

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

**NATIONAL NURSES ORGANIZING
COMMITTEE-TEXAS/NATIONAL NURSES
UNITED (BAY AREA HEALTHCARE GROUP,
LTD. D/B/A CORPUS CHRISTI MEDICAL
CENTER AN INDIRECT SUBSIDIARY OF HCA
HOLDINGS, INC.)**

RESPONDENT

and

Case 16-CB-225123

ESTHER MARISSA ZAMORA, an Individual

CHARGING PARTY

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Date: September 2, 2020

TABLE OF CONTENTS

	PAGE
INDEX TO AUTHORITIES CITED	iii
BRIEF IN SUPPORT OF EXCEPTIONS	1
I. STATEMENT OF THE CASE	2
II. SUMMARY OF RECORD EVIDENCE	7
A. Background	7
B. Zamora’s Efforts to Solicit Co-worker Support for Union Decertification Petition and the Removal of her Flyers	8
C. Citing Contractual Limitations in a Neutrality Agreement, the Employer Denied Zamora’s Request for Access to Secure Bulletin Boards	9
D. Zamora’s Information Request to Respondent Union Asking for a Copy of the Neutrality Agreement	11
E. Respondent’s Denial and Bad Faith Response	12
F. Administrative Law Judge’s Decision	16
III. ARGUMENT IN SUPPORT OF EXCEPTIONS	16
A. Respondent Violated the Act by Failing to Provide Zamora with a copy of the Neutrality Agreement and/or by Failing to Answer her in a Forthright Manner: Exceptions 1 through 14	16
1. General Legal Standards: Unions as Fiduciaries have a General Obligation to Provide Neutrality Agreements to Employees Upon Request	17
a. Union Has a Fiduciary Duty to Bargaining Unit Employee	17
b. In the Fiduciary Relationship, the Agent is Obligated to Provide Information to its Principal	18
c. Bargaining Unit Employees have a Presumptive Interest in Reviewing the Neutrality Agreements to which their Unions are Parties and the Burden is Upon Non-Producing Unions to Establish Lack of Interest	19
2. Zamora’s Reasonable Belief is Sufficient to Trigger her Information Request to the Union	22

3. Zamora Established Good Cause for Requesting the Neutrality Agreement and the Union Violated the Act by Failing/Refusing to Provide it	27
4. The ALJ erred in failing to find that the Union’s bad faith response to Zamora violated the Act	33
B. The ALJ’s Improper Legal, Procedural and Evidentiary Rulings	36
1. The ALJ Erred in Relying on Legal Conclusions in the Employer’s Position Statement: Exception 13	36
2. The ALJ Erred in Finding Respondent’s Answer to the Complaint Satisfies Section 102.20 of the Board’s Rules and Regulations Because it “Effectively” Denied the Complaint Allegations: Exception 5	38
3. The ALJ Erred in Discrediting Zamora’s Unrebutted Testimony: Exception 7	41
4. The ALJ erred and the Board Should Clarify that <i>Electrical Energy Services, Inc.</i> Does Not Prohibit Subpoena Production of the At-Issue Document in a Request for Information Case Where the Existence and Substance of the Document is Dispositive of Other Case Issues: Exception 10	43
5. The ALJ Erred in Failing to Consider and Impose Sanctions on Respondent for Misleading the Tribunal and Refusing to Comply with General Counsel’s and/or Charging Party’s Subpoenas: Exceptions 9 and 14	46
IV. CONCLUSION	49

INDEX TO AUTHORITIES CITED

Cases

A-1 Door & Building Solutions, 356 NLRB 499 (2011) 45

Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services,
367 NLRB No. 103 (2019), 26

Air Line Pilots Assn. v. O’Neill, 499 U.S. 65 (1991)..... 17

Bannon Mills, 146 NLRB 611 (1964)..... 47

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) 37

Borgess Medical Center, 342 NLRB 1105 (2004) 45

Caldwell Mfg. Co., 346 NLRB 1159 (2006)..... 22, 25-26

Columbia University, 298 NLRB 941 (1990)..... 48

Consolidation Coal Co. v. NLRB, 669 F.2d 482 (1982)..... 41, 42

Contract Carriers Corp., 339 NLRB 851, 858 (2003)..... 22

Dana Corp., 356 NLRB 256 (2010) 20

Deadline Express, 313 NLRB 1244 (1994)..... 22

Dyncorp/Dynair Services, 322 NLRB 602 (1996),
enfd. 121 F.3d 698 (4th Cir. 1997)..... 22

Endo Painting Service, Inc., 360 NLRB 485 (2014) 33-34

Electrical Energy Services, Inc., 288 NLRB 925 (1988). 14, 43-46

Equipment Trucking Co., 336 NLRB 277 (2001)..... 25

Green Apple Supermarket of Jamaica, Inc.,
366 NLRB No. 124 (2018) 25

Grinnell Fire Protection Systems Co., 332 NLRB 1257 (2000)..... 22

Groves-Granite, a Joint Venture, 229 NLRB 56 (1977) 19

Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel,
996 F.2d 561 (2d Cir. 1993)..... 20

<i>Hotel & Restaurant Employees Local 355 (Doral Beach Hotel),</i> 245 NLRB 774 (1979)	22
<i>Houston Division of the Kroger Co.,</i> 219 NLRB 388 (1975).....	20
<i>Howard Industries, Inc.,</i> 360 NLRB No. 111 (2014)).....	45
<i>IATSE (Tropicana Las Vegas),</i> 363 No. 148 (2016).....	31
<i>International Ladies' Garment Workers Union v. NLRB</i> <i>(Bernhard-Altman),</i> 366 U.S. 731 (1961).....	20
<i>International Longshoremen's Association, Local 28</i> <i>(Ceres Gulf, Inc.),</i> 366 NLRB No. 20 (2018)).....	41
<i>International Metal Co.,</i> 286 NLRB 1106 (1986)).....	47
<i>International Protective Services, Inc.,</i> 339 NLRB 701 (2003)	22
<i>Law Enforcement & Security Officers Local 40B</i> <i>(South Jersey Detective Agency),</i> 260 NLRB 419 (1982)	18
<i>Lenscraft Optical Corp.,</i> 128 NLRB 807 (1960).....	25
<i>Letter Carriers Branch 529,</i> 319 NLRB 879 (1995)	18, 19
<i>Local 307, National Postal Mail Handlers Union,</i> 339 NLRB 93, 95 (2003)	19, 28, 32
<i>Local 417, International Union, United Automobile, Aerospace</i> <i>and Agricultural Implement Workers of America (UAW)</i> <i>(Falcon Industries, Inc.),</i> 245 NLRB 527 (1980).....	18-19
<i>Majestic Weaving Co.,</i> 147 NLRB 859 (1964) <i>enfd. denied</i> 355 F.2d 854 (2d Cir. 1966).....	20
<i>McAllister Towing & Transportation Co., Inc.,</i> 341 NLRB 394 (2004)	47
<i>Miranda Fuel Co.,</i> 140 NLRB 181, 189-90 (1962), <i>enforcement denied,</i> 326 F.2d 172 (2d Cir. 1963)	17, 34
<i>NLRB v. Interboro Contractors, Inc.,</i> 388 F.2d 495 (2d Cir. 1967)	41
<i>NLRB v. Truitt Mfg. Co.,</i> 351 U.S. 149 (1956).....	26

<i>Olean General Hospital</i> , 363 NLRB No. 62 (2015).....	45
<i>Ohio Power Co.</i> , 216 NLRB 987 (1975), <i>enfd.</i> 531 F.2d 1381 (6 th Cir. 1976)	22
<i>Operating Engineers Local 513 (Various Employers)</i> , 308 NLRB 1300, 1300 (1992)	18
<i>Page Litho, Inc.</i> , 311 NLRB 881, 882 (1993) <i>enfd. in part</i> , <i>denied in part mem.</i> 65 F.3d 169 (6 th Cir. 1995)	22
<i>Richfield Hospitality, Inc.</i> , 368 NLRB No. 44 (2019)	30
<i>Richmond Health Care</i> , 332 NLRB 1304, 1305 fn. 1 (2000).....	22
<i>Russell Stover Candies, Inc.</i> , 221 NLRB. No. 73 (1975)	41
<i>Office Employees Local 251 (Sandia National Laboratories)</i> , 331 NLRB 1417 (2000)	32
<i>Snow & Sons</i> , 134 NLRB 709, 710 (1961) <i>enfd.</i> 308 F.2d 687 (9 th Cir. 1962)	20
<i>Stage Employees IATSE (Global Experience Specialists)</i> , 369 NLRB No. 34 (2020)	49
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), <i>enfd.</i> 188 F.2d 362 (3d Cir. 1951)	41
<i>Steelworkers v. Rawson</i> , 495 U.S. 362 (1990).....	17
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967)	17
<i>Waste Mgmt. of Louisiana, L.L.C. v. Par.</i> , No. CIV.A. 13-6764, 2015 WL 5798029 (E.D. La. Oct. 5, 2015)	37

Statutes and Other Authority

National Labor Relations Act, 29 U.S.C. § § 151-169...	Passim
Restatement (Third) Of Agency § 8.11 (2006).....	18, 21
Nicholas M. Ohanesian, <i>Does “Why” or “What” Matter: Should Section 302 Apply to Card Check Neutrality Agreements?</i> , 45 U. Mem. L. Rev. 249 (2014).....	19

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Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, submits this Brief in Support of General Counsel Exceptions to the Decision of Administrative Law Judge (ALJ) Keltner W. Locke (JD-29-20) dated June 24, 2020.¹

In this case, the Respondent Union failed to provide a requested document to the Charging Party Esther Marissa Zamora (Zamora) relevant to the Union's relationship with her employer and relevant to her terms and conditions of employment. The ALJ incorrectly decided that the Union was not obligated to provide the requested document – a "neutrality agreement" because the Union asserted it was not relevant to terms and conditions of employment -- and that the Charging Party and the General Counsel should not be provided the document pursuant to a trial subpoena to

¹ Citations are as follows: "JD slip op. at #, LL. #" for Judge's Decision and page, line numbers; "Tr. Vol. # at #" for Transcript Volume and page numbers; "CP Exh." for Charging Party Exhibits, "GC Exh." for General Counsel Exhibits, "Jt. Exh." for Joint Exhibits and "R Exh." for Respondent Exhibits.

verify the claims made by the Union. The ALJ's decision was wrongly decided on numerous grounds, based on incorrect legal, procedural and evidentiary findings. First, the ALJ erred in concluding that the neutrality agreement (without reviewing it) did not include terms and conditions of employment and was, therefore, not relevant to Zamora's employment and, accordingly, the Union was not obligated to produce it to Zamora. Second, the ALJ erred to the extent he held that because the document was a neutrality agreement that, by definition, it did not apply to Zamora's terms and conditions of employment. Third, the ALJ erred in concluding that because the neutrality agreement did not include terms and conditions of employment it was not relevant to Zamora and the Union was not required to provide it to her even though it concerned her Union's relationship with her employer. Fourth, the ALJ erred in concluding that the Union's response to Zamora Party in not providing the neutrality agreement to her and concealing whether or not it existed was not unlawful. Fifth, the ALJ erred in his evidentiary findings which are not supported by the record evidence. Sixth, the ALJ erred in his denial of the trial subpoenas of the Charging Party and the General Counsel.

I. STATEMENT OF THE CASE

In 2010, the Union successfully campaigned to represent a unit of the Employer's nurses in Texas. The Union's success was, in part, attributable to a neutrality agreement, a fact that was no secret. Indeed, the existence of the neutrality agreement was disclosed to and reported by the media at the time, even if all of its terms were not revealed.²

² See GC Bench Brief to the ALJ at 6, fn. 2 and Attachments A-D which are the proper subject of judicial notice. Relevant, public articles on the subject include *Sixel: Unions take aim at hospitals*, Houston Chronicle (6/23/10) ("In what it calls a 'remarkable two-week streak,' the National Nurses Organizing Committee-Texas won all five secret ballot elections in the past month to organize 1,769 registered nurses in Corpus Christi, El Paso, McAllen and Brownsville... The two unions set aside their own differences to forge a "peace agreement" and then reached a three-way neutrality pact with HCA, said Ed Bruno, southern regional director for the National Nurses Organizing Committee/National Nurses United in Tampa."); Attachment B: *Unions Enter Pacts to Boost Members*, Wall Street Journal, Maher, Kris. 2011 (Jan. 29). <http://tinyurl.com/nsk9zyd>; and Attachment C: *Collective Bargaining Under Duress, Case Studies of Major U.S. Industries*, LERA Series (2013) ("CNA/NNOC/NNU's efforts to organize RNs

Zamora was not employed by the Employer at the time of the campaign in 2010. She became a unit employee in 2017. Zamora came to desire that the Union cease to represent her and the other unit employees and, in 2018, unit employees enjoyed a brief window in which they could attempt to secure a decertification vote.

However, Zamora soon found that she was not on a level playing field. When she posted flyers in appropriate areas advocating for a decertification effort, they were repeatedly removed. When she complained and requested an enclosed case—as enjoyed by the Union—she was explicitly told by an Employer representative that a neutrality agreement between the Employer and the Union forbade granting her such access. When Zamora requested to see the neutrality agreement, the Employer demurred, insisting that the agreement’s confidentiality provisions prohibited disclosure of the terms.

Zamora next turned to her bargaining representative (the Union), requesting that it furnish her with a copy. Although the Union owes Zamora the good-faith representation of a fiduciary, its response to her request was that of an adversary responding to an interrogatory in a legal proceeding. In its response, the Union did not deny the existence of a neutrality agreement, but rather stated that, besides the CBA, “there is no agreement between HCA and NNOC that controls

in states without a significant nurses union presence have been greatly aided by a neutrality agreement it signed in 2010 with one of the nation’s largest hospital chains—HCA. SEIU also signed the same agreement. The agreement allowed the two unions to organize 20 HCA hospitals in Florida, Missouri, Nevada, and Texas without opposition from the employer. Under the terms of the arrangement, CNA/NNOC/NNU would organize the nurses at these hospitals, while SEIU would organize the support staff. In return, the unions agreed to refrain from engaging in negative campaigns against the company and to not attempt to organize workers at other HCA facilities.”) *See also*, Attachment D: *Members of NNU Ratify First Contracts With Four Texas Hospitals Owned by HCA*, Bloomberg Law’s Developing Labor (09/10/2012)(“All the nurses covered by the first contracts voted for representation by NNU under an election procedure agreement the nurses’ union and the Service Employees International Union reached in 2009 with HCA that governed organizing at its hospitals in Florida, Missouri, Nevada, and Texas. Under that agreement, HCA designated which of its hospitals the two unions could target and set timelines for organizing the workers. The unions had 75 days to collect union authorization cards to trigger an NLRB election, and were given limited access to workers on hospital property. The company agreed to refrain from actively campaigning against the unions.”)

how your employer, Corpus Christi Medical Center – Doctor’s Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit.”

Rather than an outright denial of the existence of the neutrality agreement, the Union implicitly asserted there was such an agreement but that, under *its* reading of the agreement, Zamora’s terms and conditions of employment were not affected and therefore it did not need to provide the agreement to her. This noncommittal response is not appropriate or lawful when a union requests information from an employer, it is even less appropriate for an agent who owes a fiduciary duty when *responding* to its principal. Moreover, the response leaves the Union as the unchecked decision maker when it comes to determining whether the neutrality agreement’s terms affect Zamora’s terms of employment and forced her to rely on the Union’s unsubstantiated claims on blind faith.

With this background in place, the General Counsel issued Complaint in this matter. The General Counsel and Charging Party issued trial subpoenas to the Union and the Employer, requiring those entities to provide the neutrality agreement at issue. The Employer conceded that such an agreement existed, but refused to produce it. The Union never denied that such an agreement existed, but refused to produce it. Then two days into the hearing, the Union suddenly declared that there was no neutrality agreement.

The ALJ erred by assigning to the General Counsel a burden of Herculean proportions and then found that the General Counsel had failed to meet that burden. Although the existence of the Union and Employer’s neutrality agreement is a matter of public record, and although the Employer admitted to the existence of a neutrality agreement, the ALJ reasoned that the General Counsel had not proven the existence of a neutrality agreement that included provisions affecting

the terms and conditions of employment of unit employees. The ALJ also erred in concluding, without reviewing the agreement, that there is no evidence that it is relevant to Zamora.

In reaching this conclusion, the ALJ misapplied the law and cherry-picked evidence from the record in a manner that lacks internal logic. Where Zamora recounted an un rebutted conversation with a deceased Employer agent, he discredited her. Where the Employer's position statement was admitted into evidence, he accepted the important fact that there was a neutrality agreement but also erroneously adopted the legal conclusion that it did not affect terms and conditions of employment and that Zamora had not otherwise met her burden of relevance. Having accepted that a neutrality agreement existed, the ALJ erred in failing to hold the Union accountable for its unlawful conduct toward Zamora, including its failure to confirm or deny the existence of the agreement and its failure to turn it over to her for her review. The ALJ's reasoning does not withstand scrutiny and his decision must be overturned.

Under long established Board precedent, a neutrality agreement between an union and an employer may be lawfully maintained as long as it does not include impermissible terms amounting to, *inter alia*, unlawful assistance, improper minority recognition, or improper pre-determination of bargaining unit employees' terms and conditions of employment. Zamora had a reasonable belief and a legitimate interest in obtaining the admitted neutrality agreement after the Employer not only advised Zamora that such an agreement exists, but also that it dictated how the Employer handles employee anti-union activity or decertification efforts, which was the basis for having denied Zamora's request to post a flyer concerning union decertification. Zamora requested the neutrality agreement in order to evaluate whether she had been treated lawfully by her Employer. Respondent also breached its duty of fair representation owed to Zamora by refusing to provide her with a copy of the requested neutrality agreement. The Respondent breached its

fiduciary duty to Zamora by concealing the terms of its neutrality agreement with the Employer. Respondent's conduct was arbitrary and/or in bad faith and violates Section 8(b)(1)(A) of the Act.

Respondent's unsubstantiated claims that the neutrality agreement does not impact bargaining unit terms and conditions of employment are nothing more than self-serving conclusions that should be discounted in their entirety. Indeed, based on the overwhelming evidence and the ALJ's own conclusion that the agreement exists, the ALJ should have, at the very least, reviewed the document in camera and permitted the General Counsel to review it before making any determination concerning its relevance. However, as demonstrated below, a neutrality agreement is presumptively relevant to a bargaining unit member and a failure of a union to produce it should draw an adverse inference and ultimately a finding of a violation of the Act.

Contrary to the ALJ's determinations, General Counsel contends that the at-issue neutrality agreement, like collective bargaining agreements, hiring hall rules, grievance procedures or similar documents, are relevant to bargaining unit members and may set contractual terms and conditions of employment that apply to bargaining unit employees and a union has a duty to provide such to any unit employee who requests such to determine whether she has been treated fairly by her employer. This sort of agreement, which is a side agreement to a collective-bargaining agreement, has a clear connection to the relationship between the union and the employer and may pertain to terms and conditions of employment. Respondent owes a fiduciary duty to bargaining unit employees, like Zamora, to be transparent and truthful concerning matters that affect bargaining unit employees, such as the Union's relationship with the Employer, and it breached this duty in this case. By refusing to provide Zamora with the neutrality agreement and/or replying to her information request in bad faith, the record evidence established that Respondent has violated Section 8(b)(1)(A) of the Act. Counsel for the General Counsel takes exception to the ALJ's

decision and urges the Board to reverse the ALJ's factual findings, legal conclusions and dismissal of the Complaint.

II. SUMMARY OF RECORD EVIDENCE

A. Background

National Nurses United (NNU) is a national union comprised of affiliated unions throughout the country. California Nurses Association (CNA) and National Nurses Organizing Committee (NNOC) are affiliates of the NNU. NNOC-Texas is the Texas state affiliate of the NNOC. (Tr. 166, LL. 10-14; 170-171; and Jt. Exh. 9 at 1).

Respondent (NNOC-Texas/NNU) has been the certified exclusive collective-bargaining representative of a unit of registered nurses employed by Bay Area Healthcare Group, LTD. d/b/a Corpus Christi Medical Center (Employer) since about June 7, 2010. (Jt. Exh. 1 and 2). The Employer is an indirect subsidiary of HCA Holdings, Inc. (GC Exh. 7 at 1), which is a holding company that, through its subsidiaries, including Hospital Corporation of America, Inc. (HCA), owns and operates hospitals throughout the country. (Jt. Exh. 9 at 1). In Corpus Christi, the Employer operates a chain of hospitals providing acute care facilities known as the Corpus Christi Medical Center, which consists of the Bay Area Medical Center Campus, the Heart Hospital Campus, the Doctor's Regional Campus, Northwest Campus, and Woolridge Road Campus. (Tr. 73, LL. 3-11; Jt. Exh. 1 and 2).

The parties' prior collective-bargaining agreement was effective from September 15, 2015 to June 30, 2018. (Tr. 175, LL. 11-19; Jt. Exh. 5). After contract expiration until about October 2018, the Employer and Union engaged in successor collective-bargaining agreement negotiations and operated without a contract. (Tr. 177, LL. 7-11). Labor Representative Bradley Van Waus was the Respondent's chief spokesperson during the negotiations. (Tr. 175-177; 202, LL. 5-8). Van

Waus is an admitted Respondent agent within the meaning of Section 2(13) of the Act. (JD slip op. at 6, LL. 14-15; GC Exh. l(m)). The parties reached agreement on a successor agreement in October 2018, with effective dates October 20, 2018 - June 30, 2021. (Tr. 177; Jt. Exh. 6).

Zamora has been a licensed registered nurse for 33 years. (Tr. 72, LL. 4-7). She has worked for the Employer since February 27, 2012, without any gaps in employment. From February 27, 2012 to July 2017, Zamora held management non-bargaining unit positions with the Employer. (Tr. 73-74). In July 2017, Zamora left management, taking a bargaining unit bedside nurse position in the rehab department at the Doctor's Regional Campus. (Tr. 74, LL. 6-12; 75, LL. 18-23). Although she has been employed in a bargaining unit position since July 2017, Zamora has not asked to join the Union as she does not support unions. (Tr. 76-77, LL. 16-7).

B. Zamora's Efforts to Solicit Co-worker Support for Union Decertification Petition and the Removal of her Flyers

Commencing about June 11, 2018,³ Zamora posted flyers titled "Making a Critical Decision Evaluating Pros and Cons" around the Employer's facility, which advertised educational meetings with co-workers, described as "informational in-services." (Tr. 80, LL. 1-3; 84, LL. 16-18; GC Exh. 3). In these flyers, Zamora posed critical questions regarding the quality of the Respondent's representation. (GC Exh 3). Zamora chose this date because she was aware that the 2015-2018 collective bargaining agreement was expiring, and she wanted to open up a dialogue with co-workers in an effort to gather support for a potential decertification effort. (Tr. 79-80, LL. 20-13; 91, LL. 9-13). Prior to posting the flyers, Zamora sought and obtained Employer permission to hold the informational in-services in conference rooms located in the Employer's facility. The Employer provides employees with the employment benefit of holding in-services in conference rooms at the Employer's facility. (Tr. 84-85, LL. 25-5). Zamora posted her flyers in nurse lounges

³ All dates herein are 2018 unless stated otherwise.

and on bulletin boards at the Employer's facility. (Tr. 80, LL. 4-6; GC Exh. 4).

On or about June 12, Zamora discovered that all her flyers had been removed. She reposted her flyers a second and third time that week, but the flyers were repeatedly and anonymously removed. (Tr. 80, LL. 6-9). Because she observed that other employees posted their in-service flyers in glass enclosed bulletin boards, she determined to request a similar benefit from the Employer in effort to prevent her flyers from being removed. (Tr. 80, LL. 13-22; 85, LL. 10-18; GC Exh. 4). The evidence is undisputed that the Employer provides the various employee unions, including Respondent, with glass-enclosed bulletin boards at the facility. This benefit is memorialized in Respondent's collective-bargaining agreement at Article 4, Section 3 Bulletin Boards. (Jt. Exh. 5 at 5). Zamora spoke to Sabrina Jones, administration secretary, and requested permission to access a secure bulletin board to post her flyers. As soon as Jones learned this was union-related, she denied Zamora's request and referred Zamora to Michael Lamond, HCA's labor liaison who maintained an office at Corpus Christi Medical Center. (Tr. 81, LL. 12-20).

C. Citing Contractual Limitations in a Neutrality Agreement, the Employer Denied Zamora's Request for Access to Secure Bulletin Boards

On June 20, Zamora sent a "Formal Complaint," via e-mail, to Vince Goodwine, human resources vice president, and Michael Lamond, HCA labor liaison, stating:

I would like to file a formal complaint against the NNOC union organizers for removing my in-service flyers from the nurse's break rooms and other bulletin boards throughout Dr's Regional Medical Center. There are a few of us who are opposed to having this particular union represent us and would like to educate our coworkers on another perspective or viewpoint. These are educational in-services with the intent to open up a dialogue regarding the pros and cons of unionization. We cannot educate our peers if they are unaware of our in-services...

Goodwine replied, "Thanks for your email. All employees have the same privilege in use of our employee information bulletin boards. I'll defer to Michael to resolve with the NNOC..." (Tr. 78-79, LL. 19-18; GC Exh. 2).

On about June 28, during a ten-minute telephone conversation with Lamond, Zamora discussed her complaint about the flyers being removed and inability to keep them up. Zamora asked Lamond about “the protected bulletin board” and requested the same privilege that was provided to the pro-union nurses. (Tr. 87-88, LL. 7-3). Zamora testified:

15 A: I talked to him at great length about the denial
16 and it being unfair and biased on my employer’s part. I
17 felt like I was being treated unfairly. We discussed
18 the Neutrality Agreement. I talked to him about that I
19 was fully aware or felt very strongly that there was a
20 Neutrality Agreement based on my...

7 A: Yes, we talked about a Neutrality Agreement that I
8 firmly believed had to be in place based on my past
9 experience with a Neutrality Agreement. I felt that
10 there was something in that that was preventing my
11 hospital from granting my request for these privileges.
12 He did discuss that there was a Neutrality
13 Agreement but that it had expired or a certain portion
14 of it had expired. There –

23 A: So he was explaining to me that a portion of the
24 agreement had expired but that there was an ongoing
25 portion and I felt that there was something in that
1 agreement that was hindering my Section 7 right. I
2 really wanted to see it in writing and I asked him if he
3 could please get me a copy. He did say he would try but
4 he wasn’t going to guarantee me.

(Tr. 88-90). During this same discussion, Lamond told Zamora that the Employer could not facilitate her decertification efforts. (Tr. 106, LL. 15-23). Lamond said there were certain aspects in the agreement that were not expired, that the agreement continued, and she would not get her request because the agreement states that the Employer will not assist an employee or group of employees with any kind of antiunion activity. (Tr. 108, LL. 2-7).

On July 3, Zamora sent Lamond, Goodwine and others a follow-up e-mail stating:

On Thursday, June 28th, I spoke to you concerning my request for the protected bulletin board and you said I was denied because it pertained to opposition to the Union. I’ve included Mr. Goodwine’s response below which state all employees

have the same privilege in use of informational bulletin boards. Are you both telling me that ALL employees would be denied use of the protected bulletin boards. Because as I see it, the employees that are pro-union are getting all the privileges and those of us anti-union are being denied the same privileges. I am simply asking for the same privileges my pro-union counterparts have established...

(Tr. 90-91, LL. 22-13; GC Exh. 3).

On July 8, Zamora sent Lamond, Goodwine and others another follow-up e-mail:

I have been told on numerous occasions, from you, Mr. Goodwine and several others that I can not [sic] have a protected bulletin board because it would be “facilitating” anti-union support. By not providing me with the same privileges you are thereby facilitating pro-union support. I would very much like to see this language in writing. I am formally requesting a copy of the Neutrality Agreement between HCA and NNOC at your earliest convenience. I will gladly make a trip to your office to retrieve or if you like you can email it to me. Mr. Goodwine informed me that it is an HCA policy. I cannot find this so-called policy. Can you direct me to that as well, please?

(Tr. 91-93).

D. Zamora’s Information Request to Respondent Union Asking for a Copy of the Neutrality Agreement

About July 11, after no response from the Employer, Zamora mailed an information request to the Union’s local and national offices seeking a copy of the HCA/NNOC neutrality agreement:

My name is Esther M. Zamora. I am an RN employed at Corpus Christi Medical Center-Doctor’s Regional Hospital in Corpus Christi, Texas and am currently represented by the National Nurse’s Organizing Committee. I am formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility. I understand that the first stage has expired, but that my employment remains governed by the second, post-organizing stage of this agreement. I understand that aspects of this current agreement control how my employer can deal with me, and vice versa. Since my working life at Corpus Christi Medical Center-Doctor’s Regional Hospital is being affected by the neutrality agreement’s current terms and conditions, I have a right to a copy of this Agreement and you have a fiduciary duty to provide it to me. Please send the agreement to me as soon as possible...If you refuse to send it, please explain your refusal...

(Tr. 96, LL. 12-13; Jt.. Exh. 3).

E. Respondent's Denial and Bad Faith Response

Respondent's Oakland office forwarded Zamora's information request to Labor Representative Bradley Van Waus for response. (Tr. 173, LL. 7-8; 177, LL. 21-23). Vaus Waus could not recall the date of receipt, but conceded that he must have received the information request after July 11. (Tr. 173, LL. 16-23). Van Waus claimed not to recall who forwarded the information request to him, how it was forwarded or whether he received any directive as to what to do with the information request. (Tr. 174-175, LL. 8-2). Upon review, Van Waus understood that Zamora was requesting a copy of the HCA/NNOC neutrality agreement. (Tr. 173, LL. 10-12; 177, LL. 12-20; 180, LL. 11-13). However, he claimed to have "no idea" what Zamora was asking for. (Tr. 177-178, LL. 24-3, 14-16).

Van Waus admitted that Corpus Christi Medical Center is affiliated in some manner with HCA, but he lacked an understanding as to HCA or its corporate structure. (Tr. 181-183). Notwithstanding his purported lack of understanding, Van Waus did not call anyone or otherwise make any efforts to ascertain information regarding the existence of a neutrality agreement between HCA and NNOC as requested by Zamora. Instead, despite his admitted lack of knowledge, he determined to "handle the issue" by drafting a reply letter. (Tr. 183-184, LL. 14-3; 185, LL. 2-4; 188-189, LL. 24-11). On about July 25, Van Waus mailed Zamora a response letter:

Thank you for your letter of July 11, 2018. There is no agreement between HCA and NNOC that controls how your employer, Corpus Christi Medical Center – Doctor's Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015 - June 30, 2018 collective bargaining agreement between NNOC/Texas and Corpus Christi Medical Center. Enclosed is a copy of that collective bargaining agreement...

(Tr 178-179, LL. 17-10; Jt. Exh. 4). Van Waus acknowledged that his response did not admit or deny the existence of neutrality agreement as requested by Zamora. (Tr. 180, LL. 8-21). At trial, Van Waus initially testified that there are no neutrality agreements of any kind between

Respondent or the various arms of the Employer and its corporate parent. (Tr. 184-185, LL. 4-5). However, when confronted with the Employer's admission in a legal position statement, which showed that the Employer certainly believed such an agreement existed, Van Waus was evasive. He ultimately conceded that Respondent and HCA have "lots of agreements" and he had no reason to dispute the Employer's admission regarding the existence of such an agreement between the parties. He testified, "We make lots of agreements." (Tr. 186-189, LL. 8-11; 211, LL. 2-13; 213, LL. 1-5; GC Exh. 7).

In its position statement to Region 16 of the Board, Respondent, similar to Van Waus, did not admit or deny the existence of a neutrality agreement. Respondent asserted:

5. You have also asked whether NNOC-Texas/NNU is currently party to a "neutrality agreement" with Corpus Christi Medical Center and/or HCA Holdings, and if so how such agreement applies to the Union's bargaining unit of employees at Corpus Christi Medical Center. Simply stated, **there is no agreement of any sort (aside from the above-referenced CBA) between the Union, NNOC, or NNU with Corpus Christi Medical Center and/or HCA Holdings, which controls in any manner Charging Party's and other bargaining unit employees' terms and conditions of employment and/or that limits how Corpus Christi Medical Center (the Employer) and/or HCA Holdings can deal with the Charging Party and other bargaining unit employees, as Charging Party alleges.**

To the extent any such "neutrality agreement" exists between the Union, NNOC, or NNU with Corpus Christi Medical Center and/or HCA Holdings that does not touch upon the terms and conditions or treatment of the Corpus Christi Medical Center bargaining unit, the Union is under no obligation under Board law to furnish a copy of it to Charging Party Zamora...

(GC Exh. 9).

Thus, instead of admitting or denying the existence of a neutrality agreement, Respondent attempted to parse legal language that leaves open the possibility that an agreement exists, while at the same time arguing that it has no obligation to provide the document, as, *from its perspective*, the agreement does not impact the terms and conditions of employees of bargaining unit employees. Respondent continued this position during the hearing. The ALJ expressly noted:

Before and at first during the hearing, the Respondent repeatedly avoided revealing whether or not it had entered into any other pact called a “neutrality agreement,” that is, into a “neutrality agreement” which did *not* affect terms and conditions of employment. It is puzzling why the Respondent worked so hard to leave uncertain whether or not any kind of neutrality agreement existed. The existence of such a document would not have affected the Respondent’s argument that it had no duty to provide an employee with such an agreement, or, indeed, with any document which did not pertain to or affect the terms and conditions of employment of bargaining unit employees.

(JD slip op. at 16, LL. 35-42). The ALJ further noted that Respondent advanced this same argument as part of its affirmative defenses in the Answer to the Complaint. (JD slip op. at 17, LL. 1-2). Seeking to resolve this inherent ambiguity, the ALJ asked Respondent counsel a very direct question designed to elicit a direct answer. Respondent counsel repeatedly evaded a direct answer. (Tr. 127-128; 138-139). As the hearing progressed, it became evident that Respondent was shifting its defense with regard to the existence of a neutrality agreement and that such new position conflicted with not only Respondent’s position statement, but also the Employer’s position statement. Thus, Counsel for the General Counsel issued Respondent a subpoena duces tecum seeking production of the at-issue neutrality agreement.⁴ (Jt. Exh. 8(aa), Exh. 1). Respondent immediately filed a motion in opposition in which it cited *Electrical Energy Services, Inc.*, 288 NLRB 925 (1988)⁵ and argued, *inter alia*, that the General Counsel was attempting to use the

⁴ General Counsel issued a similar subpoena, but withdrew such following a pre-hearing conference during which the ALJ informed the parties he would deny subpoena production as it was improper to subpoena the at-issue document in an information request case under *Electrical Energy Services, Inc.*, 288 NLRB 925 (1988). The Charging Party also issued a subpoena duces tecum to Respondent seeking production of the neutrality agreement. (Jt. Exh. 8(r), Exh. 1).

⁵ In *Electrical Energy Services, Inc.*, *supra*, the respondent employer was charged with a Section 8(a)((5) and (1) violation for failing to provide certain requested information that is relevant to and necessary for the union’s duty of representation. A subpoena duces tecum was served on the employer “attempting to obtain each and every document placed in issue by the complaint.” *Id.* at 931. The Board adopted the ALJ’s decision which found:

In the instant case, the General Counsel is attempting to use the subpoena duces tecum as a substitute for the Board order sought by the complaint. Not only is this procedure improper, but it is an abuse of the subpoena power because it would undercut the statutory requirement for an unfair labor practice hearing where the ultimate issue to be decided is whether the General Counsel is entitled to the information in question. *Id.*

Thus, the subpoena was revoked in *Electrical Energy Services, Inc.* “because of the manifest improper purpose it seeks to achieve.” *Id.* at 931.

subpoena duces tecum as a substitute for the Board order sought by the Complaint. (Jt. Exh. 8(aa)). After Counsel for the General Counsel and Charging Party counsel both demanded production consistent with his ruling regarding a similar subpoena issued upon the Employer (JD slip op. at 20-21, LL. 36-5), the ALJ directed Respondent to provide the document for an *in camera* inspection and pressed Respondent whether it possessed any documents responsive to the subpoenas. Respondent now took a firm position and for the first time asserted that no such document exists, which the ALJ accepted. (Tr. 218)

Contrary to Respondent's denials, the existence of a neutrality agreement or similar document is implicit not only in Respondent's position statement, but also in the Employer counsel's pre-trial e-mail to the ALJ advising that the Employer would not comply with the ALJ's directive to produce the neutrality agreement for an *in camera* inspection. (Jt. Exh. 7). Moreover, the existence of a neutrality agreement is explicit in the Employer's position statement to Region 16 of the Board during the investigation of a related matter:

8. Is Corpus Christi Medical Center/HCA Holdings currently party to a neutrality agreement with NNOC-Texas and/or NNU? If so, how does this neutrality agreement apply to the bargaining unit at Corpus Christi Medical Center?

Response: **HCA Holdings, Inc. is party to an agreement with California Nurses Association, of which NNOC-Texas, NNU is an affiliate.** That agreement requires the parties and their affiliates to conduct their relationships in a manner consistent with mutual respect and joint commitment to problem solving. The agreement does not govern the terms and conditions of employment of bargaining unit employees at CCMC.

a. Does this neutrality agreement limit the way in which Corpus Christi Medical Center/HCA Holdings can deal with bargaining unit employees...

Response: **The agreement provides that neither CCMC nor HCA Holdings shall encourage or support decertification,** but does not otherwise limit how they can deal with bargaining unit employees

(GC Exh. 7).

F. Administrative Law Judge's Decision

The hearing opened on February 4, 2020 and closed on March 18, 2020. The ALJ issued his decision on June 24, 2020. In his decision, the ALJ dismissed the Complaint in its entirety following the rationale summarized at the outset of his decision:

The credited evidence fails to establish that any term or condition of employment of bargaining unit employees was determined, controlled, or affected by any agreement entered into by the Respondent other than the collective bargaining agreement between the Respondent and the Employer, together with the "side letters" and memorandum of understanding it references. The record further fails to establish that any other agreement or document [i.e. the at-issue neutrality agreement] related to, affected, or was affected by the Respondent's exercise of its authority and/or discharge of its duties as the employees' exclusive bargaining representative. The Respondent's refusal to provide to a bargaining unit employee a copy of another document [i.e. the at-issue neutrality agreement], not shown to relate to terms and conditions of employment or its responsibilities as the exclusive bargaining representative, did not violate Section 8(b)(1)(A) of the Act.

[JD slip op. at 1]

III. ARGUMENT IN SUPPORT OF EXCEPTIONS

A. Respondent Violated the Act by Failing to Provide Zamora with a copy of the Neutrality Agreement and/or by Failing to Answer her in a Forthright Manner: Exceptions 1 through 14

Although he also erred in his evidentiary and procedural rulings, as discussed below, the ALJ's major and primary errors were in his analysis of the facts and misapplication of the law. First, without having reviewed the neutrality agreement, the ALJ erred in concluding it did not include terms and conditions of employment and was, therefore, not relevant to Zamora's employment and, accordingly, the Union was entitled not to produce it to Zamora. Second, the ALJ erred, to the extent he held that because the document was a neutrality agreement it, by definition, did not apply to Zamora's terms and conditions of employment. Third, the ALJ erred in concluding that because the neutrality agreement did not include terms and conditions of employment it was not relevant to Zamora and that the Union was not required to provide it to her even though it concerned her Union's relationship with her employer. Fourth, the ALJ erred in

concluding that the Union's response to Zamora in not providing the neutrality agreement and concealing whether or not it existed was not unlawful.

Although employees requesting neutrality agreements should not be required to provide specific evidence as to how the agreement might affect them, Zamora *did* provide such evidence, but the ALJ erred rejecting such evidence as hearsay. Contrary to the ALJ's hearsay conclusions, Zamora's discussions with her Employer sufficiently justify her information request. The Charging Party need only have a reasonable belief and does not need to prove, in fact, that an affected condition exists to substantiate her request for information. The Union violated its duty to Zamora both by failing to provide the neutrality agreement and providing her with a bad faith response.

1. General Legal Standards: Unions as Fiduciaries have a General Obligation to Provide Neutrality Agreements to Employees Upon Request

a. A Union Has a Fiduciary Duty to Bargaining Unit Employees

In *Vaca v. Sipes*, 396 U.S. 171 (1967), the Supreme Court reiterated:

It is now well established that, as the exclusive bargaining representative of the employees ... the Union [has] a statutory duty fairly to represent all of those employees, "and that this duty" includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct ... a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.

Board and court precedent is well established that in its capacity as exclusive bargaining representative, a union owes a duty of fair representation to all bargaining-unit employees. *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 75–78 (1991); *Steelworkers v. Rawson*, 495 U.S. 362, 376 (1990); *Vaca v. Sipes*, 386 U.S. at 177; *Miranda Fuel Co.*, 140 NLRB 181, 189-90 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). The duty of fair representation by the exclusive bargaining representative is clear and fiduciary in nature. *Miranda Fuel Co.*, 140 NLRB at 185.

b. In the Fiduciary Relationship, the Agent is Obligated to Provide Information to its Principal

The fiduciary relationship of a union to the employees it represents is a common law duty and although not identical to other fiduciary duties such as that of the attorney to his client, the same common law fiduciary principles apply. Under these common law principles:

An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when:

- (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
- (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

Restatement (Third) Of Agency § 8.11 (2006).

Consistent with the common law requirements of a fiduciary, the Board has long recognized the duty of unions to provide information to represented employees. See *Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB 419 (1982). The Board has recognized that the duty includes providing requested information to a unit member when the request is reasonably directed toward ascertaining whether he or she has been treated fairly, or relating to terms and conditions of employment. See, e.g., *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300, 1300 (1992) (right to see hiring-hall records to ascertain whether employee was rightly referred for work); *Letter Carriers Branch 529*, 319 NLRB 879, 881-82 (1995) (employee entitled to copy of grievance file); *Law Enforcement & Security Officers Local 40B*, supra at 420 (employee entitled to copy of collective-bargaining agreement). As a corollary, without question, a union has a responsibility not to misinform an employee in such a vital matter as his employment rights. See, e.g., *Local 417, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)*

(*Falcon Industries, Inc.*), 245 NLRB 527, 534 (1980); *Groves-Granite, a Joint Venture*, 229 NLRB 56, 63 (1977).

As explained in more detail below, the Board determines the lawfulness of a union's refusal to provide information to a bargaining unit employee based on six factors: (1) the documents requested pertained to a grievance filed by the charging party; (2) the charging party had a legitimate general interest in obtaining the documents; (3) [the] legitimate interest was communicated to the [u]nion; (4) the [u]nion raised no substantial countervailing interest in refusing to provide the charging party with copies of the requested documents; (5) the ability of the [u]nion to provide copies of the documents; and (6) the relative ease in complying with the request taking into account the amount of documentation requested. *Local 307, National Postal Mail Handlers Union*, 339 NLRB 93, 95 (2003) (citing *Letter Carriers Branch 529*, 319 NLRB at 881). The weight and importance of these factors will generally depend on the facts of the case, such as the type of information requested and the reason for the request.

With respect to the second factor, the employee's interest in the information, when the subject of the request is a neutrality agreement, the Board should presume that employee has a strong interest.

c. Bargaining Unit Employees have a Presumptive Interest in Reviewing the Neutrality Agreements to which their Unions are Parties and the Burden is Upon Non-Producing Unions to Establish Lack of Interest

Neutrality agreements have no strict definition. They “can range from a simple agreement limiting what the employer and union will say about the campaign to more detailed agreements allowing a union to have greater access to the employer's premises and employees.” See Nicholas M. Ohanesian, *Does “Why” or “What” Matter: Should Section 302 Apply to Card Check Neutrality Agreements?*, 45 U. Mem. L. Rev. 249, 272–74 (2014). Examples of neutrality

agreement terms include union agreement to refrain from organizing certain employee classifications or facilities, union agreement to refrain from public criticism of the employer, employer agreement to refrain from campaigning against union organization, employer agreement to recognize favored unions by card check, employer agreement to recognize unions at future locations, employer agreement to provide unions with employee information, facility access, and posting locations for union literature. *Snow & Sons*, 134 NLRB 709, 710 (1961) (employer bound by agreement to honor results of card check), *enfd.* 308 F.2d 687 (9th Cir. 1962); *Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (enforcing card-check and neutrality agreement pursuant to §301 of Labor-Management Relations Act); *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975)(future locations). Not all neutrality agreements are lawful. At times, the parties pre-negotiate the terms of future collective bargaining agreements. See *International Ladies' Garment Workers Union v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961) (interim agreement was the vehicle for prematurely granting union exclusive bargaining status which was found objectionable); *Majestic Weaving Co.*, 147 NLRB 859 (1964) *enfd. denied* 355 F.2d 854 (2d Cir. 1966)(employer pre-recognition bargaining unlawful); *Dana Corp.*, 356 NLRB 256 at 266 (Hayes' Dissent)(criticizing the "deceptive cloak of authority" potentially created).

Whether lawful or unlawful, neutrality agreements are relevant because they include information concerning the relationship between the employer and the union and may impact represented employees in a variety of ways and, if unlawful, may infringe upon their rights under the Act. Although in this case Zamora established that the neutrality agreement may contain provisions concerning her terms and conditions of employment, the Board should not require such a specific showing of relevance because such agreements are presumptively relevant to bargaining

unit employees. Thus, absent some compelling reason to the contrary, a union should be required to provide, upon request by unit members, documents concerning their union's relationship to the employer, such as easily accessible neutrality agreements. This principle is consistent with unions' fiduciary duty to bargaining unit members to be transparent concerning the respective obligations of unions, employers, and unit employees to each other.

The ALJ inappropriately burdened Zamora with establishing a legitimate interest in the neutrality agreement. Were the Board to uphold such a distribution of burdens, the results would be predictable. Few employees would be able to establish their interest in a document which they had never seen. The facts herein involve an unusual exception because the Employer revealed the existence of the agreement to Zamora and gave her some information about how it was affecting her. In most situations, such revelations will not be made; what stays in the dark will remain unseen. In the normal course, if an employee who does not have specific information about a neutrality agreement, requests a copy, assuming that a union acknowledges its existence, unions could be excused by simply stating that the agreement does not affect the requesting employee. No one is in a position to review the union's assessment.

Such an arrangement of burdens would provide unions with essentially unfettered secrecy in a manner that is in contrast to both common law fiduciary principles and principles established by the Board with respect to the burdens involved in the production of information in a variety of contexts. With respect to the common law obligation to provide information, there is no burden on principals to establish interest in documents that they have not seen; the principal simply proves that the information was requested. Restatement (Third) Of Agency § 8.11 (2006). Similarly, in the context of bargaining relationships, the Board does not require requesting unions to establish that a requested document has direct bearing on the employment relationship. Rather, the Board

uses a “broad, discovery-type of standard in determining relevance in information requests.” *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). In accordance with this “discovery-type” standard, potential or probable relevance is sufficient to give rise to an employer’s obligation to provide information. *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). The Board recognizes that certain categories of information are presumptively relevant to bargaining partners. The Board has long held that information pertaining to the bargaining unit is presumptively relevant and no showing of relevance is required. *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976)⁶. As to presumptively relevant requests, the employer has the burden of proving the lack of relevance, and a union does not need to make a specific showing of relevance unless the presumption is rebutted. *Contract Carriers Corp.*, 339 NLRB 851, 858 (2003). In corollary situations, certain information held by unions may be presumptively relevant to requesting employers. For instance, contracts that unions have with other employers may be presumptively relevant where “most favored nations” clauses come into play. See, e.g., *Hotel & Restaurant Employees Local 355 (Doral Beach Hotel)*, 245 NLRB 774 (1979). Following the Board’s established burden-shifting schemes, an employee’s requests for neutrality agreements should be considered presumptively relevant.

2. Zamora’s Reasonable Belief is Sufficient to Trigger her Information Request to the Union

Even if the information sought by Zamora were not presumptively relevant, she established

⁶ In the bargaining context, presumptively relevant information includes the names of unit employees and their addresses; seniority dates; rates of pay; a list of job classifications and other pay-related data; a copy of insurance plans in effect and rates paid by the employer and employees; the number of paid holidays in effect; pension or severance plans; requirements for and amounts of vacation; incentive plans; night shift premiums; and “any other benefit or privilege that employees receive.” *Dyncorp/Dynair Services*, 322 NLRB 602 (1996), *enfd.* 121 F.3d 698 (4th Cir. 1997); *International Protective Services, Inc.*, 339 NLRB 701 (2003); *Deadline Express*, 313 NLRB 1244 (1994). Presumptively relevant information also includes the names and payroll records of strike replacements since they are bargaining unit employees. *Page Litho, Inc.*, 311 NLRB 881, 882 (1993) *enfd. in part, denied in part mem.* 65 F.3d 169 (6th Cir. 1995); *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257 (2000).

relevancy. General Counsel avers that in order to trigger a requirement that a union produce information to a bargaining unit employee, the requester need only establish a reasonable belief that the information exists and is relevant. The ALJ improperly relied on the hearsay rule to exclude Zamora's testimony regarding her discussions with Lamond about the neutrality agreement. Zamora's testimony is relevant to her reasonable belief, and the ALJ should have accepted such as an exception to the hearsay rule.

The General Counsel provided convincing evidence that the neutrality agreement did, in fact, impact Zamora's terms and conditions of employment, or at least that Zamora had a reasonable basis to conclude such. This evidence came in the form of statements that Michael Lamond (HCA labor liaison) made to Zamora, wherein he revealed the existence of a neutrality agreement. According to Zamora, Lamond informed her that she could not post her anti-union flyers on enclosed bulletin boards due to the neutrality agreement. Lamond's communication to Zamora was the trigger or basis that prompted her to make an information request to Respondent.

Counsel for the General Counsel issued a subpoena to Lamond, but Lamond passed away and was therefore unavailable to testify. (JD slip op. at 9, L. 10). Thus, at the hearing, the substance of the discussion between Zamora and Lamond was based solely on Zamora's unrebutted testimony as supplemented by their e-mail communications. In his decision, the ALJ reiterated that he allowed Zamora to testify about the substance of her discussions with Lamond as an exception to the hearsay rule, but would not accept it for the truth of the matter asserted, finding that such testimony was hearsay. (JD slip op. at 9, LL. 9-15).

However, here the ALJ erred in two regards. First, he enforced the hearsay rule too rigidly and second, he failed to consider the testimony for purposes other than the truth of the potentially hearsay statement.

The statements attributed to Lamond are out-of-court statements by a speaker who is not a party to the case, and so if they were to be relied upon for their truth, a hearsay exception would need to be established. In this regard, both the Federal Rules of Evidence and NLRB practices and procedures allow for the admission of otherwise hearsay evidence that does fall squarely within the bounds of an established exception. Recognizing that there may be times when otherwise hearsay evidence should be admitted, the Federal Rules of Evidence include the “Residual Exception.” Under the “Residual Exception,” under which evidence may be introduced when (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. Residual Exception Fed. Rules of Evidence Rule 807 (3d ed.). Both conditions are satisfied here. Zamora’s testimony has guarantees of trustworthiness insofar as the testimony was consistent with other testimony she gave while Lamond was still alive and with her contemporaneous emails and subsequent actions. The trustworthiness of her testimony is further verifiable because it could be rebutted by a production of the neutrality agreement itself. With respect to the second factor, this was clearly the most probative evidence that the General Counsel or Zamora could otherwise provide.

Alternatively, the evidence could have been received for its truth as a sanction. NLRB hearings are only subject to the Federal Rules of Evidence as far as practicable and the Board has adopted its own practices over the years. One key Board practice allows for the use of “secondary” or hearsay evidence by a party when another party has failed to properly answer a Complaint or produce relevant, subpoenaed information. In this case, the Union failed to produce the neutrality agreement and so Zamora’s testimony about Lamond’s understanding of the agreement can be

relied upon. See *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip op. at 10 (2018) (accepting secondary evidence, including hearsay testimony, in lieu of subpoenaed payroll records). Additionally, Respondent's failure to deny the Complaint allegations, as discussed below, coupled with its failure to produce the document are grounds for sanctions including the admission of secondary evidence and the striking of portions of an Answer. See *Equipment Trucking Co.*, 336 NLRB 277 n. 1 (2001) (striking respondent's answer with respect to certain allegations); and *Lenscraft Optical Corp.*, 128 NLRB 807, 817 (1960) (striking testimony of witnesses who failed to reappear for cross-examination after the documents were belatedly disclosed). Thus, the ALJ should have admitted the testimony as a necessary sanction.

Finally, even if the ALJ was correct in rejecting the testimony for the truth of the matter asserted, he erred by failing to receive it for non-hearsay purposes. In his decision, the ALJ rejected the substance of Lamond's communication to Zamora as hearsay to establish that there was a neutrality agreement that affected terms and conditions of employment. That is not the end of the issue. Statements are not hearsay when admitted to establish the mental impressions of the listener/witness as opposed to the truth of the speaker/non-witness. See Rule 803, Exception 3, Exceptions to the Rule Against Hearsays, Fed. Rules of Evidence (3d ed.).

The evidence need only establish that the discussion with Lamond was sufficient to justify Zamora's information request to verify if, in fact, there is such an agreement. The Board has dealt with similar issues extensively in deciding whether, for example, a union has established relevance in asking an employer for financial information. In general, if statements by the employer reflect an inability to pay for certain bargaining proposals, regardless of whether the employer could in fact pay, the Board has held the employer must provide financial information, so the union can verify whether the statements were true. See, e.g., *Caldwell Manufacturing Company*, supra

(where a union requests “specific information to evaluate the accuracy of the [employer’s] specific claims and to respond appropriately with counterproposals,” the employer has a duty to provide such information.) That, in essence, is exactly what happened in this case. General Counsel contends that the requester need only have a reasonable belief and does not need to prove, in fact, that the condition exists. Thus, when an employer justifies its bargaining position by claiming an inability to pay the union’s demands, the union may request financial documents sufficient to substantiate the employer’s position. As the Supreme Court explained, “[i]f such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.” *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–53 (1956); *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 367 NLRB No. 103, slip op. at 1 (2019) (affirming the judge’s conclusion that the respondent violated Section 8(a)(5) and (1) by failing and refusing to provide specific financial information requested by the Union necessary to assess claims made by the respondent during bargaining).

After the introduction of the Employer’s position statement and Zamora’s testimony about Lamond’s statements about the neutrality agreement, the record before the ALJ included significant evidence supporting her reasonable belief that the Union was party to a neutrality agreement, which was sufficient to trigger her information request to the Union. To the extent that this evidence rested in hearsay, that evidence could easily have been rebutted by contradicting it with the agreement. However, the Union failed to produce this potentially exonerating evidence and the ALJ failed to impose appropriate sanctions for that failure. The ALJ improperly relied on the hearsay rule to exclude Zamora’s testimony regarding her discussions with Lamond about the neutrality agreement. Zamora’s testimony is hearsay exception relevant to her reasonable belief to

the existence of the neutrality agreement triggering sufficient basis for her information request and the Union's fiduciary duty to provide the document.

3. Zamora Established Good Cause for Requesting the Neutrality Agreement and the Union Violated the Act by Failing/Refusing to Provide it

The ALJ erred in dismissing Complaint allegations 8(a) and (c) that Respondent violated Section 8(b)(1)(A) of the Act and its duty of fair representation by refusing and/or failing to provide Zamora with the neutrality agreement it maintains with the Employer.

Contrary to the ALJ's findings and conclusions of law, the record in this case established that the at-issue neutrality agreement in this matter, like collective bargaining agreements, hiring hall rules, grievance procedures or similar documents, is relevant and may set contractual terms and conditions of employment that apply to bargaining unit employees and the Union has a duty to provide such to a unit employee who, as in this case, requests such to determine whether she has been treated fairly by her employer. Respondent had an obligation to provide Zamora with a copy of its neutrality agreement with the Employer and by refusing to do so, Respondent violated Section 8(b)(1)(A) of the Act and its duty of fair representation to Zamora.

During June 2018, the Union and Employer were engaged in negotiations on a successor collective bargaining agreement, which was set to expire on June 30, 2018. During the week of June 11, 2018, Zamora determined to solicit co-worker support for a union decertification petition. Such conduct is unquestionably protected Section 7 activity. Zamora sought and was granted Employer permission to hold informational meetings in conference rooms in the Employer's facility. Zamora then posted flyers around the Employer's facility posing critical questions regarding the quality of the Union's representation and advertising the union-information meetings. These flyers were repeatedly removed. While the Union had bargained for locked, glass-

enclosed bulletin boards at the facility, “[f]or the posting of union notices communicating to bargaining unit employees,” Zamora necessarily posted her flyers on open-air surfaces.

As her flyers were repeatedly removed, Zamora asked her Employer for access to enclosed bulletin boards, which she legitimately viewed as an employment benefit enjoyed by other employees. The Employer referred Zamora to its HCA Union liaison, Lamond. In denying Zamora’s request, Lamond referred to terms or contractual limitations in a neutrality agreement maintained by the parties that purportedly stated the Employer could not facilitate employees going against the union. As the party’s neutrality agreement was the source of the Employer’s refusal to provide Zamora with access to an enclosed bulletin board, which was an employment privilege provided to other bargaining unit employees, she then made a written request to Respondent for “a copy of the HCA/NNOC Neutrality Agreement.”

Zamora’s request for information directly pertained to Respondent’s dealings with the Employer on behalf of unit employees and called on Respondent to act in its capacity as the exclusive bargaining representative. Zamora’s information request was premised on concerns that her Section 7 rights were being infringed and a workplace complaint or grievance she raised to her Employer regarding disparate treatment over access to enclosed bulletin boards. In response to the information request, Respondent Labor Representative Van Waus sent Zamora a reply letter that implicitly denied the request for the neutrality agreement and was carefully drafted to conceal whether or not Respondent maintained a neutrality agreement with the Employer.

As noted, the Board determines the lawfulness of a union’s refusal to provide such information based on six factors as laid out in *Local 307, National Postal Mail Handlers Union*, supra. The ALJ in this case failed to conduct the proper analysis under the Board’s six factor test. The preponderance of the evidence established that Respondent breached its duty under the

applicable six factor test.

The first factor involves the sufficiency of the document request. Here, Zamora, in writing, requested a copy of the neutrality agreement that the Employer and Union maintain separate and apart from the collective bargaining agreement. While Zamora's information request did not pertain to a grievance the Union was processing, the document expressly pertained to a complaint Zamora initiated with her Employer regarding disparate treatment and denial of an employment privilege other employees received. The evidence is undisputed that Zamora endeavored to solicit co-worker support for a union decertification petition under the Board's processes. To that end, Zamora posted informational flyers announcing information meetings with co-workers to be held at the Employer's facility. After her flyers were removed, Zamora filed a complaint with her Employer and requested access to enclosed bulletin boards to post her flyers. She requested such bulletin board access because she had observed co-workers regularly post similar in-service flyers in the protected bulletin boards. However, citing terms in the parties' neutrality agreement, the Employer denied Zamora's request. After her Employer failed to provide her with a copy of the neutrality agreement, Zamora asked the Union for a copy of the neutrality agreement to determine whether she was being treated fairly by her Employer. If the neutrality agreement includes a provision that commits the Employer and/or Union to obstruct or challenge rights of employees to contest recognition through Board processes, then arguably such a provision restrains employee access to Board processes and is inconsistent with the purpose and policies of the Act. The record established that the information Zamora requested from Respondent pertained to her employment dispute with the Employer and had a demonstrated connection to Respondent's dealings with the Employer on behalf of employees as the exclusive collective bargaining agent.

The second factor goes to the interest the requestor has in obtaining the document. As discussed above, this interest should be presumed when the request involves a neutrality agreement. Moreover, the evidence plainly established that Zamora had a legitimate general interest in obtaining the agreement after the Employer suggested that such an agreement exists, and relied on terms in the agreement to deny her request for access to a secure bulletin board to post her in-service flyers as the neutrality agreement assertedly dictates how the Employer handles employee anti-union activity, union dissidents or decertification efforts. Contrary to the ALJ's findings that the record does not establish that a privilege to post notices on a locked bulletin board was a condition of employment enjoyed by any bargaining unit employee, Zamora testified that she sought permission to post her in-service notices on an enclosed bulletin board, which was the same privilege provided to "pro-union" employees based on her direct and personal observations. Zamora's testimony on this matter is uncontroverted. It was Zamora's reasonable belief and the evidence supports such a finding that her terms and conditions of employment were expressly being affected when her Employer told her that she could not post her informational in-service flyers on the secure bulletin boards, while she observed that other, pro-Union, employees could post such in-service flyers on the bulletin boards.

It was only the content of her in-service flyers that triggered the Employer's disparate treatment toward her and subsequent denial of an employment benefit other employees enjoy as part of the status quo. Without question, access to and ability to post notices on bulletin boards can be a term and condition of employment. See, e.g., *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 1, n3 (2019) (Board affirmed an administrative law judge's decision in finding that employer violated Section 8(a)(5) by unilaterally discontinuing the past practices of allowing the union to post notices on respondent's bulletin boards). The ALJ's findings that bargaining unit

employee use of secure bulletin boards in this case does not implicate terms and conditions of employment is contrary to Zamora's uncontroverted testimony and established Board law. The ALJ should therefore have found, consistent with Board law, that a document that may implicate these terms should have been produced. See, e.g., *IATSE (Tropicana Las Vegas)*, 363 No. 148, slip op at page 1, fn. 1 (2016) (duty to provide information that is relevant to employee's reasonable investigation of potentially improper union actions).

Zamora had a legitimate general interest in obtaining the neutrality agreement after the Employer suggested that such an agreement exists, and relied on terms or contractual limitations in the agreement to deny her request for access to a secure bulletin board to post her in-service flyers as the neutrality agreement assertedly dictates how the Employer handles employee anti-union activity, union dissidents or decertification efforts.

The third factor goes to the communication of the legitimate interest. The record evidence is undisputed that on July 11, 2018, Zamora sent a written information request to Respondent. In such letter, Zamora unequivocally expressed to Respondent her legitimate general interest in obtaining the neutrality agreement, including her concern that "aspects of this current agreement control how my employer can deal with me, and vice versa."

The fourth factor involves whether the requestee raised substantial countervailing interests. Here, Respondent failed to raise *any* countervailing interests. Respondent sent Zamora a response to the information request, but other than a bald claim that the only document affecting terms and conditions of employment is the collective bargaining agreement, Respondent did not assert any countervailing interest for not providing the neutrality agreement to Zamora.

The fifth and sixth factors, which go to Respondent's ability to provide the documents and the burden or "relative ease" involved, clearly weigh in favor of a violation. Other than its bare

claim that it has no duty to provide Zamora with the neutrality agreement, Respondent has not asserted that it is impracticable to comply nor has it identified any impediment or obstacle to providing the document to Zamora. Respondent has not asserted that it is unable to comply with the request due to the size of the request or some other difficulty in complying with the request.

Overall, under the Board's well established six-factor test, a violation is present in this case. Respondent, without confirming or denying the existence of the neutrality agreement, implicitly declined Zamora's request for the neutrality agreement by stating that no agreement exists other than the collective bargaining agreement that affect employees' terms and conditions of employment. This meant that Zamora was unable to review the agreement to ascertain whether she was being treated fairly, or whether the parties' collective bargaining agreement, in fact, accounted for all of her terms and conditions of employment. Rather, she was forced to simply to accept on faith the Respondent's assurances. The totality of the six factors as laid out in *Local 307, National Postal Mail Handlers Union*, supra, and the record evidence established not only that a neutrality agreement exists, but Respondent had a duty to furnish such to Zamora and by not doing so, it breached its fiduciary duty.

To the extent the Board has questions about whether this matter implicates purely internal union matters under the legal principles set forth in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000), such is not the case. *Sandia National* is typically invoked to protect unions against charges involving purely internal union matters. The neutrality agreement here, as suggested by the Employer to Zamora, sets contractual limits on the assistance the Employer may provide to employees in decertification efforts or anti-union activity, and such contractual limitations squarely affect the employee-employer relationship. This type of agreement between a union and employer relates to their relationship and has a clear connection to and

directly pertains to Respondent's dealings with the Employer on behalf of unit employees and is thus not an intraunion matter.

The at-issue neutrality agreement, like a collective bargaining agreement, hiring hall rules, grievance procedures or similar documents, may set contractual terms and conditions of employment that apply to bargaining unit employees. The Union therefore has a duty to provide such to a unit employee, as in this case, who requests such to determine whether she has been treated fairly by her employer. Further, even if the neutrality agreement at issue here did not, in fact, impact terms and conditions of employment, Zamora had a legitimate interest in reviewing it for that purpose and also because it is a document relevant to the nature of the relationship between Employer and the Union. By refusing to provide Zamora with a copy of the neutrality agreement, Respondent violated its duty of fair representation and Section 8(b)(1)(A) of the Act.

4. The ALJ erred in failing to find that Respondent's bad faith response to Zamora violated the Act

The ALJ erred in dismissing Complaint allegations 8(b) and (c) that Respondent violated Section 8(b)(1)(A) of the Act by responding to Zamora's request for information in a manner that was arbitrary and/or in bad faith.

If nothing else, fiduciary agents owe their principals straight answers. If no neutrality agreement existed, the Union should have informed Zamora of that fact. A prompt response, rather than an answer given after months of litigation may have saved Zamora, the Union, the Employer, and taxpayers a great deal of time and frustration. The Union's response was not an appropriate one to be given within the fiduciary union-employee relationship. Just as employers breach the duty to bargain in good faith when they fail to inform their bargaining partners whether requested information exist, a union surely violates its fiduciary duty by not providing unit members with such information. See, e.g., *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014)) (duty to

bargain includes the duty “to timely disclose that requested information does not exist.”). Thus, through its false and misleading responses, the Union violated the duty it owed Zamora.

The duty of fair representation by the exclusive bargaining representative is clear and fiduciary in nature. *Miranda Fuel Co.*, 140 NLRB at 185. Certainly, a union has a responsibility not to misinform an employee in such a vital matter as her employment rights. Because of a union’s unique position as the exclusive bargaining agent of the employees it represents, it owes these employees a fiduciary duty to deal fairly with them. Employees must rely on their union to represent them fairly in all matters covered by the collective-bargaining agreement, which controls the terms and conditions of their employment, or a side neutrality agreement, as in this case, that purportedly sets contractual limitations on how an employer may deal with employees. If a union enters into a side agreement supplementing the collective bargaining agreement, a bargaining unit employee is entitled to see the side agreement to determine if she is being treated fairly or whether the additional contractual limitations impact terms and conditions of employment. However, when a union, as in this case, denies employees it represents an opportunity to examine its side agreement with their employer, it severely limits the employees’ ability to determine whether they have been treated fairly or afforded fair representation that is their due.

Here, Respondent’s failure to provide Zamora a copy of its neutrality agreement impeded her ability to understand her rights under such document and hampered her ability to determine whether she was treated fairly by the Employer, as well the quality of Respondent’s representation under the agreement. Respondent’s conduct fell far short of fulfilling its fiduciary duty to deal fairly with employees it represents. Respondent’s response to Zamora can hardly be categorized as correct information or a good faith response. On the contrary, Respondent treats Zamora more as an adversary rather than a bargaining unit employee to whom it owes a fiduciary duty.

Respondent's response to Zamora was nothing more than wordsmithing or parsing of legal language in an effort to conceal whether it maintains a neutrality agreement. In his testimony, Van Waus claimed that upon receipt of Zamora's request for information, he "had no idea" what she was requesting. He then feigned ignorance claiming he does not understand the complex corporate structure between Corpus Christi Medical Center and the parent entity HCA. Notwithstanding that he understands that Respondent and HCA maintain "lots of agreements," he did not bother to confirm whether there were any responsive documents to Zamora's request for information. His intent was to "handle the issue." His intent was not to represent Zamora fairly as a fiduciary.

Significantly, Van Waus conceded that he cannot dispute the Employer's admission that it maintains a neutrality agreement with Respondent. According to the Employer, "The agreement provides that neither CCMC nor HCA Holdings shall encourage or support decertification." Such an agreement surely falls within the ambit of Zamora's request for information. Had Van Waus exercised his fiduciary duties in good faith and called someone to inquire whether Respondent maintains any documents responsive to Zamora's information request, then he could have provided Zamora with correct information. Instead, Van Waus sent Zamora a deceptive response concealing whether Respondent actually maintains a neutrality agreement with the Employer.

Throughout this matter, Respondent has engaged in a classic hide the ball game. It refused to admit or deny whether any such neutrality agreement exists, while at the same time arguing that Zamora has never seen the neutrality agreement so she cannot prove the agreement exists or prove that it affects employee terms and conditions of employment. Again, Zamora has never seen the agreement because Respondent has refused to provide it to her or even admit or deny whether it exists. Respondent has a fiduciary duty to respond to Zamora in good faith. Its misleading response can only be deemed as dishonest or deceitful. Respondent's response was both arbitrary and in bad

faith. The Board has repeatedly found unions to breach their duty of fair representation by arbitrary conduct. The Board has also found unions to breach their duty of fair representation by bad faith conduct. By responding to Zamora's request for information in a manner that was arbitrary and/or in bad faith, Respondent has violated its duty of fair representation and Section 8(b)(1)(A) of the Act. The ALJ's findings and conclusions to the contrary should be rejected.

B. The ALJ's Improper Legal, Procedural and Evidentiary Rulings

In determining what evidence could be admitted into the record and the extent to which that evidence should be relied upon, the ALJ erred in fundamental ways. First, although the ALJ properly admitted the Employer's position statement and properly relied upon it for the proposition that there was a neutrality agreement, he improperly relied upon the Employer's *legal* conclusion that the neutrality agreement "does not otherwise limit how they can deal with bargaining unit employees." Next, the ALJ erroneously found that Respondent's answer effectively denied the allegations concerning its failure to provide the neutrality agreement. Third, the ALJ also erroneously discredited the un rebutted testimony of Zamora. Fourth, the ALJ erred by denying subpoena enforcement on grounds of equity or due process. Finally, in light of the clearly delineated controversy over the terms of the neutrality agreement, the ALJ erred by failing to sanction the Union for its failure to produce the neutrality agreement.

1. The ALJ Erred in Relying on Legal Conclusions in the Employer's Position Statement: Exception 13

The ALJ noted the ambiguity in the record regarding the existence of a neutrality agreement. The ALJ expressly rejected Respondent's contentions regarding the neutrality agreement and concluded that "...the most trustworthy evidence concerning the existence of a neutrality agreement is the October 17, 2018 position letter of HCA Holdings and the Employer, submitted during the investigation of Case 16-CA-225103. (JD slip op. at 21, LL. 43-45; GC Exh.

7). Therein, the Employer asserts that the neutrality “agreement provides that neither CCMC nor HCA Holdings shall encourage or support decertification, but does not otherwise limit how they can deal with bargaining unit employees.” The ALJ properly relied upon the position statement to find that there was a neutrality agreement, especially given other supporting evidence of its existence, but he erred in relying upon the Employer’s characterization and legal conclusions concerning the provisions of the agreement.

To begin with, the best evidence of a contract is the contract itself. Evidence regarding the contents of written instruments may be introduced only in limited circumstances, which include circumstances where “the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing.” See Rule 1004. Admissibility of Other Evidence of Content, Fed. Rules of Evidence Rule 1004 (3d ed.). Here, the Union clearly had control of the original and had notice its contents would be at issue. Here, it was proper for the ALJ to rely on the Employer’s position statement to conclude the neutrality agreement existed.

However, the ALJ erred by adopting the hearsay conclusions about the document itself. The interpretation of a contract involves the application of legal analysis. Conclusions about duties imposed by contracts are legal conclusions. See, e.g., *Waste Mgmt. of Louisiana, L.L.C. v. Par.*, No. CIV.A. 13-6764, 2015 WL 5798029, at *13 (E.D. La. Oct. 5, 2015) A legal conclusion is hearsay evidence and may not be relied upon. See, e.g., *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445, 1989 A.M.C. 441, 26 Fed. R. Evid. Serv. 257 (1988), § 32[a], in which the Supreme Court cautioned in a footnote that the Court expressed no view as to whether a legal conclusion—as opposed to a factual conclusion—was admissible under Rule

803(8)(C) of the Federal Rules of Evidence. Whether the agreement might “otherwise limit how [the Employer] can deal with bargaining unit employees” is a matter that can only be known after review of the document. The ALJ erred in relying upon this hearsay legal conclusion about the terms of the unproduced agreement because, in doing so, he implicitly ignored or rejected Zamora’s *unrebutted direct testimony* concerning the agreement.

2. *The ALJ Erred in Finding Respondent’s Answer to the Complaint Satisfies Section 102.20 of the Board’s Rules and Regulations Because it “Effectively” Denied the Complaint Allegations: Exception 5*

The ALJ erred in finding that Respondent effectively denied paragraph 8 of the Complaint and the Board should reject such a finding. Section 102.20 of the Board’s Rules and Regulations, as amended, requires a respondent to “specifically admit, deny, or explain each of the *facts alleged in the complaint*, unless the respondent is without knowledge, in which case the respondent shall so state. . .” (Italics added.) Section 102.20 further provides, in pertinent part, that “any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.” In this case, Respondent’s Answer(s) to the Complaint fail to satisfy the requirements of Section 102.20 and the allegations in paragraph 8 of the Complaint must be deemed as admitted.

As the ALJ acknowledged, on January 10, 2020, Deputy Chief ALJ Amchan granted Counsel for the General Counsel’s Motion to Strike Portions of Respondent’s Answer, including Respondent’s answers to paragraph 8 of the Complaint. Significantly, the Deputy Chief ALJ’s Order expressly states: “...Respondent Union has not, as required by Section 102.20 of the Board’s Rules of Procedure, admitted or denied the allegation in paragraph 8 that it refused to provide to the Charging Party, as requested on July 10, 2018, a copy of the neutrality agreement between Respondent and the Employer. Unless the answer is timely amended, this allegation is deemed

admitted.” (*emphasis added*) (JD slip op. at 4-5; GC Exh. 1(l)). Although Respondent filed a Motion for Reconsideration (Jt. Exh. 8(1)) and then a second Request for Reconsideration (Jt. Exh. 8(n)), the Deputy Chief ALJ did not grant them. Thus, the Deputy Chief’s Order Granting General Counsel’s Motion to Strike Portions of Respondent’s Answer, including answers to paragraph 8 of the Complaint stands.

Respondent, thereafter, filed an amended Answer (GC Exh. 1(m)) which deleted the unseemly portions of its original Answer, but did not resolve the ambiguity inherent in its original answer to Complaint paragraph 8. (JD slip op. at 5). Notwithstanding that Respondent had failed to deny the allegation as plead, the ALJ discerned a denial to be present in Respondent’s affirmative defenses. Through statements made in affirmative defense, the ALJ concluded that Respondent’s Answer included sufficient explanation to satisfy Section 102.20 and effectively denied the allegations raised in paragraph 8 of the Complaint. (JD slip op. at 5-6, LL. 32-3). The ALJ expressed his concern that the wording of the Complaint “did not place the Respondent on notice that it needed to deny the existence of any neutrality agreement” and that it simply assumed the “existence of such a document by alleging that the Respondent has failed to provide a copy of its neutrality agreement.” (JD slip op. at 5, LL. 19-30). Counsel for the General Counsel respectfully disagrees and urges the Board to reverse the ALJ’s holding herein.

Throughout the hearing, in its original Answer (GC Exh. 1(h)), its Amended Answer (GC Exh. 1(m)), and its subsequent post-hearing Answer to the Complaint, Respondent advanced various affirmative defenses all carefully crafted to avoid revealing the existence of a neutrality agreement. However, in none of its affirmative defenses, nor in its Answer(s) to paragraph 8 of the Complaint did Respondent expressly admit or deny the allegations in paragraph 8 of the Complaint as required under Sec. 102.20 of the Board’s Rules and Regulations and as directed by

the Deputy Chief ALJ in his January 10, 2020 Order Granting General Counsel's Motion to Strike. (GC Exh. 1(l)). Respondent was on notice that "unless the answer is timely amended, this allegation is deemed admitted." Respondent thereafter failed to expressly admit or deny the allegations in paragraph 8 of the Complaint. Accordingly, the allegations in paragraph 8 of the Complaint should be deemed admitted.

To the extent that the ALJ avers that the Complaint did not satisfy the Board's Rules and Regulations or did not place Respondent on notice as to the Complaint allegations, such a holding is clearly at odds with the record, including the Deputy Chief ALJ's prior ruling(s). In this respect, on December 18, 2019, Respondent filed a Motion for Bill of Particulars seeking additional information on the Complaint allegations. (Jt. Exh. 8(b)). On January 2, 2020, Counsel for the General Counsel filed an Opposition to Respondent's Motion for a Bill of Particulars. (Jt. Exh. 8(g)). In the Opposition, Counsel for the General Counsel reiterated that the Complaint "identifies the information requested (a copy of Respondent's neutrality agreement with the Employer), the individual who made the information request (Zamora), the date of the information request (on or about July 10, 2018), and the names of Respondent's agents (Bradley Van Waus and/or Maria (last name unknown)) by whom such acts were committed." On January 9, 2020, the Deputy Chief ALJ issued an Order Denying Respondent's Motion for Bill of Particulars expressly holding that the "complaint provides Respondent adequate notice of its means for a defense; i.e., that it did provide the document or that it was never asked for it or that [as] a legal matter, it was not required to give it to the Charging Party." (GC Exh. 1(k)). The Deputy Chief ALJ ruled that the Complaint satisfies the Board's Rules and Regulations and Respondent was on full notice of the allegations.

Respondent was on notice that its Answer did not admit or deny the allegations in paragraph 8 of the Complaint and that unless the Answer was timely amended, this allegation

would be deemed admitted. Respondent thereafter failed to expressly admit or deny the allegations in paragraph 8 of the Complaint. Accordingly, the allegations in paragraph 8 of the Complaint should be deemed admitted. The ALJ's findings to the contrary should be overturned. At a minimum, Respondent's failure to answer the complaint directly should have resulted in sanctions, including the allowance of secondary testimony as discussed below.

3. *The ALJ Erred in Discrediting Zamora's Unrebutted Testimony: Exception 7*

Although it is well established that credibility determinations are difficult to overturn, the Board will overrule an ALJ's credibility resolutions if the clear preponderance of all the relevant evidence convinces the Board that the ALJ's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Significantly, where credibility determinations of an ALJ rest on analysis of testimony, rather than on demeanor, those credibility determinations deserve less than usual deference on review. *Consolidation Coal Co. v. NLRB*, 669 F.2d 482, 488 (1982), *citing NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 501 (2d Cir. 1967). The Board has the responsibility under Section 10(c) to make appropriate determinations of fact, and should not rely on an ALJ's findings when they are clearly erroneous and improperly based on matters not before the judge. *Russell Stover Candies, Inc.*, 221 NLRB No. 73 (1975). Where an ALJ's credibility determinations are based on improper bases, they should be disregarded. See, e.g., *International Longshoremen's Association, Local 28 (Ceres Gulf, Inc.)*, 366 NLRB No. 20 (2018). (Board vacated ALJ's decision and remanded case for new hearing as ALJ erred by relying in part on improper bases in making credibility determinations).

Here, the ALJ erred when, despite having decided that the circumstances precluded him from assessing the truth of the matter asserted, he closely scrutinized Zamora's testimony to discredit her. He concluded that Zamora's testimony was vague because she did not reveal how or

by whom the subject of neutrality agreements arose during her conversation with Lamond. (JD slip op at 9, LL. 16-26). The ALJ next discredited Zamora based on purported implausibility and his subjective doubts of several key parts her testimony. He cited a “reason to doubt that Lamond mentioned” neutrality agreements first or Zamora’s subjective beliefs. (JD slip op. at 9-10, LL. 45-25). Such credibility determinations, which rest on analysis of testimony, rather than on demeanor, deserve less than usual deference on review. *Consolidation Coal Co. v. NLRB*, 669 F.2d at 488.

The ALJ then speculated as to ulterior motives or extraneous evidence regarding Zamora’s prior experience with neutrality agreements as further basis to scrutinize and discredit her unrebutted testimony. He cited her January 2010 testimony on neutrality agreements before a Congressional committee as an indication that Zamora may be attempting to make this case a vehicle for obtaining a precedent establishing that a union has a duty to furnish employees, on request, a copy of an existing neutrality agreement. (JD slip op. at 10-1, LL. 35-4). The ALJ’s statements and conclusions herein should be disregarded. Assuming, *arguendo*, that Zamora was seeking to create precedent establishing that a union has a duty in these circumstances, such should not have any bearing on determinations about her credibility. She has standing to file a charge and enjoys statutory rights without regard to her advocacy on this issue. Zamora’s past experience with or knowledge of neutrality agreements makes it even more likely she had a reasonable belief or basis for her information request. The Board should disavow the ALJ’s credibility resolutions and reasoning in this regard.

Zamora testified credibly and consistently about the background events that triggered her information request to Respondent. Her testimony regarding her complaint to her Employer about disparate treatment and regarding her employment terms and conditions or status quo, including employee privileges to hold educational or informational in-services, to use Employer conference

rooms for said in-services and to post in-service announcements on the enclosed bulletin boards, is unrebutted and fully supported by the evidence. There is ample record evidence, including Zamora's e-mails with Lamond, to support the veracity of her testimony with regard to Lamond's communications as to not only the existence of the neutrality agreement, but also the Employer's reliance on such to deny Zamora's request to post her anti-union flyers on an enclosed bulletin board. For example, on July 3, 2018, after the conversation with Lamond, Zamora sent Lamond and various Employer officials an email stating, "On Thursday, June 28th, I spoke to you concerning my request for the protected bulletin board and you said I was denied because it pertained to opposition to the Union..." (JD slip op. at 11, LL. 21-37) This July 3 e-mail fully corroborates Zamora's testimony regarding Lamond's communication to her. The ALJ acknowledged the e-mail but discredited Zamora without providing an alternative explanation for it (JD slip op. at 12, LL. 9-14).

Overall, the ALJ's credibility resolutions regarding Zamora rest on analysis of testimony, rather than on demeanor, and deserve less than usual deference by the Board on review. General Counsel urges the Board to reject the ALJ's credibility conclusions.

4. The ALJ erred and the Board Should Clarify that Electrical Energy Services, Inc. Does Not Prohibit Subpoena Production of the At-Issue Document in a Request for Information Case Where the Existence and Substance of the Document is Dispositive of Other Case Issues: Exception 10

Throughout this matter, Respondent and the Employer have relied upon *Electrical Energy Services, Inc. (EESI), supra*, for the proposition that the General Counsel and/or the Charging Party are prohibited from subpoenaing the at-issue neutrality agreement in this refusal to furnish information case on the grounds that it is tantamount to an impermissible attempt to use the subpoena duces tecum as a substitute for the Board order sought by the Complaint. (Jt. Exh. 8(aa)). The ALJ erred in relying on that case to deny the subpoena.

That case is inapplicable here because in *EESI* the ALJ did not need to review the documents and the information requested to determine whether the withholding of the information was a violation. Here, on the other hand, at least according to the reasoning of the ALJ, the content of the agreement is determinative as to whether a violation of the Act occurred. In such circumstance, it behooves the ALJ to grant the trial subpoena.

Further, it should be noted that the decision to revoke the subpoena in *EESI* was an ALJ decision that received no comment from the Board. Thus, although the case has survived, its weight as authority may have been embellished over the years. Nevertheless, the case is clearly distinguishable from the case at hand. In *EESI*, the ALJ found that the charging party union had established the relevance of the information and documents requested by the union and did not need to see it to make that determination. Here, the premise of the Respondent's argument, which was adopted by the ALJ, is that the Respondent does not need to produce the agreement because it is irrelevant to Zamora's employment because it does not include terms and conditions of employment. Because relevance—the very question that needs to be decided to determine whether a violation of the Act has occurred under the ALJ's view of the matter can only be determined by review of the document—this is a case that mandates production of the document, or, at the very least in camera inspection of the document or a protective order. Unlike in *EESI*, enforcement of the subpoena is not an “end run” to the remedy because in this situation the requested document is necessary to determine whether a violation occurred and the remedy, if there is a violation, would be broader than mere production of the document. Further, as discussed above, Respondent proffered no argument other than relevance for its failure to produce the document. There are therefore no countervailing interests preventing the production of the document.

Citing *EESI*, the ALJ, in the context of a petition to revoke the Charging Party’s subpoena issued to the Employer seeking production of the neutrality agreement, conceded that this presents an “unusual issue” and that *EESI* is not squarely on point. He reasoned that, unlike *EESI*, this case involves the clash of two competing principles, and then, based on nothing but surmise, held that the Respondent and the Employer have a legitimate interest in keeping the document secret. (JD slip op. at 19-20). There is no record evidence that either the Employer or the Union claimed that the document was confidential to Zamora or at trial. Indeed, the record evidence establishes that its existence was publicized. The Board has long held that, in the context of an information request, the confidentiality defense must be timely raised by the party asserting it. See, e.g., *Olean General Hospital*, 363 NLRB No. 62, slip op. at 6 (2015) (employer’s asserted confidentiality interest “does not end the matter”; employer must also notify union in a timely manner and seek to accommodate the union’s request and confidentiality concerns); *Howard Industries, Inc.*, 360 NLRB No. 111, slip op. at 3 (2014) (even assuming requested information was confidential, respondent violated the Act by failing to seek an accommodation); *A-1 Door & Building Solutions*, 356 NLRB 499, 501 (2011) (employer required to provide union’s requested information or “to state a legitimate reason for not doing so and to timely offer an accommodation”); *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004) (party asserting confidentiality bears burden of proposing reasonable accommodation). Even if Respondent had raised a confidentiality claim (which it has not), it could not both refuse to acknowledge the agreement and assert that it has a confidentiality interest in maintaining its secrecy. Nor could the Union announce to the media the importance of its neutrality agreements and then credibly maintain that the agreements do not exist. The ALJ has no basis in the record to reach such a conclusion about confidentiality.

The ALJ further elaborated, “On the other hand, granting the petition to revoke the subpoena would deny the Charging Party evidence highly relevant to a central, indeed dispositive issue: Whether the neutrality agreement actually affected or pertained to terms and conditions of employment. The neutrality agreement itself would be the most relevant evidence needed to resolve this issue and might be the only evidence.” (JD slip op. at 19-20). Counsel for the General Counsel agrees that the neutrality agreement itself is the most relevant evidence for a determination on the substance of the document, including whether it impacts terms and conditions of employment. Given no legitimate countervailing interest by the Union in non-production, the ALJ erred in revoking the subpoena.

The General Counsel agrees with the ALJ that this case presents an unusual issue in light of the Board’s precedent as set forth in *EESI*, supra. General Counsel respectfully requests that the Board clarify its precedent and holding in *EESI*. The Board should hold that in a request for information case, whether it be a case against an employer or a union, *EESI* does not prohibit subpoena production of the at-issue document where the existence and substance of the document is highly relevant to a central, indeed dispositive issue, as in this case. At the very least, to the extent that the Board holds that *EESI* serves to protect respondents from “end-runs” to the remedy by way of subpoena, that protection must be forfeited where, as here, the respondent lack candor about the existence of the responsive documents.

5. The ALJ Erred in Failing to Consider and Impose Sanctions on Respondent for Misleading the Tribunal and Refusing to Comply with General Counsel’s and/or Charging Party’s Subpoenas: Exceptions 9 and 14

The ALJ erred in failing to impose sanctions on Respondent for its failure to comply with the ALJ’s instructions and misleading both the ALJ and parties with regard to the existence of responsive documents to the General Counsel’s and/or Charging Party’s subpoenas. The ALJ

properly noted that when a *party* to a Board proceeding fails to comply with a subpoena served on it by an opposing party, the Board may impose a variety of sanctions. (JD slip op. at 21, LL. 30-36). These sanctions include permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party. *McAllister Towing & Transportation Co., Inc.*, 341 NLRB 394 35 (2004); *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986); *Bannon Mills*, 146 NLRB 611 (1964).

In his decision, the ALJ only considered sanctions in regard to the Employer's failure/refusal to comply with subpoenas for the neutrality agreement. The ALJ properly held that sanctions on the Employer, who is not a party to the proceeding, would not be appropriate. However, the ALJ expressly credited the Employer's position statement as the most reliable evidence with regard to the existence of a neutrality agreement. He did such over Van Waus' testimony⁷, over Respondent counsel's express denials with regard to the existence of a neutrality agreement and also over Respondent counsel's "on-the-record" claim that no responsive documents to Counsel for the General Counsel's and Charging Party's subpoenas existed.

If Respondent's shifted position at the hearing were true, i.e., that no responsive documents exist as sought by Charging Party's information request, then of course Respondent cannot produce such. However, Respondent's belated departure from its repeated prior position defies credulity. If there truly are no responsive documents—that begs the question: why could this not have been relayed in short order to Zamora? Instead, Respondent provided Zamora with a parsed response intended to conceal whether or not it maintains a neutrality agreement with the Employer, or its corporate parent (HCA), that applies to bargaining unit employees including Zamora.

⁷ The ALJ implicitly discredited Van Waus by finding that an agreement existed, but he erred by failing to make an explicit finding as to Van Waus' credibility in this regard. [Exception 14]

Respondent provided the same parsed response to the Region in its position statement and again repeatedly to the ALJ at the hearing. It was not until pressed for a direct answer by the ALJ in consideration of a subpoena production that Respondent suddenly altered course and now claimed that no such document exists. This equivocation in response to Zamora's request in and of itself warrants a finding of a violation of the Act. See, e.g., *Columbia University*, 298 NLRB 941, 945 (1990) (in context of bargaining relationship, requested party must either provide responsive information, explain that it does not exist, or give reasons for refusal to provide).

But even in this response to the ALJ, Respondent equivocated and was less than forthright. When pressed by the ALJ as to the existence of a document to produce in response to the subpoena, Respondent's counsel claimed there was no such document to produce "as it has been requested, and as we have flushed [sic] it out . . ." (Tr. 218) Again, if there truly are no responsive documents, why did Respondent not simply say so at the outset and why did Respondent continue to evade even on direct pressing from the ALJ? In the absence of such an explanation, the only plausible conclusions are that such a document does exist and that Respondent's candor before the tribunal is in question. The ALJ should have drawn an adverse inference against Respondent and found that the agreement was relevant and should have been produced.

The ALJ's holding inherently discredits Respondent's representations with regard to subpoena production as he found the most reliable evidence is the Employer's position statement, which acknowledges the existence of a neutrality agreement. As such, Respondent should have been required to turn over the responsive documents to the General Counsel's and Charging Party's subpoenas or to the ALJ for an in-camera inspection. The ALJ should have considered and imposed sanctions on Respondent for its failure to comply with the subpoenas. More specifically, it would have been proper to draw an adverse inference, binding on Respondent, when it failed to

comply with the subpoena and misled the ALJ and parties regarding the existence of responsive documents. The Board should draw an adverse inference as to the existence and contents of the neutrality agreement. See *Stage Employees IATSE (Global Experience Specialists)*, 369 NLRB No. 34 (2020), slip op. at 1, footnote 2 (ALJ did not abuse her discretion in imposing sanctions for respondent's failure to comply with General Counsel's subpoenas). General Counsel urges the Board to impose sanctions upon Respondent.

Thus, the ALJ erred in significant evidentiary and procedural matters: He should not have accepted the Employer's conclusions about the scope of the terms of the neutrality agreement; he should not have found a denial in Respondent's answer; he should not have disregarded and discredited Zamora's testimony about Lamond's statements; and he should have enforced the subpoena or granted sanctions for failure to do so.

V. CONCLUSION

The General Counsel respectfully urges the Board to reverse the ALJ's credibility determinations, factual findings and legal conclusions resulting in dismissal of the Complaint as elaborated in Exceptions 1 through 14. General Counsel urges the Board to reverse the ALJ to find that Respondent violated its duty of fair representation and Section 8(b)(1)(A) of the Act by refusing to provide Zamora with a copy of the neutrality agreement it maintains with the Employer as requested by Zamora on or about July 11, 2018 and/or by responding to Zamora's request for information in a manner that was arbitrary and/or in bad faith. The General Counsel requests an order requiring Respondent to cease and desist its unlawful conduct in all respects; to furnish the at-issue information to Zamora; and post an appropriate notice at Respondent's office in Corpus Christi and in all places at the Employer's facilities where bargaining unit employee notices are

customarily posted, including electronic postings. The General Counsel further requests all additional relief deemed appropriate by the Board.

DATED at Fort Worth, Texas this 2nd day of September 2020.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing General Counsel’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge has been electronically filed and served this 2nd day of September 2020 upon each of the following:

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