UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALBERTSON'S LLC

and **Case 28-CA-22546**

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 540, AFL-CIO, CLC

GENERAL COUNSEL'S ANSWERING BRIEF

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GENERAL COUNSEL'S ANSWERING BRIEF

I. OVERVIEW

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the General Counsel (CGC) submits this Answering Brief to the Exceptions filed by Albertson's LLC (Respondent), to the decision of Administrative Law Judge William Nelson Cates (ALJ), which issued on February 2, 2010 (the ALJD). As correctly found by the ALJ, Respondent has, since May 7, 2009,[1] refused and continues to refuse to provide information requested by United Food and Commercial Workers International Union, Local 540, AFL-CIO, CLC (Union) in violation of Section 8(a)(1) and (5) of the Act. (ALJD 13)

By its exceptions, Respondent urges the Board to set aside the ALJD on the bases that it ignores relevant evidence and Board precedent; overturns the longstanding Board rule that information concerning employees outside the bargaining unit is not presumptively relevant "unless the union can establish relevancy based on employer statements made at the negotiation table;" establishes a legal rule providing for "a sweeping legal information

[1] All dates hereinafter are 2009 unless otherwise noted.

disclosure duty;" and would "significantly limit the Section 7 rights of employees to receive important information during election campaigns." The General Counsel urges the Board to reject Respondent's exceptions inasmuch as they are without merit. As discussed below, the record fully supports the ALJ's finding that Respondent has failed and refused to provide information requested by the Union pertaining to the wages, hours, and other terms and conditions of employment of the Respondent's non-Union represented employees at the Respondent's eight grocery stores in El Paso, Texas, in violation of Section 8(a)(1) and (5) of the Act (ALJD 14:4-6). As found by the ALJ and as supported by the record, such information is relevant and necessary to enable the Union to perform its representational duties regarding certain meat department employees in the El Paso area. The record shows that such information was established as relevant when Respondent compared and contrasted the wages, hours, and working conditions of its unrepresented employees and those of its Union-represented employees, while stating its intent to treat all employees fairly. Though the Union has made the relevance of and need for the information known to Respondent, Respondent has failed and refused to provide the requested information. CGC urges the Board to adopt the ALJ's findings, conclusions, and recommended order.

II. THE RECORD EVIDENCE

A. Respondent's Business and Relationship with the Union

Respondent is engaged in the retail sale of groceries and meat related items, including at eight retail grocery stores in El Paso, Texas. (ALJD 3, Tr. 1, 87) Since July 19, 1993, the Union has been as the exclusive collective-bargaining representative of the following bargaining unit (the Unit):

> All full-time and regular part-time journeymen and apprentices in the classifications of meat wrapper, meat cutter, butcher block clerk, butcher block

> manager, meat deli clerk and assistant head meat cutter employed by the Respondent at its stores located at 2200 North Yarbrough Drive, 9111 Dyer Street, and 7022 North Mesa Street in EI Paso, Texas; excluding all other store employees, including but not limited to office clerical employees, head meat cutters (a/k/a meat department managers), service deli employees, direct store delivery clerks, guards and supervisors as defined in the Act. (ALJD 4, fn. 7; GCX 1(c):2; GCX 1(f):2; cf. RX 11)

The parties' most recent collective-bargaining agreement covering Unit employees expired in 2002 and, since that time, the parties have been bargaining over the terms of a successor contract. (ALJD 4; Tr.18, 89)

B. The Respondent's RM Petition and February 6, 2009 Flyer

In January, Respondent filed an RM petition in Case 28-RM-615 seeking an election among the Unit employees. (ALJD 4; Tr. 90, 18) During the election campaign preceding the February 12 and 13 representation election, Respondent passed out to employees and posted at certain of its stores a flyer, dated February 6 (ALJD 4-5; GCX 2; Tr. 104), which stated:

> TO ALL MEAT DEPARTMENT ASSOCIATES
> AT STORES 932, 933 AND 934
>
> Recently, a majority of you told us that you no longer wanted the UFCW to represent you. That is not surprising since history shows the union has been less than diligent in these negotiations. You have been working without a new contract since 2002, and your last wage adjustment was in May 2001. The law requires that we give no wage increases without the union's agreement. We have been trying to get a deal done with the union but it has been difficult. You have seen the correspondence. The Company filed a charge with the National Labor Relations Board in 2005 because the union refused to meet and bargain in good faith, and we had to threaten to file a similar charge in 2008 before they would get back to us.
>
> Upon learning of your desire, we asked the Board to conduct a secret ballot election so you could vote "Yes" or "No" on keeping the UFCW. That election is scheduled for February 12 and 13. Between now and the election, you will hear many things. You will have to decide who to believe– the union or the Company. Some of you told me that the UFCW has said that without a union, the meat market managers will be free to fire people they do not like,

and the Company will reduce the wages of every meat department here in El Paso. There is no factual basis for their claims.

Albertsons has a long track record of treating our associates well. Look at it. Talk to associates in our union–free stores. Listen to them. We treat all of our associates fairly and with dignity and respect. That is true whether they are union or union free. Our long–standing practice is that every discipline action is to be reviewed carefully by the Associate Relations team to guard against retaliation and favoritism. That will not change. Ever since 2002, when the contract expired, the arbitration clause expired, too. Since that time, we could have fired you without having to justify the reason to an arbitrator. Have we done so? Of course not.

As to wages, Albertsons has never reduced wages when store associates have voted to go non–union. I have never seen any other major grocery company do that. It is bad for morale and if they did, the employees would not trust them anymore. So, if the union is telling you that your wages could be decreased if you vote to be union free, all I can say is, don't believe everything the union tells you. They are trying to scare you. If our objective is to reduce El Paso meat associates wages and the union is what is stopping us, why would we continue to raise the wages of the union free meat associates in El Paso to the point that the gap is as much as $1.80 an hour? The union free meat associates were already being paid a higher wage in 2001 than the union meat associates. There would have been no reason for Albertsons to give them raises in 2004, 2005 and 2008 since the union wages were not being adjusted. Think about it.

All other Albertsons associates in El Paso and most other Albertsons associates are union–free. We believe they choose to be union free because they are treated fairly and enjoy good wages and benefits without a union. But this is your decision, so vote in the way you believe is best for you and your family. Please, do 35 not make your decision based on false union claims and scare tactics. This will be a secret ballot. Take a hard look at the facts. And please exercise your right to vote. A majority of those who show up to vote will decide the outcome. You can vote in any of the three scheduled elections, even if it is not at your home store.

Thank you for your time. If you have any questions or concerns, please feel free to contact me at (602) 382–5323.

Danny Ma. February 6, 2009.

(ALJD 4-5; GCX 2)

C. The Union's April 22 Oral and April 30 Written Information Request

On February 24, based on the results of the election, Region 28 issued a Certification of Representative in Case 28-RM-615, certifying the Union as the collective-bargaining representative of the Unit employees. (RX 11; Tr. 31, 90) The parties held their first negotiating session on March 17 and the second on April 22. (ALJD 5; Tr. 19, 32, 93, 95) At the April 22 session, Union official Felipe Mendez (Mendez) told Respondent's Attorney Charles High, Respondent's chief spokesperson (High), and Danny Ma, Respondent's Director of Labor Relations (Ma), that Respondent had used information during the election campaign that compared the wages, benefits, and terms and conditions of employment of employees in its non-Union stores with those at its unionized stores and the Union was requesting that Respondent provide such to the Union. (ALJD 5-6; Tr. 19, 21, 25) Specifically, Mendez asked for "information of non-bargaining unit employees in the non-union stores, regarding [their] wages, benefits, and terms of working conditions." (ALJD 6; Tr. 19, 21, 25, 48) High asked what the relevance of the information was and stated that the Union needed to follow up with its request in writing for Respondent to consider. (ALJD 6; Tr. 21, 48)

On April 30, pursuant to Respondent's request, Mendez followed up his oral request with a written request, in pertinent part, as follows (ALJD 6-7; GCX 1(c)):

> Dear Mr. Ma:
>
> This letter is a follow up of our verbal request for information made during 20 our last bargaining session held on April 22, 2009, in reference to non–bargaining unit employees and pursuant to the forthcoming collective bargaining process between the parties, the Union is hereby requesting the following necessary information in preparation thereof:
>
> 1. Individual rates of pay and classification for each bargaining unit employee;

2. Updated copies of Company rules, regulations and attendance policies applicable to new bargaining unit employees;

3. Copy of job and crewing standards;

4. Copy of job evaluations methods;

5. Copy of employee insurance plan or plans, employee summary plan description, monthly premium cost to the company, monthly premium cost to the employees. If the plan provides for family coverage and single coverage, for example, the appropriate monthly cost and cents per hour for each. A breakdown of how many employees have family coverage and single coverage, listed separately, etc.;

6. Copy of employee pension plan(s), employee summary plan description, and all Company's related cost, title and names of all pension plan trustees;

7. Copy of profit sharing plan, and all Company related costs;

8. Copy of 401K plan, and all Company related costs;

9. A list of paid holidays and the number of hours employees are compensated for each holiday;

10. A total breakdown of all job classifications and job descriptions, along with the rates of pay for each job;

11. Starting rates of pay for new hires and the progression schedule for wage increases;

12. A total description on the method of resolving employee grievances and/or complaints;

13. A total description on the method of earning paid vacation time, up to the maximum;

14. A total description of any formula or methods used to pro–rate paid vacation time;

15. A total description of Company policies regarding any unpaid leave of absence from work;

16. Total annual expense for FICA and unemployment compensation for the past two (2) years and year to date, listed yearly;

17. Total number of overtime hours worked by employees in the past two (2) years to date, listed yearly;

18. Total expense for all overtime hours paid to employees for the past two (2) years to date, listed yearly;

19. Most current list of names, social security numbers, addresses and phone numbers of all non bargaining unit employees;

20. A total breakdown of sex and age of each non bargaining unit employee;

21. The number of paid relief periods issued to employees in a normal scheduled worked day and duration of such relief period;

22. The method of the distribution of overtime opportunities within a work group or department when the entire group is not required to work the overtime;

23. The Company policy regarding equipment, tools and clothing issued to employees and the laundry for such clothing and the party responsible for the cost;

24. The method for determining a workweek for payroll purposes. (The beginning and ending of a work week);

25. The number of layoffs and the number of non bargaining unit employees affected by each layoff in the past two (2) years and year to date, listed yearly;

26. The current scheduled start times for all non bargaining unit shifts and night premium pay qualifications;

27. The Company policy regarding pay for holiday work and Saturday and Sunday work or scheduled days off in lieu of Saturday or Sunday;

28. The current method for promotions to higher paying jobs, shift preference, vacation preference, layoffs and job transfers;

29. Total number of straight time hours worked by the non bargaining unit in the past two (2) years to date, listed yearly;

30. Seniority list;

31. Number of weeks vacation each employee is eligible for year to date;

32. OSHA 300 logs;

33. Copies of employee handbooks and/or employee benefit booklets;

34. Declaration of all past practices not covered in employee handbook or employee benefits booklets;

35. Annual income statements and balance sheets for the last three (3) years and year to date;

36. Company documents showing the wages and benefits of all employees at all 45 of its locations;

37. List names of all non–bargaining unit personnel with titles and areas of responsibility for this area location.

D. Respondent's May 7 Letter

By letter dated May 7, Respondent, by its attorney, High, responded to the Union's written information request. High's letter states, in pertinent part (ALJD 8; GCX 4):

> This is in response to your letter of April 30, 2009, in which you request 37 different categories of information concerning Albertson's "non–bargaining unit employees." Although not clear from your letter, we assume the information you are requesting is for all non–bargaining unit employees in Albertson's eight El Paso stores, including both meat and non–meat employees, as well as managerial employees. If this is incorrect, please let me know.
>
> In your letter, you state that the requested information is "requested pursuant to the forthcoming collective bargaining process between the parties." This, we assume, is a reference to the ongoing negotiations between Local 540 and Albertson's for a new agreement covering associates in the three meat departments at Stores 932, 933, and 934 in El Paso, which are represented by Local 540.

High advised the Union that Respondent does not believe the requested information, "all of which is for non–unit employees, is needed by the Union to fulfill its statutory duties as the exclusive bargaining representative for the meat department associates at Stores 932, 933, and 934" and that "information regarding the wages and benefits of non-bargaining unit employees is not presumptively relevant and need not be produced by an employer absent a showing by the union that it is relevant to bargainable issues." Respondent's counsel concludes his letter by expressing that Respondent does not see the relevance of the information and until such time as the Union establishes the relevance, Respondent would deny the Union's request and not supply the information. (ALJD 8; GCX 4)

On May 8, the day after the Union received High's May 7 letter, the parties met for bargaining. At that meeting, Mendez said that he had received High's May 7 letter and then explained that the information requested was relevant because Respondent had compared the

wages, benefits and working conditions of the non-unit employees with the unionized employees, and that the information was "necessary for these negotiations." (ALJD 8; Tr. 26) Ma's testimony corroborates that of Mendez. In this regard, in response to a question posed by Respondent's counsel, Ma testified that, " [Mendez] made one statement, a brief statement, I believe on May 8th, to the effect that it is relevant because [Respondent] raised the issue during the [decertification] campaign." (Tr. 100-101)

On the same date, Mendez again told High that the requested information was "for the non-bargaining unit employees." High told Mendez that Respondent was not going to provide the information but did not say why. Mendez advised High that if Respondent did not provide the information the Union would go to the Board, to which High responded "the Union could do whatever they wanted to do." Nothing further was said about the information request or High's responses at this bargaining session. (ALJD 8; Tr. 25-27)

At the parties' bargaining session on May 21, Mendez reiterated the Union's April 30 information request. High responded, as he had before, that Respondent was not going to provide the information. (ALJD 8; Tr. 28-29, 62)

E. The Union's August 31 Letters to the Respondent

On August 31, the Union's Attorney, G. William Baab (Baab), under covering letter addressed and faxed to High, provided Respondent with a "a statement concerning the relevance of individual items of the information request made over the table and reiterated" in Mendez' April 30 letter to Ma. The attachment was a copy of Baab's letter, of the same date to an agent of the Board in connection with the investigation of the unfair labor practice charge in this matter, explaining to the Board the relevance of each item in the Union's April 30 request for information. (ALJD 9; GCX 5)

Specifically, in its letter, the Union once again clarified for Respondent that the Union was seeking information regarding the wages, benefits, and other terms and conditions of employment of the non-bargaining unit employees in the immediate El Paso area and provided a detailed explanation of the purpose, factual basis, and relevance of the Union's request and each item comprising the request. The first page of the attached letter reads in part (GCX 5):

> This letter is intended as Charging Party Local 540's response to the Region's request for a statement of "relevance" concerning the items identified in Felipe Mendez' April 30, 2009 information request to Danny Ma of Albertson's.
>
> * * *
>
> In *Brazos Electric Power*, 241 NLRB 1016 (1979) aff'd. 613 F.2d 1100 (5th Cir. 1980), the Board specifically concluded that where circumstances justified a union's belief that the subject employer had "maintained a degree of wage parity or equivalency between (union and non-union groups) information concerning the non-union employees' wages and benefits became presumptively relevant and the employer violated the Act when it refused to provide requested information concerning these wages and benefits." Applying *Brazos Electric* in this context, non-bargaining unit employees' larger terms and conditions of employment would, in addition, have presumptive relevancy because those broader terms and conditions provide a stark context and do much to define the absolute value of the wages and benefits which non-bargaining unit employees enjoy. In this larger context, the question concerning the "relevancy" of the thirty-seven (37) items in Mr. Mendez' April 30, 2009 Chris D. Lerma, letter reduces to the basic, bald question of whether those items constitute information defining or by which Local 540 could seek to verify the wages, benefits, and other terms and conditions of employment of non-bargaining unit employees in the immediate El Paso area. In this context, we address the individual items specifically and briefly characterize each item's clear relevancy.

The Union's letter goes on to provide a detailed explanation as to the relevancy of the 37 information requests. In the penultimate paragraph of his letter, Baab explained:

> Isolated instances in which the Region, may determine that the request for information is not justified cannot serve to invalidate the information request as a whole or to excuse the Employer from providing necessary relevant and justified information. See *Azabu USA (Kona), Co.*, 298 NLRB 702 (1990).

F. The Union's Testimony and Evidence at the December 1 Hearing

On December 1, at the underlying unfair labor practice hearing, not only did Respondent receive another copy of the Union's August 31 letter, GCX 5, but Mendez also testified in the presence of Respondent providing further clarification regarding the nature and relevance of information sought by the Union. This testimony not only supports the unfair labor practice allegations, it also is a further communication to Respondent of the relevance of the documents sought.

More specifically, Mendez testified that before sending the April 30 letter, he read Respondent's campaign flyer (Tr. 55:12-18). Mendez states that the Union made its information request because during the RM election campaign, Respondent compared "wages and benefits and terms and conditions from the non-union stores to the union stores" (TR. 19:17-21), as set out in GCX 2 (TR. 70:21-25). Mendez attested that while he did not mention the Respondent's flyer to the Respondent at the time, since the posting "used the comparison," the contents of the flyer made the Union's information request relevant (TR. 51:3-9). Most importantly, Mendez testified that while he knew that the Respondent's remarks in its flyer "were not true," "we requested the information because of the comparison, you know, I mean, we wanted to know, we wanted to -- when they did the comparison, we wanted the information. We needed it to compare to -- for equality" (Tr. 79:2-8).

Mendez testified that the Respondent's flyer made numerous comparisons between how the Respondent treats employees at its Union stores versus non-Union El Paso stores, such as a claim that employees at the "union free" stores are paid higher wages than those at the Union stores, and that the employees at the "union free stores" are "treated fairly and enjoy good wages and benefits without a union" (TR. 51:10; 52:5-9; 53:25-55:11). Mendez

testified that the posting referred to a "big gap, you know in wages," a gap of "$1.80 an hour" (Tr. 51:20-52:9).

G. The Respondent's Continuing Failure and Refusal to Provide the Requested Documents

At hearing, the parties stipulated that Respondent provided the information requested in paragraphs 1 and 2 of the Union's information request (GCC 3) to the extent that the specific written language in paragraphs 1 and 2 of the Union's requests are read to be limited to the Unit employees (Stipulation 36:7-15; 38:2-13; 92:9-15). However, with regard to all the other information requested by GCX 3, the Respondent, to date, has continued to fail and refuse to provide such information (Tr. 28:7-9). Indeed, in its Answer, Respondent admits that it failed to provide the Union with the documents requested in paragraph 3, 6 through 11, 13 through 18, and 21 through 34, of the Union's April 30 request (GCX 1(f); 2).

III. ARGUMENT

As discussed above, the ALJ correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with the information requested in paragraphs 3, 6 through 11, 13 through 18 and 20 through 34 of the Union's April 30 request.

A. The ALJ Analyzed and Applied Appropriate and Current Law

In its Brief Supporting its Exceptions, Respondent states that the ALJ "gave lip service" to longstanding Board law that a union is entitled to information that is "presumptively relevant," that is, information that pertains to employees within the bargaining unit, and that in order to obtain information pertaining to employees outside the bargaining unit, a union must show its relevance. Contrary to Respondent's assertion, the ALJ properly

set forth the correct legal analysis and appropriate case law in support thereof. See the ALJD at 9 and 10.[2]

B. The ALJ Correctly Found that the Union Established the Relevance of the Requested Information

As the ALJ noted, contrary to Respondent's assertions, the evidence establishes that the Union demonstrated the relevance of the non-unit information it requested and that such relevance was, or should have been, apparent to Respondent under the circumstances herein. (ALJD 11)

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[2] As the ALJ summarized (ALJD 9-10):

> The principle has long been established that an employer is under a duty to provide a union which represents the employer's employees with information requested by the union which is relevant and necessary for the proper performance of the union's duties in representing the unit employees. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Manufacturing, Co*., 351 U.S. 149 (1956). A failure to fulfill the obligation to furnish relevant information upon request conflicts with the statutory policy to facilitate effective collective bargaining *Proctor & Gamble Mfg. Co. v NLRB*, 603 F.2d 1310 at 1315 (8th Cir. 1980). The duty to furnish information turns on the circumstance of the particular case. *Emeryville Research Center v. NLRB*, 441 F 2d 880 at 883 (9th Cir. 1971). Where a union's request is for information pertaining to employees in the bargaining unit that information is presumptively relevant and the employer must provide the information. *Madison Center*, 330 NLRB 1 (2000). Where the requested information pertains to employees outside the bargaining unit, the burden is on the union to demonstrate the relevance of the requested information. *National Broadcasting Company*, 352 NLRB 90, 97 (2008), and, *Disneyland Park*, 350 NLRB 1256, 1257 (2007). The key question in determining whether information must be produced is one of relevance. The standard for relevancy is a liberal discovery–type standard both for bargaining unit and outside the bargaining unit information. In both situations the sought after information need not necessarily be dispositive of the issue(s) between the parties but rather only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Bacardi Corp.*, 296 NLRB 1220 (1989). As the Board noted in *Disneyland Park* supra, to demonstrate relevance for non–bargaining unit information the government must present evidence either that the union demonstrated the relevance of the non–unit information, or, that the relevance of the information should have been apparent to the employer under the circumstances. Absent such a showing the employer is not obligated to provide the requested information. The Board also noted in *Disneyland Park* supra at 1258 fn. 5, "The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information [citations omitted]."

1. Respondent Was Aware of the Scope of the Union's Information Request

The record establishes that Respondent knew or had sufficient reason to know that the Union's information request was limited to *employees* in Respondent's El Paso stores who are not in the Unit.

Specifically, on April 22, Mendez orally requested from the Respondent "information of non-bargaining unit employees in the non-union stores, regarding [their] wages, benefits and terms of working conditions," and that request was followed by the Union's April 30 letter. In Respondent's May 7 letter to Mendez, Attorney High suggests that Respondent assumes that the Union's April 30 request is "for all non-bargaining unit employees in Albertson's eight El Paso stores, including meat and non meat employees, as well as managerial employees," and that the Union should let the Respondent know if that was incorrect. However, later in that letter, High refers only to non-unit employees and does not refer to managers.

Respondent's labor attorney knew or should have known, and does know, that Section 2(3) of the Act defines the term "employee" as excluding any individuals "employed as a supervisor" and excluding "any other person who is not an employer as herein defined." In *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980), the Supreme Court defined managerial employees as those individuals who "formulate and effectuate management policies by expressing and making operative the decisions of the employer" and that these individuals are "much higher in the managerial structure than those explicitly mentioned by Congress [(i.e. statutory supervisors)] which regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary."

To further clarify issues for Respondent, on May 8, Mendez orally responded to the Respondent's May 7 letter by informing Respondent that the information requested "was regarding "the non-bargaining unit employees." Furthermore, the Union's letter to the Respondent on August 31, and the Union's representative's testimony at the December 1 hearing further explained that the scope of the request was limited to employees.

Finally, even if the Respondent believed in good faith that the Union's request was overly broad because it still understood the scope of the request to include managers, the Respondent could have simply complied with the request to the extent that it was limited to the non-managers. Indeed, in its August 30 letter to Respondent, the Union explained (GCX 5):

> Isolated instances in which the Region, may determine that the request for information is not justified cannot serve to invalidate the information request as a whole or to excuse the Employer from providing necessary relevant and justified information. See *Azabu USA (Kona), Co.*, 298 NLRB 702 (1990).

2. Respondent Was Aware of the Purpose and Reasons for the Information Sought by the Union

Contrary to suggestions by Respondent, the relevance of the information sought is supported by Board law. Specifically, Board law provides that a union requesting non-unit information need not provide the employer with the factual basis for its requests; rather it needs only to indicate the reason for its request. In *Pulaski Construction*, 345 NLRB 931, 931, 932 (2005), the Board explained:

> This case is substantially similar to the Board's recent decision in *Contract Flooring Systems*, 344 NLRB No. 117 [125] (2005) , which also involved a union request for information concerning an alleged alter ego to which the union believed the employer was unlawfully diverting bargaining unit work. There the Board held that in cases involving such nonunit information that is not presumptively relevant to a union's representational duties "the union must demonstrate a reasonable objective basis for believing that an alter ego relationship exists." Id. at slip op. at 1. Under established Board precedent, the

> requesting union "need not inform the signatory employer of the factual basis for its requests, but need only indicate the reason for its request." Id.

The Board in *Pulaski*, 345 NLRB at 936, affirmed the administrative law judge, who explained that:

> …. where the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, the employer is obligated to divulge the requested information. *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980). The sufficiency of the request should not be determined solely from the request itself, but should be judged in light of the entire pattern of facts available to the employer. *Ohio Power Co.*, 216 NLRB 987, 990 fn. 9 (1975) .

Respondent knew the purpose of the Union's April 22 oral information request because when it was made, Mendez explained that the Union was requesting the information because Respondent had used this information (two months earlier) during the representation campaign as a comparison between the non-Unit wages, benefits and working conditions and those of Union-represented employees. Mendez again explained the purpose of the Union's information request on May 8, one day after receiving the Respondent's May 7 letter. On May 8, Mendez explained that Respondent made this information relevant because Respondent "compared the wages, benefits, and working conditions from the non-union stores during the campaign." If Respondent had any confusion whatsoever of the basis of the relevancy claims, such confusion would have been completely eliminated on August 31, when the Union further explained the purpose and factual basis for the request (GCX 5):

> The background of the written request, formalizing the request made at the bargaining table, is important. As now repetitively noted, during an election campaign which immediately preceded subject bargaining, Albertson's had taken the position in writing and in meeting with bargaining unit employees that bargaining unit employees' terms and conditions of employment were substantially analogous to those of non-bargaining unit employees in area (El Paso) stores, that employees in those non-union facilities received equal or superior wages and benefits, and that their (non-union) terms and

> conditions of employment were similarly equal or superior to what bargaining unit employees could expect by continued representation.

Moreover, in this letter, the Union also provided Respondent with controlling case law, described below, which provided the legal rationale and further explication of the relevancy of the Union's request, including details regarding why each of its specific requests were relevant. Continuing at the December 1 hearing, Mendez provided extensive testimony regarding both the purpose of and the factual basis for the Union's information request.

It is well established that relevancy of an information request can be established for the first time at the hearing. See, e.g. *Brazos Electric Power Cooperative*, supra, ("Any possibility of doubt as to [r]espondent receiving notice concerning the reasons the [u]nion needed the information was removed in the course of the hearing"). In *Contract Flooring Systems*, 344 NLRB 925 (2005), the Board found that an employer violated Section 8(a)(5) of the Act by providing the union with requested unit information based upon sending the employer a letting stating the reason for its request, i.e., its belief that there was an alter ego relationship between the employer and another company. The Board further explained at Union must:

> [A]pprise [an employer] of *facts* tending to support" its request for nonunit information by communicating those facts to the employer in its information request. (Emphasis in original.) The Union met this standard, <u>but not until the hearing</u> when it apprised the Respondent of the facts underlying its belief that there was an alter-ego relationship [emphasis added].

In *Barnard Engineering Company, Inc*, 282 NLRB 617, 620-621 (1987), an administrative law judge, affirmed by the Board, explained:

> In any event, the Union's information request--submitted in September 1984 and thereafter renewed in an exchange of letters between September and December--was a continuing request, and the relevance of the requested information to the Union's performance of its statutory duties was fully clarified at the hearing. That clarification alone would seem to be sufficient to

trigger Respondent's duty to provide the information under Board law. See *Ohio Power Co*., 216 NLRB at 990-991 fn. 9, in which the Board stated:

> [T]he Union's purposes in seeking the information are relevant to a determination of the legitimacy of the requests.... [The employer] was apprised at the hearing of those purposes. The requests for information are still outstanding. The [employer's] continuing failure to accede to them can thus no longer be attributed to inadequacy of the communications.
>
> See also *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 363 fn. 40 (D.C. Cir. 1983); *NLRB v. Temple-Eastex*, 579 F.2d 932, 936-937 (5th Cir. 1978); and *Press Democrat Publishing Co. v. NLRB*, 629 F.2d 1320, 1325 fn. 8 (9th Cir. 1980).

Similarly, in *Leland Stanford Junior University*, 262 NLRB 136, 152-153, (1982), an administrative law judge, affirmed by the Board, explained:

> I recognize that the Union's October 8 request for the information did not state that the Union intended to use it to formulate contract proposals. However, during the hearing in this case Respondent was specifically made aware that the Union intended to use the requested information in order to formulate contract proposals. It is well settled that a union's explanation of relevance in a case, if shown to be adequate in its own right, is not invalidated by the fact that it was offered after the unfair labor practice charge was filed or the hearing commenced. See *N.L.R.B.* v. *Temple-Eastex, Inc.*, 579 F.2d 932, 936-937 (5th Cir, 1978) (only notice requirement is that basis for relevance be asserted in complaint or hearing and be fully litigated); *N.L.R.B.* v. *Ohio Power Company*, 531 F.2d 1381 (6th Cir. 1976), enfg. 216 NLRB 987, 989-990, fn. 9 (1975), and *Brazos Electric Power Cooperative, Inc., supra*, 241 NLRB 1016, 1018-19 (1979) (notice requirement met where basis for relevance first asserted at hearing); *Standard Oil Co. of California, Western Operations, Inc. v. N.L.R.B.*, 399 F.2d 639, 642 (7th Cir. 1968) (notice requirement met where basis for relevance first asserted in charge); *International Telephone & Telephone Corporation* v. *N.L.R.B.*, 382 F.2d 366, 371 (3d Cir. 1967), cert. denied 389 U.S. 1039 (notice requirement met where basis for relevance first asserted in writing in charge). See also *N.L.R.B. v. F. W. Woolworth Company*, 235 F.2d 319, 322 (9th Cir. 1956), reviewed on other grounds, 352 U.S. 938 (only notice requirement is that "at sometime or someplace some specific relevancy should be asserted"); *N.L.R.B.* v. *Western Wirebound Box Company*, 356 F.2d 88, 92 (9th Cir. 1966) (notice requirement "does not contemplate erection of artificial barriers and resort to patent technicalities to obfuscate the proceedings.") See, also, *Press Democrat Publishing Company v. N.L.R.B.*, 629 F.2d 1320 1325, fn. 8 (9th Cir. 1980) . In any event the record establishes that the Union's communications to Respondent, in context, would have appraised a reasonably

> perceptive person that the Union was seeking to use the requested information in order to formulate contract proposals in addition to policing the current contract.

C. Respondent Misconstrues the Possible Impact of the ALJD

Respondent's assertion in its brief that, "[i]f the ALJ's decision is adopted, any statement made by a representative of an employer during an NLRB election campaign - representation or decertification election - that the employer tries to treat all employees "fairly" or indeed any similar reference to employees outside the bargaining unit, such as in an employee handbook, a corporate mission statement, or the like, will trigger a duty to disclose all information relating to non-unit employees in negotiations, without the need to refer to anything actually occurring at the bargaining table," is hyperbole at best and misrepresentative at worst. (See R's Brief, p. 7)

Contrary to Respondent's suggestion that the flyer generally suggests fair treatment, the ALJ found that Respondent's flyer asked Unit employees to compare their wages, benefits and other working conditions with those at its non-unionized stores and see how well Respondent treated its non-unionized employees. More specifically, Respondent's flyer stated that some non-unionized employees were being paid $1.80 per hour more than similarly-situated unionized employees, and asked Unit employees to consider the disciplinary practices, working conditions, and related benefits for its non-unionized employees and see that Respondent treated non-unionized employees "fairly" with "good wages and benefits without a union." (ALJD 11; GCX 1(c))

In any event, Respondent overreaches when it suggests that merely telling employees that it treats all of its employees fairly resulted in the ALJ's finding that the information was relevant and necessary to the Union's representational duties, and exaggerates when it asserts,

in its brief in support of its exceptions, that "the approach taken by the ALJ in this case, [allows] a union to obtain non-unit information simply to 'verify' statements made by the employer during an election campaign." (R's Brief, p. 8) Respondent failed to cite the page(s) wherein the ALJ stated that the Union requested the information just to "verify" the statements Respondent made in its flyer. To the contrary, the ALJ concluded that,

> It should have been clear to the Company the Union was requesting the information in order to be better informed and/or prepared for negotiations at the bargaining table to, for example, possibly adjust proposals already made or propose new or different proposals in light of the wages, benefits and working conditions enjoyed by the Company's non–unionized employees. To the extent the Company contends the Union had a fixed bargaining position related to an acceptable successor agreement for the El Paso unionized stores and the information could not, or would not, have been useful to the Union, that contention is without merit. (ALJD 11-12)

D. The ALJ Correctly Rejected Respondent's Argument that Relevance of Requested Information Must be Based on Statements Made at the Bargaining Table

The ALJ correctly stated that there is no requirement that statements made by a company that trigger a relevancy claim have to be made in bargaining sessions or in connection with bargaining. In support of his statement, the ALJ, noted that in *Frito-Lay Inc.*, 333 NLRB 1296 (2001), vacated 51 Fed. Appx. 482 (5th Cir. 2002), the union's information request relating to nonunit employees followed observations made by unit employees at other plants of the company. (ALJD 11) The ALJ further noted that, in *Brazos Electric Power*, supra, the information request regarding nonunit employees was made after the union "received information" about a wage increase granted to nonunit employees. (ALJD 11)

The ALJ's conclusion is further buttressed by *Lakeland Bus Lines*, 335 NLRB 322, 323, 326 (2001), enf. denied on other grounds, 347 F.3d 355 (D.C. Cir. 2000), in which the employer, like Respondent here, had direct written communication with employees, and the Board stated: "We find that under *Truitt* … and its progeny, the Respondent's … letter to

employees effectively communicated that it was unable to afford to pay anything more than that contained in its final offer." In a footnote to that sentence, footnote 7, the Board explained:

> We reject the Respondent's contention that under *Burruss Transfer*, 307 NLRB 226 (1992), the Respondent's statements cannot trigger an obligation to furnish financial information because they were made away from the bargaining table. In *Burruss*, the Board found that an informal statement by the respondent's vice president to an employee that he could not afford to pay employees any more than they were already making--made 4 to 6 months prior to the commencement of contract negotiations--did not undercut the respondent's claim during negotiations of a competitive disadvantage. The Board's finding was based on the fact that the comment was not linked to any economic proposal, not that the comment was made away from the bargaining table. Conversely, the Respondent's comments in its February 25 letter to employees were solely linked to its final offer, and were made in an attempt to persuade employees to accept that offer.

The ALJ properly noted that in the instant case, "[t]he Union's information came from the Company flyer. The Company cannot be heard to complain that the information sought as a result of the statements made in its flyer is not relevant." (ALJD 11)

E. Contrary to Respondent's Contentions, the Cases Relied Upon by the ALJ Support the ALJD and Did Not Err in Failing to Require a "Bargaining Nexus" to the Union's Request

By its exceptions, Respondent incorrectly asserts that the election flyer contained no factual nexus to bargaining and urges, therefore, that the Board overrule the ALJD (R's Brief at p. 15). Specifically, the thrust of Respondent's argument that the cases cited by the ALJ are distinguishable and that he erred in not requiring a "bargaining nexus" to the Union's information request is that the Union's request was predicated on information Respondent disseminated to Unit employees during the decertification election campaign. Respondent appears to argue that a "bargaining nexus" is one in which a union's information request is made based on statements by an employer at the bargaining table or "involved information

requests that were in fact specifically tied to distinct and very real bargaining issues." (R's Brief, p. 15-16) (emphasis in original) Contrary to Respondent's assertions, and as the Union spelled out in its August 30 letter to Respondent, each requested item related to wages, benefits, and other terms and conditions of employment that were raised by Respondent's flyer and are clearly bargaining issues directly related to Unit employees' terms and conditions of employment. Consequently, it is difficult to glean how a "bargaining nexus" does not exist between the Union's information request and the issues being negotiated by the parties.

Contrary to Respondent's assertion, the ALJ's reliance on *Comar, Inc.*, 349 NLRB 342, 355 (2007); *Frito-Lay, Inc.*, 333 NLRB 1296 (2001), vacated 51 Fed. Appx. 482 (5th Cir. 2002); and, *Brazos Electric Power Cooperative, Inc.*, 242 NLRB 1016 (1979), enfd 613 F.2d 1100 (5th Cir. 1980) is not misplaced. Although Respondent devoted much of its Brief to reciting certain facts of each of these cases, it failed to establish how the ALJ erred in relying on them. The ALJ's reliance on, and analysis of, these cases to support his sound conclusion that Respondent violated, and continues to violate, Section 8(a)(1) and (5) of the Act by refusing to furnish the information requested by the Union, has not been undermined by Respondent's contention.

F. Respondent's Reliance on *Burruss Transfer* is Misplaced

In its brief in support of its exceptions, Respondent again asserts that this case should be controlled by the Board's decision in *Burruss Transfer*, 307 NLRB 226 (1992). Respondent argues that Board law provides that statements made away from the bargaining table do not trigger a request for information and do not make such requests relevant. Respondent argues that the Board has required that statements made by a company which trigger a relevancy

claim have to be made in the bargaining sessions or in connection with bargaining. At hearing, in its brief to the ALJ, and now in its brief in support of its exceptions, Respondent cites to *Burruss Transfer* as support for that principle. Respondent also makes references to *Facet Enterprises*, 290 NLRB 152 (1988), and *Stanley Building*, 166 NLRB 984 (1967), in support of its position. (Tr. 42: 21-25; 45:10-16) Each of these cases involved an information request for financial records based upon an asserted employer inability to pay claim. In contrast, in the instant case, the information requests at issue do not involve a request for financial records.

More importantly, Respondent erroneously describes the controlling case law. In *Lakeland*, supra, the employer, like the Respondent in the instant case, had direct written communication with employees. The Board, in *Lakeland*, addressed *Burruss Transfer*, the most recent case cited by the Respondent. In *Lakeland*, after the company submitted its final offer to the union, the company's president sent a letter to the employees, which stated, in pertinent part, "[W]e are trying to bring the bottom line back into the black." The Board stated: "We find that under *Truitt* … and its progeny, the Respondent's … letter to employees effectively communicated that it was unable to afford to pay anything more than that contained in its final offer." In a footnote to that sentence, footnote 7, the Board explained:

> We reject the Respondent's contention that under *Burruss Transfer*, 307 NLRB 226 (1992), the Respondent's statements cannot trigger an obligation to furnish financial information because they were made away from the bargaining table. In *Burruss*, the Board found that an informal statement by the respondent's vice president to an employee that he could not afford to pay employees any more than they were already making--made 4 to 6 months prior to the commencement of contract negotiations--did not undercut the respondent's claim during negotiations of a competitive disadvantage. The Board's finding was based on the fact that the comment was not linked to any economic proposal, not that the comment was made away from the bargaining table. Conversely, the Respondent's comments in its February 25 letter to employees were solely

> linked to its final offer, and were made in an attempt to persuade employees to accept that offer.

While the letter to the employees in *Burruss* was sent to the employees four to six months prior to the commencement of the contract negotiations, Respondent's February 6, flyer was posted less than two months before bargaining resumed on March 17.

Any suggestion by Respondent that the ALJ's findings and conclusions are contrary to the Board's decision in *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), is without merit. In *Midland National,* the Board addressed the limited issue of when an election can be set aside based upon misrepresentation objections. In its decision, the Board explained that it would no longer probe into the truth or falsity of the parties' campaign statements, and that it would no longer set aside elections on the basis of misleading campaign statements. It stated that henceforth the Board will intervene in only two situations: (1) where a party has used forged documents which render the voters unable to recognize propaganda for what it is, and (2) "when an official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election." It stated that the Board will no longer overturn elections based on the substance of the parties' representations, but only because of the deceptive manner in which the representations were made.

However, nothing in the *Midland National* case stands for the principle that an employer is not otherwise accountable and responsible for remarks it makes during an election campaign. Indeed, the Board explained in *Midland National*, at 133, "[w]e will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice." Moreover, nothing in the *Midland National* case stands for the principle that an employer is not accountable and responsible for remarks it makes during an election which would otherwise constitute a violation of the Section 8(a)(1)

and (5) of the Act. For instance, instance in *Lower Bucks Cooling & Heating, Inc*., 316 NLRB 16, 22 (1995), an administrative law judge, affirmed by the Board, found that an employer failed to bargain in good faith remark the employer made just before an election. The administrative law judge explained:

> The Respondent has shown in several ways that it refused to bargain in good faith. To make a determination whether or not a party has violated Section 8(a)(5) and (1) of the Act, the Board looks to the totality of the Respondent's conduct not only during the negotiations but also to the conduct away from the bargaining table *Overnite Transportation Co.*, 296 NLRB 619 (1989), enfd.938 F.2d 815 (7th Cir. 1991). Initially, the records show that the Respondent expressed in no uncertain terms that it had no intention to bargain with the Union. In graphic language, Ripka told the employees prior to the Union's election that there was no way that he would negotiate with "the expletive Union" and that he would close his doors before he would ever bargain with the Union. (Tr. 61)

Indeed, in these cases the Board does not "probe into the truth or falsity of the parties' campaign statement" (i.e. not for the truth of the matter asserted), but does rely on statements made by the employer. As a result, Respondent cannot attempt to shield itself from the requirement to produce information on the basis that its flyer was distributed during a representation campaign.

G. Respondent's Suggestion That the ALJD Undermines the Policies Of the Act is Without Merit

By its exceptions, Respondent suggests that the ALJD would undermine the policies of the Act by having a chilling effect on lawful employer comments and speech rights during decertification and other election campaigns (R's Brief at p. 22-24). Respondent argues that employers will be chilled from telling its employees that they treat all employees "fairly in wages and discipline, whether they are union or non-union," and that the reluctance to make such statements will hamper employees' Section 7 right to full and unrestricted lawful information about their election choices." Such statements by Respondent suggest that

Respondent misreads the ALJ's analysis and conclusions. The ALJD does not in any manner restrict employer's speech during an election campaign, though it does protect employees' Section 7 rights by insuring that employees' bargaining representatives have adequate information to fully and fairly represent employees in terms of bargaining and other representational matters. The suggestion that the ALJD somehow undermines employees' Section 7 rights is absurd, and should be entirely rejected by the Board. Respondent's suggestion that the ALJ's decision --which is based on solid and longstanding Board precedent and which protects employees' rights to be fully and fairly represented by a representative of their collective choosing -- should be overruled because of some imagined, possible impact on certain employers' reluctance to say certain statements during hypothetical election campaigns and other conjecture, should itself be rejected by the Board.

IV. CONCLUSION

Based on the foregoing, CGC prays that Board adopt the ALJ's findings, conclusions, and recommended Order and find that Respondent violated § 8(a)(1) and (5) of the Act as alleged in the Complaint, and order that Respondent cease and desist from such unlawful conduct, post an appropriate Notice to Employees, and order such other relief as is necessary and appropriate under the circumstances.

Dated at Phoenix, Arizona, this 16th day of March 2010.

/s/ Liza Walker-McBride

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in Albertson's LLC, Case 28-CA-22546, was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via Federal Express, on this 16th day of March 2010, on the following:

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