

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 14, 2018

TO: John Doyle, Regional Director
Region 10

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: United States Postal Service
Case 10-CA-220727

530-6067-6001-3700
530-6067-6001-3755

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act by failing and refusing to produce subcontracting information requested by the Union. We conclude that the Employer violated Section 8(a)(5) because the relevance of the information was clearly apparent, and the Employer did not dispute the relevance or establish any other defense for its failure to produce the information. Accordingly, the Region should issue complaint, absent settlement.

FACTS

The Charging Party, American Postal Workers Union – Atlanta Metro Area Local 32, (“the Union”) represents employees of the United States Postal Service (“the Employer”) at the North Metro Processing and Distribution Center in Atlanta, Georgia. The parties are subject to a nation-wide collective-bargaining agreement in effect from May 21, 2015 to September 20, 2018.¹ The bargaining unit is separated into numerous craft divisions, including the Maintenance Craft unit relevant in this case.

The collective-bargaining agreement contains the following language in Article 32 Subcontracting:

¹ All remaining dates are in 2018.

- A. The Employer will give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees when evaluating the need to subcontract.
- B. The Employer will give advance notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet with the Union while developing the initial Comparative Analysis report. The Employer will consider the Union's views on costs and other factors, together with proposals to avoid subcontracting and proposals to minimize the impact of any subcontracting. A statement of the Union's views and proposals will be included in the initial Comparative Analysis and in any Decision Analysis Report relating to the subcontracting under consideration. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union.
- C. When a decision has been made at the Field level to subcontract bargaining unit work, the Union at the Local level will be given notification.

On March 26, the Union requested from the Employer "all documents that management relied upon to make the decision to subcontract" certain fire system equipment work, the name of the official who made the decision, documents about payments for the subcontracted work, and decision analysis documents for the cost comparisons done before subcontracting this work.

The next day, the Employer responded to the Union, saying unit employees are not certified to repair the fire system equipment, and provided the Union with a copy of a document describing the Employer's consideration of each element required by the collective-bargaining agreement when deciding whether to subcontract work. On that same day, the Union requested documents about subcontracting for numerous other projects.

On April 3, the Union requested documents relating to the Employer's subcontracting of two additional maintenance projects, and submitted follow-up requests for information about the fire system equipment work, including a request for information about the Employer's claim that unit employees were not sufficiently certified on fire system equipment.

On May 16, the Union renewed several of its previous, unanswered requests. The Employer did not provide any information or response to the Union regarding any of these requests. On about July 13, the Employer orally informed the Union that it was

seeking information from sources outside of the facility about a few of the subcontracting projects that the Union had asked about. However, the Employer never followed up with the Union with any response about that information.

The information request form used by the Union for all of the information requests at issue in this case included the following statement on the template: “We request that the following documents and/or witnesses be made available to us in order to properly identify whether or not a grievance does exist and, if so, their relevancy to the grievance.” The Employer never challenged the relevance of any of the Union’s requests for information or asserted any other reasons for failing to provide information.

ACTION

We conclude that the Employer violated Section 8(a)(5) because the relevance of the subcontracting information requested by the Union was clearly apparent and the Employer did not dispute the relevance or establish any other defense for its failure to produce the requested information. The Region should therefore issue complaint, absent settlement.

A collective-bargaining representative is entitled to information relevant and necessary to carrying out its statutory duties and responsibilities, including negotiating over mandatory bargaining subjects and policing a collective-bargaining agreement.² When the requested information deals with the terms and conditions of employment of bargaining unit employees, the Board will deem the information presumptively relevant and necessary to the union’s performance of its statutory duties.³ Where the information requested by a union is not presumptively relevant, the burden is on the union to demonstrate its relevance.⁴ Information about

² See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979) (citing *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967), and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)).

³ See, e.g., *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (citing *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enfd.*, 347 F.2d 61 (3d Cir. 1965)); see also *Fleming Cos.*, 332 NLRB 1086, 1086-87 (2000) (finding employer should have provided union with grievant’s personnel file, work rules, other disciplinary actions taken, and a list of names and contact information for all unit employees employed by respondent’s predecessor).

⁴ *Disneyland Park*, 350 NLRB 1256, 1257-58 (2007) (although contract term prohibited the employer from subcontracting work to evade bargaining obligation,

subcontracting is not presumptively relevant and therefore a union seeking such information must demonstrate its relevance.⁵ The Board applies a liberal discovery-type standard in determining whether information is relevant to a union's statutory functions.⁶ Potential or probable relevance is sufficient to trigger a duty to furnish information.⁷ To demonstrate relevance, the General Counsel must present evidence that (1) the union requesting the information demonstrated relevance of the non-presumptively relevant information, or (2) that the relevance of the information "should have been apparent" to the respondent under the circumstances.⁸

Here, although the information requested by the Union related to subcontracting and therefore was not presumptively relevant, its relevance should nevertheless have been apparent to the Employer.⁹ Thus, the requested information would have allowed the Union to evaluate the subcontracting decisions and file grievances if it appeared that, e.g., the Employer had not adequately considered the contractual factors prior to subcontracting unit work and the work should have been assigned to bargaining unit employees.¹⁰ Rather than questioning or disputing the relevance of any of the Union's

union never made claim that any subcontracting had that evasive purpose, and union must do more than cite contract provision to prove relevance of subcontracting agreements).

⁵ *Disneyland Park*, 350 NLRB at 1258; *Richmond Health Care*, 332 NLRB 1304, 1305 n.1 (2000).

⁶ *Acme Indus. Co.*, 385 U.S. at 437.

⁷ *Disneyland Park*, 350 NLRB at 1258.

⁸ *Id.*, citing *Allison Co.*, 330 NLRB 1363, 1367 n.23 (2000). See, e.g., *Marathon Petroleum Co. d/b/a Catlettsburg Refining*, 366 NLRB No. 125, slip op. at 6-7 (July 18, 2018) (relevance of requested subcontracting information established by surrounding circumstances and union's demonstration). As discussed below, it is the General Counsel's view that the requesting party cannot simply argue that relevance should have been "apparent" under *Disneyland*, without further explanation, once relevance has been contested. Rather, the parties have an obligation to engage with each other over whether and how the information is relevant, instead of simply litigating before the Board whether the relevance of the information should have been apparent.

⁹ See *Disneyland Park*, 350 NLRB at 1258.

¹⁰ See *Marathon Petroleum Co. d/b/a Catlettsburg Refining*, 366 NLRB No. 125, slip op. at 6-7 (the requested information about subcontracting was relevant because the

requests, the Employer simply refused to provide most of the information. Moreover, the Employer never claimed that the information requested by the Union did not exist.¹¹ While the Employer eventually told the Union that it was contacting a third party about obtaining information in response to several of the requests,¹² it never apprised the Union of the result of such an attempt or said anything about information in the Employer's possession that was responsive to the request.

Since the Employer did not challenge the relevance of the requested information, and we have determined that it was in fact relevant, the Employer was obligated to provide the information to the Union. Had the Employer challenged the relevance of the Union's information request, the General Counsel believes that the Union would not have been able to rely on the apparent relevance of its request and instead would have had to respond to the Employer and establish the relevance of the information through an interactive process in order to preserve the unfair labor practice allegation.¹³ Requiring parties to engage in an interactive process comports with the

union could use it to show that unit employees could perform the work of the contractors more efficiently). *Cf. Disneyland Park*, 350 NLRB at 1258-59 (in finding that the relevance of the request for subcontracting information was not apparent from the surrounding circumstances, the Board held that the union needed to do more than just cite a provision in the collective-bargaining agreement and instead must set forth at least some facts to support a reasonable belief that the information sought was relevant).

¹¹ Even if the requested information does not exist, the party asserting that fact must timely inform the requester that the information does not exist. *See Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014), *enfd. mem.* 679 F.App'x 614 (9th Cir. 2017).

¹² *See, e.g., Sea Jet Trucking Corp.*, 327 NLRB 540, 547 (1999) ("Requested information which is not in the employer's possession must be provided if it can be obtained from a third party with whom the employer has some relationship.") *petition for review denied per curiam*, 221 F.3d 196 (D.C. Cir. 2000); *Arch of West Virginia, Inc.*, 304 NLRB 1089, 1089 n.1 (1991) (in order to establish that relevant information concerning alleged single employer relationship is unavailable, respondent must show that it requested the information from its parent corporation and sister subsidiaries and that they have refused to provide the information).

¹³ *See First Transit, Inc.*, Case 09-CA-219680, Advice Memorandum dated Oct. 19, 2018, at 5-7. *See also United Parcel Service of America, Inc.*, 362 NLRB No. 22, slip op. at 3 (2015) (if an employer has effectively rebutted the presumption of relevance of requested documents, the union must respond and "may not ignore the employer's concerns or refuse to discuss a possible accommodation, even when the requested

Act's Section 8(d) mutual obligation requirement that an employer and union "meet at reasonable times and confer in good faith." Additionally, it encourages parties to resolve disputes regarding requested information between themselves through a greater understanding of their mutual positions with respect to the information. Moreover, should the parties fail to resolve the dispute after engaging in this interactive process, the Board will be better able to evaluate whether the information should have been produced without having to engage in speculation about the requester's actual need for the information and the other party's real reason for not producing it. Here, however, since the Employer did not challenge the relevance of the Union's information requests, and the information sought was in fact relevant for purposes of policing the collective-bargaining agreement, the Employer's failure to provide the information violated Section 8(a)(5).

Accordingly, the Region should issue complaint, absent settlement.

/s/
J.L.S.

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information is presumptively relevant"); *IGT d/b/a International Game Technology*, 366 NLRB No. 170, slip op. at 2 & fn.7 (Aug. 24, 2018) (employer not required to provide union with information about all locations because the union failed to respond to the employer's request for an explanation of relevance of the other locations).