

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

AT&T MOBILITY SERVICES, LLC

and

Case 25-CA-249079

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 4202, A/W COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

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Comes now Counsel for the General Counsel and respectfully submits this Brief to the Administrative Law Judge in support of the General Counsel's position in the cause herein.

I. Introduction

The complaint alleges that AT&T Mobility Services ("Respondent" or "Employer") violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide relevant information to Communications Workers of America, Local 4202 ("Union" or "Local 4202" or "Charging Party"). There is no dispute that the Union submitted four written information requests for the "Integrity Matrix" between September 18, 2019 and September 26, 2019, nor is there a dispute that Respondent, in writing on September 27, 2019, refused to provide the Integrity Matrix to the Union. The issue in this case is whether the Integrity Matrix is relevant to the Union's representational duties, and thus whether the Respondent is obligated to produce the document.

The record evidence demonstrates that Respondent's own characterizations of the Integrity Matrix make it presumptively relevant to the Union's representational duties, as several of Respondent's agents explained to the Union that the Integrity Matrix is used to determine the appropriate level of discipline for Unit employees for violations of Respondent's Code of Business Conduct ("COBC"). Indeed, the testimonial evidence shows that the Integrity Matrix is a step-by-step set of instructions and action steps managers must take when they discover a Unit employee may have violated the COBC. Those steps may and often do result in the employee

receiving discipline, and even if no discipline is issued, the process is documented in Respondent's records system.

The evidence establishes that the Integrity Matrix is presumptively relevant because it is directly related to Unit employees' terms and conditions of employment, and it further shows that even though it had no obligation to do so, the Union sufficiently established the relevance of the Integrity Matrix. Finally, the record demonstrates that Respondent failed to prove a legitimate or substantial confidentiality interest in withholding the Integrity Matrix from the Union, and Respondent failed to offer to bargain with the Union over an adequate accommodation for the request. Accordingly, Respondent is failing and refusing to bargain in good faith with the Union in violation of Sections 8(a)(1) and (5) of the Act.

II. Statement of Facts

A. Background

The Respondent provides mobile voice and data products and services to business and residential customers and operates call centers throughout the United States, including one in Rantoul, Illinois ("Rantoul Call Center"). (Jt. Ex. 12) The Respondent employs roughly 120 Customer Service Representatives at the Rantoul Call Center. (Tr. 27, 69) The Customer Service Representatives employed at the Rantoul Call Center ("the Unit") are represented by Communications Workers of America ("CWA") and CWA's designated agent, Local 4202. (Tr. 27, 69, 192 – 193) Unit employees take incoming calls from customers regarding sales, service, and billing issues. (Jt. Ex. 12) In addition to the Collective Bargaining Agreement ("CBA"), Unit employees are subject to Respondent's work rules and policies, including a Code of Business Conduct ("COBC"), a Progressive Discipline Policy, and a Clean Desk policy. (Tr. 64, 195, 205; Jt. Exs. 1, 2, 3, 4, & 12)

The Code of Business Conduct sets forth Respondent's "commitment to [its] values and the code itself . . . and to all who have a stake in AT&T's success." (Jt. Ex. 3) The COBC outlines commitments to the company and its shareholders, its customers, to make a difference, and to others. (Jt. Ex. 3) The COBC applies to all of Respondent's employees, including union-represented employees like those in the Unit, and violations of the COBC can result in discipline up to and including termination. (Tr. 122, 151 – 152; Jt. Exs. 2, 3, 12)

The Progressive Discipline Policy applies primarily to Respondent's union-represented employees, including the Unit at issue here. (Jt. Ex. 2) Progressive discipline is generally

reserved for job performance or attendance matters, and states that misconduct, failure to follow policies, and COBC violations are subject to immediate discipline, up to and including termination. (Tr. 122, 151 – 152; Jt. Ex. 2) The Progressive Discipline Policy provides for four levels of discipline, counseling through termination, and sets forth which level of management is responsible for initiating, reviewing, and approving each level of discipline. (Tr. 122, 151 – 152; Jt. Ex. 2) Respondent’s Clean Desk Policy applies to Respondent’s call center employees, including the Unit employees. (Tr. 205, Jt. Exs. 4, 12) The Clean Desk Policy sets forth Respondent’s expectations for protecting customer information. (Jt. Ex. 4) Violations of the Respondent’s Clean Desk Policy are considered COBC violations and are subject to discipline. (Tr. 45, 196 – 196; Jt. Ex. 4)

The Respondent has a long-standing collective bargaining relationship with CWA and the Union. (Jt. Ex. 12) The Respondent recognizes CWA as the exclusive-bargaining representative of unit employees, and such recognition has been embodied in successive Collective Bargaining Agreements (“CBAs”), including the current CBA effective February 12, 2017 through February 12, 2021. (Jt. Ex. 12) The Union is responsible for enforcing the CBA locally at the Rantoul Call Center, as well as other locations operated by Respondent. (Tr. 27, 69; Jt. Ex. 12) The Union processes grievances and meets with Respondent on behalf of Unit employees, requests information from Respondent in order to process grievances and enforce the contract, and generally performs representational duties for Unit employees. (Tr. 28) Likewise, Respondent generally acknowledges the Union’s representational role relative to Unit employees, provides information when requested, and meets with the Union to resolve grievances. (Tr. 28, 69; Jt. Exs. 5 – 11; GC Exs. 2 – 10)

The Union processes regionwide grievances on behalf of all members as well as individual grievances. (Tr. 30 – 31, 34) To file an individual grievance, Unit employees submit a grievance form on the Union’s website, and the Union then “protects” the grievance by notifying Respondent it intends to appeal a grievance to the first step of the grievance procedure. (Tr. 30; Jt. Exs. 5 – 7) Oftentimes the Union submits a request for relevant data (“RDR”) at that time and schedules a meeting with the Area Manager. (Tr. 30) If the grievance is not resolved at the first step meeting, the Union sends a protection letter notifying Respondent it intends to appeal the grievance to the second and final step of the grievance procedure. (Tr. 30; Jt. Exs. 5 – 7) The Union schedules a second step meeting with HR Labor Management and may submit another

RDR if necessary. (Tr. 30) If the grievance is not resolved at the second step meeting, the Union sends it to the CWA Area District to be reviewed for arbitration. (Tr. 30).

Typically, the Union and Respondent will discuss several grievances in one meeting; they discuss one grievance at a time and move on to the next when a particular grievance discussion is finished. (Tr. 31, 46, 167) At grievance meetings the Union and Respondent each have one person designated to speak and one person taking notes. (Tr. 31 – 32; GC Exs. 2 - 10) It is not uncommon for the Union and Respondent to have off-the-record conversations at grievance meetings, which are not reflected in either party's meetings notes. (Tr. 83 – 86, 190)

B. The Integrity Matrix

In 2015, Respondent acquired satellite television service provider DIRECTV, and in March 2016, Respondent began integrating and training the former DIRECTV workforce on Respondent's policies and practices, including Respondent's COBC, Progressive Discipline Policy, and practices for managing union-represented employees. (Tr. 110 – 111, 113)

Through the integration process, Respondent discovered that managers were not following a consistent process to deal with customer complaints, and in many situations, managers were not taking action to correct the issues leading to the customer complaints. (Tr. 115 – 116, 137 – 138) Respondent found that without a process in place, it couldn't hold anyone accountable for integrity issues; so, starting around the Fall of 2016 through the Spring of 2017, Respondent set out to create such a process to address these issues and consistently hold employees accountable for COBC and integrity issues. (Tr. 116 – 118, 136 – 138) The resulting process was called the Integrity Matrix, and it is characterized as a procedural guide or a management tool containing a step-by-step set of instructions and action steps managers must take when they learn of a possible COBC issue. (Tr. 116 – 117, 118, 197). Respondent utilizes the Integrity Matrix in regions with employees covered by collective bargaining agreements, including the Unit employees at issue here. (Tr. 118)

Managers use the Integrity Matrix tool to investigate and potentially discipline Unit employees for COBC issues. (Tr. 116 – 118, 147, 162 – 163, 197, 204) It is organized as an interactive "decision tree" where managers first select from a few options describing how they learned of the potential COBC issue – whether it was reported through Respondent's call

monitoring programs¹, a customer complaint, another employee, or compliance. (Tr. 127 – 130, 143 – 144) After the manager clicks on the source of the complaint, he or she chooses from options to describe the type of COBC violation – customer mistreat, sales integrity, or legal and regulatory. (Tr. 127, 130, 134, 144) Once the manager chooses the type of COBC violation, for example “customer mistreat,” a list of the procedural steps he or she must take to handle mistreatment of a customer appears, and the manager is then expected to follow all the steps outlined in the Integrity Matrix. (Tr. 116 – 118, 130, 139, 155, 147, 162 – 163, 188, 195) When a manager reaches the end of the steps listed for the COBC violation under investigation, the Integrity Matrix provides a range or a list of possible disciplinary actions that may be appropriate in that case. (Tr. 207 – 208) For some categories, the Integrity Matrix lists the potential actions specifically, such as counseling or final warning, and for other categories, the Integrity Matrix states that discipline may be taken up to and including a certain step, for example, up to and including termination. (Tr. 208)

The Integrity Matrix includes several steps for each scenario: 1) review the issue, determine how the issue was raised, and research to understand what happened; 2) contact the customer to resolve the issue; 3) identify interview questions to ask the employee and the sequence in which the questions will be asked; 4) conduct an investigation; 5) review the employee’s prior disciplines, coaching, and training; 6) contact the investigating manager’s leadership team to review all of the facts and details uncovered through the course of the investigation, the employee’s history, and the employee’s prior coaching, training, and discipline; 7) decide if and at what level discipline is appropriate; 8) if deciding discipline is appropriate, contact the Employee Relations Manager (“ERM”) with the recommendation and take the appropriate disciplinary action; 9) whether discipline is issued or not, document everything in the Respondent’s documentation system of record, including the call, the complaint, investigation documents, coaching and training, and anything else reviewed in the course of the Integrity Matrix investigation, and 10) notify the Integrity Team of whatever action was or was not taken. (Tr. 120 – 122, 144 – 147)

Essentially, the Integrity Matrix directs managers as to what information to gather and consider when determining whether discipline may or may not be appropriate in COBC situations. (Tr. 120 – 122, 144 – 147) Managers are held accountable and can face discipline if

¹ Including SOARS call monitoring described below.

they fail to use the Integrity Matrix, and it is possible that, depending on the circumstances, a Unit employee's discipline or non-discipline could change if Respondent determines the manager failed to follow the steps set forth in the Integrity Matrix. (Tr. 153, 162 – 163)

C. The Union Learns About the Integrity Matrix

1. *November 2018 – Regionwide Grievance*

The Union first learned about the Integrity Matrix at a regionwide grievance meeting in November 2018. (Tr. 35) The Union filed a regionwide grievance because Unit employees started receiving disciplines for COBC violations after their calls were monitored and reported to management by a third-party group referred to as “SOARS.” (Tr. 32 – 34) In the grievance, the Union alleged Respondent was violating the CBA by allowing SOARS to monitor Unit employee calls, and Unit employees were receiving discipline as a result. (Tr. 32 – 34; Jt. Ex. 5) It was within the context of the step I meeting for this regionwide grievance that the Union learned of the Integrity Matrix, which is the document at the center of this case. (Tr. 35; GC Ex. 2)

On November 9, 2018, Respondent's Area Manager John Williams (“Williams”) brought up the Integrity Matrix during the grievance meeting about SOARS. (Tr. 35, GC Ex. 2) Williams explained to Union Executive Vice President Dea Polchow (“Polchow”) and Union Steward Skylar Martin (“Martin”) that SOARS was involved only in COBC issues. (Tr. 35 – 36; GC Ex. 2) Martin raised an example of a Unit employee who had recently received a COBC discipline for misquoting a price by \$2.00, and she pointed out that if Respondent followed its past practice, the Unit employee's mistake would have resulted in an informal coaching and a call to the customer to correct the error. (GC Ex. 2) Martin asked what had changed to require a lengthy investigation and disciplinary action for such an error. (GC Ex. 2) In response, Williams explained that Respondent created an Integrity Team and an Integrity Matrix in 2018, which was scrutinizing managers for actions that are recommended in integrity (i.e. COBC) situations. (Tr. 36, 80 – 81; GC Ex. 2) Williams said Respondent used the Integrity Matrix to provide “checks and balances” and ensure COBC disciplines were issued consistently across the nation. (Tr. 35 – 36, 80 - 81; GC Ex. 2) When the Union requested to see the Integrity Matrix, Williams said it was proprietary and he could not release the information to the Union. (Tr. 36) The step I regionwide grievance meeting was recessed until May 17, 2019. (Tr. 36; Jt. Ex. 5; GC Ex. 2)

2. *Patricia May and Alice Harris COBC Disciplines*

In the meantime, two other Unit employees were disciplined for COBC violations before the regionwide grievance meeting was reconvened. (Tr. 44; Jt. Ex. 12) SOARS flagged a call Unit employee Patricia May (“May”) received on November 26, 2018 because she typed a customer’s credit card number into a computer program called Notepad. (Tr. 44 – 45; Jt. Ex. 6) Similarly, SOARS flagged a call Unit employee Alice Harris (“Harris”) received on February 15, 2019 because she typed a customer’s credit card number into the notes section of computer software called Clarify. (Tr. 45; Jt. Ex. 7) Respondent investigated both calls, and on January 24, 2019, May received a final written warning for violating the Clean Desk Policy and the COBC during her November 26, 2018 call, and on March 18, 2019, Harris received a counseling for the same policy violations during her February 15, 2019 call. (Tr. 40, 44 – 45, 62 – 63; Jt. Exs. 6, 7, 12) Neither May nor Harris typed the expiration dates or the CVV numbers associated with the customer card numbers, and neither saved the credit card numbers to their computers. (Tr. 45)

May and Harris both filed grievances over their disciplines, and the Union pursued both grievances through steps I and II of the process. (Tr. 43 – 44; Jt. Exs. 6, 7, 12) Patricia May’s step I grievance meeting took place on April 26, 2019, and the step II meeting took place on May 7, 2019. (Jt. Exs. 6, 12) Harris’s step I grievance meeting was held on May 17, 2019, and the step II meeting was on August 8, 2019. (Jt. Exs. 7, 12) Both grievances are currently at CWA’s district level under review for arbitration. (Tr. 43 – 44, 62, 87)

3. *Spring 2019 – Grievance Meetings*

On April 26, 2019, the Union and Respondent met to discuss May’s step I grievance. (Tr. 42, 170; Jt. Exs. 6, 12; GC Exs. 9, 5) At the meeting, Respondent offered to change May’s discipline level. (Tr. 94, 170) Polchow and Union Vice President Peggy Vermillion (“Vermillion), who were representing the Union in the grievance meeting left the room to call Union president Holly Sorey (“Sorey”) for approval of the offer to reduce May’s discipline. (Tr. 94, 100, 170 – 171) Sorey rejected Respondent’s offer, and the meeting concluded. (Tr. 94, 100, 170 – 171)

On May 17, 2019, the Union and Respondent convened at the Rantoul Call Center for several grievance meetings, and among them were the regionwide step 1 grievance, reconvened from the initial November 9, 2018 meeting, and Harris’s step I grievance. (Tr. 37, 43, Jt. Exs. 5, 7, 12) Polchow and Vermillion were present for the Union, and Area Manager Roberta Secor

[Chisholm] (“Chisholm”) and Customer Service Team Manager Jaime Majko (“Majko”) were present for the Respondent. (Tr. 43, GC Exs. 5, 7) The Integrity Matrix came up again through the course of the grievance meetings on May 17, 2019, and Chisholm explained that the Integrity Matrix was used as a guideline to determine what infraction and what discipline should issue to Unit employees for COBC violations. (Tr. 37, 44; GC Exs. 3, 7)

Polchow and Chisholm discussed how SOARS flagged calls for potential COBC violations and then managers conducted an investigation (a “QIR”) and sent the QIR to the Employee Relations Manager (“ERM”) to review and determine discipline. (Tr. 37; GC Exs. 3, 7) Chisholm affirmed that the Integrity Operations Team was created to protect the best interests of and uphold the integrity of the company, employees, and customers. (GC Exs. 3, 7) Chisholm also explained the Integrity Team and the Integrity Matrix made the CSP articles² efficient and user friendly, ensuring that employees follow the COBC. (GC Exs. 3, 7) However, when Polchow specifically asked, “What is the Integrity Matrix,” Chisholm replied that she could not answer the question because it was management proprietary information. (GC Exs. 3, 7) Polchow asked for a copy of the Integrity Matrix, and Chisholm gave the same response. (Tr. 38 – 39; GC Ex. 3) At the conclusion of the May 17, 2019 grievance meetings, Chisholm denied the regionwide and Alice Harris grievances. (Tr. 39, 44; Jt. Exs. 5, 7; GC Exs. 3, 7)

At either the April 26, 2019 or May 17, 2019 grievance meeting, Chisholm and Majko turned a laptop around to show Polchow and Vermillion what the Integrity Matrix looked like. (Tr. 37 – 38, 89 – 90, 170 – 171) The laptop screen was approximately 14 inches across, and Polchow and Vermillion were about three to five feet away, across the table. (Tr. 38, 176) Polchow was only able to see a couple paragraphs on the screen. (Tr. 38) The laptop was turned toward Polchow and Vermillion for approximately 45 to 60 seconds before they left the room to make a phone call to Sorey. (Tr. 38, 171, 178) The meeting ended when Polchow and Vermillion re-entered the room, and they did not look at the computer screen again. (Tr. 171, 178)

4. *August 2019 – Grievance Meetings*

On August 8, 2019, the Union and Respondent again met to discuss several grievances, including the regionwide step II grievance and Alice Harris’s step II grievance. (Tr. 39, 46; Jt.

² The CSP is a guide for non-supervisory employees, including Unit employees, to use when they are on the phone with a customer. (Tr. 131 – 132) The CSP also contains training documents, policies, and procedures for non-supervisory, including Unit, employees. (Tr. 132)

Exs. 5, 7, 12; GC Exs. 4, 6, 8, 10) By this time, the Union was starting to see a connection between SOARS and the Integrity Matrix in connection with the regionwide grievance and May's and Harris's disparate COBC disciplines. (Tr. 40, 45 – 46) Hence, the Integrity Matrix came up again at the August 8, 2019 grievance meetings. (Tr. 40 – 41, 45 – 46; GC Exs. 4, 6, 8, 10)

In an attempt to square the Respondent's assertions that the matrix was used to consistently apply COBC disciplines with the fact that employees May and Harris received different levels of discipline for the same infraction, Polchow asked what the Integrity Matrix was and whether the Integrity Matrix specified set disciplines. (Tr. 40, 191; GC Exs. 4, 8) Lead Labor Relations Manager Trent Schott ("Schott") explained that the Integrity Matrix was a management guideline used to determine the appropriate level of discipline depending on the COBC violation. (Tr. 40, 46 – 47; GC Exs. 4, 8) When confronted with Area Manager Williams's statements about consistent discipline across the board at the step I meeting, Schott said he assumed Williams was referring to the fact that the company had to keep discipline consistent because there was a guideline. (GC Exs. 4, 8) Explaining further, Schott used theft as an example of a COBC violation which would result in termination. (Tr. 40, 187; GC Exs. 4, 8)

During an off-the-record conversation at the August 8, 2019 meeting, Schott told Polchow and Vermillion he could not give them a copy of the Integrity Matrix because it belonged to AT&T and was used for management purposes as a guideline for issuing discipline. (Tr. 47) Instead, Schott showed them a portion of the Integrity Matrix on his computer screen. (Tr. 41, 187 – 190, 194) Schott turned his laptop screen around so Polchow and Vermillion could view the Integrity Matrix from the other side of the table. (Tr. 41, 187 – 188) Schott wanted to show the Union that the Integrity Matrix outlines the steps managers should take "up to [the] investigation and afterwards" and then provides for a range of possible actions as opposed to requiring a specific action if the investigation revealed a certain COBC violation. (Tr. 187) So, he showed Polchow and Vermillion "a couple different screens" where managers click through the different paths to complete an investigation using the Integrity Matrix. (Tr. 189, 197) Schott then pointed Polchow and Vermillion to where the Integrity Matrix directs managers, "the following may occur, and it could be any level of discipline or it could be no discipline" depending on the results of the Integrity Matrix investigation. (Tr. 189 – 190) Schott didn't show the Union his computer screen for very long, approximately 30 seconds to a few minutes, which

was long enough to give the Union a few examples in which the Integrity Matrix allowed for a range of disciplinary action. (Tr. 41, 190)

Schott denied the regionwide step II grievance and the Harris step II grievance at the conclusion of the August 8, 2019 meetings, and the Union forwarded both grievances to its District Office to be reviewed for arbitration. (Tr. 62).

D. Union's Requests for Integrity Matrix

On September 18, 2019, Polchow sent Majko an email attaching a request for information related to Harris's grievance. (Jt. Exs. 8, 12). Polchow asked for IEX reports for a certain time period, a copy of the Clean Desk Policy, and the Integrity Matrix. (Jt. Ex. 8) The request for information stated the Union required the information, "In order to make a determination as to whether a valid grievance exists, or if an existing grievance should be elevated to the next step." (Jt. Ex. 8) The same day Majko provided Polchow with the requested IEX reports and the Clean Desk Policy without objection, but she failed to provide the Integrity Matrix. (Tr. 64; Jt. Ex. 8)

On September 19, 2019, Polchow sent Majko another email requesting the Integrity Matrix for a second time. (Jt. Ex. 9) In response, Majko informed Polchow that she provided the information requested in a protect file. (Jt. Ex. 9) On September 20, 2019, Polchow confirmed she received the IEX reports and the Clean Desk Policy and reiterated her request for the Integrity Matrix. (Jt. Ex. 9) In response, Majko instructed Polchow to ask Schott for the information. (Jt. Ex. 9)

Thus, on September 20, 2019, Polchow sent Schott an email attaching a request for information related to Alice Harris's grievance. (Jt. Ex. 10) Polchow requested the Integrity Matrix for the third time, and again the information request specifically stated, "In order to make a determination as to whether a valid grievance exists, or if an existing grievance should be elevated to the next step." (Jt. Ex. 10) Schott never replied to Polchow's September 20, 2019 request. (Jt. Ex. 10)

On September 26, 2019, Polchow sent Schott an email attaching a fourth request for the Integrity Matrix. (Jt. Ex. 11) Again, the request stated the information was needed, "In order to make a determination as to whether a valid grievance exists, or if an existing grievance should be elevated to the next step." (Jt. Ex. 11)

On September 27, 2019, Schott responded to Polchow's request. (Jt. Ex. 11) Schott stated that the item the Union was requesting was a "Manager document thus the CWA is not privy to this item." (Jt. Ex. 11) Respondent has never provided the Union with a copy of the entire Integrity Matrix, nor has Respondent offered to bargain with the Union over ways to accommodate its request. (Tr. 41, 64) Yet, Respondent continues to use the Integrity Matrix to investigate and discipline Unit employees for COBC violations. (Tr. 64)

III. Argument

A. Information Requests

1. *Employer's Obligation to Furnish Information*

It is well established that an employer has a general obligation "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). *Accord Caldwell Mfg. Co.*, 346 NLRB 1159 (2006); *United States Postal Service and National Association of Letter Carriers, Branch No. 422*, 337 NLRB 820, 822 (2002); *Asarco, Inc.*, 316 NLRB 636, 643 (1995), *enfd.* in relevant part 86 F.3d 1401 (5th Cir. 1996); *Western Massachusetts Electric Company*, 234 NLRB 118 (1978). A labor organization's right to information exists not only for the purpose of negotiating a collective-bargaining agreement, but also for the proper administration of an existing contract, including evaluating and processing employee grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). *See also Southern California Gas Co.*, 344 NLRB 231, 235 (2005); *RBH Dispersions*, 286 NLRB 1185 (1987); *Westinghouse Electric Corp.*, 239 NLRB 106 (1978); *United-Carr Tennessee*, 202 NLRB 729 (1973).

The issue is whether the requested information is potentially relevant to the union's statutory obligation to represent unit employees, and the union is generally entitled to the requested information to judge for itself whether to press claims through contractual grievance procedures, before the Board, or in the Courts. *Maben Energy Corp.*, 295 NLRB 149, 152 (1989). *See also Southern California Gas Co.*, 344 NLRB 231, 235 (2005). However, a grievance need not be pending at the time of the information request, nor must the information requested clearly dispose of a grievance. *Ohio Power Co.*, 216 NLRB 987, 991 (1975). *Accord Los Angeles Chapter, Sheet Metal Contractors*, 246 NLRB 886, 888 (1979); *United Technologies Corp.*, 274 NLRB 504 (1985). *See also Western Massachusetts Electric Company*,

234 NLRB 118, 119 (1978) (“it is well settled that a labor organization's entitlement to information is not to be limited merely to that which would be pertinent to a particular existing controversy but rather extends to all information that is necessary for the labor organization properly and intelligently to perform its duties in the general course of bargaining”).

2. *Relevant Information*

Requests for information related to bargaining unit employees' terms and conditions of employment are presumptively relevant, and upon request, employers must provide such information without a demonstration of relevance by the union. *Southern California Gas Co.*, 344 NLRB 231 (2005). *See also Jano Graphics, Inc.*, 339 NLRB 251, 259 (2003); *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), *enfd.* 763 F.2d 887 (7th Cir. 1985). Where the union's request is for information pertaining to bargaining unit employees, “which goes to the core of the employer-employee relationship,” the information is presumptively relevant. *Knappton Maritime Corp.*, 292 NLRB 236, 238 (1988). *See also In Re LBT, Inc.*, 339 NLRB 504, 505 (2003); *Beth Abraham Health Services*, 332 NLRB 1234, 1239 (2000); *Uniontown County Market*, 326 NLRB 1069, 1071 (1998); *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

In contrast, the union bears the burden to establish relevancy where the requested information does not involve the bargaining unit. *Knappton Maritime Corp.*, 292 NLRB 236, 238 (1988). *See also Ohio Power Co.*, 216 NLRB 987 (1975); *Pence Construction Corp.*, 281 NLRB 322 (1986). The Board has held that where requested information is not presumptively relevant, the union must show it has an “objective, factual basis” for believing the information is relevant. *Diamond Trucking Inc.*, 365 NLRB No. 64 (April 25, 2017) (quoting *Piggly Wiggly Midwest*, 357 NLRB 2344 (2012). *Accord Disneyland Park*, 350 NLRB 1256, 1258 (2007); *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988). Requests for information relating to persons outside the bargaining unit require the requesting party to show there is a “logical foundation and a factual basis for its information request.” *United States Postal Service and Stamford, Connecticut Area Local 240, American Postal Workers Union*, 310 NLRB 391, 391 (1993).

To demonstrate relevance, the General Counsel must present evidence that either (1) the union demonstrated relevance of the information, or (2) the relevance of the information should have been apparent to the Respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). *See also Allison Co.*, 330 NLRB 1363, 1367 *fn.* 23 (2000); *Brazos Electric*

Power Cooperative, Inc., 241 NLRB 1016, 1018-1019 (1979), enfd. in relevant part 615 F.2d 1100 (8th Cir. 1980). The burden is not particularly heavy, as it “consists of a showing of a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Allison Co.*, 330 NLRB 1363, 1367, fn. 23 (2000).

Whether the information requested is presumptively relevant or not, the standard for relevancy is a “liberal discovery-type standard.” *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). *See also Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985); *RBH Dispersions*, 286 NLRB 1185, 1186-87 (1987); *Knappton Maritime Corp.*, 292 NLRB 236, 238 (1988); *Bacardi Corp.*, 296 NLRB 1220, 1223 (1989); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991); *Aerospace Corp.*, 314 NLRB 100, 103 (1994); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997) (citations omitted), enfd. 172 F.3d 57 (9th Cir. 1999); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). An employer is obligated to provide a union with requested information if the information is probably or potentially relevant to the union’s execution of its statutory duties and responsibilities as exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). *See also RBH Dispersions*, 286 NLRB 1185, 1186–87 (1987); *Pfizer Inc.*, 268 NLRB 916, 918 (1984); *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984); *Associated Gen. Contractors of California*, 242 NLRB 891, 893 (1979). Likewise, the sought-after information “need not be necessarily dispositive of the issue between the parties.” *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997), enfd. 172 F.3d 57 (9th Cir. 1999). *See also Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

3. Confidential Information

In certain situations, claims of confidentiality may justify a refusal to provide the union with relevant information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In making such determinations, the trier of fact must balance the union's need for the information against the “legitimate and substantial” confidentiality interests of the employer. *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). *See also A-1 Door & Building Solutions*, 356 NLRB 499, 500 – 501 (2011); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Furthermore, it is well settled that as a part of this balancing process, the party making a claim of confidentiality has the burden of proving its interests in confidentiality are in fact present and outweigh the union's need for the information. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 – 501

(2011); *Borgess Medical Center & Michigan Nurses Association*, 342 NLRB 1105, 1106 (2004); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

Nevertheless, even when an employer demonstrates a legitimate and substantial confidentiality interest, it cannot simply ignore the Union's request for information, but rather it has an obligation to timely raise its concerns and seek to accommodate its own concerns as well as the union's need for the information. *Borgess Medical Center & Michigan Nurses Association*, 342 NLRB 1105, 1106 (2004). See also *A-1 Door & Building Solutions*, 356 NLRB 499, 500 – 501 (2011); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Enforcing three Board orders involving, among other things, requests for information asserted to be trade secrets, the D.C. Circuit Court summarized, “While *Detroit Edison* makes clear that a union's interest in relevant information will not always outweigh an employer's legitimate and substantial interests in maintaining the confidentiality of such information, that case certainly affords no support for the proposition that an employer is absolutely privileged from revealing relevant proprietary or trade secret information.” *Oil, Chemical & Atomic Workers Local Union No., 6-418 v. NLRB*, 711 F.2d 348, 362 (D.C. Cir. 1983) (internal citations omitted).

Because it is in the better position to propose how best to respond to the request for information, the onus of formulating a reasonable accommodation is on the employer, and a union need not propose the precise alternative to providing the information unedited. *United States Testing Co.*, 324 NLRB 854 (1997), *enfd.* 160 F.3d 14, 21 (D.C. Cir. 1998). See also *Tritac Corp.*, 286 NLRB 522, 522 (1987); *Oil, Chemical & Atomic Workers Local Union No., 6-418 v. N.L.R.B.*, 711 F.2d 348 (D.C. Cir. 1983).

B. Respondent is Obligated to Provide the Integrity Matrix to the Union

I. *The Integrity Matrix is Presumptively Relevant*

The Respondent is obligated to provide the Union with a copy of the Integrity Matrix because it is undoubtedly related to the Respondent's disciplinary process concerning Unit employees and is thus presumptively relevant. Unit employees are subject to Respondent's Code of Business Conduct (“COBC”) and can be disciplined up to and including termination for violations of the policy. (Jt. Exs. 2, 3) The Respondent requires managers to use the Integrity Matrix when investigating Unit employees alleged to have violated the COBC. (Tr. 116 – 117,

136 – 139, 153, 162, 204) Since managers must follow the steps set forth in the Integrity Matrix when investigating and eventually deciding whether or not to discipline Unit employees for COBC violations, it is clearly related to the core of the employer-employee relationship as it bears on whether the relationship remains intact or is terminated. *LBT, Inc.*, 339 NLRB 504, 505 (2003) (“indeed, it is difficult to imagine an issue more fundamental to the employer-employee relationship than an understanding of how and why the employer decided whether or not to terminate it.”). See also *Knappton Maritime Corp.*, 292 NLRB 236, 238 (1988); *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

In *LBT, Inc.*, supra (2003), the Board found that employee evaluations were presumptively relevant because they were designed to be and were used to determine which bargaining unit employees would be laid off and which would be retained, and thus went to the core of the employer-employee relationship. *Id.*³ See also *United States Postal Service and National Association of Letter Carriers, Branch 1037*, 339 NLRB 400 (2003) (finding that driving observation forms in which a supervisor records driving infractions by carriers who drive vehicles, and which could be used to support disciplinary action, are presumptively relevant to the Union's performance of its duties). Distinctively, the Board recently determined that customer complaints about unit employees were not presumptively relevant because, standing alone, they do not directly concern wages, benefits, or other terms and conditions of employment. *NP Palace LLC*, 368 NLRB No. 148 (December 16, 2019). Rather, the Board held that, “a customer's complaint to an employer about a unit employee is a complaint from a third party who has no control over the employee's terms and conditions of employment.” *Id.* The Board noted in *NP Palace* though that the relevance of customer complaints can be established in particular cases by showing the employer relied on the customer complaints to discipline unit employees. *Id.* In contrast here, there is no need to establish the relevance of the Integrity Matrix because Respondent created and controls the document and requires that it directly inform investigations and subsequent disciplinary decisions imposed on Unit employees.

³ Although not controlling, *United States Postal Serv. & S. New York Area, Am. Postal Workers Union, Local 522, Afl-Cio*, 2004 WL 1149360 (May 19, 2004) is informative. In that case, the Administrative Law Judge found management tools used to assess deficiencies in the office to be presumptively relevant. The Union requested two documents, one of which was the “Function 4 Review,” which was based upon observations of work done by clerks and contained recommendations, including that one position be eliminated. *Id.* Based on the “content of the two documents, the manner in which the information was collected and used, and management’s description of the purpose to which the documents could be put,” the ALJ found the Function 4 Review to be presumptively relevant, noting in particular that the it contained recommendations based on observations of work. *Id.*

Likewise, the Integrity Matrix is presumptively relevant based on the content of the document, the information collected pursuant to it, the manner in which such information is used, and the Respondent's own descriptions of the purpose of the Integrity Matrix. To begin with, the Integrity Matrix contains instructions managers must follow when investigating and ultimately deciding whether discipline is appropriate for Unit employees. (Tr. 116, 118, 120 – 122, 139, 147, 162 – 163, 195) It is organized as an interactive “decision tree” where managers make various selections and eventually reach a list of the procedural steps he or she must take to handle the particular COBC situation. (Tr. 116 – 118, 120 – 122, 130, 139, 144, 147, 162 – 163, 188, 195) The Integrity Matrix instructs managers to make recommendations for what disciplinary action, if any, is appropriate for the COBC violation, and disciplinary recommendations made in accordance with the Integrity Matrix are typically followed. (GC Exs. 3, 7)

In terms of the information collected and its use, the Integrity Matrix generally instructs managers to collect certain information which is used to formulate a recommendation as to whether and at what level discipline is appropriate for the Unit employee. (Tr. 120 – 122, 140 - 141) The Integrity Matrix further instructs managers to save in the Respondent's documentation system all information reviewed, collected, and used in the course of the investigation, whether or not disciplinary action was ultimately taken. (Tr. 120 – 122, 140 - 141)

Lastly, the Respondent continually described the purpose of the document as a guideline used to determine the appropriate level of discipline. Particularly when the Union first became aware of the Integrity Matrix on November 9, 2018, uncontroverted evidence shows that Area Manager John Williams (“Williams”) told the Union the Integrity Matrix was implemented for purposes of corrective action and was used to ensure COBC disciplines were issued consistently across the board. (Tr. 35 – 36, 80 – 81; GC Ex. 2) When the Union subsequently asked about the Integrity Matrix, the Respondent continued to explain that it was used to investigate and determine the appropriate level of discipline for COBC violations.⁴ (Tr. 35 – 36, 38 – 39, 40 – 41, 44 – 47, 80, 186 – 187, 188 – 190, 193 – 196, 203 – 204; GC Exs. 2 – 4, 7 – 8) Accordingly, the Integrity Matrix is presumptively relevant.

⁴ The Employer's own contemporaneous notes from the regionwide step II grievance meeting indicate that Schott said the Integrity Matrix was used to determine the appropriate level of discipline. (GC Ex. 8) When confronted, Schott did not deny informing the Union the matrix was used to determine the level of discipline but instead equivocated that he misspoke if he said that to the Union. (Tr. 196)

Finally, the Respondent failed to rebut the presumption that the Integrity Matrix is relevant. Respondent seems to argue that it rebutted the presumption of relevance by correcting the Union's misunderstanding of the document's contents. Based on Respondent's statements about the Integrity Matrix, the Union believed the Integrity Matrix required managers to issue specific levels of discipline for specific COBC violations, and Respondent apparently asserts that by briefly showing the Union that the matrix instead provided for a range of potential disciplines for COBC violations, the Respondent rebutted the presumption of relevance. However, the Respondent's clarification to the Union did not rebut the presumption of relevance. To the contrary, descriptions of the Integrity Matrix offered by Mr. Williams, Ms. Chisholm, and Mr. Schott all made clear to the Union that the Integrity Matrix is used in the disciplinary process, even if it does not require a certain discipline for a certain violation. The Respondent's established procedure for conducting investigations into potential COBC violations, which may and in many cases do result in discipline for Unit employees is without question related to Unit employees' terms and conditions of employment. As such, Respondent must give the Union a copy of the document.⁵

2. *Even if the Integrity Matrix is not Presumptively Relevant, the Union Established its Relevance*

Even if the Administrative Law Judge determines the Integrity Matrix is not presumptively relevant, the Union has adequately established the relevance of the document under the long-standing liberal discovery-like standard, and the Respondent must give the Union the document. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).⁶ The Respondent contends the Integrity Matrix is a management tool or procedural guide, and thus is not related to Unit employees' terms and conditions of employment and not presumptively relevant. As outlined above, the Integrity Matrix directly impacts discipline issued to Unit employees and is presumptively relevant. Nevertheless, and although there is no evidence that Respondent asked the Union to explain why the Integrity Matrix was relevant, the Union established it had an

⁵ Though Respondent has not indicated that the interactive format of the Integrity Matrix would make producing it overly burdensome or impossible, it is important to note that testimony confirmed it is possible to format and print the Integrity Matrix in a producible form. (Tr. 208)

⁶ See also *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985); *RBH Dispersions*, 286 NLRB 1185, 1186-87 (1987); *Knappton Maritime Corp.*, 292 NLRB 236, 238 (1988); *Bacardi Corp.*, 296 NLRB 1220, 1223 (1989); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991); *Aerospace Corp.*, 314 NLRB 100, 103 (1994); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997) (citations omitted), enfd. 172 F.3d 57 (9th Cir. 1999); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).

objective, factual basis for requesting the document. *See Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988).⁷

The Union indicated that it needed the Integrity Matrix because Respondent was starting to monitor Unit employees for COBC violations more frequently, particularly, Unit employees Patricia May and Alice Harris received different levels of discipline for the same conduct, and generally Unit employees continued to receive COBC discipline as a result of Integrity Matrix investigations. (Tr. 34, 40 – 41, 63, 64 – 65) In fact, the Respondent’s own statements founded the Union’s objective, factual basis for its belief that the Integrity Matrix is relevant to its representational duties. *See Pfizer, Inc.*, 268 NLRB 916, 918 (1984), *enfd.* 763 F.2d 887 (7th Cir. 1985) (finding that where employer told the union it relied on two personnel files in deciding to discharge two employees, the employer itself provided the union with the factual basis for its belief the requested personnel files were relevant).

Within the context of a regionwide grievance meeting involving the Respondent’s practices of listening to Unit employee calls for potential COBC violations, the Respondent informed the Union that the Integrity Matrix was created to ensure COBC disciplines were issued consistently and used to determine the appropriate level of discipline for Unit employees who violated the COBC. (Tr. 35 – 37, 80 – 81; GC Exs. 2 – 4, 7 – 8) Subsequently, Patricia May and Alice Harris, two Unit employees, were disciplined for the same COBC violations. (Jt. Exs. 6, 7) Although their conduct was nearly identical - typing a customer’s credit card information onto their computers and then deleting it - May received a final written warning and Harris received a counseling. (Jt. Exs. 6, 7)

Given the discrepancy in May’s and Harris’s disciplines and the Respondent’s statements about managers using the Integrity Matrix to issue COBC disciplines consistently across the board, the Union started informally asking questions about the Integrity Matrix and requesting a copy of the document. (Tr. 32 – 41, 80 – 81; GC Exs. 2 – 4, 7, 8) The Respondent was well aware of the Union’s reasons for requesting the information by the time the Union submitted its first written request for the Integrity Matrix in September 2019. *See Disneyland Park*, 350 NLRB 1256, 1258 (2007) (“to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the information, or (2) that the relevance of the

⁷ *See also Diamond Trucking Inc.*, 365 NLRB No. 64 (April 25, 2017); *Piggly Wiggly Midwest*, 357 NLRB 2344 (2012); *Disneyland Park*, 350 NLRB 1256, 1258 (2007).

information *should have been apparent to the Respondent under the circumstances*)(emphasis added).

Respondent does not deny the Integrity Matrix instructs first and second-line managers on how to investigate potential COBC violations, and dictates what information should be considered when making a discipline decision, who the manager should consult when recommending discipline, and what information to save and document in relation to the investigation and discipline, if issued. (Tr. 115 – 118, 136 – 139, 147, 162 – 163) The facts that the Integrity Matrix does not require a specific level of discipline for certain COBC violations or that the Union understood the Integrity Matrix to include such requirements does not negate the Union’s need to see a document used to investigate and issue discipline to Unit employees, including Ms. May and Ms. Harris. Since Respondent continues to use the Integrity Matrix to investigate and discipline Unit employees for COBC violations, the Union’s need for the document endures. (Tr. 64 – 65)

In *Western Massachusetts Electric Company*, 234 NLRB 118 (1978), the Board held that upon its request, the union was entitled to receive a management tool which impacted the work assignments and route lengths of bargaining unit employees. The employer, a public utility, began to revise established meter-reading routes using a formula created by the utility’s parent corporation based on a study of the utility’s operations. *Id.* at 118. The union repeatedly requested information about the formula, arguing that the revisions were resulting in longer routes and would inevitably lead to layoffs for bargaining unit meter readers. *Id.* Still, the employer refused to furnish the union with the requested information. *Id.*

The Board overruled the ALJ in *Western Massachusetts Electric Company*, finding that the Administrative Law Judge’s “characterization of the formula as merely a management tool to reduce the amount of time required by supervisors to arrive at scheduling is at once simplistic and misleading.” *Id.* at 119.⁸ In contrast, the Board found a “significant and substantial”

⁸ In *Western Massachusetts Electric Company*, the Board distinguished *Kroger Co. v. NLRB*, 389 F.2d 455 (6th Cir. 1967) and *General Aniline and Film Corporation*, 124 NLRB 1217 (1959), which were relied upon by the ALJ. In *Kroger*, the requested Operating Ratio program covered many facets of managerial concern unrelated to the Union’s statutory duties in addition to scheduling unit work hours, and the Court determined the union failed to show its need for the information was immediate and practical. *Supra* at 457. In *General Aniline*, the Board found the employer was not required to provide the union with a report outlining standards used by management to schedule work because the standards were not communicated to employees, employees were never told what to accomplish in accordance with the report, employees were never rewarded or punished based on the standards in the report, and the employer did not use the report to justify its positions during bargaining. *Supra* at 1220. Both cases are similarly distinguishable here. Respondent’s employees are regularly trained on the COBC and their obligations to comply

relationship between the employer's use of the formula to restructure its meter reading system and the working conditions of bargaining unit employees. *Id.* The Board went on to state,

Without question, meter readers and their bargaining representative have a direct and immediate interest in a management initiative which not only alters the length and composition of meter-reading routes, and hence may change the workload employees will be expected to carry, but will also in all probability, as [r]espondent concedes, affect the tenure of some meter readers by occasioning layoffs. *Id.*

Likewise, there is a significant and substantial relationship between the Integrity Matrix and the terms of conditions of employment for Unit employees. The Integrity Matrix contains a number of steps managers must follow when investigating potential COBC violations and consequently issuing discipline for such violations. Although the Integrity Matrix does not *require* a certain level of discipline for a certain COBC violation, it is very clearly related to the Respondent's disciplinary process. Like the formula used in *Western Massachusetts Electric Company*, the Integrity Matrix will affect the tenure of Unit employees who may face termination for COBC violations following an Integrity Matrix investigation.

Respondent will likely argue that the Union failed to establish the relevance of the Integrity Matrix after Schott showed Polchow and Vermillion that the document did not prescribe specific levels of discipline for certain COBC violations. According to Schott, he understood that the Union's sole reason for requesting a copy of the Integrity Matrix was to see if disciplines for COBC violations were listed in the Integrity Matrix and whether they matched the disciplines Unit employees received for such violations. (Tr. 186) As such, Respondent may assert that because Chisholm and Schott showed Polchow and Vermillion a small portion of the document to correct the Union's understanding that the Integrity Matrix set forth specific disciplines for COBC violations, the Union no longer needed the document to see whether disciplines issued to employees matched those set forth in the document. However, Schott construed the Union's reasons for requesting the document too narrowly. Rather, the Union explained it needed the document more broadly to understand why May and Harris received such disparate disciplines given the Respondent's assertions that the Integrity Matrix was implemented to make sure COBC disciplines were issued consistently. (Tr. 63 – 64)

with the policy, which is precisely what the Integrity Matrix was designed to evaluate. Furthermore, employees are punished if the Integrity Matrix investigation reveals they failed to comply with the COBC.

Furthermore, the Union cannot be required to know what is in the document in order to establish its relevance. *See Hofstra University*, 324 NLRB 557, 558, fn. 5 (1997). Determining the Union’s request for a consultant-prepared report was rooted in specific concerns about mandatory bargaining subjects the Board majority in *Hofstra* noted, “I fail to see how the union’s request could be more specific when it did not know what the [document] contained beyond the obvious fact that it dealt with unit employees’ working conditions.” *Id.* at fn. 5. Similarly, here the Union cannot be expected to establish the document’s relevance by citing with accuracy the information contained in it. The Union’s reason for requesting the Integrity Matrix was based on Respondent’s own descriptions of the Integrity Matrix and its role in the disciplinary process. Even if the Respondent clarified that the document did not prescribe specific discipline for specific COBC violations, it maintained the Integrity Matrix is used to investigate and determine whether discipline is appropriate for Unit employees. By explaining it needed a copy of the Integrity Matrix to evaluate disciplines issued to Unit employees following Integrity Matrix investigations, the Union certainly established the document is relevant under the “liberal, discovery-like standard.” *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

The Respondent may also argue, without merit, that because the time limits for pursuing arbitration set forth in the CBA have expired for the related grievances already filed, the Union cannot justify its need for the Integrity Matrix. It is well established that the Union’s right to receive information is not “limited merely to that which would be pertinent to a particular existing controversy but rather extends to all information that is necessary for the labor organization properly and intelligently to perform its duties in the general course of bargaining.” *Western Massachusetts Electric Company*, 234 NLRB 118, 119 (1978).⁹ At present, the Respondent continues to investigate and discipline Unit employees using the Integrity Matrix; thus, the information is relevant to the Union’s responsibilities as the collective-bargaining representative for Unit employees.

3. *Respondent Failed to Prove it has a Legitimate and Substantial Confidentiality Interest*

On several occasions, the Respondent told the Union it was not entitled to receive a copy of the Integrity Matrix because it was proprietary, though it never validated such claims. (Tr. 36,

⁹ *See also Ohio Power Co.*, 216 NLRB 987, 991 (1975). *Accord Los Angeles Chapter, Sheet Metal Contractors*, 246 NLRB 886, 888 (1979); *United Technologies Corp.*, 274 NLRB 504 (1985).

38 – 39, 41, 88, 198, 206; GC Exs. 3, 7) In certain situations, “legitimate and substantial” claims of confidentiality may excuse an employer’s refusal to provide relevant information to the union. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).¹⁰ In such circumstances, the party making a claim of confidentiality has the burden of proving its interests in confidentiality are in fact legitimate and substantial enough to outweigh the union's need for the information. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 – 501 (2011).¹¹

Here, Schott confirmed that he “made the point clear” to the Union that the Integrity Matrix was considered proprietary and/or confidential. (Tr. 206 – 207) Yet, Respondent offered no evidence to substantiate its proprietorial interest in the Integrity Matrix. In fact, without objection, the Respondent provided another proprietary document, the Clean Desk Policy, to the Union in response to the same information request at issue in this case. (Tr. 200 – 201, Jt. Exs. 4, 8) When asked to explain the difference between the proprietary Clean Desk Policy and the Integrity Matrix, Schott testified that Unit employees are able to see the Clean Desk Policy but the Integrity Matrix is only accessible to managers. Such rationale does not prove a legitimate and substantial confidentiality interest. Likewise, when asked why he could not give the Union a copy of the Integrity Matrix, Schott simply stated that it was a “manager document” and he “didn’t think there was any reason that [the Union] needed to have a physical copy of it.” (Tr. 197). Respondent offered no other evidence to support claims that the Integrity Matrix is proprietary or confidential, and as such, Respondent failed to prove it had a legitimate and substantial proprietorial interest which would justify withholding the document from the Union.

4. *Respondent Never Offered to Bargain an Accommodation with the Union*

Even if the Respondent substantiated its confidentiality claim, the Respondent never offered to bargain an accommodation with the Union. (Tr. 41) Although the Respondent probably timely raised the issue of confidentiality, as it asserted the Integrity Matrix was proprietary on various occasions to the Union. However, the Respondent never offered to bargain with the Union or proposed to accommodate the Union’s need for the information and its own interest in protecting its proprietary interests. *See Borgess Medical Center & Michigan Nurses Association*, 342 NLRB 1105, 1106 (2004); *United States Testing Co.*, 324 NLRB 854

¹⁰ See also *A-1 Door & Building Solutions*, 356 NLRB 499, 500 – 501 (2011); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995).

¹¹ See also *Borgess Medical Center & Michigan Nurses Association*, 342 NLRB 1105, 1106 (2004); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

(1997), *enfd.* 160 F.3d 14, 21 (D.C. Cir. 1998); *Tritac Corp.*, 286 NLRB 522, 522 (1987). Nevertheless, the Respondent may attempt to argue that it satisfied its obligation to offer a reasonable accommodation when it showed the Union a portion of the Integrity Matrix on a laptop computer screen. Respondent may even argue that the Union accepted such an offer as a reasonable accommodation, but such arguments are ineffective.

To begin with, the Respondent did not propose to show the Union the Integrity Matrix on the screen; rather, Chisholm and Majko and later Schott simply turned their computers around and informed Polchow and Vermillion that the item on the screen was the Integrity Matrix. (Tr. 37, 41, 64, 89) It was not an invitation to discuss a possible accommodation, and such action does not constitute a good faith offer to bargain or even a bargaining proposal. *See Wigwam Mills, Inc.*, 149 NLRB 1601, 1602, fn. 33 (1964)(quoting *N.L.R.B. v. Montgomery Ward & Co.*, 133 F. 2d 676, 686 (9th Cir. 1943)) (“the duty to bargain in good faith . . . [requires] “a sincere effort must be made to reach a common ground.”)

Furthermore, the Integrity Matrix as a whole is relevant to the Union’s representational duties; therefore, showing the Union only a portion of the Integrity Matrix for no more than a few minutes does not reasonably accommodate the Union’s need for the information. There is no evidence that Respondent allowed the Union to see the entire Integrity Matrix. In fact, Chisholm testified that when she and Majko turned the screen around, Polchow and Vermillion didn’t have time to look at it because they were getting up to make a phone call. (Tr. 171, 177) When Polchow and Vermillion returned to the room, the screen was still turned around, but the meeting ended and the Integrity Matrix “wasn’t brought back up.” (Tr. 171, 177) Schott testified that he went through “a couple options” within the document to show the Union that the Integrity Matrix “doesn’t specifically prescribe discipline.” (Tr. 194 – 195) Even so, Schott admittedly showed the Union only a couple options, and there is no evidence that Schott even allowed the Union to review those options in their entirety, such as the step-by-step instructions for handling the COBC issues.

Additionally, the Union did not accept as an accommodation Respondent’s display of a portion of the Integrity Matrix to Polchow and Vermillion. If, when it turned the laptop around, Respondent was making a good faith offer to accommodate its own confidentiality interests and the Union’s request for the information, the Board compels the Respondent to ascertain whether such an accommodation was reasonable. *See United States Testing Co.*, 324 NLRB 854 (1997),

enfd. 160 F.3d 14, 21 (D.C. Cir. 1998) (declaring that the onus of formulating a reasonable accommodation is on the employer, and the union need not propose a precise alternative to providing the information unedited). The Respondent did not ask the Union if seeing an excerpt of the Integrity Matrix satisfied its need for the information or whether the Union needed to see such an excerpt at closer range or for a longer period of time. Yet, after Schott showed her the computer screen, Polchow informed Schott the Union still needed a copy of the Integrity Matrix, and in fact submitted written requests for it, which should have indicated to Respondent that the Union's request was not acceptably accommodated. (Tr. 191, 198) Respondent's act of showing the Integrity Matrix to the Union was not an offer to bargain accommodations, and if it could be construed in some way as a proposed accommodation, it certainly was not reasonable. Accordingly, Respondent did not meet its obligation to offer to bargain an accommodation after asserting the Integrity Matrix was proprietary.

C. Respondent's Other Defenses are Meritless

In addition to the defenses already addressed above, Respondent argues that even if it was found to be in violation of the Act, such conduct would be too minor, isolated, or *de minimis* to warrant remedy. (GC Ex. 1(e)) However, Respondent failed to offer any evidence in support of such a defense. To the contrary, Respondent's conduct is not *de minimis* as nearly a year after the Union requested the Integrity Matrix, its need for the requested information is ongoing. Therefore, a finding that Respondent committed an unfair labor practice and an order remedying the violation is appropriate and will effectuate the purposes of the Act.

IV. Conclusion and Remedy Requested

For the reasons stated herein, Counsel for the General Counsel respectfully requests that the Administrative Law Judge find Respondent's aforementioned conduct to be in violation of the Act and recommend an appropriate remedy for said violations. The record shows that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the Complaint, and Counsel for the General Counsel has met its burden to establish Respondent violated the Act by refusing to provide information that is necessary and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of the Unit.

Although Respondent asserts various defenses as to why it has not violated the Act, it failed to persuade by a preponderance of the evidence that its conduct was not unlawful. Counsel

for the General Counsel therefore asks the Administrative Law Judge to make the appropriate findings of fact, conclusions of law, and recommend an appropriate remedy for Respondent's unfair labor practices.

A. Proposed Conclusions of Law

1. AT&T Mobility Services, LLC ("Respondent") is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
2. Communications Workers of America, Local 4202, a/w Communications of Workers of America, AFL-CIO ("Union") and Communications Workers of America, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.
3. At all material times Communications Workers of America, AFL-CIO has been the exclusive collective-bargaining representative of certain employees in the following appropriate unit ("Unit") within the meaning of Section 9(a) of the Act:

The employees described in Article 2, Section 1 of the collective bargaining agreement between the Communications Workers of America and Respondent, which is effective from February 12, 2017 to February 12, 2021.

4. For purposes of collective bargaining, including but not limited to the processing of grievances, at all material times Respondent has met and discussed with the Union, as the local affiliate of the exclusive collective-bargaining representative of the Unit, subjects related to the terms and conditions of employment for Unit employees.
5. By failing and refusing to furnish the Union with the Integrity Matrix, Respondent has been failing and refusing to bargain collectively and in good faith with the collective-bargaining representative of its employees in violation of Sections 8(a)(1) and (5) of the Act.
7. The unfair labor practices of Respondent affect commerce within the meaning of Sections 2(6) and (7) of the Act.

B. Proposed Remedy Section

Having found that Respondent violated and continues to violate Sections 8(a)(5) and (1) of the Act by refusing to grant the Union's request for the Integrity Matrix, I recommend an order requiring that it cease and desist from engaging in such conduct and that it immediately furnish the Union with the Integrity Matrix as requested.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

C. Proposed Order

The Respondent, AT&T Mobility Services, LLC, shall:

1. Cease and desist from

(a) Refusing to bargain collectively with Communications Workers of America, Local 4202 a/w Communications Workers of America (the Union) by refusing to furnish the Union with a copy of the Integrity Matrix, or other information relevant and necessary to the Union's duty as the collective bargaining representative of Respondent'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.

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

(a) Promptly furnish to the Union a copy of the Integrity Matrix as it requested on September 18, 2019, September 19, 2019, September 20, 2019, and September 26, 2019.

(b) Within 14 days after service by the Region, post at its Rantoul Call Center copies of the attached notice marked "Appendix."¹² Copies of the notice on forms provided by the Regional Director for Region 25, 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. If 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 September 27, 2019.

(c) Within 21 days of service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

¹² Counsel for the General Counsel's proposed Notice to Employees is attached herein as Appendix A.

Respectfully submitted,

Dated: August 12, 2020

/s/ Tiffany J. Limbach

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APPENDIX A

**NOTICE TO MEMBERS
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.

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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.

Communications Workers of America, AFL-CIO is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

The employees described in Article 2, Section 1 of the collective bargaining agreement between the Communications Workers of America and Respondent, which is effective from February 12, 2017 to February 12, 2021.

WE WILL NOT refuse to provide the Union with information 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 provide the Union with the information it requested on September 18, 2019, September 19, 2019, September 20, 2019, and September 26, 2019.

AT&T Mobility Services, LLC

(Employer)

Dated: _____ **By:** _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

575 N Pennsylvania St Ste 238
Indianapolis, IN 46204-1520

Telephone: (317)226-7381
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nlrb.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge Has been filed electronically with the Division of Judges through the Board's E-Filing System this 12th day of August 2020. Copies of the filing are being served upon the following persons by electronic mail:

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