

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

AMERICAN BENEFIT CORPORATION

and

**Case Nos. 9-CA-44679
9-CA-44701**

**TEAMSTERS LOCAL UNION NO. 505
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**ANSWERING BRIEF OF THE UNION TO EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION FILED BY RESPONDENT**

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I. INTRODUCTION AND STATEMENT OF THE CASE

These cases now come before the National Labor Relations Board pursuant to a July 2, 2009 Decision and Order by the Honorable David I. Goldman, Administrative Law Judge (“ALJ”), who conducted a hearing in these cases in Huntington, West Virginia on April 28 and 29, 2009.

The actions that prompted these cases was American Benefit Corporation’s (“respondent” or “company”) diversion or transfer of bargaining unit work to non-bargaining unit individuals in October and November of 2008 and its refusal to and delay in providing necessary and relevant information to the Union when the Union filed a grievance challenging those actions

The parties are signatory to a collective bargaining agreement (“CBA” or “contract”) that contains a complete prohibition of the diversion, subcontracting or transfer of bargaining unit work by the company unless the company provides notice to and bargains with the Union over the transfer of such work. (GCX 2). If the company does not obtain the Union’s written consent to the transfer of bargaining unit work, the Union is released from its no strike obligation under the CBA and is free to engage in a strike. Despite this broad prohibition, as the respondent readily admits, it transferred bargaining unit work in this case to nonunit individuals without advance notice to or bargaining with the Union.

When it was discovered that the company had taken work away from the bargaining unit and diverted it to non-bargaining unit individuals in late October of 2008, the Union filed a grievance and submitted an information request to the company to determine the extent of the violation of the contract. (GCX 5, 6). The company balked at first, claiming that the information request was over broad and sought irrelevant information, although it failed to identify what specific requests for information were over broad or irrelevant. (GCX 7). The company then belatedly provided vague responses to the request several weeks after it was originally requested. (GCX 8). Additionally, the

company contended that the Union's grievance contending that the subcontracting, transfer or diversion of bargaining unit work violated the contract, was untimely and has refused to process the grievance. (Tr. 65).

The Union then filed charges in the above referenced cases, alleging, *inter alia*, that the company had failed to provide relevant and necessary information and that it engaged in a unilateral change in mandatory terms and conditions of employment and had failed to provide notice to and bargain with the Union before subcontracting and/or diverting work away from the bargaining unit. On or about February 4, 2009, the Regional Director for Region 9 issued an Order consolidating the above cases and issuing a consolidated complaint and notice of hearing.

On April 24, 2009, the eve of the hearing in this case, the company provided an additional response to the Union's information request. (Tr. 69, UEX 1).

II. FACTUAL BACKGROUND

As Judge Goldman wrote in his July 2, 2009 Decision and Order, there "is no serious dispute about the basic facts" of this case. (ALJD, p.2). Indeed, the company readily admits to the basic underlying facts of its actions in this case that it sent out bargaining unit work to non-bargaining unit individuals without advance notice to the Union or a meaningful and realistic opportunity to bargain. Judge Goldman's recitation of the facts is thorough, well-supported by the credible record evidence and unchallenged by the respondent. (ALJD, pp. 3-12). Accordingly, the Union provides a brief recitation of relevant facts.

The respondent, located in Huntington, West Virginia, provides, among other services, third party administration of benefits and actuarial services for pension and health and welfare funds, many of whom are Taft-Hartley benefit funds associated with various Unions in the West Virginia

and Ohio area. (Tr. 25). The Teamsters Local Unions 175/505 health and welfare fund is one of the funds administered by the company. The employees who work for the company are located at the company's Huntington facility and are represented by Local 505 and have been for many years. (GCX 2; Tr. 24). These employees represented by Local 505, perform the claims auditing and other clerical work associated with the employer's business. (Tr. 25).

The current CBA between the parties runs from June 9, 2006 through June 8, 2011, and contains a memorandum of agreement ("MOA") that prohibits the company from **subcontracting, diverting or transferring any bargaining unit work in any fashion at any time in the future** absent a signed agreement with the Union that permits the company to do so. (GCX 2, p. 26) (Emphasis supplied). If the company does not obtain the Union's consent, the Union is released from its no-strike obligation under the CBA and is free to engage in a strike and the company is prohibited from permanently replace the striking employees. (GCX 2).

The MOA was reached during the 2006 negotiations to ensure that the company would not transfer, subcontract or divert bargaining unit work in any form or fashion. (Tr. 52-56). In 2004, the Union discovered that the company had diverted bargaining unit work to a non-bargaining unit individual in Ohio by the name of Maria Beimly. Ms. Beimly had apparently worked for a client of the company and the client wanted the company to continue to provide Ms. Beimly work so she could remain employed. (Tr. 53). The Union filed a grievance over the diversion of this bargaining unit work. The parties eventually settled the grievance with the company acknowledging that the work was bargaining unit work and that upon Ms. Beimly's separation or retirement or by the end of the 2001 CBA, the work would be returned to the Huntington location. (Tr. 54; GCX 13). The Union agreed to this settlement because it was trying to help the company maintain the account with

the client but by no means did it agree that the company could unilaterally and without notice transfer or divert work to non-bargaining unit individuals. (Tr. 53).

In 2006 negotiations, the Union agreed to a continuation of the Beimly grievance settlement but with more explicit restrictions and express prohibitions on the company's transfer, subcontract or diversion of bargaining unit work in any form or fashion. Furthermore, the parties expressly agreed that the continuation of the Beimly grievance settlement would not operate as a waiver by the Union of its right to bargain over and consent to the transfer or diversion of bargaining unit work in any form or fashion in the future. (GCX 2, p. 26; Tr. 55).

Beginning in or about August of 2008, the company due to changes in its computer software program for processing medical claims and due to the start of the new school year, ostensibly began to experience a lag in the processing of claims. (Tr. 253-254). Employees noticed this lag and asked to work overtime to catch up on the processing of these claims. (Tr. 195). The company denied those requests to work overtime. (Tr. 195, 199). In September of 2008, the company laid off three bargaining unit employees who were claims clerks. (Tr. 224, 227, 228). There were also several other employees on lay off who had been laid off in or about December of 2006 who had contacted the company about coming in to work on nights and weekends to help the company reduce the purported backlog of claims. (Tr. 96, 118-119). The company, declined to call any of these people back to help out with this purported backlog of claims.

In early October of 2008, the company requested that employees sign up to work overtime. (Tr. 227). Many of the employees, upset that there were laid off employees willing to come back to work but the company was asking for current employees to work overtime, declined to do so. (Tr. 211, 219, 230). On October 9, 2008, the company called a meeting to discuss the issue of employees

not working overtime. (Tr. 210, 225-227). At this meeting, the employees voiced their concern that the company was asking employees to work overtime while there were employees on layoff. Additionally, shop steward Sheila Lusk voiced her concern that the company was diverting work away from the bargaining unit. (Tr. 232). Apparently these concerns did not impress the company since its only response was to suspend Ms. Lusk for three days. (Tr. 61). The Union members, however, began to sign up for overtime again after this meeting. (Tr. 212-214).

Around the time frame of October 16, 2008, and unbeknownst to the Union or its members, the company had begun the process of surreptitiously transferring or diverting bargaining unit work from the bargaining unit to non-bargaining unit individuals. (UEX 1(e), 1(j)-1(ii); Tr. 156).

The company readily admits that it transferred medical claims electronically to two individuals, one in Illinois and one in Maryland. It did so by granting access to its computer system for these two individuals and then electronically transferring the bargaining unit work to them. (Tr. 309). With respect to the dental claims, Ryan Jones, the company's chief financial officer, directed supervisors, Linda Sites and Angie Napier to physically remove hard copy paper claims from the file cabinets of employees assigned to process those claims and take those claims to a competitor's office, where that competitor's employees, using the competitor's equipment and office space would process those claims for the respondent, allegedly for nothing in return. (Tr. 155-158). The physical removal of the dental claims from the respondent's office apparently took place after hours on Friday, October 17, 2008 without notice to or bargaining with the Union about the transfer of the bargaining unit work. (Tr. 158).

Several employees who had signed up to work overtime on the weekend of October 18, 2008 to help reduce the purported backlog, discovered that the claims were missing when they reported

for work that Saturday morning. (Tr. 172). When they asked Linda Sites, their supervisor, what happened, all she would say was that the claims were “out of the office”. (Tr. 173). When the employees reported for work again on Monday and the claims had not been returned, the employees raised similar concerns but still could not get a straight answer from their supervisor or Patricia Bostic, the human resources manager who also said the claims were taken “out of the office”. (Tr. 175). After contacting Local 505 President and Business Agent Dennis “Midget” Morgan, about the unusual occurrences, Cheryl Coburn, a bargaining unit employee assigned to process dental claims, submitted an information request to Ms. Bostic to find out what happened to the bargaining unit work. (GCX 3).

Similarly, at approximately the same time, the company again, without notice to or bargaining with the Union, began the electronic diversion of bargaining unit work to nonunit individuals in Illinois and Maryland. (Tr. 311-313). With respect to the individual in Illinois, she performed this diverted bargaining unit work for approximately 30 days. (Tr. 268). The company readily admits that they did not provide notice to or give the Union an opportunity to bargain over the transfer and/or diversion of this bargaining unit work prior to doing so. (Tr. 311-313).

When Mr. Morgan, who had been traveling on Union business the week of October 20, returned to his office on or about October 27, he attempted to find out what happened. After several unsuccessful attempts to obtain information from Ms. Bostic, he submitted a grievance over the issue and an information request attempting to determine the nature and extent of the company’s violation of the contract. Ultimately, the company refused to process the grievance, contending it was untimely, and failed to respond timely and adequately to the Union’s information request. (Tr. 65).

The respondent’s main contention in this case that the individuals performing this bargaining

unit work outside of the company's Huntington facility were "temporary" employees and that the CBA permits them to use temporary employees to perform bargaining unit work away from or outside of the Huntington facility. The company similarly contends that the Union "waived" its right to bargain over this issue. Unfortunately for the respondent, it did not present any facts or bargaining history to support these claims. Indeed, the only evidence submitted on this issue was by the Union, where the application of temporary employee language under the CBA undisputedly showed that when temporary employees were used in the past, they were used at the company's Huntington facility and not outside of it and that the company would provide the Union notice that it was going to use temporary employees pursuant to the conditions of the CBA. (Tr. 33-36). It was not until after the company had transferred the work in this case that the company for the first time took the position that the temporary employee language allowed it to divert work outside of the Huntington Facility to non-bargaining unit persons. (Tr. 33). Indeed, as Judge Goldman found, the undisputed testimony of Union President Morgan, was that the company had never before diverted bargaining unit work to temporary employees outside of the facility. (ALJD, p. 16). Similarly, the company presented no evidence that the Union had clearly and unmistakably waived its right to bargain over this issue.

The contract language regarding temporary employees remained unchanged in the current CBA from the previous CBA's and the company presented no evidence that any negotiations over either the 2001 or 2006 contracts addressed or discussed the use of temporary employees in any form or fashion. Critically, the company presented no evidence, bargaining history or otherwise, to support its contention that it has the right to use "temporary" employees to perform bargaining unit work outside of the Huntington facility, other than its recently contrived interpretation of that clause.

Mr. Jones also admitted, however, that he has never negotiated a collective bargaining agreement in his life and did not negotiate the current CBA between the parties, nor does he have any knowledge of any past practice or history under the CBA other than what some managers may have told him. (Tr. 298, 322). The company failed to present their main negotiator for the 2006 agreement, Ms. Bostic, to testify on any subject in this case. Instead, they presented only Ms. Wood and Ms. Sites who were on the negotiating team for the company but could only testify that the temporary employee language in the 2006 contract remained unchanged from the 2001 contract.

III. ARGUMENT

A. The Union Did Not Clearly and Unmistakably Waive its Right to Bargain Over the Company's Unilateral Transfer of Bargaining Unit Work Outside of the Bargaining Unit

The respondent's first exception contends that Judge Goldman was wrong when he found that the respondent had violated §8(a)(5), when it indisputably without notice to or bargaining with the Union, unilaterally diverted bargaining unit work to non-bargaining unit temporary employees.¹ The respondent contends that it was privileged to do so because the Union had waived its rights to bargain over the company's unilateral transfer or diversion of bargaining unit work. (Respondent's Exceptions, p. 9).² The company's sole contention, unsupported by the record evidence or bargaining history, is that the clause in the contract that permits them under certain defined

¹The respondent's first exception, misstates the Judge's finding. The Judge did not find that the respondent violated §8(a)(5) by hiring temporary employees. Rather, the Judge found that respondent violated the Act by failing to provide the Union notice and an opportunity to bargain before unilaterally diverting "core bargaining unit work" to non-bargaining unit temporary employees. (ALJD, pp. 16, 23-24).

²Critically, the respondent does not challenge the Judge's findings that the transfer of work was a mandatory subject of bargaining and that the respondent's transfer in this case was a unilateral change in existing conditions. (ALJD, p. 16).

circumstances to use “temporary employees” permitted them, without notice to or bargaining with the Union, to transfer bargaining unit work away from the Huntington facility to non-bargaining unit individuals several states away or at a competitor’s office.³ Because the company defends its unilateral change here based on a claim of contractual right, the alleged waiver must be “clear and unmistakable”. *Metro Edison Co., v. NLRB*, 460 U.S. 693, 708 (1983). The company’s argument is essentially that since the temporary employee clause of the contract states that it can use temporary employees in certain specified circumstances, nothing more is required because the Union waived its right to bargain.⁴ The respondent’s argument here is fatally flawed just like it was before the ALJ.

Judge Goldman’s decision rejecting the respondent’s defense that the Union waived its right to bargain over this issue is more than adequately supported by the credible record evidence and he correctly applied the Board’s clear and unmistakable waiver rule in this case. The rule requires that a waiver of a statutory right is not to be lightly inferred but instead must be “clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). “The standard for waiving statutory rights, however is high. Proof of a contractual waiver is an affirmative defense and it is the employer’s burden to show that the contractual waiver is ‘explicitly stated, clear and unmistakable.’” *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1079 (9th Cir. 2008) (citing

³The company relies on Article 31 of the CBA which states that “The Union recognizes the need for the Company to use outside temporary employees in cases where the workload is of an immediate nature such that it cannot be completed by regular employees during the normal work day or during overtime hours.” (GCX 2, p. 15).

⁴The company did not dispute nor could it, that the transfer of bargaining unit work to temporary employees whether at or away from the Huntington facility is a mandatory subject of bargaining. See, *St. George Warehouse, Inc.*, 341 NLRB 904, 905 (2004), *enf’d*, 420 F.3d 294 (3rd Cir. 2005). Similarly, the company did not dispute that the subcontracting, transfer or diversion of bargaining unit work in this case involved a mandatory subject of bargaining.

Silver State Disposal Service, Inc., 326 NLRB 84, 86 (1998)). “Equivocal, ambiguous language in a bargaining agreement without more, is insufficient to demonstrate waiver.” *Id.* Furthermore, while a waiver of a statutory right may be evidenced by bargaining history, the Board requires “the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter.” *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989).

As Judge Goldman found, the “[a]pplication of this rule to the facts here leaves [the company] with little in the way of defense.” (ALJD, p. 21). As Judge Goldman found, the company failed to adduce a shred of bargaining history or past practice to support its claim that the Union had clearly and unmistakably waived its right to notice and an opportunity to bargain over the company’s diversion of bargaining unit work in this case. (ALJD, p. 23).

The record is clear that the company, which bears the burden of proof on this issue, has utterly failed to produce any evidence that the company’s diversion of bargaining unit work to so called temporary employees outside of the Huntington facility was “fully discussed and consciously explored” during the 2006 or any other set of negotiations. Indeed, the only evidence the company presented was that the temporary employee clause language stayed the same from the 2001 to the 2006 agreement and that there were no discussions concerning it during negotiations. The company presented no evidence that there was any discussion during 2006 or any earlier negotiations that the parties had fully discussed and the Union had consciously yielded that the company could transfer core bargaining unit work to non-bargaining unit individuals outside of the Huntington facility even on a temporary basis, regardless of whether you call the non-bargaining unit employees temporary or something else. Instead the only bargaining history presented was by the Union where Local 505

President Morgan testified, without rebuttal, that the on the only occasions that company had used temporary employees, the temporary employees came to and worked at the Huntington facility and at no time had the parties ever agreed that the company could transfer bargaining unit work to “temporary” employees working outside of the Huntington facility.

Furthermore, it is undisputed that the company clearly and unmistakably agreed in the 2006 CBA that it would not subcontract, transfer or divert bargaining unit work in any fashion without notice to the Union, an opportunity to bargain and obtaining the Union’s written consent to permit it contract out or transfer the work. The company also clearly and unmistakably agreed that the Union did not waive its right to prohibit the subcontracting of work in any fashion by agreeing to permit Ms. Beimly to continue to perform a limited amount of bargaining unit work at a location in Ohio. What is clear and unmistakable here is that the company waived its right to engage in any kind or fashion of subcontracting, transfer or diversion of bargaining unit work without the Union’s written consent. The company’s argument that the Union waived its right to demand notice and bargaining over the transfer of work outside of the bargaining unit based on the temporary employee language contained in Article 31 of the CBA is nothing more than an unsupported contrivance.

Judge Goldman properly and thoroughly analyzed the other relevant provisions of the agreement, including the management rights and zipper clauses and the MOA, to conclude that the Union had not clearly and unmistakably waived its right to bargain over the issue. (ALJD, pp. 21-23).⁵ Moreover, the respondent continues to advance the discredited argument that the Judge’s

⁵The respondent did not except to the Judge’s findings and legal analysis regarding the contract’s management rights and zipper clause in this case and that neither of these clauses provided any basis to conclude that the Union waived its right to bargain over this issue. (ALJD, p. 23). The Union submits that Judge Goldman’s findings here are more than adequately supported by the record.

findings incorrectly found that the MOA superseded Article 31 of the CBA. (Respondent’s brief, p. 12). This is simply not true and the Judge’s decision cannot logically be read to support such an argument. Rather, the Judge appropriately pointed out that in light of the MOA, which must be read in conjunction with the 2006 agreement, because it was negotiated at the same time as and is specifically made part of the CBA, that it was “not credible to conclude that the 2006 Agreement, **considered as a whole**, ‘clearly and unmistakably’ show that the parties intended to waive the Union’s bargaining rights on the subject”. (ALJD, p. 22) (Emphasis supplied).

The temporary employee clause in the CBA does not unequivocally and expressly state that temporary employees can be used outside of the Huntington location and there is no express provision in the CBA that permits the company to electronically or otherwise transfer work to temporary employees outside of the Huntington location. Furthermore, there is no evidence of bargaining history or past practice that such practices had occurred and/or were permissible. At best, the company can only argue that the clause in question is ambiguous, which under extant Board law, without more, is insufficient to demonstrate waiver. See also, *Metro Edison*, 460 U.S. at 708 (declining to “infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is “explicitly stated”).

Recently, the Board in *Provena Hospitals*, 350 NLRB 808 (2007) reaffirmed its long-standing and well-established clear and unmistakable waiver standard doctrine. In doing so, the Board majority held that

The clear and unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. *Id.* at 811.

It is crystal clear that there was no such unequivocal and specifically expressed intention by the Union in this case to permit the company to unilaterally transfer bargaining unit work to so called temporary employees outside of the Huntington facility. Moreover, there is no express substantive provision in the contract regarding the transfer or diversion of bargaining unit work to purported temporary employees outside of or away from the Huntington facility. Finally, there is not one scintilla of evidence that the issue of using temporary employees outside of or away from the Huntington facility “was consciously explored in bargaining or that the Union intentionally relinquished its right to bargain over the topic.” *Id.* at 815.

At bottom, “[i]n the absence of either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining, the Respondent was not authorized to act unilaterally on this undisputedly mandatory subject of bargaining.” *Id.* As Judge Goldman wrote in his decision, a collectively-bargained provision may be deemed a waiver by the union of an employer’s duty to bargain “only if the contract’s text, or the parties practices and bargaining history ‘unequivocally and specifically address their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.’” (ALJD, p. 20 citing *Provena*, supra, at 811). Judge Goldman properly concluded that the application of “clear and unmistakable” waiver standard “thwarts every contention advanced by the Respondent.” (ALJD, p. 21).⁶

⁶As a last gasp, the respondent now contends, without any support in the record, that it defended this case in the alternative, on the contract coverage rule and purportedly cites a passage from its brief to the ALJ. This claim is without merit. First, there is nothing in the record that the respondent sought to defend the case on this basis and it presented no evidence to support such a claim. Second, as the Judge noted, the respondent never disputed that the clear and unmistakable waiver rule was the proper rule to be applied in this case.

B. The Respondent's exception that the ALJ inserted terms into the CBA is wholly without merit

The respondent contends in its second exception that Judge Goldman “inserted terms into the unambiguous language” of the CBA in order to reach his findings in this matter. (Respondent’s Brief, pp. 14-16). The respondent’s exception here is devoid of any merit and completely ignores the Judge’s findings. Respondent’s contention here rests on a flawed argument that finds no basis in either the facts or the language of the CBA. The respondent contends that since Article 31 is silent about whether the performance of bargaining unit work by temporary employees at places other than the Huntington location is permitted - a fact duly and appropriately noted by Judge Goldman - that the language is thus “unambiguous” and it is permitted to act unilaterally. This argument borders on the frivolous. It is hardly the case that contract language that as Judge Goldman noted “does not expressly treat with the issue” is “unambiguous” as claimed by the respondent. Indeed, as Judge Goldman properly found, the language does not proscribe, but it also does not expressly permit the diversion of work away from the Huntington facility to temporary employees. Judge Goldman appropriately reviewed other provision of the CBA (the management rights and zipper clauses) as well as the MOA to properly conclude that the language of the agreement lacked the degree of specificity needed to constitute a clear and unmistakable waiver of the Union’s right to bargain over this issue.

The respondent advances this fatally flawed argument here because it failed to adduce any bargaining history or past practice of the use of temporary employees’ offsite in an attempt to show a clear and unmistakable waiver by the Union of its right to bargain. Rather, the Union submitted evidence **undisputed by the respondent** that Article 31 has never been interpreted to allow the

offsite use of temporary employees to perform bargaining unit work and that the only use in the past of nonbargaining unit employees to perform work offsite was subject to a grievance and negotiation of the MOA as a resolution which specifically prohibited the transfer or diversion of bargaining unit work in any fashion. Furthermore, the only evidence regarding the use of temporary employees at all, involved the use of them at the Huntington location. At bottom, the respondent failed to produce a shred of evidence that either by way of past practice or bargaining history, that bargaining unit work was permitted to be transferred offsite for performance by nonunit employees. Accordingly, as Judge Goldman found, “it is not credible to conclude that the 2006 Agreement, considered as a whole, ‘clearly and unmistakably’ show that the parties intended to waive the Union’s bargaining rights on this subject.” (ALJD, p. 22).

C. The Respondent’s third exception that it did not violate the Act by failing and refusing to provide and/or failing to timely provide the Union with requested information is frivolous

The respondent’s third exception is based on the utterly meritless claim that neither the General Counsel nor the Union presented any evidence to show how the information requested was relevant to the Union’s role as collective bargaining representative of the employees. The respondent also claims, similarly without merit, that the ALJ’s decision was based on the notion that the Union was entitled to the information simply because it requested it. (Respondent’s brief, p. 17). This is sheer nonsense. At the hearing in this case, the respondent failed to challenge the complaint allegations that it failed to provide the Union information necessary and relevant to the Union’s proper performance of its duties as collective bargaining representative. The respondent completely ignores the fact that the information request was made in conjunction with the Union’s grievance concerning the diversion of bargaining unit work, which the respondent admits to engaging in.

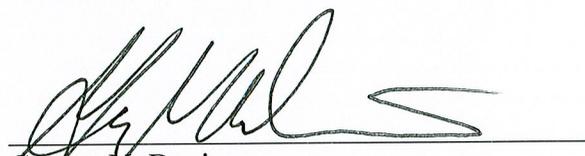
Judge Goldman went through a painstaking analysis of the applicable legal principles and the relevancy of the Union's information request to properly conclude that the information requested was directly related to its contractual claims and the defenses being asserted by the respondent to the grievance. (ALJD, p. 27). It is abundantly clear that the Union's information request was necessary and relevant to the Union's ability to represent the bargaining unit employees and to perform its duties as collective bargaining representative. As the Judge found "[t]his was not a case where the Union needed to cite additional facts to justify its desire for this information." (ALJD, p. 26). Union President Morgan testified about the information request, that it was directed to the "who, what, where, when and how—regarding ABC's hire and use of nonunit employees to perform bargaining unit work offsite." (ALJD, p. 26). Given the respondent's undisputed actions and the Union's challenge to those actions, as Judge Goldman wrote, "the relevance of the information should have been apparent to the Respondent under the circumstances." (ALJD, pp. 27-28, n. 17, citing *Disneyland Park*, 350 NLRB 1257, 1258 (2007)). It is crystal clear that the company violated the Act by failing to provide the Union the requested information and its exception here should be rejected out of hand.

The respondent does not challenge the Judge's finding that its delay until April 24, 2009, just four days prior to the hearing in this case, to provide some of the information to the Union, much of it illegible, is a black letter law violation of the Act. See, *Amersig Graphics, Inc.*, 334 NLRB 880 (2001) (Two to three month delay unlawful); *Bituminous Roadways of Colorado*, 314 NLRB 1010 (1994) (employer's six month delay unlawful); and *Finn Industries*, 314 NLRB 556 (1994) (Five month delay unlawful). Accordingly, the Judge's decision here should be affirmed in all respects and the respondent's exception overruled.

V. **CONCLUSION**

The Judge's decision in this case is more than amply supported by the credible record evidence. Furthermore, the Judge correctly applied the law to the facts of this case. The Union respectfully submits that the respondent's exceptions are due to be overruled and the Judge's findings and conclusions of law affirmed in all respects.

Respectfully submitted,



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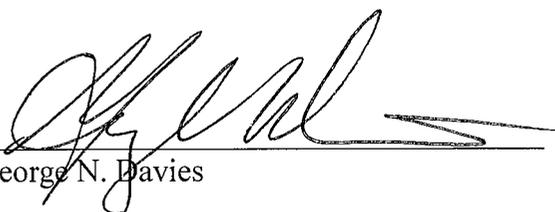
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answering Brief of the Union was electronically filed with the National Labor Relations Board and served by U.S. mail and email to:

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On this the 28th day of September, 2009.


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