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**Michigan Bell Telephone Company and Local 4034,
Communication Workers of America (CWA),
AFL-CIO. Case 07-CA-150005**

January 24, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On December 3, 2015, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On January 10, 2015,² a unit employee warned the Respondent about a possible concerted refusal to work overtime. On January 12, the Union asked the Respondent to provide it with the identity of that employee (the Informant), a description of the information that the Informant provided (the summary), and a list of people to whom the Respondent disseminated that information (the distribution list).³

The judge found that the Respondent rebutted the presumptive relevance of the informant information and therefore dismissed the General Counsel's allegation that the Respondent violated Section 8(a)(5) and (1) by failing to provide the informant information.⁴ The judge also implicitly rejected the General Counsel's allegation that the Respondent unlawfully failed to respond timely to the Union's request for the informant information.

We agree with the judge that the Respondent rebutted the presumptive relevance of the Informant's identity and the distribution list and therefore did not violate the Act by failing to provide that information to the Union. However, we reverse the judge and find that the Respondent did not rebut the presumptive relevance of the summary and thus violated Section 8(a)(5) and (1) by failing to provide it to the Union. We also reverse the

judge and find that the Respondent violated Section 8(a)(5) and (1) by failing to respond in a timely manner to the Union's request for the distribution list.⁵

Facts

The Respondent provides communications services, including telephone, internet, and television services, in and around Grand Rapids and Lansing, Michigan. The Respondent's premises technicians (Prem Techs) are represented by the Union.

The Respondent has had a long-standing dispute with the Union about mandatory overtime. On September 19, 2014, for instance, approximately 400 unit employees engaged in a "family night," a term used by the Union's members to denote a concerted refusal to work overtime. During early January 2015, the Union and the Respondent were negotiating a settlement agreement regarding the September 19 incident. On January 12, the Respondent and the Union reached a settlement agreement, which included discipline of all unit employees who were involved.

Meanwhile, on January 4, the Respondent's Grand Rapids area manager, Mike Ten Harmsel, announced a new mandatory overtime policy under which shifts would automatically be extended until management expressly released the Prem Techs for the day. The next evening, the Union held a general meeting that approximately 40 Prem Techs attended. Some of the Prem Techs were angry about the new mandatory overtime policy, and at least one of them suggested that they should engage in another family night.

On the morning of Saturday, January 10, the Informant apparently told Prem Tech Manager Andrew Maki that a family night could possibly occur that evening. Maki relayed the Informant's tip to Ten Harmsel, who then directed three supervisors to question any Prem Techs who returned to the Respondent's garage without authorization that evening. Nineteen Prem Techs returned without authorization, and the supervisors asked them a number of questions, including whether they were acting individually.⁶ Ten Harmsel and the supervisors ultimately directed the 19 Prem Techs to return to work, but at least 5 of them refused.

Subsequently, the Union's administrative assistant Brian Hooker learned from the Respondent's manager Dionje Evans that the Respondent had acted based on a tip about a potential family night. On the morning of January 12, Hooker called Maki and asked him to dis-

¹ Member Emanuel is recused and took no part in the consideration of this case.

² All dates hereinafter are in 2015 unless otherwise indicated.

³ We will refer to the Informant's identity, the summary, and the distribution list collectively as the "informant information."

⁴ Additionally, the judge rejected the Respondent's confidentiality defense, and no party objects.

⁵ We find it unnecessary to pass on the allegations that the Respondent violated the Act by failing to respond timely to the Union's requests for the Informant's identity and the summary because finding those additional violations would not affect the remedy.

⁶ The Prem Techs indicated that they were acting individually.

close the Informant's identity. Maki told Hooker that he did not feel comfortable doing so, and that he first needed to talk to Ten Harmsel and to ask the Informant for permission. Later that same morning, Hooker emailed Maki to request the summary and the distribution list as well as to repeat his earlier request for the Informant's identity. The Respondent did not respond to the Union's January 12 email.

Between February 17 and 20, the Respondent suspended the five Prem Techs who refused to return to work on January 10 for insubordination.

On February 20, the Union filed a grievance, alleging that the Respondent's conduct on January 10 violated Article 5.02 of the parties' collective-bargaining agreement, which states that if any union employees engage in a prohibited work stoppage "without the authority and sanction of the [Union], the Parties shall cooperate to enable the [Respondent] to carry on its operations without interruption or other injurious effect." The February 20 grievance also included an information request, which, among other things, reiterated the Union's need for the informant information.⁷

The Respondent replied to the February 20 grievance in a March 3 email. Although the Respondent provided some of the information requested on February 20, it refused to provide any of the informant information. The Respondent claimed that the informant information was not relevant because it did not consider the Prem Techs' January 10 conduct to be a concerted job action. Between March 3 and April 13, the Union renewed its request for the informant information on several occasions. The Union repeatedly stated that the informant information was relevant to the February 20 grievance because the events of January 10 occurred as a result of the Respondent acting as if a concerted job action was in progress. The Respondent refused to provide the informant information on each occasion, maintaining that the informant information was not relevant.

At the time of the hearing, the Respondent had not provided the Union with any of the informant information.

Analysis

I. RELEVANCE OF THE INFORMANT INFORMATION

An employer, as part of its duty to bargain, must provide requested information to a union if that information is relevant to the union's duties as the employees' collective-bargaining representative, including the union's grievance-processing duties. See *United Parcel Service*

⁷ Additionally, on March 25, the Union filed grievances regarding the suspensions of the five Prem Techs who refused to return to work on January 10.

of America, 362 NLRB 160, 161 (2015). Information that relates to unit employees' terms and conditions of employment is presumptively relevant. See *id.* at 162. An employer must provide such information unless it rebuts the presumption of relevance or establishes an affirmative defense. See *id.* Applying this precedent, we agree with the General Counsel that the judge erred in finding that the Respondent rebutted the presumption of relevance regarding the summary, but we agree with the judge that the Respondent rebutted the presumption regarding the Informant's identity and the distribution list.⁸

The Union's February 20 grievance alleges that the Respondent's actions on January 10 violated Article 5.02 of the collective-bargaining agreement. The Union interprets the phrase "other injurious effect" in that article to include injurious effects to the Union and its members, not just to the Respondent. Thus, the Union believes that the Respondent violated Article 5.02 by failing to seek the Union's cooperation to deal with the potential family night on January 10, and claims that the Respondent's actions ultimately resulted in injurious effects to the five Prem Techs who were suspended. Thus, to pursue effectively the February 20 grievance, the Union needs to determine both whether the Respondent had information that would trigger its purported obligation to cooperate with the Union and, if so, the steps the Respondent took to comply with that obligation.⁹

The summary is relevant to the Union's evaluation and prosecution of the February 20 grievance because it directly answers the question of what the Respondent knew about the potential for a family night on January 10. However, the Informant's identity and the distribution list are not relevant to the February 20 grievance. Whether the Respondent had an obligation under Article 5.02 to cooperate with the Union does not depend on the identity of the specific employee informant or the identities of the managers to whom the Respondent disseminated the Informant's tip. Further, the Union is already well aware of what steps, if any, the Respondent took to cooperate with it to prevent a family night on January 10, and the Informant's identity and the distribution list would not shed any light on that inquiry.

Thus, we find that the Respondent only violated Section 8(a)(5) and (1) by failing and refusing to provide the summary to the Union.¹⁰

⁸ No party excepts to the judge's finding that the informant information is presumptively relevant.

⁹ The Board does not pass on the merits of an underlying grievance when determining the relevance of a union's request for information. See *United Parcel Service*, 362 NLRB at 162.

¹⁰ We agree with the judge that the informant information is not relevant to the Union's March 25 grievances because the five unit employees were not suspended as a result of the Informant's tip but, in-

II. TIMELINESS OF THE RESPONDENT'S RESPONSE

Under a well-established corollary to the requirement that an employer must provide relevant requested information to a union in a reasonably timely manner, an employer must timely respond to a union request seeking relevant information even when the employer believes that it has grounds for not providing that information. See *Columbia University*, 298 NLRB 941, 945 (1990) (“[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 reasons 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.”).¹¹ The Board considers the “totality of the pertinent circumstances” to determine if an employer has failed to respond in a timely manner to an information request. *Endo Painting Service*, 360 NLRB 485, 486 (2014). Applying those principles, we find that the Respondent violated Section 8(a)(5) and (1) by failing to respond in a timely manner to the Respondent’s request for the distribution list.

As stated above, the judge found that the distribution list was presumptively relevant, and no party excepts to that finding. The Union first requested the distribution list in a January 12 email. The Respondent did not respond to the Union’s request for the distribution list until March 3, which was after the Union had reiterated its request for the distribution list as part of its February 20 grievance. Thus, the Respondent did not respond to the Union’s request for the presumptively relevant distribution list for 7 weeks. The Union’s January 12 information request was neither complex nor burdensome, and no other circumstances even remotely justify the Respondent’s 7-week delay in informing the Union that it did not believe that the distribution list was relevant. Thus, although the Respondent ultimately rebutted the

stead, were suspended for disobeying their supervisors’ direct orders to return to work.

¹¹ See also *A-1 Door & Building Solutions*, 356 NLRB 499, 501 (2011) (employer with legitimate confidentiality defense to disclosure has affirmative duty to respond and seek accommodation); *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004) (if employer believes request is ambiguous or overbroad, it must seek clarification or comply with request to extent it encompasses relevant information), *enfd.* 401 F.3d 282 (5th Cir. 2005), *cert. denied* 546 U.S. 874 (2005); *DaimlerChrysler Corp.*, 331 NLRB 1324, 1329 (2000) (although employer may have had legitimate objections to providing requested information, it was obliged to make those objections known to the union in a timely fashion), *enfd.* 288 F.3d 434 (D.C. Cir. 2002); *Yeshiva University*, 315 NLRB 1245, 1248 (1994) (where employer had information in form not requested by the union, employer was required to so notify the union so that it could modify request).

presumptive relevance of the distribution list and therefore does not have to provide that information to the Union, its unreasonable delay in responding to the Union’s request for that presumptively relevant information still violated the Act.¹²

CONCLUSIONS OF LAW

1. Michigan Bell Telephone Company (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 4034, Communication Workers of America (CWA), AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Failing and refusing to furnish the Union with a description of the information regarding a potential “family night” that the Informant provided to the Respondent on January 10, 2015.

(b) Failing to respond in a timely manner to the Union’s request for a list of people to whom the Respondent disseminated the information that the Informant provided to it on January 10, 2015.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to furnish to the Union in a timely manner a description of the information that the Informant provided to it on January 10, 2015.

ORDER

The National Labor Relations Board orders that the Respondent, Michigan Bell Telephone Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹² In *IronTiger Logistics, Inc.*, 359 NLRB 236 (2012), *affd.* and incorporated by reference 362 NLRB 324 (2015), the Board found a violation in similar circumstances. On review, the United States Court of Appeals for the District of Columbia Circuit “reject[ed] [the employer’s] broad challenge to the Board’s policy requiring an employer to timely respond to a union’s request for information that is presumptively relevant.” *IronTiger Logistics, Inc. v. NLRB*, 823 F.3d 696, 697, 699–700 (D.C. Cir. 2016). However, the court remanded the case to the Board on a different question, and under the particular circumstances presented, the Board decided to vacate its earlier decision. See *IronTiger Logistics, Inc.*, 366 NLRB No. 2 (2018). Today, we reaffirm the principle that an employer has a duty to respond timely to a union’s request for presumptively relevant information, even if the employer ultimately rebuts the presumption of relevance.

(a) Refusing to bargain collectively with Local 4034, Communication Workers of America (CWA), AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(b) Refusing to bargain collectively with the Union by failing to respond in a timely manner to the Union’s requests for presumptively relevant information.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner a description of the information regarding a potential “family night” provided to it on January 10, 2015.

(b) Within 14 days after service by the Region, post at its Grand Rapids, Michigan facility copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 12, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Dated, Washington, D.C. January 24, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in part and dissenting in part.

This case arises out of the Union’s January 12, 2015 request for the identity of a unit employee (the Informant) who apparently warned the Respondent about the potential for a concerted refusal to work overtime (a family night) on January 10, 2015, a description of the information that the Informant provided to the Respondent (the summary), and a list of people to whom the Respondent disseminated the information (distribution list). The General Counsel alleged that the Respondent violated the Act by failing to provide the three items of requested information to the Union and by failing to respond in a timely manner to the Union’s request.

Reversing the judge, my colleagues find that the Respondent should have provided the summary to the Union; I agree, for the reasons offered by the majority. Affirming the judge, however, the majority finds no violation with respect to the Respondent’s failure to provide the distribution list and the identity of the Informant. I disagree. As to the distribution list, I would find the information relevant (again contrary to the majority) and would order production. As to the Informant’s identity, I would find that information relevant (contrary to the majority), and I would order the Respondent to bargain with the Union toward an accommodation of the Respondent’s confidentiality interest with the Union’s need for the information. Finally, reversing the judge, the majority finds that the Respondent’s delay in responding to the union’s information request was unlawful, notwithstanding that the information sought was only presumptively relevant. I concur in finding the violation, based on the Respondent’s unreasonable delay, although I view the requested information as actually (not just presumptively) relevant.¹

¹ If the information had been only presumptively relevant, I would still agree with the majority’s application of *IronTiger Logistics, Inc.*, 359 NLRB 236 (2012), affd. and incorporated by reference 362 NLRB

Contrary to the majority, I would find that both the distribution list and the identity of the Informant (and not just the summary) were relevant to the Union's February 20, 2015 grievance, which alleges that the Respondent failed to comply with Article 5.02 of the parties' collective-bargaining agreement on January 10, 2015. Given the broad standard of relevance that the Board applies, the Informant's identity and the distribution list are relevant to the February 20 grievance because disclosure of that information would allow the Union to attempt to question the Informant and the people on the distribution list to verify the accuracy of the summary. Accordingly, I would order the Respondent to provide the distribution list to the Union.

As to the identity of the Informant, however, a finding of relevance does not resolve the ultimate issue because, the Respondent timely raised and (contrary to the judge) established a confidentiality interest in the Informant's identity.² When the Union's administrative assistant Brian Hooker asked the Respondent's manager Andrew Maki to disclose the Informant's identity during a January 12, 2015 telephone conversation, Maki said that he did not feel comfortable doing so, and that he first needed to talk to the Respondent's Grand Rapids area manager Mike Ten Harmsel and to ask the Informant for permission. It "would be naïve to deny any latent possibility of retaliation against," or harassment of, an informant whose tip ultimately led to the suspension of fellow union employees. See *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999). Here, union official Hooker essentially acknowledged such a possibility. He testified that he told only the Union's stewards about the existence of the Informant. He did not want the general membership to know, in part, because he wanted to avoid a conflict between the members and the Informant. Additionally, in a January 12 email, Hooker warned the Union's stewards to not "[go] off the deep-end on anyone," in regard to the existence of the Respondent's "pets/rats," a clearly derogatory reference to the Informant.

324 (2015), remanded 823 F.3d 696 (D.C. Cir. 2016), vacated 366 NLRB No. 2 (2018).

² As my colleagues observe, the Respondent did not cross-except to the judge's alternative finding that its confidentiality defense lacks merit. Although the Board only infrequently addresses a judge's findings in the absence of exceptions, I would do so here because the confidentiality interest at stake belongs not just to the Respondent, but also to the Informant, a nonparty, and because the confidentiality issue was fully litigated at the hearing. See generally *Golden Stevedoring Co.*, 343 NLRB 115, 116 fn. 4 (2004) ("It is well established that '[e]ven absent an exception, the Board is not compelled to act as a mere rubber stamp for its [judge]...'").

Of course, the existence of a legitimate confidentiality interest does not mean the Respondent was privileged to reject flatly the Union's request for the Informant's identity. An employer asserting confidentiality has a duty to seek an accommodation with the union. See *Metropolitan Edison*, 330 NLRB at 107. Where, as here, an employer first offers to bargain toward an accommodation more than 6 months after a union initially requested an informant's identity, that offer is clearly untimely.³ Therefore, I would find that the Respondent violated Section 8(a)(5) and (1) by failing to offer in a timely manner to bargain an accommodation regarding the Informant's identity. To remedy this violation, I would "give the parties an opportunity to bargain regarding the conditions under which the Union's need for relevant information could be satisfied with appropriate safeguards protective of the Respondent's confidentiality concerns." *Metropolitan Edison*, 330 NLRB at 109.

Dated, Washington, D.C. January 24, 2019

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Local 4034, Communication Workers of America (CWA),

³ See, e.g., *Finley Hospital*, 362 NLRB 915, 923 (2015) (finding that the employer's 3-month delay in offering to bargain an accommodation was untimely), enf. denied in part 827 F.3d 720 (8th Cir. 2016). Thus, I disagree with the judge's conclusion that "the Respondent met whatever obligation it had to bargain an accommodation."

AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to bargain collectively with the Union by failing to respond in a timely manner to the Union’s requests for presumptively relevant information.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner a description of the information regarding a potential “family night” provided to us on January 10, 2015.

MICHIGAN BELL TELEPHONE COMPANY

The Board’s decision can be found at www.nlr.gov/case/07-CA-150005 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Colleen J. Carol, Esq., for the General Counsel.
Stephen J. Sferra, Esq. (Littler Mendelson, P.C.), of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on October 6, 2015. CWA Local 4034 filed the charge on April 13, 2015. The General Counsel issued the initial complaint on July 28, 2015, and an amended complaint on September 29, 2015.

The issue in this case is whether Respondent, Michigan Bell Telephone Company, violated Section 8(a)(5) and (1) by refusing the Union’s request that it identify the employee who informed Manager Andrew Maki on the morning of Saturday, January 10, 2015, that employees would take part in a “family day” that evening. Family day is code for a refusal to work overtime.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Michigan Bell Telephone Co. provides communications services, including telephone, internet and television services in the area around Grand Rapids, Michigan. Respondent annually derives gross revenues in excess of \$100,000. It provides services in excess of \$5000 outside the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent, Michigan Bell Telephone has a collective-bargaining agreement with District 4 of the Communications Workers of America (CWA) which runs from April 12, 2015 to April 11, 2018. The parties had a prior contract that ran from April 2012 to April 2015. CWA Local 4304 enforces the contract by such means as representing bargaining unit members in grievances and arbitrations.

Both the current and prior contracts contain a “No-strike” clause, Article 5. Both also include an Appendix F applicable to premises technicians. These are employees who install and service U-verse, AT&T’s television, telephone and internet services in the homes or offices of customers (as opposed to “core employees,” who only work on traditional land line telephone service). Section 5.08 of Appendix F in the 2012–2015 contract provided that employees may be required to work up to 17 hours per week of overtime, depending on the needs of Respondent’s business. However, this limitation does not apply to emergencies. The contract does not define emergency or indicate who determines that an emergency exists. The 2015–2018 contract has the same provision except that it specifies that employees may be required to work up to 14 hours per week of overtime, rather than 17.

On January 4, 2015, Respondent’s area manager in Grand Rapids, Mike Ten Harmsel, met with unit employees. He told them that on any given day they would have to remain at work until they were advised by management that there was no work to be performed. Regardless of when their scheduled shift ended, employees were not to return to the Grand Rapids garage until “cleared” by management or told by a supervisor that there was no work to be performed.

The next evening the Union had a membership meeting. About 60 unit employees attended the meeting, including about 40 premises technicians. Some of the premises technicians were angry about Ten Harmsel’s announcement on the previous day. One or more suggested that employees have a “family night.” This is code for a protest against management enforcing a program of mandatory overtime without prior notice. The protest would take the form of a refusal to work overtime.

Union employees in Michigan and Indiana had engaged in such family nights in 2012 and on September 19, 2014. Grand Rapids employees participated in the 2012 family night and possibly the 2014 family night. Respondent disciplined a number of Grand Rapids employees on both occasions.

Saturday Morning, January 10, 2015

On the morning of Saturday, January 10, 2015, Andrew Maki, a U-verse manager at the Grand Rapids garage held a short meeting for the 40–50 employees who reported to work that day on the early shift. Another dozen or more employees were scheduled to work starting at about 10:30. On Saturday, the employees were scheduled to do repair, rather than installation, work. After the meeting, Maki returned to the supervisors' office, which is locked from the outside.

Shortly after Maki returned to his office, a unit employee knocked at the door. Maki opened the door and ushered the employee into the office. This employee told Maki that a "family night" might occur that evening. This employee did not request that his identity be kept confidential, nor did he express any fear of retaliation if his identity was divulged. Maki advised Mike Ten Harmsel, his boss, of the substance of the conversation.

Ten Harmsel directed 3 supervisors to meet unit employees as they returned to the garage at the end of their shift. The supervisors asked employees a number of questions including who told them that it was acceptable to return to the garage and whether their decision to do so was individual activity, G.C. Exh. 10, p. 2.¹ Nineteen unit employees returned to the garage at the end of their scheduled shift without being "cleared" by management. Supervisors directed them to return to work and 12–14 did so; the other 5–7 refused.

Brian Hooker, the administrative assistant to the president of Local 4034, learned on January 10 that Andrew Maki had been "tipped off" that day in advance that a family night might occur. On Monday, January 12, Hooker called Maki and asked if this was true. Maki confirmed that he had been told of the possible family night by a unit employee. Hooker asked if Maki had promised the employee confidentiality as to his or her identity. Maki responded that he had not done so. Hooker asked Maki for the name of his informant; Maki said he could not divulge the name without the individual's permission. There is no evidence that Maki or any other agent of Respondent asked the employee/informant if Respondent could identify him or her to the Union.

Hooker followed up his telephone conversation by sending Maki an email on January 12:²

Andrew:

Mon, Jan 12, 2015 at 10:38 AM

The below request is in reference to a telephone call this morning between you and I regarding the events on 1/10/14 at the Eastern Uverse garage and your knowledge of a purported job action that was thought by Grand Rapids Uverse management to be orchestrated by Local 4034. In our conversation this morning, you confirmed that it was you who received information from a union member, on Saturday, 1/10/14 at about 8:30 a.m., which you claim indicated that an overtime work-stoppage job action was

to take place on the above-referenced date. You further told me in our telephone conversation that you had not promised confidentiality to the employee who indicated to you that Local 4034 was planning a job action that date.

For purposes of clarity, the work-group has referred this matter in grievance form to the Local and therefore you are reminded that you are prohibited by agreement in the contract with discussion of the matter with any member of the work-group except Union representatives. Because this is a legal and contractual request, and the information is already in your possession, the Union deems it reasonable to receive this information by close of business today.

Relevant Data Request:

In order to make a determination as to whether a valid grievance exists, or if an existing grievance should be elevated to the next step and/or to bargain terms and conditions of employment on behalf of our members, the Union requires the information listed below. Contractual time limits for proper filing and escalation of grievances make it necessary that we receive this information as soon as possible. Please contact me ASAP to arrange my receipt of the below data. If there are any questions as to format and/or, clarification on our request for any of this data, please contact me at the email address provided below. If for any reason the data can not, or will not, be provided, please so state in an email reply to this request. This is a continuing request; the company is requested to supplement its response if further responsive information develops. Please contact the undersigned with any questions. Thank you for your prompt attention to this very important matter.

1. Please provide in writing the name of the employee who informed you that a job-action was to take place Saturday, 1/10/14.

1. Please provide in writing a specific description of the information you received.

2. Please provide in writing a list of the people to whom you disseminated the information, including the date, time and method of notification.

2. The Union reserves all rights to request such information as it deems necessary to represent its members...

Between February 17 and 20, 2015, Respondent suspended 4 current employees for 1 day for insubordination on January 10. 1 other received a 3-day suspension. Two other employees may have also been disciplined but are no longer employed by Respondent.

Hooker made another information request on February 20, which reiterated his January 12 request for information concerning the January 10 informant. Hooker also asked for other information, including the identities of employees disciplined as a result of their conduct on January 10, the nature of the discipline and the reasons for the discipline. He also asked for the names of management employees consulted in imposing discipline.

On March 3, except for the request regarding the January 10 informant, Mike Ten Harmsel provided the information re-

¹ The Regional Director dismissed a charge filed by the Union alleging that the employees who were disciplined as a result of their conduct on January 10 were engaged in protected concerted activity.

² The email mistakenly refers to January 10, 2014, several times rather than January 10, 2015.

quested by the Union on February 20. In response to these requests he identified 5 unit employees who had received 1–3 day suspension for what he termed insubordination on the evening of January 10. He declined to provide the identity of the informant, on the grounds that the information was irrelevant because the Respondent did not consider what occurred on January 10 to be a job action. Ten Harmsel stated that the 5 employees were disciplined for insubordination.

On March 4, the Union responded by stating that the information provided to Andrew Maki on January 10 and the identity of the informant was relevant to the grievance.

The Union reiterated its request for the identity of the January 10 informant on subsequent occasions. On July 21, for the first time, Respondent, by Ten Harmsel, specifically raised the company's interest in maintaining the confidentiality of the employee's identity.

This email provides the Company's supplemental response to your prior request for information regarding "the name of the employee who informed [the Company] that a job-action was to take place Saturday, 1/10/15." The Company previously declined to provide the name of the individual and did not think the name was relevant because the Company did not consider the events on January 10, 2015, to be a job action.

In addition, the Company is interested in maintaining the confidentiality of the employee's name in question. Specifically, the Company has legitimate concerns that the employee would be subject to possible harassment and/or retaliation by Local Union officials or members if his name is disclosed. These concerns are heightened by the fact that the Local has not explained the relevance of its request, or why the individual's actual name is necessary for the Local to determine if a valid grievance exists. The Company hereby offers to bargain a reasonable accommodation that will protect each side's interests. To that end, please provide an explanation as to why you believe the individual's name is relevant, and, specifically, why it is necessary for the Local to know the employee's actual name. Based on the reason provided, the Company may be able to provide alternative information that satisfies the Local's needs. Secondly, please confirm whether or not the Local is willing to provide written assurances that the employee in question will not be subject to any type of retaliation by the Local or its members, including assurances that the Local or CWA International will not file internal disciplinary charges against the employee if his name is disclosed.

The Union responded by questioning the legitimacy of these expressed concerns.

The relevance of the above-requested information is that the Union is investigating the Company's alleged violation of article 5.02 and other potential contract violations. Notwithstanding the Company's current revisionist history that it did not contemplate the events of January 10, 2015 as a job action, several Company agents went on record as saying that it was viewed as such, including on more than one occasion yourself. That is the relevance of our request.

As to the Company's second concern, it is well established under law and under Company policy that such behavior is

prohibited and Locals which engage in such behavior are in danger of losing the protection of the Act. The Union rejects root and branch the Company's putative "legitimate concerns" and asks that, if such exist, the Company provide further information regarding such instances, including steps that the Company took to remediate such behavior. If the Company can not or will not provide specific examples in which such harassment and retaliation did take place as regards CWA Local 4034, then the Union must insist on receiving its information.

As to the Company's concern regarding the Union's internal disciplinary processes, the Union does not feel it necessary to review, discuss or negotiate any of its internal processes with any employer.

Ten Harmsel responded to this email, as follows:

This responds to the email you sent me yesterday. The operative events occurred on January 10, 2015, which is outside the contractual time period for the Local to file a grievance relating to the Company's "alleged violation of article 5.02 and other potential contract violations." Moreover, the mere assertion that the Local is "investigating" alleged violations of Article 5.02 or "other contract violations" does not establish why the name of the individual at issue is relevant or necessary to the union's investigation. The Company is willing to discuss providing other relevant information that may be necessary to the Union. However, we are simply trying to understand why you need the person's actual name, and your conclusory statement that you "need it because you need it" does not establish relevance. This is particularly so in this case based on the Company's expressed concerns that the individual may be subjected to harassment or retaliation by the Local or fellow Union members.

Finally, I will interpret your response to mean that the Local is not willing to provide written assurances that the employee in question will not be subject to any type of retaliation by the Local or its members, including disciplinary charges. If I have misunderstood your position, please let me know.

Analysis

General Principles

Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. An employer's duty to bargain includes a duty to provide information needed by the bargaining representative in contract negotiations and administration. Information pertaining to bargaining unit employees is presumptively relevant to a union's representational duties. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

Even if requested information is relevant, in certain instances a party may assert a confidentiality to defense to the demand for information, *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

Respondent has two defenses to the allegation that it violated the Act in refusing to provide the name of the January 10 informant and related information; (1) relevance of the request

and (2) confidentiality concerns. I conclude that its confidentiality defense has absolutely no merit. There is no evidence that the January 10 informant requested that his identity be kept secret. Andrew Maki did not promise confidentiality when he spoke to the employee.

In responding to Brian Hooker on January 12, Maki told Hooker that he could not identify the informant without checking with the informant and Ten Harmsel.³ There is no evidence that any manager asked the informant if Respondent could identify him or her to the Union. Thus, its claims to confidentiality are purely speculative. It could well be that the informant does not have an objection to such disclosure. At least half the premises techs did not return to the garage on January 10. It may be that some were opposed to the conduct of those that did. District union officials were concerned that any job action on January 10, might compromise its settlement negotiations with Respondent regarding discipline imposed as a result of the September 19 job action, Tr. 33. It could well be that some premises technicians had similar concerns and might not be shy about making them known.⁴

Generally, the Board regards that any information request regarding bargaining unit employees is presumptively relevant, *Curtiss-Wright Corp., Wright Aeronautical Div.* 145 NLRB 152, 156–157 (1963). However, by relevant, the Board means that the information is relevant to the Union's duties as the unit employees' collective bargaining representative. In this case, the record establishes that the identity of the informant, what he or she said to management and the dissemination of the information is irrelevant to these duties. The presumption of relevance is a rebuttable presumption, *Armstrong World Industries, Inc.*, 254 NLRB 1239, 1245 (1981). The record in this case rebuts that presumption.

The identity of a bargaining unit informant may be relevant in some cases, e.g. *Alcan Rolled Products*, 358 NLRB 37 (2012),⁵ in which an employee may have been disciplined in whole or in part on the basis of employee statements.

However, in this case, the identity of the informant, what he told Maki and the extent of the message's dissemination has no

relevance to the Union's duties in administering its collective bargaining agreement with Respondent. The identity of the informant does not have any relevance to the discipline of the 5–7 bargaining unit members. These employees were not disciplined as the result of any information that the informant gave to Andrew Maki. They were told to return to work and refused to do so. The identity of the unit employee who alerted management to the possibility that employees might return to the garage at the end of their scheduled shift has no relevance to whether these employees were disciplined for just cause.

Additionally, there is no nexus between the identity of the informant and the contrasting views of the Union and management as to the company's authority to require employees to work overtime, with or without advance notice.

At Tr. 49–50, the General Counsel asked Brian Hooker why the information he sought was relevant. He answered as follows:

For several reasons. My present and primary concern, as related to me, was that had the events of Tuesday evening, January 5th at the general membership meeting, had we inadvertently, we being the Local Union, communicated to the membership that a job action needed to take place or should take place? So we wanted to interview the person to see why did you think that there was a family night coming out? We take very seriously our contractual duties under Article 5, and—which is another reason that we needed to know that name, because we need to explain to the membership that during the times that we are not bargaining, we do not do work stoppages. We feel that that is part of our duty under the contract, as the Company also has duties under that same article.

Another reason that we needed it was because discipline had resulted from the information that this person had provided to the Company. Under the Act, we have a DFR, a duty of fair representation, and it was necessary to get all the information possible together about the events that surrounded that day so that I could adequately represent the members or direct the representation of the members at the first-step grievance meeting.

If the Union wanted to know why 19 employees returned to the Grand Rapids garage when the scheduled shift ended, it should ask those employees, not the informant, who assumedly was not one of the 19. What the informant thought is completely irrelevant to the question of why 19 unit employees thought they were justified in returning to the garage. Also, the Union does not need the name of the informant in order to explain to the Union's membership that when the Union is not bargaining that, "we do not do work stoppages."

Further, I see no relationship to the Union's grievances on behalf of the disciplined employees and the identity of the informant. While it is true that there would not have been 3 supervisors at the garage to meet the "early returnees," those disciplined were those who, unlike 12–14 other unit employees, disobeyed a direct order to return to work.

In sum, I find that the Union's information request is not rel-

³ Confidentiality claims must be timely raised, *Gas Spring Co.*, 296 NLRB 84, 99 (1989). Although Respondent did not specifically claim confidentiality until July 21, I find that Maki's hesitation to divulge the identity of the informant on January 12 satisfies this requirement.

⁴ I give no weight to Respondent evidence regarding Brian Hooker's allegedly boorish behavior towards Respondent's managers. There is no reason to suspect from this evidence that Hooker would bully or harass a bargaining unit member. On the other hand, Hooker's email of January 12, Exh. R-6, does suggest that if the Union received the requested information, it would harbor some animosity towards the informant. Hooker stated, "But, until we get answers I want no one going off the deep-end on anyone; management would love to kill one of us for COBC [Code of Business Conduct] over one of their (maybe) pets/rats." This certainly suggests that the Union is seeking the identity of the informant to determine who may be a company pet/rat, which I view as a completely illegitimate use of the Board's processes in this context, where the identity of the informant has no relevance to any grievance the Union did file or could have filed.

⁵ Although this decision was rendered by a Board which was composed of two members who were not validly appointed, I rely on the rationale of the Judge's decision, which is sound.

evant to the Union's duties as the collective-bargaining representative of unit employees. I therefore dismiss the complaint.⁶

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁶ I also find that Respondent met whatever obligation it had to bargain an accommodation with the Union regarding the requested information.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The complaint is dismissed.

Dated, Washington, D.C., December 3, 2015.

mended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.