

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

IN THE MATTER OF:

IRONTIGER LOGISTICS, INC.,

Respondent

and

Case 16-CA-27543

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,**

Charging Party

**BRIEF IN SUPPORT OF
RESPONDENT'S EXCEPTIONS TO
THE DECISION AND ORDER ISSUED
BY JUDGE GEORGE CARSON, II**

Submitted this 2nd day of June, 2011

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SUMMARY OF ARGUMENT AND STATEMENT OF ISSUES

The Exceptions to Judge George Carson II's decision rest upon the premise that he improperly used the concept of a "per se" violation as his basis for concluding that the answer to the union's request for irrelevant information was untimely and that was bad faith bargaining in and of itself. Judge Carson finds "that the information sought was not relevant" (Judge Carson Decision, pages 1, 7 and 8). However, without considering the context of the May 11, 2010¹ request for information, he finds that the Respondent's September 27 answer stating that the request was irrelevant and harassment was untimely and that IronTiger was a law violator for having waited until September 27 to respond. All of the facts and circumstances surrounding the May 11 request for irrelevant information establish the Union's bad faith in its request and its retaliation and harassment, which alleviate any legal obligation for IronTiger to respond or to have responded earlier. The strong and uncontroverted evidence demonstrates that it was Boysen Anderson, the Union's Representative, whose conduct blocked the process of good faith bargaining from ever occurring. Anderson prevented good faith bargaining when he refused to provide any information to support his claim of an alleged violation of the CBA and then again when he blatantly refused to ever "meet and confer" with the Respondent, despite being asked many times. Therefore, if all this is true (and it is), how could one find that the Respondent bargained in bad faith when the process of good faith bargaining was barricaded and foreclosed from its inception by the Union? Ironically, it is the Union that made the charge that Respondent bargained in bad faith. Not true!

The Supreme Court has rejected Judge Carson's concept of "per se" violations of Sections 8(a)(1) and (5) and has set an "all of the facts and circumstances" test. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 150, 152-154 (1956). Consistent with *Truitt*, the purpose of the

¹ All dates will refer to 2010 unless otherwise designated.

Act and collective bargaining and a finding of good faith or bad faith must be treated as a single history made up of “all of the facts and circumstances” and “the totality of the respondent’s conduct justifies the conclusion that it has violated the specific command of [Section 8(a)(5)]”² *NLRB v. Insurance Agents’ International Union, AFL-CIO* 361 U.S. 477, 512 (1960). Good faith can not be fairly and realistically tested or inferred by an isolated fact, the mere date of September 27. The “per se” approach taken by Judge Carson by isolating one fact should not be permitted as the sole basis for a finding of bad faith. In light of “totality of negotiation” rule as set forth in *Truitt* and *Insurance Agents’ International Union*, the “per se” principle of determining a violation of Section 8(a)(1) and (5) of the Act as applied by Judge Carson does not take into consideration the entire story. It is the unitary, not a fragmented process that requires a valid review in this case. Respondent’s September 27 answer can not be plucked from the context of the whole story of bargaining regarding the Union’s request for information and conclude bad faith bargaining occurred, particularly when there was no basis for requesting the information and no evidence of any prejudice to the Union because of when the Respondent answered the request. This story must also take into consideration the strong and uncontradicted evidence that Boysen Anderson’s motivation to make this request was bad faith and was done to harass the Respondent.

Judge Carson’s conclusion isolated a mere date and did not consider “all of the facts and circumstances” of this case, many of which he found based on uncontradicted evidence. He did not include in his analysis all that he should have in determining whether Respondent bargained in good or bad faith. Judge Carson’s rule of law improperly found a “per se” proscription of a single event of an isolated fact. This rule allows bad actors to make irrelevant requests

² While *Insurance Agents’* dealt with § 8(b)(3) the holding in *Insurance Agents* should apply with equal force to employer sections of the Act, § 8(a)(1) and § 8(a)(5).

regardless of the context of the request and assault an employer with unnecessary transaction costs. When “all of the facts and circumstances” are considered, Respondent’s answer on September 27 did not prejudice the Union. Stated another way, because the request was irrelevant, if Respondent had answered the Union’s May 11 request on May 12 saying the same thing Respondent stated on September 27, nothing would have been different. There was no harm or prejudice to the Union. There was no legal obligation to respond to the Union’s harassment.

Three questions illustrate the need to reverse Judge Carson’s decision:

1. Should the union be required to show good faith and prejudice before there is a legal corresponding obligation of the employer to bargain in good faith? Answer: Yes.
2. Was Judge Carson’s conclusion flawed by his failure to consider all of the facts and circumstances to find bad faith bargaining? Answer: Yes.
3. What difference would it have made to the overall justice of this case if Respondent had answered the Union’s request for information on May 12, one day after the request for information with the same answer it gave on September 27, telling the Union its request was irrelevant and harassment? Answer: None, there was no harm or prejudice.

The Supreme Court in *Truitt* articulated the overriding principle in deciding good or bad faith bargaining in a request for information case. The Court noted that “[e]ach case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.” *Id.* at 351 U.S. at 153-154 (footnote omitted). Because the duty to provide information is an interpretive requirement imposed by the Act to bargain in good faith, this duty is highly dependent upon the context of the requested information, something not ultimately done by Judge Carson. The Supreme Court further instructed that “[t]he duty to supply information under Section 8(a)(5) turns upon ‘the circumstances of the particular case’ and much the same may be said for the type

of disclosure that will satisfy that duty.” *Detroit Edison Co., v. NLRB* 440 U.S. 301 314-315 (1979). Further, an employer is not automatically obligated to produce available information merely because a union demands it, nor to produce information in a manner the union requests. See id. at 314. Judge Carson did find that the information requested by the IAM was irrelevant. This finding and the context of this case, based on “all of the facts and circumstances” surrounding the IAM’s May 11 request for irrelevant information and IronTiger’s September 27 response indicating the request was irrelevant and harassment, is not a violation of Section 8(a)(5). IronTiger did not bargain in bad faith!

The record as a whole and Judge Carson’s finding of facts illustrate the Union’s conduct here was bad faith bargaining and harassment and there was no prejudice, which relieves Respondent of any liability. The record is devoid of any such evidence of prejudice, as it should be, because the request for information was irrelevant when made on May 11 it was irrelevant on September 27 and also irrelevant right through the trial of March 28, 2011. Further, without ever getting any information from its May 11 request, Judge Carson, the Union and General Counsel concede that the information request was satisfied; not because information was ever given. The Union was only told its request was irrelevant and harassment. Prejudice? None!

Applying the “all of the facts and circumstances” test to this case, most of which are based on uncontroverted testimony and exhibits, does not demonstrate that IronTiger acted in bad faith. While each of these elements and the totality of the circumstances will be discussed below, a summary of some of the points gives the story its true meaning and demonstrates that IronTiger was not acting in bad faith:

1. Boysen Anderson’s conduct was inspired by a desire to retaliate and harass and, therefore, was not made in good faith. On March 24, five days before the filing of the underlying grievance, it is uncontroverted that Anderson threatened Tom Jones and Tom Duvall with no “labor peace” and that he would make their “lives

hell” because the Company would not reinstate employee Richard Shafer and others (Judge Carson’s Decision, page 7, lines 33-43). Anderson did not deny his threats or factually defend it as not related.

2. The Respondent asked the Union to “meet and confer.” The union admits and Judge Carson found the Union refused to meet based on the Respondent’s April 5, request and at least four times thereafter (TR 78-80, 121, 181, 184; Respondent’s Exhibits 4, 17, 18, 33, 34 and 36; and Judge Carson’s Decision, page 6, lines 1-6, 9-18 and 28-30).
3. The Respondent asked for information regarding the alleged underlying violation. The Union refused to give Respondent one example or any evidence of a contract violation. Respondent made a minimum of six (6) requests for this information. From before the filing of the grievance on March 16 and the filing of the grievance on March 29, and throughout the trial, the Union never came up with even one example of a contract violation that IronTiger drivers were not given all the available loads on the IronTiger kiosk. Therefore, from March 29 until one year later at the trial on March 28, 2011, not one example of a contract violation existed. Further, the evidence makes it clear there was no basis for the Union to even suspect that IronTiger was violating the subcontracting provision of the CBA. We all agreed, including Judge Carson, the IAM and the General Counsel, that the Respondent satisfied the Union’s information request and that all information was given to the IAM before the trial (Judge Carson’s Decision, page 6, lines 50-52). To illustrate an example of Anderson’s harassment, he was asked, “Q. You never gave any specifics did you? A. I don’t know” (TR 71-72). This evasive answer on this crucial question and his testimony generally support the finding of his harassment. Finally, after Anderson continued manipulation in trying to avoid the answer, Judge Carson asked Anderson: Judge Carson: And Counsel’s question and my question is did you identify any employees to the Company in 2010? The Witness: Specific employees, no (TR 106).
4. The Union’s grievance has no merit because there can not be a violation of the CBA. The evidence establishes that only TruckMovers.com, Inc. (hereinafter TruckMovers) has contracts with Volvo/Mack, Inc. and Navistar, Inc. (hereinafter Volvo/Mack and Navistar), that the contracts restrict the use of IronTiger drivers, and only TruckMovers gives work to IronTiger. This, in and of itself, establishes the unilateral right of TruckMovers to assign work to IronTiger. Secondly, to confirm this unilateral right, the Letter of Agreement (Respondent’s Exhibit 40), which applies to all four terminals since each became operable, states that if it is not on the kiosk it is not an IronTiger load. This unqualified and unilateral right completely trumps the IAM’s grievance claiming a contract violation and, therefore, the request for information is bogus because it is meritless and irrelevant. These two facts establish why the Union and General Counsel can not establish a single violation of the CBA. Further, The IAM and General Counsel concede that loads from Volvo/Mack and Navistar will be dispatched by TruckMovers to possibly 17 carriers, including IronTiger (TR 129-130);

Respondent's Exhibit 17; and Judge Carson's Decision, page 2, lines 9-52 and page 3, lines 1-22). How, in any distorted version of this concession, can Anderson ever say that all available loads should be put on the IronTiger kiosk with a straight face or that there is any merit to the grievance? Anderson concedes that not all loads have to be placed on the kiosk and, if they are not on the kiosk, by definition, they are not available loads for IronTiger drivers. This is something Anderson has known since 2008 and his grievance and request for irrelevant information were made solely to retaliate and harass the Respondent (TR 109-119 and 169-176).

5. Two days after the May 11 request for information Anderson illegally told Tom Jones that two of the four terminals did not have a CBA because they were rescinded: Springfield, OH and Garland, TX. Boysen, on one hand admitted that he was seeking to enforce the CBA at all four terminals with his grievance and then, on the other hand, Boysen said there was no CBA only two days after this request for information and he later threatened to illegally strike Springfield and Garland because he believed each did not have an enforceable CBA and a no strike clause (Judge Carson's Decision, page 6, lines 28-43; TR 58-60, 77-78, 139; Respondent's Exhibits 5, 6, 7 and 8). Anderson's bad faith and harassment was directly related to his request for information. In March of 2011, Anderson finally agreed that he had a CBA at these two locations and the Union signed an NLRB Notice based on his admitted violation of Section 8(b)(3) and (d) of the Act and further stated that he would not strike the Company (Respondent's Exhibit 9; also see Complaint in 16-CB-8084 and General Counsel's Exhibits 1(e) and 1(h)). Anderson admitted that he bargained in bad faith from at least May 24, thirteen days after this request for information was made, until that issue was resolved on March 9, 2011, almost 10 months later (Respondent's Exhibit 9; TR 58-70).
6. Further, the grievance of March 29, which served as the basis for Anderson's May 11 request for information (TR 52-54), had been forfeited as of May 5 under the CBA, Article 22, Section 3 and this was before the May 11 request for information. The grievance was filed on March 29 and the Company responded within ten (10) days, or on April 5, and under the CBA (General Counsel's Exhibit 2) the parties had 30 days to meet and process the grievance (*See* Article 22, Section 1(c)). That never happened. Therefore, under Article 22, Section 3 which, in part, provides:

“Failure of either party to adhere to the time limits in this Article will result in forfeiture.

Any time limits spelled out in the above procedure may be extended by mutual agreement of the parties.”

There was no mutual agreement to extend the time limits; Boysen never asked for one. Therefore, there was no grievance to enforce, because 30 days under the

CBA had passed and there was no mutual agreement to extend the time limits (TR 197-198). There should be no dispute that the grievance was forfeited on May 5; therefore six days before the May 11 request for information there was no grievance pending based on the record evidence. Anderson did not care and he and the General Counsel did not defend this point. More evidence of Anderson's bad faith and harassment.

7. Anderson's May 11 request for names of TruckMovers drivers was inappropriate because based on the uncontested testimony of Duvall and Jones, Anderson had at least 10 union authorization cards and stated he was going to organize TruckMovers employees (TR 138, 141, 196). This request is inappropriate under *Excelsior Underwear*, 156 NLRB 1236 and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Taking into consideration "all of the facts and circumstances," the Union's request for subcontracting information was made in bad faith to harass the Respondent. See *NLRB v. Wachter Construction*, 23 F.3d 1378 (8th Cir. 1994). IronTiger did not bargain in bad faith. The uncontroverted facts were not taken into consideration in Judge Carson's "per se" conclusion.

ARGUMENTS

I. THE STRONG AND UNCONTROVERTED EVIDENCE IN THIS CASE, AND MANY OF JUDGE CARSON'S FINDINGS, ALL ILLUSTRATE THAT ANDERSON'S REQUEST FOR INFORMATION WAS MADE IN BAD FAITH AND HIS MOTIVATION IN MAKING THIS REQUEST WAS TO HARASS THE RESPONDENT, WHICH ALLEVIATED IRONTIGER OF ANY LEGAL DUTY TO RESPOND AND, THEREFORE, IRONTIGER'S CONDUCT DOES NOT RESULT IN A FINDING OF BAD FAITH.

The following axioms serve as a foundation of the Act: the Act mandates that both parties "confer in good faith"; these reciprocal duties of good faith between both parties require a review of "all of the facts and circumstances" in deciding what is good or bad faith bargaining. *Truitt*. In the instant case, the proper questions are: Did the Union make a good faith request for information or was the Union's request made in bad faith and motivated by retaliation and harassment? Judge Carson finds the information requested was irrelevant and one of his

findings, upon which he confirms the irrelevancy finding, we believe also establishes that the Union's request was made in bad faith. Judge Carson finds:

Anderson recalled meeting with attorney Jones regarding an unrelated matter on May 12, the day after the May 11 information request and the day before he asserted that there was no contract at Garland or Springfield. In casual conversation, Anderson recalled that Jones referred to the information request, stating that Anderson was "asking for a lot of bullshit." Anderson recalls answering, "Yes I am, but I need it." He claims that Jones stated that he would be responding, but no response was received until September 27. Anderson's agreement that the information sought was "bullshit," absent an explanation regarding why the information was needed, confirms my finding that the information requested was irrelevant.

(Judge Carson's Decision, page 7, lines 45-52 and TR 219).

Anderson's agreement that his May 11 request for information was "bullshit" (without any explanation), when viewed with "all of the facts and circumstances", should also confirm that Anderson's request was not only irrelevant it was also made in bad faith and that IronTiger was not bargaining in bad faith when it sent its e-mail to Anderson on September 27 advising Anderson his request was irrelevant and harassment. Couple this with the following substantive and uncontroverted evidence of "all of the facts and circumstances" and try not to find bad faith and harassment:

1. Anderson's uncontested threat to destroy "labor peace" and make "life a living hell" five (5) days before he filed his grievance (Judge Carson's Decision, page 7, lines 33-38).
2. Refusal to disclose even one violation of the CBA ever and telling Respondent, without any information, "Bullshit you WILL abide by the contract" after Respondent made at least six (6) requests for information (Judge Carson's Decision, pages 6 and 7).
3. Anderson's refusal to "meet and confer" at least five (5) times after Respondent requested to do so (Judge Carson's Decision, pages 3-7; page 6, lines 1-6, 9-18 and 28-30).
4. No possible belief or suspicion or any evidence of a violation of the CBA (Judge Carson's Decision, pages 3, 5 and 6).

5. Respondent provided 29 pages of answers to the first information request of April 12 then the second irrelevant request Boysen Anderson made on May 11 required the review of 10,500 units that were involved (Judge Carson's Decision, page 4 and page 6, lines 1-6).
6. Threat to rescind the CBAs and strike IronTiger two days after the request for information of May 11 (Judge Carson's Decision, page 6, lines 32-43).
7. Regional Director's finding that these threats were illegal and finding that Anderson was not bargaining in good faith from at least May 24 through March 9, 2011 (Judge Carson's Decision, page 6, lines 32-43).
8. A bogus grievance filed on March 29 (Judge Carson's Decision, pages 5 and 7).
9. Besides Anderson claiming there was no CBA at Springfield and Garland, the underlying grievance had expired and was forfeited and no grievance was pending on May 11 (Judge Carson's Decision, page 6, lines 32-43 and page 7, lines 11-18).
10. An uncontested fact that Anderson wanted information to organize a non-union company, TruckMovers (TR 138, 141 and 196).
11. No evidence that the September 27 answer of irrelevancy and harassment caused the Union any harm or prejudice or could it ever (Respondent's Exhibit 1, amended charge of December 1; and General Counsel's Exhibits 1(c) and 1(e)).
12. Finding the information was irrelevant; irrelevant on May 11, September 27 and on the day of the trial, March 28, 2011 (Judge Carson's Decision, pages 1, 7 and 8).
13. Agreeing that the request for information was "bullshit;" agreeing it was "bullshit" he wanted (TR 219; and Judge Carson's Decision, page 7, lines 45-52).
14. Ultimately agreeing that the assignments were really restricted and then conceding it did not need any information based on its May 11 request and that the Respondent then satisfied the bogus request for information (Judge Carson's Decision, page 6, lines 46-52 and page 7, line 1).

Again, try not to find harassment on this strong and uncontroverted evidence in this case and the many findings by Judge Carson. "All of the facts and circumstances" illustrate that Anderson's motive in making his information request was made in bad faith and this bad faith and harassment alleviated IronTiger of any legal duty to respond and, further, that IronTiger did not

bargain in bad faith. *NLRB v. Wachter Construction*, 23 F.3d 1378, 1380-1388 (8th Cir. 1994). The only way Judge Carson could avoid finding the Union's bad faith and harassment here was his improper application of the concept of a "per se" violation. By not applying "all of the facts and circumstances" here he avoids all of the facts and the finding that there was no prejudice. It is unacceptable for Judge Carson to find IronTiger a law violator while giving Anderson a pass on Anderson's uncontroverted bad faith and resulting harassment. What's more, in every case relied upon by Judge Carson to find his "per se" violation, each case is distinguishable and, if read, arguably support Respondent's position here. As will be discussed below, each case found the request was relevant and there were no defenses raised and, therefore, no need to review "all of the facts and circumstances." As those cases discuss, if there was a defense, they may not have found that respondent was a law violator based on those defenses or "all of the facts and circumstances." The General Counsel previously argued that *NLRB v. Wachter*, supra, is distinguishable. It's not. "All of the facts and circumstances" involving IronTiger and Anderson's conceded threat, his illegal attempt to rescind the CBA and strike IronTiger, his bogus and forfeited grievance, his request for irrelevant information, his refusal to provide one example of the bogus grievance alleging a contract violation, his refusal to meet and confer, plus the list above outlining other evidence, establish Anderson's bad faith and his motive to harass the Respondent, all make this more of a case of harassment than found in *Wachter*.

Further, there is no reason to justify Anderson's request. None! Also making this a stronger case for harassment than *Wachter* is the request for information was irrelevant. *Island Creek Coal*, 292 NLRB 480 (1989) as discussed in *Wachter* and relied upon by the General Counsel is, therefore, distinguishable if it can be considered good law. Anderson has made a mockery of the Act's purpose and when all of the above is reviewed with no harm or prejudice to

the Union, IronTiger did not bargain in bad faith with Anderson; Anderson was bargaining in bad faith and harassing IronTiger, which alleviates IronTiger of any legal obligation to respond, let alone respond earlier than September 27.

II. JUDGE CARSON’S DECISION THAT AN EMPLOYER IS ALWAYS BARGAINING IN BAD FAITH, IN VIOLATION OF SECTION 8(a)(5) AND (d) OF THE ACT UNLESS IT TIMELY REPLIES TO A UNION’S REQUEST FOR INFORMATION, CONCEDED TO BE IRRELEVANT TO ANY LEGITIMATE AGENCY FUNCTION OF THE UNION, IMPOSES COSTS ON THE EMPLOYER WITH NO CORRESPONDING BENEFIT FOR THE EMPLOYEES OR THE UNION. THE RULE OF LAW ANNOUNCED IN THIS DECISION CREATES A MORAL HAZARD—AN INCENTIVE FOR THE UNION TO ENGAGE IN OPPORTUNISTIC STRATEGIC BEHAVIOR, USING INFORMATION REQUESTS TO IMPOSE COSTS ON THE EMPLOYER TO ACHIEVE OBJECTIVES UNRELATED TO THAT INFORMATION REQUEST.

Judge Carson found that the information requested by the Union on May 11, was “irrelevant” to the effective enforcement of any claim that IronTiger breached any existing collective bargaining agreement (Judge Carson’s Decision, pages 1, 7 and 8). Judge Carson, in part, concluded that all information sought in that May 11 request (Judge Carson’s Decision, page 5) was “irrelevant” because TruckMovers.com, Inc. assigned work to IronTiger, pursuant to the terms of TruckMovers carriage contracts with various truck manufacturers. IronTiger’s only obligation, under its contract with the Union, was to allocate the loads assigned to it by TruckMovers, loads displayed electronically on what was called a “kiosk”, to IronTiger employees covered by the contract with the Union, on a first-in-first out basis. There was absolutely no evidence that IronTiger breached that contract obligation (Judge Carson’s Decision, pages 2, 3 and 7). Yet, IronTiger, Judge Carson concluded, violated Sections 8(a)(1) and (5) of the Act by waiting four months to tell the Union that the requested information was “irrelevant” to any claim of contract breach because one request among the 10 made on May 11,

sought the identity of or referred to IronTiger drivers who were, in fact, assigned loads by the terms of the contract (Judge Carson's Decision, pages 5 and 8).

The Supreme Court has rejected the concept of "per se" violations of Sections 8(a)(1) and (5) arising from disputes over the employer's obligation to disclose information necessary to the union's agency obligations. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 150, 152-154 (1956), *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-320 (1979). The approved analysis asks, do the total costs of disclosure or responding, to all parties, exceed the benefits to employees and to the union as their agent in the particular transaction or dispute? *Detroit Edison Co. v. NLRB*, 440 U.S. 314-320 (1979).

In this case, production of the information, encapsulated in the 10 items in the May 11 request, entailed some positive cost to IronTiger. IronTiger, after all, did answer the Union's request on September 27 (Judge Carson's Decision, page 5). A response that the request was seeking irrelevant information and was harassment.

What benefit or prejudice did the IronTiger drivers or their agent, the Union, obtain from this production? None. The information was not relevant to the expired claim of breach of a contract limitation on subcontracting. All parties agree that loads "posted" on the kiosk were allocated to IronTiger drivers, IronTiger's only obligation under the contract (Judge Carson's Decision, pages 1-8).

What cost or prejudice was incurred by the drivers and their agent because the response to the May 11 request came four months later? None. If the information was never transferred, neither the workers or their agent were harmed. They had no case from the get-go on the claim of illegal subcontracting.

Judge Carson's decision imposes an inefficiency on the contract management process. The costs of "timely" production of the information (and there is not an inkling of what production date would have been "timely," in Judge Carson's view), exceed any benefit of a "prompt" reply, on the particular facts of this transaction.

Judge Carson's decision creates another, and more serious, inefficiency. A rule of law that requires an employer to respond to all information requests not relevant (Judge Carson's Decision, page 8), creates an opportunity for strategic behavior. A union, with an agenda unrelated to the dispute giving rise to the nominal information request can inundate employers with requests for irrelevant information and if the employer refuses to respond, have the employer before the Board, obtain an NLRB decision, a "government" decision, that the employer has bargained in "bad faith" in violation of the law. This is opportunism at its worst: Using the NLRA and the Board processes to gain leverage in some non-related dispute, regardless of the relative merits of that dispute.

That is exactly what happened here. Anderson, the drivers' agent, was upset with Duvall over his refusal to reinstate some discharged employee and, on March 24, Anderson threatened "no labor peace" at IronTiger unless that person was put back to work. Duvall refused. Anderson, true to his word, set out to make Duvall's life "hell" by generating a cascade of claims of contract breach and document requests, including the May 11 request (Judge Carson's Decision, pages 3-8).

This activity did nothing but impose needless transaction costs on IronTiger in the management of the union contracts. An inefficiency.

At the very least, a rule of law—all irrelevant information requests require a timely response on threat of being found to be a law violator—should not create a moral hazard: an

opening for an opportunity for a determined agent to engage in strategic conduct rather than in good-faith bargaining over the dispute immediately at hand.

Why care about efficiency? From Section 1 of the Act through a sea of decisional law, “labor peace” is as much an objective of the Act as distributive justice is the enhancement of worker’s bargaining power. Absent labor peace, all relevant resources are not being put to their highest valued use—the practical working definition of efficiency. This case is a testament to that observation.

For these reasons, then, avoidance of a rule of law creating a moral hazard—a rule giving an opportunistic manipulator a chance to game the legal process for leverage, requires reversal of Judge Carson’s conclusion that even requests for irrelevant information require a prompt response on threat of a Section 8(a)(1) and (5) violation.

III. IT IS UNCONTROVERTED THAT BOYSEN ANDERSON THREATENED THE RESPONDENT FIVE DAYS BEFORE HE FILED HIS GRIEVANCE HERE BECAUSE THE RESPONDENT WOULD NOT REINSTATE THREE EMPLOYEES THAT THERE WOULD BE NO “LABOR PEACE” FROM THAT POINT ON AND HE WOULD MAKE “LIFE A LIVING HELL” FOR THE RESPONDENT. HE DID JUST THAT BY FILING HIS GRIEVANCE AND MAKING HIS REQUEST FOR IRRELEVANT INFORMATION. FURTHER, TWO DAYS AFTER THE MAY 11 REQUEST FOR INFORMATION ANDERSON TRIED TO ILLEGALLY RESCIND THE CBA AT TWO OF THE FOUR TERMINALS AND THREATENED TO ILLEGALLY STRIKE IRONTIGER.

The uncontradicted testimony of Tom Duvall and Tom Jones establishes that Anderson was not going to get his way on March 24 regarding the reinstatement of three terminated employees; therefore, Anderson threatened that there would be no labor peace and he would make their life hell (TR 136-137 and 177-178). Anderson has done just that. Five days after his threat, Anderson filed the March 29 grievance, which had no merit, and his related request for information flowing from this meritless grievance was based on Anderson’s threat to destroy any

labor peace and make life hell for IronTiger, Tom Duvall and Tom Jones. The Regional Director found that Anderson's threats were illegal and that Anderson, since May 24, was bargaining in bad faith. Anderson did not admit to his violation for almost 10 months or until on or about March 9, 2011 (TR 69-70 and Respondent's Exhibit 9).

It is uncontradicted that on March 24 Tom Duvall and Tom Jones met with Boysen Anderson. Duvall's uncontradicted testimony was:

And I said, That doesn't make any sense, I'm not going to do that. It makes no sense.

And he said, "I don't give a" –

Q Go ahead and say it.

A "I don't give a fuck." And he told me – and I told him I would personally go to Garland and investigate the allegations that he made regarding their termination, and he told me, "If you ever want labor peace again, you'll bring those three guys back." That's when I said, I'll go there. And he said, You don't bring these three guys, I'll make your life hell. And he has.

(TR 137).

Tom Jones' uncontradicted testimony was:

THE WITNESS: “. . . But anyway, what is important was the fact that Boysen said three things that night. Okay? He said, If you guys don't reinstate Shafer – he may have said and the two others, but I specifically remember Shafer – you will never have labor peace again, and I will make your lives hell. Then he went on to say that, Oh, and by the way, I'm going to be organizing TruckMovers, I've already got 10 cards signed.

Q BY MR. KRUKOWSKI: By the way, was Shafer ever reinstated?

A. No, he was not. He filed a – Boysen filed a Board charge on his behalf that was dismissed in Region 16.”

(TR 177-178)

Boysen never denied these facts and the General Counsel never challenged these threats! The three employees were not reinstated and Anderson began his march to harass the Company. Five

days after the March 24 meeting Anderson filed the grievance on March 29 (General Counsel's Exhibit 4). After that and on April 12 and May 11 Boysen made his baseless requests for irrelevant information involving the meritless grievance (General Counsel's Exhibits 3 and 6). Again, every time the Company asked for specific information illustrating a violation of the CBA, Anderson either simply refused or said, "Bullshit. You WILL comply with the contract" (Respondent's Exhibits 10, 11, 12, 13, 14 and 15). More harassment!

Two days after the May 11 request for information, Boysen called Tom Jones and illegally told him that there was no CBA at Springfield and Garland because he is rescinding those CBAs. Jones' e-mail confirms Anderson's threat:

Subject: FW: IronTiger Logistics, Inc. and our Thursday Phone Conversation

-----Original Message-----

From: grinsley@aol.com [<mailto:grinsley@aol.com>]

Sent: Tuesday, May 18, 2010 8:36 AM

To: banderson@iamaw.org

Subject: IronTiger Logistics, Inc. and our Thursday Phone Conversation

This e-mail is written to confirm our Thursday, May 13, 2010 phone conversation during which you told me that you were officially putting IronTiger Logistics, Inc. on notice that the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) does not have a labor contract with our facilities at 2801 Wood Drive, Garland, TX 75041 and 5240 Prosperity Drive, Springfield, MO 45502. After a review with the legal department of the IAM, you told me that this was the opinion of your General Counsel, and that that individual had authorized this legal conclusion.

I have a few questions. You are essentially taking the position that the collective bargaining agreements signed by you for these two locations are rescinded. I would like to know what facts and law you, as a representative of the IAM, have to support this position. I would like as many details as you can provide so that we can properly evaluate your position and provide you a response. I would also like the name and contact information for your General Counsel so that we may communicate with this individual after we receive the requested information. If your General Counsel wants to write me directly regarding my inquiry that would be fine and we will get back to you with our position.

Thank you in advance for your cooperation.

Regards,

Tom Jones

(Respondent's Exhibit 4)

More harassment! Anderson testified that he admits the facts set forth in this document (TR 56). Anderson sought to rescind the CBA on May 13 and that's only two days after his request for information on May 11. If *Truitt* means anything, these facts must also be reviewed. Anderson's bad faith trumps any legal obligation IronTiger might have had to respond.

Anderson's threat to rescind and the threat to strike (Respondent's Exhibits 5, 6, 7 and 8) were illegal and the Regional Director of Region 16, Martha Kinard, agreed. Even though she says this, she simultaneously says that IronTiger also bargained in bad faith until it told Anderson on September 27 that its request for information was irrelevant and harassment. Set forth in the Regional Director's Complaint, signed by Martha Kinard, specifically in part, Region 16 provided that Anderson was violating the Act:

12.

- a. Since on or about May 24, 2010, and on numerous occasions thereafter, The Union has threatened to engage in a strike against the Employer at its Garland, Texas facility.
- b. Since on or about May 24, 2010, and on numerous occasions thereafter, the Union has threatened to engage in a strike against the Employer at its Springfield, Ohio facility.
- c. The Union engaged in the conduct described above in paragraphs 12a and 12b in an effort to modify or terminate the agreement described above in paragraphs 10 and 11.
- d. The terms and conditions of employment, described above in paragraphs 11a and 11b, are mandatory subjects for the purpose of collective bargaining.

16.

By the conduct described above in paragraph 12, the Union has been failing and refusing to bargain collectively and in good faith with an employer within the meaning of Section 8(d) of the Act in violation of Section 8(b)(3) of the Act.

17.

By the conduct described above in paragraph 12, the Union has been violating Section 8(d) of the Act.

(General Counsel's Exhibit 1(e)).

It is illogical and inconsistent for Kinard to say that the Union bargained in bad faith since May 24 until Anderson signed and posted a "Notice" on or about March 9, 2011, almost 10 months later, and then to say that IronTiger was bargaining in bad faith from only May 11 to September 27; less than half the period of time—or four months, during Anderson's bad faith bargaining in violation of Section 8(b)(3) and (d), or ten months. It is illogical and inconsistent to say that during this interim period of the Union's bad faith bargaining, IronTiger delayed telling Anderson that the request was irrelevant and harassment until September 27. Then the NLRB Notice, dated on or about March 9, 2011 (TR 69-70 and Respondent's Exhibit 9) regarding Anderson's violation regarding the attempted rescission and strike and the Union's bad faith bargaining, in part, provides:

"WE WILL NOT threaten to strike IronTiger Logistics, Inc. where an object of such strike is to force or require IronTiger Logistics, Inc. to terminate its collective bargaining agreement with us, unless we comply with the requirements of Section 8(d) of the Act."

(Respondent's Exhibit 9)

Again, Anderson violated the NLRA and the Regional Office determined that since May 24 Anderson was failing and refusing to bargain collectively and in good faith with IronTiger within the meaning of Section 8(b)(3) and (d) of the Act. This issue was not resolved until just before the trial and sometime approximately on or about March 9, 2011 (TR 69-70 and

Respondent’s Exhibit 9). She or Judge Carson can not logically believe that IronTiger’s response on September 27, almost three months before the Complaint was issued on December 22, was untimely and somehow IronTiger’s mere delay was bad faith bargaining during the entire time Anderson was admittedly bargaining in bad faith.

Judge Carson, while finding the threats of Anderson were uncontroverted, he, without reviewing all the facts, merely re-stated the General Counsel’s argument that the March 24 admitted threats came after the Union’s March 16 statement alleging the failure to place loads on the board (Judge Carson’s decision, page 7, lines 33-41). However, “all of the facts and circumstances” illustrate that the first request for information on April 12 and the filing of ULP charges for the reinstatement of three employees occurred on the exact same day, April 12. These charges served as the basis for Anderson’s threat to destroy “labor peace” and to make life a “living hell” for Respondent. First, as Tom Jones’ uncontested testimony provides, “He filed a—Boysen filed a Board charge on his [Shafer] behalf that was dismissed in Region 16” (TR 178). Confirming this is Respondent’s Exhibit 37 which, in part, provides:

Date Filed	Charge No.	Issue/Description	Status
April 12, 2010	16-CA-27397	8(a)(1),(3) & (5) Termination of employees who did not submit to drug screen; made employees work off the clock. Discharged Don Jefferson, Nadine Patwala, Richard Schafer and Hollis Johnson because they engaged in protected concerted activities.	NLRB DISMISSED charge because the Union failed to cooperate and provide information regarding the status of the grievance. Union’s APPEAL DENIED on 2/28/11

The discharge of Shafer and others occurred on March 14. See NLRB Charge in case 16-CA-27397 listed above, filed on April 12. It, in part, provides:

“ . . .

Since on or about March 14, 2010, . . .

Since on or about the dates listed above, the Employer, through its officers, agents or representatives, has interfered with, restrained or coerced employees in the exercise of their rights guaranteed in Section 7 of the Act by the following acts and conduct discharged Don Jefferson, Nadine Patwala and Richard Shafer because they engaged in protected concerted activities.”

This charge was dismissed by Region 16, which had full knowledge of Schafer’s and others’ terminations on March 14, the filing of the charge on April 12, the dismissal and the denial of the appeal on February 28, 2011 (Respondent’s Exhibit 37). Anderson’s statements regarding the assignment of loads occurred on March 16, two days after the termination of Shafer and others on March 14. The threats of March 24 were made ten days after the termination and eight days after the March 16 bogus allegation of improper assignments. Again, the discharges preceded the March 24 threats by 10 days!

Therefore, during this entire time and the filing of these charges, the subject of the terminated employees was ongoing and occurring simultaneously with the threats, which include the grievance and the request for information. All of these facts are directly related and, most important, after the uncontroverted threat is made on March 24, the grievance is filed five days later on March 29. The threat and the resulting grievance are what is most important and relate to the two information requests on April 12 and May 11. Also important is the fact that on April 12, Anderson makes his first request for information and on the same day, April 12, the IAM filed the ULP charge seeking Shafer’s and others’ reinstatement. These facts are directly related to the threat to make “life hell” because it all stems from Anderson trying to push his “weight” around and make threats and get the results he wants, regardless of the merits of any of his bogus claims. These facts are all uncontroverted and related to the threat and are to be considered when reviewing “all of the facts and circumstances.” More harassment!

IV. ANDERSON BLOCKED THE BARGAINING PROCESS FROM EVER OCCURRING. THEREFORE, IN LIGHT OF ALL OF THE FACTS AND CIRCUMSTANCES IN THIS CASE, THE RESPONDENT'S SEPTEMBER 27 ANSWER TO THE IAM'S MAY 11 INFORMATION REQUEST WAS NOT BAD FAITH BARGAINING. THE IAM'S REQUEST WAS NOT MADE IN GOOD FAITH, IT WAS MADE TO HARASS THE RESPONDENT. THE IAM DID NOT "BARGAIN IN GOOD FAITH" AND THE SEPTEMBER 27 ANSWER WAS NOT LEGALLY OBLIGATED AND THE TIMING OF THIS ANSWER DID NOT PREJUDICE THE IAM PARTICULARLY BECAUSE THE INFORMATION WAS IRRELEVANT. FURTHER, THE UNDERLYING GRIEVANCE NO LONGER EXISTED FOR IT HAD BEEN FORFEITED EVEN BEFORE THE REQUEST FOR INFORMATION WAS MADE.

According to the U.S. Supreme Court in *Truitt*, a case which determined whether an employer had acted in good faith when it denied to meet a union's request for information, "[e]ach case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been made." (351 U.S. at 152-154) The NLRA mandate that both parties "confer in good faith." 351 U.S. at 153-154. This obligation to "confer in good faith" applies to both employers and unions. "The union is likewise obligated to furnish the employer with relevant information." *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979).³

The IAM's request for information on May 11 was not made in good faith, it was made to harass the Respondent and, again, based on all of the facts and circumstances", Respondent's waiting until September 27 to answer the May 11 request stating that it was irrelevant and harassment was not bad faith bargaining.

³ Just as the employer has an obligation to furnish relevant information, so does the Union under § 8(b)(3) of the Act. The obligation is not imposed on the employer alone, the IAM has a similar duty. *Oakland Press*, 233 NLRB 994; aff'd, 598 F.2d 267 (D.C. Cir. 1979). The Board continues to hold that the Union's duty to furnish information under § 8(b)(3) is "commensurate with and parallel to an employer's obligation to furnish [information] to a Union pursuant to § 8(a)(1) and § 8(a)(5) of the Act." See also, *Local One-L*, 352 NLRB 906 (2008) and *Food Drivers Helpers & Warehouse Employees Local 500*, 340 NLRB 251 (2003)

Anderson personally blocked the bargaining process and his answer to the Respondent's requests for meetings and specifics of a contract violation were instructive. Anderson, in part, stated, ". . . As to your concerns regarding the merit of the grievance, the last time I checked, the merit of a grievance is the wholly [sic] decision of the Union to determine, not the Company . . ." (Respondent's Exhibit 31) UNBELIEVABLE AND NOT TRUE! The Union can not just refuse to tell the Respondent what facts (including when and where) support a contract violation and a request for information and then expect IronTiger to respond or answer the inquiry when it is Anderson who blocked the process based on his devious practices that are not consistent with the Act's purpose.

According to Boysen Anderson, only he should know what the violation of the contract is. However, *Disneyland Park*, 350 NLRB 1256, 1258 (2007) provides:

In order to show the relevance of an information request, a union must do more than cite a provision of the collective bargaining agreement. It must demonstrate that the contract provision is related to the matter about which information is sought, and that the matter is within the union's responsibilities as the collective bargaining representative.

Boysen Anderson, when faced with the inevitable, flippantly suggested that he believed that IronTiger had a contract with Volvo/Mack and Navistar to support an argument that this makes this claim possible. That's Anderson's only defense! It is rank speculation! He admits he never saw such a contract, he admits he does not have such a contract, nor does he even tell us what his belief was founded on other than what he tells us he believes (TR 97-98). This is the only thing Anderson could do—make it up or just speculate. Incredible! This merely adds to his need to harass; push the bogus issue and change the rules as he goes along. Judge Carson finds that IronTiger is not a party to TruckMovers contracts (Judge Carson's Decision, page 3, lines 1-22). More harassment!

Again Anderson, when faced with the truth, suggested that TruckMovers might have removed loads from IronTiger's kiosk. This is a lame and obscure defense. This only happened once in 2009 and, when faced with the specifics, Tom Duvall immediately "stepped up to the plate" and resolved that lone issue. This illustrates that IronTiger does and will bargain in good faith when not blocked by Anderson's deliberate misconduct. Duvall admitted there was a problem, corrected it and told Anderson:

Anderson Boysen

Subject: Subcontracting grievances

From: Tom Duvall [mailto:tom@truckmovers.com]

Sent: Monday, March 30, 2009 5:09 PM

To: Anderson Boysen

Subject: Subcontracting grievances

We are in receipt of grievances from Don Bowling, Steve Roberson, and Virginia Collins regarding 2 loads that allegedly appeared on the IronTiger dispatch board then were subsequently moved by TruckMovers drivers. I have investigated this matter and have found that the 2 loads in question 090300759 and 090300731 did in fact appear on the IronTiger dispatch kiosk prior to being assigned to TM drivers.

* * *

I have discussed this with him and let him know that this was not an option pursuant to our labor agreement. I also stressed to him the importance of this not happening again and I am assured that it won't. In the interim, I will be asking my computer guys to put some controls in place to prevent it from happening.

(Respondent's Exhibit 2).

What is glaring about this example and the issues in 2009, unlike what was alleged in 2010, is:

1. When specifics are given and discussed the Respondent can respond and solve the problem;
2. No such issue or specific facts existed in 2010, before or after the grievance of March 29; and

This example is instructive and it should further illustrate that the grievance and request for information here were without merit and were harassment and that IronTiger did not bargain in bad faith. If there were any facts or specific incidents of a violation, the Respondent could have or would have resolved them as it did in 2009. Anderson never let that happen! More harassment!

B. The IAM's Further Refusal To Bargain In Good Faith Regarding Its Grievance And The Request For Information Is The Union's Complete Refusal To "Meet And Confer" Regarding The Alleged Violation And Why The Information Request Is Relevant.

Reviewing "all of the facts and the circumstances" of the particular case, as set forth in the *Truitt* test, the Respondent had no legal obligation to respond to the Union because the Union blocked the process of bargaining and, in bad faith, refused to "meet and confer" after the Respondent made numerous requests to do so. Stated another way, IronTiger did not fail in its "statutory obligation to bargain in good faith." (See *Truitt*, 351 U.S. at 154). There is a reciprocal duty of good faith between both parties to a collective bargaining agreement. The Union's request was not made in good faith and the Union wholly failed to bargain in good faith regarding its grievance and Anderson's request for information. More harassment!

On April 5 before the May 11 request for information, the Company asked for a meeting. Anderson refused to meet. The Company asked for five meetings to discuss the issue and not once would Anderson meet. How can good faith bargaining, the need to communicate, exist without responding to a request for a meeting? Five (5) times Anderson told the Company no – no meetings (TR 78-80, 121, 181, 184 and numerous Respondent's exhibits asking for a meeting; Respondent's Exhibits 4, 17, 18, 33, 34 and 36 and Judge Carson's Decision, page 6, lines 1-6, 9-18 and 28-30). This, by definition, adds to the evidence of Anderson's bad faith. More harassment!

The NLRA, specifically Section 8(d), requires the parties “to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement . . .” This same process exists when requesting information during and after negotiation of the contract. Anderson’s refusal to meet further illustrates a violation of Section 8(b)(3) and without these meetings the parties could not confer because of Anderson’s refusal to meet. Judge Carson recognized the validity of the Company’s request for meetings when responding to the General Counsel’s objection to Respondent’s exhibit. Judge Carson stated, “. . . [w]hen we, in fact, don’t understand what’s happening and we ask for clarification, we have an obligation to get together, don’t we?” (TR 80).

The foundation for any information request analyzing Section 8(a)(1) and (5) should be grounded in good faith. In *Truitt*, the Court discussed a request for information during negotiation, which should also apply to the administration of a CBA. The Court stated:

“Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. . .”

351 U.S. at 153

Anderson did not make an honest claim and, if the grievance or request for information was important enough to make, Anderson wholly failed to give IronTiger some sort of proof of its accuracy. In analyzing Anderson’s request for irrelevant information, why should the second bargainer, here the Respondent, have any legal responsibility to respond to Anderson with no proof of accuracy? Anderson blocked the process and yet Respondent has been labeled as the one who is a law violator. Because the Act requires mutuality, the union’s failure here to proceed in good faith alleviates IronTiger’s obligation under the Act and it can not be found to have bargained in bad faith. Anderson did not comply with the obligations outlined in *Truitt*!

Good faith and the sharing of information encourages mutual respect between the parties relying on cooperation and an open exchange for the continuance of labor peace. These principles exist in negotiations as they do in the enforcement of a CBA. The Supreme Court in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) held that the duty to furnish information, like the duty to bargain, “extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” 385 U.S. at 436. Therefore, both parties must exercise good faith in both situations, which serves not only the issue involved but labor peace, something Anderson admitted he said he did not want.

Tom Duvall provided Anderson with 29 pages of data in response to Anderson’s first request for information on April 12 (General Counsel’s Exhibits 3 and 5). Tom Duvall did so in good faith and in a hope that this extensive submission would result in this issue going away (TR 129). Boysen withdrew his charge regarding the April 12 request (Respondent’s Exhibit 1). That doesn’t satisfy Boysen’s need to harass so he made the second irrelevant request on May 11. The Respondent did not respond until September 27 because Tom Duvall testified that as of May 11 he knew that he was being harassed (TR 136) and knowing Anderson never had any reason to suspect the contract was violated and Anderson never had even one example of a CBA violation. Duvall tried to end this dispute but Anderson only sought to add to Respondent’s transaction costs. This is opportunism at its worst—using the Act and the Board to gain leverage in some non-related dispute to impose needless transaction costs on IronTiger. Anderson did not want labor peace, he wanted to retaliate, contrary to the objectives of Section 1 of the Act. The requested information was irrelevant, Anderson gave no specifics of a violation of the CBA and Anderson refused to meet. Therefore, shortly after Anderson filed the grievance, the Respondent made a request to meet on April 5 and then made at least four (4) more requests to meet and

Boysen Anderson refused each one (TR 181 and Judge Carson's Decision cited above). All these facts are either admitted or uncontroverted testimony. Why wouldn't Anderson meet? Answer: Anderson never had any facts to support a violation of the CBA nor could he establish relevancy; he just wanted to retaliate and harass the Respondent! As important, this uncontroverted evidence illustrates that Anderson blocked the bargaining process from ever occurring and because he did that, IronTiger did not have a legal obligation to respond or respond earlier than September 27.

V. THE TOTAL LACK OF MERIT TO THE IAM'S GRIEVANCE NOT ONLY ILLUSTRATES THE LACK OF RELEVANCY IT FURTHER ILLUSTRATES THE UNION'S BAD FAITH AND HARASSMENT IN APPLYING THE "ALL FACTS AND CIRCUMSTANCES" TEST UNDER TRUITT. JUDGE CARSON CORRECTLY FINDS THAT THE IAM'S MAY 11 INFORMATION REQUEST WAS NOT RELEVANT. HOWEVER IT IS NOT THE MERE FINDING OF THE LACK OF RELEVANCE IT IS ALSO THE TOTAL LACK OF ANY MERIT AND NO BASIS TO EVEN SUSPECT A BREACH OF THE CBA WHICH MUST BE REVIEWED UNDER THE "ALL OF THE FACTS AND CIRCUMSTANCES" TEST OF TRUITT IN DETERMINING WHETHER IRONTIGER BARGAINED IN GOOD OR BAD FAITH AND JUST HOW FAR ANDERSON WOULD GO IN HARASSING THE RESPONDENT.

Judge Carson found, and the IAM and General Counsel conceded, that loads from Volvo/Mack and Navistar can be dispatched by TruckMovers to possibly 17 carriers, including IronTiger (TR 129-130; Respondent's Exhibit 17; and Judge Carson's Decision, page 2, lines 9-52 and page 3, lines 1-22). Everyone conceded and no one refuted the fact that not all loads have to be placed on the kiosk and, if loads are not on the kiosk, by definition, they are not available loads for IronTiger drivers. This is something Anderson has known since 2008 (TR 109-119, 169-176). Therefore, not only the lack of relevancy sets the story here, it is the degree of its irrelevance that further adds to a finding of Anderson's bad faith and his motive to harass the Respondent. It is one thing to make a colorable claim of a contract violation, it's another to

make sheer frivolous and bogus claims with no chance of them having any merit. That was Anderson's strategy. The Respondent never had an obligation to furnish any information or even respond to this conceded misdirected claim. The IAM's requests were never made relevant because it only made a frivolous allegation without any supporting arguments or, more importantly, any facts. That is why Judge Carson found the requested information irrelevant. This is true even after everyone conceded that the Union said it needed no more information and still had not provided even one example of a contract violation. Again, what caused the Union to say that Respondent sufficiently answered its May 11 request is that Respondent merely told the Union that the CBA completely refuted the Union's bogus claims (Judge Carson's Decision, page 6, lines 40-52 and page 7, line 1). There never was any "information" given to the Union.

The IAM was seeking information regarding subcontracting or, stated another way, the Union employees were not given loads that another carrier did get. The underlying grievance states, "The Employer is not placing all available loads on the dispatch board. . ." and, presumably, giving loads to another carrier, a non-union carrier. The contract makes it clear that this is not a violation of the contract.

In *Disneyland Park*, 350 NLRB 1256 (2007) the Board held:

Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant. Therefore, a union seeking such information must demonstrate its relevance, *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). (*See Disneyland* at page 1258).

This is easy to understand. It makes sense that bargaining unit information is not relevant here in the context of our case because who the bargaining unit employees are or have been doing has nothing to do with a violation of a subcontracting issue. Again, why is what bargaining unit employees do significant? It's not. We assume they are doing bargaining unit

work—so what! Anderson’s grievance says, “failure to assign work to IronTiger drivers.” How does it shed light on any potential subcontracting issues? It doesn’t. What bargaining unit employees do is not even remotely tangential to whether or not the subcontracting provision has been violated because, presumably, these loads have all been assigned to bargaining unit employees. Again, they are doing bargaining unit work. As Tom Duvall testified, information regarding bargaining unit employees illustrates compliance of the CBA not a violation (TR 125-126, 134-135). Although Judge Carson finds this information was irrelevant, we further contest that it is presumptively relevant in the context of this case.

Therefore, the General Counsel and the IAM did not prove anything, as stated in

Disneyland:

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. *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989). See also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003).

See 350 NLRB at 1259, footnote 5.

Both the unit and non-unit information is not relevant (TR 123-136). As stated, the Union has only made conclusory arguments. Saying “Bullshit” is hardly sufficient to the Company’s responses when asked what specifics the IAM had . Now, compare the language in

Disneyland with IronTiger’s contract language:

DISNEYLAND

During the terms of the Agreement, the Employer agrees that it will not subcontract work for the purpose of evading its obligations under this Agreement. However, it is understood and agreed that the Employer shall have the right to subcontract when: (a) where such work is required to be sublet to maintain a

IRONTIGER

The parties hereto agree that loads not appearing on the IronTiger Logistics drivers’ kiosk are not IronTiger Logistics loads and will be moved by carriers other than IronTiger Logistics and the movement of such loads does not constitute Sub-Contracting and does

legitimate manufacturers' warranty; or (b) where the subcontracting of work will not result in the termination or layoff, or the failure to recall from layoff, any permanent employee qualified and classified to do the work; or (c) where the employees of the Employer lack the skills or qualifications or the Employer does not possess the requisite equipment for carrying out the work; or (d) where because of size, complexity or time of completion it is impractical or uneconomical to do the work with Employer equipment and personnel^[FN4]

not violate Article 19 of the Agreement between IronTiger Logistics, Inc. and the International Association of Machinists and Aerospace Workers covering the period from September 29th, 2008 through and including September 30, 2011.

The Union can not argue its request is relevant within the defining language of the CBA. In *Disneyland*, the language prohibited subcontracting unlike IronTiger's CBA. In *Disneyland*, it provided language that the employer could not evade the contract; language not in IronTiger's CBA; also, in *Disneyland's* CBA, it could subcontract under four qualifying contexts; again, IronTiger's CBA has no qualifiers. In *Disneyland*, the Board said, as here, that information requested was not relevant and is not apparent from the language or surrounding circumstances. However, in *Disneyland*, at least the union tried to explain why it needed the information. The Board, however, found “. . . these explanations insufficient under the circumstances to explain the relevance of the requested subcontract information” at page 1258. The Board went on to say:

In order to show the relevancy of an information request, a union must do more than cite a provision of the collective-bargaining agreement. It must demonstrate that the contract provision is related to the matter about which information is sought. . . . Here, it has not been shown that the union had a reasonable believe supported by objective evidence that the information sought was relevant. Therefore, we find that the union failed to meet its burden. (*See Disneyland* at page 1258.)⁴

⁴ Chairman Liebman's dissent in *Disneyland* recognized, “. . . Only where a union has ‘no basis for even suspecting that the [employer] might be in breach’ of a contractual subcontracting provision *1260 will the Board reject a claim for subcontracting information. *Detroit Edison Co.*, 314 NLRB 1273, 1275 (1994) (footnote omitted).” This is that case; there is no basis for suspecting a breach. Further, recent Board law affirms that there is a need for objective evidence which must be presented with the request for information for it to be relevant in subcontracting cases after

Now let's review the Union's evidence here. Its request was irrelevant and was merely an absurd generalization without any facts to support the claim that could trigger the Respondent's obligation to furnish information or even respond to the request (these e-mails are outlined in detail above). Anderson knew this and his only motive was to harass the Respondent.

1. The IAM's March 29 grievance. It merely says, "The Employer is not placing all available loads on the dispatch board." (General Counsel's Exhibit 4).
2. Prior to the grievance Boysen's e-mail to Tom Duvall on March 16 stated, "All loads available loads are to be placed on the Board for dispatch." (Respondent's Exhibit 10).
3. On March 16 Tom Duvall wrote back to Boysen and said, "All available IronTiger loads ARE placed on the board for dispatch. If you believe that they are not, please give me some specifics so that I can investigate." (Respondent's Exhibit 11).
4. On the same day, March 16, Boysen explains his position to Tom Duvall: "Tom—don't question me on what I believe, here are the facts, one driver 1 load,—two drivers 2 loads—six drivers 6 loads. Enough of this bullshit." (Respondent's Exhibit 12).
5. Tom Duvall, again on March 16, in an e-mail to Boysen, stated that we don't set the priorities, our client does. (Respondent's Exhibit 13).
6. Boysen, on March 16, again responds, "Bullshit you WILL abide by the contract." (Respondent's Exhibit 14).
7. The grievance is filed (See no 1. above). The company's response is from Tom Duvall on April 5 that there was no contract violation and requested a meeting. (Respondent's Exhibits 16, 17 and 18).

That was the Union's explanation. Compare the above facts to *Disneyland's* facts. Not only does the CBA here entirely trump Anderson's claim, he has utterly failed to explain what

Disneyland and stating that the failure to do so will result in a finding of no obligation to furnish anything. See *A-1 Door and Building Solutions*, 356 NLRB No. 76 (Jan. 11, 2011: Chairman Liebman, Members Becker and Hayes) in adopting the ALJ analysis; *Castle Hill Health Care Center*, 355 NLRB No. 196 (Sept. 28, 2010: same panel) adopting the ALJ analysis; *Chrysler, LLC and Local 412, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO*, 354 NLRB No. 128 (Aug. 5, 2010: Chairman Liebman, Members Schaumber and Pearce); and *Racetrack Food Services, Inc.*, 353 NLRB 687 (Sept. 30, 2010: Chairman Liebman, Members Becker and Hayes).

facts support a claim and why his request is relevant or why he could believe or suspect a violation of the CBA was occurring. This also illustrates the degree of irrelevancy which is added evidence of Anderson's bad faith and his motive to harass the Respondent. Anderson blocks the bargaining process from ever occurring. Anderson's generalization and his only emphasis on the word "BULLSHIT" does not come close to meeting his and the General Counsel's burden required by *Disneyland* and further is evidence illustrating harassment and there is no need for Respondent to respond nor can it be concluded that Respondent bargained in bad faith as found by Judge Carson. Why? You can not stop the bargaining process from occurring and then argue that Responding is bargaining in bad faith. Good faith bargaining was not something Anderson wanted; he just wanted to retaliate and harass, not bargain.

A. There Is No Evidence That The CBA Was Ever Violated And Without That Evidence The Relevancy Argument Fails And, Further, Respondent Did Not Need To Respond To The Union's Request.

Judge Carson provides that all concede that all information has been sufficiently provided to the IAM (TR 8-9). However, there is not even one example to support a violation of the CBA or support the Union's forfeited grievance. From May 11 until March 14, 2011, when William Haller (Counsel for the IAM) told Judge Carson that the Company adequately responded to the Union's information request, the Respondent only gave the IAM redacted copies of TruckMovers' contracts with Volvo/Mack and Navistar which restricted the availability of IronTiger loads (TR 8-9 and 142-145; Respondent's Exhibit 27; and Judge Carson's Decision page 6, lines 45-52). This is something Boysen Anderson knew from the beginning and it was the basis for the kiosk restriction in the Letter of Agreement (TR 109-119, 169-176; Respondent's Exhibit 40; and Judge Carson's Decision, page 2, lines 5-52 and page 3, lines 1-22). Respondent never did provide any names or any specific data or information regarding the

May 11 request but the IAM was satisfied that Respondent's answer was sufficient (TR 91 and Respondent's Exhibit 27). Why? Anderson's "game" was up and Anderson could not come up with any new twists to continue his harassment. Again, the uncontradicted testimony of both Tom Duvall and Tom Jones demonstrates that Boysen Anderson knew this long before the IAM's grievance and request for information and actually before the Company voluntarily recognized the IAM and before the CBAs were negotiated and before IronTiger moved one load (TR 109-119, 169-176). This was first told to Anderson before the Dublin terminal negotiation then again for Macungie and then again on December 6, 2009 for the Springfield and the Garland terminals. This is all uncontradicted and uncontested testimony (Judge Carson's Decision, pages 2 and 3).

B. Judge Carson's Questioning Makes It Conclusive That The CBA Was Never Violated And There Was No Basis For The Grievance Or Even To Suspect The CBA Was Violated.

Judge Carson sought to understand whether the grievance had merit. Judge Carson got Anderson to grudgingly admit that he did not have a claim or a basis for his grievance. Judge Carson asked the following questions:

JUDGE CARSON: Okay. Now you just said something though. You said should have been assigned to them. What makes the should?

THE WITNESS: Well, if it was taken off of the IronTiger board and give to a TruckMovers driver, then that load should have stayed on the IronTiger board for a IronTiger driver.

JUDGE CARSON: Okay. But as a practical matter there's no should with regard to what goes on to the IronTiger board in the first place. True or False?

THE WITNESS: That's correct. Any load that's on the IronTiger board, per the contract –

JUDGE CARSON: Yes.

THE WITNESS: -- should be moved – or will be moved by IronTiger –

JUDGE CARSON: Once it goes –

THE WITNESS: Right.

JUDGE CARSON: -- on the board.

THE WITNESS: Yes, sir.

JUDGE CARSON: Okay. But the – if, in fact, TruckMovers wanted to discriminate against its IronTiger unit drivers, whoever was doing the dispatching could look over what loads were there ahead of time and give all the 1000-mile loads to TruckMovers and 500-mile loads to IronTiger drivers, and there'd be no grievance. If it never went on to the IronTiger board. If somebody sifted through it ahead of time. Am I correct?

THE WITNESS: If it was on the board, or you're –

JUDGE CARSON: No.

THE WITNESS: -- saying before –

JUDGE CARSON: Before the board. If somebody carefully selected which ones were going on to the IronTiger –

THE WITNESS: Oh, absolutely.

JUDGE CARSON: -- board.

THE WITNESS: Absolutely.

JUDGE CARSON: Okay.

THE WITNESS: Absolutely. Yes.

JUDGE CARSON: You understand what I asked?

MS. ELIFSON: Yes, Your Honor.

JUDGE CARSON: You understand what I asked?

MR. KRUKOWSKI: I did.

JUDGE CARSON: Okay.

(TR 44-45)

The conclusion that follows these questions is: If the assignments can be made accordingly, then there is no basis for a grievance and the Union's March 29 grievance and the request for information of May 11, which flows from the grievance, are both totally meritless, and, therefore, the request itself is, by definition, irrelevant and a further element of Anderson's bad faith, not IronTiger's.

C. Anderson's Changing Of His Request For Information Is A Further Example Of The Harassment and Baselessness Of His Underlying Grievance And The Request For Information.

Early on, when Anderson was asked to explain his position or give any facts of a contract violation, he said, "Enough of this bullshit and . . . don't question what I believe." Another one of Anderson's responses to a request for facts and no facts forthcoming he merely said, "Bullshit you WILL abide by the contract." Anderson makes this an easy case. Anderson's approach to not questioning what he believes attempts to place himself as an unquestionable mystic requiring everyone else to be clairvoyant. That is not the law and without facts the Respondent never had an obligation to provide anything to the Union. It does illustrate added evidence of Anderson's bad faith and his motive to harass the Respondent.

Anderson has done everything to attempt to confuse the underlying issue and block the bargaining process as part of his harassment. The CBA simply states that the Company will place all available loads for dispatch. Anderson, recognizing this is not a limitation, changes direction by changing his position that the Respondent removed loads (Judge Carson's Decision, page 6, lines 8-32). Again, recognize that this also means nothing, the Union returns to its earlier position. Then, as late as December 9, just before Regional Director Martha Kinard filed the December 22 Complaint in this matter, the Union again changed its position and, as the Union stated, it is going to "reformulate" its position. This last obfuscation is all based on the Union

not having any facts to support a violation of the contract or any evidence to support the argument that its request for information is relevant even after the IAM conceded that the Respondent had complied with the Union's information request. Time and again the Respondent asked for an example of a contract violation and an explanation of not only the violation but also why the request for information is relevant. To add to the Union's stonewalling and bad faith bargaining is the Union's rejection of the Respondent's numerous requests for a meeting. The Union did nothing to support its case even though it has the burden to do so and, instead of meeting in the light of day, it was hiding behind statements like, "Do not question what I [Boysen Anderson] believe" (Respondent's Exhibit 19). Why? Anderson wanted to block the process. More harassment!

The December 9 change in the Union's position, its self-admitted reformulation, is another admission it has no evidence of a contract violation and the Union's last ditch effort to continue to harass the Respondent with its request for information. However, this reformulation illustrates just how conniving Anderson could be. Anderson wanted to know two things: 1). What is the system for assignment of drivers? and 2). What documents does the Company have regarding assignments? This system was negotiated with Boysen Anderson. The procedure was designed with Boysen Anderson's suggestions, which include that the procedure would be set out in a "Letter of Agreement" (TR 109-119 and 169-176; and Judge Carson's Decision, pages 2 and 3). Anderson was asked if all loads IronTiger, TruckMovers or others should be placed on the kiosk and Anderson's response was just IronTiger loads. How many loads are assigned to IronTiger is based on a restriction from the customer to TruckMovers. Only some of the loads can be assigned to IronTiger and Anderson knew this and it is why the "Letter of Agreement" was negotiated in the first place. The "Letter of Agreement" discussed above is an unqualified

right of the Respondent to assign loads to the IronTiger kiosk. The CBA simply provides, “The parties hereto agree that loads not appearing on IronTiger Logistics drivers’ kiosk are not IronTiger Logistics loads and will be moved by carriers other than IronTiger Logistics. . .” The Union’s lack of any evidence of a CBA violation and their inconsistent positions further illustrate its request and Anderson’s conduct to block bargaining was made in bad faith and was harassment and demonstrates just how far Anderson would go in harassing the Respondent.

VI. THE CASES RELIED UPON BY JUDGE CARSON ARE ALL DISTINGUISHABLE. EACH CASE DOES NOT FIND THAT THE REQUESTED INFORMATION IS IRRELEVANT BUT RATHER RELEVANT. NOT ONE CASE FOUND THAT RESPONDENT BARGAINED IN BAD FAITH BECAUSE THE RESPONDENT SHOULD HAVE AT LEAST TOLD THE UNION EARLIER THAT ITS REQUEST WAS IRRELEVANT AND HARASSMENT. NOT ONE OF THE CASES ILLUSTRATED THAT, LIKE ANDERSON WHO BLOCKED BARGAINING FROM EVER HAPPENING, RESPONDENT VIOLATED THE ACT. THERE IS NO SUCH LEGAL OBLIGATION AND AGAIN EACH CASE CITED BY JUDGE CARSON FINDS THE REQUESTED INFORMATION WAS RELEVANT AND THE RESPONDENT IN THESE CASES DID NOT DEFEND ITS ARGUMENTS WITH EVIDENCE. FURTHER, THE “ALL OF THE FACTS AND CIRCUMSTANCES” TEST OF *TRUITT* MAKES THESE CASES DISTINGUISHABLE AND WHEN READ ARGUABLY SUPPORTS RESPONDENT’S POSITION.

Each case cited by Judge Carson is distinguishable. Those cases all find that the underlying claim had merit and the requested information was relevant. Because the requests were relevant, none of these cases had to discuss the “all of the facts and circumstances” test of *Truitt*. In the cases discussed below the Board and the Administrative Law Judges ask hypothetical questions that suggest that respondents could have proved more as IronTiger did here. Further, arguable for that reason these cases support Respondent’s argument. Further, in each of these cases where they found the information was relevant, if, however it was litigated at the hearing and found not relevant, what legal penalty would attach if each of these respondents waited until the time for trial to prove irrelevancy? None. While each respondent would have

answered the Regional Offices' Complaint, if the first time the Respondent raised the relevancy argument what legal sanction would these respondents be given? None. Why? There is no harm or prejudice because none can be proven if the information request is found to be irrelevant!

Judge Carson cites *Daimler Chrysler Corp.*, 331 NLRB 1324, 1329 (2000). *Daimler Chrysler* is not precedent for this case and it is distinguishable. In *Daimler*, the majority of the Board found the information request was relevant and there was no analysis or discussion of whether a delay in responding to the union's request was lawful or unlawful. The facts are not at all comparable. In *Daimler Chrysler* the judge's decision cited by Judge Carson does not support his conclusion and, possibly, arguably supports the opposite conclusion. In *Daimler*, the judge, at the cited page of Judge Carson, reviews numerous information requests. See *Daimler*, 331 NLRB, 1324, 1329 (2000) (again, as cited by Judge Carson). The first information request review by Judge Amcham at page 1329 finds, ". . . Chrysler has made no effort to rebut this presumption other than argue that these requests are not relevant to the grievance pending before the parties' Appeals Board. There has been no showing that these information requests are irrelevant or that the new grievances are obviously without merit." 331 NLRB at 1329.

This statement could be interpreted to support the opposite finding in this case because opposite of what Judge Amcham determined, if the Respondent did establish irrelevancy, as we did here, and if there had been a showing, as there is here, that the information is irrelevant and the grievance was obviously without merit, the opposite conclusion would be appropriate. To add to this, Judge Carson himself and his questioning of the Union made it conclusive that the Union's grievance was obviously without merit (TR 44-45). *Daimler* supports the opposite conclusion here, that a violation of Section 8(a)(1) and (5) did not occur. Judge Amcham at page

331 NLRB at 1324 goes on to find other information requests were ignored. Judge Amcham found, “. . . Chrysler ignored the request and failed to provide the information. At the hearing and in its brief, the company offered no defense for not providing the requested information. . . .” Judge Amcham reviewed additional information requests but it appears that Chrysler simply ignored the union’s request and did not or could not prove irrelevancy. The discussion in *Daimler* does not establish the “per se” rule of law that irrelevant information has to be responded to but, rather, Respondent can wait even at the time of the trial of this issue to establish the requested information was irrelevant. Judge Carson found the information request was not relevant and if you consider all of the facts and circumstances, which include Anderson’s blocking the process of good faith bargaining and no prejudice, there is no violation of Section 8(a)(1) and (5).

Judge Carson’s citing of *Columbia University*, 298 NLRB 941, 945 (1990) is also distinguishable. *Columbia* involved subpoenas served during interest arbitration, which the Board believed was a continuation of the negotiation process. The information request was determined to be relevant and the issue of relevancy was not litigated. The employer sought to quash the subpoenas in arbitration and the employer’s motion was denied and the sole issue was not a delay of a response it was the failure to provide relevant information.

Also, *Ellsworth Sheet Metal*, 232 NLRB 109 (1977), is distinguishable because there was no question that the information was relevant and, as the Board found, that Respondent argued it had no obligation to provide the information. The Board held, “Respondent adduced no evidence in support of this contention at the hearing. Accordingly, we find this contention lacking in merit.” See 23 NLRB 109 at ft. 3. IronTiger has presented evidence to which Judge Carson found the IAM’s request for information was irrelevant. That finding distinguishes

Ellsworth and all of the other cases relied upon by Judge Carson to find a Section 8(a)(1) and (5) violation.

Judge Carson also cites *Beverly California Corp.*, 326 NLRB 153, 157 (1998) and, specifically, page 157 regarding a Section 8(a)(1) and (5) violation for failure to provide information upon the union's request. The Board's decision in *Beverly* is distinguishable. First, the information request was found to be relevant because it involved information specific to a union member's discipline and there was a pending grievance. Here, as in all other cases, arguably they support Respondent's position. First, it is proven that the information request here was irrelevant and, secondly, the evidence demonstrates that the underlying grievance had been forfeited under the CBA and there was no grievance pending when the IAM made its request for information on May 11, 2010.

The IAM sought the information based on its grievance and after that same grievance was forfeited when it made its request for information. Therefore, the IAM was seeking information on a non-existing dispute. Both Judge Carson's finding of irrelevant information and the fact that the grievance no longer existed distinguish our case from *Beverly* and, as stated, could arguably support Respondent's exceptions.

Again, in *Interstate Food Processing*, 283 NLRB 303 (1987), as cited by Judge Carson at 283 NLRB, 304 at fn. 9 (1987), this case is as well distinguishable. The underlying information requested seniority information. The request was not contested and it was found relevant. The only issue was did the employer's failure to respond because of the ambiguous wording of the request violated the law. Affirming Judge Johansen, the Board concurred by quoting the Judge:

The judge concluded that Respondent "violated Section 8(a)(5), notwithstanding the ambiguity of the Union's request." He noted that imprecision in the wording of an information request does not entitle an employer to ignore the request, e.g., *Postal Service*, 276 NLRB 1282, 1287 (1985), 283 NLRB at 304.

Here, Anderson's information request was found not relevant and the delayed response should not be a violation of Section 8(a)(1) and (5). Further, in *Interstate*, the employer admitted it was not aware of an ambiguity until the hearing and had previously thought the information was to be given the union. The Board determined that the employer thought the ambiguity was not important or material. 283 NLRB at 305.

In *Interstate*, unlike the facts here, the employer in *Interstate* “. . . gave no explanation for not complying with the Union's initial requests. . . [B]elated compliance, which occurred after issuance of the unfair labor practice complaint, can not retroactively cure the unlawful refusal to supply the information. *U.S. Gypson Co.*, 200 NLRB 305, 308 (1972). See also *Postal Service*, 276 NLRB at 1288.” Here, on September 27 IronTiger told the Union it's requesting irrelevant information and its request was harassment. The Regional Director merely said the May 11th request was being investigated (Respondent's Exhibit 1). The Complaint in this case was not served for almost three months after the Respondent's September 27 answer, or on December 22. Again, it is arguable that *Interstate* supports Respondent's case here, not Judge Carson's decision.

As in all the cases relied upon by Judge Carson, each finds the requested information was relevant and there was some prejudice to the union for the employer's failure to respond. Not so here and, when “all of the facts and circumstances” are considered, including Anderson's blocking of bargaining, IronTiger did not bargain in bad faith; the information requested was irrelevant, no complaint was issued until three months after Respondent told the Union and the Regional Director that the information was irrelevant and the request was harassment and the evidence demonstrates Anderson's harassment and it follows that the Union was never harmed or prejudiced from “all of the facts and circumstances” test of *Truitt*.

VII. THE TIME BETWEEN THE REQUEST OF MAY 11 AND RESPONDENT'S ANSWER ON SEPTEMBER 27 THAT THE INFORMATION WAS IRRELEVANT AND THE REQUEST ITSELF WAS HARASSMENT IS NOT BAD FAITH BARGAINING AS FOUND BY JUDGE CARSON BECAUSE THERE CAN NOT BE AND THERE WAS NO HARM OR PREJUDICE TO THE UNION DURING THIS FOUR-MONTH PERIOD.

As stated above, the Union's request was made in bad faith and it failed to itself bargain in good faith regarding the grievance and the request for information by not meeting and not giving even one example of a violation of the CBA after Respondent made at least six (6) requests. What difference does it make that Respondent waited until September 27 and it did not respond on May 12, one day after the request for information of May 11, to tell Anderson his request was irrelevant and harassment? As previously argued, how was the Union harmed or prejudiced? There never could be a violation of the CBA. The grievance had expired; it was forfeited before the information request, therefore, there was nothing to grieve or arbitrate. Regardless of when the Respondent answered the May 11 request the information requested was itself still irrelevant. Considering "all of the facts and circumstances", how does the need to respond before September 27 make the September 27 response an unfair labor practice or establish that Respondent bargained in bad faith? Everything remained the same from May 11 to September 27 and through to the trial of March 28, 2011; the request was still seeking irrelevant information.

Evaluating all of the facts and circumstances here, the investigation was merely ongoing as of September 27. On the same day Respondent answered the Union's request the Union withdrew its April 12 request (Respondent's Exhibit 1).

“. . . This is to advise that with my approval an allegation in the above-referenced charge has been withdrawn as follows:

. . .

Further processing will continue on the remaining allegation of the charge concerning the information request dated May 11, 2010 and resubmitted to the Employer on July 30, 2010. . .”

Therefore, Respondent’s answer was given to the Regional Director, Martha Kinard, and Anderson on September 27, the same day Ms. Kinard said that “Further processing will continue on the remaining allegations of the charge concerning the information request dated May 11, 2010. . .” If further investigation or processing of the charge was ongoing, what prejudice is there and what is the big deal about not responding earlier when it took Ms. Kinard another three months before she issued her Complaint on December 22? None!

Also, approximately 65 days after the September 27 notice to further investigate and Respondent’s answer to the request for information, the IAM filed an amended charge on December 1, which states:

“Since on or about May 11, 2010, the above-named employer, through its officers, agents, and/or representatives has unlawfully delayed in providing information to its employees’ exclusive collective bargaining agent that is relevant and necessary to the fulfillment of that bargaining agent’s statutory role.”

(General Counsel’s Exhibit 1(e) dated December 1).

This charge changes the case from one of refusal to furnish information to now a mere delay in responding to the Union’s request for information. However, 65 days earlier the Respondent did answer the Union’s request. What is truly instructive here is that from May 11 through the trial here, on March 28, 2011, no information was ever given to the Union regarding its requested information and the Judge, the Union, the General Counsel and, I assume, Regional Director Kinard, agree that the Respondent has satisfied the Union’s information request (TR 8-9). All that Respondent did was instruct the Union that the Union already knew all along: assignments were properly made. That’s why at trial the General Counsel merely told Judge Carson that the September 27 answer was a mere delay, not that Respondent owed any information to the Union

or Board (Judge Carson's Decision page 6, lines 45-52 and page 7, line 1). Everyone agrees that no information need be given. Again, what difference does it make that the Respondent answered the IAM's request on September 27 and not on May 12? None.

In *Union Carbide Corp.*, 275 NLRB 197 (1985) the Employer's delay by 10 months to respond was not an unfair labor practice and respondent did not bargain in bad faith because there was no prejudice. The Board's decision in *Union Carbide Corp.* at 275 held:

“. . . This lack of candor on the part of Respondent does not, however, alter the conclusion that there is no showing that Respondent was in any way dilatory in its actual handling of the request. Accordingly, in view of the above and in the absence of any evidence that the union was prejudiced by the delay, I recommend that this complaint allegation be dismissed.”

275 NLRB at 201.

If the “all of the facts and circumstances” test of *Truitt* have any meaning, the Respondent, in its September 27 answer, did not refuse to bargain in good faith, it was just responding to the reality of the situation saying the request was irrelevant and harassment and there was no prejudice nor could there be because everyone agrees that the Respondent satisfied the May 11 request without giving the Union any information requested on May 11. Further, the May 11 request for information was as irrelevant then as it is today.

Likewise, and in another case, a four month delay is not an unfair labor practice where there is no prejudice. *U.S. Postal Service*, 341 NLRB 655 (2004). Citing *Union Carbide Corp.*, 275 NLRB 197, 201 (1985), the ALJ held there was no unfair labor practice because there was no prejudice. He stated:

“. . . Arguing that Respondent's delay was unreasonable, counsel for the General Counsel points out that the delay was in excess of four months, that the requested information was “fairly simple,” and that Respondent easily could have compiled all the information in as little time as a week. Assuming a contrary view, counsel for Respondent contends that there is no evidence that the Local Union suffered any prejudiced by the delay herein and that, as Wing never contacted Perez

regarding the material, her own “lack of diligence” contributed to the delay. Having considered the matter, I find that, while Respondent’s delay in providing the casual employees’ dates of hire to the Local Union arguably may have been unreasonable, there is no record evidence that Respondent acted in a bad faith, dilatory manner. Moreover, there exist no pending grievances for which the requested information was essential or immediately required, the Local Union acted with deliberate speed in analyzing the information once it was provided by Respondent; and Wing never communicated with Perez as to the reason for the delay. In these circumstances, I agree with counsel that, in the absence of any prejudice to the Local Union caused by Respondent’s delay, I shall recommend that this complaint allegation be dismissed.”

In both *Union Carbide Corp.* and *United States Postal Service*, the request for information was found to be relevant. Here the information, as found by Judge Carson, was irrelevant, giving more definition to a finding that there was, nor could there be, harm or prejudice and that IronTiger violated the law by bargaining in bad faith. It didn’t! The requested information was not relevant on May 11, September 27 and at the trial on March 28, 2011 and, by definition, irrelevant information can not be prejudicial and, likewise, telling someone it was irrelevant is, by definition, not prejudicial nor is it bad faith bargaining not to do so, particularly with evidence of Anderson’s bad faith in seeking admitted “bullshit” and the uncontroverted threat to retaliate and make “life hell” and destroying “labor peace.” Again, because Anderson blocked the bargaining process from its inception, IronTiger can not be found to have bargained in bad faith to this non-existent process, made possible by Anderson’s manipulations.

CONCLUSION

Judge Carson finds that the Charging Party, specifically Boysen Anderson, was making a request for irrelevant information. Judge Carson, however, did not review “all of the facts and circumstances” to conclude that Respondent bargained in bad faith. If Judge Carson had reviewed “all of the facts and circumstances,” he would have found the following: Anderson was motivated to harass the Respondent, which he admitted he would do; Anderson’s bad faith

request and harassment was based in part on the degree of irrelevancy; Anderson provided no information of even a suspicion of a CBA violation; Anderson refused to tell anyone why the CBA was violated and even at the trial he did not or could not; Anderson refused to meet; Anderson sought to rescind the CBA at two locations; Anderson admitted threatening to strike on or after May 13, almost simultaneously with his May 11 request for information, resulting in the Section 8(b)(3) violation; and, finally, Anderson also agreed his requested information was “bullshit.” What more should the employer do legally to avoid being called a law violator? IronTiger is not a law violator; it tried to bargain in good faith but was faced with Anderson’s blueprint and strategy to retaliate and harass the Respondent with bad faith requests. Bargaining never occurred because it was Boysen Anderson who refused to negotiate; he barricaded and foreclosed the process from its inception. If we allow Judge Carson’s decision to stand without a review of “all of the facts and circumstances”, bad actors, like Boysen Anderson, will continue to make a mockery of the Act ‘s requirement for mutuality and the need to meet and confer in “good faith,” something Anderson believes he can ignore. We respectfully ask that the Complaint herein be dismissed.

Dated at Milwaukee, Wisconsin, this 2nd day of June, 2011.

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

IN THE MATTER OF:

IRONTIGER LOGISTICS, INC.,

Respondent

and

Case 16-CA-27543

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,**

Charging Party

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 2, 2011, a copy of Respondent IronTiger Logistics, Inc.,'s Brief In Support Of Respondent's Exceptions To The Decision And Order Issued By Judge George Carson II was electronically filed using the E-Filing system of the National Labor Relations Board's website, and served in the same manner as that utilized in filing with the Board, on the following individuals listed below:

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