

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

**MURRAY AMERICAN ENERGY, INC. AND THE
MONONGALIA COUNTY COAL COMPANY, A
SINGLE EMPLOYER**

and

Case 06-CA-254520

**UNITED MINE WORKERS OF AMERICA,
DISTRICT 31, LOCAL 1702, AFL-CIO, CLC**

BRIEF OF THE CHARGING PARTY

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BRIEF OF THE CHARGING PARTIES

COME NOW the charging parties, the United Mine Workers of America District 31 and United Mine Workers of America Local Union 1702, and through undersigned counsel hereby submit this Brief in the above-captioned case.

I. INTRODUCTION

This bad-faith bargaining case arises under Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the “Act”) (29 U.S.C. §§ 158(a)(1), (5)). Charging party United Mine Workers of America (“UMWA” or “Union”) District 31 (the “District”), a division of the UMWA International Union, represents bargaining-unit employees at the underground coal mine owned by Respondent Murray American Energy/Monongalia County Coal Company (“the Company” or “Respondent”). Charging party UMWA Local Union 1702 (the “Local”) also represents Respondent’s bargaining-unit employees. Joint Motion & Stipulation of Facts (hereinafter “Stip.”) at 6-8.

On or about October 4, 2019, by electronic mail, the Union submitted to Respondent a request for information. Stip. at 8. Specifically, the UMWA requested a copy of employee Jeff Reel’s personnel file and all of his disciplinary records. Joint Exhibit 4.¹ This information is necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representatives of Monongalia’s bargaining unit employees. The parties exchanged correspondence regarding this request for information, but at no time has Respondent provided the Union with the information that the Union first requested on October 4, 2019. Stip. at 8-9.

¹ Hereinafter, the joint exhibits to the Joint Motion and Stipulation of Facts will be designated “JX.”

That failure is a clear example of bad-faith bargaining that impermissibly limits the Union's ability to represent its members at Monongalia County Mine. Without the information set forth in Mr. Reel's personnel file, it is impossible for the UMWA to fulfill its representational duties and to monitor Respondent's compliance with past arbitration awards. The UMWA was entitled to the information and is under no obligation to reimburse the Respondent for such costs or to bargain regarding their allocation. Instead, the UMWA was and is entitled to the information it requested, at the Respondent's expense, and the Respondent must provide the information without further delay.

II. STATEMENT OF THE CASE

The factual record in these cases is contained in the Joint Motion and Stipulation of Facts and accompanying Joint Exhibits but is summarized here for convenience.

A. Parties

Both UMWA District 31 and UMWA Local Union 1702 are, and at all times material to these cases were, labor organizations under the Act. *Id.* at 6. At all material times, Respondent Murray American Energy, Inc. ("Murray") mined and sold coal through subsidiaries including Monongalia. *Id.* at 5. Murray and Monongalia are a single employer. *Id.* at 6. The Murray/Monongalia single employer entity is, and was at all material times, an employer engaged in commerce under the Act. *Id.* at 6. Both entities are, and at all material times were, party to the National Bituminous Coal Wage Agreement of 2016 (the "NBCWA") with the UMWA. *Id.* at 7-8. Under the NBCWA, the bargaining unit at Monongalia includes all employees who are:

...engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal...repair and maintenance work normally performed at the mine site or the central shop...and the maintenance of [waste] piles and mine roads, and work of the type customarily related to all of the above.

Id.

B. Procedural History

The Union filed the charge that gave rise to this case on January 13, 2020. *Stip.* at 5; JX 1(a). On March 25, 2020, the Regional Director for the National Labor Relations Board (“the Board” or “NLRB”) Region 06 issued a complaint in this matter. *Stip.* at 5; JX 1(c).

A Hearing in this matter was set for June 22, 2020. JX 1(c). On that date, the hearing was opened but was recessed to allow the parties to agree to stipulated facts and joint exhibits. *See* June 29, 2020 Order. The hearing was rescheduled for June 30, 2020. On June 29, 2020, the parties filed a motion to submit stipulated facts and joint exhibits. *Id.* The Administrative Law Judge granted the motion on June 29, 2020. *Id.*

C. Factual Background

Article XXIII Section (c) of the NBCWA provides that bargaining unit employees have access to grievance procedures in order to adjust any disputes that arise between those employees and the employer. JX 2 at 267-270. The Union and Respondent have a mutual obligation to disclose to one another all information each intends to rely upon in connection with a grievance or dispute. This obligation arises under Article XXIII, Section (e), of the NBCWA and predecessor agreements, which states,

At all steps of the complaint and grievance procedure, the grievant and the Union representatives shall disclose to the company representatives a full statement of the facts and the provisions of the Agreement relied upon by them. In the same manner, the company representatives shall disclose all the facts relied upon by the company.

Id. at 271; *Stip.* at 10. Pursuant to Article XXIII, Section (e), of the NBCWA, Respondent has, as matter of course, provided to the UMWA disciplinary records regarding bargaining-unit employees when Respondent intends to rely upon such records in a pending grievance proceeding.

Stip. at 10. Respondent maintains disciplinary records in bargaining-unit members' personnel files. Stip. at 11.

At or about 9:44 a.m. on October 4, 2019, UMWA International District Representative for District 31 Mike Phillippi sent an email to Monongalia's Supervisor, Human Resources Jim Travelstead and Murray's Supervisor of Employee Relations, Timothy Baum. JX 4. In that e-mail, Mr. Phillippi stated, "Gentlemen, I am requesting a copy of Jeff Reel's Personnel file including any and all prior discipline he has received. Please provide this by Wednesday, October 9, 2019. Thanks." *Id.* At 9:52 a.m. that morning, Mr. Baum responded, asking about the relevance of the request. At 10:23 a.m., Mr. Phillippi responded that the information was "needed to verify the contents of [Mr. Reel's] record. Additionally, it is needed to establish what is in his file at this specific time for any past, pending, or future litigation where this information is pertinent." *Id.*

At or about 12:21 p.m., Respondent's Attorney, Cory R. Barack transmitted a letter to Mr. Phillippi regarding the Union's information request. JX 5, 6. In that letter, Mr. Barack asked Mr. Phillippi to "have Mr. Reel follow the Company's policy regarding requests to review personnel files." JX 5.

At 12:29 p.m., Mr. Phillippi responded, "requesting the company policy regarding requests to review personnel files." JX 6. Mr. Phillippi clearly stated that the information request was being made on behalf of the Union, not personally by Mr. Reel, and that failure to comply might, "again result in the union being forced to file a Board Charge." *Id.*

At or about 3:16 p.m., Mr. Barack responded with a second letter to Mr. Phillippi. JX 7, 8. That letter included an enclosed "Request To View/Copy Personnel File" form. JX 7. Mr. Barack informed Mr. Phillippi that "usage of such form represents the Company's authorized procedure for an employee to view his or her files. Accordingly, Mr. Reel's personnel files will

not be provided directly to you via this letter correspondence.” *Id.* Also enclosed was a copy of Monongalia’s “Access to Employee Personnel File Policy.” *Id.* That policy states that individual employees are permitted to make a written request for an appointment to view their personnel files. *Id.* Further, “[e]mployees may also request to make copies of documents contained in the personnel file. The Company may charge the employee the actual costs of copying.” *Id.* Respondent did not provide the information by October 9, 2019. Stip. at 9.

On October 10, 2019, Mr. Phillippi sent another e-mail to Mr. Barack requesting a copy of Mr. Reel’s personnel records. JX 8. Attached to that email was a letter signed by Jeff Reel, confirming Mr. Phillippi’s authority to make the request. Mr. Reel’s letter stated, in pertinent part:

We are making this request so that the UMWA has a current copy for their records. Being that management has frivolously disciplined me and made at least one statement alleging discipline that would be in my file, this request being made in writing as opposed to going to the Human Resources office . . . Since this information needs to go to the Union, it is far more practical for you to email it directly to Mr. Phillippi. I am not interested in signing for a copy of my record, nor being charged for a copy of my record.

JX 8. Monongalia did not respond directly to that request.

On October 11, 2019, the Union filed an unfair labor practice charge against Respondent that was assigned case number 06-CA-249781. Stip. at 9. The charge was served on Monongalia on the same day. *Id.* In the charge, the UMWA alleged that

During the past six months, [Monongalia] discriminated against Jeff Reel and subjected him to unwarranted and unjustified discipline in retaliation for his protected, concerted activities and in retaliation for Mr. Reel’s participation in the Board’s process. Mr. Reel has, among other things, filed charges with the Board and given statements in Board Proceedings.

JX 9(a). Ultimately, the charge was dismissed on March 27, 2020. Stip. at 9, JA 9(c).

On March 4, 2020, Mr. Phillippi submitted a “Request to View/Copy Personnel File,” again seeking copies of Mr. Reel’s disciplinary records. JX 10. Attached to that request was a letter signed by Jeff Reel, confirming Mr. Phillippi’s authority to make the request.

Later on March 4, 2020, Mr. Barack responded to Mr. Phillippi’s request via email. JX 11.

In his response, Mr. Barack stated:

The usage of [the Request to View/Copy Personnel File] form represents the Company’s authorized procedure for an employee to view his or her files. Further, a copy of Mr. Reel’s discipline file will be made available to him upon receipt of the actual cost of copying it, as set forth in the form. Accordingly, Mr. Reel’s discipline record will not be provided directly to you via this letter correspondence.

Id.

Since March 4, 2020, Monongalia has provided no additional response to the Union’s request. Stip. at 9. Further, Monongalia has never provided the Union with the information first requested on October 4, 2019.

III. LEGAL STANDARD

Section 8(a)(5) of the Act states that it is an unfair labor practice for an employer “to refuse to bargain collectively with representatives of [its] employees.” 29 U.S.C. § 185(a)(5).² The employer’s bargaining duty extends to “a general duty to provide information needed by the bargaining representative in contract negotiations and administration.” *Murray Am. Energy, Inc.*, 366 NLRB No. 80, slip op. at 24 (2018) (quoting *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011), *enf’d in part sub nom. Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286 (9th Cir. 2011) and *supplemented sub nom. Plaza Auto Center, Inc.*, 360 NLRB 972 (2014) (internal citations

² “It is settled that an employer’s violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act.” *Graymont PA, Inc.*, 364 NLRB No. 37 at slip op. at 20 n.7 (2016) (citing *Tenn. Coach Co.*, 115 NLRB 677, 679 (1956), *enf’d sub nom. NLRB v. Tenn. Coach Co.*, 327 F.2d 907 (6th Cir. 1956), and *ABF Freight Sys.*, 325 NLRB 546, 562 n.3 (1998)).

omitted)). That is, the employer must “supply a union with requested information that will enable [the union] to negotiate effectively and to perform properly its other duties as bargaining representative.” *NY & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011) (quoting *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983) (internal quotation omitted)). Among these “other duties” is “the duty ‘to see to it that an employer meets its [collective bargaining agreement] obligations.’” *Id.* (quoting *Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 648 F.2d 18, 25 (D.C. Cir. 1980)).

Also included among the “other duties” is “the decision” of whether “to file or process grievances.” *Disneyland Park*, 350 NLRB 1256, 1257 (2007) (citing *Beth Abraham Health Servs.*, 332 NLRB 1234 (2000)); *see also W-L Moulding Co.*, 272 NLRB 1239, 1240 n. 6 (1984) (quoting *Rockwell-Standard Corp.*, 166 NLRB 124, 132 (1967), *enfd sub nom. NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) and citing *Curtiss-Wright Corp.*, 145 NLRB 152, 153-54 (1963), *enfd sub nom. Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965)) (stating, “the Union’s statutory function of policing the collective-bargaining agreement...includes...‘evaluat[ing] a possible grievance’”). The Union need not have a particular grievance, or even incident, in mind when making an information request:

The Union is not limited to requesting information for specifically named or even specifically-contemplated grievances, or requests for specifically referenced incidents. The Union’s right to knowledge-based representation and bargaining is not a stingily-dispensed right, but rather, a right central to the Act, and part of the promise of union representation.

Murray American Energy, 366 NLRB No. 80, slip op. at *30.

Because of the broad scope of a Union’s responsibilities under a collective bargaining agreement, the Union’s right to information is, likewise, broad. The employer, therefore, must

provide the union any information that it requests that is relevant to the union's role as the enforcer and administrator of the collective bargaining agreement.

Information pertaining to the terms and conditions of employees in the bargaining unit is presumptively relevant, and must be provided upon request, without need on the part of the requesting party to establish specific relevance or particular necessity. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90-91 (1995). In such an instance, the employer bears the burden of showing a lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Moreover, a union may rely upon the presumption of relevance of information pertaining to employees within the bargaining unit and has no further obligation to explain its significance, unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). See also *Quality Building Contractors*, 342 NLRB 429, 430 (2004), quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001) (“When a union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing of relevancy.”)

An employer must furnish on demand information regarding a disciplinary action enforced against a bargaining unit employee because it is presumptively relevant to the Union's duties, unless the employer rebuts relevance. *Queen of the Valley Medical Center*, 368 NLRB No. 116, slip op. at 28 (2019) citing *Grand Rapid Press*, 331 NLRB 296, 329-330. The Board has repeatedly held that disciplinary records of bargaining unit employees are “presumptively relevant and must be furnished on request, unless (the) relevance it rebutted.” See *Antioch Rock & Ready*

Mix, 328 NLRB No. 116, slip op. at 2 (1999). The Board has likewise required employers to provide unions with entire personnel files of bargaining unit employees. See *Saginaw General Hospital*, 320 NLRB 748 (1996). The Board has reasoned that the entire contents of an employee's personnel file constitute relevant information as the documents therein are “intrinsic to the core of the employer-employee relationship” *Fleming Cos.*, 332 NLRB 1086 (2000).

As a result, “[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union’s task of representing its constituency is a *per se* violation of the Act.” *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975). Likewise, “[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Monmouth Care Ctr.*, 354 NLRB 11, 41 (2009), *reaff’d*, 356 NLRB 152 (2010), *enfd sub nom. Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012). The Act requires the employer to make “a reasonable good-faith effort to respond as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062 n.9 (1993).

IV. ARGUMENT

Respondent’s continuing refusal to provide a response to the Union’s information request is a clear violation of Section 8(a)(5). The information sought by the Union is a type routinely sought by collective bargaining agents and is clearly within the scope of the Union’s representational duties. At no time has Respondent offered any recognized or reasonable basis for withholding the requested information.

Accordingly, the Board should order the Respondent to fulfill all outstanding UMWA information requests that are at issue in this case, post a notice affirming their employees’ rights in this regard, and take any other remedial action that the Board finds appropriate – thereby

complying with the Act's mandate that they bargain in good faith and restoring to UMWA members the full "promise of union representation" that the law guarantees to them.

A. The Respondent's failure to provide the information the UMWA requested is an unfair labor practice.

On October 4, 2019, Mr. Phillippi, on behalf of the Union, requested a copy of Mr. Reel's "Personnel file, including any and all prior discipline he has received." JX 4. Mr. Reel is a member of the bargaining unit at Monongalia County Mine, specifically Local Union 1702. Stip. at 6-8. Mr. Phillippi directed the Union's request to Mr. Travelstead and Mr. Baum from Respondent's Human Resources Department. Stip. at 7, JX 4. Mr. Phillippi reasonably requested that the information be provided by October 9, 2019, five days later. JX 4. It is undisputed that Respondent failed to provide Mr. Reel's personnel file by October 9, 2019. Stip. at 9.

On October 10, 2019, Mr. Phillippi renewed the Union's request for Mr. Reel's personnel record, including disciplinary information. Stip. at 9, JX 8. Again, it is undisputed that Respondent failed to provide the personnel file following the October 10, 2019 information request. Stip. at 9. Finally, Mr. Phillippi renewed the Union's request a final time on March 4, 2020. Stip. at 9, JX 11. Significantly, Mr. Phillippi used Respondent's preferred "Request to View/Copy Personnel File," form to make this final request. Nonetheless, it is undisputed that Respondent failed to provide the personnel file following the March 4, 2020 information request. Stip. at 9.

The information sought by the Union pertained to the terms and conditions of a bargaining unit employee, and therefore, it was presumptively relevant and should have been provided on request. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB at 90-91. Further, the information request, on its face, sought information regarding an employee's disciplinary record, which is also presumptively relevant. *Antioch Rock & Ready Mix*, 328 NLRB No. 116 at 2. In fact, Mr. Reel's entire personnel record was relevant. *See Fleming Cos.*, 332 NLRB 1086 (2000).

Respondent can hardly assert that it is unaware of these principles, as it has recently been admonished by the Board for failure to comply with the Union's lawful and relevant information requests. *See Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 30. *See also* Complaints in Case 06-CA-215195 and Case 06-CA-218979

Respondent's repeated and ongoing refusal to comply with the Union's reasonable and relevant information request is a clear violation of Section 8(a)(5) of the Act. Therefore, the Board should order Respondent to fulfill its obligations to provide that information, post a notice affirming the employee's rights, and any other remedial action the Board finds appropriate.

B. The UMWA, and not Mr. Reel, made the information requests at issue in this case.

At the time Mr. Phillippi made his information requests on October 4, 2019; October 10, 2019; and March 4, 2020; the only reason offered by Respondent for its failure to respond was its claim that Mr. Phillippi needed to "have Mr. Reel follow the Company's policy regarding requests to review personnel files." JX 5. In other communications, Respondent continued to discuss the information requests at issue as though they were personnel requests made by Mr. Reel. *See e.g.* JX 7, 11 ("usage of such form represents the Company's authorized procedure for *an employee* to view his or her files.") (emphasis added). Further, Respondent relies on the fact that on October 23, 2017, Mr. Reel was charged \$7.20 for the copying of his personnel record. Stip. at 10, JX 13, 14. Respondent points to this instance to show its "normal" process for providing personnel files to individual employees and, further, to show that Mr. Reel had complied with it in the past. It claims that this process is "consistent with Pennsylvania law" and "was adopted consistent to the express terms of the NBCWA." Stip. at 11.

However, the instant case does not concern an individual employee who requested a copy of his/her personnel file. It is an information request made by the bargaining representative in order to administer the parties' collective bargaining agreement.

Respondent cannot, in good-faith, argue that it was unaware that this was an information request by the Union, rather than a request by an individual for his personnel file. Each request in this matter was made by Mr. Phillippi, the Union's International District Representative. JX 4, JX 6, JX 8, JX 10. If the Respondent was, in any way, confused about the nature of the request, Mr. Phillippi dispelled it in his October 4, 2019 12:29 email, stating "the request has been made for management *to provide the union with this information*. Failure to do so may again result in the union being forced to file a Board Charge." JX 6 (emphasis added).

While two of the requests included letters from Mr. Reel, these show that the request was being made on behalf of the Union. Mr. Reel wrote, "I am confirming the request by my presentative, Michael Phillippi, to receive a copy personnel file including any and all discipline paperwork" and noted, "[s]ince this information needs to go to the Union, it is far more practical for you to email it directly to Mr. Phillippi." JX 8. Because Mr. Reel was not making the request for his own purposes, he explicitly stated he would not sign or pay for a copy of the records. *Id.*

The October 23, 2017 and March 4, 2020 "Request to View/Copy Personnel File" forms further show that this was a Union information request. JX 10, JX 14. The October 23, 2017 request is signed by Jeff Reel and explicitly agreed to be charged for the costs of copying. JX 14. The March 4, 2020 request is signed by Mr. Phillippi in his capacity as an International District Representative and administrator of the NBCWA.

It was therefore made abundantly clear to Respondent that the Union was making an official information request in its capacity as the collective bargaining representative. Whatever

policies that Respondent has in place for individual employees to gain access to their personnel records is immaterial to that request.³ Likewise, Respondent's reliance on the NBCWA is misplaced. Respondent can point to no section of the NBCWA which requires the Union to follow any particular procedure in making an information request. Instead, union information requests are governed by the Board's case law. As noted above, that case law requires the Respondent to provide relevant information to the Union to allow the Union to fulfill its representative duties.

C. The UMWA is not required to pay the costs associated with the instant information requests.

In refusing to provide the Union with the information requested, Respondent argued that Mr. Reel was required to comply with its policy regarding employee request to review personnel files. Specifically, two portions of that policy – first, Respondent argued that Mr. Reel was required to fill out the “Request to View/Copy Personnel File” form and second that he pay the costs associated with copying his record. JX 7, JX 11.

As discussed above in Section IV(B), Respondent's insistence on that policy as based upon a misstatement of the facts and the Union is not bound by the policy. Nonetheless, for Respondent's convenience, Mr. Phillippi filled out a copy of the “Request to View/Copy Personnel File” on March 4, 2020 and transmitted it to Respondent. JX 10. Therefore, to the extent that the Union was under any obligation to comply with the Company's internal records management processes, any deficiency was cured on March 4, 2020. Nonetheless, Respondent still refused to comply with the information request after that date.

³ By its very terms, Respondent's policy applies to employees, not to the Union. It states, “[u]pon receipt of *your* written request, human resources will schedule an appointment for *you* to view *your* personnel file during normal office hours . . . The Company may *charge the employee* the actual costs of copying.” JX 7 (emphasis added).

The only remaining basis that Respondent cited at the time for its failure to provide Mr. Reel's personnel record was that the Union did not agree to pay for the cost of the record production. JX 11 ("a copy of Mr. Reel's discipline file will be made available to him upon receipt of the actual costs of copying it, a set forth in the form.").

Once again, the Union is not bound by Respondent's policy for retrieving personnel files. Instead, the Union's obligation, if any, to pay for the costs of an information request are dictated by the NLRA and the Board's case law. For an employer to pass on a portion of the cost of providing relevant information pursuant to a union information request, that employer bears the burden of proving that production of the information would be financially burdensome. *Tower Books*, 273 NLRB 671, 671, n. 5 (1984), *enfd sub nom. Queen Anne Record Sales, Inc. v. NLRB*, 772 F.2d 913 (9th Cir. 1985) (citing *Food Employers Council*, 197 NLRB 651 (1972); *see also Beverly Health & Rehab. Servs., Inc.*, 346 NLRB at 1327, *overruled on other grounds by E.I. DuPont de Nemours, Louisville Works*, 364 NLRB No. 113 (2016) (finding, "It is the Respondent's burden to show that the production of the information requested by the Union was unduly burdensome" (internal citations omitted)) and *I. Appel Corp.*, 308 NLRB 425, 442 (1992), *enfd sub nom. NLRB v. I. Appel Corp.*, 19 F.3d 1433 (6th Cir. 1994) (stating that an employer claiming to be cost-burdened by a union's information requests must "establish[] the truth of such contentions").

The Board has, in the past, rejected Respondent's blanket claims regarding undue burden, holding, holding that "the Respondent has to do more than assert burdensomeness – it has the 'burden of proving its contention that providing the requested information would be overly burdensome'; therefore, the company's "blanket assertion" regarding its burden was insufficient. *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 30 (quoting *Mission Foods*, 345

NLRB 788, 789 (2005)). Even if Respondent had presented evidence of its supposed burden, the company still would have been required “to seek an accommodation with the Union,” such as by making an effort to supply some of the requested information “and document[ing] to the Union the reasons why some of the request could not be met.” *Id.* (citing *Goodyear Atomic Corp.*, 266 NLRB 890, 891 (1993), *enfd sub nom. Goodyear Atomic Corp. v. NLRB*, 738 F.2d 155 (6th Cir. 1984)). However, Respondent has never informed the Union regarding the costs associated with copying Mr. Reel’s personnel file or made an attempt to supply some of the information.

Without an accounting showing the expected cost from the Respondent, the Respondent never even attempted to show, let alone conclusively established, the existence of an undue burden caused by the information request. Instead, they simply asked for an open-ended commitment for Mr. Reel to agree to pay the costs. The Union is not obligated to make such a commitment. *Tower Books*, 273 NLRB at 671. As a result, the Union was not required to even bargain over the costs of production, let alone pay the entire sum. *See Hosp. Episcopal San Lucas*, 319 NLRB 54, 57 (1995) (holding that the union need bargain over cost-sharing only if the employer could demonstrate a financial burden and that, in the absence of such demonstration, the employer violated the Act).

Further, all evidence in the record indicates that Respondent would endure little burden in producing the requested information. From a practical standpoint, the Union requested only the personnel record of a single employee, which is hardly likely to be voluminous. In fact, on October 24, 2017, just shy of two years before Mr. Phillippi’s initial request for documents, Respondent had produced Mr. Reel’s personnel file at his request. Stip. at 10, JX 14. The record at that time was 72 pages, for which they charged Mr. Reel \$7.20. Stip. at 10, JX 14. Even in the unlikely event that Mr. Reel’s personnel file had grown by an order of magnitude in the two years between

his request and the Union's request, it is impossible to conclude that the costs associate with production would be "financially burdensome." In fact, in its Answer, Respondent refers to the costs associated with producing the documents as "nominal." JX 1(e) at 6.

In short, Respondent cannot foist all the costs associated with the Union's information request onto the Union. In order to even demand bargaining over the issue, Respondent must establish that the request is financially burdensome. In this case, Respondent made no such demonstration. And, in fact, the record indicates that the costs would be *de minimis*. As a result, Respondent had no basis to refuse the information request and has violation Sections 8(a)(1) and 8(a)(5).

D. The UMWA's Information Request was relevant.

In its Answer, Respondent asserts "[t]he requested information was insufficiently 'necessary for, and relevant to' the requesting party's performance of its duties to be worth incurring this nominal cost . . ." JX 1(e) at 6. This statement in the Answer is the first time that Respondent has challenge the relevance of the Union's information request.

As noted above in Section III, information pertaining to terms and conditions of bargaining unit employees is presumptively relevant and must be provided upon request even without an explanation of relevance. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995). The employer bears the burden of proving a lack of relevance and the union can rely upon the presumption until the employer meets that burden. *AK Steel Co.*, 324 NLRB at 183; *Samaritan Medical Center*, 319 NLRB at 397 (1995); *Beverly Health & Rehabilitation Services*, 346 NLRB at 1326; *River Oak Center for Children*, 345 NLRB at 1336; and *Quality Building Contractors*, 342 NLRB at 430. That general rule applies to disciplinary records. *Queen of the Valley Medical*

Center, 368 NLRB No. 116; *Antioch Rock & Ready Mix*, 328 NLRB No. 116. And personnel records. *Saginaw General Hospital*, 320 NLRB 748; *Fleming Cos.*, 332 NLRB 1086.

As set forth in Section IV(a) above, the information request at issue here was for Mr. Reel's personnel record. Mr. Reel is a member of the bargaining unit and his disciplinary record was undoubtedly related to the terms and conditions of his employment. As a result, that information request was presumptively relevant.

Respondent has produced no evidence or argument to substantiate its new claim that the information request was not relevant. This claim is not even an attempt at a rebuttal, it amounts to a mere bald assertion contained in Respondent's Answer. If Respondent's post-hearing brief contains any argument regarding the alleged lack of relevance, it will be the first time the Union has heard it. In all of the correspondence between the parties, Respondent never raised any concern that could even arguably be construed as a claim that the information request was not relevant. As a result, the Board should find that the request is relevant and find that Respondent's failure to comply with the request is a violation of Section 8(a)(1) and 8(a)(5) of the Act.

Further, while Respondent failed to present any evidence or argument to support its claim that the information request was not relevant, the Union provided Respondent with an explanation for why it was relevant on two separate occasions. JX 4, JX 8. Following Mr. Phillippi's initial October 4, 2019 request for Mr. Reel's personnel records, Mr. Baum wrote back asking Mr. Phillippi to "[p]lease explain the relevance of this request." JX 4. As noted above, the Union was not required to provide that explanation to Respondent but instead was entitled to rest on the presumption of relevance accorded to requests of that kind. Nonetheless, as a courtesy, Mr. Phillippi responded, "this information is requested at the request of Jeff Reel and the UMWA. It is needed to verify the contents of his record. Additionally, it is needed to establish what is in his

file at this specific time for any past, pending or future litigation where this information is pertinent.” *Id.* Later, Mr. Reel provided an additional statement regarding the relevance of the request, noting, “[w]e are making this request so the UMWA has a current copy for their records. Being that management has frivolously discipline me and made me at least on statement alleging discipline that would be in my file, this request is being made in writing as opposed to going to the Human Resources office.” JX 8.

After Mr. Baum’s response email on October 4, 2020, Respondent never again raised any questions regarding the relevance of the information request. In fact, Respondent later stated that “Mr. Reels discipline file will be made available to him upon receipt of the actual cost of copying it.” JX 11. This clearly indicates that the only reason for Respondent’s refusal to provide the personnel record was financial consideration and that Respondent did not believe relevance to be an issue. Therefore, the Board should reject any argument Respondent now seeks to make at the 11th hour regarding relevance.

V. CONCLUSION

On October 4, 2019; October 10, 2019; and March 4, 2020 the Union made a request for information regarding a bargaining unit employee at Monongalia County Mine. That information requested was relevant to the Union’s role as the collective bargaining representative of classified employees at the mine, both as a matter of law and fact. Respondent was therefore legally obligated to respond.

However, since October 4, 2019, Respondent has consistently refused to comply with the information requests. It has provided no legal justification for this refusal. It has presented no evidence or argument to rebut the presumption that the Union’s request was relevant, nor could it. Further, it has raised spurious claims that the information request was made by an individual miner

on his own behalf and that the Union was obligated to pay for the costs of producing the documents. There is no support in the Board's case law for either of these propositions.

The Respondent, therefore, violated Sections 8(a)(1) and 8(a)(5) in failing to provide the information that the UMWA requested. The Board should order Respondent to comply with the information request, post a notice affirming the rights of their employees' and take other remedial action.

Date: August 13, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of the Charging Parties was served this 13th day of August, 2020 by electronic transmission upon:

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