United States Postal Service *and* Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL–CIO. Case 07–CA–232299

July 21, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

On December 23, 2019, Administrative Law Judge Donna Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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.

INTRODUCTION

At issue here is whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by delaying furnishing information requested on November 29, 2018,[1] by Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL–CIO (the Union). The Union made an information request after learning that the Respondent had scheduled an investigatory interview with employee Charlotte Barker. Notably, the Union asked the Respondent to provide the information in advance of the interview. The General Counsel alleged, and the judge found, that the Respondent violated the Act by unreasonably delaying providing the Union with the information it requested, which the judge found was relevant and necessary to the performance of the Union's function as the exclusive collective-bargaining representative of the Respondent's employees.

As explained below, we affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) by failing to provide the requested information in a timely manner. However, we disagree with the judge's extension of *Weingarten*[2] to find that the Union had a pre-interview right to the requested information. Accordingly, we reverse his finding that the Respondent's obligation to furnish the information commenced with the Union's November 29 request. Rather, we find that the Respondent did not have an obligation to provide the requested information until December 11, when it completed its investigation into Barker's misconduct.

BACKGROUND FACTS

The Respondent provides postal services for the United States. Since 1971, the Respondent has recognized the Union as the exclusive collective-bargaining representative of a unit of employees at its Eaton Rapids, Michigan facility.[3]

On November 20 and 27, employee Charlotte Barker failed to report to work. In response, the Respondent issued Barker absence without leave (AWOL) charges, which were notifications of the allegations against her. On November 28, Supervisor Kathy Strahan notified Union Steward John Greathouse that the Respondent had scheduled a predisciplinary interview to discuss Barker's AWOL charges.

In a November 29 email to Postmaster Timothy Schuchaskie, Greathouse wrote, "Prior to the investigative interview . . . the [Union] is requesting copies of all records and documents including questions to get used in the interview." Schuchaskie consulted with the Respondent's labor management department, which opined that the Union was not entitled to this information in advance of the interview: "[n]o decision has been made so there is no basis for the Union to have access. . . . [An] [i]nvestigatory interview [is] . . . part of a process to make a decision." On December 3, Schuchaskie replied to Greathouse, repeating the advice he had received: "Cart before horse. This is an investigatory interview and if we take action then you can have copies. The logic is this. Information is just that until it is used for a basis or support of a decision. Investigatory interview is just a part of the process to make a decision."

On December 4, the Respondent interviewed Barker in Greathouse's presence.

On December 6, the Union filed with the Board an unfair labor practice charge alleging that the Respondent failed to provide the requested information in a timely manner. The charge noted that the Union also filed a grievance on December 6 over the Respondent's "failure to provide information in a timely manner."

As part of its investigation, the Respondent interviewed Postmaster Schuchaskie on December 7. Thereafter, Schuchaskie and Supervisor Strahan signed an Administrative Action Request recommending Barker's removal. Supportive documentation for the removal included (1)

[1] All subsequent dates are in 2018 unless otherwise noted.

[2] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[3] The parties most recent collective-bargaining agreement was effective from May 21, 2015, to September 20, 2018. Negotiations for a successor contract were pending arbitration at the time of the hearing.

notification of absence forms dated November 20 and 27 and signed by Strahan; (2) Barker's leave analysis form, which included handwritten comments and the names of several witnesses to Barker's November 27 absence and was signed and dated November 30 by Strahan; and (3) Respondent's notes from the investigative interviews of Barker and Schuchaskie. The Administrative Action Request also referenced Barker's past disciplines.[4]

On December 11, the Respondent mailed a notice of removal to Barker, which she received 2 days later. Neither the Respondent nor Barker informed the Union of the notice of removal.

On December 27 or 28, Greathouse renewed the information request during a Step 1 grievance meeting with Strahan and Supervisor Chad Rodriguez on an unrelated matter.

On January 4, 2019, during a meeting with Respondent's labor relations specialist, Patricia Schaefer, Greathouse learned about Barker's notice of removal. On January 10, 2019, Schuchaskie provided Greathouse with documents related to Barker's removal and stated that he was "waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal."

DISCUSSION

The Respondent excepts to the judge's (1) finding that the requested information was relevant; (2) extension of employees' *Weingarten* rights to include a union's request for pre-interview information; and (3) conclusion that the Respondent unlawfully delayed providing the requested information to the Union. We affirm the judge's findings that the information was relevant and that the Respondent unlawfully delayed providing the requested information to the Union. However, as discussed infra, we reject the judge's extension of employees' *Weingarten* rights to include a union's request for pre-interview information.

When a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished. See *Regency Service Carts, Inc.*, 345 NLRB 671, 673 (2005). An unreasonable delay in furnishing information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information. See *Finn Industries,* 314 NLRB 556, 558 (1994). In determining whether there was an unlawful delay, the Board considers the nature of the information sought, the difficulty in obtaining it, the amount of time it took to provide, the reasons for the delay, and whether the provider contemporaneously communicated those reasons to the requesting party. See *Safeway, Inc.*, 369 NLRB No. 30, slip op. at 7 (2020).

The information at issue here was relevant,[5] not complex, and readily available to the Respondent. The Respondent failed to explain why the information would not be immediately furnished after the conclusion of the investigation or why it waited 4 weeks thereafter to provide the information to the Union. See *Postal Service*, 308 NLRB 547, 551 (1992) (finding 4-week unexplained delay unlawful where information was neither complex nor difficult to retrieve).

We reject the Respondent's argument that the delay should be excused because it was waiting for the Union to renew its information request. A union generally is not required to repeat its information request,[6] and here the Union had no indication that the Respondent expected it to do so. In its December 3 response to the Union's request, the Respondent stated that it would provide the information to the Union once it "took action." The Respondent "took action" on December 11 when it mailed the notice of removal to Barker but failed to provide the Union with the information at that time or within a reasonable time thereafter. Additionally, it should have been clear to the Respondent that the Union was still interested in the information after the interview as the Union filed a charge and grievance over the requested information on December 6, never withdrew either of those actions, and orally renewed its request on or about December 27 (the last date to file a grievance under the parties' contract) or December 28.

As noted above, although we agree with the judge that the information was relevant and the Respondent unreasonably delayed providing it, we find that the Respondent's obligation to provide the information began on December 11, not November 29 as the judge and our colleague would find. Where an employer announces that it will conduct an investigatory interview of an employee alleged to have committed misconduct and a union, prior to that interview, requests relevant information concerning the interview, the employer may refuse to disclose such

[4] Barker's prior disciplines included a letter of warning and 14-day suspension in 2017 and a long-term suspension in September 2018.

[5] The Act requires an employer to furnish information requested by a union that is the bargaining representative of its employees if there is a probability that the information is relevant and would be of use to the union in carrying out its statutory duties and responsibilities as the employees' bargaining representative. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Those duties include the filing and processing of grievances, as well as evaluating whether to pursue a grievance in the first place. See id.; *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). We agree with the judge that the information requested by the Union was presumptively relevant as it pertained to discipline and a potential grievance concerning Barker's time and attendance and other terms and conditions of her employment.

[6] See, e.g., Bundy Corp., 292 NLRB 671, 672 (1989).

information while the investigation is ongoing, but must provide it at the conclusion of the investigation. This holding is consistent with the Supreme Court's decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and the Board's decision in *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982), enfd. in rel. part 711 F.2d 134 (9th Cir. 1983).

In *Weingarten*, the Supreme Court sustained the Board's position that Section 7 of the Act grants employees the right to request the attendance of a union representative in any interview that he or she reasonably fears may result in discipline. 420 U.S. at 260–261. The Court added, however, that it was not granting a union "any particular rights with respect to predisciplinary discussions which [the union] otherwise was not able to secure during collective-bargaining negotiations." Id. at 259. Lastly, the Court specifically declared that the presence of the representative should not transform the interview into an "adversary contest" or "interfere with legitimate employer prerogatives," and that "[t]he employer has no duty to bargain with the union representative at an investigatory interview." Id. at 258–259, 260, 263.

In *Weingarten*, the Supreme Court tasked the Board with striking a careful balance between the right of an employer to investigate the conduct of its employees during an interview and the role to be played by the employees' union representative. This is underscored by the Board's decision in *Pacific Telephone,* which established that if the *Weingarten* right to representation is to be "anything more than a hollow shell," both the employee and the representative must also have some indication of the subject matter being investigated. 262 NLRB at 1048. The Board explained, however, that an employer need only provide an employee and his union representative with a "general statement as to the subject matter of the interview, which identifies . . . the misconduct for which discipline may be imposed." Id. at 1049.[7] Emphasizing that "the employer controls the manner, form, and timing of its investigatory . . . process and can take steps to protect its legitimate interests," the Board held that the employer's duty to inform the union of the subject matter of the interview does not "dictate anything resembling 'discovery'": an employer "does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed." Id.

The right to know the general subject matter of an investigatory interview is very different from having access to the entirety of an ongoing investigation, and the request at issue here sought information the Respondent had "obtained" and the "specifics of the misconduct to be discussed"—the very things *Pacific Telephone* said employers are not required to provide. Thus, the Respondent was within its rights to decline to provide the requested information in advance of Barker's interview. Moreover, we are convinced by the Respondent's argument that because the duty to furnish information stems from the duty to bargain,[8] and, as the Court held in *Weingarten*, an employer has no duty to "bargain" with a union representative during an investigatory interview, then it follows that the Respondent had no obligation to provide the investigation-related information requested by the Union while the investigation was ongoing. Accordingly, we find that the Respondent did not have an obligation to provide the information *before* the conclusion of its investigation,[9] but

[7] The Board in *Pacific Telephone* recognized this right in order to make meaningful the employee's right to consult with his or her union representative before the investigatory interview. Id. at 1048 (citing *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978)).

[8] See, e.g., *American Stores Packing Co.*, 277 NLRB 1656, 1658–1659 (1986); *Emery Industries*, 268 NLRB 824, 824–825 (1984); see also *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) (holding that the duty to furnish information derives from the statutory duty to bargain in good faith); *FirstEnergy Generation, LLC v. NLRB*, 929 F.3d 321, 334 (6th Cir. 2019) (finding that because the employer did not have a duty to bargain over a particular subcontracting decision, it had no duty to provide the union with information related to that decision).

[9] In concluding otherwise, the dissent relies on *Kankakee County Training Center for the Disabled, Inc.*, 366 NLRB No. 181 (2018), but that case is consistent with our decision. There, at the time the union requested information, the employer had already made its disciplinary decision, albeit not a *final* decision. On November 13, 2015, employee Priscilla Williams was involved in an altercation with a coworker. That same day, a supervisor who witnessed the incident reported it to management; the employer interviewed and obtained statements from the four other individuals who had also witnessed it, all of whom corroborated the supervisor's account; and the employer issued Williams two letters, the first of which informed her that she was suspended pending a predisciplinary meeting, and the second of which, entitled "Proposed disciplinary action," stated that "a decision *has been made* to discharge you." Id., slip op. at 12 (emphasis added). On November 16, the union requested information relevant to Williams' discharge. The employer provided a partial response. A meeting was held on November 19, at which the employer "decided that the decision to terminate Williams *stood*." Id., slip op. at 13 (emphasis added). At that meeting, Williams provided written statements from alleged witnesses but did not otherwise tell her side of the story. HR Director Julie Galeaz testified that she would normally ask the employee involved to give a statement, but did not need to do so here in light of the witness statements provided to her on November 13, and because the witness statements Williams provided during the November 19 meeting did not refute the facts establishing the offense. Id. Thus, no investigatory interview took place at the November 19 meeting, at which the employer's preliminary discharge decision was merely confirmed. In contrast, no decision about Barker's employment status, preliminary or otherwise, had been made in advance of her interview. The Respondent's labor management department told Schuchaskie that an investigatory interview was "part of a process to *make* a decision," and Schuchaskie told the Union that the requested information would be provided "*if* we take action" (emphasis added).

The dissent also relies on *Grand Rapids Press, a Division of Booth Newspapers, Inc.*, 331 NLRB 296 (2000). However, the issue in that

it did have an obligation to provide the information after the December 11 conclusion of the investigation, and it unlawfully failed to do so until January 10, 2019.

The dissent contends that, under what she calls our "new rule," employers will be able to withhold information "at the very moment that it would be of greatest value to unions and the employees they represent." But the rule we apply is far from new, and our colleague's criticism is properly directed at *Pacific Telephone* itself, not at our decision, which simply applies *Pacific Telephone*. The dissent also asserts that we have conflated "separate statutory rights," but the Supreme Court itself linked those rights when it held in *Weingarten* that an employer has no duty to bargain during an investigatory interview. Since the duty to furnish information is an aspect of the duty to bargain, the Board in *Pacific Telephone* ruled consistently with *Weingarten* in holding that, in advance of an investigatory interview, an employer "does not have to reveal its case [or] *the information it has obtained*." 262 NLRB at 1049 (emphasis added). We see no reason to depart from this plain, well-established precedent.[10]

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Eaton Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL–CIO, by unreasonably delaying furnishing it with requested information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

> All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

(b) 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) Post at its Eaton Rapids, Michigan facility copies of the attached notice marked "Appendix."[11] 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, 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 December 11, 2018.

(b) 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.

Dated, Washington, D.C. July 21, 2021

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William J. Emanuel, Member

case was whether the requested information was relevant. Relevance is not at issue here.

[10] Nothing in *Pacific Telephone* or our decision today prevents an employer from agreeing, in collective bargaining, to a framework for broader pre-disciplinary information sharing. Absent such an agreement, however, an employer is entitled to stand on its rights under *Pacific Telephone* as set forth above.

[11] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting in part.

In anticipation of an employer's investigatory interview of an employee, the Union here requested basic information from the employer—including copies of existing records and documents related to the potential disciplinary action—that would have undoubtedly helped it perform its representative duties. That information was, in the majority's own account, "relevant, not complex, and readily available to the Respondent." The Respondent did not raise any compelling confidentiality concerns or argue that the request was unduly burdensome, nor did it offer an accommodation. In other words, pursuant to longstanding precedent under Section 8(a)(5) of the Act, there was simply no lawful reason for the Respondent to deny the Union's request.

Even so, the majority finds instead that the Respondent did *not* violate the Act by failing to provide the information to the Union before the investigatory interview.[1] The majority announces a blanket rule—purportedly based in the Supreme Court's decision in *NLRB v. J. Weingarten*[2]—that where a union requests relevant information prior to an investigatory interview, "the employer may refuse to disclose such information while the investigation is ongoing" without establishing any particularized justification.

As I will explain, this position is not only contrary to *Weingarten*—which recognized that informed union representatives play an integral role in the disciplinary process—but is also an unwarranted departure from core Section 8(a)(5) principles. Finding that the Respondent violated the Act by failing to provide the relevant information before the interview would not require (as the majority alleges) an "extension of employees' *Weingarten* rights." To the contrary, it is the only correct outcome under Board's well-established information-request framework. Employees' *Weingarten* rights do not come at the expense of unions' right to information, nor should they. The information-request framework fully accommodates employers' legitimate interests in conducting disciplinary investigations.

I.

The Supreme Court has held that Section 8(a)(5) establishes the "general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties" and that this obligation "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). In setting out the contours of this duty, the Court endorsed the Board's "discovery type standard" for assessing information requests. Id. at 437. Accordingly, the Board uses a liberal standard for determining relevance in information request cases, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information.[3]

The Board has thus held that disciplinary records for unit employees—including warnings, notices, records, and personnel files—are presumptively relevant.[4] In so holding, the Board has emphasized that a grievance need not be pending to make this information relevant.[5] Indeed, the Board has found such information to be presumptively relevant not only in cases where discipline has already occurred, but also in cases like this one involving the potential for future discipline.[6] An employer has a duty to timely furnish relevant information absent presentation of a valid defense.[7] Where an employer has asserted a confidentiality defense, it has the burden of proving that such interests are legitimate and substantial, and that they outweigh the union's need for the information.[8] Further, an employer refusing to supply information on confidentiality grounds has a duty to seek an accommodation with the union.[9]

Finally, an employer's unreasonable delay in furnishing relevant information is as much of a violation of Section 8(a)(5) of the Act as is a refusal to furnish the information at all.[10] Absent evidence of justification, such a delay will constitute a violation of the Act inasmuch "[a]s the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as

[1] I agree with the majority that the Respondent violated Sec. 8(a)(5) and (1) by unreasonably delaying in providing the requested information, but I disagree with the majority's finding that the Respondent's obligation to provide the information only began on December 11, when its investigation concluded.

[2] 420 U.S. 251 (1975).

[3] See *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

[4] See, e.g., *Antioch Rock & Ready Mix*, 328 NLRB 116, 116 (1999); *Super K-Mart*, 322 NLRB 583, 584 (1996); *Bloomsburg Craftsmen*, 276 NLRB 400, 402 (1985).

[5] See *United Technologies Corp.*, 274 NLRB 504, 506 (1985).

[6] See, e.g., *Booth Newspapers, Inc.*, 331 NLRB 296, 302 (2000) (requiring an employer to provide, on an ongoing basis, predisciplinary memos regarding employees' work performance and alleged misconduct).

[7] *Woodland Clinic*, 331 NLRB 735, 736 (2000).

[8] See, e.g., *A-1 Door & Building Solutions*, 356 NLRB 499 (2011); *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006).

[9] *Northern Indiana Public Service*, supra, 347 NLRB at 211.

[10] See *Woodland Clinic*, supra, 331 NLRB at 736.

promptly as possible."[11] To this end, the Board has considered whether the information was "readily available"[12] and could have been produced easily within a short time of the request.[13] Likewise, the Board has assessed whether an employer's production was timely in light of how and when the union would use the information.[14]

II.

The straightforward facts here present no reason to depart from this well-established legal framework. The Respondent initiated an administrative action request against employee Charlotte Barker based on allegations that she repeatedly failed to report to work. The request was supported by documentation that included notification of absence forms, a leave analysis form, a list of witnesses, and references to Barker's past disciplinary record. The Respondent scheduled an investigatory interview with Barker for December 4, 2018.[15] John Greathouse, the Union's steward, would be representing Barker at the interview.

On November 29, Greathouse requested by email that the Respondent provide to the Union "copies of all records and documents including questions to get used in the interview" prior to Barker's investigative interview. Greathouse testified that he needed the requested information "to have a greater understanding as to what the agency was charging [Barker] with and to be able to counsel the grievant prior to the investigative interview." On December 3, Postmaster Timothy Schuchaskie responded to Greathouse by stating: "Cart before the horse. This is an investigatory interview and if we take action then you can have copies. The logic is this. Information is just that until it is used for a basis or support of a decision."

On December 4, the Respondent conducted the investigatory interview with Barker, with Greathouse present as her representative. On December 6, Greathouse filed an unfair labor practice charge alleging that Respondent had failed to provide information in a timely manner. The Respondent on December 11 mailed a notice of removal to Barker for failing to report to work; the notice reflected the Respondent's consideration of Barker's past disciplinary record including a letter of warning and 14-day suspension in 2017 and a long-term suspension in September 2018. Barker did not notify the Union when she received this notice.

Greathouse did not learn that the Respondent had issued the December 11 removal notice for Barker until January 4, 2019, during a meeting on another matter. On January 10, 2019, Postmaster Schuchaskie provided Greathouse with the requested documents and sent an email stating that, "I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal." The General Counsel alleged that the Respondent violated Section 8(a)(5) and (1) by unreasonably delaying in furnishing the requested information from November 29, 2018, to January 10, 2019.

III.

The Board need not break new ground in applying its information request framework to these facts. In *Kankakee County Training Center for the Disabled, Inc.*, 366 NLRB No. 181 (2018), which involved a substantially similar scenario, the Board found that an employer violated the Act by refusing to provide readily available information to the union in advance of a predisciplinary meeting. There, an employer notified an employee, following an altercation, that she was suspended without pay pending a predisciplinary meeting.[16] Three days before the meeting, the union's staff representative—who would be representing the employee at the meeting—requested that the employer provide to the union, among other things, a copy of the personnel files, evaluations and past discipline of all bargaining unit employees, and a copy of the employee's personnel file, evaluations, and past discipline.[17]

Applying Section 8(a)(5), the Board found that the requested documents "would have been relevant to the Union in attempting to establish disparate treatment of Williams at the November 19 meeting."[18] The Board found that the employer failed to establish a legitimate and substantial confidentiality interest and that it also failed to offer an accommodation in refusing the union's request.[19] Significantly, the Board concluded that the employer violated Section 8(a)(5) and (1) by "failing to furnish the Union with this information *prior to the meeting*" (emphasis added).[20]

[11] *Pennco, Inc.*, 212 NLRB 677, 678 (1974). See also *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993) ("What is required is a reasonable good-faith effort to respond to the request as promptly as circumstances allow.").

[12] *Olean General Hospital*, 363 NLRB 561, 566 (2015).

[13] *Tennessee Steel Processors*, 287 NLRB 1132, 1132 (1988).

[14] See, e.g. *YP Advertising & Publishing*, LLC, 366 NLRB No. 89, slip op. at 11 (2018) (finding delay in providing information unreasonable where it impeded union's ability to prepare for negotiations); *Globe Business Furniture*, 290 NLRB 841, 851 (1988), enfd. 889 F.2d 1087 (6th Cir. 1989) (same where information was provided very late in bargaining and employer had already engaged in lockout).

[15] All dates are in 2018 unless otherwise stated.

[16] Id., slip op. at 12.

[17] Id., slip op. at 13, 15.

[18] Id., slip op. at 15.

[19] Id., slip op. at 1, fn. 4.

[20] Id., slip op. at 15. The majority incorrectly characterizes the meeting in *Kankakee County* as non-investigatory in nature and therefore distinguishable from the meeting in this case. The facts in *Kankakee* make clear that the employer had prepared only a preliminary proposal to

IV.

The analysis in this case should be similarly straightforward. Here, Greathouse—in his capacity as union steward and Barker's representative—requested underlying documents and records that were related to Barker's upcoming disciplinary interview. As *Kankakee County* illustrates, under the Board's liberal standard for information requests, there is no question that these items were presumptively relevant in their relation to the potential disciplinary action against Barker. A union does not need to wait for discipline to be imposed before requesting information that might allow an employee to avoid or mitigate discipline or that would facilitate a timely, well-informed challenge to discipline ultimately imposed. Moreover, the requested documents were indisputably relevant to the Union's representation of Barker in the investigatory interview; as in *Kankakee*, the information would have assisted Greathouse in preparing himself (and Barker) for the meeting and in participating effectively. As I will explain, at the interview, Greathouse could properly have used the information to elicit favorable facts on Barker's behalf, present an informed defense, and propose potential solutions short of discharge.

In response to the General Counsel's showing of relevance, the Respondent has not established a valid defense. Its bare assertion that the Union's request "put the cart before the horse" did not establish a substantial confidentiality interest in the information sought by the Union or even make a claim that furnishing the documents would have impeded its investigation. If anything, the Respondent's statement reflected only its own position that the Union's request was premature—an assertion that is belied by the obvious relevance of the documents to the upcoming meeting. Finally, the requested documents were clearly available and easy to produce; in fact, the Respondent had already compiled them to support its administrative action request. Accordingly, the Respondent was required—pursuant to its obligations under Section 8(a)(5)—to provide the documents to the Union before the December 4 interview.

V.

The majority, however, holds otherwise. It correctly recognizes that the requested information was "relevant, not complex, and readily available to the Respondent" and that the Respondent failed to provide any explanation for its delay in providing the information. But it finds that the Respondent had no statutory obligation to provide the requested documents *before* the December 4 meeting; instead, it holds that the Respondent violated the Act only by delaying in providing the information after the Respondent's investigation concluded on December 11. Where a union has requested relevant information before an investigatory interview, the majority announces, "the employer may refuse to disclose such information while the investigation is ongoing, but must provide it at the conclusion of the investigation."

In support of this new rule, the majority relies first on *NLRB v. J. Weingarten*, in which the Supreme Court agreed with the Board's holding that an employee has a Section 7 right to union representation in investigatory interviews that the employee reasonably believes may lead to discipline. Specifically, the majority cites the Court's statements that it was not granting a union "any particular rights with respect to predisciplinary discussions which [the union] otherwise was not able to secure during collective-bargaining negotiations"[21] and that "[t]he employer has no duty to bargain with the union representative at an investigatory interview."[22] In addition, the majority relies on the Board's statements in *Pacific Telephone & Telegraph Co.*[23] that an employee's *Weingarten* right does not ""dictate anything resembling 'discovery,'" and that the employer need not "reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed."[24]

Based on these decisions, the majority reasons that, because the duty to provide information stems from an employer's duty to bargain, and because an employer has no

discharge the employee and had sought at the meeting to adduce information about the incident from the employee and her union representative. Specifically, the employer's representative stated that she began the meeting by asking if there were any witness accounts that the union wanted to present or if the employee wanted to give her version of the incident. The employer made the decision to discharge the employee only after reviewing the additional evidence that was provided at the meeting. Significantly, the Board in *Kankakee* emphasized that the union steward could have used the requested information to "establish disparate treatment" during the meeting—which would not have been possible had the employer already made a final decision to discharge the employee. See *Ball Plastics Division*, 257 NLRB 971, 971 fn. 3 (1981) (finding meeting to be investigatory in nature where objectives were to seek information from employee and lay procedural foundation for her termination).

[21] 420 U.S. at 259. The Court's reference makes clear that in holding that employees were entitled to a representative at an investigatory interview, it was not holding that employers were statutorily required to conduct such interviews at a union's demand or to admit the union to the interview, even if the employee did not request a union representative.

[22] Id. To say that the interview itself is not an occasion for bargaining is not to say that the interview does not implicate the union's role as bargaining representative. Indeed, a union's duty of fair representation is surely triggered by knowledge that an employee not only is under disciplinary investigation, but has requested the union's representation.

[23] 262 NLRB 1048 (1982), enfd. in relevant part 711 F.2d 134 (9th Cir. 1983).

[24] Id. at 1049. As I will point out, the case did not involve a union's Sec. 8(a)(5) information request.

duty to bargain during an investigative interview, an employer has no obligation to provide relevant information while an investigation is ongoing. The majority also reasons that a union has no right of "access to the entirety of an ongoing investigation." Accordingly, it concludes that the Respondent did not violate Section 8(a)(5) and (1) by failing to provide the requested relevant information before the investigatory interview.

VI.

The majority repeatedly frames today's decision as necessary to curb the judge's unwarranted "extension of *Weingarten*" to include information requests.[25] But my colleagues have it exactly backwards. Here, the majority uses Barker's concurrent *Weingarten* right, under Section 8(a)(1), to improperly curtail the Union's right to relevant information under Section 8(a)(5). Conflating these separate statutory rights, the majority impermissibly narrows the scope of the Union's Section 8(a)(5) right to information.[26] And it improperly presumes—in the absence of any actual evidence establishing a legitimate and substantial justification by the Respondent—that providing the requested relevant information would have interfered with the Respondent's managerial prerogatives.

Rather than applying the standard Section 8(a)(5) information request framework, as set forth above, the majority tethers the Union's request to Barker's *Weingarten* right. Accordingly, it asks and answers the wrong question: whether the Supreme Court's decision in *Weingarten* created a separate affirmative obligation, under Section 8(a)(1), for an employer to provide information to a union or employee whenever an investigative interview is scheduled. Certainly, I agree with my colleagues that *Weingarten* created no such requirement. But neither did *Weingarten* relieve employers of their separate duty to timely provide unions with requested, relevant information, subject to any legitimate justification for withholding the information. The correct result here is not dictated by the limited scope of Barker's *Weingarten* right.[27] Barker did not request information from the Respondent; the Union did. The only appropriate question here, where the Respondent has never asserted a cognizable justification for withholding information, is whether, under Section 8(a)(5), the requested information is relevant to the Union's representational duties.

The majority finds initially that it was relevant, but reasons that because the Respondent had no duty to bargain with Greathouse *during* the investigative interview, the Respondent had no obligation provide investigation-related information *in advance* of the meeting. The majority takes an impermissibly narrow view of the situation. Given the nature of its representational role, a union may well be entitled to information even when it will not be used immediately in actual bargaining with the employer.[28] As the Supreme Court held in *Acme*, an employer's statutory responsibilities "unquestionably extend[ ] beyond the period of contract negotiations and appl[y] to labor-management relations during the term of an agreement."[29] The Board accordingly assesses whether information is "reasonably necessary for the union's performance of its representative duties"[30] generally. Those

[25] I similarly reject the judge's use of this characterization in her decision, which primarily hews to the appropriate Sec. 8(a)(5) framework and principles.

[26] Contrary to the majority, the Supreme Court in *Weingarten* did not "link[ ]" *Weingarten* rights with statutory rights under Sec. 8(a)(5) by holding that an employer had no duty to bargain during an investigatory interview. In affirming the Board's construction of the Act, the Court merely defined the scope of an employer's obligations pursuant to Sec. 8(a)(1). What the majority does here is entirely different—it uses an employee's *Weingarten* right as a basis for denying the Union's right to relevant information under Sec. 8(a)(5). Nothing in the Court's decision suggests that it intended to limit the exercise of rights under other provisions of the Act.

[27] The majority contends as well that its decision here is a simple application of *Pacific Telephone & Telegraph Co*. But that case likewise implicated only the scope of an employer's obligations under Sec. 8(a)(1) pursuant to *Weingarten*; it did not involve an information request by the union or the application of Sec. 8(a)(5) and the Board did not purport to say anything at all regarding the scope of that statutory provision. Therefore, *Pacific Telephone* cannot plausibly be construed as controlling in this case—which implicates only a request for information under Sec. 8(a)(5)—and the majority's novel maneuver here certainly should not be confused for a rote application of any existing legal precedent.

More relevant to this case, the Board in *Pacific Telephone* held that the employee and her representative must have some indication of the matter being investigated before an investigatory interview so as not to interfere with the employee's *Weingarten* right under Sec.8(a)(1). In rejecting the argument that providing this information would interfere with employer prerogatives or constitute discovery, the Board explained that the employer still "controls the manner, form, and timing of its investigatory and disciplinary process and can take steps to protect its legitimate interests" and has no obligation to bargain with the representative. 262 NLRB at 1049.

The same principles apply here. Just as having to disclose the subject of an investigation, pursuant to *Weingarten*, does not transform an investigatory interview into an adversarial hearing with discovery, the fact that a union requests information pursuant to Sec. 8(a)(5) does not mean that the union gets whatever it asks for—the employer can always assert valid defenses—or that the union can use the information at the interview in any way it chooses. Indeed, *Pacific Telephone* underscores that, in the *Weingarten* context, the employer retains essential control over the disciplinary process and that the role of the *Weingarten* representative remains limited, even where the union is entitled to additional information from the employer in conjunction with the employer's separate duty under Sec. 8(a)(5) to bargain collectively.

[28] See, e.g., *Kraft Foods North America*, Inc., 355 NLRB 753, 755–756 (2010) (rejecting argument that union's information request was premature because it was made more than a year before actual negotiations started).

[29] 385 U.S. 432, 435–436.

[30] *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984).

duties include representing employees in connection with potential discipline—an ounce of prevention is worth a pound of cure in this context, too.[31] And nothing in *Weingarten* suggested that the Court intended to limit the scope of other rights, including those under Section 8(a)(5).

If anything, Greathouse's role as *Weingarten* representative—in the literal performance of a representative duty on the Union's behalf—underscores why the requested information was relevant to the Union's duties before and during the interview. The Court in *Weingarten* explained that a "knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview."[32] The Court specifically rejected the argument that a union's representative responsibilities attach only after an employer has already imposed discipline; at that point, in the Court's view, "it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished."[33] The Board has since echoed these themes, emphasizing in this context that a union representative is "accustomed to administering collective-bargaining agreements and is familiar with the 'law of the shop,' both of which provide the framework for any disciplinary action an employer might take against a unit member. A union representative's experience allows him to propose solutions to workplace issues and thus try to avoid the filing of a grievance by an aggrieved employee."[34]

Surely the information requested here would have helped Greathouse and the Union fulfill these contemplated representative functions. To this end, the documents would have aided Greathouse in preparing for the interview and participating in an informed and constructive manner. But even apart from the Union's *Weingarten*-related interests, the requested information would have been relevant to the Union's general role in addressing disciplinary matters. To the extent the documents would have assisted the Union in persuading the Respondent not to discipline Barker, or in timely challenging Barker's discipline after the fact, they would have been relevant. More broadly, the information could have helped the Union advise unit members on how to better comply with the Respondent's attendance rules or even in bargaining to change the rules themselves. In sum, there is an overwhelming case here that the requested information would have been relevant to the Union's representative duties even if the investigatory interview itself was not an occasion for bargaining.

In any event, it is the *Respondent's* burden to establish that the requested information was not relevant until after discipline was imposed or to provide a justification for refusing to provide it before the interview. But the majority's entire analysis simply presumes—without any basis in the Respondent's actual contentions or the record evidence—that providing the information would have somehow interfered with the Respondent's investigation or undermined its managerial prerogatives. Indeed, the Respondent did not even make a relevance argument, nor did it establish a legitimate and substantial confidentiality interest. Rather, as the judge found, "there is no evidence that witnesses needed protection, evidence was in danger of being destroyed, testimony might be fabricated or there was a need to prevent a coverup."

In essence, the majority invents a new legal rule—that an employer may refuse to disclose relevant information while an investigation is ongoing—to cover for what the Respondent here failed to establish during the proceeding. That result is not simply unjust in the context of this case. The majority's new rule will now permit all employers to lawfully withhold relevant, readily available information at the very moment that it would be of greatest value to unions and the employees they represent. This outcome is the opposite of what the Board's information-request jurisprudence under Section 8(a)(5) envisions: a system under which unions will be able effectively to carry out their statutory duty to represent employees and so "encourage resolution of disputes" before they disrupt the workplace.[35]

VII.

Today's unfortunate decision is in line with other cases in which the majority has permitted employers to impose restrictions on employees, even those represented by a union, in the name of investigative confidentiality.[36] In those cases, too, employers' interests were deemed self-evident and held to outweigh employees' rights under the Act. The majority's approach was wrong there, and it is wrong here. Because I see no basis in *Weingarten* for diminishing a Union's right to relevant information, and no other good reason to depart from the Board's well-settled framework for assessing information requests, I would find that the Respondent violated Section 8(a)(5) and (1)

[31] See *Public Service Company of New Mexico*, 364 NLRB No. 86 (2016), slip op. at 9, fn. 25 (rejecting argument that union's information request was premature because employer's investigation was ongoing and no final disciplinary decision had been made).

[32] 420 U.S. at 263.

[33] Id. at 263–264.

[34] *IBM Corp.*, 341 NLRB 1288, 1292 (2004).

[35] *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991).

[36] See, e.g., *Alcoa Corp.*, 370 NLRB No. 107, slip op. at 4–5 (2021) (dissenting opinion).

by refusing to provide the requested information before the December 4 investigatory interview.

Dated, Washington, D.C. July 21, 2021

Lauren McFerran, Chairman

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 Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL–CIO, by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

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

UNITED STATES POSTAL SERVICE

The Board's decision can be found at www.nlrb.gov/case/07-CA-232299 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.

Eric S. Cockrell, Esq., for the General Counsel.
Roderick D. Eves, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 29, 2019. Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL–CIO, the Charging Party (the Union) filed the charge against the United States Postal Service (USPS) (Respondent) on December 6, 2018. The General Counsel issued the complaint on March 29, 2019, alleging that Respondent unreasonably delayed in furnishing the Union with requested information, necessary and relevant to the Union's representational duties, from November 29, 2018 until January 10, 2019, in violation of Section 8(a)(5) and (1) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States and operates various facilities throughout the United States in performing its duties, including its facility in Eaton Rapids, Michigan. The Board has jurisdiction over Respondent and this case by virtue of Section 1209 of the Postal Reorganization Act (PRA).

At all material times, the APWU (national union) and the Local 300 have been labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Relationship Between Respondent and the Union

At all relevant times, the individuals below held the positions set forth opposite their names. Respondent has admitted and I

find that they have been supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act:

Timothy Schuchaskie	-	Postmaster
Kathy Strahan	-	Acting Supervisor
Chad Rodriguez	-	Supervisor Customer Service

The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely nonconfidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

Since about July 20, 1971, Respondent has recognized the National Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from May 21, 2015 through September 20, 2018. Negotiations for a successor contract is pending arbitration. (Tr. 30.) Since July 20, 1971, the National Union has been the exclusive collective-bargaining representative of the unit pursuant to Section 9(a) of the Act.

At all material times, the Charging Party has been the designated servicing agent of the National Union for the employees in the unit employed at many of Respondent's facilities located in Central Michigan. (GC Exh. 1(c), par. 5). John Greathouse is the Union's Central Michigan Area Local 300 steward representing over 200 members, including those unit members in the Eaton Rapids, Michigan Post Office (facility) involved in this case. In his position, he investigates complaints, requests information, and if they have merit, files grievances. He is also employed as a distribution clerk at the Lansing, Michigan processing and distribution center.

The collective-bargaining agreement (CBA) referred to above includes several articles that the parties either questioned witnesses about and/or relied upon to support their positions and/or are otherwise relevant to this case. (Jt. Exh. 2.) They are as follows:

> The steward, chief steward or other Union representative properly certified in accordance with Section 2 above [regarding "Appointment of Stewards"] may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

Art. 17, Sec. 3, par. 2; "The Union may designate in writing to the Employer one Union officer. . . to act as a steward to investigate, present and adjust a specific grievance or to investigate a specific problem to determine whether to file a grievance." Art. 17, Sec. 2(B);

> The Employer will make available for inspection by the Union all relevant information necessary for collective-bargaining or enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information[. . .]

Art. 31, sec. 3, par. 1; "Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee." Art. 31, Sec. 3, par. 2; and "The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required." Art. 15, Sec. 2 (a).[1]

B. Background

This case arises from a disciplinary action taken by Respondent against unit member and part-time flexible clerk, Charlotte Barker (Barker) at the Eaton Rapids, Michigan facility. The disciplinary action is not at issue here, only the related information request. Supervisor Kathy Strahan (Strahan) submitted an administrative action request, dated December 4, 2018, and signed on December 7, 2018, by Strahan and concurring official, Schuchaskie,[2] recommending Barker's removal. Strahan based her request for action on Barker's alleged failure to report to work as scheduled on November 20 and 27, resulting in absences without leave (AWOL) "LATE" charges. (Jt. Exh. 3.) Supportive documentation included, but was not limited to, notification of absence forms signed by Strahan and dated November 20 and 27, Barker's leave analysis form, and Respondent's notes from investigative interviews of Barker and Postmaster Schuchaskie. The leave analysis form contained handwritten comments, signed and dated by Strahan on November 30, regarding Barker's AWOL charges. (See Jt. Exh. 3, pp 10–13). It also named several witnesses to the November 27 incident, including Strahan, Supervisor Rodriguez, Schuchaskie and one other employee. (Id.) These documents also referenced past discipline issued to Barker and considered by management and notification of her mandatory investigative interview on December 4. (Jt. Exh. 3.)

On December 4, at 8:30 a.m., Respondent conducted the investigatory interview with Barker, with Greathouse present as her representative. Schuchaskie was interviewed on December 7. (Jt. Exh. 3, pp. 16–18). On December 11, Respondent through Strahan and postmaster Schuchaskie mailed a notice of removal to Barker for failing to report to work as assigned on November 20 and 27. This notice reflected Respondent's consideration of

[1] Although negotiations for a successor contract are pending arbitration, both Respondent and the General Counsel referenced and relied upon all or most of these provisions in the expired contract.

[2] All dates are in 2018 unless otherwise indicated.

Barker's past disciplinary record including a letter of warning and 14-day suspension in 2017 and a long-term suspension in September 2018. (Jt. Exh. 3, pp. 19–22.) It is undisputed that Barker received the notice on December 13. (Tr. 107). It is also undisputed that Barker did not contact the Union when she received this notice.

C. The Union's Request for Information and Respondent's Actions

1. Union's request and Respondent's response

On November 28, Strahan called Greathouse to notify him about Barker's December 4 interview concerning the AWOL charges. (Tr. 44.) Therefore, on November 29, 2018, Greathouse, on behalf of the Union, requested by email to Schuchaskie that Respondent provide the Union with "copies of all records and documents including questions to get used in the interview," prior to Barker's investigative interview. (Jt. Exh. 2.)

On November 30, Schuchaskie emailed labor relations specialist Patricia Schaefer (Schaefer) requesting guidance on how to respond to the Union's request for information. He stated that "I have never had a request like this. The paperwork hasn't been finalized because the interview isn't done." Schaefer in turn emailed to "GMD LABOR RELATIONS," stating that

> This is a great big bunch of bulls**t . . . How can they ask for information when no discipline has been issued and there is nothing to grieve since we haven't done the II [investigatory interview]. The people doing the interview don't know what questions may come about at the II depending on the answers . . .[h]ave any of you ran across this?

(R. Exh. 2.) In response, Susan Harcus-Zumberg (Harcus), Respondent's manager, labor relations, wrote:

> Cart before the horse. They are not entitled to pre-decisional information. This is an investigatory interview and if we take action then they can have a [sic] copies.
>
> The logic is this. No decision has been made so there is no basis for the Union to have access as there is no basis for a grievance. Information is just that until it is used for a basis or support of a decision. Investigatory interview are [sic] just that a part of a process to make a decision.

(Id.) On December 3, Schuchaskie responded to Greathouse with part of the same language used by Harcus: "Cart before the horse. This is an investigatory interview and if we take action then you can have copies. The logic is this. Information is just that until it is used for a basis or support of a decision. Investigatory interview is just a part of the process to make a decision." (Jt. Exh. 2; R. Exh. 2.) In other words, Respondent believed the entire request was premature. (Tr. 93–94.)

On December 6, Greathouse filed an unfair labor practice charge alleging that Respondent had failed to provide information in a timely manner.[3] (GC Exh. 1(a)-(b).) Greathouse testified that he orally renewed the Union's information request on December 27 or 28, during a Step 1 meeting related to another case, when he questioned both Strahan and Rodriguez about the status of the information request. They did not know the status. (Tr. 38–41.) He did not communicate a renewed request to Schuchaskie or anyone else. Schuchaskie acknowledged the Union's initial written request but denied that Strahan or Rodriguez informed him of an oral request. (Tr. 66.)

However, Greathouse did not learn that Respondent had issued Barker the December 11 removal notice for AWOL until a January 4, 2019 meeting with Schaefer on another matter. Schaefer confirmed, and it has not been disputed, that he was "totally shocked" to find out that Barker received the notice, and that Greathouse "said something about Charlie [Barker] hasn't notified me, or Charlie, it would have been nice if she'd have told me." (Tr. 33, 62–63, 113–114.) Greathouse testified that Barker had notified him about another removal notice that she received on December 6, putting her on administrative leave for failing to follow instructions. When he questioned Barker about the December 11 removal, after his January 4 meeting with Schaefer, Barker responded that "[s]he did receive it [the removal notice] on December 13," but upon opening it, she "thought it was a copy of the original notice of removal that she had received on December 6th, and literally just took it, threw it on her desk, and didn't think anything of it." (Tr. 62–63, 65–67.) Prior to that, Greathouse had not previously asked Barker if Respondent had advised her of a decision regarding the AWOL charges.[4] (Tr. 66.)

On January 10, 2019, Schuchaskie provided Greathouse with the requested documentation and emailed him that "I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal." (Tr. 45–47; Jt. Exh. 3.) Schuchaskie testified that he had not provided the requested documentation to the Union earlier or after Respondent issued Barker the notice of removal because he expected the Union to make another request. However, in his December 3 response, he did not specifically ask, or tell, Greathouse to renew the request, but rather vaguely stated, "Cart before the horse. This is an investigatory interview and if we take action then you can have copies." (Jt. Exh. 2.) Schuchaskie then testified that Harcus had instructed him to send the information on January

[3] This charge also included a violation of *Weingarten* rights claim, which was subsequently dismissed. Greathouse testified and indicated in the charge that he had filed a grievance on the same date, December 6, "for the failure to provide information in a timely manner." (Tr. 61–62; GC Exh. 1(a).) However, a copy of that grievance was not introduced into evidence.

[4] A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above. That said, I credit Greathouse's testimony regarding his subsequent conversation with Barker about her receipt of the removal notices. It was straightforward, he was truthful and sincere about his discovery on January 4 of the second notice, and his testimony was not disputed.

10, 2019, because the Union had filed a "labor charge for lack of all the information." (Tr. 93–94.) The information furnished included the administrative action request, with all of the documents previously mentioned. (Tr. 45–50; 51, 93–94; Jt. Exh. 3.)

2. Greathouse's explanation for the information request

Greathouse acknowledged that going into the interview, he knew that Barker had been charged with AWOL, but explained that he needed the requested information "to have a greater understanding as to what the agency was charging her [Barker] with and to be able to counsel the grievant prior to the investigative interview." (Tr. 45, 65.) Although he admitted that Respondent does not normally notify the Union when an employee receives discipline, and that Barker had not notified him when she received the notice, Greathouse believed that Respondent's failure to furnish the requested documentation in a timely manner resulted in Barker's removal and the Union's inability to timely grieve it.[5] (Tr. 58–61, 67.)

Greathouse pointed out that Barker's notices of absence to request leave were dated and signed by Strahan on November 20 and 27, 2018, and leave analysis dated November 30, with Strahan's comments, were completed prior to December 4. (Jt. Exh. 3, pp. 12–15.) Greathouse conceded that interview questions may not have been created prior to December 4, but that Respondent did not convey this to him. (Tr. 76.) Other than Schuchaskie's statement on January 10, 2019, that he was "waiting for an info request after this [the removal notice] was issued," and had not received a grievance on the removal, Respondent did not provide a reason for the continued delay after the investigatory interview took place or after discipline issued. (Tr. 50–51.) Nor did Respondent ask that the information request be clarified or narrowed to exclude documents/information not yet in existence.

Greathouse insisted that Respondent had previously furnished the same or similar documentation in about five or six other cases right after the investigative interview and in approximately two cases, prior to the interview. When asked for details, he testified that Respondent had furnished him with an inspector general (OIG) report and other documents relating to a removal in the Holt Post Office the day before the interview. (Tr. 56–58, 77–78.)

3. Respondent's justification for the delay

As previously stated, Schuchaskie testified that he delayed in the issuance of Barker's removal notice because he expected the Union to make another request for information after discipline was issued. (Tr. 89.) He recalled seeing Greathouse at the facility on December 27 when Greathouse attended a meeting to interview Strahan and Rodriguez regarding another matter; however, Greathouse never asked him about the status of the information request.[6] Schuchaskie indicated that pursuant to the CBA, Greathouse should have directed all inquiries about the pending information request to him. (Tr. 86, 91–92, 97–98, 100.)

Schuchaskie acknowledged that Respondent had provided information in connection with the Union's information request in another of Barker's cases within a few days but explained that that request was for medical documentation only and not associated with an investigative interview. However, when asked if there was an investigative interview conducted in that other case, Schuchaskie could not recall. (Tr. 99–102.)

Labor Relations Specialist Schaefer confirmed that a grievance on Barker's removal notice filed after Greathouse learned about it on January 4, 2019 would have been untimely because it had not been filed within the 14-day period after Barker received it. (Tr. 107.) She admitted that some underlying documents existed in this case prior to the investigative interview, but that it did not mean that "all the questions are written or all the evidence is put together yet." (Tr. 118.) Although Schaefer insisted that Respondent had no duty to furnish any information before a disciplinary decision had been made, Respondent continued to delay in furnishing it once it issued Barker's December 11 removal notice.

III. LEGAL STANDARDS AND ANALYSIS

A. The Requested Information is Presumptively Relevant

Pursuant to Section 8(a)(5) and (d) of the Act, an employer must provide a requesting union with information that is necessary and relevant for the performance of its duties. *NLRB v. Truitt Mfg. Co*. 351 U.S. 149, 153 (1956); *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979). Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *Whitesell Corp*., 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 635 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co*., 344 NLRB 231, 235 (2005). "[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 436 (1967). This includes information necessary "not only for collective bargaining but for grievance adjustment and contract administration." *Centura Health St. Mary-Corwin Medical Center*, 360 NLRB 689, 692 (2014), citing *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 (2005). Therefore, the Board has established that information requested regarding bargaining unit employees, and especially the filing, possible filing or processing of grievances is presumptively relevant. *Yeshiva University*, 315 NLRB 1245, 1248 (1994); *Contract Flooring Systems*, 344 NLRB 925, 928 (2005); *T.U. Electric*,306 NLRB 654, 656 (1992); *Ohio Power Co.*, 216 NLRB

[5] As previously stated, CBA Art. 15, Sec. 2 (a) instructed that "The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance."

[6] Greathouse did not believe that Schuchaskie was at the facility when he met with Strahan and Rodriguez on December 27 because "[h]is van was not there." (Tr. 68.) Contrary to Respondent's implication that Greathouse did not tell the truth about asking Strahan or Rodriguez about the status of the information request, I credit Greathouse's testimony on this point. Respondent did not call either Strahan or Rodriguez to rebut Greathouse's testimony and Greathouse was forthright in his testimony that he never sought to renew the request for information with Schuchaskie. Further, Schuchaskie admitted, after initially testifying that he was at the facility the entire day, that it was possible that he may have stepped out for a period of time. (Tr. 97–98.)

987, 991–992 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).[7]

The burden to establish relevance in information requests is not a heavy one, and potential or probable relevance will sufficiently invoke an employer's obligation to provide information. The Board uses a broad, discovery-type standard, requiring only that the union demonstrate "more than a mere suspicion of the matter for which the information is sought." *Racetrack Food Services*, 353 NLRB 687, 699 (2008) (citation omitted), reaffd. 355 NLRB 1258, 1258 (2010); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Reiss Viking*, supra; *Children's Hospital of San Francisco*, 312 NLRB 920, 930 (1993).

I find that the record supports a finding that the information requested by the Union as the exclusive representative of the unit and pertaining to discipline and a potential grievance concerning Barker's time and attendance and other terms and conditions of her employment was presumptively relevant. The Union in representing its member employee needed information prior to the investigative interview to effectively understand the charges levied against her, counsel her and prepare to represent her. There is no evidence to doubt the Union's reasonable and good-faith belief that an investigative interview would result in further discipline of Barker.

In those instances where information pertaining to employees in the bargaining unit is presumptively relevant, as in this case, the employer has the burden of rebutting that presumption. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *AK Steel Corp.*, 324 NLRB 173, 183 (1997). The evidence shows that in this case, Respondent has not done so.

B. Respondent's Confidentiality Defense Fails

General

Respondent has not really challenged the relevancy of the Union's requested information. Rather, Respondent argues that the request was premature, and it was not legally obligated to provide any of the requested information prior to the completion of its disciplinary investigation much less prior to the interview. Respondent grounds its contention in an assertion of confidentiality, first proffered during the trial. In its brief, Respondent argues that its legitimate interest in maintaining confidentiality of the documents requested prior to issuance of Barker's notice of removal outweighed the Union's need for the information. Further, Respondent indirectly contends that the Union failed to accept and/or fully participate in Respondent's offer to accommodate by reasserting the request once it completed the investigation and issued the removal notice to Barker.

Where, as here, an employer raises confidentiality concerns, generally the employer has the burden of establishing a legitimate claim of confidentiality that would justify refusal to provide the requested information. *Medstar Washington Hospital Center*, 360 NLRB 846, 846, fn. 1 (2014), citing, *NLRB v. Detroit Edison*, 440 U.S. 301 (1979). To determine whether an employer has established its claim, the Board has applied the balancing test set forth in *Detroit Edison v. NLRB,* 440 U.S. 301 (1979). See also, *American Baptist Homes of the West,* 362 NLRB 1135 (2015), enfd. in relevant part 858 F.3d 612 (D.C. Cir. 2017) (Board indicated it would apply *Detroit Edison* test in future cases when an employer asserts a confidentiality interest in protecting witness statements). Under *Detroit Edison*, the Board balanced the Union's need for requested relevant information against the employer's established legitimate and substantial confidentially interests. 362 NLRB at 1139. In establishing such an interest, an employer must demonstrate more than a generalized concern about protecting the integrity of employee disciplinary investigations. Id. Instead, an employer must determine in each case whether any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a coverup. Id. citing *Hyundai America Shipping Agency,* 357 NLRB 860 (2011), enfd. in relevant part 805 F.3d 309, 314 (D.C. Cir. 2015). If a legitimate and substantial confidentiality interest is established, the employer must offer to accommodate both its concern and its bargaining obligation, "as is often done by making an offer to release the information conditionally or by placing restrictions on [its] use . . . . [T]he onus is on the employer because it is in the better position to propose how best it can respond to a union request for information." See also *Metropolitan Edison Co.*, 330 NLRB 107, 107–108 (1999). The union need not propose the precise alternative/accommodation. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998).

Here, there is no evidence that witnesses needed protection, evidence was in danger of being destroyed, testimony might be fabricated or there was a need to prevent a coverup. Instead, Respondent had accused Barker of violating its attendance rules and policies by being late, without approved leave, on more than one occasion. Respondent also considered her prior discipline, but there is no evidence that Greathouse or Barker knew what past discipline would be used or how far back Respondent would reach. In addition, it appears that the only witness interviewed was Postmaster Schuchaskie who showed no signs of being concerned about witness intimidation. Others noted to have been witnesses included Rodriguez, Strahan, and a clerk, but there is no evidence that they (other than Strahan) provided statements. Nor were they presented to testify. (Jt. Exhs, pp. 4, 15, 18). It is highly unlikely that sharing more details about the nature of the charges involved in this case would have resulted in witness intimidation or tampering or would have otherwise disrupted the investigation in any way. This case is distinguished from cases in which the employer's confidentiality interest outweighed the union's or employee's need. It was not related to any physical altercation or any safety matters or illegal activity such as drug use or theft. See, e.g., *Climax Molybdenum Co. v. NLRB,* 584

[7] A pending grievance is not a prerequisite for requested information to be considered relevant to a union's statutory responsibilities. Indeed, the union is entitled to information to assess whether it should exercise its representative function and whether the information will warrant further action, such as filing a grievance or bargaining about a disputed matter. See *Public Service Co. of New Mexico*, 360 N at 574, citing *Disneyland Park*, 350 NLRB 1256, 1258 (2007) (information presumptively relevant to union's statutory duty to represent unit employee "in any possible future dispute with the Respondent over the retained information"); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 fn. 7 (2000), enfd. on other grounds 263 F.3d 345 (4th Cir. 2001) (the union may retain information relevant for potential future use for its performance of its representational duties).

F.2d 360, 362–364 (10th Cir. 1978) (investigation of a mining safety incident involving a physical altercation between employees created a special set of facts such that the employer had a substantial and legitimate confidentiality interest.)

Although interview questions had not been drafted, the evidence shows that other related documents either were or came into existence prior to the interview, e.g., the AWOL notices dated and signed by Strahan on November 20 and 27, 2018, and the leave analysis review prepared and signed by Strahan on November 30. (Jt. Exh. 3, pp. 12–15). Therefore, I find that Respondent had an obligation to provide the Union with available information regarding the charges against Barker prior to the investigative interview. In the event that the Board finds that Respondent's proffered confidentiality interest outweighs the Union's need, Respondent may not simply refuse to provide the information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality. *American Baptist Homes of the West,* 362 NLRB at 1137. I find that Respondent did not propose a sufficient accommodation in this case. I reject Respondent's argument that it did so on December 3 with Schuchaskie's response that "if we take action then you can have copies." This was not a reasonable accommodation, but a refusal to provide any information at all until and unless Respondent took disciplinary action against Barker.

Nevertheless, any alleged accommodation defense is negated by Respondent's failure to make good on its offer. Once it completed the interview on December 4 and issued Barker's removal notice on December 11, Respondent waited another month, without sufficient justification or explanation, before it furnished the Union with the requested documents. Schuchaskie first testified that he had been waiting until the Union reinstated its request following issuance of the removal notice; however, as determined, his December 3 response to Greathouse did not reflect this intent. Nor did it put Greathouse "on notice" that the investigative interview and ongoing investigation "could be compromised if information [was] revealed too soon." (R. Br. at 9.) Assuming the Union had an obligation to reinstate its request (which it did not), the Union's December 6 charge in this case should have alerted Respondent that the Union had not waived or otherwise abandoned the request. Instead, Schuchaskie continued to withhold the information promised until January 10, 2019, when Harcus instructed him to release it.

C. Respondent's Weingarten Defense Fails

Respondent further argues that the Supreme Court's seminal case, *NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975), Board law and a General Counsel Advice Memorandum, support its contention that it had no obligation to provide the requested documentation prior to the investigative interview. Respondent contends that such law and opinion instruct that "a right to know the nature of the matter being investigated and to consult with a union representative prior to the investigative interview does not equate to a right to conduct discovery during the employer's investigation—before any action has been taken against the employee." (R. Br. at 7, 8–9.) Similarly, Respondent relies on the Supreme Court's acknowledgment in *Weingarten* that an employer has no duty to bargain with a union during an investigative interview.

I find that Respondent's reliance on *Weingarten*, other Board decisions and Board advice is misplaced.[8] The Court in *Weingarten* found that unionized employees have the right to request a union representative's presence at any investigatory interview that could reasonably result in disciplinary action. It also cautioned against permitting the "exercise of the right" to "interfere with legitimate employer prerogatives." The Supreme Court did not, however, speak to the issue of whether an employer may lawfully delay the furnishing of any and all relevant and necessary information, under all circumstances, prior to an employee's investigatory interview. It certainly did not require that the Union reinstate its request after the employer completed its investigation. The Court did confirm that a union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident in question. *Weingarten*, above, at 262–263.

Other cases cited by Respondent involve the now well-settled law that a union has a right to consult with its members prior to an investigative interview, but also do not address the issue of whether an employer has an obligation to provide a union with any relevant and necessary information prior to an investigative interview. Nevertheless, I find that most would support a finding that an employer would have an obligation to do so under certain circumstances, including those involved in this case. In *Climax Molybdenum Co.,* 227 NLRB 1189, 1190 (1977), enfd. denied 584 F.2d 360 (10th Cir. 1978), the Board relied on the Supreme Court's opinion in *Weingarten* that to effectively represent an employee "too fearful or inarticulate to relate accurately the incident being investigated" a union representative must be "knowledgeable" to "assist the employer by eliciting favorable facts, and . . . getting to the bottom of the incident." Therefore, the Board determined that "these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts." Id. The Court of Appeals ultimately denied reinforcement in this case because the affected employees never expressed any interest in consulting with their union representative prior to the interview. However, as previously stated, the Court considered the specific facts in determining that a mining safety incident involving dangerous work activity and a physical altercation among employees created a special circumstance and compelling business justification "of conducting a smooth-running business operation." *Climax Molybdenum Co. v. NLRB*, 584 F.2d 360, 362–364 (10th Cir. 1978).

The Ninth Circuit Court of Appeals has also enforced the Board's extension of an employee's right to consult with a union representative during a disciplinary interview to the right to

[8] Board advice, while instructive of the General Counsel's position, is not legal precedent, and therefore, I must follow current Board law unless or until it has been reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

counsel with them and obtain certain information prior to the interview. In *Pacific Telephone & Telephone Co. v. NLRB*, 711 F.2d 134, 136 (9th Cir. 1983), the court of appeals affirmed the Board's decision that the employer violated the Act by failing to inform the employees of the subject matter of the interview and granting them any pre-interview conferences with their union representatives. The court held that that:

> If the right to insist on concerted protection against possible adverse employer action encompasses union representation at interviews such as those here involved, then in our view the securing of information as to the subject matter of the interview and a pre-interview conference with a union representative are no less within the scope of that right. The Board's order that failure to provide such information and grant such pre-interview conferences constituted unfair labor practices is as permissible a construction of § 7 as was the construction upheld in *Weingarten.* Without such information and such conference, the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished.

Id. at 136–137.

Therefore, I find that it is reasonable here, in light of the Board law above concerning the right of a union to request and receive relevant information in connection with grievances and potential grievances and the enforcement of the Board's holding in *Pacific Telephone*, above, to extend *Weingarten* to employees and/or their union representatives seeking pre-interview information concerning the charges leveled against the employee as long as such extension does not impede the investigation. Further, accepting Respondent's arguments and imposing a blanket prohibition against the right to receive relevant information prior to investigative interviews, especially those which most likely will result in discipline, would undermine the Union's right to carry out its duty to effectively represent its members in connection with disciplinary and potential disciplinary actions. A union representative who must always wait until after discipline is issued to request and receive any information about charges rendered against its members is at a great disadvantage.

Respondent further asserts that the union representative's role at the investigatory interview is limited, citing the following cases: *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279–280 (1992) ("permissible extent of participation . . . is seen to lie somewhere between mandatory silence and adversarial confrontation"); *IBM Corp.*, 341 NLRB 1288, 1293 (2004) (Board declined to extend *Weingarten* rights to non-unionized employees and expressed concern about interfering with "an employer's ability to conduct an effective internal investigation.")[9] However, as described below, the facts in these cases are inapposite to those in this case and do not speak to pre-interview information requests.

In *New Jersey Bell Telephone*, the Board found that the union representative overstepped the rights set forth in *Weingarten* by interfering with legitimate employer "prerogatives" to compel employees to submit to questioning about alleged misconduct during the investigatory interview. The union agent in that case continuously interrupted the interview by repeating the questions asked of the employee, continuously objecting to and instructing the employee not to answer questions and essentially impeding the employer's right to conduct the interview. *New Jersey Bell Telephone Co.*, above at 279–280. In *Colgate-Palmolive Co.*, 257 NLRB 130 (1981), the Board rejected the respondent's arguments that the employees had not requested union consultation prior to the interview and that it had met its obligation by permitting the employees to privately meet with their representatives in the midst of the interview. In doing so, the Board refused to accept the respondent's general contention that the union "frequently advise[s] employees that they do not have to answer questions during investigatory interviews," and that "permitting preinterview consultation would violate the teachings of *Weingarten* by making the full disclosure of facts less likely, transforming interviews into adversary contests and interfering with the employer's legitimate prerogative to investigate misconduct dangerous to other employees." Id at 133. There is no evidence in the instant case that the Union had a history of attempting to counsel Barker or other members not to answer questions prior to or during such interviews or otherwise tried to thwart the Respondent's interview process.

Finally, I have read and considered the General Counsel's advice memorandum referenced in Respondent's brief. See *United States Postal Service*, 12–CA–24496 (Dec. 6, 2005). The General Counsel determined in that case that despite an inspector general's report being relevant, the Postal Service during its independent disciplinary investigation had a legitimate confidentiality concern that releasing it prior to the conclusion of the investigation would have been untimely and "could have" jeopardized the Postal Service's ongoing investigation. The memo stated that disclosure during the investigation would make it more difficult for management to assess credibility and could "compromise other investigative avenues available to the Postal Service." The General Counsel further concluded that the Postal Service's confidentiality interest during its investigation to ensure "fiscal integrity" where employees were suspected of theft outweighed the union's need for the report in preparing for *Weingarten* interviews. The General Counsel also found that the Postal Service had reasonably accommodated the Union when it provided it with the report within 3 days after the interviews were completed. However, in the cases cited in support of the memorandum, the Board evaluated whether the employer lawfully withheld information according to the facts in each one. For example, in *Postal Service*, 306 NLRB 474, 477 (1992), the Board decided that the Postal Service was justified in refusing to provide the union with names of confidential informants and audio and video of drug transactions because "disclosure might impair the ongoing investigations which may have begun as a result of the current investigation." In *IBM Corp.*, 341 NLRB 1288, discussed above, the Board voiced concern about interference in the employer's internal investigation, but in connection with its decision not to extend *Weingarten* to nonunion individuals. I find

[9] In *IBM Corp.*, above, the Board expressed concern that information not kept confidential may reduce the employer's opportunity of getting the truth and impede witnesses from coming forward. However, that case dealt with whether to extend *Weingarten* rights to non-unionized employees. *IBM Corp*., supra, at 1293.

that in extending *Detroit Edison* to the facts in the instant case, the disclosure of the existing information prior to Barker's interview would not have compromised or jeopardized Respondent's investigation into her AWOL charges.

Even if Respondent's confidentiality concerns in this case were legitimate and substantial, I find that they should have been alleviated as of December 11. In any event, the Union had an equal or greater compelling need for the requested information: to prepare for potential discipline and the filing of a grievance.

D. Respondent's Unlawful Delay in Providing Relevant Information

The Board has long held that an employer must respond to an information request in a timely manner. See *Woodland Clinic*, 331 NLRB 735, 736 (2000). Thus, "[a]n 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." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). See also *Finn Industries,* 314 NLRB 556, 558 (1994). In determining whether an employer has unlawfully delayed in furnishing information, the Board considers the totality of the circumstances. Therefore, "[w]hat 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." *Endo Painting Service*, 360 NLRB 485, 486 (2014), citing *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in pertinent part 394 F. 3d 233 (4th Cir. 2005). Thus, the Board has found that a delay is unreasonable when the information requested is easily and readily accessible from an employer's files. See *Postal Service*, 365 NLRB No. 92 (2017); *Bundy Corp*., 292 NLRB 671, 672 (1989). The Board has also found that this analysis is an objective one; it does not turn on "whether the employer delayed in bad faith . . .but on whether it supplied the requested information in a reasonable time." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018). In sum, an employer has a duty to timely furnish such information absent presentation of a valid defense. See, e.g., *Mary Thompson Hospital*, 296 NLRB 1245 fn. 1 (1989), enfd. 943 F.2d 741 (7th Cir. 1991); *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1377–1378 (7th Cir. 1991), enf. 296 NLRB 715 (1989).

The Board has held that unjustified multi-month delays of 1.5 months to 3.5 months have been unlawful. See, e.g., *Management & Training Corp.*, 366 NLRB No. 134, slip op at 2, 4 (3.5-month delay); *Postal Service*, supra (6-week delay unreasonable where information was readily available); *Pan American Grain*, 343 NLRB 318 (2004), enfd. in relevant part 432 F. 3d 69 (1st Cir. 2005) (3-month delay); *Woodland Clinic*, 331 NLRB 735, 736–737 (2000) (7-week delay); *Postal Service*, 308 NLRB 547, 551 (1992) (4-week unexplained delay unlawful where information was not difficult to retrieve); and *Bundy Corp.*, 292 NLRB 671 (2.5-month delay).

I find that Respondent violated the Act by delaying in furnishing the Union with certain of the requested information. Specifically, I find that providing the Union with the notice of absence forms signed on November 20 and 27 and subsequent leave analysis review signed on November 30 would have been well within the purview of the Act, Board law and even *Weingarten*, in that they would have explained the nature of the AWOL charges without compromising the investigation.

I find that Schuchaskie's December 3 response to Greathouse's November 29 request did not sufficiently explain the delay, state Respondent's confidentiality concern, ask for a narrowing of the information requested or propose a reasonable accommodation. In fact, Schuchaskie did not provide any real explanation for the delay until he sent the requested information to the Union via email on January 10, 2019, long after he initially consulted via email with Schaefer and Harcus and over a month after the Union filed its charge.[10] Nor did he give sufficient justification for the delay in his January 10, 2019 email with the attached information. The latter merely stated that "I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal." (Jt. Exh. 3.) As previously noted, there was no requirement that the Union reinstate its request.

I reject Respondent's claim that Greathouse timely received all of the responsive information because he was present during Barker's interview. Even had Respondent provided requested information during its questioning of Barker, the Board in *Borgess Medical Center* found that a union does not have the burden of showing an ongoing need for the information. Instead, these facts as they exist at the time of the order on the merits must be considered in constructing the remedy for the violation. 342 NLRB at 1107. Further, Respondent's assertions that the Union was never entitled to other documents related to Barker's actual discipline because they had not yet been created, they were not "used in the interview," and were not responsive to the Union's November 29 request are without merit. I find that the Union's request on its face was not limited to the investigative interview questions, as it stated that, "[p]rior to the investigative interview . . . the APWU is requesting copies of all records and documents including [emphasis added] questions to get used in the interview." (Jt. Exh. 2.) Although the removal notice and interview questions may not have been created prior to the interview, other documents as set forth above had been created. I further find that Respondent's promise to furnish documents post investigation would have included Strahan's discipline recommendation which ultimately encompassed the removal notice issued to Barker on December 11.

I understand that Respondent does not normally send or copy the Union with notices of discipline; however, this situation was distinguished by the Union's presumptively relevant information request and Respondent's promise to furnish the information if it took disciplinary action against Barker. Although a grievance was not filed, under the circumstances, the Union would have had the opportunity to meet the filing deadline had Greathouse received the requested information.[11] I am not overlooking the fact that Barker did not read all of her mail and did not inform the Union when she received the December 11 removal notice.

[10] Greathouse was not privy to the internal email exchanges among Schuchaskie, Schaefer, and Harcus.

[11] I note that the General Counsel did not request any remedy in connection with the Union missing the deadline for filing a grievance.

The evidence shows however that Greathouse did not discover the second notice until his January 4 meeting with Schaefer (regarding Barker's first and separate removal notice). (Tr. 62–63.) As stated, the investigative interview and resulting discipline here were not commonplace since they took place in the context of the Union's request for information and Barker's receipt of another removal notice only days before. According to the CBA provision set forth above, Greathouse arguably did not reasonably become aware of the facts giving rise to the grievance, i.e., the removal notice, until January 4. (Jt. Exh. 1, Art. 15, Sec. 2 (a)). Nevertheless, the Union never waived or forfeited the right to the presumptively relevant information, nor did the request become moot after the investigative interview.

Therefore, I find that Respondent delayed in furnishing the Union with relevant and necessary information in violation of Section 8(a) (5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over Respondent, the United States Postal Service, and this case by virtue of Section 1209 of the Postal Reorganization Act (PRA).

2. Local 300, Central Michigan Area, American Postal Workers Union (APWU), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By unreasonably delaying in providing the Union with information as requested on November 29, 2018, and thereafter until January 10, 2019, that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that 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. More specifically, having found that Respondent has engaged in unfair labor practices within the meaning of Section (a)(5) and (1) of the Act, it shall be ordered cease from unreasonably delaying in providing the Union with information relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees. Respondent will further be ordered to post and mail a notice to employees as attached as the Appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent, United States Postal Service, East Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unreasonably delaying in providing the Union, Local 300, Central Michigan Area, American Postal Workers Union (APWU), AFL–CIO, with information, on request, that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

> All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely nonconfidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

(b) In any like or related manner interfering with, restraining, or coercing employees 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) On request, furnish the Union with information in a timely manner that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

(b) Within 14 days after service by the Region, post at its facility in Eaton Rapids, Michigan 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 and members 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 November 29, 2018.

(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.

Dated, Washington, D.C. December 23, 2019

[12] 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.

[13] 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.

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 unreasonably delay, on request, in providing the Union, Local 300, Central Michigan Area, American Postal Workers Union (APWU), AFL–CIO, with information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

All maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, operating services and facilities services employees, but excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely nonconfidential clerical capacity, security guards as defined by Public Law 91-375, 1201(2), all postal inspection service employees, employees in the supplemental work force as defined in Article 7, rural letter carriers, mail handlers and letter carriers.

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 HAVE responded to the Union's information requests from November 29, 2018, regarding a bargaining unit employee.

WE WILL, on request, furnish the Union in a timely manner with information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

UNITED STATES POSTAL SERVICE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-232299 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.