

King Soopers, Inc. and Paper Allied Industrial Chemical and Energy Workers International Union, Local 5-920. Cases 27–CA–16934 and 27–CA–17102

June 17, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On May 22, 2001, Administrative Law Judge James L. Rose issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, answering briefs, and reply briefs, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions,³ and to adopt the recommended Order as modified below.⁴

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

² The Respondent has 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 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 judge's findings.

³ In rejecting the Respondent's claim that Pharmacy Specialist Mike Lupo's interview notes fall within a management privilege excusing the Respondent from providing the notes in response to the Union's request, Chairman Battista and Member Schaumber do not reject the concept of a management privilege concerning notes of an interview. Rather, they reject applicability of the privilege here because the record does not show the purposes of Lupo's note taking or what Lupo did with his notes.

We affirm the judge's recommended Order requiring the Respondent to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with the employees' exercise of their Sec. 7 rights. In disagreeing with Member Liebman's suggestion that a broad cease-and-desist order is appropriate, we note that neither the General Counsel nor the Charging Party has excepted to the judge's failure to grant a broad cease-and-desist order. We further rely on the considerations cited in *King Soopers, Inc.*, 344 NLRB No. 104 (2005), also decided today, where we denied the General Counsel's request for a broad cease-and-desist order against the Respondent. As to the general matter of broad orders, the respective views of Chairman Battista and Member Schaumber are set forth in that opinion.

Member Liebman, unlike her colleagues, would grant a broad cease-and-desist order under *Hickmott Foods*, 242 NLRB 1357 (1979) (finding that a broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights"). Based on the violations found in this proceeding, and the violations found in other proceedings before the Board, she would find that the Respondent has demonstrated a proclivity to violate the Act. See, e.g., *King Soopers, Inc.*, supra, 344 NLRB No. 104 (2005), also decided today; *King Soopers, Inc.*, 340

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 1(a) of the recommended Order.

"(a) Refusing to bargain with Paper Allied Industrial Chemical and Energy Workers International Union, Local 5-920 (the Union) as the duly designated representative of its employees in appropriate bargaining units by refusing to provide, or unreasonably delaying in providing, on request, necessary and relevant information to the Union concerning bargaining unit employees, including postings and bids for the "floater pool" and management notes and security reports taken in connection with investigations of employees' alleged violations of the work rules."

2. Substitute the following for paragraph 2(b) of the recommended Order.

"(b) Within 14 days after service by the Region, post at the stores where employee Kartik Joneja was working at the time of his discharge and all its stores in the northern area, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places, where notices to employees are customarily posted. 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 any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees

NLRB 628 (2003); *King Soopers, Inc.*, 334 NLRB No. 38 (2001) (not reported in Board volumes); *King Soopers, Inc.*, 332 NLRB 23 (2000), affd. 275 F.3d 978 (10th Cir. 2001); *King Soopers, Inc.*, 332 NLRB 32 (2000), enfd. 254 F.3d 738 (8th Cir. 2001).

⁴ We shall modify the judge's recommended Order to conform to the requirements of *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also modify the judge's recommended Order and notice to more closely conform to the violations found by the judge and to require that the Respondent remedy the violations found by posting copies of the notice at the stores where employee Kartik Joneja was working at the time of his discharge in addition to all the stores located in its northern area.

We shall also substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

employed by the Respondent at any closed facility at any time since May 2, 2000.”

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

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 with Paper Allied Industrial Chemical and Energy Workers International Union, Local 5-920 (the Union) as the duly designated representative of our employees by refusing to provide necessary and relevant information concerning bargaining unit employees, including postings and bids for the “floater pool” and management notes and security reports taken in connection with investigations of employees’ alleged work rule violations, or by unreasonably delaying in providing such information.

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

WE WILL furnish the Union all management notes in connection with the discharge of employee Kartik Joneja.

KING SOOPERS, INC.

Daniel J. Michalski, Esq., for the General Counsel.

Emily F. Keimig and Patrick J. Miller, Esqs., of Denver, Colorado, for the Respondent.

Richard Rosenblatt, Esq., of Englewood, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Denver, Colorado, on February 21 and 22, 2001, upon the General Counsel’s complaint which alleged that the Respondent refused to furnish, and delayed furnishing cer-

tain information to the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act (the Act).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that certain material is covered under the attorney/client privilege and is an attorney’s work product.

Upon the record¹ as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The Respondent is a corporation engaged in the operation of retail grocery stores with facilities, among other places, in cities north of Denver, Colorado. During the course and conduct of this business the Respondent annually purchases and receives directly from points outside the State of Colorado, goods, products, and materials valued in excess of \$500,000 and annually derives gross revenues in excess of \$50,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 5-920 (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Since 1974 the Union has been the bargaining representative for units of the Respondent’s pharmacy department employees in various retail stores. The Union and Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective from January 27, 1997, extended and modified March 29, 1999, to January 25, 2003. While there is no history that the parties have had problems with information requests, the Respondent has had disputes with other labor organizations on this issue. Two of these disputes have resulted in actions before the Board.²

This case involves two distinct information requests, the first concerning the Union’s grievance over the Respondent’s failure to follow the appropriate procedure in posting bids and assigning individuals to the “floater pool.” The second concerns a grievance over the discharge of a pharmacist for allegedly stealing controlled substances. The facts of each request will be set forth in more detail below.

B. *Analysis and Concluding Findings*

1. The floater grievance

In addition to having pharmacists assigned to specific stores, the Respondent utilizes a “floater pool” from which employees

¹ Most references to “Mr. Miller” in the transcript should read “Mr. Rosenblatt.”

² 332 NLRB 23 (2000).

are assigned to various stores within a area. In May 2000,³ Union President Mary Newell learned from certain members that, apparently, the Respondent had not properly posted a floater position before offering the job to a new employee. Thus on May 2, Newell filed a grievance report and on that day sent a letter to Stephanie Bouknight, the Respondent's manager of labor relations which included the following requests:

1. Copies of all primary bids posted by the Company for the previous 12 months from this date for all the northern area stores and all northern area floater positions.

2. Copies of all primary bid and secondary/tertiary bid requests received by King Soopers for all northern area pharmacy openings and northern area float positions in the last 12 months from this date.

3. A list of all pharmacists that have worked in the float pool as full time, part time, or casual pharmacists in the northern area pharmacies in the last 12 months from this date.

4. A list of all pharmacists newly hired as full time, part time, or casual status to work in the northern area pharmacies or on the float team in that area for the last 12 months from this date.

As a matter of course, Bouknight sends Newell schedules for all the pharmacies, and these include much of the information requested. However, the Respondent does not question the fact that Newell did not have all the information requested and in fact did not get it all until the parties met on August 14, although at a meeting on June 14 Bouknight told Newell she thought the Union had all the material.

There is no question that an employer has the duty under Section 8(a)(5) to furnish the union representing its employees, on request, such information as is necessary and relevant to its functioning as that representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Further, the employer's response must be timely and an unreasonable delay in furnishing such information is as much a violation as an outright refusal. *Woodland Clinic, A Medical Practice Foundation*, 331 NLRB 735 (2000), where a delay of 7 weeks was found excessive and violative of Section 8(a)(5).

The Respondent argues that the Union was premature in filing the charge on May 24, at a time when the Respondent could not reasonably be expected to have gathered the requested information. Citing *WXON-TV, Inc.*, 289 NLRB 615 (1988), the Respondent contends that in filing a charge so soon after making the information request, the Union's request was not legitimately for purposes of collective bargaining. I disagree. While 3 weeks may not be a long time within which a company should respond to an information request, the parties had previously entered into an agreement whereby requested information would be furnished within 2 weeks. Though this document is undated, unquestionably the parties entered into it prior to the events here and there is no indication it did not remain in effect. In any event, the parties agreed, in writing, that 2 weeks would be sufficient time to gather and deliver requested information. And unlike *WXON-TV*, where the Board concluded that the union was attempting discovery for other alleged violations of

the Act, here the information clearly related to processing a grievance under the collective-bargaining agreement.

Although Newell had many of the schedules for the previous 12 months, and therefore much of the information she asked for, many bids were missing and were not furnished until July 25 or August 14, some 14 weeks after the initial request was made. Accordingly, I conclude that the Respondent's delay in furnishing all the requested information was violative of Section 8(a)(5).

There are immaterial factual disputes concerning who was responsible for canceling a meeting scheduled for July 12 and when after that date more information was given to the Union. These need not be resolved since the fact is that the Respondent delayed for some time answering the Union's request for clearly relevant and necessary material.

2. The discharge of Kartik Joneja

On August 6, Newell filed a grievance alleging that the Respondent unlawfully discharged Kartik Joneja on July 24. The Respondent contends that the discharge was for cause—that he stole controlled substances. At a meeting on August 14, Bouknight gave Newell a copy of his personnel file and a videotape which purports to show Joneja taking the substance.

In addition to Joneja's personnel file, by letter of August 6 Newell also asked for "copies of all notes and meeting notes and correspondence surrounding the decision made to terminate this employee. The Union requests copies of all alleged violations and shortages that King Soopers attributes to Kartik Joneja [sic]." Newell also requested any information the security department might have and finally, she requested copies of notes Pharmacy Specialist Mike Lupo made in his meetings concerning Joneja.

The Respondent contends that it is not required to furnish more information than is necessary for the Union to handle Joneja's grievance. The Respondent argues that the videotape and Joneja's personnel file are sufficient. Specifically, the Respondent declines to furnish any notes made by Lupo on grounds of a general privilege, and attorney/client or attorney work product privileges. I reject these arguments.

I disagree with the Respondent's contention that the Board recognizes a privilege to the effect that information gathered during the course of investigating alleged wrongdoing by an employee need not be disclosed. Such would clearly be at odds with *Acme*. Counsel cited no persuasive authority to the contrary. The Respondent has no privilege to pick and choose which investigatory material it will disclose.

Nor does the more well-known work product privilege shield these notes from disclosure. Lupo is not an attorney, therefore by no stretch could his notes be construed as attorney work product. The notes were made during the course of the Respondent's investigation to determine whether to discharge Joneja. The notes have nothing to do with the interworkings of an attorney's mind, strategy, or the like. To conclude that investigatory notes by a manager is an attorney's work product because the potential discipline might lead to litigation would mean that all material developed in an investigation is privileged. I do not believe that the work product rule is so all inclusive. See generally *Hickman v. Taylor*, 329 U.S. 495

³ All dates are in 2000, unless otherwise indicated.

(1947). The notes are clearly germane to the grievance and could, conceivably, contain exculpatory material.

I further conclude that the attorney/client privilege does not apply. There is no indication that the notes were made during the course of consultation with the Respondent's attorney wherein legal advice was sought. These notes memorialized the underlying facts leading to Joneja's discharge. As such, it is not a document protected by the attorney/client privilege, even though the Respondent's counsel ultimately came into possession of the notes. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

I conclude that by refusing to furnish the management notes, the Respondent violated Section 8(a)(5). *Postal Service*, 332 NLRB 635 (2000).

Newell also asked for the security department report which was not delivered until the first day of the hearing in this matter, about 7 months after the request. The Respondent contends that Newell should have gone to the security department to get the report rather than relying on Bouknight. Newell testified, credibly I conclude, that in the past she had gone directly to security for information and was told that Bouknight had to first approve the request; and, Bouknight has told Newell "that if I want something with respect to the contract I have to go to her first." I conclude that Newell's request for the security report from Bouknight was reasonable and the Respondent violated Section 8(a)(5) in failing to deliver it for 7 months.

IV. REMEDY

Having concluded that the Respondent has violated the Act in certain respects, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel has requested a broad, companywide remedy to include a notice posting at all the Respondent's stores. This is based on the General Counsel's assertion that the Respondent has a history of repeated violations of its duty to furnish information and the fact that Bouknight was involved in them all. Although decisions in two previous cases were made a part of the record here, and a similar case was heard by me involving another bargaining unit⁴ the evidence does not support the kind of proclivity to violate the Act which the General Counsel contends. Although the Respondent did breach its obligations to furnish requested information, in large part this was based on legitimate issues and a reasonable belief that the Union had much, if not all, the information requested.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

⁴ Cases 27-CA-16914-1, 27-CA-16914-2, and 27-CA-16902-1.

⁵ 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

ORDER

The Respondent, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the designated representative of its employees in appropriate bargaining units by refusing to furnish, or unreasonably delaying furnishing, the Union on request necessary and relevant information concerning bargaining unit employees including postings and bids for the "floater pool" and management notes taken in connection with investigations of employees' alleged violation of work rules.

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

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

(a) Furnish the Union all management notes in connection with the discharge of Kartik Joneja.

(b) Within 14 days after service by the Region, post at all its stores in the northern area copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 27, 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 any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

(c) Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

Board and all objections to them shall be deemed waived for all purposes.

⁶ 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."