National Broadcasting Company, Inc. *and* American Federation of Television and Radio Artists, AFL–CIO. Case 2–CA–37396

February 14, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On March 5, 2007, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations 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,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, National Broadcasting Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Member Schaumber views the information request as covered by the parties' contractual arbitration clause and would defer the request to arbitration. See *Team Clean, Inc.*, 348 NLRB 1231 fn. 1 (2006). He recognizes, however, that Board precedent is to the contrary. See, e.g., *Shaw's Supermarkets,* 339 NLRB 871, 871 (2003) (stating that "[t]he Board has a longstanding policy of nondeferral to arbitration in information request cases"). Accordingly, for institutional reasons, he concurs in finding that the Respondent violated Sec. 8(a)(5) by failing to furnish the requested information.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

We agree with the judge that the Respondent failed to establish the defense of confidentiality justifying its blanket refusal to supply the requested information. In its exceptions, the Respondent contends that, even if it is found to be obligated to provide the information, legitimate confidentiality and privacy concerns still exist regarding certain information sought by the Union, in particular confidential information about nonunit employees. In ordering the Respondent to furnish the requested information, we do not preclude the Respondent, at the compliance stage of this case, from making "a particularized showing" of legitimate and significant confidentiality concerns related to specific information requested by the Union that must be balanced against the Union's need for that information. *Jacksonville Area Assn. for Retarded Citizens,* 316 NLRB 338, 341 fn. 14 (1995).

Joane S. Ian Wong, Esq., for the General Counsel.
Andrew Herzig, Esq. and *Stuart Goldstein, Esq.,* of New York, New York, for the Respondent.
Peter Fuster, Esq., of New York, New York, and *(Cohen, Weiss and Simon, LLP) on brief,* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed on December 19, 2005,[1] by the American Federation of Television and Radio Artists, AFL–CIO (AFTRA or the Union), the Regional Director for Region 2 issued a complaint and notice of hearing on April 28, 2006, alleging that National Broadcasting Company (Respondent[2] or NBC) violated Section 8(a)(1) and (5) of the Act, by refusing to supply relevant information to the Union. The trial was held with respect to the allegations in the complaint on August 17, 2006. The complaint and answers were amended at the trial in various respects. Briefs[3] have been filed by the parties, and have been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation engaged in the business operating a television broadcasting network. Annually, Respondent sells media space to advertisers that advertise national products and its business is national in scope. Respondent annually derives gross revenues in excess of $100,000. It is admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

The Union and Respondent are parties to many collective-bargaining agreements, Including a multiemployer agreement known as the AFTRA National Code of Fair Practice for Network Television Broadcasting (the Code or the contract). Signatories to this contract include the major television networks, such as NBC, CBS, and ABC, as well as members of the Alliance of Motion Pictures and Television Producers (AMPT),

[1] All dates hereinafter referred to are in 2005, unless otherwise indicated.

[2] The charge was filed against NBC Universal. The complaint alleged NBC, Inc. as Respondent, since that entity is the signatory to the collective-bargaining agreement in issue. Respondent has stipulated that NBC is a subsidiary of NBC Universal, and to the extent that NBC is found to have an obligation to produce certain documents to the Union, NBC Universal will assume responsibility for such production.

[3] In her brief, the General Counsel made the motion to correct the transcript. The motion is unopposed and is granted as follows: [Certain errors in the transcript have been noted and corrected].

which is a multiemployer organization representing the interest of motion picture and television producers.

Paragraph 75 of the Code entitled "people covered," defines the unit. It reads as follows:

> All persons who perform as talent, e.g., actors; comedians; masters-of-ceremonies; quiz masters; disc jockeys; singers; dancers; announcers (other than staff duties of staff announcers); sportscasters; specialty acts; stunt persons; background actors' puppeteers; reporters and analysts (with the exception of government employees and persons who are engaged occasionally on a single program basis because they are specialists whose regular employment or activity is in the field in which they report, such as college professors and scientists) in the fields of home economics, fashion, farm and rural subjects, and market reports; models; moderators; members of panel where format of program requires such persons to participate generally in entertainment. Excluded from the provisions of this agreement are members of panel who take part in discussion of news, education, or public affairs programs, or persons who act only as judges of contests; provided that services of staff newspersons on such panel programs shall be subject to their respective staff agreements.
>
> This Code also applies to all persons other than staff newspersons rendering services in the field of news including but limited to commentators and analysts and persons who criticize, review and/or comment on the following: books, the fine arts, music, sports, the theatre, movies, dance, radio, television, society, and travel; and including persons who perform in live, film, or recorded news inserts in network television programs. However, management personnel delivering editorials are excluded from the coverage of this Code.

Although the Code makes no specific reference to weathercasters, the evidence discloses that Willard Scott, a well-known weathercaster was covered by the Code, when he appeared on NBC's Today Show, and when local weathercasters fill in from time to time on network Programs, such as the "Today Show" they are also covered by the Code. Section 76 of the Code is entitled "News Service" and it states as follows:

> Any person rendering services on behalf of Producer in the field of news of the type covered by this Code under Paragraph 75.A. who performs in live, film or recorded news stories not exceeding five (5) minutes in length which originate within the continental limits of the United States and which are made available by Producer for telecast on a non-interconnected basis by two (2) or more stations as part of their local news programs shall be paid by Producer one (1) single payment of $85.00 for each such news story in which such person is seen or heard, up to a maximum of $171.00 per day for all news stories made available by Producer on any day, provided:
>
> (1) such person is employed by Producer in New York, Los Angeles, Chicago, San Francisco or Washington, D.C., and said news story originates from such city or originates from another city within the continental limits of the United States when such person is sent to such other city for the purpose of making such origination; or,
>
> (2) such person's employment is otherwise covered under an AFTRA contract with a station if such contract covers services in the field of news.
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> For the payment made pursuant to this Paragraph 76, Producer may allow each local station either or both of the following: (a) an unlimited number of such telecasts within forty-eight (48) hours after the news story has first been made available by Producer hereunder; (b) one (1) such telecast after such forty-eight (48) hour period but within seven (7) days after the news story has first been made available by Producer.

B. Prior Related Cases

1. *National Broadcasting Co.,* 318 NLRB 1166 (1995)

On September 19, 1995, the Board issued its decision in *National Broadcasting Co.,* 318 NLRB 1166 (1995), affirming the decision of Administrative Law Judge James Morton, that Respondent, NBC had violated Section 8(a)(1) and (5) of the Act, by refusing to supply relevant information to AFTRA. That case involved representation by the Union in two units. One unit involved staff newspersons, which was covered under a contract referred to the staff newspersons contract or the staff contract. The other unit which applied to nonstaff or freelance employees, who were covered under the Code, is the same contract at issue in this proceeding.

The Union sought information concerning the operations of various entities including General Electric (the parent company of Respondent), CNBC (Consumer News and Business Channel), NBC News Channel, and Nightside. The Union requested the information because it believed that unit work was eroding because of changes being implemented by Respondent and that unit employees may not be receiving compensation called for in the agreements for their stories when used by CNBC and NBC News Channel.

The staff contract provides that it is applicable to Staff newspersons employed by Respondent in New York, Washington, Chicago, or Los Angeles, or in a domestic news bureau. Respondent claimed that CNBC is primarily a cable service, and that only 1 percent of its news is made available for use on a network basis, and that the language of the staff contract excluded CNBC from coverage. The General Counsel contended that a bona fide question existed as to whether CNBC and NBC News Channel newspersons were employees of "domestic network bureaus." The Union argued that CNBC may be bound under its contracts with Respondent as it is located in Fort Lee, New Jersey, just across the river from New York City, on the ground that it is thus located in the New York metropolitan area. The Respondent placed in evidence in that proceeding an arbitration award in which a similar claim was made by the Union against the Columbia Broadcasting Company, and that was rejected. Thus Respondent asserted before the judge and the Board, that this arbitration award "disposes of that aspect of the Union's reasons for seeking data about CNBC."

The judge's decision, affirmed by the Board, without charge or comment on the basis or rationale of his decision, found that

the Union had demonstrated relevance for its request for the information, concerning single-employer status vis-á-vis General Electric, Respondent and the other entities, and moneys to employees for their stories used by CNBC and other entities. He concluded that a prima facie case was established that the request was relevant to the Union's responsibilities to represent staff and nonstaff persons in Respondent's employ. The judge then proceeded to consider Respondent's argument that sought to rebut that showing by pointing to contract language and an arbitration award issued in favor of CBS. It argued that NBC News Channel cannot be found to be a domestic news bureau, and "that I must find that CNBC, which is located across the river from the Respondent's headquarters, is beyond the unit scope." The judge concluded that the "record before me does not allow for a finding as a matter of law, that the Union's request has no relevance to the Union's responsibilities as bargaining representative. Rather, the contentions of the Respondent are more properly matters to be presented to any arbitration proceeding that might ensue." 318 NLRB at 1169.

2. *National Broadcasting Co.,* Case 2–UC–561

In 2001, the Union filed a UC petition in Case 2–UC–561 seeking to clarify a unit of NBC newspersons based in New York, Washington, Chicago, Los Angeles, or in News Bureaus, to include staff newspersons employed by MSNBC[4] in Secaucus, New Jersey.[5] In that proceeding, the Union contended that NBC and MSNBC should be deemed a single employer under the Act, and that MSNBC staff newspersons constitute an accretion to the existing unit. Respondent asserted therein that NBC and MSNBC are not a single employer and that even if it is determined that NBC and MSNBC constitute a single employer, factors employed by the Board in accretion cases were not present. Further, the Employer argued that the agreement itself expressly precludes coverage for the employees at issue, since Secaucus, New Jersey, was beyond the geographic scope of the staff Newspersons Agreement. The Union opposed Respondent's argument in that regard, as it did in the prior Board trial, and as it does in this proceeding, by contending that the term "New York" in that agreement meant the New York metropolitan area.

In that regard, the Union introduced some of the same evidence in the UC proceeding that it proffered here, to support its contention that in the industry and under the contract, New York means New York metropolitan area. Such evidence included a 2001 Nielson rating for the broadcast industry, which defines the New York market in the industry to include Secaucus, New Jersey, as well as the fact that the parties have applied contracts to employees employed in Burbank, California, although the contracts by their terms refer to Los Angeles.[6]

Furthermore, an employment contract was put into evidence in the UC proceeding concerning Lester Holt, a MSNBC anchor whose employment contract said his area of employment was New York/New Jersey. Finally, testimony at the UC hearing by Roman Escobar a management witness, reflected that he had previously worked at WXTV, an Univision affiliated television station that is located in Secaucus, New Jersey. In Escobar's testimony, he said, "[I]t was right here in New York," that the television station was "right here in New York," and he referred to it as Univisions' "New York affiliate."

Notwithstanding the above evidence, and the contentions of the parties with respect to geographical coverage of the contract, the Regional Director specifically declined to rule on that issue. Further, she also specifically declined to rule on the issue of single-employer status vis-á-vis NBC and MSNBC. The Regional Director dismissed the petition solely on the grounds that the Union did not establish that MSNBC Cable anchors share the "requisite overwhelming community of interest," with the existing NBC unit to support an accretion finding.

The Regional Director in assessing the factors relevant to an accretion analysis, considered the issue of geographic proximity. She concluded that the unit was national in scope, and so the distance of nine miles between NBC's Rockefeller Center Studios and MSNBC's Cable's Secaucus base would not seem to weigh against a finding of accretion. She added however, that the broad geographic sweep of the unit, which spans the entire country, suggests that the relative proximity of one unit member to another is not of much significance in this industry. In a footnote to this discussion, the Regional Director as noted above, specifically disclaimed any ruling or opinion on the "distinct contractual issue" as to whether "New York" as defined in the contract is to be understood as the New York metropolitan area, which would include parts of New Jersey or as encompassing only New York City.

Finally, the UC decision also reflected that the Union had previously taken the position that MSNBC Cable employees appearing on the air, should be covered under the preexisting agreement with Respondent covering NBC staff persons, and that Respondent had disagreed with the Union's position in that regard. The decision further reflected that the Union raised the issue during negotiations that began in late August 1997, and had asked Respondent at that time for certain information. The Union informed Respondent that depending on what the information that it sought from Respondent ultimately revealed, that it believed that the MSNBC Cable staff were already covered under the existing contract by operation of law. In the alternative, the Union told Respondent, that if the facts did not establish that the MSNBC staff newspersons were covered under the contract by operation of law, then the Union would negotiate to extend the contract to MSNBC Cable staff newspersons. The Union did not file an accretion petition at that time, because the information it had received from Respondent up to that point had been incomplete and, accordingly insufficient to determine whether MSNBC Cable staff newspersons were covered under the then existing contract. Negotiations for the 1997 agreement stalled, and the Union proposed that it would withdraw its information request to facilitate reaching an agreement. The Union never withdrew its claim concerning MSNBC, and Respondent provided the Union with the information requested regarding MSNBC Cable by way of a stipulation between the

[4] MSNBC was formed in July 1996 as a result of joint venture between Microsoft and NBC.

[5] This staff newspersons agreement is no longer in effect, inasmuch as the Union has been decertified as the collective-bargaining representative of Respondent's employees in that unit.

[6] Burbank, California, is a city close to, but separate from the city of Los Angeles.

parties in November 1999. The Union filed its UC petition on October 17, 2000.

C. Weather Plus and the Union's Information Request

Weather Plus is a 24-hour television weather service that operates out of Secaucus, New Jersey. It was created in 2004 by NBC and the NBC Affiliate Futures Committee (Affiliate Committee) which represents over 200 local stations that carry NBC network programming throughout the U.S. The Affiliate Committee is comprised of corporations independent of NBC, such as Gannett Broadcasting, Hearst Argyle Television Inc., and Ray Com Media. Approximately 90 of the more than 200 local affiliate stations, 10 of which are owned by and operated by NBC subscribe to Weather Plus. The service is distributed by digital cable service providers over the air, although most customers are only able to view Weather Plus via digital cable. There are two components to the Weather Plus program, a local weather component and a national weather component. Weather Plus viewers will see both local and national weather stories and related news. Fifty percent of the time, national weather is reported, with local weather comprising the remaining 50 percent of the time on the station. The national portion of the Weather Plus service is produced at the MSNBC studios in Secaucus, New Jersey. The national content is produced by a team of technical staff and on-and-off air meteorologists, all of whom report to Jeff Thein, vice president and executive producer of Weather Plus.

In November 2004, Thomas Carpenter, AFTRA's general counsel and director of Legislative Affairs, attended a meeting of the Federal Communications Commission, wherein an NBC official discussed that NBC was preparing to launch as a joint venture with affiliate groups, Weather Plus, as a digital over the air broadcast that would air on part of the digital spectrum that NBC's own stations and their affiliates were granted as part of the digital transition. The NBC representative stated that existing NBC weather casters would be used to do local cut-ins for local weather, but that programming would have a national component as well, with dedicated meteorologists located in Secaucus, New Jersey, doing the national forecasting to all of the affiliates around the country. He added that while Weather Plus was co-owned by the network and the affiliate groups, it was going to be managed and overseen by NBC. After this meeting, Carpenter received e-mails from Mary Cavallaro, a union staff member, forwarding articles that appeared in trade publications, discussing NBC's launching of Weather Plus. They included an article in Variety, posted November 5, 2004, entitled "*NBC, Affils Plan For Weather*." This article states that Respondent and its affiliates, launched Weather Plus a jointly owned weather net saying they want to "catch the country by digital storm." The article quoted an NBC executive, as stating that programming costs would be minimized, since content was being provided by the existing weather staff at NBC News and weather desks at local stations. Cavallaro also forwarded another article from Broadcasting and Cable entitled *"Peacock Plays Weather Vane,"* that reported that weather junkies would get "NBC's long planned Weather Plus digital service." It added that the channel will be broadcast digitally over WNBC New York, and that "a mix of familiar local meteorological talent and anchors from NBC and MSNBC will be tossed together with quality graphics and forecast data," and that "NBC will make the service supported by a dedicated staff at the NBC news channel here in Charlotte, N.C. available to affiliates free of charge with both sides then splitting revenues equally."

An article in TV Week dated November 16, 2004, entitled *"NBC debuts Digital Weather Channel in New York,"* details that Weather Plus was due to launch in WNBC TV in New York, as well as in 14 other stations throughout the country. Another article forwarded to Carpenter from Mediaweek, dated November 15, 2004, entitled *"NBC U Weather Net Blows into New York,"* states that NBC Universal and its affiliates, will roll out in phases a 24-hour national and local weather network called Weather Plus, and that Time Warner's Digital Service in New York, will be the channel's first distributor. It added that NBC Universal hoped to compete with the 22-year-old Weather Channel which is available in 45 percent of U.S. homes. Finally, an article dated November 16, 2004 entitled "*NBC Uni Tunes up Weather Plus,"* reports that NBC Universal launched an "all digital broadcast network that will eventually deliver local weather and community information on network stations across the country." It also reported that NBC Universal "had this project on the boards for 17 months," and quoted a media representative as observing that "TV stations are finally stepping up and recognizing that they have valuable bandwidth to bring the market places at the transition to digital comes."

In December 2004 and January 2005, Carpenter spoke with Cavallaro and Patricia O'Donnell, an AFTRA representative in its Washington-Baltimore office about information that these representatives had obtained from their members about Weather Plus. Cavallaro was informed that existing union members working for local stations in Philadelphia would be performing the network portion of the Weather Plus program stream, because the Secaucus facility was a little delayed in getting up and running. O'Donnell told Carpenter that AFTRA members employed by WRCT, a NBC station in Washington, D.C., had been approached about doing local cut-ins for the Weather Plus stream.

By June 2005, Carpenter had information that Weather Plus had launched in at least two markets, which is required before a program can be characterized as a network program under the Code, as well as the information from trade publications and discussions with staff representatives of the Union, indicating a relationship between Respondent and Weather Plus. Therefore, based on the above, Carpenter after consulting with his superiors filed a grievance against Respondent on June 21, 2005. The grievance asserts that Respondent violated the Code by "failing to apply the terms and conditions of employment in the Collective Bargaining Agreement to the services performed by the employees on the 'Weather Plus stream.'" The grievance demanded that the Agreement be applied to any employees working on the Weather Plus program, and that all affected employees be made whole.

Respondent did not reply to this grievance. The Union by its attorney filed for arbitration, of the grievance dated June 21, 2005.

Carpenter testified that he believed that by virtue of Section 75 of the Code, which by its terms covers "all persons who perform as talent," that people who are doing work on digital over-the-air broadcast weather programming that was networked should be covered by the contract that covers digital, over-the-air broadcasts of network programming.

After the Union's demand for arbitration was filed, Peter DeChiara, the Union's counsel did an internet search on September 12, 2005, using Google to find public documents concerning the relationship between NBC and Weather Plus. Some of the items found by DeChiara included a press release, dated March 30, 2005, released by NBC Universal, which quotes Brandon Burgess, an NBC Universal executive vice president as saying, "[W]e created NBC Weather Plus to tap the tremendous potential of digital over-the-air broadcast technology and enable our affiliates to better service their local markets." The press release also notes that Jay Ireland is the president of NBC Universal and is chairman of the NBC Weather Plus board of directors. The release also states as follows:

> NBC Weather Plus combines national and local weather coverage with in-depth, live reports throughout the day from trusted local meteorologists backed by the strength of the NBC News network. When viewers tune into NBC Weather Plus, the network's distinctive "L Bar" on the perimeter of the screen provides current temperatures as well as five-day and hour-by-hour forecasts in real time, 24 hours a day, seven days a week, even during commercials, a first for any network.

DeChiara's search also revealed a document from an NBC website, which reflected that Ireland was both president of NBC Universal and chairman of the Weather Plus board of directors, and that the address listed for Weather Plus was the same address as NBC Universal, 30 Rockefeller Plaza. DeChiara also found a transcript from an MSNBC program "Hardball" dated August 31, 2005, in which Chris Mathews the host, introduced a reporter Bill Karins as being with "NBC Weather Plus." Later on in the transcript, Karins is referred to as "Bill Karins, NBC Meteorologist." DeChiara viewed this evidence as indicating a single-employer relationship between NBC and Weather Plus. Finally, DeChiara printed out an article from the Houston Chronicle, dated September 1, 2005, which discussed coverage of Hurricane Katrina by various networks and cable stations. What caught DeChiara's eye in the article was the following quote:

> MSNBC and its broadcast counterpart NBC also found benefit in two lesser-known reporters, Bill Karins and Jeff Ranieri, from its obscure digital cable channel, NBC's Weather Plus channel 20 on Time Warner. Ranieri, in particular, was put to prominent use.

DeChiara testified that the use of the word "its" in the above quote, suggested to him a possessive relationship between NBC and Weather Plus. The fact that the article mentioned Ranieri's prominent use on NBC's Today, suggested to DeChiara that since Ranieri was "put to use" on the Today Show, his employer might be NBC.

On September 12, 2005, DeChiara left a voice mail message for Andrew Herzig, Respondent's attorney, that the Union assumed that there were individuals who were employed nominally by Weather Plus as on-air talent, and that AFTRA was going to make an information request to explore whether there was a single-employer relationship between NBC and Weather Plus. Later on that day, Herzig and DeChiara spoke on the phone. Herzig informed DeChiara that he did not know much about Weather Plus, and would get back to DeChiara after meeting with the "Weather Plus people." DeChiara told Herzig that if on-air employees were employees of Weather Plus, he would be making a single-employer argument in the grievance. On September 16, 2005, the parties agreed to select Maurice Benewitz as the arbitrator for the grievance filed by the Union and so notified AAA.

On September 26, Herzig and DeChiara spoke again, and Herzig stated that he would get back to DeChiara with regard to Respondent's position on the single-employer issue in a few days. DeChiara responded that he was going to be sending Respondent an information request.

On September 29, 2005, DeChiara sent an information request to Respondent. In preparing this request, DeChiara looked back in his file from the MSNBC unit clarification case decided in 2001, and noted that the single-employer issue was litigated in that case. He also noted that at that time, the Union had made an information request for similar material from Respondent, and that Respondent provided such information to AFTRA. The request reads as follows:

> Dear Mr. Herzig:
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> This office represents AFTRA in the above matter.
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> Pursuant to Section 8 (a)(5) of the National Labor Relations Act, and in preparation the arbitration of the grievance, AFTRA hereby requests the following relevant information documents.
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> Definitions:
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> For purpose of this information request, "NBC" includes (1) NBC Universal, (2) NBC's various divisions and subsidiaries, Including NBC's television operations, and (3) NBC's corporate owners, including General Electric.
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> "Broadcast" means sent through the airwaves, as opposed to through a cable.
>
> Requests:
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> 1. A list of all persons, including but not limited to correspondents and meteorologists, who perform on-air (meaning, in front of the camera) for programming that appears on Weather Plus, but not including employees of local television stations or persons who give only local weather reports.
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> 2. A copy of the personnel file of each person referred to in Request #1 above.
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> 3. A copy of each employment contract, personal services agreement or loan-out agreement entered into by or on behalf of each person referred to in Request #1 above.

4. A copy of any resume or corporate bio of each person referred to in Request #1 above.

5. A list of any NBC-sponsored health insurance plan, life insurance plan, savings plan, pension plan, 401(k) plan, disability plan or any other NBC-sponsored welfare or benefit plan provided to or made available to each person referred to in Request #1 above.

6. A list of the street addresses of the facilities where the persons referred to in request #1 above have been provided with offices or workspaces.

7. Any telephone directory that includes the persons referred to in Request #1 above.

8. The business email addresses of the persons referred to in Request #1 above.

9. Copies of all workrules, employment manuals, office manuals, policy manuals, codes of behavior, codes of ethics, and/or statements of policy (*e.g.,* sexual harassment policy, computer use policy) to which the persons referred to in Request #1 above are required to adhere.

10. Sample copies of pay checks, pay stubs or other pay records for each of the persons referred to in Request #1 above.

11. Sample copies of any timesheets or work logs maintained by or for or submitted by or for persons referred to in Request # 1 above.

12. Sample copies of any expense reimbursement forms submitted by persons referred to in Request #1 above.

13. Sample copies (with account numbers redacted) of any credit cards or expense account cards issued to the persons referred to in Request #1 above.

14. A copy of the home pages of any internal NBC intranet websites accessible to the persons referred to in Request #1 above.

15. Videotape of Weather Plus broadcasts in which each person referred to in Request #1 above appears.

16. Any charter, bylaws or other governing documents of Weather Plus.

17. Any documents concerning or addressing which entities own or control Weather Plus.

18. A list of the members of the Board of Directors of Weather Plus.

19. The minutes of all meetings of the Board of Directors of Weather Plus.

20. A list of the officers of Weather Plus.

21. The resume or corporate bio of each member of the Weather Plus board of Directors and of each officer of Weather Plus.

22. A list of all managerial personnel of Weather Plus, including executive producers, with their titles.

23. The resume or corporate bio of each managerial employee of Weather plus, including Michael Steib, Jeff Thein and Jordan Hoffner.

24. A list or chart of the officers and directors of NBC.

25. A list or chart of all managerial employees involved in NBC's network television operations, with their titles.

26. A copy of any agreements or other legal documents, between NBC and any other party or parties, that establish or created Weather Plus, including but not limited to a joint venture agreement or a limited liability company agreement.

27. A copy of any contracts, leases, guarantees, licensing agreements or other agreements between NBC and Weather Plus.

28. A copy of any contracts, leases, guarantees, licensing agreements or other written agreements between NBC and any other party or parties concerning either Weather Plus, Weather Plus employees or Weather Plus operations.

29. Any documents describing, concerning or memorializing any transfers of assets or funds between NBC and Weather Plus, including but not limited to any loans or payments.

30. Any chart or other document showing the corporate relationship between NBC and Weather Plus.

31. Any press releases concerning Weather Plus.

32. Copies in your files of any newspaper or magazine articles, which either appeared in print or electronically, concerning Weather Plus.

33. Any internal non-privileged memos concerning Weather Plus.

34. All financial statements (audited, if available) of Weather Plus, including profit and loss statements, balance sheets and cash flow statements, with all applicable notes.

35. All NBC financial statements that include mention of Weather Plus.

36. Any documents showing costs incurred by NBC that are attributable to Weather Plus or Weather Plus operations.

37. Any documents showing revenues or profits received by NBC attributable to Weather Plus.

38. Any business plans for or regarding Weather Plus.

39. All correspondence, including email correspondence, between NBC, its officers or employees, on the one had, and Weather Plus, its officers or employees, on the other, concerning the operations or finances of Weather Plus.

40. A list by name, title and department, of any NBC in-house counsel, NBC in-house financial or accounting personnel. NBC in-house human resources personnel or NBC in-house communications or publicity personnel who have performed services for Weather Plus.

41. A list of any NBC television executive producers, producers, associate producers, directors, associate directors, assistant directors, stage managers, production assistants, camera operators, technicians or any other NBC staff or crew who have performed services for Weather Plus.

42. Any documents memorializing, setting forth or addressing the type or quantity of services rendered to Weather Plus by any of the persons referred to in Requests ## 40, 41 above.

43. Any documents memorializing, setting forth or addressing any payments by Weather Plus for the services

rendered to Weather Plus by any of the persons referred to in Requests ## 40, 41 above.

44. Copy of any print advertisement promoting Weather Plus paid for, in whole or in part, by NBC and, in addition, any record of reimbursement for such payment made by Weather Plus.

45. A copy of any agreement or other document contemplating, concerning, addressing or memorializing any payment by NBC to any other person or entity to have services performed for or on behalf of Weather Plus, or to have goods provided to Weather Plus.

46. A list of any and all banks or other financial institutions at which NBC and Weather Plus both have accounts.

47. A list of any and all accounting firms, advertising firms, law firms, public relations firms, actuarial firms, consultants, banks, financial institutions, and vendors that have, since the inception of Weather Plus, provided services or goods to both NBC and Weather Plus.

48. Any documents concerning or addressing the locations from which Weather Plus broadcasts originate (excluding inserts of local weather reports).

49. A list of the television stations over which Weather Plus programs are broadcast.

50. Any and all documents showing, either geographically or numerically, the extent to which Weather Plus broadcasts reach viewing households (for example, the number or percentage of households reached in a given area, or the regions or cities reached).

Please provide the requested information and documents by October 31, 2005. If you believe that any information or documents responsive to the foregoing requests are confidential, AFTRA would be willing to discuss the terms of an appropriate confidentiality agreement.

Sincerely,

Peter D. DeChiara

On October 27, 2005, Herzig wrote to DeChiara acknowledging receipt of the request, and stating that "without waiving any argument that it may assert that such requests are collectively, or individually irrelevant, unduly burdensome, overly broad or otherwise objectionable, the Company is in the process of preparing its response." On November 21, 2005, Herzig and DeChiara spoke by phone, and Herzig requested an adjournment of the arbitration which had been scheduled for January 20, 2006, because of his negotiation schedule, and told DeChiara that NBC planned to raise a geographic defense at the arbitration, i.e., that Secaucus, New Jersey, where Weather Plus is located, is beyond the geographic scope of the Code. Herzig also informed DeChiara that he would be starting to provide DeChiara the documents, pursuant to the Union's information request "soon." At no time during any of their conversations, did Herzig assert to DeChiara that any of the information sought was confidential or burdensome, or that it was improperly prearbitration discovery. Indeed, Herzig did not object to any portion of the request, and in fact indicated to DeChiara that he was going to get the documents to him soon.

However, Respondent never provided any of the requested information to the Union. On December 13, 2005, Herzig left a voice mail message for DeChiara, stating that he was requesting that the arbitration be adjourned to April, and he would be sending a letter to that effect. DeChiara replied by voice mail, since he hadn't received the information that he had been promised, he was going to file a charge with the Board.

On December 19, the Union filed its charge. The next day, Herzig responded with the following letter:

Re: NBC-AFTRA Weather Plus arbitration

Dear Mr. DeChiara:

Because we have been unable to speak by telephone, and in light of your filing of an unfair labor practice charge yesterday in connection with AFTRA's information request, I felt the need to convey to you the specifics of the proposal I had mentioned in my earlier messages to you.

The Union has indicated it needs the information it has sought in support of its position that NBC is the employer of the on-air talent appearing on Weather Plus. The Company, however, believes that this dispute may be resolved without such information. To that end, the Company proposes a bifurcation of the arbitration in which the parties first litigate whether Weather Plus is a program covered by the AFTRA Network Code. Then, only if Arbitrator Benewitz rules in the Union's favor, would the issue whether NBC is the employer of the individuals in question become relevant. In the meantime, the parties would retain their respective positions with regard to the Union's information request and any other claims and defenses.

Bifurcation in this manner would benefit both parties. The question whether Weather Plus is a program covered by the Network Code is independent of and can be fully resolved without responding to the Union's information request or determining whether NBC is the employer of Weather Plus on-air talent. Moreover, the facts necessary for the Arbitrator to rule on this question are simple and straightforward. Thus, bifurcation could save the parties from lengthy and costly litigation, first of the merits of the information request and then the question whether NBC is the employer of Weather Plus on-air talent, and would serve the interest of attempting to reach the most expeditious resolution of the parties' dispute.

I would be happy to discuss this proposal with you in more detail. Please give me a call at your earliest convenience.

Sincerely,

Andrew Herzig

The Union did not agree to the proposal made by Respondent in the above letter to bifurcate the arbitration proceeding and have the arbitrator decide the contract coverage issue first, which could obviate the necessity of litigating the single-employer issue and the information request. However, the Union requested and Respondent agreed that the arbitration proceeding be stayed pending resolution of the instant unfair

labor practice proceeding. Respondent's letter agreeing to the Union's request reads as follows:

> Dear Mr. DeChiara:
>
> The Company herby agrees to the Union's request to stay the above-referenced arbitration pending resolution of the Union's December 19, 2005 unfair labor practice charge. The Company so agrees with the understanding that it is the Company's intention, among its other defenses, to request that the NLRB defer the unfair labor practice charge to arbitration. The Company continues to believe that, because the arbitrator can readily dispense with the instant grievance without reference to the requested information, deferral is appropriate in this case. Nevertheless, the Company will continue to review the Union's information request to determine what, if any, information sought is relevant and in the possession of the Company such that producing it to the Union would be appropriate.

While as noted this letter indicates that Respondent would be continuing to review the Union's information request to determine whether to produce same to AFTRA, it has not produced any of the information requested. After the General Counsel rested its case, on the date of the trial, August 17, 2006, counsel for the General Counsel requested on the record that Respondent produce the information responsive to AFTRA's information request. Respondent, by its attorney refused the request, stating that the information is not relevant, and that the arbitrator should be ruling on the issues.

Respondent presented as a witness, Wendy Freedman, Respondent's vice president of labor relations and employment, who has been employed by Respondent since 1982. She was involved in negotiating and enforcing the Code as well as the now defunct Network Staff News Agreement. Freedman testified that in her view, assuming that NBC and Weather Plus were a single employer, the Weather Plus employees could not be covered under the terms of the Code. She contends that under the Code, weather casters would be characterized as "news services," which under section 76 of the Code, explicitly excludes coverage unless the employee is employed in the "city" of New York, Los Angeles, Chicago, San Francisco, or Washington, D.C. Thus since it is undisputed that the national portion of the Weather Plus content is produced exclusively in Secaucus, New Jersey, and the Weather Plus employees are based exclusively in Secaucus, New Jersey, Freedman asserts that the Weather Plus employees would not be covered by the Code even if NBC were the employer of these employees.

Freedman also testified that when she first became employed by Respondent in 1982, she was informed about the history of the Code's operations in Burbank, California. According to Freedman, many years ago, much of the programming of Respondent, as well as that of other networks, such as CBS and ABC was produced under the Code in Los Angeles. However, at some point, undisclosed in the record, the networks all moved their facilities to Burbank, California, which is outside the city limits of Los Angeles. In conjunction with the move, Freedman claims that the Union and representatives from all the networks, including Respondent, reached an oral agreement that in the California area the Code would stay in effect notwithstanding the fact that the Code referred to employees employed in the city of Los Angeles. Freedman testified that "there was an understanding that all the business that was unionized would stay unionized; that nobody would take the position that Johnny Carson, for example, wasn't covered because it was in Burbank as opposed to Los Angeles."

III. ANALYSIS

An employer, on request must provide a Union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees, which includes information relevant to contract administration and the processing of grievances. *NLRB v. Acme Building Industrial Co.,* 385 U.S. 432 (1957); *CEC Inc.,* 337 NLRB 516, 518 (2002). Where as here, the information concerns a purported single-employer relationship between the Respondent and a nominally separate employer, the Union bears the burden of establishing the relevancy of the requested information. *Dodger Theatricals Holdings, Inc.,* 347 NLRB 953, 966 (2006); *Reiss Viking,* 312 NLRB 622, 625 (1993). A union has satisfied its burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. *Dodger Theatricals,* supra at 966; *CEC,* supra.

In determining relevancy of requested information, the Board uses a broad, discovery type standard, wherein the union's burden, not exceptionally heavy, requires only a showing of probability that the desired information is relevant, and that it would be of use to the union carrying out its duties and responsibilities. *Certco Distribution Centers,* 346 NLRB 1214, 1215 (2006); *Shoppers Food Warehouse,* 315 NLRB 258, 259 (1994). The Board does not pass on the merits of the union's claim that the employer has breached the collective-bargaining agreement, in determining whether information relating to the processing of a grievance is relevant. *Dodger Theatricals,* supra at 967; *Certco Distribution Center,* supra at 2; *Shoppers Warehouse,* supra at 259.

In determining whether the union has made a sufficient demonstration of its reasonable belief of single-employer status, it may rely on hearsay or other types of evidence that may not be reliable or accurate. *Dodger Theatricals,* supra at 967, and cases cited therein.

In applying these principles to the instant case, the first issue to be determined is whether the Union has met its burden of establishing a reasonable belief based on objective facts indicating a single-employer relationship between Respondent and Weather Plus. I conclude that the evidence presented is more than sufficient to meet the Union's burden in this regard. *Dodger Theatricals,* supra. Indeed, Respondent does not even argue in its brief, to the contrary.

The Union's belief was based upon information from trade publications, Respondent's websites and press releases, and from transcripts of TV shows. Thus, the Union found out that NBC announced at an FCC meeting that it was preparing to launch Weather Plus and intended to oversee and manage it, an NBC executive was quoted as saying, "[W]e created Weather Plus," the president of NBC Universal Television Stations was also the chairman of the board of Weather Plus; Weather Plus

has the same street address as NBC and shares a website with it; NBC approached employees at local NBC stations about working on Weather Plus; NBC affiliated MSNBC identified a Weather Plus reporter as an "NBC meteorologist"; and NBC used Weather Plus reporters on NBC's Today program.

Although some of the above information relied upon by the Union was derived from what can be characterized as "hearsay" sources, Board and court precedent makes clear that such evidence can be considered in establishing a "reasonable belief" by the Union. *Dodger Theatricals,* supra at 967; *Contract Flooring Systems,* 344 NLRB 925, 927 (2005); *Cannelton Industries,* 339 NLRB 976, 1005 (2003); *Leonard Herbert Jr.,* 259 NLRB 881, 885 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983); *Heck Elevator Maintenance,* 197 NLRB 96, 98 (1982), enfd. mem. 471 F.2d 647 (2d Cir. 1973).

Although Respondent as noted did not contest or dispute the fact that the Union sustained its burden of establishing a reasonable belief of single-employer status, vis-á-vis Respondent and Weather Plus, it vigorously disputes the relevance of the requested information, notwithstanding this conclusion.

Respondent argues that even assuming that single-employer status between Respondent and Weather Plus is established, that the employees of Weather Plus (or Respondent) would not be covered under the Code. Therefore, Respondent contends that the information sought by the Union cannot be relevant to its representational responsibilities, since as a matter of law the employees working in Secaucus, New Jersey, are not covered by the contract between Respondent and the Union.

Respondent asserts that the Board has frequently exercised its authority to examine and interpret collective-bargaining agreements, in connection with evaluating unfair labor practice allegations. *West Point Pepperell, Inc.,* 200 NLRB 1031, 1037 fn. 4 (1972); *Frank N. Smith Associates,* 194 NLRB 212, 219, (1971), and that a similar examination of the Code here, reveals that Weather Plus on Air Talent are not covered by that contract. Thus, the Union has therefore not established relevancy to its information request.

In this connection, Respondent relies on section 76(A) of the Code, which refers to News Service employees, and states that the Code applies only if the person is employed in and the story originates in five specific cities, New York, Los Angeles, San Francisco, Chicago, or Washington, D.C. Thus, since the record is undisputed that the national portion of the Weather Plus content is exclusively produced in Secaucus, New Jersey, Weather Plus content is not produced in, nor are Weather Plus employees on air employees based in New York, Chicago, Washington, D.C., Los Angeles, or San Francisco, Respondent argues that the Code does not cover Secaucus based employees, even if Respondent were the Employer.

However, the Union argues that article 76 would not necessarily apply to Weather Plus employees, inasmuch as various issues would need to be determined such as whether reports shown on Weather Plus around the clock can be deemed "news," that such reports do not "exceed five minutes in length," and that such reports can be deemed part of "a local national mix." The Union contends that this record does not allow the Board to make findings and determination on the scope of that article. More significantly, the Union and the General Counsel argue that the issue what is meant by "city" in the Code is not clear, particularly in view of past practice and past positions of the parties. The Union asserts that it intends to argue at the arbitration, as it did in two prior proceedings involving Respondent, that the word "city" in the Code means "metropolitan area," and that Secaucus, New Jersey, is within the metropolitan area of New York.

I agree with the position of the General Counsel and the Union, and conclude that in these circumstances, the issue of whether the geographic restrictions in the Code preclude coverage of Weather Plus employees, should be left to the arbitrator and not be decided by the Board. *Dodger Theatricals,* supra; *Certco Distribution Centers,* supra.

While Respondent is correct that in various circumstances, such as those in cases that it cited,[7] the Board will and has interpreted collective-bargaining agreements, these cases are not similar to the case at hand, where the Board is being asked to decide the contract coverage issues vis-á-vis an information request, assuming a single-employer relationship is established. That kind of a decision is properly one for the arbitrator to make, and it is not appropriate to find as a matter of law that the contract does not cover Weather Plus employees. *Dodger Theatricals,* supra; *NBC,* supra, 318 NLRB at 1169.

I note in this regard that undisputed evidence reveals that the parties have applied the terms of the Code to employees working in Burbank, California, although the contract as noted specifies the city of Los Angeles in order for coverage to be applied. While Respondent presented testimony that this practice was the result of an oral agreement by the parties to apply the Code to Respondent's operations in Burbank, as it had previously done in Los Angeles, that evidence does not conclusively refute the Union's reliance on the parties past practice. It is true as Respondent argues, that the parties did agree to extend the Code to Burbank employees, while there was no such agreement with respect to employees in Secaucus, and the prior practice involved a union operation, which moved its operations to another facility, as opposed to the current case, where Secaucus has been a nonunion operation, since its inception. However, these arguments and distinctions should be made to the arbitrator, who will evaluate them, along with the Union's contention that the agreement to extend to Code to Burbank implicitly means that the parties intended the term city in that contract to refer to "metropolitan area."

The Union also presented evidence, which it also introduced in prior proceedings with Respondent where the issue of "geographical coverage" was litigated, of the Neilsen ratings, which defines the New York market in the Broadcast industry as including Secaucus, New Jersey. Further, a management witness in the prior UC proceeding, testified that he had previously worked at WXTV, a Univision affiliated television station that is located in Secaucus, New Jersey. The witness testified that it "was right here in New York," the TV station was "right here in New York," and that Secaucus was Univisions' New York affiliate.

This evidence as Respondent points out may be not determinative, since the Code contains no reference to the use of Neil-

[7] *West Point Pepperell,* supra; *Frank N. Smith,* supra.

sen market areas to add meaning to the geographic terms of the contract, nor any other evidence that the parties intended that the Neilsen market areas be considered as relevant to any term in the contract. However, again these are arguments that can and should be made to the arbitrator, who will consider them as well as the Union's argument that industry usage and perceptions, does bear upon the appropriate interpretation of the contract.

Respondent has misperceived the role of the ALJ and the Board in this type of case. It is not for me or the Board to decide whether there is a single-employer relationship between Respondent and Weather Plus, or whether the contract has been violated, assuming such a single-employer relationship is found. These are issues for the arbitrator, since the Board does not pass on the merits of the Union's claim that the contract has been violated. *Dodger Theatricals,* supra at 969; *Certco Distribution,* supra; *Shoppers Warehouse,* supra.

The Board need only decide whether the information sought has some "bearing" on these issues, or would be of use to the Union. *Dodger Theatricals,* supra; *Crowley Marine Services,* 329 NLRB 1054, 1060–1062 (1999), enfd. 234 F.3d 1295 (D.C. Cir. 2000); *George Koch Sons, Inc.,* 295 NLRB 695, 699 (1989), enfd. 950 F.2d 1324 (7th Cir. 1991), *Pfizer Inc.,* 268 NLRB 916, 918–19 (1984).

Therefore, I emphasize that I need not and do not make any findings on whether or not the contract covers the Weather Plus employees, assuming that a single-employer relationship is found between Respondent and Weather Plus. I need only find, which I do that the Union has established a nonfrivolous position that if a single-employer relationship is found to exist between Respondent and Weather Plus, that a violation of the contract can be found. *Dodger Theatricals,* supra at 968.

I note that the Charging Party argues that under the doctrine of collateral estoppel, Respondent should be barred from litigating the issue of contract coverages, based on the Board's prior decision in *National Broadcasting Co.,* supra, citing *Labor Ready Inc.,* 332 NLRB 378, 381 fn. 18 (2000). The charging party argues that the Board there rejected the very same geographical defense raised by Respondent here, and that therefore it is precluded from raising this defense once again in this proceeding. I disagree. While the Charging Party is correct that Respondent did raise the same geographical defense in that proceeding, the Board did not reject it or make any finding concerning the geographic scope of the agreement. While the Charging Party is also correct that nothing in the Board's decision suggested that the Board accepted Respondent's argument that CNBC was beyond the scope of the Net Code, there is also nothing in the decision that suggested that it rejected this contention either. The Board simply did not decide that issue. Thus, the doctrine of collateral estoppel is inapplicable, as is *Labor Ready* cited by the Charging Party.

However, *National Broadcasting Co,* supra, is relevant as persuasive authority, and consistent with *Dodger Theatricals* and other cases cited above, in holding as here, that the issue of the geographical scope of the contract, is properly to be determined by the arbitrator and not the Board. See also *Kellogg's Snack Co.,* 344 NLRB 756, 759 (2005) (ALJ affirmed by the Board, states that "[i]t is not for me to prejudge the outcome of the arbitration").

Accordingly, based upon the above analysis and authorities, I reject Respondent's principal defense, that the Union's request is not relevant, because the Weather Plus employees, cannot be covered under the contract, even assuming a single-employer finding vis-á-vis Respondent and Weather Plus.

Respondent also raises several other defenses, some only in its answer, and others in its brief and answer. It contends that the Board should defer the instant complaint under the principles of *Collyer Insulated Wire,* 192 NLRB 837 (1971). While Respondent recognizes the Board's general policy of nondeferral to arbitration in information request cases, *Shaw's Supermarkets, Inc.,* 339 NLRB 871 (2003); *General Dynamics Corp.,* 270 NLRB 829, 834–836 (1989), it urges that an exception be made to these principles here, since the crucial issues here of contract interpretation, are bound up with the information issue presented. Respondent cites dissents of Chairman Hurtgen in *Ormet Aluminum Mill Product Corp.,* 335 NLRB 788 (2001), as well as Member Bartlett's concurrence in *Phoenix Coca-Cola Bottling Co.,* 338 NLRB 498, 498–499 and fn. 2 (2002), agreeing with Chairman Hurtgen's dissent in *Ormet,* supra. Respondent argues that the Board's policy of nondeferral in information cases is rooted in the effort to "avoid the perceived inefficiency that could result from a two-tiered process involving an initial arbitration issue and a second arbitration issue on the merits of the underlying contractual issue." *Shaw's Supermarkets,* supra at 872 (dissenting opinion of Chairman Battista). Therefore, Respondent contends that here since the arbitrator has already been selected, and the contractual coverage issue is key to resolution of the Union's claim, that tangling the issue up in the Board's process, increases inefficiency and promotes chances for delay and confusion. Thus, the arbitrator should be permitted to decide both issues (information and contract coverage) in one forum, which would prevent waste of time and resources of the Board, and avoid the necessity of two-tiered proceedings.

However, it is clear that Respondent has based its arguments on dissenting or concurring opinions from various Board members, which do not represent extant Board law, to which I am bound. Current law establishes, and I so conclude, that information cases are not deferred under *Collyer,* supra, and I therefore reject Respondent's defense in that regard. *Team Clean, Inc.,* 348 NLRB 1231 fn. 1 (2006); *SBC California,* 344 NLRB 243 fn. 3 (2005); *Shaw's Supermarkets,* supra.

I would note that a careful examination of the footnotes in *Team Clean,* supra, and *SBC,* supra, reveals that in appropriate circumstances there could very well be a three-member majority to reconsider the Board's nondeferral policy in information cases. (Members Schaumber and Karsanow state in *Team Clean,* supra, that they would view the request as encompassed by the parties arbitration clause, and would defer, but in absence of a majority to reverse Board precedent, they agreed to apply current Board precedent. Chairman Battista and Schaumber in *SBC,* supra, would have deferred the union's request therein, but in the absence of a Board majority to overrule current Board, found that the ALJ correctly applied the Board's policy of nondeferral in information request cases.)

However, I do not believe that the instant case, is one where the current Board membership would change the Board's long-standing precedent in this area. Thus, Chairman Battista's concurrence in *Team Clean,* supra, reveals that in his view, the fundamental prerequisite for deferral to arbitration is that the issue be arbitrable. A general arbitration clause covering disputes over interpretation application and compliance with the provisions of the Agreement, does not contain a provision as to information. Therefore, in such circumstances Chairman Battista views the dispute as not arbitrable, and would not defer. Notably, Members Karsanow, and Schaumber would have viewed the request in *Team Clean* to be encompassed by the arbitration clause and would have deferred. Here, as in *Team Clean,* supra, the arbitration clause in the contract does not contain a contract provision as to information. Contrast that with *SBC,* supra, where Chairman Battista would have deferred to arbitration, since the arbitration clause therein specifically provided that the arbitration procedures covers information requests, and that the arbitrator is empowered to rule on such issues.

Accordingly, it does not appear that a majority of current Board members exist to reconsider deferral issues of information cases on the facts herein. I therefore reaffirm my conclusion to reject Respondent's deferral request.

Respondent also makes the somewhat related, but analytically different argument, that the complaint should be dismissed on the grounds that the request for information amounts to improper pretrial discovery prior to arbitration. *California Nurses Assn.,* 326 NLRB 1362 (1998); *Tool & Die Makers Lodge 78 (Square D. Co.),* 224 NLRB 111, 112 (1976); *Cook Paint & Varnish Co.,* 246 NLRB 646 (1979), enf. denied on other grounds 648 F.2d 712 (D.C. Cir. 1981). Respondent also cites the dissenting opinion of Chairman Hurtgen in *Ormet Aluminum,* supra; that "Section 8(a)(5) is not to be used as a device to secure pretrial discovery in arbitration proceedings." Chairman Hurtgen emphasized in his dissent that in his view, the information requests therein was essentially interrogatories, seeking to draw the Board into what is, in effect, pretrial discovery. The Chairman further argued that allowing pretrial discovery would unduly clog the process, and that the arbitrator should be deciding both the information and grievance issues.

However, as in the related issue of *Collyer* deferral, discussed above, current law is contrary to Chairman's dissent in *Ormet,* supra, and to Respondent's position here. As the majority opinion in *Ormet* states, one of the functions of arbitration procedures, is to permit the union the opportunity to evaluate the merits of the grievance, at whatever stage, and perhaps withdraw it if necessary, once it received the information. Id. at 789. Thus, the Board majority viewed Chairman Hurtgen's dissent, as it would view Respondent's position here, as inappropriate, since it would, "compel the Union to take its grievance all the way to arbitration without providing the opportunity to evaluate the merits of its claims." Id.

In this regard, Respondent points to the Union's alleged lack of diligence in investigating the possible allegation that NBC was failing to cover Weather Plus employees under the Code. It contends that although Carpenter testified that he first found out about Weather Plus in November 2004, based upon statements made by an NBC official at an FCC hearing, and that he subsequently received reports from staff and from articles in publications relating to the relationship between NBC and Weather Plus, he never found out who was providing on-air services for Weather Plus nor who ultimately provided such on-air services. Carpenter also conceded that he never learned whether any staff of NBC provided services for Weather Plus or whether the employees allegedly approached in Philadelphia were staff or freelance, and in fact that he had never even watched the Weather Plus channel. Accordingly, Respondent argues that despite the "utter lack of diligence over a seven-month period in investigating a possible allegation that NBC improperly was failing to cover Weather Plus talent under the Code, the Union filed a grievance on June 21, 2005." Respondent further argues that thereafter the Union made no attempt to conduct any further investigation, or attempts to ask questions or concerns concerning Weather Plus, but instead served its arbitration demand on September 1, 2005, and made its information request on September 29, less than a month after the arbitration demand. Thus, Respondent asserts, that the Union was not attempting to obtain the information, in order to meaningfully consider the merits of the grievance, but was attempting to engage in prohibited pretrial discovery.

However, I cannot agree with Respondent's assertion that the Union's alleged lack of diligence in investigating the grievance, transformed the information request into a prohibited example of pretrial discovery. The Union has, as I have noted above, more than established a reasonable basis based on objective facts, for its belief that NBC and Weather Plus are a single employer, and that such information is relevant to its grievance that the employees might be covered by the Code. The fact that the Union might have been more diligent in conducting investigation, and might have been able to uncover more information on its own is not significant. The Union has satisfied its burden, and Respondent is obligated to respond in a timely fashion, to assist the Union in carrying out its representational responsibilities.

Furthermore, the Union after filing the grievance, requested the information and gave Respondent ample opportunity to furnish the information before filing its unfair labor practice charge. Cf. *WXON-TV,* 289 NLRB 615, 617–618 (1988) (the Board dismisses information allegation, since union filed ULP charge and information request on the same day. Board concludes that the information request was akin to a discovery device pursuant to pursuit of unfair labor practice charges rather than to duties as a collective bargaining representative.).

Respondent although initially indicating that it was in the process of compiling the information requested, apparently had a change of heart, and declined to produce the information, instead deciding to pursue the strategy of bifurcating the arbitration. However, the Union would not and need not agree to such a procedure. While Respondent is correct, that it is possible that a bifurcation could save time and expenses, if the arbitrator decides that the contract does not cover Weather Plus employees, that result is uncertain. If the arbitrator rejects Respondent's geographical defense, and concludes that the Weather Plus employees working in Secaucus, New Jersey, would be covered, even if they were employees of Respondent,

then the single-employer issue would have to be litigated, resulting in a two-tiered arbitration, causing additional delay. The preferred procedure, which is responsible for the Board's refusal to defer information request cases, is for the arbitrator to decide all issues in one proceeding. Here, that result is not possible, since the arbitration clause does not provide the arbitrator the authority to decide information issues, and the Union would be prevented from properly representing its constituents, by forcing it to proceed to the arbitration without the information, and not enabling the Union to properly evaluate the merits of the grievance, before proceeding further into the arbitration. *Ormet Aluminum,* supra; *NLRB v. Acme Industrial,* 385 U.S. 432, 438 (1967). See also *Kellogg's Snacks,* supra at 760 (ALJ rejects respondent's defense that information is not necessary because it intends to concede to the arbitrator the practice complained of by the union, and let the arbitrator decide if the practice is violative of the contract. Judge finds that if the information is relevant, disclosure should not depend on the procedural state of the grievance arbitration process.).[8] *California Nurses Assn.,* supra, cited as authority, for Respondent's argument that dismissal is warranted, is clearly distinguishable. That case provided a limited exception to the Board's requirement to supply information, as to names of witnesses it intends to call and evidence it intends to rely upon at the arbitration proceeding. It is that kind of information, which delves into Respondent's strategy and preparation in litigating the arbitration, that the Board viewed as being precluded from disclosure as a substitute for pretrial discovery.

The information requested here does not request that Respondent supply the Union with names of witnesses it intends to call, evidence it intends to rely, or any other information that would delve into Respondent's litigation strategy at the arbitration. The information requested by the Union here is "garden variety" information, relevant to single employer status, which has been consistently been deemed relevant and ordered to be turned over to Unions, without being considered "pretrial discovery." *Dodgers Theatrical,* supra; *NBC,* supra; *Pulaski Construction Co.,* 345 931, 936 (2005). Indeed, if this information request is deemed to be "pretrial discovery," virtually every information request could be so characterized. Therefore, the fact that the Union has actually filed its arbitration request, and the case has been scheduled for arbitration, does not change the nature and relevancy of the Union's information request. *Ormet,* supra; *Pulaski Construction,* supra; *Jewish Federation Council,* 306 NLRB 507 fn. 1 (1992) (Union is entitled to information, even though Union had already decided to process the grievance to arbitration). See also *Kellogg's Snack,* supra. (ALJ affirmed by Board, required information to be turned over, even though some of the same information was subpoenaed by Union in arbitration proceeding, which subpoena is enforceable under New Jersey law, where the Employer is located.).

Accordingly, I reject Respondent's defenses and arguments that the complaint should be dismissed or deferred under *Collyer,* or that it be dismissed because it is a substitute for pretrial discovery.

Respondent also argues in its affirmative defense and in its brief, that the Union's request is overly broad, confidential, and proprietary. Respondent points to some of the information sought, such as personnel files, employment contracts, personal service agreements, loan out agreements, paychecks, and contracts between Weather Plus and NBC. It argues further that the information sought is of a sensitive financial nature and would be of great interest to competitors of Weather Plus. In this regard, Respondent relies on the alleged concession by Carpenter that such information could be construed as confidential.

The Board has defined confidential information, which could in certain circumstances give rise to a valid confidentiality claim, justifying refusal to turn over information as follows:

> Confidential information is limited to a few general categories: that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits. [*Detroit Newspaper Agency,* 317 NLRB 1071, 1073 (1995).]

Respondent has not adduced sufficient evidence to meet any of the stringent criteria, established in *Detroit Newspaper* to warrant a finding of confidential information. *Pulaski Construction,* supra at 937.

Respondent's reliance on Carpenter's alleged concession that some of the information sought "could" be considered confidential is hardly sufficient to meet the Board's definition. More importantly, Respondent conveniently ignores Carpenter's additional response to its attorney's question about confidentiality, which completely undermines Respondent's defense in this regard. Carpenter testified that while it is possible some of the information could be considered personal or confidential, "if that objection had been made we would have looked at it and considered whether we could modify the request or do a partial request. But we didn't receive any information relative to the request. And to my knowledge, no specific knowledge objection was made about any of these items." Indeed, in its information request, the Union specifically asked Respondent to contact it in order to work out any confidentiality concerns that Respondent might have about any of the items requested.

It is well settled that confidentiality claims must be timely raised. The reason a confidentiality claim must be timely raised is so that the parties can attempt to seek an accommodation of the employer's asserted confidentiality concerns.[9] *Detroit*

[8] Also see *Schrock Cabinet Co.,* 339 NLRB 182, 188 (2003) (ALJ, affirmed by Board, rejects employer's defense that union is not entitled to information until arbitration decides whether agreement was breached, and that assuming arbitration holds against the union, there is no need to prove damages. ALJ holds that hearings are not bifurcated, and one hearing is held at which all issues are decided. The union is entitled to prepare for these hearings.).

[9] Indeed, the record reflects that in 2001, the Union filed an information request with Respondent with respect to similar single-employer

Newspaper, supra; *Tritac Co.,* 286 NLRB 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. *U.S. Testing, Inc. v. NLRB,* 160 F.3d 14, 20 (D.C. Cir. 1998).

Here, Respondent unlike in the prior information request made by the Union in 2001, made no complaint to the Union about confidentiality, nor any effort to accommodate its alleged concerns in these areas. In these circumstances, it is clear that Respondent failed to timely raise that concern and that defense must be rejected. *Detroit Newspaper,* supra; *U.S. Testing,* supra.

Respondent also alleged in its answer as an affirmative defense that the request was "ambiguous, vague, overbroad and overly burdensome." However, Respondent never made such objections to the Union, and never sought clarification from the Union in order to narrow the request. In these circumstances, Respondent's assertion that the request is burdensome is untimely, and must be rejected. *Land-O-Sun Dairies,* 345 NLRB 1222, 1223 (2005); *Pulaski,* supra at 936–937; *NBC,* supra at 1170.

Moreover, Respondent did not introduce any evidence at the hearing to substantiate its claim that the information request would be burdensome, i.e., time, resources expenses necessary to comply with the request. *Pulaski,* supra; *Goodyear Atomic Corp.,* 266 NLRB 890, 891 (1983), enfd. 738 F.2d 155 (6th Cir. 1984).

Accordingly, this defense of Respondent must also be rejected.

Having rejected all of Respondent's affirmative defenses, I conclude, for the reasons detailed above, that Respondent has violated Section 8(a)(1) and (5) of the Act, by refusing to supply relevant information to the Union.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide the Union with information in its letter dated, September 29, 2005, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, National Broadcasting Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with American Federation of Television and Radio Artists, AFL–CIO by refusing to furnish it with information that it requests which is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of Respondent's unit employees.

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

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

(a) Promptly furnish the Union with the information it requested in its letter of September 29, 2005.

(b) Within 14 days after service by the Region, post at its New York, New York facility, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 29, 2005.

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

issues vis-á-vis NBC and MSNBC. After Respondent raised some confidentiality concerns at that time with respect to some of the information sought, the parties discussed it and reached a mutually satisfactory accommodation. The information was therefore submitted to the Union.

[10] 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.

[11] 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."

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 American Federation of Television and Radio Artists, AFL–CIO by refusing to furnish it with information that it requests which is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL promptly furnish the Union with the information it requested in its letter of September 29, 2005.

NATIONAL BROADCASTING COMPANY, INC.