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SPECIAL FEATURE

Employers ignore union info requests at their peril

By Todd A. Newman and Brian D. Carlson

The National Labor Relations Board recently ruled that an employer committed an unfair labor practice — or ULP — by failing to respond "in a reasonably timely manner" to a union information request concerning bargaining-unit employees, even though the information sought by the union ultimately was found to be irrelevant to the union's role as bargaining representative.

In *IronTiger Logistics, Inc.*, the employer waited four and a half months to respond to the union's information request. The board found the delay to be a breach of the employer's statutory duty to bargain in good faith with the union, regardless of whether the employer actually had an obligation to produce the information requested by the union.

According to the board, the employer "was required to timely provide that information or to timely present the Union with its reasons for not doing so" and therefore committed a ULP by doing neither.

Further, in accordance with a standard policy adopted by the board in 2010, it ordered that if the employer customarily communicated with its employees via electronic means (*e.g.*, email or intranet postings), then the employer would be required to post the board's remedial "Notice to Employees" electronically as well as physically.

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Case facts

The respondent in the case, IronTiger Logistics, Inc., or ITL, is an interstate freight shipper whose drivers are represented by the International Association of Machinists and Aerospace Workers.

ITL is under common ownership with another shipping company, TruckMovers.com, whose employees are not represented by the Union.

Under an arrangement between the two companies, TruckMovers determined which loads would be assigned to ITL for delivery and which loads would be assigned to its own drivers for delivery. In that regard, ITL and the Union clarified in a letter of agreement that the loads assigned to TruckMovers' drivers were not ITL's and that their delivery by TruckMovers would not be considered subcontracting.

On March 29, 2010, the Union filed a grievance under its collective bargaining agreement with ITL. The grievance alleged that ITL was violating the CBA by failing to list all available delivery assignments on its dispatch board.

Two weeks later, on April 12, 2010, the Union submitted an information request to ITL, asking for information concerning all units of work dispatched to ITL's and TruckMovers' drivers over the previous six months. On May 7, 2010, ITL provided a detailed 29-page response containing a list of all loads assigned to the companies' respective drivers over that time period.

Nevertheless, on May 11, 2010, only four days after receiving ITL's response, the Union submitted a supplemental information request to ITL, seeking detailed responses to 10 specific inquiries. Eight of the 10 concerned TruckMovers' drivers, even though the Union did not represent those drivers.

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Viewing the Union's supplemental information request as harassing and burdensome, ITL did not promptly respond. Consequently, on July 15, 2010, the Union filed a ULP charge against ITL, contending that ITL's failure to promptly respond constituted a failure to bargain in good faith under the National Labor Relations Act.

ITL eventually responded to the supplemental information request, but not until Sept. 27, 2010.

In the course of the ULP pre-hearing proceedings, the Union conceded that ITL was not legally obligated to provide the requested information. Thus, the sole question presented to the administrative law judge hearing the case (and, ultimately, the board) was whether ITL had violated the NLRA by waiting more than four months before providing any response to the Union's supplemental information request.

NLRB's decision

The administrative law judge concluded that ITL had violated the NLRA through its delay. In a 2-1 decision, by Chairman Mark Gaston Pearce and member Sharon Block, the NLRB affirmed the judge's decision, holding that ITL "was required to timely provide [the requested] information or to timely present the Union with its reasons for not doing so."

In its holding, the board relied and expanded on some long-established principles under the NLRA. In brief, those principles hold that:

- An employer generally must provide to a union, upon request, and in a reasonably timely manner, information relevant to the bargaining relationship;
- Information relating to bargaining-unit employees is presumptively relevant and therefore must be provided unless the employer can show that the information is not, in fact, relevant to the bargaining relationship;
- If an information request does *not* relate to bargaining-unit employees, the employer need not produce the requested information unless the union demonstrates its relevance; and
- An employer must provide a timely response to a union's request for relevant information even if the employer believes it has grounds (such as confidentiality concerns) for not providing the information itself, in which case the employer must at least respond by providing the basis for its objections.

In affirming the administrative law judge's decision, the board clarified that the last of these longstanding principles encompassed union requests for *presumptively* relevant information.

Thus, whenever a union requests information relating to bargaining-unit employees, the employer must now provide a timely response to the request, even if the employer is not required to produce the information itself.

Accordingly, the board held that ITL had violated the NLRA by failing to provide a reasonably timely response to the Union's supplemental information request, as two of the 10 inquiries contained in the supplemental request concerned ITL's drivers.

In that regard, the board opined that when a union requests presumptively relevant information, "it is reasonable for the union to expect production of the information, unless and until the employer notifies it otherwise."

The board added that there are "good policy reasons" for requiring an employer to respond in a timely manner to a request for presumptively relevant information, even if the employer is not actually required to produce the information.

The board explained that requiring such responses could help to avoid unnecessary ULP charges by "encouraging the parties themselves to address potential disputes before they disrupt the collective-bargaining relationship and burden the parties and the public with the cost of administrative investigation and litigation."

Dissenting from the majority's holding, member Brian Hayes emphasized that the board had never previously required employers to respond to union requests for irrelevant information.

In Hayes' view, by requiring employers to respond to every request for information relating to bargaining-unit employees, the *IronTiger Logistics* decision "gives even greater latitude for unions to hector employers with information requests for tactical purposes that obstruct, rather than further, good-faith bargaining relationships."

ITL has appealed the board's decision to the U.S. Court of Appeals for the D.C. Circuit, so it is possible that the holding may ultimately be reversed or modified — particularly in light of the D.C. Circuit's recent holding that President Obama's recess appointments to the board in January 2012 were constitutionally invalid.

However, the NLRB has long asserted that it is not bound by decisions of the U.S. Courts of Appeals, apart from the specific cases in which they are issued. Thus, even if the D.C. Circuit reverses or modifies the *IronTiger Logistics* decision, the board could take the same position in a subsequent case.

Recommendations for employers

In light of the board's decision, there are a number of important steps that unionized employers should consider taking.

First, employers should consider responding to *all* union information requests, irrespective of their subject matter. Although the *IronTiger Logistics* holding applies only to information requests relating to bargaining-unit employees, it is not always clear whether an information request falls into that category.

Providing some type of response — however brief — to any union information request is unlikely to be unduly burdensome and can help protect an employer against a potential ULP charge.

Second, employers should bear in mind that the board's decision requires a timely *response* to a union information request — and not necessarily production of the underlying information.

If the information sought by the union is not relevant to the collective-bargaining relationship, or if there is some other legal basis for withholding it, then the employer is not obligated to provide the information. As noted, though, in such a case, it would be prudent for the employer to explain the basis for its objections in its response.

Third, employers should make certain to respond to union information requests in a reasonably timely fashion.

Notably, the board has declined to establish any *per se* rule as to how quickly an employer must respond. Rather, as the board explained in a 2003 decision, an employer must respond "as promptly as circumstances allow," considering such factors as "the complexity and extent of information sought, its availability and the difficulty in retrieving the information."

Finally, employers should be aware that an information request need not be conveyed in any particular format, or even in writing.

For instance, union representatives often request information orally during labor-management meetings and do not always confirm such requests in writing. Thus, employers should be vigilant with regard to informal union information requests and provide reasonably timely responses. NEIH