 13-15; Tr 45, 65). ALJ Dawson correctly decided that there was no evidence to doubt Charging Party's reasonable and good-faith belief that the scheduled investigative interview would result in further discipline of Barker. (ALJD P 8, L 15-16; ALJD P 7, L 20-39; ALJD P 8, L 1-8). Greathouse believed that Respondent's failure to provide the requested documentation in a timely manner resulted in Barker's removal discipline and Charging Party's inability to grieve that matter. (ALJD P 6, L 11-13; Tr 58-61, 67; Jt EX 1, Art. 15, Sec. 2(a), p. 77). Language found in Article 15, Sec. 2(a) of the parties' collective-bargaining agreement supports Greathouse's good-faith belief:

The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance.

(ALJD P 6, fn. 5).

ALJ Dawson properly decided that information requested about "bargaining unit employees, and especially the filing, possible filing or processing of grievances is presumptively relevant. *Yeshiva University*, 315 NLRB 1245, 1248 (1994); *Contract Flooring Systems*, 344 NLRB 925, 928 (2005); *T.U. Electric*, 306 NLRB 654, 656 (1992); *Ohio Power Co.*, 216 NLRB 987, 991-992 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). [footnote omitted] (ALJD P 7, L 35-39). In footnote 7 of the ALJ Dawson's decision, she further stated:

A pending grievance is not a prerequisite for requested information to be considered relevant to a union's statutory responsibilities. Indeed, the union is entitled to information to assess whether it should exercise its representative function and whether the information will warrant further action, such as filing a grievance or bargaining about a disputed matter.

See *Public Service Co. of New Mexico*, 360 NLRB 573 at 574, citing *Disneyland Park*, 350 NLRB 1256, 1258 (2007) (information presumptively relevant to union's statutory duty to represent unit employee "in any possible future dispute with the Respondent over the retained Information"); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 fn. 7 (2000), *enfd.* on other grounds 263 F.3d 345 (4th Cir. 2001) (the union may retain information relevant for potential future use for its performance of its representational duties).

(ALJD P 7, fn. 7). ALJ Dawson properly decided that the "burden to establish relevance in information requests is not a heavy one, and potential or probable relevance will sufficiently invoke an employer's obligation to provide information." (ALJD P 8, L 1-3). "The Board uses a broad, discovery-type standard, requiring only that the union demonstrate 'more than a mere suspicion of the matter which the information is sought.'" *Racetrack Food Services*, 353 NLRB 687, 699 (2008) (citation omitted), *reaffd.* 355 NLRB 1258, 1258 (2010); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011) . . . [citation omitted] *Children's Hospital of San Francisco*, 312 NLRB 920, 930 (1993)." (ALJD P. 8, L 1-8).

ALJ Dawson properly decided that where, as in the instant case, the requested information is presumptively relevant, Respondent has the burden of rebutting that presumption. "*Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *AK Steel Corp.*, 324 NLRB 173, 183 (1997)." (ALJD P 8, L 18-21). Further, contrary to Respondent's contention, ALJ Dawson properly decided that Respondent failed to meet its burden which procedure was not novel, extraordinary, nor unusual for Respondent to follow. (ALJD P 8, L 20-21; R EX 1; R Brief 4).

- (2) The ALJ erred when she determined that management did not proffer a confidentiality concern and, if it did, management failed to determine if the investigation would be impeded by disclosing the requested information

ALJ Dawson properly decided that Respondent did not possess a confidentiality privilege to refrain from providing Charging Party with all documents, records and questions to be used in an investigative interview of bargaining unit employee Barker before Respondent's issuance of a notice of removal, dated December 11, 2018, to her and such privilege did not outweigh Charging Party's need for the aforementioned requested information. (ALJD P 8, L 30-33; ALJD P 9, L 15-39; Jt EX 2-3).

ALJ Dawson properly decided that where "an employer raises confidentiality concerns, generally the employer has the burden of establishing a legitimate claim of confidentiality that would justify refusal to provide the requested information. *Medstar Washington Hospital Center*, 360 NLRB 846, 846, fn. 1 (2014), citing, *NLRB v. Detroit Edison*, 440 U.S. 301 (1979). To determine whether an employer has established its claim, the Board has applied the balancing test set forth in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). See also, *American Baptist Homes of the West*, 362 NLRB 1135 (2015), enfd. in relevant part 858 F.3d 612 (D.C. Cir. 2017) (Board indicated it would apply [the] *Detroit Edison* test in future cases when an employer asserts a confidentiality interest in protecting witness statements). Under *Detroit Edison*, the Board balanced the Union's need for requested relevant information against the employer's established legitimate and substantial confidentiality interests. 362 NLRB at 1139. In establishing such an interest, an employer must demonstrate more than a generalized concern about protecting the integrity of employee disciplinary investigations. *Id.* Instead, an employer

must determine in each case whether any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a coverup. *Id.* citing *Hyundai America Shipping Agency*, 357 NLRB 860, (2011), *enfd.* in relevant part 805 F.3d 309, 314 (D.C. Cir. 2015). If a legitimate and substantial confidentiality interest is established, the employer must offer to accommodate both its concern and its bargaining obligation, ‘as is often done by making an offer to release the information conditionally or by placing restrictions on [its] use[T]he onus is on the employer because it is in the better position to propose how best it can respond to a union request for information.’ See also *Metropolitan Edison Co.*, 330 NLRB 107, 107-108 (1999). The union need not propose the precise alternative/accommodation. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998).” (ALJD P 8, L 38-47; ALJD P 9, L 1-13; R EX 2; R Brief 4-8).

Also, contrary to Respondent’s assertion, Charging Party did not fail to accept and/or fully participate in Respondent’s offer to accommodate by reasserting the request once Respondent completed the investigation and issued the notice of removal to Barker. (ALJD P 8, L 33-36). ALJ Dawson properly decided that “there is no evidence that witnesses needed protection, evidence was in danger of being destroyed, testimony might be fabricated or there was a need to prevent a coverup.” (ALJD P 9, L 15-16). Respondent charged Barker with “violating its attendance rules and policies by being late, without approved leave, on more than one occasion.” (ALJD P 9, L 17-18). Moreover, Respondent considered Barker’s prior discipline, but there is no evidence that Greathouse or Barker knew what past discipline would be used or how far back

Respondent would go, and it appears that the only witness interviewed was Postmaster Timothy Schuchaskie, who showed no signs of having concerns about witness intimidation. (ALJD P 9, L 18-22). Others noted to have been witnesses, including Acting Supervisor Kathy Strahan, Supervisor Customer Service Chad Rodriguez, and a clerk, but there is no evidence that they (other than Strahan) provided statements, nor were they presented to testify. (ALJD P 2, L 10-11; ALJD P 9, L 22-24; Jt EX 3, pp. 4, 15, 18). ALJ Dawson properly decided that “[i]t is highly unlikely that sharing more details about the nature of the charges involved in this case would have resulted in witness intimidation or tampering or would have otherwise disrupted the investigation in any way.” (ALJD P 9, L 24-26). ALJ Dawson correctly decided that the instant case involving Barker is distinguishable from cases where the employer’s confidentiality interest outweighed the need of either the union or the employee. (ALJD P 9, L 26-28). ALJ Dawson correctly stated that requested information “was not related to any physical altercation or any safety matters or illegal activity such as drug use or theft. See, e.g., *Climax Molybdenum Co. v. NLRB*, 584 F.2d 360, 362-364 (10th Cir. 1978) (investigation of a mining safety incident involving a physical altercation between employees created a special set of facts such that the employer had a substantial and legitimate confidentiality interest.)” (ALJD P 9, L 28-32). ALJ Dawson correctly decided that Respondent did not propose a sufficient accommodation in the instant case and it was obligated to provide Charging Party with the available information about the charges against Barker before the investigative interview. (ALJD P 9, L 37-47).

ALJ Dawson correctly decided that any Respondent accommodation defense is negated by Respondent's failure to make good on its offer. (ALJD P 10, L 1-2). After Respondent completed its interview on December 4, 2018 and issued Barker's notice of removal on December 11, Respondent waited one month, without sufficient justification or explanation, before eventually providing the requested information to Charging Party on January 10, 2019. (ALJD P 10, L 2-5, 12-14; Tr 46-55, 74-76, 93, 102, 103; Jt EX 2-3).

- (3) The ALJ erred when she determined that an employee's Weingarten rights should be extended to include a union's request for pre-interview information.

ALJ Dawson properly decided, contrary to Respondent's contention, that Respondent was lawfully obligated to provide the requested relevant and necessary documentation before Barker's investigative interview of December 4, 2018 on the premise that an employer has no duty to bargain with a union during an investigative interview. (ALJD P 10, L 16-43; ALJD P 11, L 1-16; Tr 31, 42-45, 65; R EX 3; R Brief 8-12; Jt EX 3, Investigative Interview Statement and Barker's notice of removal, dated December 11, 2018). ALJ Dawson correctly decided that an employer would have an obligation to provide a union with relevant and necessary information before an investigative interview under certain circumstances, which are present in the instant case. *Climax Molybdenum Co.*, 227 NLRB 1189, 1190 (1977), *enfd. denied* 584 F.2d 360 (10th Cir. 1978) (ALJD P 11, L 2-16). The "Board relied on the Supreme Court's opinion in *Weingarten* [*NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975)] that to effectively represent an employee 'too fearful or inarticulate to relate accurately the incident being

investigated' a union representative must be 'knowledgeable' to 'assist the employer by eliciting favorable facts, and . . . getting to the bottom of the incident.'" (ALJD P 11, L 3-7). ALJ Dawson stated that "the Board determined that 'these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts.'" Id. (ALJD P 11, L 7-9). While the 10th Circuit Court of Appeals denied reinforcement in this case because the affected employees never expressed any interest in consulting with their union representative before the interview, the Court, nonetheless, "considered the specific facts in determining that a mining safety incident involving dangerous work activity and a physical altercation among employees created a special circumstance and compelling business justification 'of conducting a smooth-running business operation.' *Climax Molybdenum Co. v. NLRB*, 584 F.2d 360, 362-364 (10th Cir. 1978)." (ALJD P 11, L 9-16).

ALJ Dawson properly decided that the Ninth Circuit Court of Appeals has also enforced the Board's extension of an employee's right to consult with union representation during a disciplinary interview to the right to counsel with them and obtain certain information before the interview. See *Pacific Telephone & [Telegraph] Co. v. NLRB*, 711 F.2d 134, 136 (9th Cir. 1983) (ALJD P 11, L 18-37). Based upon the aforementioned case law concerning a union's right to request and receive relevant information in connection with grievances and potential grievances and the enforcement of the Board's holding in *Pacific Telephone*, to extend *Weingarten* to employees and/or their union representatives seeking pre-interview information concerning the charges

leveled against the employee provided that such extension does not impede the investigation. (ALJD P 11, L 39-44). ALJ Dawson reasoned that “accepting Respondent’s arguments and imposing a blanket prohibition against the right to receive relevant information prior to investigative interviews, especially those which most likely will result in discipline, would undermine the Union’s right to carry out its duty to effectively represent its members in connection with disciplinary and potential disciplinary actions.” (ALJD P 11, L 44-47; ALJD P 12, L 1). She further reasoned that a “union representative who must always wait until after discipline is issued to request and receive any information about charges rendered against its members is at a great disadvantage.” (ALJD P 12, L 1-42; ALDJ P 13, L 1-12).

ALJ Dawson reasoned “that in extending *Detroit Edison* to the facts of the instant case, the disclosure of the existing information prior to Barber’s interview would not have compromised or jeopardized Respondent’s investigation into her AWOL charges.” (ALJD P 13, L 12-14). She further reasoned that even assuming that Respondent’s confidentiality concerns were “legitimate and substantial”, any confidentiality concerns would have been resolved as of December 11, 2018 when Schuchaskie and Strahan issued a notice of removal to Barker, by U.S. Mail, stating that Respondent would remove her from employment no later than January 18, 2019 and that Barker would be placed on administrative leave in the interim. (ALJD P 13, L 16-17; Tr 31-32, 49, 66; Jt Ex 3, Notice of Removal, dated December 11, 2018). Moreover, ALJ Dawson properly decided that Charging Party possessed “an equal or greater compelling need for the requested information: to prepare for potential discipline and the filing of a grievance.”

(ALJD P 13, L 17-19). Also, ALJ Dawson properly decided that there is “no evidence” in the instant case that Charging Party “had a history of attempting to counsel Barber or other members not to answer questions prior to or during such interviews or otherwise tried to thwart the Respondent’s interview process.” (ALJD P 12, L 29-31).

- (4) The ALJ erred when she determined that management unlawfully delayed providing the requested information to the Union

Contrary to Respondent’s contention, the delay in providing Charging Party with information, including all documents, records and questions to be used in an investigative interview of bargaining unit employee Charlotte Barker, from about November 29, 2018 to January 10, 2019, was clearly unlawful. (ALJD P 13, L 21-47; R EX 4; R Brief 12-16). As ALJ Dawson correctly decided that the Board “has long held” that an employer must respond to an information request in a timely manner. (ALJD P 13, L 21-24). Also, she properly decided that an unreasonable delay in providing relevant and necessary information is equivalent to an outright refusal to provide the information under Section 8(a)(1) and (5). *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989); *Finn Industries*, 314 NLRB 556, 558 (1994). (ALJD P 13, L 24-27).

ALJ Dawson correctly decided that in determining whether an employer has unlawfully delayed in providing requested information, the Board considers the totality of the circumstances and a respondent must exercise a good faith effort in order to respond to requests promptly under the circumstances, including the complexity and extent of the information sought, its availability and the difficulty in securing the information. *Endo Painting Service*, 360 NLRB 485, 486 (2014), citing *West Penn Power Co.*, 339 NLRB

585, 587 (2003), enfd. in pertinent part 394 F.3d 233 (4th Cir. 2005). (ALJD P 13, L 27-34). Whether the requested information is “easily and readily accessible from an employer’s files” are factors which the Board examines in determining whether the delay is unreasonable. *United States Postal Service*, 365 NLRB No. 92 (2017); *Bundy Corp.*, 292 NLRB 671, 672 (1989). (ALJD P 13, L 34-36).

ALJ Dawson correctly decided, contrary to Respondent’s contention that it did not act in bad faith in the delay in providing the instant information, that the analysis of whether an employer’s delay is reasonable is objective and does not rest upon whether an employer acted in bad faith. *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018). (ALJD P 13, L 36-43; R Brief 12-14).

ALJ Dawson correctly decided that “an unjustified multi-month delays of 1.5 months to 3.5 months have been unlawful. See e.g., *Management & Training Corp.*, 366 NLRB No. 134, slip op at 2, 4 (3.5-month delay); *United States Postal Service*, supra (6-week delay unreasonable where information was readily available); *Pan American Grain*, 343 NLRB 318 (2004), enfd. in relevant part 432 F.3d 69 (1st Cir. 2005) (3-month delay); *Woodland Clinic*, 331 NLRB 735, 736-737 (2000) (7-week delay); *United States Postal Service*, 308 NLRB 547, 551 (1992) (4-week unexplained delay unlawful where information was not difficult to retrieve); and *Bundy Corp.*, 292 NLRB 671 (2.5-month delay).” ALJD P 13, L 45-47; ALJD P 14, L 1-5).

ALJ Dawson correctly decided that Respondent violated the act by the delay in furnishing Charging Party with certain of the requested information, including the provision of the “Request for or Notification of Absence” Form 3971 signed on

November 20 and 27, 2018, and the “Leave Year 2018 Analysis” Form 3972 signed on November 30, 2018, would have been well within the scope of the Act, Board law, and *Weingarten*, which information would have explained the nature of the AWOL charges levied against Barker without compromising the investigation. (ALJD P 14, L 7-12; Tr 47-55, 74-76; Jt EX 3).

ALJ Dawson correctly decided that Schuchaskie’s December 3, 2018 response to Greathouse’s November 29, information request “did not sufficiently explain the delay, state Respondent’s confidentiality concern, ask for a narrowing of the information requested or propose a reasonable accommodation.” (ALJD P 14, L 14-16). ALJ Dawson further correctly decided that “Schuchaskie did not provide any real explanation for the delay until he sent the requested information to the Union via email on January 10, 2019, long after he initially consulted via email” with Respondent’s Labor Relations Specialist Patti Shaefer and Manager Labor Relations Susan Harcus and “over one month” after Charging Party filed the instant unfair labor practice charge on December 7, 2018. (ALJD P 14, L 14-19; R 1; GC 1(a), GC 1(b); Jt EX 3). Schuchaskie testified that Harcus instructed him to send the information on January 10, 2019 because Charging Party had filed “a labor charge for lack of all the information.” (Tr 93-94). Also, ALJ Dawson correctly decided that Schuchaskie “did not give sufficient justification for the delay in his January 10, 2019 email.” (ALJD P 14, L 19-20). Schuchaskie stated: “I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal.” (ALJD P 14, L 20-22; Jt. EX 3, cover email).

The waiver of a statutory right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Ground Breakers, Inc.*, 280 NLRB 146 (1986). Also, a respondent's subsequent failure to provide information does not constitute a continuing waiver. *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). A respondent's failure to provide previously requested information does not constitute a continuing waiver by the requesting union regarding the information it requested. Charging Party was not required to renew or resurrect the November 29, 2018 and December 27, 2018 information requests in order to maintain its entitlement to the requested information. The hearing record is devoid of any testimony or other evidence that subsequent to either the November 29 or December 27 information requests, Charging Party waived its right to the requested information. Any assertion that that Charging Party must renew an extant information request lacks legal foundation because any waiver cannot be inferred and must be both clear and unmistakable. *Ground Breakers*, supra. Here, Schuchaskie testified that he had not provided the requested documentation to Charging Party either earlier or after Respondent issued the notice of removal to Barker because he expected Charging Party to make another request. (ALJD P 5, L 27-29; Jt EX 2; Jt EX 3, cover email). ALJ Dawson properly decided that there was no requirement that Charging Party reinstate the information request. (ALJD P 5, L 25-29; ALJD P 14, L 22-23). Also, ALJ Dawson properly decided that Charging Party neither waived nor forfeited the right to the presumptively relevant information, nor did the request become moot after the investigative interview. (ALJD P 15, L 11-13).

A party receiving an ambiguous or overly broad request must promptly seek clarification or narrowing; if a party fails to do so, it in effect waives its right to object to the over-breadth of otherwise relevant information. *Streicher Mobile Fueling, Inc.*, 340 NLRB 994, 995 (2003); *Pacific Physicians Services, Inc.*, 315 NLRB 108 fn. 4 (1994). Here, Respondent never requested that Charging Party either narrow or clarify the November 29 and December 27, 2018 information requests. (Tr 55-56, 98).

III. CONCLUSION

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

Respectfully submitted this 13th day of February 2020.

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Case 07-CA-232299

CERTIFICATE OF SERVICE

I certify that on the 13th day of February 2020, I E-filed **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**, and served a copy electronically on the following parties of record:

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