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United States Postal Service *and* American Postal Workers Union, AFL–CIO. Case 05–CA–119507

June 15, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 13, 2014, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief. The Charging Party filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to amend the remedy, and to adopt the judge's recommended Order as modified.[2]

For the reasons stated by the judge, we adopt the judge's findings and conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide or unreasonably delaying in providing information requested by the Union in paragraphs 1, 2, 4, 9, 11, 16, 17, 19, and 25 of its November 22, 2013 information request. The November 22 request followed the Respondent's notice to the Union that it planned to launch a 1-year pilot program with Staples, Inc., under which the Respondent's most popular products and services would be sold at 84 Staples locations in five cities: Atlanta, Pittsburgh, San Diego, San Francisco, and Worcester.

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as collective-bargaining representative. See *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967); accord *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), enfd. 39 F.3d 1410 (9th Cir. 1994). This includes information necessary to decide whether to file or process contractual grievances on behalf of unit employees. *Acme Industrial*, 385 U.S. at 435–439; see *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

In this case, the requested information was plainly relevant, and it was readily apparent from the circumstances of the request that the information was relevant. Specifically, the information was necessary in order for the Union to determine whether it had a right to invoke the provision in its collective-bargaining agreement with the Respondent concerning bargaining over the Respondent's potential outsourcing initiatives. See *Ormet Aluminum Mill Products*, 335 NLRB 788, 801 (2001), and cases cited therein. Thus, the Respondent was statutorily required to respond to the request promptly and in good faith. *Endo Painting Service, Inc.*, 360 NLRB No. 61, slip op. at 2 (2014) (citing *West Penn Power*, 339 NLRB 585, 587 (2003), enfd. in relevant part 394 F.3d 233 (4th Cir. 2005)). We agree with the judge's conclusion that the Respondent failed to respond in a timely manner to this request for relevant information, but we amend the remedy.[3]

AMENDED REMEDY

The judge ordered the Respondent to immediately provide the Union with the documents requested in paragraphs 1, 2, 4, 9, 11, 17, 19, and 25 of its November 22 information request.[4] However, in the remedy section of

[1] The Charging Party also filed a Notice of Recent Authority.

[2] We shall modify the judge's recommended Order to conform to the violation found and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified. We adopt the judge's remedy except as specified below.

[3] Where, as here, the information requested by a union is not presumptively relevant, Member Miscimarra would apply *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997), in which the court held that an employer's duty to furnish information that is not presumptively relevant is conditioned on the union's disclosure to the employer of facts sufficient to demonstrate relevance, unless the factual basis is readily apparent from the surrounding circumstances. See, e.g., *Bud Antle, Inc.*, 361 NLRB No. 87, slip op. at 2 (2014) (Member Miscimarra, concurring). Member Miscimarra agrees with the judge and his colleagues that the relevance of the information the Union requested on November 22, 2013 was readily apparent from the surrounding circumstances at the time of the request. He does not rely on the judge's further finding that any doubt regarding relevance was removed by the testimony of union officials at the unfair labor practice hearing.

[4] We agree with the judge's finding that although the Respondent unreasonably delayed its response to paragraph 16 of the Union's information request, it furnished a complete response to that paragraph on January 31, 2014. In addition, there is no information responsive to paragraph 19 of the Union's request. In that paragraph, the Union requested "a copy of any/all provisions relied upon to support the use of postal employees training private sector workers performing work traditionally performed by postal employees." At the hearing, the Respondent introduced testimony that unit employees would not be required to train Staples' employees. Although the more-than-4-month delay from the date of the request until the date of the hearing was unreasonable and unlawful, no information responsive to paragraph 19 exists. The judge recognized as much in the remedy section of his decision, but he inadvertently overlooked this fact in drafting the recommended Order. We will modify the judge's recommended Order accordingly.

his decision, the judge permitted the Respondent to redact the following information: "the specific numbers or estimates of foot traffic at Staples locations; discounts provided or discussed with Staples in terms of percentages and/or specific amounts; and costs of promotion of Staples and/or Respondent in terms of percentages or actual costs." The judge further required the Respondent to furnish the unredacted documents, but only after the Union agreed to and executed a confidentiality agreement. The judge also limited disclosure of the confidential information to 10 union officials. In its cross-exceptions, the Union requests that we order the Respondent to promptly produce all of the information with no redactions or restrictions. We do so for the reasons set forth below.

The judge found that the Respondent's "delayed, often unsupported, and staggered responses" and its "belated production of documents including the largely redacted Staples contract" evidenced "a policy of delay and frustration rather than one of accommodation." The judge further found that "to order more bargaining concerning the production of information would not serve, but rather would frustrate the purposes of the Act, and serve to reward the Respondent for its course of conduct." Finally, the judge found that the Respondent did not timely offer any proposal to accommodate both its own confidentiality concerns and the Union's interest in obtaining relevant requested information. The judge ordered the immediate production of some of the requested documents, subject to certain redactions and to the execution of a confidentiality agreement.

We disagree with this remedy and instead order immediate and unredacted production of all documents requested, without any confidentiality agreements. By failing either to timely assert a confidentiality interest or propose an accommodation, the Respondent waived its opportunity to raise those defenses. See *Olean General Hospital*, 363 NLRB No. 62, slip op. at 6 (2015) (employer's asserted confidentiality interest "does not end the matter"; employer must also notify union in a timely manner and seek to accommodate the union's request and confidentiality concerns); *Howard Industries, Inc*., 360 NLRB No. 111, slip op. at 3 (2014) (even assuming requested information was confidential, respondent violated the Act by failing to seek an accommodation); *A-1 Door & Building Solutions*, 356 NLRB 499, 501 (2011) (employer required to provide union's requested information or "to state a legitimate reason for not doing so and to timely offer an accommodation"); *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004) (party asserting confidentiality bears burden of proposing reasonable accommodation).

As the judge stated, the Respondent intentionally delayed its response to the Union's information request for 2 months, thereby frustrating the Union's ability to bargain over the impact of the pilot program. In our view, allowing the Respondent to make a belated assertion of a confidentiality interest (without even offering an accommodation) would reward the Respondent for its intentional delay. This is particularly true in light of the Respondent's rich history of responding to information requests with denials and delay,[5] and where the delay in this instance prevented the Union from obtaining information about the Respondent's pilot program with Staples until after the pilot was completed. We will not condone the Respondent's unlawful conduct by allowing it to delay any longer in producing the information. Cf. *West Penn Power Co.,* 339 NLRB 585, 586 (2003) (requiring employer to furnish information, despite employer's claim that the request was unduly burdensome, where employer failed to meet its duty to bargain with union over the scope of the request), enfd. in relevant part 394 F.3d 233 (4th Cir. 2005). We therefore amend the judge's remedy to require the Respondent to provide the Union unredacted copies of the information sought in paragraphs 1, 2, 4, 9, 11, 17, and 25 of the Union's November 22, 2013 information request.[6] The Union,

[5] See, e.g., *Postal Service*, 363 NLRB No. 11 (2015); *Postal Service*, 362 NLRB No. 70 (2015); *Postal Service*, 361 NLRB No. 6 (2014); *Postal Service*, 360 NLRB No. 94 (2014); *Postal Service*, 360 NLRB No. 35 (2014); *Postal Service*, 360 NLRB No. 31 (2014); *Postal Service*, 354 NLRB 412 (2009); *Postal Service*, 345 NLRB 409 (2005), enfd. 477 F.3d 263 (5th Cir. 2007); *Postal Service*, 337 NLRB 820 (2002).

[6] Our colleague, while concurring in finding the violation, criticizes the majority's remedy of ordering the immediate and unredacted production documents containing confidential information on the grounds that it is inconsistent with prior Board law. See infra fn. 7. That assertion is incorrect. See, e.g., *Midwest Division—MMC, LLC, d/b/a Menorah Medical Center*, 362 NLRB No. 193, slip op. at 3–7 (2015). He also argues that the Respondent should now be permitted to redact the unlawfully withheld information, notwithstanding the Respondent's lengthy and egregious course of unlawful conduct, citing cases in which the Board structured an accommodation of the respondent's asserted confidentiality interest as part of the remedy. See *Kaleida Health, Inc*., 356 NLRB 1373, 1381 (ordering limited disclosure of requested information while preserving confidentiality); *Pennsylvania Power Co*., 301 NLRB 1104, 1108 and fn. 18 (1991) (same). Those cases differ significantly from the case before us in that personal privacy rights of employees were implicated. In particular, we note that, although our dissenting colleague relies on the *Kaleida* decision to support non-waiver of the confidentiality claim, the information requested in *Kaleida* included confidential patient medical information, which was also protected by New York State law and thus materially different from the sort of information requested in this case. *Id*. Moreover, *Kaleida* did not involve an employer that has repeatedly thumbed its nose at its statutory obligation to provide information to its bargaining partners.

moreover, is under no obligation to restrict dissemination of this information to any particular number of officials.[7] See *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995) (ordering unredacted production of information requested where Respondent made an untimely blanket

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As to our colleague's assertion that the Board has failed to recognize the Respondent's asserted confidentiality interest, we reiterate that the Respondent failed to raise the confidentiality defense in a timely manner. The Respondent waited until January 2 (some 6 weeks after the November 22 request) to assert the defense at all, and even then failed to offer redaction or any other accommodation, even when the Union offered a nondisclosure agreement. Even in its last response on January 31, the Respondent continued to refuse to provide redacted documents or offer accommodations. Instead, the Respondent asserted for the first time that its subcontractor Staples had an interest in prohibiting release of the requested information, pursuant to the terms of the Respondent's contract with Staples. However, it is undisputed that the contract itself allows the Respondent to disclose its contents to the Union in order to comply with statutory bargaining obligations. Thus, when the Respondent finally did turn over its agreement with Staples (heavily redacted, on the eve of trial, and some 4 months after the initial request), the Respondent had already waived the right to assert a confidentiality interest in the agreement.

[7] Contrary to his colleagues, Member Miscimarra would adopt the judge's remedy and allow the Respondent to redact the three narrow categories of confidential information stated above in the amended remedy—"the specific numbers or estimates of foot traffic at Staples locations; discounts provided or discussed with Staples in terms of percentages and/or specific amounts; and costs of promotion of Staples and/or Respondent in terms of percentages or actual costs"—plus any description of Staples' trademarks that may be incorporated in correspondence or the agreement between the Respondent and Staples, unless and until the Union executes a confidentiality agreement as described in the judge's opinion. There are no exceptions to the judge's finding that the Respondent demonstrated a confidentiality interest in some of the information the Union requested. When an employer demonstrates a confidentiality interest in information, the Board typically orders the employer to bargain with the union for a mutually acceptable accommodation of their respective interests. See, e.g., *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999); *Pennsylvania Power*, 301 NLRB 1104, 1108 fn. 18 (1991) (departing from typical remedy, but noting in doing so "the Board's usual view that parties should bargain over the disclosure of partially confidential information"); *Tritac Corp.*, 286 NLRB 522, 545–546 (1987). In the rare cases in which the Board has departed from its typical remedy, it has fashioned its own accommodation. See, e.g., *Kaleida Health, Inc.*, 356 NLRB 1373, 1381 (2011) (ordering immediate production of the disputed documents, but allowing certain redactions despite fact that respondent asserted confidentiality defense 2 months after the request for information and offered no reasonable accommodation); *Pennsylvania Power*, 301 NLRB at 1107–1108 & fn. 18 (fashioning accommodation despite respondent's failure to offer accommodation). Here, however, the majority does neither. Instead, they order the immediate, unredacted production of information, some of which is confidential. The majority identifies one case where it says the Board has done likewise—*Menorah Medical Center*, 362 NLRB No. 193 (2015)—but *Menorah Medical Center* is distinguishable. There, the Board found that of the three categories of information requested by the union, two were not confidential, and as to the third, the employer's confidentiality interest did not outweigh the union's need for the information. 362 NLRB No. 193, slip op. at 4–5. Here, by contrast, there are no exceptions to the judge's finding that the Respondent established a confidentiality interest in the categories of information identified above; and although the judge did not make an express finding that this confidentiality interest outweighed the Union's need for the information, he did so implicitly in ordering the Respondent to furnish documents with that information *redacted*, pending the negotiation and execution of a confidentiality agreement—an option that was not considered in *Menorah Medical Center*. The majority also cites *West Penn Power Co.,* 339 NLRB 585, 586 (2003), but that case is distinguishable because the employer there claimed undue burdensomeness, not confidentiality. An unduly burdensome information request affects only the employer's interests, whereas ordering immediate, unredacted production of the documents in dispute here also affects the confidentiality interest of a third party, Staples. Moreover, in *West Penn Power*, the Board allowed the employer to raise its burdensomeness concerns at the compliance stage. No similar allowance is afforded the Respondent here.

The majority asserts that the Respondent waived its confidentiality claim by failing to raise it "in a timely manner." This assertion is also unsupported by precedent. As the majority notes, the Respondent raised its confidentiality concerns on January 2, 2014, about 6 weeks after the Union requested the information, and it did so in its first response to the Union's request. In *Kaleida Health,* supra, the employer first raised its confidentiality concerns regarding requested information nearly 2 months after the request, despite several communications between the parties, including a face-to-face meeting. The Board found no waiver of the employer's confidentiality claim; rather, as noted above, the Board fashioned an accommodation allowing the employer to redact confidential information.

The majority justifies its decision to order the immediate, unredacted production of all requested documents, without any confidentiality agreement or other accommodation of Respondent's legitimate confidentiality concerns, based on an unwillingness to "condone the Respondent's unlawful conduct by allowing it to delay any longer in producing the information." Member Miscimarra respectfully disagrees with the majority's justification because the remedy formulated by the judge does not delay production or "condone" the Respondent's actions. Rather, the judge's remedy requires immediate production of the documents with narrow redactions while permitting the parties to work out reasonable measures to guard against the broader dissemination of sensitive information—dissemination that, if it occurred, may harm both the Respondent *and* its employees.

The majority also fails to give any consideration to the confidentiality interests of Staples, an innocent third party, which are also put at risk by the remedy formulated by the majority. For example, Member Miscimarra relies on the testimony of Brian Code, the Respondent's manager of retail alliances, which the judge deemed relevant, in part, when crafting his exceptionally careful remedy. According to the judge, Code testified that "one of the standards [the Respondent] used in identifying confidential clauses of the agreement was if the information *was uniquely Staples, and did not have anything to do with the Postal Service*" (emphasis added)—such as descriptions of Staples' trademarks, which the judge would have permitted the Respondent to redact. Code also testified that the discounts offered to Staples—which the judge also would have allowed to be redacted—was information "Staples did not want out . . . there because they are fighting in a very competitive market." Code further testified that information about discounts and "market initiatives"—i.e., costs of promotion, another category of information the judge would have allowed to be redacted—was "information *Staples desperately seeks to protect in order to maintain advantage in the marketplace*" (emphasis added). Thus, Member Miscimarra believes the business interests of Staples also deserve the protection the judge's remedy would have afforded, and those interests should not be disregarded because the majority finds the Respondent's confidentiality claim untimely. Accordingly, Member Miscimarra would adopt the judge's remedy.

confidentiality claim; finding production of information requested was "too little, too late"); *Pennsylvania Power Co*., 301 NLRB at 1105 (requiring production of requested information with protections for witness identity).

The Union has also cross-excepted to the judge's recommended narrow cease-and-desist order. It requests that we order the Respondent to cease and desist from violating the Act "in any other manner." The judge rejected the Union's request for a broad order on the basis that it was not litigated. We do not rely on this reasoning. Remedial issues may be addressed by the Board even if the parties do not litigate them. See, e.g., *Care Initiatives, Inc. d/b/a Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996) ("[R]emedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions."). Nonetheless, we will adopt the judge's narrow cease-and-desist order, as we find that a broad order is not warranted here.[8] See *Hickmott Foods*, 242 NLRB 1357 (1979). The Board has issued narrow cease-and-desist orders in many information-request cases involving the Respondent,[9] and the facts of this case do not warrant a departure from our usual practice. The Board did issue a broad cease-and-desist order in an information-request case in *Postal Service*, 345 NLRB 409 (2005), enf. denied in relevant part 477 F.3d 263 (5th Cir. 2007). In doing so, the Board cited a number of factors, including that the Respondent, in fewer than 2 years, had twice committed a series of information-request violations at the same facility. Most of the factors the Board relied on in that case are missing here, and the Union does not contend that the Respondent has previously committed similar violations at its Washington, D.C. headquarters facility. We therefore decline to issue a broad order here.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Renumber the second paragraph 1 as paragraph 2 and substitute the following for the renumbered paragraph 2(a).

"(a) Promptly furnish the Union with the information requested in paragraphs 1, 2, 4, 9, 11, 17, and 25 of the Union's November 22, 2013 information request relating to the Respondent's 1-year pilot program with Staples, Inc. in the manner described in the remedy section of the judge's decision as amended in this decision."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 15, 2016

____
Mark Gaston Pearce, Chairman

____
Philip A. Miscimarra, Member

____
Kent Y. Hirozawa, 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 American Postal Workers Union by refusing to furnish it or delaying in furnishing it with requested information that is relevant and necessary to the Union's performance as the collective-bargaining representative of our unit employees.

[8] Contrary to his colleagues, Chairman Pearce would issue a broad cease-and-desist order. Chairman Pearce notes that given the Respondent's extensive history of continuously violating Section 8(a)(5) and (1) by failing to provide requested relevant information, as evidenced by the cases cited in footnote 5 above, such a remedy is warranted here. See also, *Postal Service*, 345 NLRB 426 (2005), enfd. 486 F.3d 683, 688 (10th Cir. 2007); *United States Postal Service*, 339 NLRB 1162 (2003).

[9] See, e.g., *Postal Service*, 363 NLRB No. 11; *Postal Service*, 362 NLRB No. 70; *Postal Service*, 361 NLRB No. 6; *Postal Service*, 360 NLRB No. 94; *Postal Service*, 360 NLRB No. 35; *Postal Service*, 360 NLRB No. 31.

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 promptly furnish the Union with the information requested in paragraphs 1, 2, 4, 9, 11, 17, and 25 of the Union's November 22, 2013 information request relating to our 1-year pilot program with Staples, Inc.

UNITED STATES POSTAL SERVICE

The Board's decision can be found at www.nlrb.gov/case/05-CA-119507 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.

Gregory M. Beatty, Esq., for the General Counsel.
Roderick D. Eves, Esq., of St. Louis, Mo. for the Respondent.
Anton G. Hajjar, Esq., and *Lisa M. Manson, Esq.*, of Washington, D.C. for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Washington, D.C., on April 1, 2014. The American Postal Workers Union (the Union) filed the charge on December 19, 2013, against the United States Postal Service (the Respondent)[1] and the General Counsel issued the complaint on February 25, 2014, alleging, as amended, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide or unlawfully delaying in providing the Union with certain requested information. The complaint alleges that since about November 22, 2013, in writing, the Union has requested that Respondent provide it with the following information:

> (a) Copy of any/all agreements between the Postal Service and Staples regarding Staples offering postal products and services at Staples locations.
> (b) Copy of any/all correspondence between the Postal Service and Staples regarding Staples offering postal products and services at Staples locations.
> (c) Copy of any/all correspondence between the Postal Service and Staples regarding the Retail Partner Expansion Program.
> (d) For each postal product and service sold by Staples, identify any/all discounts that the Postal Service will provide to Staples.
> (e) Identify the criteria to be used in determining any Postal Service compensation to Staples based on performance or other factors. Also provide the range of possible compensation.
> (f) Identify the steps, if any, that the Postal Service will take to protect the sanctity of the mail when the mail is in the hands of Staples employees.
> (g) Provide a copy of any/all training material provided to Staples employees.
> (h) Provide a copy of any/all provisions relied upon to support the use of postal employees training private sector workers performing work traditionally performed by postal employees.
> (k) Provide all cost analyses for the Partner Post/Retail Partner Expansion Program/CPU programs for Staples, including but not limited to DARs.

The complaint was amended at the hearing to allege Respondent failed and refused to provide the information contained in above paragraphs 6(a) through (e), (g) and (k), and unreasonably delayed in providing the information requested in paragraphs 6(f) and (h).[2]

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by all parties, I make the following:[3]

FINDINGS OF FACT

I. JURISDICTION

The Respondent is subject to the jurisdiction of the National Labor Relations Board pursuant to Section 1209 of the Postal Reorganization Act of 1970. It was conceded and I find the Union is a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Contractual provisions

The current collective-bargaining agreement between the parties expires in May 2015[4] and contains the following provisions:

> Article 15 Grievance-Arbitration Procedure
>
> Section 1. Definition: A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this

[1] All dates are in 2013 unless otherwise indicated.

[2] The General Counsel withdrew the allegation listed in 6(i) of the complaint at the hearing.

[3] In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951).

[4] The record is unclear as to whether the agreement was effective in November 2010, or began in May 2011.

Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Article 31 Union-Management Cooperation

Section 3. Information:

The Employer will make available for inspection by the Union all relevant information necessary for collective-bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

* * *

Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended.

Article 32 Subcontracting

Section 1. General Principles:

A. The Employer will give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees when evaluating the need to subcontract.

(See Memos, pages 369, 371, 372, 404 and 412)

B. The Employer will give advance notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet with the Union while developing the initial Comparative Analysis report. The Employer will consider the Union's views on costs and other factors, together with proposals to avoid subcontracting and proposals to minimize the impact of any subcontracting. A statement of the Union's views and proposals will be included in the initial Comparative Analysis and in any Decision Analysis Report relating to the subcontracting under consideration. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union.

C. When a decision has been made at the Field level to subcontract bargaining unit work, the Union at the Local level will be given notification.

The following Memorandums of Understanding (MOUs) were contained in the collective-bargaining agreement:

Re: Contracting or Insourcing of Contracted Service

It is understood that if the service can be performed at a cost equal to or less than that of the contract service, when a fair comparison is made of all reasonable costs, the work will be performed in-house.

Re: Consideration of National Outsourcing Initiatives

The parties agree that it is in their best interest to meet and discuss national outsourcing initiatives at an early stage of the process.

Once the Strategic Initiative Action Group (SIAG) has determined that a proposed concept will involve significant impact on bargaining unit work and preparation begins on a memo detailing consideration of the five Article 32 factors, the Union will be provided notification. Union involvement at this early stage of the process is without prejudice to either party's position regarding the determination as to whether there is a potential significant impact on bargain unit work.

Following receipt of notice, the Union will be afforded opportunities for briefings, meetings and information sharing as the concept is developed, costing models prepared and of Comparative Analysis document drafted.

The above process also will be utilized when an existing contract for national outsourcing initiative is expiring and consideration is being given to rebid the outsourcing of the work.

The parties understand that the purpose of the Memorandum of Understanding is to allow the Union an opportunity to compete for work internally at a point in time contemporaneous with the outsourcing process and early enough to influence any management decision. The Union may suggest less restrictive work rules, mixes of employee categories, lower wage rates that may improve efficiency and lower the costs of an in-house operation.

B. The Current Dispute

There were four witnesses who testified at this proceeding, Clint Burelson and Phil Tabbita for the Union and Patrick Devine and Brian Code for Respondent. Burelson testified that he authored the Union's November 22, information request to Respondent which was sent under the signature of Union President Mark Dimondstein and is at the heart of current dispute. Tabbita has worked for the Union for about 30 years and his current title is management of negotiations support and special projects. Tabbita is a member of the Union's negotiating committee at the national agreement level. Tabbita was involved in negotiations for the current collective-bargaining agreement. Tabbita has been involved in every contract negotiation since 1981.

Devine is Respondent's manager of contract administration for the headquarters labor relations group that deals with the APWU. Devine, who is an attorney, has spent a lengthy career with Respondent in various capacities. He testified he has been a member of Respondent's negotiating team for contract negotiations in 2006 and 2010, the latter for the current contract. Devine testified that, during 2010 into 2011, he sat on the SIAG committee referenced in one of the above collective-bargaining agreement MOUs. Code works for Respondent as the manager of retail alliances. He has held that position since August 2011, and has worked for Respondent since April 1999. Code met with Devine in formulating Respondent's response to the Union's November 22 request for information.

Burelson testified there are four divisions within the Union, the clerk division, maintenance, motor vehicle, and support services. The clerks are Respondent's employees who customers see when they enter a post office; they also sort mail and bulk mail. Code estimated that in 2013 there were about 33,400 post offices in the United States. Code testified that in

2000 and there were around 35,000 post offices, with both figures including mail processing facilities.

Code testified Respondent had a program first called Shipper Plus, then renamed Partner Post, and now it is called the Retail Partner Expansion Program. He testified Respondent was trying to devise a program to help support partner initiatives in the marketplace to expand Respondent's access and market share in high-demand areas. Code testified Respondent came up with a new program they wanted to test in the marketplace currently called the Retail Partner Expansion Program.

Code testified retail partner expansion is not unique to the United States in that providing postal products and services through retail establishments is something well established in countries in Europe, Canada, Australia, and New Zealand. He testified this is the way a significant portion of those domestic populations receive their retail services from their post offices. Code testified Respondent has been working on this concept in earnest since August 2011, when Respondent began to develop a sustainable strategy for a retail network. Code testified it took a year for Respondent to formulate a test concept. Code testified around September 2012 they decided to test the concept. Code testified Canada was one of the primary places Respondent studied in formulating Respondent's concept as Canada has a sophisticated way of partnering, expanding access and managing their network. Code testified Respondent also did some benchmarking in Europe to understand how the dynamics behind their retail network changed over the last 15 years. In Europe, Germany was the country most studied, but Respondent also looked at England, Sweden, Australia, and The Netherlands. Code testified in developing Respondent's retail strategy, there were issues where they have demand imbalances in high-demand areas as to how gain market share from their competitors. Code testified the latter was the key component when discussing the Retail Partner Expansion Program. He testified Respondent's competitors were in the box business, UPS and FedEx. Code testified the models Respondent studied in Canada and Europe dealt with retail transactions that typically occur at the windows at Respondent's post offices.

Code testified the Staples model which is involved in the Union's November 22 information request includes weighing small packages and selling stamps. He testified the Staples service is a simplified version of the service Respondent provides customers at its post offices. He testified at Staples they do not have all of the products and services they offer at the post office in that Respondent wanted to create a simple portfolio so it would be easy to transact for the retailers and their employees and would still cover the majority of transactions needed in the marketplace. He testified there are a lot of transactions conducted at the Staples stores.

Code testified Respondent started the Staples program in 2013. Code testified Respondent settled on a strategy for it in about September 2012. Code testified that from September 2012 to about January 2013, they were able to do a competitive analysis, market research, and testing to verify their course of action. In January 2012 Respondent released a request for information to potential retail partners. Code testified it essentially went to the 75 largest retailers in the country, all with different verticals such as big box stores, grocery chains, drugstores, and office superstores. In August 2012, Staples contacted Respondent expressing an interest. Concerning partnering with retailers, Code testified Respondent wanted to create enterprise-level partnerships which would allow Respondent to use efficiencies of those partnerships and leverage their intellectual property in the marketplace. Code testified Respondent used a pilot plan with Staples because any rollout would have significant cost consequences and if it rolled out and did not perform to the level of their assumptions then it would be a bad decision to engage in it on a larger scale.

Code testified that prior to beginning the pilot with Staples, Respondent submitted to SIAG a statement outlining the goals of the pilot. Code identified a letter dated December 14, 2012, with a one page attachment labeled the "Memorandum of Due Consideration of Article 32 Factors." Code testified that he, along with his team, developed the memo to submit to SIAG to determine whether Respondent's planned test would constitute an impact to the Union's bargaining unit. The attached memo states, in part:

> The Approved Shipper Plus Program aims to establish USPS customer access points in leading national and regional retailer's store locations nationwide. In order to determine whether to launch the full-scale program, USPS will conduct a program pilot beginning in April 2013 at 200 retail locations and select markets. The pilot will enable USPS to collect customer, transactional, and operational data to measure the impact and validate operational and financial assumptions before potentially launching the full-scale program.

On December 18, 2012, a letter was copied to Code, stating that "The Strategic Initiatives Action Group (SIAG) has reviewed your draft Memorandum of Do Consideration of the Article 32 factors. Based on the facts presented in the memorandum and your presentation, the SIAG has determined the Approved Shipper Plus Pilot will not have a significant impact on the bargaining unit." "As discussed, please come back to SIAG for further review once the pilot's realization has been determined."

By letter dated March 14, to then Union President Cliff Guffey, Devine stated:

> As a matter of general interest, the Postal Service intends to initiate a pilot of the Partner Post program, to establish customer access points in leading national and regional retailer's store locations to offer Postal Service products and services.
>
> The pilot is scheduled to begin in April/May at approximately 185 locations and select markets and end after approximately one (1) year. The purpose of the pilot will be to collect customer, transactional, and operational data to measure the test impact and validate operational and financial hypotheses. It is anticipated that the information from this data will allow the Postal Service to determine the suitability of possible further expansion.
>
> No significant impact to the bargaining unit is anticipated.

In September Respondent and Staples signed off on an "Approved Postal Provider Pilot Agreement," which by its terms stated it was dated August 29. The agreement stated it is "a Retail Pilot Agreement (a type of Marketing Agreement) with a negotiated service agreement component for discounts relating to particular products, as set forth in accordance with Exhibit F."[5] Respondent's contract with Staples contains Article 14 "Confidential Information, " which contains the following language:

> Nothing in this Agreement shall prevent the Party from disclosing information to the extent that such Party is legally compelled to do so by any governmental or judicial entity pursuant to proceedings over which such entity has jurisdiction; provided, however, that such Party shall (a) notify the other Party in writing of the agency's order or request to disclose such information, providing, to the extent practicable, at least (redacted) notice where practicable prior to disclosure, (b) If disclosure of this Agreement is requested, redact mutually agreed-upon portions of this Agreement under applicable laws, rules and regulations, and (c) otherwise cooperate with the other Party in protecting against such disclosure and obtaining with a protective order narrowing the scope of the compelled disclosure and protecting its confidentiality.
>
> * * *
>
> The Receiving Party shall be under no obligation to hold in confidence any Confidential Information which:
>
> * * *
>
> iv. is required by a Federal, State, or local governmental body to be disclosed in the proper exercise of its oversight or investigatory jurisdiction;
> v. is required to be disclosed by law; or
> vi. is independently developed by the Receiving Party without breach of this Agreement.

By letter dated October 2 from Devine to Guffey, Devine stated the following:

> As a matter of general interest, this notice is provided as a follow-up to the enclosed notice dated March 14 regarding the initial Partner Post-pilot. The Postal Service plans to launch a one-year pilot program of Partner Post at 84 Staples locations in five media markets. Markets include Atlanta, Pittsburgh, San Diego, San Francisco and Worcester. Customers of the participating Staples stores will have access to a simplified product portfolio containing our most popular products and services. Products and services offered will include:

Stamps	Standard Post
Priority Mail	Priority Mailed International
First-Class Mail	Global Expressed Guaranteed
Priority Mailed Express	Priority Mail Express International
First-Class Mailed International	First-Class Package International Service

> A soft launch is planned for mid-October with Grand Openings scheduled on or about November 15. There is no anticipated impact to the bargaining unit at this time.

On November 22, Union President Dimondstein sent a letter to Doug Tulino, vice president, labor relations of Respondent. The subject of the letter was, "USPS October 2, 2013 Notice regarding USPS Plans to Launch a One Year Pilot Program of Partner Post at 84 Staples Locations in 5 Media Markets." It was stated in the letter that, "Per Article 17 and 31 of the Collective Bargaining Agreement, the union requests the following information:" The letter also stated, "Without prejudice to the union's right to obtain all information in a timely manner, please do not wait for all of the items to be completed before providing any information. Please provide information as it is available." The letter listed 27 paragraphs of requested information which included the 9 items which are in dispute in this proceeding.

By letter dated December 4, to Dimondstein, Devine stated as follows:

> This letter acknowledges receipt of your November 22 request for information (RFI) regarding the Postal Services October 2 letter regarding Partner Post at Staples Locations.
>
> Please note that this RFI has been assigned information request tracking number IR13–44. This request shall be processed in accordance with the applicable rules, regulations and the Collective Bargaining Agreement. You shall be notified if this request requires remittance on the part of the American Postal Workers Union, AFL–CIO, for photocopies and or time spent processing the information.

By letter dated January 2, 2014, Devine wrote Dimondstein regarding the Union's November 22 information request as follows:

> Please be advised that the Postal Service, by letter dated March 14, 2013, notified the APWU of its intention to initiate a pilot of the Partner Post program to establish customer access points in leading national and regional store locations to offer Postal Service products and services. As stated in the same letter, "the purpose of the pilot will be to collect customer, transactional, and operational data to measure the test in fact and validate operational and financial hypotheses. It is anticipated the information from this data will allow the Postal Service to determine the suitability of possible future expansion."
>
> Thereafter, by letter dated October 2, 2013 the APWU was notified that the Postal Service plans to launch a one-year pilot program of Partner Post and 84 Staples locations in five (5) media markets identified in the letter. The letter also specified the products and services to be offered at the pilot site locations.
>
> Because this is a pilot program, the information requested in your letter does not appear to be relevant or simply premature in light of the one-year pilot. However, the Postal Service is

[5] A heavily redacted copy of Respondent's agreement with Staples was provided to the Union by Respondent on March 24, 2014.

providing information that is currently available without prejudice to its position that the information is not relevant to the APWU's role and responsibilities as the bargaining representative of the employees it represents. Also, as the information request is not within the immediate control of this office some information (as specified below), as it becomes available, will be provided to the APWU.

In the interim, the following is the Postal Services responses to the information being requested.[6]

1. Copy of any/all agreements between the Postal Service and Staples regarding Staples offering postal products and services at Staples locations.

> In accordance with the Collective Bargaining Agreement (CBA), Article. 31.3, please explain the relevance of the requested information to the APWU's responsibilities which would make it necessary for collective-bargaining or the enforcement, administration or interpretation of the CBA.
> Moreover, the request appears to be overly broad and unduly burdensome. Please specify the information that the union is seeking. Once a response has been received by the Postal Service from the APWU, the information request will be revisited.
> Please be advised that the documents requested may contain proprietary and/or confidential information; therefore some information may be redacted.

2. Copy of any/all correspondence between the Postal Service and Staples regarding Staples offering postal products and services at Staples locations.

> In accordance with the Collective Bargaining Agreement (CBA), Article 31.3, please explain the relevance of the requested information to the APWU's responsibilities which would make it necessary for collective-bargaining or the enforcement, administration or interpretation of the CBA.
> Moreover, the request appears to be overly broad and unduly burdensome. Please specify the information that the union is seeking. Once a response has been received by the Postal Service from the APWU, the information request will be revisited.
> Please be advised that the documents requested may contain proprietary and/or confidential information; therefore some information may be redacted.

4. Copy of any/all correspondence between the Postal Service and Staples regarding the Retail Partner Expansion Program.

> Your request as written is unduly broad and burdensome, please specify in detail the information you are seeking so as to assist in providing necessary and relevant information to you.
> Please be advised that documents requested may contain proprietary and/or confidential information; therefore some information may be redacted.

9. For each postal product and service sold by Staples, identify any/all discounts that the Postal Service will provide to Staples.

> In accordance with the Collective Bargaining Agreement (CBA), Article 31.3, please explain the relevance of the requested information to the APWU's responsibilities which would make it necessary for collective-bargaining or the enforcement, administration or interpretation of the CBA.
> Moreover, the request appears to be overly broad and unduly burdensome. Please specify the information that the union is seeking. Once a response has been received by the Postal Service from the APWU, the information request will be revisited.
> Please be advised that the documents requested may contain proprietary and/or confidential information; therefore some information may be redacted.

11. Identify the criteria to be used in determining any Postal Service compensation to Staples based on performance or other factors. Also provide the range of possible compensation.

> In accordance with the Collective Bargaining Agreement (CBA), Article 31.3, please explain the relevance of the requested information to the APWU's responsibilities which would make it necessary for collective-bargaining or the enforcement, administration or interpretation of the CBA. Once a response has been received by the Postal Service from the APWU, the information request will be revisited.
> Please be advised that the documents requested may contain proprietary and/or confidential information; therefore some information may be redacted.

16. Identify the steps, if any, that the Postal Service will take to protect the sanctity of the mail when the mail is in the hands of Staples employees.

The Postal Service takes pride in the security and sanctity of the mail, it is unlawful for retail partner employees to reveal the record information about packages to anyone other than the Postal Inspection Service. Each pilot location will have a designated letter drop for letters and envelopes. At no time will mail be placed or stored in an area that is accessible to the public.

17. Provide a copy of any/all training material provided to Staples employees.

> In accordance with the Collective Bargaining Agreement (CBA), Article 31.3, please explain the relevance of the requested information to the APWU's responsibilities which would make it necessary for collective-bargaining or the enforcement, administration or interpretation of the CBA. Once a response has been received by the Postal Service from the APWU, the information request will be revisited.
> Please be advised that the documents requested may contain proprietary and/or confidential information; therefore some information may be redacted.

[6] Only the items remaining in dispute in the complaint are listed here from Devine's letter.

19. Provide a copy of any/all provisions relied upon to support the use of postal employees training private sector workers performing work traditionally performed by postal employees.

> At the outset, it appears that the union appears to be suggesting that retail partner employees not be trained. Please clarify the request. In addition, as noted in the response to item #18, above, non-bargaining unit personnel will be utilized to train. For that reason the request does not appear to be relevant. Please explain the relevancy of your request, as well.

It was stated in response to item 18 that, "Non-bargaining unit employee will be utilized to train and/or assist retail partner employees, if resource constraints exist we may seek the assistance of Lead Clerks."[7]

25. Provide all cost analysis for the Partner Post/Retail Partner Expansion Program/CPU programs for Staples, including but not limited to DARs.

> In accordance with the Collective Bargaining Agreement (CBA), Article 31.3, please explain the relevance of the requested information to the APWU's responsibilities which would make it necessary for collective-bargaining or the enforcement, administration or interpretation of the CBA. Once a response has been received by the Postal Service from the APWU, the information request will be revisited.
>
> Please be advised that the documents requested may contain proprietary and/or confidential information; therefore some information may be redacted.

By letter dated January 17, 2014, in response to Devine's January 2, 2014, letter, Dimondstein stated, in part:

You state: "Because this is a pilot program, the information requested in your letter does not appear to be relevant or is simply premature in light of the one-year pilot." You reiterate the same alleged lack of relevance of requested information in several paragraphs and asked for an explanation of relevance.

Nowhere does the National Agreement exempt so-called "pilots" from application of the National Agreement. Staples employees are now clearly performing bargaining unit work and more will do so in the future. There also possible violations of Article 32 and memoranda of understanding addressing contracting out and the preservation and return of bargaining unit work; handbooks or manuals MOUs addressing Contract Postal Units (CPUs); Article 5 (unilateral changes in compliance with law); and perhaps other contract provisions, depending on what the APWU is able to discern after reviewing the requested information. The union is entitled to information that relates to potential grievances and not only actual grievances.

The Postal Service claims that some of the requested information is "overly broad" or that production would be "unduly burdensome" or "overly cumbersome." The APWU disagrees. The information requested is either in documents or are answers to specific questions. If the Postal Service is able to explain in sufficient detail when information is "unduly burdensome" or "overly cumbersome" to produce, the APWU will be open to discuss ways to lessen the burden. Similarly, if there are any items that the Postal Service about which needs clarification, it can simply ask.

The Postal Service asserts that some requested information may contain confidential or proprietary information. As the Postal Service is surely aware, having dealt with these issues in the past, blanket claims of confidentiality are not acceptable. The Postal Service bears the burden of demonstrating to the Union that it has legitimate and substantial confidentiality concerns. If the Postal Service is able to do so, the parties may be able to reach an accommodation. But if, for example, such an accommodation takes the form of a nondisclosure agreement, there is no justification for redacting any information, as your letter states the Postal Service may do and in the case of the Retail Partnership RFI (paragraphs 5 and 8), has done. The Union insists on production of the redacted portions unless and until the Postal Service demonstrates its legitimate and substantial confidentiality concerns and offers to negotiate an accommodation.

The APWU offers the following clarification to requests nos. 9, and 10 for discounts the Postal Service will provide Staples and the range of prices for postal products. First, discounts may have the result of incentivizing Staples to the detriment of Postal Service retail facilities and employees who staff them. An example would be if Staples offers "points" or other rewards under customer loyalty programs that will include purchases of postal products and services. Please confirm if this is so and if so, and provide details.

Second, certain prices and discounts may violate provisions of the Postal Reorganization Act and therefore violate Article 5. The Postal Service says that its products and services will be sold at published prices. Similar to the clarification in the preceding paragraph, the Postal Services compensation to Staples (paragraph 11) may similarly incentivize Staples to the detriment of Postal Service retail facilities and the employees who staff them.

As for the Union's request for information about training Staples employee training (paragraphs 17, 18, 19 and 20), this information will help the Union understand whether the safety and security of the mail as mandated in statutes and regulations is being safeguarded. Because Staples is a receptacle for mail, the safety of postal employees could be compromised if Staples employees are not adequately trained on mailable matter. If postal employees are providing training or assistance to Staples employees, their working conditions are affected.

By letter dated January 24, 2014 from Dimondstein to Tulino the Union initiated a "National Dispute" concerning "Staples-Partner Post". The letter stated that:

The Postal Service has embarked on an implementation of the program with Staples in excess of 80 of its stores, under a Na-

[7] The record revealed that lead clerks are within the Union's bargaining unit.

> tional Sales Agreement (NSA). The stores will contain post offices in which most postal products will be sold to the public. These post offices will use equipment provided by the Postal Service. City letter carriers will pick up the mail from Staples post offices.
>
> The APWU has asked for information about the arrangement with Staples, including the NSA, but to date the Postal Services provided only the Partner Post PowerPoint, the Request for Information (RFI) addressed to "potential partners for the U.S. Postal Service Retail Partnership Program," and a chart purporting to be the proximity of the Staples stores to postal facilities. The Union is entitled to an adverse inference, that the information requested, if produced, would have supported the Union's allegations and been adverse to the Postal Services allegations.
>
> This program constitutes contracting out in violation of Article 32, including but not limited to the Union's right to advance notification and to meet and be involved in early stages of consideration of contracting out, and the following memoranda of understanding in the National Agreement: "Contracting or Insourcing of Contracted Services" (page 369), "Consideration of National Outsourcing Initiatives" (P 369–370).
>
> The work being done at Staples stores' is work that must be assigned to the bargaining unit under Article 1.5 and the "New Positions and New Work" MOU (page 298).
>
> To the extent that the Postal Service considers these Staples post offices to be Contract Postal Units (CPUs), the Postal Service failed to treat them in accordance with handbooks and manuals addressing CPUs in violation of Article 19. The Postal Service also failed to meet to discuss and consider options for addressing the provision of retail services in those locations" in accordance with the "Contract Postal Units" MOU (pp. 371–372).
>
> The transportation of mail matter from Staples stores to postal facilities is of mail in bulk that must be assigned to the Motor Vehicle Service craft.

By letter dated January 31, 2014, to Dimondstein, Devine responded Dimondstein's January 17, 2014 letter. Devine stated, in part:

> This letter also requests a meeting with you to discuss potential ways of providing and/or safeguarding the information you request. Please advise me as soon as possible as to your availability to meet.
>
> Regarding your concerns, you first state that "pilots" are not exempt from application of the National Agreement. Your assertion appears to ignore the historical practice of the parties during previous pilots and tests. Moreover, as the employees you represent are not directly involved in the operation of the pilot at Staples the impact on employees is not obvious. For these reasons, it appears the only contractual issue you are raising concerns application of Article 32, specifically whether the work performed at Staples constitutes subcontracting of bargaining unit work. As stated in my January 2, 2014 letter, a determination of the application of Article 32 will be made upon the conclusion of the pilot. As you are undoubtedly aware, there is a long history of providing alternate access to postal products and services that have not fallen under the purview of Article 32. Nevertheless, if Article 32 and/or any of the Subcontracting MOUs are triggered by a permanent program with Staples, all applicable collective bargaining agreement requirements will be satisfied.
>
> Perhaps more importantly, as explained in our original notification to the APWU dated March 14, 2013, the "purpose of the pilot will be to collect customer, transactional, and operational data to measure the test impact and validate operational and financial hypotheses." As you are aware, operational and financial data assessments are components of the analysis of the due consideration of the five (5) factors considered under an Article 32 proposal. Presumably, the APWU will be interested in receiving the measured, finalized, and validated version of the information it seeks that could be made available in the event that the Staples pilot is implemented permanently.
>
> You also raise a concern in your letter that the Postal Service's response to the RFI asserts that many of the requests the APWU makes are "overly broad" Or "unduly burdensome." The basis for the assertion is clear. Many of the requests are for "any and all" agreements, solicitations, and correspondence with Staples which lack specificity as to type, subject matter, information needed, and time period. A more-specific request should presumably address the concern we raise.
>
> You respond in your letter to the Postal Service's statement that some of the information you seek is confidential or proprietary. Without prejudice to your assertion that the Postal Service bears the burden of demonstrating that it has legitimate and substantial confidentiality concerns, the Postal Service believes that sharing the confidential and proprietary terms of the Agreement would limit the ability of the Postal Service to negotiate Agreements with other entities regarding offering Postal products and services in the future and could have an adverse effect on existing Agreements.
>
> An example of terms of the Agreement that would limit the Postal Service's ability to negotiate with other entities are the portions of the Agreement that state which party will be covering various expenses during the one-year pilot. If this information were to be released and viewed by other companies or organizations, the Postal Service would be at a competitive disadvantage to negotiate on various expenses with other partners in the future. In addition, entities with existing Agreements with the Postal Service may wish to adjust their terms, now or in the future, in a way that adversely impacts the Postal Service. The Negotiated Services Agreements included as part of the Pilot Agreement contain restricted and sensitive business information. Negotiated Services Agreements have not been shared with outside parties in the past. Sharing the terms of the Negotiated Services Agreements would weaken the negotiating position of the Postal Service with regards to the discounts or incentives given to partners currently and moving forward. For example, the Negotiated Services Agreements include the discounts provided to Sta-

ples during the one-year pilot. If the discounts provided to Staples were to be released and viewed by other companies or organizations, the Postal Service would be in a disadvantageous position to negotiate discounts given to partners in the future.

Furthermore, the Pilot Agreement contains provisions explicitly prohibiting release of any confidential Information or information relating to the economic terms of the Agreement without prior approval from Staples. As information, Staples does not approve of the release of the Pilot Agreement or any of the economic terms enclosed therein.

Regarding the clarification on points or rewards offered by Staples to its rewards program members, that is a matter that is not within the control of the Postal Service. Your concern that Staples, by offering products and services at published prices, somehow violates the Postal Reorganization Act is not clear. Please explain.

Concerning the training received by Staples employees, the training program and materials developed for the Retail Partner Expansion Program pilot are based on the training given to APWU-represented employees—i.e., the Sales and Service Associates Training Guide Course #1002146, dated October 2012. The program includes both classroom and on-the job training. Additionally, each pilot site will receive on-the-job shadowing from the Postal Service. Each retail partner location will be certified by the Postal Service; site certification includes an assessment of the training received and the ability of retail partner employees to appropriately sell Postal Service products and services following all procedures.

The training program and materials developed for the Retail Partner Expansion Program pilot ensure that retail associates at pilot locations are fully educated concerning Postal Service products; services, and policies concerning safety and security, as well as the use of the CARS (Contract Access Retail System) Point-of-Sale terminal. The program and materials reflect the latest changes in Postal products and services.

Regarding the procedures to secure and make safe the mail received at Staples locations, security and sanctity of the mail is emphasized in all aspects of the training. Retail associates at pilot locations are informed of the high trust that customers place in the Postal Service and the importance of safe guarding the items that are accepted at pilot locations. The training program and materials are designed so that retail associates are thoroughly trained on hazardous materials (HazMat) acceptance and aviation security (AvSec), as retail associates must comply with all HazMat/AvSec guidelines.

In response to your inquiry as to "what steps" are taken, the following steps are taken to ensure the sanctity and security of the mail at pilot locations:

> Retail associates are trained to conduct every transaction by first greeting the customer, then inquiring about their needed product and or service and finally asking the currently required HazMat questions.
>
> The CARS system begins the customer transaction by displaying the HazMat questions on the customer monitor. The customer monitor has a 15" color screen and is equipped with "text to speech" technology for the visually impaired.
>
> Retail associates are only allowed to accept international packages 'with electronically generated custom forms, adding a greater level of security to international shipping.
>
> Mail at pilot locations is kept behind the counter in Postal provided equipment, and is kept out of the reach of customers.
>
> A separate letter drop fixture is positioned on the sales floor in close proximity to the Postal counter. This is a locked fixture and is only opened when the letter carrier arrives to collect the mail.
>
> Finally, your suggestions that several of the items you received were not responsive to your requests should be discussed at length.
>
> Again, I urge you to contact me as soon as possible to make arrangements to meet and discuss your request.

On March 24, 2014, Respondent provided the Union with a copy of a heavily redacted version of its agreement with Staples entitled, "Approved Postal Provider Pilot Agreement." On March 29, 2014, Respondent provided the Union with a minimally redacted copy of the "Retail Partner Expansion Program Retailer Associate Training Manual," which is a manual Respondent developed and was using to train Staples employees concerning the retail sale of Respondent's products. In a memo dated March 31, 2014, from Respondent's attorney to the Union's attorney it was stated, "Based on the preliminary data and feedback, Staples has recently expressed interest in expanding the pilot to additional stores. In accordance with the collective bargaining agreement, we are considering whether the program proposed by Staples constitutes subcontracting or bargaining unit work."

Tabbita testified that collective-bargaining agreement Article 32, Section 1(B), concerning subcontracting provides for advanced notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and for early involvement of the Union in the process. Tabbita testified the MOU on page 369 of the collective-bargaining agreement relates to early input from the Union when Respondent is considering a new initiative. He testified the memo on "Consideration of National Outsourcing Initiatives" contains an opening sentence stating it is in the parties "best interest to meet and discuss national outsourcing initiatives at an early stage of the process." He explained the Union wants to meet early on because it has been their experience when they meet after considerable work by Respondent and preliminary or final decisions on projects have been made the Union is trying to convince the Respondent to reverse course and undo what they have done. Whereas, if they meet earlier when the Respondent is considering an initiative but before senior management has made decisions, the Union is in a better position to influence those decisions, and when they make those decisions, they will have seen the Union's concerns and received its input. Tabbita pointed out the MOU on page 370 of the agreement states, "The parties understand the pur-

pose of the memorandum is to allow the Union an opportunity to compete for the work internally at a point in time contemporaneous with the outsourcing process and early enough to influence any management decision." Tabbita testified that in order for the Union to influence a management decision about outsourcing, "We need to know what exactly it is that they intend to outsource, some kind of statement of the work, some specificity about what it is exactly that they are looking to remove from in-house and place in an outsource environment so that we can begin to do an apple-to-apple comparison between in-house and outsource." He testified that, "We want to be able to isolate those things that are being proposed to be done by the contractor and what they cost, and then look at doing those things in-house and determine the costs that are isolated to just those things."

Tabbita testified he has discussed outsourcing initiatives with Respondent over the last 30 years. He testified Respondent prepares a written document called a comparative analysis, where it goes through the different factors to evaluate outsourcing initiatives. He testified it has been his experience in discussing those reports with Respondent the one factor that is more important than the others is cost. Tabbita testified the MOU refers to the Strategic Initiatives Action Group (SIAG). He testified there are no union officials on SIAG. Tabbita testified that while the MOU refers to whether SIAG makes a determination that a proposed concept will involve significant impact on bargaining unit work, the Union is free to dispute any decision management makes concerning whether or not there is significant impact. Tabbita testified if the Respondent says there is no significant impact, the Union can grieve and go to arbitration. He testified that has not yet been done in this case, but it was done in a recent case involving motor vehicle operations. Tabbita testified there is no time limit to file such a grievance, but it should be filed reasonably quickly upon knowing what the facts are. Tabbita testified that, in this case, the first he heard that SIAG met and made a determination of no significant impact was during the morning of the trial on April 1, 2014, when counsel for Respondent made his opening remarks. Tabbita testified it is his view, under Article 32 of the contract, that the Union should receive notice when SIAG meets and determines there is no significant impact. He testified the Union has received notice in the past when SIAG meets and determines there is no significant impact, and the Union has an opportunity to grieve that determination.

Tabbita testified Respondent informed the Union the pilot would last about a year and the Union understood it started in late October or November 2013 and therefore anticipated the initial pilot would end sometime late October or early November 2014. The General Counsel entered into evidence an exhibit showing the location of the Staples stores that were part of the pilot, and the distance of those stores from the nearest post office. The exhibit shows that a large number of the 80 to 84 stores were less than a mile from the nearest post office. Tabbita testified that some of the locations were literally across a parking lot or across a street. He testified the Union's concern is the traffic to the Staples stores may be pulling transactions away from the Postal Service retail units.

Tabbita testified as follows: Respondent has a point-of-sale system which records every transaction, and a time table allotted for that transaction. For example, there are so many seconds allowed for selling a book of stamps, and so many minutes or seconds allowed for each type of package. Respondent is able to multiply the number of transactions times the allotted time. They then create something called earned hours showing productive time for those hours. When Respondent does staffing and scheduling, they create charts showing the staffing for a window. If on Tuesday there is 11 hours of clerk staffing on a window but the earned hours are only 7 hours, Respondent attempts to bring that staffing time down as close as they can to earned hours. If the bargaining unit loses transactions to Staples stores, they lose time, and ultimately the staffing mechanism is going to take hours out of the unit. Sometimes this will result in people leaving the station or branch, and in some cases this may help justify consolidating stations or branches.

Tabbita testified the Union cannot wait until the end of the pilot program to obtain the requested information because it is likely Respondent is not going to abruptly stop business in 80 stores if they decided to expand it. Most likely they will make the decision to continue or expand before the deadline so it is uninterrupted. Tabbita testified it will have a detrimental effect on the program if there is an abrupt interruption. Tabbita testified right now Respondent and Staples are evaluating the program and deciding what they are going to do. This is the point when the Union needs to be involved and able to make reasoned arguments with some detail, justifying some correction in the course Respondent may decide to take.

Tabbita testified the Union has received information pursuant to Article 32 from Respondent in the past. He testified generally the information the Union initially receives in terms of a comparative analysis and other documents generates a lot of questions. He testified typically the Union critiques the cost analysis and suggests to Respondent any errors they think were made, appropriate numbers or other factors. The Union reviews the operation to see if it has been designed most efficiently and makes suggestions on a more efficient operation. When the Union does its own cost analysis, they make proposals about staffing, how the operation might be changed, and how they might limit the adverse impacts on Respondent's employees.

Tabbita testified he has made proposals based on received Article 32 data to Jack Potter, who, at the time, was the vice president of labor relations, and later became chief operating officer and postmaster general. Tabbita testified this was in the late 1990s and it involved the outsourcing of work pertaining to transportation equipment service centers. He testified the Union thought it was less expensive to use the bargaining unit to do the work. However, the Respondent did not agree. Tabbita testified the bargaining unit was still less expensive as to some of the outsourced operations. Tabbita testified he made a proposal to Potter concerning the outsourcing, but this was before there was early involvement language in the collective-bargaining agreement, and Respondent had already made the decision to outsource. Tabbita testified he went to Potter after that decision was made with the Union's analysis that, according to Respondent's own numbers, the Union was less expen-

sive at particular sites. Potter's response was Respondent did not think the Union would agree to split the sites. Tabbita responded the yes the Union would do so. Potter got back to Tabbita a couple of weeks later and said no one wants to reconsider.

Tabbita testified the provisions in the contract on the Union's early involvement in outsourcing decisions came into the 2000 contract during interest arbitration. Tabbita testified the Union was the proponent of the changes. Tabbita testified it is the position of the Union that the Staples pilot program was having a significant impact on bargaining unit work at the time of the hearing. He testified it was not the Union's view that they had to wait for SIAG to declare a particular program by Respondent as having a significant impact before the Union could request information about it. Tabbita testified, "We can request information whenever." Tabbita also testified the Union does not have to wait for SIAG to declare a particular program as having a significant impact before the Union may file a dispute over it. He testified the Union can file a dispute when they have a concern that the contract is violated as to an outsourcing that should not have happened and/or the Union should have received notice of it. He testified the Union is "free to grieve that the contract's been—violated. One, we didn't get notice, and two, it was inappropriate for whatever reasons we can justify." Tabbita testified, "I'm only saying that the failure of the Postal Service to do something doesn't mean we can't grieve. In fact, that may be the justification for—the failure of SIAG to meet, the failure of SIAG to make a decision, their failure to notify us, doesn't mean that we can't grieve."

Tabbita did not recall any negotiated service agreement provided by Respondent to the Union in the Article 32 context. Tabbita testified, to his knowledge, no union member has been terminated as a result of loss of work to Staples, nor is he aware of any bargaining unit employee who was displaced, reassigned to another facility because of lack of work or lost work because of the Staples agreement. He testified no post offices near Staples have been consolidated at this point because of work going to Staples. Similarly, Burleson testified he has no evidence that post offices near the pilot Staples stores lost clerk hours. Tabbita testified that in order for the Union to determine whether there is an impact to the bargaining unit they would need to know about the potential growth and work and whether they are able to get a piece of that work. He testified the Union would need to know about the kind of volumes that might be taken away from post offices that have an adverse impact on employees because of staffing and scheduling changes or reduced hours, et cetera. Tabbita testified to the extent that there are estimates or actual information, the Respondent would have the information.

Tabbita testified that in order for the Union to effectively intervene in the Article 32 process, they need the best costing data available and a clear statement of work or description of exactly what will be done in an outsourced environment. This allows them to begin assessing the operations to see if there are more efficient ways to conduct those operations to reduce cost. Tabbita testified the Union wants this information as early as possible so they we can influence the decision-making process. Tabbita testified that in a typical Article 32 situation the Union would be involved before there was ever a contract. He testified the Staples situation is unusual because there is already a contract.

Tabbita testified in determining whether there is significant impact, the Union looks at the potential for growth in the bargaining unit and the potential for negative impacts in the bargaining unit. He testified they would be looking at the number of transactions, the volumes of packages and so on, to see if the Union is involved in the Staples operation, are they getting more work, and if the bargaining unit is not involved in the Staples operation, what are the negative impacts that might occur. Tabbita testified that paragraph 25 in the Union's information request relating to cost analysis would likely be based on some estimate of volumes, and he also expects that in response to paragraph 4 there may be correspondence that is tracking various things that would give the Union information on volumes and hours.

Concerning the Union's November 22 information request, as to the information requested in paragraph 1, Burelson explained Staples was doing the work that Respondent's union represented employees normally perform. Burelson testified he wanted a copy of Respondent's agreement with Staples to better understand it, in order to have a proper discussion with the Respondent about it. Burelson testified the information requested in paragraph 2 concerning correspondence may provide additional information about the arrangement and could clarify it. He testified it could show the intent of the Respondent and Staples. Concerning the information requested in paragraph 4, Burelson testified the Retail Partner Expansion Program is the program the Staples and Postal Service agreement falls under. It could be expanded to other companies as well, so Burelson wanted to better understand the arrangement and the program. Tabbita testified concerning the relevance of paragraph 1, that a copy of the agreement would allow the Union to review with specificity what Staples is expected to do, and the work involved. This would give the Union a basis on which to compare the costs for that operation, with the costs for an operation like that done with bargaining unit employees. Tabbita testified that, by obtaining this early in the process, it gives the Union an opportunity to suggest how an operation at Staples might be staffed with bargaining unit employees playing a role in it. It gives the Union an opportunity to look at weaknesses in the agreement that they may argue should moderate or eliminate the agreement. Tabbita testified early access allows the Union to critique the program, suggest revisions to it, help cost out what it would cost to have Postal employees do some or all of the work, and hopefully persuade management to maximize the benefits while minimizing the harm to postal employees. Tabbita testified the relevance of paragraph 2 of the request concerning the Respondent's correspondence with Staples will shed light on the specificity of the arrangements between Staples and Respondent. He testified the relevance of paragraph 4 regarding correspondence regarding the Retail Partner Expansion Program is very similar to paragraph 2. Tabbita testified he would expect there may be discussions between Respondent and Staples about the future of the project, and the expansion of the project. That information will be helpful to the Union to determine where this project is

headed.

Burelson testified the information requested in paragraph 9 pertaining to discounts goes to the heart of the matter. He testified the greater the discounts, the more work the bargaining unit will lose to Staples. He testified the Union wanted to understand what the discounts were and how much incentivizing Respondent was doing to give work away to private corporations like Staples. Burelson testified a discount could result in the loss of unit work because the greater the discount the more the incentive for the company to do more of that work and thereby take work away from the bargaining unit. Burelson testified paragraph 11, relating to the criteria used in determining any Postal Service compensation to Staples, was also requested to try and understand the kind of compensation provided to Staples and what method they were using. He testified the Union needed this information to understand the incentives of the private corporation to perform the work. Similarly, Tabbita testified concerning the Union's request in paragraph 9 that it in terms of understanding the financial arrangements between Staples and Respondent, the discount Staples receives for various products may be one of the primary ways Staples is compensated for the work. Tabbita testified it is helpful for the Union to have this information early in the process, stating "I don't think we're going to persuade the Postal Service without some reasoned argument, and cost will be an important one of those arguments." Concerning paragraph 11, and the criteria to be used determining Respondent's compensation to Staples, Tabbita testified it is not unusual for the Postal Service to offer incentives to a supplier to bring in additional volume or to perform at a particular level, and this is a question of how much compensation may be involved in Staples performing this work.

Burleson testified concerning paragraph 16, pertaining to the steps the Respondent will take to protect the sanctity of the mail when it is in the hands of Staples employees, that it was the Union's understanding when Staples employees are handling the mail prior to turning it over to the Post Office, it was not covered by federal rules. Burleson testified that Respondent's employees have to take an oath of office as a postal employee. He testified there were a lot of qualifications, and the Union was concerned the sanctity of the mail would be compromised in the hands of non-postal employees. He testified there are safety considerations involved in handling the mail, that they have had anthrax at his post office located at the Capital, and there were other threats concerning the mail to public officials. Burelson testified if someone is not checking for these type things at the entry-level it could affect the safety of Respondent's employees, Congress, and judges. Similarly, Burleson testified the Union's request in paragraph 17 for training material provided to Staples employees pertained to the same issues. Burelson testified the Union was concerned the Staples employees are not being trained properly, and those savings might be an incentive to take work away from the bargaining unit. Burelson testified union represented employees receive a wage premium because of their training and qualifications. He testified that Union wanted to understand what kind of training and qualifications are going to Staples employees. He testified, "we don't want people in the private sector undercutting our wage premium." As to paragraph 19, "provisions relied upon to support the use of postal employees training private sector workers performing work traditionally performed by postal employees," Burelson testified Respondent's employees were upset that they were going to have to train their replacements. He testified the reasons he previously mentioned as to training apply to this paragraph.

As to paragraph 17 regarding training material, Tabbita testified training is a cost that will be incurred both for the trainer and the trainee, and understanding what is involved in the training program will help the Union determine the size of that cost. Tabbita testified the other concern is a question of safety and security. He testified if Staples employees are not trained adequately on accepting packages, there is real hazard to the public, Respondent's employees and to Staples' employees. Tabbita testified lead clerks referenced in Respondent's response to the Union's request in paragraph 18 are bargaining unit employees.

As to the request in paragraph 25, calling for all cost analyses for the Partner Post/Retail Partner Expansion Program/CPU programs for Staples, including but not limited to DARs, Burleson testified the Union wanted to understand how Respondent was making their decisions on costs, and if it was less expensive for the bargaining unit employees to perform the work. Burleson testified the Union needed this information to show the bargaining unit could do it at a more affordable cost. Burleson testified the Union needs the information because Staples employees are currently performing the work of postal workers. He testified the Union objects to it, wants to challenge it, and wants to have a discussion with the Respondent about it. Similarly, Tabbita testified, concerning paragraph 25, regarding cost analyses that the Union is already late. He testified there is a contract of some kind, and there should be a cost analysis in that there was a cost analysis done to justify the business decision to enter the contract. Tabbita testified this will give the Union the Respondent's view of what the cost and benefits are, and it is going to be a starting point for the Union to begin to critique the program, build cost models, and make suggestions.

Devine testified Article 32.1.B of the collective-bargaining agreement pertaining to subcontracting is triggered when there is a significant impact, which is determined by the SIAG committee. Devine testified when a subcontracting proposal is made a memorandum of due consideration is submitted, which takes into consideration the five factors listed in Article 32.1.A: public interest, cost, efficiency, availability of equipment, and qualifications of employees. Devine testified a comparative analysis report under Article 32.1.B is generally binders full of information that Respondent provides to the Union which compares, as part of the analysis, costs, efficiencies and all of the relevant factors for in-house performance of work versus it being subcontracted. He testified the report could include the actual subcontract.

Devine testified the procedure is when SIAG makes the determination as to whether or not there is a significant impact concerning contracting, they notify the manager of contract administration, who is currently Devine. Devine testified his shop then notifies the Union of the determination as to whether

or not there has been a finding of significant impact. Devine testified from his experience on sitting on the SIAG committee there are several factors used in the determination. One is a determination of how many work hours will be replaced under the subcontracting initiative. He testified they also look at a whether the impacted employees are going to be excessed, that is the involuntary reassignment of employees, sometimes within their installation or sometimes to a different installation. Devine testified the scope of the change is considered and all of the things that are contained within the Goldberg arbitration decision are considered.[8] Devine testified this arbitration serves as a guide for himself and his department regarding whether something is a significant impact. Devine testified he is not aware of anything to suggest that hours of work have been diminished for union members as a result of the Staples pilot, or the need to reassign anyone.

Devine testified the Union has a mechanism by which they can challenge SIAG's determination that a proposed action does not significantly impact bargaining unit work, which is by the Union's filing a step four dispute. He testified this is encompassed in Article 15.4 in the collective-bargaining agreement which concerns grievance procedures. Devine testified that concerning the maintenance craft, one of the former Union assistant directors had filed several disputes through Article 15.4.D contesting that something was of significant impact where Respondent had determined that it was not. These events took place during 2005, 2006, and into 2007, but they have not been arbitrated yet, although they have been appealed to arbitration. Devine testified that the scheduling of arbitration is by mutual agreement.

Concerning Devine's October 2 letter to the Union President Guffey referencing 84 Staples stores, Devine wrote at the end of the letter that no significant impact to the bargaining unit is anticipated. Devine testified the purpose of that clause was to distinguish it from an Article 32.1.B announcement. Devine testified the pilot was an experiment to determine whether to establish the program on a broader basis as an end goal, but in the meantime to collect data. Devine testified they actually only had the pilot at 82 Staples locations out of the 185 originally announced in Devine's March 14 letter. He testified in terms of ending the pilot and determining if they were going to continue with it generally that does not happen. Devine testified if the pilot goes forward, there is some sort of transition period to doing it permanently. Whether to do it permanently for just at the 82 locations, or on a larger basis would be a determination that would be made at a later date and time. Devine testified pilots generally do not go more than a year. The Staples pilot started in October 2013 and Devine testified October 2014 will be the end of the pilot. He testified that at that point Respondent could conclude it would have a significant impact if Respondent decided to expand it.

Devine testified a pilot is used interchangeably with the term "test." It is something that Respondent is not going to instantly implement permanently. Rather, they need additional information as they might want to change vendors, or change the costing in a contract with a vendor. He testified Respondent would have a better idea at the end of the pilot. Devine testified the pilot with Staples is having a third-party vendor performing work similar to what Respondent does in-house. Devine testified he is not familiar, since he has been a manager or labor relations specialist beginning in 2005, with an information request by the Union that is like the information request currently in dispute. He testified he is not aware of an information request by the Union seeking a contract with a third party vendor outside the Article 32 realm. He testified that, "Obviously, when—after we've given notification on—that subcontract is at play, we've gotten requests for information on contracts, yes. But not during a test." He testified that prior to the invocation of Article 32, during a pilot or a test, the Union has never asked for a negotiated service agreement.

Devine testified he is not familiar with Respondent giving the Union a negotiated service agreement even after the pilot stage. Devine testified he has received requests for contracts under Article 32 but not negotiated service agreements like the one involving Staples. He testified usually negotiated service agreements pertain to retail contracts and any of the contract requests he has received pertained to mail processing and transportation. Devine testified a negotiated service agreement, is for a subcontractor, but a different type of subcontractor. However, Devine testified he is not familiar with any other negotiated service agreements for retailers outside of Staples.

Devine testified that, under Article 32, Respondent has provided the Union with subcontracting agreements. He testified the difference in the subcontracting agreement with Staples was the nature of the contract. He testified, while he has never previously been asked to provide a negotiated service agreement, there is nothing otherwise that distinguishes the Staples contract from the subcontract agreements he has provided to the Union. Devine testified he would tend to believe if Respondent determines the Staples agreement is an Article 32 issue that will have significant impact on the bargaining unit, and the Union' s request for it is ongoing the Respondent would provide the Staples agreement to the Union, subject to a non-disclosure agreement. Devine testified when he turned over subcontracts in the past Respondent was able to negotiate a nondisclosure agreement with the Union. Devine testified when Respondent sends the notice that they have made the final decision to subcontract under Article 32.1.B, which is of significant impact, the letter says, "Awaiting your execution of a non-disclosure agreement, we have available the comparable analysis." He testified then what usually happens is the Union requests the contract as well, and it is provided subject to a nondisclosure agreement.

Devine testified he never previously received a request for all communications between Respondent and a third-party vendor during a pilot phase with the vendor. He testified he has not received, during the pilot stage, requests for discounts provided to the third-party vendor. Similarly, Devine testified he has not received a request for costs analysis or the DAR during a pilot stage, only during a significant impact Article 32.1.B initiative. He testified that information that has been provided to the Union in the Article 32 process has been subject to a

[8] Respondent submitted into evidence arbitrator Goldberg's decision dated March 4, 2013. The SIAG committee decision concerning Staples was made in December 2012.

nondisclosure agreement.

Code testified he participated in a collaborative effort, along with Devine, in determining what was to be redacted from the Staples agreement in terms of what was provided to the Union. He testified that Staples had an investment in the outcome. Code testified he sought support from counsel and labor relations at Respondent to help understand this process. Code testified it was a matter of going through question by question, figuring out the implications as to the relationship governed by the agreement with Staples and what latitude Respondent had in providing information so it did not appear they were in breach of the agreement with Staples.

Code testified that in responding to the information requests he had never received a letter asking for detailed information about the partner portfolio he manages. Code testified Respondent has thousands of partners. Code testified that when Respondent rolled out Office Depot, Code never received a formal letter stating that Code needed to provide the Union with all of this information. Code testified this is the first time he received an information request from the Union. However, Code testified Respondent has never previously structured a business deal the way it has with Staples in that with Staples they are not using a managed services agreement. Code testified the managed services agreement is an agreement used to procure goods and services by the federal government. Code testified the agreement with Staples is a marketing deal, and Staples compensation is in the form of discounts. Code testified they have structured this as a licensing agreement, a retail agreement where Staples is putting a lot in the game in the hope that the business model works for both of them.

Code testified that, at some point, if Respondent provides a notification under Article 32 the Union is going to be entitled to cost information concerning Staples. As to the confidentiality of cost information Code testified, "I think when we make a determination—and these are two separate things. One, we're in test and we feel fairly confident that this has no or little impact on the bargaining unit. But if we do feel like that this has merit and we identify the fact that there might be a consequence to expansion, we would certainly provide any information that would be required in order for us to fill our obligations within the agreement." When asked the question that "Not all cost information is per se confidential." Code testified, "Correct." However, Code testified he did not have a law degree.

Code testified the Staples pilot will be deemed a success and likely to expand based on what impact it has on Respondent's market share for mailing and shipping. Code testified if it is a success and Respondent expands they have modeled the program expand to all of Staples locations. Code testified if the program is successful by around the end of 2015 there is a possibility of Respondent being at 1300 Staples locations. Code testified if they determine the pilot program is a success there could be a number of different scenarios. If they receive feedback that Staples wants to move forward with the program, then Respondent would figure out what the terms would be. He testified Respondent would have to determine whether this has a significant impact on the unions. Code testified different scenarios could unfold as they might make a determination the test is insufficient and Respondent would expand to other locations different than the markets currently in place. He testified if Respondent develops a comfort level and an understanding, then Respondent would seek to see what impact this would have on the unions and follow the rules that govern that relationship.

Code testified when Respondent makes the determination that this pilot has ended, and if both parties are interested parties in moving forward they would stop the expansion process. Code testified, while it is not his decision whether to expand, it is his understanding there is a process in place that Respondent needs to adhere to, and part of that would be doing the comparative analysis with the Union if Respondent determined there is a significant impact on the bargaining unit. He later testified he did not definitely know whether Respondent would stop expansion while the process with the Union goes on. He testified it was his understanding it would stop, "which is not an expert opinion." Code testified there was a chance they would start a program to expand to all 1300 stores, but "I'm pretty sure it would be contingent upon outcomes of discussions with the Union."

Respondent submitted into evidence 24 pages of an arbitration by Steven Goldberg dated March 4, 2013. Article 32 of the collective-bargaining agreement is entitled, "Subcontracting." In the award, the arbitrator concluded there is nothing in the text of contract Article 32.1.B or Article 32.2 entitled "Motor Vehicle Craft-Highway Movement of Mail" or the history of those articles that would lead to a conclusion that a proposed subcontract that would have a significant impact on bargaining unit work is excluded from article 32.1.B because it deals with the highway transportation of mail. The arbitrator concluded that Article 32.1.B deals with subcontracting which will have a significant impact on bargaining unit work, while Article 32.2 deals with subcontracting which will have a lesser effect on bargaining unit work. The arbitrator noted at page 10 of his decision that concerning contracts under Article 32.1.B which would have a significant impact on bargaining unit work the Postal Service is now obliged to:

> . . . meet with the Union while developing the initial Comparative Analysis report. The Employer will consider the Union's views on costs and other factors, together with proposals to avoid subcontracting and proposals to minimize the impact of any subcontract. A statement of the Unions views and proposals will be included in the initial Comparative Analysis and in any Decision Analysis Report relating to the subcontracting under consideration. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union.

In the award the arbitrator concluded that for contracting to be deemed to have a significant impact the contracting could be limited to one state and still meet that requirement in that instance it was the state of California. The arbitrator noted the proposed contracting, although regional in scope, would displace in excess of 800 bargaining unit employees and once the contracting occurred the operation would not return. The arbitrator concluded the contracting if implemented would have a significant impact on bargaining unit work and that as a result Respondent must comply with Article 32.1.B prior to making a

final decision on whether or not the work will be contracted out.

In the award, the arbitrator rejected Respondent's argument that the "Contracting or Insourcing of Contracted Service" MOU applied only to Article 32.1.B situations that is where it was determined that the contracting had significant impact on bargaining unit work in accordance with Article 32.1.B. The arbitrator concluded the MOU applied to estimated costs as opposed to actual costs based on the timelines as defined in Article 32.1.B. and Article 32.2, whichever one applied to the contracting at issue. The arbitrator stated at page 23–24:

> Conversely, I reject the argument which I understand the Postal Service to be making, that the Contracting MOU leaves untouched the decisions of Arbitrators Snow and Mittenthal cited in note 7 to the extent those decisions held that the sole contractual obligation of the Postal Service, when deciding whether or not to contract out highway transport work, is to give due consideration to the five factors set out in Articles 32.1 or 32.2 (depending on whether the contract would have a significant impact on bargaining unit work), and that if the Postal Service has done so it may contract out even if the cost of doing so is greater than the cost of keeping the work in-house. While those decisions may have been contractually sound at the time they were rendered, they do not survive the Contracting MOU.
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> Hence, the Postal Service can no longer justify contracting out work that would be less expensive to keep in-house on the ground that it has given due consideration to cost as well as the other Article 32.1 or 32.2 factors. To be sure, each of those factors must be considered but if factors other than costs do not rule out keeping work in-house, and the cost of keeping work in-house would be less than contracting out, both the text and the bargaining history of the Contracting MOU require that the work be kept in-house.

C. Analysis

1. The requested information is relevant to the Union's representational functions

Under Section 8(a)(5) of the Act, an employer is obligated to provide a union, upon request, relevant information needed to properly perform its duties as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)). When a union's requested information pertains to employees within the bargaining unit, the information is presumptively relevant and the employer must provide it. Where the requested information is not presumptively relevant, it is the union's burden to demonstrate relevance. *Disneyland Park*, 350 NLRB 1256, 1257 (2007). A union satisfies its burden by demonstrating a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra. The Board in *Disneyland Park*, *supra* at 1258 stated:

> Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant. Therefore, a union seeking such information must demonstrate its relevance. (*Richmond Health Care,* 332 NLRB 1304, 1305 fn. 1 (2000).
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> The Board uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. Id. To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information or, (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. See *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018–1019 (1979), enfd. in relevant part 615 F.2d 1100 (8th Cir. 1980). Absent such a showing, the employer is not obligated to provide the requested information.

In assessing the relevance of requested information a union claims is necessary to investigate whether an employer has violated a collective-bargaining agreement, "the Board does not pass on the merits of the union's claim… thus, the union need not demonstrate that the contract has been violated in order to obtain the desired information." *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990). Information requested to enable a union to assess whether a respondent has violated a collective-bargaining agreement by contracting out unit work and, accordingly, to assist a union in deciding whether to resort to the contractual grievance procedure, is relevant to a union's representative status and responsibilities. See, *AK Steel Corp.,* 324 NLRB 173, 184 (1997).

The Board has held a respondent can be apprised of the relevancy of requested information through the testimony of union officials at the unfair labor practice hearing. See *National Grid USA Service Company Inc.,* 348 NLRB 1235, 1246–1247 (2006); *Ormet Aluminum Mill Products*, 335 NLRB 788, 802 (2001); *Barnard Engineering Co.,* 282 NLRB 617, 620 (1987); *Oil Workers Local 6-418 v. NLRB,* 711 F.2d 348, 363 fn. 40 (D.C. Cir. 1983); and *Ohio Power Co.*, 216 NLRB 987, 990–991 fn. 9 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976), the latter case holding the adequacy of information requests to apprise a respondent of the relevancy of the information must be judged in the light of the entire pattern of facts available to the respondent. It was found there the respondent was, at a minimum, apprised of the relevancy of the requests by the testimony of the union officials, and the respondent's continuing refusal to accede to those requests could no longer be attributed to inadequacy of communications.

The Board has held that the inclusion of a union's right of certain specified information in a collective-bargaining agreement does not constitute a waiver of its more general right under the Act to receive relevant information. See, *Ormet Aluminum Mill Products,* 335 NLRB 788, 804–805 (2001); *King Broadcasting Co.,* 324 NLRB 332, 337 (1997); *Postal Service,* 308 NLRB 358, 359 (1992); *Chesapeake and Potomac Telephone Co.,* 259 NLRB 225, 229 (1981), enfd. 687 F.2d 633

(2nd Cir. 1982);[9] and *Globe-Union, Inc.,* 233 NLRB 1458, 1460 (1977).

In *National Grid USA,* supra, a case involving subcontracting the Board held that a union, upon establishing relevance, was entitled to "requests for proposals" sent to potential subcontractors, and the actual contracts with the winning subcontract bidders. In *Ormet Aluminum Mill Products Corporation,* supra, the Board approved the finding regarding an information request pertaining to subcontracting that the respondent employer was required to provide the union with such information as the subcontract, a copy of the prints, sketches, or manufacturing instructions supplied by the respondent employer to the subcontractor, a copy of all correspondence between the respondent employer and the subcontractor, and a copy of all invoices from the subcontractor for a specified time period. See also, *ATC/Vancom of Nevada,* 326 NLRB 1432, 1433 (1998) (any and all correspondence, tangible documents, and financial information concerning subcontracting to be provided); and *A.O. Smith Corp,* 223 NLRB 838, 841 (1976).

The Board has found that subcontracting of unit work impacts a bargaining unit even when unit employees do not lose employment or have reduced wages or hours as a result of the contracting. In *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 1–3 (2014), the Board majority stated:

> The judge found that the Respondent did not unlawfully refuse to bargain over its decision to have RJR Trucking drivers deliver Unified products directly to its stores, because the General Counsel failed to show that this decision had a "material, substantial and significant" impact on drivers' terms and conditions of employment. She found that no unit drivers were laid off and that the drivers' wages and hours were not significantly affected.
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> We disagree with the judge's conclusion. By eliminating cross-docking, the Respondent assigned delivery work to a subcontractor, specifically delivery of Unified products from the DC to stores that was previously performed by unit drivers. Under *Fibreboard,* supra, and *Torrington Industries*, 307 NLRB 809 (1992), the Respondent was required to bargain with the Union prior to contracting out this work. And bargaining is not excused simply because no driver was laid off or experienced a significant negative impact on his employment.
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> The judge's failure to find that the Respondent violated its duty to bargain when it unilaterally eliminated the cross-docking derived from the incorrect premise that the General Counsel must show an immediate impact on the drivers' terms and conditions of work. While it is true, as the judge pointed out, that the subcontracting of this work did not result in layoffs or significantly affect wages and hours of work due to the increase in private-label deliveries, this may have only tempered the immediate impact of the loss of work on unit drivers who had previously transported 88 pallets of Unified products daily. Moreover, as discussed below, the Board has held that when bargaining unit work is assigned to outside contractors rather than bargaining unit employees, the bargaining unit is adversely affected. Absent an obligation to bargain, an employer could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the Union's bargaining strength.
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> In *Overnite Transportation Co*.[FN4] the Board found that an employer had an obligation to bargain over its decision to use subcontractors, rather than unit employees, to handle an influx of new work that unit employees could not handle. Noting that unit employees did not lose work as a result of the subcontracting, it held that its decision in *Torrington*, supra, requiring bargaining over subcontracting is not limited to situations in which it has been affirmatively shown that the employer has taken work away from current bargaining unit employees. In so finding, the Board reasoned:
>
>> At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit. 330 NLRB at 1276.
>
> The Board reached similar conclusions in *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc*., 346 NLRB 696, 702–703 (2006). In both cases, the Board concluded that even absent an affirmative showing that subcontracting caused the layoff or job loss of current employees, issues amenable to the collective-bargaining process remained, such as the adjustment of unit employees' workloads or the reemployment of terminated bargaining unit members.

Similarly, in *Ohio Power Co.* supra at 992–994, two unions

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[9] In *Chesapeake and Potomac Telephone Co.,* supra., at 227, although the underlying grievance was pending arbitration and the information request was repeated in the form of a subpoena signed by the arbitrator, the respondent's argument that the information request was barred because it constituted pre-arbitration discovery was rejected by the judge, as approved by the Board, with the judge stating:

> It has been held numerous times that the duty to supply information extends to a request for material to prepare a grievance for arbitration. The *Fafnir Bearing Company*, 146 NLRB 1582, 1586 (1964), enfd. 362 F.2d 716, 721 (2d Cir. 1966); *St. Joseph's Hospital (Our Lady of Providence Unit)*, 233 NLRB 1116, 1119 (1977); *Designcraft Jewel Industries, Inc.*, 254 NLRB 791 (1981); *The Kroger Company*, 226 NLRB 512 (1976); *Fawcett Printing Corporation*, 201 NLRB 964, 972–973 (1973); *Metropolitan Life Insurance Company*, 150 NLRB 1478, 1485–86 (1965); *Cook Paint & Varnish Co.* v. *N.L.R.B.*, 648 F.2d 712, 712–716 (D.C. Cir. 1981).[FN7]

Along these lines, the judge stated, "Although the procedural rights in the conduct of the arbitration hearing may be governed by the AAA rules, there is nothing therein which abolishes the rights for the production of material which the Union may find necessary to decide whether to pursue a grievance to arbitration." *Chesapeake and Potomac Telephone Co.,* supra, at 229.

were involved in an economic strike, upon the ending of which they reached collective-bargaining agreements with a respondent employer, the terms of which were approximately a year and one-half. The strike ended with some of the strikers being permanently replaced and placed on a preferential recall list. The collective-bargaining agreements contained subcontracting provisions precluding subcontracting which would cause the layoff or discharge of employees. Following the strike, the unions made a request for contracting information arguing that the placement of strikers on a preferential hire list was the equivalent of a layoff, making the information request pertaining to the contract relevant under the contracts subcontracting language. In concluding the information was relevant under said provision it was stated it was not the Board's job to determine whether the unions' contractual position was correct. Rather, that was for the arbitrator. It was only the Board's role to facilitate the unions' acquisition of the information for the unions to determine whether the further processing of their grievances over the dispute was warranted. However, in addition to the contractual dispute it was noted that the unions have another duty stating the "the unions are obliged to police the Respondent's actions to assure that employment opportunities, including promotional opportunities, within the appropriate units are not foreshortened or curtailed by actions of the Respondent. Thus, however legitimate the Respondent's motives, it is conceivable that the subcontracting of work performable within the unit might constrict the possibilities of employment within the unit, including the possibilities of promotion of unit employees." It was stated in *Ohio Power and Light* that:

> It is consequently concluded that the information requested by the Charging Party in its letters to the Respondent of February 10 and April 16, 1974, is relevant and essential to the locals' performance of their obligations as bargaining representatives in three respects: (1) Protection of and effectuation of the rights of employees on the preferential hiring list in accordance with the principles of *Fleetwood Trailer,* (2) protection and maintenance of work opportunities and promotion possibilities within the appropriate unit, (3) determination as to the merit, under the contract, of the grievances filed by employees in February, March, and April relating to employees replaced or displaced as a consequence of the strike. Id. at 994.

In the instant case, Respondent began studying in earnest in August 2011 retail applications for the sale of postal products as performed in Europe, Canada, Australia, and New Zealand. Code testified this is the way a significant portion of those domestic populations receive their retail postal services. Thus, Respondent began to develop a sustainable strategy for a retail network outside of its post offices. Code testified that in January 2012 Respondent released a request for information to potential retail partners. It went to 75 of the largest retailers in the country such as the largest big box stores, grocery chains, drugstores, and office superstores. In August 2012, Staples contacted Respondent expressing an interest. Code testified Respondent settled on a strategy in about September 2012, and from September 2012 to about January 2013, they were able to do a competitive analysis, market research, and testing to verify their course of action. Code testified Respondent used a pilot plan because any rollout would have significant cost consequences to the organization and if it rolled out and did not perform to the level of their assumptions then it would be a bad decision to engage in it on a larger scale.

Code testified that prior to beginning the pilot with Staples, Respondent, on December 14, 2012, submitted a statement to SIAG, a committee of Respondent's officials described in the parties' collective-bargaining agreement. The statement to SIAG contained an outline of what Respondent was trying to do with the retail pilot. The attached memo states, in part:

> The Approved Shipper Plus Program aims to establish USPS customer access points in leading national and regional retailer's store locations nationwide. In order to determine whether to launch the full-scale program, USPS will conduct a program pilot beginning in April 2013 at 200 retail locations and select markets. The pilot will enable USPS to collect customer, transactional, and operational data to measure the impact and validate operational and financial assumptions before potentially launching the full-scale program.

By letter dated December 18, 2012, SIAG wrote that SIAG had determined that the retail program as described "will not have a significant impact on the bargaining unit."

By letter dated March 14, from Devine to then Union President Guffey, Devine stated, "the Postal Service intends to initiate a pilot of the Partner Post program, to establish customer access points in leading national and regional retailer's store locations to offer Postal Service products and services. The pilot is scheduled to begin in April/May at approximately 185 locations and select markets and end after approximately one (1) year. The purpose of the pilot will be to collect customer, transactional, and operational data to measure the test impact and validate operational and financial hypotheses. It is anticipated that the information from this data will allow the Postal Service to determine the suitability of possible further expansion. No significant impact to the bargaining unit is anticipated."

By letter dated October 2, Devine wrote Duffey that, this was a follow up to the March 14, letter. He stated Respondent plans to launch a one-year pilot program at 84 Staples locations in five media markets, which include Atlanta, Pittsburgh, San Diego, San Francisco and Worcester. Customers of the participating Staples stores will have access to a simplified product portfolio containing our most popular products and services. Products and services offered will include: stamps, standard post, priority mail, priority mail international, first-class mail, global expressed guaranteed, priority mail express, priority mail express international, first-class mail international, and first-class package international service. It was stated that "a soft launch is planned for mid-October with Grand Openings scheduled on or about November 15. There is no anticipated impact to the bargaining unit at this time." Code testified the Staples pilot model includes weighing small packages and selling stamps. He testified the Staples service is a simplified version of the service Respondent provides customers at its post offices. He testified Respondent wanted to create a simple

portfolio that would be easy to transact for retailers and their employees and would still cover the majority of transactions needed in the marketplace. He testified there are a lot of postal transactions conducted at the Staples stores.

On November 22, the Union sent a 27 paragraph information request to Respondent the subject of which was entitled, "USPS October 2, 2013 Notice Regarding USPS Plans to Launch a One Year Pilot Program of Partner Post at 84 Staples Locations in 5 Media Markets." Paragraphs 1, 2, 3, 4, 9, 11, 16, 17, 19, and 25 of the information request remain in contention for this proceeding. The Union cited collective-bargaining agreement articles 17 and 31 as the basis of its request, of which article 31 was placed into evidence as part of a joint exhibit by the parties. Article 31 of the agreement provides in part, "The Employer will make available for inspection by the Union all relevant information necessary for collective-bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue processing of a grievance under this Agreement." It also states, "Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended."

By letter dated January 2, 2014, Devine gave a substantive response to the Union's November 22 information request. Devine argued, in part, that because the Staples program is a pilot program, "the information requested in your letter does not appear to be relevant or simply premature in light of the one-year pilot." Moreover, Devine went on to specifically request the relevance of paragraphs 1, 2, 9, 11, 17, and 25 of the Union's request, with Devine citing Article 31.3 of the collective-bargaining agreement.

By letter dated January 17, 2014, Dimondstein responded to Devine's January 2, 2014 letter. Concerning, Devine's assertion that the requested information was not relevant or premature, Dimondstein stated, "Nowhere does the National Agreement exempt so-called "pilots" from application of the National Agreement. Staples employees are now clearly performing bargaining unit work and more will do so in the future. There also possible violations of Article 32 and memoranda of understanding addressing contracting out and the preservation and return of bargaining unit work; handbooks or manuals MOUs addressing Contract Postal Units (CPUs); Article 5 (unilateral changes in compliance with law); and perhaps other contract provisions, depending on what the APWU is able to discern after reviewing the requested information. The Union is entitled to information that relates to potential grievances and not only actual grievances." Dimondstein offered further clarification as to paragraphs 9 and 10 of the Union's request for discounts that the Postal Service will provide Staples and the range of prices for postal products. He stated, "First, discounts may have the result of incentivizing Staples to the detriment of Postal Service retail facilities and employees who staff them. An example would be if Staples offers "points" or other rewards under customer loyalty programs that will include purchases of postal products and services. Please confirm if this is so and if so, and provide details. Second, certain prices and discounts may violate provisions of the Postal Reorganization Act and therefore violate Article 5. The Postal Service says that its products and services will be sold at published prices. Similar to the clarification in the preceding paragraph, the Postal Services compensation to Staples (paragraph 11) may similarly incentivize Staples to the detriment of Postal Service retail facilities and the employees who staff them." Diamondstein also stated, "As for the Union's request for information about training Staples employee training (paragraphs 17, 18, 19 and 20), this information will help the Union understand whether the safety and security of the mail as mandated in statutes and regulations is being safeguarded. Because Staples is a receptacle for mail, the safety of postal employees could be compromised if Staples employees are not adequately trained on mailable matter. If postal employees are providing training or assistance to Staples employees, their working conditions are affected.

By letter dated January 24, 2014, the Union initiated a "National Dispute" concerning "Staples-Partner Post". The letter stated that:

> The Postal Service has embarked on an implementation of the program with Staples in excess of 80 of its stores, under a National Sales Agreement (NSA). The stores will contain post offices in which most postal products will be sold to the public. These post offices will use equipment provided by the Postal Service. City letter carriers will pick up the mail from Staples post offices.
>
> The APWU has asked for information about the arrangement with Staples, including the NSA, but to date the Postal Services provided only the Partner Post PowerPoint, the Request for Information (RFI) addressed to "potential partners for the U.S. Postal Service Retail Partnership Program," and a chart purporting to be the proximity of the Staples stores to postal facilities. The Union is entitled to an adverse inference, that the information requested, if produced, would have supported the Union's allegations and been adverse to the Postal Services allegations.
>
> This program constitutes contracting out in violation of Article 32, including but not limited to the Union's right to advance notification and to meet and be involved in early stages of consideration of contracting out, and the following memoranda of understanding in the National Agreement: "Contracting or Insourcing of Contracted Services" (page 369), "Consideration of National Outsourcing Initiatives" (P 369–370).
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> The work being done at Staples stores' is work that must be assigned to the bargaining unit under Article 1.5 and the "New Positions and New Work" MOU (page 298).
>
> To the extent that the Postal Service considers these Staples post offices to be Contract Postal Units (CPUs), the Postal Service failed to treat them in accordance with handbooks and manuals addressing CPUs in violation of Article 19. The Postal Service also failed to meet to discuss and consider options for addressing the provision of retail services in those locations" in accordance with the "Contract Postal Units" MOU (pp. 371–372).
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> The transportation of mail matter from Staples stores to postal

facilities is of mail in bulk that must be assigned to the Motor Vehicle Service craft.

I find that the Union has established the relevancy of the requested disputed information. Code's testimony reveals that Respondent has been studying a retail expansion program since August 2011. Thus, when on October 2, 2013, Respondent notified the Union that Respondent intended to launch a one year pilot program at 84 Staples stores, Respondent had already spent substantial time and effort studying the implementation of such a program. Moreover, the pilot spanned five states in major population areas, and Respondent was having Staples employees perform a broad array of bargaining unit work creating alternative retail outlets through Staples performing many of the central functions of bargaining unit employees performed at Respondent's post offices. The Staples stores were in very close proximity to Respondent's locations where bargaining unit employees were performing essentially the same work. While Devine stated in his October 2 letter that there was no anticipated impact on the bargaining unit at this time. He did not inform the Union that the SIAG committee had met and determined there was no significant impact as per Article 32(B) of the collective-bargaining agreement. Moreover, Tabbita credibly testified that he was not informed of such a determination of the SIAG committee until April 1, 2014, the opening day of the unfair labor practice trial. This information is important because, Tabbita's testimony, which was agreed to by Devine, was that the Union could dispute through the parties' grievance procedure a SIAG committee determination of no significant impact pertaining to subcontracting.

In *Mi Pueblo Foods,* 360 NLRB No. 116 (2014), the Board majority reversed the judge in a case involving a unilateral change pertaining to subcontracting and found a violation by the respondent's failure to bargain. The judge had found there was no significant impact by the subcontracting on bargaining unit work because no unit drivers were laid off and the drivers' wages and hours were not significantly affected. The Board stated, "We disagree with the judge's conclusion." The Board found that "The judge's failure to find that the Respondent violated its duty to bargain when it unilaterally eliminated the cross-docking derived from the incorrect premise that the General Counsel must show an immediate impact on the drivers' terms and conditions of work. The Board citing precedent stated the Board has held that when bargaining unit work is assigned to outside contractors rather than bargaining unit employees, the bargaining unit is adversely affected. It was stated the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.

In the instant case, Tabbita testified it is the position of the Union that the Staples pilot program was having a significant impact on bargaining unit work at the time of the hearing. He testified it was not the Union's view that they had to wait for SIAG to declare a particular program by Respondent as having a significant impact before the Union could request information about it, or file a grievance over the program. He testified the Union can file a dispute when they have a concern that the contract is violated as to an outsourcing that should not have happened and/or the Union should have received notice of it. He testified the Union is "free to grieve that the contract's been—violated. One, we didn't get notice, and two, it was inappropriate for whatever reasons we can justify." Tabbita testified in determining whether there is significant impact, the Union looks at the potential for growth in the bargaining unit and the potential for negative impacts in the bargaining unit. He testified they would be looking at the number of transactions, the volumes of packages and so on, to see if the Union is involved in the Staples operation, are they getting more work, and if the bargaining unit is not involved in the Staples operation, what are the negative impacts that might occur.

Here the record revealed that a large number of the 80 to 84 Staples stores used in the pilot program were located less than a mile from the nearest post office. Tabbita testified that some of the locations were literally across a parking lot or across a street. He testified the Union's concern is that the traffic to that Staples store may be pulling transactions away from the Postal Service retail unit. Tabbita testified Respondent has a point-of-sale system which records every transaction. Respondent is able to take the time by day, by hour, and multiply out the number of transactions times the allotted time, which allows Respondent to create something called earned hours showing productive time for those hours. Respondent attempts to bring staffing time down as close as they can to their earned hours. If the bargaining unit loses transactions to Staples stores, they lose time, and ultimately the staffing mechanism is going to take hours out of the unit. Tabbita testified sometimes this will result in people leaving the station or branch, and in some case this may help justify consolidating stations or branches. In fact, Code's testimony reveals the number of posts offices has declined by about 1600 units from the year 2000 to the year 2013.

Thus, whether or not the SIAG committee was correct in its assessment that the ongoing contracting to Staples has a significant effect on the bargaining unit, the requested information was relevant to the Union to decide whether to dispute such a determination, as well as to the Union's ability to generate information and studies to argue on behalf of the unit employees that some or all of the disputed work was less expensive, the same cost, or safer if performed by current in house employees with regard to whether Respondent continued the pilot or decided to expand it. For as the Union argues Article 32 states the Union will be given advance notice at the national level when subcontracting which will have a significant impact on the bargaining unit is being considered and the Respondent will meet with the Union in developing the initial comparative analysis. Here, the evidence reveals the Respondent was using information obtained from the pilot to decide whether to expand the subcontracting from 80 Staples stores to 1300 of those stores. Thus, there is clearly an argument contracting with a national impact on the unit was being "considered" even assuming arguendo it was not already taking place with the existing pilot. There are also provisions in the "Consideration of National Outsourcing Initiatives" MOU relating to the Union's involvement "at an early stage of the process" which has created an area of dispute between the parties as to the time of the

Union's involvement in the process should begin. Here, the record indicated that as of March 2014, if not sooner, Staples had indicated a desire to expand the pilot program, and if the program was expanded, as per Code's testimony it would have been expanded to some 1300 Staples locations. Thus, the requested information was relevant on several points, including one to dispute any SIAG determination that the ongoing program at 80 or more Stapes stores in five states stores did not constitute a significant impact on the bargaining unit. Two, so the Union would have maximum time to consider and develop alternate proposals to Respondent's possible plan to expand the program to 1300 locations at a time when the Union's input had the chance of greatest impact in preserving bargaining unit positions, current and future. Three, the MOU regarding, "Contracting or Insourcing of Contracting Service," provides that "It is understood that if the service can be performed at a cost equal to or less than that of the contract service, when a fair comparison is made of all reasonable costs, the work will be performed in-house."[10] Four, Article 31 of the collective-bargaining agreement gave the Union the right to request information to in essence police the agreement by deciding whether to file a grievance. This article allows the Union to request information to decide whether the agreement has been violated and/or to file a grievance under the subcontracting provisions mentioned in this paragraph at a minimum.

Thus, I find the Union's November 22 information request citing Article 31 to Respondent giving it the right to obtain all relevant information necessary for collective-bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue processing of a grievance under this Agreement was sufficient to place Respondent on notice of the relevance of the requested information, particularly given the sophistication of the parties as well as Devine's admission that the Union has a right to grieve the initial SIAG determination as to the impact of the disputed contracting.[11] Given the subcontracting Article and MOU's in the contract, I find that the relevance of the requested evidence was self evident, but if not the request was explained by the citations of Article 31 in the request.[12] In this regard, the subcontracting was ongoing at the time the Union filed its information request, and it was obvious, giving the subcontracting clause and the MOU's in the collective-bargaining agreement, that the Union was requesting the information to determine if those provisions had been violated, to police the agreement and to decide whether to file a grievance.

Moreover, the Union did not stop with its November 22 letter in terms of a relevancy explanation for the information sought. When Respondent subsequently requested an explanation of the relevance of the information Respondent was given a further explanation in Dimondstein's January 17, 2014, letter where he explained that "pilot" programs are not exempted from the national agreement, that Staples employees are now performing bargaining unit work and more will do so in the future, and where he stated there were possible violations of Article 32 and MOUs addressing contracting out and the preservation and return of bargaining unit work; handbooks or manuals MOUs addressing Contract Postal Units (CPUs); Article 5 (unilateral changes in compliance with law); and perhaps

[10] In this regard, in his March 2013, award, submitted into evidence by Respondent, arbitrator Goldberg concluded that the referenced MOU was not limited to Article 32.1.B situations, that is, those having a significant impact on bargaining unit work. Thus, the Union has an argument that the Staples pilot program was violative of the contract, if it can be shown that the cost would have been equal or less if the work at Staples was performed in house, regardless of whether it is concluded that the pilot program had a significant impact on the unit. Arbitrator Goldberg also concluded the Union was entitled to estimates in making the cost comparison calculations.

[11] While Article 32.1.B refers to a comparative analysis be generated in the subcontracting process, and that analysis is also mentioned in one of the contractual MOUs, nothing in the collective-bargaining agreement limits the Union's statutory right to request information, or otherwise limits the timing of that request. See, *Ormet Aluminum Mill Products,* 335 NLRB 788, 804–805 (2001); *King Broadcasting Co.,* 324 NLRB 332, 337 (1997); *Postal Service,* 308 NLRB 358, 359 (1992); *Chesapeake and Potomac Telephone Co.,* 259 NLRB 225, 229 (1981), enfd. 687 F.2d 633 (2nd Cir. 1982); and *Globe-Union, Inc.,* 233 NLRB 1458, 1460 (1977). This is particularly so when Article 31 is referenced stating, that "Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended."

[12] Where the circumstances surrounding an information request are reasonably calculated to put an employer on notice of a relevant purpose which the union has not specifically spelled out, the employer is obligated to divulge the requested information. *Brazos Electric Power Cooperative, Inc.,* 241 NLRB 1016, 1018–1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980). The sufficiency of the request is not determined solely from the request itself, but is judged in light of the entire pattern of facts available to the employer. *Ohio Power Co.,* 216 NLRB 987, 990 fn. 9 (1975). See also, *Pulaski Construction Co.,* 345 NLRB 931, 936. Here, the cited article in the collective-bargaining agreement gave the union the right for information to police the agreement. The Respondent had recently notified the Union of Staples subcontracting. Devine admitted the Union had the right to challenge Respondent's determination of no significant impact. I find that Devine was aware or should have been aware based on the circumstances before him of the relevance or potential relevance of the Union's November 22 request at the time he received it. The circumstances in *Disneyland Park,* 350 NLRB 1256 (2007), cited by Respondent are inapposite to those here. In *Disneyland Park, the* subcontracting provision only precluded the respondent from subcontracting if it resulted in the "termination, layoff, or failure to recall unit employees from layoff," and the union there never claimed that any of those events took place rendering the requested information as not relevant to any contractual term. Here, for the reasons stated the contractual subcontracting provisions were much more expansive and subject to obvious and legitimate dispute between the parties. Similarly, I do not find that Respondent's citation to *United States Postal Service,* 352 NLRB 1032 (2008), fn. 1, requires a different result. There, the Board refused to rely on the judge's interpretation of Article 32 of the collective-bargaining agreement, and conclusions regarding confidentiality. Rather, the Board adopted the judge's finding that the Union failed to establish the relevancy of an unredacted form where it purportedly sought the information contained therein to compare it to that on another form which the judge concluded did not exist. The judge also found that the Postal Service furnished the union with alternate information with which it could perform the analysis it sought to do. These are circumstances and facts not present here. I also note this case cited by Respondent issued by a two member Board panel, which was later found not to be fully constituted.

other contract provisions, depending on what the APWU is able to discern after reviewing the requested information. Dimondstein reiterated that the union is entitled to information that relates to potential grievances and not only actual grievances. In fact, on January 24, 2014, the Union initiated a "National Dispute" concerning Respondent's activity with Staples. Therein, it is alleged, concerning Respondent's program with Staples, that:

> This program constitutes contracting out in violation of Article 32, including but not limited to the Union's right to advance notification and to meet and be involved in early stages of consideration of contracting out, and the following memoranda of understanding in the National Agreement: "Contracting or Insourcing of Contracted Services" (page 369), "Consideration of National Outsourcing Initiatives" (P 369–370).
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> The work being done at Staples stores' is work that must be assigned to the bargaining unit under Article 1.5 and the "New Positions and New Work" MOU (page 298).
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> To the extent that the Postal Service considers these Staples post offices to be Contract Postal Units (CPUs), the Postal Service failed to treat them in accordance with handbooks and manuals addressing CPUs in violation of Article 19. The Postal Service also failed to meet to discuss and consider options for addressing the provision of retail services in those locations" in accordance with the "Contract Postal Units" MOU (pp. 371–372).
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> The transportation of mail matter from Staples stores to postal facilities is of mail in bulk that must be assigned to the Motor Vehicle Service craft.

I find the Union's statements in its November 22, and the nature of the information requested, given Respondent's knowledge of the collective-bargaining contract, was sufficient to place Respondent on notice that the Union by its information request was seeking relevant and/or potentially relevant under the Board's discovery standards for requested information to police the parties' agreement and to decide whether to file a grievance. See, *Disneyland Park,* 350 NLRB 1256 (2007). In assessing the relevance of requested information a union claims is necessary to investigate whether an employer has violated a collective-bargaining agreement, "the Board does not pass on the merits of the union's claim… thus, the union need not demonstrate that the contract has been violated in order to obtain the desired information." *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990). Information requested to enable a union to assess whether a respondent has violated a collective-bargaining agreement by contracting out unit work and, accordingly, to assist a union in deciding whether to resort to the contractual grievance procedure, is relevant to a union's representative status and responsibilities. See, *AK Steel Corp.,* 324 NLRB 173, 184 (1997); and *Island Creek Coal Co.,* supra at 490. The nature of the information sought here was relevant to the Union's policing its collective-bargaining agreement, and thereafter for the prosecution of its January 24, 2014 grievance. See, *National Grid USA,* 348 NLRB 1235 (2006) and *Ormet Aluminum Mill Products Corporation,* 335 NLRB 788 (2001). Moreover, Respondent's initial assertion of not knowing the relevance of the requested information was certainly cured by the pronouncements contained in Dimondstein's January 17 letter, and the positions maintained in the Union's January 24 grievance. However, I find the relevance of the requested information was apparent at the time of the Union's November 22 request. Accordingly, I find the Respondent was aware of the relevance of the information listed paragraphs 1, 2, 4, 5, 9, 11, 16, 17, 19, and 25 of the Union's November 22 information request at the time it received the request.[13]

2. Respondent's defenses to the production of the requested information

Since I find the General Counsel has established the requested information is relevant the Respondent must produce it, unless it raises and substantiates a legitimate defense to its production. Respondent has raised defenses discussed here that the production of some of the information is burdensome and that some of it constitutes confidential information, or both.[14]

a. Respondent's burdensomeness defense

In *Conditioned Air Sys.,* 360 NLRB No. 97, slip op. 4 (2014), the Board approved the following concerning an alleged burdensome request for information:

> If an employer declines to supply relevant information on the grounds that it would be unduly burdensome to do so, the employer must not only timely raise this objection with the union, but also must substantiate its defense. Respondent has done neither. Respondent never advised the union that its request was unduly burdensome, and never sought clarification from the union in order to narrow the request, *Pulaski Construction Co.,* 345 NLRB 931, 937 (2005). There is no doubt that production of the information may impose strains on an employer, but that consideration does not outweigh the union's right to the information requested. *H.J. Scheirich Co.,* 300 NLRB 687, 689 (1990).

Here the Union made its request for information on Novem-

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[13] I also note Devine did not specifically dispute the relevance of paragraphs 4, 16, and 19 of the Union's request in Devine's January 2, 2014, letter to Dimondstein providing Respondent's response to the request. Moreover any doubt as the relevance of the any of the disputed information was explained by the union officials during their testimony at the hearing. See, *National Grid USA Service Company Inc.,* 348 NLRB 1235, 1247 (2006); *Ormet Aluminum Mill Products*, 335 NLRB 788, 802 (2001); *Barnard Engineering Co.,* 282 NLRB 617, 620 (1987); *Oil Workers Local 6-418 v. NLRB,* 711 F.2d 348, 363 fn. 40 (D.C. Cir. 1983) and *Ohio Power Co.*, 216 NLRB 987, 990–991 fn. 9 (1975), enfd. 531 F.2d 1381 (6th Cir, 1976).

[14] In addition to the two defenses discussed in this section of the decision, Respondent raised three other defenses in its answer to the complaint, two pertaining to relevancy which were parenthetically rejected in the prior section of this decision wherein I concluded relevancy of the requested information has been established. Respondent's other argument that the Union refused Respondent's offer to bargain over the information request is discussed in a subsequent section of the decision.

ber 22. Respondent did not give a substantive response to that request until January 2, 2014. In Devine's response, he stated pertaining to paragraphs 1, 2, and 9 that the "request appears to be overly broad and unduly burdensome. Please specify the information that the union is seeking. Once a response has been received by the Postal Service from the APWU, the information request will be revisited."

I do not find merit to Respondent's burdensomeness defense. As to paragraph 1, the Union requested a "Copy of any/all agreements between the Postal Service and Staples regarding Staples offering postal products and services at Staples locations." I find the Union's request to be quite specific, and in need of no further explanation. Respondent's asking for a further explanation serves to undermine its position in refusing to provide the information in the first place. In fact, Respondent eventually tendered a copy of its agreement with Staples, shortly before the hearing which took place on April 1, 2014 to the Union, although it was a heavily redacted version. Respondent raised no testimony at the hearing concerning its burdensome defense concerning the production of that agreement, nor did it claim there were any other agreements with Staples that it did not produce which would be a burden to produce. Devine addressed the burdensome argument to Dimondstein in his letter of January 31, 2014, but he did not argue redacting the Staples agreement constituted a burden rather he argued "Many of the requests are for 'any and all' agreements, solicitations, and correspondence with Staples which lack specificity as to type, subject matter, information needed, and time period. A more-specific request should presumably address the concern we raise." Thus, in the letter, Devine did not mention any concern about the costs of a review or redaction of documents by Respondent of potential confidential information. I find that Respondent failed to establish a burdensome defense for the information sought in paragraph 1 of the Union's request.[15]

In paragraph 2 of the Union's request it asked for "Copy of any/all correspondence between the Postal Service and Staples regarding Staples offering postal products and services at Staples locations." Contrary to Devine's comments in his January 31, 2014 letter, I find the Union's request was specific as to type and subject matter. In fact, I have concluded that Respondent knew exactly what the Union wanted but was merely opposed to providing the Union with the information. Moreover, by Code's testimony the information sought by the Union was somewhat time limited in that he claimed Respondent did not start working on a retail services program until August 2011, and that it was not until September 2012 that Respondent decided to test the concept. Code testified in January 2012 Respondent released a request for information to potential retail partners. Thus, from Code's description the time period of Staples involvement with Respondent was not over that great a duration, and if it was over a greater time than Code described, Respondent neglected to put that into evidence in support of its burdensomeness defense.

Devine testified he met with Code in preparation of Devine's January 2, 2014, response to the Union's November 22 information request. Concerning the Union's request for correspondence with Staples, Devine testified a small team of people from Respondent were in touch with Staples and that it was his understanding that it was about three or four people over a term of several years. Devine testified he was told that the majority of correspondence was by email. Devine testified he did not recall the number of emails or correspondence involved, but testified he was informed of it at one point. Code testified the correspondence is accessible, but the nature of the correspondence is that it covered lot of sensitive data, as there is a lot of information about contract discussions. He testified there are potentially thousands of emails, if you look at everyone who participated. Code testified that conservatively there are probably at least 15 to 20 postal employees in some capacity across the organization that has contributed in some meaningful way to the discussion with Staples. He testified the information contained in the emails is sensitive, in that there are things that went back and forth about the Staples contract, how they were structured, what the discounts would be for the products and services, market initiatives, how they were going to target marketing, how Staples marketing infrastructure works. He testified there was proprietary information Staples is sharing with Respondent, and would have an impact if that was to become public. Code testified the emails themselves would not be hard to retrieve but taking the time to review them to determine what is confidential is a significant problem. Code testified it is beyond just review because making sure there is not a material breach of the agreement with Staples concerning information Staples provided in good faith that Respondent will not disclose information as to how their operations works. Code testified that as to information requested in paragraph 4 there are no other concerns other than what he stated pertaining to paragraph 2. He testified it is just a distinction between the programs, and they are named differently.

First, in his January 2, 2014, response, Devine did not raise a burdensomeness argument concerning paragraph 4 of the Union's request. Second, the Union only asked for correspondence directly between Staples and Respondent, not for internal emails between Respondent's officials, and Devine's testimony that only three or four of Respondent's employees communicated directly with Staples was not contradicted by Code. Code admitted the emails requested by the Union would not be hard to retrieve, but he expressed a concern of the time needed by Respondent's officials to review the emails as to whether they contained confidential information. However, the Union's request had been outstanding since November 22, 2013, yet by April 1, 2014, Respondent still had not gathered the requested emails, which Code admitted would not have been a difficult task. Code's testimony further supports my conclusion that the Union's request was specific enough to alert Respondent of precisely what the Union was looking for. Moreover, Respondent never until the time of Code's testimony specifically

[15] In fact, by letter dated December 4, to Dimondstein, Devine stated "you shall be notified if this request requires remittance on the part of the" Union "for photocopies and or time spent processing the information." Yet, as of the time of the hearing, Respondent had never bothered to notify the Union of any specific costs in obtaining the requested information further undermining any legitimate claim that it was concerned about the purported burdensome nature of the Union's request.

alerted the Union of its concerns about a cost of a review of the correspondence, bothered to make a determination of what those costs would be, or requested the Union to contribute to those costs. Thus, I do not find that Respondent's burdensomeness defense was made in good faith. Rather, it did not want to provide the requested materials and was throwing straw arguments as roadblocks in the way for the Union to obtain them. I would also find that the Union should not be required to contribute to the costs of Respondent's review of its own documents before tendering them to the Union. Respondent had a collective-bargaining agreement with the Union prior to entering its relationship with Staples. It knew it had certain responsibilities to the Union under that agreement and under the Act, which are equal to or of greater import than any private and subsequent agreement it entered with Staples. These are part of Respondent's costs of entering a third party arrangement, which it knew could be challenged by the Union. I do not find that the Union should have to absorb the costs Respondent accrued for entering into a third party contract, or for the cost of Respondent's officials time of reviewing documents to which the Union is statutorily entitled in an effort to sanitize them before presenting them to the Union.

I find the information requested by the Union in paragraph 9 of its request pertaining to discounts provided to Staples was specific and self explanatory. Respondent has raised no argument in support of its burdensomeness claim pertaining to that information put forth in Devine's January 2, 2014, letter. Accordingly, I have considered and rejected Respondent's burdensomeness defense pertaining to any and all of the information requested by the Union on November 22, 2013.[16]

b. Respondent's confidentiality defense

Respondent also argues that certain of the requested information is confidential information as a defense to its disclosure. In *Howard Industries, Inc.,* 360 NLRB No. 111, slip op. at 2 (2014), the Board stated:

> When a union requests relevant but assertedly confidential information,[FN3] the Board balances the union's need for the information against any "legitimate and substantial confidentiality interests established by the employer." *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318–320 (1979). The party asserting confidentiality has the burden of proving that it has a legitimate and substantial confidentiality interest in the information sought, and that such interest outweighs its bargaining partner's need for the information. *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984); *Northern Indiana Public Service Co*., supra at 211. When a party is unable to establish confidentiality, no balancing of interests is required and it must disclose the information in full to the requesting party. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995); *Lasher Service Corp.*, 332 NLRB 834, 834 (2000). See generally *Bud Antle*, 359 NLRB No. 140, slip. op at 9 (2013) (union grieving subcontracting of unit work entitled to requested information on contracts, production, and locations where work performed, etc., where employer failed to substantiate claim that information was trade secret and proprietary); *Bridge, Structural & Ornamental Ironworkers Local 207 (Steel Erecting Contractors),* 319 NLRB 87, 91 (1995) (union that failed to establish that requested information on apprentices' wages and dues was proprietary was ordered to disclose information).
>
> Conversely, where a claim of confidentiality is adequately established, it may be a valid basis for declining to fully produce the requested information. However, the party asserting this confidentiality claim cannot simply refuse to furnish the information. Rather, it has a duty to come forward with an offer to accommodate the request and engage in bargaining to seek a resolution that addresses both parties' needs. See *Tritac Corp.*, 286 NLRB 522, 522 (1987); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991).
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> * * *
>
> Confidential information is limited to a few general categories, including information which would reveal substantial proprietary information, such as trade secrets. *The Southern New England Telephone Co.*, 356 NLRB No. 62, slip op. at 7 (2010). Trade secrets include "formulas, devices, or compilations of data, reasonably calculated to provide their possessor with some business advantage over competitors[.]" *Borden Chemical*, 261 NLRB 64, 82 (1982), enfd. sub nom. *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). Id. at 2 fn. 3[17]

In *Pulaski Construction Co.*, 345 NLRB 931, 937–938 (2005), the following was stated:

> If it is determined that the information sought to be protected is confidential, the issue then becomes whether the defense was timely raised by the employer so that the parties could attempt to seek an accommodation of the employer's confidentiality concerns. It is not enough that an employer raise a confidentiality concern; it must then come forward with some offer to accommodate both its concern and its bargaining obligation.

In *Borgess Medical Center,* 342 NLRB 1105, 1106–1107 (2004), the Board majority stated:

> Nonetheless, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by failing to offer a reasonable accommodation of the Union's request. [FN6] When an employer demonstrates a substantial confidentiality interest, it

[16] To the extent Respondent attempted to establish a burdensomeness defense at the hearing concerning the request in paragraph 4, I find that argument to be never previously raised to the Union, and untimely here. Moreover, substantively, I reject the argument for the same reasons I rejected Respondent's burdensomeness arguments with respect to paragraph 2 of the request.

[17] In *Good Life Beverage Co.*, 312 NLRB 1060, 1060 (1993), the Board majority stated, "Union requests for financial information frequently raise difficult confidentiality questions. See, e.g., *Dubuque Packing Co.*, 303 NLRB 386 fn. 26 (1991). Indeed, there seems to be no question that the additional information the union auditors sought on March 29 was confidential information. Moreover, the auditors requested a great deal of detail. Given the confidential and detailed nature of the information sought, we find that there were substantial and legitimate confidentiality concerns regarding that information."

cannot simply ignore the Union's request for information. It must still seek an accommodation of its concerns and the Union's need for the requested information. 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. *United States Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998) (citing *Tritac Corp.*, 286 NLRB 522, 522 (1987)).

* * *

We conclude, however, that the Respondent's offer failed to adequately fulfill its duty to accommodate. As the Union attorney explained during her discussion with the Respondent's attorney, the Emergency Department director's testimony could not supply the Union with the information it needed to assess Wagner's grievance. The Respondent did not offer to provide any evidence regarding the specific circumstances of previous incidents, which would be necessary to determine whether Wagner had in fact been unfairly treated. (The incident reports, in contrast, provided some description of what each incident involved.) Certainly, the testimony offered by the Respondent would not establish whether other employees had self-reported and, if not, whether failure to do so had been treated as a coverup warranting discipline. [FN7] In a letter subsequent to this conversation between the parties' attorneys, the Respondent simply stated its willingness to discuss the matter and did not offer any specific accommodation. [FN8] We therefore conclude that the Respondent did not adequately offer to accommodate its confidentiality interests and the Union's need, as required under Section 8(a)(5) and (1).

FN8. Although the Respondent had, on previous occasions, given the Union summaries of requested incident reports as well as the names of the employees who filed the reports, the Respondent made no such offer to accommodate here.

* * *

Our dissenting colleague asserts that the finding of a violation here *requires* that we order the Respondent to provide access to the requested information. That assertion is incorrect. We have found that the Respondent refused to bargain in good faith because it refused to offer a reasonable accommodation of the Union's request. If the information were not moot, the appropriate remedy would have been to order the Respondent to bargain with the Union. If bargaining had not resolved the matter, the Board would then balance the interests. *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) ("The appropriate remedy in these cases is to give the parties an opportunity to bargain" over an accommodation). We need not decide these matters because the Union's request is now moot.

In *U.S. Testing Co., Inc. v. NLRB,* 160 F.3d 14, 20–22, (D.C. Cir. 1998), the court stated:

Insofar as the Company contends that the Board erred in failing to find that the individual claims information for nonunion employees was confidential and, therefore, unavailable to the Union, the Company attempted neither to redact the requested information nor to explain why that was not possible. Yet it has long been established that the employer has the burden of seeking to accommodate the union's request for relevant information consistent with other interests rightfully to be protected. *See, e.g., Oil, Chemical,* 711 F.2d at 362; *Tritac Corp.,* 286 N.L.R.B. 522, 522 (1987). An employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information. *See, e.g., East Tennessee Baptist Hosp. v. NLRB,* 6 F.3d 1139, 1144 (6th Cir.1993);[FN3] *E.W. Buschman Co. v. NLRB,* 820 F.2d 206, 208–09 (6th Cir.1987); *Safeway Stores, Inc. v. NLRB,* 691 F.2d 953, 958 (10th Cir.1982).

Having made a reasonable accommodation the employer avoids a Board finding that it violated § 8(a)(5). *See, e.g., Detroit Edison,* 440 U.S. at 319–20, 99 S.Ct. 1123; *Buschman,* 820 F.2d at 209; *Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1098 (1st Cir.1981), *abrogated on other grounds, NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 786 n. 7, 796, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990). The rationale for this placement of the burden derives from the interest in allowing the parties to work out through an informal process how their corresponding duties and responsibilities can be met. *See H.K. Porter Co. v. NLRB,* 397 U.S. 99, 103, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970); *NLRB v. Acme Indus. Co.,* 385 U.S. 432, 437–38, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967) *; NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152, 76 S.Ct. 753, 100 L.Ed. 1027 (1956); *Oil, Chemical,* 711 F.2d at 358; *Florida Steel Corp. v. NLRB,* 601 F.2d 125, 129 (4th Cir.1979). In other words, the onus is on the employer because it is in the better position to propose how best it can respond to a union request for information. The union need not propose the precise alternative to providing the information unedited. *Oil Chemical,* 711 F.2d at 362–63; *Tritac Corp.,* 286 N.L.R.B. at 522.

* * *

The Company was undoubtedly correct to raise concerns about the privacy rights of the non-union employees. *See United States v. Westinghouse Elec. Corp.,* 638 F.2d 570, 577 (3rd Cir.1980); *cf.* Fed. R. Civ. P. 35. The Company, however, never attempted to redact the requested information, and never even claimed that it would be unduly burdensome or costly to do so. Even now the Company makes no claim that consent or notice or some other means of protecting employees' privacy rights could not have been achieved. Indeed, the Company had ready access to the information that the Union sought, specifically in the form of the insurance carrier's "explanation of benefits" statement listing the services, the provider of the services, the date rendered, the total costs, and the amount payable by the carrier in benefits. Information about health care costs for employees and their dependents was not, so far as the record reveals, otherwise available to the Union.

In any event, since the Company made no effort to accommodate the Union's request for individual claims information, by redaction or otherwise, the Board was not required to decide whether a particular form of accommodation was sufficient

> and did not unduly restrict the information that the Union requested. As ordered by the Board, the confidentiality of their identities as to specific medical claims is protected. *See Johns-Manville Sales Corp. v. International Chem. Workers Local 60,* 252 N.L.R.B. 368, 368, 1980 WL 12424 (1980).

Thus, the court enforced the Board's order that the respondent was required to provide the union with the names of each of its employees and dependents covered by Respondent's medical and dental plans; and the claims submitted and paid by the respondent for each and every benefit provided for the cumulative policy year through August, 1995. See, *U.S. Testing Co*. 324 NLRB 854 (1997).

In determining the remedy for an unlawful refusal to provide requested confidential information the Board does not always require further bargaining between the parties to reach an accommodation. In *Kaleida Health, Inc.*, 356 NLRB 1373, 1381 (2011), the Board approved the following remedy determined by the judge concerning the provision of requested information to which it was determined that the respondent employer had established a confidentiality interest:

> With respect to the affirmative portion of the remedy, the Respondent contends that if a violation of Section 8(a)(5) and (1) of the Act is found, the appropriate remedy would be an order requiring it to bargain over an accommodation with the Union over the provision of the disputed information, rather than an affirmative order to provide the requested incident reports and STARS reports. The Respondent relies on *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) in support of its position.
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> * * *
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> In considering the Respondent's argument, I note that in *Borgess Medical Center*, the Board reiterated its policy that the burden of formulating a reasonable accommodation is on the employer and that the union does not have to present any concise alternative to receiving the information unedited.
>
> In the instant case, the Respondent's proposed alternative did not meet its burden of establishing a reasonable accommodation of its interests and the Union's need for the requested information. In my view, to order further bargaining in the circumstances of this case would not be an appropriate remedy. The record establishes that the Union will not make a determination as to whether to arbitrate the grievance of discharged employee Andrews until it has had an opportunity to review the requested information. There can be an extensive amount of information contained in an incident report form and such detailed information is necessary to determine issues involving disparate treatment. With respect to the Union's request for nurses notes regarding fallen patients, Respondent has not raised any objection to their production in this proceeding. To give the Respondent another opportunity to bargain over the provision of the incident report forms and STARS reports, which I have found were unlawfully withheld, seems unwarranted under the circumstances of this case. This is especially so when one considers that the underlying grievance in this case will not be resolved until this collateral dispute regarding the provision of information is resolved. The Union has indicated its willingness, consistent with the past practice of the parties, to have the Respondent redact patients' names from the information it seeks. The inclusion of the medical record of a patient in the documents will permit the union to crosscheck incident reports with the nurse's notes regarding the incident, while protecting the anonymity of a patient. In order to assure the confidential nature of the identities of the patients involved I will provide for the redaction of patients names and other safeguards in my Order. In ordering the Respondent to provide the requested information under the conditions as set forth herein, I note that the Board has, in the past, ordered that confidential information be provided under conditions it specified, rather than order bargaining over the provision of such information, where the circumstances indicate that such a remedy was appropriate. *Pennsylvania Power*, 301 NLRB 1104, 1108 fn. 18 (1991).[18]

I find that Respondent violated Section 8(a)(5) and (1) of the Act by its failure to provide requested information or its delay in doing so as set forth the in the complaint, as amended. In this regard, on November 22, the Union made a 27 paragraph information request pertaining to the Staples subcontracting, of which there are currently nine paragraphs in dispute. By letter dated January 2, 2014, Devine made Respondent's first substantive response to the subcontracting. As to paragraphs 1, 2, 4, 9, 11, 17, and 25, Devine stated, "Please be advised that the documents requested may contain proprietary and/or confidential information; therefore some may be redacted." Devine did not offer any further explanation as to the asserted confidentiality with respect to any particular paragraph, nor did he request the signing of a confidentiality agreement, or offer or to provide the Union a redacted version of the requested information meeting the Respondent's asserted confidentiality needs.

Dimondstein responded by letter dated January 17, 2014, stating, "blanket claims of confidentiality are not acceptable. The Postal Service bears the burden of demonstrating to the Union that it has legitimate and substantial confidentiality concerns. If the Postal Service is able to do so, the parties may be able to reach an accommodation." He stated if such an accommodation takes the form of a nondisclosure agreement, there is no justification for redacting any information, as your letter states the Postal Service may do…". Thus the Union indicated a willingness to sign a nondisclosure agreement if

[18] The Board took a similar approach in fashioning a remedy in *U.S. Postal Service,* 359 NLRB No. 115, slip op. at 4 (2013), although the Court's decision in *NLRB v. Noel Canning, a Division of the Noel Corp***.,** No. 12–1281, ___ S.Ct. ___, 2014 WL 2882090 (June 26, 2014) brings into question the current status of the Board's decision the rationale applied and the cases cited in *U.S. Postal Service* are instructive here. There, in fashioning a remedy fitting the facts of that case the Board stated:

Section 10(c) of the Act authorizes the Board to issue an order requiring a party who has engaged in an unfair labor practice to "take such affirmative action . . . as will effectuate the policies of th[e] Act." The remedial power vested in the Board by this provision is a "broad discretionary one." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (internal quotation mark omitted); see also *NLRB v. Solutia, Inc.*, 699 F.3d 50, 72 (1st Cir. 2012) ("The Board has wide discretion in selecting remedies.") (internal quotation marks omitted).

Respondent demonstrated a legitimate and substantial confidentiality concern. Thus, over a month after the Union's request for information Respondent had not specified its confidentiality concerns, nor had it offered the Union a specific accommodation in a way to provide the requested information while meeting Respondent's purported confidentiality needs.

Devine responded by letter dated January 31, 2014 wherein he requested a meeting "to discuss potential ways of providing and/or safeguarding the information you request." Devine went on to state:

> the Postal Service believes that sharing the confidential and proprietary terms of the Agreement would limit the ability of the Postal Service to negotiate Agreements with other entities regarding offering Postal products and services in the future and could have an adverse effect on existing Agreements.
>
> An example of terms of the Agreement that would limit the Postal Service's ability to negotiate with other entities are the portions of the Agreement that state which party will be covering various expenses during the one-year pilot. If this information were to be released and viewed by other companies or organizations, the Postal Service would be at a competitive disadvantage to negotiate on various expenses with other partners in the future. In addition, entities with existing Agreements with the Postal Service may wish to adjust their terms, now or in the future, in a way that adversely impacts the Postal Service. The Negotiated Services Agreements included as part of the Pilot Agreement contain restricted and sensitive business information. Negotiated Services Agreements have not been shared with outside parties in the past. Sharing the terms of the Negotiated Services Agreements would weaken the negotiating position of the Postal Service with regards to the discounts or incentives given to partners currently and moving forward. For example, the Negotiated Services Agreements include the discounts provided to Staples during the one-year pilot. If the discounts provided to Staples were to be released and viewed by other companies or organizations, the Postal Service would be in a disadvantageous position to negotiate discounts given to partners in the future.
>
> Furthermore, the Pilot Agreement contains provisions explicitly prohibiting release of any confidential Information or information relating to the economic terms of the Agreement without prior approval from Staples. As information, Staples does not approve of the release of the Pilot Agreement or any of the economic terms enclosed therein.[19]

Thus, Devine only gave Respondent's first explanation as to why any of the information sought in the Union's November 22 information request was confidential on January 31, 2014, over 2 months after the Union made its information request. Devine and Code admitted that had Respondent's SIAG committee determined that the subcontracting had a significant impact that Respondent would have presented the Union with a copy of the Staples contract, with Devine adding that Respondent had tendered subcontracting agreements to the Union in the past, but always upon the Union's signing of a confidentiality agreement.[20] Yet, as of January 31, 2014, Devine did not offer to provide the Union with a copy of the Staples agreement either redacted, nor did he provide the Union with a confidentiality agreement the execution of which they could obtain the unredacted contract.

Respondent, even assuming it demonstrated a legitimate confidentiality concern concerning some of the requested information, failed to offer the Union a specific proposal to meet those concerns. In the face of this 2 month delay for a response, I find Devine's January 31, 2014, offer of a meeting did not meet Respondent's statutory obligations, but could only be seen by the Union as part of an effort to stall responding to the request. See, *Borgess Medical Center,* 342 NLRB 1105, 1106–

[19] Respondent's contract with Staples has Article 14 "Confidential Information," which contains, in part, the following language:

Nothing in this Agreement shall prevent the Party from disclosing information to the extent that such Party is legally compelled to do so by any governmental or judicial entity pursuant to proceedings over which such entity has jurisdiction; provided, however, that such Party shall (a) notify the other Party in writing of the agency's order or request to disclose such information, providing, to the extent practicable, at least (redacted) notice where practical full prior to disclosure,…..

Respondent's agreement with Staples did not prohibit disclosure of the requested information to the Union when legally required to do so. Moreover, Respondent entered the agreement with Staples knowing it had an agreement with the Union concerning subcontracting as well as the fact that it had a statutory obligation to disclose to the Union certain relevant and/or potentially relevant information. Those obligations take precedence over any subsequent agreement Respondent negotiated with Staples or any other third party entity.

[20] Devine testified he is not familiar with Respondent giving the Union a negotiated service agreement, which is the nature of the Staples contract, even after the pilot stage. However, Devine also testified he is not familiar with any other negotiated service agreements for retailers outside of Staples. Devine testified that, under Article 32, Respondent has provided the Union with subcontracting agreements. He testified the difference in the subcontracting agreement with Staples was the nature of the contract. He testified he has never been asked to provide a negotiated service agreement before but there is nothing otherwise that distinguishes the Staples contract from the subcontract agreements he has provided to the Union. Devine testified that he would tend to believe that if Respondent determines that the Staples agreement is an Article 32 issue that will have significant impact on the bargaining unit, and the Union' s request for it is ongoing Respondent would provide the Staples agreement to the Union, subject to a non-disclosure agreement. Devine testified when he turned over subcontracts in the past Respondent was able to negotiate a nondisclosure agreement with the Union. Devine testified when Respondent sends the notice they have made the final decision to subcontract under Article 32.1.B, which is of significant impact, the letter says, "Awaiting your execution of a non-disclosure agreement, we have available the comparable analysis." He testified then usually the Union requests the contract as well, and it is provided subject to a nondisclosure agreement. Since I have concluded the Union was entitled to the requested information in terms of relevancy and the timing of the request, it fell upon Respondent to provide the Union with a non-disclosure agreement when they made the request and for Respondent to turn over the information upon the execution of the agreement. This Respondent failed to do. It was also incumbent on Respondent to provide the requested information with redactions, had the parties been unable to agree upon a non disclosure agreement. In fact, Respondent provided, in an untimely fashion a redacted version of the Staples pilot agreement to the Union shortly before the hearing.

1107 (2004) (where a Section 8(a)(5) violation was found where offering to discuss an information request did not constitute the offer of a specific accommodation required by a respondent when raising confidentiality concerns.) See also, *U.S. Testing Co., Inc. v. NLRB,* 160 F.3d 14, 20–22, (D.C. Cir. 1998). I note that Respondent did provide a heavily redacted version of its agreement with Staples in the latter part of March 2014, some 4 months after the Union made its request and no explanation was given why this was not provided at a much earlier date. I find the same considerations are warranted in finding a Section 8(a)(5) and (1) violation with respect to Respondent's response to paragraphs 2, 4, 9, 11, and 25 of the Union's November 22 request. Respondent also raised a burdensomeness argument with respect to paragraph 2 of the Union's request, which I previously rejected, and although admittedly it would not have been burdensome for Respondent to gather the requested correspondence, by the time of the trial which was 4 months after the request, it had failed to do so. It would be difficult to provide the Union with redacted information, or propose an accommodation concerning its provision as the Respondent was required to do, without first gathering it, and reviewing the quantity and its contents. Thus, I find Respondent's positions were more in the nature of seeking delay than a resolution, and I do not find the Union, in the circumstances here, was required to take the bait of a meeting which I view as falling short of Respondent's statutory obligations, and more than that part of an effort to delay responding to the Union's request.

As to paragraph 17 of the Union's request seeking a copy of any and all training materials, which Devine asserted related to confidential materials in his January 2, 2014, letter, Devine gave no explanation of why those requested materials were confidential in his January 2 or 31, 2014, responses. In fact, Respondent provided the Union with a document entitled "Retailer Associate Training Manual" on March 29, 2014, with only a few lines of the 34 page document redacted. Code testified the training manual for Staples employees was provided to the Union and the only thing Respondent redacted were things that were unique to Staples' operation such as where things are located in stores in terms of the work flow. However, Code testified the redacted information would be visible to anyone including another retailer who walked into the particular Staples store. At page 7 of Retail Associates Training Manual, there is reference to a "Product Guide," stating "You will be given a copy of the guide to refer to as needed." Code testified the product guide is a reference guide Respondent put together for the Staples program. Code testified it is not included in the training manual. He testified it is a generally available document that Responded pulled from its domestic mail manual. Referring to the training manual at page 9, Code testified the term CARS is an operating system or platform that allows Respondent to provide its partners with a mechanism to transact certain business. It is a proprietary system of the Postal Service. Code testified Respondent is going to be installing these systems in the Staples stores. There is a reference to a CARS DVD in the manual, and Code testified a copy of the DVD was given to Staples, along with the CARS operating manual. Code testified that Respondent could provide it to the Union and he testified, "I will send it to you." The Union and the General Counsel assert these materials referenced in Code's testimony were not provided to the Union at the time their briefs were filed.

I find that Respondent has failed to establish a confidentiality defense with request to the Union's request in paragraph 17, and the Union is entitled to a complete copy of the "Retailer Associate Training Manual" with no redactions, as well as the materials referenced therein including the "Product Guide", the CARS DVD and the CARS operating manual. These items were provided to Staples as part of their subcontracting arrangement with Respondent, and Code informed the Union at the hearing that the items would be provided to them, but failed to do so, at least at the time the briefs were filed. I find Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the information requested in paragraph 17 of the Union's November 22, request in a timely and complete fashion.[21]

[21] I find that Respondent unlawfully delayed in providing its response to paragraph 16 of the Union's November 22 request calling for "the steps, if any, that the Postal Service will take to protect the sanctity of the mail when the mail is in the hands of Staples employees." Respondent did not specifically challenge the relevance of this request in Devine's January 2, 2014, letter to the Union as it had with other items requested, nor did Respondent contend it was burdensome or was confidential information. Yet, Respondent did not provide the Union with the requested information on January 2, 2014, but only gave the Union a partial response. Respondent did not provide a complete response to this request until Devine's January 31, 2014, letter, wherein he listed the requested steps in detail. Respondent argues in its brief that it was justified in not tendering its January 31, response until the Union clarified its request wherein the Union cited safety concerns for Respondent's employees in the Union's January 17 letter. First, the Union's citing safety concerns was in response to Respondent's questioning the relevance of other paragraphs of the request not paragraph 16 of the request. Respondent did not question the relevance of that paragraph, but rather appeared to just snub the Union's request by giving an incomplete response on January 2, 2014. I also find the safety of the mail as it relates to Respondent's employees to be obvious from the circumstances here, that no additional explanation was needed from the Union's initial request on this matter. Moreover, once Respondent provided a partial response on January 2, there was no reason provided for its failure to be more forthcoming and provide the detailed response it gave on January 31, on an earlier date. Rather, I find that Respondent has engaged in a pattern of delay, in providing partial and delayed responses over a course of a period of time to delay in providing the Union with requested information. Along these lines, Respondent did not provide the Union with a copy of the "Retail Partner Expansion Program Retailer Associate Training Manual," until March 29, 2014. I find Respondent has provided no satisfactory justification for its 2 month delay in Respondent's response to the information requested in paragraph 16 of the Union's request and therefore Respondent has violated Section 8(a)(5) and (1) of the Act concerning its delayed response. Similarly, as to paragraph 19, the Respondent did not inform the Union that bargaining unit employees would not be required to train Staples employees until the trial. In this regard, in his January 2, 2014, letter, Devine left open the possibility that Respondent would require lead clerks, who are bargaining unit employees, to train Staples employees. Accordingly, I find Respondent unlawfully delayed in providing a response to paragraph 19 of the Union's request in violation of Section 8(a)(5) and (1) of the Act.

I have found the Respondent violated Section 8(a)(5) and (1) of the Act by failing to and delaying in providing the Union certain requested information, and by failing to timely offer a specific proposal concerning accommodations for the Union to receive the requested information which Respondent contended was confidential. On the other hand for the reasons below, and despite Respondent's described conduct, I have found Respondent established a confidentiality interest with respect to some of the requested information.

Code testified that in January 2012 Respondent released a request for information to potential retail partners going to the 75 largest retailers in the country such as the largest big box stores, grocery chains, drugstores, and office superstores. Respondent has an estimated 33,000 postal facilities and if the Staples program goes through as planned it will be rolled out in approximately 1,300 Stapes stores. As with the Union, the collective-bargaining agreement affords Respondent certain rights concerning subcontracting. Thus, the specific discounts offered to Staples, marketing strategy in terms of costs by Respondent and Staples, the use of Staples trademarks, and estimates and specifics as to foot traffic at the Staples all fit within the penumbra of confidential financial information and trade secrets such as "formulas, devices, or compilations of data, reasonably calculated to provide their possessor with some business advantage over competitors." See, *Howard Industries, Inc.,* 360 NLRB No. 111 (2014), slip op. at 2 (2014); and *Good Life Beverage Co.*, 312 NLRB 1060, 1060 (1993).

Devine explained to the Union in his January 31, 2014, letter concerning his description of what Respondent considered to be confidential that sharing the confidential and proprietary terms of the Staples agreement "would limit the ability of the Postal Service to negotiate Agreements with other entities regarding offering Postal products and services in the future and could have an adverse effect on existing Agreements." He specifically cited "the portions of the Agreement that state which party will be covering various expenses during the one-year pilot." Devine stated, "The Negotiated Services Agreements included as part of the Pilot Agreement contain restricted and sensitive business information." He stated, "Sharing the terms of the Negotiated Services Agreements would weaken the negotiating position of the Postal Service with regards to the discounts or incentives given to partners currently and moving forward. For example, the Negotiated Services Agreements include the discounts provided to Staples during the one-year pilot." Devine also stated "the Pilot Agreement contains provisions explicitly prohibiting release of any confidential Information or information relating to the economic terms of the Agreement without prior approval from Staples." He asserted that Staples did not approve of the release of the Pilot Agreement or any of the economic terms enclosed therein. This was in essence the only explanation given to the Union as to why the Respondent considered the information to be confidential until its witnesses testified on April 1, 2014.

In terms of the pilot agreement with Staples, Code testified at the hearing one of the standards they used in identifying confidential clauses of the agreement was if the information was uniquely Staples, and did not have anything to do with the Postal Service. He testified for example trademarks were redacted, as well as how they are used and associated with Staples' intellectual property. Code testified some of those trademarks could be used in advertising and marketing promotions for Respondent's products and some would not be appropriate to use in such a way. He testified some of them are new trademarks. Code testified Respondent felt anything that provided information as to the understanding of Respondent's business model with Staples model was confidential. He testified there is an overlap between Respondent and Staples' business models and they are one and the same. He testified Respondent is protecting their partnership because Staples is in competition in the marketplace and does not want people to understand aspects of their business, particularly margins, and the cost of their responsibility to this program. Code testified if Respondent deems this program to be successful or a different retailer is interested in pursuing a test in a different retail vertical, Respondent does not want them to know the parameters of its relationship with Staples, because it provides them with an unfair advantage in negotiating terms.

When asked if he was talking about costs or procedures in terms of confidentiality, Code testified primarily costs, and he stated there are capital investments that both sides make. He testified there are technology costs associated with the program, who pays for what which are terms of the national service agreement (NSA). Code testified the other redacted elements of the Staples NSA are different than what Respondent would consider a management services contract in that in the NSA, instead of compensation for activity, Respondent provides Staples discounts for Respondent's mail products and services. Code testified those discounts need to be held closely because that type of information gives Respondent's competitors an advantage if they understand Respondent's thresholds for discounting its competitive products in order to increase its volume in the marketplace. Code testified Respondent wanted to keep all aspects of the business model closed because if this is a viable program, Respondent knew Staples did not want it out there because they are fighting in a very competitive market. Code testified if Respondent is interested in expanding pilots into different verticals, Respondent did not want them to know what its established compensation structure is. Code testified the contract with Staples was based on variable business volume and the margins are very low because Respondent has low cost coverage on its products and services.

As to the information contained in the requested correspondence through emails being sensitive, Code testified first and foremost are things about the Staples contract, how they are structured, what the discounts would be for the products and services, market initiatives, how they were going to target marketing, and how Staples marketing infrastructure works. Code testified Respondent integrated with Staples online learning systems. He testified that is proprietary information Staples is sharing with Respondent, and would have an impact if that was to become public. He testified this is information Staples desperately seeks to protect in order to maintain advantage in the marketplace.

Concerning the information requested in paragraph 9 concerning discounts, Code testified this is highly proprietary in-

formation. It is information Respondent provides to its regulator to make sure Respondent is covering its costs and providing value to the organization in doing these NSAs. Respondent does not want their competitors and retailers Respondent might be interested in doing pilots with in the future, to understand what Respondent is already using as baseline in this contract, because Respondent could receive better terms or could get beaten by these margins pertaining to Staples when Respondent is competing against UPS on other kinds of programs. As to paragraph 11, in the Union's request Code testified this goes back to his prior testimony concerning other paragraphs. Code testified compensation is a word they do not use in NSAs. Code testified Respondent is just providing Staples discounts. He explained Respondent is providing Staples a margin on Respondent's published rate and Respondent is not directly compensating them for work being performed.

Concerning paragraph 25 of the Union's information request, Code testified that, at the time, there were a couple of things Respondent did not have access to from a data standpoint. He testified, more importantly, the DAR referenced in the Union's request was something that outlines the test business model and provides very detailed information as to discount structures. He testified the Approved Postal Provider Pilot Agreement is a marketing agreement. It is a shared risk agreement, and there are a lot of things in there that detail who is taking what risk, how the risk is structured, and if Respondent were to find other partners for the test, this is information that Respondent would want desperately not to make public. Code testified Staples feels the same way as this is sort of a blueprint for Respondent and Staples' competitors.

In terms of Devine's January 31, 2014, letter, and Code's testimony as it relates to Respondent's competitors and possibly using other retailers in lieu of or in addition to Staples I find Respondent has established a confidentiality interest in terms of the specific numbers of: Staples foot traffic, discounts provided or discussed with Staples in terms of percentages and/or specific amounts; and costs of promotion in terms of percentages or actual costs. Weighing the needs between the parties, I do not find that Respondent has established a confidentiality interest in contract language describing promotions, discounts or the nature of the business relationship with Staples, aside from the specific numbers discussed and/or agreed to with Staples as previously described in these paragraphs. In this regard, Respondent has a specific product line which it has discussed with Staples, which may or may not be discussed with other retailers in other ways. I find, in these circumstances, that the actual numbers discussed and/or agreed to between Respondent and Staples may place Respondent and/or Staples a competitive disadvantage, not the description of what Staples and Respondent bargained about. I also find the Union has not shown a specific need of any discussion of Staples trademarks which may be incorporated in correspondence or the agreement between Respondent and Staples beyond which it will obtain, by reviewing the underlying documents upon the signing of a confidentiality agreement.

Code testified there are dates and names as well that Respondent redacted from the Staples agreement provided to the Union in terms of contact people at Staples and signature blocks. Code testified he took out expiration dates of the agreement. Code explained he considered this to be confidential because Respondent's approach was to make it impossible for someone to build the business model timeline used with Staples. Code testified that, in terms of the dates, in the agreement being confidential that goes to termination clauses and things of that nature, which he was advised by Respondent's counsel should be kept confidential. I note that Respondent previously informed the Union that the pilot agreement with Staples was to be about one year. Any other time lines discussed or negotiated with Staples go to the projected length of the relationship or how rapidly they intend to proceed with expansion. I do not find this to be proprietary information or otherwise confidential.

Code testified there was one other schedule that was redacted in the Staples agreement provided to the Union, and it was the aviation security and hazardous mail agreement. He testified the inspection service advises this is sort of a blueprint as to how Respondent manages its security, and they do not want that as public knowledge for people to use and understand how they can get around Postal Service security. Code testified Respondent was taking security procedures used at its post offices and trying to translate them to Staples. First, Respondent did not raise this issue to the Union in Devine's January 31, 2014 letter, or otherwise prior to the hearing. Thus, it gave the Union no opportunity to reach an accommodation concerning it, and I find it to be untimely raised now. Moreover, Code testified that it was based on security arrangements at Respondent's post offices. Respondent put on no evidence on how the Union or its employees are instructed or required to keep this information confidential concerning Respondent's post offices, and merely because Respondent has adopted its procedures for Staples, I do not find it has established through the evidence at the hearing that this is confidential information.

CONCLUSIONS OF LAW

1. By failing and refusing to provide and/or unlawfully delaying in providing the American Postal Workers Union (the Union) with information requested in paragraphs 1, 2, 4, 9, 11, 16, 17, 19, and 25, the Union's November 22, 2013, request for information as further explained by the Union on January 17, 2014, and again at the hearing on April 1, 2014, the Respondent has unlawfully refused to bargain with the Union and has violated Section 8(a)(5) and (1) of the Act.
2. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. With respect to the Union's information request in paragraphs 16 and 19 there was only an unlawful delay alleged and thus there was no contention any further information need be provided. With respect to paragraph 17, as disclosed at the hearing, Respondent belatedly provided a mildly redacted document to the Union shortly before the trial, and the testimony of Respondent's witness re-

vealed that there were other related documents that I have found would fall within the Union's request in that paragraph, which Respondent promised to provide during the hearing, but as represented in the parties briefs were not provided. I have concluded that the information requested in paragraph 17 was relevant and necessary to the Union's representative functions, and that Respondent raised no bonafide defense for the redactions, the missing documents, and the belated tender of what it did provide. Accordingly, as part of this recommended remedy I am requiring the Respondent to provide the Union with an unredacted version of the document it previously provided along with the missing materials previously discussed in this decision.

As to paragraphs 1, 2, 4, 9, 11, 19 and 25, I have rejected the burdensomeness arguments Respondent has raised with respect to any of those paragraphs. I also note that Respondent only provided a heavily redacted version of its contract with Staples to the Union shortly before the hearing with no justification for the delay in providing this redacted version. I have found that once it raised a confidentiality concern it was Respondent's obligation and burden to formulate a reasonable accommodation in furnishing the requested information to the Union, and this Respondent failed to do. See, *Kaleida Health, Inc.*, 356 NLRB 1373, 1381 (2011); *Borgess Medical Center,* 342 NLRB 1105, 1106–1107 (2004); *Pulaski Construction Co.*, 345 NLRB 931, 938 (2005); and *U.S. Testing Co., Inc. v. NLRB,* 160 F.3d 14, 20–22, (D.C. Cir. 1998). I have concluded that by its delayed, often unsupported, and staggered responses exhibited in Devine's January 2 and 31, 2014 letters, and by the belated production of documents including the largely redacted Staples contract that Respondent was seeking a policy of delay and frustration rather than one of accommodation. In these circumstances to order more bargaining concerning the production of information would not serve, but rather would frustrate the purposes of the Act, and serve to reward the Respondent for its course of conduct. In this regard, the Union's request for information was time sensitive with the subcontracting with Staples ongoing and the likelihood of an expansion of that contracting on the horizon.[22] Thus, the Union's interest in receiving the information quickly to protect the bargaining unit is high. See, *Kaleida Health, Inc.,* supra.; *Pennsylvania Power*, 301 NLRB 1104, 1108 fn. 18 (1991); and *U.S. Postal Service,* 359 NLRB No. 115 (2013).

Therefore, as part of the remedy here, I find Respondent is required to immediately produce to the Union the documents requested in paragraphs 1, 2, 4, 9, 11, 19 and 25 of the Union's request only redacting the following: the specific numbers or estimates of foot traffic at Staples locations; discounts provided or discussed with Staples in terms of percentages and/or specific amounts; and costs of promotion of Staples and/or Respondent in terms of percentages or actual costs. The numbers, as specified, can be redacted, but not the discussions of those numbers. I also find any description of Staples trademarks which may be incorporated in correspondence or the agreement between Respondent and Staples can be redacted from the initial documents to be supplied to the Union pursuant to its request. I find the above described information constitutes the only items to be redacted from the information provided to the Union.

It was the testimony of Devine that the Union has previously signed confidentiality agreements concerning the production of subcontracting materials including prior contracts. Accordingly, I find Respondent be required to tender the Union a copy of the last three confidentiality agreements executed between the Respondent and the Union as model agreements, and that upon the Union agreeing to and executing a confidentiality agreement tailored by the parties to meet the requirements of this remedy section, that Respondent will tender to the Union the complete and unredacted documents as requested in paragraphs 1, 2, 4, 9, 11, 19 and 25 of its November 22, information request, with the information I previously described in this remedy section to be redacted to be only used by the Union in the prosecution of grievances relating to the parties collective-bargaining agreement and to the processing of this unfair labor practice charge. The General Counsel recommended that if there was a confidentiality agreement the disclosure of the confidential information was to be limited to 10 union officials, to which I agree, given the scale of the potential subcontract. I also find that the Union may disclose the confidential information to their attorneys and financial advisors, upon their signing of the confidentiality agreement, as necessary for the processing of grievances, as well as this unfair labor practice complaint. If upon the signing of a confidentiality agreement and the Union's receipt of the previously redacted information, there is a dispute between the parties as to whether Respondent redacted information goes beyond which I recommended it can do, the Union can take the matter to the Regional Director or his designee to try to resolve the dispute, if the parties do not

[22] By "Erratum Brief" dated July 31, 2014, Respondent's counsel stated, "As of the date of the hearing, the Postal Service's one-year Retail Partner Expansion Program pilot with Staples was on-going and no decision had yet been made to end, continue or expand the pilot. By letter, dated July 7, 2014, the Postal Service notified the APWU that it would end the pilot on August 1, 2014, and that Staples would begin transitioning to the Postal Service's previously existing Approved Shipper Program by August 29, 2014. See Exhibit 1. The Approved Shipper Program is generally described in GC Ex. 6 (p. 4) …". On August 5 and 6, 2014, respectively, counsel for the Union and the General Counsel filed motions to strike Respondent's Erratum Brief. They argue Respondent's brief is in effect an improperly filed motion to reopen the record. I grant the motion to strike Respondent's filing. First, even if Staples relationship with Respondent is to be transferred into Respondent's "Approved Shipper Program" as represented; the relationship with Staples, however it is labeled, is still ongoing. Therefore I do not find the relevance of the Union's request for information changes. In fact, Code testified the "Approved Shipper Program" was an earlier name for the retail pilot program. There is no claim the Union has withdrawn its outstanding grievance pertaining to the Staples relationship, or that it will not file other grievances once the requested information is produced. The ultimate viability of Respondent's relationship with Staples, past and present, can be resolved by an arbitrator, if the Union, upon receiving the requested information decides to pursue the matter further. Accordingly, the motions to strike Respondent's July 31, 2014, "Erratum Brief" are granted.

then agree, the Regional Director can then bring the matter up in a compliance proceeding with the parties to the proceeding requesting a protective order, if necessary. In the meantime, the Union, upon signing of a confidentiality agreement, will have the complete information in order to process grievances related to the subcontracting through the parties' contractual grievance and arbitration procedures.[23]

Since the dispute is between the Respondent and the national Union, and because the subcontracting is already taking place in five states at around 80 locations, with a possible expansion to 1300 Staples locations, I am ordering a notice posting at all locations where bargaining unit employees work within a 2 mile radius of Staples locations performing bargaining unit work in dispute here. Moreover, since the information request was made by the Union pertaining to contracting that may potentially take place at about 1300 Staples locations, I am requiring the Respondent transmit and/or otherwise make the attached Notice available to all bargaining unit employees employed by Respondent at any location in the manner described in the Order section of this decision.[24]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

I. Pursuant to Section 10(c) of the National Labor Relations Act, it is hereby ordered that the United States Postal Service (Respondent), its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to bargain collectively with the American Postal Workers Union by refusing to furnish it or delaying in furnishing it with information that it requests that is relevant and necessary to the Union's performance as the collective-bargaining representative of the Respondent's bargaining unit employees.

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

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

(a) Promptly furnish the Union with the information requested in paragraphs 1, 2, 4, 9, 11, 17, 19 and 25 of the Union's November 22, 2013, information request relating to Respondent's subcontracting with Staples in the manner described in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its locations where bargaining unit members represented by the American Postal Workers Union work who are working within a two mile radius from any Staples store or facility performing contract work for Respondent copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 5, 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. 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 closed any of the described facilities, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all bargaining unit employees and former employees employed by the facility in question any time on or after November 22, 2013. 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 to all bargaining unit employees represented by the American Postal Workers Union.

(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 Respondents have taken to comply.

Dated, Washington, D.C., August 13, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[23] The limited nature of the redactions I have recommended, that is only specific numbers, percentages, and trademark identifications should help solve disputes as to what is confidential and hopefully facilitate the parties agreement on a confidentiality agreement. As set forth above, *U.S. Postal Service,* 359 NLRB No. 115 (May 2, 2013), cited by the Union appears to be no longer a valid Board pronouncement. Even in that case, the Board did not authorize the Regional Director with discretion to finally resolve disagreements between the parties concerning confidential information. Rather, the Board designated specific steps the Regional Direction was to follow based on the Board's determination on how the matter was to be resolved. Similarly, here, I have not dictated the terms of any confidentiality agreement between the parties, but have only set forth terms in this recommended remedy sufficient to remedy Respondent's unfair labor practices.

[24] The Union seeks a broad order, and cites some settlement agreements that were not placed into evidence. The General Counsel did not request a broad order, nor was Respondent notified of such a remedial request prior to the filing of briefs. I find that the request for a broad order was not litigated here, and based on due process grounds the Union's request is denied.

[25] 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.

[26] 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."

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 American Postal Workers Union by refusing to furnish it or delaying in furnishing the Union with information that it requests that is relevant and necessary to the Union's performance as the collective-bargaining representative of the our unit employees, including requested information relating to our subcontracting activities with Staples the Office Superstore, LLC (Staples).

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

WE WILL promptly furnish the Union with the information requested in paragraphs 1, 2, 4, 9, 11, 17, 19 and 25 of the Union's November 22, 2013, information request relating to our subcontracting with Staples in the manner described in the Board's decision.

UNITED STATES POSTAL SERVICE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-119507 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.