

The Hertz Corporation and Automotive, Petroleum, Cylinder and Bottled Gas, Chemical Drivers, Helpers and Allied Workers and Public Transportation Employees, Local Union 922, International Brotherhood of Teamsters, AFL-CIO.
Case 5-CA-23956

October 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On October 13, 1994, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed a cross-exception and answers to the General Counsel's and the Charging Party's exceptions and supporting briefs. The Charging Party filed an answering brief to the Respondent's cross-exception.

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,¹ and conclusions only to the extent consistent with this Decision and Order.

The pertinent facts, as more fully described by the judge, are as follows. The Respondent is engaged in the rental of motor vehicles. The Union represents many of the Respondent's employees at four of the Respondent's facilities in the Washington, D.C.-Baltimore metropolitan area: Dulles International Airport, Washington National Airport, "Washington Metro" (the downtown Washington, D.C. facility), and its pool office in Alexandria, Virginia. The Union's collective-bargaining agreement with the Respondent designates it as the exclusive bargaining agent "for all Rental Representatives, Office Clerical, Courtesy Bus Drivers, Shuttlers, and all Garage Employees" at these four facilities.

Article XXV of this collective-bargaining agreement, entitled "Non-Discrimination," provides:

The Employer and the Union agree that neither will discriminate either directly or indirectly, nor will they permit any of their agents, members or representatives to discriminate either directly or indirectly against any employee by reason of race,

¹ The General Counsel, the Charging Party, and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

creed, color, age, sex, national origin, being handicapped or membership or activity in the Union.

Three times a year, as required by a provision in the collective-bargaining agreement, the Respondent sends the Union a list of bargaining unit employees by position. Each list, which states the name and date of hire for each employee, ranks the employees by seniority.

When the Union's president, Eddie Kornegay, received one of these sets of lists in the autumn of 1992, he became concerned about the list regarding the vehicle service attendants (also called "garagemen"). This list showed that in 1992 the Respondent had hired as vehicle service attendants persons with the surnames of Phung, Ayubi, Mangialai, Chhun, Riaz, Telila, Baig, and Ashraf. Kornegay testified that from the list it appeared that all, or almost all, of the recently hired employees for this classification appeared to be "foreign nationals." Kornegay explained that what he meant by this comment was that the names were not "typically American."

Kornegay further explained that the underlying basis for his concern about this list was that it raised the possibility that the Respondent might deliberately be avoiding the hiring of African-Americans. Kornegay knew that there was a large pool of unemployed unskilled or semiskilled young African-American men living in Washington, D.C., whom he believed would be interested in being hired as vehicle service attendants. Yet, the list of persons the Respondent had hired for the service attendant position in 1992 raised a question to Kornegay as to whether any of the new hires were African-American.

At about the same time as Kornegay received this list, some members of the bargaining unit telephoned him to report that it "appeared . . . the only persons that were being hired were foreign nationals." In addition, about April 1993, Kornegay, in his weekly visits to the various facilities of the Respondent, observed that the Respondent seemed to be employing a greater number of employees who appeared to him to be foreign.

It is undisputed that at least twice, in late 1992 or early 1993 and then in February or March 1993, Kornegay orally requested from the Respondent information about persons who had applied for bargaining unit positions, and that the Respondent did not provide the Union with any of the requested information.

The Union subsequently sent three letters to the Respondent requesting information regarding applicants. First, on April 30, 1993,² Kornegay sent a letter to Michael Kovalcik, the manager of the Respondent's Balti-

² All dates are in 1993 unless otherwise noted.

more-Washington pool of automobiles for rent. This letter read:

As a follow-up to the Union's previous request, the Union is again requesting a list of all applicants for employment in the Washington Metro area who, if employed, would have been covered by the Labor Agreement between the Hertz Corporation and Local 922 for the period March 1990 to present. Such list to the extent it can be determined, should distinguish the applicant by race, National origin, and sex gender.

As I explained earlier, this information is needed for the Union to assure that we are in compliance with Federal and State law and to assure that the provision referencing Non-Discrimination of the labor Agreement is being fully complied with.³

In a May 5 letter, Kovalcik responded to Kornegay:

Pursuant to your letter of April 30th, and your request for employment information dating back to March of 1990, as you were informed in March, we do not feel that we are required to provide you with that information.

Kornegay wrote back that Kovalcik's letter was "totally unacceptable." On June 9, 1993, the Union's attorney sent a letter to Kovalcik which stated:

As Mr. Kornegay has explained, the Union wants this information to determine whether the Company is in compliance with the collective-bargaining agreement and relevant law.

By this letter, I renew Mr. Kornegay's request and further ask that, in addition to the information already requested for each applicant, you also indicate (1) the date on which the applicant applied for employment, (2) the applicant's color, (3) whether the applicant was hired, and (4) if the applicant was hired, the date on which he or she was hired.

In a July 9 letter the Respondent rejected the Union's request, stating:

[A] showing must be made by the Union as to the relevancy of its request for information. Certainly, the mere assertion by the Union that the information is needed to determine whether the Company is in compliance with the Collective-Bargaining Agreement does not automatically trigger entitlement to applicant equal employment data.

. . . .

IBT Local 922 has not alleged that Hertz has engaged in discriminatory hiring practices. In fact,

³ According to the credited testimony, this was the first time the Union specifically asked the Respondent for this information on unit employees.

the Union has not alleged *any* breach of the collective-bargaining agreement. If that is not the case and you wish to correct the record in that regard, I would appreciate hearing from you. [Emphasis in the original.]

In a final letter dated August 6 the Union's attorney replied:

Local 922 is requesting the information because it is investigating allegations that Hertz may have discriminated against certain protected classes of applicants in making hiring decisions for positions under the Agreement.

The judge dismissed the complaint, finding that the Union did not meet its burden of demonstrating that the requested information regarding applicants for unit positions was relevant to the Union's function as collective-bargaining representative. Although he found that the Union demonstrated that it had a rational basis for requesting the information sought with regard to the applicants for service vehicle attendant positions, he found that the Respondent was under no obligation to provide the requested information since, until Kornegay testified at the hearing, the Union never communicated to the Respondent the facts underlying its belief that the Respondent might be discriminating in the hiring of vehicle service attendants. The judge further found that, with regard to the requested information about applications for positions other than vehicle service attendants, the General Counsel failed to show that the Union had a rational basis for believing that the Respondent was acting discriminatorily in filling those positions.

The General Counsel and the Charging Party except to the judge's findings, contending that the Respondent was obligated to furnish the requested information to the Union. For the reasons set forth below, we find merit in these exceptions.

It is well settled that an employer, on request, must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees.⁴ This duty to provide information includes information relevant to contract administration and negotiations.⁵ Further, the Board has held that requested information concerning applicants for union-represented positions is necessary and relevant to a union's performance of its bargaining obligation with respect to eliminating discriminatory employment practices, including the hiring process.⁶

⁴ *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

⁵ *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987); and *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enf. 715 F.2d 473 (9th Cir. 1983).

⁶ *Star Tribune*, 295 NLRB 543, 549 (1989); *East Dayton Tool & Die Co.*, 239 NLRB 141, 142 (1978). *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

Further, although a union bears the burden of establishing the relevance of requested information pertaining to nonunit individuals,⁷ it is well settled that the union's burden of establishing the relevance of such information "is not exceptionally heavy,"⁸ and is satisfied by "some initial but not overwhelming demonstration by the union."⁹ In this regard, the Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information.¹⁰ Finally, in assessing the relevance of the information, the Board does not pass on the merits of a union's claim that the employer breached the collective-bargaining agreement. Thus, the union need not demonstrate that the contract has been violated in order to obtain the desired information.¹¹

Applying these principles, we find, contrary to the judge, that the Union established that the requested information was relevant to the Union's function as collective-bargaining representative.

From its first letter to the Respondent dated April 30, 1993, the Union stated that it wanted the requested information "to assure that we are in compliance with Federal and State law and to assure that the provision referencing Non-Discrimination is being fully complied with." In its June 9 letter to the Respondent, the Union repeated that it "wants this information to determine whether the Company is in compliance with the collective-bargaining agreement and relevant law." Further, in its August 6 response to the Respondent's July 9 letter in which the Respondent refused to provide the requested information because the Union "has not alleged that Hertz has engaged in discriminatory hiring practices . . . [or] any breach of the collective-bargaining agreement," the Union explained it was requesting the information because it "is investigating allegations that Hertz may have discriminated against certain protected classes of applicants in making hiring decisions for positions under the Agreement."

By these letters, the Union demonstrated a sufficient basis for its information request, i.e., that, as the collective-bargaining representative charged with ensuring that the collective-bargaining agreement was being complied with, it was investigating allegations of discrimination by the Respondent in its hiring decisions.

⁷ *Reiss Viking*, 312 NLRB 622, 625 (1993); *Duquesne Light Co.*, 306 NLRB 1042 (1992).

⁸ *Leland Stanford Junior University*, supra.

⁹ *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 868-869 (9th Cir. 1977).

¹⁰ *Reiss Viking*, supra; *Children's Hospital of San Francisco*, 312 NLRB 920, 930 (1993); and *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enf.d. 763 F.2d 887 (7th Cir. 1985).

¹¹ *Reiss Viking*, supra, and *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), enf.d. mem. 899 F.2d 1222 (6th Cir. 1990).

As discussed above, concerns by a union about possible discrimination in the workplace, including in the hiring process, are relevant to the union's representative function.¹² In fact, as evidenced by the parties' inclusion of a nondiscrimination clause in the collective-bargaining agreement, the parties considered possible discriminatory hiring practices as an appropriate subject for bargaining.¹³ The Board has further found that a union's expressed concern, such as the Union made here in its April 30 letter, that it not be required to defend against a charge of unlawful discrimination based on alleged acquiescence in an employer's hiring process is not inconsistent with the union's representative function.¹⁴ We, therefore, find that the Union has adequately met its burden of showing its information request was relevant to its duties as a collective-bargaining representative.

Further, unlike the judge, we find that these letters were sufficient to put the Respondent on notice that the Union was requesting the information in order to fulfill its representative functions. The Union by its three letters advised the Respondent that the purpose of its information request was its investigation of allegations concerning whether the Respondent was discriminating in hiring for unit positions in violation of the nondiscrimination clause of the collective-bargaining agreement. Under these circumstances, and in light of the fact that the Respondent was a party to this collective-bargaining agreement, we find that the Union provided the Respondent with an adequate basis of knowing that the information request was related to the Union's collective-bargaining duties.

Finally, we disagree with the judge insofar as he finds that the Union established a rational basis for requesting information only concerning possible discrimination based on race and national origin as to applicants for vehicle service attendant positions. Rather, based on Kornegay's examination of the list of vehicle service attendants, the contemporaneous calls he received from employees regarding new hires, and his subsequent visits to the Respondent's facilities, as well as the nondiscrimination clause in the collective-bargaining agreement, we find that the Union had an adequate basis for seeking information relevant to an investigation of all possible discriminatory hiring practices in all unit classifications.

Thus, it is not necessary, as the judge seems to suggest, that the Union demonstrate actual instances of discrimination based on gender, race, and national origin, directed against employees from each of the unit job classifications before the Respondent must supply the requested information. As the Board has elsewhere noted, if, in instances such as these, a union had suffi-

¹² *Star Tribune*, supra; *East Dayton Tool & Die Co.*, supra.

¹³ See *East Dayton Tool & Die Co.*, supra.

¹⁴ *Ibid.*

cient information to prove contractual violations, it would not need to request information from the employer.¹⁵ As noted above, we are not passing on the merits of the Union’s concerns about possible discrimination by the Respondent in hiring—an issue which has not been litigated. We are only passing on the Union’s entitlement, under the liberal discovery-type standard that applies here, to the information it needs—and which the Union has shown is relevant to its representative function—to make an informed evaluation of what action, if any, it should take on this matter to responsibly fulfill this representative function.¹⁶

For all these reasons, we find that the Union’s information request concerned relevant and necessary information and that the Respondent violated Section 8(a)(5) and (1) by failing to provide the requested information.

ORDER

The National Labor Relations Board orders that the Respondent, The Hertz Corporation, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Automotive, Petroleum, Cylinder and Bottled Gas, Chemical Drivers, Helpers and Allied Workers and Public Transportation Employees, Local Union 922, International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the Respondent’s employees in the appropriate unit described below, by refusing to furnish the Union the information it requested in letters dated April 30, May 5, and June 9, 1993. The appropriate unit is:

All Rental Representatives, Reservationists, Office Clerical force, Courtesy Bus Drivers, Shuttlers, and all Garage Attendants, and Combination Workers, (greasers, checkers, tire persons), employed by the Respondent in its Car Rental Division Stations, in metropolitan Washington, D.C. area, but shall not include Shop Forepersons, Supervisory, Secretary to the City Manager and all employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

(b) In any like or related manner interfering with, restraining, or coercing its 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.

¹⁵ *Reiss Viking*, supra at 626, quoting *Doubarn Sheet Metal*, 243 NLRB 821, 824 (1979).

¹⁶ See *Reiss Viking*, supra.

(a) On request, furnish the above-named Union with the information it requested in letters dated April 30, May 5, and June 9, 1993.

(b) Post at its Washington, D.C. facility copies of the attached notice marked “Appendix.”¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 5, 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.

¹⁷ 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Automotive, Petroleum, Cylinder and Bottled Gas, Chemical Drivers, Helpers and Allied Workers and Public Transportation Employees, Local Union 922, International Brotherhood of Teamsters, AFL-CIO by refusing to furnish information that it requested in letters dated April 30, May 5, and June 9, 1993. The unit is:

All Rental Representatives, Reservationists, Office Clerical force, Courtesy Bus Drivers, Shuttlers, and all Garage Attendants, and Combination Workers, (greasers, checkers, tire persons), employed by the Employer in its Car Rental Division

Stations, in metropolitan Washington, D.C. area, but shall not include Shop Forepersons, Supervisory, Secretary to the City Manager and all employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

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

WE WILL, on request, furnish the Union with the information it requested in letters dated April 30, May 5, and June 9, 1993.

THE HERTZ CORPORATION

Steven L. Sokolow, Esq., for the General Counsel.

Frank B. Shuster, Esq. (Constangy, Brooks & Smith), of Atlanta, Georgia, for the Respondent.

Patrick J. Szymanski, Esq. (Baptiste & Wilder), of Washington, D.C., for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. At issue is whether the Respondent, The Hertz Corporation, violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by refusing to provide information requested by the Charging Party, Teamsters Local 922 (the Union).¹

I. THE UNION'S ORAL REQUESTS FOR INFORMATION

The Union represents many of the employees employed by Hertz at its facilities in the Washington, D.C. area.² Edward Kornegay is Local 922's president and business manager. It is undisputed that at least twice, in late 1992 or early 1993 and then in February or March 1993 Kornegay made oral requests of Hertz officials for information about persons who had applied for bargaining unit positions. What is disputed

¹ The Union filed its unfair labor practice charge on October 6, 1993. The complaint issued on November 19, 1993. I held the hearing in this matter on June 30, 1994, in Rosslyn, Virginia. The General Counsel, Hertz, and the Union have filed briefs. Hertz admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, that Local 922 is a labor organization within the meaning of Sec. 2(5) of the Act, and that the National Labor Relations Board (the Board) has jurisdiction in this matter.

² The Hertz-Union collective-bargaining agreement provides:

Section 1. The Union shall be the exclusive bargaining agent . . . for all Rental Representatives, Office Clerical, Courtesy Bus Drivers, Shuttlers, and all Garage Employees employed by the Employer in its Car Rental Division Stations, in metropolitan Washington, D.C. area, except those listed in Section 2

Section 2. It is mutually agreed that the term "employee" for the purposes of this Agreement shall include all rental representatives, reservationists, telephone operators, office clerical force, courtesy bus drivers, shuttlers, and all garage attendants, combination workers (greasers, checkers, tire persons), but shall not include Shop Forepersons, Supervisory, Secretary to the City Manager and all employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

is precisely what information Kornegay asked for and, in particular, what reason he gave for wanting the information. I am first going to summarize Kornegay's version and then that of the Hertz officials with whom Kornegay talked.

A. Kornegay's Version

Three times a year Hertz sends lists of bargaining unit employees to the Union—that is, listings of the names and dates of hire of the employees represented by the Union. Each kind of job (e.g., vehicle service attendant, courtesy bus-driver, car rental representative) is separately listed. And each list ranks the employees by seniority.

Kornegay received one such set of lists in the autumn of 1992. He became troubled, he testified, by the list covering vehicle service attendants. (Vehicle service attendants—also sometimes called garagemen—are the employees who ready cars for rental by fueling the cars, cleaning them, and the like. They do not handle repair work of any significant sort.) What troubled him, Kornegay said, was that, in light of their last names, all, or almost all, of the recently hired employees appeared to be "foreign nationals." What Kornegay was referring to was that the list showed that the only vehicle service attendants hired by Hertz in 1992 were the following (listed in order of hire): Phung, Ayubi, Mangialai, Chhun, Riaz, Telila, Baig, and Ashraf.

When Kornegay was asked what he meant by "foreign national," he said that he meant that the names were not typically American. He testified that he did not mean that the individuals with those names were not American citizens or even that they necessarily were born abroad.

What bothered him about the hiring of all these "foreign nationals," Kornegay continued, was that it raised the possibility that Hertz might be deliberately avoiding hiring Afro-Americans. The way Kornegay came to that thought is this. Kornegay knew that there is a large pool of unemployed unskilled or semiskilled young Afro-American men living in Washington, D.C. Openings for the position of vehicle service attendant positions, particularly at Washington National Airport, ought to have attracted many such individuals. (Indeed, as Kornegay knew, a large proportion of the persons employed by Hertz as vehicle service attendants in the Washington, D.C. area are Afro-Americans.) Yet it was unlikely, looking at the names of the vehicle service attendants whom Hertz hired in 1992, that any were Afro-American.

About the same time that Kornegay began to concern himself with the possibility that Hertz was discriminating in hiring, Kornegay testified, he received some telephone calls from members of the bargaining unit who told him that it "appeared to be that the only persons that were being hired were foreign nationals." (On cross-examination Kornegay was asked for the names of the employees who telephoned him. He testified that he did not remember who they were. I credit his testimony about receiving such calls. I do not credit his claim that he did not remember who made them.)

Kornegay testified that he visits the various Hertz facilities at least once a week. Notwithstanding those telephone calls and notwithstanding what Kornegay noticed about the seniority lists, he did not conduct any on-the-spot investigations into the makeup of the bargaining unit. (Sometime later, apparently about April 1993, Kornegay noticed that Hertz seemed to be employing a greater number of persons who looked to Kornegay to be foreign.)

In an earlier paragraph I listed the names of the vehicle service attendants whom Hertz hired in 1992. As is about to be discussed, in the information requests at issue the Union did not ask solely about applicants for vehicle service attendant positions. Accordingly I list here (in order of hiring) what the record tells us of the employees hired in 1992 into other bargaining unit classifications.

<i>Rental Representatives</i>	<i>Courtesy Bus Drivers</i>
Adawi, M.	Stewart, W.
Towne, J.	Smith, W.
Mohammed, A.	Dobbins, K.
Shammir, I.	Rusnak, R.
Bhaskar, A.	

Turning first to the rental representatives, Kornegay, I suppose, could reasonably assume that Adawi, Shammir, and Bhaskar are unlikely to be Afro-American. On the other hand Towne, Kornegay agreed, is a classically "American" name, so that it would be no surprise if its owner was Afro-American. And Mohammed, as Kornegay testified, might well be the name of an Afro-American. As for the courtesy bus-drivers, Kornegay certainly had no basis, just considering the names of the newcomers, to conclude that Hertz might be discriminating against Afro-Americans when filling busdriver positions.

The General Counsel did not seek to introduce into the record seniority lists pertaining to other bargaining unit classifications, and I will proceed on the assumption that no significant number of persons hired into those other classifications during 1992 (if there were any) had "foreign" sounding names.

Kornegay had been scheduled to meet at the end of 1992 or in early 1993 with the manager of Hertz' Baltimore-Washington "pool," Michael Kovalcik, concerning a grievance, in Kovalcik's office.³ According to Kornegay, at that meeting he complained to Kovalcik that, having looked at the seniority list, he was concerned about Hertz hiring only foreign nationals. Kornegay asked to see the applications of everyone who had applied for bargaining unit jobs during the period in question. Kornegay testified that he wanted the applications "because I wanted to see how many folk who . . . appeared to be of Afro-American descent had applied for jobs and not gotten jobs." (Kornegay did not testify that he explained this reasoning to Kovalcik. As for why Kornegay chose to ask for the applications of job applicants—as opposed to, say, a list of applicants showing race and national origin, that is unclear.⁴) As touched on earlier, Kornegay did not limit his request to applications for vehicle service attendant positions.

Kovalcik told Kornegay that he would contact Kornegay later about Kornegay's request. But Kovalcik did not do so. (All parties agree that Hertz has not provided the Union with

³ Presumably "pool" refers to Hertz' pool of automobiles for rent. The facilities making up Hertz' Baltimore-Washington pool include the Hertz facilities at Dulles International Airport, Washington National Airport, Baltimore-Washington International Airport (BWI), "Washington Metro" (the downtown Washington, D.C. facility), and the pool office. The Union does not represent the BWI employees.

⁴ While Hertz asks applicants to include racial and national origin information on the application forms that they fill out, Hertz subsequently removes that information from the forms.

the applications that Kornegay requested or with any information from the applications.)

Kornegay testified that his only other conversation with anyone from Hertz about the job applications occurred at a meeting in February or early March 1993 with Joseph Happe, Hertz' vice president for the mid-Atlantic region. Kornegay testified that he repeated his request to see the applications and his reason for wanting to see them. Happe said that he would have to check with Hertz' headquarters. Kornegay heard nothing further from Happe.

B. Hertz' Version

Kovalcik too remembered meeting in his office in early 1993 with Kornegay. And Kovalcik agreed that at that meeting Kornegay asked for information about persons who had applied for bargaining unit positions. But according to Kovalcik, Kornegay said nothing whatever about foreign-sounding names or discriminatory hiring practices by Hertz. And Kornegay did not ask for the applications that had been submitted by job applicants. Rather, Kornegay asked for a list of the names and addresses of job applicants. The reason Kornegay gave for wanting the information, Kovalcik testified, was that Kornegay was on a Teamsters committee involved in "enrollment," and Kornegay needed those names and addresses for that committee. (In rebuttal testimony Kornegay not only denied that he asked any Hertz official for applicants' names and addresses in connection with the work of a Teamsters committee, he denied that he was ever on any such committee.)

Kovalcik agrees with Kornegay that Kovalcik said that he would get back to Kornegay about the request and did not do so.

Both Kovalcik and Happe testified about a second meeting with Kornegay in February or March 1993, and it is clear that Kornegay was wrong in recalling that he and Happe met alone. According to both Kovalcik and Happe, Kornegay again asked for the names and addresses of applicants who had applied for bargaining unit jobs and again said that he wanted the information because of his membership on a Teamsters committee. Kovalcik and Happe both testified that Kornegay said nothing whatever about discrimination in hiring or about names at the bottom of a seniority list. Happe, like Kornegay, testified that he told Kornegay that he would have to check with Hertz' headquarters about whether to provide the Union with the requested information.

According to Happe, he had one other conversation with Kornegay about applicant information, this time by telephone. Kornegay, said Happe, again asked for "information pertaining to applications." And again, Happe testified, Kornegay gave as his reason for wanting the information "the requirements that were on him from the Teamsters" (to quote from Happe's testimony). Happe denied that Kornegay said anything about possible discrimination by Hertz or about names on a seniority list. Happe testified that he told Kornegay that Hertz was not going to provide the information to Kornegay.

C. Did Kornegay Advise Hertz of his Concern About Possible Discrimination Against Afro-Americans

It is more likely than not that sometime between late 1992 and the end of April 1993, Kornegay came to have the con-

cern that Hertz might be discriminating against Afro-Americans in its filling of vehicle service attendant positions. (The sequence of events, however, was probably different from the one described by Kornegay. Almost surely the issue was first raised by complaints coming to Kornegay from some of the vehicle service attendants. Kornegay's awareness of the "foreign" looking names on the seniority list then resulted from those complaints.)

But did Kornegay share with Hertz these considerations about anti-Afro-American discrimination? Plainly Hertz was under no obligation to provide information about job applicants to Kornegay if the only reason that Kornegay gave for wanting the information was to provide it to a Teamsters committee interested in membership "enrollment." Thus the differences between Kornegay's testimony, on the one hand, and Kovalcik's and Happe's, on the other, about the reasons that Kornegay communicated for wanting applicant information, are material.

As I will discuss later in this decision, it was up to the General Counsel to prove that Kornegay's version of his meetings with Kovalcik and Happe was the correct one. I find that the General Counsel failed to carry that burden of proof. Both Kovalcik and Happe were at least as credible witnesses as Kornegay was. In fact Kornegay's testimony, more so than either Kovalcik's or Happe's, suggests that his memory can be spotty and that on occasion Kornegay is willing to shade the truth.

As for documentary evidence, it cuts both ways. Thus one letter in the record tends to support Kornegay, to at least a limited extent (as will be noted below). On the other hand, the Union did not keep even one of the several seniority lists showing the hiring of "foreign nationals" that Kornegay claimed so troubled him. (The lists that are in the record were obtained from Hertz.) One would ordinarily expect someone in Kornegay's shoes—concerned about possible discrimination by Hertz—to keep careful track of his copies of those lists.

II. THE UNION'S WRITTEN REQUESTS FOR INFORMATION

On April 30, 1993, Kornegay sent a letter to Kovalcik that read:

As a follow-up to the Union's previous request, the Union is again requesting a list of all applicants for employment in the Washington metro area who, if employed, would have been covered by the Labor Agreement between Hertz Corporation and Local 922 for the period March 1990 to present. Such list to the extent it can be determined, should distinguish the applicant by race, National origin, and sex gender.

As I explained earlier, this information is needed for the Union to assure that we are in compliance with Federal and State law and to assure that the provision referencing Non-Discrimination of the labor Agreement is being fully complied with.

The record is clear that this was the first time that Kornegay had asked specifically for information about the race, national origin, and sex of the applicants for bargaining unit positions.

Kovalcik and Happe apparently continued to believe, even after Kovalcik received this letter from Kornegay, that

Kornegay still wanted the applicant information solely for the use of some Teamsters committee that was attempting to increase union membership. But given Kornegay's letter, that belief was unreasonable. Let us assume, for present purposes, that given what Kovalcik and Happe remembered of Kornegay's earlier oral communications, they could reasonably disbelieve the reason stated in the letter for the information request: "to assure that we are in compliance with Federal and State law and to assure that the provision referencing Non-Discrimination of the labor Agreement is being fully complied with." Still, Kornegay's letter does not ask for copies of the applications or even for the applicants' addresses. And a response by Hertz that omitted addresses would not have been of much use to a Teamsters "enrollment" effort.

On May 5, 1993, Kovalcik responded to Kornegay:

Pursuant to your letter of April 30th, and your request for employment information dating back to March of 1990, as you were informed in March, we do not feel that we are required to provide you with that information.

I mentioned earlier that one letter in the record tends to support Kornegay's version of the meetings he held with Kovalcik and Happe. This is that letter. Kornegay's letter had stated that, "As I explained earlier," the requested information was relevant to the Union's concerns about discrimination by Hertz. Standing alone Kornegay's letter is too self-serving to suggest anything about whether Kornegay actually had previously referred to his concerns about racial discrimination on Hertz' part. But if Kornegay had not said anything about discrimination prior to his April 30 letter, why did Kovalcik's responding letter not address that matter? It could be, of course, that Kovalcik saw no need to bother correcting Kornegay's statement. Still, the interchange adds to the possibility that Kornegay had previously told Kovalcik of the Union's worry about discrimination by Hertz.

As it turns out (for reasons to be discussed later in this decision), the outcome of this case does not hinge on whether or not Kornegay, in his meetings with Kovalcik and Happe, said that his interest in the applicant information stemmed from concerns about discrimination by Hertz. The more important question is whether Kornegay ever told Hertz what gave rise to the Union's concerns (that is, the string of hirings of persons whom the Union believed to be "foreign nationals"). Kornegay's April 30 letter said nothing about that, and thus Kovalcik's response carries no implications in that regard.

Kornegay wrote back that Kovalcik's letter was "totally unacceptable."

Kornegay's letter was followed by one dated June 9, 1993, from the Union's attorney to Kovalcik. The letter states, in pertinent part:

As Mr. Kornegay has explained, the Union wants this information to determine whether the Company is in compliance with the collective-bargaining agreement and relevant law.

By this letter, I renew Mr. Kornegay's request and further ask that, in addition to the information already requested for each applicant, you also indicate (1) the

date on which the applicant applied for employment, (2) the applicant's color, (3) whether the applicant was hired, and (4) if the applicant was hired, the date on which he or she was hired.

This letter, like the April 30 letter from Kornegay, makes it plain that the Union was concerned about possible discriminatory hiring practices by Hertz. But, like the April 30 letter, this one is silent about why the Union believed that Hertz might be engaging in any such practices.

An attorney for Hertz responded to the Union's June 9 letter by a letter dated July 9. That letter reads, in part (emphasis in the original):

Please be advised that Hertz will not provide the information to the Union as requested. . . . [A] showing must be made by the Union as to the relevancy of its request for applicant information. Certainly, the mere assertion by the Union that the information is needed to determine whether the Company is in compliance with the Collective-Bargaining Agreement does not automatically trigger entitlement to applicant equal employment data.

. . . .
IBT Local 922 has not alleged that Hertz has engaged in discriminatory hiring practices. In fact, the Union has not alleged *any* breach of the collective-bargaining agreement. If that is not the case and you wish to cor-

rect the record in that regard, I would appreciate hearing from you.

The last piece of relevant correspondence, dated August 6, 1993, was from the Union's attorney to Hertz'. It states, *inter alia*, that—

Local 922 is requesting the information because it is investigating allegations that Hertz may have discriminated against certain protected classes of applicants in making hiring decisions for positions under the Agreement.

III. DATA CONCERNING THE EMPLOYEES IN THE BARGAINING UNIT

At the hearing the Respondent provided data about the number of employees in the bargaining unit who are members of minorities. The data, which are as of December 31, 1992, also show male/female ratios. Additionally, Hertz provided minority data for new hires into the bargaining unit during the first 4 months of 1993. I think the data are relevant for two purposes: (1) in evaluating the reasonableness of Kornegay's belief that Hertz might be discriminating against Afro-Americans in filling vehicle service attendant slots, and (2) in determining whether Hertz should have understood why the Union wanted information about the race, national origin, color, and sex of job applicants.

First, as to the makeup of the bargaining unit in terms of minority numbers and percentages:

Table 1

<i>Classification</i>	<i>Total No. Employed</i>	<i>Total White</i>	<i>Total Afro-Amer.</i>	<i>Total Hispanic</i>	<i>Total Asian-Amer.</i>	<i>Percent Afro-Amer.</i>	<i>Percent Minority</i>
Courtesy Bus Driver	31	12	17	0	2	54%	61%
Car Control Clerk	1	1	0	0	0	0%	0%
Office Clerk	7	4	2	0	1	29%	43%
Customer Service Rep.	4	1	3	0	0	75%	75%
Counter Sales Rep.	53	25	22	3	3	42%	53%
Subtotal	96	43	44	3	6	46%	55%
Vehicle Service Attendants	49	11	27	3	8	55%	78%
Totals with Vehicle Service Attendants	145	54	71	6	14	49%	63%

As to male/female numbers and percentages:

Table 2

<i>Classification</i>	<i>Total No. Employed</i>	<i>Total Male</i>	<i>Total Female</i>	<i>Percent Male</i>	<i>Percent Female</i>
Courtesy Bus Driver	31	28	3	90%	10%
Car Control Clerk	1	0	1	0%	100%
Office Clerk	7	0	7	0%	100%
Customer Service Rep.	4	1	3	25%	75%
Counter Sales Rep.	53	20	33	38%	62%
Subtotal	96	49	47	51%	49%
Vehicle Service Attendants	49	49	0	100%	0%
Totals with Vehicle Service Attendants	145	98	47	68%	32%

Finally, as to new hires into the bargaining unit in the first 4 months of 1993:

Table 3

Total New Hires 1/93-4/93	White	Black	Hispanic	Asian-American	Percent Black	Percent Minority
28	5	21	0	2	75%	82%

IV. CONCLUSION

One uncomfortable subject needs to be addressed first. In his testimony in this case Kornegay came perilously close to sounding as though he was opposed to Hertz' hiring people with names like Phung, Ayubi, Mangialai, and Chhun. If I thought that some prejudice of that ilk was the basis of Kornegay's information request, I would dismiss this case solely for that reason. But, considering Kornegay's testimony in its entirety, I am convinced that Kornegay's concern was that Hertz might be excluding Afro-Americans from vehicle service attendant positions, not that Hertz was hiring people with "foreign" names.

This is a case, that is to say, about a union's request for information about job applicants, in which the union's interest in the information stems from the union's concern about possible racial discrimination by the employer in its hiring practices. By and large, the law is clear about a union's right to information in such circumstances.

When the information requested concerns persons not represented by the union . . . the union has the burden of establishing that the information is necessary to the performance of its representational responsibilities. . . . Since the union may have a duty to demand bargaining over the elimination of a hiring practice if it is discriminatory, we believe a union satisfies this burden with respect to information relevant to the issue of discrimination whenever it has a rational basis for believing that the practice *may* discriminate, i.e., information sufficiently probative of discrimination to support a belief that further inquiry is justified. [*U.S. Postal Service v. NLRB*, 18 F.3d 1089, 1101 (3d Cir. 1994), modifying 308 NLRB 1305 (1992) (emphasis in original).]⁵

I turn first to the Union's information request insofar as it relates to applicants for vehicle service attendant positions.

As we have seen, as of the end of 1992 over half of Hertz' vehicle service attendants were Afro-Americans. Nonetheless, it seems to me that Kornegay did have a rational basis for believing that Hertz might be discriminating against Afro-Americans in its hiring of vehicle service attendants. Members of the bargaining unit commented to Kornegay that the new employees all appeared to be "foreign nationals." And seniority lists showed that the last eight vehicle service attendants whom Hertz had hired—that is, all of the vehicle service attendants hired in 1992—had names that made it unlikely that any were Afro-Americans. Yet, as Kornegay reasonably believed, the universe of potential employees for ve-

⁵I will sometimes refer to the circuit court's decision as "the court's *Postal Service* decision" and the cited Board decision as "the Board's *Postal Service* decision."

hicle service attendant positions included a relatively high percentage of Afro-Americans. Under these circumstances, Kornegay could reasonably conclude that Hertz' hiring practices regarding vehicle service attendant positions *might* be discriminatory. And that is enough to support a request for information about the race and national origin of the applicants for those positions. In the words of the court's *Postal Service* decision, "further inquiry" by the Union was "justified."⁶

As for the Union's request for information about applicants for positions other than vehicle service attendant, the General Counsel failed to show that the Union had a rational basis for believing that Hertz was acting discriminatorily in filling those positions. That is painfully obvious in respect to every classification other than sales representative. As to sales representatives: (1) nothing in the record shows that Kornegay believed that it was the type of job that should attract many Afro-American applicants (even though many of the sales representatives were Afro-American); (2) unlike the vehicle service attendant situation, the implication of the names on the sales representative seniority list was ambiguous.

Hertz argues that even if a union would ordinarily be entitled to the applicant information it seeks, Local 922 waived that right by the terms of its collective-bargaining agreement with Hertz.⁷ But the Board's *Postal Service* decision makes it clear that there is no merit to that contention.

Further, the Union's written requests for information did, of course, advise Hertz of the purposes for which the Union wanted the information.⁸

All that is left to consider is whether it matters that there has been no showing that, until Kornegay testified in this proceeding, the Union had ever communicated to Hertz the facts that caused Kornegay to believe that Hertz might be discriminating against Afro-Americans in its hiring of vehicle service attendants.

⁶The Union's information request asks that Hertz include the sex of each applicant along with information about race and national origin. There is nothing in Kornegay's testimony to suggest that he had any reason to think that Hertz might be discriminating on the basis of sex.

⁷Hertz cites the "Management Rights" and "Non-Discrimination" provisions of the agreement. The former provides, in part, that: "The right to hire . . . is the sole responsibility of the Employer." The latter, Hertz points out, refers to employees; it says nothing about job applicants: "The employer and the Union agree that neither will discriminate either directly or indirectly . . . against any employee by reason of race, creed, color, age, sex, national origin, being handicapped or membership or activity in the Union."

⁸For cases involving employer contentions that the union did not state the purpose for which the union wanted the requested information see, e.g., *American Stores Packing Co.*, 277 NLRB 1656, 1659 (1986); *Emery Industries*, 268 NLRB 824, 825 (1984); *Leonard B. Hebert Jr. & Co.*, 259 NLRB 881, 883 (1981), *enfd.* 696 F.2d 1120 (5th Cir. 1983); *Western Massachusetts Electric Co.*, 228 NLRB 607, 623 (1977), *enfd.* as modified 573 F.2d 101 (1st Cir. 1978).

My conclusion is that this apparent failure by the Union to explain its concern to Hertz is determinative of the outcome of this case.

To begin with, while a union's request for information about any of the core aspects of the employer's relationship with members of the bargaining unit is ordinarily presumed to be relevant (see, e.g., *Honda of Hayward*, 314 NLRB 443 (1994)), as the Board's *Postal Service* decision holds, that presumption of relevance does not apply to a request for information about job applicants.

Second, I will assume that if the circumstances should reasonably have put Hertz on notice of the factual considerations that led the Union to make its information request, Hertz would not be heard to complain that the Union failed to communicate those considerations to Hertz. Cf. *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1018 (1979). But consider the makeup of the bargaining unit generally and of the vehicle service attendant employees in particular (as set out in tables 1 and 3, above). Given those data, it does not seem to me that Hertz could reasonably have been expected to realize that the way it filled vehicle service attendant slots in 1992 had led the Union to believe that Hertz might be discriminating against Afro-Americans. Additionally, the Union disguised its real interest by asking for male/female data along with information about the race and national origin of applicants.

Third, I will further assume that Hertz' arguments about not understanding why the Union wanted the requested information would be entitled to diminished weight had the record not included testimony from members of the employer's management about that lack of understanding. See *Ohio Power*, supra, 216 NLRB at 994. But here two of Hertz' managers did credibly testify that, until Kornegay testified at the hearing here, they had no idea why the Union believed that Hertz' hiring practices might be discriminatory.

Lastly, and most importantly, Hertz put the Union on notice that the Company wanted to know what facts led to the Union's belief that Hertz' hiring practices might be discriminatory. As discussed earlier, Hertz responded to the Union's June 9, 1993 information request by a July 9 letter that stated:

[T]he mere assertion by the Union that the information [requested by the Union] is needed to determine wheth-

er the Company is in compliance with the Collective-Bargaining Agreement does not automatically trigger entitlement to applicant equal employment data.

. . . .

IBT Local 922 has not alleged that Hertz has engaged in discriminatory hiring practices. In fact, the Union has not alleged *any* breach of the collective-bargaining agreement. If that is not the case and you wish to correct the record in that regard, I would appreciate hearing from you.

It is true that the letter goes too far in suggesting that the Union had to say why a breach of the collective-bargaining agreement had occurred in order for the Union to be entitled to the information it sought. Nonetheless, the Union should have recognized that, by that letter, Hertz was asking the Union to state what facts supported its information request.

The Union, however, responded by again stating only its purpose in asking for the information, not by providing even a hint of the facts led the Union to conclude that Hertz' hiring practices might be discriminatory. Under these circumstances Hertz was entitled to conclude that the Union knew of no facts indicating that the Company might be choosing job applicants discriminatorily. That being the case, Hertz was under no obligation to provide the requested information.⁹

[Recommended Order for dismissal omitted from publication.]

⁹According to the court's *Postal Service* decision, a union's failure to advise the employer, prior to the unfair labor practice hearing, of the facts that caused the union to believe the employer's hiring practices might be discriminatory is itself enough to require dismissal, whether or not the employer asked for such explication. 18 F.3d at 1102 fn. 7. But my obligation is to follow the teachings of the Board, not those of the courts of appeals. E.g., *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). The Board's position, in turn, is not entirely clear about whether an employer's failure to provide the information amounts to a violation of Sec. 8(a)(5) if the union waits until the unfair labor practice hearing to communicate such facts. Compare *Ohio Power*, supra, 216 NLRB at 990-991 fn. 9, with *Adams Insulation Co.*, 219 NLRB 211, 214 (1975). But it does not appear that the Board has previously had an opportunity to consider the import of an employer's request that the union explain the reasons that led to the information request.