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

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 23,	Case 19-CB-175084 Case 19-CB-198689
and	
JIM TESSIER and KEITH LOWE	

RESPONDENT'S POST-HEARING BRIEF

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INTRODUCTION

The instant case centers upon International Longshore and Warehouse Union ("ILWU") Local 23's ("Local 23" or "Union") handling of two separate information requests made by two individuals, Karey Martinez and Keith Lowe, registered Class A longshore workers who had worked out of Local 23's dispatch hall as voluntary travelers from their home local in Seattle.

Both men were, for different reasons, the subject of employer complaints and later disciplined by the Joint Port Labor Relations Committee ("JPLRC"), a committee comprising Union and employer representatives tasked with investigating complaints and issuing discipline. Both were issued six-month suspensions from travel to Local 23, and both submitted to the Union information requests seeking minutes for the JPLRC meetings in which their respective suspensions were discussed.

Although the Union had created and developed a formal, uniform system for receiving and processing information requests, the circumstances surrounding both Martinez's and Lowe's requests would require the Union to deviate from this protocol for markedly different reasons. While the nature of the challenges faced by the Union in responding to these requests differed significantly, the nature of the Union's responses was uniform: when required to do so, it reasonably exercised its discretion in a manner consistent with the duty of fair representation.

With respect to Martinez, when Union leadership learned that Martinez had returned to the Union hall just two business days after submitting his information request and was "bullying," "berating," and demanding from Union secretaries his records that instant, it immediately took action. Instead of having Martinez return to the Local where he had previously attempted to intimidate Union staff in an interaction described as "upsetting," the Union decided to solve the problem entirely by expediting Martinez's request and faxing the responsive records

to his home local in Seattle. By doing this, the Union ensured the safety of its staff while simultaneously providing Martinez with the documents he requested less than one week prior.

Lowe's information request presented its own challenges, albeit with less fanfare. At the time Lowe made his information request, the JPLRC minutes he sought had not yet been produced to the Union. Because the minutes would not be made available until the following month, a Union secretary informed Lowe that his records would not be ready within the normal two- to three-week processing timeframe. Lowe neither protested the delay nor did he give any explanation as to why he needed the documents sooner. He made no attempt to follow up with the Union before filing an unfair labor practice charge approximately one week before the Union even came into possession of his requested records.

Counsel for the General Counsel ("GC") subsequently issued complaints against Local 23 based on how the Union handled the information requests described above. Both charges—19-CB-175084 related to Martinez and 19-CB-198689 to Lowe—alleged that the Local breached its duty of fair representation in connection with its handling of the requests. Region 19 Director Ronald Hooks issued a Complaint consolidating the charges on July 26, 2017. GC Ex. 1(m). The parties convened for a one-day hearing before the Honorable Eleanor Laws, Administrative Law Judge, on December 13, 2017, at NLRB Region 19 in Seattle, Washington.

Post-hearing briefs were due January 17, 2018. Tr. 223. The Union's request for an extension was granted on January 12, 2018, setting January 24 as the new deadline. The deadline was subsequently extended by one day to January 25, 2018, because of closures caused by the federal government shutdown on January 22.

Respondent submits this timely post-hearing brief.

STATEMENT OF FACTS

I. THE PARTIES

A. Respondent International Longshore and Warehouse Union, Local 23

Local 23 represents registered and partially-registered longshore workers at the Port of Tacoma. Tr. 189-191. It is part of a coastwise bargaining unit that primarily covers the loading, unloading, movement and handling of all cargo inbound or outbound at any terminal operated by a Pacific Maritime Association ("PMA") signatory employer. Tr. 189; J. Ex. 1, p. 2. The PMA is the multiemployer bargaining agent for dozens of carriers, stevedoring and shipping companies, and is signatory with ILWU to the Pacific Coast Longshore Contract Document ("PCLCD"), the labor agreement for longshore work. *See* Tr. 189; J. Ex. 1, p. 2.

Pursuant to the PCLCD, the PMA and the ILWU have a JPLRC in each port, including Tacoma, comprising employer and union representatives. Tr. 190-91; J. Ex. 1, p. 90. This joint committee, *inter alia*, deals with employee grievances, handles employer complaints, and oversees the operation of the dispatch hall for longshore work at the Port of Tacoma. Ex. 1, p. 90-91.

B. Karey Martinez

Karey Martinez is a Class A registered longshore worker represented by ILWU Local 19, which is headquartered in Seattle. Tr. 22-23. Although his "home" local is in Seattle, Mr. Martinez has on occasion worked out of Local 23's dispatch hall as a voluntary traveler, which allows Class A registrants to work at ports other than their home port without having to obtain advanced clearance from the host local. Tr. 23-24.

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C. Keith Lowe

Keith Lowe is also a Class A registered longshore worker represented by ILWU Local 19 (Seattle). Tr. 94. Like Martinez, Lowe has also worked as a voluntary traveler at Local 23. Tr. 95.

II. KAREY MARTINEZ

On April 1, 2016, a PMA member-employer filed a complaint alleging that Martinez disregarded the employer's interests by walking "off the job without securing a replacement and/or notifying a foreman." Tr. 24-25; GC Ex. 2. Martinez was working as a voluntary traveler out of Local 23's dispatch hall at that time. Tr. 24-25. The JPLRC referred this employer complaint to Local 23's Executive Board for investigation before it was addressed at the April JPLRC meeting, where the joint committee found him guilty of the infractions alleged in the complaint. GC Ex. 6, pp 6-7. The JPLRC imposed on Martinez a six-month suspension from travel to Tacoma. GC Ex. 6, p 7.[1]

A. Martinez's Information Request—June 15, 2016

On June 15, 2016, Karey Martinez made an in-person information request with Local 23 for copies of the JPLRC minutes from April and May 2016 in hopes of obtaining more information about the joint committee's discussion of the suspension it issued him in April. Tr. 87, 36-37; GC Ex. 3.

Pursuant to the Union's information request protocol, when a member seeks records from the Union, he is required to fill out a standard form that contains fields for the member to provide the date, his name, his member ID, his phone number, and a description of records he seeks. *See* GC Ex. 3. Once the member completes this portion of the form, he submits the request to one of

[1] Neither the employer complaint nor the resulting six-month suspension is at issue in this proceeding.

the Union's financial secretaries for processing. Tr. 121-22. Once received by the secretaries, the form is date-stamped and a copy is returned to the requestor. Tr. 121-22.

At this point, Union staff begins to process the request by locating responsive documents. Tr. 122. If any privacy or confidentiality issues arise during the search, Union staff works with the officers to clear any conflicts and redact information when appropriate.[2] Tr. 122, 129-30. When the search is complete and the documents are ready for pickup—usually between two and three weeks—a secretary calls the requestor to inform him that he may come to the office to retrieve the records. Tr. 122; *see* GC Ex. 7. The request form explicitly describes this process. Large, bold font in the middle of the page reads:

- **INFORMATION WILL BE AVAILABLE WITHIN 2-3 WEEKS OF REQUEST BEING SUBMITTED**

- **YOU WILL BE NOTIFIED WHEN YOUR INFORMATION IS READY TO BE PICKED UP**

GC Ex. 7. The Union adopted the policy requiring members to retrieve these documents in person to avoid the risk of important information being lost in the mail; having members sign for the records confirms that the documents were, indeed, produced to and received by the requestor. Tr. 122, 194.[3]

B. Martinez's Return to the Local—June 20, 2016

On June 20, 2016, just two business days after Martinez made his records request, he returned to the Local 23 secretaries' office. Tr. 37-43. At this point, the parties' characterizations of the events that followed diverge sharply.

[2] The Union's president, Dean McGrath, testified that the Union previously had a computer system for members to review JPLRC minutes. Tr. 193. The Union discontinued this practice, however, after concerns arose that members' private information was freely accessible by all. Tr. 193.

[3] Nothing in the Complaint or at the hearing alleged any aspect of Local 23's normal protocol for handling information requests by registrants violated the Act.

Martinez testified that he went to the secretaries' office that morning to "see if [his] minutes were available and bring attention to a settlement agreement."[4] Tr. 37. He claims that he never demanded that he be provided with a copy of the minutes that day and that his interactions with the financial secretaries were "quite polite and respectful and calm in manner." Tr. 43.

The Union's witnesses—to a person—painted a starkly different picture of the events of June 20.[5] After being told on June 15 that his information request would take two to three weeks to process and that someone from the Union would contact him once the records were ready, Martinez admittedly wasn't satisfied. Tr. 66. Tawni Baily and Sarah Faker, the Union's financial secretaries on duty the morning of the June 20, testified that when Martinez arrived he immediately began asking about the status of the information request he submitted two business days earlier. Tr. 126-29. Dressed in a black trench coat, Martinez angrily "shoved" and "thrusted" a 2005 Board settlement entered into by the Union at the secretaries while admonishing them that they had a legal obligation, and that it was in their "best interest" to give him the documents he sought. Tr. 127, 135, 149-50; GC Ex. 4.

The secretaries attempted to explain to Martinez that the documents were not yet ready, but their efforts were in vain. As Faker testified, "I was explaining to him that I couldn't release that information, until I had approval, [and] that I had contacted the business agent to have that done. And he just kept on and on. I kept saying, you know I'm only doing my job here." Tr. 149. Local 23 secretary Tawni Bailey described the situation this way:

[4] Martinez also alleged that he traveled to Local 23 that day to ask if the Union had a kiosk he could use to review the JPLRC minutes. Tr. 39-40. On cross examination, however, he admitted that in the seven years he had traveled to Local 23 for work he had never seen such a kiosk in the facility. Tr. 62-64.
[5] The witnesses were sequestered during the hearing. Tr. 7.

> He was very aggressive. He was very aggressive, and I knew that he wanted the information and he wanted it now. I can't give it to you. I mean, it's that plain and simple. And that's what we were trying to tell him. . . . I can't just give you anything that I want or that you come in and demand. We have rules. We have rules for a reason. That reason is to protect our members.

Tr. 129. Faker described the interaction as "upsetting." Tr. 153. "He was very irritated and upset that he wasn't getting what he wanted. And then to tell me it's in my best interests to do something . . . . It made us nervous, it made me nervous."[6] Tr. 153.

After repeatedly explaining to Martinez that his documents were not yet ready and that he needed to take up the issue with a business agent or the Union president, he abruptly left the office and headed further into the Union hall. Tr. 129-30, 152; *see* U Ex. 7. Martinez returned to the secretaries' office minutes later and told Faker to put a copy of the 2005 settlement in the business agent's mailbox. Tr. 152-53.

Martinez's conduct caught the attention of more than just those directly involved. When Local 23's president, Dean McGrath, entered the office shortly after Martinez departed, he "could tell immediately that something was amiss," and observed that Faker and Bailey were "extremely upset." Tr. 196, 199. Another administrative employee who witnessed the exchange through the window expressed her concern that Martinez could have had a firearm concealed under his coat. Tr. 156. As further evidence of the severity of Martinez's conduct that morning, both Faker and Bailey memorialized their accounts of what happened in written statements, a measure both considered rare in connection with an information request. Tr. 131, 141, 153.

At approximately 11:00am on June 20, a Union business agent, Ryan Whitman, called Martinez to discuss his information request and his conduct in the secretaries' office that

[6] Martinez testified that he didn't recall telling the secretaries that it was in their "best interest" to give him the information he requested, but noted that his memory was "kind of spotty" the day of the trial. Tr. 70. When asked whether he told the secretaries that they were required to provide him with the records that day, he responded, "I'm not sure." Tr. 67-68.

morning.[7] Tr. 178-79. During that conversation, Whitman informed Martinez that the Union was working on the information request and that his conduct toward the secretaries was unacceptable.[8] Tr. 180-82. After speaking with Martinez, Whitman called the president of Martinez's home local to inform him that Martinez was "acting a fool" in Local 23's secretaries' office. Tr. 181.

When Local 23's president, Dean McGrath, got word of what had transpired with Martinez, he immediately took corrective action by instructing the secretaries to make Martinez's information request their top priority. "I told them to stop everything they're doing. . . . I'd shut down the office and told them get this done. Their safety is my primary [concern]. I had them do it right—you know, get the information as soon as possible." Tr. 213-14. Apart from expediting the request, McGrath also instructed his staff to deviate from the established practice of having the requestor personally come in and pick up the responsive information. Instead, citing safety concerns with Martinez returning to the hall and the fact that he was currently suspended from dispatch out of Local 23, McGrath directed Faker to fax the documents to Martinez's home local in Seattle. *See* Tr. 198-200, 154, 139; GC Ex. 6.

At approximately 12:52pm on June 20, McGrath called Martinez to discuss Martinez's behavior at the local and to update him on the status of his records request. Tr. 198-206. The parties dispute the content of this call. Martinez admitted through his testimony that McGrath

[7] Martinez's testimony corroborates this point. He testified that, when Whitman called him, Whitman was concerned that Martinez was "bullying" the Local's secretaries. *See* Tr. 72.

[8] The circumstances surrounding this call were peculiar. Whitman testified to hearing a "clicking" sound when he was on the phone with Martinez, and that, when he asked Martinez if he was recording the call, Martinez responded that he wasn't—but that, unbeknownst to Whitman, Martinez had his "attorney on the line." Tr. 179. Martinez confirmed through his testimony that, while he was speaking with Whitman, his phone was on speaker mode and that he had his "labor consultant" on a different phone, which was also on speaker mode, effectively allowing the labor consultant to hear his conversation with Whitman. *See* Tr. 90. Martinez's sneaky behavior prompted Whitman to end the call: "I didn't know whom I was speaking with or if I was being recorded. I wasn't comfortable with that." Tr. 180.

confronted him about "berating" the union secretaries and business agent that morning. Tr. 76. He denied, however, that McGrath informed him that his records would be faxed to his local; he testified that McGrath told him his records would be made available in two to three weeks per the Union's established protocol. Tr. 46.

McGrath fervently disputed Martinez's account of events in this regard. *See* Tr. 199. McGrath testified that his memory of his phone call with Martinez was "[c]rystal clear," and that he was driving south on I-5 near the Tacoma Dome when he made the call. Tr. 200. Refuting Martinez's testimony, McGrath testified that he gave Martinez clear and unequivocal instructions not to return to the secretaries' office and informed him that his records would be faxed to his home local. "I told him directly that [his records] would be up there [at Local 19] and he was not to come back to the secretary's office. . . . You don't need to come back. There's no purpose for you to come back to the secretary's office." Tr. 205-06. McGrath further testified that he also spoke with Martinez's home local president in person that evening about his intention to fax the documents to Seattle. Tr. 202.

The responsive documents were subsequently faxed to Martinez's home local the following day, June 21. GC Ex. 6.

III. Keith Lowe

On March 23, 2017, Lowe was the subject of an employer complaint alleging that he failed to appear for a work assignment or secure a replacement in his absence. Tr. 96; GC Ex. 8. Like Martinez, Lowe was also a voluntary traveler when the complaint issued. Tr. 95-96. At its April 2017 meeting, the JPLRC found Lowe guilty of the alleged violation and handed down a six-month suspension from travel to the Local 23 dispatch hall. Tr. 97; GC Ex. 8.

On April 19, 2017, Lowe made an in-person request for a copy of the April JPLRC minutes in which his suspension was discussed.[9] Tr. 101-02; GC Ex. 7. Pursuant to the procedures set forth above in B.1., Lowe filled out a request form and submitted it to Sarah Faker. Tr. 157-58. When Faker reviewed Lowe's completed request form and saw that he was requesting JPLRC minutes from the current month, she informed him that, because the minutes for that meeting would not be finalized until the middle of the following month, there would be a delay in processing his information request.[10] Tr. 157-58. This was so because the minutes of the April meeting would remain in draft form until the JPLRC convened and finalized them prior to its May meeting.[11] Tr. 159. Faker's undisputed testimony was that Lowe neither objected to nor protested the Union's proposed course of action. Tr. 158.

As was customary, Faker received the draft April JPLRC minutes on Tuesday, May 16, 2017, and the finalized version of the minutes on Friday, May 19. Tr. 159-60. Accordingly, on Wednesday, May 24, and Thursday, May 25, Faker called and left voicemails for Lowe informing him that his records were available for him to pick up. Tr. 161; GC Ex. 7. Lowe subsequently retrieved the documents at Local 23 on May 31. Tr. 102; GC Ex. 7; U Ex. 9.

SUMMARY OF ARGUMENT

As the members' exclusive bargaining representative and the operator of an exclusive dispatch hall, Local 23 owes its members a duty of fair representation. This duty proscribes a union from engaging in conduct that is arbitrary, discriminatory or in bad faith, and applies to all facets of a union's dealings, including its handling of members' information requests. While the

[9] Details of Lowe's interactions with the Union related to his information request are not especially clear from the record. At times during his testimony he seemed overwhelmed with emotion and unable to convey coherent answers.
[10] Lowe acknowledges as much through his testimony. *See* Tr. 105.
[11] Faker testified that it was the Union's policy not to release to members minutes in draft form. Tr. 158.

duty of fair representation requires a union to refrain from engaging in certain types of conduct, unions retain a significant degree of latitude in how they satisfy this obligation.

The factual underpinnings of the two charges set forth in the General Counsel's complaint are strikingly different, but the result is the same: facing unique circumstances, the Union did not act arbitrarily, discriminatorily, or in bad faith in handling either Martinez's or Lowe's information requests.

Regarding Martinez, the record overwhelmingly reflects that mere days after submitting his information request he returned to Local 23 and "berated" the secretaries, imploring them to hand over the information he requested then and there. Martinez's behavior presented a legitimate safety concern and the Union acted accordingly, taking steps to protect its staff while simultaneously upholding its duty to provide him with the information he requested. The Union's actions in this regard cannot be said to have violated its duty of fair representation.

In light of the circumstances, the Union also acted reasonably in handling Lowe's request. At the time Lowe submitted his information request, the Union did not possess the documents he sought and communicated this to him from the outset. Further, at no time prior to filing his unfair labor practice charge did Lowe communicate to the Union that he was anything but amenable to receiving the documents when they became available. Moreover, once the Union received the responsive records, it acted promptly to alert him that they were available. On this record, the General Counsel cannot carry its burden of proving that the Union's handling of Lowe's information request was arbitrary, discriminatory or in bad faith.

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ARGUMENT

I. LOCAL 23 ACTED REASONABLY UNDER THE CIRCUMSTANCES IN PROCESSING MARTINEZ'S AND LOWE'S INFORMATION REQUESTS AND THEREFORE DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION

A. The Duty of Fair Representation

Generally, a union that is the exclusive representative of bargaining unit employees is obligated to serve the interests of all the employees without hostility toward any. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Courts and the Board have interpreted this obligation as prohibiting a union from dealing with its members in a manner that is arbitrary, discriminatory, or in bad faith. *See id.; Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 67 (1991); *IBEW, Local 48*, 342 NLRB 101, 105 (2005).

This tripartite standard applies to all union activity, including a union's conduct of its exclusive dispatch or hiring hall. *O'Neill*, 499 U.S. at 67; *IBEW, Local 48*, 342 NLRB 101; *ILWU (Oberti)*, 365 N.L.R.B. No. 149 (2017) (stating that the tripartite standard applies "whether the union's actions occurred in the context of representing an employee in a grievance proceeding, in contract negotiations, or in the operation of a hiring hall."). Accordingly, "[a]s part of its duty of fair representation, a union has an obligation to operate the exclusive hiring hall in a manner that is not arbitrary or unfair."[12] *Int'l Alliance of Theatrical Stage Emps.*, 363

[12] Although the General Counsel mentioned in its opening statement (Tr. 12) and will likely argue in its brief that the Union should be held to a more exacting standard because it operated an exclusive dispatch hall, the Board has not adopted a "heightened duty" standard in these circumstances. *See Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631*, 340 NLRB 881, 881 n.4 (2003) (stating that "the Board has applied the 'heightened duty' standard . . . only in the course of applying the law of the case on remand from the U.S. Court of Appeals for the District of Columbia Circuit. Thus, the Ninth Circuit's recent suggestion that the Board itself has adopted the 'heightened duty' standard is incorrect. *Lucas v. NLRB*, 333 F.3d 927, 934 (9th Cir. 2003)"). As recently as December 13, 2017—the day of the hearing in this matter—the Board has acknowledged that "[a]lthough the 9th Circuit refused to enforce this decision in *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003), finding that unions in hiring hall context owed a 'heightened duty' standard, the Board has not adopted such standard." *ILWU (Oberti)*, 365 N.L.R.B. No. 149 (2017).

Even if the ALJ assumes that such a "heightened duty" standard exists and is applicable to this case, the outcome remains the same. In *Steamfitters Local Union No. 342*, where the Board, on the D.C. Circuit Court of Appeals' remand, applied the "heightened duty" standard, it nevertheless concluded that even "applying this

N.L.R.B. No. 148 (2016) (quotation marks omitted). Inherent in a union's duty to operate an exclusive hiring or dispatch hall in accordance with these principles is an obligation to "deal fairly with an employee's request for information" pertaining to matters affecting his employment. *Local No. 324, Operating Engineers*, 226 NLRB 587 (1976); *Miranda Fuel Co., Inc.*, 140 NLRB 181, 185 (1962). Thus, the Board has found that "a union breaches its duty of fair representation . . . when it arbitrarily denies a member's request for job referral information, when that request is reasonably directed toward ascertaining whether the member has been fairly treated with respect to obtaining job referrals." *Iron Workers Local Union 377*, 326 NLRB 375, 388-89 (1998); *see also Int'l Alliance of Theatrical Stage Emps.*, 363 N.L.R.B. No. 148; *Operating Engineers Local 513*, 308 NLRB 1300, 1302.

Although the duty of fair representation restricts a union's ability to engage in certain conduct, the union retains substantial latitude in carrying out its day to day affairs. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). As the Board has noted, "'[a] union is its members' representative, not their puppet, and its duty of fair representation is not a servitude to their individual whims.'" *Int'l Union of Operating Engineers Local 18 (Precision Pipeline, LLC)*, 362 N.L.R.B. No. 176 (2015) (quoting *Amburgey v. Consolidation Coal Co.*, 923 F.2d 27, 30 (4th Cir. 1991)).

Accordingly, it is well settled that mere negligence is generally insufficient to establish a union's breach of its duty of fair representation; rather, the General Counsel bears the burden

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'heightened duty' standard, we reaffirm the Board's earlier holding that inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate the union's duty of fair representation." 336 NLRB 549, 550 (2001).

of proving that the union's actions were arbitrary, discriminatory or in bad faith. *Dushaw v. Roadway Express*, 66 F.3d 129, 132 n.1 (6th Cir. 1995); *IBEW, Local 48*, 342 NLRB 101; *Steamfitters Local Union No. 342*, 336 NLRB 549, 553 (2001). "[I]n operating hiring halls, unions perform a valuable service for employers as well as employees. . . . As a matter of sound public policy, then, we are unwilling to infer that the duty of fair representation admits no mistakes in the hiring hall context." *Steamfitters Local Union No. 342*, 336 NLRB 549, 553.

Where, as here, the gravamen of the General Counsel's charges pertain to *delays* in processing rather than outright *refusals* to provide requested information, review of the Board's jurisprudence interpreting a union's analogous obligation to timely furnish information to an employer under its statutory duty to bargain is informative. *See Int'l Alliance of Theatrical Stage Emps.*, 363 N.L.R.B. No. 148 (relying on caselaw interpreting a party's obligation to furnish information in the bargaining context to adjudicate a DFR claim where the information requests at issue in the DFR claim were "similar to a collective-bargaining situation.").[13] Under these circumstances, the Board has established that the union has an obligation to provide the requested information "reasonably promptly," and that, when determining whether the union has met this obligation, the Board will take into account the totality of the circumstances surrounding the request. *See NLRB v. John S. Swift Co.*, 277 F.2d 641, 645 (7th Cir. 1960); *West Penn Power*

[13] Similarly, Martinez's and Lowe's records requests here were more akin to those that might be made in the bargaining context. In *International Alliance of Stage Employees*, the Board framed a union's duty to respond to a member's information request in the hiring hall context as an obligation to provide information necessary "to verify the accuracy of hall data and ensure that the hall's hiring operations are not conducted in a discriminatory manner. In that regard, the names, addresses, and telephone numbers of list registrants, dispatch records, and dates of referral are producible and a union's refusal to supply members *this type of information* may pose a violation of Section 8(b)(1)(A)." 363 N.L.R.B No. 148.

The JPLRC minutes Martinez and Lowe requested are categorically distinct from the type of documents listed above. Unlike dispatch records, which pose minimal privacy concerns and which are likely readily available, JPLRC minutes are created periodically through the efforts of a joint body and often contain confidential and/or sensitive employee information, such as medical conditions and drug- and alcohol-related information. *See* Tr. 156.

Co., dba Allegheny Power, 339 NLRB 585, 587 (2003). In *Allegheny Power* the Board explained that:

> In determining whether [a union] has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, "the Board will consider the complexity and extent of the information sought, its availability and the difficulty in retrieving the information.

citations omitted.

Thus, in applying this framework, the Board has concluded, for example, that a 10½ month delay in producing documents was warranted where "[t]here was simply no showing that the procedures established by Respondent for handling the request were not reasonable or that the Respondent could have done anything else to produce a faster result." *Union Carbide Corp., Nuclear Div.*, 275 NLRB 197, 201 (1985). Conversely, the Board has held that an employer violated its duty to bargain related to its handling of an information request where it possessed much of the information the union requested at the time the request was made, and where the employer "was very slow in turning over the information it possessed and never notified the Union that there would be a delay in turning over the information" it had not yet obtained. *Shaw's Supermarkets, Inc.*, 339 NLRB 871, 875 (2003).

Further, in the bargaining context, when a party harbors legitimate concerns about releasing information to the requestor—*e.g.*, for confidentiality reasons—the party harboring the concerns has the obligation to communicate this to the other party and attempt to seek an accommodation that will meet the needs of both parties. *See Consolidation Coal Co.*, 310 NLRB 109, 112 (1993) ("[A] party refusing to supply

information on confidentiality grounds has a duty to seek an accommodation"); *National Steel Corp.*, 335 NLRB 747, 748 (2001); *Tritac Corp.*, 286 NLRB 522 (1987) (stating that a party "cannot simply raise its confidentiality concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation").

Viewing the record in light of these principles, the General Counsel cannot carry its burden of proving that the Union's response to Martinez's or Lowe's information requests was arbitrary, discriminatory or in bad faith.

B. Martinez's Claims

With regard to Martinez's information request, the record makes clear that, when Martinez made the in-person request on Wednesday, June 15, 2016, he was informed and understood that it was the Union's normal practice to process these requests within two to three weeks and that the Union would contact him once the records were available for pickup. *See* Tr. 66, 140; GC Ex. 3. Admittedly unsatisfied with this information, Tr. 66, Martinez returned to the secretaries' office on June 20, a mere two business days after making the request. Tr. 140, 37, 126-27.

Although Martinez, through his self-serving testimony, asserted that his interactions with the secretaries on June 20 were "quite polite," "calm," and "respectful," the overwhelming weight of the evidence suggests a different story. Tawni Bailey and Sarah Faker, the Union's financial secretaries, testified credibly that on June 20 Martinez decided to take matters into his own hands by attempting to bully and threaten the staff into getting what he wanted. *See* Tr. 72, 127-29, 148-53, 196; U exs. 6-7. Clad in a black trench coat in the middle of summer, Martinez entered the secretaries' office and immediately began demanding the documents he requested two business days earlier. Tr.

126-27. "Shoving" and "thrusting" a copy of a prior Board settlement in the secretaries' faces, Martinez menacingly told them that it was in their "best interests" to comply with his demands and give him what he was seeking. Tr. 135, 149. Calmly and rationally informing Martinez that the documents were not yet available didn't dissuade him: "he just wouldn't stop," Faker noted, "[l]ike he was just trying to get us to do something. . . . as I continually told him, there's nothing I can do." Tr. 150. After this episode, which Faker described as "upsetting," McGrath observed that both secretaries were "extremely upset." Tr. 196, 199, 153.

Martinez's treatment of the secretaries was so inappropriate that Bailey and Faker memorialized their accounts of the events in written statements, something that is almost never done in connection with processing an information request. Tr. 130-31, 152; U Ex. 6-7.

It was against this factual backdrop that the Union was required to respond to Martinez's request. Given the gravity of the situation created by Martinez's conduct, the Union took reasonable steps to ensure that it complied with its duty to furnish him with the information while simultaneously ensuring the safety of its staff. Instead of following its standard procedure and having Martinez return to the scene of the June 20 incident to retrieve his documents, McGrath instead instructed the Union's secretaries to "stop everything they're doing," prepare the response, and fax the responsive documents to Martinez's home local in Seattle. Tr. 213-14. McGrath communicated this course of action to Martinez as well as to the president of Martinez's local. Tr. 199, 202.

Although Martinez denies being informed that his records would be faxed to his home local, the ALJ should not credit this testimony. As explained above, McGrath gave

a detailed account of his telephone conversation with Martinez, even noting his precise location on the interstate when the call occurred. Tr. 200. Apart from McGrath's testimony, the objective facts established on the record also refute Martinez's contentions that he was told that his records would be ready for pick up in two to three weeks. There is little dispute that the character of Martinez's interactions with the secretaries on the morning of June 20 prompted (1) the secretaries to write statements describing their account of the events; (2) the business agent to contact Martinez personally about his behavior in the secretaries' office; (3) the Union president to contact Martinez about his "berating" of the secretaries; and (4) the Union president to instruct the secretaries to "stop everything" and process Martinez's information request. *See* Tr. 130-31, 152, 178-81, 197-99, 213-14; U Exs. 6-7. Given these measures, it would be illogical to believe that McGrath would call to invite Mr. Martinez—who was then serving a six-month suspension from dispatch from Tacoma—to return to the Union hall to retrieve his documents from the very individuals he "bullied" and "berated" earlier that morning. *See St. Francis Regional Med. Cntr.*, 363 N.L.R.B. No. 69 (2015) ("A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole."). In light of the above measures, the ALJ should credit McGrath's testimony about his conversation with Martinez and informing him that the records he requested would be faxed to his home local for pickup.

Therefore, in light of the circumstances described above, the Union acted promptly and reasonably in handling Martinez's information request, and any deviation

the Union made from its standard practice was within the "wide range of reasonableness" afforded to unions in carrying out their duty of fair representation. *See Huffman*, 345 U.S. at 338; *see General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616, 618 (1975) (a union's duty to avoid arbitrary conduct means "at least that there be a reason for the action taken"). Accordingly, on this record, the General Counsel cannot meet its burden of proving that the Union's actions were arbitrary, discriminatory or in bad faith.

The General Counsel may argue that the Union's decision to fax the responsive documents to Martinez's home local in Seattle caused a delay in him receiving the records and was therefore improper. This argument must fail, however. As detailed above, the Union's decision to deviate from its routine practice of having members personally confirm receipt of responsive records was not an arbitrary one; rather, it was a decision necessitated by Martinez's aggressive and inappropriate conduct toward Union staff. Therefore, any delays brought about by the alternative delivery method were the product of Martinez's misconduct and should not be used to prejudice the Union; there is no evidence on the record that the Union took this drastic step for any reason *other than* Martinez's misconduct on the morning of June 20, 2016.

C. Lowe's Claims

Similarly, the Union's handling of Lowe's information request comported with its duty of fair representation.

When Lowe made an in-person request for April JPLRC minutes on April 19, 2017, he was seeking documents that were not then in the Union's possession. *See* GC ex.7; Tr. 157-60. Faker, the individual who processed Lowe's request, informed him of

such and let him know that she wouldn't have the April minutes in final form until the middle of the following month. Tr. 157-58. Upon being informed of the foreseen delay, Lowe did not protest or alert Faker of any extraordinary need to have the documents early. Tr. 158. In fact, Lowe himself testified that Faker told him at the time he submitted the request that there would be a lag on providing the minutes. Tr. 105. It is also unrefuted that, after receiving the finalized minutes on May 19, Faker promptly called and left voicemails for Lowe on May 24 and 25, advising him that his records were available for pickup. Tr. 161; GC Ex. 7.

In stark contrast to the circumstances in *Shaw's Supermarkets*, *supra*, where the employer breached its duty to bargain by unreasonably delaying production of information it had in its possession and failing to advise the union that there would be a delay in producing the information it had yet to obtain, here the sole document Lowe sought was not in the Union's possession when he requested it, and the record is abundantly clear that, upon his making the request, the Union informed him of its unavailability and that there would be a delay in processing the request. By alerting Lowe that his records would not be available in the timeframe contemplated by the Union's standard protocol, the Union acted transparently and fulfilled its obligation of making Lowe aware of its concerns related to processing his request. In so doing, Local 23 invited a dialogue about how the needs of both parties could be met. *See National Steel Corp.*, 335 NLRB 747, 748. Instead of engaging in a dialogue, Lowe represented that he understood and went on his way, never following up with the Union prior to filing this unfair labor practice charge. *See* Tr. 105-06, 158.

Further, when the minutes became available, the Union took steps to redact sensitive or private information from the records, a process that requires coordination between the staff and the Union's officers. *See* Tr. 129-30, 156; GC Ex. 8. Thus, by making the records available to Lowe just three business days after coming within the Union's possession, the Union clearly succeeded in making a "reasonable good faith effort to respond to the request as promptly as circumstances allow[ed]." *See West Penn Power Co., dba Allegheny Power*, 339 NLRB 585.

Therefore, considering that (1) the documents Lowe requested were not yet available to the Union at the time he made the request, (2) he did not object to or raise concerns regarding the timeline for processing presented to him by the Union, and (3) the Union promptly contacted him once the documents became available, it cannot be said that the Union's handling of his request was arbitrary, discriminatory or in bad faith. Stated plainly, "[t]here was simply no showing that the procedures established by Respondent for handling the request were not reasonable or that Respondent could have done anything else to produce a faster result." *Union Carbide Corp*, 275 NLRB at 201.

CONCLUSION

For all of the foregoing reasons, the Union urges the ALJ to conclude that the Union did not breach its duty of fair representation and to dismiss the allegations in their entirety.

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RESPECTFULLY SUBMITTED this 25th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2018, I caused the foregoing Respondent's Post-Hearing Brief to be filed with the National Labor Relations Board via electronic filing, and true and correct copies of the same to be delivered to the following parties in the manner indicated below:

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