

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

IRONTIGER LOGISTICS, INC.

Respondent

and

Case 16-CA-27543

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

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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COMES NOW Counsel for the Acting General Counsel, pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and files this Answering Brief to Respondent's Exceptions and Brief in Support of Exceptions (herein Exceptions) to the Decision and Recommended Order of the Administrative Law Judge.

The Honorable Administrative Law Judge George Carson II heard this case on March 28, 2011. On May 6, 2011, the Judge issued his recommended Decision and Order. In his Decision and Order, the Judge correctly found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to timely respond to the Union's information request. The recommended Decision and Order requires Respondent to post and e-mail a notice to employees.

Respondent filed twelve Exceptions to the Judge's finding of facts, conclusions of law and recommended remedy. This Brief addresses Respondent's Exceptions.

Section I contains a statement of material facts, and Section II contains specific points of fact in record evidence and case law that support the Judge's findings and conclusions with regard to Respondent's Exceptions. Counsel for the Acting General Counsel submits that the Judge's decision is fully supported by the credible record evidence and case law and urges the Board to adopt the Judge's decision with respect to the Exceptions filed by Respondent.

I. STATEMENT OF FACTS

Respondent is a Missouri corporation engaged in the transportation of new vehicles from production lines to various locations across the country. [JD slip op. at 1, 2.]¹ Respondent employs about 100 employees at four terminals located in Dublin, Virginia; Macungie, Pennsylvania; Springfield, Ohio; and Garland, Texas. [JD slip op. at 2.] Tom Duvall is Respondent's president and owner. Duvall also owns TruckMovers, a non-union company similarly engaged in the transportation of vehicles from production lines. [JD slip op. at 2, Tr. 108, 131.]

In 2008, Respondent recognized the Union pursuant to a card check and then signed a National Master Agreement with the Union, effective September 27, 2008 until September 30, 2011, for the Dublin, Virginia location. The parties subsequently executed letters of agreement extending the National Master Agreement to the Respondent's locations at Macungie, Springfield, and Garland. [JD slip op. at 2, GC Exh. 2.] The bargaining units at each of the four locations include all yard drivers, shop workers, utility workers, and drivers. [JD slip op. at 2.]

¹ References are as follows: JD slip op. for judge's decision, Tr. for transcript, GC Exh. for General Counsel exhibits, R. Exh. for Respondent exhibits.

Boysen Anderson is the Union's coordinator in the automotive department. He negotiated the National Master Agreement (herein contract) and the letters of agreement on behalf of the Union. [JD slip op. at 2, Tr. 28-29.] Tom Jones is Respondent's attorney and primary spokesman in the negotiation and administration of the National Master Agreement and the letters of agreement. [JD slip op. at 2, Tr. 32, 167-168, 201.]

On March 16, 2010,² Anderson by e-mail informed President Duvall of the Union's concern that the company was violating the contract by not placing all available loads on the IronTiger drivers' dispatch board. [JD slip op. at 3, R. Exh.10.] The Union suspected Respondent was violating the contract by outsourcing IronTiger Logistics work and giving it to non-bargaining unit employees of TruckMovers. The Union's suspicion was based on employee complaints to Anderson, Union representative Mark Hammond, and Union stewards that loads were being taken off of the IronTiger dispatch board and given to TruckMovers. [Tr. 99-100.] On March 29, Anderson filed a grievance with Respondent about this alleged contract violation. [JD slip op. at 3, GC Exh. 4.] The Union previously filed similar grievances with Respondent, which resulted in Respondent admitting that it had taken loads off of the IronTiger Logistics dispatch board and assigned them to TruckMovers drivers. [JD slip op. at 6, Tr. 34-35, R. Exh. 2.]

On April 12, Anderson by e-mail sent Duvall an information request seeking information necessary to investigate the Union's March 29 grievance. On April 21, Anderson by e-mail resubmitted the April 12 request to Duvall, and on May 7, Duvall e-mailed Anderson a response. [JD slip op. at 4, Tr. 33-35, GC Exh. 3.]

After reviewing Duvall's May 7 response, Anderson shared the information with IAM representative Mark Hammond who, in turn, shared it with Union stewards charged

² All dates are in 2010 unless otherwise noted.

with monitoring the suspected outsourcing of work. The Union concluded Respondent's May 7 response was vague and that further information was necessary to fully investigate the grievance. [Tr. 40-41.] On May 11, in order to continue investigating the grievance, Anderson e-mailed a new information request to Duvall seeking different items than those included in the prior request. [JD slip op. at 5, Tr. 41, GC Exh. 6.] Anderson copied Respondent's attorneys Tom Jones and Thomas Krukowski with the May 11 information request. [GC Exh. 6.]

On July 30, after the Union did not receive a response to the May 11 information request, Anderson by e-mail resubmitted it to Duvall again copying Jones and Krukowski. [JD slip op. at 5, Tr. 46-47, GC Exh. 6.]

Respondent failed to respond in any manner to the information request until September 27, 2010 – more than four months after the initial request. [JD slip op. at 5, Tr. 47-48, GC Exh. 7.] Respondent's two-page response did not offer any explanation for the delay in responding. [Tr. 47-48.]

II. RECORD EVIDENCE AND LEGAL AUTHORITY FULLY SUPPORT THE JUDGE'S CONCLUSIONS AND FINDINGS

Respondent filed twelve Exceptions to the judge's finding of facts, conclusions of law and recommended remedy. This Section discusses why Respondent's Exceptions are procedurally defective and how the Judge's decisions to which Respondent objects are fully supported by the record evidence and case law.

A. Respondent's Exceptions are Procedurally Flawed and Should be Disregarded

Counsel for the Acting General Counsel asserts that Respondent's Exceptions are procedurally defective and should be disregarded in all respects.

Section 102.46(b)(1) of the Board's Rules and Regulations requires that:

[e]ach exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Although Respondent identifies the parts of the judge's decision to which objections have been made, the Exceptions do not state the questions of procedure, fact, law or policy corresponding with each Exception. Nor do the Exceptions cite to any portions of the record or state the grounds for the Exception.

Further, Respondent's Brief in Support of Exceptions does not comply with Section 102.46(c) which provides that:

[a]ny brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following: (1) [a] clear and concise statement of the case containing all that is material to the consideration of the questions presented[;] (2) [a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate[; and,] (3)[t]he argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

Respondent's Brief does not provide a clear statement of the case, and the issues argued in the Brief fail to reference any specific Exceptions. Instead, the Brief is general in nature. Accordingly, Counsel for the General Counsel contends Respondent's Exceptions and Brief in Support of Exceptions are procedurally defective and urges the Board to disregard such in their entirety.

B. Respondent's Exceptions to Factual Findings and Legal Determinations are Unfounded and Should be Disregarded

Counsel for the Acting General Counsel further submits that Respondent's Exceptions to the Judge's factual findings and legal determinations are substantially unfounded as such determinations are fully supported by the credible record evidence and case law.

1. Respondent Had a Duty to Respond

The Judge correctly applied Board law to the facts in the case, and the Decision should, therefore, be affirmed in full.

It is well-settled that an employer, as part of its duty to bargain, must provide information that is potentially relevant and of use to the union in fulfilling its duties as representative, which includes the processing of grievances and policing of the contract. *Acme Industrial Co.*, 385 U.S. 432 (1967). A union can make an information request in order to determine whether or not to file a grievance or to further process a grievance. *Island Creek Coal Co.*, 292 NLRB 480 (1989), citing *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). Moreover, an employer's duty to bargain regarding information requests exists even where no grievance procedure is in place. *Wackenhut Corp.*, 345 NLRB 850 (2005).

Requested information pertaining to bargaining unit employees is presumptively relevant, and the requester does not need to provide an initial showing of relevance. *International Protective Service, Inc.*, 339 NLRB 701 (2003) and *Hofstra University*, 324 NLRB 557 (1997). Rather, the burden to justify a failure to produce presumptively relevant information is on the non-requester who must rebut the presumption of relevance. *Contract Carriers Corp.*, 339 NLRB 851, 858 (2003).

Where an information request is not specifically limited to bargaining unit employees and could encompass non-unit employees as well, the employer is not excused from responding. *Streitcher Mobile Fueling*, 340 NLRB 994 (2003). Board law is clear that “[A]n employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification or comply with the request to the extent that it encompasses necessary and relevant information.” *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004), *enfd.* 401 F.3d 282 (5th Cir. 2005); *Gruma Corp.*, 345 NLRB 788 (2005); *Azabu USA (Kona) Co.*, 298 NLRB 702 (1990). As *Columbia Univ.*, 298 NLRB 941, 945 (1990), citing *Ellsworth Sheet Metal*, 232 NLRB 109 (1977), makes clear, “[A]n employer must respond to a union’s request for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time. Failure to make either response in a reasonable time is, by itself, a violation of Section 8(a)(5) and (1) of the Act. Some kind of response or reaction is mandatory.” [Emphasis added.]

Respondent does not dispute that the Union’s May 11 request relates to bargaining unit employees – namely, IronTiger drivers. [Tr. 133-134]. Respondent also does not dispute that it failed to respond at all to the request until September 27, more than four months after the request and despite the fact that the Union had resubmitted the request on July 30. [Tr. 135-136, 152-153; GC Exh. 6, GC Exh. 7.] This response came more than two months after the July 15 filing of the charge herein. [GC Exh. 1(a).] Not only does Respondent not deny this delay, but it refused to offer the Union any reason for the delay. Furthermore, the fact that the response was a mere two pages in length demonstrates Respondent’s delay was unreasonable. In fact, Respondent only responded

to the information request after being notified by the Regional Director that the Region would be further processing the charge with respect to this information request. [R. Exh. 1.]

Applying the long-established Board precedent to these undisputed facts, the Judge properly found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide a timely response to the Union's information request. Respondent could not simply ignore the information request. Respondent had a duty to respond because the requested information related to unit employees, which is presumptively relevant.³ [JD slip op. at 8.] Respondent was, therefore, obligated to timely respond to the Union's request and explain why it was refusing to provide the requested information. *Daimler Chrysler Corp.*, 331 NLRB 1324, 1329 (2000); *Interstate Food Processing*, 283 NLRB 303, 304 at fn. 9 (1987).

In its Exceptions, Respondent argues that the cases cited by the Judge are distinguishable. First, Respondent asserts *Daimler Chrysler* is distinguishable because the Board found the requested information to be relevant and the issue of delay was not discussed. *Daimler Chrysler*, however, is not distinguishable, and the Judge appropriately relied on it as precedent. Similar to the facts here, the union in *Daimler Chrysler* asked for information pertaining to bargaining unit employees which was presumptively relevant. Meanwhile, the employer, like Respondent, ignored the union's information requests. The judge found, and the Board affirmed, that even if the employer had a viable objection to the information requests, it was still obligated to inform the Union of those objections in a timely fashion because the union was seeking information

³ Although the Judge concluded that the requested information was not relevant to any pending grievance, he noted that the Union requested presumptively relevant information and concluded the Respondent had a duty to respond.

that was presumptively relevant. The fact that the employer in *Daimler Chrysler* ignored the requests indefinitely rather than having delayed in responding to the requests does not make the case distinguishable. Delay is as much of a violation of Section 8(a)(5) as not giving information at all. *Northwest Graphics*, 342 NLRB 1288 (2004).

Respondent similarly argues that *Columbia University*, supra, and *Ellsworth Sheet Metal*, 232 NLRB 109 (1977), are distinguishable because the requested information was found to be relevant and the failure to provide information, not delay, was in issue. However, in both cases, at least some of the information requested concerned bargaining unit employees and was, therefore, presumptively relevant. The issues of delay and a refusal to provide information were both addressed by the judge in *Columbia University*. As discussed above, unreasonable delay in response and a failure to provide information are equally violations of Section 8(a)(5). Furthermore, in *Columbia University*, the employer, like Respondent, argued unsuccessfully that it was not obligated to furnish the requested information because the request was made in bad faith.

Contrary to Respondent's contentions, *Beverly California Corp.*, 326 NLRB 153 (1998), was also appropriately applied to this case. In *Beverly California Corp.*, the union requested, *inter alia*, evidence relating to the suspension and termination of a bargaining unit employee. After the employer failed to respond to the request for a month, the union filed a Board charge. The employer then provided a response to the request a month later. The Board found the employer's two-month delay violated Section 8(a)(5) because the "[employer's] belated compliance, after the unfair labor practice charge was filed, did not retroactively cure the unlawful refusal to supply the

information.” *Beverly California Corp.*, 326 NLRB at 157.⁴ Similarly, in the instant case, the Union’s request pertains to bargaining unit employees, and Respondent failed to respond for more than two months after the charge was filed and more than four months after the initial request.

2. Respondent’s Unreasonable Delay Prejudiced the Union

In its Exceptions, Respondent argues it did not violate Section 8(a)(5) because there was no prejudice to the Union. However, by failing to respond for more than four months and/or explain the reason for its refusal to furnish the requested information, Respondent’s conduct prejudiced the Union because the Union was not given the opportunity to bargain over the information request and/or explain the relevance of the requested information. Board law shows that Respondent’s delay in responding did, in fact, prejudice the Union and the Judge’s finding of a violation was well-founded.

For example, in *In re Summa Health System, Inc.*, 330 NLRB 1379 (2000), the Board found unlawful the employer’s delay of two months in responding to a request for information related to whether bargaining unit work was being performed by non-unit employees. As in this case, the delay was also unexplained to the union. Even though there was no evidence of non-unit performance of bargaining-unit work, the Board affirmed the judge’s finding that the delay prevented the union from determining the merit of their concern and, therefore, prejudiced the union.

Respondent cites *Union Carbide Corp.*, 275 NLRB 197 (1985) and *U.S. Postal Service*, 341 NLRB 655 (2004) in support of its contention that Respondent’s delay did not prejudice the Union. In *Union Carbide Corp.*, the judge examined the

⁴ Respondent incorrectly substituted the word “complaint” for the word “charge” in this citation which was inaccurately attributed to *U.S. Gypsum Co.*, 200 NLRB 305 (1972).

reasonableness of the employer's 10-1/2 month delay in furnishing requested health and safety information. The judge noted that within days of the information request, the employer started the time-consuming process of gathering the requested data which continued without interruption for 10 months. In light of the volume of information requested and the evidence that the employer diligently gathered this information over the course of 10 months, the judge found the delay to be reasonable. The judge cited the absence of any evidence of prejudice to the union to support his finding. These facts are clearly distinguishable from the instant case because Respondent simply ignored the Union's request for more than four months and made no effort to diligently compile the requested information or timely respond with the reason for its refusal to comply.

Contrary to Respondent's assertion, in *U.S. Postal Service*⁵, the judge did not find a lack of prejudice to the union. Rather, the Board affirmed the judge's findings of violations due to unreasonable delay where the employer failed to provide the union an explanation for the two-month delay.

3. The Union's Information Request Was Made in Good Faith

In his decision, the Judge fully considered and correctly discounted Respondent's assertion that its failure to respond should be excused because the Union's information request was a form of harassment. JD slip op. at 7. Respondent's defense of harassment is largely premised on an alleged statement about "labor peace" made by Anderson on or about March 24. Disagreeing with Respondent's arguments, the Judge pointed to Respondent's failure to claim harassment when responding to an earlier information

⁵ Respondent incorrectly attributed *U.S. Postal Service*, 341 NLRB 655 (2004), with the quote found on page 46 of its Brief in Support of Exceptions. The quote is actually found in an unpublished opinion – *U.S. Postal Service*, 20-CA-31473 (2004), where the employer did furnish the requested information and the judge found the union's lack of diligence contributed to the delay.

request dated April 12. The Judge appropriately relied on the fact that the Union had communicated its concern about the placement of loads on the IronTiger board well before the March 24 meeting. [JD slip op. at 7, R. Exh. 10.] In fact, Respondent had processed many grievances filed by the Union well before this alleged statement was made, and Respondent had never asserted that these grievances were attempts at harassment. [Tr. 179.]

During the hearing, Respondent similarly contended that the Union harassed Respondent by filing numerous Board charges. The Judge asked Respondent if it was going to cite case law to support its contention and Respondent stated it would. To date, Respondent has failed to cite any case law in support of this contention. [Tr. 198-200.]

The Judge also fully considered Respondent's argument that the Union, in severed Case 16-CB-8084, held a position that no contract existed at the Garland and Springfield terminals. The Judge appropriately found that any such position had no bearing on his finding that Respondent had a duty to respond.⁶ [JD slip op. at 7-8.]

Contrary to Respondent's arguments, the Board presumes that a union's request for information is made in good faith until the employer can demonstrate otherwise. *Columbia Univ.*, 298 NLRB at 945, citing *O&G Industries*, 269 NLRB 986, 987 (1984). The good-faith requirement is met if "at least one reason for the demand can be justified." *AK Steel Corp.*, 324 NLRB 173 (1997). Anderson testified that the Union made the May 11 information request to further investigate the March 29 grievance and police the collective-bargaining agreement. [Tr. 41] The Judge acknowledged the May 11 request

⁶ It is undisputed the Union continued as bargaining representative at all four terminals, and Respondent admitted it operated under the belief that a collective bargaining agreement existed at all four terminals. Respondent also admitted it never responded to the May 11 request and asserted the parties had no collective bargaining agreement. [Tr. 152-153, 202.] Even if the parties had no collective bargaining agreement in place, Respondent still has an affirmative duty to respond to information requests when the Union is the bargaining representative. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

related to the March 29 grievance. [JD slip op. at 7.] Although the Judge ultimately found that the request was not relevant due to the precise wording of the March 29 grievance, the Union, nevertheless, met the good-faith requirement by articulating the need for the requested information. *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788 (2001). The mere assertion of harassment is insufficient to overcome the presumption of good faith accorded to the Union.

The instant case is factually distinguishable from *NLRB v. Wachter Construction*, 23 F.3d 1378 (8th Cir. 1994), cited by Respondent, in which the court reversed and denied enforcement of the Board's order to comply with information requests on the grounds that the information requests were made in bad faith.⁷ There, letters from union officials unequivocally stated that their motive in requesting the information was to harass the employer into contracting only with unionized contractors. Further, the union had not filed any prior grievances or made any complaints to put the employer on notice about a concern regarding contract violations. Also, the union was seeking information that was not in the employer's possession but instead in the control of independent subcontractors. *Id.*

In the instant case, on the other hand, the Union communicated its concern by e-mail to Duvall about a potential contract violation on March 16,⁸ and then filed the grievance on March 29. The requested information is in Respondent's control, not in the possession of an independent, unrelated entity. Lastly, the record is void of any evidence that the Union was seeking to harass Respondent with this information request.

⁷ The Eighth Circuit court applied a different standard than the Board to determine good faith.

⁸ This March 16 e-mail (R. Exh. 10) communicating concern about a contract violation was sent before March 24, when Anderson is alleged to have made a statement about labor peace. (Tr. 137).

Respondent failed to meet its burden of proof here and the Judge appropriately discounted any assertions of harassment by the Union.

4. The Judge Did Not Establish a Per Se Violation But Rather Applied Long-Established Board Precedent to the Material Facts of the Case

In its Exceptions and Brief, Respondent spends an overwhelming amount of time arguing that the Judge established a “per se” violation or improperly applied the concept of a “per se” violation to the facts and circumstances in the case. Respondent’s contentions are unfounded. The Judge did not make a per se finding. Rather, the Judge merely applied long-standing Board precedent that holds an employer cannot simply ignore a union’s request for information. *Daimler Chrysler Corp*, supra. Respondent was obligated to inform the Union in a timely manner of the reasons that it did not believe the information sought was relevant. Some kind of response or reaction is necessary, and Respondent’s failure to make any sort of response within a reasonable time is, by itself, a violation of Section 8(a)(5). *Columbia Univ.*, supra. Respondent’s contentions that the Judge improperly established a “per se” rule or failed to properly consider the facts and circumstances of this case are without merit. The Judge’s Decision addresses all of Respondent’s defenses in his Findings of Fact, and his Conclusions of Law are sound.

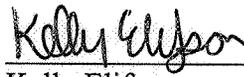
III. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel requests that the Board deny Respondent’s Exceptions in their entirety, affirm the Judge’s findings of fact and conclusions of law and adopt the Judge’s recommended Order in full. To grant Respondent’s Exceptions would mean Respondent was allowed to ignore the Union’s

request for more than four months without providing the Union an opportunity to bargain over the relevance of the requested information.

Dated June 24, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions has been served this 24th day of June 2011, upon each of the following:

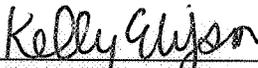
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