UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

THE PERMANENTE MEDICAL GROUP INC.

and

NATIONAL UNION OF HEALTHCARE WORKERS

Case 28-CA-273219

COUNSEL FOR THE GENERAL COUNSEL’S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

The Honorable John Giannopoulos
Administrative Law Judge
National Labor Relations Board
Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103

Submitted by:
Lisa J. Dunn, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 N Central Ave., Suite 1400
Phoenix, AZ 85004
lisa.dunn@nlrb.gov

Date: March 22, 2022
# TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................................................... 1

II. STATEMENT OF FACTS AND CREDIBILITY ......................................................................................... 2

   A. Bargaining Background and the Parties’ Most Recent Collective Bargaining Agreement .......... 2

   B. The Union’s June 1, 2018 Similar Information Request ............................................................... 3

   C. The Union’s December 8, 2020 Information Request at Issue in this Case ................................. 8

   D. Union’s Follow-Up to its 2020 RFI .................................................................................................... 10

   E. Respondent’s March 10, 2021 Partial & Only Responsive Information Provided to the Union’s 2020 RFI ........................................................... 11

   F. Respondent Fails to Provide Information Responsive to Item 1 .................................................... 11

   G. Respondent Fails to Provide Information Responsive to Item 2 .................................................... 12

   H. Respondent Fails to Provide Information Responsive to Item 3 .................................................... 12

   I. Respondent Fails to Provide Information Responsive to Item 4 .................................................... 13

   J. Respondent Fails to Provide Information Responsive to Item 5 .................................................... 13

   K. Respondent Fails to Provide Information Responsive to Item 6 .................................................... 13

   L. Respondent Fails to Provide Information Responsive to Item 7 .................................................... 13

   M. Respondent Delays in Providing Information Responsive to Item 8 ............................................ 14

   N. Respondent Fails to Provide Information Responsive to Item 9 .................................................... 14

   O. Respondent Fails to Provide Information Responsive to Item 10 ................................................. 15

   P. Respondent Fails to Provide Information Responsive to Item 11 ................................................. 15

   Q. Union’s March 15, 2021 Detailed Response Regarding its 2020 RFI ............................................. 15

       1. Union’s Specific Response to Item 1 ............................................................................................... 17

       2. Union’s Specific Response to Item 2 ............................................................................................... 17

       3. Union’s Specific Response to Item 3 ............................................................................................... 17

       4. Union’s Specific Response to Item 4 ............................................................................................... 17

       5. Union’s Specific Response to Item 5 ............................................................................................... 18

       6. Union’s Specific Response to Item 6 ............................................................................................... 18

       7. Union’s Specific Response to Item 7 ............................................................................................... 19

       8. Union’s Specific Response to Item 8 ............................................................................................... 19

       9. Union’s Specific Response to Item 9 ............................................................................................... 19

      10. Union’s Specific Response to Items 10 and 11 ........................................................................ 19
R. Respondent Fails to Credibly or Sufficiently Explain Why It Delayed and Failed to Provide Information to the Union Responsive to the 2020 RFI ......................................................................................................................20

S. The Union’s Similar June 1, 2021 Information Request ........................................22

III. RESPONDENT FAILED TO TIMELY PROVIDE THE UNION WITH RELEVANT INFORMATION IN VIOLATION OF SECTION 8(a)(1) AND (5) OF THE ACT .................................................................26

A. The Applicable Legal Standard Regarding Information Requests and Relevance ..............................................................................................................................26

B. Respondent Has Failed to Justify its Delay in Providing Information and Failed to Seek Accommodations as Alleged in Paragraph 5(k) of the Complaint, as Amended ..................................................................................27

C. Respondent Has Violated Section 8(a)(5) of the Act by Failing to Produce Information Requested at Items 1, 5, and 7 and its Defense that the Information is not Readily Available or not Collected in the Manner Requested should be Rejected .......................................................................29

   1. Respondent Failed and Refused to Furnish the Union with Information Requested at Item 1 ..................................................................................................................29

   2. Respondent Failed and Refused to Furnish the Union with Emergency Department Information Requested at Item 5 .................................................................31

   3. Respondent Failed and Refused to Furnish the Union with Information Requested at Item 7 ..................................................................................................................32

D. Respondent Has Violated Section 8(a)(5) of the Act by Failing to Produce Information Requested at Items 3, 4, 6, 10, and 11 and its Defense that the Information is not Relevant should be Rejected ................................................33

   1. The Union Met its Burden to Explain the Relevance of Item 3 ..........................33

   2. The Union Met its Burden to Explain the Relevance of Item 4 .........................33

   3. The Union Met its Burden to Explain the Relevance of Item 6 .........................34

   4. The Union Met its Burden to Explain the Relevance of Items 10 and 11 ..............34

E. Respondent Has Violated Section 8(a)(5) of the Act by Failing to Fully Produce Information Requested at Items 2 and 9 ........................................................................36
F. Respondent’s Untimely Relevance Defense to the 2018 RFI in its Amended Answer Must Fail ................................................................. 36

G. There is No Issue Preclusion from Case 32-CA-226909 .................................................. 39

IV. CONCLUSION .............................................................................................................................................. 44
### TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>Authority</th>
<th>Citation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aeolian Corp.,</td>
<td>247 NLRB 1231 (1980)</td>
<td>28</td>
</tr>
<tr>
<td>Barnard Engineering Co.,</td>
<td>282 NLRB 617 (1987)</td>
<td>26</td>
</tr>
<tr>
<td>Bituminous Roadways of Colorado,</td>
<td>314 NLRB 1010 (1994)</td>
<td>28</td>
</tr>
<tr>
<td>Bundy Corp.,</td>
<td>292 NLRB 671 (1989)</td>
<td>28</td>
</tr>
<tr>
<td>Butcher Boy Refrigerator Door Co.,</td>
<td>127 NLRB 1360 (1960)</td>
<td>28</td>
</tr>
<tr>
<td>Carpenters Local 370 (Eastern Contractors Assn.),</td>
<td>332 NLRB 174 (2000)</td>
<td>41</td>
</tr>
<tr>
<td>Casino Pauma,</td>
<td>363 NLRB 536 (2015)</td>
<td>39, 40</td>
</tr>
<tr>
<td>Colorado Symphony Assoc.,</td>
<td>366 NLRB No. 122 (2018)</td>
<td>41, 42</td>
</tr>
<tr>
<td>Disneyland Park,</td>
<td>350 NLRB 1256 (2007)</td>
<td>35</td>
</tr>
<tr>
<td>Endo Painting Service, Inc.,</td>
<td>360 NLRB 485 (2014)</td>
<td>27, 30, 31</td>
</tr>
<tr>
<td>Good Life Beverage Co.,</td>
<td>312 NLRB 1060 (1993)</td>
<td>28</td>
</tr>
</tbody>
</table>
International Credit Service,
240 NLRB 715 (1979) ................................................................. 28

JAM Productions, Ltd.,
371 NLRB No. 26 (2021) ................................................................. 42

Leland Stanford Junior University,
262 NLRB 136 (1982) ................................................................. 35

Martin Luther King, Sr. Nursing Center,
231 NLRB 15 (1977) ................................................................. 42

McKenzie-Willamette Medical Center Associates,
362 NLRB 135 (2015) ................................................................. 35

Mission Foods,
345 NLRB 788 (2005) ................................................................. 26

Monmouth Care Center,
354 NLRB 11 (2009) ................................................................. 27, 28

Moulton Mfg. Co.,
152 NLRB 196 (1965) ................................................................. 43

NLRB v. Acme Industrial Co.,
385 U.S. 432 (1967) ................................................................. 26, 35-38

NLRB v. Truitt NFG. Co.,
351 U.S. 149 (1956) ................................................................. 26

Operating Engineers Local 12 (Associated Engineers),
270 NLRB 1172 (1984) ................................................................. 43

Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel),
357 NLRB 1683 (2011) ................................................................. 41

Postal Service,
276 NLRB 1282 (1985) ................................................................. 26, 37

Postal Service,
332 NLRB 635 (2000) ................................................................. 27

Public Service Co. of New Mexico,
360 NLRB 573 (2014) ................................................................. 35

Samaritan Medical Center,
319 NLRB 392 (1995) ................................................................. 26, 27, 37
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Decision</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sands Hotel &amp; Casino,</td>
<td>324 NLRB 1101 (1997)</td>
<td>35</td>
</tr>
<tr>
<td>Shoppers Food Warehouse Corp.,</td>
<td>315 NLRB 257 (1994)</td>
<td>35</td>
</tr>
<tr>
<td>Somerville Mills,</td>
<td>308 NLRB 425 (1992)</td>
<td>26, 37</td>
</tr>
<tr>
<td>Sparks Restaurant,</td>
<td>366 NLRB No. 97 (2018)</td>
<td>42</td>
</tr>
<tr>
<td>The Permanente Medical Group, Inc.,</td>
<td>368 NLRB No. 131 (2019)</td>
<td>Passim</td>
</tr>
<tr>
<td>Tom Rice Buick,</td>
<td>334 NLRB 785 (2001)</td>
<td>42</td>
</tr>
<tr>
<td>Trump Marina Associates LLC,</td>
<td>354 NLRB 1027 (2009)</td>
<td>41</td>
</tr>
<tr>
<td>United States Postal Service,</td>
<td>308 NLRB 547 (1992)</td>
<td>28</td>
</tr>
<tr>
<td>United States Postal Service,</td>
<td>365 NLRB No. 92 (2017)</td>
<td>28</td>
</tr>
<tr>
<td>West Penn Power, Co.,</td>
<td>339 NLRB 585 (2003)</td>
<td>27</td>
</tr>
<tr>
<td>Wolf Creek Nuclear Operating Corp.,</td>
<td>365 NLRB No. 55 (2017)</td>
<td>39</td>
</tr>
<tr>
<td>Woodland Clinic,</td>
<td>331 NLRB 735 (2000)</td>
<td>28</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

National Union of Healthcare Workers (the Union) represents a unit of mental health professionals (the Unit or Unit employees) employed by The Permanente Medical Group, Inc. (Respondent). On December 8, 2020, the Union requested 11 enumerated items of information regarding the Unit it represents, such as information about the Unit’s patient access to new and return visits, directly affecting the Unit’s ratio of new and returning patients, and about subcontracting and outside referral of the Unit’s patients, plainly relevant to express provisions within the parties’ collective-bargaining agreement. Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying in providing one item sought in the Union’s December 8, 2020 information request and by failing and refusing to provide information responsive to the remaining ten items of the request.

While Respondent will defend that its three-month delay in providing one item of information is reasonable, the record will show otherwise. Respondent failed to explain the reason for the delay or to promptly notify the Union about any difficulties in acquiring this one item of information. Similarly, Respondent’s defenses for failing and refusing to provide the remaining 10 items of information must be rejected because Respondent did not prove that the information was unavailable or did not exist and the Union timely and sufficiently explained the relevance of these remaining ten requests.

Accordingly, for the reasons set forth more fully below, Counsel for General Counsel requests that the Administrative Law Judge find that Respondent engaged in the unlawful conduct alleged in the Complaint, as amended.
II. STATEMENT OF FACTS AND CREDIBILITY

A. Bargaining Background and the Parties’ Most Recent Collective-Bargaining Agreement

Since about December 5, 2015, Respondent has recognized the Union as the exclusive-collective bargaining representation of the Unit. (JT Ex 1, 2). The Unit currently consists of approximately 2,071 Integrated Behavioral employees including therapists, psychologists, marriage and family therapists, licensed clinical social workers, chemical dependency counselors, and other employees in locations throughout northern California in twenty-three medical centers. (JT Ex 1, 2; Tr. 134). The parties’ most recent collective-bargaining agreement was effective from October 1, 2018 to September 30, 2021 (CBA), and its terms have remained the status quo while the parties have been engaged in successor contract bargaining, since around July 20, 2021 to date. (JT EX 2; Tr. 60-61, 246).

The parties’ CBA includes a Letter of Understanding – Model of Care provision, authorizing a group of clinicians to work collaboratively in a Model of Care Committee (committee), with a goal to redesign their model of care for a period of six (6) months following the parties’ ratification of the CBA, extended by the committee until around March 12, 2021. (JT Ex 1, 2 at p. 63-64; R Ex 6D; Tr. 208). This committee was comprised of 14 members, including seven managers and seven Unit clinicians represented by the Union. (Tr. 235). The committee generated a midterm report around December 9, 2020 and issued its final report and recommendations around March 12, 2021. (Tr. 208, 210; R Ex 6D).

Additionally, the grievance and arbitration provision of the parties’ CBA sets forth the parties’ agreement “to respond adequately, in a timely, good faith manner to requests for information, and to promptly address and resolve any disputes relating to the provision of requested information.” (JT EX 1; GC EX 3 at 2).
B. The Union’s June 1, 2018 Similar Information Request

To provide background about similar information requests between the parties as well as a basis of comparison for the information request at issue in this case, the Union made two similar information requests by letter dated June 1, 2018, at Items 9 and 10, to prepare for negotiations with Respondent (2018 RFI), as follows:

9. Subcontracting/Outside Referrals. Please provide:
   a) For each Medical Center, for each calendar year 2016 and 2017 and year-to-date 2018, the number of Health Plan members referred out to outside vendors and/or outside providers for outpatient mental health services; and
   b) The total expenditure, for each calendar year 2016 and 2017 and year-to-date 2018, of subcontracting/referring out of Health Plan members for mental health services.

10. Access/Utilization. Please provide:
   a) By medical center, for each calendar year 2016, 2017 and year-to-date 2018, for the departments of Psychiatry, broken down by Adult v. Child, the following: number of new patients booked, indicating how many of these were force-booked; number of new patients seen; number of new patients seen within fourteen calendar days of request; FTKA %age for new patients; number of return appointments booked, indicating how many of these were force-booked; number of return appointments kept; number of return visits scheduled within fourteen days of the initial visit; FTKA %age rate for return appointments; the total hours of Time Available for Appointments (TAA); and the %age of TAA counted as “seen” time;
   b) The number of Health Plan members, by service area, at the end of each quarter beginning December 31, 2015 and through March 30, 2018;
   c) The percentage of Health Plan members, by service area, seeking mental health services (also referred to as the “penetration rate”) for 2016, 2017 and year-to-date 2018;
   d) The number of Psychiatry Department patients, by service area, referred to Intensive Outpatient Programs (IOP) for 2016, 2017 and year-to-date 2018;
   e) The number of patients (indicating whether Health Plan members or not), by service area, for 2016, 2017 and year-to-date 2018 who have presented to a Kaiser Emergency department; and
f) The number of Health Plan members referred for 1) crisis stabilization and 2) in-patient hospital services outside of Kaiser, by service area, for 2016, 2017 and year-to-date 2018.

(GC EX 19, p. 2-3).

By email on July 11, 2018, Respondent provided the Union with a narrative response to the 2018 RFI. (GC EX 20). Respondent objected to the relevance of the subcontracting information requested at Item 9 of the 2018 RFI, but indicated it was in the process of gathering responsive information to the access/utilization information requested at Item 10 of the 2018 RFI. (GC EX 20).

By email on July 24, 2018, the Union responded to the relevance of Item 9 of its 2018 RFI, noting that there was a subcontracting provision of the parties’ expired contract, the parties were bargaining over the subcontracting provision for the successor agreement and that until the beginning of 2018, Respondent routinely provided the Union with monthly information about the numbers of patients referred to outside providers by medical center per month. (GC EX 21).

The Union reiterated its request for information responsive to Item 10 of its 2018 RFI within two business days since it had been approximately six weeks since its 2018 RFI. (GC EX 21).

Over two months after the Union made its 2018 RFI, on August 20, 2018, Respondent provided partial responsive information to Items 9 and 10 of the 2018 RFI, including information responsive to Items 9(a), 10(a)(1), 10(a)(2), 10(a)(4), 10(a)(5), 10(b), 10(c), and 10(d). (GC 23).

On August 22 and 23, 2018, the Union notified Respondent that the following information remained outstanding from the Union’s 2018 RFI:

- **Item 9(b):** The Union reiterated its request for the total cost to Respondent of subcontracting for referring Kaiser patients to outside providers, including the aggregate cost for all services for each of the calendar years 2106, 2017, and 2018 YTD.
- **Item 10(a):** “number of return appointments booked, indicating how many of these were forced booked; number of return appointments kept; number of
return appointments booked within fourteen days of the initial request; FTKA %age rate for return appointments.” This information was requested for 2016, 2017 and YTD 2018.

- Item 10(e): Also, after further review, Respondent did not provide any information responsive to item 10(e), regarding patients presenting to the Emergency Department during the 2016, 2017 calendar years and 2018 YTD.

- Item 10(f): Respondent only provided information for 2017; 2016 and 2018 YTD information was omitted.

(GC EX 24).

On August 29, 2018, the Union requested an electronic version of all of the information Respondent provided responsive to the 2018 RFI as well as Respondent’s methodology for arriving at the figures responsive to Item 10 of the 2018 RFI. (GC EX 15). The Union reiterated its request for Item 10(a)(3), arguing that Respondent is under scrutiny to track availability and timeliness for follow-up appointments and that Respondent routinely provided the Union with such information in the past, referred to as “seen-to-seen” data, most often supplied as the percentage of return appointments within 14 days over a specified period of time, but was also provided as raw numbers. (GC EX 15).

For Item 10(e) of the 2018 RFI, in response to Respondent’s claim that Respondent does not have a mechanism to differentiate patients requiring emergency level of care for psychiatric conditions presenting to its emergency department, in its August 29, 2018 email, the Union countered that Respondent is required to maintain meticulous records for its emergency department to comply with a whole host of regulations. (GC EX 15). Further, the Union pointed out in its August 29, 2018 email that when the parties were bargaining over changes to the provision of emergency services for Respondent’s Oakland and Richmond facilities in 2014 and for its Vallejo and Vacaville facilities in 2015-16,Respondent was able to provide the Union
with detailed records, broken down by day and by hour, including the number of psychiatric
consults requested. (GC EX 15).

Three months after the Union made its 2018 RFI, on September 19, 2018, by hand
delivery, Respondent provided the Union with responsive information to Items 10(a)(3) and
10(a)(4) of the 2018 RFI. (GC EX 17). Respondent also provided the Union with its
Methodology and Description of data provided for its responses to Items 9 and 10 of the 2018
RFI, as the Union requested on August 29, 2018. (GC EX 17).

On March 18, 2019, Associate Chief Administrative Law Judge Gerald M. Etchingham
(Judge Etchingham) conducted an unfair labor practice hearing in Case 32-CA-226909,
involving alleged Section 8(a)(5) and (1) allegations pertaining to the 2018 RFI. The
Permanente Medical Group, Inc., 368 NLRB No. 131, slip op. at 2 (2019). At this March 18,
2019 hearing, Respondent first produced at least some documents responsive and no longer
contested liability with respect to the emergency department request at Category 10(e) of the
2018 RFI. Id. at 1 and 7.

On July 25, 2019, Judge Etchingham issued a decision (ALJD) finding that the
Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the
Union in a timely manner with information responsive to the 2018 RFI Item 9(b), seeking
subcontracting information, and the 2018 RFI Item 10(e), seeking numbers of patients presenting
at Kaiser Emergency Departments. Id. at 1. With respect to the Item 10(e) of the 2018 RFI,
since Respondent did not provide any responsive documents to Item 10(e) to the Union until the
March 18, 2019 hearing, Judge Etchingham made the following finding:

The Respondent does not contest its liability as to Category 10(e) regarding
information on the number of patients presenting at Kaiser Emergency
departments. It previously asserted that the information did not exist before
admitting at the March 18 hearing that it does in fact possess the relevant data.
Accordingly, I find that Respondent unreasonably delayed in providing
information pertinent to Category 10(e), in violation of Section 8(a)(5) and (1) of the Act.

*Id.* at 7.

On September 23, 2019, the Respondent filed exceptions to the ALJD in Case 32-CA-226909, specifically excepting to the judge’s conclusion regarding the subcontracting information at Item 9(b) of the 2018 RFI, but did *not* file exceptions to the judge’s conclusion regarding the Emergency Department Information at Item 10(e) of the 2018 RFI. *Id.* at 1.

On November 5, 2019, the Counsel for the General Counsel (Region 32 General Counsel) filed an unopposed Motion to Remand to Approve Charging Party’s Withdrawal Request, because on October 15, 2019, the Charging Party advised the Region 32 General Counsel that, due to changed circumstances since the information was initially requested, it no longer needed the subcontracting information at Item 9(b) of the 2018 RFI and requested withdrawal of that allegation. *Id.* On December 11, 2019, the Board granted the Region 32 General Counsel’s motion to remand the allegation pertaining to the subcontracting information at Item 9(b) of the 2018 RFI, severed this allegation, and remanded it to Region 32 for further appropriate action. *Id.*

With respect to the remaining emergency department request allegation at Item 10(e) of the 2018 RFI, since Respondent did not file Exceptions to the ALJD for this emergency department allegation, the Board adopted the judge’s conclusion of law regarding the remaining emergency department information and adopted the judge’s recommended Order as modified, including an affirmative Order to “Promptly provide the Union with the number of patients presenting at Kaiser Emergency departments.” *Id.*

On January 17, 2020, Respondent filed a Certificate of Compliance with Region 32 in Case 32-CA-226909, certifying that on April 11, 2019, it provided the information that the
Board’s Order required to be provided responsive to Item 10(e) of the 2018 RFI, to the Region 32 General Counsel, and to the Union, by its counsel’s April 11, 2019 letter with enclosures. (GC EX 25). To the contrary, despite Respondent admitting liability to Judge Etchingham at the March 18, 2019 hearing for the emergency department request at Item 10(e) of the 2018 RFI, about a month later, on April 11, 2019, Respondent then claimed to the Region 32 General Counsel and the Union that it did not have data responsive to the Board Order to “Promptly provide the Union with the number of patients presenting at Kaiser Emergency departments.” *Id.* (GC EX 24 and 25, p. 4). Rather than simply complying with the Board Order, Respondent mind-numbingly referred back to its August 23, 2018 response to the Union that the “Employer does not have a mechanism to differentiate patients requiring emergency level of care for psychiatric conditions presented to the ED.” *The Permanente Medical Group, Inc.*, 368 NLRB No. 131, slip op. at 1 (2019). (GC EX 24 and 25, p. 4).

At the hearing in the instant proceeding, Agnes Amistoso (Amistoso), Respondent’s Regional Director for Strategies and Programs within its Department of Regional Mental Health Administration and Gregory Tegenkamp, the Union’s Director of the Kaiser Division (Tegenkamp) each testified that Responded did provide the Union with responsive information to this 2018 RFI emergency department request as a result of the NLRB hearing for Case 32-CA-226909. (Tr. 113-114, 181-184). However, Tegenkamp testified that he could not locate the responsive information to this 2018 RFI emergency department request when he conducted a search for the hearing for this case. (Tr. 184).

**C. The Union’s December 8, 2020 Information Request at Issue in this Case**

On December 8, 2020, the Union, by Tegenkamp, emailed Respondent the request for information at issue in this proceeding (2020 RFI), requesting the following 11 items of information:
(1) By medical center, for each month from January, 2019 through November 2020, for the departments of Psychiatry, broken down by Adult v. Child, the following: number of new patients booked; number of new patients seen; number of new patients seen within fourteen calendar days of request; %age of new patients who cancel or fail to keep their appointment (note: “new patients” include transfer patients); number of return appointments booked; number of return appointments kept; number of return visits scheduled within fourteen days of the initial visit; %age of established patients who cancel or fail to keep their return appointments;

(2) The number of Health Plan members, by service area, at the end of each quarter beginning December 31, 2018 and through November 30, 2020;

(3) The percentage of Health Plan members, by service area, seeking mental health services (also referred to as the “penetration rate”) for each month from January 2019 through November 2020;

(4) The number of Psychiatric Department patients, by service area, referred to Intensive Outpatient Programs (IOP) for each month from January 2019 through November 2020;

(5) The number of patients (including whether Health Plan members or not), by service area, for each month from January 2019 through November 2020 who have presented to a Kaiser Emergency department, indicating the number of these patients who were placed on psychiatric hold (5150);

(6) The number of Health Plan members referred for 1) crisis stabilization and 2) in-patient hospital services outside of Kaiser, by service area, for each month from January 2019 through November 2020;

(7) The number of group mental health appointments performed by Kaiser’s internal provider network of non-MD clinicians, by medical center, during each month since January 1, 2019 and the total number of enrollees participating in group mental health appointments for each month during this period;

(8) By medical center, for each month from January 2019 through November 2020, for the departments of Psychiatry, the number and percentage of patients seen via video and via phone;

(9) The total number of appointments booked by therapists assigned to the Northern California Region’s Connect to Care (C2C) program for each month beginning in January 2019 to present, disaggregated by appointment type and appointment modality (i.e., telephone or video);

(10) For each Medical Center, for each month from January, 2019 through November 2020, the total number of Health Plan members (unique
medical record numbers) referred out to outside vendors and/or outside providers for out-patient mental health non-MD services; and

(11) Number of individual treatment appointments performed by Kaiser’s external provider network of non-MD clinicians during each month since January 1, 2019.

(JT Ex 1, 3, 3A).

In its request, the Union specified why it asked for this information, to enable the Union to evaluate any recommendations that will be made by the committee and so the Union can effectively evaluate the implementation of any accepted recommendations. (JT Ex 3A). This requested information related to both access and capacity, including outside referral data, similar to two items the Union requested prior to commencing bargaining in 2018 and 2021, (by its 2018 RFI and by what is referred to below as its 2021 RFI). (JT Ex 3A, GC Ex 19, R Ex 1A).

The Union made its 2020 RFI on December 8, 2020, the day before the Model of Care committee generated its December 9, 2020 midterm report, to enable the Union to obtain baseline data to evaluate the committee’s recommendations. (Tr. 224). The requested information was useful to the Union in its representation of the Unit because the committee’s recommendations impact the workload of the clinicians, including the demand for services performed by the Unit, as well as the amount and type of patients the Unit treated. (Tr. 224-225).

D. Union’s Follow-Up to its 2020 RFI

Although Respondent acknowledged receipt of the Union’s 2020 RFI on December 8, 2020, Respondent did not provide any further response for over one month. (JT Ex 1, 4). On January 11, 2021, the Union, by Tegenkamp to Respondent, asked Respondent the status of Respondent’s response. (JT Ex 1, 5). On the same date, Respondent, by its Senior Labor Relations Consultant Deborah Glasser (Glasser), provided the following email response to the
Union, “There are multiple people working on this response together. I will check to see what may be ready to send and forward to you. As additional information becomes available we will complete the request.” (JT Ex 1, 6).

Two months passed and the Union still had not received any further response to its 2020 RFI. On February 25, 2021, the Union, by email from Tegenkamp to Respondent, to Glasser, *inter alia*, requested that Respondent furnish the Union with the information it requested, as follows: “NUHW has yet to receive any of the information requested on December 8, 2020. Not even an update. Please respond and provide the information requested.” (JT Ex 1, 7).

E. **Respondent’s March 10, 2021 Partial & Only Responsive Information Provided to the Union’s 2020 RFI**

The Union’s 2020 RFI lingered without any responsive information provided by Respondent for over three months—until March 10, 2021 (March 10th response). (JT Ex 1, 8, 8A). During the hearing, the parties stipulated that Respondent’s March 10th response was its only response to the Union’s 2020 RFI. (JT Ex 1, 8, 8A; Tr. 49-50). This March 10th response was incomplete and only provided responsive information to satisfy one item of the Union’s 2020 RFI, as plead in paragraph 5(d)(8) of the Complaint (Item 8). (JT EX 1, 3A; GC EX 1(c), 18).

F. **Respondent Fails to Provide Information Responsive to Item 1**

With respect to the first item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(1) (Item 1), Respondent responded, “Much of the data drilldown being requested is not readily available in our system of reporting. See attachment.” JT EX 3A, 8. Further, rather than providing, broken down by medical center, for each month from January 2019 through November 2020, the requested *numbers* of new patients booked, new patients seen, and
new patients seen within 14 calendar days of the request, Respondent provided the percentages of these Item 1 requested subparts. (JT EX 3A, 8A).

Moreover, it is undisputed that Respondent did not provide responsive information to Item 1, broken down by medical center, for each month from January 2019 through November 2020: the percentages of new patients who cancel or fail to keep their appointment (including transfer patients), number of return appointments booked and kept, number of return visits scheduled within fourteen days of the initial visit, or the percentage of established patients who cancel or fail to keep their return appointments. (JT EX 3A, 8A; Tr. 49-50).

G. Respondent Fails to Provide Information Responsive to Item 2

With respect to the second item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(2) (Item 2), Respondent responded, “See attachment.” (JT EX 3A, 8.) However, rather than providing quarterly data of the number of health plan members from December 31, 2018 through November 30, 2020 as requested at Item 2, Respondent only provided end of year responses for calendar years ending 2019 and 2020. (JT EX 3A, 8A). Further, in Item 2, the Union requested these numbers to be broken down by service area, and Respondent’s response fails to do so. (JT EX 3A, 8A).

H. Respondent Fails to Provide Information Responsive to Item 3

Respondent did not provide any responsive information to the third item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(3) (Item 3). (JT EX 3A, 8A; Tr. 49-50). Rather, Respondent responded to Item 3, “The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant.” (JT EX 3).
I. **Respondent Fails to Provide Information Responsive to Item 4**

Similarly, Respondent did not provide any responsive information to the fourth item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(4) (Item 4). (JT EX 3A, 8A; Tr. 49-50). Rather, as with its response at Item 3, Respondent responded to Item 4 as follows, “The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant.” (JT EX 3).

J. **Respondent Fails to Provide Information Responsive to Item 5**

As with Items 3 and 4, Respondent did not provide any responsive information to the fifth item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(5) (Item 5). (JT EX 3A, 8A; Tr. 49-50). Rather, similar to its response to Item 1, Respondent responded to Item 5 as follows, “This information is not collected by the Employer in the manner being requested.” (JT EX 3).

K. **Respondent Fails to Provide Information Responsive to Item 6**

As with its response to Items 3-5, Respondent did not provide any responsive information to the sixth item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(6) (Item 6). (JT EX 3A, 8A; Tr. 49-50). Rather, similar to its response to Items 3 and 4, Respondent responded to Item 6 as follows:

Please provide the Union’s definition for 1) “crisis stabilization”. 2) The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant.

(JT EX 3).

L. **Respondent Fails to Provide Information Responsive to Item 7**

As with Items 3 through 6, Respondent did not provide any responsive information to the seventh item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(7) (Item 7). (JT
EX 3A, 8A; Tr. 49-50). Rather, similar to its response to Item 5, Respondent responded to Item 7 as follows, “This information is not collected by the Employer in the manner being requested. Please provide the Union’s rationale on how this information is necessary and relevant to assessing recommendations from the Collaborative.” (JT EX 3).

M. Respondent Delays in Providing Information Responsive to Item 8

As indicated above, the parties stipulated that on March 10, 2021, Respondent provided the Union with responsive information to satisfactory respond to Item 8. (JT EX 1, 3A, 8A, 9)

On January 25, 2022, at the hearing, the General Counsel moved to amend the Complaint to add paragraph 5(k), alleging that Respondent delayed in providing information responsive to Item 8 to the Union, plead at paragraph 5(d)(8) of the Complaint. (GC EX 1(c), 18; Tr. 63-64). On January 25, 2022, the Judge granted this Motion to Amend. Id.

On January 26, 2022, after the General Counsel had already rested its case in chief, Respondent provided its Answer to Amendment of Complaint (Amended Answer), denying the delay in providing information responsive to Item 8 and adding a Third Affirmative Defense, “TPMG alleges that any requests for information, and allegations of untimely responses thereto, prior to the issuance of the final recommendation from the Model of Care Collaborative, are irrelevant, premature, unmeritorious, and fail to state a claim.” (R Ex. 9; Tr. 63-64, 231, 244-245).

N. Respondent Fails to Provide Information Responsive to Item 9

As with Items 3 through 7, Respondent did not provide any responsive information to the ninth item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(9) (Item 9). (JT EX 3A, 8A; Tr. 49-50). Rather, similar to its response to Item 2, Respondent responded to Item 9, “See attachment.” (JT EX 3). However, it is undisputed that no attachment was provided by Respondent. (JT EX 3A, 8A; Tr. 49-50).
O. Respondent Fails to Provide Information Responsive to Item 10

As with Items 3 through 7 and 9, Respondent did not provide any responsive information to the tenth item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(10) (Item 10). (JT EX 3A, 8A; Tr. 49-50). Rather, similar to its response at Items 3 and 4, Respondent responded to Item 10 as follows, “The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant.” (JT EX 3).

P. Respondent Fails to Provide Information Responsive to Item 11

Similar to Items 3 through 7, 9, and 10, Respondent did not provide any responsive information to the eleventh item of the Union’s 2020 RFI, plead in the Complaint at paragraph 5(d)(11) (Item 11). (JT EX 3A, 8A; Tr. 49-50). Rather, as with its response at Items 3, 4, and 10, Respondent responded to Item 11 as follows, “The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant.” (JT EX 3).

Q. Union’s March 15, 2021 Detailed Response Regarding its 2020 RFI

On March 15, 2021, the Union provided a general response to Respondent’s timeliness, Respondent’s argument that certain items were not relevant, as well as detailed response to Respondent for each item it requested in its 2020 RFI, including Items 1-7, 9, and 10 that remained outstanding (March 15th response). (JT Ex 1, JT Ex 9). The Union’s preliminary comments responsive to the timeliness of Respondent’s response as well as Respondent’s relevancy arguments were as follows:

I have thoroughly reviewed your response and have a few general comments before I go through your response in detail. First, the information request was made more than three months before your response. About a month after the information request, on January 11, 2021, you responded with the following:
There are multiple people working on this response together. I will check to see what may be ready to send and forward to you. As additional information becomes available we will complete the request. (Emphasis added).

Since that message, the Employer has not made any objections to providing the information and in particular has not questioned the relevance of any of the information being requested. Rather, you stated you were collecting the information and that you would supply it. To raise relevance issues at this point, after a ULP charge has been filed with the NLRB, is at best disingenuous. Furthermore, with the exception of the information requested about groups and about the percentage of video and telephone visits, the information requested mirrors the request the Union made in 2018 prior to bargaining. Finally, the requested information pertains directly to the work our members do, i.e., providing behavioral health services to KP patients, and is therefore presumptively relevant. The burden is on the Employer to rebut this presumption, not simply assert it does not believe the requested information is relevant.

As to the Employer’s repeated questioning of the relevance of the requested information to the contractual Model of Care committee, the Union’s general response is as follows. Among the purposes and objectives of this committee enumerated in the contract are: “to improve internal capacity to provide psychotherapy”; and “Improved return access for individual psychotherapy”. The Union cannot determine if internal capacity is improved or if access is improved without baseline data, which is why we have requested information related to access and subcontracting. As you know, demand for services and staffing are two key components that determine access. It is therefore necessary and relevant to have information related to patient demand for services.

(JT Ex 9).

The Union closed its March 15th response as follows: “In summary, the Union still expects the Employer to provide all of the information requested on December 8, 2020.” (JT Ex 9). It is undisputed that other than Respondent’s March 10th response summarized above, Respondent did not provide any further responsive information to the Union. (JT Ex 1, 8, 8A; Tr. 49-50).

With respect to the Union’s specific response to each item that remained outstanding, the Union stated as follows: “Now for some comments specific to your responses for various items requested (Note - for economy, I am not copying the content of the specific requests, only my comments on the Employer’s responses, which are repeated in bold).” (JT Ex 9).
1. Union’s Specific Response to Item 1

The Union specifically responded to Item 1 as follows:

Much of the data drilldown being requested is not readily available in our system of reporting. See attachment. First, I note that the Employer has not disputed the relevance of this set of data, but merely states it is not readily available. Of the sixteen specific bits of information requested, when similarly requested prior to 2018 bargaining, the Employer provided a response to fifteen of them. Here, the Employer is providing a response to two of the sixteen, and even this response is not exactly what was requested, i.e., the Union requested number of new patients seen within 14 calendar days, not percentages. Moreover, the Employer has had over three months to provide this information so a claim that it is not readily available is specious and somewhat laughable.

(JT Ex 9).

2. Union’s Specific Response to Item 2

For Item 2, the Union succinctly responded, “See attachment. The Union requested quarterly data for two years. The Employer provided end of year data only. This request has not been fulfilled.” (JT Ex 9).

3. Union’s Specific Response to Item 3

The Union responded as follows regarding Item 3:

The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant. See my general response to the relevance issue above. The number of KP health plan members seeking the behavioral health services provided by our members is critical to any determination whatsoever of demand, of workload, of staffing.

(JT Ex 9).

4. Union’s Specific Response to Item 4

The Union’s specific response to Item 4 was as follows:

The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant. See my general response to the relevance issue above. IOP services are an integral part of the current model of care and therefore an understanding of demand for IOP services
is critical for evaluating any recommendation that would modify the current model of care.

(JT Ex 9).

5. Union’s Specific Response to Item 5

The Union responded to Item 5 as follows:

_This information is not collected by the Employer in the manner being requested._

The Employer made this same claim in response to the 2018 information request, but later admitted during an NLRB hearing in Case 32-CA-226909, that it did indeed have the information and was then, as part of the Order, required to provide that information to the Union. Here is an excerpt from the ALJ’s decision in that case:

“The Respondent does not contest its liability as to Category 10(e) regarding information on the number of patients presenting at Kaiser Emergency departments. It previously asserted that the information did not exist before admitting at the March 18 hearing that it does in fact possess the relevant data. Accordingly, I find that Respondent unreasonably delayed in providing information pertinent to Category 10(e), in violation of Section 8(a)(5) and (1) of the Act.”

(JT Ex 9). _The Permanente Medical Group, Inc., 368 NLRB No. 131, slip op. at 7 (2019)._ 

6. Union’s Specific Response to Item 6

The Union responded as follows regarding Item 6:

_The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant._ First off, I am surprised that the Employer does not know what crisis stabilization means and wonder if the Department of Managed Health Care knows this. It seems to me the Employer should know how to define a service it is required to provide. To help you out, here is a common, well understood definition:

“Crisis stabilization is defined as “a direct service that assists with deescalating the severity of a person's level of distress and/or need for urgent care associated with a substance use or mental health disorder.”

Also, see my general response to the relevance issue above.

(JT Ex 9).
7. **Union’s Specific Response to Item 7**

The Union specifically responded to Item 7 as follows:

This information is not collected by the Employer in the manner being requested. Please provide the Union’s rationale on how this information is necessary and relevant to assessing recommendations from the Collaborative. Please provide the information in whatever manner it is collected. As with other behavioral health services, groups are an integral part of the integrated behavioral health system that is the essence of the model of care. Also, see my general response to the relevance issue above.

(JT Ex 9).

8. **Union’s Specific Response to Item 8**

As noted above, the Union responded that it was satisfied with the responsive information Respondent provided for Item 8: “See attachment. Thanks for providing this information.” (JT Ex 9).

9. **Union’s Specific Response to Item 9**

As indicated above, the Union responded to Item 9 by pointing out that Respondent failed to attach any document responsive to Item 9: “See attachment. I am assuming you meant to attach this information; however it was not included. Please send.” (JT Ex 9). It is undisputed that Respondent did not provide any responsive documents to Item 9. (JT EX 3A, 8, 8A; Tr. 49-50).

10. **Union’s Specific Response to Items 10 and 11**

The Union specifically responded to Items 10 and 11 pertaining to subcontracting as follows:

The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant. See my general response to the relevance issue above. Also note that improving internal capacity, which is a key objective of the MOC committee, is in large part dependent on reducing outside referrals. Finally, please note that the ALJ in the aforementioned NLRB decision ruled that information related to subcontracting and outside
referrals was necessary and relevant to the Union’s collective bargaining obligations. No different here.

(JT Ex 9). *The Permanente Medical Group, Inc.*, 368 NLRB No. 131, slip op. at 6 (2019).

**R. Respondent Fails to Credibly or Sufficiently Explain Why It Delayed and Failed to Provide Information to the Union Responsive to the 2020 RFI**

As summarized above, there is little dispute that Respondent failed to provide fully responsive information to Items 1 through 7 and Items 9 and 10. (JT EX 1, 3A, 8, 8A; Tr. 49-50). With respect to Item 8, Respondent delayed in providing this information by taking over 3 months to provide this information. (JT EX 1, 3A, 8, 8A; Tr. 49-50).

Respondent’s Senior Labor Relations Consultant Deborah Glasser (Glasser) was designated by Respondent to respond to the December 20th information request on Respondent’s behalf. (JT EX 1, paragraph 5(e), p. 5). On January 11, 2021, Glasser represented to the Union, “As additional information becomes available we will complete the Request.” (JT EX 1, paragraph 5(g), p. 5). However, it is undisputed that Respondent did not complete the December 20th information request. (JT EX 1, 3A, 6, 8, 8A; Tr. 49-50).

Glasser was subpoenaed by the General Counsel to testify at the hearing and was its first witness. (Tr. 25). Despite having advance notice and time to prepare for her testimony, Glasser could recall virtually no specifics regarding Respondent’s response to the Union’s 2020 RFI. (Tr. 66-69, 74-76, 81, 102).

When pressed by the General Counsel about the steps that Glasser took to complete each specific item of the 2020 RFI, Glasser testified generally that on a date she could not recall, she reached out to operations, whom she could only recall and identify as Amistoso, Respondent’s Regional Director for Strategies and Programs within its Department of Regional Mental Health Administration. (Tr. 66-69, 74-76, 81, 102). However, Glasser could not recall any specifics about such discussions with Amistoso regarding the
December 20th information request. Id. Instead, Glasser merely testified generally that Respondent went through the data to see what types of information was available. Id.

When Glasser was asked specifically about the steps she took to respond to those items that Respondent provided partial responsive documentation, for Item 1, Glasser recalled that there was some question by Amistoso about access to responsive information because of a legacy system Glasser thought was replaced called PARRS but, once again, Glasser could not recall details. (Tr. 68-69). With respect to the steps Glasser took to respond to Item 2, Glasser testified only that she reached out to operations to see if Respondent had responsive data compiled. (Tr. 74-75). When asked to explain the scant, two pages of responsive information that Respondent did provide the Union, Glasser testified, “I would not be comfortable going through each one of these.” (Tr. 41).

When Glasser was asked specifically questions about the potential usefulness and relevancy of certain items contained within the Union’s December 20th information request, Glasser again refused to answer, as she was “not comfortable just answering these questions essentially without a greater understanding.” (Tr. 72-73). Similarly, when Glasser was asked about its responses to Items 5 and 7 about the information “not collected by the Employer in the manner being requested,” Glasser was unable to articulate if or how responsive information was collected by Respondent. (Tr. 77-78, 82).

The General Counsel next called Amistoso to testify at hearing, the only individual Glasser identified by name that she consulted to respond to the December 20th information request. (Tr. 66, 67, 69, 75, 81, 85, 88-90, 101). Amistoso responded generally that she simply consulted with two named individuals from TPMG Consulting to gather and compile Respondent’s only responsive information, consisting of two pages partially responsive to Items
1 and 2 and fully responsive to Item 8, provided over three months after the initial request, on March 15, 2021. (JT EX 1, 3A, 8, 8A-1, 8A-2; Tr. 105, 107, 108, 110, 111, 113, 119-123, 128).

With respect to Item 5 specifically, requesting the number of patients who have presented to Respondent’s emergency department, by service area, for each month from January 2019 through November 2020, although Amistoso admitted that Respondent maintained such emergency department records, she later backtracked and stated that she was unaware of Respondent “keeping that information in a standardized, centralized way” and that she is “not aware of exactly how that data is kept.” (Tr. 111-112.). Amistoso also admitted that Respondent provided at least some documents responsive to a similar emergency room information request in as part of the Union’s 2018 RFI. (Tr. 113-114; GC EX 19, 25).

The record reflects that the one item of the Union’s information request made in June 2021 (detailed below and referred to as the 2021 RFI) requesting emergency department data differed from Item 5, as it was limited to the number of patients during a specified time period “who have presented to a Kaiser Emergency department with a psychiatric emergency and the number of these who were placed on 5150 hold.” (R EX 1(c) at p. 21). Respondent responded to this June 2021 emergency department request, “Data is not available. No standardize report exists with therapist data only.” Id.

S. The Union’s Similar June 1, 2021 Information Request

As with the 2018 RFI, to provide background and a basis of comparison for the information request at issue in this case, the Union made two similar information requests by letter dated June 1, 2021, at Items 9 and 10, to prepare for negotiations with Respondent (2021 RFI), as follows:

9. Subcontracting/Outside Referrals. Please provide:
a) For each Medical Center and for each Connect-to-Care (C2C) hub, for each calendar year 2019 and 2020 and year-to-date 2021, the number of Health Plan members referred out to outside vendors (segregated by vendor) and/or outside providers (indicating if through KP Direct) for out-patient mental health services; and

b) The total expenditure, for each calendar year 2019 and 2020 and year-to-date 2021, of subcontracting/referring out of Health Plan members for mental health services.

10. Access/Utilization. Please provide:

a) For each medical center and each C2C location, for each calendar year 2019, 2020 and year-to-date 2021, for the departments of Psychiatry, broken down by Adult v. Child, the following:

1) number of new patients booked, broken down by modality (i.e., in person, telephone, video);

2) number of new patients seen, broken down by modality;

3) number of new patients seen within fourteen calendar days of request;

4) FTKA %age for new patients;

5) number of secondary intake appointments booked, broken down by modality;

6) number of secondary intake appointments kept, broken down by modality;

7) number of secondary intake appointments scheduled within fourteen days of the initial visit;

8) FTKA %age rate for secondary intake appointments;

9) number of return appointments booked, broken down by modality;

10) number of return appointments kept, broken down by modality;

11) number of return visits scheduled within fourteen days of the initial visit or secondary appointment visit;

12) FTKA %age rate for return appointments;

b) The number of Health Plan members, by service area, at the end of each quarter beginning December 31, 2018 and through March 30, 2021;
c) The percentage of Health Plan members, by service area, seeking mental health services (also referred to as the “penetration rate”) for 2019, 2020 and year-to-date 2021;

d) The number of Psychiatry Department patients, by service area, referred to Intensive Outpatient Programs (IOP) for 2019, 2020 and year-to-date 2021;

e) The number of patients (indicating whether Health Plan members or not), by service area, for 2019, 2020 and year-to-date 2021 who have presented to a Kaiser Emergency department with a psychiatric emergency and the number of these who were placed on 5150 hold; and

f) The number of Health Plan members referred for 1) crisis stabilization and 2) in-patient hospital services outside of Kaiser, by service area, for 2019, 2020 and year-to-date 2021.

(R EX 1A, p. 2-3; GC EX 19).

On June 11, 2021, the Union followed up with Respondent regarding its 2021 RFI, as follows:

As for the information request, please provide information as it becomes available and let me know within the next week if the Employer has any questions about any of the itemized requests or any objections. If I do not hear from you by next Friday, I will proceed as if there are no objections and expect all information to be provided by July 1, 2021.

(R EX 1C, p. 2).

On June 29, 2021, the Union followed up with Respondent again regarding its 2021 RFI, “It is nearly a month and the Union has not received any of the information requested.” (R EX 1C, p. 2). The Union continued, “You have not raised any objections so if the requested information is not provided by July 1, the Union can only assume the Employer is purposefully delaying and/or refusing to provide the information and will proceed accordingly.” (R EX 1C, p. 3).

About three months after the Union’s 2021 RFI, by email dated September 2, 2021, Respondent provided the Union with partial responsive information to Items 9 and 10 of its 2021 RFI. (R EX 1C, p. 1). Specifically, Respondent provided partial responsive information to Item
9 of its 2021 RFI to the Union, to portions of Item 9(a) pertaining to outside referrals. (R EX 1C, p. 9). Respondent also requested the relevance of Item 9(b) of the Union’s 2021 RFI. (R EX 1C, p. 12).

Further, with respect Item 10(a) of the Union’s 2021 RFI, Respondent admitted it did not break down its response to Item 10(a)(1) by modality. Id. Respondent claimed that its response to Item 10(a)(1) encompassed its response to Items 10(a)(2) and (3) of the Union’s 2021 RFI. Id. With respect to Items 10(a)(4), (8), and (12), Respondent claimed that FTKA rates are “not available by modality or by news or returns.” Id. With respect to Items 10(a)(5)-(7) and (9)-(11), Respondent provided the total return appointments seen at each medical center, but claimed: “We do not break it down by modality. There is no report available for measuring access for return appointments, including secondaries.” Id.

With respect to Item 10(b) of the 2021 RFI requesting the number of Health Plan members, by service area, at the end of each quarter beginning December 31, 2018 and through March 30, 2021 (emphasis added), Respondent claimed this data was provided in response to the 2020 RFI. Id. However, it is temporally impossible that Respondent provided a complete response through March 30, 2021, as Respondent’s response to the 2021 RFI was provided to the Union 20 days earlier, on March 10, 2021. Id. (JT EX 8, 8A; Tr. 49-50).

On September 2, 2021, Respondent provided the Union responsive information to Items 10(c) and 10(d) of the 2021 RFI. (R EX 1C). With respect to the emergency department data requested at Item 10(e) of the 2021 RFI, Respondent responded, “Data is not available. No standardize (sic) report exists with therapist data only.” (R EX 1C, p. 12; GC EX 24 and 25, p. 4).

Respondent did not provide responsive information to Item 10(f) of the 2021 RFI on September 2, 2021, but rather simply responded, “Pending.” (R EX 1C, p. 12). The record does
not reflect that any further responsive information was provided by Respondent responsive to the 2021 RFI after September 2, 2021.

III. RESPONDENT FAILED TO TIMELY PROVIDE THE UNION WITH RELEVANT INFORMATION IN VIOLATION OF SECTION 8(a)(1) AND (5) OF THE ACT

A. The Applicable Legal Standard Regarding Information Requests and Relevance

Pursuant to Section 8(a)(5) of the Act, an employer is obligated to furnish information to a union which is potentially relevant and which the union could use to satisfy its statutory duties as the collective bargaining representative of the unit. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 434 (1967); *NLRB v. Truitt NFG. Co.*, 351 U.S. 149, 152-153 (1956); *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987). The Board applies a “liberal, discovery-type standard” to determine relevance of the request by which the union must show only “the probability that the desired information [is] relevant, and that it would be of use to the [requesting party] in carrying out its statutory duties and responsibilities.” *Acme Industrial Co.*, supra. at 437. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union’s role as the exclusive collective-bargaining representative. *Southern California Gas. Co.*, 344 NLRB 231, 235 (2005).

After relevance has been established, the burden shifts to the party from whom the information was requested to establish that the information was not relevant, that it did not exist, or for some other valid defense, could not be furnished. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992) and *Postal Service*, 276 NLRB 1282 (1985). If an employer has a legitimate claim that a request for information is unduly burdensome or overbroad, it must articulate those concerns to the union and make a timely offer

As will be shown below, based on Respondent’s delay in providing responsive information responsive to Item 8, and its outright refusal to provide relevant information sought in Items 1-7 and 9-11, Respondent has violated Section 8(a)(1) and (5) of the Act.

**B. Respondent Has Failed to Justify its Delay in Providing Information and Failed to Seek Accommodations as Alleged in Paragraph 5(k) of the Complaint, as Amended**

Respondent unlawfully delayed in providing Item 8 of the 2020 RFI, which is presumptively relevant information as it relates to the Unit employees’ workload as well as their terms and conditions of employment, since the request seeks information pertaining to the number of patients Unit employees have seen by video and by phone. (JT EX 3A). Generally, when an employer does not have the requested information or needs more time to collect the information, an employer must communicate to a union that it does not have the information or needs more time to gather the information otherwise the Board finds an unreasonable delay and therefore a violation of the Act. The law does not give an employer the right to provide the information whenever it is convenient to them or to otherwise ignore the request. *Postal Service*, 332 NLRB 635, 638-639 (2000); *Endo Painting Service, Inc.*, 360 NLRB 485, 496 (2014).

As the Board made clear, “[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Monmouth Care Center*, 354 NLRB 11, 51 (2009), reaff’d. 356 NLRB 152 (2010), enf’d. 672 F.3d 1085 (D.C. Cir. 2012). “In evaluating the promptness of the employer’s response, ‘the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.’” *West Penn Power, Co.*, 339 NLRB 585, 587 (2003), (quoting *Samaritan Medical Center*, 319 NLRB 392, 298 (1995)) enf’d. in relevant part 394 F.2d 233 (4th
“Indeed, it 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, n. 9 (1993).


Here, Item 8 of the 2020 RFI related to the number and percentage of patients seen by the bargaining unit by video and phone was presumptively relevant, and it is undisputed that Respondent did not provide any responsive information to Item 8 until March 10, 2021, over three months after the Union’s initial request. (JT EX 3A, 8, 8A; Tr. 49-50). This over three-month time frame does not meet the criteria under well-established Board law, since it is not “as promptly as circumstances allow.” Good Life Beverage, supra. at 1062 n. 9 (1993), quoting E.I. Du Pont & Co., 291 NLRB 759 n. 1 (1988).
At a minimum, between December 8, 2020 and March 10, 2021, Respondent could have responded in some fashion and could have attempted to arrange a mutually acceptable schedule with the Union for furnishing the documents. Instead, the Union had to pester Respondent twice, on January 11, 2021 and February 25, 2021, to provide a response, and Respondent did not provide a substantive response until March 10, 2021. (JT EX 1, 5, 6, 7). Respondent has not offered any defense regarding why it took over three months to provide the Union responsive information to Item 8, simply seeking, for each Respondent medical center, the number of patients seen by Unit employees by video and by phone during a specified period of time.

For purposes of comparison between the 2018 RFI, the 2020 RFI, and the 2021 RFI, there is not a comparable request to Item 8 for the 2018 RFI. (GC EX 19, p. 2-3). With respect to the 2021 RFI, the Union requested modality in certain of its requests at Item 10(a), such as by video or by phone as requested at Item 8 of the 2020 RFI. (R EX 1A). Respondent admitted it did not break down its response to the 2021 RFI Item 10(a)(1) by modality, but provided no clear explanation as to why it did not break down the requested data by modality as the Union requested. (R EX 1C, p. 12).

Accordingly, the evidence establishes that Respondent violated the Act by delaying in providing the Union with responsive information to Item 8 as alleged in Paragraph 5(k) of the Complaint, as amended. (GC EX 18).

C. Respondent Has Violated Section 8(a)(5) of the Act by Failing to Produce Information Requested at Items 1, 5, and 7 and its Defense that the Information is not Readily Available or not Collected in the Manner Requested should be Rejected.

1. Respondent Failed and Refused to Furnish the Union with Information Requested at Item 1.

It is undisputed that Respondent has not provided all of the responsive information sought at Items 1, 5, and 7 of the Union’s 2020 RFI. (JT EX 3A, 8, 8A; Tr. 49-50). With respect
to Item 1, rather than providing, broken down by medical center, for each month from January 2019 through November 2020, the requested *numbers* of new patients booked, new patients seen, and new patients seen within 14 calendar days of the request, Respondent provided the *percentages* of these Item 1 requested subparts. (JT EX 3A, 8A) (emphasis added). Further, Respondent did not provide responsive information to Item 1, broken down by medical center, for each month from January 2019 through November 2020: the percentages of new patients who cancel or fail to keep their appointment (including transfer patients), number of return appointments booked and kept, number of return visits scheduled within fourteen days of the initial visit, or the percentage of established patients who cancel or fail to keep their return appointments. (JT EX 3A, 8A; Tr. 49-50).

Respondent’s only defense with regard to its failure is that, “Much of the data drilldown being requested is not readily available in our system of reporting.” Importantly, Respondent made no claim that the information sought at Item 1 did not exist. It is well established that Respondent was “obligat[ed] to timely disclose that requested information does not exist” as part of the duty to timely provide information. *Endo Painting Service*, 360 NLRB 485, 486 (2014). Respondent made no such timely disclosure in the instant case responsive to Item 1, and in fact, did somewhat attempt to partially respond to two portions of the portions requested, albeit providing *percentages* rather than the *numbers* of new patients seen as requested. (JT EX 3A, 8, 8A).

Further, as the Union pointed out in its March 15<sup>th</sup> response, Respondent makes this “not readily available” claim responsive to Item 1 *over three months after* the Union’s 2018 RFI. *Id.* (JT EX 3A, 8, 8A, 9). While this “not readily available” excuse may have been understandable a few days or even a week after the Union made its request on December 8, 2020, this excuse rings
hollow over three months later, particularly when Respondent failed to advance any credible
defense regarding its failure to provide information responsive to Item 1. *Id.*

2. **Respondent Failed and Refused to Furnish the Union with Emergency Department Information Requested at Item 5.**

With respect to Item 5 of the Union’s 2020 RFI, seeking the number of patients, by service area, who presented to Respondent’s emergency department for each month from January 2019 through November 2020, as well as the number of those patients who were placed on a psychiatric hold (5150), Respondent’s nebulous response is, “This information is not collected by the Employer in the manner being requested.” (JT EX 3A, 8, 8A). It is undisputed that Respondent provided no responsive information to Item 5 of the 2020 RFI. (JT EX 3A, 8A; Tr. 49-50).

As with its response to Item 1, Respondent does not state that responsive information to Item 5 does not exist, as it is obligated to timely do, if accurate. *Endo Painting Service*, 360 NLRB 485, 486 (2014). However, here, any claim that information responsive to Item 5 does not exist is plainly inaccurate considering Respondent admitted liability for its failure to timely provide responsive information to the similar emergency department information requested Item 10(e) of the Union’s 2018 RFI. *The Permanente Medical Group, Inc.*, 368 NLRB No. 131, slip op. at 1 and 7 (2019). Further, according to the ALJD, consistent with the testimony from Amistoso and Tegenkamp, Respondent provided at least some information responsive to Item 10(e) of the Union’s 2018 RFI as a result of the March 18, 2019 hearing before Judge Etchingham. *Id.*

On January 17, 2020, Respondent filed a Certificate of Compliance in Case 32-CA-226909, certifying that on April 11, 2019, it provided information responsive to the Board Order to “Promptly provide the Union with the number of patients presenting at Kaiser Emergency
departments” to the Region 32 General Counsel and the Union. *Id.* (GC EX 24 and 25, p. 4). (GC EX 25). To the contrary, despite Respondent admitting liability to Judge Etchingham and providing the Union with responsive information to Item 10(e) of the 2018 RFI associated with the March 18, 2019 hearing, about a month later, on April 11, 2019, Respondent then incredibly claimed to the Region 32 General Counsel that it did *not* have further data responsive to Item 10(e) of the 2018 RFI to provide to the Union for the number of patients presenting at Kaiser Emergency departments. (GC EX 24 and 25, p. 4).

With respect to the emergency department data requested at Item 10(e) of the 2021 RFI, as noted above, it is distinguishable from Item 5 of the 2020 RFI because it specifically sought the number of patients “who have presented to a Kaiser Emergency department with a psychiatric emergency and the number of these who were placed on 5150 hold.” (R EX 1A, p. 4). Given the Union’s specific request in its 2021 RFI for emergency department patients presenting with a psychiatric emergency and 5150 hold, Respondent responded, “Data is not available. No standardize report exists with therapist data only.” (R EX 1C, p. 12; GC EX 24 and 25, p. 4). The record does not reflect that any further responsive information was provided by Respondent responsive to the 2021 RFI after September 2, 2021.

3. **Respondent Failed and Refused to Furnish the Union with Information Requested at Item 7.**

Item 7 of the Union’s 2020 RFI generally seeks information regarding the number of group mental health appointments performed by Respondent’s internal, non-MD clinicians and the total number of enrollees participating in such appointments per month. (JT EX 3A.) Respondent claimed that it did not collect this information in the manner being requested and requested the relevance of this information. (JT EX 8). The Union reasonably responded, “Please provide the information in whatever manner it is collected,” and specifically responded
that such group mental health appointments are relevant as an integral part of Respondent’s integrated behavioral health system that is the essence of its model of care.  (JT EX 9).

Respondent made no further response thereafter, and therefore any defense must fail.  (JT EX 3A, 8A; Tr. 49-50).  Accordingly, Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide the information requested in Items 1, 5, and 7 of the Union’s 2020 RFI.

D.  Respondent Has Violated Section 8(a)(5) of the Act by Failing to Produce Information Requested at Items 3, 4, 6, 10, and 11 and its Defense that the Information is not Relevant should be Rejected.

1.  The Union Met its Burden to Explain the Relevance of Item 3

Respondent requested the relevance of Item 3, generally seeking the percentage of Respondent’s members seeking mental health services, or the penetration rate.  (JT EX 3A, 8).

The Union specifically responded that the number of Respondent’s members seeking behavioral health services provided by Unit employees is “critical to any determination whatsoever of demand, of workload, of staffing.”  (JT EX 9).  Respondent made no further response thereafter, and therefore any relevance defense must fail.  (JT EX 3A, 8A; Tr. 49-50).

2.  The Union Met its Burden to Explain the Relevance of Item 4

Respondent also requested the relevance of Item 4, generally seeking the number of psychiatry department patients referred to Intensive Outpatient Programs (IOP).  (JT EX 3A, 8).

The Union specifically responded that such IOP services are an integral part of Respondent’s model of care and “an understanding of demand of IOP services is critical for evaluating any recommendation that would modify the current model of care.”  (JT EX 9).  Respondent made no further response thereafter, and therefore any defense must fail.  (JT EX 3A, 8A; Tr. 49-50).
3. The Union Met its Burden to Explain the Relevance of Item 6

At Item 6, the Union generally requested the numbers of Respondent’s health plan members referred for 1) crisis stabilization and 2) inpatient hospital services outside of Respondent. (JT EX 3A). Respondent requested the Union’s definition for crisis stabilization and challenged the relevance of Item 6. (JT EX 8). The Union specifically responded:

Crisis stabilization is defined as a direct service that assists with deescalating the severity of a person’s level of distress and/or need for urgent care associated with a substance use or mental health disorder.

(JT EX 9). The Union relied on its general response regarding relevance for Item 6, that the requested information pertains directly to the work performed by Unit employees, by providing behavioral health services to Respondent’s patients. (JT EX 9). The Union further explained that such information is relevant and necessary to determine patient demand for services impacting the work of Unit employees. (JT EX 9). Respondent made no further response thereafter, and therefore any defense must fail. (JT EX 3A, 8A; Tr. 49-50).

4. The Union Met its Burden to Explain the Relevance of Items 10 and 11

Respondent requested the relevance of Item 10, generally seeking the total number of Respondent’s health plan members referred to outside vendors and/or providers for out-patient mental health non-MD services. (JT EX 3A, 8). Respondent also requested the relevance of Item 11, generally seeking the number of treatment appointments performed by Respondent’s external provider network of non-MD clinicians. (JT EX 3A, 8).

The Union specifically responded that “improving internal capacity” is “a key objective” of the Model of Care committee and is in “large part dependent on reducing outside referrals.” (JT EX 9). The Union also explained that Judge Etchingham found that information related to subcontracting and outside referrals was necessary and relevant to the Union’s collective
bargaining obligations. (JT EX 9). *The Permanente Medical Group, Inc.*, 368 NLRB No. 131, slip op. at 6 and 7 (2019).

The Board has held that information requested pertaining to subcontracting agreements, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, 350 NLRB 1256 (2007). Information concerning employees outside the bargaining unit is not presumptively relevant; rather, relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 257, 259 (1994).

The burden to show relevance, however, is “not exceptionally heavy,” *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). Rather, “[t]he standard for relevancy is a ‘liberal discovery-type standard,’ and the sought-after evidence need not be necessarily dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities.” *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), quoting *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997) (citations omitted), enfd. 172 F.3d 57 (9th Cir. 1999). See also *McKenzie-Willamette Medical Center Associates*, 362 NLRB 135 (2015), quoting *Acme Industrial Co.*, supra. At 437. It merely requires “a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances.” *Public Service Co. of New Mexico*, supra. at 574. See also *Disneyland Park*, 350 NLRB 1256, 1258 (2007); *Shoppers Food Warehouse*, supra. at 259.

In the instant matter, the Union provided its justification for relevance for subcontracting information requested at Items 10 and 11 of the 2020 RFI. (JT EX 9). As required in *Disneyland Park*, the Union, through Tegenkamp, provided its objective basis for why the
information it was seeking was relevant to the performance of its statutory duties. Then, the burden shifted to Respondent to either furnish the information or provide an adequate justification for why it was refusing. Respondent failed to take either step, and therefore, it has violated Section 8(a)(5) of the Act as alleged in the Complaint, as amended. (GC EX 1(c), 18; JT EX 3A, 8A; Tr. 49-50).

E. Respondent Has Violated Section 8(a)(5) of the Act by Failing to Fully Produce Information Requested at Items 2 and 9

Respondent responded to Items 2 and 9, “See attachment.” (JT EX 3A, 8, 8A). For Item 2, the Union specifically explained that this “request has not been fulfilled,” as the “Union requested quarterly data for two years” and Respondent only “provided end of year data.” (JT EX 3A, 8A, 9). For Item 9, the Union notified Respondent that no responsive attachment was included, again requesting that Respondent please provide it. (JT EX 3A, 8A, 9). Respondent made no further response to Items 2 or 9 thereafter, and therefore any defense must fail. (JT EX 3A, 8A; Tr. 49-50).

F. Respondent’s Untimely Relevance Defense to the 2018 RFI in its Amended Answer Must Fail

First, as noted herein, the Union did not make any relevancy arguments for any portion of the 2020 RFI until over three months after the Union’s request. (JT EX 3A, 8, 8A). This first notice of Respondent’s relevancy arguments to Items 3, 4, 6, 7, and 10 and 11---over three months after the Union’s 2020 RFI---was itself untimely.

A mere five days later, the Union responded to the relevancy of the 2020 RFI in general and then specifically to Items 3, 4, 6, 7, and 10 and 11, to clearly demonstrate “the probability that the desired information [is] relevant, and that it would be of use to the [requesting party] in carrying out its statutory duties and responsibilities.” Acme Industrial Co., supra. at 437. The burden then shifted to Respondent to establish that the information was not relevant, that it did
not exist, or for some other valid defense, could not be furnished. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992) and *Postal Service*, 276 NLRB 1282 (1985). Respondent failed its relevancy burden miserably by admitting it provided *no* response to the Union regarding relevancy or anything else pertaining to the 2020 RFI thereafter, other than serving the Union with its Answer and Amended Answer to the instant Complaint, as amended. (Tr. 49-50; GC EX 1(g); R Ex. 9).

Second, over a year later, on January 26, 2022, after the General Counsel had already rested its case in chief, Respondent provided its Amended Answer, adding a Third Affirmative Defense:

TPMG alleges that any requests for information, and allegations of untimely responses thereto, prior to the issuance of the final recommendation from the Model of Care Collaborative, are irrelevant, premature, unmeritorious, and fail to state a claim.

(R Ex. 9; Tr. 63-64, 231, 244-245). Respondent’s belated, catch-all third affirmative relevancy defense must fail based on timing alone, since it did not timely communicate these relevancy arguments to the Union as required to meet its obligation to bargain in good faith. *Samaritan Medical Center*, supra.

Third, taken at face value, Respondent’s third affirmative defense that the Union’s 2020 RFI is somehow irrelevant because it was requested from Respondent prior to the issuance of the final recommendation from the Model of Care Collaborative around March 12, 2021 misapprehends the low threshold of relevancy a Union must establish as the exclusive bargaining representative of the Unit employees. Again, the Union must show only “the probability that the desired information [is] relevant, and that it would be of use to the [requesting party] in carrying out its statutory duties and responsibilities.” *Acme Industrial Co.*, *supra.* at 437. The Union fully
met its burden on March 15, 2021, when it responded generally and specifically to each item for which Respondent argued relevancy. (JT EX 9).

Respondent’s argument regarding the timing of the Union’s 2020 RFI, made a day before the Model of Care committee generated a midterm report around December 9, 2020 and before the committee issued its final report and recommendations around March 12, 2021, does not alter the Union’s established relevancy of its 2020 RFI. (Tr. 208, 210; R Ex 6D). As the Union explained in its March 15th response, it gave Respondent its 2020 RFI because the Union cannot determine if Respondent’s internal capacity is improved or if access is improved through the parties’ contractual Model of Care committee without baseline data, including the requested information related to access and subcontracting. (JT EX 9).

Further, the Union explained that “demand for services and staffing are two key components that determine access. It is therefore necessary and relevant to have information related to patient demand for services” for the Union to evaluate the Model of Care committee’s recommendations. (JT EX 9). There is no temporal limit to the relevancy of the Union’s requests for information pertaining to its representation of the Unit employees as Respondent contends—the Union must only establish that the requested information is useful to its representation of the Unit. Acme Industrial Co., supra. at 437. Through its March 15th response, the Union fully met this low threshold to show how its 2020 RFI was useful to its representation of the Unit. (JT EX 9).

Moreover, the Model of Care committee is a creature of the parties’ CBA and half of the committee members are Unit employees represented by Respondent. (JT EX 1; GC EX 2-4). Additionally, the grievance and arbitration provision of the parties’ CBA sets forth the parties’ agreement “to respond adequately, in a timely, good faith manner to requests for information, and to promptly address and resolve any disputes relating to the provision of requested
information.” (JT EX 1; GC EX 3 at 2). These contractual Model of Care and grievance and arbitration procedure provisions further bolster the Union’s relevancy arguments since the 2020 RFI could be useful to the Union to enforce the parties’ CBA provisions which remain in effect. (JT EX 1; GC EX 2-4; Tr. 60-61, 246).

Based on the foregoing, the Union’s untimely and patently incorrect third affirmative relevancy defense must fail.

G. There is No Issue Preclusion from Case 32-CA-226909.

With respect to potential issue preclusion raised sua sponte by the Judge Giannopoulos (the ALJ) in the instant case involving issues in an unfair labor practice proceeding that were litigated and decided in a prior unfair labor practice proceeding, in Case 32-CA-226909, the burden is on the party asserting preclusion to demonstrate that the identical issue was fully litigated, and on the party opposing preclusion to show that circumstances have changed materially. (Tr. 227-230). See Casino Pauma, 363 NLRB 536, 536 at 1 n. 1 (respondent tribal casino was collaterally estopped from contesting jurisdiction where the issue had been litigated and decided in a prior case and the facts had not changed). See also Wolf Creek Nuclear Operating Corp., 365 NLRB No. 55 (2017).

First, recognizing the similarity of the Union’s 2020 RFI in the instant proceeding with Items 9 and 10 of the Union’s 2018 RFI and its 2021 RFI, at the start of the hearing, the General Counsel requested that the ALJ take administrative notice of the record in Case 32-CA-226909. (Tr. 16-21, 159, 218, 220). The ALJ denied the General Counsel’s request, in an apparent attempt to not overburden the instant record, noting that the 2020 RFI was similar to only to two items requested in the 2018 RFI that containing requests for over ten items of information. Id. Instead, the ALJ instructed the General Counsel to offer any admitted exhibits from the record in Case 32-CA-226909 and prepare a separate General Counsel exhibit containing a key of the
General Counsel exhibit number in the instant proceeding with the admitted General Counsel exhibit number from Case 32-CA-226909. (GC EX 14-17, 19-24, 26; Tr. 16-21, 152, 159, 204, 218, 220).

Second, with respect to potential issue preclusion, despite the similarity between two items of the 2018 RFI and the 2021 RFI with the 2020 RFI, the General Counsel submits the 2020 RFI at issue in the instant matter is not the identical issue as the 2018 RFI or the 2021 RFI, since each request was a different request made at a different time for a different purpose. Specifically, the Union made the 2018 RFI, as well as its 2021 RFI, to prepare for successor collective bargaining agreement negotiations with Respondent. (GC EX 19, p. 2-3; R EX 1A, p. 2-3). Conversely, the Union made the instant 2020 RFI related to both access and capacity, including outside referral data, to evaluate any recommendations that will be made by the Model of Care committee, so the Union could effectively evaluate the implementation of any accepted recommendations. (JT Ex 3A). Moreover, as noted above, the ALJ acknowledged the patent, express differences between the 2018 RFI and the 2020 RFI in denying the General Counsel’s request to take administrative notice of the record in Case 32-CA-226909. (Tr. 16-21, 152, 204).

Third, Respondent did not assert issue preclusion in its Answer, its Amended Answer, or at any time during the hearing. (GC EX 1(g); R Ex 9). Rather, as noted above, the ALJ raised potential issue preclusion on his own initiative. (Tr. 227-230). Thus, Respondent did not meet any burden to demonstrate that the identical issue was fully litigated in Case 32-CA-226909. See Casino Pauma, supra.

Fourth, with respect to any burden being placed on the General Counsel to show that circumstances have changed materially, respectfully, the ALJ is improperly placing a burden on the General Counsel to present a “competent” witness to testify that the circumstances have changed materially involving Respondent’s systems. (Tr. 227-230). Any potential witnesses
able to testify to establish that the circumstances have changed materially involving Respondent’s systems are witnesses within Respondent’s control related to a potential issue preclusion defense that Respondent has not asserted to date. (Tr. 227-230; GC EX 1(g); R Ex 9).

Further, during the hearing, the ALJ raised the General Counsel’s purported “res judicata issue” specifically regarding a request for “follow-up visits scheduled within 14 days” at Item 1 of the 2020 RFI, vis-à-vis a similar request in a portion of the 2018 RFI. The ALJ suggested that in his view, he is bound by Judge Etchingham’s finding that Respondent “no longer maintains records on follow-up visits scheduled within 14 days and that it is not required by regulatory standards to do so.” Id. at 7. (Tr. 227-230). However, as discussed herein, no exceptions were filed regarding Judge Etchingham’s “follow-up visits scheduled within 14 days” finding and therefore it does not constitute Board precedent. See Colorado Symphony Assoc., 366 NLRB No. 122, slip op. at 1 n. 3 (2018), enfd. 798 Fed. Appx. 669 (D.C. Cir. 2020); Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel), 357 NLRB 1683 n. 1 (2011); Trump Marina Associates LLC, 354 NLRB 1027 n. 2 (2009), reaffd. 355 NLRB 585 (2010), enfd. 435 Fed. Appx. 1 (D.C. Cir. 2011); and Carpenters Local 370 (Eastern Contractors Assn.), 332 NLRB 174, 175 n. 2 (2000), and cases cited there.

Additionally, unlike the hearing in Case 32-CA-226909, at this unfair labor practice hearing, Respondent did not call any witness within its control, such as a supervisor, manager, or an agent, to testify about its defense to this “follow-up visits scheduled within 14 days” portion of Item 1 of the 2020 RFI. Rather, the General Counsel called Glasser, the witness Respondent designated to respond to the Union’s 2020 RFI and Amistoso, the only person Glasser identified as providing assistance in seeking to respond to the 2020 RFI, but neither was able to recall specifics regarding the steps they took to respond to the 2020 RFI, including purported systemic
issues limiting Respondent’s response. (Tr. 69, 120-121). Thus, the General Counsel respectfully requests that the ALJ exercise his discretion to make an adverse inference against Respondent for failing to present a witness within its control at this hearing in support of its own defense to the “follow-up visits scheduled within 14 days” portion of Item 1.

A judge may draw an adverse inference when a party fails without explanation to call a witness reasonably assumed to be favorably disposed toward it. “[T]he decision to draw an adverse inference lies within the discretion of the factfinder.” JAM Productions, Ltd., 371 NLRB No. 26, slip op. at 16 n. 53 (2021), citing Tom Rice Buick, 334 NLRB 785, 786 (2001). See, e.g., Sparks Restaurant, 366 NLRB No. 97, slip op. at 9–10 (2018) (drawing an adverse inference against the employer for failing to call its manager to testify), enf’d. 805 Fed. Appx. 2 (D.C. Cir. 2020); Martin Luther King, Sr. Nursing Center, 231 NLRB 15 n. 1 (1977) (same, where the employer failed without explanation to call its supervisors to testify); and Dayton Newspapers, Inc., 339 NLRB 650, 664 (2003) (same, where employer failed to call a dispatcher who attended meetings between operations director and employees), enf’d. in part 402 F.3d 651, 661–662 (6th Cir. 2005).

Fifth, Respondent filed exceptions pertaining to the Union’s subcontracting request included in its 2018 RFI, but the Board granted the General Counsel’s unopposed request to remand the subcontracting request to Region 32 to take further appropriate action, rendering Respondent’s exceptions moot. The Permanente Medical Group, Inc., 368 NLRB No. 131, slip op. at 1 (2019). Because the Board adopted Judge Etchingham’s conclusion of law and recommended Order, as modified, in the absence of exceptions, pertaining only to Item 5 of the Union’s 2018 RFI regarding Respondent’s emergency department, the ALJD is not binding precedent in other cases. See Colorado Symphony Assoc., supra.
Although lacking precedential legal authority, a judge’s decision that has been adopted by the Board in the absence of exceptions may properly be relied on in a subsequent case involving the same parties, at least where all the required elements of collateral estoppel are met. See *Moulton Mfg. Co.*, 152 NLRB 196, 207–209 (1965) (rejecting the respondent’s argument that such decisions should be given no more effect than a settlement agreement); and *Operating Engineers Local 12 (Associated Engineers)*, 270 NLRB 1172, 1172–1173 (1984) (prior ALJ decision may be relied on to show respondent has a proclivity to violate the Act, even if the decision was adopted by the Board in the absence of exceptions). See also *Hitchens v. County of Montgomery*, 98 Fed. Appx. 106 (3d Cir. 2004) (hearing officer’s proposed decision that was adopted by the state labor agency in the absence of exceptions was a final order sufficient to bar relitigation of the same issues in a subsequent federal action against the same party or party in privity).

Consistent with the General Counsel’s arguments set forth above, the General Counsel contends that the ALJD does not constitute binding precedent. In the event that Respondent argues that and/or the ALJ finds, based on the principles of collateral estoppel, that portions of the ALJD may be relied upon for the instant case, the General Counsel respectfully submits that the ALJ rely upon the ALJD to find that: Respondent has a proclivity to violate the Act; Respondent admitted liability regarding the portion of the 2018 RFI pertaining to the number of patients who have presented to its emergency department, similar to Respondent’s request at issue at Item 5 of the 2020 RFI at issue in this proceeding; and Respondent violated Section 8(a)(5) of the Act by failing and refusing to furnish the Union with information responsive to Item 5 as alleged in the complaint, as amended. *The Permanente Medical Group, Inc.*, 368 NLRB No. 131, slip op. at 1 and 7 (2019).
IV. CONCLUSION

For the reasons set forth above, Counsel for the General Counsel respectfully urges a finding by the Administrative Law Judge that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the Complaint, as amended, and to enter an Order which includes a posting of the proposed Notice attached hereto as Appendix A, and any other remedy deemed just and proper under the law.

Dated at Phoenix, Arizona this 22nd day of March, 2022.

Respectfully submitted,

_/s/ Lisa J. Dunn_________________
Lisa J. Dunn
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 N Central Ave., Suite 1400
Phoenix, AZ 85004
lisa.dunn@nlrb.gov
THE NATIONAL LABOR RELATIONS ACT 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 interfere with, restrain, or coerce you in the exercise of the above rights.

National Union of Healthcare Workers (the Union) is the employees’ representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

All full-time and regular part-time non-supervisory staff Neuropsychologists, Psychologists, Licensed Clinical Social Workers, Marriage and Family Therapists, Licensed Professional Clinical Counselors and Chemical Dependency Counselors I & II, Unlicensed Case Managers, Psychiatric Social Worker Assistants, Marriage and Family Therapist Assistants, Psychological Assistants and Professional Clinical Counselor Assistants who perform clinical work and provide patient care in the Northern California Region; excluding Psychologists, Chemical Dependency Counselors, Licensed Clinical Social Workers, Marriage and Family Therapists and Licensed Professional Clinical Counselors who work in supervisory, administrative and/or research capacities or function as Chiefs, Division Chiefs, Coordinators, Sub- Regional Chiefs/Coordinators, students and volunteers, guards, managers, and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, within five (5) calendar days, provide the Union with the information it requested on December 8, 2020, and re-requested on January 11, February 25, and March 15, 2021.

THE PERMANENTE MEDICAL GROUP INC.,
NORTHERN CALIFORNIA REGION
(Respondent)

Dated: ____________________ By: ____________________
(Representative) (Title)
The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below or you may call the Board’s toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

2600 North Central Avenue -Suite 1400
Phoenix, AZ 85004-3099

Telephone: (602)640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nlrb.gov.
CERTIFICATE OF SERVICE

I hereby certify that the COUNSEL FOR THE GENERAL COUNSEL’S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in The Permanente Medical Group Inc., Case 28-CA-273219. was served via E-Gov, E-Filing, and E-Mail, on this 22nd day of March 2022, on the following:

Via E-Gov, E-Filing:
The Honorable John Giannopoulos
Administrative Law Judge
National Labor Relations Board
Division of Judges
901 Market Street, Suite 485
San Francisco, CA 94103-1779

Via Electronic Mail:
Michael R. Lindsay, Esq.
Alicia Anderson, Esq.
Nixon Peabody, LLP
300 South Grand Avenue, Suite 4100
Los Angeles, CA  90071
Email: mlindsay@nixonpeabody.com
Email: acanderson@nixonpeabody.com

April L. Weaver, Esq.
Kaiser Permanente Legal Department
One Kaiser Plaza, 19th Floor
Oakland, CA  94612
Email: april.l.weaver@kp.org

Florice Hoffman, Esq.
Law Office of Florice Hoffman, L.C.
8502 East Chapman Avenue, Suite 353
Orange, CA 92869
Email: floricehoffman@gmail.com

Greg Tegenkamp, Kaiser Division Director
National Union of Healthcare Workers, [NUHW]
1250 45th Street Suite 200
Emeryville, CA 94608
Email: gtegenkamp@nuhw.org
Dawn M. Moore
Program Support Assistant
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada  89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov