

Anthony Motor Company, Inc. d/b/a Honda of Hayward and East Bay Automotive Council and its affiliated Local Unions: Machinists Automotive Trades District Lodge No. 190 and East Bay Automotive Machinists Local 1546 (affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO); Auto, Marine and Specialty Painters Union, Local No. 1176; and Teamsters Automotive Employees Union, Local No. 78, AFL-CIO. Case 32-CA-12640

July 19, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On August 25, 1993, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs. The Respondent filed a brief in opposition to the Charging Party's exceptions, and the Charging Party filed a response to the Respondent's exceptions.

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

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

The judge found that the content of the workers' compensation policy and the description of the health care plan were presumptively relevant to the Union in its role as the exclusive representative of the unit employees. However, he found that the name, address, and contact person for the current workers' compensation carrier was not the type of information which is presumptively relevant. The judge further found that the Union had not established the reasonable or probable relevance of the information. For the same reasons, the judge found the Respondent was not obligated to furnish the Union with the name, address, and principal contact of the office that administers the Respondent's current health care plan. The Union excepts to these rulings on the ground that information about the workers' compensation carrier and the health care plan administrator is relevant to the Union's ability to evaluate benefits and the administration of claims. It

¹We find it unnecessary to adopt that portion of the judge's recommended Order which retains jurisdiction over this case in connection with the possible outcome of the Respondent's appeal to the United States Court of Appeals for the Ninth Circuit. In the event the court sustains the Respondent's appeal, the Board may entertain a motion for reconsideration without a formal retention of jurisdiction.

contends that this information is as presumptively relevant as the content of the workers' compensation policy or the description of the health care plan. We agree.

The Board has held that the carrier of a health benefit plan is as much a component of a health and welfare plan as are the levels of coverage. In *Aztec Bus Lines*,² the Board adopted the judge's reasoning that with such information, the union would be able to investigate a carrier's financial condition and reputation for prompt and fair payment of claims. That case dealt with the unlawful unilateral change of the carrier of the health plan. We find that its rationale applies with equal force here to the request for information concerning the carrier of a workers' compensation policy or the administrator of a health plan. Accordingly, we find that the information sought by the Union regarding the carrier of the workers' compensation policy and the administrator of the health care plan is presumptively relevant to the Union in its role as exclusive representative of the unit employees and that the Respondent is obligated to furnish such information to the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Anthony Motor Company, Inc. d/b/a Honda of Hayward, Hayward, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete the final paragraph beginning with the words, "IT IS FURTHER ORDERED that jurisdiction"

²289 NLRB 1021, 1037 (1988).

Ariel Sotolongo, for the General Counsel.
Robert L. Zaletel (Keck, Mahin & Cate), for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held before me on June 7, 1993, is based on an unfair labor practice charge filed on July 20, 1992, by the above-captioned labor organizations (the Union), and on a complaint issued on October 28, 1992, on behalf of the General Counsel of the National Labor Relations Board (the Board), by the Regional Director for Region 32, alleging that Anthony Motor Company, Inc. d/b/a Honda of Hayward (Respondent) engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by failing and refusing since June 17, 1992, to furnish to the Union certain specified information, requested by the Union in its letter to the Respondent dated May 12, 1992, which the complaint alleges was necessary and relevant to the Union's performance of its du-

ties as the exclusive collective-bargaining representative of an appropriate unit of employees employed by Respondent in its parts and service departments. In its answer to the complaint filed on November 10, 1992, Respondent denied the commission of the alleged unfair labor practices.¹

On the entire record, and having considered the parties' posthearing briefs, I make the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*²

The Respondent sells and services automobiles at its place of business in Hayward, California. It went into business at that location early in March 1990. Since the commencement of Respondent's operations, the Union at all times has been the exclusive representative for purposes of collective bargaining of Respondent's employees employed in the following appropriate bargaining unit (the unit):

All full-time and regular part-time employees employed in the Parts and Service Departments in the job classifications set forth in Article XVII of the "Addendum Between the Greater East Bay New Car Dealers Association For And On Behalf of Southern Alameda County Dealers Association and East Bay Automotive Council," effective July 1, 1989 through June 30, 1993; excluding all other employees, guards, and supervisors as defined in the Act, as amended.

Commencing in March 1990, and continuing thereafter, Respondent refused to recognize the Union as the exclusive collective-bargaining representative of the employees in the unit. On April 29, 1992, in *Honda of Hayward*, supra, the Board ordered Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit. This decision is currently on appeal to the Ninth Circuit Court of Appeals. In that appeal, Respondent denies it has a collective-bargaining relationship with the Union, and/or that it violated the Act by engaging in the conduct which formed the basis for the Board's decision that Respondent was obligated to recognize and bargain with the Union.

In mid-May 1992, the Respondent received a 24-page letter from the Union, dated May 12, 1992, requesting Respondent to enter into collective-bargaining negotiations with the Union and, in connection with those negotiations, to furnish the Union with certain information. Respondent did not supply any of the requested information. The complaint alleges Respondent violated the Act only as to its refusal to furnish some, not all, of the information asked for by the Union in the May 12 information request. The portion of the

¹ The parties stipulated and the Respondent's answer to the complaint admits Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard. Also, the parties stipulated and the Respondent's answer to the complaint admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

² The findings of fact are based on a stipulation of facts entered into by the parties and on the Board's Decision and Order issued on April 27, 1992, in *Honda of Hayward*, 307 NLRB 340.

information requested by the Union in its May 12 information request, which the General Counsel contends Respondent was legally obligated to furnish, has been specifically alleged in paragraph 9(b) of the complaint, as amended.

I note that the complaint does not allege Respondent violated the Act by refusing to comply with the part of the "Holiday Gifts" section of the May 12 information request, which asks Respondent to furnish "a statement of any company policies or procedures with respect to holiday gifts." In his posthearing brief counsel for the General Counsel moves to amend the complaint to allege that the refusal to furnish this information violated Section 8(a)(5) and (1) of the Act. Counsel for the General Counsel argues that the amendment should be granted because it will not prejudice Respondent, inasmuch as the Union's request for this information is inextricably related to the Union's further request that Respondent furnish "a copy" of its policy or procedure concerning the granting of gifts to the unit employees, a request Respondent intends to comply with if the Union is ultimately found by the court of appeals to be the exclusive bargaining representative of the unit employees. Under the circumstances, I agree Respondent has not been prejudiced by this amendment. Therefore, I shall grant it.

The preamble to the Union's May 12 information request, reads as follows:

This letter constitutes an information request on behalf of the [Union]. As the Board has reaffirmed the employer's obligation to bargain, this information is relevant. The information is sought from the time the store opened.

We are also requesting . . . dates for negotiations. Please advise when you will be available.

Those portions of the Union's May 12, 1992 information request which the amended complaint alleges Respondent was legally obligated to furnish and which the amended complaint alleges Respondent violated the Act by refusing to furnish, read as follows:

GENERAL REQUEST

1. For purposes of bargaining please provide the following information:

1. A list of current employees including their names, dates of hire, rates of pay, job classifications, last known address, phone number. . . .

2. A copy of all current company personnel policies or procedures;

3. A statement of all company policies or procedures other than those mentioned in Number 2 above;

4. A copy of all company fringe benefit plans including pension, profits sharing, severance, stock incentive, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees;

5. Copies of all current job descriptions;

. . . .

WORKERS' COMPENSATION

2. Although workers' compensation benefits are to a large degree regulated by state law, there are some areas in which the employer has discretion and which affect the terms and conditions of employment. In addition, information is necessary for us to determine whether there is inadequate safety in the work site, since we must bargain to assure safe working conditions. For purposes of bargaining over those issues, we are requesting you provide the following information:

- 1. The name, address and contact person for the current workers' compensation carrier;
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- 3. A complete listing of all job classifications and job descriptions;
- 4. A copy of all on the job accident reports for the last five years;
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- 7. A copy of any current workers' compensation policy.
- 8. Copies of the OSHA 200 Logs for the last 5 years.³

PROFIT SHARING AS ALTERNATIVE TO PENSION

3. Although our members would prefer to be covered by our union pension plan, we are prepared to consider as an alternative either the employer's current profit sharing plan or an alternative profit sharing plan to be negotiated between the parties. Such a profit sharing plan would have to be based upon an ascertainable measure of the employers profit as well as some measure which would be subject to verification and control. Alternatively, we would be interested in a stock investment plan. For purposes of bargaining we are requesting you provide the following information:

- 1. A copy of any current profit sharing plan or stock investment plan or similar plan affecting any employees;
- 2. A copy of the most recent Form 5500 for any such plan;⁴
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BULLETIN BOARDS

4. Bulletin board or places to post notices to members are an important means by which this union communicates. In order for us to discuss such bulletin boards we are asking that you provide the following information:

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- 2. Please designate on those drawings [referring to architect's drawings of all locations] where any bulletin board or other area is located where notices

have been customarily posted to employees and/or customers;

. . . .

LAWSUITS AGAINST EMPLOYEES BY THIRD PARTIES

6. The bargaining unit is concerned that they be insulated from any lawsuits filed by third parties which might occur in the course and scope of their employment. For example, they are concerned about whether they would be defendants in lawsuits where there were personal injuries occurring on the premises or claims arising out of the sale of merchandise. For the purpose of bargaining over some adequate protection from these suits, we are requesting you provide the following information:

- 1. Copies of all lawsuits filed against . . . its employees during the last five years including a copy of the complaint.
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- 3. Copies of all public liability policies currently in effect.
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ATTENDANCE POLICY

13. We are interested in negotiating a reasonable and fair attendance policy. In order to negotiate such a policy we will need information as to the company's current policy as well as the manner in which that policy has been administered in the past. For the purposes of this bargaining, we are requesting that you provide the following information:

- 1. Copy of any attendance policy or program;
- 2. A statement of any company policy or program with respect to attendance;
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- 4. A copy of any attendance policies which were in existence during the last five years but which are no longer in effect or have been modified.

FAMILY LEAVE

15. Our members are concerned about negotiating a fair maternity and/or paternity leave and/or family leave and/or adoptive leave policy. For purposes of such negotiation please provide the following information:

- 1. A copy of any maternity/paternity/family, adoptive leave policy or program;
- 2. A statement of any maternity/paternity/family, adoptive leave policy or program;
- 3. Copies of all disability plans or programs including copies of all disability policies maintained by the company;
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HEALTH CARE BENEFITS

16. With respect to bargaining over health care benefits, we are not unwilling to consider the employers current health care [or proposed plan]. We, of course, prefer the current union health care plan for many reasons and we will be willing to discuss those reasons

³Pursuant to 29 CFR § 1904.2, employers must maintain a log for OSHA ("form 200") reporting employees' injuries in the workplace.

⁴The Internal Revenue Service (IRS) requires employers to file a "Form 5500" reporting employees' benefits such as profit-sharing and health benefits. See IRS Code 6058, 26 U.S.C. § 1023A(a)(A).

across the table. In order to consider the employer's plan [or proposed plan] we need the following information:

- 1. A copy of the summary plan description as well as the plan;
- 2. A copy of the most recent Form 5500;
- 3. A copy of any rules, regulations or policies which affect or relate to the plan;
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- 5. The name, address and principal contract of the office which administers the plan;
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CUSTOMER COMPLAINTS

18. Customer complaints can often lead to discipline. We are concerned about establishing a fair procedure to deal with customer complaints and for that purpose ask that you provide the following information:

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- 3. A copy of any company policy or procedure with respect to handling customer complaints;
- 4. A statement of any company policy or procedure with respect to the handling of customer complaints;
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HEALTH AND HANDICAP RISK

20. We are concerned about the health of our members. We are also concerned that we are able to negotiate an acceptable health and welfare program. For purposes of that please provide with respect to all current employees and past employees for the last five years:

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- 3. Please state any company policies with respect to employees with diseases, physical handicaps, disabilities or illness.
- 4. Provide copies of any company policies with respect to employees with diseases, physical handicaps, illness or disabilities.
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PROMOTIONS

22. Our members are interested in their right to promotion both within the bargaining unit as well as to promotion from positions within the bargaining unit to positions outside the bargaining unit. For purposes of this bargaining we need the following information:

- 1. Copies of all company procedures or policies with respect to promotions;
- 2. A statement of all company policies or procedures with respect to promotions;
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TRAINING PROGRAMS

23. Our members are interested in having training programs so that they may perform their current tasks better and/or be trained for better positions. For such bargaining we are asking that you provide the following information:

- 1. A copy of any and all company training programs;
- 2. A statement of any and all company policies regarding training.
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LIFE INSURANCE

24. Our members are interested in a company paid or company sponsored life insurance program. We will, of course, have to negotiate the costs of such a program and, as you know, often the cost of any such program may be dependent upon the group of individuals who participate in any such program. For the purpose of bargaining over life insurance we are asking that you provide the following information:

- 1. A copy of all company life insurance plans or programs.
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SUMMER OR TEMPORARY HELP

25. We are concerned about the circumstances under which summer or temporary help is hired. For purposes of bargaining over this issue we ask that you provide the following information:

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- 2. A copy of any company policies or procedures with respect to the hiring of temporary summer help;
- 3. A statement of any company policy or procedure with respect to the hiring of any summer or temporary help.

LEAVE POLICIES

26. Our members are interested in having a fair and equitable leave policy whether those leaves are for short time or long periods. Such leaves may be for many purposes including funeral, further study, travel, maternity, paternity, family obligations, adoption, illness or recreation. For purposes of bargaining over such an issue we ask that you provide the following information:

- 1. A copy of all company leave policies;
- 2. A statement of all company policies or procedures with respect to leaves;
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CHEMICALS AND COMPOUNDS

27. Our members are concerned about the chemicals or compounds which are used at their work location. This includes those chemicals or compounds used in the shop. We are concerned that those chemicals be safe and that the employees know how to use them safely. In order for us to negotiate over these issues we are asking that you provide the following information:

- 1. A list of all chemicals or compounds which are used, stored or sold at the facility including a description of the ingredients of that chemical or compound, as well as the generic name of all such chemicals or compounds;

- 2. The location in the facility where that chemical or compound is stored for either sale or use;
- 3. A copy of any company emergency response plan or program. . . . ;
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- 5. Copies of all Material Safety Data Sheets.

CASH TRANSACTIONS

29. Our members are concerned to the extent that they may be disciplined with respect to the handling of cash or non-cash sales. In order for us to determine how they are to handle cash or non-cash sales and to effectively bargain over issues such as work rules or discipline we need the following information:

- 1. A copy of all company policies with respect to the handling of cash or non-cash transactions;
- 2. A statement of all company policies with respect to the handling of cash or non-cash transactions.
- 3. A list of all non-cash items which are accepted in lieu of cash (coupons, etc.). With respect to each such item a copy of all agreements or documents which reflect the manner in which those documents are to be handled or the transactions with respect to those items conducted;

USE OF PROPRIETARY INFORMATION

31. We are concerned with respect to possible discipline which may be imposed for divulging so-called proprietary information. In order to bargain over the question of discipline with respect to the misuse of proprietary information we will need the following information:

- 4. A statement of company policy with respect to use of proprietary information.

LAYOFFS AND RECALL

33. For purposes of bargaining we are concerned about the employer's practices with respect to layoffs and recall. We are therefore requesting that with respect to any employee who has been laid off and brought back to work during the last five years the following information:

- 3. Please provide a copy of all policies or procedures with respect to the employment of employees;

PRIZES, BONUSES, ETC.

34. Our members are interested in any bonuses, prizes, or special benefits which are awarded to individuals during the course of their employment. In order to bargain over such items we are asking that you provide the following information:

- 2. If there are any such programs, a copy of the program should be provided;

- 3. A statement of any company policy regarding bonuses, prizes, spiffs, rewards or unusual cash or other gifts.

HOLIDAY GIFTS

35. If the Employer gives gifts to its employees including at any holiday season we are interested in bargaining over such gifts. For that reason we are asking that you provide the following information:

- 2. If the employer maintains any policy or procedure with respect to the giving of gifts to its employees please provide a copy of that policy or procedure.
- 3. A statement of any company policies or procedures with respect to holiday gifts.

SEPARATE ORAL AND WRITTEN AGREEMENTS

36. We are concerned whether there are any oral agreements or written agreements with any employees in the bargaining unit. For purposes of bargaining over that issue please provide the following information:

- 1. Please identify any employee with whom the company has any oral agreement or written agreement. For each such employee provide a copy of the agreement if in writing or, if oral, please describe the agreement including all of its essential terms and conditions.

DISCRIMINATION AND HARASSMENT

37. As part of our bargaining we need to consider whether there has been discrimination and harassment with respect to hiring, promotions, job assignments in all aspects of the employment relationship against any person. In order to bargain over these issues we are asking that you provide the following information concerning race, national origin, sex, sexual preference and age discrimination or harassment:

- 6. Please provide a copy of any affirmative action plan which is or has been in existence during the last five years.
- 9. Copies of all internal policies or procedures concerning affirmative action or discrimination or harassment with respect to race, national origin, sex, sexual preference, age or religion.
- 10. Copies of all EEO-1 reports for the last five years.
- 11. Copies of all sexual harassment policies.

This union is dedicated to eliminating discrimination in the workplace. We expect to negotiate an effective policy to avoid discrimination and this information is necessary to evaluate the extent to which there may have been discrimination in the past by this employer. It is also necessary to evaluate the necessity of affirmative action programs to ensure that if there has been past discrimination it will be remedied effectively in the future.

GROOMING

38. Our members are concerned about whether clothes, grooming, height or weight or any other personal factors will affect their employment. For purposes of bargaining over these issues please provide the following information:

- 1. A statement of any policies or procedures with respect to grooming, clothes, weight or height or any other personal affects.
- 2. A copy of any company personnel policies or procedures with respect to grooming, clothes, weight or height or any other personal affects.

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DRUG AND ALCOHOL ABUSE

39. This union is committed to eliminating drug or alcohol abuse. As you are aware, the development of an effective policy is a very difficult and sensitive issue which will require extensive bargaining. For purposes of bargaining over these issues we are asking that you provide the following information:

- 1. A copy of any company policy or procedure with respect to drug or alcohol abuse;
- 2. A statement of any company policies or procedures with respect to drug or alcohol abuse;

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- 6. Please provide copies of any reports or studies with respect to use or abuse of drugs or alcohol with respect to this employer.

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CLOTHES AND UNIFORMS

40. Our members would like to know the kind of clothes or uniforms which they are required to wear. For purposes of bargaining over those issues we ask for the following information:

- 1. A list of all company uniforms or special clothes which the employees are required to wear including a description of the uniforms or special clothes, the classifications of employees which are required to wear those uniforms or special clothes as well as a description of the circumstances under which they are to be worn.
- 2. All company policies or procedures with respect to uniforms.
- 3. A statement of all company policies or procedures with respect to the wearing of uniforms.

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- 5. Please provide a statement of the costs to . . . the employees of all company uniforms.

DISCIPLINE

41. Discipline is an important topic of negotiations. Whether we eventually agree to a clause which prohibits discharge except for just cause or some similar standard or whether we will need to bargain over the circumstances under which discipline will occur in individual circumstances depends upon a number of factors. In order for us to evaluate the kinds of proposals we

will make in this area, we need the following information:

- 1. A copy of all company policies or procedures with respect to discipline.
- 2. A copy of all company work rules, house rules or similar kinds of rules.
- 3. A statement of all company policies or procedures with respect to discipline as well as a statement of all company policies or procedures with respect to work rules, house rules and similar rules.

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NON-SMOKING

44. The union believes that a fair and equitable no-smoking policy should be adopted. Please provide the following information:

- 1. Copies of all company policies regarding smoking.
- 2. A statement of all company policies regarding smoking.

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AMERICANS WITH DISABILITIES ACT

46. With the implementation of the Americans With Disabilities Act, obligations are imposed on the employer to accommodate disabilities. Obligations are likewise placed on the union with respect to accommodating those disabilities where there is a collective bargaining agreement or collective bargaining relationship. For purpose of bargaining over the implementation of any procedures or policies with respect to the ADA, we are requesting the following information:

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- 2. Copies of all job descriptions.
- 3. A description of all medical tests required of all applicants and employees.

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- 6. A list of all jobs that have been restructured in the last five years describing each restructuring that has occurred and the reasons for the restructuring.

- 7. A copy of any company policies or procedures regarding implementation or administration of any program concerning the Americans With

The Union concluded its May 12, 1992 information request with the following declaration:

CONCLUSIONS

47. We believe that these information requests are valid and demand relevant information under the Labor Board standards. Should the employer have any concerns we stand ready to negotiate over the employer's concerns to work out a mutually agreeable resolution. Your refusal or failure to demand bargaining over any of these requests will be construed as a waiver of any such right. Please respond within one week.

There is no evidence whether Respondent ever replied to the Union's May 12, 1992 information request. The parties to this proceeding, however, stipulated that since on or about

June 17, 1992, Respondent has failed and refused to furnish the Union with the information, which has been described in detail above.

B. Discussion

As I have found, *supra*, since the start of the Respondent's business operations in early March 1990, the Union has been the exclusive collective-bargaining representative of the Respondent's unit employees. Therefore, by virtue of Section 8(a)(5) of the Act, Respondent was obligated, upon the request of the Union, to furnish information relevant to the Union's proper performance of its collective-bargaining duties. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-154 (1956). The Supreme Court has characterized the applicable standard in determining a union's right to information as "a broad discovery type standard," permitting the union access to a broad scope of information potentially useful for the purpose of effectuating the bargaining process. *NLRB v. Acme Industrial*, 385 U.S. 432, 437 and fn. 6 (1967).

On May 12, 1992, shortly after the Board issued its Decision and Order in *Honda of Hayward*, 307 NLRB 340 (1992), ordering Respondent to recognize and bargain with the Union, the Union wrote Respondent a letter. In this letter, referred to here as the Union's May 12, 1992 information request, the Union asked Respondent to meet with it for the purpose of negotiating a collective-bargaining agreement and requested that Respondent furnish it with certain information, and indicated, in substance, it intended to use the requested information to formulate its collective-bargaining proposals. Since on or about June 17, 1992, Respondent has failed and refused to furnish the Union with any of the information requested by the Union in its May 12 information request.

In its posthearing brief Respondent contends it has no obligation to provide any of the information requested by the Union because the request was undertaken in bad faith in an effort to harass Respondent. In support of this argument Respondent relies on the following factors: the length of the request—24 pages; Respondent was not obligated under the Act to comply with a significant part of this lengthy request; and, there could have been no useful reason for the Union to request the information when it did, in May 1992, because Respondent had made it plain that it did not intend to recognize and bargain with the Union pending the outcome of Respondent's appeal of the Board's decision in *Honda of Hayward*. For the reasons below, there is no merit to Respondent's contention that it was privileged to refuse to supply the Union with the requested information because the Union made the request in bad faith.

The Board has held that "[b]ad faith is an affirmative defense that must be pled" by the respondent. *Island Creek Coal Co.*, 292 NLRB 480, 489 fn. 14 (1989), citing *Hawkins Construction Co.*, 285 NLRB 1313, 1322 fn. 20 (1987). Here, Respondent did not raise the issue of bad faith in its answer to the complaint, nor did it raise it during the hearing. Instead, it raised the issue for the first time in its posthearing brief. Under the circumstances, Respondent's contention that the Union acted in bad faith when it requested the information from Respondent was not raised in a timely manner and, for this reason, I am precluded from considering that contention.

In any event, for the reasons below, the evidence is insufficient to establish that the Union acted in bad faith.⁵ It is not unusual for a labor organization which is in the process of formulating bargaining proposals for an initial contract with an employer, as was the case here, to need extensive information from the employer in order to intelligently and effectively represent the employer's employees; the fact that the Union's information request was too broad in a number of respects was counterbalanced by the Union's offer to the Respondent that if Respondent had any concerns about the validity of the Union's several requests that the Union was willing "to negotiate over the employer's concerns to work out a mutually agreeable resolution; and, it made good sense for the Union, as soon as it was notified that the Board on April 27, 1992, had issued an order directing Respondent to recognize and bargain with the Union, to promptly request that Respondent meet with it for collective-bargaining negotiations and, in connection with those negotiations, to ask Respondent to furnish it with information so it could intelligently represent the unit employees. In this last respect, assuming that when it made its May 12, 1992 information request, the Union knew Respondent intended to appeal the Board's order to the court of appeals, the Union was entitled to rely on the settled law that an employer's refusal to supply a union with requested information needed by the union to prepare for collective-bargaining negotiations violates the Act, notwithstanding that the employer is contesting the union's representational status before the Board or before a court of appeals. See *Kitchen Fresh, Inc.*, 258 NLRB 523 (1981).

The Information Concerning the Unit Employees

The complaint alleges Respondent violated Section 8(a)(5) and (1) of the Act, by its failure and refusal since June 17, 1992, to provide the Union with some of the information requested in the Union's May 12, 1992 information request, insofar as that information encompassed unit employees and postdated Respondent's commencement of business operations. This information, specifically alleged in paragraph 9(b) of the complaint, as amended, has been set forth in detail in the statement of facts, *supra*.

Where a union, as in the instant case, seeks information regarding the terms and conditions of employment of the employees employed within the bargaining unit represented by the union, that information is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties. The rationale for this presumption is that such information is at the "core of the employee-employer relationship" (*Graphics Communications Local 13 v. NLRB*, 598 F.2d 267, 271 fn. 5 (D.C. Cir. 1959)), thus it is relevant by its "very nature." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971). In these circumstances the union is entitled to the receipt of the requested information without the need to make a specific showing of its relevance, unless the employer presents sufficient evidence to rebut the presumption of relevance. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965), cited with approval in *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

⁵There is a presumption that a union acts in good faith when it requests information from an employer, until the contrary is shown. *Hawkins Construction Co.*, *supra* at 1314.

In the instant case, the following portions of the Union's May 12, 1992 information request relate directly to the unit employees' terms and conditions of employment:⁶ paragraphs 1, 2, 4, and 5 of the section entitled "General Request"; paragraphs 3 and 7 of the section entitled "Workers' Compensation"; paragraph 1 of the section entitled "Profit Sharing As Alternative To Pension"; the section entitled "Bulletin Boards," insofar as it obligates Respondent to furnish to the Union a statement describing where notices to unit employees have been customarily posted; paragraphs 1 and 2 of the section entitled "Attendance Policy"; paragraphs 1 through 3 of the section entitled "Family Leave"; paragraphs 1 and 3 of the section entitled "Health Care Benefits"; paragraphs 3 and 4 of the section entitled "Health and Handicap Risks"; the section entitled "Promotions," insofar as it obligates Respondent to furnish the Union with copies of, and a statement of, all company policies concerning the promotion of unit employees to positions within the unit; paragraphs 1 and 2 of the section entitled "Training Programs"; paragraph 1 of the section entitled "Life Insurance"; paragraphs 2 and 3 of the section entitled "Summer or Temporary Help"; paragraphs 1 and 2 of the section entitled "Leave Policies"; paragraph 3 of the section entitled "Chemicals and Compounds"; paragraphs 1 and 2 of the section entitled "Cash Transactions"; paragraph 4 of the section entitled "Use of Proprietary Information"; paragraph 3 of the section entitled "Layoffs And Recall"; paragraphs 2 and 3 of the section entitled "Prizes, Bonuses, Etc."; paragraphs 2 and 3 of the section entitled "Holiday Gifts"; the section entitled "Separate Oral and Written Agreements"; paragraphs 6, 9, and 11 of the section entitled "Discrimination and Harassment"; paragraphs 1 and 2 of the section entitled "Grooming"; paragraphs 1 and 2 of the section entitled "Drug and Alcohol Abuse"; paragraphs 1, 2, and 3 of the section entitled "Clothes And Uniforms"; paragraphs 1 through 3 of the section entitled "Discipline"; paragraphs 1 and 2 of the section entitled "No-Smoking"; and, paragraphs 2, 3, 6, and 7 of the section entitled "Americans With Disabilities Act."

Having found that the aforesaid information directly relates to the unit employees' terms and conditions of employment, I also find that this information is presumptively relevant to the Union, so it may properly perform its collective-bargaining duties. Therefore, because Respondent has failed to present evidence to rebut this presumption, I find that by failing and refusing since June 17, 1992, to furnish the Union with the aforesaid information, insofar as that information encompassed the unit employees' terms and conditions of employment, that Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

In its posthearing brief, Respondent contends that "certain requests as to unit Employees are improper/irrelevant."

⁶Respondent does not defend its refusal to comply with the sections of the Union's May 12 information request, which are described here and alleged in the complaint, on the ground that the request was overly broad and/or ambiguous. In any event, given Respondent's complete failure to comply with any part of the Union's May 12 information request or to seek an accommodation with the Union regarding the request, Respondent may not now belatedly justify its conduct on the basis of an alleged objection to the form of the Union's request. See *A-Plus Roofing*, 295 NLRB 967, 972 fn. 7 (1989).

However, in making this contention Respondent does not argue it was not legally obligated to furnish the Union with the aforesaid portions of the May 12 information requests, which I have found Respondent was legally obligated to furnish, insofar as this information encompassed the unit employees. Respondent does contend that certain of the *other* portions of the May 12 information request, not set forth immediately above, were "improper" and/or "irrelevant. I shall now evaluate this contention.

Paragraph 3 of the May 12 information request's section entitled "General Request," asks the Union to supply "[a] statement of all company policies or procedures other than those mentioned in [paragraph] 2 above." Paragraph 2 requests, "[a] copy of all current company personnel policies or procedures." Respondent argues it is not obligated to furnish the information requested in paragraph 3 because the request is "overboard" inasmuch as it requires Respondent to furnish the Union with a statement of its policies or procedures which do not deal with unit employees personnel policies. I agree. When viewed in context, it is clear from the wording of paragraphs 2 and 3 that in paragraph 3 the Union asked Respondent to furnish it with a statement of the Company's policies or procedures, other than its policies or procedures dealing with personnel. Under the circumstances, and considering the absence of any evidence which demonstrates the reasonable or probable relevance of this information, I find Respondent was not obligated to furnish this information to the Union. Accordingly, Respondent did not violate the Act when it failed and refused to furnish to the Union a statement of the Company's policies or procedures, other than the Company's current personnel policies or procedures.

I agree with Respondent that it was not obligated to furnish the Union with "the name, address and contact person for the current workers' compensation carrier," because this is not the type of information which is presumptively relevant to the Union in its role as the exclusive representative of the unit employees. Nor did the Union's May 12 information request, or the record otherwise, demonstrate the reasonable or probable relevance of this information. I therefore find that Respondent did not violate the Act, as alleged in the complaint, when it failed and refused to furnish this information to the Union.

Paragraph 4 of the May 12 information requests section entitled "Workers' Compensation," requests "[a] copy of all on the job accident reports for the last five years." Respondent does not contend that the job accident reports, insofar as they cover unit employees' accidents, are not relevant to the Union's bargaining responsibilities, and I find that they are relevant for that purpose. Respondent argues it was not required to furnish this information because it would have been too burdensome to comply with the request and because the information infringes on "employees' privacy rights." I reject these defenses for the following reasons.

Initially I note that, as alleged in the complaint, Respondent is not required to furnish this information for a period of 5 years, but only from March 1990, when Respondent went into business. In any event, Respondent's failure to raise at the outset any issue concerning the possible costliness or burden of complying with the Union's request, undermines its claim of burdensome as a defense. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 353 fn. 6 (D.C. Cir. 1983). If a party "does wish to assert that a request for in-

formation is too burdensome, this must be done at the time information is requested and not for the first time during the unfair labor practice proceeding.” *Id.*, quoting Gorman, “BASIC TEXT ON LABOR LAW 417” (1976). See also *Westinghouse Electric Co.*, 129 NLRB 850, 866 (1960). Moreover, even at the hearing in this proceeding the Respondent failed to establish an evidentiary predicate for its claim of undue burdensomeness. It presented no witness to testify on this issue and no documentary evidence.

Also lacking in evidentiary support is Respondent’s contention that the “job accident reports” would infringe on “employees’ privacy rights.” This argument is based on counsel’s assertion that the job accident reports will disclose employees’ medical records or information of a sensitive medical nature. However, the record contains no specific company claim, or documentary or other evidentiary support for a finding that the requested job accident reports contain any such asserted confidential information. Accordingly, Respondent’s contention that the job accident reports are protected from disclosure on confidential grounds must fail for want of evidence that they contain anything confidential. See *NLRB v. Pfizer, Inc.*, 763 F.2d 887, 890–891 (7th Cir. 1985) (refusing to hold that employee personnel files are per se confidential and finding that the employer failed to establish that the particular file at issue contained confidential information). Assuming the job accident reports do contain confidential information, the Respondent did not raise its alleged confidentiality concern, when the Union requested disclosure, nor did it present evidence to support this claim, but instead belatedly raised this issue in its posthearing brief. Thus, Respondent is precluded from relying on the alleged confidentiality concern. See *NLRB v. Pfizer, Inc.*, *supra* at 891 (“the burden of showing a legitimate claim of confidentiality should be on the employer who is resisting production.” Accord: *Mary Thompson Hospital v. NLRB*, 943 F.2d 741 (7th Cir. 1991).

Based on the foregoing, I reject Respondent’s defenses to its refusal to supply the Union with the job accident reports and find that by failing and refusing since June 17, 1992, to furnish to the Union the job accident reports covering accidents of unit employees during the period since Respondent took over the operation of the business in March 1990, Respondent has violated Section 8(a)(5) and (1) of the Act.

Paragraph 8 of the May 12 information request’s section entitled “Workers’ Compensation” asks for “[c]opies of the OSHA 200 Logs for the last 5 years,” and paragraph 2 of the May 12 information request’s section entitled “Profit Sharing As Alternative to Pension” asks for “[a] copy of the most recent Form 5500 for any such plan [referring to Respondent’s current profit sharing plan or stock investment plan or similar plan covering the unit employees].” Respondent argues it was not obligated to furnish either the OSHA 200 Logs or the Company’s most recent form 5500 because no evidence was introduced to establish the nature of either of these documents, thus Respondent argues that the General Counsel failed to establish the information contained in those documents is relevant to the Union’s role as the unit employees’ bargaining representative and, as to the OSHA 200 Logs, argues it would also be too burdensome for the Company to furnish them for a 5-year period, as requested.

As discussed *supra*, as requested by the General Counsel, I have taken judicial notice that the IRS requires employers

to file a “Form 5500” reporting employees’ profit-sharing and health insurance benefits and that OSHA requires employers to maintain a log designated as an “OSHA 200 Log” reporting employees’ injuries in the workplace. I find that insofar as the information reported by Respondent in those documents encompasses unit employees, that the information is the type of information which is presumptively relevant to the Union in its role as the unit employees’ bargaining representative. I therefore find that Respondent violated Section 8(a)(5) and (1) of the Act by its failure and refusal since June 17, 1992, to furnish the Union with copies of the “OSHA 200 Logs” maintained since Respondent commenced doing business in March 1990,⁷ and by its failure and refusal since June 17, 1992, to furnish the Union with its most recent form 5500, insofar as that document provides profit-sharing benefit information covering the unit employees.

Paragraph 1 of the May 12 information request entitled “Lawsuits Against Employees By Third Parties,” in pertinent part, asks for “[c]opies of all law suits filed against . . . its employees during the last five years including a copy of the complaint.” Respondent argues that it was not obligated to furnish this information because on its face the information appears to relate to a nonmandatory subject of bargaining and could also prove to be embarrassing to the employees involved in the lawsuits and implicate their privacy concerns. I reject these defenses for the following reasons.

The probable relevance of this information to the Union in its role as the unit employees’ collective-bargaining representative is established by the Union’s explanation to Respondent set forth in the May 12 information request. In this regard, the Union gave Respondent the following reason why it needed this information:

The bargaining unit is concerned that they be insulated from any lawsuits filed by third parties which might occur in the course and scope of their employment. For example, they are concerned about whether they would be defendants in lawsuits where there were personal injuries occurring on the premises or claims arising out of the sale of merchandise. For the purpose of bargaining over some adequate protection from these suits, we are requesting you provide the following information.

Respondent’s further contention that it was privileged to withhold this information because its release could prove embarrassing to the employees’ involved in the lawsuits and implicate the employees’ privacy concerns, lacks merit inasmuch as in balancing the interests of the parties, as I am required to do under *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), I am convinced that the following factors weight heavily in favor of disclosure:⁸ the requested information is necessary to enable the Union to properly and intelligently

⁷ It is for the same reason that I rejected Respondent’s “burden-some” defense raised in connection with Respondent’s refusal to furnish the job accident reports, *supra*, that I now reject this defense raised in connection with Respondent’s refusal to furnish the OSHA 200 Logs for the period since Respondent began doing business.

⁸ As I have indicated previously in this decision, the party claiming confidentiality—in this case the Respondent—has the burden of proof.

represent the unit employees; and, Respondent did not raise its alleged confidentiality concern, when the Union requested disclosure of the information, nor did it present evidence to support this claim, but instead belatedly raised this issue in its posthearing brief. In short, Respondent's confidentiality defense appears to be more of an afterthought than an actual basis for refusing to supply the information.

Based on the foregoing, I find the General Counsel has established the probable relevance of the Union's request for copies of all lawsuits, including complaints, filed by third parties against the unit employees during the period Respondent has been in business, and I further find that by failing and refusing since June 17, 1992, to furnish this information to the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.

Paragraph 3 of the Union's May 12 information request's section entitled "Lawsuits Against Employees By Third Parties," in pertinent part, requests "[c]opies of all public liability policies currently in effect." Respondent argues it was not obligated to furnish this information because the subject of its public liability insurance policy is not a mandatory subject of bargaining, thus an information request about the Respondent's public liability insurance policy does not involve the type of information which, on its face, is presumptively relevant, but must be accompanied by an affirmative showing of probable relevance, and no such showing was made by the Union in this case. I agree, and for this reason find Respondent was not obligated under Section 8(a)(5) of the Act, as alleged in the complaint, to supply the Union with copies of its public liability policies currently in effect.

Paragraph 4 of the May 12 information request's section entitled "Attendance Policy" asks for "[a] copy of any attendance policies which were in existence during the last five years but which are no longer in effect or have been modified." Respondent argues that since the Union in the preceding paragraphs of the information request's "Attendance Policy" section has requested copies of the Respondent's current attendance policies or programs, there was no reason for the Union to request prior policies no longer in effect. I disagree. In requesting this information, the Union, when it made its May 12 information request, informed Respondent, as described in detail *supra*, that to negotiate a reasonable and fair attendance policy the Union needed not just information about the Company's current attendance policy, but needed information about the manner in which the Company's attendance policy had been administered in the past. Plainly, the way in which Respondent had handled the unit employees' attendance in the past has probable relevance to the Union in formulating a bargaining proposal or position concerning the way in which the unit employees' attendance is currently governed. I therefore find Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing since June 17, 1992, to furnish the Union with a copy of any attendance policies effecting unit employees, which were in existence during the period Respondent has operated the business, but which are no longer in effect or have been modified.

Paragraph 2 of the May 12 information request's section entitled "Health Care Benefits," asks for "[a] copy of the most recent Form 5500." Respondent argues it was not obligated to furnish this information because no evidence was introduced to establish the nature of the information contained

in this form, thus the General Counsel failed to establish that the information contained was relevant to its role as the unit employees' bargaining representative. I reject this defense for the same reasons that I have previously rejected Respondent's identical defense raised to justify its refusal to furnish the form 5500 in connection with the part of the Union's information request related to the unit employees' profit-sharing benefits. Accordingly, I find Respondent violated Section 8(a)(5) and (1) of the Act by its failure and refusal since June 17, 1992, to furnish the Union with its most recent form 5500, insofar as that document provides health insurance benefit information concerning the unit employees.

I agree with Respondent that it was not obligated to furnish the Union with "the name, address and principal contact of the office which administers the [Respondent's current health care] plan," because this is not the type of information which is presumptively relevant and the record lacks evidence which establishes the reasonable or probable relevance of the information. I therefore find Respondent did not violate the Act, as alleged in the complaint, when it failed and refused to furnish this information to the Union.

The section of the May 12 information request entitled "Customer Complaints," in pertinent part, informed Respondent that "[c]ustomer complaints can often lead to discipline," so "[w]e are concerned about establishing a fair procedure to deal with complaints and for that purpose ask that you provide," among other things, a copy and statement of "any company policy or procedure with respect to the handling of customer complaints." Respondent argues that the way it handles its customer complaints is a nonmandatory subject of bargaining and, as such, information about this subject is not presumptively relevant to the Union's role as the unit employees' bargaining representative, and since there is a lack of evidence establishing the reasonable or probable relevance of this information, Respondent was not obligated to furnish it to the Union.

I am of the view that from the above-described reason which the Union gave to Respondent for demanding the information requested in the customer complaints section of the May 12 information request, the Union was not interested in the way Respondent handled its customers' complaints, *per se*, but was interested in this subject only insofar as it revealed how Respondent handled customers' complaints which lead to the discipline of unit employees.⁹ Given the context in which this information request was made, I am of the view that this should have been reasonably clear to Respondent. In any event, assuming the Union's information request here was ambiguous or overly broad and as a result Respondent did not realize that by requesting the disputed information the Union was seeking to learn about Respondent's policy and procedure concerning the discipline of unit employees because of customers' complaints, the law is settled that a blanket refusal to comply with an overly broad or ambiguous information request is unlawful where, as here, the Employer made no effort to have the Union clarify its request or offer to provide the Union with a more limited ac-

⁹Information about Respondent's policy and procedure regarding the disciplining of unit employees as the result of customers' complaints is obviously the type of information which is germane to the Union's role as the unit employees' collective-bargaining representative.

cess to the Employer's books and records. See *Keahou Beach Hotel*, 298 NLRB 702 (1990); and *A-Plus Roofing*, 295 NLRB 967, 972 fn. 7.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing since June 17, 1992, to furnish to the Union a copy and statement of any company policy or procedure regarding the disciplining of unit employees as the result of customers' complaints.

The section of the May 12 information request entitled "Chemicals And Compounds" requested in paragraphs 1 and 2, "[a] list of all chemicals or compounds which are used, stored or sold at the facility including a description of the ingredients of that chemical or compound, as well as the generic name of all such chemicals or compounds," and "[t]he location in the facility where the chemical or compound is stored for either sale or use," and further requested in paragraph 5, "[c]opies of all Material Safety Data Sheets." In requesting this information, in its May 12 information request, the Union explained to Respondent:

Our members are concerned about the chemicals or compounds which are used in their work location. We are concerned that those chemicals be safe and that the employees know how to use them safely. In order for us to negotiate over these issues we are asking that you provide the following information.

Respondent argues it was not obligated to furnish the above information requested in paragraphs 1 and 2 of the "Chemicals and Compounds" section of the May 12 information request, because it related to a nonmandatory subject of bargaining, namely, what chemicals the employer purchases, and also because the request was overbroad and burdensome and there has been no showing Respondent has access to the information. Respondent argues that it was not obligated to furnish the information requested in paragraph 5 because no explanation was given by the Union to Respondent as to what the material safety data sheets are or how they would enable the Union to bargain; thus, Respondent argues the Union has failed to establish that the material safety data sheets contain information relevant to the Union's role as the unit employees' bargaining representative. For the reasons below, I reject Respondent's defenses.

The law is settled that information regarding the health and safety of employees is both necessary and relevant to a union's role as collective-bargaining representative because "the environment of the workplace and its effect on the health and well-being of employees is fundamentally related to conditions of employment." *Goodyear Atomic Corp.*, 266 NLRB 890, 891 (1983). Therefore, it follows that the information concerning the chemicals and compounds used, stored, or sold at Respondent's facility and their location is relevant to the Union's role as the unit employees' collective-bargaining representative.

Likewise relevant to the Union's role as bargaining representative is any written record maintained by Respondent showing whether the chemicals and compounds used or sold at its facility are being stored in a safe manner, whether Respondent refers to such written record as a material safety data sheet, or by some other name. When viewed in its context, I am of the view that the Union's request for "[c]opies of all Material Safety Data Sheets," was reasonably cal-

culated to alert Respondent that the Union was seeking any written record maintained by Respondent dealing with the safe storage of the chemicals and compounds used or sold at Respondent's facility.

Concerning Respondent's contention that the information request here was overbroad, the request on its face does not appear to be overbroad. Nor has Respondent established an evidentiary predicate for its claim of undue burdensomeness. It presented no witness to testify on this issue and no relevant documentary evidence. In addition, Respondent's claim of burdensomeness as a defense is further undermined by its failure to raise at the outset, on receipt of the May 12 information request, any issue concerning the possible costliness or burden of complying with the Union's information request. Lastly, as to Respondent's contention that "there has been no showing that the Employer has access to this information [referring to the information requested in paragraphs 1 and 2]," the law is settled that it is Respondent which has the burden of proving it does not have access to relevant information. In any event, as I note *infra*, the question of the existence of information here, which I have found to be relevant to the Union's role as bargaining representative, is an issue which has been left to the compliance stage of this proceeding.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) of the Act, by failing and refusing since June 17, 1992, to furnish the Union with the information requested in paragraphs 1, 2, and 5 of the section of the May 12, 1992, information request entitled "Chemicals and Compounds."

The section of the Union's May 12 information request entitled "Cash transactions," in pertinent part, informed Respondent that, "[o]ur members are concerned to the extent that they may be disciplined with respect to the handling of cash or non-cash sales," so, "[i]n order for us to determine how they are to handle cash or non-cash sales and to effectively bargain over issues such as work rules or discipline we need," among other things:

3. A list of all non-cash items which are accepted in lieu of cash (coupons, etc.). With respect to each such item a copy of all agreements or documents which reflect the manner in which those documents are [to] be handled or the transactions with respect to those items conducted.

Respondent argues that the list of all noncash items which it accepts in lieu of cash is a nonmandatory subject of bargaining, therefore that part of the information requested above in paragraph 3 concerning this subject was not presumptively relevant to the Union's role as the unit employees' bargaining representative, and since there is a lack of evidence establishing the reasonable or probable relevance of this information, Respondent was not obligated to furnish it to the Union. I reject these defenses for the reasons below.

When viewed in context, the Union's request that Respondent provide it with a list of all noncash items, which Respondent accepts in lieu of cash, constitutes an integral part of the other information the Union requested and needed in order to intelligently represent the unit employees concerning Respondent's discipline of unit employees in connection with employees' alleged mishandling of noncash sales.

Since the subject of Respondent's discipline of unit employees for the way they mishandle noncash sales is plainly a mandatory subject of bargaining, it follows that for the Union to intelligently formulate a bargaining position on that subject, it would have to be able, among other things, to identify the noncash items which the unit employees are required to accept in lieu of cash. I therefore find that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint, by failing and refusing since June 17, 1992, to furnish the Union with the information requested in paragraph 3 of the cash transactions section of the May 12, 1992 information request.

Paragraph 10 of the May 12 information request's section entitled "Discrimination and Harassment," asks for "[c]opies of all EEO-1 reports for the last five years." Respondent argues that because this request is "overbroad" it should be denied. More specifically Respondent states in its posthearing brief that any EEO reports maintained by Respondent would not be limited to unit employees and it would be impossible to break down the reports to show only unit employees, and for these reasons Respondent was not obligated to comply with the request for this information. This defense lacks merit for the reasons below.

Initially I note it is undisputed, and I find, that insofar as the EEO-1 reports maintained by Respondent contain information which encompass the unit employees, these reports are relevant to the Union in its role as the unit employees' bargaining representative.

If Respondent is contending that the portion of its EEO-1 reports which encompass the unit employees are unavailable to the Respondent, this is no defense to the unfair labor practice finding herein because Respondent failed to establish that this information was unavailable or that its reason for refusing to furnish this information was due to its unavailability. Moreover, at the hearing Respondent agreed that if, as alleged in the complaint, it was found to have violated the Act by failing and refusing to furnish the information requested by the Union, that any contention by Respondent that the requested information did not exist or was not in its possession, would be left for the compliance stage of this proceeding. See generally *NLRB v. George Koch & Sons*, 950 F.2d 1324, 1326 (7th Cir. 1991), *enfg.* 295 NLRB 695 fn. 2 (1989).

If Respondent is contending that the requested information is available, but that to break down the EEO reports to compile the information encompassing the unit employees would be prohibitively expensive in time, labor, and resources to fulfill, Respondent failed to establish an evidentiary predicate for this defense. It presented no witness to testify on this issue and no documentary evidence. Moreover, as I have discussed previously in this decision, Respondent's failure to respond to the Union's information request by informing the Union of its concerns about the burden of complying with the request, undermines its claim of burdensomeness as a defense to the unfair labor practice findings here.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1), as alleged in the complaint, by its failure and refusal since June 17, 1992, to furnish the Union with copies of those portions of Respondent's EEO-1 reports which encompass the unit employees, and which have been maintained by Respondent during the period it has been in business.

The section of the Union's May 12 information request entitled "Drugs and Alcohol Abuse" informed Respondent that:

[t]his union is committed to eliminating drug or alcohol abuse. As you are aware, the development of an effective policy is a very difficult and sensitive issue which will require extensive bargaining. For purposes of bargaining over these issues we are asking that you provide the following information: . . . 6. Please provide copies of any reports or studies with respect to the use or abuse of drugs or alcohol with respect to this employer.

Respondent argues its refusal to furnish the information did not violate the Act because the relevance of the information has not been shown and the request "implicates serious privacy questions of any employees named in any such reports." I reject these defenses for the reasons below.

The Union in its May 12 information request, as set forth in detail *supra*, indicated to the Respondent that insuring the workplace was free from the hazards caused by employees' use and abuse of drugs or alcohol was vitally important to the Union in discharging its obligations as the unit employees' statutory representative. To prepare for negotiations regarding the sensitive issues associated with the promulgation of work rules dealing with alcohol or drugs, it was essential that the Union be able to share any of the reports or studies possessed by Respondent which concerned the use or abuse of drugs or alcohol by the employees represented by the Union. In my opinion such studies or reports are germane to the Unions role as the unit employees' bargaining representative because they will reveal to the Union what, if any, problems exist in the workplace because of drug or alcohol use and abuse, and will more effectively enable the Union to carry out its responsibilities to formulate bargaining proposals designed to make the work environment free from the hazards associated with drug or alcohol use or abuse, while at the same time protecting the unit employees from the imposition of arbitrary work rules. It is for this reason that I find that the information requested here—copies of any reports or studies with respect to use or abuse of drugs or alcohol with respect to this employer—is potentially relevant to the Union in carrying out its duties of representing the unit employees.

Respondent's contention that it was privileged to refuse to furnish this information because "the request implicates serious privacy questions of any employees named in such reports," lacks merits for the same reasons I rejected Respondent's argument that it was privileged to refuse to furnish the Union with the "job accident reports" because there was information in those reports that would infringe on "employees privacy rights." These reasons, which have been discussed in detail, *supra*, may be briefly summarized in the following terms; Respondent is precluded from relying on its alleged confidentiality concern because it failed to raise this concern to the Union, when the Union requested disclosure, nor did it present evidence to support this claim, but instead belatedly raised the issue in its posthearing brief.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint, by its failure and refusal since June 17, 1992, to furnish the

Union with copies of any reports or studies with respect to the use or abuse of drugs or alcohol regarding the unit employees employed by the Respondent.

Paragraph 5 of the section in the May 12 information request entitled "Clothes And Uniforms," requests, in pertinent part, "a statement of the costs to the employees of all company uniforms."¹⁰ It is undisputed, and I find, that the costs to the unit employees of the uniforms that Respondent requires them to wear is the type of information which is presumptively relevant to the Union in its role as the unit employees' bargaining representative. Respondent defends its refusal to furnish this information on the ground that the information would not be within its knowledge. This is not a defense to the unfair labor practice finding here because Respondent failed to present evidence establishing that it does not possess this information or that its reason for failing to furnish it to the Union was due to its unavailability. Moreover, as noted *infra*, Respondent has agreed that if it is found to have violated the Act by refusing to furnish the information requested by the Union, as alleged in the complaint, that any contention by Respondent that the requested information did not exist or was not in its possession, would be left for the compliance stage of this proceeding.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint, by failing and refusing since June 17, 1992, to furnish to the Union a statement of the costs to the unit employees of their company uniforms.

The Information Concerning the Nonunit Employees

The complaint also alleges Respondent violated Section 8(a)(5) and (1) of the Act, by its failure and refusal since June 17, 1992, to provide the Union with some of the information requested in the Union's May 12, 1992 information request, insofar as that information encompassed employees employed by Respondent who are not employees employed in the unit represented by the Union. This nonunit information, which the complaint describes and alleges that Respondent is legally obligated to furnish, is as follows: copies of all on-the-job accident reports and of the OSHA 200 Logs for the period of time during which Respondent has been in business; a copy of and a statement of any company policies or procedures with respect to the hiring of any summer or temporary help; a copy of and a statement of all company policies or procedures with respect to leaves; and a copy of and a statement of all company policies with respect to the information set forth in item "29" of the Union's May 12, 1992 information request entitled "Cash Transactions."

Where a union, as here, seeks to obtain information concerning employees employed outside of the bargaining unit represented by the union, the burden is on the union to establish relevance without the benefit of a presumption of relevance. *E. I. du Pont & Co.*, 744 F.2d 536, 538 (6th Cir. 1984). While the burden of proving relevance shifts from the employer to the union in cases involving nonunit information, "the ultimate standard of relevancy is the same in all cases." *Prudential Insurance Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969).

¹⁰This paragraph also requests a statement of the costs to the company of all company uniforms, but the complaint does not allege that Respondent's refusal to furnish this information violated the Act.

When the requested information concerns nonunit employees, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the requested information. *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1985), citing *Southern Nevada Home Builders Assn.*, 274 NLRB 350, 351 (1985); *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984); and *Postal Service*, 310 NLRB 391 (1993). The duty to disclose information concerning nonunit employees will be triggered by a showing that the union has a reasonable basis for requesting that information. *CEK Industrial Mechanical Contractors*, 295 NLRB 635, 637 (1989); see also *NLRB v. Leonard B. Herbert Jr. & Co.*, 696 F.2d 1120 (5th Cir. 1983). The union's burden of establishing the relevance of nonunit information "is not exceptionally heavy" (*Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983)), and is satisfied by "some initial, but not overwhelming demonstration by the union." *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 868-869 (9th Cir. 1977).

In the instant case, the Union failed to establish the relevance of the above-described nonunit information it requested. The Union's May 12, 1992 information request, on its face, did not offer a factual basis for its request for the nonunit information, nor did the General Counsel, in prosecuting the Union's charge in this proceeding, present evidence that the Union had a factual basis for requesting the nonunit information. Absent evidence that the Union had a reasonable factual basis for requesting Respondent to supply the above-described nonunit information, I find the Union did not meet its burden of showing probable relevance. I therefore shall recommend the dismissal of those sections of the complaint which allege Respondent violated the Act by failing and refusing to furnish the Union with information regarding nonunit employees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to provide the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the information requested in those parts of the Union's May 12, 1992 information request which, pursuant to Section 8(a)(5), Respondent was obligated to furnish, I shall recommend, among other things, that Respondent furnish to the Union, on request, the information requested in those parts of the Union's May 12, 1992 information request, which I have found, *supra*, that Respondent was legally obligated to furnish.

If, on receipt of the Union's request, Respondent takes the position that it is unable to provide the requested informa-

tion, in whole or in part, because it does not exist or it is not in Respondent's possession, this issue will be resolved at the compliance stage of this proceeding. This is consistent with long-standing Board policy (*NLRB v. George Koch & Sons*, supra), and with the agreement reached by the parties in this case.

In connection with Respondent's defense of confidentiality, raised in its posthearing brief, to justify its refusal to furnish some of the requested information here, I have not recommended that the parties be ordered to bargain about the method of production so that confidentiality is observed, because Respondent did not raise its confidentiality concerns in response to the Union's disclosure request and presented no evidence whatsoever that the information sought in fact contained material of a confidential nature. Under these circumstances, I am of the view that it would be inappropriate for me to order the parties to bargain about the method of production so that confidentiality may be observed, rather than to recommend an order requiring disclosure.

Lastly, I reject Respondent's request that the order here requiring the production of the information be stayed pending the resolution of the Respondent's appeal of *Honda of Hayward*, 307 NLRB 340, which is currently pending before the Ninth Circuit Court of Appeals in Cases 92-70412 and 92-70449. Respondent cites no authority for this novel request. Moreover, for me to grant such a request would appear to be contrary to the rationale of those decisions which hold that a refusal to supply a union with requested information violates Section 8(a)(5) of the Act, notwithstanding that the employer is contesting the union's representative status before the Board or the court of appeals. See, e.g., *Kitchen Fresh, Inc.*, 258 NLRB 523. However, since the decision of the Court of Appeals for the Ninth Circuit could have a significant impact on whether Respondent was obligated under Section 8(a)(5) of the Act to recognize the Union during the time material, and therefore whether Respondent was legally obligated to comply with any part of the Union's May 12, 1992 information request, I shall recommend that the Board retain jurisdiction of this case for the limited purpose of entertaining an appropriate and timely motion for further consideration of the case should the Ninth Circuit sustain the Respondent's appeal in such a manner that it could effect the outcome of the instant case. *Toyota of Berkeley*, 306 NLRB 893, 896 (1992).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Anthony Motor Company, Inc. d/b/a Honda of Hayward, Hayward, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by refusing to supply relevant information on request.

¹¹ 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.

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

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

(a) Furnish to the Union, on request, the information requested in those parts of the Union's May 12, 1992 information request which Respondent, as found in this decision, was legally obligated to furnish.

(b) Post at its Hayward, California facility copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

IT IS FURTHER ORDERED that jurisdiction over this case be retained for the limited purpose of entertaining an appropriate and timely motion for further consideration of the unfair labor practices found here, should the Court of Appeals for the Ninth Circuit in Cases 92-70412 and 92-70449, sustain Respondent's appeal in such a manner so as to affect the decision and recommended Order issued here.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the East Bay Automotive Council and its affiliated local unions: Machinists Automotive Trades District Lodge No. 190 and East Bay Automotive Machinists Lodge 1546 (affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO); Auto, Marine and Specialty Painters Union, Local No. 1176; and, Teamsters Automotive Employees Union, Local No. 78, AFL-CIO by refusing to supply them with relevant information on request.

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

WE WILL, on request, furnish to the above-named Unions the information requested in those portions of the Unions' May 12, 1992 information request, which the National Labor

Relations Board found that we were obligated, under the National Labor Relations Act, to furnish to the Unions.

ANTHONY MOTOR COMPANY, INC. D/B/A
HONDA OF HAYWARD