

From: (b) (6), (b) (7)(C)
To: [Ohr, Peter S.](#); [Hitterman, Paul](#); [Nelson, Daniel N.](#)
Cc: [Bock, Richard](#); [Szapiro, Miriam](#); [Dodds, Amy L.](#); [Shorter, LaDonna](#)
Subject: Crowne Plaza O'Hare, Case 13-CA-259749 (case-closing email)
Date: Monday, July 20, 2020 4:14:48 PM

The Region submitted this case, which arose because of the COVID-19 pandemic, for advice on whether the Employer violated Section 8(a)(5) by refusing to provide information requested by the Union. We agree with the Region that the Employer did not violate Section 8(a)(5) by refusing to provide the requested information. Thus, it should dismiss the charge, absent withdrawal.

Teamsters Local 727 ("the Union") represents a unit of about 12 bellmen and airport shuttle drivers who work for Crowne Plaza O'Hare ("the Employer"). The parties' current collective-bargaining agreement has a term of January 1, 2017 through December 31, 2021. Article 8 of that agreement, entitled "Seniority," includes language stating that layoffs are to occur based on seniority. Article 18, entitled "Management Rights," states in full, "[a]ll rights, powers, and authority customarily exercised by the Employer are retained and reserved by the Employer except as otherwise specifically modified by express provisions of this Agreement."

In mid-March 2020, the Employer announced that because of COVID-19 and the effect on travel, it would temporarily close the hotel and lay off its entire staff. On March 20, the Union filed a grievance over the Employer's failure to bargain over its decision to lay off the unit employees and the effects of that decision. In the email submitting the grievance, the Union also requested that the Employer bargain over the layoff decision and its effects. The Employer subsequently provided each unit employee a letter stating that she or he was being laid off "due to business level" at the hotel.

On March 31, the Union submitted a seven-part information request to the Employer that sought, in relevant part:

(3) Any and all documents or information relied upon by the company to make the decision to temporarily furlough members.

(6) Any and all communications, contracts, bargaining notes, and communications between the company and/or clients that support the company's position.

(7) The company's document retention policy.¹

On April 7, the Employer closed the hotel. The next day, the Union filed the charge in Case 13-CA-258800, which alleges that the Employer violated Section 8(a)(5) by unilaterally laying off the unit employees. The Union also sent the Employer a second, six-part information request

that sought, in relevant part:

(1) Any and all applications to any loans, payroll programs, or emergency relief funds previously applied to, currently pending, or accepted for [the Employer] under the CARES Act, county, city, or state programs. To the extent the company feels the information on any applications is confidential, the Union would ask the company [to] redact the confidential information ONLY and proceed with fulfilling the information request.

(2) To the extent that the date and status of the applications referenced in request 1 is not ascertainable, please provide.

(3) To the extent that the company does not have documents responsive, please provide any information or documents with the company's intentions or plans to seek the relief outlined in request 1 and the date upon which the company intends to do so.

(4) Any and all communications regarding request 1 and request 3.²

On April 10, the Employer provided the Union with partial responses to each of its information requests. Regarding the Union's March 31 request, the Employer responded to item (3) by: stating it was not obligated to provide the information because it did not have an obligation to bargain over the layoff decision; providing the Union with charts showing how the hotel's occupancy level for March 1 through April 2, 2020, significantly had decreased in comparison to the same period in 2019; and requesting that the Union provide an explanation if it wanted different or additional information. In response to items (6) and (7), the Employer replied, respectively, that it did not understand the Union's request and the requested information was not relevant. Regarding the Union's April 8 request, the Employer responded to items (1) through (4) by stating that the information was confidential and asking the Union to explain why it would be required to provide financial information, to which the Union typically is not entitled.

On April 13, the Union replied that if the Employer was claiming that economic hardship had caused the recent layoffs, the Employer had opened the door to discussing any conditions that caused its weakened economic status. It added that if the Employer had not applied for any economic relief packages, the Employer was financially solvent and could continue paying its employees. The Union also stated that because the Employer had asserted it did not have written documents that were responsive to some of the Union's requests, it wanted to know the Employer's document retention policy.

On April 15, the Employer replied to, among other things, item (3) in the March 31 request and items (1) through (4) in the April 8 request by reiterating it did not believe the Union was

entitled to the requested information and the Union's recent response did not suggest otherwise. The Employer added that, "[r]egardless, the Hotel is presently closed, and it should require no information from the Employer for the Union to be able to understand that a closed hotel does not require bell staff or airport shuttle drivers." The Employer also stated, in response to item (7) of the March 31 request, that it did not have a written document retention policy.

On April 28, the Region issued a letter deferring Case 13-CA-258800 under *Dubo*. The next day, the Union filed the charge in the current case.

We agree with the Region that the Employer did not violate Section 8(a)(5) by refusing to provide the information requested by the Union on March 31 or April 8. Regarding the earlier request, we agree with the Region that the Employer provided the information requested in items (3), (6), and (7). In response to items (3) and (6), the Employer provided the Union with charts showing how the hotel's occupancy level for March 1 through April 2, 2020, had decreased in comparison to the same period in 2019. This information supported the Employer's assertion, set forth in the letters to the unit employees, that they were being temporarily laid off "due to loss of business." Moreover, absent an inability-to-pay claim, an employer's financial information is not relevant to a union's duties as a bargaining representative and an employer is not obligated to provide it. *See, e.g., UNY, LLC d/b/a General Super Plating*, 367 NLRB No. 113, slip op. at 2 (April 11, 2019). Because the Employer's reason for the layoffs did not constitute a claim that the Employer lacked sufficient assets to continue paying the unit employees, the Employer did not obligate itself to provide the Union with any financial records, including those requested by the Union. *See, e.g., Arlington Metals Corp.*, 368 NLRB No. 74, slip op. at 2-3 (Sept. 13, 2019) (citing *North Star Steel Co.*, 347 NLRB 1364, 1369-70 (2006) (no inability-to-pay claim where employer made presentation regarding poor market conditions but "stayed completely clear of the subject of company assets and its ability to pay employees" and never indicated it was financially incapable of continuing operations)). Also, even assuming item (7) was relevant, the Employer provided the Union with the requested information in its April 15 response that it did not maintain a document retention policy.

Regarding the Union's April 8 request, we conclude that the Employer did not have a duty to provide the requested information under Section 8(a)(5) because it was not relevant to the Union's statutory duties as the unit employees' exclusive bargaining representative. Initially, we conclude that under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677-79, 686 (1981), the Employer's decision to temporarily close the hotel due to the loss of business caused by the COVID-19 pandemic was an entrepreneurial business decision not subject to mandatory bargaining. The Employer's action was driven solely by the significant decrease in hotel guests caused by the pandemic rather than an intention to lower the labor costs associated with its bellmen and airport shuttle drivers. Indeed, the Employer closed the entire

hotel and did not seek to contract out only unit work to a lower-cost provider. *Id.* at 687. Because the Employer's decision to temporarily close here was not amendable to resolution through bargaining over the unit employees' terms and conditions of employment, it did not violate Section 8(a)(5) by failing to bargain over that decision. *See, e.g., BC Industries*, 307 NLRB 1275, 1275 n.2, 1281 (1992) (finding employer did not violate Section 8(a)(5) by not bargaining over decision to close plant where it had lost money for years, the lease had expired and the lessor wanted the property for development purposes, and the employer could not obtain additional financing); *Aquaslide 'N' Dive Corp.*, 281 NLRB 219, 219 n.2, 223-24 (1986) (finding employer did not violate Section 8(a)(5) by unilaterally laying off and recalling employees because although the layoffs technically involved labor costs, the employer's bankruptcy due to exposure to product liability claims had caused its assets to be frozen); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 683-84 (1993) (finding, in the alternative, that subcontractor did not violate Section 8(a)(5) by unilaterally terminating its hauling operation because that was the "only decision open to it" after its customer terminated the subcontract).

However, the inquiry into whether the Employer has an obligation to furnish information does not stop there. An effects-bargaining obligation is relevant to the issue. It is well established that "[a]n employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself." *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (finding employer unlawfully failed to bargain about the effects of subcontracting some of the bargaining unit's work, even though the employer lawfully made the subcontracting decision unilaterally); *see also First National Maintenance Corp. v. NLRB*, 452 U.S. at 681-82. "Effects bargaining can include such topics as layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer's operations, and reference letters for jobs with other employers." *Allison Corp.*, 330 NLRB at 1365 n.14. An employer may avoid effects-bargaining, however, if it shows that the effects of its non-bargainable decision were an "inevitable consequence." *See Fresno Bee*, 339 NLRB 1214, 1214-15 & n.3 (2003); *Litton Business Systems*, 286 NLRB 817, 819-20 (1986), *enforced in relevant part*, 893 F.2d 1128 (9th Cir. 1990), *reversed in part on other grounds*, 501 U.S. 190 (1991) (2000).

Where an employer remains obligated to engage in effects bargaining, it is required under Section 8(a)(5) to timely provide a union, on request, with information relevant and necessary to the proper performance of its duties as bargaining representative. *See, e.g., Sea-Jet Trucking Corp.*, 327 NLRB 540, 546 (1999), *enforced*, 221 F.3d 196 (D.C. Cir. 2000) (unpublished decision). However, where a union requests information that is not presumptively relevant because it does not concern unit employees' terms and conditions of employment, and it also fails to explain why the requested information would be relevant and necessary for meaningful effects bargaining, an employer does not violate Section 8(a)(5) by failing to provide that information. *See, e.g., Miami Rivet of Puerto Rico*, 318 NLRB 769, 771 (1995) (finding employer that partially closed plant did not violate Section 8(a)(5) by failing to

provide for effects bargaining requested information about its tax-exempt status and whether it had notified government agencies about the closure).

Here, in its March 20 email submitting a grievance over the Employer unilaterally laying off the unit employees, the Union also requested that the Employer bargain over the layoffs and effects of its temporary closure decision. Arguably, the Employer did not have an obligation to bargain over the layoffs because they were an “inevitable consequence” of the Employer’s non-bargainable decision to temporarily close the entire hotel due to the COVID-19 pandemic. But assuming the Union’s April 8 information request applied to other potential subjects of effects bargaining, the Employer did not violate Section 8(a)(5) by failing to provide the requested information. The Union essentially wants to know if the Employer has applied, or intends to apply, to Federal, state, and local government programs established in response to the pandemic that provide employers with payroll assistance. That information is not presumptively relevant because it does not concern the unit employees’ terms and conditions of employment. *See Miami Rivet of Puerto Rico*, 318 NLRB at 771. After the Employer asked the Union why it would be required to provide financial information, to which the Union typically is not entitled, the Union replied on April 13 that if the Employer was claiming that economic hardship had caused the recent layoffs, the Employer had opened the door to discussing any conditions that caused its weakened economic status. It added that if the Employer had not applied for any economic relief packages, that meant the Employer remained financially solvent and could continue paying its employees. However, as noted above, the Employer never asserted to the Union that a lack of assets had dictated its actions. Thus, whether the Employer had applied for any government payroll assistance programs would not be relevant to the parties’ effects bargaining. *Cf. Southwestern Bell Telephone Co.*, 262 NLRB 928, 933 (1982) (information union had requested about cost of subcontracting unit work was not relevant to grievance it had filed over subcontracting because employer never asserted economic defense and it was clear employer subcontracted work for non-economic reasons). As a result, the Employer did not violate Section 8(a)(5) by failing to provide the requested financial information.

For similar reasons, the Union’s April 8 information is not relevant to the grievance it filed on March 20 over the Employer’s unilateral decision to lay off the unit employees. Again, because the Employer did not assert that a lack of assets caused it to lay off the unit employees, the financial information the Union requested is not relevant to further processing of the grievance, and the Employer is not obligated to provide it. *See id.*

This email closes this case in Advice. Please contact us if you have questions.

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¹ The Union admits that the Employer provided a timely response to items (1), (2), (4), and (5) in its March 31 information request.

² The Union admits that the Employer provided a timely response to items (5) and (6) in its April 8 information request.