UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SOLUTION ONE INDUSTRIES, INC.,

Respondent,

vs.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,

Charging Party.

Case No. 09-CA-281081
09-CA-282143
09-CA-284213

POST-HEARING BRIEF ON BEHALF OF RESPONDENT
SOLUTION ONE INDUSTRIES, INC.

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I. INTRODUCTION

Solution One Industries, Inc. (“SOI” or the “Company”) is a defense contractor with a facility at the Bluegrass Station in Lexington, Kentucky. A portion of its employees are represented by the International Association of Machinists and Aerospace Workers, AFL-CIO (the “Union”).

The Union, through the Region, has asserted claims against SOI related to the resolution of grievances, pay for the Juneteenth holiday, SOI’s use of temporary labor, and information and documents SOI produced in response to the Union’s requests for information.

However, as will be demonstrated below, these claims are wholly without merit. Instead, these claims are a clear representation of the Union’s efforts to play a “gotcha” game, waiting for any small issue to assert charges the SOI, rather than working with the Company to develop a productive and cooperative relationship. For example, not once has the Union reached out to SOI to request supplementation to any of SOI’s responses to the requests for information that the Union contends are deficient. Instead, the Union filed charges and elected not raise the issue with SOI again until at the hearing. SOI, on the other hand, continues to work with the Union, maintaining open communication lines and addressing grievances. The Union should not be awarded for such tactics.

As all claims against SOI are without any factual or legal merit they must be dismissed.

II. STATEMENT OF FACTS

A. Background

SOI is a unique, multi-faceted defense sector company that was founded in 2003. (Tr. 391).1 It does everything from providing professional services to aid NASA’s work on

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1 Portions of the hearing transcript are referred to herein as “Tr. ____.” Joint Exhibits shall be referred to as “Jt. Ex. ____,” SOI’s Exhibits as “Co. Ex. ____,” and the General Counsel’s Exhibits as “GC Ex. ____.”
propulsion systems, performing engineering work to support bases, and even providing general logistic support. (Tr. 391-92). The logistic support SOI provides is specifically in the areas of transportation, shipping and receiving, and warehousing. (Tr. 392).

The SOI’s facility at issue here is located at the Bluegrass Station, a military facility in Lexington, Kentucky. (Tr. 393). There, SOI is a subcontractor to Lockheed Martin (“Lockheed”), the prime contractor to the federal government for logistics support at that facility. (Tr. 393). As a subcontractor to Lockheed, SOI operates as Lockheed’s executing arm in the areas of storage, warehouse, receiving, and field returns. (Tr. 395). This includes: cataloguing and storing items that return from the field, ensuring no classified material remains; cataloguing and either storing or shipping out items that were ordered from vendors; and, performing an annual inventory of all items stored. (Tr. 399, 401-03). This role can be very demanding due to the type of military groups based out of the Bluegrass Station – special operators (“special ops”) forces. (Tr. 395, 397-98).

SOI began work at Bluegrass Station in October 2017. (Tr. 431). At that time, SOI bridged a previously existing contract with the Union at the Bluegrass Station and then later entered into a new agreement with the Union. (Tr. 432). The current iteration of the Parties’ Collective Bargaining Agreement (“CBA”) is their third labor contract to date. (Tr. 432).

**B. Relevant Contractual Provisions**

Relevant portions of the Parties’ current CBA are as follows:

**PREAMBLE**

**5 Subcontracting**

It is not the intent of the Company to use on-site or off-site contractors for the purpose of reducing or transferring the work ordinarily performed by employees in the bargaining unit. If because of technological change, modifications to the Company’s contractual requirements, surges, or other revised business requirements, the Company considers such subcontracting or outsourcing, it will
notify the Business Representative or his/her designee of the Union as soon as practicable. Such decision shall not contribute to the layoff of Bargaining Unit employees. This in no way infringes on the Government’s or Customer’s right to subcontract work, or to direct the Company to subcontract work in writing. Any subcontractors brought in by the company will become signatory to the CBA as well.

…

ARTICLE 3 CONTRACT REQUIREMENTS

The Union recognizes that the company is a subcontractor to the customer, which is a contractor to the Federal Government and that the Company is required at all times to meet its contractual obligations. The Union and the Company recognize that the Customer or Government may impose various demands or obligations upon the Company and its employees. If such action affects any terms or conditions of this Agreement, the Company and the Union will meet to work out a mutually-agreeable solution. If an agreeable solution cannot be reached, the matter maybe submitted through the grievance/arbitration procedure. However, the Company and the Union agree to comply with any requirement imposed to the degree necessary, subject to rebuttal by either or both parties through the grievance and arbitration procedure, if deemed necessary.

…

ARTICLE 9 GRIEVANCES

9.1 Definition of a Grievance

Grievances are defined as any alleged violation of the terms of this Agreement, company policy, Federal or state laws. An earnest effort shall be made between the employee and Supervisor/Manager to settle such grievance promptly. Each party acknowledges that it is in the best interest of both parties to settle disputes at the lowest level possible.

9.1.1 Grievance Time Limits

a. In the event the Company does not answer a grievance within the time limits set forth in the grievance procedure, the grievance shall be considered settled on the basis of the Union’s written request. Any grievance that is not instituted by the employee or referred by the Union to the next appropriate step within the time limit specified in the grievance procedure shall be considered settled in favor of the Company.

b. The parties shall grant, on a case by case basis, prior to the expiration of the time limits, time limit extensions on all grievances appealed beyond Step 1 of the grievance procedure. Such extension of time limits must be made in writing and acknowledged by signature or initial by the other party.
While the granting of this extension will be made without question, both parties affirm their conviction that the timely resolution of grievances is in the mutual best interest of all parties.

c. In those instances when a grievance resolution is accomplished in Step 1, Step 2, Step 3 or pre-arbitration resulting in a monetary settlement, the payment will be made within 30 days from the date of the settlement of the grievance.

An example of the intent of this clause is if there is a grievance regarding a shortage of pay, etc. that the Company agrees to pay the employee to settle the grievance, the payment will be made within 30 days.

9.2 Grievance Procedure

Step 1. The agreement endorses the concept of settling grievances at the lowest possible level. Accordingly, any employee alleging a complaint will, within four (4) working days after he/she knowing of the facts giving rise of the alleged violation, meet with his/her immediate supervisor, Program Manager and area Shop Steward and attempt to resolve the complaint. This oral step is mandatory prior to any grievance being reduced to writing.

Step 1 will not be applicable in cases of discharge or suspension for cause or of involuntary resignation. Discharge or suspension shall proceed directly to step 3.

Step 2. Grievance Reduced to Writing. Both parties encourage the verbal resolution of disputes as quickly as possible. An aggrieved employee, with his/her Chief Steward may, within ten (10) working days, reduce to writing a statement of the grievance and shall submit it to their supervisor and the Program Manager. This statement attested to by signature of the grievant, must contain the following:

a. The facts upon which the grievance is based; clearly state what and how the article in this Agreement is claimed to have been violated.

b. The remedy sought.

The employee’s immediate supervisor and/or the manager responsible for alleged violation will record on the grievance the date the grievance was submitted to him/her. This step will be between the grievant, his/her supervisor, the Program Manager, and the area shop steward and chief steward of the Union. The supervisor and/or the manager responsible for alleged violation will return a copy of the grievance to the Union with his/her written disposition not later than two (2) working days from the date of which he/she received the written grievance.

Step 3. Written Grievance Handling at Union Representative/Company Representative Level. If no settlement is reached in Step 2 within the specified or mutually extended time limits, the Union Representative or his designee may, within (5) working days, submit the grievance to the Human Resources Manager
of the Company or designee. After such submission, the Human Resources Manager and the Program Manager of the Company or designee and the Union or designee thereof, shall, if the Human Resource Manager’s or his designated representative’s answer does not settle the grievance, the grievance shall be discussed at the next monthly meeting between the Human Resource Manager, or his designated representative. A Business Representative of the Union may be present at any step 3 grievance meeting. The Human Resource Manager, Program Manager or his designated representative, will answer the grievance in writing within five (5) regular working days after the date of this meeting at which it was discussed. A copy of the Company’s Step 3 answer will also be mailed to the District Lodge Office. The name(s) of the Company designee must be provided to the Union in writing and updated if any changes occur. Exceptions to timelines will be adjusted on a case by case basis at the request of either party.

**Step 4. Arbitration or Binding Mediation.** If no settlement is reached in Step 3 within the specified or mutually extended time limits, then either party may, in writing within ten (10) work days thereafter, request that the matter be submitted to an arbitrator or binding mediation in accordance with the provisions of Section 8 of this Article.

Note: Notwithstanding any provision of section 9.2, in any case and all cases where disciplinary action, whether oral, written or otherwise, is taken or contemplated to be taken by management, a Steward will be notified. Any grievance not submitted within the time frame outlined above will be barred.

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**ARTICLE 12 OVERTIME**

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**12.3 Designated Holidays**

Double time plus holiday pay shall be paid to any employee required to work on a designated holiday.

…

**ARTICLE 13 HOLIDAYS**

**13.1 Recognized Holidays**

Employees will be provided with 10 Holidays that mirror the Customer’s scheduled holidays, plus a floating holiday that can be taken on any day of the year with prior approval from the Company.
13.2 Holiday Observance

In the event any of the holidays listed above occur on a Saturday or Sunday, they shall be observed by the Contractor per the practice observed by the Customer. If the Customer designates a holiday in lieu of the holidays recognized in Section 13.1, the Company shall follow the same schedule. In addition to the holidays listed above, the Company will observe any holidays declared as a legal holiday by Congress or the President and observed by the military where the contractor employees are authorized to be paid.

…

ARTICLE 23 GOVERNMENT SECURITY CLEARANCES

…

23.2 Security Clearance Denial

It is understood by and between the parties hereto that, as a necessary condition of continued employment, employees shall be subject to investigation for security clearance or national agency check and/or unescorted entry authorization under regulations prescribed by the Department of Defense, or other agencies of United States Government on government work, and that denial of such clearance and/or unescorted entry authorization by such governmental agency shall be cause for release from the Company due to inability to meet job requirements.

(Jt. Ex. 1).

C. SOI’s Attempts To Create A More Productive Relationship And The Union’s Grievances

SOI routinely made efforts to create a better working relationship with the Union; however, these attempts were often ignored, or rebuffed. Instead of creating a cooperative, productive relationship, the Union instead chose to file grievance after grievance, amounting to a total of 70 grievances for 2021.² (Tr. 316).

On February 18, 2021, the Union filed the first grievance at issue, 2021-10, claiming that all bargaining unit employees were being forced “to use their PTO and PPL to gain Financial Gain at the cost of exhausting employees[‘] Paid time off.” (GC Ex. 2).

² For the sake of brevity, SOI will not address all 70 grievances that were filed by the Union last year. Rather, the Post-Hearing Brief will be constrained to those currently at issue.
The very next day, on February 19, 2021, the Union filed a near-identical grievance, 2021-12, claiming: “The Company continues to create a work environment full of confusion and distrust. The Company is forcing employees to use their earned PTO and PPL for lost days of employment due to Bluegrass Station being closed.” (GC Ex. 3).

Two days later, on February 22, 2021, the Union filed yet another grievance, 2021-13, this time specifically for employee Ron Evans, claiming: “Grievant was forced without [sic] to put in PTO due to inclement weather. Pay stub does not indicate use of PTO and was shorted.” (GC Ex. 4).

While these three grievances (particularly the first two class grievances) would have been sufficient to address the issue of whether PTO and PPL had to be exhausted with SOI, the Union then proceeded to file at least two more grievances on that topic, 2021-15 on February 23, 2021, and 2021-22 on March 11, 2021. (GC Exs. 5, 6).

On March 29, 2021, Jeff Scafaro, SOI’s then-Director of Employee and Labor Relations, reached out to Ryan McCarthy, the Union’s business representative for SOI’s Bluegrass Station location. (Tr. 44-45; Co. Ex. 8). In that email, Scafaro noted his frustration that grievances were being filed without much, if any, supporting information or evidence. (Co. Ex. 8). Scafaro asked that the grievances be more fully fleshed out because he’d “rather not deny grievances out of hand, but need[s] more information from the union to support its claims.” Id. In that same email, Scafaro also proposed moving several mediations forward and setting a standing monthly labor-management meeting – all efforts towards a more productive relationship. (Co. Ex. 8). That same day, Scafaro emailed Bryan Martin, the Union’s Chief Steward and an employee of SOI with Step II responses, including one to Grievance 2021-22. (Co. Ex. 9).
On April 13, 2021, Scafaro sent McCarthy Step III Grievance Responses from a meeting they had on April 1, 2021. (Co. Ex. 10). This addressed several of the PTO/PPL leave-related grievances at issue, including 2021-10, 2021-12, and 2021-15. The response to all three notes that the leave issue is addressed by the CBA, SOI followed the CBA, and the grievances are, therefore, denied. *Id.*

On April 30, 2021, the Union filed yet another grievance, this time claiming: “On or about April 26, 2021 the company terminated Drew Davenport for unjust cause.” (GC Ex. 7). Despite SOI’s previous request for more factually developed grievances from which SOI could make a meaningful evaluation of the grievance, the Union continued its process of filing these bare-boned grievances, here specifically failing to explain why Davenport should not have been terminated. *Id.*

D. **The May 2021 Meetings**

On May 11, 2021, Scafaro reached out to the Union’s representatives, both McCarthy and Martin, via email to discuss issues with receiving grievances and to schedule Step II and Step III meetings.3 (Co. Ex. 12). In that email, Scafaro specifically followed up about a potential Step II meeting for Monday, May 17, 2021, that SOI had proposed, but the Union had yet to confirm. *Id.* Regarding a potential Step III meeting, Scafaro recommended they hold the proposed Step II meeting on Monday first and then address the Step III meeting and mediations in a separate meeting later in the week. *Id.*

In that same email, Scafaro noted that, despite being SOI’s Director of Employee and Labor Relations, the grievances were not all being sent to him; rather, some were going to the local

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3 While Step III meetings are required by the CBA, there is no such requirement for Step II meetings. (Jt. Ex. 1). Rather, the Step II meetings are held “to keep the collaborative relationship with the Union, to resolve any lingering issues…[and] to build that relationship.” (Tr. 372).
Bluegrass Station team and others were going to SOI’s HR. (Co. Ex. 12). Given that issue and his need to be prepared for the upcoming Step II and Step III meetings, Scafaro requested a list of the grievances at issue, as well as a PDF copy of each grievance listed. McCarthy, however, elected not to provide that information. (Tr. 143).

Two days later, Scafaro reached out again to McCarthy and Martin in an effort to make progress on the Union’s grievances. (Co. Ex. 13). Scafaro noted that the Parties had previously agreed the Union would send agendas in advance of meetings to address anything they wanted to discuss. Id. While the Union had still yet to send an agenda, Scafaro remained amenable to a meeting the next week. Id. Similarly, he also followed up on his request for PDF copies of the grievances to be discussed the next week and an inventory of Step III grievances and mediations the Union wished to advance. Id. No such documents were provided by McCarthy. (Tr. 146-47).

On May 27, 2021, McCarthy sent SOI a letter via email claiming that a Step III meeting was held on May 13, 2021, regarding the grievances regarding PTO/PPL leave (2021-10, 2021-12, 2021-13, 2021-15, 2021-22) and the grievance regarding Davenport’s termination (2021-38). (GC Ex. 8). Moreover, it contended that because SOI did not timely respond to the Step III meeting, the grievances are deemed settled. Id.

Scafaro responded that day, pointing out that, while a meeting was held on May 13th, it was a Step II meeting, not a Step III, but he would be willing to set up a Step III meeting if requested by the Union. (GC Ex. 9). McCarthy’s reply email, however, claims that after the hearing on May 13, 2021, the Union suggested they move immediately on to the Step III meeting, to which he claims SOI agreed. Id. Notably, McCarthy’s email recounts a telephone conversation he and Scafaro had earlier that day: “You Called [sic] me today asking if I would allow you to give the Union answers to those grievances by the end of the day and I responded with no.” Id. McCarthy’s
reaction to a reasonable extension runs counter to clear language in the CBA encouraging the
Parties to grant requests for extensions and, in some instances, even requiring it. (Jt. Ex. 1).

McCarthy then threatened to file a charge with the Board should his demand for the
aforementioned grievances not be deemed resolved as requested by the Union. (GC Ex. 9). In an
effort to rise above such unproductive and needless threats, Scafaro suggested that the Union could
submit proposed dates in which to hold the Step III meeting for the grievances at issue. Id. No
further response was received from the Union.

E. The Union’s Continued Grievances

After failing to respond to SOI’s offer to schedule the Step III meeting, the Union continued
to file grievances against the Company. On June 1, 2021, the Union filed grievance 2021-42,
claiming that SOI failed to pay multiple employees for a holiday that occurred way back on
February 15, 2021 (President’s Day). (GC Ex. 10).

Two days later, the Union filed grievance 2021-43 asserting that “SOI Has been notified
of being past its time line [sic] for 3rd step response[s] for multiple grievances. SOI has refused
to adhere to the grievance procedure outline[d] in 9.1.1 grievance timelines.” (GC Ex. 11).

Around this time, SOI experienced some staffing changes. Scafaro left in early June and
Stacey Walker began around that time for a one-month period as the HR Manager at SOI’s
Bluegrass Station location. (Tr. 130, 419; Co. Ex. 18). Despite those changes in the SOI personnel
that deal directly with the Union, SOI still responded to the Union’s latest grievance in a June 8,
2021, letter from Walker. (Co. Ex. 18). There, SOI made its position clear that a Step III meeting
was not held on May 13, 2021; therefore, SOI’s deadline to respond to any purported Step III
grievances had not run. Id. As such, the Company did not consider the grievances resolved in the
Union’s favor.
On June 14, 2021, the Union claims that a Step II meeting occurred between Martin and Chris Bettancourt (SOI’s former project manager at Bluegrass Station). (Tr. 229-30). There, they purportedly discussed grievances 2021-42, 43, and 44.4

SOI continued to address the Union’s wave of grievances and on June 21, 2021, Walker sent the Union SOI’s Step III responses to various grievances, including to grievance 2021-21. (Co. Ex. 21). Shortly after that letter, Walker decided to leave SOI for other opportunities. (Tr. 419).

On July 21, 2021, the Union filed grievance 2021-49, claiming SOI had terminated Derrick Butner for unjust cause that day. (GC Ex. 16). Just as with the Drew Davenport grievance asserting termination for unjust cause, the grievance provided no facts, explanation, or context to demonstrate why Butner should not have been terminated. Id.

On July 22, 2021, the Union sent SOI a letter claiming that SOI never responded to the three Step II Grievances (2021-42, 43, and 44) and deemed all three to be settled in the Union’s favor. (GC Ex. 15).

The very next day, however, Valenda Taylor of SOI, sent the Step II answers to McCarthy. (Co. Ex. 23). The 2021-42 grievance was denied because the Company had paid all eligible employees for the President’s Day holiday earlier that year. Id. The 2021-43 grievance regarding the purportedly overdue responses following the May 13th meeting was also denied. Id. There, SOI reminded the Union that it had previously addressed this grievance in a letter from Stacey Walker. Id. While those two were denied, SOI was not just denying grievances out of hand. In fact, in that letter, the 2021-44 grievance, which was related to SOI providing company work shirts, was sustained. Id.

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4 Per the Second Consolidated Complaint, Grievance No. 2021-44 is not at issue in this matter.
Shortly thereafter, on August 2, 2021, SOI’s new Employee Labor Engagement Manager, Jamie Vermillion, sent SOI’s responses to the Step II grievances for 2021-47 (issues related to the payment of Juneteenth holiday pay), 2021-48 (regarding disciplinary points), and 2021-49 (the termination of Derrick Butner) to the Union. (Co. Ex. 24). Of those, 2021-48 was sustained, but the remainder denied. Id.

On August 12, 2021, the Union and SOI met for a Step III grievance meeting to address the Derrick Butner termination. At that time, SOI’s prime contractor, Lockheed, was still investigating the incident that had led to Butner’s termination. (Tr. 341). Vermillion recalled that SOI needed additional time to respond to the grievance because it was waiting on Lockheed to provide a copy of Lockheed’s disc regarding the incident. (Tr. 343-44). Vermillion’s understanding, as reflected in a letter she sent to the Union, was that at that meeting, SOI had requested additional time to investigate the termination and that was granted by the Union. (Co. Ex. 25; GC Ex. 18). While she could not recall the specifics at the hearing, Vermilion could not recall the Union denying any such request. (Tr. 344). The Union, however, wrote a letter on August 25, 2021, to SOI noting that no response was received in response to the Butner Step II grievance, it was overdue, and the Union considered the grievance to be settled in its favor. (GC Ex. 17). This is belied by both Vermillion’s letter and her notes from a September 10, 2021, meeting with the Union regarding outstanding grievances. There, Vermillion’s notes indicate that the Butner grievance (2021-49) and the Juneteenth Holiday grievance (2021-47) would both be proceeding to arbitration. (Co. Ex. 26).

F. The Juneteenth RFI

Within the last six months, the Union also sent the Company several requests for information. The first concerned the then-newly created federal holiday – Juneteenth. On June
18, 2021, McCarthy emailed Stacey Walker to inquire into whether the employees would have this holiday off and, if not, whether they would receive holiday pay. (GC Ex. 19). Walker advised McCarthy of the applicable language in the CBA indicating that SOI matches the schedule of Lockheed. *Id.* The Union then let ten days pass, until June 28, 2021, when it sent a request for information seeking:

1) A [c]opy of the letter requesting reimbursement for the Juneteenth Holiday pay to the Contracting Officer.

2) Contact information for the Contracting Office[; i.e. ([p]hone number, mailing address, email address[,] and phone number [sic])(].

3) Did the federal [e]mployees located at Bluegrass [S]tation receive the Juneteenth Holiday? (GC Ex. 1(j)).

Following receipt of that request, Tyrone McLaurin, the President and Chief Operating Officer of SOI, attempted to email McCarthy, stating: “The Union request is for several areas that’s languages already negotiated within our current CBA. Please call to discuss further.” (Co. Ex. 29).  

McLaurin and McCarthy later had a phone call regarding the Juneteenth request for information. McLaurin testified that during that call, he explained the CBA to McCarthy, the negotiations regarding same, that Lockheed was not recognizing the holiday, and that none of Lockheed’s employees or its subcontractors would get holiday pay for it. (Tr. 428-29). In fact, McLaurin had confirmed with Lockheed that it was not recognizing the holiday and had even reached out to Lockheed to ask that it provide an official response to the Union’s requests.

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5 At the hearing, it was revealed that McLaurin had inadvertently misspelled McCarthy’s email address and McCarthy never received the email. McLaurin, however, never received any sort of bounce back message noting the email was undeliverable. As such, he had no way of knowing the email went to the incorrect address. (Tr. 428).
McCarthy only recalls that McLaurin did in fact state during the call that SOI does not have a contract officer. (Tr. 82).

It makes sense that SOI would not have a contract, or contracting, officer. A contracting officer is a government official that has a warrant regarding obligations to the federal government. (Tr. 393). A prime contractor, such as Lockheed Martin in this instance, contracts directly with the government to provide services and would, in that instance report to the contracting officer. (Tr. 394). A subcontractor, such as SOI is here, would not have a contracting officer. (Tr. 396).

Since SOI had no contracting officer, it had no letter requesting reimbursement that it would have sent to the contracting officer, nor did it have that non-existent contracting officer’s contact information. (Tr. 425).

G. The Subcontractor RFI

The Union also sent requests for information to SOI regarding a subcontractor it had engaged with, Sterile Solutions, to provide temporary labor at the Bluegrass Station facility, all of which was permitted under the CBA.

In 2021, SOI dealt with a perfect storm of factors that required it to utilize a subcontractor for temporary labor. First, SOI was and is currently understaffed. While it has the authorization to have more than 220 employees, SOI currently only employs approximately 150. (Tr. 410). COVID-19 has also caused personnel shortages.

To add to the difficulties of being understaffed, SOI also experienced a surge of work. As Misty Jones, the current operations manager at SOI’s Bluegrass Station’s location, testified, it is the busiest she has seen there in her 18 years employed at the Bluegrass Station. (Tr. 369, 373-74). This surge in work has come from both the end of the war in Afghanistan and a concurrent increase in deployments elsewhere throughout the world. (Tr. 412). While SOI’s prime
contractor, Lockheed, has experienced similar increases in work, Lockheed has not had the funding to perform overtime, which means that SOI is required to handle even more work from the work Lockheed cannot get to in its normal hours. (Tr. 412-13).

SOI has tried to recruit and hire new employees, but those efforts have been made exponentially more difficult by the fact that all SOI employees are required to obtain a finalized secret security clearance. (Tr. 403-04, 406; Jt. Ex. 1 at 25). While interim clearances are available, those are insufficient to work at SOI under the federal government’s current requirements. (Tr. 406).

The process to get this secret level of clearance can take a long time. Clearances are processed by the Defense Security Service. (Tr. 404). From his current experience as the President and COO of SOI and from his previous experience as a Facility and Security Officer, McLaurin testified that, on average, it takes approximately eight to twelve months for the secret security clearance process to be completed. (Tr. 407-08). While this may be sped up if the applicant previously had a valid clearance within the past five years, the likelihood of finding such individuals in the Lexington, Kentucky area is much lower than in other areas given that there are no major military installations nearby. (Tr. 408-10). This all makes hiring an adequate amount of staff challenging for SOI in the Lexington, Kentucky area.

With an understaffed workforce, a significant surge in work, and difficulty in hiring new employees, SOI was often forced to have its employees work overtime (almost every week since November 2020 to just recently). (Tr. 375). While SOI would first seek volunteers to fill its overtime needs, only a couple shifts since November 2020 have ever been completely covered by volunteers. Id. SOI is then forced to go by seniority, from the lowest to the most senior, in mandating overtime. Id. The SOI employees were displeased by the mandated overtime
requirements and there were instances of individuals not showing up for those shifts, not calling, or just showing up for an hour and then leaving work. (Tr. 376).

For these reasons, SOI decided to contract with Sterile Solutions for temporary labor, which began around July or August of 2021. Prior to having the Sterile temporary workforce begin work at Bluegrass Station, McLaurin first informed the then-program manager, Chris Bettencourt, of this decision, who then proceeded to inform the Union. (Tr. 420).

The Sterile temporary workers performed different jobs from the SOI employees, and specifically did not perform the same work as the bargaining unit employees. (Tr. 388). As noted above, SOI employees must have secret clearance. This means that they are also able to have a CAC card and are able to access the secure military facilities without being escorted. (Tr. 382). The Sterile workers do not have a security clearance. Id. Without that clearance, the Sterile workers cannot operate “MHE,” such as forklifts or cherry pickers, nor are they able to access the government computers. Id. They also generally cannot work in a secured area of the facility called “behind the fence,” with the sole exception being Building 220 and only if they are escorted. (Tr. 386-87).

While the SOI employees can do those things (operating MHE vehicles, working on government computers, and accessing the area behind the fence), the Sterile employees were limited to manual labor jobs, such as verifying material, boxing up material, pulling manual tickets, paper tickets, and sanitizing in certain areas. (Tr. 381, 384-85).

These Sterile workers were easily identifiable to those at the subject facility because the Sterile workers were required to wear red visitor badges or a white temporary badge, whereas SOI employees have a badge specific to them with their picture on it. (Tr. 383).
On July 22, 2021, the Union sent SOI a request for information related to temporary labor retained through SOI’s subcontractor Sterile, to which it followed up on August 6, 2021. (GC Exs. 1(j) and 21). On September 16, 2021, SOI responded to the Union’s requests by: (1) identifying Sterile; (2) disclosing the reason the temporary workers have been arranged; (3) clarifying that no Sterile employees have been hired and that no bargaining unit employees will be laid off as a result of the temporary labor; (4) clarifying that no additional employees will be working for SOI; and (5) definitively stating that no Sterile employees will be performing the work of any bargaining unit members. (GC Ex. 22).

The only area SOI declined to provide information was in response to a request for the temporary workers’ pay rate, which is irrelevant because it seeks information regarding individuals outside the bargaining unit and, moreover, seeks information about a subcontractor SOI is lawfully permitted to retain under the CBA. *Id.* Importantly, at no time has the Union ever followed up on SOI’s responses to request supplementation.

At the beginning of this year, SOI stopped using Sterile’s temporary labor. (Tr. 451). No bargaining unit employee was laid off, or lost overtime opportunities, as a result of the use of Sterile employees. (Tr. 452). Meanwhile, SOI continues its hiring efforts, even hiring several of the Sterile workers who were able to obtain security clearances and could now join the bargaining unit or may have already. *Id.*

**H. The Terminated Employees RFIs**

On July 22, 2021, the Union sent two requests for information to SOI regarding the terminations of Derrick Butner and Drew Davenport. (GC Ex. 1(j)). Both asked for identical categories of information:

1. The terminated employee’s personnel file;
2. The name and date of hire of all employees and all statements associated with this matter;

3. The manager[s’] names, locations, shifts, and all information related to the termination from the managers;

4. “A copy of any and all employee discipline which may be similar or like as used in the disciplinary action up to [and] including termination as issued to [the terminated employee].”;

5. All documents related to progressive discipline and the company’s alleged “just cause” determination; and,

6. The names of the Union Steward and Company representative who were present at any of the disciplinary meetings involving the investigation or up through the termination.

*Id.* These letters were not sent to Jaime Vermillion, SOI’s Employee Labor Engagement Manager who resides in Kentucky; rather, they were mailed to SOI’s corporate office in Texas. (Tr. 322-23). Vermillion only received them weeks later, after a HR manager went to the corporate headquarters for training and returned with those documents.

On August 6, 2021, the Union resent the requests by email and certified mail. (GC Exs. 23-24). That day, McLaurin responded to the emailed requests for information, acknowledging the requests, indicating that SOI would have a response by August 11, 2021, and advising the Union that all CBA-related questions were to be directed to Vermillion, while cc’ing the program manager, the Sr. HR manager, and McLaurin. (Co. Ex. 37). On August 11, 2021, McLaurin notified the Union that the responses would be sent via certified mail. (Co. Ex. 38).

Vermillion prepared the responses to these requests: producing the terminated employees’ personnel files; providing the names and dates of hire of all relevant SOI employees; noting there were no other similar incident by other bargaining unit employees; producing the investigation notes; and placing the video of the accidents on thumb drives. (Tr. 328-30; Co. Exs. 50, 51). On September 2, 2021, Vermillion then prepared the packages with these responses and document
production and mailed them to the Union via certified mail. (Tr. 333; Co. Ex. 49). At that time, Vermillion was wholly unaware Union had filed a charge regarding the Butner and Davenport requests for information just a few days earlier on August 27, 2021. (Tr. 321). In other words, the charge in no way motivated Vermillion’s preparation and mailing of the responses.

Later that month, using the tracking information from the certified mail receipts, Vermillion was able to determine that delivery attempts of the package were made, but the Post Office had no access to the delivery location. (Co. Ex. 54). Since it had not yet been received, Vermillion went ahead and sent the contents of the package to the Union via email, but did not include the video because, for security reasons, video of secure areas is not allowed to be emailed. (Tr. 329, 334; Co. Ex. 52).

On September 28, 2021, after the package had been in transit for almost a month, Vermillion inquired into its location with the Post Office and was told it was still waiting pick up by the Union, despite the Union having been a sent a “pink slip” requesting a recipient come and pick up a package directly from the Post Office. (Tr. 336; Co. Ex. 53). On top of that, Vermillion was advised the Union had a change of address; yet, the Union never advised her of same. Id. Since the package had not been picked up, Vermillion requested it be returned to her home address, and it was. Id.

Since then, the Union has never sent any communication to SOI requesting any supplementation of those discovery responses, or noting any deficiencies therein. (Tr. 365-66, 454). The Union was on notice that there was video of the subject accidents – in fact, obtaining that video is what caused the delay; yet, the Union never once followed up requesting additional documents or information. Id.
I. Procedural Background

On August 10, 2021, the Union filed charge 9-CA-281081, alleging that SOI failed to provide information requested regarding the Juneteenth Holiday pay. (GC Ex. 1(a)). On August 27, 2021, the Union filed charge 09-CA-282143, claiming SOI failed to respond to the requests for information related to Butner, Davenport, and the subcontractors. (GC Ex. 1(c)). On October 7, 2021, the Union filed charge 09-CA-28421, wherein the Union claims that SOI did not timely address grievances, it subcontracted work performed by bargaining unit employees, and failed to pay holiday pay. (GC Ex. 1(e)).

On November 5, 2021, the Region filed its Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing. GC Ex. 1(g). The claims therein related to the Union’s requests for information. Id. A hearing was set for January 18, 2022. Id. SOI filed its Answer on November 5, 2021, denying any liability. (GC Ex. 1(i)).

Then, on December 28, 2021, the Region filed its Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing. With just twenty days before the hearing, the Region added claims relating to the Juneteenth payments, the resolution of grievances, and the use of subcontractors. SOI moved to postpone the hearing to prepare a defense to these additional claims, but that motion was denied by the Board’s Division of Judges. (GC Exs. 1(l), 1(m)). SOI then filed its Answer to the Second Consolidated Complaint on January 11, 2022, and an Amended Answer on January 13, 2021. (GC Exs. l(n), 1(p)).

The hearing went forward on January 18 and 19, 2022. Following that hearing, it is clear that the claims should be dismissed.
III. LEGAL ARGUMENT

A. The Claims In Paragraphs 6 And 7 Should Be Deferred To Arbitration

All allegations in Paragraph 6 and 7 of the Second Consolidated Complaint that allege a breach of the parties’ collective bargaining agreement (the processing of grievances, Juneteenth holiday pay, and use of subcontractors), should be dismissed as it is not the proper function of the National Labor Relations Board to determine whether a labor contract has been breached. Rather, that function is left to labor arbitrators or the Federal District Courts under Section 301 of the Act.

In situations such as this, where there is no alleged or actual repudiation, the Board “leaves the parties to enforce their contractual rights through civil litigation under Section 301 of the Act or perhaps through other means provided under the collective bargaining agreement itself.” Paramount Potato Chip Company, Inc., 252 NLRB 794, 798 (1980). Here, the General Counsel stated on the record that counsel was not alleging a wholesale repudiation; only an abrogation. (Tr. 293-94).

If the ALJ were to find that an abrogation occurred, which is denied, the General Counsel’s requested remedy that the ALJ decide the merits of the timely answered grievances in Paragraphs 6 and 7 of the Second Consolidated Complaint (the failure to answer grievances, Juneteenth, and subcontracting) is not available. The remedy for an abrogation is the return to the status quo ante and to adhere to the contract for its term. See Victoria Packaging, 332 NLRB 597, 598 (2000) (M. Hurtgen, dissenting in part); see also Standard Metal Prod. Co., 313 NLRB No. 170 (1994) (ordering all terms and conditions of the collective-bargaining agreement, retroactively to December 1992, including processing of pending grievances in accordance with the CBA).
1. **As A Threshold Matter, The Complaint Does Not Allege An Abrogation Or Wholesale Repudiation of the Contract**

SOI has not abrogated any portion of the labor contract with the Union; rather, the parties merely disagree over the proper interpretation over a handful of provisions in the CBA. As there was no abrogation of the contract, the claims in Paragraph 6 and 7 are deferrable and, in fact, should be dismissed to deferred to arbitration.

At the hearing, General Counsel took the position for the very first time that SOI had abrogated the parties’ CBA, specifically Article 9.1.1, by not settling grievances that were not timely answered. (Tr. 293-94). Abrogation was not explicitly pled in the Second Consolidated Complaint. Moreover, while the General Counsel had sufficient opportunity to amend the Second Consolidated Complaint to explicitly include an allegation of abrogation, but failed to do so. By not explicitly alleging abrogation, the lack of notice placed SOI in the inequitable position of being unable to fully prepare its defense. Since the allegation that SOI abrogated any portion of the CBA was not explicitly pled in the Complaint, it should be deemed to be improperly before the Board and should not be entertained. *See Victoria Packing Corp.*, 332 NLRB 597, 598 (2000) (M. Hurtgen, dissenting in part).

B. **Even If The Abrogation Claim Is Properly Before The ALJ, For The Reasons Stated In Section III(B) Below, The General Counsel Has Not Met Her Burden To Demonstrate That SOI Has Abrogated The CBA’s Grievance Procedure—The Region’s Claims In Paragraph 6(i), (iii), And (iv) Should Be Dismissed Because SOI Did Not Refuse To Settle Grievances**

SOI properly responded to the grievances and as such, under the CBA, SOI was not required to settle any of them in the Union’s favor.

There are nine grievances at issue. Of those nine, six all relate to the question of whether a Step III meeting was held on May 13, 2021 (2021-10, 2021-12, 2021-13, 2021-15, 2021-22, and 2021-38). The remaining three were filed after May 13, 2021.
The issue over whether the May 13, 2021, Step III ever occurred is a matter of fact and contract interpretation. Just shortly prior to May 13, 2021, there are multiple emails from Jeff Scafaro detailing how he needed the Union to provide him an inventory of grievances at issue and copies of same before he could be prepared for any Step III meeting. (Co. Exs. 12-13). This is because, despite Scafaro being the Director of Employee and Labor Relations, the Union would occasionally send grievances to SOI’s HR or to SOI’s local team at the Bluegrass Station, instead of to Scafaro. *Id.* Due to that inconsistency from the Union, Scafaro needed to make sure he understood what grievances were at issue so he could be prepared to address them. *Id.* Thus, he requested the information about the grievances before they could meet the week of May 17th for a proposed Step III meeting. McCarthy admits that he never provided that information to Scafaro. (Tr. 143, 46-47). Given the need for Scafaro to prepare for a Step III meeting and his insistence for that information before any Step III meeting that he was proposing the week of May 17th, it makes little sense for the Step III meeting to have occurred, as the Union alleges it did, on May 13, 2021, before Scafaro could prepare. This logical conclusion is further supported by Scafaro’s emails clarifying that no Step III occurred in response to the Union’s allegations that SOI failed to respond to the Step III grievances at issue. (GC Ex. 9).

Despite the fact that no Step III meeting occurred, Scafaro was still willing to prepare responses to these grievances. As noted in both McCarthy’s email and his testimony, Scafaro called McCarthy in response to the Union’s letter asserting that SOI missed its deadline to respond to the Step III grievances. In that call, Scafaro asked for a small extension of time in which to send those responses.6 (Tr. 61-62; GC Ex. 9). McCarthy said no. (Tr. 62; GC Ex. 9). This denial,

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6 The exact length of the requested extension is unclear. McCarthy’s email claims it was “by the end of the day.” (GC Ex. 9). McCarthy’s testimony indicated Scafaro asked for a one-day extension. (Tr. 61). Either way, however, the requested extension was for a small, reasonable amount of time.
however, runs counter to the clear language of the CBA, which encourages the Parties to grant requests for extensions of time and, in some instances, even requires it.\footnote{Article 9.1, Step 3 of the CBA states “Exceptions to timelines \textit{will} be adjusted on a case by case basis at the request of either party.” (Jt. Ex. 1) (emphasis added).}

Even if the Step III meeting did occur, which it did not, SOI would still not have been required to settle all grievances addressed at that purported meeting. Martin’s notes from that Step II meeting states “Union will hold on grievances 21-15 21-10 21-13.” (Co. Ex. 65). From a commonsense reading of that statement, it indicates that the Union would not be proceeding forward with those grievances, at least at that time. Given that, if the May 13\textsuperscript{th} meeting did constitute a Step III meeting (it was not), then SOI should have had no obligation to respond to grievances on which the Union was not proceeding.

As to the remainder of the grievances the Union claims were addressed at the purported Step III meeting, even if SOI did not respond, any purported refusal to process the grievances would not constitute a Section 8(a)(5) violation. For example, in \textit{Airport Aviation Services, Inc.}, 292 NLRB 823, 830 (1989), the Board adopted the ALJ’s holding that refusing to process a series of grievances did not violate Section 8(a)(5). Notably, just as here, the employer continued to recognize the union and process a wide range of different grievances. Dismissing the Section complaint, the Board held the employer did not threaten the viability of the basic bargaining relationship or “obstruct the overall functioning of the process of grievance resolution.” \textit{Id}. at 830.

The next grievance at issue filed after the alleged May 13\textsuperscript{th} meeting, 2021-42, was untimely and should be considered invalid. That grievance, filed June 1, 2021, claims that SOI failed to pay several employees for President’s Day, February 15, 2021. (GC Ex. 10). Pay related to that holiday would have been disbursed in the first pay cycle of March 2021, almost three months before the grievance was filed. (Tr. 318). Article 9 of the CBA requires a Step I meeting to occur...
four days after the employee knows of the facts giving rise to the alleged violation. (Jt. Ex. 1). A Step II written grievance must then be filed within ten days thereafter. Any employee who was allegedly not paid for the President’s Day holiday would have known of that purported issue when pay was disbursed in the first pay cycle of March, well before the grievance was filed in June. Given that grievance 2021-42 was untimely, it does not comply with the CBA and is, therefore, invalid.

The eighth grievance at issue, 2021-43, was filed on June 3, 2021 and relates to the alleged May 13th meeting. There, the Union asserted: “SOI has been notified of being past its time line [sic] for 3rd step response[s] for multiple grievances [sic]. SOI has refused to adhere to the grievance procedure outline[d] in 9.1.1 grievance timelines.” On June 8, 2021, SOI responded by letter making clear its position that a Step III meeting was not held on May 13th; therefore, SOI’s deadline to respond to any Step III had not run and it was not required to settle the grievances in the Union’s favor. (Co. Ex. 18). While the Union claims that a Step II meeting was held on this grievance on June 14, 2021, and following that SOI never sent its responses, that claim was rebutted in a letter from SOI noting that its response to this grievance was sent to the Union on June 22, 2021. (Tr. 229-30; GC Ex. 15; Co. Ex. 23). The Union never responded to the SOI’s position that it already provided the Step II response. Given this and the Union’s notable lack of follow-up, SOI sufficiently responded to this grievance.

The final grievance, 2021-49, relates to the termination of Derrick Butner. Both SOI and the Union agree that a Step II grievance meeting was held on August 12, 2021, to address Butner’s termination. As demonstrated by her letter to the Union, Vermillion understood that SOI had requested and was granted additional time to respond to the grievance as it was waiting on Lockheed to provide a copy of Lockheed’s investigative notes and video regarding the subject
accident that led to Butner’s termination. (Tr. 341, 43-44; Co. Ex. 25; GC Ex. 18). The Union disputes this; however, their argument is undermined by the fact that the Union itself appreciated the importance of the video in relation to Butner’s termination – the Union asked for that very thing in a request for information to SOI. (GC Ex. 1(j)). Given this, the Union’s position that a delayed response was unacceptable, after it was seeking the same information SOI needed to respond to the grievance, and after it had granted an extension, is untenable. It is even more unreasonable that the Union brought this issue before this adjudicative body when in a September 10, 2021, grievance meeting, Vermillion’s notes indicate that the Union had, in fact, agreed to arbitrate the issue of Butner’s termination. (Co. Ex. 26).

As demonstrated, SOI properly addressed each of the nine grievances at issue. As such, no conduct on SOI’s part related to these grievances rises to the level of an 8(a)(5) violation and the claims asserting such should be dismissed.

C. SOI Was Not Contractually Required To Observe The Juneteenth Holiday

Under the clear and unambiguous language of the CBA, SOI was not required to observe the Juneteenth Holiday. Article 13.1 of the CBA specifically states: “[e]mployees will be provided with 10 Holidays that mirror the Customer’s scheduled holidays….” (Jt. Ex. 1) (emphasis not in original). Article 13.2 of the CBA goes on to state: “If the Customer designates a holiday in lieu of the holidays recognized in Section 13.1, the Company shall follow the same schedule. In addition to the holidays listed above, the Company will observe any holidays declared as a legal holiday by

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8 Again, because the Juneteenth holiday issue is a matter purely of contract interpretation, and not one that would rise to the level of an 8(a)(5) violation, the Board has no jurisdiction over this claim and it should be deferred to arbitration.
Congress or the President and observed by the military where the contractor employees are authorized to be paid.” (Jt. Ex. 1).

In interpreting this contractual provision, it is necessary to first determine who is the “Customer.” On this issue, Article 3 of the CBA is instructive. There it states: “The Union recognizes that the company is a subcontractor to the customer, which is a contractor to the Federal Government and that the Company is required at all times to meet its contractual obligations.” (Jt. Ex. 1). Given that SOI is a subcontractor to the “Customer” who is, in turn, a contractor to the Federal Government, the only entity the “Customer” could possibly be at SOI’s Bluegrass Station location is Lockheed Martin. This logical conclusion was confirmed by both Jamie Vermillion and Tyrone McLaurin. (Tr. 306, 436).

Since Lockheed is the Customer, it is Lockheed’s schedule that SOI mirrors. Juneteenth has not been and is still not a federal holiday for Lockheed. (Tr. 430). Therefore, it has not been and is still not a federal holiday for SOI. *Id.*

Even if one were to focus on the second half of the Article 13.1, the provision still does not support the Region’s argument that SOI should be treating Juneteenth as a federal holiday. There, the provision states, “In addition to the holidays listed above, the Company will observe any holidays declared as a legal holiday by Congress or the President and observed by the military where the contractor employees are authorized to be paid.” (Jt. Ex. 1). SOI’s employees, however, are not authorized to be paid for working on Juneteenth, whether by Lockheed or any other entity. (Tr. 435). Thus, even under the Union’s interpretation, SOI is still not required to provide the Juneteenth holiday.

Given this straightforward contract interpretation, the claims against SOI related to Juneteenth recognition and pay must be dismissed.
D. **SOI Properly Subcontracted Under The CBA**

SOI properly engaged with a subcontractor, Sterile Solutions, to provide workers at SOI’s facilities at Bluegrass Station.

SOI is explicitly permitted by the Parties’ CBA to use subcontractors.\(^9\) At the very beginning of the CBA, it clearly states:

5. **Subcontracting**

It is not the intent of the Company to use on-site or off-site contactors for the purpose of reducing or transferring the work ordinarily performed by employees in the bargaining unit. If because of technological change, modifications to the Company’s contractual requirements, surges, or other revised business requirements, the Company considers such subcontracting or outsourcing, it will notify the Business Representative or his/her designee of the Union as soon as practicable. Such decision shall not contribute to the layoff of Bargaining Unit employees. This in no way infringes on the Government’s or Customer’s right to subcontract work, or to direct the Company to subcontract work in writing. Any subcontractors brought in by the company will become signatory to the CBA as well.

(Jt. Ex. 1). Thus, the CBA only requires that when SOI decides to use subcontractors that it: (1) be due to technological change, modification to SOI’s contractual requirements, surges, or other changed business needs; (2) notify the Union as soon as practicable; and (3) not contribute to the layoff of Bargaining Unit employees. Here, all requirements were met.\(^{10}\)

First, the need for subcontractors was due to a surge in work from the end of the war in Afghanistan and an increase in deployment throughout the rest of the world combined with hiring

\(^9\) As with the grievances and the Juneteenth holiday pay claims, this too is a matter of pure contract interpretation and any alleged failure to pay Juneteenth pay would not rise to the level of an 8(a)(5) violation. Accordingly, the Board has no jurisdiction over this claim and it should be deferred to arbitration forthwith.

\(^{10}\) Even if the ALJ were to find that the Union was not provided sufficient notice, the Union suffered no harm as a result of the lack of notice, and the CBA does not prohibit subcontracting under these circumstances.
individuals who had the secret security clearance required to work for SOI at the Bluegrass Station location. (Tr. 369, 73-76, 403-04, 06-10, 12-13).

Second, SOI notified the Union about its use of Sterile Solutions’ temporary workers. Prior to having the Sterile temporary workforce begin work at Bluegrass Station, McLaurin first informed the then-program manager, Chris Bettancourt, who proceeded to inform the Union. (Tr. 420). Moreover, the Union was notified by Sterile workers’ presence and the different badges they wore from those worn by SOI employees. (Tr. 383).

Third and finally, no bargaining unit employees at SOI were laid off, or even had overtime opportunities reduced, because of the Sterile temporary workers. (Tr. 452).

Since all three requirements were met, under the CBA, SOI had the unilateral right to contract with Sterile to use its temporary workers. Moreover, because this unilateral right was explicitly set out in the CBA, SOI had no obligation to engage in decision bargaining before deciding to contract with Sterile. *MV Transportation, Inc.*, 368 NLRB No. 66, **2-3** (Sept. 10, 2019). And to the extent the Region contends SOI was required to engage in effects bargaining, it is also undisputed that the Union never demanded to engage in either decisional or effects bargaining over SOI’s decision. Without such a demand, SOI would be under no obligation to bargain. Accordingly, this portion of the Region’s Second Amended Complaint should be dismissed.

**E. SOI Properly Responded To The Union’s Requests For Information Regarding Juneteenth, Temporary Labor, And Terminations**

1. **The Juneteenth Request Was Timely Addressed**

SOI should not be responsible for providing information to the Union that was not sought, nor should it responsible for divining what documents and information the Union wanted beyond what was explicitly sought in the Union’s own requests.
Here, the Union asked for correspondence with the Contracting Officer, contact information for the Contracting Officer, and whether the federal employees at Bluegrass Station received the Juneteenth Holiday. (GC Ex. 1(j)).

Upon receipt of the request, SOI’s President and COO, Tyrone McLaurin, called McCarthy and explained the CBA to McCarthy, the negotiations regarding same, that Lockheed was not recognizing the Juneteenth holiday, and that none of Lockheed’s employees or its subcontractors would get holiday pay for it. (Tr. 428-29). Importantly, McCarthy recalls that during the conversation McLaurin explicitly told McCarthy that SOI does not have a contracting officer. (Tr. 82). Only prime contractors, such as Lockheed, have contracting officers with the government. (Tr. 393-94). SOI, as a subcontractor to Lockheed, would not have a contracting officer and would not interact with Lockheed’s contracting officer. (Tr. 425). In fact, SOI does not have Lockheed’s contracting officer’s contact information and has no access to him. Id.

Case law is clear that an employer does not have any obligation to create information that it does not have and does not have access to, regardless of how relevant that information would be if it did exist. Leiferman Enterprises, LLC, 352 NLRB 152, 153 (2008). Since SOI does not have a contracting officer, it would not have any communications sent to that non-existent person, nor would it have that non-existent person’s contact information. Since SOI does not have this information, it has no obligation to provide it to the Union.

Similarly, the Company was not required to provide information to the Union regarding employees outside of the Company’s bargaining unit (the federal employees), as the Union had not met its burden in demonstrating the relevance of such information. When requested information deals with matters outside the bargaining unit, the union has the burden of establishing the relevance of, and its need for, the requested information. Public Service Co. of Colorado, 301
NLRB 238, 245 (1991) (citing San Diego Newspaper Guild, Local 95 v. NLRB, 548 F.2d 863 (9th Cir. 1977)). The Union never did so here and, in fact, it could not do so here. Even if the federal employees at Bluegrass Station received the Juneteenth holiday, that information would only be relevant if Lockheed had authorized SOI to pay its employees for the Juneteenth holiday. It had not. (Tr. 435). Therefore, whether the federal employees received that holiday would have no bearing on whether the bargaining unit employees were entitled to Juneteenth holiday recognition and pay at SOI. This was made clear to the Union when McLaurin told McCarthy that SOI’s contract, Lockheed, and its subcontractors would not be getting holiday pay for Juneteenth.

Since the information provided by SOI’s President and COO, Tyrone McLaurin, to the Union’s representative, Ryan McCarthy, promptly addressed all three of the Union’s requests for information regarding the Juneteenth holiday, the Region’s claim asserting anything to the contrary must be dismissed.

2. SOI Provided Sufficient Information Regarding Its Use Of Temporary Workers

SOI sufficiently responded to the Union’s requests regarding SOI’s use of temporary workers at Bluegrass Station.

On July 22, 2021, the Union sent SOI a request for information related to temporary labor retained through SOI’s subcontractor Sterile, to which it followed up on August 6, 2021. (GC Exs. 1(j) and 21).

On September 16, 2021, SOI responded to Sterile’s requests by: (1) identifying the company SOI contracted with – Sterile; (2) disclosing the reason the temporary workers have been arranged; (3) clarifying that no Sterile employees have been hired and that no bargaining unit employees will be laid off as a result of the temporary labor; (4) clarifying that no additional
employees will be working for SOI; and (5) definitively stating that no Sterile employees will be performing the work of any bargaining unit members. (GC Ex. 22).

The only area SOI declined to provide information was in response to a request for the temporary workers’ pay rate, which is presumptively not relevant because it seeks information regarding individuals outside the bargaining unit. Id. Importantly, at no time has the Union ever followed up on SOI’s responses to request supplementation.

As set out above, when requested information deals with matters outside the bargaining unit, the union has the burden of establishing the relevance of, and its need for, the requested information. Public Service Co. of Colorado, 301 NLRB 238, 245 (1991) (citing San Diego Newspaper Guild, Local 95 v. NLRB, 548 F.2d 863 (9th Cir. 1977)). Here, when SOI provided its position that the requested information about pay rate was irrelevant, the Union chose to remain silent. It was the Union’s burden to establish the relevance and it failed to do so. Accordingly, SOI’s responses to the Union’s requests for information regarding temporary labor were sufficient.

3. **SOI Properly Responded To The Requests Regarding Employee Terminations**

SOI properly and timely responded to the Union’s requests for information regarding the terminations of Drew Davenport and Derrick Butner. SOI should not be responsible for the Union’s failure to address the requests properly, to accept delivery of the Company’s responses and document production from the U.S. Post Office, or to follow up on any documents the Union contends should have been produced.

On July 22, 2021, the Union sent two requests for information, one addressing the termination of Derrick Butner and the other addressing the termination of Drew Davenport, both asking for the same categories of information and documents. (GC Ex. 1(j)). These documents were not sent to SOI’s Employee Labor Engagement Manager, Jaime Vermillion; rather, they were
mailed to SOI’s corporate office in Texas. (Tr. 322-23). Vermillion did not obtain the requests until a few weeks after their July 22, 2021. Id. The Union then followed up on its requests on August 6, 2021, via email and mail. (GC Exs. 23-24). McLaurin responded that day indicating SOI would respond by August 11th and requested that the Union begin directing CBA-related issues to Vermillion. (Co. Ex. 37).

On August 11, 2021, McLaurin advised the Union that SOI would send its responses via certified mail. The very next day, Vermillion met with the Union, regarding the grievance claiming Butner was improperly terminated. In that meeting, SOI and the Union discussed that SOI was waiting on Lockheed to provide its investigation notes, including a video of the subject accident that led to Butner’s termination. (Tr. 341, 43-44). Since the requests at issue here sought both investigation notes and video, the Union was on notice as of August 12, 2021, that SOI was waiting to obtain documents from Lockheed. (GC Ex. 1(j), 23-24).

Following receipt of the Lockheed documents, Vermillion responded to the Butner-related grievance at the end of August and then mailed SOI’s responses to the requests for information via certified mail on September 2, 2021. (Tr. 328-30, 33; Co. Exs. 49-51). While the Union had filed a charge relating to these responses, Vermillion was wholly unaware of it as she sent the responses and document production to the Union; thus, the charge had no impact on SOI’s response timeline. (Tr. 321).

The Post Office was unable to deliver the package to the Union, but did leave a pink slip telling the Union to pick up the package from the Post Office in person. (Co. Exs. 53, 54). However, the Union, never did so. (Tr. 36; Co. Ex. 53). Upon realizing this, Vermillion emailed the Union the responses and document production, with the exception of the video due to security concerns about emailing video of a secured location at a military facility. (Tr. 329, 334; Co. Ex.
At that point, the Union still could have obtained the package from the Post Office and obtained the video – it did not. Vermillion was then forced to have the package returned to her to maintain its contents’ confidentiality.

Not once has the Union followed up with SOI regarding its responses and production in response to these two requests for production. (Tr. 365-66, 454). Not once did the Union request any supplementation. *Id.* If the Union actually believed any further information or documentation was relevant, it could have reached out to SOI in good faith to resolve this issue. It did not and, instead, waited to raise it again only at the hearing. These are not the actions of a party that is actually interested in receiving the requested information and documents; rather, they are the actions of one interested only in gamesmanship.

SOI should not be held in any way liable for the Union’s failings in serving the requests for production, getting the mail package from the Post Office, and in following up to work to resolve disputes over SOI’s properly asserted objections in good faith.

**IV. CONCLUSION**

For the foregoing reasons, the Region’s claims against respondent Solution One Industries, Inc., as set forth in its Second Consolidated Complaint, should be dismissed with prejudice.
Dated: February 23, 2022

Respectfully submitted,

SOLUTION ONE INDUSTRIES, INC.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 23, 2022, I caused a copy of the foregoing document to be served upon Administrative Law Judge Keltner W. Locke, via e-file, and served upon the following parties to this action via email:

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