

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON DC BRANCH OFFICE**

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, LOCAL 5668
(Constellium Rolled Products Ravenswood, LLC)

Respondent

and

Case: 09-CB-257509

CONSTELLIUM ROLLED PRODUCTS
RAVENSWOOD, LLC

Charging Party

BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL

To the Honorable Arthur Amchan, Administrative Law Judge

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A. INTRODUCTION

The General Counsel alleges the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, Local 5668 (“Respondent”), violated Section 8(b)(3) of the National Labor Relations Act (“the Act”) by refusing to provide Constellium Rolled Products Ravenswood, LLC (“the Employer”) with relevant and substantive information concerning the arbitrable issue of which party is responsible for pre-65-year-old retiree (“pre-65 retiree”) health care costs. Additionally, the General Counsel alleges Respondent unnecessarily delayed in providing requested information to the Employer. For both allegations, all the critical facts are uncontested.

In June 2019, Respondent filed grievance 19-05-G claiming the Employer was not abiding by the collective-bargaining agreement (“CBA”) in capping pre-65 retiree health care costs at \$13,007 per year and a monthly \$250 pension supplement, thus leaving any cost in excess of those amounts to the retiree or participant. When it filed grievance 19-05-G, Respondent, in support of its position, provided the Employer with a document titled “Pechiney Rolled Products Proposed Retiree Health Care Summary” (“the Summary”). Respondent argued that the terms contained in the Summary are the agreed-to terms between the parties regarding pre-65 retiree health care costs and make the Employer responsible for any excess health care expense. However, the Employer noticed the Summary was undated, unsigned, and its terms were never incorporated into the CBA. Naturally, the Employer found the Summary and its terms suspicious, and so denied grievance 19-05-G setting the issue for arbitration.

Prior to arbitration, the Employer requested the most obviously relevant information baring on Respondent’s claim that the Employer had previously agreed to

incur the cost of pre-65 retiree health care as identified in the Summary. Specifically, the Employer requested documents in Respondent's possession showing: (1) the terms identified in the Summary were ever incorporated into the CBA; (2) the Union ever accepted the terms identified in the Summary; and (3) that the parties behaved in a way that they understood the terms of the Summary as the agreed-to terms regarding pre-65 retiree health care costs.

Seeking refuge from its statutory obligation to furnish the requested information, Respondent asserts the Employer is engaged in pre-arbitration discovery. However, the Board's decisions in cases such as *California Nurses Assn.*, 326, NLRB 1362 (1998), *Oncor Electric Co. LLC*, 364 NLRB No. 58, slip op. at 17 (2016), and *Hamilton Park Health Care Center*, 365 NLRB No. 117, slip op. at 9 (2017), make clear that Respondent is required to provide substantive information upon request concerning matters pending arbitration. In its effort to shirk its responsibility to engage in a good faith exchange of information, Respondent argues for a collapse of the Board's clear demarcation line into a single question: is the requested information the kind of information it might use at arbitration? According to Respondent, if the answer is yes, then the Employer is engaged in pre-arbitration discovery. However, the Board has already definitively rejected that argument in the cases cited above.

Further coloring Respondent's efforts to comply with its statutory obligations is its dishonest delay in providing necessary information. Respondent glibly responded that it had no documents responsive to one of the paragraphs in the Employer's information request. Then, approximately two weeks later, after an arbitrator advised Respondent to provide documents responsive to that paragraph, Respondent suddenly discovered responsive documents.

Counsel for the General Counsel argues that the ALJ should find the violations alleged in the complaint and order Respondent to remedy its unlawful conduct. To assist the ALJ in making his determination, this brief provides a facts section followed by the applicable legal framework and analysis.

B. ISSUES PRESENTED

1. On February 25, 2020, Respondent claimed bullet points 1, 2, and 4 of the Employer's February 18, 2020 information request was an attempt at pre-arbitral discovery. Did bullet points 1, 2, and 4 of the Employer's information request seek substantive information pertaining to the arbitral issue, or Respondent's litigation strategy?
2. On February 25, 2020, Respondent claimed not to have documents responsive to bullet point 3 of the Employer's information request. Then, only after an arbitrator advised Respondent to provide the documents responsive to bullet point 3, did Respondent furnish responsive documents. Did Respondent unnecessarily delay in furnishing documents responsive to bullet point 3 in violation of Section 8(b)(3)?

C. FACTS

I. *THE EMPLOYER BELIEVES THE CBA CLEARLY CAPS ITS HEALTH CARE COST FOR PRE-65 RETIREES*

a. The CBA

The CBA contains provisions regarding the Employer's responsibility for pre-65 retiree health care costs. (33, King)¹(Jx1, pg. 203) The section commonly referred to as "the Cap Letter" states in relevant part:

- a. The average annual Company contributions to be paid for all health care benefits per participant who retires on or after January 1, 2003 shall not exceed \$13,007 for participants under the age of 65 and \$5,764 for participants age 65 and older. The age of any such participant or dependents of such participant will be determined as of each January 1 for the entire year.
- b. If the average annual cost of health care benefits for each such group described in paragraph "a." above exceeds the specified amount, the cost in excess of that amount shall be allocated evenly to all participants in such group, as an annual individual contribution, payable monthly, beginning the following year.
- c. Notwithstanding the foregoing, no participant shall be obligated to contribute for such excess health care costs until January 1, 2011 with the exception of the \$250.00 per month supplement payable to age 65 that was provided under the terms of the 2002 Agreement in order to cover any retiree medical contributions. In addition, it is agreed that this amount will also be made available for those employees who retire on or before the expiration of the new agreement. For such retirees receiving this supplement, the retiree will pay up to \$250.00 per month for the amount in excess of \$13,007 for the retiree, and the retiree's spouse and/or other dependent participant who is or are under the age of 65. It is further agreed that for post-65 retirees, spouses, and dependents, the annual cost of health care will be reduced by the amount received by the Company under Medicare Part D. (Jx1, pgs. 203-204)(47-48, King)

¹ Testimonial citations take the form of transcript page number(s), then witness name.

As described by Matt King, the Employer's Senior Manager of Labor Relations, the above referenced CBA provisions cap the Employer's cost for pre-65 retiree health care cost at \$13,007 per year per participant. (43, King) Any amount in excess of \$13,007 is allocated evenly between all participants in the group to be paid in monthly installments over the following year. *Id.* at 43, 103 However, the Employer provides a \$250 per month pension supplement that a pre-65 retiree recipient can use towards the allocated excess health care cost. *Id.* According to the Employer, any health care cost remaining after a participant uses the \$250 monthly pension supplement is the responsibility of the retiree or participant. *Id.*

II. RESPONDENT DISPUTES THE EMPLOYER'S INTERPRETATION OF THE CAP LETTER USING AN EMPLOYER PROPOSAL FROM THE EARLY 2000s

- a. Respondent Files Grievance 19-05-G Asserting the Employer Is Financially Responsible for all Pre-65 Retiree Health Care Costs in Excess of the Cap and Supplement

On June 7, 2019,² Kevin Gaul, Respondent's Grievance Chairman, filed grievance 19-05-G with King. *Id.* at 34. The "[s]tatement [o]f [e]mployee [g]rievance" states:

THE COMPANY IS NOT ABIDING BY THE CONTRACT RELATING TO CAP LIMIT LEVELS OF \$250 DOLLARS. WITH THIS \$250 DOLLARS BEING THE CEILING LEVELS FOR PAYMENTS FOR PRE-65 RETIREE'S OVERAGES EXCEEDING THE AMOUNT OF \$13,007 DOLLARS. (caps in original) (Jx2)

The "[r]emedy [o]r [c]orrection [d]esired [f]rom [c]ompany" states:

ABIDE BY THE CONTRACT LANGUAGE REGARDING THE CAP LETTERS WITH IN [sic] THE COLLECTIVE BARGAINING AGREEMENT AND MADE ALL EFFECTED INDIVIDUALS WHOLE FOR THIS VIOLATION. (caps in original) *Id.*

² Unless otherwise stated, all dates are in 2020.

Noticeably, in its grievance, Respondent failed or refused to identify a specific section of the CBA supporting its interpretation of the parties' agreement concerning pre-65 retiree health care costs.³ *Id.* at 39. However, in support of its interpretation, Respondent did attach an undated, unsigned, contextless employer "proposal" likely from the parties 2004 negotiations. (*Id.* at 52, 54)(Jx2, pg. 2)

b. The Summary

At the time Gaul provided King with grievance 19-05-G, Gaul also handed King the "Pechiney Rolled Products Proposed Retiree Health Care Summary" ("the Summary").⁴ (*Id.* at 51)(Jx2, pg. 2) Gaul claimed the terms of the Summary supported Respondent's position that the Employer was responsible for pre-65 retiree health care costs beyond the cap and supplement amounts. *Id.* at 53. Specifically, Gaul stressed the highlighted portion of the Summary which states:

For such retirees receiving this supplement, the retiree who is under the age of 65 will pay no more than \$250 per month once the cap is exceeded. The retiree's spouse and/or other dependent participant do not pay this \$250 per month. *Id.*

King was skeptical of the document and its terms. *Id.* at 54. First, he had never seen the document before, and neither the document nor its terms were clearly part of the CBA. *Id.* at 54, 55. Additionally, King noticed that the Summary must have been used during an earlier contract negotiation since "Pechiney" was the Employer's previous company name and was signed by the former Vice President of Human Resources Jim Guillow, who ended his career in approximately 2006. *Id.* at 52, 54, 55.

³ King testified that it was unusual for Respondent not to identify the portion of the CBA allegedly violated. (39, King)

⁴ Pechiney was the name of the Employer in the early 2000s. (52, King)

Further, King noticed that the terms were clearly identified as being “proposed” and did not contain a date or any indication of Respondent’s acceptance. *Id.*

The Employer’s skepticism of the Summary and grievance 19-05-G were communicated in writing to Respondent after their step 3 grievance meeting stating:

The Company has a different interpretation of the Cap letter language. In addition, the letter provided by the Union as an attachment to this grievance, states “proposed”, is not dated, nor is it included in the current CBA per the terms of Memoranda and Letters of Understanding. The Company respectfully denies the grievance. (Jx3)

Unable to resolve grievance 19-05-G, Respondent appealed to arbitration on August 2, 2019. Arbitration was originally scheduled for February 27. (GCx3)(Rx6)

c. The Issue for Arbitration

As King testified, the issue for arbitration was whether the language of the CBA capped the Employer’s pre-65 retiree health care costs as identified in the “Cap Letter,” or whether the terms identified in the Summary, as argued by Respondent, are controlling, and thus requires the Employer to pay any pre-65 retiree health care expense in excess of the \$13,007 cap amount and the monthly \$250 pension supplement. (43, 103, King)(Jx2) Therefore, the primary issue for arbitration is whether the terms identified in the Summary were ever adopted by the parties and made part of the CBA.

III. RESPONDENT REFUSES TO PROVIDE THE EMPLOYER WITH INFORMATION REGARDING THE SUMMARY AND ITS TERMS

a. The Information Request

Prior to arbitration, on February 18, King sent an information request to Respondent seeking information to substantiate Respondent’s claim that the terms identified in the Summary are the parties’ agreed-to terms concerning pre-65 retiree

health care costs. (Jx4)(62-65, King) The information request titled “RE:

Documentation Supporting Cap Letter Grievance (19-05-G)” requested:

- All documents in the Union’s possession or under its control which show or are evidence that the “Pechiney Rolled Products Proposed Retiree Health Care Summary” signed by Jim Guillow ever became a part of any labor agreement or became an agreed upon modification of any existing agreement;
- All documents in the Union’s possession or under its control which show or are evidence that the “Pechiney Rolled Products Proposed Retiree Health Care Summary” signed by Jim Guillow was ever signed or accepted in writing by the Union;
- All documents in the Union’s possession or under its control that relate to the subject of retiree health care costs that are in excess of the cap set forth in the cap letters appended to the 2010, 2012, and 2017 labor agreements being passed on to retirees;
- All documents in the Union’s possession or under its control on which it relies to show that the excess retiree health care costs (meaning those costs in excess of the caps set forth in the cap letters) were ever intended by the Company and Union to limit retiree costs to \$250 per month;
- A copy of the page or pages of any applicable CBA on which appears the section or sections of the contract that the Union claims is violated with respect to Grievance 19-05-G.⁵

King testified that his first two requests specifically sought documentation to verify that the Summary, as claimed by Respondent, was ever agreed to by the parties and are the terms of the CBA or any memorandum to the CBA. (64-65, King)

⁵ For ease of reference, counsel for the General Counsel refers to each bullet point as a separate number, 1, 2, 3, 4, or 5. For instance, bullet point 1 is the first bullet point on the February 18 information request which seeks, “All documents in the Union’s possession or under its control which show or are evidence that the “Pechiney Rolled Products Proposed Retiree Health Care Summary” signed by Jim Guillow ever became a part of any labor agreement or became an agreed upon modification of any existing agreement.”

Due to the upcoming arbitration, King requested Respondent to provide the information no later than February 24.⁶ (Jx4)

b. Respondent Refuses to Provide Requested Information

Despite Respondent's assertion that the CBA requires the Employer to pay pre-65 retiree health care costs in excess of the identified cap and supplement, and its reliance on the Summary to support its position, Respondent refuses to provide the Employer with the requested information sought to validate Respondent's claim. (Jx5)

On February 25, Respondent responded to each separate bullet point in the Employer's information request.⁷ (Jx5) Concerning bullet points 1, 2, 4, and 5 Respondent stated "[t]he Union respectfully declines to provide a response on the ground that this request improperly seeks to engage in pre-arbitral discovery."⁸ *Id.*

Regarding bullet point 3 of the Employer's request, Respondent claimed "[t]he Union does not possess any documents matching this description. That is the Union does not possess any documents that deal with passing along to retirees any cost in excess of the Cap Letters appended in the 2010, 2012 and 2017 Labor Agreements." *Id.*

⁶ Respondent failed to provide a response by February 24 as requested by King. (Jx4)(Jx5) When he did not receive a response from Respondent, King followed up by sending an e-mail to Wedge and Gaul stating, "On February 18, 2020, the Company sent the Union the attached information request asking that you provide your response by February 24, 2020. It is now past the close of business hours and we have not received your response. The information we have requested is necessary to prepare for our arbitration on Thursday and Friday of this week. We will be prejudiced by your failure to respond. Accordingly we reserve the right to move to exclude any evidence you present at the arbitration that should have been provided in response to this request and to move to continue the arbitration hearing until such time as we have an opportunity to obtain and review said information." (Rx2)

⁷ Respondent's February 25 response was drafted and sent by Brian Wedge. Wedge is a staff representative for Respondent and was acting as an agent of Local 5668 when he responded to the Employer's information request. (10, Keough)

⁸ Respondent's response to bullet point 5 of the Employer's information request is not at issue in the present case. However, it is telling that Respondent claimed the Employer's request seeking the portion of the CBA allegedly violated was also pre-arbitral discovery. (Jx5)

After receiving Respondent's February 25 refusal to provide the requested information, King again requested the same information in a February 26 e-mail to Wedge and Gaul, stating:

Please see the attached NLRB case decision pertaining to the Union's February 25, 2020, response to the Company's information request received by the Union on February 18, 2020. The decision stipulates that the Board affirmed the trial judge who found that, "at the pre-arbitration stage, a party can request substantive information pertaining to the issues but not information about the parties' presentation of its case before the arbitration." Thus, in relationship to the ban on pre-arbitration discovery, the Board focuses on the nature of the information requested, making a distinction between information that delves into litigation strategy and preparation which is deemed improper pre-arbitration discovery, as opposed to substantive information (i.e., evidence) pertaining to the issues at arbitration, which must be produced.⁹

The Company sought documents that are evidence, not mental impressions and strategy. In fact, the Union's stance on this matter equates to failing to bargain in good faith in an effort to withhold information that it is required to provide.

As such, the Company is once again requesting said information. If the Union fails to provide the requested information by the close of business today, February 26, 2020, the Company will proceed with filing an Unfair Labor Practice charge against the Union for failing to bargain in good faith. (Rx3)

Respondent never contested the relevancy of the requested information to the arbitrable issue. (Jx5)(Rx6)

c. Opening of the February Arbitration

Shortly before the arbitration opening, Respondent contacted the Employer about settling grievance 19-05-G. (72, King)(Rx6) As a result of settlement discussions, while on the record, the parties jointly requested postponement of the arbitration. (Rx6,

⁹ King attached copies of the NLRB's decisions in *Oncor Electric Co. LLC*, 364 NLRB No. 58, slip op. (2016), and *Hamilton Park Health Care Center*, 365 NLRB No. 117, slip op. (2017) to support the Employer's position that it was entitled to the requested information. (Rx3)

pg. 87) Before adjourning, the Employer requested an advisory opinion from the arbitrator regarding its February 18 information request. (Rx6, pg. 88)

While still on the record, the parties provided brief position statements regarding the February 18 information request. *Id.* The Employer, consistent with its prior communications with Respondent, repeated its position that the requested information was necessary to prepare for the arbitrable issue stating:

It does not seek to discover pre-litigation strategy, pre-arbitration strategy or the mental processes of the Union. It basically focuses on documents that are relevant to the issue in this case which is what the parties agreed to with respect to this cap letter that affects the outcome of the case and whether they have evidence that they believe bears on their argument and supports their argument. *Id.*

By contrast, Respondent offered a muddled justification for refusing to provide the requested information. Although Wedge initially refers vaguely to a belief that the information request amounts to “pre-arbitration discovery,” he then expressed general frustration at having to comply with the information request stating:

I don't think it's something that eight days before the arbitration that I should hand my play book over to the opponent. I think there was – looking at the date of the grievance, 250-some days from the grievance to the information request. They had opportunity to engage in that. They didn't...” *Id.*

In the above comment, Wedge appears to suggest that if the Employer's request was made earlier, at some unknown time, the information requested would not be pre-arbitration discovery. Then, Wedge, still on the record, again shifts Respondent's basis for refusing to provide the requested information stating:

...I just want to say that what they're asking for is for me to lay out my strategy based on facts that we have, that we collected throughout the years, and what they're asking for is documents that were provided by the Company at one time or another. They're not Union-generated documents; they're Company-generated documents. And I think that we must protect our strategy moving

forward. And by turning over this information, if we have it, then it limits us to what we turn over. *Id.* at 89.

d. Arbitrator's Advisory Opinion

On March 3, the arbitrator issued his advisory opinion regarding the Employer's February 18 information request. (Jx6) Before communicating his opinion regarding each bullet point, the arbitrator states:

Since the hearing had not commenced, the arbitrator was not given a copy of the contract, a copy of the grievance nor any specific information as to what actually is in dispute other than generalized comments as to accounting standards relevant to the issue of retiree health. *Id.* at pg. 1

Moreover, the arbitrator states that he,

...professes no particular expertise or knowledge regarding information requests as not being the norm in most arbitration cases in his experience...What is clear is that NLRB believes that when a ULP is filed for failure to answer an information request, it will retain jurisdiction and generally not defer to an arbitrator if an arbitration is also pending. *Id.* at pg. 2.

To summarize his advisory opinion, the arbitrator believed bullet points 1, 2, and 4 of the information request sought pre-arbitration discovery. *Id.* at 2, 4, and 5.

Concerning bullet points 3 and 5, the arbitrator advised Respondent to provide the requested information. *Id.*

On March 4, the Employer filed the instant charge. (GCx1)

e. Respondent Produces Documents It Previously Stated Did Not Exist

On March 9, and after the arbitrator's advisory opinion, Respondent produced documents in response to bullet point 3 it previously stated did not exist. (Jx7) More specifically, Respondent produced documents previously exchanged between an actuarial firm and the Employer. (Jx7)(78-79, King) Respondent never informed the

Employer that the documents in its possession responsive to bullet point 3 were ever in the possession of the Employer. (115, King)

When Respondent reversed course and provided information, it gave no reason why it previously stated it had no responsive documents, or why it had now discovered responsive documents.

Respondent still did not provide information concerning bullet points 1, 2, and 4 of the information request.

D. LEGAL ANALYSIS AND CONCLUSION

I. Legal Framework

The Board has long held that a labor organization's duty to furnish information pursuant to Section 8(b)(3) of the Act is parallel to that of an employer's obligation to furnish information pursuant to Section 8(a)(1) and (5) of the Act. *Firemen & Oilers Local 288 (Diversity Wyandotte)*, 302 NLRB 1008, 1009 (1991). This duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary for administration of a collective-bargaining agreement, including information required by a party to process a grievance through arbitration. *Jewish Federation Council of Greater Los Angeles*, 306 NLRB 507 (1992); *Bacardi Corp.*, 296 NLRB 1220 (1989); *Howard University*, 290 NLRB 1006 (1988). The production of information, which is arguably relevant to a disposition of the grievance, to the party not in possession of that information is required so that the parties to the grievance procedure have the opportunity to “evaluate the merits of the claim” and work toward settlement. *Firemen & Oilers*, *supra* at 1008.

The Board has held that there is no right to pretrial discovery when a grievance has been referred to arbitration. The lead case standing for that proposition

is *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362, 1362 (1998). In *Cal. Nurses Assn.*, the Board found that the union was not required to provide the employer with the names of witnesses it intended to call, and the evidence on which it intended to rely, at the arbitration hearing. *Id.* However, the Board also found that the union violated Section 8(b)(3) by refusing to provide the employer with the facts and documents relevant to each incident on which the union was relying to support its grievance and the names of persons involved in each incident. *Id.*

Not inconsistent with *Cal. Nurses Assn.*, cases issued both before and after it, state that the duty to supply information extends to a request for material to prepare for arbitration. See, e.g., *Fleming Cos.*, 332 NLRB 1086, 1094 (2000) (“Employer must furnish information that is necessary to properly prepare for arbitration as long as the information is relevant to the grievance scheduled for arbitration.”), cited with approval in *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1353 (2010); *Jewish Federation Council*, 306 NLRB 507 fn. 1 (1992); *Chesapeake & Potomac*, 259 NLRB 225, 227 (1981), *enfd.* 687 F.2d 633 (2d Cir. 1982).

In *Oncor Electric Co., LLC*, 364 NLRB No. 58, slip op. at 17 (2016), the Board addressed the scope of *Cal. Nurses Assn.*'s prohibition on pre-arbitration discovery. In *Oncor Electric*, the employer denied the union's third-step grievance over the discharge of an employee. On February 26, 2013, the union filed a request for arbitration and on March 25, 2013, made an information request in connection with the upcoming arbitration on the discharge. *Id.* The employer asserted it had no obligation to comply with the information request, claiming that it was an attempt by the union for pre-arbitration discovery. *Id.* slip op., at 21. The Board affirmed the trial judge who found that “at the pre-arbitration stage, a party can request substantive information

pertaining to the issues but not information about the parties' presentation of its case before the arbitrator.” *Id.* slip op., at 1, 21. *Thus, in relationship to the ban on pre-arbitration discovery, the Board focuses on the nature of the information requested, making a distinction between information that delves into litigation strategy and preparation which is deemed improper pre-arbitration discovery, as opposed to substantive information which must be produced.* (Italics added) *Id.* at 21.

An unreasonable delay in furnishing necessary information is as much of a violation of Section 8(b)(3) of the Act as a refusal to furnish the information at all. See *General Drivers Local No. 89*, 365 NLRB No. 115, slip op. (2017). “[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). To determine whether a party has failed to furnish information in a timely manner, the Board considers a variety of factors, including the nature of the information sought (including whether the requested information sought is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party. *Local No. 89*, 365 NLRB No. 115.

II. *Respondent Violated Section 8(b)(3) When It Refused to Provide Substantive Information Pertaining to the Arbitrable Issue of the Parties' Agreement Regarding Excess Health Care Costs for Pre-65 Retirees*¹⁰

By refusing to provide the information requested in bullet points 1, 2, and 4, of the Employer's February 18 information request, Respondent violated Section 8(b)(3).

When, on June 7, 2019, Respondent filed grievance 19-05-G claiming the Employer was not honoring the parties' agreement concerning pre-65 retiree health care costs, and provided the Summary as proof of the terms concerning pre-65 retiree health care costs, the issue between the parties, and for the arbitrator, became, in part, whether the terms contained in the Summary are, in fact, the agreed-to terms between the parties regarding pre-65 retiree health care expenses.

As stated in *Oncor Electric Co.*, the critical question is whether the Employer requested substantive information pertaining to the arbitral issue.¹¹ *Oncor Electric Co.*, 365 NLRB slip op. at 21. In the present case, the arbitrable issue is whether the parties' agreed-to terms are the terms identified in the Summary. Directly pertinent to that question, the Employer requested the most obviously relevant information concerning that issue: (1) documents showing that the proposed terms of the Summary were ever accepted by Respondent; (2) documents showing that the terms of the Summary were made part of the CBA or any modification of the CBA; and (3) documents showing that

¹⁰ Paragraphs 6(a), (b), and (c) of the Complaint and Notice of Hearing addresses the allegation that Respondent violated Section 8(b)(3) of the Act by failing or refusing to provide relevant and necessary information contained in bullet points 1, 2, and 4 of the Employer's February 18 information request.

¹¹ Respondent may argue that the Board does not allow for information requests after a party has moved for arbitration. The ALJ should easily reject this claim. The facts in *Oncor Electric* make clear that both the ALJ and Board in that case considered facts in a case in which a party filed an information request after arbitration had been scheduled. Moreover, in *Hamilton Health*, the information request at issue in that case was made after the arbitration began. 365 NLRB No. 117.

the parties behaved as if the terms of the Summary were the agreed-to terms regarding pre-65 retiree health care costs.

Respondent's defense of pre-arbitration discovery amounts to a claim that the requested information is so obviously relevant to the arbitrable issue that Respondent would of course use that same information at arbitration to satisfy its burden of proof. Respondent admitted as much when Wedge, at the opening of the arbitration, expressed frustration at having to turn over documents he intended to use at arbitration. (Rx6, pg. 88, 89) However, the Board clearly rejects any notion that because requested information is relevant to the issues before an arbitrator, it automatically constitutes pre-arbitration discovery. See *Cal. Nurses Assn.*, 326 NLRB 1362. Had the Board adopted such a position, it would make information requests a nullity since all that would be provided would be irrelevant information.

The facts in *Cal. Nurses Assn.* are instructive to the present case. In *Cal. Nurses Assn.* the employer asked the union for both facts and documents relevant to the arbitrable issues and sought the specific names of witnesses and documents the union intended to use at arbitration. *Cal. Nurses Assn.* 326 NLRB at. 1362. Obviously, the Board understood there could be overlap between these categories or requests, however, the Board struck the balance that the union in that case had to produce all relevant facts and documents but did not have to provide the specific names of witnesses or identify the specific exhibits the union intended to use at arbitration. The Board distinguished the need to furnish relevant substantive information from a specific request for witness names and identified exhibits with the former being permissible, and the latter impermissible.

In the present case, the Employer never specifically requested Respondent's witness names or exhibits; nor did it request Respondent's trial strategy or preparations. Rather, the Employer requested information that showed or would show that the terms of the Summary were the agreed-to terms regarding pre-65 retiree health care cost as proffered by Respondent. Applying some common sense to the issue, Respondent should want to provide the information since it arguably constitutes its contractual rationale for filing and attempting to settle the underlying grievance. It goes without saying that the Board envisioned this as a basis for requiring the exchange of relevant information.

Based on the arguments and case law cited above, the ALJ should find Respondent violated Section 8(b)(3) by refusing to provide the Employer with the information requested in bullet points 1, 2, and 4 of the February 18 information request.

III. Respondent Violated Section 8(b)(3) by Failing to Promptly Provide Requested Information¹²

By initially claiming to have no responsive documents to bullet point 3 of the Employer's February 18 information request, and then suddenly providing responsive documents only after an arbitrator advised it to do so, Respondent violated Section 8(b)(3).

A mere two days before the start of the scheduled arbitration, Respondent glibly responded to bullet point 3 of the Employer's information request by stating:

The Union does not possess any documents matching this description. That is the Union does not possess any documents that

¹² Paragraphs 6(a) and (d) of the Complaint and Notice of Hearing addresses the allegation that Respondent violated Section 8(b)(3) of the Act by unreasonably delaying in furnishing information contained in bullet point 3 of the Employer's February 18 information request.

deal with passing along to Retirees any cost in excess of the Cap Letters appended in the 2010, 2012 and 2017 Labor Agreements.

However, when the arbitrator advised Respondent to provide responsive documents in their possession, Respondent suddenly had documents responsive to bullet point 3 and provided the information approximately five days later.

When considering the factors identified by the Board in *General Drivers Local No. 89*, 365 NLRB No. 115, it is clear Respondent failed to make a good faith effort to comply with bullet point 3 of the Employer's February 18 information request. First, the information requested in bullet point 3 was time sensitive due to the pending arbitration. Second, Respondent offered no evidence that it had difficulty obtaining the requested information once the arbitrator advised Respondent to produce the information in question. Next, Respondent provided no reason for the initial response that the information did not exist, and never communicated the reason for the delay or for its initial response.¹³ Additionally, Respondent never informed the Employer that the documents it had were likely in the Employer's possession already.¹⁴ Thus, Respondent cannot claim that it acted in good faith in its response that it did not possess documents in response to bullet point 3. Therefore, the ALJ should find Respondent violated Section 8(b)(3) by unnecessarily delaying production of the requested information in bullet point 3.

¹³ Wedge, while on the record in the arbitration hearing, referenced "company generated documents" Respondent intended to use at arbitration. (GCx7, pgs. 87, 89) It is likely that Wedge was referring to the documents ultimately provided in response to bullet point 3 of the Employer's information request. If so, that would make Respondent's initial response to bullet point 3 on February 25 a blatant lie.

¹⁴ The ALJ should reject any argument from Respondent that it did not have to provide the documents in its possession responsive to bullet point 3 because the documents were either company generated documents or were already in the Employer's possession. The Board makes clear that Respondent had the legal obligation to notify the Employer that documents responsive to bullet point 3 were already in the Employer's possession if that is its defense, which it did not do. See. *Cal. Nurses Assn.*, 326 NLRB 1362.

APPENDIX I – PROPOSED ORDER

That Respondent, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Industrial and Service Workers International Union, AFL-CIO-CLC, Local 5668, its officers, agents, successors, and assigns be ordered to:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Employer, by failing and refusing to furnish it with necessary and relevant information in advance of arbitration including the following information contained in the Employer’s February 18 information request:

- All documents in the Union’s possession or under its control which show or are evidence that the “Pechiney Rolled Products Proposed Retiree Health Care Summary” signed by Jim Guillow ever became a part of any labor agreement or became an agreed upon modification of any existing agreement;
- All documents in the Union’s possession or under its control which show or are evidence that the “Pechiney Rolled Products Proposed Retiree Health Care Summary” signed by Jim Guillow was ever signed or accepted in writing by the Union;
- All documents in the Union’s possession or under its control on which it relies to show that the excess retiree health care costs (meaning those costs in excess of the caps set forth in the cap letters) were ever intended by the Company and Union to limit retiree costs to \$250 per month.

(b) Refusing to bargain with the Employer by unreasonably delaying in providing responses to requests for relevant information.

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

Act:

(a) Furnish to the Employer in a timely manner the information requested by the Employer in its February 18 information including:

- All documents in the Union's possession or under its control which show or are evidence that the "Pechiney Rolled Products Proposed Retiree Health Care Summary" signed by Jim Guillow ever became a part of any labor agreement or became an agreed upon modification of any existing agreement;
- All documents in the Union's possession or under its control which show or are evidence that the "Pechiney Rolled Products Proposed Retiree Health Care Summary" signed by Jim Guillow was ever signed or accepted in writing by the Union;
- All documents in the Union's possession or under its control on which it relies to show that the excess retiree health care costs (meaning those costs in excess of the caps set forth in the cap letters) were ever intended by the Company and Union to limit retiree costs to \$250 per month.

(b) Within 14 days after service by Region 9, post at its business offices and meeting halls copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Also, Respondent shall post the notice in any location at the Employer's facility in which Respondent posts notices or information to its members. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its member employees by such means. Steps shall be

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

APPENDIX II – (Proposed) NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with **Constellium Rolled Products Ravenswood, LLC**. by refusing to furnish it with relevant requested information or by unreasonably delaying in providing it with relevant information.

WE WILL furnish to **Constellium Rolled Products Ravenswood, LLC**. in a timely manner the information it requested on February 18, 2020, identified in bullet points, 1, 2, and 4.

WE WILL NOT restrain and coerce employees' rights protected under Section 7 of the Act.

CERTIFICATE OF SERVICE

This is to certify that on November 12, 2020, a copy of the Brief of the counsel for the General Counsel was served by e-mail on:

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