UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MV TRANSPORTATION, INC.

and

Case 19-CA-279935

COMMUNICATION WORKERS
OF AMERICA, LOCAL 7800

COUNSEL FOR THE GENERAL COUNSEL’S
ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE’S DECISION

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I. RESPONDENT’S EXCEPTIONS MUST BE REJECTED AS PROCEDURALLY DEFECTIVE

Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for General Counsel (“General Counsel”) submits this Answering Brief to the Exceptions filed by MV Transportation, Inc. (“Respondent”), to the May 24, 2022, decision of Assistant Chief Administrative Law Judge Gerald Etchingham (“ALJ”) in the above-captioned case1 [JD(SF)-11-22] (“ALJD” or “Decision”).

Respondent takes numerous Exceptions to the ALJ’s findings. However, it does not except to the ALJ’s central finding that Respondent violated §§ 8(a)(5) and (1) of the Act by failing and refusing to timely furnish the Union with requested financial information and/or has failed and refused to bargain with the Union over the confidentiality of the requested information. [ALJD 1, 18:30–33]. Nor does it delineate any specific exceptions going to the ALJ’s findings or conclusions that: (1) Respondent has not provided to the Union any documents responsive to the information request [ALJD 12:28 –20]; (2) although Respondent raised legitimate confidentiality concerns, it offered the Union no accommodation of those concerns until after the instant charge was filed, and when it finally did so, the offered accommodations were incomplete and unreasonable [ALJD 17:40–44, 18:20–25]; (3) the Union met Respondent’s confidentiality concerns by offering to sign a confidentiality agreement and that there is no evidence that the Union could not be expected to honor such an agreement [ALJD 18:14]; (4) under the proposed remedy, and order, Respondent must provide the requested financial information from

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1 References to the ALJD will be designated as [ALJD __:___], including appropriate page and line citations. References to the official transcript will be designated as [Tr. __:___], including appropriate page and line citations. References to the General Counsel’s and Joint exhibits will be referred to as [GC Exh], and [Jt Exh], respectively.
Respondent’s contract with Microsoft, upon execution by the Union of its offered confidentiality agreement [ALJD 18-20].

Without having filed exceptions to the above findings/conclusions, in its Memorandum in Support of Exceptions Respondent nevertheless attempts to attack them, arguing that the ALJ incorrectly found the requested financial information must be produced. Because Respondent failed to properly lodge exceptions going to these points, its brief addressing them should be stricken. Rules and Regulations of the National Labor Relations Board §102.46. However, because the findings Respondent does except to are predicates to the findings it did not except to, I will address these issues herein, despite Respondent’s procedural failings.

Respondent’s Exceptions, both raised specifically and not raised but briefed, are unsupported by the record evidence or the caselaw. As discussed in detail below, the General Counsel respectfully submits that the ALJ’s factual findings and legal conclusions that Respondent unlawfully failed and refused to provide relevant requested information and failed to provide a reasonable accommodation of confidentiality concerns are appropriate, proper, and fully supported by the record evidence and established precedent. Accordingly, the Board should sustain the ALJ’s decision and recommended order.
II. **THE ALJ’S FACTS AND FINDINGS SHOULD BE AFFIRMED**

A. *The ALJ appropriately found that Respondent’s conduct and statements made the financial information in its contract with Microsoft relevant and necessary (Exceptions 2, 3, 5–8, 10, 14–18, 20, 21)*

The ALJ found, and Respondent does not dispute, that, in the course of bargaining for a successor agreement, the Union made a wage proposal to Respondent and Respondent’s representative Patrick Domholdt ("Domholdt") responded that the proposal was ridiculous, both because of its size and because Microsoft was paying Union employees not to work during the pandemic. [ALJD 7:20–25; Tr.30-31, 45, 88–89]. The ALJ further found, based on both testimony from two witnesses and Union bargaining notes, that Domholdt also said in response to the wage proposal that there was no money in the Microsoft contract for raises. [ALJD 7:27–41, 12:10–14, 15:35–37; Tr.31, 45, 59–62, 71; GC Exh.2 at 2]. The ALJ found Respondent’s lone witness, Domholdt, to lack credibility when, at trial, he denied saying this. [ALJD 12:10–14; Tr.89–92]. Such a credibility finding is unassailable under these circumstances. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

The ALJ found that Respondent made a wage proposal at the next bargaining session that it untruthfully characterized to the Union as a 2 percent raise. [ALJD 8:31–9:4]. Respondent does not deny that it described the proposal to the Union in these terms, and it cannot deny that in fact the proposal represented only a 1.5 percent increase, as it stipulated to this. [Tr.32, 46, 51, Jt. Exh.6, 12]. Therefore, its exception to the ALJ’s finding that it was untruthful about its wage proposal is puzzling.

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2 There is no Exception 4; Respondent’s Exceptions jump from 3 to 5.
3 Despite five other Respondent representatives’ having attended the bargaining session in question, Respondent called no witnesses to corroborate Domholdt’s account, nor did it enter any bargaining notes from the session. [Tr. 28, 59; Jt. Exh. 12; GC Exh. 2].
The ALJ also rightly found that the mixed messages Respondent was giving about wages—first saying there was no money provided for raises in the Microsoft contract, then making a proposal from Respondent that provided for small raises, the size of which it mischaracterized—made the Microsoft contract financials relevant and necessary for bargaining, and, when the Union then requested them, obliged Respondent to produce them. [ALJD 9:10–19; Tr.33]. While Respondent may disagree because it doesn’t like the conclusion drawn, the ALJ properly found that the information only became more relevant—and the Union’s lack of trust in Respondent’s statement more justified—when, in response to the Union’s reiteration of its information request, Respondent increased its wage proposal, saying that the contract with Microsoft actually provided for 2.5 to 3 percent raises. [ALJD 10:19–29, 16:36–42; Jt. Exh. 8].

The ALJD also correctly found that Respondent’s statements at bargaining amounted to a claim of inability to pay, and therefore, under Board caselaw, it was obligated to provide the requested financial information. [ALJD 15:36–41]. Where an employer bases its bargaining positions on claims about financial information, it thereby makes the information relevant and the union is entitled to that information in order “to evaluate and verify the [employer's] assertions and develop its own bargaining positions.” *Caldwell Mfg.*, 346 NLRB at 1160 (cited in *Kitsap Tenant Support Servs., Inc.*, 366 NLRB No. 98 (May 31, 2018)). See also *Stella D’oro Biscuit Co., Inc.*, 355 NLRB 769, 770-73 (2010) (employer claimed an inability to pay demanded wages and was obligated to provide copies of requested financial documents). Furthermore, the Union here never asked Respondent to open its books generally, but asked only for the Microsoft contract
financials, to which Respondent had repeatedly tied its wage proposals. [ALJD 15:40–45; Jt. Exh.7].

As the ALJ correctly noted, Respondent’s continued citation to and reliance upon G4S Secure Solutions, 369 NLRB No.7 (Jan. 9, 2020), is inapposite, as that case involved a union’s mere speculation as to what an employer’s contract with another party contained, without explanation to the employer as to why it believed that contract to be relevant. Here, Respondent’s own statements linked its contract with Microsoft to its ability to provide wage increases, and the Union repeatedly explained that this was why it was asking for the Microsoft financials. [ALJD 9:20–34; Jt. Exh. 7, 8]. In its responses to the Union, the Respondent never—until trial—denied that it had made such claims.

Respondent’s citation to Fairhaven Properties, 314 NLRB 763 (1994), involving retraction of a claim of inability to pay, is also inapposite, as well as inappropriate. Respondent claims that its own disingenuous and shifting claims amount to retraction of any claim of inability to pay and thereby extinguished any obligation to provide the requested financial information. This has it precisely backwards—as the ALJ found, those shifty claims made the Union’s request even more relevant and its need for the information even clearer. [ALJD 10:19–29, 16:37–42].

B. The ALJ appropriately found that Microsoft’s control over employees’ terms and conditions of employment also made the requested financial information relevant (Exceptions 1, 9, 11, 12, 13, 22)

Leading up to the Union’s information request, Microsoft repeatedly exercised power over the Unit employees’ terms and conditions. [ALJD 3:30–45, 8:15–24; Tr. 20, 23–24]. The contract between Microsoft and Respondent grants Microsoft the power to require removal of unit employees from work under the contract, and Respondent has
informed the Union on occasion that it was firing certain employees because Microsoft had requested that they be removed. [Tr. 21-22; Jt. Exh. 9 p.5 section 2(h)].

Unit employees received a $2-an-hour wage increase shortly before the Union and Respondent began negotiating a new contract, and Respondent told the Union that the increase was being given at Microsoft’s request. [Tr. 20–22]. When the Unit drivers temporarily ceased driving shuttles due to the pandemic, Respondent continued paying the drivers, telling the Union that this was at Microsoft’s request. [Tr. 22–23]. As the ALJ found, this history made it reasonable for the Union to believe that the money flowing from Microsoft strongly affected the money that was available for raises. [ALJD 8:20–24].

C. The ALJ appropriately found that the Union’s request was relevant and clearly understood by Respondent (Exceptions 15, 19)

As described above, Respondent’s own statements directly put the Microsoft financial information at issue, and it was appropriate for the ALJ to have so found. Furthermore, when the Union made the information request in July 2021, the parties had been bargaining for 8 months and had reached the point of discussing economics. Without the financial information that Respondent had said was the basis for its position on economics, the Union reasonably believed it could not bargain effectively over economics. [ALJD 16:31–45; Tr. 36].

There was no hint of confusion from Respondent about what the Union was asking for. At trial, Domholdt testified that the Microsoft contract contains a 33-page Exhibit C consisting of “large Excel sheets” dealing with Microsoft financials. [Tr.81–83, 98–99]. A fully redacted copy of Exhibit C was entered into the record as a joint exhibit, and Respondent stipulated that the document responsive to the Union’s request is a 33-page set of spreadsheets and charts. [Jt. Exh. 10, 12]. Therefore, the ALJ was singularly
justified in finding that the document responsive to the Union’s request is 33-page unredacted Exhibit C. [ALJD 4:38–42, 12:29–32].

Yet, incredibly, Respondent excepts to these findings, recycling its previously discredited claims that Respondent somehow did not know what the Union was requesting. At no point in the numerous communications Respondent made to the Union did Respondent tell the Union that it did not understand what information the Union was seeking or ask the Union for clarification. [ALJD 12:34–37; Tr. 69–70, 100–101; Jt. Exh. 8]. To the contrary – on the witness stand, in response to questions from Respondent’s attorney asking if the Union ever clarified what it was seeking, Domholdt made clear that he knew precisely what the Union sought: “[T]hey’re looking for all financials which is that entire Exhibit C.” [Tr. 93:7–8]. He did not come to this understanding only at trial; he explained that, in responding to the Union request back when it first made it, “We said, look, we cannot give you the -- the Microsoft financials, that Exhibit C” to the Microsoft contract. [Tr. 93:13–14]. Thus, there can be no proper attack for the ALJ having found Exhibit C to be the information responsive to the Union’s request and Respondent to have clearly understood this.

**D. The ALJ appropriately found that Respondent has not provided a reasonable accommodation between its confidentiality interests and the Union’s need for the information and has refused the Union’s offered reasonable accommodation**

Even when an employer establishes a legitimate confidentiality interest, it cannot simply refuse to provide the information. *Am. Baptist Homes of the West*, 362 NLRB 1135, 1139–40 (2015); *Gen’l Dynamics Corp.*, 268 NLRB 1432 (1984). Yet that is precisely what Respondent did and the ALJ so found. [ALJD 12:28–32, 18:15–18; Jt. Exh.8, 12; Tr.63]. In fact, months after the Union filed the charge in this matter,
Respondent finally offered, first, to allow the Union to view the 33 pages of spreadsheets in its offices under supervision and, then, to view them over Zoom. [ALJD 13:23–38; Tr. 52–56; 66, 96–98]. These belated offers did not satisfy Respondent’s obligation to offer a reasonable accommodation, which must be in a form adequate to a union’s needs, considering the volume and nature of the information (and, in this case, the COVID pandemic). See *Stella D’Oro Biscuit Co.*, 355 NLRB 769, 773 (2010), *enf. denied sub nom. SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281 (2d Cir. 2013) (violation where employer refused copy and offered only to allow union to view 19-page financial statement); *Union Switch & Signal*, 316 NLRB 1025 (1995) (violation where employer refused copy and offered only to allow union to review 12-page air quality study); *Roadway Exp.*, 275 NLRB 1107 (1985) (viewing sufficient in case of one single-page letter); *Am. Tel. & Tel. Co.*, 250 NLRB 47 (1980) (refusal to provide copies unlawful where personnel records totaled about 90 pages); *Abercrombie & Fitch Co.*, 206 NLRB 464 (1973) (inspection, without copy, of an employee’s half-page confession and only 3 pages of uncomplicated cash register records was sufficient).

Here, the requested 33-page document is neither short nor simple, and thus the Union appropriately refused Respondent’s inadequate offers. [ALJD 13:27–36, 18:20–25; Tr.52–56, 66, 96–98]. On the other hand, the Union repeatedly offered to sign a confidentiality agreement to protect the information from disclosure. [ALJD 13:42–46; Tr. 53, 56; Jt. Exh. 12]. As the Union has never breached a confidentiality agreement with Respondent, nor otherwise given Respondent grounds to indicate it would violate a confidentiality agreement [ALJD 14:1–3, 18:25–28; Jt. Exh. 12], the ALJ properly
determined there was no legitimate basis for Respondent to continue to withhold the information.

Therefore, mere viewing of the document was inadequate, the confidentiality agreement offered by the Union appropriately met Respondent’s interests, and the ALJ properly ordered Respondent to turn over the requested Microsoft financial document. [ALJD 20:13–15]. See Stella D’Oro, 355 NLRB 769 (even though employer established legitimate confidentiality interests in requested information, Board ordered it to provide the information to the union, which had offered to sign a confidentiality agreement). See also Island Creek Coal Co., 289 NLRB 851, 851 n.1 (1988) (“Absent proof that the [u]nion was unreliable respecting confidentiality agreements, the [r]espondent's failure to test its willingness to treat the information confidentially weighs heavily against its defense”), enfd. 879 F.2d 939 (D.C. Cir. 1989); Pertec Computer, 284 NLRB 810, 811 (1987), decision supplemented sub nom. Triumph-Adler-Royal, 298 NLRB 609 (1990), enfd. in rel. part sub nom. Olivetti Office USA, Inc. v. NLRB, 926 F.2d 181 (2d Cir. 1991) (employer did not show why it couldn’t have supplied the information to the union’s financial analyst under the union’s offer of an agreement limiting use and dissemination, when the employer had not shown the Union was not reliable in honoring such agreements).

This case law finding confidentiality sufficiently protected by union agreements to be bound to confidentiality follows the teachings of the Supreme Court in Detroit Edison,

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4 In the special circumstances of the attorney-client and work-product privileges, the Board has found employers justified in refusing to turn over relevant documents, despite union offers to sign confidentiality agreements. Ralph’s Grocery Co., 352 NLRB 128 (2008) (employer not required to provide copies of attorney work-product privileged documents); BP Exploration Alaska, Inc., 337 NLRB 887 (2002) (same, for attorney-client privileged documents). Respondent in this matter has never claimed the requested documents here are subject to any such privilege.
where the Court found a Board order restricting dissemination of requested information to be inadequate protection of employer confidentiality, because the union was not a party to compliance proceedings and hence not clearly bound by the order. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979). Here, the Union would, in contrast, be a party and bound by the confidentiality agreement it has offered to sign.

For these reasons, Respondent’s procedurally improper attack on the ALJ’s order that the information must be produced is also substantively lacking. The ALJ’s order should be upheld in its entirety.

III. CONCLUSION

Based on the foregoing, it is respectfully submitted that the Board should deny Respondent’s Exceptions and adopt the ALJ’s findings of fact and conclusions of law that Respondent violated § 8(a)(5) and the ALJ’s order that Respondent turn over the requested documents.

DATED at Seattle, Washington, this 29th day of June, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel’s Answering Brief to Respondent’s Exceptions to Administrative Law Judge’s Decision was submitted by E-filing to the National Labor Relations Board, Office of Executive Secretary, on June 29, 2022 and that each of the following parties were served with a copy of the document by e-mail on June 29, 2022:

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