JD(ATL)76–03
Noblesville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA DIVISION OF JUDGES

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MAR–ZANE, INC.

10 **and** **CASE 25–CA–28670**

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION 103 a/w INTERNATIONAL UNION OF OPERATING
15 **ENGINEERS, AFL–CIO**

***Belinda J. Brown*, Esq.,**
20 for the General Counsel
***John Nunley*, Vice President**
for the Charging Party
***James D. Masur* II, Esq.,**
for Respondent
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DECISION

30 ### Statement of the Case

MARGARET G. BRAKEBUSCH, **Administrative Law Judge.** The charge in Case 25–CA–28670 was filed on April 17, 2003[1] by the International Union of Operating Engineers Local Union 103 a/w International Union of Operating Engineers, AFL–CIO,
35 (the Union). Based upon the allegations contained in Case 25–CA–28670, the Regional Director for Region 25 of the National Labor Relations Board (herein the Board) issued a Complaint and Notice of Hearing on August 25, 2003. The complaint alleges that Mar–Zane, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to bargain collectively with the Union as
40 the exclusive collective bargaining representative of its employees. Specifically, the complaint alleges that Respondent failed and refused to provide to the Union requested information that is necessary and relevant to the Union's performance of its duties as the exclusive collective bargaining representative. Respondent filed a timely Answer and a First Amended Answer denying the essential allegations.

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[1] All dates are 2003 unless otherwise indicated.

A hearing on these matters was conducted before me in Indianapolis, Indiana on October 2, 2003, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross–examine witnesses, and to argue orally.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the pre–trial briefs filed by the General Counsel and Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office in Noblesville, Indiana and facilities in Noblesville, Indiana and Indianapolis, Indiana is in the business of manufacturing and producing asphalt. Annually Respondent, in conducting its business operations, purchases and receives at its Indianapolis, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent's Executive Vice–President Nick Little testified that Respondent has been in the business of manufacturing asphalt and concrete since sometime in the 1940's or 1950's. Respondent maintains its corporate headquarters in Zanesville, Ohio. As a subsidiary, Respondent is the manufacturing arm for Shelly and Sands. While Shelly and Sands secures the contracts with public entities and private contractors for the manufacture of asphalt, Respondent manufactures the actual product. Out of Respondent's 26 manufacturing plants, only five are unionized. Respondent operates three unionized plants in Ohio and two in Indiana.

On November 23, 1990, the Board certified[2] the Union as the exclusive collective bargaining representative for all plant operators and loader operators at Respondent's Noblesville, Indiana facility. On January 2, 1991, Respondent and the Union entered into a collective bargaining agreement adopting the existing agreement between the Union and the Indiana Constructors, Inc., Labor Relations Division, herein Indiana Constructors. The agreement provides that Respondent recognizes the Union as the sole and exclusive bargaining representative for and on behalf of Respondent's employees within the territorial and occupational jurisdiction of the Union. The Union's

[2] The certification was based upon the Union's having received a majority of ballots counted in a November 13, 1999 election. Of approximately two eligible voters, two votes were cast for the Union.

Local Vice–President and Business Agent John Nunley testified that the 1991 agreement has remained in effect since 1991 without any additional signed agreements between the Union and Respondent. The terms of the agreement allow for the continuation of the agreement or a "roll–over" when there is no timely notification of termination or modification. By becoming signatory to the agreement between the Union and the Indiana Constructors, an employer is required to utilize the Union's referral procedures for work performed within the 33 counties of the Union's jurisdictional area. As Nunley testified, Union members cannot solicit their own work but must depend upon the employers' utilization of the referral procedure.

The agreement between the Union and the Indiana Constructors provides that the agreement covers highway construction, heavy construction and railroad contracting, and local production of materials, as well as all job site equipment repairs and maintenance, and other job site work. The agreement however, does not cover job site repair or maintenance performed by warranty and specialized mechanics that are not employees of the Respondent.

The parties stipulated that since 1994, when Respondent established its Kentucky Avenue manufacturing facility in Indianapolis, employees represented by the Union who have been dispatched to the Kentucky Avenue facility have performed work at the Noblesville facility. The parties further stipulated that employees represented by the Union and dispatched to work at the Noblesville facility have performed work at the Kentucky Avenue facility. The record reflects that as early as May 13, 1994, the Union referred an employee to work at Respondent's Kentucky Avenue facility.

Little testified that employees at both Respondent's Noblesville and Kentucky Avenue facilities are paid according to the wage rates of the agreement between the Union and the Indiana Constructors. Additionally, Respondent deducts union dues and makes health and welfare and pension contributions for its employees at the Kentucky Avenue facility. Respondent further stipulated that since the inception of the Kentucky Avenue facility, it has staffed the facility with employees provided by the Union and it has applied the terms and conditions of the agreement between the Union and the Indiana Constructors.

The record reflects that the bargaining units at both the Noblesville facility and the Kentucky Avenue facility contain a plant operator, loader operator, and foreman. Little testified that the three employees in both plants perform "pretty much the same kind of work." As foreman for the Kentucky Avenue facility, Earnest Rotert is responsible for overseeing the daily operation of the asphalt production. Plant Operator Tom McDowell works primarily inside the plant and operates the equipment and operates the manufacturing process by computer. Loader Operator Scott Rotert primarily operates a rubber–tired loader to place materials such as sand and stone into the hopper for mixing the asphalt. Rotert testified that as plant foreman, he daily performs the same work as McDowell and Scott Rotert. He also testified that he orders materials and repairs anything in the manufacturing process that needs repair. Both Rotert and Noblesville plant foreman Richard McGill testified that they have performed work at both facilities.

B. Respondent's Reconstruction of its Indiana Facilities

Little testified that Respondent is required to meet the standards set by the Environmental Protection Agency, herein EPA, with respect to air emissions and other environmental concerns. Most of Respondent's plants are 20 to 30 years old. Rather than spending two to three million dollars for a new plant, Respondent has upgraded two to three of its plants each year. Respondent usually schedules the upgrade during the winter season when road construction is down and during the period when temperatures prohibit production. Little estimated that normally Respondent's plants operate only from March to December of each year with a shut down or layoff period from the end of December until February.

Little testified that approximately two to three years ago, Respondent converted the Noblesville plant from a "batch" plant to a "drum" plant. The conversion process involved the installation of an 8 by 15 foot aluminum drum at a cost of approximately $300,000. The conversion occurred during the winter months and Respondent brought in employees from its Zanesville, Ohio facility to perform the plant's upgrade. Respondent asserts and there is no record evidence that the Union filed any grievance concerning the upgrade work on the Noblesville facility.

In approximately January and February of 2003, Respondent upgraded the Kentucky Avenue facility to meet EPA standards and to reduce the cost of the manufacturing process. In his testimony, Little described the upgrade to include such processes as: replacing the old horizontal container tanks with vertical tanks, replacing valves and pipes, constructing a new "Bayhouse", as well as adding a new dryer and a new style burner. Respondent also incorporated some of its old equipment with the newly constructed portions of the plant. The new equipment was manufactured at the Zanesville's facility in 2002 and later installed by Zanesville employees at the Kentucky Avenue facility over the course of a six to eight week period in 2003. Little testified that the expense of the upgrade was approximately $400,000 to $500,000. He testified that most of the people brought in from Zanesville for the upgrade were supervisors and that the three union employees at the facility also worked on the upgrade.

Plant Foreman Rotert recalled that there were approximately ten additional employees who worked at the Kentucky Avenue facility during Winter 2003. Rotert operated a backhoe during the construction process and the new employees on the job site operated a crane and a man–lift. Little explained that four 20 thousand gallon tanks replaced the old horizontal tank. In order to replace the tanks, Respondent used such heavy equipment as a crane and backhoe. While Little could not recall whether a union employee or a Zanesville employee ran the backhoe, he recalled that a Zanesville employee operated the crane.

The agreement between the Union and the Indiana Constructors sets out a listing of wage rates as well as health and welfare and pension benefits that must be paid by the employer for specific machines and equipment. The agreement also provides that all equipment for which classifications and wage rates have been established in the

agreement shall be manned, when operated, by employees in the bargaining unit and paid the rates as specified in the agreement. Included among the list of over 100 machine and equipment classifications are the following: crane or derrick with any attachment including clamshell, dragline, shovel, backhoe, etc., cherry picker under 15 tons, backhoe on farm type tractor, bulldozer, and forklift.

C. The Union's Response to the Construction

Nunley testified that he left his office early on February 21 to visit five of the asphalt plants in his jurisdiction. When he drove onto the premises of the Kentucky Avenue facility he saw approximately 9 green trucks that he described as Respondent's utility trucks. He also saw someone operating a 40–ton crane[3]. Nunley did not recognize the individual as one of his union members. Nunley approached the individual and handed him his union card. Nunley recalled saying: "Here's my union card. Where is yours?" The man responded that he didn't need a union card because he was a "company man." When Nunley saw other individuals operating equipment on the site, he attempted to contact Matt Kelly. Little testified that as Shelly and Sands' Indiana Area Manager, Kelly is responsible for bidding the work. Little testified without contradiction that Respondent's managers report to Jerry Taylor who is over all of Respondent's plants and who is located in the Zanesville corporate office. Nunley however, testified that since had been a business agent working with Respondent, he has always called Kelly or Kelly's predecessor if he had any problems or needed to talk with Respondent about upcoming work.

When Nunley could not reach Kelly on his office phone or cell phone, Nunley contacted his own office and requested that his office fax a grievance to Respondent's Noblesville office. Respondent admits that on February 21, the Union filed a grievance concerning the Kentucky Avenue facility. The grievance asserts that Page 15, Section 19 of the collective bargaining agreement was not followed because:

> On February 21, 2003, work was being performed without employees covered by the Heavy Highway Agreement between Mar–Zane and the Operating Engineers Local 103. We are asking that operators be employed and made whole for all back hours, wages and fringe benefits covered by the Heavy Highway Agreement.

Nunley testified that after filing the grievance he went back to the facility numerous times during the course of the construction work. Without contradiction, Nunley testified that during the period between the first of the year and March 27, Respondent never requested a referral for employees from the Union.

Nunley recalled that he was finally able to talk with Kelly on the Monday following the filing of the grievance. Kelly acknowledged receipt of the grievance but told Nunley that he would have to get back with him. Nunley explained to Kelly that the construction

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3 Nunley explained that normally a loader was the only heavy equipment used at the facility. On that day however, he observed the use of a crane, backhoe and a bobcat.

work being performed was covered by Respondent's agreement with the Union. Nunley discussed the grievance with Kelly when they met for lunch on March 4. During their lunch meeting as well as in later conversations, Nunley explained to Kelly what was necessary to resolve the grievance. Nunley told Kelly that the Union wanted pay for six Union employees based upon Plant Foreman Rotert's hours for the duration of the project. When Nunley called Kelly on March 18 to get more information as to how Respondent would handle the paperwork on the payment to the employees, Kelly told him that Little wanted to discuss the grievance with him.

Nunley testified that when he met with Little on March 26, he told Little what he understood to be the resolution of the grievance that was worked out with Kelly. Little explained that Kelly did not have the authority to make such an offer. Nunley described his meeting with Little as their reaching an "agreement to disagree". Nunley suggested that Respondent might want to consider mediation rather than arbitration as a faster means of resolving the grievance. Little told Nunley that he would discuss the matter with Respondent's attorneys. Nunley recalled that at the end of the meeting, he told Little that he would send Respondent an information request concerning the grievance.

Respondent stipulates that by letter dated March 27, the Union presented the Respondent with an information request. It is without dispute that in his March 27th letter, Nunley requested the following information relevant to the February 21 grievance:

> Payroll records including all hours worked for all personnel involved in the maintenance and rebuilding of Plant #16 in Indianapolis, Indiana from the first day of the rebuilding until its completion.

Respondent does not deny that since about March 27, Respondent has not provided the information requested by the Union.

III. Analysis and Conclusions

A. Issues

Based upon the entire record including Respondent's Answer and its First Amended Answer, the following issues require resolution:

1. Whether the unit as described in the existing collective bargaining agreement between the Union and the Indiana Constructors constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act?
2. Whether the Union is the exclusive collective bargaining representative of the Kentucky Avenue employees?
3. Whether the Union is entitled to the information sought in its March 27, 2003 request?
4. Whether Respondent's failure and refusal to provide the information requested by the Union on March 27 constitutes a violation of Section 8(a)(1) and (5) of the Act.
5. Whether the General Counsel is foreclosed from offering evidence

relating to discussions concerning settlement of the February 21 grievance?

B. Unit Appropriateness and the Union's Status as Exclusive Collective Bargaining Representative

In the Complaint, General Counsel alleges that the unit as defined in paragraph numbers 1,3, 4, 5, 6, 7, and 10 of the existing[4] collective bargaining agreement between the Union and the Indiana Constructors is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act. The complaint also alleges that since about January 2, 1991, the Union has been the exclusive collective–bargaining representative of the Unit. In both the original answer and the first amended answer, Respondent denies unit appropriateness and denies that the Union is the exclusive collective bargaining representative of the Unit. In its first amended answer, Respondent adds:

> Respondent further states that the presumptive unit at Respondent's facility consists of 3–4 employees engaged in asphalt production; that the Union does not appear to serve as representative of said unit, and, consequently, no Collective Bargaining Agreement proviso obtains. Further, the provisions of the Collective Bargaining Agreement allegedly excludes from its coverage the type of work for which the Union sought information; in addition its scope does not include those employees for whom the Union seeks information.

In its brief, Respondent acknowledges that the Union was initially certified for Respondent's Noblesville facility's unit of plant operators and loader operators as defined by the Act. Respondent further confirms that it has agreed to the terms of, and has applied, a collective bargaining agreement with respect to its Noblesville employees. Respondent argues however, that the "certification specifically excludes any other employees, other than those of Respondent's loaders and loader operators."

There is no dispute that the Union was certified in 1991 as the exclusive collective bargaining representative for all plant operators and loader operators at Respondent's Noblesville, Indiana facility. On January 2, 1991, Respondent signed a written agreement with the Union and agreed to adopt and to be bound by the terms of the agreement between the Union and the Indiana Constructors. The record contains no evidence that since January 2, 1991, Respondent has failed to follow the terms and conditions of that agreement. There is no evidence that Respondent has not paid the wage rates as required by the agreement or that it has failed to contribute to the Union's health and welfare plan or the pension plan. The Union however, does not contend that it has ever been certified to represent employees at the Kentucky Avenue facility. Nunley admitted that there has been neither an election nor a card showing of interest for recognition. Respondent admits however, that since the inception of the Kentucky Avenue facility, Respondent has staffed the facility with employees provided by the

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[4] The agreement, received into evidence as Joint Exhibit Number 2, is effective from April 1, 1999 through March 31, 2004.

Union and has applied the terms and conditions of the collective bargaining agreement between the Union and the Indiana Contractors.

General Counsel has further demonstrated that the six employees working at the two facilities share a community of interest. Admittedly, the employees share similar wages and their pay is based upon the collective bargaining agreement's wage schedule. Additionally, the employees share the same health and welfare and pension plans. At both facilities, the employees are responsible for the production of asphalt. Little acknowledged that the three employees perform "pretty much" the same kind of work. While each of the six employees may have different responsibilities for their respective plants, there is evidence that employees also perform each other's duties. Both Rotert and McGill testified that they have performed work at both the Noblesville and Kentucky Avenue facilities even though assigned to only one of the facilities. More significantly, Respondent stipulated that since 1994 and the establishment of the Kentucky Avenue facility, employees dispatched to the Kentucky Avenue facility have performed work at the Noblesville facility and employees dispatched to the Noblesville facility have performed work at the Kentucky Avenue facility.

In its decision in ***Central Washington Hospital***, 303 NLRB 404 (1991), the Board affirmed the administrative law judge in finding the appropriateness of a disputed bargaining unit. In dismissing the employer's contention that the unit was inappropriate, the judge cited the Board's earlier decision in ***Morse Shoe, Inc***., 227 NLRB 391, 394 (1976), where the six–month limitation period in Section 10(b) of the Act was found to preclude a respondent from questioning the unit appropriateness where voluntary recognition occurred more than 6 months before the conduct giving rise to the unfair labor practice charge. Inasmuch as the disputed units had been certified or voluntarily recognized for several years and embodied in several successive collective bargaining agreements, the judge as affirmed by the Board, found that the respondent was precluded from defending against the pending complaint on the ground that the units were inappropriate.

In ***Tahoe Nugget, Inc***., 227 NLRB 357 (1976), enfd. 584 F2d 293 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979), the Board cited not only an earlier Supreme Court decision,[5] but also reiterated its earlier holding[6] that a respondent may not defend against a refusal–to–bargain allegation on the ground that the original recognition, occurring more than 6 months before charges had been filed in the proceeding raising the issue, was unlawful. In a more recent decision, the Board noted that Section 10 (b) of the Act precludes the Government from prosecuting an employer or union for an unfair labor practice that allegedly occurred more than 6 months before an unfair labor practice charge was filed. According, the employer risks no penalty by asserting that it acted unlawfully in recognizing a union, if it waits until after the statute of limitations has run before making this claim. The Board also noted that under the Board doctrines upheld by the Supreme Court, such an employer would also derive no benefit from such

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5 Bryan Manufacturing, 362 U.S. 411 (1960).

6 Nord Bros. Ford, Inc., 220 NLRB 1021 (1975).

an admission, because its silence for 6 months creates the presumption that the union was lawfully recognized. See ***Pekowski Enterprises, Inc***. 327 NLRB 413, 425 (1999).

Respondent admits that it has applied and continues to apply the terms of the collective bargaining agreement to the Kentucky Avenue employees. By its very conduct, Respondent has treated, and continues to treat the Union as the exclusive collective bargaining representative of both its Noblesville and Kentucky Avenue facility employees. Accordingly, Respondent has presented no valid basis for denying the unit appropriateness or the representational status of the Union. Accordingly, finding no evidence to the contrary and inasmuch as there is a presumption of lawful recognition, I find the Union to be the exclusive bargaining representative for the unit as defined in the collective bargaining agreement. Further, I find the represented unit to be appropriate.

C. Whether the Union is Entitled to the Requested Information and Whether the Respondent Has violated Section 8(a)(5) and (1) of the Act By Its Failure to Provide the Requested Information

Respondent concedes that it is "axiomatic that a union is entitled to information which is relevant to its functioning as a representative of employees within any unit for which it is authorized, through certification or otherwise, to act as a collective bargaining representative." Respondent argues however, that the requested information pertains to Respondent's "non–unit employees" at its Indianapolis location. Respondent further contends that the collective bargaining agreement specifically excludes job site repair or maintenance performed by warranty and specialized mechanics that are not employees of Respondent. Accordingly, Respondent argues that the information sought by the Union has no relevance to the performance of the union's responsibilities to administer the collective bargaining agreement's provisions and is thus relevant only to Respondent's non–unit related activities. Respondent contends, "There is simply no basis for the information request whatsoever."

Respondent is correct that while a union is not required to show the precise relevance of the requested information to bargaining unit issues, the union must show that the information is relevant when the request is for information outside the bargaining unit. See ***Proctor & Gamble Mfg. Co. v. NLRB***, 603 F2d 1310, 1315 (8th Cir. 1979, ***Curtis–Wright Corp.,*** 145 NLRB 152 (1963), enfd. 347 F2d 61, 69 (3rd Cir. 1965). In ***N.L.R.B. v. Acme Industrial Co***., 385 U.S. 432, 87 S. Ct. 565 (1967), the Court dealt with the issue of an employer's obligation to provide information to the union when there had been no arbitrator's decision as to the relevancy of the requested information. The Court upheld a Board ruling that an employer must turn over information requested by a union to determine whether or not to proceed with a grievance. In affirming the Board, the Court noted that the information request is subject to a discovery type standard which has nothing to do with the merits of the grievance. There only needs to be "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." ***Acme Industrial***, 385 U.S. at 437. In an earlier decision, the Board dealt with an employer's failure to provide information concerning non–unit employees. In finding a violation of Section 8(a)(5) of the Act, the Board noted that the primary issue

was whether the requested information has relevance to any legitimate union need. The Board further explained that a liberal discovery type of standard is applied when evaluating the issue of relevance. ***Brazos Electric Power Cooperative, Inc***., 241 NLRB 1016, 1018, (1979). The Board has continued to use a broad, discovery–type standard in determining relevance in information requests and does not pass on the merits of a union's claim of breach of a collective bargaining agreement in determining the whether information relating to the processing of a grievance is relevant. ***Cannelton Industries, Inc***., 339 NLRB No. 124, slip op. at 14. (2003).

In her brief, Counsel for the General Counsel cites the Board's decision in ***Brooklyn Union Gas Company***, 220 NLRB 189 (1975) wherein the Board affirmed the administrative law judge in finding that the employer unlawfully failed to provide information to the union. As a defense, the employer asserted that the union did not need information concerning job duties and compensation of non–unit employees and that any information would be irrelevant to any proper arbitration proceeding. ***Citing Hollywood Brands, Inc.****, 142 NLRB 304 (1963),* ***Goodyear Aerospace Corporation***, 157 NLRB 496 (1966), and ***Northwest Publications*, Inc**., 211 NLRB 464 (1974), the judge noted that an employer may be required to furnish a union with information about the employer's employees working at another plant and outside the bargaining unit or about supervisors and salaried technicians who are clearly outside the scope of the bargaining unit or the union's representation.

It has also been found that information requested to enable the union to assess whether the respondent has violated the collective bargaining agreement by contracting out bargaining unit work and, accordingly, to assist the union in deciding whether to resort to the contractual grievance procedure, is relevant to the union's representative status and responsibilities. ***AK Steel Corp***., 324 NLRB 173, 184 (1997), ***Island Creek Coal Co.,*** 292 NLRB 480, 491 (1989), enfd. 899 F2d 1222 (6th Cir. 1990).

Respondent argues that denial of the requested information is in conformity with longstanding Board law. In support of its argument, Respondent cites the Board's ruling in ***United Technologies Corp***., 274 NLRB 1069 (1985) where the union sought information concerning employees in a summer program. Respondent argues that in the instant matter, Respondent's "early 2003 construction activities had no material affect on the terms and conditions of employment on the unit employees, numbering at most three or four." Respondent thus argues that it had no obligation whatsoever to bargain with the Union over the use of non–Union, temporary, employees to perform construction activities. In ***United Technologies Corp***., the employees in the summer help program were not employees represented by the union and the union had in fact disclaimed any interest in representing them. Additionally, the Board further noted that it viewed the summer help program as entirely discretionary and any change in the program was entirely within the control of the employer. The Board found that the program was not a mandatory subject of bargaining and thus the employer had no obligation to bargain about the program or to provide information to the union about the program. In its brief, Respondent also cites ***Federated Publications***, 275 NLRB 46 (1985), where the employer refused to provide the union with information about advertising employees who were not represented by the union. The Board noted that

there had been no determination through the grievance and arbitration procedure that the union represented the employer's advertising employees and the General Counsel conceded that the union was not entitled to the information in the absence of such a determination.

I find both of these cases distinguishable from the instant circumstances. In the matter at issue, the Union requested the payroll records including all hours worked for all personnel involved in the maintenance and rebuilding of the Indianapolis plant from the first day of the rebuilding until its completion. The March 27, 2003 information request followed the Union's February 21, 2003 grievance in which the Union asserted that Respondent was performing work without using employees covered by the parties' collective bargaining agreement. There is testimonial evidence and Respondent does not dispute that Respondent used some of the bargaining unit employees to perform the work in question. Respondent contends that the Union has no right to inquire about the work in issue because the collective bargaining agreement specifically excludes the work and because non–unit employees performed it. The very essence of the grievance is the question as to whether Respondent failed to utilize bargaining unit employees as required under the collective bargaining agreement. Thus, the union's request for information for the pay and the hours worked for all personnel on the job relates to the issue of whether work was performed without using bargaining unit employees in violation of the collective bargaining agreement and related to the previously filed grievance. The relevance of the information is not diminished by the fact that the Union had already filed the grievance prior to its information request. The Board has held that the duty to supply information extends to a request for material to prepare a grievance for arbitration. See ***Chesapeake & Potomac***, 259 NLRB 225, 227 (1981), **St*. Joseph's Hospital (Our Lady of Providence Unit***), 233 NLRB 1116, 1119 (1977). The information need not be dispositive of the issues of the parties, it need only have some bearing on it. ***Pfizer, Inc.,*** 268 NLRB 916, 918 (1984). An employer must furnish information that is of even probable or potential relevance. ***Conrock Co.*,** 263 NLRB 1293, 1294 (1982). Whether the information that the Union seeks will be sufficient to prevail in an arbitration procedure, it is arguably relevant information that may aid the arbitral process and is therefore relevant. ***Acme Industrial***, 385 U.S. at 438.

Once the initial showing of relevance has been made, "the employer has the burden to prove a lack of relevance…or to provide adequate reasons as to why he cannot, in good faith, supply such information. ***San Diego Newspaper Guild Local 95 v. NLRB*,** 548 F2d 863, 867 (9th Cir. 1977). In the instant case, Respondent has neither argued nor demonstrated a "legitimate and substantial" concern for confidentiality interests that would be compromised by disclosure. ***Detroit Edison v. NLRB***, 440 U.S. 301, 315, 318–320, 99 S. Ct. 1123 (1979). ***Roseburg Forest Products***, 331 NLRB 999, 1001 (2000). Accordingly, Respondent has not met its burden of demonstrating that the requested information is not relevant nor has it demonstrated adequate reasons as to why it cannot, in good faith, supply such information.

The Board has long determined that in assessing the relevance of the information, it will not pass on the merits of the union's claim that the employer

breached the collective bargaining agreement and thus the Union need not demonstrate that the contract has been violated in order to obtain the desired information. See ***Island Creek Coal, Co***., supra at 487. The requested information in issue is of sufficient relevance and bears upon the Union's pursuit of its grievance and its preparation for arbitration. Accordingly, I find that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the information requested in the Union's letter of March 27, 2003.

D. Whether General Counsel Is Precluded from Offering Evidence Concerning the Settlement of the February 21, 2003 Grievance

At the commencement of the trial, Respondent filed a motion to exclude the introduction of settlement discussion–related evidence. In support of its motion, Respondent cited portions of Counsel for the General Counsel's pre–trial brief referencing communications, conversations, purported agreements, settlement offers, proposals and counter–proposals concerning the February 21, 2003 grievance. In its motion, Respondent argues that such communications to resolve a disagreement are patently inadmissible and that General Counsel should be foreclosed from offering evidence relating to settlement discussion, and such references should be stricken from the record entirely. In further support of its motion, Respondent additionally argues that such information has no relevance on the matter at issue because the Union's request for information is in issue and not the merits of the Union's grievance. During the course of the trial, Respondent's counsel objected to Union Vice–President Nunley's testimony concerning his discussions with Respondent's representatives about settlement or resolution of the outstanding grievance. Counsel argued that the grievance underlies the charge that led to the complaint in this matter. Counsel for the General Counsel maintains that it was only Respondent's failure to provide information to the Union that led to the complaint.

Rule 408 of the Federal Rules of Evidence provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The rule further provides however:

> This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose such as proving bias or prejudice of a witness, negativing a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

Nunley's testimony concerning his discussions with Kelly and Little about

resolving the grievance was not excluded. The record reflects that Nunley's discussions concerning the grievance occurred prior to the Union's request for information. There was no testimony offered concerning conversations or communications about resolving the alleged unfair labor practice of Respondent's failure to provide information in response to the Union's March 27, 2003 request. Accordingly, Respondent' motion is denied.

Conclusions of Law

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

2. The International Union of Operating Engineers Local Union 103 a/w International Union of Operating Engineers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the International Union of Operating Engineers Local Union 103 a/w International Union of Operating Engineers, AFL–CIO has been the exclusive representative for purposes of collective bargaining of the unit as defined in paragraph numbers 1, 3, 4, 5, 6, 7, and 10 of the existing collective bargaining agreement between the International Union of Operating Engineers Local Union 103 and the Indiana Constructors, Inc., Labor Relations Division.

4. Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with requested information that is relevant and necessary for the Union to fulfill its role as the collective–bargaining representative of the unit employees.

Remedy

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

The Respondent having unlawfully failed to provide the Union with certain information, it must supply the Union with that information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Mar–Zane, Inc., Indianapolis, Indiana, its officers, agents,

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[7] 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.

successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing to provide the Union with requested information that is relevant and necessary for the Union to fulfill its role as the collective–bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights to organize and bargain collectively or to refrain from such activities.

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

(a) Provide the Union with the information that it requested but that was unlawfully withheld.

(b) Within 14 days after service by the Region, post at its Noblesville, Indiana and Indianapolis, Indiana facilities, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2003.

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

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

8 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with the International Union of Operating Engineers Local Union 103 a/w International Union of Operating Engineers, AFL–CIO, by failing and refusing to provide to that Union information it requested on March 27, 2003, said information being relevant and necessary to the Union for those of you for whom that Union is your collective bargaining representative.

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 promptly furnish the Union with the information that we previously failed and refused to provide in the manner set forth in the remedy section of the decision.

MAR-ZANE, INC.
(Employer)

Dated _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 N. Pennsylvania Street, Room 238, Indianapolis, IN 46204–1577
(317) 226–7382; Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (317) 226–7413.