NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

American Medical Response of Connecticut, Inc. *and* International Association of EMTs & Paramedics Local R1-999, NAGE/SEIU Local 5000. Case 01–CA–263985

June 10, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND WILCOX

On March 11, 2021, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.[3]

Here, the Union requested certain information from the Respondent in an effort to investigate, for possible grievance filing purposes, whether the Respondent was increasingly eliminating or "browning out" unit employees' scheduled shifts in favor of having nonunit employees perform that work. The judge found, and we agree, that the information requested by the Union was either presumptively relevant or that the Union established the relevance of the information.[4] See, e.g., *Kauai Veterans Express*

[1] The Respondent excepts to the judge's denial of its motion to amend its answer to allege as an affirmative defense that President Biden's removal of former General Counsel Peter Robb and his temporary appointment of Acting General Counsel Peter Sung Ohr was invalid. The Board has determined that such challenges to the authority of the Board's General Counsel based upon the President's removal of former General Counsel Peter Robb have no legal basis. *Aakash, Inc., d/b/a Park Central Care and Rehabilitation Center*, 371 NLRB No. 46, slip op. at 1-2 (2021). In addition, the Fifth Circuit recently rejected a similar challenge to the President's removal of the former General Counsel. See *Exela Enterprise Solutions, Inc. v. NLRB*, 32 F.4th 436, 441–445 (5th Cir. 2022). Member Ring acknowledges and applies *Aakash* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position that "reviewing the actions of the President is ultimately a task for the federal courts," as the Board concluded in *National Assn.. of Broadcast Employees & Technicians—The Broadcasting & Cable Television Workers Local 51*, 370 NLRB No. 114, slip op. at 2 (2021). See *Aakash*, 371 NLRB No. 46, slip op. at 4–5 (Members Kaplan and Ring, concurring); see also *Exela Enterprise Solutions, Inc. v. NLRB*, supra (reaching the same conclusion the Board reached in *Aakash* regarding the President's removal of Robb, but based on de novo review and according the Board's decision no deference).

Further, on August 20, 2021, General Counsel Abruzzo issued a Notice of Ratification in this case approving the continued prosecution of the complaint, and, on December 2, 2021, she issued a second Notice of Ratification in this case that states as follows:

> On February 8, 2021, after the hearing in this case had closed, Respondent filed an untimely motion to amend its answer to allege that the continued prosecution was an ultra vires act by former Acting General Counsel Ohr. Specifically, Respondent alleged that President Biden had unlawfully removed former General Counsel Peter B. Robb and unlawfully designated former Acting General Counsel Ohr.
>
> I was confirmed as General Counsel on July 21, 2021. My commission was signed and I was sworn in on July 22, 2021. On August 20, 2021, I ratified the issuance of the complaint and its continued prosecution in this case.
>
> Former General Counsel Robb's term has indisputably now expired. In an abundance of caution, I was re-sworn in on November 29, 2021. Following appropriate review and consultation with my staff, I have again decided to ratify the issuance of the complaint and its continued prosecution in this case. Those actions were and are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with Respondent's forfeited argument in this case or arguments in any other case challenging the validity of actions taken following the removal of former Acting General Counsel Robb. Rather, my decision is a practical response aimed at facilitating the timely resolution of the unfair-labor-practice allegations that I have found to be meritorious.
>
> For the foregoing reasons, I hereby ratify the continued prosecution of the complaint and all actions taken in this case subsequent to the removal of former General Counsel Robb, including by former Acting General Counsel Ohr and his subordinates.

Applying *Wilkes-Barre Hospital Co. LLC d/b/a Wilkes-Barre General Hospital*, 371 NLRB No. 55, slip op. at 1 fn. 2 (2022) (full-Board decision; collecting cases), we find that General Counsel Abruzzo's ratification renders the Respondent's argument moot. Member Ring acknowledges and applies *Wilkes-Barre* as Board precedent, although he expressed disagreement there with the Board's approach, and he adheres to the views he expressed in that case. See id.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

There are no exceptions to the judge's dismissal of the allegation that the Respondent unlawfully failed to provide requested "[d]ocumentation supporting response time requirements for emergency calls."

[3] We have added a remedy section, which the judge inadvertently failed to include in his decision. We shall also substitute a new notice to conform to the Board's standard remedial language.

[4] In so finding, we reject the Respondent's contention that the Union disclaimed its right to the requested documentation of New Haven response times due to its representative's alleged testimony that he never explained the relevance of the information to the Respondent. The

Co., 369 NLRB No. 59, slip op. at 2 (2020) (to extent requested information not presumptively relevant, union met burden by expressing need "to police [CBA] and ascertain whether nonunit employees had been performing bargaining unit work"). We also agree with the judge, for the reasons he states, that the Respondent was not privileged to withhold requested call volume data based on its insistence that the information was proprietary.[5] As a

representative testified only that he did not explain relevance after July 17, 2020, which has no bearing on the Union's showing of relevance over the previous months, and in any event, conflicts with the Union's July 22, 2020 written explanation that the information was relevant to its pending grievance.

In addition, we reject the Respondent's arguments that it could refuse to provide the requested number of calls responded to by nonunit employees in the New Haven coverage area because its purportedly established practice of assigning New Haven work to nonunit employees could render the grievance meritless and the Union was able to process a similar grievance without the information in 2019. The Board does not address the merits of a potential breach of contract claim in ruling on an information request. See, e.g., *Shoppers Food Warehouse*, 315 NLRB 258, 260 (1994). Further, the Union's processing of the 2019 grievance without the information does not show that this information is unnecessary now. See, e.g., *Leonard B. Hebert, Jr.*, 259 NLRB 881, 884–886 (1981) (rejecting argument that information was unnecessary because union had not previously requested it), enfd. 696 F.2d 1120 (5th Cir. 1983), cert. denied 464 U.S. 817 (1983).

We further note that to the extent some of the requests could be construed to refer to nonunit employees or nonrelevant information, that did not entitle the Respondent to simply refuse to provide any of the information. Rather, the Respondent was obligated to either seek clarification or provide the information to the extent it pertained to unit employees. See *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004) (recognizing duty), enfd. 401 F.3d 282 (5th Cir. 2005), cert. denied 546 U.S. 874 (2005); *Mission Foods*, 345 NLRB 788, 789 (2005) (bare assertion of overbreadth insufficient).

In finding that the Respondent violated the Act by failing to provide the records concerning response times, Member Ring does not rely on the "apparent" prong of the relevance standard, pursuant to which the relevance of the information "should have been apparent to the Respondent under the circumstances." See *Disneyland Park*, 350 NLRB 1256, 1258 (2007). Rather, he relies on the Union's stated concerns over staffing levels and shift cancellations (i.e., "brown outs") and the pending subcontracting grievance, all of which, as the judge found, support the relevance of the response time records request. Further, he relies on testimony establishing that response times--which the Respondent tracks and documents--would be affected by Bridgeport ambulances having to travel from Bridgeport to New Haven to answer a call versus already being in the New Haven area when a call came in. Such evidence may indicate circumstantially that unrepresented Bridgeport employees were performing unit work inasmuch as the requested response time records, analyzed against unit employees' shift-cancellation records, could show unit shifts being browned out without a concomitant increase in response times. Taken together, this evidence shows that the Union demonstrated "a reasonable belief supported by objective evidence that the requested [response time] information is relevant," even without considering whether relevance could have been apparent to the Respondent under the circumstances here. *E.I. Du Pont de Nemours & Co.*, 366 NLRB No. 178, slip op. at 4 (2019) (citing *Disneyland Park,* 350 NLRB at 1258).

[5] Regarding the Union's request for call volume data, Chairman McFerran and Member Wilcox note that, in response to the Union's request, the Respondent claimed only that the information was "proprietary" and offered no explanation of why. This bare assertion as part of a laundry list of possible defenses to the Union's information request did not give the Union any meaningful insight into the Respondent's concerns and equip it to bargain over an accommodation. See *Providence Hospital v. NLRB*, 93 F.3d 1012, 1020–1021 (1st Cir. 1996). Thus, we agree with the judge that the Respondent did not satisfy its burden of timely asserting and proving a legitimate confidentiality interest. See, e.g., *Mondelez Global LLC v. NLRB*, 5 F.4th 759, 774 (7th Cir. 2021); *Public Service Co. of New Mexico*, 364 NLRB 1017, 1018–1019, 1024–1025 (2016); *Mission Foods*, supra at 791–792.

Echoing arguments made by the Respondent, Member Ring would find that the Respondent did not waive a confidentiality defense as to the call volume data and would order the parties only to engage in accommodative bargaining. In his view, even though the Respondent did not timely assert or prove a legitimate confidentiality interest, the Respondent cured its inadequate response by offering additional justifications for its confidentiality defense at the unfair labor practice hearing and thus accommodative bargaining is appropriate. We disagree.

Under established Board and court precedent, to preserve its confidentiality defense, the Respondent was required to seek a timely accommodation or provide a justification for withholding the information prior to the hearing. See *Postal Service*, 364 NLRB 230, 231 (2016) (finding waiver under similar circumstances), reconsideration denied Case 05–CA–119507 (NLRB Aug. 26, 2016) (unpublished decision), enfd. Appeal No. 16-1313 (D.C. Cir. July 17, 2017) (unpublished decision on stipulation for consent judgment); *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995) (confidentiality claim raised during hearing untimely). See also *General Electric Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1990) (employer's justifications for refusing to provide requested information "must be examined as of the time of the demand and refusal," not at the time of the hearing); *Printing Pressmen Local 51 (Milbin Printing) v. NLRB*, 538 F.2d 496, 501 (2d Cir. 1976) (employer's response at hearing to information request inadequate because "it was the Employer's obligation to provide this explanation at the time the Union asked . . . , not to reserve it until the administrative proceedings many months later"). The Respondent did not do either and, thus, the judge correctly ordered the Respondent to provide the information. See, e.g., *Lasher Service Corp.*, 332 NLRB 834, 834 (2000) (order to bargain over accommodation inappropriate where employer raised only bare confidentiality claim).

In arguing to the contrary, our dissenting colleague attempts to distinguish the instant case from *Detroit Newspaper*, *Postal Service*, and *Lasher*. But his basis for doing so is his mistaken view that the Respondent's bare assertion of confidentiality here in response to the Union's information request and its late justifications offered at the unfair labor practice hearing were sufficient to preserve the Respondent's confidentiality defense. Further, Member Ring contends that *Metropolitan Edison Co.*, 330 NLRB 107 (1999), and *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983), support his position. In those cases, however, the employer invoked an arguably legitimate confidentiality interest in its initial response to the union's information request. *Metropolitan Edison*, supra at 107; *Minnesota Mining*, supra at 31–32, 39 (judge credited testimony that the respondent raised concerns about disclosure of trade secrets in its initial response). The Respondent failed to do so here and, as a result, the Union had no opportunity to evaluate the nature or legitimacy of the Respondent's confidentiality interest and discuss it with the Respondent.

Finally, we note that our dissenting colleague's approach is untenable as a matter of policy. Affording a respondent the opportunity to withhold justifications for an assertion of confidentiality and begin accommodative bargaining from square one at the remedial stage is at odds with the duty to timely seek accommodations and would incentivize respondents to drag out disputes while enjoying the unjust benefits of the delays. See,

result, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with the requested information identified in the judge's decision.

REMEDY

Having found that the Respondent engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with certain relevant information requested on May 7, June 10 and 15, and July 22, 2020, we shall order the Respondent to provide that information to the Union.[6] We shall also order the Respondent to post an appropriate remedial notice to employees.

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e.g., *Delaware County Memorial Hospital*, 366 NLRB No. 28, slip op. at 1 fn. 2 (2018), enfd. in relevant part sub nom. *Crozer-Chester Medical Center v. NLRB*, 976 F.3d 276 (3d Cir. 2020). As the Board admonished in *Nexstar Broadcasting Inc. d/b/a KOIN-TV*, 367 NLRB No. 117, slip op. at 1 fn. 2 (2019), "parties are more likely to obtain a satisfactory and timely resolution of [information request] disputes through more extensive good-faith discussions between themselves rather than involving the Board through unfair labor practice litigation." In our view, ordering only accommodative bargaining here would contradictorily lead to more labor disputes, bargaining obstacles, and litigation – an outcome inconsistent with the dictates of the Act.

Member Ring agrees that the Respondent violated Sec. 8(a)(5) with respect to the Union's request for call volume data, but he would not order it to furnish the data outright. The Respondent timely asserted that the information was proprietary when it initially refused to provide the information. Although it did not explain the basis of that assertion immediately, it provided evidence at the hearing that Member Ring would find sufficient to prove the proprietary nature of the information. Accordingly, as to the call volume data, Member Ring would order the Respondent to engage in accommodative bargaining. See *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) ("The appropriate remedy in these circumstances is to give the parties an opportunity to bargain regarding the conditions under which the Union's need for relevant information could be satisfied with appropriate safeguards protective of the Respondent's confidentiality concerns."); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 31–32 (1982) (ordering accommodative bargaining based on testimony introduced at the hearing establishing the proprietary nature of some of the information the union requested), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

Member Ring finds Board precedent cited by the majority inapposite. In *Detroit Newspaper Agency*, the respondent did not assert its claim of confidentiality until, or shortly before, the unfair labor practice hearing. 317 NLRB at 1072. Here, the Respondent asserted confidentiality in its initial response to the information request. In *Lasher Service Corp.*, the respondent failed to provide evidence in support of its confidentiality claim and thus failed to prove the defense. 332 NLRB at 834. Here, the Respondent's witness provided unrebutted testimony that established the proprietary nature of the call volume data. In *Postal Service*, the respondent frustrated the union's ability to bargain over the impact of an announced pilot program by delaying the provision of any information about the program until it was implemented. Only then did the respondent belatedly claim that some of the information the union had asked for was being withheld on confidentiality grounds. Under those circumstances, the Board refused to entertain the confidentiality claim lest it "reward the [r]espondent for its intentional delay" or otherwise "condone the [r]espondent's unlawful conduct by allowing it to delay any longer in producing the information." 364 NLRB 230, 231. Those facts bear no resemblance to this case. The Respondent timely and consistently maintained that the call volume data was proprietary, and it proved that claim at the hearing. It failed to offer an accommodation as is required, and thus it violated the Act, but the remedy should be to require the Respondent to bargain with the Union for a mutually acceptable accommodation of their respective interests. See *Metropolitan Edison*, supra.

The majority distinguishes *Metropolitan Edison* and *Minnesota Mining & Manufacturing* on the basis that in those cases, the employer "invoked an arguably legitimate confidentiality interest in its initial response to the union's information request." But the Respondent did, too. It invoked a confidentiality interest in its initial response, and that interest is legitimate, as it demonstrated at the hearing. Apparently, the majority believes *Metropolitan Edison* and *Minnesota Mining & Manufacturing* are materially different from this case because the employers, in their initial responses, said why the requested information was confidential, and the Respondent did not. Those explanations were terse, however, especially in *Minnesota Mining*, where the employer said only that providing the information would disclose trade secrets to competitors. 261 NLRB at 39. In other words, to accommodate *Minnesota Mining*, the majority must take the position that whether an employer will be allowed to protect its competitive position through accommodative bargaining legitimately turns on whether or not it said a handful of words at the right time. Member Ring would not rest such weighty consequences on so slender a reed.

In fact, however, the majority's position is more extreme than this. The majority apparently believes, not merely that an accommodative-bargaining remedy is unwarranted here, but that the Board should *never* order that remedy unless some accommodative bargaining has already taken place. The Board should not, they say, afford respondents the opportunity "to begin accommodative bargaining from square one at the remedial stage . . . ." Board precedent is to the contrary. See, e.g., *Metropolitan Edison*, 330 NLRB at 107, 109 (ordering accommodative bargaining notwithstanding that the employer "did not offer any alternatives" to the union); *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984) (ordering accommodative bargaining absent evidence that employer proposed any accommodation); *Minnesota Mining & Mfg.*, 261 NLRB at 32–33 (same); see also *Pennsylvania Power Co.*, 301 NLRB 1104 (1991), where the Board adjusted the parties' competing interests itself but also recognized that doing so deviated from its "usual view that the parties should bargain" their own accommodation. Id. at 1108 & fn. 18.

Member Ring believes that his colleagues' position fails to accord due consideration to the Respondent's interest in protecting its competitive position—an interest that the unit employees obviously share. Moreover, ordering accommodative bargaining here would not injure the Union's interests. Assuming good faith on both sides, the Union would obtain the call volume data in short order under mutually-agreed conditions. And if the Respondent failed to bargain in good faith, the Union could come right back to the Board. In sum, while Member Ring joins his colleagues in finding that the Respondent violated the Act, he believes that ordering the Respondent to furnish the call volume data disregards the Respondent's legitimate business interests, whereas an accommodative bargaining remedy would protect all parties' interests. Member Ring would so order.

[6] The Union acknowledged that its requests for a list of unit members removed from the Respondent's work schedule and a list of employees affected by the "brown outs" sought essentially the same information. The judge analyzed them as one request but ordered the Respondent to furnish the Union with both categories of information. We clarify that the Respondent need not produce information in response to one request

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Medical Response of Connecticut, Inc., New Haven, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 10, 2022

Lauren McFerran, Chairman

John F. Ring, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 fail and refuse to bargain collectively with the International Association of EMTs & Paramedics Local R1-999, NAGE/SEIU Local 5000 (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the performance of its functions as the collective-bargaining representative of our New Haven unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish the Union with: a list of all unit members who have been removed from the schedule since March 1, 2020; data showing the call volume since March 1, 2020; the number of calls responded to by nonunit members in the New Haven coverage area since March 1, 2020; documentation detailing the AMR New Haven response times for the period of May 1 through June 15, 2020; and a list of all bargaining unit employees affected by the "brown outs" since March 1, 2020.

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

The Board's decision can be found at www.nlrb.gov/case/01-CA-263985 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

John A. McGrath, Esq., for the Acting General Counsel.
Brian Carmody, Esq., for the Respondent.
Douglas A. Hall, Esq., for the Charging Party.

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. The complaint alleges that American Medical Response of Connecticut, Inc. (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it failed and refused to provide the International Association of EMTS & Paramedics Local R1-999, NAGE/SEIU Local 5000 (the Union) with requested information that is relevant to the representation of the

that is duplicative of information the Respondent will provide in response to the other request.

As noted above, Member Ring would order the parties to engage in accommodative bargaining over the Union's information request regarding call volume data.

[1] Abbreviations are as follows: "Tr." for transcript; "GC Exh." for the General Counsel's Exhibits; "R Exh." for Respondent's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

unit employees in the New Haven area. In around April 2020,[2] the Union became concerned that management was increasingly eliminating (referred to as "browning out") the unit employees' scheduled shifts while increasingly using nonunit employees to perform unit work. To investigate those concerns, the Union made a series of information requests. On May 7, the Union requested a list of all unit employees removed from the schedule, data showing the call volume, and the number of calls responded to by nonunit members in the New Haven coverage area, all since March 1. On about June 15, the Union requested documentation detailing response times for the period of May 1 through June 15. On July 8, the Union filed the first of two grievances alleging that management was subcontracting unit work in violation of the parties' collective-bargaining agreement. On July 22, the Union again requested much of the same information it previously requested, as well as a list of all unit employees affected by "brown outs" since March 1, and the New Haven response time policy/procedure/standard operating guidelines. Management refused to provide the Union with any of the information at issue, claiming, inter alia, that the requests were overly broad, lacked relevance, or sought proprietary information. For the reasons stated below, I find Respondent violated the Act substantially as alleged.

Statement of the Case

The Union filed its unfair labor practice charge in this case on August 3. On October 15, the General Counsel, through the Acting Regional Director for Region 1/Subregion 34 of the National Labor Relations Board (the Board), issued the complaint against Respondent. On October 29, Respondent filed its answer. On January 6, 2021, Respondent amended its answer, raising affirmative defenses. The hearing was held by video on January 19, 20, and 26, 2021, due to the compelling circumstances created by the Coronavirus (COVID-19) pandemic. At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions.[3] The parties filed post-hearing briefs, which I have carefully considered.[4]

Findings of Fact[5]

I. Jurisdiction and Labor Organization Status

Respondent has provided emergency medical services at various facilities throughout the State of Connecticut, including at its facility in New Haven, Connecticut. Annually, in conducting its business operations, Respondent purchases and receives at that facility goods valued in excess of $50,000 directly from points located outside the State of Connecticut. There is no dispute, and I find, that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. There also is no dispute, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1.)

II. Alleged Unfair Labor Practices

A. Respondent's Operations

American Medical Response (AMR) has facilities throughout the United States, including four "divisions" in the State of Connecticut. Those divisions are in Waterbury, Bridgeport, Hartford, and New Haven. The New Haven division (AMR New Haven or the Employer) has a geographic area covering New Haven, West Haven, East Haven, Hamden, Orange, and Woodbridge. (Tr. 168–1.) Tim Craven is the Operations Manager for the New Haven division. He reports to William Schietinger, the Regional Director overseeing the New Haven and Bridgeport divisions. Aaron Nupp is a labor relations manager for AMR's parent company, Global Medical Response. (Tr. 241–242.) Schietinger and Nupp are admitted agents of Respondent within the meaning of Section 2(13) of the Act.

B. Collective-Bargaining Relationship and Terms of the Agreement

The Union is the certified exclusive bargaining representative of all full-time and regular part-time paramedics, EMTs and HandiVan drivers employed at the New Haven, Connecticut facility; excluding all other employees, mechanics, dispatchers,

[2] All dates refer to 2020, unless otherwise stated.

[3] On February 8, 2021, Respondent moved to amend its answer a second time to allege as an affirmative defense that the complaint should be dismissed because President Biden unlawfully removed Peter Robb as General Counsel on January 20, 2021, and appointed Peter Sung Ohr as the Acting General Counsel on January 25, 2021. Respondent argues Robb's removal was improper and that Ohr therefore lacks authority regarding this case. Respondent does not seek to reopen the record to present additional evidence, only to argue the merits of the defense in its posthearing brief. Counsel for the Acting General Counsel and the Union both oppose the motion.

Pursuant to Sec. 102.23 of the Board's Rules and Regulations, I deny Respondent's motion to amend its answer as untimely under the circumstances. Robb's removal and Ohr's appointment both occurred before the record closed. Yet the motion was not filed until nearly two weeks into the briefing period, without any explanation for the delay. Absent a bona fide explanation, I find no good cause for granting Respondent's belated motion.

[4] I grant counsel for the Acting General Counsel's motion to correct the transcript as follows: (1) on p. 66, from LL.9 to 16, the transcript mistakenly identifies me instead of Smith as the speaker; (2) on p. 241, L.15, the transcript also mistakenly identifies McGrath instead of Carmody as the speaker; and (3) on p. 267, L.24, the transcript mistakenly identifies two speakers where McGrath was speaking.

[5] The Findings of Fact are a compilation of the credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)).

office clerical employees and guards, professional employees and supervisors as defined in the Act, as amended.[6] The New Haven unit consists of approximately 125 full-time and 300 part-time employees. (Tr. 169.) Michael Montanaro is the union president. He also has worked as a full-time EMT at the New Haven division for over 25 years. Nate Smith is the national representative for the International Association of EMTs and Paramedics assigned to assist in the representation of the New Haven and Waterbury bargaining units. (Tr. 37–38).

The parties' collective-bargaining agreement is dated from January 1, 2019, through December 31, 2021 (the Agreement). (GC Exh. 2.)[7] Article 4 of the Agreement states:

> *Section 4.01 – Managements Rights*
> Except to the extent expressly abridged by a specific provision of this Agreement, the Employer reserves and retains, solely and exclusively, all rights and authority to manage and administer the business and operations of the Employer. The sole and exclusive rights and authority of the Employer shall include, but are not limited to, its rights and authority: to establish, continue, change or abolish its operational policies, practices or procedures; to establish or continue reasonable rules and regulations and to change or abolish said rules and regulations with prior notification to and consultation with the Union (notification and consultation shall not be required in an emergency situation); to establish, extend, limit, curtail, or discontinue its business or operations; to determine the number and types of employees required; to establish plans for increased efficiency and maintain standards of quality; to select, hire, promote, transfer or demote employees; to assign work to employees in accordance with the needs and requirements determined by the Employer; to establish and change work schedules and assignments; to schedule employees for work or time off; to transfer employees; to lay-off, terminate or otherwise relieve employees from duty for lack of work; to establish and enforce reasonable rules for the maintenance of discipline; to discipline, suspend or discharge employees, to direct the working forces; to hire and direct supervisors; and to take such measures as it may determine to be necessary for an orderly operation of the business. Except as limited by the terms of this Agreement, all management rights are reserved.
>
> *Section 4.02 -- Subcontracting*
> EMT and Paramedic work done by bargaining unit employee shall not be subcontracted to any outside party during the term of this Agreement. Other work may be subcontracted as long as such action does not cause any employee who is in the bargaining unit to be laid off over his/her objection.

(GC Exh. 2, pp. 10.)

Article 9 ("Hours of Work and Overtime") of the Agreement divides employees into two categories: "full-time employees" and "regular part-time employees." Section 9.03 of the Agreement states the following about regular part-time employees:

> The assignment of work hours will be made at the Employer's sole discretion in order to meet its operational needs and consideration of employee availability and, if needed, part-time employee's seniority. The Employer reserves the right to limit the amount of shifts which a part-time employee may work at any time specifically to ensure that the Employer is not required to begin providing additional benefits to that employee which they are not already receiving as a part-time employee.
>
> . . .
>
> If the Employer, contrary to the wishes of the affected employee, is to cut the number of hours of work available for a regular, part-time employee to a level substantially below the number of hours previously agreed upon, it must do so in the order of inverse seniority, provided always that a senior employee seeking to exercise seniority rights must be available to work the shifts which the Employer requires to have filled.

(GC Exh. 2, pp. 17–18.)

EMTs and paramedics working at the New Haven division select their shifts through the Telestaff computerized scheduling system. (Tr. 171.) If a shift remains unfilled, the Employer will either: find a part-time EMT or paramedic to work the shift, "hold over" a part-time EMT or paramedic to work a portion of the shift or cancel the shift entirely. (Tr. 340–342). A cancelled/removed shift will appear as "browned out" in the scheduling system. (Tr. 171.) (GC Exh 12((a)-(c)). If an employee(s) loses hours because their shift is browned out, the Employer typically offers them another shift(s). (Tr. 309–310; 34.4.

D. October 2019 Grievance

On October 14, 2019, Union President Montanaro filed a grievance alleging the Employer was violating section 4.02 of the Agreement by subcontracting unit work out to its other corporate divisions. (GC Exh. 3.) Montanaro filed the grievance after receiving reports that Bridgeport ambulances/crews were handling emergency calls and routine transports in the New Haven area.[8] (Tr. 175–177.) The Employer denied the grievance at Step 1, and the parties met at Step 2 in November 2019. Montanaro, National Representative Smith, Union Attorney Doug Hall, Operations Manager Craven and Regional Director Schietinger attended that Step 2 meeting. Montanaro explained that the Union wanted the Bridgeport crews to stop handling New Haven unit work. (Tr. 307–308.) The parties eventually resolved the grievance with Schietinger agreeing that the Employer would not schedule Bridgeport ambulances/crews to come and handle calls/transports in the New Haven area, absent

[6] The paramedics and EMTs in Waterbury are represented by the International Association of EMTS & Paramedics Local R1-911. The paramedics and EMTs in Hartford are represented by the International Brotherhood of Teamsters. The paramedics and EMTs in Bridgeport are not represented by a labor organization. (Tr. 40–41).

[7] The preamble and section 1.01 (Scope of the Agreement) both identify the Employer as "American Medical Response of Connecticut, New Haven Division." (GC Exh. 2, p. 6.) The Board's October 2013 certification of representative identifies "American Medical Response of New Haven" as the Employer. (GC Exh. 29.)

[8] Each division has its own ambulances with identifying numbers or call signals that are stenciled on the vehicles and used by crews when communicating over the radio. New Haven's ambulances all start with either a two or a five; Bridgeport's ambulances all start with a seven. (Tr. 289–290.)

a "mutual aid" situation.[9] (Tr. 47–50; 177–179.)

"Mutual aid" is not addressed in the parties' Agreement. It is an industry term used to describe an arrangement between neighboring communities or providers agreeing to assist one another in times of need. (Tr. 178–179.) The Employer has mutual aid arrangements, including between the New Haven and Bridgeport divisions. (Tr. 178–179.) However, the specific terms were not introduced into the record.

E. COVID-19 Crisis and Scheduling

On March 16, the vice president of labor relations for Global Medical Response sent the national director for EMS IAEP/NAGE/SEIU Local 500 a detailed letter about the COVID-19 crisis and its likely effects on operations across the country. The letter states, in pertinent part:

> As you know, most or all of our CBAs include provisions whereby the parties agreed that in the event of disaster or catastrophe outside of the control of the Employer causing disruption to normal operations, the Employer would be temporarily relieved of obligations under the CBA relating to certain matters including scheduling and shift changes. . . . As I trust you can understand, the Company deems the current COVID-19 crisis to be such an event.

(R Exh. 4, pp. 8–9).[10]

In March and April, New Haven experienced a drop in call volume which caused the Employer to decrease the number of shifts scheduled for New Haven unit employees; however, in early May, the call volume in New Haven began to increase. (Tr. 193–194; 292–294.)

F. Union's May 7 Request for Information

In late April, Montanaro learned Bridgeport ambulances/crews were increasingly handling calls/transports in the New Haven area. (Tr. 179–180.) He saw the ambulances in parking lots of area hospitals and heard crews accepting area calls over the radio. (Tr. 180–185.) At the same time, both he and Smith received complaints from part-time members about their shifts were being "browned out" on the schedule, while others were being "held over" to cover portions of other shifts. (Tr. 186–188.)[11]

On May 2, Montanaro emailed Schietinger about these issues. (GC Exh. 7.) He stated that with the elimination of so many part-time hours from the New Haven schedule, the Union was requesting that shifts be awarded based on seniority, as defined in sec. 9.03 of the Agreement. He also stated that additional shifts should be added to the schedule rather than continuing to hold employees over from their shifts, sometimes up to 4 hours. Later that day, Schietinger emailed Montanaro that the Employer was monitoring call volume and would be adding back shifts based on increased demand. (GC Exh. 7.)

Two days later, Montanaro emailed Schietinger that he was "taken aback" by the number of shifts that had been deleted from the New Haven schedule, and that he was hearing Bridgeport crews signing on to handle calls/transports in the New Haven area, all of which was surprising because he was under the impression from their earlier email exchange that the Employer was going to be adding part-time shifts back to the New Haven schedule. (GC Exh. 8.) Later that day, Schietinger emailed Montanaro that the Employer was adding unit hours back to the schedule. He acknowledged the Employer had assigned a Bridgeport ambulance/crew to transport a patient to a New Haven hospital because there had been "a spike in call volume," and the Employer assigned that same ambulance/crew to transport a different patient from that hospital because they were already there. (GC Exh. 8.)

Montanaro and Schietinger later spoke in person. (Tr. 192–194.) Montanaro asked why the Employer had cut 1000 hours from the New Haven schedule, and Schietinger explained it was because of COVID. As for crews being held over, Schietinger stated the Employer would do its best to get the crews out on time. He also stated he was going to do his best not to schedule Bridgeport crews to handle calls in the New Haven area.

Smith then called and spoke with Schietinger. Smith reiterated may of the same points Montanaro raised. He also stated he had received complaints that the Employer was not following seniority when scheduling/browning out shifts. (Tr. 63.) Schietinger acknowledged that was accurate, and the Employer was instead relying on the "unit hour utilization" rates, an industry term used to describe the time an ambulance is in service creating revenue by handling calls/transports versus sitting idle. (Tr. 63.) As for the use of the Bridgeport ambulances/crews, Schietinger responded they were being used in the New Haven area on a mutual aid basis only. (Tr. 66.) Smith concluded by informing Schietinger that he would be requesting information to understand and communicate to unit members what was happening. (Tr. 66).

On May 7, Smith emailed Schietinger a request for information. The May 7 request states:

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[9] Schietinger testified he agreed in this meeting not to "pre-schedule" Bridgeport crews. (Tr. 288.) I credit Smith and Montanaro, who corroborated one another, that Schietinger said the Employer would not schedule, as opposed to preschedule, Bridgeport crews. In addition to corroborating one another, I find it implausible that the Union would have resolved the grievance by the Employer merely agreeing not to "pre-schedule" nonunit crews.

[10] The Agreement addresses local and natural disasters. Sec. 23.03(A) states in the event of a "Local Disaster" the Employer is relieved of any obligations "relating to scheduled paid time off, job posting, shift changes and transfers, in the event of and during the terms of disaster or catastrophe such as fire, flood, explosion, power failure, earthquake, or other act outside the control of the Employer and causing normal disruption to the Employer's normal operations." Sec. 23.03(B) addresses "Natural Disasters" where the Employer is relieved of obligations under the Agreement for employees who volunteer and are deployed as part of a Disaster Response Team (DRT) effort. (GC Exh. 2, p. 45). The record does not reflect that any New Haven unit employees were deployed as part of a DRT effort.

[11] Connecticut's Emergency Medical Services Regulations sec. 19a-179-1 requires that licensed or certified emergency medical service providers maintain records for inspection on each request for service, including the name, date, time of notification, time of response, location of response, time of arrival at scene, patient condition upon arrival, treatment rendered, destination location, and time of arrival at destination. New Haven EMTs and paramedics include this information on the "patient care reports" they complete for each call/transport they perform. (Tr. 201–202.)

> As the IAEP continues to look into concerns regarding the reduction of part-time membership, and the reduction of shifts, we are respectfully requesting the following information from you:
>
> 1. List of all bargaining unit members who have been removed from the schedule since March 1, 2020.
> 2. List of all shifts removed from the schedule since March 1, 2020.
> 3. Data of call volume since March 1, 2020.
> 4. Number of calls responded to by non-AMR New Haven bargaining unit members in the New Haven coverage area since March 1, 2020.
> 5. Explanation of management's decision on what shifts to cut since March 1, 2020.
> 6. Copies of the schedule from March 1, 2020 to present.

(GC Exh. 9).

On May 18, after receiving no response, Smith resent another copy of his May 7 request. (GC Exh. 10.) The following day, Schietinger emailed Smith apologizing and informing him that Aaron Nupp would be responding to the request. (GC Exh. 11.)

On May 18, Montanaro separately emailed Schietinger that New Haven crews were being sent home prior to spikes in call volume, leaving the division understaffed. (R. Exh. 6.) Schietinger responded in an email, explaining that part of the issue was that shifts were left open because unit employees were not signing up to work, or they would call off when they were scheduled to work. (R. Exh. 6.)

Smith and Nupp later had a telephone conversation about the May 7 request. (Tr. 74; 244–245.) Nupp stated he was trying to figure out how to provide the Union with the information about the schedules, stating that it was about 200 pages long. Smith informed him that he was not necessarily stuck on the whole schedule, but was primarily looking for the brown outs, what shifts had been browned out from the New Haven schedule and the unit members affected by the brown outs. Nupp stated that he had that information and would forward it to Smith. That was the end of their conversation. (Tr. 74; 76.) Nupp did not raise concerns or express confusion about any of the information the Union was seeking.

On June 7, Nupp emailed Smith a response to the Union's May 7 request, stating:

> Your information request for AMR New Haven dated May 7, 2020 was forwarded to me for reply, and this letter will serve as the Employer's response. The Employer has considered your request and is providing the following responses and information.
>
> 1. **List of all bargaining unit members who have been removed from March 1, 2020**. The Employer objects to the Union's request as it is overly broad. Should the Union wish to revise its request to indicate the specific reason(s) the employee(s) had hours reduced or removed from the schedule, the Employer may consider the revised request.
> 2. **List of all shifts removed from the schedule since March 1, 2020.** The Employer objects to the Union's request as it is overly broad. However, the Employer is providing information with regards to shifts that have been Browned out (BO) as part of its response to request #6 below. Please be aware that just because a shift was removed from the schedule on a specific day or days during a specific week may not be indicative of permanent removal from the schedule.[12]
> 3. **Data of call volume since March 1, 2020.** The Employer objects to the Union's request as it is overly broad, lacked a basis of relevance, and is proprietary in nature and is outside the Union's jurisdiction and the collective-bargaining relationship.[13]
> 4. **Number of calls responded to by non-AMR New Haven bargaining unit members in the New Haven AMR coverage area since March 1, 2020**. The Employer objects to the Union's request as any information pertaining to non-bargaining unit employees is outside the Union's jurisdiction and the collective-bargaining relationship.
> 5. **Explanation of management's decision on what shifts to cut since March 1, 2020.** The Employer's decision to assert its rights under the CBA, including the allocation of company resources, was necessary to ensure continued operational efficiency. Should the Union wish to discuss further, please contact the Regional Director.
> 6. **from March 1, 2020 to present**. The Employer is providing the information as requested from March 1, 2020 to May 31, 2020. It should be noted that just because an employee(s) may have been removed from a shift(s). It does not mean that they weren't reassigned/rescheduled for the same numbers of hours on the same day, or during the work week.

(GC Exh. 12) (bold in original).

On June 10, Smith responded to Nupp in an email, stating:

> I am in receipt of your response to our initial request for information dated June 7, 2020, and wish to clarify some of the information I am seeking:
>
> 1. **List of bargaining [ ] unit members who have been removed from the schedule from March 1, 2020**—I am asking

[12] The Employer provided the Union with copies of schedules showing the shifts that were browned out during the requested period. Those copies showed the date, the position, and the hours of the browned-out shift(s), but not the names or seniority of the unit employees, if any, scheduled to work. (GC Exhs. 12(a)-(c).) Nor does the information provided identify which brown outs resulted in a loss of hours to unit member. A shift could be browned out because the scheduled employees switched shifts or were reassigned to different ambulances/crews; the mere fact that a shift was browned out does not necessarily imply that an employee lost hours. (Tr. 260.)

[13] Nupp responded that the information was proprietary, without any further explanation. (Tr. 255.) Schietinger explained, for the first time at hearing, that the call volume data was considered proprietary because, if disclosed, it could be used by competitors against the Employer, and the Employer regularly takes steps to safeguard that information from disclosure to others. (Tr. 301–3.3). No other evidence was offered to support this testimony.

for the list the company used, by seniority of the members who were impacted by the "brown outs" as per CBA, Article 9, Section 9.03.

2. **List of all shifts removed from the schedule since March 1, 2020**—the Union will accept the list of shifts that the Company has issued.

3. **Data of call volume since March 1, 2020**—the information is relevant to the ongoing union investigation into non-bargaining unit AMR employees performing bargaining unit work in the New Haven coverage area on a frequent basis during continued brown outs.

4. **Number of calls responded to by non-AMR New Haven bargaining unit members in the New Haven AMR coverage area since March 1, 2020**—see number 3.

5. **Explanation of management's decision on what shifts to cut or brown outs since March 1, 2020**—I will be reaching out to Bill for another discussion on this and making an attempt to set up a labor-management meeting to further clarify what is being requested.[14]

6. **Copies of schedule from March 1, 2020** to present—the Union will accept the information provided describing the "brown out shifts".

(GC Exh. 13)(bolding in original).

G. Union's June 15 Request for Information

On June 15, Smith submitted a new written request for information to Schietinger, in which he stated the IAEP continues to investigate concerns over staffing levels and the brown outs, and it was requesting the following information:

1. Documentation supporting response time requirements for emergency calls.

2. Documentation detailing the AMR New Haven response times for the period of May 1, 2020 through today's date.

(GC Exh. 14).[15]

Smith testified that he requested the response times to make sure unit members were within those response times, and to determine how long it was taking Bridgeport crews to respond to calls in the New Haven geographic area. If they took longer, that would suggest they were coming in from the Bridgeport area. If they responded quickly, that would suggest they were strategically being placed in/around the New Haven geographic area to await calls. (Tr. 160–161.)

On July 2, after receiving no response, Smith resent the June 15 request. (GC Exh. 15.)

H. Union's July 8 and 16 Grievances

On July 8, Montanaro filed a grievance against the Employer alleging that it was violating Section 4.02 of the Agreement by using surrounding AMR divisions to attempt to cover increased call volume while taking and not returning hours to the New Haven division schedule. (GC Exh. 16.) The Employer denied the grievance at Step 1. (GC Exh. 17.) On July 16, the Union moved the grievance to Step 2.

Also, on July 16, the Union filed a grievance alleging that Respondent was violating Section 4.02 by removing/not returning hours from the New Haven schedule and using other AMR divisions to cover increased call volume. (GC Exh. 19.)

I. Subsequent Correspondence Regarding June 10 Information Request

On July 2, Smith emailed Nupp following up on his June 10 email clarifying his earlier request for information. (GC Exh. 15). On July 16, Smith again emailed Nupp. (GC Exh. 18). The next day, Nupp responded to Smith that the company had considered the Union's request and was providing the following:

1. **List of bargaining unit members who have been removed from March 1, 2020.—**I am asking for the list the Company used, by seniority of the members who were impacted by the "brown outs" as per CBA, article 9, section 9.03. The Employer has no responsive information regarding a seniority list for brown outs. Hours reduced or removed from the schedule were based on the Employer's determination of need and its rights as defined in Article 4, Section 4.01 of the CBA. Additionally, the Union was provided notice on 3/16/2020 that the Employer was temporarily invoking the local and national disaster provisions of the collective bargaining agreement due to the COVID 19 Crisis which temporarily relieves the Employer of obligations under the CBA relating to certain matters including scheduling and shift changes.

2. **Data of call volume sce March 1, 2020-the information is relevant to the ongoing Union investigation into non-bargaining unit AMR employees performing bargaining unit work in the New Haven coverage area on a frequent basis during continued brown outs.** The Employer renews its objection to the Union's request as it is overly broad, lacks a basis of relevance, and is proprietary in nature and is outside the Union's jurisdiction and the collective-bargaining relationship.

3. **Number of calls responded to by non-AMR New Haven bargaining unit members in the New Haven AMR coverage area since March 1, 2020 - See number 3**. The Employer renews its objection to the Union's request as it has a right to allocate and/or reallocate Company resources and to, ". . . take such measures as it may determine to be necessary for an orderly operation of the

[14] The record does not reflect whether this meeting was scheduled or held.

[15] Response time is the period between when the Employer receives the call to provide service and when the ambulance/crew arrives at the call. (Tr. 317.) The Employer must retain information on response times for inspection by the State of Connecticut. See Regs. Conn. State Agencies §19a-179-7. In practice, EMTs and paramedics complete patient care reports for each call they handle. These reports include the times for when: the call came into dispatch, the dispatcher gives the call to the ambulance, the ambulance goes in-route, the ambulance arrives on scene at the call, the crew makes patient contact, the crew transports the patient to the hospital, the ambulance arrives at the hospital, and the ambulance/crew becomes available to respond to another call. (Tr. 201–202; 315–317; 326.) Schietinger confirmed the Employer documents this information, but disputes whether it should be referred to as "response times." (Tr. 31.5. He also noted the Employer has different response times for different clients. (Tr. 328.)

business…" Additionally, any information pertaining to non-bargaining unit AMR employees is outside the Union's jurisdiction and the collective bargaining relationship.

4. Documentation supporting response time requirements for emergency calls. The Employer objects to the Union's request as it is overly broad, lacks a basis of relevance, and is outside the Union's jurisdiction and the collective bargaining relationship.

5. Documentation detailing the AMR New Haven response time for the period of May 1, 2020 through June 15, 2020. The Employer objects to the Union's request as it is overly broad, lacks a basis of relevance, and is outside the Union's jurisdiction and the collective bargaining relationship.

(GC Exh. 20)(bolding in original).

J. Union's July 22, 2020 Request for Information

Article 16 of the Agreement contains the Grievance Procedures. Section 16.08 requires that each party "produce non-privileged and nonconfidential information relevant to the particular grievance in response to a written request for such information." (GC Exh. 2, p. 35.)

On July 22, Smith emailed another request for information which he stated was for the Union's investigation into its active grievance at Step 2 for the New Haven unit, referring to the July 8 grievance alleging the Employer was violating section 4.02. The request sought the following information:

1. List of employees affected by the "brown out[s]" since March 1, 2020.
2. Data of AMR New Haven call volume since March 1, 2020.
3. Number of calls responded to in the New Haven service area by non-bargaining unit employees.
4. AMR New Haven's response time policy/procedure/standard operating guidelines.
5. Detailed log of response times for AMR New Haven for a time period of May 1, 2020 through present.

(GC Exh. 21).

On July 24, the Employer denied the Union's Step 2 grievance received on July 16, stating there was no violation of Section 4.02. (GC Exh. 22.)

On July 29, Nupp emailed a response to Smith's July 22 request, stating:

1. **List of employees affected by the brown out since March 1, 2020**. The Employer objects to the Union's request as it is overly broad and subjective in nature.[16]

2. **Data of AMR New Haven call volume since March 1, 2020**. The Employer has already provided a response to this request in its letters dated 6/7/2020, and 7/17/2020.

3. **Number of calls responded to in the New Haven service area by non-bargaining unit employees.** The Employer has already provided a response to the same or similar request in its letter dated 7/17/2020.

4. **AMR New Haven's response time policy/procedure/standard operating guidelines.** The Employer has no responsive information regarding response time policy/procedure/standard operating guidelines for AMR New Haven.[17]

5. **Detailed log of response times for AMR New Haven for a time period of May 1, 2020 through present**. The Employer has already provided a response to the same or similar request in its letter dated 7/17/2020.

(GC Exh. 24)(bolding in original).

On July 31, the Union submitted to arbitration its July 8 grievance that the Employer was violating the parties' Agreement by subcontracting unit work in lieu of scheduling unit members. (GC Exh. 25.)

Analysis

A. Complaint Allegations and Answer

The General Counsel's complaint alleges Respondent violated Section 8(a)(5) and (1) of the Act: (1) since about May 7, by failing and refusing to provide the Union with a list of all unit members who have been removed from the schedule since March 1, data showing call volume for New Haven since March 1, and the number of calls responded to by nonunit members in the New Haven coverage area since March 1; (2) since about June 15, by failing and refusing to provide the Union with documentation detailing the AMR New Haven response times for the period of May 1 through June 15; and (3) since about July 22, by failing and refusing to provide the Union with a list of all bargaining unit employees affected by the "brown outs" since March 1, and AMR New Haven's response time policy/procedure/standard operating guidelines. Respondent's amended answer denies the alleged violations and affirmatively asserts the Union waived its right to the information, the requested information was not relevant, the requests were overly broad, and certain of the requested information was proprietary, confidential, and/or privileged.

B. Legal Standard

An employer's duty to bargain requires providing requested information that is relevant and necessary for the union to administer and police the collective-bargaining agreement, including evaluating and pursuing grievances. See *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *Disneyland Park*, 350 NLRB 1256, 1257 (2007). "An actual grievance need not be pending nor must the requested information clearly dispose of the grievance. It is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued." *Leland*

[16] Smith testified this request was seeking the same information as the first item on his May 7 request. (Tr. 149).

[17] Schietinger and Nupp testified New Haven has no written rules, policies, or guidelines regarding response times. (Tr. 254, 315). Montanaro was trained when he started working at New Haven over 25 years ago, and he was told they had approximately 3 minutes to respond to call, but he could not attest to seeing or hearing about any written rules, policies, or guidelines on the topic. (Tr. 197–199.)

Stanford Junior University, 307 NLRB 75, 80 (1992), enfd. 715 F.2d 473 (9th Cir. 1983). The refusal to provide relevant information is a per se violation of Section 8(a)(5) and (1) regardless of the employer's subjective good or bad faith. *Piggly Wiggly Midwest, LLC,* 357 NLRB 2344 (2012).[18]

Generally, information concerning the wages, hours, and/or terms and conditions of employment of bargaining unit employees is "presumptively relevant" and must be produced. *NP Palace, LLC*, 368 NLRB No. 148, slip op. at 4 (2019); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). By contrast, when the union requests information about nonunit employees, it has the burden of establishing the relevance of the requested information to the union's representational duties. *Richmond Health Care*, 332 NLRB 1304 (2000); *Disneyland Park*, 350 NLRB at 1257; *Leland Stanford Junior University*, 262 NLRB at 139. The burden of establishing relevance is not exceptionally heavy as the Board applies a liberal, discovery type of standard. *NLRB v. Acme Industrial Co*., 385 U.S. at 437; *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. 1, fn. 2 (2018). The union need only establish that the requested information has some bearing on the matter in dispute, and it will be of potential or probable use to carrying out its representational duties. See *PAE Aviation and Technical Services LLC*, 366 NLRB No. 95, slip op. at 3 (2018); *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014); *Pennsylvania Power & Light Co*., 301 NLRB 1104, 1104–1105 (1991). Information is relevant if it helps prove or disprove a grievance because the process of the parties resolving their grievances is served by the disclosure of information which will tend to resolve grievances one way or the other. *NLRB v. Acme Industrial Co*., supra.

The union's explanation of relevance must be with some precision; a generalized, conclusory explanation is insufficient to trigger an obligation to provide the requested information. *Disneyland Park*, 350 NLRB at 1258 fn. 5. The union must have a reasonable belief, supported by objective evidence, that the requested information is relevant, unless the relevance should have been apparent under the circumstances. Id.; *Shoppers Food Warehouse*, 315 NLRB at 259. In determining possible relevance, the Board does not pass upon the merits of the grievance or matter in dispute, and the labor organization is not required to demonstrate that the information considered by it is accurate, not hearsay, or even ultimately reliable. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2017), enfd. 902 F.3d 296, 302 (D.C. Cir. 2018); *Postal Service*, 337 NLRB 820, 822 (2002).

Once the union has established relevance, the burden shifts to the employer to establish the information is not relevant, does not exist, or could not be furnished based on a legitimate and substantial interest. *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 370 NLRB No. 68, slip op. at 10 (2021), citing to *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

C. Relevancy

Applying the foregoing standards, I find the Union has met its burden of establishing relevance. In early May, Montanaro and Smith raised with Schietinger the Union's concerns about the Employer using nonunit employees to perform unit work while, at the same time, browning out shifts for unit employees. Smith expanded on those concerns in his communications with Nupp in May through July. As explained below, these communications and the surrounding circumstances establish the information's relevance to the Union's investigation and pursuit of grievances over potential violation(s) of the parties' Agreement.[19]

The list(s) of unit employees removed from the schedule/affected by the brown outs since March 1 is presumptively relevant because it directly relates to the unit employees' hours of work. *Columbia College Chicago*, 360 NLRB 1116, 1127 (2014) (list of unit teachers who had class assignments reduced considered presumptively relevant). Regardless, Smith established the relevance of the list(s) in his communications with Schietinger and Nupp. In the May 7 request. Smith stated the Union was seeking the information to investigate concerns over the reduction of part-time unit members and shifts. In his conversation with Nupp, Smith explained the Union was looking for a list of those employees who lost hours because of the brown outs. Later, in his June 10 email, he stated he also was looking to determine whether management followed the seniority provisions of section 9.03 when removing/browning out unit employees from the schedule. This is particularly relevant after Schietinger's earlier admission that those decisions were being made based on unit hour utilization rates, as opposed to seniority. In his July 22 request, Smith stated the list of those affected by the brown outs since March 1 was relevant to the Union's investigation of its pending Step 2 grievance alleging that Respondent was violating Section 4.02 by using surrounding AMR divisions to attempt to cover increased call volume while taking and not returning hours to the New Haven schedule. Contrary to Nupp's reply, I do not find any confusion or subjective interpretation over the use of the term "affected," particularly in light of Smith's earlier statements about what the Union was attempting to determine.

The New Haven call volume data and the number of New Haven calls responded to by nonunit employees are also both relevant for many of the same reasons.[20] When Montanaro raised concerns over the Employer browning out shifts and assigning work to nonunit employees in early May, Schietinger said scheduling was dependent on call volume and shifts would be added based on demand. Schietinger also stated the Employer had assigned a Bridgeport crew to handle a call and a transport in New Haven because of a spike in call volume. Immediately after these revelations, the Union submitted its May 7 request. In his June 10 email to Nupp, Smith stated he needed the call volume data

[18] An employer's violation of Sec. 8(a)(5) is also a derivative violation of Sec. 8(a)(1) of the Act. *Bemis Co.,* 370 NLRB No. 7, slip op. at 1 fn. 3 (2020).

[19] Recently, members of the Board have expressed interest in revisiting whether relevance should continue to be established by the circumstances alone. *McLaren Macomb*, 369 NLRB No. 73 fn. 1 (2020). Here, I find the Union's statements to the Employer were sufficient to establish relevance. As with all communication, however, those statements are more fully understood when viewed in the light of the surrounding circumstances.

[20] Respondent argues it did not know the Union was looking for the call volume data for New Haven. I reject this. Smith's June 10 email clearly specifies the Union is looking for the New Haven division.

and the calls responded to by non-unit employees for the Union's ongoing investigation into non-unit employees performing unit work on a frequent basis during continued brown outs, resulting in the loss of hours for unit employees. In his July 22 request, Smith stated the information was also needed for the Union's pending grievance that Respondent was violating section 4.02. Information about non-unit employees is not presumptively relevant, but it is demonstrably relevant where, as here, it aids the union with the investigation of actual or potential grievances that the employer is using the nonunit employees to perform unit work in violation of the parties' agreement. See generally, *Triumfo, Inc.,* 370 NLRB No. 61, slip op. at 8 (2020); *Murray American Energy, Inc*., 370 NLRB No. 55, slip op. at 8 (2020), citing to *Schrock Cabinet Co*., 339 NLRB 182, 182 fn. 6 (2003); *St. George Warehouse, Inc*., 341 NLRB 904 (2004), enfd. 420 F.3d 294 (2005).

The New Haven response times and any related policy/procedure/standard operating guidelines are similarly relevant. Smith explained in the June 15 request that the response times were needed to investigate concerns over staffing levels and the brown outs. He also stated in the July 22 request that the response times and related policy were relevant to the pending grievance alleging that the Employer was violating section 4.02. As with the other information at issue, these requests and circumstances make clear that the Union was attempting to investigate who was performing unit work and whether it was being done in accordance with the Agreement. Presumably, New Haven crews would be closer and able to respond more quickly to calls in their area than crews from another division, unless, as the Union suspected based on Montanaro's observations, the Employer was not scheduling enough New Haven crews to promptly handle the call volume, and/or it was stationing nonunit crews in or near the New Haven area to handle calls. Also, this information, along with the other requested information, would allow the Union to investigate whether Respondent was, as it claimed, only using nonunit crews in mutual aid situations; and, if so, whether they were true emergencies or the result of inadequate staffing due to browning out shifts.

Overall, I find all the requested information at issue has potential or probable relevance to the Union in evaluating, filing, and processing grievances over potential violation(s) of the Agreement.

D. Respondent's Defenses

Respondent raises several defenses for failing to provide the requested information at issue. First, it argues the Union contractually waived its right to the information by agreeing to Section 4.01, which reserves to the Employer the right "to assign work to employees in accordance with the needs and requirements determined by the Employer; to establish and change work schedules and assignments; to schedule employees for work or time off; . . . and to take such measures as it may determine to be necessary for an orderly operation of the business." Respondent argues that this provision—along with the added discretion afforded under section 23.03 because of the COVID-19 crisis—excused the Employer from the requirements of the Agreement and, therefore, the obligation to provide the Union with the requested information. I reject this argument.

The sole dispute before me is over the failure and refusal to provide relevant information; not whether there was an unlawful unilateral change, repudiation of the contract, or, even, a violation of the contract. It is, therefore, unnecessary, in fact inappropriate, for me to evaluate the merits of Respondent's contractual waiver arguments. That being said, the Board has held a waiver of the right to bargain may waive a union's right to information when requested solely for the purpose of bargaining, see e.g., *ADT, LLC*, 369 NLRB No. 31 (2020), but not when it is sought for another, legitimate purpose, such as investigating and pursuing a grievance. Recently, in *Stericycle, Inc.,* 370 NLRB No. 89 (2021), the Board reaffirmed that even though the union waived its right to bargain over a unilateral implementation of a healthcare recoupment plan, the employer had a duty to provide the requested information because it was also relevant to the union's investigation into a possible grievance over the employer's conduct. Id. fn. 3, citing to *Emery Industries*, 268 NLRB 824, 825 fn. 4 (1984). As stated, the Union requested the information at issue to investigate and later pursue grievance(s).

Additionally, although not raised by any of the parties, Section 16.08 explicitly requires that the Employer produce requested, nonprivileged and nonconfidential information that is relevant to a particular grievance. The information at issue is relevant to the Union's grievance alleging Respondent was violating section 4.02, and as explained below, has not been established to be privileged or confidential. Respondent, therefore, failed to show that the Union, contractually or otherwise, clearly and unmistakably waived its right to the relevant information at issue. See generally, *McLaren Macomb*, 369 NLRB No. 73, slip op. at 8 (2020).

Respondent next claims the requests are overly broad, and that it provided the Union with the information determined to be relevant. I also reject this claim. The Employer provided print outs of browned-out shifts, without the names or seniority of the unit employees who lost those shifts. A union is not required to accept only portions of the information the employer believes to be relevant and is willing to provide. See *FirstEnergy Generation, LLC*, 362 NLRB 630, 636 (2015); *Shoppers Food Warehouse*, 315 NLRB at 259. Absent a valid defense, the union has the right to review the information for itself and draw its own conclusions. The Board has consistently held that an employer cannot comply with its obligation to disclose information by making its own evaluation of the information requested and concluding, even if in good faith, and/or correctly, that the grievance is nonmeritorious, and/or the information is not essential to the union's decision-making functions. *Carpenters Local 608*, 279 NLRB 747, 758 (1986), enfd 811 F.2d 149 (2d Cir. 1987), cert denied 484 U.S. 817 (1987). See also *Endo Painting Service, Inc*., 360 NLRB 485, 485–486 (2014).

Respondent also argues it was privileged not to provide the call volume data because it is considered proprietary. A party asserting this defense has the burden to prove it has a legitimate and substantial interest in protecting against the information's disclosure that outweighs the requesting party's need for it. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979). See also *Jacksonville Area Assn.*, 316 NLRB 338, 340 (1995). The Board evaluates this defense based on the facts in each case. See *Northern Indiana Public Service Co*., 347 NLRB 210, 211 (2006). Furthermore, "when a union is entitled to information

concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests." *Oncor Electric Delivery, LLC*, 369 NLRB No. 40, slip op. at 3 (2020), quoting *Pennsylvania Power Co*., 301 NLRB at 1105–1106. The onus is on the employer because it is in the better position to propose how best it can respond to a union's request. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998). The appropriateness of the accommodation depends on the circumstances of each case. *Detroit Edison*, 440 U.S. at 314.

Nupp asserted that the call volume data was proprietary, with no explanation as to why. A blanket claim that information is confidential or proprietary, without more, does not satisfy the employer's burden. *Detroit Edison*, 440 U.S. at 314. See also *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). Where the employer fails to demonstrate a legitimate and substantial interest in keeping the information private, the union's right to the information is effectively unchallenged, and the employer must furnish the requested information. *Watkins Contracting, Inc*., 335 NLRB 222, 226 (2001). For the first time at trial, Schietinger claimed the call volume data was proprietary because, if disclosed, it could be used by competitors against Respondent. Even if this conclusory explanation was sufficient, and I do not find that it is, Respondent never proposed or offered to bargain with the Union over an accommodation to address its alleged concern. *PAE Applied Technologies, LLC,* 367 NLRB No. 105, slip op. at 23 (2019); *Borgess Medical Center*, 342 NLRB 1105, 1105–1106 (2004). As a result, I find it failed to meet its burden.

Finally, Respondent asserts it did not fail or refuse to provide its response time policy/procedure/standard operating guidelines because no such document exists. Nupp and Schietinger both testified to this; Montanaro, who has worked for the company as an EMT for over 25 years, was not aware of any such document. The Acting General Counsel, however, argues that because the State of Connecticut states that providers, like the Employer, must retain for inspection documentation on response times, the Employer must ipso facto have a written policy/procedure addressing response times. I disagree. The Employer trains its EMTs to complete the patient care reports, including information related to response times, and that information is, as it must be, retained and subject to inspection. But, without more, this evidence does not establish that the Employer had a written policy/procedure that it failed to provide.

For all the other requested information at issue, I find Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide it to the Union.

CONCLUSIONS OF LAW

1. Respondent, American Medical Response of Connecticut, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Association of EMTS & Paramedics Local R1-999, NAGE/SEIU Local 5000 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been the recognized exclusive collective-bargaining representative of:

> All full time and regular part-time Paramedics, EMTs and HandiVan Drivers employed at the New Haven, Connecticut facility; excluding all other employees, mechanics, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the Act, as amended

4. Respondent violated Section 8(a)(5) and (1) of the Act since about May 7, by failing and refusing to provide the Union with: a list of all unit members who have been removed from the schedule since March 1; data showing the call volume since March 1; and the number of calls responded to by nonunit members in the New Haven coverage area since March 1; (2) since about June 15, by failing and refusing to provide the Union with documentation detailing the AMR New Haven response times for the period of May 1 through June 15; and (3) since about July 22, by failing and refusing to provide the Union with a list of all bargaining unit employees affected by the "brown outs" since March 1.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

Respondent, American Medical Response of Connecticut, Inc, at its New Haven, Connecticut facility, through its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Association of EMTS & Paramedics Local R1-999, NAGE/SEIU Local 5000 ("Union") by failing and refusing to furnish it with information that is relevant and necessary to its performance of its duties as the collective-bargaining representative of the Respondent's New Haven unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Furnish the Union with: a list of all unit members who have been removed from the schedule since March 1; data showing the call volume since March 1; and the number of calls responded to by nonunit members in the New Haven coverage area since March 1; documentation detailing the AMR New Haven response times for the period of May 1 through June 15; and a list of all bargaining unit employees affected by the "brown outs" since March 1.

(b) Post at its New Haven facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided

[21] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted

by the Regional Director for Region 1/Subregion 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1/Subregion 34 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 11, 2021

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose a representative to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail or refuse to bargain collectively with the International Association of EMTS & Paramedics Local R1-999, NAGE/SEIU Local 5000 ("Union") by failing and refusing to furnish it with requested information that is relevant and necessary to the performance of its functions as the collective-bargaining representative of our New Haven unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish the Union with: a list of all unit members who have been removed from the schedule since March 1; data showing the call volume since March 1; and the number of calls responded to by nonunit members in the New Haven coverage area since March 1; documentation detailing the AMR New Haven response times for the period of May 1 through June 15; and a list of all bargaining unit employees affected by the "brown out" since March 1.

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-263985 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.