Piggly Wiggly Midwest, LLC *and* United Food & Commercial Workers Union Local 1473. Cases 30–CA–18574 and 30–CA–18575

January 3, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On March 28, 2011, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified, and to adopt the recommended Order as modified.[3]

1. This case arises out of the Respondent's sale of two of its unionized grocery stores to franchisees. We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying providing sales and franchise agreements that the Union requested, as well as information about equipment transactions between the Respondent and the franchisees (item 27 of the Union's December 17, 2009[4] information request). The Respondent also unlawfully failed to furnish information about services that it provided to the franchisees, including administrative, bookkeeping, clerical, detailing, drafting, managerial, and other services (items 30 and 34 of the request). We agree with the judge that the Union established the relevance of the information to its concern that the franchisees were alter egos of the Respondent. We also adopt the judge's findings that the failure to timely provide the requested information impeded the Union's ability to engage in effects bargaining,[5] violating Section 8(a)(5) and (1) of the Act, and that a limited backpay remedy pursuant to *Transmarine Navigation Corp.*[6] is warranted.[7]

Contrary to the Respondent and our dissenting colleague, Board precedent does not hold that the duty to provide information that is not presumptively relevant arises only after a union has made a demand and communicated facts to the employer demonstrating that it has an objectively reasonable basis for believing the requested information is necessary for, and relevant to, the performance of its statutory duties. Instead where, as here, a union requests information pertaining to a suspected alter-ego relationship, the union must establish the relevance of the requested information,[8] and have an objective, factual basis for believing that the relationship exists.[9] Board precedent holds, however, that the union "is not obligated to disclose those facts to the employer" at the time of the request; "[r]ather, it is sufficient that the General Counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief."[10]

Rather than apply extant Board precedent, the Respondent and dissent rely on decisions of certain courts of appeals holding that, to trigger an obligation to furnish information that is not presumptively relevant to the col-

[1] The Respondent has requested oral argument. The request is denied, as the record, exceptions, arguments, and briefs adequately present the issues and the positions of the parties.

[2] We find it unnecessary to pass on the General Counsel's exception to the judge's failure to find that certain items in the Union's December 17, 2009 information request (pertaining to equipment transactions and services provided to franchisees) are relevant to effects bargaining, in addition to the alter ego issue as the judge found, as the additional finding would not affect the remedy.

[3] The General Counsel requests that we direct the Respondent to furnish the sales *and* franchise agreements to the extent that it has not already done so. We modify the Order accordingly, consistent with the Union's information request and the judge's finding of the violation, which we have adopted. We have also corrected inadvertent errors in the judge's recommended Order and notice.

[4] Dates are in 2009 unless otherwise noted.

[5] In finding that the Respondent's failure to timely provide the requested information impeded effects bargaining, we note particularly that an understanding of whether the franchisees and the Respondent were alters egos was essential for the Union to assess the scope of the parties' bargaining obligations. In addition, the limited time available for effects bargaining before the sale of the stores was largely consumed by discussions about the pending information requests, rather than by actual effects bargaining.

[6] 170 NLRB 389, 391 (1968).

[7] Further, we adopt the judge's dismissals of allegations that the Respondent unlawfully failed to provide information about fund transfers between the Respondent and franchisees, and about the Respondent's employees who were or had been employees of the franchisees. Finally, we agree with the judge that the Respondent did not unlawfully delay its overall response to the Union's 63-part information request.

[8] *Contract Flooring Systems, Inc.,* 344 NLRB 925 (2005).

[9] *M. Scher & Son, Inc.,* 286 NLRB 688, 691 (1987).

[10] *Cannelton Industries,* 339 NLRB 996, 997 (2003). See also *Contract Flooring,* supra; *Hawkins Construction Co.,* 285 NLRB 1313, 1315 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988); *Barnard Engineering Co.*, 282 NLRB 617, 620 (1987) (finding that union did not forfeit its right to nonunit information merely because it failed to inform the employer of the factual basis for its request; such a result "would be contrary to the policies favoring the exchange of a broad range of information necessary for informed bargaining" because "it would focus the parties on attacking or defending the union's basis for seeking the information rather than resolving the underlying dispute"); *Corson & Gruman Co.*, 278 NLRB 329, 334 (1986) ("the requesting union need not inform the signatory employer of the factual basis for its requests, but need only indicate the reason for its request."), enfd. 811 F.2d 1504 (4th Cir. 1987).

lective-bargaining process, a union generally must disclose to the employer sufficient facts "tending to support" the information's relevance, at the time of the request.[11] While we continue to adhere to Board precedent, we nonetheless find that, under either standard, a violation has been established.

Where the factual basis of a request for nonunit information is obvious from all the surrounding circumstances, the union's failure to spell it out will not absolve the employer of its obligations under the Act, even under the more demanding standard applied in some circuits. *Hertz*, 105 F.3d at 874 ("In some situations, a union's reasons for suspecting that discrimination is occurring will be readily apparent. When it is clear that the employer should have known the reason for the union's request for information, a specific communication of the facts underlying the request may be unnecessary.").[12] That is precisely the situation here.

The Union informed the Respondent at the time of the request that it wanted the information to determine whether the Respondent and the franchisees were alter egos. Even without the Union expressly informing the Respondent of the specific facts giving rise to its belief that an alter ego relationship existed, the Respondent was well aware of the circumstances underlying the Union's suspicion. It had previously informed the Union that one of the franchisees was the current manager of the store he was purchasing. Additionally, the Respondent had announced to the public that the stores would continue to operate in the same manner as before the sales, with the same name, logo, and advertisements. The Respondent had also described the sale as "seamless," said that store customers would not notice a difference once the stores were franchised, and stated that it would continue to have "some agreements" with the franchise stores relating to requirements of purchasing goods from the Respondent's warehouses. In addition, the Union had observed one of the Respondent's managers reviewing employment applications for the franchisees. In these circumstances, it should have been apparent to the Respondent that the Union had a reasonable basis to suspect that the franchisees and the Respondent had sufficiently similar business purposes, management, operations, equipment, supervision, and ownership to constitute alter egos.[13]

2. On due process grounds, we reverse the judge's finding that the Respondent unlawfully failed to provide presumptively relevant information that the Union requested about the accrued vacation and holiday pay of the unit employees. The failure to supply this information was not pleaded in the complaint, nor did the General Counsel move to amend the complaint to reflect this allegation at any time during or after the hearing.

It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.[14] Whether a matter has been fully litigated rests in part on "whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made."[15] Here, because the Respondent was not on notice that it faced liability for this specific conduct, it had no reason at the hearing to attempt to substantiate the claim it made to the Union that problems with its payroll provider made it impossible to provide the information as requested. Whether or not new evidence would have changed the result, "[i]t is the *opportunity* to present argument under the new theory of violation, which must be supplied." *NLRB v. Quality C.A.T.V., Inc*.[16] Accord: *Mine Workers District 29*.[17]

[11] *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997) (citing *NLRB v. Postal Service*, 18 F.3d 1089 (3d Cir. 1994)). The Fourth and Seventh Circuits have similarly held that facts unknown to an employer at the time of its denial of a union's information request should not be taken into account in deciding if the denial was unlawful. *NLRB v. A.S. Abell Co.*, 624 F.2d 506, 513 fn. 5 (4th Cir. 1980); *NLRB v. George Koch Sons, Inc.,* 950 F.2d 1324, 1331 (7th Cir. 1991).

[12] See also *Allison Corp.*, 330 NLRB 1363, 1367 fn. 23 (2000) (employer is obligated to furnish requested information where the circumstances should "put the employer on notice of a relevant purpose which the union has not specifically spelled out"); *Beverly Enterprises*, 310 NLRB 222, 227 (1993) ("An employer is obligated to furnish requested information where the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out."), enfd. in relevant part sub nom. *Torrington Employees Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994); *Brazos Electric Power Co-op Inc.*, 241 NLRB 1016, 1018-1019 (1979), enfd. in relevant part 615 F.2d 1100 (5th Cir. 1980); *Ohio Power Co*., 216 NLRB 987, 990 fn. 9 (1975) ("The adequacy of the requests to apprise the Respondent of the relevancy of the information must be judged in the light of the entire pattern of facts available to the Respondent."), enfd. as modified 531 F.2d 1381 (6th Cir. 1976).

[13] See *Big Bear Supermarkets #3*, 239 NLRB 179 (1978), enfd. 640 F.2d 924 (9th Cir. 1980), cert. denied 449 U.S. 919 (1980) (alter ego relationship found to exist in a franchise setting); *Parklane Hosiery*, 203 NLRB 597, 613, 618–619 (1973) (same).

[14] *Pergament United Sales, Inc.,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Because we find that the matter was not fully litigated, as explained below, we need not determine whether the allegation was closely connected to the subject matter of the complaint.

[15] Id. at 335.

[16] 824 F.2d 542, 548 (7th Cir. 1987) (reversing Board's finding of unfair labor practice not alleged in complaint or at the Board hearing).

[17] 308 NLRB 1155, 1158 (1992) (simple presentation of evidence does not satisfy due process requirement that a claim has been fully and fairly litigated where respondent lacks notice that it faces liability for the particular conduct).

AMENDED REMEDY

We adopt the administrative law judge's recommended remedy except insofar as it directs the Respondent to provide the Union with information about accrued vacation and holiday pay owed employees. In addition to furnishing the franchise agreements, the Respondent is directed to furnish the sales agreements between it and the franchisees to the extent it has not already done so.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Piggly Wiggly Midwest, LLC, Appleton and Sheboygan, Wisconsin, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 1(c).

"(c) Failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units with respect to the effects of its decision to close its store 31 located at 15th Street in Sheboygan, Wisconsin, and its store 23, located on Northland Avenue, in Appleton, Wisconsin. The units are:

> All employees of all present and future stores located in the Counties of Outagamie and Winnebago, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").
>
> All employees of all present and future Employer stores working in the meat department located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of meat as defined in this Agreement, EXCLUDING employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty persons and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").
>
> All employees of all present and future Employer stores located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees working in the meat department[,] employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").

2. Substitute the following for paragraphs 2(a) and (b).

"(a) To the extent it has not already done so, furnish the Union with the sales and franchise agreements requested by the Union as of November 16, 2009.

"(b) Furnish the Union with the information requested by the Union in items 30 and 34 of its December 17, 2009 information request."

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

Dated, Washington, D.C. January 3, 2012

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

After the Respondent lawfully announced its decision to sell two of its stores to franchisees, the Union filed numerous requests for information concerning the transaction. Because this information did not relate to unit employees, the Respondent had no duty to provide it absent a demonstration, by the Union, of the relevance of the information. Under the standard the Third Circuit described in *Hertz Corp. v. NLRB,* 105 F.3d 868, 874 (1997), a union must "do more than state the reason and/or authority for its request for information;" the union must instead "apprise [an employer] of *facts* tending to support" its request for nonunit information by communicating those facts to the employer in its information request (emphasis in original).[1] Because the Union's requests fell short of this requirement, the Respondent was under no duty to provide the information.[2]

[1] See also my dissent in *Embarq Corp*., 356 NLRB No. 125, slip op. at 1, fn. 1 (2011).

[2] I join my colleagues in dismissing allegations that the Respondent unlawfully failed to provide information about fund transfers and the Respondent's employees who were or had been employees of the franchisees, and that Respondent unlawfully delayed its response to the

In the instant case, the Union simply asserted to the Respondent its suspicions that the franchisees were alter egos and that the sales were sham transactions. The Union presented no facts to support a reasonable basis for those suspicions. Even the purported alter ego evidence cited by the Union at the hearing and by my colleagues was typical of what one would expect in a routine and legitimate transfer of a business franchise. Nor did the Union's desire, stated at the hearing, to determine whether money had been set aside in the agreements to cover continuing financial obligations to employees provide a cogent reason why the requested information would impact the Union's ability to make specific effects-bargaining proposals.[3]

Because I would dismiss the information request allegations, I also would dismiss the allegation that the Respondent's failure to provide the information amounted to a failure to bargain over the effects of its decision to franchise the stores. I would therefore dismiss the complaint in its entirety.

Dated, Washington, D.C. January 3, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Mailed 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, mail 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 fail and refuse to furnish the Union with requested information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT delay furnishing the Union with information requested by the Union that is relevant and necessary for the Union's representational duties.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units with respect to the effects of our decision to close store 31 located at 15th Street in Sheboygan, Wisconsin, and store 23, located on Northland Avenue, in Appleton, Wisconsin, on or about December 31, 2009. The units are:

All employees of all present and future stores located in the Counties of Outagamie and Winnebago, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").

All employees of all present and future Employer stores working in the meat department located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of meat as defined in this Agreement, EXCLUDING employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty persons and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").

Union's information request. I also join their reversal, on due process grounds, of the judge's additional finding that the Respondent unlawfully failed to provide requested information related to accrued vacation and holiday pay.

[3] My colleagues find that the reasons for the Union's requests should have been apparent to the Respondent from the context of the request, primarily the ongoing relationship between the Respondent and the franchisees. This finding implies that a franchise arrangement is per se ground for a reasonable suspicion that a franchisee is an alter ego. I respectfully reject that rationale. *Big Bear Supermarkets #3,* 239 NLRB 179 (1978), enfd. 640 F.2d 924 (9th Cir. 1980), cert. denied 449 U.S. 919 (1980) and *Parklane Hosiery,* 203 NLRB 597, 613, 619 (1973), cited by the majority, are not to the contrary as both cases involved facts going well beyond the mere existence of a franchisor-franchisee relationship.

I further disagree with any implication in the majority opinion that alter ego status is established when two entities have "similar" business purposes, management, operations, equipment, supervision, and ownership. Board law clearly requires that these factors be "substantially identical" before alter ego status may be found. *D.L. Baker, Inc.,* 351 NLRB 515, 520 (2007).

> All employees of all present and future Employer stores located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees working in the meat department[,] employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act (the "Act").

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL furnish the Union with items 30 and 34 from its December 17, 2009 information request, and, to the extent we have not already done so, WE WILL provide the Union with the sales and franchise agreements requested by the Union on November 16, 2009.

WE WILL, on request, bargain with the Union about the effects of our decision to close our store 31 located at 15th Street in Sheboygan, Wisconsin, and our store 23, located on Northland Avenue, in Appleton, Wisconsin, on or about December 31, 2009, and WE WILL reduce to writing and sign any agreements reached as a result of such bargaining.

WE WILL pay to the unit employees their normal wages, plus interest, for the period of time described in the "Remedy" section of the administrative law judge's decision, as adopted by the Board.

PIGGLY WIGGLY MIDWEST, LLC

Angela B. Jaenke, Esq. (Region 30, NLRB), for the General Counsel.

John J. Prentice, Esq. and *Robert J. Simandl, Esq. (Simandl Prentice, S.C.),* of Waukesha, Wisconsin, for the Respondent.

Mark A. Sweet, Esq. and *Theresa C. Mambu-Rasch, Esq. (Sweet and Associates, LLC),* of Milwaukee, Wisconsin, for the Charging Party.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve a union and grocery chain's bargaining over the effects of the employer's decision to close two union-represented stores. The government alleges that the employer failed to satisfy its statutory duty under the National Labor Relations Act (Act) to bargain collectively over the effects of the closures, primarily by its failure to provide certain information requested by the union. The government alleges that the remedy for these violations should include a limited backpay remedy for employees, commonly known as a *Transmarine* remedy.[1] The employer, for its part, denies that it failed to bargain in good faith, or that it failed to provide the union information it was required to provide under the Act. In any event, even if it is found to have violated the Act, the employer disputes the appropriateness of the *Transmarine* remedy. As discussed herein, I find that under existing precedent the government has proven the alleged violations of the Act, and the appropriateness of the remedy it seeks.

STATEMENT OF THE CASE

On January 19, 2010, United Food & Commercial Workers Union Local 1473 (Union) filed two unfair labor practice charges alleging violations of the Act against Piggly Wiggly Midwest, LLC (Piggly Wiggly or Employer or Company) docketed by Region 30 of the Board as Cases 30–CA–18574 and 30–CA–18575. On June 30, 2010, based on an investigation of the charges filed by the Union, the Board's General Counsel, by the Regional Director for Region 30, issued an order consolidating the two cases and issuing a consolidated complaint and notice of hearing against Piggly Wiggly. The consolidated complaint alleged that Piggly Wiggly violated Section 8(a)(1) and (5) of the Act by failing and refusing to collectively bargain over the effects of the closing of two of its stores, and further, by failing to provide the Union certain relevant requested information. The complaint was amended October 28, 2010, and a further motion to amend the complaint was filed November 8, 2010. This motion, which was unopposed, was granted at the commencement of the hearing conducted in these matters November 8–10, 2010, in Milwaukee, Wisconsin.[2]

Respondent filed timely answers to the complaint, and amendments thereto, denying all violations of the Act.[3]

Counsel for the General Counsel, the Union, and the Respondent filed briefs in support of their positions on December 22, 2010. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The complaint alleges, Respondent admits and I find that at all material times, Piggly-Wiggly has been a wholesaler of grocery, meat and produce to franchise stores and an operator of corporate retail grocery stores with places of business in Appleton, and Sheboygan, Wisconsin. The complaint further alleges, Respondent admits and I find that at all material times Respondent, in conducting these operations, derived gross revenues in excess of $500,000 and purchased and received at its corporate headquarters products, goods, and materials valued in excess of $5000 directly from points located outside the State of Wisconsin. The complaint alleges, Respondent admits and I find that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and

[1] *Transmarine Navigation Corp.,* 170 NLRB 389 (1968).

[2] Throughout this decision, references to "the complaint" are to the complaint, as amended.

[3] The Respondent's answer to the original consolidated complaint was inadvertently omitted from GC Exh. 1, as entered into evidence at the hearing. The parties' joint posthearing motion to include the Respondent's answer in the record as GC Exh. 1(q) is granted.

(7) of the Act, and further, the Union, is, and has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Background

The Respondent Piggly Wiggly Midwest owns and operates retail grocery stores in Wisconsin under the name Piggly Wiggly and other names. The Piggly Wiggly stores that it wholly owns and operates are known as "corporate stores." In addition, the Respondent supplies to a network of franchised stores that operate under the name Piggly Wiggly. These stores are known to the parties as "franchise stores."

As of spring 2009, there were two union-represented Piggly Wiggly corporate stores operated by the Respondent in the Appleton, Wisconsin area. Store 23 was in Appleton, Wisconsin, on Northland Avenue. Store 24 was on Midway Road in Menasha, Wisconsin (near Appleton), about four miles from store 23. The Appleton-area union-represented employees were covered by a collective-bargaining agreement effective April 13, 2009 to February 1, 2011.[4]

As of spring 2009, the Union also represented the employees at two Piggly Wiggly corporate stores in Sheboygan, Wisconsin. Store 15 was on Wilson Avenue in Sheboygan. Store 31, also in Sheboygan, was about three miles away on 15th Street. At the Shebyogan stores the employees working for the meat department were in their own bargaining unit and had their own collective-bargaining agreement, effective May 7, 2009 to September 7, 2011.[5] The remainder of the employees working in the Sheboygan stores (with the exception of the store managers) were covered by another collective-bargaining agreement also effective May 7, 2009 to September 7, 2011.[6]

Announcement of the closure/sale; the initial information request and initial response

By two letters headed ""Notice of Cessation of Operations," dated October 30, 2009, the Respondent announced to the Union that it intended to close store 31 in Sheboygan and store 23 in Appleton. The letters, identical except that one referenced store 31 and one referenced store 23, were from the Respondent's attorney, Robert Simandl, to local union president, John R. Eiden, and local union secretary-treasurer, Grant Withers. The letters stated:

> Dear Mr. Eiden and Mr. Withers:
>
> Piggly Wiggly Midwest, LLC has requested that I contact you regarding the closure of the above-captioned store as a result of its sale to an independent franchisee. This sale will be announced publicly today. The sale is to be finalized as of midnight on December 29, 2009. The franchisee will be accepting responsibility for the Store on December 30, 2009. We will be terminating all employees at this store from Piggly Wiggly Midwest, LLC on December 29, 2009 as of midnight.
>
> We are aware that this transaction raises responsibilities under the Collective Bargaining Agreement of the parties as well as under the law. Under the Agreement, there is a transfer right for certain senior employees on the closing of the Store to the continuing Store in the contract region. We would like to discuss any transfers of employees which may be applicable and other matters relative to the [e]ffects of the transaction on our employees.
>
> Please contact me at [telephone number] at your earliest convenience to further discuss this transaction and set a date for [e]ffects bargaining on this matter. I look forward to your telephone call.
>
> Very truly yours,
>
> Robert J. Simandl

Approximately 60 bargaining unit employees were on the seniority list for store 23 and approximately 75 were on the seniority list for store 31.

In follow up to this letter, the parties made arrangements to meet to bargain on November 16, 2009.

By letter dated November 5, 2009, from Withers to Simandl, the Union requested,

> the following information in preparation for our upcoming effects bargaining, to be received prior to November 13, 2009.
>
> 1. The identity of the buyer(s)

---

[4] The bargaining unit recognized under the Appleton agreement was:

> All employees of all present and future stores located in the Counties of Outagamie and Winnebago, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty mean and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act. (Jt. Exh. 1; Appleton Agreement at p. 3.)

[5] The bargaining unit covered by the Sheboygan meat department agreement is:

> All employees of all present and future Employer stores working in the meat department located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of meat as defined in this Agreement, EXCLUDING employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty person and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act. (Jt. Exh. 2; Meat Agreement at p. 2.)

[6] The bargaining unit covered by the Sheboygan retail clerks agreement is:

> All employees of all present and future Employer stores located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees working in the meat department [,] employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act. (Jt. Exh. 3; Retail Clerks Agreement at p. 3.)

> 2. Contact person for the buyer(s)
> 3. Address and telephone number for this person or entity.
>
> In addition, the Union requests a copy of any and all documents including correspondence between the purchaser and seller relative to the Collective Bargaining Agreement relating to the purchase of these stores that have been executed or prepared or execution by the parties.

As to the request for documents of "correspondence between the purchaser and seller relative to the Collective Bargaining Agreement," Withers testified at the hearing that the Union wanted that information to see if it would provide information about "whether or not [the sale] was an alter-ego or sham transaction, and more importantly, as far as bargaining with the employees, any sales agreement tells you if there is any financial consideration . . . from one party to the other as to . . . contract benefits or anything else." In essence, Withers indicated that in preparation for the effects bargaining the Union wanted to know if the buyer and seller's relationship was arms length, and whether they had undertaken any arrangements related to the benefits available to employees under the labor agreements.

By letter dated November 16, 2009, Simandl responded to the Union's November 5, 2009 information request. The Employer's November 16 letter explained that the purchaser of store 23 in Appleton was Schneider Markets, Inc., with the principal of Daniel Schneider. Store 31 in Sheboygan was being purchased by ONE GUIDE, INC., with the principals of Robin and Mark Tietz. (Mark Tietz was a managerial employee of Piggly Wiggly and had been recently made store manager at store 31.) The Mayer Law Firm and its address and phone were listed as contact information for both franchisees. Simandl's letter further stated that

> [a]s to documents responsive to your inquiry, I will undertake to identify responsive information. I will be back to you as soon as I am able to determine the existence of any such documents.

November 16, 2009 Bargaining

The parties met three times at the Union's Milwaukee office for bargaining related to the shutdown.

The first meeting took place November 16, 2009. Present for the Union were Withers, Local President Eiden, and Union Attorney Mark Sweet. Present for Piggly Wiggly was Attorney Simandl and David Koenig, then Piggly Wiggly's vice president of retail operations.

Simandl said that the parties were present to bargain over the effects of the Company's decision to close the two stores. The Union's Attorney Sweet stated that the Union wanted to bargain both the decision to close and the effects of the closure. Simandl responded that the owners of Piggly Wiggly, Paul and Judy Butera, were no longer interested in operating retail stores, and were focusing the business on its grocery warehousing and distribution supply center operations. Simandl stated that "the decision to sell these stores has absolutely nothing to do with anything which is labor-and-employment-related; this was strictly an operations issue, and that's what it all came down to." Sweet stated that while willing to engage in effects bargaining, the Union maintained, and was not waiving, its position that it was entitled to engage in decisional bargaining with the Employer.

Sweet further testified that "I reiterated that we had an outstanding request for information from the union specifically I raised the sales agreement and if there was a franchise agreement and that had not been provided." In doing so, Sweet was amending, or, as he put it "clarifying" the November 5 information request to "include[ ] the sales agreement itself and the franchise agreement" between Piggly Wiggly and the new franchisee/owners.[7]

The parties agree that the enumerated items in the November 5 request regarding the buyer's identity and contact information were provided. See Jt. Exh. 11. As to the requested documents between the purchaser and seller, Simandl said that he was still looking into the issue and would provide information by the end of the week, if required to do so. Sweet and Simandl went back and forth on this issue. Koenig testified that he got the "impression" that Sweet was saying that the Company's failure to provide the sales agreement information was going to result in limited bargaining that day. The request for information was reiterated later in the meeting.

The Union also requested information setting forth the vacation and personal holidays owed to employees in the closing stores. Withers told the Employer that at meetings with employees there had been a lot of questions about vacation and personal holidays. The Employer bargainers said that they would have to check into it but agreed that the Employer would provide this information.

Simandl said that the Company wanted to focus on seniority issues in an effort to avoid the grievances that could follow from the closure of the stores. Specifically, the Employer wanted to discuss and come to agreement on the process and procedure for offering the limited transfer opportunities to employees in the closing store to the remaining store in each area.

The Employer also provided documents—one for stores 23 and 24—under the Appleton contract—and one for stores 31 and 15—under the Sheboygan contract—that set forth a combined roster of employees, broken down by classification, and within classification by hire date. Essentially, these rosters were a first proposal on integrating employees from the two closing stores and suggested an order for offering positions to employees from the closed stores to work at available positions in the store remaining open under each contract jurisdiction. The Company explained to the Union that these documents were to use "to go through the process of working through the assimilation of the two groups." According to Simandl, the combined rosters were designed to aid the Company's general overall goal in effects bargaining to receive "guidance" or input from the Union on how the employee lists should be merged.

Withers questioned the Employer about these store rosters (Jt. Exhs. 12, 13), and pointed out an error in rosters regarding

[7] Simandl recalled a less precise demand for "the documents associated with the transaction." However, based on the testimony of Withers, and Sweet, corroborated by the notes of Sweet, I find that the Union did specifically request the sales and franchise agreement during bargaining.

the hours that it listed employees as having worked. Simandl testified that as they looked at the document, the parties realized that Withers was correct.

During this meeting, as well as the other two meetings, described below, there was substantial discussion between the parties about how individual employees would be impacted by the merging of employees from store 23 into store 24, and the merging of employees from store 31 into store 15.

Sweet asked for the Employer's interpretation of the collective-bargaining agreement language regarding bumping, a matter directly at issue because the closure of the stores raised the issue of if, and in what order, employees at these stores would be able to obtain positions at the remaining stores under their respective contracts.

The Union perceived a conflict between the seniority provisions of the contracts, which governed the procedure to be followed in layoff situations, with the language regarding the procedure for a store closure contained in the contract, and talked through an example using two longtime employees to illustrate the concern.

The concern was driven by the fact that in the recently negotiated contracts—ratified in the spring of 2009—the number of job classifications had been expanded and employees, some with many years of service with Piggly Wiggly, were placed in the new classifications. This meant that many longtime employees found themselves with only a few months of seniority for purposes of job placement with regard to a store closing. It also meant that the employees in new classifications had the same very recent classification seniority date, although their time with Piggly Wiggly, or in the store, varied widely. Most generally, in the effects bargaining the Union wanted "employees to be able to go back to their previous classification" seniority that had prevailed prior to the introduction of the new labor agreements in Spring 2009. In other words, the Union wanted employees "previous service to be considered" when assignments to the new store were made. Simandl's initial position was that narrow store closure language—the new classification seniority—should be the determinant. However, Withers felt that during the November 16 meeting the Piggly Wiggly negotiators began to understand and consider the Union's concerns on this point.

During the meeting the Union requested a specific type of seniority list from the Employer. The Union wanted these forms because they showed the entire seniority history for each employee, not just the date of hire with the Company and not just the date of seniority in each employee's current departmental classification. Neither Koenig nor Simandl was familiar with the specific type of lists that Withers described, and Withers asked them to check with another Piggly Wiggly nonbargaining unit employee, Barbara Pike, who had been with the company longer and might recall the seniority lists for which he was looking.

Dates were suggested for the next meeting. Simandl testified that "the 1st and the 3rd of December were raised as potential next dates [to] bargain. And we said . . . 'We will take those dates.' And then we were told by Mr. Sweet, 'No, no. It's not both. It's one or the other.' And then we took the December 1st date." The meeting ended thereafter.

November 20 Correspondence

On November 20, 2009, Simandl sent a letter to Sweet providing his response to the Union's November 5 request for information. At the November 16 meeting the Union had "clarified" that it was requesting all parts of the sales and franchise documents—not just those portions "relative to "the Collective Bargaining Agreement" (as stated in the November 5 request). However, Simandl's November 20 response (Jt. Exh. 14) quoted from the November 5 request and in response, stated that "[t]he only responsive provision I have been able to identify is as follows:

¶23:

> Employees at the Store shall be employees of the Operator and not employees of Franchisor. Operator shall have the sole, exclusive and complete responsibility for the hiring, training, supervision, direction, discipline, compensation (including wages, salaries, and employee benefits) and termination of all Store employees. Operation has the exclusive right to determine and implement its employee policies and practice, including but not limited to all labor relations policies. Franchisor has no authority to direct or recommend particular personnel decision or actions to be made or taken by Operator.

Simandl explained at the hearing that he did not provide the larger set of transactional documents to the Union, such as the whole sales agreement or franchise agreement, because they contained matters "completely unrelated to anything to do with the labor-and-employment function in any sense."

December 1 meeting

Sweet began the December 1 meeting by reiterating the Union's right to the requested information, and contending that the Union had a right to bargain over the decision as well as the effects of the shutdown. Sweet indicated that the Union wanted a copy of the franchise agreement "that we requested on November 5 and clarified on November 16." Simandl responded that "[t]here's nothing else in the document that relates at all to the employees," and that he would not provide the franchise agreement, as it had nothing to do with labor and employment issues. Sweet's notes indicate that Simandl said, "we're here for the effects. . . . [the] franchise agreement is none of [your] business." Simandl and Sweet went back and forth on the issue of the information, with Sweet stating he was preserving the Union's position that it was entitled to the information, and Simandl taking the position that all transactional information "relative" to bargaining had been provided.

Sweet testified at the hearing that the Union wanted all of the information to bargain, but

> the union did not want to walk out of negotiations because, again, there was a precarious situation with all of our employees not knowing what was going to happen moving into the new store so we continued to talk but as it was with the understanding that we had a loaded gun to our head in the aspect of labor relations, that they were not giving us the information we needed, but they had this deadline.

Sweet raised, as he did at the beginning of "almost every

meeting," according to Simandl, that the Union had concerns that the franchise stores were alter-egos of PIggly Wiggly. However, Simandl testified that

> [w]e made very clear from day one that this transaction . . was between the buyer and the . . . seller to sell this store. When we sold this store, we are out of the deal.. . . . [W]e didn't control hiring, we didn't set wages. There was nothing being carried from one employer to the other. This was a clean-cut, new operation. The purchasers were on their own, except for what they paid for the inventory; otherwise we were clean.

Based on this, the Employer's view was that the merger of employees into the remaining stores was the issue that needed to be discussed, not issues regarding the sale, or vacation accrual, which Simandl indicated would be dictated by the labor agreement. Sweet took the position for the Union that the information "was necessary not only for the decision but for the effects and that we weren't waiving our right to bargain over the decision by continuing to have conversations over the effects." Simandl indicated that he "understood the union's right to file whatever frivolous claims it [ ] needs to . . . but we want to talk about the issues," specifically about the seniority lists and merging of the employees into the extant stores.

The Employer provided the Union a revised copy of the proposed schedule rosters, this time correcting the error in listed hours that Withers identified on the version of the documents provided November 16.

Simandl told the Union that the company was converting its payroll system and would not be able to provide the requested information on vacation and personal holiday for each employee. Simandl said an outside firm was performing the payroll work and he did not have a date on when the information would be available. Simandl indicated that "we'd have to go individual by individual" if the Union wanted this information.

This information was never provided to the Union. According to Simandl, the problem was with the Company's payroll system. He testified that the difficulty running a program to tell the Union how much vacation and personal holidays was owed to all of the employees was a problem that had preceded the effects bargaining.[8]

As to the specific seniority lists requested by the Union, the Employer representatives said they had talked to Barbara Pike and were still unaware of the seniority forms to which Withers was referring. Withers said he would provide the Company with versions he had received in past collective bargaining negotiations from Nadine Becker, the former HR Director. This, he thought, would help the Employer to find the lists to provide to the Union. Piggly Wiggly never provided these seniority lists for all employees as requested. According to Koenig, the Company's human resources department told him that those documents (which he had never seen) no longer existed.

The parties continued, discussing dues issues, individual grievances, and creating a position for a particular employee that the Union and Employer agreed needed assistance with employment. From the Company's perspective, according to Koenig, these were side tracks from the main issues that the Company wanted to discuss: the merger of units with the anticipated December 30 closure date fast approaching. The parties returned to this issue, and discussed the combined rosters created by the Employer and methodology that should be used for bumping and layoffs.

December 15 correspondence; December 17 information request

By letter dated December 15, 2009, and sent via email, the Employer provided the Union with further selection rosters, and set forth the methodology used in their creation. Most simply put, these rosters looked first to the current contract classification seniority for placing employees, but then, secondarily, looked to an employee's hire date where the current classification seniority was equal. This method was used first to select full-time employees, and then, the Company looked to part-time employees to fill positions. The December 15 letter, written from Simandl to Sweet, added that

> As requested, I am enclosing the above identified information for your further review and consideration in preparation for our meeting on Friday. As we have discussed, we will be looking to slot individuals based upon their current contract classification longevity, first filling full-time slots with the classification.
>
> We are open to any comments you may have as to how best to proceed in this matter. However, time is short and it is imperative that we come to a conclusion to inform employees what their employment status will be in the relatively near future.

On December 17, 2009, the Union, by Attorney Sweet, sent a letter to Simandl, attaching an extensive request for information. The letter stated:

> The Union intends to meet with you again tomorrow to discuss the Company's impending repudiation of the collective bargaining agreements with regard to the above-referenced stores. Since you have announced the purported transfer of employees as a *fait accompli*, the Union continues to pursue a mechanism for as orderly a transfer of employees as possible. As the Union has stated previously, by agreeing to discuss the pending transfer of employees, the Union does not waive, and specifically preserves, its right to challenge the decision of Piggly Wiggly Midwest to transfer nominal ownership of each store to other corporate entities but retain financial and ultimate

[8] I note that while there was some variation in the testimony about what Simandl said in this regard, I find that Simandl told the Union, as he testified, that the Union needed to give the Company specific individual employees for which it was seeking vacation (or personal holiday) information and the Company would then seek to look it up. However, the Company told the Union that it would not, or could not, provide the information for all employees. Based on his notes, Sweet recalled Simandl's comment differently, but I find that based on the weight of the testimony and evidence, Simandl did not tell the Union that it had to obtain the vacation and personal holiday information from the individual employees themselves.

managerial control of each through franchise agreements at each location.

Although you have refused to provide information relevant to the Union's enforcement of the collective bargaining agreement, it is our understanding that your client's company, Piggly Wiggly Midwest, LLC, is related to two other companies, Schneider Markets, Inc. and ONE GUIDE, INC. In order to enforce rights under the collective bargaining agreements . . . the Union hereby requests that you provide answers to the enclosed questionnaire no later than December 24, 2009.

The attached questionnaire consisted of 63 questions, including numerous subquestions, familiar in form to an extensive set of interrogatories that might be propounded in litigation, and seeking comprehensive information about all aspects of the company's records, finances, operations, and personnel details.

December 18 Meeting

The parties met again on December 18. This meeting lasted four to five hours, much longer than the previous two meetings. Dale Seianas, a union representative for the Piggly Wiggly stores in the Racine and Kenosha area also attended this meeting.

Sweet began by reiterating that the Union had a right to the information it had requested and the right to bargain over the decision to close the stores, as well as the effects of the closure. The Union continued to express suspicion that the relationship between the buyer franchisee stores and the seller Piggly Wiggly was less than arms length.

The parties discussed the updated store selection rosters created by the Company and emailed to the Union on December 15. This proposed selection rosters laid out the order in which the Company intended to fill positions at the extant stores with employees who would be displaced by the store closures. The parties went back and forth about possible scenarios under the rosters. The final outcome would, of course, depend on which employees at the closing store opted to move to the openings at the remaining store, and which employees retired, or sought and obtained jobs at the closed store, once it was under the ownership and management of the purchasing franchisees.

The Union listened to the Company's proposal, but argued that for it to fully deal with the effects of the merger of seniority lists it needed to be provided with the information it had requested. The Company indicated that with the closure date fast approaching, the Company's intention was to have one-on-one meetings with employees to determine which employees would take the open positions at the remaining store in each jurisdiction. The Union emphasized that it was not waiving rights under the contract and wanted to receive the requested information. The Union returned to what Sweet described as "a basic script" contending that the Employer had failed to provide requested information and although "we've had some discussion about effects . . . the law recognizes that we can't engage in conversations in a vacuum without the information that we've requested, that we're reserving all of our rights under the law and our rights to file grievances."

They Union wanted to know when the employees would receive vacation owed to them. In addition, for employees being hired by the franchise stores, the Union was interested in whether the employees' vacation and personal holidays balance would transfer to the new franchise stores, so that hired employees would not start with zero vacation/holiday days. This included discussion of what would happen to vacation entitlement for employees who, because of the closure, went from full-time to part-time employees, as each had different vacation entitlements under the contract. There was discussion of a side letter covering this issue. As part of this discussion, the Union reiterated its request to be told the vacation and personal holiday balance for each employee. Simandl explained again that the Company didn't have a system "that can tell you what the accrued balances are" and told Sweet "if you can tell us who you're' talking about, who are the people of concern, we can research those individuals and try to get the information." The discussion was heated and Simandl demanded that Sweet put the request for vacation information in writing. Sweet said that he might or might not put it in writing, but that Simandl had to provide the information in either case. Simandl reiterated, perhaps later in the meeting, that the Union would need to request the entitlements for individual employees who were questioning their accruals.

In the meeting the Union proposed that the Company offer voluntarily and involuntarily severing employees severance pay of one week pay per year of service. The Union's proposal also included continuation of health insurance for three months for these severed employees. Later in the meeting, Withers brought up the severance issue again, emphasizing that a plan to provide severance to employees who voluntarily quit could "create an incentive for senior employees to [resign] under voluntary severance," leaving more positions for those who could not consider leaving, and thereby reducing the number of employees subject to forced separation from the Company. Sweet testified that the Union finally made this proposal, even though its preference was to await receipt of the requested information before making a severance proposal, because "it was clear that they were going to go forward on December 31."

After a caucus break requested by the Employer, the parties resumed the meeting. Simandl said that he was disappointed that the Union wasn't going to come to any agreement. Sweet responded, "that we hadn't received the information that we requested and were unable to have meaningful discussions that would allow us to reach any kind of agreement."

Simandl indicated that employees would receive a letter explaining their termination and that the schedules listing the order in which employees were being offered remaining positions would be posted the following day. The Company's plan was to offer jobs to people within the new classifications, and within those new classifications use total seniority with the organization as a determinant, starting with full-time positions and working down filling all the slots. The Company indicated that it would have individual meetings with each employee, in the order specified by the schedule and determine who wanted to move to the new store and who was going to take the layoff. The Union, with the Company's agreement, assigned a representative to go to each closing store location for the meetings.

The meetings permitted employees to know what positions were available, and based on seniority they could choose whether to accept a position. After available positions were filled, the remaining employees who wanted positions, but for which none were available, were "displaced." There was some discussion of whether such employees were "terminated" or "laid off," and there is evidence that Simandl may have first used the term "terminated," while Koenig, indicated, "[t]hat means you were laid off." At trial, Simandl confirmed that the discussion concluded with the understanding that displaced employees "are going to be laid off, as opposed to . . . terminated, and that as positions opened they would be recalled based upon their seniority pursuant to the terms of the contract."[9]

In discussion, the Employer also rejected the Union's severance proposal and did not counterpropose. At trial, Simandl testified that "[t]here was no way for us to even consider that, cost it out, because we didn't know who was going to stay and who was going to go." Simandl stated that if there were other proposals the Employer would consider them.

Sweet asked Simandl if he received the December 17 information request. Simandl said he had received it, but had not yet reviewed it. As Simandl testified, "I had not been back to my office yet, so I had not seen it." Sweet said that "we would formulate a response and answer your request for more proposals after we get the information that I've requested and the other information that we've requested."

The meeting ended shortly thereafter.

December 30 and 31 correspondence

On December 30, Simandl sent Sweet a letter to "follow up on our recent discussions and your request for information concerning the unused vacation days of employees." In the letter, Simandl stated, "[a]s we have discussed with you previously, the Company does not have a payroll function which can identify for all employees their used and /or unused vacation." The letter continued:

> For identified individuals, the Company can manually calculate the total unused vacation entitlement of an employee. The Company has repeatedly advised the Union that there is nothing on its payroll system which allows for the generation of a summary of unused vacation hours for 2009. The Company does advise the Union that if there are individuals who have question as to vacation entitlements for 2009, please identify the names of such individuals and a records search of each individual identified will be undertaken to determine any unused vacation for 2009.

It is my understanding that that Company has relayed this offer to the Union numerous times since the fall of 2009 and to this point in time has had no luck in obtaining information as to the individuals who have questions on vacation entitlements. The Company renews its offer.

Sweet responded the next day, by letter dated December 31, 2009. The letter stated, in part:

> I have received your letter dated yesterday informing me that Piggly Wiggly will not provide information for unit employees regarding their accrued vacation benefits which the Union had requested at our meeting on December 18, 2009. At the meeting you initially indicated that when you received the Union's information request in writing, you would respond to it. After I repeatedly asked you for the information, you stated that you "understood" the Union's request. You have also failed or refused to respond to the Union's information request dated December 17, 2009.

Sweet's letter went on to contend that the refusal to provide the requested information was an unfair labor practice, and that, further, the Union was considering state law legal action for unpaid vacation. The letter reiterated that the Union wanted all requested information and that

> [i]f it is determined that a valid arms length transfer of the ownership and operation of the two stores is being made and that the new operators and Piggly Wiggly are not joint employers, the Union demands Piggly Wiggly engage in effects bargaining. In short, the Union requests that Piggly Wiggly provide all previously requested information and refrain from any unilateral actions that infringe on bargaining unit employees' rights.

Simandl responded by letter that day, December 31, 2009, stating that,

> Your argumentative and accusatory letter of December 31, 2009, will not be answered as to its substance. Your assertions are so outlandish that any response by us may only further fan your waste of limited resources of the Company and the Union in meeting its labor and employment needs.
>
> As to your December 17, 2009, information request, of some 100 requests, we are in the process of gathering information which is responsive to your requests, if any.

Store closures

The store closures (and reopening as franchise stores) occurred on or about December 31, 2009.

A number of employees who transferred to the remaining Piggly Wiggly corporate store in their jurisdiction were reduced from full-time to part-time employment, and (if they fell to less than 30 hours a week) lost health insurance under the health and welfare plan covering the represented employees. Employees not retained in a corporate store, who did remain and work at the franchise store, lost the union-represented health care and

[9] Some employees who turned down offers of employment at the surviving corporate store applied for and accepted positions at the new franchise store, thus remaining employed in the same store at which they had been working, albeit by new owners and under different terms and conditions of employment. Piggly Wiggly witnesses testified that they did not know how many of its employees took positions at the franchise stores. As Koenig explained, "[s]ome turned down our position [in the remaining corporate store]. We didn't ask where they were going, we didn't ask who was hiring, and we didn't ask if they got a job at Wal-Mart."

pension benefits, and other terms and conditions negotiated between the Union and Piggly Wiggly.

No effects bargaining agreement was reached by the parties. The December 18 meeting was the last.

In time, all of the employees at the closing stores who were initially left with no position in either the closing store—i.e., the new franchise store—or the remaining corporate store, were offered a position at the remaining corporate store, although they were immediately laid off if their seniority was low and if people above them accepted positions at the corporate store. They were also required to first apply at the franchise store, and some obtained employment there. Ultimately, eleven employees who wanted to work at the corporate stores were displaced. In time each of them was "given a call and offered a position back with either store 24 or store 15," the extant corporate stores. The testimony suggests that PIggly Wiggly calculated and paid vacation pay due to the employees who no longer worked for its corporate stores

Subsequent responses to information requests

On January 19, 2010, Sweet received a partial response to the December 17 information request. Simandl testified that he began preparing the response on December 19, but the extensive nature of the request required him to consult with "a million different departments" within the corporation. The Company's response included an answer, in some fashion to each of the 63 questions, although for many it declares the inquiry "beyond the scope of inquiry necessary for the operation and administration of the collective bargaining agreement." According to Sweet, the information "was meaningless by that point," several weeks after the store closures.

During its case-in-chief at the hearing in this matter, on November 9, 2010, the Respondent offered into evidence numerous transactional documents from the sale of stores, which appear to be some of (if not more than) the transactional documents requested by the Union a year earlier. These include, for each store sale, a promissory note, a personal guaranty by the franchise owners, a sublease and agreement between the Respondent (as sublessor) and one of the purchasers (as sublessee), a retail technology systems agreement, a security interest granted to Piggly Wiggly in the franchisee's business and property, the purchase and sale agreement, equipment and lease agreement, and a reimbursement agreement.

Analysis

The government alleges two related but distinct claims. First, the government alleges that that by refusing to provide (and/or delaying the provision of) certain information requested by the Union for the effects bargaining, the Respondent failed and refused to bargain collectively in violation of Section 8(a)(1) and (5) of the Act.

Second, the government contends that, as of December 18, 2009, the Respondent failed and refused to bargain collectively and in good faith over the effects of the store closings, in violation of Section 8(a)(1) and (5) of the Act. This refusal to bargain in good faith is based, essentially, on the alleged failure of the Respondent timely and adequately furnish the information requested by the Union. In other words, the government contends that the violations regarding the provision of information undermined the effects bargaining process.

I. THE INFORMATION VIOLATIONS

A. The Duty to Provide Information

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5).

As the Board explained in *A–1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011):

> An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). By contrast, information concerning extra unit employees is not presumptively relevant; rather, relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 257, 259 (1994). The burden to show relevance, however, is "not exceptionally heavy," *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982) enfd. 715 F.2d 473 (9th Cir. 1983); "[t]he Board uses a broad, discovery-type standard in determining relevance in information requests." *Shoppers Food Warehouse*, supra at 259.

Notably, once the burden of showing the relevance of non-unit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information. Depending on the circumstances and reasons for the union's interest, information that is not presumptively relevant may have "an even more fundamental relevance than that considered presumptively relevant." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969).

"[A]n employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations." *Caldwell Mfg. Co.*, 346 NLRB 1159, 1159–1160 (2006). This follows from the Supreme Court-approved understanding that under the Act "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). As the Supreme Court explained in *Truitt,* relying on principles adhered to since the earliest years of the Act, when a party asserts its positions without permitting proof or independent verification, "[t]his is not collective bargaining." 351 U.S. at 153 (quoting *Pioneer Pearl button Co.*, 1 NLRB 837, 842–843 (1936)).

The failure to provide requested relevant information is a

violation of Section 8(a)(5) of the Act.[10] Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.,* 220 NLRB 189, 191 (1975)*; Procter & Gamble Mfg. Co.* 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Finally, it is important to recognize that "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Monmouth Care Center*, 354 NLRB No. 2 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB No. 29 (2010).

B. At issue in this case

In this case the complaint alleges a failure to timely and adequately furnish the Union with information requested in the Union's November 5 letter and also in its December 17 letter. See GC Exh. 1(e) at ¶10(a) and (b).

At trial, the allegation transformed somewhat: the request for the transactional documents (i.e., the sales and franchise agreement), which was made orally at the bargaining table, is actually an expansion—or, as the Union referred to it, a "clarification"— of the narrower request in the November 5 letter for seller/purchaser documents "relative to the Collective Bargaining Agreement relating to the purchase of these stores."[11]

Also, at trial counsel for the General Counsel stated (Tr. 27, 376) that as to the 63 numbered items in the December 17 information request, the government was alleging that the only paragraphs at issue were the Employer's response to numbered items 16, 27, 30, 34, 39, and 63.[12]

While it is unclear why these changes did not result in a pretrial amendment to the complaint, they are in any event appropriate for consideration. The narrowed allegations based on the December 17 letter announced by the General Counsel, are, of course, encompassed by the pled allegations. The subsequent oral "clarification" of the November 5 information request, without a doubt, raises an issue that is "closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Gallop, Inc.*, 334 NLRB 366 (2001). Accordingly, these issues can be considered, and if the evidence and precedent supports it, found to be violations.

Evidence was also presented at trial as to the Respondent's failure to provide two other items of information as well. At the bargaining table, the Union requested particular seniority lists provided in past years that showed the employees' history of classification seniority. In addition, in bargaining the Union requested information documenting the vacation and personal holiday accrual for each bargaining unit employee.

Neither of these requests were alleged in the complaint. No amendment to the complaint was ever offered to allege that the failure to provide this information was a violation. However, at the hearing, in the course of describing events at the three effects bargaining, these issues were extensively discussed. Witnesses for both parties discussed these requests and the reasons offered by the Respondent for its failure, or inability, to provide this information to the Union.

These present a more difficult test of *Pergament*. Neither of these requests for information is based on the November 5 or November 17 information request letters, alleged in the complaint to be the source of the government's "information-request" case. On the other hand, they are both information requests—like the alleged violations—and they are requests made in the course of the effects bargaining negotiations directly at issue in this matter. I find that under the circumstances they are "closely connected to the subject matter of the complaint." *Pergament*, supra. Were these issues "fully litigated" as *Pergament* also requires? One must conclude that they were. There was a full recounting by all parties, in the course of their description of the effects bargaining sessions, as to when this information was requested, why it was sought, what the problems were in providing it, and why it was not furnished. The answer to the question of "whether . . . respondent would have altered the conduct of its case at the hearing, had a specific allegation been made" (*Pergament*, 296 NLRB at 335), is no.

Accordingly, I will consider each of the foregoing issues as part of the General Counsel's case.

1. The Transactional Documents

Board precedent accepts that documents such as a sales agreement or franchise agreement between a buyer and seller "pertain[ ] to matters occurring outside the bargaining unit," and, therefore, "the burden is on the General Counsel to demonstrate that the information is relevant." *Sierra Int'l Trucks*, 319 NLRB 948, 950 (1995); *Knappton Maritime Corp.*, 292 NLRB 236, 238 (1988).

However, that burden, as noted above, is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982) enfd. 715 F.2d 473 (9th Cir. 1983). The standard is not the relevance standard for admission of evidence at trial, rather, "[t]he Board uses a broad, discovery-type standard in determining relevance in information requests." *Shoppers Food Warehouse*, 315 NLRB 257, 259 (1994).

Courts construe the discovery standard for relevance "broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any

[10] In addition, an employer's violation of Section 8(a)(5) of the Act is a derivative violation of Section 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See, *ABF Freight System,* 325 NLRB 546 fn. 3 (1998).

[11] A further refinement of the matters at issue here was caused by the Respondent's decision at trial to place into evidence—with copies provided to all parties—the documents that appear to be some and probably all of the transactional documents requested by the Union. The purchase and sale agreement was provided to the Union at the trial in this matter on November 9, 2010, along with a host of other transactional documents. Whether there remains, another document that constitutes a "franchise agreement" above and beyond the extensive transactional documents furnished, is unclear on the record.

[12] It is also the case that, notwithstanding this representation, counsel for the General Counsel appears to contend on brief (GC Br. at 33–34) that the Respondent's overall response to the December 17 request—provided one month later, on January 19, 2010—was unlawfully delayed.

issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), referencing *Hickman v. Taylor*, 329 U.S. 495, 51 (1947). Of course, when a union requests information from an employer there is no "case"—application of this standard to a union's request for information requires assessment of whether the request could lead to matters that bear on any issue of involving the union's representation of the employees or policing of a contract

In this case the Union sought the transactional documents, specifically the sale agreement and franchise agreement, for two general reasons, articulated in bargaining and/or at the hearing.[13]

First, the Union wanted to know if provisions had been made, or money set aside in the agreement between the buyer and seller, for either party to pay or compensate the other for paying, employees' severance, vacation, or other employee benefits. Related to this, at the hearing, the Union contended that transactional documents would have allowed it to know if the Employer maintained any reversion rights or obligations in the event the franchisees failed, which would have been relevant for assessing the likelihood of future employment possibilities with the Employer.

Second, the Union sought the transactional documents because it had concerns, repeatedly asserted to the Employer at the bargaining table, that the transaction was something less than arms length. The Union variously described the concern as one that the closure and sale was a "sham transaction" or the establishment of an "alter ego" by Piggly Wiggly.

The central question is whether the request for the transactional documents satisfies the "broad, discovery-type standard" of relevance utilized by the Board.

As to the Union's first rationale, the Union was entitled to the transactional documents in order to ascertain whether provisions had been made or funds designated in the sale for the payment of severance or other benefits to the employees. The Board has held, adopting the reasoning of an administrative law judge, that "an assets sale agreement [is] relevant where the union wished to determine, among other things, whether financial reserves had been established to cover items negotiated during effects bargaining, such as severance pay." *Sierra Int'l Trucks*, 319 NLRB at 951, citing *Transcript Newspapers*, 286 NLRB 124 fn. 2 & 126 (1987), enfd. 856 F.2d 409 (1st Cir. 1988) (finding sales agreement relevant where union requested agreement "to determine whether reserves had been established to meet potential liabilities concerning contract negotiations or effects bargaining negotiations).[14]

With respect to its "alter ego" concerns, I also believe the Union has justified its request. As to information requests motivated by concerns that there is an alter ego relationship, the Board has a well-developed body of precedent regarding the union's relevance burden. To satisfy its burden, "the union must demonstrate a reasonable objective basis for believing that an alter ego relationship exists." *Contract Flooring Systems*, 344 NLRB 925, 925 (2005). At the same time, a union is "not required to show that the information which triggered its request was accurate or ultimately reliable, and a union's information request may be based on hearsay." *Shoppers Food Warehouse*, 315 NLRB at 259.

The Union's concerns were based on a number of indicia. The sale was to franchisees, not to a wholly unrelated entity. One of the new franchise owners, Mark Tietz, the new owner of store 31, had become store manager of that store, for PIggly Wiggly, one month before the announcement of the sale. The franchise relationship is one that, without documentation could be construed in a number of ways. Thus, the Union heard from press reports that Piggly Wiggly was saying that the stores would continue to operate in the same way: with the same store name, same logo, same advertisements. The sale was described as being "seamless," and it was reported to the Union that store customers would not notice a difference once the stores were franchised. As a franchise store, Piggly Wiggly would continue to have "some agreements"—the details were unspecified—with the franchise stores relating to requirements of purchasing goods from Piggly Wiggly's warehouses.

In addition, it came out at the hearing, that as vice-president for retail operations for Piggly Wiggly, Dave Koenig was responsible for "liaison with franchise owners" and he estimated he spent 15–20 percent of his time working with franchises "to help them improve operational efficiencies" including "payroll" "controlling, scheduling." Koenig says his assistance to the franchise was limited to "strictly operation. Running your store." He used four district managers to assist with the franchises. "They made regular calls on the stores, reported the conditions of the stores, and offered guidance to improve their operations." In addition, the Union was concerned about hearing that Piggly Wiggly Manager (and former store manager in store 31) Saeger was seen going through applications at the store for the franchisee and might be assisting in the hiring process at the store. Asked about this, Simandl said that Saeger was reviewing applications but that he was not hiring employees. According to Piggly Wiggly, Saeger was "just helping out

[13] A union's reasons for requesting information that is not presumptively relevant may be communicated at the unfair labor practice hearing. *US Postal Service*, 356 NLRB No. 75, slip op. at 4 fn. 9 (2011) (citing *H & R. Industrial Services*, 351 NLRB 1222, 1224 (2007)); *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980).

[14] In Transcript Newspapers, supra, the Board did not pass on the judge's conclusion that the sales agreement was presumptively relevant, "as on the particular facts of this case the Unions have demonstrated the relevance of the sales agreement to the performance of their roles as collective-bargaining representatives." 286 NLRB at 124 fn. 2. Coupled with the Union's showing of relevance, the Judge's recognition of the importance of the sales agreement to effects bargaining is instructive and warrants reproduction here:

> The document struck at the core of the employment relationship of the unit employees. . . . The Agreement is the base instrument which caused the unit employees to lose their jobs with [the employer]. . . . [This] makes it literally self-evident that knowledge of the terms of the sale was a required foundation for the unions to make intelligent and comprehensive proposals during effects bargaining. . . .
>
> [ ] The agreement was the single, most authoritative and reliable source of data which would have formed the underpinnings of effects bargaining.

286 NLRB at 126.

with the paperwork." Moreover, although Simandl repeatedly indicated, both in negotiations and at the hearing in this matter, that he and the Respondent "had nothing to do" with the new franchise stores, this turned out not to be entirely true. A January 11, 2010 letter from the new franchise owner Tietz to the Union bore reference initials in the bottom left corner indicating that the letter originated with Simandl and was typed by his secretary.[15] When examined about this letter Simandl was less than forthcoming about its origin and purpose. He affirmatively did not deny writing it, but denied writing it for the franchise owner Tietz, whose signature was on the letter, and then stated that he could not remember if he wrote it or not. Simandl also admitted, somewhat reluctantly, that he answered questions about "labor law" posed to him by the franchisee's attorney. There are many possible explanations for this letter—none were offered—but it does stand as evidence of some relationship with, and perhaps the involvement of Simandl or Piggly Wiggly in, the labor relations of the franchisee, a relationship that was vigorously denied prior to the introduction of this letter. Finally, in citing its concerns about the nature of the transaction, the Union recalled how Piggly Wiggly owner, Butera, who had purchased Piggly Wiggly just prior to the 2006 contracts, had called local president Eiden aside during an August 2008 health and welfare fund meeting and, in front of Withers, and the midst of complaining about the cost of negotiations, told them, "If you guys want to fight, I know how to get rid of the union." Butera also told them, "When "I'm nonunion my pockets get like 'this' [full] and when I'm union my pockets are like 'this,' meaning empty."

These are all objective facts that do not prove but are consistent with a finding of alter ego or single employer status. That is enough. In order to be entitled to receive information that will aid its investigation of whether there is a single employer relationship, the Union does not have to have proof of the matter. The objective facts on which the Union bases its request for alter ego information may, indeed, be explicable in ways that obviate the concern of alter ego status. But it is precisely the furnishing of more information that will confirm, rebut, or put in context the limited known facts. The Union is not required to accept the Respondent's bald assertions that the franchisees were totally separate operations over which the Respondent would not exercise control. *Shoppers Food Warehouse*, 315 NLRB at 258 ("We further note that the Union was not required to accept the Respondent's response that [the new entity] was a totally separate operation . . . . within the meaning of the contract. By the same token, the Union was entitled to conduct its own investigation and reach its own conclusions").

The Respondent's arguments (R. Br. at 19) to the contrary are unavailing. Citing *NLRB v. Truitt*, supra, the Respondent contends that the financial data sought in the transactional documents "is relevant only when an employer asserts inability to meet a Union's wage and benefit demands." The Respondent's contention is incorrect. *Stanley Building Specialties Co.*, 166 NLRB 984, 986 (1967) ("we read [*NLRB v. Truitt*] as announcing principles that are generally applicable to a wide variety of bargaining situations in which good-faith obligations under the Act require that a party to bargaining negotiations be willing to substantiate on request a position it has taken during the course of the negotiations"), enfd. 401 F.2d 434 (D.C. Cir. 1968); *Caldwell Mfg. Co*., 346 NLRB 1159, 1160 (2006) (rejecting argument that only assertions of an inability to pay will trigger duty to disclose financial information; "When there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for nonunit employees.").

Even more fundamentally incorrect is the Respondent's contention (R. Br. at 19) that the Union's request for the transactional documents was unnecessary because "Attorney Simandl told the Union that the transactional documents contained no labor and employment information other [the one paragraph] provided on November 20th." This is the nub of the Respondent's argument, but it is at odds with fundamental premises of the statutory bargaining process. The Union is not required to take the Respondent's word for it, but has a right to assess and verify for itself the accuracy of the Respondent's claims in bargaining. *Shoppers Warehouse*, supra. As the Supreme Court explained in *Truitt*, supra, if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152–153. The Supreme Court in *Truitt* noted that from the earliest years of the Act, it has been recognized that for a party to assert its positions without permitting proof or independent verification, "[t]his is not collective bargaining." 351 U.S. at 153 (quoting *Pioneer Pearl Button Co*., 1 NLRB at 842–843; *Caldwell Mfg. Co.*, 346 NLRB at 1160 ("the General Counsel established that the information was relevant, because it would have assisted the Charging Party in assessing the accuracy of the Respondent's proposals and developing its own counterproposals. The record evidence demonstrates that the Charging Party's requests were made directly in response to specific factual assertions made by the Respondent in the course of bargaining").

It is also no answer for the Respondent to point out that the General Counsel did not issue a complaint on the portion of the Union's original unfair labor practice charge alleging that the franchisees' were alter egos or disguised continuances of the Respondent. The Board has squarely held that dismissal of such unfair labor practice charges does not undermine the Union's right to request information on the subject where it has otherwise established relevance. *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988) (the Region's dismissal "went to the merit of the charges, i.e., whether there was sufficient evidence to establish that the Respondent violated the Act by transferring unit work to a nonunion entity which was an alter ego. In cases involving information requests, however, the Board does not consider the merits of a union's claims. Instead, the Board acts on 'the probability that the desired information was relevant, and that it would be of sue to the union in carrying out its statutory duties and responsibilities'" (quoting *NLRB v. Acme Industrial Co.* 385 U.S. 432, 437 (1967)); see, *Sands Hotel and Casino*, 324 NLRB 1101, 1110 (1997) (union

[15] The reference initials "RJS/TT" match those of Robert Simandl and his assistant Tania Turenne.

entitled to documents to test permanency and bona fides of assertedly permanent closing, even though later events demonstrated indisputably that closing was bona fide and permanent); enfd. mem. 172 F.3d 57 (9th Cir. 1999).

Similarly, the fact that the Respondent was required to bargain only over the effects, and not over the decision to close the stores, does not lessen the Union's right to request and receive information about the sale. *Compact Video Services*, 319 NLRB 131, 144 (1995) ("it is quite irrelevant to the question of a union's rights to information about a sale of the employing enterprise that the seller is not legally required to bargain about its 'decision' to sell the business. For the employer-seller still must bargain about the effects of such a decision on unit employees, and as an incident thereto, it must normally give the union access, upon request, to the sale agreement and more generally, to 'information concerning the sale'"), enfd. 121 F.3d 478 (9th Cir. 1997).

Central to the Union's request, and central to these effects bargaining negotiations, was the contention by Piggly Wiggly that "[w]e made very clear from day one . . . [w]hen we sold this store, we are out of the deal. . . . The purchasers were on their own except for what they paid of the inventory; otherwise we were clean." Piggly Wiggly maintained that it "had nothing to do" with the franchise stores, and that "the sales documents had nothing to do with the employees, that there was no relevance there." According to Simandl, the sales and franchise agreements were "completely unrelated to anything to do with the labor-and-employment function in any sense." Based on this position, Simandl testified that he refused to provide the sales agreement or franchise agreement to the Union.

The Respondent must concede that its claim was an important one; not only relevant but a central premise for the effects bargaining negotiations. It was a claim that if untrue, or if not the whole story, could have significant ramifications for the negotiations. Given this, it is simply inconsistent with the Act for the Union to be required to take Simandl's word on this important matter. The documents to verify this claim were requested and should have been provided.[16]

Finally, I point out, that the Respondent's refusal to provide the transactional documents was based *only* on its claim that nothing in transactional documents was relevant to the union's concerns. At no time did the Respondent claim that the documents were confidential. Indeed, at the hearing Simandl directly denied knowing of any confidentiality concerns regarding the documents. And the Respondent, on its own accord, placed the transactional documents into evidence. Thus, confidentiality issues that are sometimes raised in response to requests for production of certain business documents are not at issue here. The only issue is whether the General Counsel has demonstrated that this information was relevant to the bargaining under a liberal discovery standard. As discussed above, it has.[17]

I find that the Respondent was under a duty to supply the Union with transactional documents upon the Union's request. The sales agreement was finally supplied November 9, 2010, at the hearing in this matter. The Respondent unlawfully delayed providing that document to the Union. As discussed, numerous other transactional documents were provided to the Union at the hearing November 9, 2010, some of which bear directly on matters that pertain to the franchisor-franchisee relationship. To the extent those documents constitute the "franchise agreement" its provision was also unlawfully delayed. To the extent there is an additional "franchise agreement" that has not been provided, the Respondent has unlawfully failed to provide it.[18]

2. The December 17, 2009 information request: Items 16, 27, 30, 34, 39, and 63

On December 17, 2009, the Union sent an extensive information request, styled as a questionnaire, to the Respondent, containing 63 numbered questions, some with several subparts and subquestions. The information requests sought on a vast array of operations, financial, and labor and employment, and ownership information about the Respondent and the franchisee corporations.

The Respondent responded to the information request on January 19, 2010, answering certain items and declining to answer other items, often stating in response to specific questions that "[t]he information sought is beyond the scope of inquiry necessary for the operation and administration of the collective bargaining agreement."

The General Counsel contends that out of the 63 item questionnaire, the Respondent violated the Act by its responses to items 16, 27, 30, 34, 39, and 63.[19]

[16] It is notable, of course, that having finally produced the transactional documents and entered them into evidence at the hearing in this case, the Respondent claims that the documents verify its positions at the bargaining table. However, this advances the General Counsel's—not the Respondent's—position. Assuming (I have no cause to decide) that the documents verify the Respondent's claims at the bargaining table, their production at the time requested, during bargaining, might have obviated much if not all of this case. Their introduction at trial stands as an after-the-fact admission of their relevance to the bargaining, if only to verify the bargaining claims of the Respondent.

[17] At the close of the hearing, counsel for the Respondent inquired about a procedure for avoiding "public scrutiny" of the transactional documents once the case was over. I invited a posthearing motion if the Respondent wanted to pursue the matter. In any event, at no time has any confidentiality interest in the documents been advanced or articulated. The unilateral decision to place the documents into evidence at a public hearing would, it seems to me, make confidentiality a difficult argument to mount at this point.

[18] I note that some of the transactional documents provided are dated December 29, 2010, over a month after the Union's request. However, Simandl indicated that Piggly Wiggly "reviewed many of these documents" . . . . whether it be a draft document or . . . whatever it may be." Given this, and given that that Simandl did provide one paragraph of a transactional document that on November 20, 2009, he deemed relevant to the Union's request, I will date the violation from the time of the Union's request. The Respondent does not contend that the documents were not in existence—in draft or final form—at the time of the Union's request. Its only defense is relevance.

[19] These requests sought the following:

> 16. Identify amount(s) involved, reason(s) for, and date(s) of transfer of any funds between your company and the non-union company.
>
> 27. Regarding equipment transactions between your company and the non-union company, identify the purchase, rental, or lease rate,

In addition, on brief, General Counsel contends that the Respondent's January 19, 2010 response to the information was request was untimely, and thus, a violation even as to those items to which it responded.

I will review the government's contention with regard to the specific paragraphs to which a violation is alleged. Then I will briefly address the contention that the response, as a whole, was untimely.

16. Identify amount(s) involved, reason(s) for, and date(s) of transfer of any funds between your company and the non-union company.

As to item 16, the Respondent answered that

> The Company, Schneider Markets Inc. and ONE GUIDE, INC. are unrelated parties and no fund transfers have occurred.

The General Counsel contends (GC Br. at 24) that the Union demonstrated relevance for this item based on Union Attorney Sweet's testimony at the hearing. Sweet testified that this item "would deal with the fact that perhaps the [Respondent] was permitting the transfer of people's accrued vacation benefits go to the franchisee." Sweet also testified that if the Respondent was providing help to the franchisee with "startup costs, [and] if there was an ability . . . if they failed to meet a certain threshold over a certain period of time, perhaps there's an automatic reversion where the [Respondent] would buy the company back."

This was a sale situation, and, as demonstrated by the transactional documents entered into evidence, one in which the seller played a financing and subleasing role. Almost all sales, by conventional definition, involve the transfer of funds. To the extent the Union's request is intended to be read broadly (and literally) as seeking information about any transfer of funds, I do not believe the request is relevant to effects bargaining. The sales price and pricing, and exchanges of money generally play no proximate, discernible, or identified role in the Union's effects bargaining. Information about the transfer of funds would not be likely to reveal anything about a potential "right of reversion," even assuming, for the moment, that such reversion information is relevant.

To the extent the information request is read more narrowly, as being directed toward any transfer of funds for vacation (as referenced by Sweet) or other employee benefits, the request is clearly relevant. And the Respondent answered it: the Respondent said there were no such transfers. Neither the General Counsel nor the Union point to anything in the transactional documents that contradict this representation of the Respondent. I find that its response to item 16 did not violate the Act as alleged.

> 27. Regarding equipment transactions between your company and the non-union company, identify the purchase, rental, or lease rate, equipment involved, calendar period, and dollar volume of each transaction.
>
> The Respondent's response to item 27 was:
>
> No information responsive to the inquiry.

The General Counsel contends (GC Br. at 24) that the Union demonstrated relevance for this request based on Sweet's testimony that it would "go to the reversionary rights of the Union" and also was "relevant to a determination of whether the employer was an alter ego."

I accept the latter rationale, if the request is confined to the time period at and after the sale to the franchisees. Information on equipment transactions between two entities will very likely to add or detract from assertions that the transaction reflects an arms length relationship. It is precisely the type of information that would be contained in transactional documents, and, indeed, the equipment and fixtures lease agreement entered into evidence by the Respondent at the hearing in November 2010 is directly responsive to this request.

In fact, the Respondent responded to this information request on January 19, 2009. The difficulty is that in its response it denied that there was any equipment transactions between the parties. Based on the equipment and fixtures lease agreement, which was entered into December 29, 2009, this appears to be incorrect. Accordingly, the Respondent failed to provide this requested relevant information until November 9, 2010, when it supplied it at the hearing.

30. Identify those of the following services that are provided to the non-union company by or at your company.

(a) administrative
(b) bookkeeping
(c) clerical
(d) detailing
(e) drafting
(f) managerial
(g) other

The Respondent's response to item 30 was as follows:

> The information sought in your question is beyond the scope of the inquiry necessary for the operation and administration of the collective bargaining agreement. If you have specific case law to support your request for information, please identify such legal authority.

The General Counsel contends (GC Br. at 25) that the Union demonstrated the relevance of this request based on Sweet's

---

equipment involved, calendar period, and dollar volume of each transaction.

30. Identify those of the following services that are provided to the non-union company by or at your company.

(a) administrative
(b) bookkeeping
(c) clerical
(d) detailing
(e) drafting
(f) managerial
(g) other

34. Identify work your company performs on behalf of the non-union company.

39. Identify by job title and respective employment dates those employees of your company who are or have been employees at the non-union company.

63. Identify any contractual between you [sic] company and the non-union company and provide all documentation of such relationship.

testimony that it would have helped the Union make an effects bargaining proposal if the Union knew if the Respondent was "putting a commitment of time and money into these areas," and also because it "would have been relevant to whether the [Respondent] and the franchisee were—whether there was an arm's length transaction between the two."

I agree that the latter rationale—relating to inquiry into whether this was an arms length transaction—is a relevant area of inquiry that would have been advanced by receipt of this information. My reasoning is set forth above, in the discussion of the relevance of the transactional documents for this same inquiry. It is also not to be forgotten that throughout bargaining Simandl repeatedly stressed to the Union, in response to the Union's voicing of its concerns that this was a sham transaction (or words to that effect), that "[w]hen we sold this store, we are out of the deal . . . This was a clean-cut, new operation. The purchasers were on their own, except for what they paid for the inventory, otherwise we were clean." Then at the hearing, evidence was introduced that, at least through May 2010, the vice president of retail operations spent 15–20 percent of his (and his staff's) in "liaison with franchise owners," helping them "to improve operational efficiencies."

Of course, this is not to say that the evidence proves that the franchisees' are alter ego's or single employers with the Respondent. But the request for information in item 30 is relevant to the inquiry.[20]

34. Identify work your company performs on behalf of the non-union company.

The Respondent's response to item 34 was as follows:

> The information sought in your question is beyond the scope of the inquiry necessary for the operation and administration of the collective bargaining agreement. If you have specific case law to support your request for information, please identify such legal authority.
>
> My analysis is the same as for item 30. In short, I do not rely on the "reversionary" interest asserted by the Union, but I believe it is an appropriate request based on the alter-ego concerns.

39. Identify by job title and respective employment dates those employees of your company who are or have been employees at the non-union company.

The Respondent's response to item 39 was as follows:

> The Company has no information responsive to this inquiry.

Relevance aside, I read the Respondent's response as stating that it has no employees who are or were employees at the franchisees. I believe the Respondent would know this. It is an appropriate response to an information request to state that there is nothing responsive.[21]

63. Identify any contractual relationship between you [sic] company and the non-union company and provide all documentation of such relationship.

The Respondent's response to item 63 was as follows:

> The information being sought is not within the scope of information necessary for the operation and administration of the collective bargaining agreement.

As quoted in the General Counsel's brief (GC Br. at 26), when asked at trial to describe the relevance of this request, Union Attorney Sweet stated that "[t]his was just a restatement of our November 5 request for the sales and franchise agreement." Accordingly, this request is relevant for the same reasons I have found relevant the Union's request for the sales and franchise agreement. As discussed, the sales agreement was provided November 9, 2010, during the hearing. It is unclear whether the other transactional documents provided during the hearing constitute the "franchise agreement" or whether there is still some unprovided franchise agreement.

Finally, on brief, the General Counsel contends (GC Br. at 33) that the information provided January 19, 2010, in response to the Union's December 17, 2009 request, was unlawfully delayed. I reject that contention. The December 17, 2009 request was exhaustive in scope, and included 63 separate interrogatories, some with subparts. Simandl testified credibly that he began putting the response together on December 19 (the parties were negotiating on December 18). Simandl explained:

> you know, there was, gosh, I think almost a hundred, you know, subparts and everything put together. Lot of it had various aspects of the business that had to get involved. Mike, the CFO. There was information regarding the organizational structure; there was information request relative to the—I think there were questions about the principle accountant; where the corporate records are kept. You know, there was—I had a million different departments to go through to try to gather all this information. There wasn't one source within the Company that says "I got it all."

I do not doubt the Union's right to make a significant—even a huge—information request on the Respondent. However, looking at the size and scope of the request, and crediting Simandl's testimony, I believe the Respondent has demonstrated that a month is a reasonable time to investigate and provide a response to an information request of this volume. "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "In evaluating the promptness of the employer's response, "'the Board will consider the complexity and extent of information sought, its avail-

[20] I further note that the rationale for the Respondent's refusal to provide the information is unavailing. The Union is not limited to inquiry "necessary for the operation and administration of the collective bargaining agreement." The Union's representational rights and duties goes beyond the four corners of the labor agreement. Moreover, while the Respondent is free to ask the Union for case law supporting its request for information, the Union is under no obligation to perform legal research for the Respondent and is not required to cite or even be aware of legal authority to justify its information requests.

[21] Contrary to the suggestion (GC Br. at 30–31) of the General Counsel, item 39 does not ask which former employees of the Respondent currently work at the franchisees.

ability, and the difficulty in retrieving the information.'" *Allegheny Power*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enfd. in relevant part 394 F.3d 233 (4th Cir. 2005).

The General Counsel contends (GC Br. at 33) that it is not the scope of the request, but "the impact of the delay that is meaningful" In assessing the reasonableness of the delay. The precedent is clear that both the scope of the request and the "time-sensitive" nature of the request are relevant factors. *Allegheny Power,* supra. In this case, this exhaustive information request was made the day before the parties' final negotiation session, and 13 days before the scheduled sale of the facility. That timing, chosen by the Union, cannot transform the Respondent's response into an unreasonably delayed one, given the size of the information request. Of course, this does not justify the violations I have found, nor undermine the effects of those violations on the bargaining process.

I recognize that the Union contends, essentially, that it would not have needed to make the December 17 information request if its earlier request for the transactional documents had been promptly satisfied. I have found the earlier failure to provide information to be a violation and its ramifications will be discussed below. But that violation does not render the timeliness of the Respondent's response to the December 17 information request an independent violation.

3. The seniority lists

During effects bargaining the Union requested that the Respondent provide it with a specific seniority list, created in a certain format and provided to the Union during the extended negotiations for the 2009 collective-bargaining agreements. These lists allowed the reader to see the seniority history of each employee in a manner that revealed all their previous job classifications.

Neither Simandl nor Koenig was familiar with these lists. The Union asked Koenig and Simandl to check with an HR employee, Barbara Pike, who had been with the Respondent in years past, to see if she knew of these lists or where they were. They reported that they asked Pike, but that Pike was not familiar with them either. At the December 1 meeting, Withers indicated he would try to find a copy of what he had been provided a couple of years earlier. Withers found the old lists and sent them to Simandl and Koenig on December 7. According to Koenig, the Respondent's human resources department told him that those documents (which he had never seen) no longer existed.

In this case, the Union requested a specific form of seniority list. By all evidence, the Respondent looked for it and reported that it did not have such a list. There is no violation to be found.[22]

[22] It is clear to me that the Union did not request that the Respondent to compile and provide it with a history of employees' seniority classifications. Had the Union requested this of the Employer, the Employer might well have, depending on variables like the burden involved in doing so, had a duty to provide such information. But here, the Union requested a specific format that the Employer no longer had, no longer produced, and could not find. It therefore could not provide it to the Union.

4. Employee vacation/personal holiday accrual information

Under the terms of the collective-bargaining agreement, employees received paid vacation and personal holidays, based on their years of service and based on their average weekly hours of work in the preceding year.

During the effects bargaining, the Union requested that the Respondent provide it with an accounting of the vacation and personal holidays owed to each bargaining unit employee.

The Respondent refused to provide this information to the Union, asserting that its payroll system would not allow it to run that calculation. The Employer offered that if the Union had individual employees for which there was a vacation/personal holiday calculation concern, that the Respondent would make the calculation for that individual and provide it to the Union. The Union wanted the vacation/personal holiday entitlement provided for each of the employees.

Information of this sort, about bargaining unit employees' collectively-bargained benefits, is presumptively relevant information for a union to request. The Union is not require to offer a justification to be entitled to this information.[23]

On brief (R. Br. at 23–24), the Respondent reiterates its testimony and argument that the Union knew, from as far back as July 2009, that the Respondent's payroll system was deficient and that it could not provide this information. Simandl explained at the hearing, "Just tell us who you want us to look at . . . . Because . . . some people may have used all their vacation and there was no issue. So if we could narrow it down to the people that had an issue on vacation, we could research those."

The Employer's response is unsatisfactory. As the General Counsel points out, the Respondent planned to, and says it did, pay the bargaining unit employees the vacation and personal days owed to them after the sale. It necessarily found a way to calculate what it owed to each employee. This information could have and should have been provided to the Union upon request. The Union is under no duty to determine in advance for which employees there is a "problem." I accept the Respondent's contention that it would have had to manually calculate vacation and personal holiday for each employee. But there is no evidence to suggest that this was a complicated or burdensome matter. In any event, this kind of recordkeeping has long been a basic responsibility of employers, independent of the Act, and independent of union information requests. I believe this information was accessible to the Employer. Indeed, the Employer ended up having to calculate employee vacation pay in order to pay terminating employees. The failure to provide this information was a violation of the Act. *Americold Logistics*, 328 NLRB 443 (1999) (employment in-

[23] The Respondent has not rebutted the presumptive relevance of this information to the Union. Simandl's suggestion at the hearing that there was nothing to bargain about since the Respondent planned to pay the accrued vacation and personal days does not do it, as the assertion is unconvincing on its own terms and necessarily suggests the ability of the Respondent to calculate and provide the requested information. It is obvious that a union engaged in effects bargaining for a closure would have many reasons for wanting to know how much the employer believed it owed to each employee, from reassuring and counseling represented employees, to forming alternative bargaining proposals with the knowledge of how much individual employees would be receiving.

formation such as vacation and other benefits "is presumptively relevant for purposes of collective bargaining and must be furnished upon request."), enfd. 214 F.3d 935 (7th Cir. 2000).

Finally, I note that I reject the Respondent's contention—and defense to the allegations against it—that the Union's information requests were made in bad faith. "[T]he presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown." *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988); *International Paper Co.*, 319 NLRB 1253, 1266 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997).

The Respondent has failed to prove that the requests were made in bad faith. It has certainly failed to prove that the Union had no valid motive, which is necessary in order for the request to be invalid. *Hawkins*, supra (requirement of good faith "is met if at least one reason for the demand can be justified"); *Land Rover Redwood City*, 330 NLRB 331, 331–332 fn. 3 (1999) ("The requirement that an information request be made in good faith is satisfied if at least one reason for the demand can be justified."

If the December 17 request was large, it is also true that 'there is no evidence that the Union sought this information in bad faith. The Union was frustrated because it had not received timely and complete information on contracting after asking for it repeatedly." *Allegheny Energy Supply Co. v. NLRB*, 394 F.3d 233, 248 (4th Cir. 2005).

The Respondent's suggestion seems to be that because the negotiations fizzled immediately after the December 17 information request, this demonstrates that the Union did not seek the information in good faith. This argument, of course, does not treat with the contention of the Union and the General Counsel that the Respondent's failure to provide the requested information helped to undermine the negotiating process.

II. THE FAILURE TO COLLECTIVELY BARGAIN AS OF DECEMBER 18, 2009

The complaint alleges that since December 18, 2009, the Respondent has failed and refused to bargain collectively and in good faith the Union in violation of Section 8(a)(1) and (5) of the Act.

As referenced, above, Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act explains that "to bargain collectively" is to "meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 158(d).

This obligation to bargain includes a duty to bargain about the effects on employees of a management decision that is not itself subject to the bargaining obligation, including the effects of a non-bargainable decision to close a part of an operation. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). An employer's refusal to engage in effects bargaining over its decision to close a part or all of its operations violates Section 8(a)(5) of the Act. *Champion Int'l Corp.*, 339 NLRB 672 (2003); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990).[24]

Bargaining over the effects of such a decision "must be conducted in a meaningful manner and at a meaningful time." *First National Maintenance*, 452 U.S. at 682.

In this instance, the Respondent met with the Union three times prior to the closure and sale to bargain over the effects of its decision to close stores 31 and 23. Although good-faith effects bargaining could have continued beyond the closure, this preclosure period—when the Respondent was still in need of the employees' services, when the represented-bargaining unit was still intact—was the critical time for meaningful effects bargaining. After the closure, and the dissipation of the bargaining unit, the Union's bargaining power was dissipated.

In this case, from the first meeting on November 16, to the last on December 18. the Union reiterated its requests for information, and indicated to the Respondent's bargainers that the receipt of the requested information was critical to the negotiations. Koenig "paraphrased" Sweet as saying at the first meeting that "we're not going to be talking about anything until we see the terms of sale and the information request that we have related to the sale of the store." According to Koenig, "[t]he impression I got [from Sweet] was we weren't going to be discussing anything very long that day because it seemed that it was[,] we want to see this information, we want to see it now or we're not going to discuss anything further until we see that."

The Union did continue to meet and bargain after the first meeting with the Respondent, although it is settled that "[t]he Union is not required to begin bargaining at a time when relevant information is being unlawfully withheld." *Miami Rivet of Puerto Rico*, 318 NLRB 769, 772 (1995) (holding that unlawful failure to provide requested information undermined possibility of meaningful effects bargaining and privileged union's refusal to meet); see *Southern Mail, Inc.*, 345 NLRB 644, 647–648 (2005) (failure to provide requested information undermined meaningful bargaining regarding decision to change route, resulting in finding of unlawful unilateral change: "Until Respondent supplied the Union with requested relevant information, there could be no meaningful negotiations on the necessity for Springfield drivers to relocate").

While it met to bargain, the Union continued to contend that the Respondent's failure to provide the requested information was impairing negotiations. At the last meeting, Sweet took the position with the Employer that "we hadn't received the information that we requested and were unable to have meaningful discussions that would allow us to reach any kind of agreement." In subsequent correspondence with Simandl, on December 31, Sweet reiterated that upon receiving the requested information, and

> [i]f it is determined that a valid arms length transfer of the ownership and operation of the two stores is being made and that the new operators and Piggly Wiggly are not joint employers, the Union demands Piggly Wiggly engage in effects bargaining. In short, the Union requests that Piggly Wiggly provide all previously requested information and refrain from

[24] In addition, and as referenced above, an employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, supra; see *ABF Freight System*, supra.

any unilateral actions that infringe on bargaining unit employees' rights.

Thus, the Union made clear that the reinitiation of "meaningful discussions," hinged on receipt of the requested information.

The Respondent's defense—apart from its rejected claim that it did not unlawfully fail to provide information—is that it did, in fact, meet to bargain, and earnestly negotiated in good faith over pressing issue of the integration of the soon-to-be terminated employees into the remaining corporate stores. It essentially contends that as the main issue the parties needed to resolve—the integration of the store rosters—it bargained seriously and that this issue did not require the receipt of any additional information. The Respondent would say, I am sure, that even if the Union was entitled to the requested information, the Employer's failure to provide it was a sideline issue, stressed by the Union, but not, in fact, of consequence.

The problem with the Respondent's position is that it does not get to set the agenda unilaterally, or to determine unilaterally what necessary and relevant information the Union needs to engage in meaningful negotiations. Once it is established—as I believe it is here—that the requested information was required to be provided, the Respondent cannot arrogate to itself the decision about what portion of that information the Union legitimately needs to carry out its representational duties. The Union is not required to conform its decisionmaking, or its bargaining strategy, to parameters that accommodate the Respondent's unlawful refusal to provide information.

"The objective of the disclosure [of requested information] obligation is to enable the parties to perform their statutory function responsibly and 'to promote an intelligent resolution of issues at an early stage and without industrial strife.'" *Clemson Bros.*, 290 NLRB 944, 944 fn. 5 (1988) (quoting *Monarch Tool Co.*, 227 NLRB 1265, 1268 (1977)). The Board's enforcement of the parties' right to bargain with information is consistent with—indeed, it is of a piece with—the fundamental principle that the Board regulates and enforces the process of collective bargaining, not its outcome. The Board is loath to weigh in on the substance of the parties decisionmaking and bargaining choices. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . [T]he fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract").

In other words, the Board, like the Employer, does not arrogate to itself decisions about whether or not the Union could have "made do" and bargained a satisfactory outcome without information that it requested and to which it was entitled under the Act. The Board's role is to enforce the process. Thus, the issue is not whether the Union could have negotiated without the information it sought. Rather, the issue is whether the record supports the conclusion that the Union reasonably believed it needed the requested information to fully represent the bargaining unit and to make the effects bargaining meaningful. In other words, the issue is not whether the Respondent, or even the Board, believes that the information requests were a sideline issue. The issue is whether the Union did. Within the boundaries of the Act, the Union has the right to conduct its bargaining, receiving any information to which it is entitled, as it sees fit.

On this score, the record is clear. The Union's demand for the requested information was a focus of and an issue of contention at each of the three meetings between the parties. The Union made clear, throughout negotiations, and at the hearing, that its decisionmaking about proposals, its evaluation of the bargaining situation, and the formulation of its proposals, was negatively impacted by its failure to receive the requested information from the Respondent. The record is clear that the Respondent's unlawful failure to provide requested information weighed heavy in the balance for the Union as it participated in negotiations. The record of the negotiations requires the conclusion that the Employer's failure to provide requested information undermined and tainted the effects bargaining negotiations.

In bargaining three times, failing to reach agreement and choosing not to meet again, there is a sense in which the Respondent and the Union acted at their peril. The Employer refused to provide certain information that the Union contended was important to the effects negotiations and that the Union wanted to have to engage in the negotiations. If the Respondent was within its rights to refuse to provide the information requested by the Union, then the Respondent's bargaining conduct would have been vindicated and the Union's complaints about the bargaining process rejected. But, as I have found, the Respondent unlawfully refused to provide the requested information, and clearly, from the Union's perspective, this hindered the negotiations and the Union's participation in them.

Had the Respondent provided the requested information, even after negotiations had begun, but in time for the parties to engage in good faith bargaining in anticipation of the sale, the impact on the effects bargaining as a whole might have been minimized. But, as it was, the Respondent did not provide the requested information at any time prior to the sale and closure (and indeed, did not provide the transactional documents until a year later).

The General Counsel alleges a failure to engage in lawful effects bargaining as of December 18, 2009, the last day the parties met to bargain. Arguably, the failure to provide information infected the entire negotiations. However, given the General Counsel's allegation, I need not set an earlier date on which to find the commencement of the violation. What is clear is that as of December 18, 2009, when the parties stopped meeting for effects bargaining, the ongoing refusal of the Employer to provide the requested information sought by the Union for bargaining had undermined the process. I find the violation as alleged.

CONCLUSIONS OF LAW

1. The Respondent Piggly Wiggly Midwest, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party United Food & Commercial Workers

Union Local 1473 (Union) is a labor organization with the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated exclusive collective- bargaining representative of the following bargaining units of Respondent's employees:

> All employees of all present and future stores located in the Counties of Outagamie and Winnebago, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty mean and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act.
>
> All employees of all present and future Employer stores working in the meat department located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of meat as defined in this Agreement, EXCLUDING employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty person and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act.
>
> All employees of all present and future Employer stores located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees working in the meat department [,] employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide information requested by the Union and relevant to the Union's representational duties.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying the furnishing of information requested by the Union and relevant to the Union's representational duties.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union over the effects of the decision to close and sell its stores.

7. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

To the extent it has not already done so, the Respondent shall provide the Union with the franchise agreement requested by the Union as of November 16, 2009. The Respondent shall provide the Union with the information requested by the Union in items 30, and 34 of its December 17, 2009 information request. The Respondent shall provide the Union with vacation and personal holiday benefits owed to employees as of the Union's November 16, 2009 request.

To remedy the Respondent's unlawful failure to bargain in good faith with the Union over the effects of the Respondent's decision to close its facilities, the Respondent shall be ordered to bargain with the Union, on request, about the effects of its decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, it is necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany the bargaining order with a limited backpay requirement designed both to make whole the unit employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. I shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of the Board's decision and order, until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to cease operating its stores 31 and 23 on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of the Board's decision and order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a two-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky river Medical Center*, 356 NLRB No. 8

(2010).

I recommend this *Transmarine* remedy, notwithstanding the Respondent's objections. The Respondent contends that a *Transmarine* remedy is an "extraordinary" remedy and unwarranted in this case, because the Respondent did meet to bargain over effects—it did not refuse to meet and confer—and it acted in accordance with its good faith interpretation of the Act.

These defenses, which are directed to the Respondent's culpability, must be rejected because they are beside the point. [25]

The purpose of the *Transmarine* remedy is not to "punish" bad behavior, and it is not rendered unnecessary by less egregious violations of the Act. The rationale for a *Transmarine* remedy turns not on the employer's culpability, but, rather, reflects that in some situations—archetypally, those involving the layoff or termination of employees due to the closure of their facility—a mere order to bargain is an inadequate remedy, as it would likely result in mere "*pro forma* bargaining." *Transmarine*, supra at 390 (citation omitted). This is because in such circumstances

> it is impossible to reestablish a situation equivalent to that which would have prevailed had the Respondent more timely fulfilled its statutory bargaining obligation. In fashioning an appropriate remedy, we must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of his unlawful conduct, and that the remedy should 'be adapted to the situation that calls for redress.'

Transmarine, supra at 389, quoting *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938).

The purpose of accompanying the order to bargain with a limited backpay remedy is two-fold: it is "designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." *Transmarine*, supra at 390.

The first goal is to make employees whole, and in that sense the *Transmarine* backpay remedy reflects the presumption of some loss to employees from the employer's failure to bargain in good faith. However, the *Transmarine* remedy dispenses with what could only be a speculative attempt to determine the actual amount of loss that would have occurred had the parties bargained lawfully and in good faith prior to the sale and closure of its stores—in this case, at the time that the Union still actively represented an intact group of employees at the stores slated for closing.

I would add that, although the results that would have emerged from good-faith bargaining, had it occurred, cannot be discerned,[26] there is no doubt on this record that employees were adversely affected by the sale and closure of the stores. It is clear that bargaining resulted in no severance or other economic cushion. A limited number of employees transferred to the other Union-represented store in their jurisdiction, but many others did not and either moved on, managed to get hired at the new franchisees (for uncertain wages, benefits, and uncertain working conditions), or retired.

But making employees whole is the least important rationale for the bargaining and limited backpay remedy. "Secondly, and more importantly, the *Transmarine* and other similar 8(a)(5) remedies are designed to restore at least some economic inducement for an employer to bargain as the law requires." *O.L. Willis, Inc.*, 278 NLRB 203, 205 (1986). The key here is the recognition that, in cases such as this one, the affected employees represented by the Union have now been dispersed, and the bargaining unit dissipated, negating any potential that a mere bargaining order will even remotely recreate the bargaining terrain and incentives that prevailed at the time of the employer's violation. Many of the closed stores' employees are no longer employed by the Respondent, and the urgency of the circumstances triggering the bargaining obligation have long since passed. In these circumstances, a mere bargaining order would be a "*pro forma"* remedy. *Transmarine*, supra. The *Transmarine* remedy is designed to recreate, in some practicable manner, a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent, *Transmarine*, supra at 390. As the Seventh Circuit has stated, "[e]nsuring meaningful bargaining" by virtue of the *Transmarine* remedy "comports with the primary objective of the Act." *Nathan Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983), cert. denied 465 U.S. 1023 (1984).

Thus, when the purpose and rationale of the *Transmarine* is considered, this case is one for which the *Transmarine* remedy was designed. As I have found, by failing to provide the information it was required to provide to the Union, the Respondent did not satisfy its duty to bargain to the disadvantage of the Union and to the disadvantage of the effects bargaining process. It must be ordered to do it again. However, with the closure of the stores and the ensuing dissipation of the unit, and departure of store employees—most of whom are now former employees of the Respondent—a mere bargaining order is insufficient. The circumstances make the imposition of a *Transmarine* remedy appropriate.

Finally, in view of the fact that the facilities at issue in the effects bargaining have been sold by the Respondent, the Respondent shall, in addition to being ordered to post a copy of the attached notice at its extant union-represented facilities in the counties of Outagamie, Winnebago, and Sheboygan, State of Wisconsin, be ordered to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees who were employed by the Respondent at its store

---

[25] And the contention that a Transmarine remedy is "extraordinary" is simply wrong. While a Transmarine remedy is not automatic in every effects bargaining case, it is "[t]he Board's standard remedy in effects bargaining cases." *AG Communication Systems*, 350 NLRB 168, 173 (2007); *Dearborn Gage Co*., 346 NLRB 738 fn. 3 (2006).

[26] It is well-settled that a Board remedy is not punitive simply because it places the burden of uncertainty on the wrongdoer. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943). Indeed, the Supreme Court has observed that the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures,* 327 NLRB 251, 265 (1946), cited in *Rainbow Coaches*, 280 NLRB 166, 168 (1986), enfd. mem. 835 F.2d 1436 (9th Cir. 1987), cert. denied 487 U.S. 1235 (1988).

31 located at 15th Street in Sheboygan, Wisconsin, and its store 23, located on Northland Avenue, in Appleton, Wisconsin, any time since November 16, 2009, in order to inform them of the outcome of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent Piggly Wiggly Midwest, LLC, Appleton and Sheboygan, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by failing and refusing to provide information requested by the Union that is relevant and necessary to the Union's representational status.

(b) Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by delaying the furnishing of information requested by the Union that is relevant and necessary for the Union's representational duties.

(c) Failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units with respect to the effects of its decision to close its store 31 located at 15th Street in Sheboygan, Wisconsin, and its store 23, located on Northland Avenue, in Appleton, Wisconsin. The units are:

> All employees of all present and future stores located in the Counties of Outagamie and Winnebago, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty mean and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act.
>
> All employees of all present and future Employer stores working in the meat department located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of meat as defined in this Agreement, EXCLUDING employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty person and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act.
>
> All employees of all present and future Employer stores located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees working in the meat department [,] employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section7 of the Act.

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

(a) To the extent it has not already done so, furnish the Union with the franchise agreement requested by the Union as of November 16, 2009.

(b) Furnish the Union with the information requested by the Union in items 30, and 34 from its December 17, 2009 information request, and information regarding the accrued vacation and/or personal days for each bargaining unit employee as of the Union's November 16, 2009 request for that information.

(c) On request, bargain with the Union about the effects of its decision to close its store 31 located at 15th Street in Sheboygan, Wisconsin, and its store 23, located on Northland Avenue, in Appleton, Wisconsin, on or about December 31, 2009, and reduce to writing and sign any agreements reached as a result of such bargaining.

(d) Pay to the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel re cords and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its union-represented stores in the counties of Outagamie, Winnebago, and Sheboygan, State of Wisconsin, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional director for Region 30, 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. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other

[27] 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.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any 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 November 16, 2009.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked to the Union and to all former unit employees who were employed by the Respondent at its store 31 located at 15th Street in Sheboygan, Wisconsin, or its store 23, located on Northland Avenue, in Appleton, Wisconsin, at any time since November 16, 2010. The notice shall be mailed to the last known address of each of the employees.

(h) 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.

Dated, Washington, D.C. March 28, 2011

APPENDIX

NOTICE TO EMPLOYEES
MAILED 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, mail 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 fail and refuse to furnish the Union with requested information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT delay furnishing the Union with requested by the Union that is relevant and necessary for the Union's representational duties.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units with respect to the effects of our decision to close store 31 located at 15th Street in Sheboygan, Wisconsin, and store 23, located on Northland Avenue, in Appleton, Wisconsin, on or about December 31, 2009. The units are:

> All employees of all present and future stores located in the Counties of Outagamie and Winnebago, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty mean and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act.
>
> All employees of all present and future Employer stores working in the meat department located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of meat as defined in this Agreement, EXCLUDING employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty person and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act.
>
> All employees of all present and future Employer stores located in the Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise EXCLUDING employees working in the meat department [,] employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act.

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 the Union with items 30 and 34 from its December 17, 2009 information request, and, to the extent we have not already done so. WE WILL provide the Union with the franchise agreement requested by the Union November 16, 2009. WE WILL provide the Union with information regarding each employee's vacation and personal day benefit accrual as of November 16, 2009.

WE WILL on request, bargain with the Union about the effects of our decision to close our store 31 located at 15th Street in Sheboygan, Wisconsin, and our store 23, located on Northland Avenue, in Appleton, Wisconsin, on or about December 31, 2009, and WE WILL reduce to writing and sign any agreements reached as a result of such bargaining.

WE WILL pay to the unit employees their normal wages, as set forth in the Decision and Order of the National Labor Relations Board, with interest.

PIGGLY WIGGLY MIDWEST