JD–32–24
Colon, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and

LOCAL 143, AMERICAN POSTAL WORKERS UNION (APWU), AFL-CIO — **CASE 07–CA–299320**

and

JAMES STEVENSON, an Individual — **CASE 07–CA–301929**

and

LOCAL 281, AMERICAN POSTAL WORKERS UNION (APWU), AFL-CIO — **CASE 07–CA–304691**

Eric S. Cockrell, Esq.,
for the General Counsel.
Austin Black **and** ***Walaiporn Mekkriengkrai*****, Esqs.**, *(United States Postal Service)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. These unfair labor practice charges arise from an order consolidating cases and rescheduling cases for purpose of hearing issued on November 8, 2023, based on charges filed against the Respondent United States Postal Service (the Postal Service) by (1) American Postal Workers Union (APWU) Local 143 (Local 143) on July 12, 2022;[1] (2) James Stevenson (Stevenson) on behalf of APWU Local 281 (Local 281) on August 22; and (3) Local 281 on October 4, all alleging that the Postal Service failed to provide requested information or unreasonably delayed in providing such.

[1] All dates hereinafter occurred in 2022 unless otherwise specified or clear from the context.

Pursuant to notice, I conducted a trial in Grand Rapids, Michigan, on January 22, 23, and 24, 2024, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

The General Counsel and the Respondent filed posthearing briefs on May 3, 2024. In addition, the Respondent separately filed documents pertaining to Region 7's investigation of the charges in Case 07–CA–301929, as well as the General Counsel's request for special permission to appeal my evidentiary rulings rejecting certain documents that the General Counsel sought to introduce.[2]

On May 9, the General Counsel filed a motion to strike the attachments because they are not part of the official record.[3] However, the Board has held that portions of a posthearing brief pertaining to Board proceedings can be accepted because "[t]he Board may take administrative notice of its own proceedings." *Farmer Bros. Co.*, 303 NLRB 638, 638 fn. 1 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993); see also *Caesars Entertainment*, 368 NLRB No. 143, slip op. at 1 fn. 11 (2019). I note that a Regional Director's prior consideration and investigation of charges "serves a more limited and discretionary function than the hearing necessary under the Act and cannot, therefore serve as a replacement for the Board's adjudicatory responsibility." *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 269 NLRB 482, 483 (1984); see also *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924, 925 (1988). In any event, having reviewed the documents, I conclude that they do not affect my disposition of the charges before me.

ISSUES

Case 07–CA–299320

Did the Postal Service at its Colon, Michigan facility (Colon) unreasonably delay furnishing Local 143 with information that it requested on April 28 relating to a grievance filed by Janna Garland (Garland)?

Case 07–CA–304691

Did the Postal Service at its Big Rapids, Michigan facility (Big Rapids) unreasonably delay furnishing Local 281 with information that it requested on September 15 and 26 relating to grievances that management failed to address unit employees' complaints that carrier Amanda ("Mandy") Bishop (Bishop) created a hostile work environment?[4]

[2] For reasons to be stated, I reverse my ruling as to two arbitration awards that the General Counsel proffered.
[3] The Respondent filed an opposition to the motion on May 21.
[4] In the course of this decision, I make no findings regarding Bishop's conduct.

Case 07–CA–301929

Did the Postal Service at its Grand Rapids, Michigan processing and distribution center (P&DC) fail and refuse to provide Local 281 with information that it requested on August 9 and 17 relating to the terminations of probationary employees Cindy Andrews (Andrews), Kiara Carter (Carter), and Christopher Paige (Paige)?

WITNESSES AND CREDIBILITY

All witnesses at the time of the hearing were employees of the Postal Service, except Stevenson, who retired in February 2023.

The General Counsel called:

(1) Stevenson, APWU national business agent.
(2) Thomas Lothamer (Lothamer), Local 143 business agent.
(3) Amy Puhalski (Puhalski), APWU national officer since June 2023 and Local 281 president in 2022. .

The Respondent called:

(1) Brent McBride (McBride), postmaster in Hillsdale, Michigan, and postmaster at Colon in 2022.
(2) Ronald Lee Elliott, Jr. (Elliott), Big Rapids postmaster.
(3) Susan Harcus aka Susan Harcus-Zumberg (Harcus), Michigan 2 District manager of labor relations.

Because the evidence was primarily documentary and undisputed, and resolution of the issues revolves around application of the law, witness credibility is therefore not pivotal.

FACTS

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

The Respondent provides postal services for the United States and operates various facilities throughout the United States, including Big Rapids, Colon, and the Grand Rapids P&DC, Michigan. The Board has jurisdiction by virtue of Section 1209 of the Public Records Act (PRA).

At all times material, the APWU and its Locals 143 and 282 have been labor organizations within the meaning of Section 2(5) of the Act.

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

> All full-time and regular part-time maintenance employees, motor vehicle employees, postal clerks, special delivery messengers, mail equipment shops employees, material distribution centers employees, and operating services and facilities services employees; and excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined in Public Law 91-375, 1201(2), all Postal Inspection Service employees, employees in the supplemental work forces as defined in Article 7 of the Collective-Bargaining Agreement, rural letter carriers, mail handlers, and letter carriers.

At all material times, by virtue of Section 9(a) of the Act, the APWU has been the exclusive collective-bargaining representative of the unit.

Since about 1971, and at all material times, the Respondent has recognized the APWU as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from September 21, 2021, through September 20, 2024 (the CBA). (Jt. Exh. 1). The Joint Contract Interpretation Manual (JCIM) (November 2022) clarifies provisions in the CBA. (Jt. Exh. 4.)

Article 15 of the CBA sets out the grievance-arbitration procedure and provides for three steps: (1) discussion with immediate supervisor; (2) written grievance filed with the installation head or designee; (3) written appeal to the grievance/arbitration processing center; and (4) arbitration.

At all times material, Local 143 has been the APWU's designated servicing for unit employees at various facilities throughout Michigan, including Colon; Local 282 has been its designated servicing representative for unit employees at various facilities throughout Michigan, including Big Rapids and Grand Rapids.

Generally, employees at each facility are represented by the APWU, the National Association of Letter Carriers (NALC) (city carriers), or the National Rural Letters Carriers Association (NRLCA) (rural routes).

Case 07–CA–299320

Lothamer has jurisdiction over approximately 40 Postal Service offices in southwest Michigan, including Colon, an associate post office with two remote offices. Jeff Neal (Neal) was the postmaster until about May 21, when McBride assumed that position. It employs two part-time clerks (including Garland), as well as a full-time clerk at a remote office.

On April 8, Neal notified Garland that she was being placed in an administrative leave status and removed from duty effectively immediately pending an investigation of the allegation that she was smoking within the facility.[5] (GC Exh. 2.)

An employee on administrative leave is paid, and it is not considered a disciplinary action. Emergency placement, on the other hand, is unpaid and is a form of discipline under Art. 16 of the CBA. Lothamer testified that Garland was on administrative leave and paid for 8 hours for only a short time but then was put on emergency placement and reduced to 4 hours pay and then none.

On April 28, Lothamer made a Request for Information (RFI) to Neal concerning Garland's emergency placement in off-duty status. (Jt. Exh. 6.) He used his standard RFI form for grievances pertaining to emergency placement. At the time, the matter was still under investigation, and no grievance had yet been filed, but Lothamer testified that he needed the information in order to determine whether to file a grievance on Garland's behalf.

As explained in his testimony, he requested the following:

(1) Copy of the discipline notice and decision letter.
(2) Prior discipline notices (to Garland) cited as past elements.
(3) Grievant's statement and/or interview.
(4) Witness statements and/or interviews.
(5) Supervisor's interview and/or statement.
(6) Posted or published work rule alleged to have been violated.
(7) OIG Investigative Memorandum with all exhibits.
(8) All document, records or exhibits being relied upon as evidence.
(9) Settlements and/or grievance files for all cited discipline (of Garland), to see if discipline was properly progressive.
(10) Discipline proposal or request for discipline, to see if Neal acted alone or was supported by higher manager.
(11) Supervisor's notes/records of investigation and day in court, to see if the issued discipline was objective or discriminatory.
(12) Grievant's official personnel file (OPF) be made available for review by APWU steward, to confirm that information Lothamer received was correct.
(13) Higher level authority's reviewing interview and/or statement, for the reason stated under (10).

On cross-examination, Lothamer conceded that in April he received photos relating to the incident and that on about May 26 he received the OIG report. McBride testified without rebuttal that he hand-delivered a copy of the report to Lothamer on about that date.

[5] The Respondent's Office of Inspector General (OIG) conducts investigations of potentially criminal matters and was investigating whether Garland engaged in illegal drug usage on the property.

On June 10, Lothamer filed a step 1 grievance with McBride on Garland's emergency placement, requesting her immediate return her back to work. (GC Exh. 4.) Therein, he also reiterated his RFI. On June 14, he made a second request for a response and the information. (GC Exh. 5.) McBride responded on June 21, stating that internet was only restored in Colon that day and that he would work on the information request the following day. (Ibid.)

General Counsel's Exhibits 6–9 consist of a series of emails between Lothamer and McBride as follows.

On June 22, McBride advised Lothamer that had sent the information request to Neal and the Respondent's Labor Department (the Labor Department). He stated that had not had information regarding the investigation sent to him and that Colon was without internet for the past week.

On June 23, they discussed resolving the grievance. Lothamer raised his RFI.

On June 27, Lothamer asked, inter alia, if McBride had any luck filling the information request. McBride responded that he had not heard back from the Labor Department and would send them another email.

On June 28, McBride advised Lothamer that he had submitted another request for assistance with the information request, to Harcus, Neal, Jeff Price (Price) (senior labor relations specialist), and Bobbi Didion (postal operations manager).

General Counsel's Exhibit 10 includes a May 2 email from Lothamer to Neal, stating that this was his second request for information and also asking for Garland's timekeeping records.

The parties stipulated that on July 28 (GC Exh. 11) McBride furnished all remaining requested information. This contradicted the statement in Lothamer's affidavit of July 29 in which he stated that the Postal Service had "failed and refused to furnish any of the requested information."[6] Garland was already back to work.

Other that what is contained in the above emails, the Postal Service never provided a reason to the Union for the delay in furnishing the information.

Lothamer was unable to resolve the grievance with McBride, and on August 5, he filed a step 2 grievance with Price, stating that although OIG had completed its report on May 26 and found no evidence that Garland had engaged in wrongdoing, she was not returned to work until the week of June10. (GC Exh. 3.) The grievance was settled between Price and Lothamer on August 19 (ibid), providing in part that the emergency placement was rescinded, and Garland be made whole for all lost wages and benefits from April 8 through June 10.

[6] Tr. 144. This discrepancy is immaterial as far as the underlying facts.

McBride testified that shortly after he arrived, he was informed that OIG was engaged in an active investigation of Garland for smoking some kind of device at her desk and that he should not get involved in the investigation. The Colon office was very short-staffed at the time, and McBride's top priority was getting the mail delivered. The Garland RFI was the first one that he had received, and he reached out to Neal, Didion, and the Labor Department for assistance. McBride further testified that he tried to stay in contact with Lothamer throughout the process and keep him informed, but he offered no specifics beyond their email correspondence.

Case 07–CA–304691

Harcus has been manager of labor relations for Michigan 2 District, formerly known as the Greater Michigan District, since 2014. Her district covers the State of Michigan except for the Detroit area, which is Michigan 1 District, formerly Detroit District. (See Jt. Exh. 7.) She has jurisdiction over approximately 400 postmasters and 630 post offices. She personally handles terminations and RFIs escalated to her from supervisors or mangers, usually involving questions of relevance, and she had direct involvement in Cases 07–CA–304691 and 07–CA–301929.

Local 281 represents about 800 clerks and maintenance employees in Grand Rapids and its environs, including the Big Rapids facility.

The Big Rapids facility consists of four buildings. Bishop, a rural carrier associate represented by NRLCA, worked in a building along with five clerks and a custodian represented by APWU. Harcus was aware as far back as 2014 that Bishop was a problem employee.

On a date in mid-September, Postmaster Elliott observed a disturbance caused by two carriers, one of whom was Bishop, outside the building where Bishop worked.

On the same day, a clerk called then APWU Local President Puhalski and reported that Bishop was creating an unsafe, hostile work environment, including throwing trays and threatening and swearing at coworkers. He stated that employees had made many complaints about her for over a year, that management had done nothing, and that her behavior was worsening.

Both Elliott and Puhlaski testified that they thereafter had a phone conversation about Bishop in which Puhlaski raised the concern that Bishop was creating a hostile work environment. Elliott responded that he had made attempts to discipline Bishop, and Puhlaski stated that she wanted to further investigate the situation and would be sending him an RFI.

On September 15, Puhalski filed an RFI with Elliott. (GC Exh. 12(a).) Only three of the six items therein are at issue. They were for any and all:

(1) Statements provided by employees and management regarding Bishop during 2021 and 2022.
(2) Forms 1767 (safety hazards) completed regarding the Big Rapids post office during 2021 and 2022.
(3) Requests for discipline to Bishop, disciplines issued to Bishop, and settlements related to discipline issued to Bishop.[7]

From September 19 through October 5, Puhalski and Harcus and Elliott engaged in email correspondence, as follows. (GC Exh. 13). I will address only what they said regarding the information requests alleged in the complaint.

On September 19, Harcus questioned the relevance of items 1 to 3, contending that the Union did not represent Bishop and that the 1767's were safety forms and not reports of discrimination or violations of wages, hours, and other terms and conditions of employment.

Puhalski responded the same day, stating that she was entitled to all the information in order to investigate and process all grievances necessary to ensure that management addressed the hostile work environment. She pointed out that she numerous statements from employees, as well as confirmation from the postmaster, that there was an issue with Bishop.

On September 20, Elliott simply stated that item one was irrelevant and that there were no 1767's filed. He did respond to the request in Puhalski's September 15 RFI for the names of employees who had resigned from the facility: Sara Hill (Hill) and Beth Zoppa (Zoppa), both carriers represented by NALC.

On September 26, Puhalski requested a first-step grievance meeting with Elliott later that week. On the same date, she requested that he provide her with Forms 2574[8] for Hill and Zoppa and any and all correspondence regarding their resignations.

On October 4, Harcus repeated that Bishop was not represented by the Union but that management was aware of the situation; Puhalski repeated her request for the 2574's for Hill and Zoppa; Harcus questioned the relevance of the resignation forms because they had not been represented by the Union and were no longer employees; and Puhalski responded that the Union had been made aware that they had resigned because of the hostile work environment, management was not addressing it, and that she was attempting to investigate and process a grievance on behalf of unit employees.

Finally, on October 5, Harcus notified Puhalski that any questions of relevance throughout the district were being forwarded to the Labor Department. She stated that requested information had to be relevant to a grievance and that the Union could file for a member of the Union, not former employees. Puhalski repeated why she wanted the information.

[7] She requested requests for discipline, as well as actual disciplines, because Elliott had stated in their conversation that he had sought Labor Department approval to discipline Bishop.

[8] A form that employees fill out when they resign or transfer to another Federal agency.

On October 4, Puhlaski filed a step 2 grievance (GC Exh. 14), contending that management was violating (1) provisions of the CBA, (2) the manager's guide (Jt. Exh. 3), and the Employee Labor Manual by not providing the class-action grievants a work environment free of hostility and threatening behavior.

On October 31, Puhlaski sent Price a step 2 addition, stating that although he had said on October 11 that he would reach out to the Union to set up a meeting, he had not done so, and on the same date she elevated the grievance to step 3. (Ibid.)

On November 4, pursuant to a decision by the Labor Department, Elliott provided Puhlaski with documents that were responsive to both her September 15 and September 26 request. (GC Exh. 16.)[9] They included nine Forms 1767, contradicting what he had told her on September 20.[10] Prior to November 4, the Postal Service furnished the Union with no requested documents.

On December 7, Laura Rohlfs (Rohlfs), labor relations specialist, and Stevenson, settled the grievance by agreeing that management would conduct an Initial Management Inquiry Process (IMIP) investigation into the allegations regarding Bishop. (GC Exh. 15.)

No previous unfair labor practices relating to requests for information have been filed for the Grand Rapids post office.

Case 07–CA–301929

Article 12 Sec. 1.A (Art. 12.1.A) of the CBA provides:

> The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto.

The JCIM states that under Art. 12.1.A, employees separated during the probationary period do not have access to the grievance procedure concerning their separation, including challenges on the grounds of noncompliance with the Employee and Labor Relations Manual (ELM). (Jt. Exh.5.) However, a dispute over whether the action separating an employee occurred during his/her probationary period is subject to the grievance-arbitration procedure because separation during the probationary period is a precondition to the applicability of Art. 12.1.

[9] The exhibit does not include all the documents that were provided, which amounted to hundreds of pages.

[10] Elliott explained that he did not maintain the 1767's in his office; rather, a supervisor maintained them in a separate office. I have no reason to believe that he acted in bad faith by deliberately withholding documents, but he had to be aware that such forms existed and could have made efforts to locate them.

Section 365 of the ELM (Jt. Exh. 2 at 2) addresses probationary employees and provides in relevant part: (1) separation must be effectuated during the probationary period; (2) a supervisor may recommend separation, but such recommendation must be referred to the official having authority to take the action; and (3) the effective date of separation must be before the end of the probationary period and must not be retroactive.

Clerks Paige, Carter, and Andrews were on probation when they were terminated at the Grand Rapids P&DC.

On August 5, Paige was terminated for failure to maintain assigned schedule, failure to follow instructions, and poor performance. (GC Exh. 18(a).) The Union filed an RFI on his behalf on August 9. (See GC Exh. 20.) On August 11, Harcus disputed the relevance of the request because Paige was terminated within his 90-day probationary period as per the terms of the CBA and was a former employee who lacked grievance rights. (Ibid.)

In subsequent emails between Puhalski and Stevenson and Harcus from August 13 to 23 (ibid), the Union renewed the request and stated that the information was necessary in order to investigate and determine if a grievance existed, and Harcus reiterated that the Union could not file a grievance on behalf of a former employee under the terms of the CBA.

The grievance that the Union filed over Paige's termination was resolved at step 1 on August 26, which resulted in his termination being rescinded, his reinstatement with no loss of seniority or loss of benefits, and his being made whole for any lost wages. (GC Exh. 18(b).) Similarly, on August 9, another probationary clerk was terminated at the same facility, and the grievance over her termination was also settled at step 1 on the same day as Paige's by the same supervisor and on the same terms. (GC Exh. 19(a) & (b).) Harcus testified that the supervisor erroneously accepted and then settled these grievances because the two clerks were no longer employees; that the supervisor was suspended for 2 weeks as a result; and that agency headquarters determined that the settlements were nonetheless binding on the Postal Service. The General Counsel does not contend that these grievance settlements constituted a waiver of the Postal Service's position in this matter.

On August 10, Carter was issued a notice of separation for attendance and failure to follow instructions (see GC Exh. 22 at 5), and on August 17, Andrews was issued a notice of separation for unsatisfactory attendance. (GC Exh. 21 at 8.)

On August 17, the Union filed RFIs for Carter and Andrews, requesting any and all information upon which management relied in terminating them. (GC Exh. 17(a) & (b).)

General Counsel's Exhibits 21 and 22 are the Union's appeals to arbitration on October 13 for Andrews and Carter, respectively. The Union contended in part that the separations were not effectuated during the 90-day probationary period as per the CBA and the ELM and that the Postal Service failed to provide requested information confirming that it had "just cause" to separate them.

The General Counsel sought to introduce three arbitration awards, General Counsel's Exhibits 24, 25, and 26. I rejected GC Exh. 24, which did not address the issue of the grievance rights of a probationary employee.

I also rejected GC Exhs. 25 and 26, awards of October 2017 and August 2022, respectively. In both, the arbitrator sustained the Union's grievance, finding that the Postal Service had failed to comply with the procedures of the ELM and that the separation of the probationary employee was therefore not effectuated within the 90-day probationary period.

Upon further review of the provisions in the CBA, JCIM, and ELM, as well as considering the Respondent's assertion that as per the CBA, the Union waived the right to grieve the terminations of probationary employees, I reverse my rulings rejecting GC Exhs. 25 and 26 and now admit them.

I will accord both arbitration awards proper weight, repeating what I started at trial that they are not determinative of whether the Postal Service violated the Act. See *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 3 (2000); *J.R. Simplot Co.*, 311 NLRB 572, 573 n. 9 (1993), enfd. 33 F.3d 58 (9th Cir. 1994).

By email of March 21, 2023, Rohlfs provided Stevenson with unredacted Forms 50 (notification of personnel action) for Carter and Andrews. (GC Exhs. 27 and 28, respectively.) Their grievances were still pending at the time. This was in partial response to the Union's RFIs

The parties disagree on what they show. Stevenson testified that they show that September 15 was their termination dates, made retroactive to August 17; whereas Harcus testified that they show the effective date of the termination was August 17 and that September 15 was the date that Human Resources processed the separations.

Form 1750 (GC Exh. 29) is an employee evaluation and/or probationary report that rates employees on six factors. Stevenson testified that he needed the forms to investigate or dispute management's allegations in the notices of separation that the three employees received. The Postal Service has never provided them.

ANALYSIS AND CONCLUSIONS

LEGAL FRAMEWORK

Section 8(a)(5) of the Act requires an employer to provide a union with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (979); *NLRB v. Acme Industrial Co.*, 385 U.S 432, 436 (1967) ("[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).

The standard for establishing relevancy is the liberal, "discovery-type standard." *Alcan Rolled Products*, 358 NLRB 37, 40 (2012); *Disneyland Park*, 350 NLRB 1256, 1258 (2007). Thus, the requested information need not be dispositive of the issue for which it is sought but only have some relation to it. *Pennsylvania Power & Light Co.*, 301 NLRB, 1104, 1104–1105 (1991).

Once the relevancy of the requested information has been demonstrated, the burden shifts to the employer to establish that the information is not relevant, does not exist, or there is some other valid and acceptable reason why it could not be furnished. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992) and *Postal Service*, 276 NLRB 1282 (1985).

Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *Palace Station Hotel & Casino*, *3*68 NLRB No. 148, slip op. at 4 (2019); *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 649 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

On the other hand, if the requested information is not directly related to the bargaining unit, the information is not presumptively relevant, and the union has the burden of establishing that the requested material is relevant. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *The Earthgrains Co.*, 349 NRB 389, 389 (2007). However, the burden of establishing relevance for nonunit information is "not exceptionally heavy" inasmuch as the Board uses a "liberal discovery-type standard." *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011, citing *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983); see also *Acme Industrial Co.*, above at 437, 437 fn. 6.

An employer is obligated to furnish requested information that is potentially relevant to the processing of grievances. *Acme Industrial Co.*, above at 438; *Beth Abraham Health Services*, 332 NLRB 1234, 1234 (2000); *United Technologies Corp.*, 274 NLRB 504, 506 (1985); *TRW, Inc.*, 202 NLRB 729, 731 (1973). An actual grievance need not be pending at the time of the information request, nor must the requested information clearly dispose of the grievance. *United Technologies*, ibid, citing *Ohio Power Co.*, 216 NLRB 987 991 (1975) and *Los Angeles Chapter, Sheet Metal Contractors*, 246 NRB 886, 888 (1979).

As the Sixth Circuit Court of Appeals has recognized:

> The Union's access to adequate information concerning grievances allows it to render considered judgments and eliminate unmeritorious claims at an early stage in the proceedings. . . . Accordingly, a violation of Section 8(a)(5) may be predicated on the failure of the employer to provide the Union with information necessary to enable the requesting party to intelligently evaluate and process grievances. *General Motors Corp., Inc. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983).

An employer has a duty to timely supply relevant information or to adequately explain why the information will not be furnished. *Postal Service*, 371 NLRB No, 7, slip op, at 3 (2021), citing *Regency Service Carts, Inc.*, 345 NLB 671, 673(2005). Absent 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), citing *Woodlan Clinic*, 331 NLRB 735, 736 (2000) and *Valley Inventory Services*, 395 NLRB 1163, 1166 (1989).

In determining whether there was an unlawful delay, the Board considers the nature of the information sought, the difficulty in obtaining it, the amount of time it took to provide, the reasons for the delay, and whether the provider contemporaneously communicated those reasons to the requesting party. *Postal Service*, ibid, citing *Safeway, Inc.*, 369 NLRB No. 30, slip op. at 7 (2020).

Respondent's Post-hearing Confidentiality Defense

In its posthearing brief, the Respondent argues in Cases 07–CA–299320 and 07–CA–304691 that the Postal Service was not obligated to provide information to the Union relating to an ongoing investigation, due to confidential concerns and the risk that disclosure could compromise the investigation.

When a union demonstrates the relevance of the information it seeks and the employer raises confidentiality as a reason for withholding it, the union's need for the information must be balanced against any "legitimate and substantial" confidentiality interests established by the employer." *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1105 (1991), citing *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979). The burden of proof is on the employer. Ibid. If the union's need for the information outweighs confidentiality concerns, the employer must furnish it. *Kaleida Health, Inc.*, 365 NLRB 1373, 1379 (2011).

Moreover, if an employer does have a legitimate and substantial confidentiality interest, it must both notify the union in a timely manner and seek to accommodate the union's request and the confidentiality concern. *Postal Service,* 364 NLRB 230, 231 (2016); *Olean General Hospital*, 363 NLRB 561, 566 (2015).

Here, the Respondent never raised such a contention to the Union or sought an accommodation, and on that basis alone any confidentiality defense fails.

Furthermore, the Respondent did not raise confidentiality considerations as an affirmative defense either in its answers to the complaints or at any time during the hearing. Affirmative defenses not raised in the answer to a complaint or at trial but raised for the first time in a posthearing brief are untimely. *EF International Language Schools, Inc.*, 363 NLRB 199, 199 fn. 2 (2015); *SEIU Healthcare Workers-West*, 350 NLRB 284, 284 fn. 1 (2007), enfd. 574 F.3d 1213 (9th Cir. 2009); *HS Healthcare, Inc.*, 295 NLRB 17, 17 fn. 2 (1989). Allowing an eleventh-hour consideration of such defense would deprive the General Counsel and the Union of a fair opportunity to respond and violate fundamental concepts of due process.

Accordingly, I conclude that the Respondent waived its opportunity to raise the confidentiality defense and therefore will not address it.[11]

Case 07–CA–299320

Garland was a unit employee who was notified on April 8 that she was being placed in an administrative leave status and removed from duty effectively immediately pending an investigation of the allegation that she was smoking within the facility. Although placing an employee on administrative leave is not considered disciplinary, Garland was charged with drug usage on the property, and she clearly was put on notice that she could be subject to disciplinary action. Significantly, the OIG was investigating whether her conduct was criminal, and she was in fact put on unpaid emergency placement leave thereafter. Lothamer made an RFI to Postmaster Neal on April 8, for the purpose of determining whether to file a grievance on Garland's behalf.

The information sought was presumptively relevant, and the Respondent never raised any objections to providing it. However, the Respondent did not furnish all requested information until July 28—3-1/2 months later—at which time a grievance was pending. McBride offered no persuasive reasons for this delay, only vague testimony that the Colon facility was very short-staffed and that he was unfamiliar with RFIs and sought assistance from other managers and the Labor Department. Any delays in providing the information due to the internal operations of the Postal Service did not serve to relieve the Respondent from the obligation to fulfil its statutory obligation to timely provide it to the Union.

Although there is no per se rule for what constitutes an unreasonable delay, the Board has found delays for a shorter period to be unreasonable in the absence of justification. See *Capitol Steel & Iron Co.,* 317 NLRB 809 (1995) (2 weeks); *Aoelian Corp*., 247 NLRB 1231, 1245 (1980) (3 weeks); *Postal Service,* 308 NLRB 547, 551 (1992) (4 weeks); *Postal Service,* 332 NLRB 635 (2000) (5 weeks); *Linwood Care Center,* 367 NLRB No. 14, slip op. at 5 (2018) (6 weeks); and *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7 weeks).

Accordingly, I conclude that the Postal Service violated Section 8(a)(5) and (1) by its unreasonable delay in providing the Union with information that it requested pertaining to unit employee Garland.

Case 07–CA–304691

In mid-September, a unit employee reported to Puhlaski that carrier Bishop had long created a hostile work environment at the Big Rapids facility and that management had failed to

[11] Other than to point out that the Respondent's reliance on *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in connection with its confidentiality assertions, is misplaced because nothing in that case or its progeny diminish a union's right to relevant information in connection with investigating whether a grievance is warranted.

address the complaints made against her. Postmaster Elliott confirmed with Puhalski that Bishop was a problem.

On September 15, Puhalski filed an RFI with Elliott, asking for, inter alia:

(1) Statements provided by employees and management regarding Bishop during 2021 and 2022.
(2) Forms 1767 (safety hazards) completed regarding the Big Rapids post office during 2021 and 2022.
(3) Requests for discipline to Bishop, disciplines issued to Bishop, and settlements related to discipline issued to Bishop.

On September 19, Harcus questioned the requested information on the grounds that the Union did not represent Bishop and the Forms 1767 were safety forms and not reports of discrimination or violations of wages, hours, and other terms and conditions of employment. Puhalski responded the same day, stating that she was entitled to all the information in order to investigate and process all grievances necessary to ensure that management addressed the hostile work environment.

On September 20, Elliott responded to the request in Puhalski's September 15 RFI for the names of employees who had resigned from the facility, carriers Hill and Zoppa; and on September 26, Puhalski requested (resignation) Forms 2574 for Hill and Zoppa and copies of any and all correspondent regarding their resignations, as well as requested a step 1 grievance meeting concerning a hostile work environment.

On October 4, Harcus repeated that Bishop was not represented by the Union and questioned the relevance of the resignation forms for Hill and Zoppa because they had not been represented by the Union and were no longer employees. Puhalski responded that the Union had been made aware that they had resigned because of the hostile work environment, management was not addressing it, and that she was attempting to investigate and process a grievance on behalf of unit employees. On October 5, Harcus notified Puhlaski that any questions of relevance of RFIs were being forwarded to the Labor Department, and on October 31, Puhlaski elevated the grievance to step 3.

On November 4, pursuant to a decision by the Labor Department, Elliott provided Puhlaski with documents that were responsive to both her September 15 and September 26 requests, including nine Forms 1767. Previously, the Postal Service furnished the Union none of the requested documents.

The three items in the September 15 request and the September 26 request clearly were presumptively relevant to the extent that they concerned whether unit employees were being subject to a hostile work environment that management had not addressed, irrespective of the facts that Bishop, Hill, and Zoppa were outside the unit and Hill and Zoppa were no longer employed. Indeed, the Postal Service ultimately determined that the Union was entitled to all such information, thereby effectively withdrawing any relevance objections that Harcus had raised. The Postal Service never raised any other reasons for not providing the information.

The information was not provided until November 4, approximately a month-and-a-half after the second request and over 6 weeks after the first request. I therefore find that the Postal Service violated Section 8(a)(5) and (1) by its unreasonable delay in furnishing the information. See the cases I cited above.

Case 07–CA–301929

Unlike the other two cases, this one involves a failure and refusal to provide information as opposed an unreasonable delay in providing it.

The CBA, as explained in the JCIM, provides that although an employee separated during the employee's probationary period does not have access to the grievance procedure concerning the separation, a dispute over whether the action separating the employee occurred during the employee's probationary period is subject to the grievance-arbitration procedure because separation during the probationary period is a precondition having the ability to file a grievance over the separation itself. The ELM also provides that (1) the separation of a probationary employee must be effectuated during the probationary period; (2) a supervisor may recommend separation, but such recommendation must be referred to the official having authority to take the action; and (3) the effective date of separation must be before the end of the probationary period and must not be retroactive.

Andrews, Carter, and Paige received notices of separation in August, during their 90-day probationary periods, for alleged deficiencies in performance.

On August 9, the Union filed an RFI on Paige's behalf, and on August 11, Harcus disputed the relevance of the request because Paige was terminated within his 90-day probationary period as per the terms of the CBA and lacked grievance rights. The Union subsequently renewed its request, stated that the information was necessary in order to investigate and determine if a grievance existed, and Harcus reiterated her position.

On August 17, the Union filed RFIs for Andrews and Carter, requesting any and all information upon which management relied in terminating them. The Union filed separate grievances for both of them on the same date, contending in part that their separations were not effectuated during their 90-day probationary periods as per the CBA and the ELM.

The parties were unable to resolve the grievances, so they were moved to arbitration and remain unresolved. Arbitrator's awards in October 2017 and August 2022 sustained the Union's grievances that the Postal Service had failed to comply with the procedures of the ELM, and that the separations were therefore not properly effectuated within the employees' 90-day probationary periods.

On March 21, 2023, the Postal Service provided the Union with unredacted Forms 50 (notification of personnel action) for Andrews and Carter, in partial response to the Union's RFIs.

The parties disagree on what they show. Stevenson testified that they showed September 15 was their termination date, made retroactive to August 17; whereas Harcus testified that they show the effective date of termination was August 17 and that September 15 was the date that Human Resources processed the separations.

Form 1750 is an employee evaluation and/or probationary report that rates employees on six factors. Stevenson testified that he needed the forms to investigate or dispute management's allegations in the notices of separation that the three employees received. The Postal Service never provided them.

From the language of the CBA, JCIM, and the ELM, as well as prior arbitration decisions, it is clear that a separated probationary employee has the right to file a grievance to the extent of determining if the separation was exercised by the proper individual and "effectuated" within the 90-day probationary period. If the Postal Service has not complied with those requirements, then the separated employee was not validly separated during the probationary period and became an employee entitled to full grievance rights, including challenging the bases for the termination. Based on these provisions, as well as the Union's history of taking to arbitration grievances on behalf of terminated probationary employees, I reject the Respondent's argument that under the CBA, the Union waived its right to bargain thereover.

Accordingly, the information that the Union sought as to Andrews, Carter, and Paige related first to their right to challenge through a grievance the circumstances of their separations and, if they met that threshold issue, to challenge the reasons management advanced for their terminations.

In sum, the information that the Union sought on behalf of unit employees in connection with grievances related to their separations, both as to timing and the issuing authority, was presumptively relevant, irrespective of the parties' disagreement on the application of "effectuated."

Therefore, the Respondent violated Section 8(a)(5) and (1) by not providing the Union with the information it requested regarding the terminations of Andrews, Carter, and Paige.

CONCLUSIONS OF LAW

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

2. American Postal Workers Union (AFL-CIO) and its Locals 143 and 281 are labor organization within the meaning of Section 2(5) of the Act.

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

(a) Unreasonably delayed providing Local 143 with relevant information that it requested concerning Janna Garland at the Colon facility.

(b) Unreasonably delayed providing Local 281 with relevant information that it requested concerning a hostile work environment at the Big Rapids facility.

(c) Failed and refused to provide Local 281 with relevant information that it requested concerning the terminations of probationary employees Cindy Andrews, Kiara Carter, and Christopher Paige at the Grand Rapids P&DC facility.

REMEDY

I will order that the Respondent cease and desist from failing and refusing to bargain collectively with Local 143 by unreasonably delaying furnishing it with requested information.

I will order that the Respondent cease and desist from failing and refusing to bargain collectively with Local 281 by failing and refusing to provide it with requested information or by unreasonably delaying furnishing it with requested information. I will further order the Respondent to furnish Local 281 with the requested information that it did not provide.

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To the extent that the General Counsel urges the Board to expand standard notice remedies (GC Br. 74, et. seq.), that is up to the Board and is beyond my purview.

The General Counsel argues (GC Br. 70, et. seq.) that a statewide posting is appropriate because of the Respondent's proclivity to violate the Act by refusing to provide requested information, in both Michigan districts, citing *Postal Service*, 365 NLRB No. 51 (2017) and *Postal Service*, 365 NLRB No. 92 (2017). However, in both cases, the Board specifically affirmed Judge Christine Dibble's order of a district-wide (Detroit District, now District 1) positing but also her rejection of the General Counsel's request for a state-wide positing because she found no evidence that the Detroit District was or had been involved in a coordinated state-wide effort with the other areas in Michigan to circumvent the process for responding to RFIs.

For the same reason advanced by Judge Dibble, I deny the General Counsel's request for a state-wide posting and conclude that the numerous RFI violations in the Detroit District, which the General Counsel cites, cannot be bootstrapped onto those committed in this district.

Finally, the General Counsel requests a general bargaining order that includes any other labor organization that represents Postal Service employees, on the basis that the Respondent is a recidivist employer in failing to provide requested information. (GC Br. 75–76). However, the Board's general approach is not to include bargaining orders in cases involving failure to provide

information. See *Postal Service*, 356 NLRB 483,483 fn. 2 (2011), vacated on other grounds, 660 F.3d 65 (1st Cir. 2011); *PDK Investments, LLC*, 354 NLRB 1, 1 fn. 3 (2007); *H & R Industrial Services*, 351 NLRB 1222, 1222 fn. 3 2007).

I note that Michigan 2 District encompasses hundreds of facilities and that the quantum of RFI failures that have been found in the district must be viewed in that context. Thus, violations at several facilities might be significant when a smaller employer is involved, but more violations at more facilities may be required to show a pattern of recidivism in light of the Respondent's size. It is noteworthy that there is no evidence that the Union ever filed an unfair labor practice concerning an RFI at either Colon or Big Rapids. I therefore decline to impose a general bargaining order on the Respondent.

I do recognize that in *NLRB v. United States Postal Service*, 2018 WL 2337927 (2018), the Sixth Circuit Court of Appeals issued a superseding consent order and an order of civil contempt against the Respondent that concerned the Postal Service's continued failures to provide or timely provide information that unions requested. The orders covered all Postal Service facilities located within the city of Grand Rapids. The Respondent did not dispute the Board's allegations that it had violated the court's 2014 and 2015 judgments by delaying or withholding information.

The Grand Rapids P&DC is located within the city of Grand Rapids and is therefore encompassed by the court's orders. Accordingly, I conclude that it is appropriate to require posting at all of the Respondent's facilities located in Grand Rapids, not only the P&DC, as well as at the Big Rapids and Colon facilities, and will so order.

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

ORDER

The Respondent, United States Postal Service, Big Rapids, Colon, and Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with American Postal Workers Union Locals 142 and 281 by unreasonably delaying information that they requested on April 28 and September 15 and 26, 2022, respectively, which was necessary for them to perform their functions as the exclusive collective-bargaining representatives of the Respondent's clerks and maintenance personnel.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Failing and refusing to bargain in good faith with Local 281 by Refusing to provide it with information that it requested on August 9 and 17, 2022, which was necessary for the Union to perform its functions as the exclusive collective-bargaining representative of the Respondent's clerks and maintenance personnel.

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

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

(a) Provide Local 281 with the information that it requested on August 9 and 17, 2022.

(b) Within 14 days after service by the Region, post at its facilities in Big Rapids, Colon, and Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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 ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed its facilities in Big Rapids, Colon, or Grand Rapids, Michigan, 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 April 28, 2022.

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

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

---

[13] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 23, 2024.

Ira Sandron
Administrative Law Judge

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 (NLRB) 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

American Postal Workers Union (APWU), through its Locals 143 and 281, is the exclusive bargaining representative of our clerks and maintenance personnel (unit employees).

WE WILL NOT unreasonably delay providing Locals 143 and 281 with relevant information that they request that is necessary for them to perform their functions as the exclusive collective-bargaining representatives of unit employees.

WE WILL NOT refuse to provide Local 281 with relevant information that it requests that is necessary for it to perform its functions as 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 the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, provide Local 281 with relevant information that it requested on August 9 and 17, 2022, that was necessary for it to perform its functions as the exclusive collective-bargaining representative of unit employees.

United States Postal Service
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge

or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-299320 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165.