

**CASE NO. 20-60229
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**ONCOR ELECTRIC DELIVERY, L.L.C.,
Petitioner Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner**

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD CASE 16-CA-212174**

**REPLY BRIEF OF PETITIONER CROSS-RESPONDENT ONCOR
ELECTRIC DELIVERY LLC**

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III. INTRODUCTION

The General Counsel's arguments that the Board correctly found the Union established the relevancy of its request are contrary to the substantial evidence and well-established precedent. The Union was required to assert more than a bare assertion regarding its need for the requested information. The substantial evidence demonstrates it did not do so. Because the Union did not make more than a bare assertion regarding its need for the requested information, the General Counsel now argues in its Response that the circumstances surrounding the Union's request and post hoc justifications provided by the Union and the ALJ support the Board's finding of relevance. However, such reliance by the Board violates its own and this Court's precedent.

Moreover, the General Counsel's argument—asserted for the first time during this appeal—that Oncor ran afoul of the Act because it did not somehow narrow some of the information it provided to the Union is meritless. The substantial evidence establishes that Oncor could not provide the information to the Union in the exact form requested and repeatedly told the Union so at the time, offered to accommodate the Union's request, and the Union never requested that Oncor narrow or filter the information it provided.

Because the General Counsel's arguments on the merits are contrary to the record and Board precedent, it must distract this Court with frivolous arguments of

waiver and wild unsupported mischaracterizations of the Board's decision. Simply put, Oncor has not waived any arguments regarding the Board's findings of relevance regarding Requests 2-5 and 8-13 as the General Counsel claims. Oncor excepted to the ALJ's relevancy findings regarding these requests, and the General Counsel responded to those exceptions arguing that the Union in fact established relevance. Accordingly, the General Counsel and the Board were on notice of Oncor's arguments regarding the relevancy of these requests, and therefore they are properly before this Court. Indeed, the Board's order explicitly addressed the issue of relevance a number of times. If Oncor had actually failed to put the issue of relevance forward, why would the Board specifically address it?

Moreover, the Board's order concerning the Union's request 7 was unequivocal—Oncor did not violate the Act when it failed to provide any of the information requested. The Board's decision in this regard was broad in scope and was not limited to the Union's request for work orders. The General Counsel's attempt to alter this explicit holding that reversed the ALJ's finding should be ignored. In fact, the Board's lengthiest analysis in its order concerns request 7. The Board provided a detailed explanation and analysis regarding its decision to overturn the ALJ's ruling.

Finally, the General Counsel failed to address the substance of Oncor's argument regarding the Board's finding of the appropriate unit of workers involved

in this unfair labor practice—merely claiming the argument is “bizarre” and a “red herring.” The General Counsel’s argument that the listed positions are an “appropriate bargaining unit” because the positions are all covered by the same collective bargaining agreement is not supported by Board precedent or the substantial evidence in this case.

IV. ARGUMENT

A. Oncor did not waive any arguments, and the issues presented in Oncor’s brief are properly before the Court.

Because the General Counsel does not want to address the lack of substantial evidence in the record to support the Board’s decision, it makes nonsensical and erroneous waiver arguments. Oncor has not waived any arguments as the General Counsel claims. The General Counsel’s Response asserts that this Court lacks jurisdiction to consider Oncor’s challenges to the Board’s relevance finding for requests 2-5 and 8-13 by claiming Oncor did not file exceptions to the ALJ’s relevance findings regarding these requests. Bd.-Br. 27-29.¹ However, as evidenced by Oncor’s exceptions to the ALJ’s decisions, the General Counsel’s arguments in response to those exceptions, and the Board’s decision and order, Oncor did in fact present the Board with the question of the ALJ’s legal and factual findings regarding

¹ “Bd.-Br.” refers to the National Labor Relations Board’s response brief.

the relevance of these requests. The General Counsel also argues Oncor has waived any argument regarding the Board's finding on request 12 because it did not address the request in its brief. Here again, the facts easily disprove this disingenuous claim.

1. Oncor's Exceptions, the General Counsel's Response, and Oncor's Reply brief all specifically discuss the issue of relevance.

With respect to requests 2-5 and 8-13, the General Counsel claims that in Oncor's exceptions brief to the Board "it argued only that [the ALJ] erred in finding that it failed to provide information responsive to those items; nowhere did Oncor dispute the relevance of the information requested in items 2-5 and 8-13." Bd.-Br. 28. However, a cursory review of Oncor's exceptions reveals that Oncor did, in fact, except to the ALJ's relevancy findings of these requests. Specifically, Oncor filed the following exceptions regarding relevancy in Exceptions 10, 11, 14, 15, 16, 21, 22, and 27. ROA.1364-65, 1367-72, 1376-77, 1382-84.

In Exception 10, Oncor filed the following exception regarding the ALJ's relevancy findings:

The ALJ's finding that in its May 11, 2018 response, "it omitted the names of the non-unit workers, which was critical" (ALJ Dec. p. 5, lns. 2-3), as this finding is not supported by record evidence, is not supported by Board law, and is in legal error. As a preliminary matter, the applicable legal test to determine whether the Company was required to supply the names of non-bargaining unit employees is whether the names of non-bargaining unit employees are relevant, not whether the names are critical. *See Caldwell Mfg. Co.*, 346 NLRB 1159 (2006).

Accordingly, the ALJ's application of the wrong legal standard resulted in his incorrect finding that the Company violated the Act in failing to provide the names of non-bargaining unit employees and should be overturned.

ROA.1364.

In Exception 11, Oncor filed the following exception regarding the ALJ's relevancy findings:

The ALJ's findings that Oncor's alleged omissions of relevant information in its May 11, 2018 response "precluded the Union from, inter alia: contacting non-unit employees to further its investigation of the grievances; requesting additional information about specific non-unit workers; independently analyzing the qualifications of non-unit workers to safely perform such work; verifying Oncor's claims regarding how much work was performed by requesting specific payroll records; or subpoenaing specific non-unit employees to testify about their performance of unit work at a grievance or arbitral hearing" (ALJ Dec. p. 5, lns. 3-9), as these findings are not supported by record evidence. These post hoc justifications listed by the ALJ for why the names of non-bargaining unit employees were relevant to the Union's grievance were relied on in error by the ALJ as these reasons were never communicated by the Union to the Company.

ROA.1365.

In Exception 14, Oncor filed the following exception regarding the ALJ's relevancy findings:

The ALJ's findings that "Oncor violated §8(a)(5), when it failed to satisfy requests 1 to 5, and 8" (ALJ Dec. p. 8, ln. 8), as these findings are not supported by record evidence, are not supported by Board law, and are in legal error.

ROA.1367.

In Exception 15, Oncor filed the following exception regarding the ALJ's relevancy findings:

The ALJ's finding that "Oncor violated §8(a)(5), when it failed to respond to request 6, which sought its rationale for diverting unit work" and the ALJ's reasoning to support this finding (ALJ Dec. p. 8, lns. 24-26), as this finding is not supported by record evidence, is not supported by Board law, and is in legal error.

ROA.1370.

In Exception 16, Oncor filed the following exception regarding the ALJ's relevancy finding:

The ALJ's finding that "Oncor violated §8(a)(5), when it failed to respond to request 7, which sought work orders" and that "[t]he Union established that work orders were keenly relevant to its grievances" (ALJ Dec. p. 8, lns. 30-31), as this finding is not supported by record evidence, is not supported by Board law, and is in legal error.

ROA.1371.

In Exception 21, Oncor filed the following exception regarding the ALJ's relevancy finding:

The ALJ's finding that "Oncor violated §8(a)(5), when it failed to respond to requests 9 to 11, which sought the names of non-unit workers receiving training" because "[s]uch data was relevant to the safety grievance" (ALJ Dec. p. 9, lns. 11-12), as this finding is not supported by record evidence, is not supported by Board law, and is in legal error.

ROA.1376.

In Exception 22, Oncor filed the following exception regarding the ALJ's relevancy finding:

The ALJ's findings that "Oncor violated §8(a)(5), when [sic] failed to provide responses to requests 12 and 13, which sought the names of all 'new Oncor employees assigned as Damage Evaluators,' and 'more experienced employees . . . serv[ing] as Damage Evaluators during previous storms'" because they "sought information related to the Union's safety grievance" (ALJ Dec. p. 9, lns. 16-19), as these findings are not supported by record evidence, are not supported by Board law, and are in legal error.

ROA.1376-77.

In Exception 27, Oncor filed the following exception regarding the ALJ's relevancy finding: "The ALJ's failure to find that the names of non-bargaining unit employees were irrelevant, as this finding is supported by applicable Board law and the record evidence." ROA.1382.

Indeed, the General Counsel responded to Oncor's exceptions regarding the ALJ's relevance finding in its Answering Brief by specifically arguing the relevance of each of these requests to which it now claims Oncor has allegedly failed to except. ROA.1402-08. The General Counsel specifically addressed the issue of relevance of *all of the requests* at issue throughout its Answering Brief in response to the above-listed exceptions asserted by Oncor. The introduction of the General Counsel's legal analysis section states "[a]s discussed more fully below, the Judge's decision should be upheld because the Union adequately detailed the relevance of the information

requested.” ROA.1402. The title of Section III.A of the General Counsel’s Answering Brief states “[t]he Judge did not Err in Finding that the Union’s Request for Information was Relevant . . .” ROA.1402. In Section III.A discussing the ALJ’s findings, the General Counsel generally asserts that “[t]he Judge correctly determined that the Union’s request for information was relevant and necessary to carry out its statutory duties” and cites cases regarding relevance throughout. ROA.1402-08. Regarding requests 1, 12, and 13, the General Counsel states in a heading that “Names Are Relevant, Were Never Provided (Requests 1, 12, and 13).” ROA.1405. With regard to request 2, the General Counsel argued “[f]or the same reasons that the names of non-unit employees are relevant, information identifying their positions was also relevant.” ROA.1406. Regarding requests 3 and 7, the General Counsel argued “[t]his information is clearly relevant to the question of the extent to which unit employees’ paychecks may have been affected by the practice.” ROA.1406. For requests 4 and 5, the General Counsel argued “[t]he pay of employees working in non-unit positions is relevant to ‘unit work’ grievances.” ROA.1407. For request 6, the General Counsel asserted “[t]his request is directly relevant to the contractual claims, but it was never directly answered.” ROA.1407. Finally, with regard to requests 8-13, the General Counsel claimed “[t]he Union’s concern about the safety of the employees that it represented was clear and these

requests are relevant to that concern as well as to the contract policing function.” ROA.1408.

Accordingly, the General Counsel obviously had notice about Oncor’s relevance argument related to the various RFIs, as it addressed it numerous times in its Answering Brief to Oncor’s Exceptions.

Furthermore, Oncor addressed the issue of relevance in its Reply to the General Counsel’s Answering Brief in Section II.C, wherein Oncor again addressed the issue of the ALJ’s relevancy findings and his reliance on post hoc justifications to establish relevance of the requests. ROA.1428-29.

As this Court has held, “[t]he purpose of § 10(e) is to give the Board notice and an opportunity to confront objections to its rulings before it defends them in court.” *Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 551 (5th Cir. 2013). Moreover, courts have held that when the General Counsel addresses an issue in its answering brief it evidences that the Board had adequate notice of the issue. *See Consol. Freightways v. NLRB*, 669 F.2d 790, 795 (D.C. Cir. 1981). Given the content of the General Counsel’s Answering Brief, Oncor obviously gave the Board such notice. Certainly, if Oncor failed to except to the ALJ’s relevance findings as the General Counsel now claims, the General Counsel would not have strenuously argued throughout its Answering Brief that the ALJ did not err in his relevancy findings.

2. The Board’s decision specifically discusses relevance.

While Oncor raised multiple exceptions, it is not privy to why the Board addresses only certain exceptions. Nevertheless, the General Counsel’s argument is belied by the Board’s finding that the ALJ’s decision regarding the relevance of the information in request 6 was in error. ROA.1435. Specifically, the Board said, “[b]ecause we fail to see how the Respondent’s reasons for assigning work to nonunit employees are relevant to that determination, we find that the Respondent did not violate the Act by failing to provide the information described in request 6.” ROA.1435. Certainly, the Board’s decision in this regard contradicts the General Counsel’s argument that Oncor only filed exceptions to the ALJ’s relevancy determination of request 1. Had Oncor only excepted to the ALJ’s determination of relevance for request 1 as the General Counsel claims, there would have been no basis for the Board to find that the ALJ erred regarding his determination of the relevancy of request 6.² Additionally, the Board also addressed Oncor’s relevancy objections in footnote 5, stating: “For request 1, we agree with the judge that the information is relevant to investigate the Union’s grievances alleging the use of

² National Labor Relations Board Rules and Regulations 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived.”).

nonunit employees to perform bargaining unit work.” ROA.1434-35. The Board also addressed relevance regarding request 7. ROA.1435-37.

Simply put, there is no basis to find that the Board was not on notice of Oncor’s contention that it disputed the ALJ’s findings of relevance regarding all of the requests at issue. The General Counsel must assert these baseless waiver arguments because, as demonstrated below, its argument on the merits is contrary to well-established law and the record evidence. Accordingly, this Court should disregard the General Counsel’s claim that the Board’s findings of relevance regarding requests 2-5 and 8-13 are not properly before it.

3. Oncor has not waived any argument regarding the Board’s finding on request 12.

Finally, the General Counsel claims that Oncor waived any argument regarding the Board’s decision regarding request 12 stating that it failed to address the request in its brief. However, the General Counsel ignores that Oncor indicated that “[h]ad the Board considered this substantial evidence and properly applied its own precedent, it should have found no violation occurred with respect to Request Nos. 3, 5, 12, and 13 since Oncor cannot produce responsive documents and information that it does not have.” Oncor Br. at 37-38. Oncor then goes on to footnote that “Oncor maintains that—even if Oncor could produce the documents requested—it had no obligation to produce the requested documents because the Union did not meet its burden establishing relevancy.” Oncor Br. at 38 n. 10. A

review of Oncor’s brief reveals that Oncor’s argument regarding the Union’s failure to establish relevance in this case was applicable to all requests at issue—including request 12.³ Accordingly, the General Counsel’s assertion that “Oncor has waived any challenge to the Board’s finding regarding item 12, which requested the names of new employees who served as Damage Evaluators” is—like the rest of its arguments regarding waiver—totally baseless.

B. The Board’s finding regarding Request 7 is not limited to the Union’s request for work orders.

The General Counsel’s misrepresentations of the record continue in its Response by arguing that while “the Board found, contrary to the judge, that Oncor did not violate the Act by refusing to turn over the work orders because they contained confidential customer information, the Board adopted his finding that Oncor was required to provide the remaining materials requested under item 7.” Bd.-Br. 26-27. The Board found no such thing. Although the General Counsel cites to the Board’s decision in this case as the basis of this argument, a review of the Board’s decision reveals that the Board’s finding regarding request 7 was unqualified and

³ See Oncor Br. at 23 (“The Court should reverse the Board’s Order in this case because the Union articulated nothing more than bare assertions to Oncor regarding its need for the non-bargaining unit data sought in Requests Nos. 1-5 and 8-13.”); Oncor Br. at 34 (This Court should reverse the Board’s Order in this case because the Union failed to show that its requests for the names, job positions, compensation information, dates and amounts of storm evaluation work, and training information of non-bargaining unit employees bore any logical relationship to its May 4 and October 6, 2017 grievances.”).

applied to the entirety of the information sought by the Union in the request—not just the work orders. ROA.1435-37. Indeed, the Board dedicated an entire section—nearly two pages of its four page decision—to “Information Request 7” and why Oncor did not violate the Act regarding this request. ROA.1435-37.

In overturning the ALJ’s decision, the Board specifically held that it did not agree with the ALJ’s “finding that [Oncor] failed to articulate a legitimate confidentiality concern with respect to the customer information.” ROA.1435. The Board also held that Oncor “fulfilled its obligation to offer to accommodate its confidentiality concerns and its bargaining obligations.” ROA.1435-36. The Board further concluded that Oncor “established a confidentiality interest regarding customer information.” ROA.1436. Regarding the Union’s failure to respond to Oncor’s accommodation attempt, the Board held, “[c]hoosing not to respond to the Respondent’s offers of accommodation, however, effectively shut down the Respondent’s efforts to respond to the Union’s information request under an accommodation acceptable to both parties.” ROA.1436-37.

The Board’s holding regarding request 7 was as follows: “[W]e find that the Respondent has established its confidentiality claim and has met its duty to bargain towards an accommodation with the Union. We therefore conclude that Respondent did not violate Section 8(a)(5) of the Act by not providing the Union with the information it requested.” ROA.1437. The General Counsel’s attempt to narrow the

scope of these findings is contrary to the plain language of the Board’s decision and order.

C. The Board erred in finding the Union met its burden to establish the relevance of the requested information at issue.

1. The Union did not articulate a legitimate purpose for its request at the time the request was made.

As acknowledged by the General Counsel in its Response, for a Section 8(a)(5) violation to occur, the union must first show that “at the time of the information request, [] it articulated a legitimate purpose for seeking the information.” *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 431 (5th Cir. 2008); *see also S & W Motor Lines, Inc. v. NLRB*, 621 F.2d 598, 603 (4th Cir. 1980) (“Here the Union asserted no reason why it needed the demanded information relative to non-bargaining unit employees . . . there was no unfair labor practice in the Employer’s refusal to provide the information.”); *NLRB v. A.S. Abell Co.*, 624 F.2d 506, 513 (4th Cir. 1980) (union presented no more than “bare assertion” that it needed information, there was no unfair labor practice). This Court has found a union does not meet this burden when it requests non-bargaining unit data and asserts nothing more than a “bare assertion” of relevancy. *Sara Lee Bakery*, 514 F.3d at 431 (citing *Detroit Edison Co.*, 440 U.S. 301, 314 (1979)). In its Response, the General Counsel incorrectly contends that the Union did not make bare assertions of relevance, but in fact articulated a legitimate purpose for its need for the names of

non-bargaining unit members⁴ to pursue its work-diversion grievance and to ensure safe working conditions for unit employees. The record evidence proves otherwise.

Regarding the Union's request for the names of non-bargaining unit employees in request number 1, the General Counsel argues "the Union specifically explained that nonunit employees' names were relevant to its grievance allegation" as evidence that the Union articulated a legitimate purpose for its request. Bd.-Br. 31. The Board argues "that response alone . . . sufficed to meet the Union's burden of showing relevance and need." Bd.-Br. 31. The General Counsel's own articulation of the Union's alleged legitimate purpose falls squarely within the definition of a bare assertion of relevance. The Supreme Court has stated "[a] union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." *Detroit Edison*, 440 U.S. at 314. Despite this clear language, the Board attempts to defy logic by arguing the Union's conclusory explanation "that nonunit employees' names were relevant to its grievance allegation" is somehow different than an explanation "that it needs information to process a grievance."

⁴ The Board ignores that the Union must articulate a legitimate purpose for *all* of the requested information at issue—not just the names of non-bargaining unit employees. By relying on its waiver argument, the Board does not address the Union's failure to articulate a legitimate purpose for requests 2-5 and 8-13.

With regard to requests 9-13 requested by the Union on August 28, 2017, the General Counsel claims “the Union clearly conveyed to Oncor that it needed the information . . . to address concerns about the safety of unit employees.” Bd.-Br. 35. While the General Counsel makes the claim that such need was clearly conveyed, it cannot cite any record evidence where the Union articulated this alleged legitimate purpose at the time of the August 28, 2017, letter as required under *Sara Lee Bakery*. See *Sara Lee Bakery*, 514 F.3d at 431. Notably, the Union’s August 28, 2017, letter does not indicate the information is being requested because of safety concerns. ROA.234-39. On September 1, 2017, Oncor specifically asked the Union to clarify the scope of its grievance and whether “the qualification of employees doing . . . storm evaluation work is not the subject of the grievance,” to which the Union replied that “qualifications of non-bargaining unit employees or others doing this work is not, per se, the contract violation issue.” ROA.240-44. While the Union indicated it was concerned about safety, it never articulated that its additional August 28, 2017, requests were to investigate safety issues.⁵ Because the record is devoid of evidence that the Union articulated a legitimate purpose for requests 9-13

⁵ Indeed, the subject matter of all of the correspondence between the parties was the Chapman grievance alleging Oncor violated the parties’ CBA by assigning storm evaluation work to non-bargaining unit employees. ROA.198-1274. The Union’s admission that alleged safety issues were not the subject of this grievance contradicts the General Counsel’s argument that the Union’s information requests concerning the grievance were for the purpose of investigating safety concerns.

at the time the requests were made in August 2017, the General Counsel erroneously relies on a letter and conversations predating the August 28, 2017, request (even going back as far to July 2016) to argue the Union articulated a legitimate purpose for requests 9-13. Bd.-Br. 34-35. However, this Court has found that the Union had to articulate the purpose for its request *at the time* the request is made in order for an unfair labor practice to have occurred. *See Sara Lee Bakery*, 514 F.3d at 431. Because such articulation undoubtedly did not occur, there was not substantial evidence to support the Board's findings, and the Board's order should be overturned.

2. Oncor was not required to speculate regarding the Union's alleged purpose of its requests.

Seemingly admitting the Union never articulated anything other than bare assertions of relevancy, the General Counsel claims that Oncor should have known from the surrounding circumstances at the time the Union requested the information that it was relevant to the Union's duties of policing the contract and ensuring the safety of unit employees. Bd.-Br. 38-39. This is not the standard this Court set forth in *Sara Lee Bakery*. *See Sara Lee Bakery*, 514 F.3d at 431. The test applied by this Court is unambiguous: *it is the Union who must articulate a legitimate purpose for seeking the information. Id.* Oncor was not required to speculate why the Union believed the eleven requests at issue were relevant to the Union's grievance and the General Counsel failed to cite any precedent requiring such. Like this Court found

in *Sara Lee Bakery*, while Oncor may have been on notice that the Union's requests were related to its practice of utilizing damage evaluators generally, the Union never articulated any reason why any of the voluminous information requested was specifically relevant to the Union's grievance. *Id.* Indeed, Bobby Reed, the Union's Business Manager, admitted that he never explained that the Union needed the names of non-bargaining unit employees to subpoena witnesses as the General Counsel now claims, but told the company "[w]e told them because it was relevant information that we needed." ROA.66.

3. The General Counsel fails to establish a logical connection between the Union's grievance and the information requested.

The General Counsel's response makes no attempt to explain the logical connection between the requests at issue and the Union's grievance, merely stating the connection is "self-evident." Bd.-Br. 40.⁶ In making such a conclusory statement, the General Counsel wholly fails to address how the non-bargaining information the Union requested was relevant to the only issue of the Union's grievance (which the Board in fact recognized was the only issue): "whether the Respondent's use of nonunit employees led to a reduction of the regular work hours of unit employees."

⁶ Here again, given the General Counsel's argument of waiver, it only addresses the purported logical connection between names of non-bargaining unit employees and the requested information. Bd.-Br. 39-40. Indeed, the Union was required to establish a logical connection between all of the requested information and the dispute at issue.

ROA.1435. Here, the General Counsel cannot show (and does not even attempt to show) how the Union's requests for the names, job positions, compensation information, dates and amounts of storm evaluation work, and training information of non-bargaining unit employees bore any logical relationship to what the Board deemed to be the only issue of the Union's grievance. Applying the same reasoning this Court applied in *Sara Lee Bakery* and *Temple-Eastex*, the non-bargaining unit information sought by the Union is irrelevant to the "ultimate determination" of the issue underlying the Union's work jurisdiction grievance. *See Sara Lee Bakery*, 514 F.3d at 432 ("The issue underlying the Union's grievance is whether backhauling violates the CBA; information regarding the contract or contracting cost are irrelevant to that ultimate determination."); *see also NLRB v. Temple-Eastex, Inc.*, 579 F.2d 932, 938 (5th Cir. 1978) ("[I]f the Company had responded, therefore, its response would not have helped the Union determine whether a non-unit member had received a unit job."). The Union did not at the time, and the General Counsel cannot now, establish a logical connection between the Union's voluminous requests for information and the Union's work-jurisdiction grievance.

4. The General Counsel's argument that the Board, ALJ, and the Union can articulate post hoc theories of relevance is antithetical to this Court's and the Board's precedent.

Perhaps most egregious is the General Counsel's assertion that the Board may rely on post hoc justifications asserted by the Union and the ALJ to support a finding

the Union met its burden to establish the relevancy of the requested information. Bd.-Br. 40-41.⁷ This Court has found an “ALJ’s attempt to manufacture a *post hoc* theory of relevance violates well-established precedent.” *Sara Lee Bakery*, 514 F.3d at 431; *see also A.S. Abell*, 624 F.2d at 513 n. 5 (“Reasons not brought to the attention of the Company at the time but later used to justify positions in administrative hearings should not be used to convict the Company of an unfair labor practice when these reasons were not brought to its attention contemporaneously, they being not apparent from the face of the request.”). Similarly, the Board has held a union also cannot rely on justifications of relevancy first articulated at the administrative hearing. *Calmat Co.*, 283 NLRB 1103, 1106 (1987) (“[T]he General Counsel and Union argued for the first time that the information was relevant to bargain about subcontracting. At no time relevant to this case did the Union urge that the information was to be used for those purposes nor is there any evidence that the Union is pursuing bargaining over subcontracting or any other purpose. I, therefore, find no violation of the Act based on this belated argument.”).

Despite this unambiguous authority, the General Counsel avers that the Board properly relied on Reed’s ULP hearing testimony that the information sought in

⁷ The General Counsel can only argue these post hoc justifications can serve as the basis for the Board’s finding of relevance because the Union never articulated any legitimate justifications at the time the information requests were made. ROA.234-39.

request 1 was relevant because the “names were necessary to pursue its work-diversion grievances, including by interviewing nonunit employees, verifying that the work they did was actually bargaining-unit work, and subpoenaing them as arbitration witnesses if necessary.” Bd.-Br. 40. The General Counsel incorrectly asserts that this testimony “at the hearing confirms what the Union had already made clear.” Bd.-Br. 40. However, the General Counsel cannot point to any record evidence where the Union made these justifications clear before the ULP hearing. Bd.-Br. 40. This is because Reed (the Union’s Business Manager) testified that, prior to the ULP hearing, he never articulated these justifications to Oncor. ROA.66.

The same can be said for the Union’s purported justifications regarding its need for the safety-related information in requests 9-13. The General Counsel’s Response claims that Reed’s testimony only confirmed the previous justifications he told the Company regarding the Union’s need for the safety-related information: “the Union needed to know how nonunit employees were trained, what kind of work they performed, and whether they were comfortable doing it.” Bd.-Br. 40. Yet again, notably missing from the General Counsel’s response is record evidence that Reed (or anyone associated with the Union) articulated these justifications prior to the ULP hearing. Bd.-Br. 40. This is because no such record evidence exists.

Finally, the General Counsel claims “Oncor tries in vain to fault the Board for noting that having the names of nonunit employees would allow the Union to

interview or subpoena them.” Bd.-Br. 41. Oncor’s finding of fault with the Board is not in vain but is based on well-established Board law. It was the job of the Union, not the ALJ or the Board years later, to articulate why the information it sought was relevant to its grievance. *See A.S. Abell*, 624 F.2d at 513 n. 5. Accordingly, Oncor’s finding of fault with the Board’s reliance on relevancy justifications never articulated by the Union is well-founded.

D. The Board ignores that much of the information sought by the Union does not exist or did not exist in the exact form requested.

The General Counsel faults Oncor for not providing the Union with information in response to requests numbers 3 and 5 in the precise form that the Union requested. Regarding request number 3 for the dates and amount of time that individual nonunit employees performed storm evaluation work, the General Counsel claims that Oncor did not sufficiently narrow its search of work orders. Bd.-Br. 44-46.⁸

However, the substantial evidence shows there was no need for Oncor to conduct a more narrowed search of work orders because the Union accepted Oncor’s accommodation to review work orders immediately after Oncor offered the Union

⁸ The General Counsel greatly exaggerates Barbara Gibson’s testimony regarding Oncor’s ability to narrow and filter the work orders offered to the Union to review and its ability to provide the Union with complete and accurate information. Gibson testified the work orders could be narrowed by dates of “major storms.” ROA.148. However, filtering in this manner would include work orders that were unrelated to damage evaluation and exclude damage evaluation that occurred in non-“major storms.” ROA.148.

the accommodation. In its June 23, 2017 response, Oncor indicated it could not fulfill the Union’s request because it did not have a methodology or documents that tracked the requested information but offered to allow the Union to review work orders from January 1, 2016 to the present. ROA.204. The Union accepted this accommodation. ROA.236. After the Union deemed this accommodation acceptable, there was no reason for Oncor to unilaterally further narrow the information. *See Day Auto. Res., Inc.*, 348 NLRB 1257, 1263 (2006) (finding employer did not violate the Act when union indicated it was satisfied with the information provided). If the Union believed narrowing the work orders would provide more accurate information, it was incumbent on the Union to make such a request to Oncor. *Yeshiva Univ.*, 315 NLRB 1245, 1248 (1994) (“[w]hen the employer presents a legitimate, good faith objection [to the form in which information is requested] on the grounds of burdensomeness or otherwise, and offers to cooperate with the union in reaching mutually acceptable accommodation, *it is incumbent on the union to reach some type of compromise with the employer as to the form, extent, and timing of the disclosure.*”). No such request was ever made to Oncor by the Union to narrow the work orders requested.

In fact, the Union admitted that it never went to review work orders because “it was a total waste of time.” ROA.71. Reed’s testimony evidences that even if the Company had narrowed the search—which it was not required to do—the Union had no intention of ever reviewing the information it was requesting. ROA.71, 236. Such

conduct by the Union is not operating in good faith in the accommodation process. Indeed, Board law permits accommodations because it recognizes that information may not always be available in the manner requested. Thus, once the Company presents an accommodation, it is incumbent upon the Union to negotiate about the accommodation. *Yeshiva Univ.*, 315 NLRB at 1248. Despite the General Counsel's argument otherwise, a violation of the Act does not occur because Oncor failed to offer the Union the most perfect, narrow, and complete accommodation out of the gate. Rather, the Act requires a union "to reach some type of compromise with the employer as to the form, extent, and timing of the disclosure." *Id.* The substantial evidence in this case establishes that with regard to request 3, Oncor offered the Union an accommodation to review the work orders, and the Union accepted that accommodation. The Union never reviewed a single work order and never requested Oncor provide a more narrow set of work orders. Nevertheless, the Board argues that Oncor violated the Act because it did not unilaterally filter or narrow its data to an unspecified level that the General Counsel deems reasonable. Simply put, this is not the law.

The General Counsel makes a similar argument regarding request number 5, alleging Oncor's response was "unnecessarily overbroad." Bd.-Br. 47. In so arguing, the General Counsel concedes that Oncor provided the Union with the requested information, but ironically argues that Oncor violated the Act for providing the

Union with too much information. Bd.-Br. 47-48. Specifically, the General Counsel alleges that Oncor did not sufficiently narrow its list of instances where nonunit employees received storm exceptional pay specifically for work during major storms. However, the Union did not request that Oncor limit its search to storm exceptional pay for major storms. ROA.198-1274. This is yet another example of a post hoc explanation manufactured by the General Counsel years after the parties exchanged letters. Oncor provided the Union a spreadsheet identifying the specific non-bargaining unit employees who received Storm Exceptional Pay (identified by a unique identification number), their annual salary at the time they received Storm Exceptional Pay, and the amount received for Storm Exceptional Pay, but indicated “Oncor cannot determine that such pay was explicitly for ‘storm evaluation work,’ as its records do not delineate such information.” ROA.1229, 1231-61. Had Oncor excluded storm exceptional pay for non-major storms as the General Counsel now claims it should have, the list provided to the Union would have been under inclusive.⁹

⁹ In fact, the Union stated it is “not grieving ‘a specific storm,’ but rather *all instances* in which Oncor used non-bargaining unit employees to do storm evaluation work since January 1, 2016.” ROA.238 (emphasis added).

E. The Board’s finding regarding the appropriate bargaining unit in this case warrants reversal.

The General Counsel does not attempt to meaningfully address the Board’s erroneous finding regarding the appropriate bargaining unit in this case. The Board’s finding that the positions identified constituted an appropriate bargaining unit is not supported by the substantial evidence. Despite the General Counsel’s argument to the contrary, the fact that these positions are all covered by the same collective bargaining agreement does not mean the positions are a part of the same bargaining unit as the ALJ found. As explained in Oncor’s opening brief, the Board is not free to change the composition of a certified bargaining unit on its own whim. *Springfield Transit Mgmt.*, 281 NLRB 72, 79 (1986) (“[T]he scope or composition of an established unit may not be altered except by agreement of the parties or by action of the Board in a representation proceeding.”) (citing *Arizona Elec. Power*, 250 NLRB 1132 (1980)). The ALJ and the Board’s findings concerning the makeup of the bargaining unit are not supported by the record evidence. Despite the General Counsel’s absurd response, it is textbook and fundamental labor law that the composition of the bargaining unit occurs by vote during the representation hearing, which is what occurred here. There is no record evidence that the parties agreed to change the makeup of the bargaining unit by agreement, and this Court can take judicial notice of Case Nos. 16-RC-10746, 16-RD-1592, and 16-RC-10906 which

sets forth the appropriate bargaining unit in this case. *See* Supplemental ROA.1611-22.

V. CONCLUSION

For all the foregoing reasons, and for all of the reasons set forth in Oncor's Principal Brief, Oncor respectfully requests the Court grant its petition for review and deny the Board's application for enforcement. Oncor further requests that the Court reverse the Board's Order.

Respectfully submitted,

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VI. CERTIFICATE OF SERVICE

I certify that on the 2nd day of September, 2020, I caused the foregoing to be filed with the United States Court of Appeals for the Fifth Circuit and a copy of the same to be served on the following counsel of record via ECF, except as otherwise noted below:

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VII. CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 6,442 words. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010.

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