In the Matter of) )
MV TRANSPORTATION, INC. ) )
and ) Case No: 19-CA-279935 )
COMMUNICATION WORKERS OF ) )
AMERICA LOCAL 7800 ) )

MEMORANDUM IN SUPPORT OF RESPONDENT’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S DECISION

MV Transportation, Inc., Respondent in this matter, by and through its undersigned
counsel, files this Memorandum in Support of its Exceptions to the Decision of Administrative
Law Judge Gerald M. Etchingham issued on May 24, 2022. For the reasons noted below, MV’s
exceptions should be granted.

I. STATEMENT OF THE CASE

The evidence shows that MV Transportation, Inc. (“MV” or “Company”) did not violate
Sections 8(a)(1) or (5) or the National Labor Relations Act (the “Act”) as alleged in the
Complaint. Indeed, the facts show that the Union’s request for the “financials” of MV’s contract
with its customer Microsoft was not relevant and, therefore, MV was not required to produce any
part of its customer contract. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042
(1965); Sioux City Stockyards Div. 293, NLRB 1, 130 LRRM 1427 (1989). The evidence also
shows that MV worked with the Union to attempt to accommodate its request for information.
However, the Union rejected all of MV’s proposals. In short, the evidence shows that MV did not violate the Act and that the Complaint should be dismissed.

II. BRIEF SUMMARY OF BACKGROUND FACTS

A. MV’s Operations and Revenue Contract With Microsoft

MV provides transportation services across the United States pursuant to various contracts with public and private entities. Relevant to this matter, MV has a contract with Microsoft to provide shuttle services at Microsoft’s campus in Redmond, Washington. [Tr. pp. 19, 21-22, 78-79.] Patrick Domholdt is MV’s Director of Labor Relations for the Redmond facility. [Tr. pp. 77-78.]

Mr. Domholdt explained at the hearing its contract with Microsoft is made up of several parts. [Tr. pp. 79-82.] Mr. Domholdt explained that first portion of the contract is a made up of standard contract language such as scope of work, conflict of interest and other such provisions. [Tr. p. 79]. He further explained that there are exhibits (A through H) that contain specific terms of service that is expected to provide. [Tr. pp. 79-80.] A redacted copy of MV’s contract with Microsoft is found at Joint Exhibit 10.

Mr. Domholdt testified at the hearing, that MV is subject to a non-disclosure agreement and contractual confidentiality requirements as part of its contract with Microsoft. [Tr. p. 80; JX 10 and 11.] Mr. Domholdt explained that as a condition of bidding on the Microsoft contract MV (and all other bidders) were required to enter into the NDA that prohibits it from disclosing information related to the contract. Once MV was awarded the contract by Microsoft, the NDA was incorporated into the service agreement, which also had additional confidentiality requirements. [Tr. pp. 80-82; JX 10 and 11.]
Mr. Domholdt testified that financial data related to MV’s Microsoft contract is contained in Exhibit C of the agreement. [Tr. p. 81.] According to Mr. Domholdt, that Exhibit is 33 pages long and contains a significant amount of financial information related to the Company’s operation with Microsoft, that vast majority of which is not related to labor costs. [Tr. p. 81.] By example, Mr. Domholdt explained that the information includes such items as fuel cost, labor costs, operating cost, vehicle pricing, management fees, and technology subscriptions to name a few examples. [Tr. pp. 80-83.]

B. The Union

The Communication workers of America, Local 7800 represents shuttle drivers (among other employees) at MV’s Redmond facility. [Tr. pp. 19, 83.] The are approximately 400 employees in the bargaining unit represented by the Union. [Tr. p. 19.] The Union has represented this group since approximately 2011. [Tr. p. 19.] The Union’s president is Arthur G. Clemens. [Tr. p. 18.] Jeanne Stewart is a Staff Representative for the Union. [Tr. pp. 57-58.] MV and the Union are parties to a collective bargaining agreement (“CBA”). [Tr. p. 20.] The current CBA expired in June 2020 and the parties agreed to an extension of the agreement. [Tr. pp. 20, 24, 83.] The parties are currently in negotiations for a successor agreement. [Tr. pp. 20, 24.]

C. The Union’s First Information Request and MV’s Response

On October 30, 2020, the Union sent MV a request for information via email. [Tr. pp. 25-26, 83-84; JX 3.] Among 14 categories of items requested, the Union asked MV to provide its current service contract with Microsoft. [Tr. p. 27, 83-84; JX3.] On November 5, 2020, Mr. Domholdt responded to the Union’s information request via email. [Tr. pp. 27; JX 4.] With
respect to the Union’s request for a copy of MV’s contract with Microsoft, Mr. Domholdt replied:

In response to the Union’s request for the current contract between Microsoft and MV Transportation, the Employer believes that such information is confidential information and MV is precluded from sharing such contract without violating the terms of an NDA. The parties’ contract has a confidentiality provision which precludes MV from disclosing information contained within the current contract as it is confidential information and subject to a nondisclosure agreement. To the extent that the Union is looking for specific information in the current contract between Microsoft and MV Transportation please let me know what specific information the Union is looking for so that we can attempt to reach an accommodation. If the Union can provide us with the information that they are seeking than we can determine if this information is contained within the current contract. If such information is contained within the current contract we can work with the Client to determine whether this information could be provided without MV Transportation violating the confidentiality provisions contained within the current contract and/or the Employer’s nondisclosure agreement.

[JX 4.]

Mr. Clemens testified at the hearing that the Union did not respond to Mr. Domholdt’s November 5th email. [Tr. pp. 28, 42-44.] The Union did not raise the issue of the Microsoft contract again until July 2021.

D. The Union’s Second Information Request and MV’s Response

The parties resumed bargaining in June 2021. [Tr. p. 86.] On June 16, 2021, the parties had in-person negotiations at the Union hall. [Tr. pp. 29, 86-87.] During that session, the Union presented MV with a wage proposal for the bargaining unit. [Tr. pp. 29, 44, 87; JX5.] Mr. Clemens testified that the Union proposed a $10 per hour increase across the board for all job classifications for the first year and a $5 per hour increase each year for the subsequent 2 years of the new contract. [Tr. pp. 44-45.] The Union’s proposal effectively raised the base wage rate for each classification in the bargaining by more than $20 per hour over the life of the contract. [Tr. pp. 87-89.] Mr. Clemens testified that upon receiving Mr. Domholdt told the Union
representatives that the proposal was “ridiculous and that [MV] had no money for raises.” [Tr. pp. 30-31.]

Mr. Domholdt testified that while he was shocked by the Union’s wage proposal, he never told the Union that MV did not have money for raises. [Tr. pp. 89-90.] Mr. Domholdt further explained that Microsoft does not provide MV with any specific amount of money for raises for the bargaining unit, nor does Microsoft approve or deny what, if any, level of raises MV may negotiate with the Union. [Tr. pp. 89-90.] Mr. Domholdt credibly testified that the decision regarding what MV pays its employees is left to MV’s discretion. [Tr. pp. 89-90, 92-96.]

The parties met again on June 21, 2021, via Zoom. [Tr. p. 32.] During this session, MV presented the Union with a counter-proposal on wages. [Tr. pp. 32, 46, 91; JX 6.]

On July 2, 2021, Ms. Stewart sent Mr. Domholdt requesting “a copy of Microsoft’s Financials regarding their contract with MV Transportation.” [Tr. pp. 33, 62-63; JX 7.] Ms. Stewart stated in her email that “[a]t the last bargaining meeting it was stated that Microsoft didn’t include any raises for the contract so we would like proof regarding this.” [Tr. p. 33; JX 7.] The Union did not indicate what it meant by “Microsoft’s Financials” it was seeking at that time, or at any other time.

On July 13, 2021, Mr. Domholdt responded to Ms. Stewart’s email requesting Microsoft’s financials. [JX 8.] In his email, Mr. Domholdt explained:

MV will not be providing the contracts between Microsoft and MV Transportation as the contracts are confidential and proprietary information. MV and Microsoft have agreed to strict non-disclosure agreements which do not allow for the dissemination of the information that the Union is requesting. The Company does not believe that the Union is entitled to this information under the National Labor Relations Act due to the confidential/proprietary nature of this information. How would the Union like to proceed based on the above response and my previous email?
Following Mr. Domholdt’s response on July 13, 2021 the Union cancelled the remaining bargaining sessions and filed the instant ULP the following day. [Tr. pp. 34-35; JX 8.] The Union has refused to schedule any further contract negotiations until MV provides the “Microsoft financials.” [Tr. pp. 34-35.]

The Union never explained to MV what it meant by “Microsoft financials” and/or what specific financial data it needed for bargaining. [Tr. pp. 47-50, 65-66, 91-92; JX 8.] At the hearing Mr. Clemens testified that the Union was seeking the “financial portion” of the contract between MV and Microsoft. [Tr. p. 39.] When questioned on cross-examination as to what that meant he said he was “[r]eferring to increases in pay for MV from Microsoft.” [Tr. p. 39.] Mr. Clemens conceded, however, that the Union was not seeking financial information related to such things as MV’s fuel and maintenance costs in its contract with Microsoft. [Tr. pp. 39-40.] Ms. Stewart testified at the hearing that the Union was seeking information related to the amount of raises that might have been built into the Microsoft contract. [Tr. p. 66.] She conceded, however, that the Union never told MV that it was seeking that information. [Id.]

E. Discussions Regarding Accommodation

Following the filing of the underlying charge, MV has engaged in discussions to find an accommodation for the Union to review information it believed was needed for bargaining in the Microsoft contract. [Tr. pp. 51-54, 96-98.] To achieve that result, MV offered to have the Union come to the Redmond facility and manually review its Microsoft contract and ask the Company any questions it may have about the information. [Id.] The Union rejected MV’s proposal. [Id.] MV then offered to share the information with the Union via a Zoom meeting. [Id.] The Union rejected that proposal as well. [Id.]
III. DISCUSSION

A. The ALJ Incorrectly Found That The Financial Information In MV’s Contract With Microsoft was Relevant And Must Be Produced.

Pursuant to Section 8(a)(5) of the Act, each party to a bargaining relationship is required to bargain in good faith. Part of that obligation is that both sides are required to furnish relevant information upon request. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). This duty is statutory and exists regardless of whether there is a collective-bargaining agreement between the parties. American Standard, 203 NLRB 1132 (1973).

The employer’s duty to provide relevant information exists because without the information, the union is unable to perform its statutory duties as the employees’ bargaining agent. Like a flat refusal to bargain, “[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act” without regard to the employer’s subjective good or bad faith. Brooklyn Union Gas Co., 220 NLRB 189, 191 (1975); Procter & Gamble Mfg. Co., 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

In determining possible relevance, the Board does not pass upon the merits, and the labor organization is not required to demonstrate that the information is accurate, not hearsay, or even, ultimately reliable. Postal Service, 337 NLRB 820, 822 (2002). Information concerning employees in the bargaining unit and their terms and conditions of employment, is deemed “so intrinsic to the core of the employer-employee relationship” to be presumptively relevant. Disneyland Park, 350 NLRB 1256, 1257 (2007); Sands Hotel & Casino, 324 NLRB 1101, 1109 (1997). Presumptively relevant information must be furnished on request to employees’ collective-bargaining representatives unless the employer establishes legitimate affirmative

When the requested information does not concern subjects directly pertaining to the bargaining unit, such material is not presumptively relevant, and the burden is upon the labor organization to demonstrate the relevance of the material sought. *Disneyland Park*, supra, at 1257; *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). To determine relevance, the Board uses a “liberal, discovery-type standard” that requires only that the requested information have “some bearing upon” the issue between the parties and be “of probable use to the labor organization in carrying out its statutory responsibilities.” *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014); *Postal Service*, 332 NLRB 635, 636 (2000). The Union’s burden to establish relevance of information requests concerning employees outside the bargaining unit is “not exceptionally heavy.” *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). An articulation of general relevance, however, is insufficient. *E. I. Dupont de Nemours & Co. v. NLRB*, 744 F.2d 536 (6th Cir. 1984); *F.A. Bartlett Tree Expert Co.*, 316 NLRB 1312, 1313 (1995). The Union must demonstrate 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. *Disneyland Park*, supra at 1258 (2007).

In this case, the ALJ incorrectly found that the Microsoft contract information is relevant and necessary to the Union. The ALJ concluded that the Microsoft financial information was relevant and necessary on three findings: (1) MV asserted an inability to pay when Domholdt allegedly told the Union at the June 16 bargaining session that there was no money for wage increases in the Microsoft contract. [Dec. p. 15; Ins. 36-40.]; (2) MV’s ability to offer wage raises was “completely dependent” on revenue that MV was expecting to receive from Microsoft
as contained in the Microsoft financials. [Dec. p. 16; lns. 43-45.]; and (3) the Union’s lack of trust of MV’s economic proposals based upon the Union’s perception of a history of unreliable statements from Domholdt. [Dec. p. 16; lns. 36-37.]

As an initial matter, the ALJ wrongly held that MV asserted that it could not provide any wage increases to employees in a new collective bargaining agreement. [Dec. p. 15; lns 1-4.] In evaluating an employer’s obligation to provide financial information under Truitt, the Board evaluates whether the employer’s words and conduct specifically link its bargaining position to economic hardship. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1965); Sioux City Stockyards Div. 293, NLRB 1, 130 LRRM 1427 (1989). It is well established that an employer that simply expresses an unwillingness to pay rather than an inability to pay is not required to disclose it financial information to the Union. See Richmond Recording Corp. dba PRC Recording Co., 280 NLRB 615, 124 LRRM 1081 (1986); Advertisers Mfg. Co., 275 NLRB 100, 119 LRRM 1123 (1985).

In Fairhaven Properties the Board upheld an ALJ’s decision that the employer unlawfully refused to provide financial information requested by the union after the employer’s negotiators claimed inability to pay the demanded amount during negotiations. However, the Board did not direct the employer to furnish the requested financial information, based upon its finding that the employer effectively withdrew and retracted its claim of inability to pay. 314 NLRB 763, 147 LRRM 1033 (1994).

Here, Domholdt credibly testified that he never told the Union that there was no money for wage increases in for Union members in the Microsoft contract. Instead, Domholdt testified that he told the Union that their June 16 wage proposal (which amounted to a $20/hour wage increase over the life of the contract) was ridiculous. Even assuming Domholdt told the Union
that there was no money for wage increases in the Microsoft contract, which he did not, MV effectively withdrew any such claim. Similar to the employer in *Fairhaven Properties*, MV made a wage proposal to the Union at the parties’ next bargaining session on June 21. The Union may quibble about whether it was a 2% increase as Domholdt represented, the fact is that MV made a proposal to increase wages even though the Union claims MV had previously said it could not do so. Moreover, Domholdt specifically told the Union on July 13 that the Microsoft contract does provide for wage increases ranging from 3% to 2.5% for Union employees. As such, the record plainly establishes that MV effectively withdrew and retracted any purported claim that it could not pay for any wage increases during the term of a new collective bargaining agreement.

The ALJ’s finding that the Microsoft financials are necessary and relevant to the Union because MV’s ability to offer wage raises was “completely dependent” on revenue that MV was expecting to receive from Microsoft as contained in the Microsoft financials is also incorrect. Indeed, the ALJ’s finding completely ignores the record in the case. Domholdt testified unchallenged that Microsoft does not provide MV with any specific amount of money for raises for the bargaining unit, nor does Microsoft approve or deny what, if any, level of raises MV may negotiate with the Union. [Tr. pp. 89-90.] Domholdt credibly testified that the decision regarding what MV pays it employees is left to MV’s complete discretion. [Tr. pp. 89-90, 92-96.] There is no evidence in the record to refute Domholdt’s testimony and the ALJ cites to none in his decision.

Next, the ALJ’s decision that the Microsoft financial information is relevant and necessary to the Union because of the Union’s lack of trust of MV’s economic proposals based upon the Union’s perception of a history of unreliable statements from Domholdt is also
incorrect. The Board has consistently held that mere suspicion by a union is not sufficient to show that request for information is relevant. See Shoppers v. Food Warehouse, 315 NLRB 258, 259 (1994); Postal Service, 310 NLRB 701, 702 (1993). Accordingly, the Union’s blanket suspicion that the information MV provided to the Union regarding wage increases is not sufficient to show that its request for **ALL** of MV’s financials in its Microsoft contract was relevant and required to be produced.

Finally, the ALJ erred in finding that all of the information in the 33 pages of Exhibit C to the Microsoft contract is relevant and must be produced. As an initial matter, the General Counsel completely failed to establish what, if any, information in the “Microsoft financials” is relevant to wages for the bargaining unit employees. Mr. Domholdt testified at the hearing that the financial information in MV’s contract with Microsoft consists of approximately 33 pages of financial data that deal with a wide range of items related to the performance of its services, that vast majority of which is not at all related to overall labor costs. [Tr. p. 81.] By example, Mr. Domholdt explained that the information includes such items as fuel cost, labor costs, operating cost, vehicle pricing, management fees, and technology subscriptions to name a few examples. [Tr. pp. 80-83.]

Moreover, the evidence shows (and the Union concedes) that the Union did not tell MV what financial information from the Microsoft contract it wanted MV to provide. Instead, the Union simply stated that it wanted financial information because MV stated at the bargaining table that its Microsoft contract did not have raises built-in for employees. Mr. Domholdt credibly testified at the hearing that he (nor anyone else from MV) ever made such a statement to the Union. Even assuming Mr. Domholdt made such a statement, which he did not, MV was not
required to produce financial data about its contract with Microsoft that does not pertain to unit employees’ wages and benefits—if any.

*G4S Secure Solutions (USA), Inc. and Waste Treatment Security Guards Union 161, 369 NLRB No. 7* involved facts similar to the instant case. In that case, the union requested a copy of the service contract between the employer and its client. The Board determined that the union failed to establish that the employer’s contract with its customer was presumptively relevant and, therefore, the employer did not violate Sections 8(a)(1) or (5) of the Act by failing to provide the customer contract to the Union. The Board did, however, uphold the ALJ’s decision that the employer violated the act by not providing the union with information about running the contract that did pertain to unit employees’ wages and benefits.

Similar to *G4S Secure Solutions*, there is no evidence that shows that all of the Microsoft financials in MV’s contract are relevant and were required to be produced.

**IV. CONCLUSION**

Based upon the totality of the evidence, MV’s Exceptions should be granted.

DATED this 21st day of June, 2022.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the National Labor Relations Board’s Rules and Regulations, I served the foregoing Respondent’s Memorandum In Support of Exceptions to The ALJ’s Decision as follows:

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DATED this 21st day of June, 2022.

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