# FCA US LLC *and* Local 723, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 07–CA–219895 and 07–CA–221914

October 28, 2021

## DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

On November 5, 2019, Administrative Law Judge Melissa M. Olivero 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,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

[1] The Respondent excepts to the judge's approval of amendments to Pars. 7(a) and 7(b) of the consolidated complaint to include certain requested "taxi pull" information despite that information not being specifically included in the underlying charges. In the Respondent's view, this poses a due process problem. We disagree. The taxi pull requests are "closely related" to the requests for "[p]roduction data" and "salary employees discipline data" identified as outstanding in the relevant Board charge because they arise from the same incident (i.e., the disciplinary suspension of employee Kelli Newkirt), were sought as part of the same Union information request, and form the basis of same type of Sec. 8(a)(5) violation. Accordingly, applying the *Redd-I* factors, the taxi pull requests are "factually related," "legally related," and would be subject to the "same or similar defenses." See *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 2 (2018) (citing *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014)), enfd. 939 F.3d 798 (6th Cir. 2019); see also *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall amend the judge's conclusions of law to conform to the violations found. We shall modify the Order to conform to the Board's standard remedial language for the violations found. We shall also substitute a new notice to conform to the Order as modified, and in accordance with our decisions in *Durham School Services*, 360 NLRB 694 (2014), and *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

### I. OVERVIEW

The complaint's allegations of Section 8(a)(5) and (1) violations arise from three distinct information requests that the Union made on February 20, April 17, and June 26, 2018,[4] respectively, based on three unrelated incidents. The February 20 request sought certain team member interview forms related to an investigation that resulted in the removal of employee and Union member Robert Watts, Jr. as a team leader. The April 17 request sought information relevant to the grievance of employee Kelli Newkirt pertaining to a disciplinary suspension for engaging in conduct that allegedly violated the Respondent's Standards of Conduct (SOC). The requested information included certain "taxi pulls"[5] and daily plant production numbers[6] for Newkirt and her taxi team coworkers on second shift, as well as information about salaried, nonunit employees who were also disciplined for violations of the SOC. Finally, the June 26 request sought the confidential witness statement of employee Chris Wilson provided while he was under investigation for fraudulent use of leave provided under the Family and Medical Leave Act (FMLA).[7]

Concluding that the Union's three requests for information "were all relevant and necessary to its role in processing grievances for unit members," the judge found that the Respondent violated Section 8(a)(5) and (1) by unreasonable delay in providing the information sought by the February 20 and June 26 requests and by refusing to provide the information requested on April 17. The Respondent broadly excepts to all findings of violations.

We affirm—for the reasons stated in the judge's decision—her findings that the Respondent violated Section 8(a)(5) and (1) by unreasonably delaying its provision of the team member interview forms requested on February 20, and by failing to provide all taxi pull data pertaining to employee Newkirt and her coworkers requested on

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

[5] Taxi pulls are requests to deliver parts from the material handling department to the assembly line.

[6] Production numbers are the number of engines produced at the Respondent's plant on a given day on each shift. The judge inadvertently omitted the shift from the definition of this term in her decision.

[7] Specifically, Wilson provided his initial statement at the conclusion of a June 26 investigatory interview with two of the Respondent's officials and attended by a union representative. The Union immediately requested a copy of the statement. The Respondent refused to provide the statement on confidentiality grounds but offered as an accommodation to provide it upon conclusion of the FMLA investigation. The Union did not respond to the Respondent's proposed accommodation. No negotiations took place. Wilson provided a follow-up statement in response to further interview questions on July 16. On November 2, with the investigation completed, the Respondent provided both the statement at issue and a subsequent statement from Wilson. He was not disciplined and no grievance was ever filed.

April 17.[8] Further, we agree with the judge that the Respondent violated the Act by failing to produce the requested lists of salaried, nonunit employees who were disciplined for certain violations of the Respondent's SOC, and an indication of the discipline each received, over a two-year period. As the judge correctly found, this information was relevant and necessary inasmuch as the Union was "investigating [the] Respondent's consistency in enforcing its SOC and disciplinary policies," including whether there had been any disparate treatment of unit employees. It is well established that nonunit information may be relevant to show disparate treatment in the application of work rules. See, e.g., *E.I. Du Pont de Nemours & Co.*, 366 NLRB No. 178, slip op. at 6 (2019), and cases cited. Because the Respondent's SOC applied to unit and nonunit employees alike, the Union's request for nonunit disciplinary information pertaining to SOC violations was relevant to its grievance of Newkirt's discipline for similar SOC violations.[9]

As discussed below, we reverse the judge's finding of two violations. First, because the Union failed to establish the relevance of the requested daily plant production numbers, we dismiss the allegation that the Respondent unlawfully refused to provide the Union with this information. Second, regarding the allegedly delayed provision of a confidential witness statement, the judge misapplied *Piedmont Gardens*, 362 NLRB 1135 (2015), enfd. 858 F.3d 612 (D.C. Cir. 2017), which requires a case-by-case balancing of a requesting union's need for an employee's statement against an employer's legitimate and substantial need to protect the particular statement from disclosure. Specifically, the judge failed to account for the Union's failure to respond to, and explain the insufficiency of, the Respondent's proposed accommodation. Accordingly, we dismiss the allegation that the Respondent unlawfully delayed production of the requested confidential witness statement.[10]

[8] The Respondent refers to its "good faith effort" and "diligent efforts" to timely provide the requested team member interview forms and taxi pull information and refers to its delay in providing the interview forms as a "mistake," apparently misunderstanding the applicable legal standard to be a subjective one. Board law is clearly to the contrary. The duty to provide information "includes the obligation to do so in a timely manner," which requires an employer to "make a reasonable effort to respond promptly under the circumstances, considering factors such as the complexity and amount of information requested." *Management & Training Corporation*, 366 NLRB No. 134, slip op. at 3 (2018) (citations omitted). Accordingly, "[t]he analysis is an objective one; it focuses not on whether the employer delayed in bad faith or in an attempt to avoid production, but on whether it supplied the requested information in a reasonable time." Id. (citing *Champion Home Builders Co.*, 350 NLRB 788, 788 fn. 7 (2007)).

Applying this objective standard, the judge plainly reached the correct legal conclusions. Regarding the interview forms, Nick Weber, Jr., the Respondent's labor relations supervisor, was a member of the Respondent's Joint Team Leader Selection Committee and was present for all six team member interviews related to Watts's removal. Accordingly, he would have been in the best position to know that all such forms existed and were responsive to the Union's request for "all team member [i]nterview forms" pertaining to Watts's removal. Although we agree with the judge's rejection of the Respondent's "mistake" defense, we do not rely on her observation that the Respondent "failed to adduce credible evidence at the hearing" of an actual mistake. As stated above, the Respondent's subjective intent to comply with an information request is irrelevant. The essential question is "whether relevant information was not supplied." See *Champion Home Builders*, supra at 788 fn. 7. Regarding the taxi pull information, we agree with the judge that the Respondent unreasonably delayed its attempt to provide the time-sensitive taxi pull data, which resulted in most of the requested data becoming irretrievable and impossible to provide. See *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 2 (2017) (citing *West Penn Power Co.*, 339 NLRB 585, 587 & fn. 6, 588 & fn. 9 (2003)) (considering the time-sensitive nature of requested information in evaluating delay).

To the extent that the Respondent has already provided all requested "taxi pull" information in its possession, we shall not order it to do so again. See *West Penn Power Co.*, 339 NLRB at 588 fn. 10 (concluding that delayed submission of certain information was unlawful but finding it "unnecessary to order that it be provided again").

[9] The Respondent contends that the requested nonunit discipline information cannot be relevant because the unit employees are subject to a contractual progressive discipline policy while the nonunit, salaried employees are not. The Board has repeatedly rejected this argument, and we do so again today. See *E.I. Du Pont*, 366 NLRB No. 178, slip op. at 6 (finding the "fact that supervisors may be disciplined differently than bargaining unit members does not make the [u]nion's information request [for supervisory discipline] irrelevant, if both supervisors and unit employees are subject to the same rules"); *Postal Service*, 301 NLRB 709, 712 (1991) (rejecting employer's defense that its supervisors were "judged by different criteria and, therefore are not similarly situated for purposes of discipline," and that they "did not have comparably poor past discipline records"), enfd. mem. 980 F.2d 724 (3d Cir. 1992).

The Respondent argues that because the parties have settled the grievance pertaining to Newkirt's discipline, the Union no longer needs the information requested on April 17, 2018. We reject the Respondent's argument inasmuch as it has failed to carry its "burden of proof of establishing that the [U]nion has no need for the requested information." See *Boeing Co.*, 364 NLRB No. 24, slip op. at 4 (2016). Accordingly, we will order the Respondent to produce the requested information.

Contrary to his colleagues, Member Kaplan would refer the issue of the Union's need for the nonunit discipline information to the compliance stage of these proceedings. See *Boeing*, supra, slip op. at 4–5.

[10] Member Kaplan agrees to apply *Piedmont Gardens* for institutional reasons and concurs in his colleagues' decision to reverse the judge and dismiss the allegation that the Respondent unlawfully delayed in providing to the Union employee Wilson's confidential witness statement. However, he adheres to his position that *Piedmont Gardens* was wrongly decided and that the Board should return to the bright-line rule exempting confidential witness statements from the general duty to provide relevant information requested by a union, originally established in *Anheuser-Busch, Inc*., 237 NLRB 982, 984–985 (1978). See *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, slip op. at 10 fn. 20 (2019).

## II. DISCUSSION

### *A. The Daily Plant Production Numbers*

An employer is obligated to provide a union with requested information that is "potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees' bargaining representative." *E.I. Du Pont*, 366 NLRB No. 178, slip op. at 4 (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) and *Postal Service*, 332 NLRB 635, 635 (2000)). In evaluating relevance, the Board uses a "liberal, discovery-type standard" that requires only that the requested information have "some bearing upon" the issue between the parties and be "of probable use to the labor organization in carrying out its statutory responsibilities." Id. (quoting *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), and *Postal Service*, 332 NLRB at 636). Information pertaining to bargaining unit employees is presumptively relevant. Id. But where the information requested is not presumptively relevant, "it is the union's burden to demonstrate relevance." Id. The union's burden to demonstrate relevance is not heavy, but it does require "demonstrating a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances." Id.; see also *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Postal Service*, 310 NLRB 391, 391 (1993) (requiring "a logical foundation and a factual basis" for extra-unit information requests). Finally, the Board "does not pass on the merits of the underlying grievance, or determine beforehand whether a breach of the collective bargaining agreement occurred." *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2017).

Here, the judge found that the requested plant production information was presumptively relevant because it was sought for the purpose of processing a grievance on behalf of a bargaining unit member. But the Board has consistently held that information that does not directly concern terms and conditions of employment of unit employees is not presumptively relevant, even when sought for the purpose of processing grievances. See, e.g., *Teachers College, Columbia University*, supra, slip op. at 4 (information about non-unit employees the union believed were performing unit work, sought for the purpose of grievance and arbitration, was not presumptively relevant); *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007) (same). Moreover, the Board has specifically treated information about overall production as not being presumptively relevant, even where unit members are performing the work. See *Island Creek Coal Co.*, 292 NLRB 480, 490 (1989) (finding documents containing information about overall coal production, sought to assess the merits of a potential grievance over subcontracting, were not presumptively relevant, and the respondent was not required to produce them until the union explained their relevance). Accordingly, we find that the requested plant production information was not presumptively relevant.

The question thus becomes whether the Union carried its burden of demonstrating to the Respondent "a reasonable belief supported by objective evidence" that the information was relevant. *E.I. Du Pont*, supra, slip op. at 4. While we emphasize that this burden is light, we find, on the particular facts here, that the Union did not meet it.

First, the Union's only reply to the Respondent's request that it explain the relevance of the production information was "[t]he Union needs to intelligently review data to determine a resolution or process future grievances." This reply, which solely reiterates the Union's general view that the information might affect the processing of a future grievance, falls short of meeting the Union's burden to demonstrate the relevance of the requested information. The Board has long held that "generalized, conclusionary explanation is insufficient to trigger an obligation to supply information that is on its face not presumptively relevant." *Island Creek Coal*, supra, at 490 fn. 19 (citing *Super Valu Stores*, 279 NLRB 22, 25 (1986), affd. 815 F.2d 712 (8th Cir. 1987), and *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1099 (1st Cir. 1981), affg. in relevant part 246 NLRB 792 (1979)); see also *Detroit Edison v. NLRB*, 440 U.S. 301, 314 (1979) ("A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested.").

At the hearing in this matter, Union Steward Mark Willingham further explained that he requested the production information because "[Newkirt] was disciplined for failure to exert normal effort, and I wanted – if the production numbers were met, her effort in no way, shape, or form affected daily production."[11] We find that

[11] Willingham separately testified as follows:

> Q. Why did you request the production numbers each day for production for the last 2 weeks? Why did you request that?
>
> A. For the same reason, standard of conduct number 5, [Newkirt] was disciplined for failure to exert normal effort on the job or sleeping on the job. And if production numbers met the requirement, then no way her performance affected nor failed to exert that she was alleged, wouldn't have affected the production or assembly. [Sic]
>
> Q. Any other basis for why you requested the production numbers information?

this explanation, too, falls short of demonstrating a reasonable belief supported by objective evidence that the production numbers were relevant to the Union's grievance over Newkirt's discipline. Willingham testified that the Union represents about 600 employees at the Respondent's engine production plant at issue. Given the size of this unit—even apart from nonunit employees whose efforts would also contribute to the overall number of engines produced on a given day—we find that, without any further explanation from the Union, the connection between the plant's total daily production and Newkirt's individual effort level is too attenuated. Because the Union did not present "a logical foundation and a factual basis" sufficient to conclude that the production numbers were relevant to its grievance over Newkirt's discipline, we find that the Respondent was not required to produce that information. *Postal Service*, 310 NLRB at 391.[12]

### *B. The Confidential Witness Statement*

As previously stated, Section 8(a)(5) of the Act establishes that an employer has a "general obligation . . . to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co*., 385 U.S. at 435–436. This includes information that is relevant and necessary for the bargaining representative's processing of a unit employee's grievance of discipline.

In *Piedmont Gardens*, the Board held that when an employer asserts a confidentiality interest in protecting witness statements from disclosure, the appropriate standard is the *Detroit Edison*[13] balancing test applicable to confidential information generally. 362 NLRB at 1135. Under that standard, the Board balances a union's need for requested relevant information against an employer's established "legitimate and substantial" confidentiality interests. Id. But "[e]stablishing a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of employment investigations." Id. at 1137. Rather, an employer must "determine whether in any give[n] 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 cover up." Id. (quoting *Hyundai America Shipping Agency*, 357 NLRB 860, 873–874 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015)). Assuming that an employer establishes a legitimate and substantial confidentiality interest that outweighs a requesting union's need for the information, the employer "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." Id. (citing *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004)). We emphasize that an employer is "obligated only to offer an accommodation. If the union is dissatisfied with the offer, it is then required to respond and explain why the proffered accommodation is insufficient." Id. at 1137 fn. 7 (citation omitted).

We agree with the judge insofar as she found that the Respondent established a legitimate interest in keeping Wilson's June 26 witness statement confidential because Wilson failed to answer all of the Respondent's questions at his initial interview and had to be interviewed a second time. However, the judge also found that even assuming the Respondent's confidentiality interest outweighed the Union's need for Wilson's witness statement, the Respondent failed to carry its "burden of formulating a reasonable accommodation" when it offered to provide—and actually provided—Wilson's statement after concluding its investigation. The judge discounted the Respondent's offer, calling it a "flat refusal" to provide the statement rather than an accommodation, notwithstanding that the Respondent did eventually provide the statement. In the judge's view, the Respondent should have offered "to provide the statement in a redacted form or for a limited purpose, such as subject to a confidentiality agreement." We disagree and reverse.

To be sure, in responding to a union's request for information, an employer cannot rely on a blanket assertion of confidentiality. Instead, the employer must offer an accommodation that that "will meet the needs of both parties," *National Steel Corp*., 335 NLRB 747, 748 (2001), enfd. 324 F.3d 928 (7th Cir. 2003), which may include an "offer to release information conditionally," *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998), enfg. 324 NLRB 854 (1997). "The rationale for this placement of the burden derives from the interest in allowing the parties to work out through an informal pro-

A. Data. Data to reference that SOC violation, standard of conduct violation.

Q. Anything else? Any other basis that you can think of?

A. No, not that I can think of right now.

[12] In the context of requests for extra-unit information, we are constrained to consider not whether there *could have been* a demonstration of relevance, but whether the explanations the Union actually proffered met its burden. See *E.I. Du Pont*, supra. We do not address whether there were other reasons, not provided, that could have established relevance, and we emphasize that we do not pass on the merits of the Union's grievance. See *Teachers College, Columbia University*, supra.

Member Wilcox joins her colleagues in dismissing this allegation under extant law but would consider revisiting the Board's framework for analyzing union requests for nonunit information in a future appropriate proceeding.

[13] *Detroit Edison v. NLRB*, 440 U.S. 301, 315–320 (1979).

cess how their corresponding duties and responsibilities can be met." *U.S. Testing Co.*, 160 F.3d at 21.

Contrary to the judge, we find that the Respondent's offer to provide the Union with the full, unredacted witness statement that it had requested on an alternative timeline is undoubtedly an offer of an accommodation. Even if it was not the precise type of accommodation that the judge envisioned, the Respondent's offer still had sufficient potential to meet the needs of both parties such that the Union was required to respond. It was not obvious, in other words, that a delay in providing the witness statement (as the Respondent contemplated) would have unreasonably diminished the value or utility of the information to the Union.

Having established that the Respondent offered an accommodation to the Union, we turn to the question of the Union's response to that offer. Here, it is undisputed that the Union failed to respond to the offer and "explain why the proffered accommodation is insufficient." See *Piedmont Gardens*, 362 NLRB at 1137 fn. 7. Although a union's burden in this regard is light, the Union failed to carry it in the unique circumstances presented here. Without the Union's cooperation and engagement in response to the Respondent's lawful effort to "seek an accommodation," the Respondent had no chance of successfully agreeing to any accommodation with the Union. Were we to find otherwise, a union could frustrate any employer effort to lawfully seek an accommodation for the provision of a confidential witness statement merely by failing and refusing to respond, contrary to the collaborative accommodation process that *Piedmont Gardens* established.[14]

Accordingly, we reverse the judge's decision below in relevant part and dismiss the allegation that the Respondent failed to timely provide the Union with a copy of Wilson's June 26 witness statement.

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3:

"3. By failing and refusing to provide the Union with relevant information as requested on February 20, 2018 and April 17, 2018, the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act."

[14] In so finding, we emphasize that the Union was not required to formulate a counterproposal. Further, in reversing the judge, we neither endorse the Respondent's proposed accommodation nor express any view regarding what the Respondent's legal obligations would have been had the Union participated in the accommodation process contemplated in *Piedmont Gardens*.

ORDER

The National Labor Relations Board orders that the Respondent, FCA US LLC, Dundee, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union, Local 723, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, by unreasonably delaying in furnishing, and failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

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

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

(a) Furnish to the Union in a timely manner the information requested by the Union on February 20, 2018, and April 17, 2018. The Respondent is under no obligation to furnish to the Union the daily plant production numbers for a two-week period requested on April 17.[15]

(b) Post at its Dundee, Michigan facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to

[15] To the extent that the Respondent has already provided all requested "taxi pull" information in its possession that the Union requested on April 17, it need not do so again. See *West Penn Power Co.*, 339 NLRB 585, 588 fn. 10 (2003).

[16] 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."

ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 2018.

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

Dated, Washington, D.C. October 28, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

Gwynne A. Wilcox, Member

(SEAL) 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 the Union, by unreasonably delaying in furnishing, and failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on February 20, 2018, and April 17, 2018. The Respondent is under no obligation to furnish to the Union the daily plant production numbers for a two-week period requested on April 17, or any "taxi pull" information already provided.

FCA USA, LLC

The Board's decision can be found at www.nlrb.gov/case/07-CA-219895 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.
*Darlene Haas Awada, Esq., Mr. Clifford Terry, Jr.,*[1] for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 7 and 8, 2019. Local 723, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (Union or Local 723), filed the charge in case 07–CA–219895 on May 8, 2018, filed the charge in case 07–CA–221914 on June 12, 2018, and filed an amended charge in Case 07–CA–221914 on July 10, 2018. (GC Exh. 1(a), (c), (e).) The General Counsel issued the order consolidating cases, consolidated complaint, and notice of hearing (complaint) on September 27, 2018.[2] (GC Exh. 1(g).) The complaint alleges that FCA US LLC (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act[3] (Act) by failing and refusing to provide certain information to the Union and by unreasona-

[1] Respondent moved to correct the transcript in that Mr. Clifford Terry is incorrectly identified as "Clifford Terry, Esq." Respondent's motion is granted.

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

[3] 29 U.S.C. §§151–169.

bly delaying in providing other information to the Union.[4] (GC Exh.1(g).) Respondent timely answered the complaint, denying the relevant allegations and asserting 8 affirmative defenses.[5] (GC Exh. 1(j).) As set forth fully below, I find that the General Counsel has established that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses, [6] and after carefully considering the briefs filed by the parties, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

FCA US LLC, a Delaware limited liability company, has been engaged in the manufacture, nonretail sale, and distribution of automobiles from numerous facilities, including its facility in Dundee, Michigan, where annually purchases and receives goods valued in excess of $50,000 directly from points outside of the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(j).)

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Respondent's Business and Labor Relations*

Respondent operates an engine plant in Dundee, Michigan, about 50 miles from Detroit. (Tr. 22–23.) Robert Daragon is the human resources manager at the Dundee Engine Plant. (Tr. 238.) Nick Weber, Jr., is the labor relations supervisor there. (Tr. 177.) Eliza Lanway has been the labor relations representative at the Dundee Engine Plant since about February 2018. (Tr. 252.) Previously she served a human resources generalist. (Tr. 255.) Joanna Carr was a human resources generalist for Respondent. (GC Exh. 1(j).) Lanway reports to Weber, who reports to Daragon. (Tr. 238, 253.) Chris Lewis is a business unit leader of Respondent. (GC Exh. 9; R. Exh. 4; Tr. 75, 195.) Respondent admits, and I find, that Daragon, Weber, Lanway, Carr, and Lewis are supervisors of Respondent within the meaning of Section 2(11) of the Act. (GC Exh. 1(j).)

Approximately 600 employees at the Dundee engine plant are represented by Local 723. (Tr. 23.) Local 723 is the designated servicing representative of the International Union, UAW (International Union), at the plant. Mark Willingham serves as a chief steward for the Union. (Tr. 23.) In this capacity, Willingham represents about 200 employees on second shift. (Tr. 24.) His duties include enforcing the parties' collective bargaining agreement and representing unit members. (Tr. 25.) Willingham has been employed by the Union in various capacities since June 2014. (Tr. 24.) Eric Jackson is the Union's production committeeman. (Tr. 146.) Lorenzo Jamison, Sr., is the Union's shop chairman at the Dundee Engine Plant. (Tr. 146.) Jamison has held this position since May 2017, and he is the highest-ranking Union official at the plant. (Tr. 146.) Respondent admits, and I find, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (International Union) and its Local 723 are both labor organizations within the meaning of Section 2(5) of the Act. (GC Exh. 1(j).)

When grievances are filed, Willingham handles Step 1, Jackson handles Step 2, and Jamison handles Step 3. (Tr. 45.) Respondent's labor relations department, headed by Weber, handles discipline of bargaining unit employees. (Tr. 184.) However, the labor relations department is not responsible for the discipline of non-unit, salaried employees. (Tr. 184.)

#### *B. Respondent's Employee Rules and their Application*

Respondent and the International Union have been parties to a series of collective bargaining agreements, the most recent of which became effective on October 22, 2015. This agreement, referred to in the record as the "gold book" because of the color of its cover, also lists several local unions, including Local 723, as parties to the agreement. (Jt. Exh. 1.) The gold book contains a progressive disciplinary policy. (Jt. Exh. 1, pp. 39-41; R. Exh. 3.) Letters, Memoranda, and Agreements reached between the parties are contained in a separate book, referred to as the "silver book."[7] (GC Exh. 13.) Respondent maintains standards of conduct and a code of conduct for all employees. (GC Exhs. 12, 15.) Respondent further maintains an anti-harassment policy applicable to all employees. (GC Exh. 16.)

Schedule A of the gold book lists the collective bargaining units covered by its terms. (R. Exh. 1; Tr. 177.) The unit at issue in this case is

> All full-time and regular part-time production and maintenance employees employed by Dundee Engine Plant (formerly known as Global Engine Manufacturing Alliance) at its facility located in Dundee, Michigan, but excluding office clerical employees, engineers, guards, and supervisors as defined in the Act.

(R. Exh. 1., par. 13; Tr. 177–178.)

Respondent further maintains a Joint Team Leader Selection Training and Procedure Manual. (GC Exh. 14.) This manual

[4] At the hearing, the General Counsel filed a Motion to Amend the Consolidated Complaint, which I granted. (GC Exh. 1(l); Tr. 6–7.) Respondent denied the allegations contained in the amendment. (Tr. 8.) Respondent also moved to have paragraphs 7(a) and 7(b) of the complaint dismissed as containing allegations not set forth in the underlying charges. (Tr. 8.)

[5] Respondent answered the complaint on October 10, 2018, and filed an amended answer on January 22, 2019. (GC Exh. 1(i) and (j).) In the record, Respondent's original answer to the complaint is missing pp. 3–6. Respondent's amended answer shall be referred to as its "answer."

[6] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[7] The silver book also contains a disciplinary policy, in as far as it gives an appeal board the power to determine the propriety of a penalty imposed on an employee. (GC Exh. 13, pp. 19–20.)

contains the selection process and criteria, as well as a removal procedure, for team leaders. (Id.)

### *C. February 20 Information Request*

Respondent's Joint Team Leader Selection Committee (JTLSC) selects employees to serve as team leaders. (Tr. 160, 206.) Both management and the Union have representatives on the JTLSC. (Tr. 159, 206.) The JTLSC is also responsible for investigating team leaders for possible removal. (Tr. 206.) The removal process can be initiated by management or team members. (Tr. 207-208.) When a team leader is investigated for possible removal, input is sought from management, team members, and the team leader. (Tr. 208.) Interviews of team members are conducted by a member of management and a union member on the JTLSC. (Tr. 208–209.)

On February 14, Robert Watts, Jr., was removed as a team leader by Respondent. (GC Exh. 3.) The JTLSC investigated of Watts' removal as a team leader. (GC Exhs. 6, 14; Tr. 208-209.) Nick Weber, Jr., Respondent's labor relations supervisor, is a member of the JTLSC and was present for all six team member interviews related to Watts' removal. (Tr. 226.) Chief Steward Mark Willingham filed two grievances related to Watts' removal. (GC Exhs. 2, 3, 5; R. Exhs. 14, 15; Tr. 58-59.)

On February 20, Willingham sent an email to Bob Daragon, Respondent's human resources manager, seeking information.[8] (GC Exh. 6; Tr. 40.) In his email, Willingham sought "[A]ll team member interview forms that pertained to [Watts'] removal as team leader."[9] (GC Exh. 6.) Daragon provided Willingham's email to Weber. (Tr. 209.) On March 2, Weber responded to Willingham's email, attaching the package used by the JTLSC and two team member interview forms. (GC Exh. 6; Tr. 56, 211.) Weber scanned and sent over 200 documents to Willingham in response to this information request.[10] (Tr. 210.)

By May 24, the Union believed that more than two people were interviewed regarding Watts' removal. (Tr. 151, 240.) During a meeting with Daragon, the Union asked why additional team member interview forms were not provided in response to its request for information.[11] (Tr. 57, 151, 212, 240.) Weber stated that the forms were not originally provided to the Union because of what it deemed a mistake.[12] (Tr. 58, 212–213.) Daragon called Weber into the office and instructed him to provide any additional statements to the Union. (Tr. 58, 150, 213, 241.) The forms were sent to Jamison and Willingham as an email attachment within twenty minutes of the meeting. (GC Exh. 6; Tr. 213.) Four additional team member interview forms were sent by Weber. (GC Exh. 6.) Two of these statements weighed in favor of Watts' removal and two weighed against it. (Tr. 214–216.)

At the hearing, Respondent conceded that the information sought in this information request was both relevant and necessary to the Union's role as its employees' collective-bargaining representative. (Tr. 51.) Jamison ultimately withdrew Watts' grievances at Step 3 on November 29, indicating that the Union agreed that the removal was proper. (GC Exhs. 3, 5; R. Exhs. 14, 15, 17; Tr. 59, 154, 218.)

Watts' grievance forms and the minutes of the grievance meeting indicated that they were "WWP." (GC Exh. 5; R. Exhs. 14, 15, 17.) Weber testified that this means "withdrawn without precedent" and that the grievances could not have been reinstated. (Tr. 232.) Willingham testified that WWP means either "withdrawn without precedent" or "withdrawn without prejudice." (Tr. 264.) A grievance withdrawn without prejudice may be reinstated within 3 months of withdrawal. (Jt. Exh. 1, p. 34, par. 30(b).) If a grievance is withdrawn without precedent, it may not be reinstated. (Jt. Exh. 1, p. 35, par. 30(b).)

### *D. April 17 Information Request*

On April 16, unit employee Kelli Newkirt received a 3-day disciplinary suspension for failing to exert normal effort on the job, failure to follow instructions, inappropriate conduct, use of threatening/intimidating language, and returning late from a break. (GC Exh. 7; R. Exh. 2.) On her disciplinary form, Respondent indicated that Newkirt violated five of its Standards of Conduct (SOC). (GC Exhs. 7, 12.) Willingham and another Union official prepared a grievance on Newkirt's behalf regarding the discipline.[13] (GC Exh. 8; R. Exh. 10; Tr. 65.)

On April 17, Willingham submitted an information request regarding Newkirt's grievance via email to Weber, Lewis, and others at FCA. (GC Exh. 9; Tr. 184.) Among the requested information was

> . . . 3) Provide copy of taxi "pulls" for Kelli Newkirt for the past two weeks.[14] 4) Provide copy of taxi "pulls" of the entire taxi team on 2nd shift for the last two weeks. 5) Provide production numbers each day of full production for the last 2 weeks.[15] 6) Please provide a list of all individuals disciplined for violations of SOC #3, #5, #6, #11, and #14 in the past two years, hourly and salary. 7) Please provide a list of all discipline served for SOC violations of SOC #3, #5, #6, #11 in the

[8] At the hearing, the General Counsel sought first to admit a series of emails between Willingham and others related to this information request as GC Exhs. 6A, 6B, and 6C. The General Counsel later withdrew these separately numbered exhibits and sought to admit the emails and an attachment as General Counsel's Exhibit 6. The Exhibit was admitted as such. (Tr. 62.)

[9] Although Willingham's email requested other pieces of information, these requests are not part of the General Counsel's complaint. (GC Exhs. 1(g) and 2.)

[10] Weber's testimony on this point is uncontroverted. A copy of the attachment to Weber's email was not entered into evidence.

[11] For reasons discussed later in this decision, I find that there was a single meeting between the Union and Respondent regarding the team member interview forms in May.

[12] Willingham testified that Daragon said the failure to provide the additional interview forms was a mistake and that Weber said that the additional team member interview forms were not important. (Tr. 58.) Daragon's and Jamison's testimony did not mention anything regarding a mistake. Weber denies making this statement. (Tr. 213.) I credit Weber in this instance, as Willingham's version was uncorroborated.

[13] The Union also filed a grievance on Newkirt's behalf alleging harassment by 2 supervisors in May. (R. Exh. 11.)

[14] Taxi pulls are requests to deliver parts from the material handling department to the assembly line. (Tr. 77.)

[15] Production numbers are the number of engines produced at the Dundee Engine Plant on a given day. (Tr. 186-187.)

> past two years, hourly and salary . . . ***The information I have requested has relevance to a grievance and its investigation. [The] Union needs this information to bargain intelligently and or to adjust or resolve grievances.***

(Emphasis in original.) (GC Exh. 9; R. Exh. 4.) Some of these requests seek information regarding non-bargaining unit employees. However, Respondent's SOC and Code of Conduct (COC) apply to all employees. (Tr. 78, 248–249, 260–261.) Willingham sought information on non-unit employees to see if salaried employees were treated the same as unit employees for violations of Respondent's SOC. (Tr. 80.)

Willingham sought Newkirt's taxi pull information and taxi pull information for the entire second shift in order to evaluate Newkirt's work effort considering the number and types of pulls performed by others. (Tr. 78.) Willingham sought production numbers to see if the numbers met Respondent's requirements. (Tr. 78.) It was Willingham's position that if production requirements were met, Newkirt's alleged failure to exert normal effort had no effect on production or assembly. (Tr. 78.)

On April 23, Weber responded to Willingham's information request by asking for another day to respond. (GC Exh. 9.) On April 24, Weber responded to the information request by providing some of the requested information. (GC Exh. 9; R. Exh. 5.) However, Weber indicated that Respondent did not understand the relevance of the requests for taxi pulls for Newkirt or her entire shift, production numbers, or information concerning the discipline of non-bargaining unit employees. (GC Exh. 9; R. Exh. 5; Tr. 195.)

Willingham sent an email to Weber on April 24, explaining why the Union requested the information and the relevance of the requests. (GC Exh. 9; R. Exh. 6.) Willingham stated that, "[The] Union needs this information to bargain intelligently and or (sic) to adjust or resolve grievances." (GC Exh. 9; R. Exh. 6.) He also stated that the Union needed Newkirt's taxi pull information and the information for her entire shift, "to intelligently review the data." (GC Exh. 9; R. Exh. 6.) Willingham stated that the Union required the production numbers, "to intelligently review data to determine a resolution or process future grievances." (GC Exh. 9; R. Exh. 6.) Regarding the request for information concerning non-bargaining unit employees, Willingham stated, "FCA's Standards of Conduct applies (sic) to all FCA employees. In order to intelligently resolve or process future grievances, the Union requests this data, respectfully (what's in the employment jackets of salary workers who were disciplined for said SOC violations?)."[16] (GC Exh. 9; R. Exh. 6.)

Weber responded to Willingham's April 24 email on May 3, 9 days later and 16 days after Willingham's initial request for information. (GC Exh. 9; R. Exh. 6.) Weber indicated that Respondent was still collecting the data regarding Newkirt's taxi pulls and would provide it when they had it completed. (GC Exh. 9; R. Exh. 6.) Regarding the taxi pulls for Newkirt's shift, Weber stated that, "We need more time to investigate this and will update you." (GC Exh. 9; R. Exh. 6.) Weber asserted that Respondent did not believe that the Union had established the relevance of the request for production numbers. (GC Exh. 9; R. Exh. 6.) Regarding the request for information concerning the discipline of non-bargaining unit employees, Weber said, "We do not see that you've established the relevance of data for non-bargaining unit employees. Ms. Newkirt was disciplined pursuant to a collective bargaining agreement that does not apply to non-bargaining unit employees, by different supervisors, under different working conditions." (GC Exh. 9; R. Exh. 6.) Respondent did not specifically respond to the request for discipline served by all employees for SOC violations. (GC Exh. 9; R. Exh. 6; Tr. 89.)

Willingham responded to Weber's email a little over an hour later. (GC Exh. 9; R. Exh. 7.) Willingham asked Weber to supply the taxi pull information by May 7. (GC Exh. 9; R. Exh. 7.) He again asked Weber for the production information and asked that Weber provide it by May 7. (GC Exh. 9; R. Exh. 7.) Regarding the information concerning non-bargaining unit employees, Willingham stated, "Discipline was imposed due to an FCA standard of conduct violation. The policies of the company are to be enforceable to all employees; salary employees included. Please supply information requested by 5/7/18." (GC Exh. 9; R. Exh. 7.)

On May 8, Willingham received an email from Chris Lewis, a business unit leader, regarding the request for taxi pull information. (GC Exh. 9; R. Exh. 8; Tr. 92, 195.) Lewis stated that, "[I]n attempting to retrieve the requested data, we found that we can only go back 7 days. We are seeing if there is any way to recover this data from IT or CHQ. If we find that we can, we will provide it" (GC Exh. 9; R. Exh. 8.) On May 14, Lewis provided 2 days of taxi pull data for Newkirt to Willingham. (GC Exh. 9; R. Exh. 9; Tr. 94.)

On May 14, Willingham had a conversation with Weber in his office. (Tr. 96.) Willingham told Weber that he still wanted information for salaried employees disciplined for SOC violations. (Tr. 96.) Weber stated that the information was not stored electronically but was instead stored in employee files. (Tr. 96.) Weber said it would take time to get the information. (Tr. 96.) Weber then said that Respondent's corporate legal department advised him not to provide this information. (Tr. 96.) Weber stated that he would provide the taxi pull information for Newkirt and the second shift if it could be recovered. (Tr. 96.) He also agreed to provide the production numbers for 2 weeks.[17] (Tr. 98.)

Sometime later, Willingham had another conversation with Weber regarding this information request. (Tr. 98.) Willingham again requested the outstanding information and Weber gave the same responses as he had in the previous meeting. (Tr. 99.)

Jamison ultimately settled Newkirt's grievances with Respondent at Step 3. (GC Exh. 17; R. Exh. 10; Tr. 155-156.) Newkirt was given backpay, but the discipline remained on her record. (GC Exh. 17; Tr. 156.) Newkirt's grievances were

[16] Respondent conceded that FCA's SOC apply to all FCA employees and does not distinguish between unit and non-unit employees. (Tr. 223-225.)

[17] Weber was not asked about this meeting and, as such, Willingham's testimony on this point stands uncontroverted.

marked as "WWP" on September 26.[18] (R. Exhs. 10, 11, 12.) Willingham was not present for the meetings at which Newkirt's grievances were resolved. (Tr. 205-206.)

On October 9, Weber sent an email to Jamison regarding the request for information related to Newkirt's grievance. (R. Exh. 25.) Weber mentioned that some information requested by the Union that Respondent did not find relevant had never been provided to the Union. (R. Exh. 25.) As the grievance had been settled and withdrawn, Weber wanted to confirm that the Union was no longer seeking the information. (R. Exh. 25.) On October 12, Jamison responded that he assumed that Willingham still wanted the information if it was never provided. (R. Exh. 25.) Weber replied that there was no arguable relevance to the outstanding information as the grievance was resolved. (R. Exh. 25.) Weber and Jamison never met to discuss the outstanding information requests. (Tr. 204.)

On January 10, 2019, Weber sent an email to Willingham. (R. Exh. 20.) Weber asked Willingham what information the Union still required, as the underlying grievances had been resolved. (R. Exh. 20.) Willingham replied, advising Weber to review the original requests for information and provide any information that had not yet been provided. (R. Exh. 20.) Weber replied and again stated that all underlying grievances had been resolved. (R. Exh. 20.) Weber again asked Willingham to identify what information was still needed. (R. Exh. 20.) Willingham replied, "We need the company to stop denying requested information. It is a violation of the NLRA." (R. Exh. 20.)

### *E. June 26 Information Request*

On June 25, Willingham attended an investigative meeting with unit employee Chris Wilson. (Tr. 107.) Human Resources Generalist Joanna Carr was also present for Wilson's interview.[19] (Tr. 108.) Carr asked Wilson questions about an absence taken pursuant to the Family Medical Leave Act (FMLA). (Tr. 110.) After the question and answer session between Carr and Wilson, everyone was given a copy of Wilson's statement to review. (Tr. 110.) Wilson then signed and dated the form, as did Willingham and Carr. (Tr. 107, 110.)

As was his practice, Willingham asked for a copy of Wilson's statement at the conclusion of the session. (Tr. 110.) Carr advised Willingham that Daragon had told her not to provide him with a copy. (Tr. 110, 243.) Willingham testified that he needed a copy of the statement because the matters discussed could have led to discipline and the Union might have had to file a grievance on Wilson's behalf. (Tr. 111.)

Daragon sent Willingham an email regarding his request for Weber's statement on June 26. (GC Exh. 10; R. Exh. 18.) Daragon stated

> In response to your verbal request for Chris Wilson's statement, we have evaluated the specific circumstances present here, and concluded that releasing the statement to the Union while the investigation is still open raises confidentiality concerns in that disclosure poses a risk to the integrity of the investigation. The Company is willing to bargain an accommodation with the Union that satisfies its confidentiality concerns. Accordingly, the Company proposes disclosing the statement to the Union upon the conclusion of the investigation.

(GC Exh. 10; R. Exh. 18.) The Union did not make a counteroffer to Respondent's proposal and the parties never met or bargained over a proposed accommodation. (Tr. 246.)

Later that same day, Willingham sent an email to Daragon. (GC Exh. 10.) Willingham asked Daragon to articulate Respondent's confidentiality concern with providing Wilson's statement. (GC Exh. 10; R. Exh. 18.) Eliza Lanway, Respondent's labor relations representative, responded to Willingham's email. (GC Exh. 10.) Lanway stated

> . . . We have evaluated your request, and, as you have been previously informed, this is an ongoing investigation. As such, your request raises confidentiality concerns with the Company with regard to the integrity of the evidence and the willingness of potential witnesses to cooperate. The Company is willing to bargain an accommodation with the Union regarding disclosure of the information that prompted the investigation, and proposes that this be disclosed to the Union upon completion of the investigation at the international level.

(GC Exh. 10.) Lanway did not mention that Weber was under investigation for alleged fraud in her email. (Tr. 262.)

Willingham sent a second email to Daragon on June 27, asking what was confidential about the interview that would prevent him from obtaining a copy of the statement at that time. (GC Exh. 10; R. Exh. 18.) Willingham also stated that the failure to disclose Wilson's statement was a change in Respondent's practice. (GC Exh. 10; R. Exh. 18.) Willingham asked Daragon to respond by June 29. (GC Exh. 10; R. Exh. 18.) Daragon did not respond. (Tr. 113, 244.)

Daragon testified that Respondent's main confidentiality concern at that time was that Wilson's statement was not complete. (Tr. 244.) Wilson was, in fact, interviewed again on July 16 and asked different questions. (Tr. 139, 244.) Daragon also believed that the Union might share Wilson's statement with other employees, which would severely compromise the integrity of Respondent's investigation. (Tr. 245.)

Weber replied to Willingham's email on June 27. (GC Exh. 10.) Weber stated that Respondent's confidentiality concern was that disclosure of the statement while the matter was still under investigation posed a risk to the integrity of the investigation. (GC Exh. 10.) Willingham responded to Weber stating

> Just saying you have trust issues is different from explaining why you have trust issues. I want to understand why you have trust issues. I want to understand why the company has these confidentiality concerns. The reasoning behind said concerns may inspire me to change my position on requesting

[18] Newkirt's harassment grievance was withdrawn when her disciplinary grievance was settled. (GC Exh. 17; R. Exhs. 11, 12.) Also, although the grievances are marked WWP as of September 25, the grievance meeting minutes reflect that the meeting took place on September 26. (R. Exh. 10, 11, 12.) I do not find the difference in the date material.

[19] Carr did not testify at the hearing.

> the information. So please, enlighten me. Who will disclose what? Who else needs to be investigated? Any relevant details are welcome. No[t] just the generic response that has been given by the company repeatedly.

(GC Exh. 10.)

Wilson's FMLA interview statement was provided to Willingham on November 2, attached to an email from Weber. (GC Exh. 10.) Wilson's statement of June 25 and a follow-up statement of July 16 were both attached to the email. (GC Exh. 10.)

Respondent had provided confidential witness statements of employees to the Union in the past. (GC Exh. 11; Tr. 117, 254.) The Union provided copies of statements taken from two other employees on November 21, 2017, and March 28 in support of this assertion. (GC Exh. 11, 254–256.) However, neither of these prior statements was connected to a fraud investigation. (Tr. 254–256.) Willingham testified that prior to November 21, 2017, he had never been denied copies of employee statements. (Tr. 124.) Respondent provided the Union with copies of two employee interview statements concerning FMLA fraud on the same day as they were given. (GC Exh. 10; Tr. 139–140.)

## Discussion and Analysis

### *A. Witness Credibility*

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. Some of my credibility findings are incorporated into the findings of fact set forth above.

I found Willingham to be a credible witness. He appeared calm and forthright while testifying. His testimony did not waver on cross-examination. Willingham admitted difficult points when pressed on cross-examination. For example, although he initially did not characterize the investigation of Wilson as fraud examination, he was willing to concede that he later learned that the investigation was for fraud when Respondent's counsel directed him to an exhibit. Overall, I found Willingham's testimony to be worthy of belief.

I found also Jamison's brief testimony credible. Jamison's voice wavered and he appeared very nervous while testifying. However, his testimony regarding Respondent's failure to provide team member interview statements was corroborated by Willingham, Daragon, and Weber. His testimony did not falter under cross-examination. Therefore, I credit Jamison's testimony.

I found Weber to be a somewhat credible witness. For example, Weber contradicted himself when questioned by Respondent's counsel

> Q. After May 14 did you ever tell Mr. Willingham or anyone else from the Union that there was any additional responsive taxi pull data that might exist?
>
> A. Yes.
>
> Q. You did tell him that? After May 14?
>
> A. No.
>
> Q. Okay.
>
> A. No, I did not.

(Tr. 198.) Due to Weber's vacillation on this point, I instead credit Willingham's testimony regarding his conversations with Weber regarding the taxi pull information.

Furthermore, I found Weber's explanation regarding why he did not initially provide the team member interview statements to the Union unsatisfactory. As found above, Weber served on the JTLSC and received the Union's information request for the statements from Daragon. The Union specifically requested, "[A]ll team member interview forms that pertained to [Watts'] removal as team leader." (GC Exh. 6.) Weber would have known how many team members were interviewed concerning Watts' removal as team leader. Weber testified that he did not believe that the Union wanted more than the two interview statements required as a minimum for team leader removal. (Tr. 211.) This testimony is directly contradicted by Willingham's email. Therefore, I credit Weber's testimony only where it is inherently plausible, uncontradicted, or supported by more credible testimony or evidence.

I found Daragon to be credible witness. He appeared steady and relaxed while testifying. His testimony was brief and did not waver on cross-examination. He readily admitted under cross-examination that he did not respond to two of Willingham's emails. (Tr. 250-251.) Therefore, I have credited Daragon's testimony.

Finally, I found Lanway's testimony credible. Her testimony seemed certain and did not waver under cross-examination. Much of her very brief testimony concerned interview statements that were not part of the General Counsel's complaint. Her testimony regarding Respondent's confidentiality concerns over Wilson's interview statement were corroborated by an email she sent Willingham. As such, I have credited Lanway's testimony.

Several witnesses testified about a meeting or meetings that took place between the Union and Daragon and Weber in May. Jamison testified that he engaged in a single meeting with Jackson, Daragon and Weber, in which he asked why additional team member statements pertaining to Watt's removal as a team leader were not provided. (Tr. 150.) Willingham testified that he had a single meeting with Daragon and Weber in which Daragon told Weber to provide the additional team member interview forms. Daragon and Weber testified to a single meet-

ing with Willingham and one or two other Union officials in which the Union asked for additional team member interview forms and Daragon told Weber to provide them. I have found that in May, in a single meeting, the Union communicated its need for additional team member interview forms, Daragon and Weber indicated that the forms had not been provided by mistake, Daragon told Weber to provide the interview forms, and Weber provided the forms. I find it very unlikely that Daragon would twice, in separate meetings, order Weber to provide these forms to the Union. Both Daragon and Weber testified that these events transpired during a single meeting. I further find that Willingham's and Jamison's testimony diverges regarding what they believed was two meetings. Willingham testified that Jamison told him about the missing interview forms, prompting him to meet with Daragon. Jamison, however, never testified that he told Willingham about the missing forms. Given the uncertainty of the General Counsel's witnesses regarding these alleged separate meetings, I instead find that it is more likely that there was a single meeting at which Daragon advised Weber to provide the additional statements.

### *B. Respondent's Motion to Dismiss Paragraphs 7(a) and (b) of the Complaint*

At the hearing, the General Counsel moved to amend the complaint. (GC Exh. 1(l); Tr. 6-7.) I allowed the amendment at the hearing over the objection of Respondent.[20] (Tr. 8–9.) Respondent denied the allegations contained in the amendment and raised a timeliness defense under Section 10(b) of the Act.[21] (Tr. 7–8.)

As correctly pointed out by Respondent, the allegations contained in paragraph 7(a) and (b) of the complaint are not contained in either of the underlying charges. However, I find that these allegations were properly before me. Additionally, I find that the General Counsel's amendment to the complaint was proper.

The Board requires that complaint allegations be factually related to the allegations in the underlying charge. *Nickels Bakery of Indiana,* 296 NLRB 927, 928 (1989). In considering whether a charge supports an allegation in the complaint, the Board requires that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge. 296 NLRB at 927. In *NLRB v. Fant Milling Co*., 360 U.S. 301, 309 (1959), the Supreme Court held that a complaint alleging violations not specifically alleged in the charge is proper if the matters asserted in the complaint "are related to those alleged in the charge and . . . grow out of them while the proceeding is pending before the Board." 296 NLRB at 927.

In deciding whether complaint amendments are closely related to allegations made in the underlying charge, the Board considers the factors set forth in *Redd-I, Inc.,* 290 NLRB 1155 (1988). First, the Board considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely-filed charge. Id. Second, the Board considers whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the timely-filed charge. Id. Finally, the Board may examine whether a respondent would raise similar defenses to both allegations.[22] Id.

The charge in Case 07–CA–219895 alleges that alleges that Respondent violated the Act by failing and refusing to bargain in good faith with the Union by failing to furnish certain information. (GC Exh. 1(a).) Thus, the legal theory of the complaint allegations is the same as those in the charge: a violation of Section 8(a)(5) and (1) of the Act. (GC Exh. 1(a), (g).)

In addition, the complaint allegations arise from the same factual circumstances and sequence of events as those in the amended charge. In a list attached to the charge, the Union claimed that it requested, "Production data, [s]alary employees discipline data" from Weber on April 17. (GC Exh. 1(a).) Although the request referenced in the charge does not specifically list taxi pull information, the Union requested the taxi pull information in the same email in which it requested production data and discipline information for salaried employees. (GC Exh. 9.) The alleged violations all arose as a result of a single email. Thus, I find that complaint allegations involve the same legal theory and factual circumstances as those in the amended charge.

As the allegations in the charge and complaint involve violations of Section 8(a)(5) and (1) of the Act, Respondent would be expected to raise similar defenses to them. Although the requests are for different information, they were made in the course of a single email. Therefore, I find that the allegations in the complaint that were not asserted in the underlying amended charge are closely related to the allegations made in the complaint. As such, the General Counsel properly moved to amend the complaint and the amendment was proper.

### *C. Respondent Violated the Act by Failing and Refusing to Provide Requested Information to the Union*

In its information requests, the Union sought information regarding: team member interviews related to the removal of Robert Watts, Jr., as a team leader; taxi pulls for Kelli Newkirt for the previous 2 weeks; taxi pulls of the entire taxi team on second shift for the previous 2 weeks; production numbers each day of full production for the previous 2 weeks; a list of all individuals disciplined for violations of Standard of Conduct (SOC) sections #3, #5, #6, #11, and #14 in the past 2 years for salaried employees; a list of all disciplines served for SOC violations of sections #3, #5, #6, and #11 in the past 2 years for salaried employees, and; employee Chris Wilson's FMLA in-

[20] Par. 7(a) and (b) of the complaint allege that Respondent violated the Act when it failed and refused to provide the Union with copies of "taxi pulls" for employee Kelli Newkirt and for the entire second shift taxi team for the last weeks.

[21] Respondent did not object to certain other amendments to the complaint, including changing the spelling of a unit employee's name, adding an additional section of Respondent's SOC to one of the information requests, and addressing some grammar issues.

[22] Although *Redd-I* involved a complaint amendment, the precedent relied upon in *Redd-I* applies a similar closely related requirement to both initial complaints and amended complaints. See *Nickels Bakery of Indiana,* 296 NLRB at 928, citing *NLRB v. Dinion Coil Co*., 201 F.2d 484, 491 (2d Cir. 1952), as discussed in *Redd-I, Inc.* 290 NLRB at 116.

terview statement (GC Exh. 1(g), 1(l).) The General Counsel alleges that Respondent unreasonably delayed in providing the information regarding the Watts interviews and Wilson's statement. (GC Exh. 1(g), 1(l).) The General Counsel further alleges that Respondent failed and refused to provide the information concerning the taxi pulls, production numbers, and SOC violations by and discipline of salaried employees.

In dealing with a certified or recognized collective-bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal*, 224 NLRB 1506 (1976). Information concerning the wages, hours, and terms and conditions of employment of bargaining unit employees is presumptively relevant and must be furnished upon request. *North Star Steel Co*., 347 NLRB 1364 (2006); *Bryant & Stratton Business Institute*, 323 NLRB 410 (1997). Information sought by a union relating to the union's investigation of a potential grievance, or to the policing and/or proper application of the terms of a collective-bargaining agreement, relates to employees in the bargaining unit and is presumptively relevant. *Yeshiva University*, 315 NLRB 1245, 1248 (1994). It is the employer's burden to rebut the presumption. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Southern California Gas Co.,* 344 NLRB 231, 235 (2005); *Miller Processing Services*, 308 NLRB 929 (1992).

The Newkirt taxi pull information, taxi pull information for the second shift, production numbers for the Dundee Engine Plant, team member interviews concerning Watts, and Wilson's statement are all presumptively relevant. The Union sought the information regarding Newkirt and other unit employees on her shift in order to process her disciplinary grievance. The Union sought production numbers for the plant because, in Willingham's opinion, if production numbers were being met, Newkirt's alleged lack of effort should not matter. Similarly, the Union sought the information regarding Watts in order to process his grievances concerning his removal as a team leader. Wilson's statement was sought because he might have been subject to discipline and the Union could have had to file a grievance on his behalf. As such, this information was all presumptively relevant.

Respondent has not rebutted the presumption that this information is presumptively relevant. Respondent conceded that the information sought regarding Watts' removal as a team leader was relevant. Respondent did not argue that the taxi pull information for Newkirt and her shift, or Wilson's FMLA statement, were not relevant. All of this information relates directly to unit employees and the information regarding Newkirt's shift and production numbers relates directly to the Union's processing of her grievance. Therefore, Respondent had a duty to provide this information.

Absent evidence of justification, an unreasonable delay in furnishing relevant information is as much a violation of Section 8(a) (5) of the Act as a refusal to furnish the information at all. *PAE Aviation and Technical Services, LLC*., 366 NLRB No. 95, slip op. at 3 (2018). It is an employer's duty to furnish relevant information as promptly as possible, given the circumstances, as a union is entitled to the information at the time the information request is made. Id. In determining whether a party has failed to produce information in a timely manner, "the Board considers a variety of factors, including the nature of the information sought (including whether the requested information is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party." *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 2 (2017). The analysis is an objective one, focusing not on whether the employer delayed in bad faith, but rather on whether it supplied the requested information in a reasonable time. *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 3 (2018).

The Union requested the team member interviews concerning Watts' removal as a team leader on February 20. Two statements were provided to the Union on March 2, 10 days after the request. Four additional statements in Respondent's possession were not disclosed until May 24, over 3 months after the Union's request. Although the team member interviews were not time sensitive, they also were not difficult to obtain, and consisted of only a few pages. The Board has found delays in providing information of less than 3 months or less to be unreasonable and violative of the Act. *Dodge of Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 fn. 5 (2012) (2 months); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7 weeks); *Bundy Corp*., 292 NLRB 671, 672 (1989) (6 weeks). Given the Union's specific request for the statements, Weber's knowledge that the statements existed, and Weber's failure to provide the statements for over 3 months, I find Respondent's delay in providing the team member interview forms concerning Watts was unreasonable and violated the Act.

I further find Respondent's delay in providing 2 weeks of taxi pull data for Newkirt and her shift was unreasonable. The Union requested this information in an email on April 17. Weber did not respond to this request until April 23, when he questioned the relevance of the information. Weber next replied to this request on May 3, 16 days after the Union's initial request. In his May 3 email, Weber indicated that he was gathering Newkirt's taxi pull data and would provide it later. Weber further indicated that Respondent was still investigating the taxi pulls for Newkirt's shift. On May 8, 21 days after the Union's information request, Lewis provided the Union with 2 days of taxi pull data for Newkirt and stating that Respondent had learned that it could only go back 7 days to retrieve taxi pull data.

Clearly, Weber did not begin gathering the taxi pull data immediately after the Union's request. Had he done so, he would have learned that the data was only able to be retrieved for the preceding 7 days. Thus, the information was time-sensitive. Respondent provided only 2 days of taxi pull data for Newkirt, and no data related to others on her shift, 3 weeks after the initial request. This data could have shown how Newkirt's performance compared to that of other employees.

This data further could have helped the Union determine how to proceed with Newkirt's grievance. Given Respondent's inexplicable delay in beginning to gather the taxi pull data, resulting in the information becoming unavailable, I find that Respondent violated the Act by failing to provide the taxi pull data for Newkirt and her shift over a 2-week period.

The Union sought plant production numbers in order to process Newkirt's grievance. Newkirt was disciplined for an alleged lack of effort in performing her job. Respondent has never provided this information to the Union. Respondent argues that this information is not presumptively relevant, and that the Union has not established its relevance. (R. Br. p. 12.) I find that this information is presumptively relevant in that is was sought for the purpose of processing a grievance on behalf of a bargaining unit member. However, if this information is not found to be presumptively relevant, I find that the Union as established its relevance. Processing grievances is clearly a responsibility of a union, and an employer must provide information requested by the union for the purposes of handling grievances. *TRW, Inc*., 202 NLRB 729 (1973). The Board may order production of information relevant to a dispute if there is some probability that it would be of use to the union in carrying out its statutory duties, including the evaluation of grievances. *NLRB v. Safeway Stores,* 622 F.2d 425, 430 (9th Cir. 1980), cert. denied, 450 US 913 (1981). Arguably, the plant production data could have assisted the Union in defending Newkirt's grievance, as it would have shown the effect of her alleged lack of effort on production. Therefore, I find that Respondent's refusal to provide production data for a 2-week period, as requested by the Union, violated the Act.

Regarding the FMLA interview statement of Wilson, Respondent asserts that it was confidential and exempt from disclosure. In *American Baptist Homes of the West,* 362 NLRB 1135 (2015), enfd. in relevant part 858 F.3d 612 (D.C. Cir. 2017), the Board stated that in future cases in which an employer argues that it has a confidentiality interest in protecting witness statements from disclosure, it shall apply the balancing test set forth in *Detroit Edison v. NLRB,* 440 U.S. 301 (1979). Thus, the Board balances the union's need for the relevant information against any legitimate and substantial confidentiality interests established by the employer. 362 NLRB at 1137. Establishing a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of employment investigations. Id. Instead, an employer must determine 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 such a showing is made, the Board weighs the party's interest in confidentiality against the requester's need for the information. *American Baptist Homes of the West,* 362 NLRB at 1137.

In this case, I find that Respondent asserted a valid confidentiality concern initially regarding Wilson's statement. In his initial interview, Wilson did not answer all of Carr's questions. He was subsequently re-interviewed and asked different questions. It stands to reason that Respondent was concerned that Wilson could have reviewed his statement to prepare for further questioning. However, after Wilson's final interview on July 16, Respondent would no longer have any reason to withhold his interview statements. In fact, Respondent provided the Union with copies of other employee interview statements concerning FMLA fraud on the same day as they were given. Respondent offers no explanation for providing the other two FMLA statements, but not Wilson's statement, to the Union. Thus, I find that Respondent's confidentiality concern should have been alleviated as of July 16. In any event, despite Respondent's need for confidentiality during its ongoing investigation, the Union had an equally compelling need for the requested information: to prepare for potential discipline and the filing of a grievance.

Even if the Board determines that the confidentiality interest outweighs the requester's need, the party asserting confidentiality 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. The burden of formulating a reasonable accommodation is on the employer, the union need not propose a precise alternative to providing the requested information unedited, *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). I find that Respondent did not satisfy its duty to come forward with an appropriate accommodation in this case. Willingham, who attended Wilson's interview with human resources on June 25, requested a copy of Wilson's statement at the conclusion of the interview. In the past, he had always been provided copies of such statements. However, on this occasion, Willingham was told by Carr, who was acting on instructions from Daragon, that Respondent would not provide a copy of the statement. After asserting that Wilson's statement was confidential, Daragon proposed, as an accommodation, "disclosing the statement upon the conclusion of the investigation." (GC Exh. 10.) Respondent did not offer to provide the statement in a redacted form or for a limited purpose, such as subject to a confidentiality agreement. Instead, Respondent only offered to delay the provision of Wilson's statement until the conclusion of its investigation. I do not find this reasonable, as it is not really an accommodation at all, but instead a flat refusal to provide the statement. Furthermore, the Union's failure to offer a counterproposal is of no moment. The burden of formulating a reasonable accommodation is on the employer and the union need not propose a precise alternative to providing the requested information unedited. *United States Testing Co. v NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998), citing *Tritac Corp*., 286 NLRB 522, 522 (1987).

Respondent eventually provided Wilson's statement to the Union on November 2, over 4 months after the Union requested it. Curiously, Respondent provided statements of two other employees concerning alleged FMLA fraud to the Union on the same day as they were given, just a few days before Wilson's interview. Respondent offered no evidence as to why, after Wilson gave his final statement on July 16, it did not provide the statement or offer a reasonable accommodation. Wilson's statement was a single document and no evidence was asserted that it would have been difficult to locate or retrieve the state-

ment. Therefore, I find that Respondent's delay constituted a violation of Section 8(a)(1) and (5) of the Act. 8 See, e.g. *U.S. Postal Service*, 308 NLRB 547, 551 (1992) (4-week unexplained delay unlawful where information was not shown to be difficult to retrieve).

The Union further sought information regarding salaried, non-unit employees' violations of Respondent's standards of conduct (SOC) and information regarding discipline of salaried, non-unit employees for violations of Respondent's SOC. The remaining information sought by the Union in this case is not presumptively relevant. When a union seeks information concerning employees outside of the bargaining unit, there is no presumption of relevance and the union has the burden to show relevance in such circumstances. *E.I. DuPont de Nemours and Co.,* 744 F.2d 536, 538 (6th Cir. 1984). Processing grievances is a responsibility of a union, and an employer must provide information requested by the union for the purposes of handling grievances. *TRW, Inc*., 202 NLRB 729 (1973). The legal standard concerning just what information must be produced is whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc*., 272 NLRB 1128 (1984). The Board uses a broad, discovery-type standard in determining relevance in information requests and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). If a union's information request is ambiguous or concerns non-unit employees, this does not excuse an employer's blanket refusal to comply. *Keauhou Beach Hotel,* 298 NLRB 702, 702 (1990).

Inasmuch as the Union was investigating Respondent's consistency in enforcing its SOC and disciplinary policies, this information was relevant and necessary to the Union's role in representing its members. Information regarding a misconduct investigation, even of non-unit employees, is relevant to establishing whether there has been disparate treatment of employees. *NTN Bower Corp.,* 356 NLRB 1072, 1139 (2011). The Board elaborated upon the duty of the employer to furnish information in *Pfizer, Inc*., 268 NLRB 916, 918, (1984), enfd. 763 F.2d 887 (7th Cir. 1985), where it explained that certain matters relating to the unit go to the core of the employer employee relationship and are presumptively relevant: these include "wage rates, job descriptions, and other information pertaining to employees within the bargaining unit." However, "[w]here the request is for information concerning employees outside the bargaining unit, the union must show that the information is relevant." Id. The standard for relevancy is a liberal discovery-type standard. 268 NLRB at 918, citing *Loral Electronic Systems*, 253 NLRB 851, 853 (1980). In *Pfizer*, the union requested certain information about disciplinary action issued to all other non-unit employees in order to present a grievance concerning disparate application of discipline to a unit employee. The Board held that the General Counsel had shown the relevance of the requested information: the records would assist the union either in deciding whether to proceed to arbitration, or in the arbitration proceeding. *Pfizer*, supra, at 919. Similarly, in the instant case, the information regarding the non-unit employees is relevant because it could assist the Union in proving whether Newkirt was treated disparately.

After the Union demonstrated the relevancy of the requested information, the burden shifted to Respondent to establish that the information was not relevant, did not exist, or for some other valid and acceptable reason could be furnished to the requesting party. *Samaritan Medical Center,* 319 NLRB 392, 398 (1995), citing *Somerville Mills,* 308 NLRB 425 (1992), and *Postal Service,* 276 NLRB 1282 (1985). Respondent made no such showing. As such, I find that Respondent's failure to produce information regarding violations of its SOC by non-unit employees and discipline of non-unit employees for violations of its SOC violated Section 8(a)(5) and (1) of the Act. Ultimately, Respondent has failed to elucidate a reason why it should be excused from providing, or timely providing, the information requested by the Union on February 20, April 17, and June 26. The Union's requests were all relevant and necessary to its role processing grievances for unit members.

### *D. Respondent's Affirmative Defenses*

Respondent raised eight affirmative defenses in its answer to the complaint. It is well established that the burden of proof of proving an affirmative defense lies with the party asserting it. *Marydale Products, Co., Inc.,* 133 NLRB 1232 (1961) and *Sage Development Co.*, 301 NLRB 1173, 1189 (1991). I have already addressed Respondent's defenses related to confidentiality, the relevance of the requested information, and Respondent's failure to provide relevant information.

Respondent asserts that all relevant and responsive information has been provided to the Union or no longer exists. An unreasonable delay in providing relevant information to a union is as much a violation of the Act as an outright refusal to provide the information. *Finn Industries, Inc.,* 314 NLRB 556, 558 (1994). Regarding the information requested for Newkirt's grievance, Respondent did not reply to the Union's request for information relating to Newkirt's grievance for almost a month. When it did, Respondent was only able to locate 2 days' worth of taxi pull information regarding Newkirt herself. Information regarding taxi pulls for other members of Newkirt's shift and regarding production numbers for Newkirt's shift were never provided. In this case, if Respondent would have timely responded to the Union's request for taxi pull information related to Newkirt's grievance, the information would have been available. Moreover, Respondent never provided the information. Thus, I find that Respondent's delay insearching for and providing this information was a violation of the Act, which was not mooted because it subsequently provided only some of the information. The rest of the taxi pull information became unavailable by Respondent's own failure to timely respond to the information request.

Despite Respondent's assertions to the contrary, the settlement of Newkirt's grievance did not moot its obligation to provide the requested information. In *Postal Service*, 332 NLRB 635 (2000), the Board held that an undue delay in providing information relevant to a grievance is not rendered moot by the settlement of the grievance. In that case, the Board affirmed the judge's conclusion that the union's request for information was not mooted because in its request the union expressly stat-

ed that it had reason to believe that management is treating supervisor(s) differently than craft employees concerning attendance and unscheduled absences. 332 NLRB at 636. Thus, the Board found, this request was relevant to all bargaining unit members, and was not limited to the grievant. Id.

Similarly, in this case, Willingham's stated purpose for requesting the records was, "The information I have requested has relevance to a grievance and its investigation. [The] Union needs this information to bargain intelligently and or to adjust or resolve grievances." Willingham's further requested information pertaining to salaried employees who had run afoul of Respondent's SOC and the punishments given to those salaried employees. Without specifically stating that his request had to do with a problem of disparate treatment affecting the larger unit, I find his request encompassed an issue of the larger bargaining unit by requesting information pertaining to disparate treatment and referencing "grievances" (plural). Moreover, in an email of April 24, Willingham stated that he needed the information because, "FCA's Standards of Conduct applies (sic) to all FCA employees. In order to intelligently resolve or process future grievances, the Union requests this data, respectfully . . ." Thus, I find the *U.S. Postal Service* case analogous from the facts presented here and find no merit in Respondent's mootness defense.

The case cited by Respondent in support of its mootness argument is distinguishable from the instant case. See *Borgess Medical Center*, 342 NLRB 1105 (2004). In *Borges Medical Center,* a union requested incident reports with respect to a grievance it filed on behalf of discharged nurse. 342 NLRB at 1106. That grievance went to arbitration, the arbitrator issued a decision in the employer's favor, and no appeal was taken by the Union. Id. In that case, the union did not assert that it needed the information for any other purpose. Thus, the Board declined to order the Respondent to produce the information. Id. However, in this case, the Union sought information regarding disparate treatment of unit employees and stated that it needed the information to adjust or resolve grievances (plural). Furthermore, I note that the Board in *Borgess Medical Center* found that a union dis not have the burden of showing an ongoing need for the information, however, but instead that the remedy for a violation must consider the facts as they exist at the time of the order. 342 NLRB at 1107. In this case, the Union still requires the information to carry out its duties as the collective-bargaining representative of Respondent's employees to investigate possible unfair treatment of unit employees.

As Respondent's duty to provide relevant requested information to the Union was not mooted by the resolution of Newkirt's grievance, I find that Respondent's defense that it did not fail to provide relevant information necessary to the Charging Party's collective-bargaining duties fails. As I have found, the information requested by the Union remained relevant after the settlement of Newkirt's grievance because the Union tied its request to an issue of the larger bargaining unit by requesting information regarding disparate treatment and stating that it needed the information to resolve or adjust grievances (plural). Therefore, Respondent did not provide all relevant information to the Union and its affirmative defense in this regard fails.

I do not accept Respondent's defense that it merely made a mistake in not providing some of the team member interviews concerning Watts' removal as team leader. Respondent failed to adduce credible evidence at the hearing that Weber's failure to provide the team member interview forms was a mistake. Weber knew how many team members were interviewed regarding Watts' removal because he attended the interviews. Thus, his failure to provide the interview statements, despite a specific request for them, was not a mistake.

Finally, Respondent asserts that *American Baptist Homes of the West,* 362 NLRB 1135 (2015), should be overturned. (R. Br. p. 19.) It is well settled that administrative law judges of the National Labor Relations Board are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals or district courts. *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004). As such, I am bound to follow the Board's holding in *American Baptist Homes of the West*, and relevant cases cited therein.

In sum, I found no merit to any of Respondent's affirmative defenses. Moreover, I have found that the General Counsel has established that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

## CONCLUSIONS OF LAW

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

2. Local 723, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide the Union with relevant information as requested on February 20, 2018, April 17, 2018, and June 26, 2018, Respondent has violated 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 the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

## ORDER

Respondent, FCA US LLC, Dundee, Michigan, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union, Local 723, International Union, United Automobile, Aerospace and Agricultural

[23] 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.

Implement Workers of America (UAW), AFL–CIO, by unreasonably delaying, and failing and refusing, to furnish 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 full-time and regular part-time production and maintenance employees employed by Dundee Engine Plant (formerly known as Global Engine Manufacturing Alliance) at its facility located in Dundee, Michigan, but excluding office clerical employees, engineers, guards, and supervisors as defined in the Act.

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

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

(a) Furnish the Union with the following information it requested on April 17, 2018: (1) Copies of taxi pulls for unit employee Kelli Newkirt for the 2 weeks ending April 17, 2018; (2) Copies of taxi pulls for the entire taxi team on 2nd shift for the 2 weeks ending April 17, 2018; (3) Production numbers for each day of full production for the 2 weeks ending April 17, 2018; (4) A list of all non-bargaining unit individuals disciplined for violations of Standards of Conduct (SOC) violations of Sections #3, #5, #6, #11, and #14 in the past 2 years; and (5) A list of all disciplines issued for SOC violations of Sections #3, #5, #6, and #11 in the past 2 years for all non-bargaining unit employees. If any of this information does not exist, Respondent shall inform the Union that no such documents exist and, if the documents previously existed, the reasons why the documents no longer exist.

(b) Within 14 days after service by the Region, post at its facility in Dundee, Michigan, copies of the attached notice marked "Appendix."[24] 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 February 20, 2018.

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

Dated, Washington, D.C. November 5, 2019

## 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, upon request, fail and refuse to bargain collectively and in good faith with Local 723, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, (Union) as the designated servicing representative of the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by Dundee Engine Plant (formerly known as Global Engine Manufacturing Alliance) at its facility located in Dundee, Michigan, but excluding office clerical employees, engineers, guards, and supervisors as defined in the Act by refusing to provide, and unreasonably delaying in providing, the Union with requested information that is relevant and necessary to its role as the designated servicing representative of the exclusive collective-bargaining representative of unit employees.

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

WE HAVE the provided the Union with team member interview forms it requested on February 20, 2018, and the FMLA interview statement of a unit employee it requested on June 26, 2018.

WE WILL furnish the Union with the following information it requested on April 17, 2018: (1) Copies of taxi pulls for unit employee Kelli Newkirt for the 2 weeks ending April 17, 2018; (2) Copies of taxi pulls for the entire taxi team on 2nd shift for the 2 weeks ending April 17, 2018; (3) Production numbers

[24] 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."

each day of full production for the 2 weeks ending April 17, 2018; (4) A list of all non-bargaining unit individuals disciplined for violations of Standards of Conduct (SOC) violations of Sections #3, #5, #6, #11, and #14 in the past 2 years; and (5) A list of all disciplines issued for SOC violations of Sections #3, #5, #6, and #11 in the past 2 years for all non-bargaining unit employees. If any of this information does not exist, Respondent shall inform the Union that no such documents exist and, if the documents previously existed, the reasons why the documents no longer exist.

FCA US LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-219895 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.