Management & Training Corporation *and* Service Employees International Union Local 668. Cases 04–CA–095456, 04–CA–097114, and 04–CA–104790

July 25, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On January 30, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and each filed answering and reply briefs.

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

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.[1]

For the reasons stated by the judge, we agree that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with a copy of its Department of Labor Jobs Corp contract (DOL contract), and that it violated Section 8(a)(1) by threatening that bargaining would change because the Union filed unfair labor practice charges. For the reasons set forth below, we reverse the judge and find that the Respondent further violated Section 8(a)(5) and (1) by refusing to provide the Union with certain requested information and by unreasonably delaying the provision of other information. We also reverse the judge and find that the Respondent did not engage in unlawful regressive bargaining. Finally, as explained below, we reverse the judge and find that the Respondent violated Section 8(a)(1) by threatening employee Heather Rebarchak with discipline unless she provided a written statement about the incident underlying her grievance or withdrew the grievance.

I. BARGAINING AND INFORMATION ALLEGATIONS

A. Background

Pursuant to a contract with the DOL, the Respondent manages the Keystone Job Corps Center, a residential training center for disadvantaged youth in Drums, Pennsylvania. Service Employees International Union Local 668 (the Union) represents three separate units of the Respondent's Keystone employees: maintenance, professional, and resident-advisor.

In April 2012, the Respondent and the Union began negotiations for a successor collective-bargaining agreement for the maintenance unit, whose contract was set to expire on June 30, and wage reopener negotiations for the professional and resident-advisor units, whose contracts expired a year later.[2] The Union proposed a $1-an-hour wage increase across the board. The Respondent countered with no increases, based in part on the zero percent operational increase/inflationary rate applicable to DOL contracts for the relevant years. In June, the parties tentatively agreed to extend the expiring maintenance agreement with only minor changes. Unit members voted to reject that agreement.

On June 29, after the maintenance unit vote, the Union emailed a request for information to the Respondent, seeking a copy of the Respondent's DOL contract; the amount of the Respondent's underrun (the unspent portion of its DOL-allocated budget); and information relating to both unit and nonunit employees, including the recipients and amounts of bonus payments; pay grades, starting pay rates, and DOL-established minimum and maximum pay rates for certain positions; a copy of the union and nonunion pay scales; the date of the last wage increase; and the source of and reason for "extra money" paid to certain nonunit employees the prior year.[3] The email stated that, over the course of the parties' negotiations, the Respondent had provided most of its responses to the Union's information requests verbally. It then expressly asked that the Respondent provide the requested information in written form "to make sure all parties are on the same page."

That same day, the Respondent replied that it would not provide information pertaining to nonunit employees, its DOL contract, or the amount of any underrun (items 1–3, 5–8, 10, and 12–16). It characterized the underrun and the DOL contract as "proprietary information," but provided no further explanation. The Respondent agreed to provide the requested information regarding unit employees (items 4, 9, and 11), but did not actually supply that information until October 10. According to Martha Amundsen, the Respondent's Labor and Employment Counsel and principal negotiator, the 3.5-month delay was due to her inadvertent failure to forward the information to the Union when the Respondent sent it to her.

[1] We shall modify the judge's recommended Order to conform to the violations found. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694, 694–695 (2014).

[2] All dates refer to 2012, unless otherwise stated.

[3] The information request contained 17 numbered items, which are set forth in the judge's decision. Item 17, company financial records, is not at issue here, as the General Counsel did not allege that the failure to provide that information was unlawful.

In December, the Union filed an unfair labor practice charge regarding the Respondent's delay in providing the unit information and its refusal to provide the remaining information.[4]

On April 3, 2013, the parties held their first bargaining session since October 2012. Amundsen announced that negotiations were going to change because the Union had filed Board charges.

The following day, the Respondent made a bargaining proposal that included three regressive provisions: (1) it proposed for the first time to delete the contract's arbitration provision, citing the Union's rejection of its 2012 proposals to alter the provision; (2) it countered a union proposal to modify contractual bumping rights with a proposal to eliminate them; and (3) it proposed to eliminate the contractual pay differential for the night shift, as to which the Union had no outstanding proposal. The Respondent's proposal also included a concession, withdrawing its prior proposal to reduce "management grant" days, which gave employees credit for unused sick leave. After the Respondent explained its proposal, the Union ended the bargaining session without further discussion.

B. Discussion

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to provide a copy of its DOL contract to the Union.[5] We also agree that the Respondent violated Section 8(a)(1) by stating that bargaining would change due to the Union's filing of unfair labor practice charges.[6] However, contrary to the judge, we find that the Respondent also violated the Act when it failed to provide the nonunit and limited financial information requested in the June 29 email, and failed for 3.5 months to provide requested unit information, but we find that it did not violate the Act by engaging in regressive bargaining.

1. Information-request allegations

An employer has a duty to provide requested information necessary to a union's performance of its representational duties, including "information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations." *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006). Information pertaining to unit employees is presumptively relevant. However, there is no presumption of relevance for information that does not pertain to unit employees; rather the potential relevance must be shown. The burden to show relevance is "not exceptionally heavy"; the Board uses a broad discovery-type standard. *Caldwell*, 346 NLRB at 1159–1160.

The general relevance standard applies to all requested information, including financial information. Although an employer need not "open its books" to a union in the absence of a claimed inability to pay, a union may still seek specific financial data, and the employer must provide such information upon a showing of relevancy. An information request covering employer finances "is not an all-or-nothing proposition." *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011), enfd. sub nom. *KLB Indus., Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012); *Caldwell*, 346 NLRB at 1160 (rejecting argument that employer has no duty to disclose any financial information if it has not claimed an inability to pay). As the Board explained in *Caldwell*, where the employer had proposed decreasing wages due to an asserted lack of competitiveness, "'if . . . 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.'" Id. at 1159 (quoting *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 152–153 (1956)).

Here, the information the Respondent refused to provide related to pay and bonuses for certain nonunit positions, as well as limited, specific financial information (the Respondent's underrun and the source of the "extra money" given to nonunit security and recreation aides). We find that the record evidence concerning the course of the parties' bargaining, past and present, makes the requested information relevant. Although the judge emphasized that the Respondent did not rely on nonunit terms of employment to justify its proposals, that fact alone does not obviate the Respondent's duty to produce the information.

As noted, the Respondent flatly refused to give unit employees a raise or bonus, citing DOL's contract rate.

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[4] In January 2013, the Union also filed a charge regarding the Respondent's threat to discipline employee Heather Rebarchak in an incident, described in Sec. II below, that was unrelated to the parties' contract negotiations.

[5] In addition to the reasons stated by the judge, we note that the relevance of the DOL contract is shown by the facts that the Respondent cited and quoted the contract in rejecting the Union's boot-allowance proposal, its bargaining submissions made multiple references to DOL's approval (or absence of approval) of particular items, and the Respondent regularly cited the contract to explain policies during the Union's tenure as its employees' representative. We further agree with the judge that the Respondent's blanket claim of confidentiality does not satisfy its burden of proving a "legitimate and substantial" confidentiality interest in the contract. Even assuming the Respondent had established such an interest, it failed to seek an "accommodation between the union's information needs and the employer's justified interests" that would allow the union access to the contract to the extent consistent with any valid confidentiality interests. *Pennsylvania Power & Light Co*., 301 NLRB 1104, 1105–1106 (1991); see also *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006) (citing *Pennsylvania Power*).

[6] Threats of adverse consequences for filing Board charges, "a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7," are unlawful. *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011).

The Union heard rumors that nonunit security employees had received a raise, and that some managers may have received bonuses.[7] In a May 1, 2012 email, and in bargaining sessions, the Union confronted the Respondent with those rumors and asked for some of the nonunit and financial information at issue here. In response, the Respondent denied that managers had received bonuses, asserted that nonunit employees now had a separate pay scale, and stated that some nonunit employees had been given raises to comply with DOL requirements.

Given these circumstances, the requested nonunit information was contextually relevant in several respects. Historically, the Respondent's unit and nonunit employees had wage parity under a single pay scale, and raises typically tracked the DOL rate. The Union, however, had reason to believe the Respondent had recently begun, or was proposing, to treat unit employees differently, and possibly less favorably, than nonunit employees. See *Brazos*, 241 NLRB at 1018–1019 (nonunit raise relevant for formulation of contract proposals; need for information reasonably evident from circumstances including pending negotiations and historic wage parity between unit and nonunit employees); see also *Beverly California Corp. v. NLRB*, 227 F.3d 817, 844 (7th Cir. 2000) (information regarding nonunit discipline relevant where union worried about disparate treatment), cert. denied 533 U.S. 950 (2001). Here, because the Respondent cited the DOL contract rate as a basis for its flat refusal to raise unit wages or benefits, knowledge of nonunit raises would be relevant to the Union and its members in assessing the Respondent's forthrightness and bargaining position. Similarly, the Respondent had, on occasion, distributed underruns to employees as raises or bonuses, making information concerning a possible underrun relevant to support potential union bonus or raise proposals. More generally, the Union faced the challenge of persuading unit employees, who were distrustful of the Respondent and who had already rejected an extension of the contract, to accept an eventual agreement. Being able to refute or explain rumored preferential treatment of nonunit employees or expectations regarding potential underruns was relevant to that task.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by failing to provide the requested nonunit information.

We further find that the Respondent unreasonably delayed in providing the information that pertained to unit employees. An employer's duty to provide information also includes the obligation to do so in a timely manner. An unreasonable delay in providing information violates Section 8(a)(5). See *American Signature Inc.*, 334 NLRB 880, 885 (2001). An employer must make a reasonable effort to respond promptly under the circumstances, considering factors such as the complexity and amount of information requested. See *Samaritan Medical Center*, 319 NLRB 392, 398 (1995); accord *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014), enfd. 679 Fed. Appx. 614 (9th Cir. 2017). The analysis is an objective one; it focuses not on whether the employer delayed in bad faith or in an attempt to avoid production, but on whether it supplied the requested information in a reasonable time. See *Champion Home Builders Co.*, 350 NLRB 788, 788 fn. 7 (2007).

The Respondent's 3.5-month delay here was unreasonable under the circumstances. The requested unit information was not complex or voluminous and the Respondent has not identified any difficulties in assembling it; the Respondent's only asserted justification was that it forgot to forward the information to the Union. The Respondent's asserted forgetfulness is no defense. Nor, contrary to the judge's finding, did the Union's June 29 request demonstrate that the Respondent had already provided much of the data. The request states that "[a]s negotiations have progressed we have asked for many pieces of information, most responses have been given verbally. In order to make sure all parties are on the same page the Union is asking for the following information in writing." That language does not indicate that the Union already had the information; it indicates only that the information it had received to that point—in response to earlier requests that do not necessarily correspond to the June request—was verbal.

Moreover, the June 29 request expressly asks that all information be provided in writing to ensure that the parties are working from the same set of facts. While an employer need not necessarily provide information in the specific form requested, here the Respondent never offered any justification for refusing the Union's request for written production, and never asserted that it had already provided the information. Instead, it affirmed, as to each unit-information request, "We will respond." When the Union noted in mid-October that it still had no response, Amundsen admitted that she had forgotten to provide the information when she received it from the Respondent, and then supplied it.[8] The Respondent has

[7] See *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994) ("The Union was not required to show that the information which triggered its request was accurate or ultimately reliable, and a union's information request may be based on hearsay.").

[8] The judge cites cases in which the Board found oral responses sufficient. See *AT&T Corp.*, 337 NLRB 689, 691 (2002); *Howe K. Sipes Co.*, 319 NLRB 30, 39 (1995). *Cincinnati Steel Castings Co.*, 86 NLRB 592, 593 (1949). In *AT&T and Howe K. Sipes*, however, the Board noted that the union had failed to renew its request or to indicate that

presented no confidentiality interests that would justify its delay, particularly as it sought no accommodation to balance a purported interest against the Union's need for information as it would be obligated to do under Board law. See, e.g. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991).

Based on the foregoing, we find that the Respondent violated Section 8(a)(5) and (1) by failing to provide the nonunit and financial information requested in the June 29 email, and by failing and delaying for 3.5 months to provide requested unit information.

2. Regressive bargaining allegation[9]

Contrary to the judge and our dissenting colleague (Member Pearce), we find that the Respondent did not violate Section 8(a)(5) and (1) by engaging in regressive bargaining.

An employer's regressive proposals violate the Act when they are made in bad faith or are intended to frustrate agreement. See *Quality House of Graphics*, 336 NLRB 497, 515 (2001). To determine whether regressive proposals are unlawful, the Board considers the totality of an employer's conduct and the circumstances, including factors such as the substance and timing of bargaining proposals, the parties' bargaining history, whether and how the employer explains its proposals, and other evidence of its intent. See *Quality House*, 336 NLRB at 515 (citing pretextual explanation for regressive proposals made months after negotiations ended in unlawful impasse); *Mid-Continent Concrete*, 336 NLRB 258, 260–261 (2001) (citing pretextual explanations for repeated regressive proposals, "staged" negotiations, and concurrent violations), enfd. 308 F.3d 859 (8th Cir. 2002). The fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not "so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith." *Genstar Stone Products Co.*, 317 NLRB 1293, 1293 (1995). See also *Graphic Communications International Union Local 458-3M v. NLRB*, 206 F.3d 22, 33 (D.C. Cir. 2000) (Board assesses whether reasons "were so illogical or unreasonable as to necessarily warrant an inference of bad faith") (quotation omitted); *Quality House*, 336 NLRB at 515.

Here, the totality of the circumstances and the Respondent's overall conduct is not indicative of bad faith. The parties' bargaining history shows they had an established bargaining relationship encompassing three units, all with collective-bargaining agreements in place or recently expired. The Respondent and the Union agreed to extend the maintenance-unit contract with minor changes in June, albeit one the employees rejected. Four months after the Union failed to ratify that tentative agreement, the parties resumed negotiations. On October 11, the day after it provided the unit information, the Respondent tendered a contract proposal. The Union responded with a counterproposal 6 months later, on April 3, 2013. The Respondent's contested April 4 proposal was its prompt response. Although the April 4 proposal came soon after the General Counsel issued the complaint in this case and the day after Amundsen's threat to change bargaining, the Respondent did not characterize its proposal as a last, best or final offer or otherwise suggest that it was nonnegotiable. There is no evidence that the negotiations were staged. After the Respondent explained the proposal, it was the Union that chose to end the session without further discussion. The parties have not met since, and the Union's lead negotiator, Business Agent Kimberly Yost, testified that she did not push for further negotiations because the Respondent's April 4 proposal did not leave the Union with much hope. *See Reliable Tool Co.*, 268 NLRB 101, 102 (1983) (noting, in declining to find regressive proposal unlawful, that union "refrained from continuing negotiations over the subjects on which it claims the [employer] regressed in its new package, preferring instead to resolve the legitimacy of the [employer's] bargaining conduct by litigating the instant proceeding."). However, the fact that the Union was disheartened or otherwise dissatisfied with the Respondent's proposal does not mean that the proposal rises to the level of harsh, vindictive, or otherwise unreasonable conduct justifying a finding of bad faith.

The timing of the bargaining proposals is not fatal to the Respondent's exceptions. *Quality House*, on which the General Counsel and our colleague rely, is distinguishable.[10] In that case, months after declaring impasse and after negotiations completely ceased, the employer tendered regressive proposals regarding issues the parties had never discussed when it learned that the General Counsel planned to issue a complaint alleging that it had unlawfully insisted to impasse on a nonmandatory subject of bargaining. Moreover, the employer proffered a pretextual explanation for its regressive proposals, claiming that they were intended to address the union's concern about its insistence on the nonmandatory term, even

the employer's provision of the information orally was insufficient under the circumstances. Similarly, in *Cincinnati Steel*, there is no indication that the union told the employer its oral provision of the information was inadequate.

[9] Member Pearce dissents from this portion of the Board's decision.

[10] 336 NLRB 497 (2001).

though they did not address that term and the employer maintained its unlawful insistence on it. Here, in contrast, negotiations were ongoing, the Respondent did not proffer pretextual explanations for its proposals, and the April 4 proposal does not appear calculated to defend the violations alleged. And both before and after April 4, the Respondent took the initiative in keeping the negotiations on track, prodding the Union to respond to its proposals and to schedule negotiating sessions. Both of these facts point to the conclusion that there was no pattern of bad faith.

Turning to the content of and proffered explanation of the Respondent's proposals, it is significant that, despite the fact that the April 4 proposal contained three regressive provisions, it does not appear that the provisions reneged on, or attempted to reopen, any earlier agreement.[11] See *Genstar*, 317 NLRB at 1293 (finding regressive proposals lawful, citing fact that employer "did not renege on prior agreements, but instead altered proposals which the Union had consistently rejected"). Moreover, the April 4 proposal contained a new concession. Contrary to the judge's finding, the record clearly demonstrates that the Respondent dropped its proposal to reduce "management grant" days giving employees credit for unused sick leave.[12]

The proposal that most calls into question the Respondent's intent to reach agreement is the elimination of arbitration. However, the Board has declined to find violations in cases involving similar proposals, emphasizing that employers may legitimately use newly strengthened bargaining power to press for concessions. Although employers typically garner such power from successfully weathering a strike, the Board has extended that logic to a situation where, as here, employees decline to strike after rejecting a contract offer.[13] Contrary to our dissenting colleague, we find it plausible that the Respondent's proposal was based on a strengthened bargaining position. Significantly, during negotiations in May 2012, the Respondent proposed changes to the arbitration process—the choice of arbitration service, adding a time limit, and requiring grievant participation. It modified the proposal twice, once to eliminate the proposed requirement that the grievant participate and then to eliminate the proposed requirement that arbitration take place within 12 months of the demand for arbitration. The Union neither agreed nor tendered a counterproposal to these changes. The Respondent's April 4 proposal noted that history and described eliminating arbitration as its new proposal. Amundsen further explained that she thought the Union filed frivolous grievances and that the Union should sue the Respondent if it believed the Respondent breached the contract. As before, the Union made no response to the Respondent's proposal.

Nor is the Respondent's explanation for eliminating arbitration—that the Union had not responded to its earlier suggested changes, and that the Union had allegedly filed frivolous grievances—either demonstrably pretextual or so outrageous as to indicate an unwillingness to reach agreement.[14] When it made the April 4 proposal, the Respondent had already agreed to union modifications to the grievance system, and did not suggest it would renege on that agreement. It did not present the arbitration provision, or the April 4 offer, as a final position. To the contrary, it requested further negotiations. There is no evidence that the Respondent ultimately would not have been willing to agree to an arbitration provision modified to address the cost and delay concerns it had previously identified.[15]

As to the regressive bumping and night-differential provisions, neither was so unprecedented or indefensible as to demonstrate an intent to frustrate agreement. The

[11] The parties' tentative agreements included changes to the grievance process, made at the Union's request, and maintenance of the contractual probationary period. The Respondent withdrew its attempt to lengthen probation, though it did so in 2012 rather than in its April 4, 2013 proposal, as the judge found.

[12] The Respondent also added a proposal on April 4 that the parties negotiate to clarify the number of stewards, a term left undefined in their last agreement and during the last contract term. The General Counsel excepts to the judge's failure to find that proposal regressive. We find no merit in that exception. An invitation to bargain further to clarify an ambiguous term is not regressive and does not indicate an intent to frustrate reaching a broader agreement. The mere fact that the Respondent was still introducing new terms mid-negotiation is not unlawful. *See Reliable Tool*, 268 NLRB at 101 (employer did not "'sidetrack' a forward-moving process by introducing new elements into the negotiations" which had been at a standstill for 2 months).

[13] *See, e.g., L.W. Le Fort Co.*, 290 NLRB 344, 344–345 (1988) (reversing finding of unlawful surface bargaining despite employer's proposal to eliminate arbitration based in part on employer's strengthened bargaining position due to employees' failure to strike when parties previously reached an impasse).

[14] *Compare Mid-Continent Concrete*, 336 NLRB at 260 (citing evidence that employer's explanations for proposals were pretextual or disingenuous), and *Quality House*, supra.

[15] *Cf. Telescope Casual Furniture*, 326 NLRB 588, 588–589 (1998) (finding alternative, regressive proposal bona fide in part because employer offered to bargain over it, and later offered changes); *Genstar*, 317 NLRB at 1293 (noting employer continued to bargain after regressive proposals and ultimately made concessions); *Reliable Tool,* supra at 102 & fn. 4 (citing lack of evidence revealing employer intended to undermine "longstanding bargaining relationship" or was unwilling to compromise, in declining to find proposal unlawful). The Respondent also asserts that it never withdrew its agreement to the tentative contract the Union failed to ratify. See *Telescope*, 326 NLRB at 589 (employer lawfully used alternative, regressive proposal to pressure union to agree to primary proposal).

proposal to eliminate the bumping provision was the Respondent's counter to the Union's suggestion that the provision be modified to rectify inadvertent inequities. Eliminating bumping would also remedy inequities, and the Union put the issue into play with its proposal. Similarly, the proposal to eliminate the night-differential was justifiable given recent and potential layoffs, and again, there is no evidence that the Respondent would not have withdrawn it or compromised on a smaller differential if the Union had pursued further negotiations.

In light of these facts and the absence of evidence of a pattern of bad faith, and under the application of established Board law, we dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by engaging in regressive bargaining.

II. THE DEMAND FOR A WRITTEN STATEMENT FROM REBARCHAK[16]

On October 11, 2012, professional unit employee Heather Rebarchak allegedly made a sarcastic remark to two students about another employee. The Respondent twice asked Rebarchak to provide a written statement regarding the incident. Rebarchak, by email, asserted that she had not made the alleged remark, but she refused to provide a further written statement. On October 19, the Respondent met with Rebarchak and gave her a verbal warning. During an informal grievance meeting on October 26, Rebarchak admitted that she had said something to the students, but could not recall what it was.

On November 8, the Union formally grieved the warning. On January 15, 2013, the Respondent emailed the Union that it required, as part of its investigation, that Rebarchak either provide a "truthful written statement" or withdraw the grievance. The email stated that Rebarchak would face further and independent discipline "up to and including termination" if she either provided a false statement or refused to provide one at all while maintaining her grievance. The email cited the Rules of Conduct incorporated by reference in the collective-bargaining agreement that provide for discipline in the event of insubordination or "malicious, false or unsubstantiated statements." The Respondent reiterated its demand for a written statement in a January 31, 2013 email directly to Rebarchak, who submitted a statement on February 4.[17]

On March 5, 2013, the Respondent denied Rebarchak's grievance, and on April 15, 2013, the Union filed a demand for arbitration.[18]

We find, contrary to the judge, that the Respondent violated Section 8(a)(1) by threatening Rebarchak with further discipline if she failed either to provide a written statement or to drop her grievance altogether. An employer statement violates Section 8(a)(1) if it reasonably tends to interfere with employees' exercise of Section 7 rights, including the pursuit of grievances under a collective-bargaining agreement. See *Sysco Food Services of Cleveland, Inc.*, 347 NLRB 1024, 1033 (2006) (quoting *NLRB v. City Disp. Sys., Inc.*, 465 U.S. 822, 836 (1984) and citing *Yellow Transp., Inc.*, 343 NLRB 43, 47 (2004); and *Prime Time Shuttle International*, 314 NLRB 838, 841 (1994)). The test is objective: the Board considers how employees might reasonably construe a statement, not the motivation behind it. Id.

Here the Respondent compelled Rebarchak's written statement not only after issuing the verbal warning, but also after Rebarchak had formally grieved the warning. Then—fully 2 months after the initial investigation and discipline—it threatened her with additional, separate, and independent discipline if she did not either furnish a "truthful" statement or withdraw her grievance. The Respondent did not merely inform Rebarchak that the failure to provide a statement could result in her grievance being denied or that she could lose at arbitration; it imposed an additional consequence—the threat of further discipline—on Rebarchak in the context of her protected pursuit of the grievance. And it did so despite the fact that Rebarchak had already made both verbal and written (email) statements regarding the incident in question.[19] Regardless of the Respondent's intent, its ultimatum reasonably tended to interfere with and discourage Re-

[16] Member Emanuel dissents from this portion of the Board's decision.

[17] The judge inadvertently found that Rebarchak submitted her statement on February 2.

[18] The judge states that the grievance was denied under the "expired" contract, but the applicable professional-unit contract did not expire until June 30, 2013.

[19] In this regard, the Respondent's conduct is distinguishable from a lawful request to cooperate in an initial, pre-disciplinary investigation of employee misconduct. See, e.g., *Cook Paint & Varnish Co.*, 246 NLRB 646, 646 (1979), enf. denied and remanded, 648 F.2d 712 (D.C. Cir. 1981) (in preparation for arbitration, employer's counsel lawfully sought information from employees about previously undisclosed statements made to OSHA). See also *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 158–159 (2014) (noting an employer's legitimate interest in investigating facially valid complaints of employee misconduct). Although the court denied enforcement in *Cook Paint*, it did so on the ground that the Board's decision amounted to a per se rule that an employer may never use a threat of discipline to compel employees to respond to questions relating to a grievance proceeding that has been scheduled for arbitration. 648 F.2d at 720. The court acknowledged that "the limits provided by Section 8(a)(1) remain available to prohibit coercive employer conduct in an individual case." Id. at 722. In our view, the Respondent exceeded those limits here.

barchak's pursuit of her grievance, by sending the message that the only surefire way for her to avoid further discipline would be to walk away from her protected, contractual challenge to the warning.

Contrary to the assertion of our dissenting colleague (Member Emanuel), the Respondent was not entitled to compel Rebarchak to comply with the its demands under the circumstances here, where any legitimate interest the Respondent may have had is outweighed by the need to preserve employees' statutory right to pursue a grievance. Neither the Respondent's rule regarding compliance with an investigation, nor any provision in the collective-bargaining agreement related to grievances, can justify its coercive conduct.[20] For these reasons, we reverse the judge and find that the Respondent violated Section 8(a)(1) of the Act by its demands and its threat of additional punishment in connection with a written statement from Rebarchak.

ORDER

The National Labor Relations Board orders that the Respondent, Management & Training Corporation, Drums, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Service Employees International Union, Local 668 (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, or by unreasonably delaying provision of such information.

(b) Coercing unit employees by stating that bargaining will change due to the Union's filing of unfair labor practice charges.

(c) Threatening employees with further discipline if they do not either provide written statements respecting the incidents underlying their grievances or withdraw those grievances.

(d) 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) Provide the Union, in a timely manner, with a copy of its contract with the U.S. Department of Labor, and with the nonunit information requested in the first 16 items of the Union's June 29, 2012 information request.

(b) Within 14 days after service by the Region, post at its Drums, Pennsylvania facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 4, 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 June 29, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director 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.

Dated, Washington, D.C. July 25, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

[20] With respect to dissenting Member Emanuel's reliance on the contractual just cause requirement, we note that just cause requires the Respondent to show that it conducted an adequate investigation *before* it issued the verbal warning, not afterward. See generally *Key Food Stores Cooperative, Inc*., 286 NLRB 1056, 1057 (1987) (post-discharge conduct and union activity could not serve as basis for determination of just cause). To threaten Rebarchak with further discipline beyond that already meted out for the October 11 incident, if she failed to provide a "truthful" written statement about the same incident after she grieved the warning, as it did on January 15 and 31, served no purpose other than to coerce her into dropping her grievance.

[21] 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."

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting in part.

Where an employer's regressive bargaining proposals lack any reasonable explanation and are calculated to forestall the possibility of reaching agreement, they evidence bad faith bargaining and violate the Act. See *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), enfd. 26 Fed.Appx. 435 (6th Cir. 2001). Here, on April 4, 2013, the Respondent abandoned its prior positions and proposed eliminating arbitration, bumping rights, and the night-shift differential from the parties' collective-bargaining agreement. The totality of the circumstances demonstrates that these regressive proposals, interposed to retaliate against the Union for pursuing unfair labor practice charges against the Respondent, were made in bad faith and were intended to frustrate bargaining. Accordingly, and contrary to my colleagues, I would adopt the judge's finding that the Respondent's regressive bargaining violated Section 8(a)(5) and (1) of the Act.

In April 2012, the Respondent and the Union commenced negotiations for a successor collective-bargaining agreement for maintenance unit employees and wage reopeners for the professional and resident-advisor units.[1] The Respondent rejected the Union's proposal of a $1-an-hour increase in wages across the units, saying that its 5-year service contract with the Department of Labor did not include an increase in the inflation cap. In June, the Respondent and the Union agreed to extend the maintenance unit agreement with minor changes, but the unit rejected the agreement. On June 29, the Union submitted an information request to the Respondent's Labor and Employment Counsel and chief negotiator, Martha Amundsen. Amundsen refused to supply nonunit information and information she considered to be financial or proprietary, and she delayed providing the other information until October 10. Thereafter, on October 19, the Respondent issued a verbal warning to employee Heather Rebarchak for a comment she purportedly made to students about a coworker on October 11. The Union grieved the warning and in December and January 2013, respectively, filed unfair labor practice charges concerning the Respondent's refusal to, and delay in, providing information and its threat to further discipline or discharge Rebarchak if she refused to provide a written statement about the October incident—all conduct my colleagues and I have found to be unlawful. When the parties resumed bargaining on April 3, 2013, the Union requested an update on ongoing and impending layoffs. Amundsen unlawfully threatened that "bargaining would be changing" because the Union had filed unfair labor practice charges. After caucusing, the Union presented its proposals, including one to alter the bumping rights provision so that a senior full time employee would bump the least senior full-time employee (rather than the least senior full- or part-time employee). Amundsen said she would look at the Union's proposals, and provided an update on layoffs. The very next day, Amundsen fulfilled her threat by presenting three regressive proposals—eliminating arbitration and bumping rights altogether and, for the first time ever and without explanation, eliminating the night-shift differential.

It is well settled that the Board will find that an employer has engaged in bad-faith bargaining where the circumstances demonstrate that an employer's regressive proposals were made to retaliate for the filing of unfair labor practice charges. *Quality House of Graphics*, 336 NLRB 497, 515 (2001). See also *Whitesell Corp.*, 357 NLRB 1119, 1120–1121 (2011), modified on reconsideration on other grounds 2011 WL 5931998 (2011). In assessing bad faith, the Board examines the timing of the regressive proposals and any proffered justifications. Id. In *Quality House of Graphics*, the Board found that the employer's regressive proposal was made in bad faith, relying in part on the fact that it was made only *after* the employer learned that the Region intended to issue a complaint against it. Similarly, here, less than 10 days after the Region issued the complaint,[2] the Respondent proffered regressive proposals. And, tellingly, these regressive proposals were presented to the Union the very day after the Respondent, via Amundsen, unlawfully threatened that "bargaining would be changing," thereby specifically attributing the change in its bargaining stance to the unfair labor practice charges on which the complaint issued. Further, contrary to my colleagues' suggestion, the Respondent did not make these proposals based on newly strengthened bargaining power. That is, it did not weather a strike, nor did it advance these proposals in response to the Union's failure to strike 10 months earlier following its rejection of the tentative agreement. Rather, the Respondent advanced the proposals in response to the Union's filing charges, thereby

[1] All dates are in 2012 except where otherwise stated.

[2] The consolidated complaint and notice of hearing issued on March 22, 2013.

making it abundantly clear that the Respondent's proposals were retaliatory, and therefore unlawful.

The substance of the Respondent's April 4 regressive proposals also made clear its unlawful intent. The Respondent's proposal to eliminate arbitration entirely from the parties' contract contrasted sharply with its earlier proposed minor modifications to the contractual arbitration provision. Given the centrality of arbitration as a customary and cost-effective means of resolving contractual disputes, this proposal was predictably unacceptable to the Union. Arbitration is a key tool in a union's representational kit, and particularly important in bargaining relationships where, as here, the union has forfeited the right to strike. *Cf. Delaware Coca-Cola Bottling Co., Inc. v. Teamsters Local 326*, 624 F.2d 1182, 1185–1186 (3d Cir. 1980) (interpreting breadth of no-strike clause based on theory "that the no-strike clause is a quid pro quo for the arbitration clause") (citing *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407 (1976)). Additionally, the Respondent's explanation for its proposal —that the Union filed frivolous grievances—was pretextual as the elimination of arbitration would not prevent or limit the Union's ability to file grievances. Further, as the judge observed, the Respondent never established that the Union had filed frivolous or specious grievances.[3] Accordingly, the proposal, made the day after threatening to retaliate against the Union in negotiations, manifests the Respondent's intent to frustrate agreement. Moreover, the Respondent's additional new and regressive proposals to eliminate the night-shift differential in a contract devoid of pay raises and to eliminate bumping rights entirely while the Respondent was concurrently considering and implementing layoffs further support this conclusion.

Ultimately, the majority's finding that the Respondent did not engage in regressive bargaining when proffering its April 4 regressive proposals is tantamount to condoning the Respondent's coercive behavior. I would not condone that conduct. Accordingly, I would affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by engaging in regressive bargaining.

Dated, Washington, D.C. July 25, 2018

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

[3] Presumably, the Respondent's characterization of the Union's grievances as frivolous would include the Rebarchak grievance, which further smacks of retaliation.

MEMBER EMANUEL, dissenting in part.

Contrary to my colleagues, I agree with the judge's conclusion that the Respondent acted lawfully in instructing professional employee Heather Rebarchak to submit a written statement during the formal processing of her grievance or face discipline. Accordingly, I would dismiss the allegation that the Respondent's conduct violated Section 8(a)(1).[1]

On October 11, 2012, two students reported that Rebarchak made a snide comment about a coworker. On October 11 and 16, the Respondent asked Rebarchak for a written statement. Rebarchak failed to respond to the first request. After the second, she declined to provide a written statement, stating only that the alleged comment was "never made." Left with no contrary account of the incident other than Rebarchak's flat denial, the Respondent met with Rebarchak on October 19 and issued her a verbal warning. During the meeting, Rebarchak's story changed: she apparently admitted she had made a comment, but could not recall what it was. The Union formally grieved the discipline, alleging that it violated Article 9.11 (Employee Security)—also known as the "just cause" provision—of the professional unit's collective-bargaining agreement. The grievance asserted a lack of evidentiary support for the discipline.

On January 15, in the course of investigating the grievance, the Respondent emailed the Union, again requesting Rebarchak's statement, and on January 31, it emailed Rebarchak (and copied the Union), directing her to provide a written statement. In both communications, the Respondent cited the Rules of Conduct, which are incorporated by reference in Article 9.12 of the collective-bargaining agreement, and advised that Rebarchak could face discipline for violating them. The combined communications to the Union and to Rebarchak cited parts 7(b)(1), (19), and (20) of the rules (insubordination, making malicious, false, or unsubstantiated statements, and falsification of records, respectively).[2]

It is beyond dispute that the Respondent had a duty authentically to investigate Rebarchak's grievance. Although not explicitly stated in the contract, this obligation

[1] I join my colleagues in finding that the Respondent violated Sec. 8(a)(5) and (1) by delaying and refusing to provide requested information and Sec. 8(a)(1) by threatening that bargaining would change because the Union filed unfair labor practice charges. I join Member McFerran in dismissing the regressive bargaining allegation.

[2] My colleagues characterize the January 15 email as a threat of further discipline if Rebarchak "failed either to provide a written statement or to drop her grievance altogether." In my view, the email simply pointed out the obvious fact that it would no longer need a statement if Rebarchak chose not to pursue the grievance. This is evident from the language of the email, which states that the issue would be "moot" under such circumstances. Moreover, the Respondent's January 31 email to Rebarchak says nothing about withdrawing the grievance.

is imbued in the just cause and grievance provisions. And in fact, Article 13.2 of the contract, "Processing Grievances," states that a grievance shall include 'a statement of the occurrence giving rise to the grievance and containing all known pertinent facts'"—which not only imposes a duty on the Union and grieving employee to provide a statement, but also aids the Respondent in meeting its duty to investigate. Furthermore, employees have a duty to adhere to the Respondent's lawful rules.[3] Rebarchak invoked the grievance process but shirked her obligation to provide information that would enable the Respondent to adequately investigate it. From the beginning, the Respondent had sought to get to the bottom of the underlying incident, as it should when assessing the validity of a disciplinary warning, particularly when that warning is challenged as lacking evidentiary support. In short, the only party that attempted to meet its obligation here was the Respondent; yet, my colleagues would find that it violated the Act. I respectfully disagree.

Dated, Washington, D.C. July 25, 2018

William J. Emanuel, 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 Service Employees International Union, Local 668 (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, or by unreasonably delaying provision of such information.

WE WILL NOT coerce the Union and unit employees by stating that bargaining will change due to the Union's filing of unfair labor practice charges.

WE WILL NOT threaten employees with further discipline if they do not either provide written statements respecting the incidents underlying their grievances or withdraw those grievances.

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

WE WILL provide the Union, in a timely manner, with a copy of our contract with the U.S. Department of Labor, and with the nonunit information requested in the first 16 items of the Union's June 29, 2012 information request.

MANAGEMENT & TRAINING CORPORATION

The Board's decision can be found at www.nlrb.gov/case/04-CA-095456 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.

Jennifer R. Spector, Esq., for the General Counsel.
Martha J. Amundsen, Esq. (Management and Training Corporation), of Centerville, Utah, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on December 9, 2013.

[3] Moreover, the Union had a statutory duty to provide information. See *Service Employees International Union, Local 715 (Stanford Hospital)*, 355 NLRB 353, 355–356 (2010) (duty to provide information relevant to status as employees' exclusive bargaining representative), citing *Ironworkers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995); *Teamsters, Local 851 (Northern Air Freight, Inc.),* 283 NLRB 922, 925 (1987) (duty to provide information to defend against grievance); *International Association of Heat & Frost Insulators & Asbestos Workers, Local 80, AFL–CIO (West Virginia Master Insulators Assn.)*, 248 NLRB 143, 144 (1980) (duty to supply information in the context of contract administration); *Printing & Graphic Communications Local 13 (Detroit) (Oakland Press Co.)*, 233 NLRB 994, 995–996 (1977), affd. 598 F.2d 267 (D.C. Cir. 1979) (duty to provide straight-time work list in context of bargaining).

The Union, Service Employees International Union (SEIU) Local 668, filed the three initial charges in this matter between December 26, 2012, and May 10, 2013. The General Counsel issued the most recent version of the complaint on July 16, 2013.

The General Counsel alleges that Respondent, Management and Training Corporation, has violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union information that the Union requested. He also alleges that Respondent violated the Act by unreasonably delaying furnishing other information.

Additionally, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by announcing at an April 3, 2013 bargaining session that bargaining would be changing due to the filing of one of the unfair labor practice charges at issue in this case. Also, the General Counsel alleges that the following day, Respondent made proposals, consistent with that statement, which were less favorable than previous proposals concerning night shift premium pay, lay-offs, leaves of absence, arbitration, and union stewards. These proposals are also alleged to violate Section 8(a)(5) and (1) in that they establish that Respondent failed to bargain with the Union in good faith as required by Section 8(d) of the Act.

Respondent is also alleged to have violated Section 8(a)(1) by threatening that employee Heather Rebarchak would be disciplined and/or terminated if she failed to provide a written statement concerning events for which Respondent issued her a written warning.

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

Respondent, Management and Training Corporation, manages a number of entities, one of which is the Keystone Job Corps Center (KJCC) in Drums, Pennsylvania. KJCC is a residential training center for disadvantaged youth. Respondent manages KJCC under a contract with the United States Department of Labor (DOL).

Respondent annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Pennsylvania at the Drums facility. 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, SEIU Local 668, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union represents three separate bargaining units of Respondent's employees at the Keystone Job Corps Center in Drums, Pennsylvania. One unit consists of maintenance, food service and transportation employees (the maintenance unit), a second consists of professional employees and the third consists of employees who are resident advisors. Among the employees at KJCC that the Union does not represent are the security staff employees and recreation staff employees.

Respondent and the Union had a contract covering the maintenance unit that ran from July 1, 2009, to June 30, 2012. The collective-bargaining agreements for the professional and resident advisor units expired on June 30, 2013. Negotiations began for a successor contract in the maintenance unit and for wage reopeners regarding the professional and resident advisor units in April 2012. The Union proposed a $1-per-hour wage increase for employees in all three units. Respondent told the Union it was proposing no increase, at least in part because DOL was not giving Respondent any increase in its inflation cap.

In June 2012, Union and Company negotiators reached tentative agreement on extending the prior collective bargaining agreement for the maintenance unit for a period of 2 years. The unit members rejected this in a ratification vote the same month.

On June 29, 2012, Kimberly Yost, a union business agent, sent Martha Amundsen, Respondent's Labor and Employment Counsel, an email requesting information in 17 numbered paragraphs, Appendix A to the complaint. Amundsen responded the same day (GC Exh. 7), refusing to provide much of the requested information on the grounds that it did not relate to Local 668 bargaining unit members, or that the Union was requesting confidential information. The requests and Respondent's reply are as follows:

> Request No. 1: The amount of Respondent's under run (the amount budgeted by DOL that Respondent did not spend) for the contract year. MTC refused to provide this on the grounds that it is proprietary information.
>
> Request No. 2: Whether bonus money was given, to whom and how much: Respondent refused to provide this information for individuals not in any of the Local 668 bargaining units.
>
> Request No. 3: The pay grade for a security officer: Respondent refused to provide this information on the grounds that security officers are not bargaining unit members.
>
> Request No. 4: What pay grade is a resident advisor? Respondent provided this information to the Union on October 10, 2012.
>
> Request No. 5: What pay grade is a Recreation Aide? Respondent refused to provide this information on the grounds that recreation aides are not bargaining unit members.
>
> Request No. 6: What is the starting rate for a Security Officer? Respondent refused to provide this information on the grounds that security officers are not bargaining unit members.
>
> Request No. 7: What is the starting rate for Recreation Aides? Respondent refused to provide this information on the grounds that recreation aides are not bargaining unit members.
>
> Request No. 8: Provide a copy of the non-union pay scale: Respondent refused to provide this information on

the grounds that the information is not relevant to the Union's role as bargaining representative of unit employees.

Request No. 9: A copy of the union pay scale: Respondent provided this information to the Union on October 10, 2012.

Request No. 10: Department of Labor established minimum and maximum for security employees: Respondent refused to provide this information on the grounds that the information is not relevant to the Union's role as bargaining representative of unit employees.

Request No. 11: DOL established minimum and maximum for resident advisors:
Respondent provided this information on October 10, 2012.

Request No. 12: DOL established minimum and maximum for recreation aides: Respondent refused to provide this information on the grounds that the information is not relevant to the Union's role as bargaining representative of unit employees.

Request No. 13: Where was the "extra money" given to Security and Recreation Aides taken from? Respondent refused to provide this information on the grounds that the information is not relevant to the Union's role as bargaining representative of unit employees.

Request No. 14: Why were recreation and security staff given additional increases? Respondent refused to provide this information on the grounds that the information is not relevant to the Union's role as bargaining representative of unit employees.

Request No. 15: Other than DOL inflationary increments, when was the last time MTC provided workers at KJCC with wage increases? Respondent responded on October 10, 2012 that the Union already had this information re: bargaining unit members; it refused to provide any such information re: non-unit employees.

Request No. 16: A copy of the contract between USDOL and Respondent regarding the Keystone Job Corps Center: MTC refused to provide this on the grounds that it is proprietary information.

Request No. 17: Applicable financial records based on DOL restrictions. Respondent refused to provide on the grounds that it was not alleging financial hardship in its negotiations with the Union. The Region did not go to complaint on this request item. Therefore, it is not at issue in this case.

Alleged Violative Threat to Unit Employee Heather Rebarchak

On October 19, 2012, Respondent met with professional unit member Heather Rebarchak concerning a statement she allegedly made about another staff member in front of students on or about October 11. The company issued Rebarchak a verbal warning at or immediately after the meeting (GC Exh. 9).[1]

Human Resources Manager Lori Thuringer asked Rebarchak for a statement regarding this issue on October 11 and 16. Rebarchak replied by email on October 16 that she was not providing Respondent a statement because the comments students accused her of making were not made, (GC Exh. 11).

An informal grievance meeting was held on October 26. Rebarchak apparently stated that she "said something, but could not recall what she said." She declined to give Respondent a written statement.

The Union filed a formal grievance on November 8, 2012 (GC Exh. 9). As grounds the Union alleged that management employees had stated that they don't know if the grievant said what she is alleged to have said.

The parties held a formal grievance meeting on November 27. Respondent affirmed its prior decision to issue a verbal warning based on written statements from two students and the lack of any written statement from Rebarchak.

On January 15, 2013, Respondent's counsel, Martha Amundsen, informed the Union that Rebarchak could either provide a truthful written statement, withdraw her grievance, or be disciplined, and possibly terminated, for insubordination and impeding or interfering with an investigation. Human Resources Manager Thuringer reiterated this message in an email to Rebarchak on January 31.

On February 2, 2013, Rebarchak submitted a written statement under protest. She denied making a statement critical of the other staff member, as alleged by the two students. (Exh. R -12.)

Respondent denied the Union's grievance at step 4 of the grievance procedure of the expired collective bargaining agreement. On April 15, 2013, the Union filed a demand for arbitration.

Retaliation and Threat of Retaliation Against the Union in Bargaining for Filing Unfair Labor Practice Charges; Regressive Bargaining

On April 3, 2013, the parties held their first bargaining session since October 2012. Between these meetings the Union had filed unfair labor practices regarding Respondent's refusal to provide all the information it requested on June 29 and its threat to discipline Heather Rebarchak for failing to provide Respondent with a written statement.

At the April 3 negotiating session, Martha Amundsen, lead negotiator for Respondent, told the Union that bargaining would change due to the Union filing these ULP charges. The next day, April 4, Respondent made bargaining proposals that it had not made previously (GC Exh. 14).

Respondent proposed to delete the arbitration provision of the collective-bargaining agreement completely. Amundsen told the Union that since the Union had been filing grievances, Respondent did not want any arbitration provision in its contracts. It would require the Union to file suit in federal court to enforce the contract. Prior to April 4, Respondent had pro-

[1] The issues regarding Rebarchak are apparently not moot despite the fact that she no longer works for MTC, Tr. 40. The Union's grievance regarding the warning issued to Rebarchak is still pending.

posed that arbitrations would be handled by arbitrators from the Federal Mediation and Conciliation Service rather than one from the American Arbitration Association (AAA) as provided in the July 1, 2009 to June 30, 2012 contract.

The 2009–12 contract contained a section setting forth a layoff procedure (Exh. R-4, p. 14–15). That section provided that on-call, temporary and probationary employees would be laid off before permanent employees. If permanent employees were to be laid-off, they were to be laid off in order of reverse seniority. The laid off employee was allowed to displace (bump) employees with less seniority.

On April 3, 2013, the Union proposed changing this provision so that a laid-off employee would displace (bump) the least senior full-time employee, or the least senior employee with similar hours. It made this proposal because an employee who was laid off had to bump a part-time employee, thus losing not only hours of work, but fringe benefits (Tr. 48–49). In response to this proposal, on April 4, 2013, the company proposed to eliminate bumping rights altogether.

The 2009–12 contract provided for leaves of absence of up to 6 months in some circumstances (Exh. R-4, p. 19–20). There had been several proposals on this subject during prior bargaining sessions. I conclude that Respondent's proposal of April 4 is not materially different than prior proposals.

The number of union stewards would be determined by mutual agreement of the parties under the 2009–12 contract. On April 4, for the first time, Respondent proposed that there be three union stewards, plus a chief shop steward. I do not consider this to be a regressive proposal.

The 2009–12 collective-bargaining agreement provided that an employee scheduled to work an established night shift would be paid a differential of 10 percent of his or her hourly base wage. On April 4, without any prior discussion of this issue, Respondent also proposed to delete provisions for a night shift premium.

In its brief at page 40 Respondent justifies eliminating its night shift premium on the DOL budget. This is entirely inconsistent with its refusal to provide any financial documents to the Union in response to the Union's information request.[2]

Analysis

The General Counsel Failed to Demonstrate the Relevance of the Information Requested by the Union Concerning Non-Unit Employees

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations. Generally information pertaining to employees within the bargaining unit is presumptively relevant. However, there is no such presumption re: information pertaining to non-unit employees. This must be established by the General Counsel in the unfair labor practice proceeding, *Caldwell Mfg. Co.,* 346 NLRB 1159 (2006), and cases cited therein.

I find that the General Counsel has not met this burden. Respondent never alleged that it was unable to afford the terms and conditions proposed by the Union in negotiations. In taking the position that it was unwilling to raise wages, Respondent relied solely on the fact that the Department of Labor was not giving it an increase. MTC provided the Union with documentation regarding DOL's decision in 2011.

In contrast to the facts in *Caldwell Mfg.,* Respondent never relied on the terms and conditions of nonunit employees' employment in rejecting the Union's proposals or on insisting that it would not agree to any raises for unit employees. Unlike *Caldwell* and similar cases, the Union's requests for information regarding non-unit employees were not tailored to claims or representations by the Respondent. Respondent, unlike Caldwell, did not make the information requested by the Union relevant by its conduct during the course of bargaining. The complaint is dismissed with regard to the Union's request for information regarding non-unit employees.

The General Counsel did not Establish the Relevance of the Financial Information Requested by Respondent

Respondent at no time during negotiations claimed it was unable to increase unit employees' wages. It stated, to the contrary, that it was unwilling to pay any increases. This is in effect a statement that Respondent believes that it can get the labor it requires to run the KJCC at the wages paid under the prior contract. Thus, under such conditions the financial documents requested by the Union have not been shown to be relevant, *Advertisers Mfg. Co.,* 275 NLRB 100 (1985); *Gilbertson Coal Co.,* 291 NLRB 344, 345 (1988). MTC has merely informed the Union that it is exercising its bargaining power by not offering any wage increase.

Information Allegedly Provided in an Untimely Fashion

An employer must respond to an information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all, *American Signature Inc.,* 334 NLRB 880, 885 (2001).[3]

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information, *West Penn Power Co.,* 339 NLRB 585, 587 (2003), enf. in pertinent part 394 F.3d 233 (4th Cir. 2005).

[2] One could argue that in light of this, I should find that Respondent violated Sec. 8(a)(5) and (1) in failing to provide the financial information requested by the Union. However, from this record it has not been established that the relevant information was not provided verbally, or in the alternative that the previous method of conveying the information was so burdensome or time-consuming as to impede the process of bargaining. As discussed below, it is clear that some of the information requested by the Union had been provided to it verbally and it has not been shown that this was insufficient—with the exception of the Union's request for the DOL contract.

[3] This case has also been cited under the name of *Amersig Graphics, Inc.*

In *American Signature,* supra, the Board found a violation where the employer provided the information requested by the Union two and a half to three months after the request. In *Earthgrains, Co.,* 349 NLRB 389, 400 (2007), the Board found a violation where the employer responded four months after the request without explaining the delay. Thus, I would be inclined to find a violation from the evidence that Respondent failed to provide the Union with the information regarding unit employees for 3-½ months were it not for the fact that the record establishes that some or all of this information was provided verbally in a timely fashion.

The Union's June 29, 2012 information request states that most responses have been given verbally. The record does not indicate what information was not provided verbally. Also, there is no *per se* requirement that an information request be satisfied in writing. It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining, *Cincinnati Steel Castings Co.,* 86 NLRB 592, 593 (1949); *Howard K. Sipes Co.,* 319 NLRB 30, 38–39 (1995).[4] There is no evidence that the information provided verbally was of such a nature that a verbal response was insufficient—with the exception of the Union's request for the DOL contract. Since there is no evidence that any of the information to which the Union was entitled was not sufficiently provided verbally in a timely fashion, I dismiss the allegations regarding the June 29, 2012 information request—except for the Union request for the DOL contract.

Respondent Violated Section 8(A)(5) And (1) in Failing to Provide the Union with a Copy of its Contract with the Department of Labor

Respondent's contract with DOL in clearly relevant to the Union's role as representative of bargaining unit employees. MTC refused to provide a copy of the contract on the grounds that it contained confidential information. However, it made no effort to prove its claim of confidentiality, *Jacksonville Area Association for Retarded Citizens,* 316 NLRB 338, 340 (1995). Thus, it violated Section 8(a)(5) and (1) in refusing and failing to provide the contract. Assuming that the contract contains proprietary information, Respondent was obligated to seek an accommodation with the Union to determine whether portions of the contract or a redacted version could be provided to satisfy the competing interests of the Union and MTC. It never made any offer of accommodation to the Union.

Respondent did not Violate Section 8(A)(1) in Threatening Heather Rebarchak with Discipline if She Refused to Provide Respondent with a Written Statement

The General Counsel's theory with regard to the alleged violation regarding Heather Rebarchak appears to be that the demand for a written statement was discriminatorily motivated; not that an employer violates the Act by requiring an employee to provide a written with respect to a pending grievance. The General Counsel's theory requires an inference that is not supported by this record.

There is no basis for me to conclude that Respondent would have disciplined Rebarchak if she had provided a statement. Indeed, it did not discipline her a second time after she submitted a statement. Thus, the General Counsel's theory reverts to an argument that either it a violation to demand a written statement during a disciplinary proceeding, or that given the facts of this case, there could be no reason for such a demand—other than to punish Rebarchak for filing a grievance.

I find that the General Counsel has not established a violation under either alternative. Under the *Weingarten* line of cases it is clear that an employer may demand that an employee to participate in a disciplinary investigation. If the employee refuses, the employer may discipline the employee without the benefit of the employee's input. I am not aware of any case that stands for the proposition that an employer violates the Act in demanding that an employee commit his or her version of events to writing.

While Rebarchak had sent Respondent an email denying that she made the statements attributed to her by the students, it was not unreasonable for Respondent to demand a written explanation from Rebarchak as to what she recalled saying. In the informal grievance meeting of October 26, Rebarchak admitted that she said something in the presence of the students during the incident in question. Since the grievance was pending, it was not unreasonable for Respondent to force Rebarchak to exhaust her recollection of the incident in writing well in advance of the arbitration, so as to know precisely what it needed to contradict at the arbitration. I therefore dismiss the complaint allegation regarding the threat to Rebarchak.

Respondent by Martha Amundsen Violated Section 8(A)(1) in Telling the Union that Bargaining was Going to Change due its Filing of Unfair Labor Practices

Respondent by making this statement was coercing the Union in the exercise of its duties as the collective bargaining representative of unit employees. It was clearly interfering with the right of the Union and represented employees to file charges by retaliating against them for doing so.

MTC's defense, at page 37 of its brief is that it did not violate the Act in refusing to discuss irrelevant information. However, threatening the Union was unnecessary to achieve this objective. Respondent needed only to refuse to produce the information and make the Union seek an order from the NLRB to produce it. Moreover, just because I have found that Respondent did not violate the Act in failing to produce certain information, other than the DOL contract, does not mean the Union's request was frivolous. Indeed, while it has not been established on this record, it is quite possible that there was relevant information that was not furnished the Union or was not furnished in a sufficient manner.

Respondent Violated Section 8(A)(5) and (1) by Engaging in Regressive Bargaining on April 4, 2013

I have found that Respondent engaged in regressive bargaining on April 4, 2013, in three material respects: elimination of

[4] These cases have not been overruled by *AT&T, Corp.,* 337 NLRB 689, 691 (2002), which is cited by the General Counsel. That decision stands for the proposition that a verbal response is adequate when a union does not renew its information request at a later date. It does not hold that a verbal response will not suffice in other circumstances and does not mention the aforementioned cases.

the provisions for arbitration entirely, eliminating the night differential and eliminating the right of laid-off employees to displace or bump employees with less seniority.

Regressive bargaining is not per se unlawful. For it to be unlawful, regressive bargaining must be engaged in for the purpose of frustrating the possibility of agreement, *Telescope Casual Furniture, Inc.,* 326 NLRB 588 (1998). There is no bright line between regressive bargaining that violates the Act and regressive bargaining that does not. However, in this case the elimination of the arbitration clause, solely in retaliation for the Union's filing of grievances crosses the line into the illegal. This is particularly true since although Respondent asserts that the Union's grievances are frivolous; it has not established that they were frivolous. Moreover, Respondent did not set forth any economic or otherwise legitimate basis for eliminating arbitration, the night shift differential or bumping rights.

Respondent asserts that on April 4 it made two concessions in bargaining that negate any conceivable finding that it sought to frustrate the possibility of agreement. One of these was agreeing to no change from the 2009–12 contract that mandated a 90 day probationary period for new employees. A year prior to April 4, 2013, Respondent had proposed increasing the probationary period to 180 days. The other alleged concession is to the Union's position regarding "management grant days." This refers to a provision in the 2009-12 contract which gave employees credit for up to 2 days of unused sick leave. Respondent suggests that it had previously proposed to reduce this benefit to one management grant day and restored 2 days in its April 4, 2013 proposal (GC Exh. 14, P. 2). The language of the April 4 proposal is not at all clear that Respondent changed its position on this issue and there is no testimony regarding what the language means.

It sum, I conclude there is no evidence of concessions to the Union that negates the proposition that the elimination of arbitration, the shift differential and bumping rights was intended to frustrate the possibility of agreement. This is true because Respondent was perfectly willing to include an arbitration provision, albeit somewhat modified, in the new collective-bargaining agreement until it decide to retaliate for the Union's resort to the Board's processes.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act in coercing the Union and unit employees by announcing on April 3, 2013, that bargaining would change because of the Union's filing of unfair labor practice charges.

2. Respondent violated Section 8(a)(5) and (1) by engaging in regressive bargaining on April 4, 2013, in order to frustrate the possibility of reaching agreement with the Union.

3. Respondent violated Section 8(a)(5) and (1) in failing to provide the Union with its contract with the U.S. Department of Labor.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Management Training Corporation, Drums, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing the Union and unit employees by stating that bargaining would change due to the Union's filing of unfair labor practice charges;

(b) Engaging in regressive bargaining in order to frustrate the possibility of reaching agreement with the Union.

(c) Refusing to provide the Union with a copy of its contract with the U. S. Departmentof Labor.

(d) 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) Rescind its regressive bargaining proposals of April 4, 2013 with regard to arbitration, a night differential and bumping rights;

(b) Provide the Union with a copy of its contract with the U.S. Department of Labor.

(c) Within 14 days after service by the Region, post at its Drums, Pennsylvania facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4, 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, the 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. In the event that, during the pendency of these proceedings, 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 June 29, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director 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.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended 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.

[6] 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 30, 2014.

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 threaten the Union or unit employees that bargaining will change as the result of the Union filing an unfair labor practice charge.

WE WILL NOT refuse to provide the Union with information that it is relevant to its role as bargaining representative on the grounds of confidentiality without first establishing that the information is confidential and without first offering the Union an accommodation to balance our respective interests.

WE WILL NOT engaged in regressive bargaining in order to frustrate the possibility of reaching agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the regressive bargaining proposals we made on April 4, 2013, which eliminated arbitration, a night shift differential and bumping rights for laid-off employees from our proposals.

WE WILL provide the Union with a copy of our contract with the U.S. Department of Labor, as the Union requested.

WE WILL, on request, bargain in good faith with the Union, Service Employees International Union, Local 668, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in our bargaining units which that union represents.

MANAGEMENT & TRAINING CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-095456 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.