New Surfside Nursing Home *and* Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO. Case 29–CA–21696

March 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On June 10, 1999, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party and the General Counsel filed answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, New Surfside Nursing Home, Far Rockaway, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO by denying the Union the information it requested in its letter of February 27, 1998, except for employee social security numbers.

(b) Refusing to bargain in good faith with the Union by denying the Union's requests for access to its facility by the Union's representative in order for the Union to observe how work is performed in preparation for collective bargaining.

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

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

(a) Furnish to the Union, in writing, the information it requested in its letter dated February 27, 1998, except for employee social security numbers.

(b) On request, grant access to its Far Rockaway, New York facility to a representative designated by the Union for reasonable periods and at reasonable times, sufficient to allow the Union's representative to observe how work is performed in preparation for collective bargaining.

(c) Within 14 days after service by the Region, post at its Far Rockaway, New York facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent 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 and former employees employed by the Respondent at any time since December 16, 1997.

(d) 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.

[1] The judge found that the Union was entitled to the information it requested, including social security numbers of unit employees. We agree, except that we shall not require the Respondent to furnish the social security numbers. It is well established that a violation of the Act cannot be properly found where the violation was not alleged in the complaint and the issue was not litigated at the hearing. *Waldon, Inc.*, 282 NLRB 583 (1986). Here, the complaint did not allege, and the General Counsel did not contend at trial, that the Respondent unlawfully withheld social security numbers. Therefore, we find no violation in this respect, and we do not reach the issue the judge discussed of whether the Union demonstrated the relevance of the social security numbers. Cf. *ABF Freight System*, 325 NLRB 546 (1998).

In excepting to the finding that the Union is entitled to Medicaid cost reports, the Respondent relies on *Troy Hill Nursing Home,* 326 NLRB 1465 (1998). We find *Troy Hill* distinguishable. In that case the Board held that the union failed to establish the relevance of Medicaid cost reports, which are not presumptively relevant. Here, we agree with the judge's finding that the Union demonstrated the relevance of the cost reports. We also observe that there is no contention the requested cost reports are confidential financial records.

Under the circumstances of this case, we agree with the judge that, based on the principles enunciated in *Holyoke Water Power Co.,* 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), the Union has a statutory right of reasonable access to the Respondent's facility to observe how work is performed in preparation for collective bargaining. See *Washington Beef, Inc.*, 328 NLRB 612 (1999). We find it unnecessary to pass on the judge's finding that the Union also has a contractual right to access and on the Respondent's contention that the contractual access allegation of the complaint is barred by Sec. 10(b). We shall modify the recommended Order and remedy to track the Order we granted in *New Surfside Nursing Home,* 322 NLRB 531 (1996), to which the Union refers in its answering brief.

Finally, we shall modify the recommended Order to conform to our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

[2] 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO by denying the Union the information it requested in its letter of February 27, 1998, except for employee social security numbers.

WE WILL NOT refuse to bargain in good faith with the Union by denying the Union's requests for access to our facility by the Union's representative in order for the Union to observe how work is performed in preparation for collective bargaining.

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

WE WILL furnish to the Union, in writing, the information it requested in its letter dated February 27, 1998, except for employee social security numbers.

WE WILL, on request, grant access to our Far Rockaway, New York facility to a representative designated by the Union for reasonable periods and at reasonable times, sufficient to allow the Union's representative to observe how work is performed in preparation for collective bargaining.

NEW SURFSIDE NURSING HOME

Larry Singer Esq. and *Carlos G. Colon-Mochargo, Esq.,* for the General Counsel.
Eric C. Stuart Esq. (Peckar & Abramson), for the Respondent.
Ellen Dichner Esq. (Gladstein, Raif & Meginnias LLP), for the Charging Party.

DECISION

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on December 7 and 8, 1998, in Brooklyn, New York.

Pursuant to charges filed by Local 144, Hotel Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO (the Union), against New Surfside Nursing Home (Respondent), a complaint and amended complaint issued on May 18 and June 10, 1998, respectively, alleging violations of Section 8(a)(1) and (5) of the Act. The thrust of the complaints alleges that Respondent refused to supply information to the Union, when requested, and failed to grant access to union representatives in order to prepare for collective-bargaining negotiations.

On the entire record in this case, including my observation of the demeanor of the witnesses, and a careful examination of the briefs submitted by all parties, I make the following findings of fact, and conclusions of law.

The Respondent is a sole proprietorship with its office and facility located in Far Rockaway, New York, where it is engaged in the operation of a nursing home. Respondent, in the course and conduct of its operations, annually receives gross revenues in excess of $100,000. Respondent also purchases and receives at its Far Rockaway facility goods valued at in excess of $50,000 directly from points located outside the State of New York.

It is admitted, and I find that, Respondent is engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care facility within the meaning of 2(14) of the Act.

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

It is admitted, and I conclude, that the Union is the collective-bargaining representative of the following units of employees employed by Respondent:

> Unit A: All registered nurses excluding professionals, confidentials, and supervisors as defined in Section 2(11) of the Act.
>
> Unit B: All licensed practical nurses excluding professionals, confidentials, and supervisors as defined in Section 2(11) of the Act.
>
> Unit C: All aides and orderlies, porters and maids, laundry workers, attendants, head porters, groundsmen, gardeners, housekeepers, firemen/handymen, maintenance employees, painters, window cleaners, licensed engineers, dishwashers/kitchen helpers, second cooks, first cooks, assistant chefs, chefs, telephone operators, clerks, admitting, medical records, Medicaid, accounts receivable clerks, assistant dietitians, dietitians (nonsupervisory), and recreation worker aides, exlcuding professionals, confidentials, and supervisors as defined in Section 2(11) of the Act.

See also *New Surfside Nursing Home*, 322 NLRB 531 (1996).

The Respondent and the Union have been bound by a series of successive collective-bargaining agreements; the most recent of which expired on March 30, 1990. Respondent asserted at the trial that the last major set of negotiations took place prior to January 1991. The Respondent contends it submitted a final offer to the Union on January 9, 1991.

In September 1997, Peter Marks was hired by the trustee of Local 144 as an assistant to the trustee for collective bargaining.[1] At around that time, Marks became involved in collective-bargaining negotiations with Respondent serving as the Union's principal spokesperson. There was a lengthy hiatus in bargaining before Marks assumed the role of the chief spokesperson for the Union.[2] At around the time Marks began bargaining with Respondent, Respondent informed him of its final offer and advised him that the offer had been implemented.

At a bargaining session on November 3, 1997, Marks handed David Lew, Respondent's attorney and chief spokesperson in negotiations, a document requesting information the Union

[1] Local 144 was placed in trusteeship at which time the former Local 144 president, Frank Russo, was relieved of his duties.

[2] There is little record evidence concerning the parties' bargaining history from the Union's perspective because Peter Marks has no involvement in bargaining prior to September 1997 and had difficulty obtaining union files which had been destroyed by the trustee's predecessor. According to the Respondent's witness, no bargaining took place from 1991 until it resumed in 1997.

needed for collective bargaining. The information request included data showing the hours of work, straight time, overtime, and benefits on an average and on an individual employee's basis. It also included a request for data relating to the performance of bargaining unit work by nonunit individuals.

On December 18, 1997, Lew responded to Marks' information request by supplying a one-page document showing, for October 4, 1997, only, the names of certain employees, their social security number, hourly rate of pay, total monthly hours worked, gross pay, and adjusted gross pay. Accompanying this document was a cover letter from Lew, stating that the one-page document was responsive to items one through seven of the Union's information request. Lew further stated that the Union had already obtained cost reports sought in item 9 of the November 3 request, that those reports were available from state authorities and that the information was not relevant. With respect to the Union's request for benefits information, employee dependents, and employee use of vacation and sick leave, Lew provided no information except to say that the benefits in effect are those provided under the expired collective-bargaining agreement. Lew did not respond to the Union's request for information concerning nonbargaining unit individuals performing bargaining unit work.

According to Peter Marks' credible and unrebutted testimony, he renewed his request for the information at each of the bargaining sessions following his November request, stating that the Union had not received the information and needed it. On February 27, 1998, Marks sent another information request to Lew asking for the information previously requested and for some additional information, such as the names of agencies referring individuals to work at the Home, their weekly hours of work, shift, and unit worked. In paragraph 8, Marks also explained why the cost reports were relevant to negotiations. Finally, Marks expanded his request to include information for all of 1997 (in addition to 1996, as previously requested) and stated that the Home could supply the information on any basis it desired, whether on computer disk or hard data.

Respondent provided no information to the Union, other than the one-page document provided with Lew's December 18, 1997 letter. Peter Marks testified that after sending the February 27 letter to Lew, Lew stated to Marks that he had given Marks all that he was entitled to, that the Union did not need the information, and that Marks could obtain information from the welfare and pension funds. Marks explained that the funds were separate from the Union and that he needed the information from the Employer. Lew's response was that the Union had received all that it was going to get.

On December 5, 1997, shortly after bargaining was resumed by Peter Marks, Local 144 Organizer Garth Swaby requested that he be afforded access to the Employer's facility on December 16, 1997. In his request, he stated that he was entitled to access under the expired collective-bargaining agreement, citing to the Board's decision findings that the contract's access provisions had survived the expiration of the contract. When Swaby arrived at Respondent's premises on December 16, and asked for access, he was denied access by Respondent's administrator.

The parties stipulated that the access clause in effect at the time the complaint in this matter issued was the clause contained in the 1981–1984 master agreement which provides:

> A. Visitation: The business representative for the union or the union designee shall have admission to all properties covered by this agreement to discharge its duties as representative of the union. No employee may be called off his station by the union representative without the employer's consent, which consent shall not be unreasonably withheld. The employer shall arrange to relieve the affected employee upon the request of the union representative.

In *New Surfside Nursing Home*, the judge found that the access clause had survived the expiration of the contract. 322 NLRB at 535.

By letters dated January 13, and February 27, 1998, Marks reiterated the Union's request for access and explained the importance of the Union's access to collective-bargaining negotiations. He stated that access was necessary in order for Local 144 representatives to observe the work processes of people performing bargaining unit work. Lew's response to Marks' request for access was that the Home did not have to let anyone in, that he had a decision of the Board.

At the trial Marks elaborated on the necessity for the Union to observe people at work. He testified that the Union needed to have someone on site, who understood the industry, to observe whether the jobs were done in a way Marks might expect and understand, and to see if there were safety problems. The Union needed to see how the jobs were actually performed so that it could translate those findings into contract negotiations, to such matters as whether the pay rate reasonably related to the duties performed and how the duties compared with those of other employees in the industry.

Analysis and Conclusions

Request for Information

The U.S. Supreme Court resolved well over 30 years ago that an employer has the duty to supply its employees' collective-bargaining representative information that is requested by the union that is necessary and relevant to the union's performance of its responsibility. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956); and *New Surfside Nursing Home*, 322 NLRB 531 (1996). The duty to furnish information turns on "the circumstances of the particular case." *NLRB v. Truitt Mfg. Co*., 351 NLRB at 153. The standard used to determine if the information requested is relevant is a liberal one. The Union needs only to establish two factors: (1) that there is a probability that the desired information is relevant and (2) that it would use that information to carry out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co*., 385 U.S. at 437; and *New Surfside Nursing Home*, 322 NLRB at 534.

Subsequent to Lew's receipt of the February 27 letter, Marks reiterated his request and Lew responded that he had given the Union everything they are entitled to and that, additionally, the Union could obtain that evidence from the Local 144 Welfare Funds. Respondent claims they filed the monthly union report with the Funds every month.

At no time did either Lew or Eric Stuart, also counsel for Respondent, ever complained that the information requested by the Union was not relevant, or raised any other objection besides saying that the Union had access to the information, that the Union did not need the information, or that Respondent had supplied it, referring to the single October 1997 report.

Under this standard, information related to employees' terms and conditions of employment is presumed to be relevant. *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). It is well-

established Board law that names of employees, their classification, hours and wages, addresses, dates of hire, fringe benefits, and date and amount of last wage raise are related to the employees' terms and conditions of employment and are thus presumptively relevant information for the purpose of collective bargaining. *Millar Processing Services*, 308 NLRB 929 (1992); and *Phoenix Co*., 274 NLRB 995 (1985). An employer, therefore, on the union's request, must furnish this information to the union.

With regard to information that is not presumptively relevant, it is necessary to establish: (1) that it is relevant and (2) would be used in connection with collective bargaining. *NLRB v Acme Industrial Co.,* 385 U.S. at 437, and *New Surfside Nursing Home*, 322 NLRB at 534.

In the instant case, Marks sent Respondent's attorney, David Lew, a letter dated February 27, 1998, restating the Union's demands for information for the years 1996 and 1997. The demands are as follows:

> 1. The names of all full-time and part-time employees and their job classification.
>
> 2. The number of straight time and overtime hours worked by each full-time and part-time employee identified in response to item 1 above.
>
> 3. The number of night shift (differential) hours worked by each employee identified in response to item 1 above.
>
> 4. IRS Form W-2 compensation for each employee identified in response to item 1 above.
>
> 5. The address, social security number, date of hire, marital status, number of dependents, and current vacation entitlement for each employee identified in response to item 1 above.
>
> 6. The date and amount of last increase received by each employee identified in response to item 1 above.
>
> 7. The names, referring agency, weekly number of hours worked, shift and unit worked by each individual who worked for the Home, through an employment agency and/or on a temporary basis.
>
> 8. A complete copy of the cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid and from any other public entity or funding source for years 1994, 1995, and 1996.

Marks expressed a preference in receiving the information on a computer disk, but made it clear that the Union would accept a hard copy.

I concluded that items 1–4 and 6 and most of the information in items 5 and 7 of the Union's requests constitute *presumptively* relevant information. They directly relate to terms and conditions of employment and are necessary in order for the Union to be able to carry out its duties as the collective-bargaining representative of Respondent's employees.

I further conclude that based on the credible testimony of Marks that item 4, the average W-2 compensation by job classification, separately for full-time and part-time employees is relevant to collective bargaining since it was requested to determine how much people are earning at that location by job classification. Also, the Union needed the information in order to compare the Respondent's employees earnings to the earnings of other employees in the field. It was needed to help that Union to establish reasonable bargaining demands.

I also conclude based on the credible testimony of Marks that item 5, which asked for the Respondent to furnish the social security number, marital status, and number of dependants of the Respondent's employees, was presumptively relevant. In regards to the social security numbers, the Union requested this information to use it to cross-check other information they requested, including verifying the identity of employees. This information would also be used to formulate bargaining demands. The marital status and number of employee's dependant were asked in relation to fringe benefits. The Union needed to know that information in order to be able to formulate proposals concerning employees' health benefits.

Based on the credible testimony of Marks, I conclude that item 7, which asked for the Respondent to furnish the Union the hours by week of any work performed in bargaining unit classifications by nonbargaining unit individuals, was necessary because the Union was concerned about the amount of bargaining unit work which had been performed by nonunit members. Respondent conducts a 24-hour a day, 7-day a week, 365-day-a-year operation and the Union needed to know how much money Respondent spent in subcontracting unit work which would be performed by nonunit members, and how this assignment affects the overtime of employees in the unit. In the February 27 request, the Union modified its November 3 request and asked for the names, referring agency, weekly number of hours worked, and shift and unit worked by each individual who worked for Respondent through an employment agency and/or temporary basis. The Union asked for this additional information because it was brought to Marks attention that there were a number of agency workers working for Respondent. The Union wanted to find out how many agency workers were doing unit work. They were also interested in learning to assess their relative strength collective bargaining. Also, they wanted to know if Respondent was obtaining an additional economic benefits from having agency workers doing the job and this could affect the Union's economic proposals.

Finally, based on the credible testimony of Marks, I conclude that item 8, which asked for a complete copy of the cost reports submitted including any supplemental submissions, for reimbursement for Medicaid and for any other public entity for the years 1994, 1995, and 1996. These cost reports, which are submitted to the Government to receive reimbursement, contain economic information. Among other information, they contain the amount of agency workers working for Respondent and the amount of money Respondent pays to those agency workers. The Union was entitled to this information to be able to evaluate their economic proposals and demands. Also, by obtaining this information, the Union would be able to tell how much money in reimbursements Respondent is receiving. Respondent contends that the Union did not need the information or that it could obtain it from other sources, such as the health and welfare funds, a separate entity from the Union. The Board has consistently held that an employer's belief that the information requested is not needed or does not contain information the union needs is not a valid defense. *Providence Hospital*, 320 NLRB 791, 795 (1996); *Amphlett Printing Co*., 237 NLRB 955, 956 (1978). Similarly, the Board has held that an employer's claim that a union can obtain information from other sources is

not a viable defense. *Alltel Pennsylvania, Inc.,* 316 NLRB 1155 (1995); *New York Times Co.,* 265 NLRB 353 (1982).

To the extent the Respondent contends it provided a meaningful portion of the information requested, that claim must be rejected. The one-page document Respondent provided reflects information for 1 month only; information was requested for all of 1996 and 1997. Straight time and overtime hours were not provided nor were shift differentials, W-2 forms,[3] dates of hire, marital status and dependents, date and amount of last wage increase, sick leave, vacation, and other leave use and balance.

I find Lew's testimony about the information requested was contradictory, disingenuous, and simply not credible. He testified that the payroll information was provided through an audit reflected in Respondent's Exhibit 4. However, that audit covered a period ending March 31, 1996, while the Union's information request covered all of 1996 and 1997. Lew testified that the part-time and full-time hours could be obtained from the monthly report submitted to Marks, but later had to concede that one would have to assume someone was a full-time employee based on certain hours. After additional cross-examination, Lew testified the November report would have to be compared with 4 to 6 months to determine whether an employee was full time. However, as eventually conceded by Respondent, reports for those additional months were never provided.

Lew's testimony concerning the provision of information reflects his conscious decision not to provide information. For example, with respect to the Union's simple request for the date and amount of last wage increase, Lew initially testified that the Union could obtain that information by comparing wages over a 5-year period. (Of course, as noted above, Lew did not supply this wage data.) Lew subsequently testified that there was only one wage increase during the past several years but that he would not advise Marks of this because Marks "knew" about the increase. When pressed further on cross-examination, Lew testified that "Marks" knew because Lew sent a letter to former union president, Russo, notifying him of the wage increase in 1994 or 1995. Lew later conceded that Russo had been relieved of his duties at the time the trustee was placed at the Union, and was not there at the time Marks took over negotiations. Lew also testified he "knew" Marks had the information or could quickly obtain it based on Marks' smile and attitude.

Right to Access

I conclude Respondent's defenses of this issue is entity without merit.

I conclude that the Union was entitled to access under Section 8(a)(5) in order for it to responsibly represent bargaining unit employees.

Soon after Marks commenced bargaining with Respondent, Marks and Swaby requested that the Employer grant access to a union representative to meet with employees and to observe employee work processes. It is undisputed that these requests were denied.

The Board has held that the denial of a union's request for access to observe employee work processes violates Section 8(a)(5) of the Act. In *C.C.E., Inc.*, 318 NLRB 977 (1995), where an identical request for access was made, the Board held that the union must be granted such access in order to understand the operation, working conditions, and employee jobs. It explained,

> [T]here can be no adequate substitute for the Union representative's direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as job classifications, safety concerns, work rules, relative skills and other matters necessary to develop an informed and reasonable negotiating strategy. [Id. at 978.]

In the instant case, the Union sought access precisely for the purpose described by the Board to be of significant importance in bargaining: to observe employees at work, to observe how the jobs were performed and to see how the pay rates relates to duties actually performed so that the Union could utilize those observations in contract negotiations. As Marks testified, the need for this type of access was particularly acute here where there had been a long hiatus in bargaining and the Union had a new chief negotiator, who was new to Local 144.

In analyzing the statutory right of access, the Board has followed the balancing test articulated in *Holyoke Water Power Co.,* 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985). This test balances the conflicting rights of employees to be responsibly represented by their union against the right of the employer to control its property. The Board held that "where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end." Id. Only where it is found that a union can effectively represent employees by some alternative means would the employer's property rights predominate. Id.

It is the employer's burden to establish "those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access." *New Surfside Nursing Home*, 322 NLRB at 535, citing *Hercules Inc.,* 281 NLRB 961 (1986). In the instant case, the Employer presented no evidence or claim that its property rights should prevail over the Union's need for access. Nor did it in any way dispute the reasons advanced by Marks for the Union's need for access. Accordingly, given the significant need of the Union to obtain the information about employee work processes, especially after a long hiatus in bargaining and where it is represented by a new negotiator, the employees' right to be responsibly represented by their union predominates.

Similarly, Swaby's request for access to meet with employees was made in order for the Union to effectively represent employees. In *CDK Contracting Co.,* 308 NLRB 1117, 1121 (1992), the judge explained that "[p]ersonal contact with a union representative is typically essential to, and an integral part of, employees' exercise of Section 7 rights." In *Houston Coca-Cola Bottling Co.,* 265 NLRB 766, 777 (1982), the judge also addressed this fundamental Section 7 right, noting that this access right exists in the absence of a contractual right of access. See also *NLRB v. C. E. Wylie Construction Co.,* 934 F.2d 234 (9th Cir. 1991).

I also conclude the Union had a contractual right to access in addition to its statutory right. The amended complaint alleges that in addition to the Union's statutory right to access, the Union is entitled to access under the expired collective-bargaining agreement. At the beginning of the hearing, Respondent's counsel stipulated that the access clause in effect at

[3] W-2 forms are presumptively relevant. *MBC Headwear, Inc*., 315 NLRB 424, 427 (1994).

the time the complaint issued in this case was the clause contained in the 1981–1984 master agreement. This is the same clause found to have survived the expiration of the contract in prior *New Surfside Nursing Home* case. This factual determination was made by the judge's connection with the Respondent's claim that it was not required to grant access. Respondent's asserted ground for denying access was that the collective-bargaining agreement expired. The judge rejected this defense and in doing so explained that the Board has held that access provisions of a collective-bargaining agreement survive the expiration of the contract. 322 NLRB at 535.

Respondent disputes the validity of this finding. In support of its claim that Judge Steven Davis made an erroneous findings, Respondent submitted several exhibits, formal documents, complaints, etc., from the prior *New Surfside* case which I rejected. Respondent's only avenue for challenging Judge Davis' findings was to file exceptions to that finding with the Board. Exceptions were, in fact, filed by Respondent's counsel, Eric Stuart, but they did not result in a reversal of Judge Davis' finding. Significantly, Respondent did not except to Judge Davis' finding that the access clause survived contract expiration.[4]

Respondent contends that the complaint allegations relating to the denial of access are barred by Section 10(b) of the Act.

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge." There is no dispute that the charge was filed within 6 months of Respondent's refusal to provide access to the Union to meet with employees and observe employee work processes in late 1997 and 1998.

Respondent is claiming that the charge is time-barred because it should have been filed after the Union was allegedly denied access in 1992. I conclude this defense lacks merits because the access alleged in the amended complaint was separate and distinct from any access requests Respondent contends were made in the past 1962.

The access requests at issue here were made by the Union in late 1997 and early 1998, for the purpose of observing employee work processes and meeting with employees. The information to be obtained from this access was needed to inform collective-bargaining negotiations. This information was critical to the new union spokes person who was conducting negotiations, after a long hiatus in bargaining. Thus, these requests were separate and distinct from access requests union representatives may have made in the past to meet with employees.

The distinct nature of each access request made for informational purposes is underscored by the Board's approach to evaluating statutory 8(a)(5) access claims like that alleged in the amended complaint. Under *Holyoke Power Co.* and *C.C.*E., informational access claims are very fact specific and subjected to a balancing test. Accordingly, each access claim must be analyzed under the balancing test weighing the union's needs against the employer's property rights. The access request here could not have been addressed earlier because it was of a distinct nature from the alleged denials starting in 1992, and was not made until late 1997 and early 1998.

The fact that access for other purposes may have been denied in the past does not render a separate and distinct violation untimely. In *Lakes Pilots Assn.*, 320 NLRB 168 (1995), the Board, following the Supreme Court's analysis in *Machinists Local 1424 v. NLRB*, 362 U.S. 418 (1960), explained that a charge based on occurrences within the 6-month 10(b) period that represents a distinct violation standing on its own and does not depend on acts that existed only prior to the10(b) period is not time-barred, even where it is closely related to similar conduct outside the 10(b) period. Section 8(a)(2) and (3) violations that were similar to allegations in an earlier case and involved a continuation of circumstances present at the time of the hearing in the prior case. Finding the charge to be timely, the Board distinguished that case from untimely charges where "the unlawful character of . . . [the] conduct could be proved only by reference to the conduct that had taken place *before* the 10(b) period." 320 NLRB at 170 (emphasis in the original).

In the instant case, the denial of access was a distinct violation that occurred within the 6-month limitation period and "in an of [it]self" constitutes an unfair labor practice, without reliance on unlawful conduct outside the 10(b) period. Further, because the statutory claim is fact specific and requires the application of a balancing test, weighing the Union's need for access to observe work processes against the Employer's property rights, it is a discrete claim that must be independently evaluated and thus has no relation to prior access requests. That is, whatever access issues may or may not have existed in the past would have no bearing on this access request and the application of the *Holyoke* balancing test here.

During the course of this trial, Respondent asserted that it wished to amend its answer to include an affirmative defense based on *Jefferson Chemical*, 200 NLRB 992 (1972), to bar the General Counsel from litigating a contractual right of access claim. In articulating its defense, counsel for Respondent stated that "under *Jefferson Chemical*, or a legitimate extension of the doctrine of *Jefferson Chemical,* counsel for the General Counsel has an obligation to bring all allegations at the time of the Judge Davis case, several years ago, including any claim for contractual visitation, which they failed to do."

The *Jefferson Chemical* doctrine is inapplicable to this case because the facts and circumstances giving rise to the access allegation did not take place until after the case before Judge Davis was heard and decided. The doctrine applies to the General Counsel's failure to litigate related violations involving the same parties, known to (or which should have been known to) the General Counsel at the time of the initial proceeding. As recently explained by the Board in *Frontier Hotel*, 324 NLRB 1225–1226 (1997), *Jefferson Chemical* generally will not permit the General Counsel to "relitiate the lawfulness of specific conduct in separate proceedings by asserting that the conduct violates different sections of the Act, and that a decision on the part of the General Counsel not to include conduct encompassed by a pending charge in the complaint may bar a subsequent complaint concerning that conduct."

The *Jefferson Chemical* doctrine is not jurisdictional or "a rule of substantive law." *Public Service Co.*, 314 NLRB 1197, 1198–1199 (1974). It reflects a policy aimed at permitting judicial economy and fairness. Id. The General Counsel possesses broad discretion in determining which cases to consolidate and its determination will be upheld absent a showing of arbitrary abuse of discretion. *Service Employees Local 87 (Cresleigh Management),* 324 NLRB 774 (1997). Even where the General Counsel fails to consolidate cases which the Board feels should have been consolidated, the Board will not dismiss

[4] Under the Board's Rules and Regulations, Sec. 102.46(b)(2) and (g), matters not included in exceptions are deemed waived and may not thereafter be urged before the Board, or in any further proceeding. Therefore, Respondent is bound by the judge's findings.

the complaint in the absence of a showing of prejudice to the respondent. Id. at 776.

The Board has repeatedly held that allegations pertaining to circumstances arising after a trial cannot be barred under *Jefferson Chemical*. For example, in *E. I. du Pont & Co.*, 311 NLRB 893, 908 (1993), it was held that 8(a)(2) and (5) allegations that the employer dominated joint employer/employee safety committees were not barred by an earlier case alleging employer domination in connection with a joint employer/employee design team because "the [10(b)] limitation periods for the six safety committee began months *after* the trial in the Design Teams case on May 2–4, 1989.'' [Emphasis in the original.] Similarly, in *Great Western Produce, Inc*., 299 NLRB 1004 fn. 1 (1990), the Board rejected a *Jefferson Chemical* defense asserted in a case where both proceedings involved unilateral changes over nondriving tasks. There, even though the unilateral changes were almost identical, the defense was rejected on the ground that the second case involved tasks assigned more than a year after the hearing in the first case closed. See also *Glover Bottled Gas Co.,* 292 NLRB 873, 884–885 (1989).

Based on the above analysis, I conclude Respondent's *Jefferson Chemical* is without merit.

[Recommended Order omitted from publication.]