Westinghouse Electric Corporation *and* International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge No. 13, Local Lodge No. 565. Case 32–CA–11310

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On March 26, 1991, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Westinghouse Electric Corporation, Sunnyvale, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We adopt the judge's remedy in the absence of any demonstrated relevance of the requested information apart from the relevance demonstrated with respect to the already concluded arbitration of Pena's discharge. Further, we note that no party excepted to the judge's finding that the arbitrator was without authority to reopen the arbitration.

Patricia Milowicki, for the General Counsel.
Brian K. Williams, for the Respondent.
Ted Neima, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. The hearing in this case held on January 18, 1991, is based upon an unfair labor practice charge filed on August 3, 1990, by International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge No. 93 and Local Lodge No. 565 (the Union), and a complaint issued September 18, 1990, against Westinghouse Electric Corporation (Respondent), on behalf of the General Counsel of the National Labor Relations Board, by the Regional Director of the Board, Region 32, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). More specifically, the complaint alleges that the Union, which represents a unit of Respondent's employees, in connection with a contractual grievance it filed against Respondent contesting the termination of a unit employee, on May 23, 1990, asked Respondent to furnish it with the names of, and the disciplinary action taken against, all employees, unit as well as nonunit, who had violated Respondent's plant rule A.8. The complaint further alleges this information was necessary for, and relevant to, the Union's performance of its function as the representative of the unit employees, and that since on or about August 13, 1990, Respondent has refused to furnish the information, in violation of Section 8(a)(5) and (1) of the Act.

In its amended answer to the complaint Respondent denied engaging in the alleged unfair labor practice, and admitted ''that the Union, on or about May 23, 1990, requested Respondent to furnish it with the names and disciplinary actions of all unit and nonunit employees who violated plant rule A.8, and that Respondent provided the disciplinary action logs of all unit and non-unit non-exempt employees.''[1]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the General Counsel's and Respondent's posthearing briefs, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Evidence*

Respondent is a corporation with a place of business in Sunnyvale, California, the only facility involved in this case, where it manufactures marine equipment. The Sunnyvale facility, Respondent's marine division, employs approximately 2600 employees of whom approximately 1400 are classified as ''non-exempt'' and approximately 1200 are classified as ''exempt.'' The employees classified as nonexempt are paid by the hour and are represented by various labor organizations. The employees classified as exempt are paid a salary and are not represented by a labor organization. They are employed as administrative, managerial, supervisory, and professional employees.

The Union represents a bargaining unit of mechanical production and maintenance employees employed at the Sunnyvale facility (the unit). During the time material there were approximately 700 employees employed in the unit. The Union has represented the unit employees since at least 1949 and, with Respondent, has been party to successive collective-bargaining agreements covering those employees. The most recent agreement was effective by its terms from August 29, 1988, through August 25, 1991.

Section 8 of the current agreement provides for a multistep grievance procedure ending in binding impartial arbitration, which covers among other things grievances concerning employees' discipline. The sole reference to Respondent's obligation to furnish the Union with information in connection with the processing of an employee's grievance, is set forth in paragraph E3(a) of section 8, and reads as follows:

> The arbitrator shall have no authority to issue any subpoena or other form of legal process or award to compel either party to produce new evidence (not already presented during processing of the grievance in the grievance procedure) considered by such party to be

[1] Respondent's amended answer admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets one of the Board's applicable discretionary jurisdictional standards. Also Respondent's answer admits the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

> confidential or not relevant or material to the proceeding, or which is not available. This shall not limit the arbitrator's authority to compel the production of information which this Agreement requires either party to provide to the other.

All of the persons employed at the Sunnyvale facility, the exempt as well as the nonexempt employees, are covered by the same plant rules, which are set forth in detail in a booklet distributed to the employees. The exempt, as well as the nonexempt employees, are expected to obey the rules. The rule involved in this case, plant rule A.8, reads as follows:

> A. Any of the following actions by an employee are considered extremely serious misconduct and may result in discharge. . . .
>
> 8. Fighting, assault, horseplay or other disorderly conduct.

The management official responsible for administering discipline imposed upon employees for violating the plant rules, insofar as those rules apply to the nonexempt employees, is the facility's manager of union relations, Greg Wilson Jr., who has occupied this position since 1972. During his tenure as manager of union relations, Wilson's policy has been to apply the plant's rules in a uniform and consistent manner. In order to be sure that the plant's rules are being applied in a uniform and consistent manner, Wilson has maintained ''Disciplinary Action Logs'' for each one of the rules, including rule A.8. The logs contain the following information: in chronological order, the name of each nonexempt employee disciplined for having violated the rule involved; the employee's department; the disciplinary action imposed, i.e., discharge, written warning, suspension, and number of days suspended; and, a brief description of the basis of the discipline, including whether it was based upon the employee's violation of more than that rule.

Wilson makes the ultimate decision whether a nonexempt employee has violated a plant rule and, if so, what, if any, discipline will be imposed. His reason for maintaining the above-described logs is to insure that disciplinary action imposed upon nonexempt employees for violating Respondent's plant rules is imposed uniformly, with the same degree of discipline being imposed upon the employees for engaging in similar misconduct. In this regard, Wilson testified, ''in viewing the facts and circumstances in any potential case of discipline I will certainly refer to the log to see what the history shows on non-exempt employees and use that as a basis for establishing the proper discipline for the case at hand.''

As I have noted supra, all of Respondent's employees, including those classified as exempt employees, are covered by and expected to obey Respondent's plant rules, including rule A.8. Wilson is not responsible for administering the plant rules insofar as they apply to the exempt employees. Another management official, who occupies a position similar to Wilson's, is responsible for administering the plant rules insofar as they cover the exempt employees. In determining whether or not a nonexempt employee has violated a plant rule and, if so, how the employee should be disciplined, Wilson does not consider the manner in which exempt employees have been treated. In fact Wilson has no knowledge whatsoever of how exempt employees are treated in connection with alleged violations of plant rules.

On or about March 29, 1990,[2] unit employee Rudy Pena was discharged by Respondent for allegedly engaging in disorderly conduct, in violation of plant rule A.8.

On April 4 the Union, on Pena's behalf, filed a contractual grievance protesting his discharge. The grievance alleged in substance that the Union thought Pena's discharge was ''unjust'' because Supervisor Tom Ruiz had not been discharged even though Ruiz had engaged in the same type of disorderly conduct which Pena had allegedly engaged in. When the representatives of Respondent and the Union were unable to resolve the grievance at the initial steps of the contractual grievance procedure, the Union requested arbitration and on September 6 the grievance was heard by an impartial arbitrator, as required by the contractual grievance procedure. There is nothing in the record which indicates how Pena's grievance was resolved by the arbitrator. However, in its posthearing brief at footnote 2, Respondent represents that on January 14, 1991, the arbitrator denied Pena's grievance.

On May 23 William Leumer, the Union's president and chief steward, prepared an information request which he signed and addressed to Respondent's union relations manager, Wilson, and to Dale MoDavis, the area manager for the area in which Pena worked. The May 23 information request reads, in pertinent part, as follows:

> . . . In order for the union to prepare its case and process the Pena grievance, the union requests the following information from the company: 1) Copies of *ALL* bargaining unit and non-bargaining unit disciplinary records (hourly, salaried and professional employees) in regards to the specific discipline issued for violations of plant rule A.8; specific names we have in mind at this time are Tom Ruiz, Ray Rios, Pat Atters, Richard Barenchi, Nick Gilman, Nadeen Allison and Elizar Salinas. These above names do not constitute our only requests; we repeat, we want *ALL* the disciplinary records for violations of A.8 that the Company has. . . . 3) Names of any employees who violated Rule A.8 but were not disciplined.
>
> The union deems 15 work days to be ample time for the information requested to be provided. If there is a need for an extension, contact me as soon as possible.

The employees specifically named in the May 23 information request were all bargaining unit employees represented by the Union except for Tom Ruiz, a supervisor, and Nadeen Allison and Pat Atters, who were employed in another bargaining unit. Leumer asked for the information concerning those three employees because Ruiz had assaulted him and not been discharged, and as far as Leumer knew, otherwise disciplined for engaging in that conduct, even though Leumer had complained about it to management, and Leumer had been informed by officials of the union which represented Allison and Atters that they had a physical altercation in the plant, yet neither one had been terminated.

On May 23 Leumer handed the above-described May 23 information request to Supervisor David Weissbart, Pena's immediate supervisor, who works under the supervision of

[2] All dates hereinafter refer to the year 1990 unless specified otherwise.

Area Manager MoDavis. After Weissbart read the request, Leumer explained to him the Union needed the requested information because it did not think Respondent had treated Pena fairly, that other people had been disciplined less severely, or not at all, for engaging in comparable conduct. Weissbart accepted the information request and stated he would give it to MoDavis.

A few days later Leumer spoke to MoDavis and asked whether he received the May 23 request for information. MoDavis answered that Weissbart had given him the request and that he was transmitting it to Union Relations Manager Wilson and Wilson would handle the matter.

Wilson testified that on or about May 23 MoDavis informed him he had received a request for information from the Union. Wilson further testified he instructed MoDavis to transmit the request to him and that he would handle it, but did not receive the May 23 information request from MoDavis and that it did not come to his attention until the week of the hearing in this case. I reject Wilson's testimony that he did not receive the Union's May 23 information request from MoDavis. I find MoDavis transmitted the request to Wilson, who received it some time late in May. This conclusion is based upon: Wilson's poor testimonial demeanor; Respondent's failure to call Area Manager MoDavis to corroborate Wilson's testimony, which warrants the inference that MoDavis would have testified he transmitted the information request to Wilson; and, Respondent's admission in its answer to the complaint that on or about May 23 the Union requested Respondent to furnish it with the information set forth in the Union's May 23 information request.

When there was no response from Respondent to the Union's May 23 request for information, Charles Phillips, the Union's business representative, wrote Respondent in June and in this letter, referring specifically to the Union's May 23 information request, asked that the information requested therein be provided.[3]

On August 3 the Union filed its unfair labor practice charge in the instant case. It was received by Respondent on August 6.

On August 13, in response to Phillips' June letter and to the Union's charge, Wilson wrote Phillips, as follows:

> Enclosed is a copy of my log regarding IAM Local 565 represented employees disciplined under plant rule A.8 in response to the union's request for information dated June of 1990. The balance of the information requested May 22, 1990 is not available to you and/or has not been determined for the arbitration hearing.
>
> As you know, this relates to your NLRB charge filed. Call me if you have any questions.

As indicated in Wilson's August 13 letter, enclosed with the letter was the disciplinary action log maintained by Wilson for plant rule A.8. As noted previously, this log contained the following information: in chronological order, the name of each nonexempt employee disciplined for violating rule A.8; the employee's department; the disciplinary action imposed, i.e., discharge, written warning, suspension, and number of days suspended; and, a brief description of the basis for the discipline including whether the discipline was based upon more than just a violation of rule A.8. However, the copy of the log enclosed with Wilson's August 13 letter did not contain the names of all of the nonexempt employees disciplined for violating rule A.8. Rather it contained only the names of the nonexempt employees who had violated the rule and were in the bargaining units represented by the Union and IAM Local 322. Wilson whited out the names of the nonexempt employees who had been disciplined for violating rule A.8, but were not in the bargaining units represented by the Union and IAM Local 322.[4] Also not furnished to Phillips, in Wilson's August 13 response, were the names of those employees classified as exempt employees (supervisory, managerial, administrative, professional), disciplined for having violated rule A.8, or not disciplined for violating that rule. Neither this information nor the whited out information in the log sent to Phillips by Wilson has ever been furnished to the Union by Respondent.

Between his receipt of Wilson's August 13 letter, on August 15, and the September 6 arbitration hearing concerning Pena's grievance, Phillips complained to Wilson about Respondent's failure to supply the Union with all of the requested information. He told Wilson he had been requested by the Union's steward and chief steward to get all of the information which had been requested and would like to have that information. Wilson replied by stating that the information not furnished by Respondent pertained to other bargaining units and to management and professional employees, and stated that Respondent did not have to supply the Union with that information, that it was not required to do so and did not intend to do so.[5]

It is undisputed that during the hearing before the arbitrator concerning Pena's grievance, the Union did not ask the arbitrator to compel Respondent to furnish it with the requested disputed information herein or otherwise seek the aid of the arbitrator in requiring Respondent to supply the disputed requested information herein. The Union's failure to do so is not very surprising because as discussed infra, under the provisions of the parties' collective-bargaining contract the arbitrator had no power to compel Respondent to furnish this information.

During the arbitration hearing, in support of its case against Pena, Respondent showed the arbitrator a copy of the disciplinary action log maintained by Wilson for rule A.8 violations. Respondent showed the arbitrator the identical ''whited out'' copy of the log that Wilson had furnished to the Union. In the past, however, when Respondent used Wilson's disciplinary action logs to support its position during

[3] Based upon Phillips' testimony. In crediting his testimony I considered that Phillips was not able to locate a copy of the June letter and considered Wilson's testimony that no such letter was ever received by him. I credited Phillips' testimony because his testimonial demeanor was good, whereas Wilson's was poor and because, as described in detail infra, in August Wilson wrote Phillips stating, among other things, ''enclosed is a copy of my log regarding IAM Local 565 represented employees disciplined under plant rules A.8 *in response to the union's request for information dated June of 1990.*'' [Emphasis added.]

[4] In the case of several of the names that were whited out, the remainder of the information on the log pertinent to those names was not whited out. Wilson testified it was his intent to white out all of the information connected with those names, but inadvertently failed to do so. The record establishes that absent the names of the employees, the information inadvertently not whited out concerning those names could not be used by the Union to determine whether or not Respondent had treated Pena disparately.

[5] Based upon Phillips' testimony. Wilson testified that this conversation never occurred. I credit Phillips because his testimonial demeanor was good, whereas Wilson's was poor.

the preliminary stages of the grievance procedure and before arbitrators in cases involving employees' grievances, it had relied upon unexpurgated logs; those that had not been whited out and which included the names of all nonexempt employees who had been disciplined for violating Respondent's rules. It whited out the log furnished to the arbitrator in Pena's case because this is what it had done to the log it had furnished the Union during the preliminary stages of the processing of the grievance.

The record reveals that the Union's reasons for requesting Respondent to furnish it with its records showing the discipline or lack of discipline imposed on *all* of the facility's employees, not just those represented by the Union, for violating plant rule A.8, are as follows:[6] the Union understood that Respondent's plant rules applied equally to all of the personnel employed at the Sunnyvale facility; the Union believed that employees, including exempt employees, had been engaged in conduct which literally fell within the language of plant rule A.8, but unlike Pena had not been discharged for their conduct; if the requested information showed Pena was treated no differently than other similar violators of rule A.8, then the Union might decide not to press Pena's grievance to arbitration; but, if the requested information demonstrated Pena was the victim of disparate treatment, the Union intended to use that information to support Pena's grievance during the initial stages of the grievance procedure and, if Respondent continued to deny the grievance, rely upon this information in presenting the grievance to an arbitrator.

Finally, the record shows that the Union went ahead with the arbitration instead of asking that it be postponed pending the outcome of this proceeding, because Pena, who, as a result of his discharge, had been unemployed for several months, was undergoing severe financial hardship.

B. *Discussion*

Rudy Pena, an employee employed at Respondent's Sunnyvale facility in the bargaining unit represented by the Union, was discharged on or about March 29 for allegedly engaging in disorderly conduct, in violation of plant rule A.8. On April 4 the Union filed a grievance on his behalf pursuant to the grievance provisions of the collective-bargaining agreement between the Union and Respondent. The grievance alleged Pena's discharge was ''unjust,'' asked for his reinstatement with backpay, but indicated the Union would be willing to negotiate a less severe penalty.

On May 23, the Union informed Respondent that in order to process and evaluate Pena's grievance it was requesting that Respondent furnish it with the names of all of the persons employed at the Sunnyvale facility, those not represented by as well as those represented by the Union, who violated plant rule A.8, and to furnish the records showing what, if any, discipline had been imposed upon those persons for violating rule A.8.

The Union intended to use the above-described information in two ways: If it showed Pena was treated no differently than other persons who violated rule A.8, then the Union would consider withdrawing the grievance, but if it demonstrated Pena was the victim of disparate treatment, the Union intended to use this information to support his grievance during the initial stages of the grievance procedure and, if Respondent continued to deny the grievance, rely upon the information in presenting the grievance to an arbitrator.

On August 15, by its letter of August 13, Respondent furnished the Union with its records which showed the names of the employees who violated rule A.8, described how they had violated the rule, and described the type of discipline imposed upon them for violating the rule. This information, however, was limited to only the employees who were represented by the Union or by IAM Local No. 322. Respondent failed to furnish, as requested by the Union, the names and disciplinary records of all of the other rule A.8 violators who were not represented by the Union. More specifically, Respondent refused to furnish the Union with the names of the exempt employees (supervisors, managers, administrators, and professional employees), and with the names of the nonexempt employees not represented by the Union or IAM Local No. 322, who had violated plant rule A.8, and the records showing the discipline imposed by Respondent upon them for violating that rule. Respondent informed the Union that it had not furnished the Union with this information because Respondent was not required to do so and did not intend to do so.

Counsel for the General Counsel contends Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with the names of the above-described nonunit employees who violated plant rule A.8 and by refusing to furnish the Union with its records showing the discipline imposed upon those employees for having violated rule A.8. Respondent in its posthearing brief argues that its admitted refusal to furnish the aforesaid information did not violate the Act, for three different reasons: (1) ''The Union failed to meet ¢its burden to affirmatively demonstrate the probable or potential relevance of information concerning non-unit employees''; (2) ''The Union waived its right to the requested information pursuant to Section VIII, paragraph E3(a) of the collective-bargaining agreement;'' and (3) ''The absence of an outstanding grievance renders the instant Complaint moot.'' For the reasons stated below, I reject Respondent's arguments and agree with the General Counsel that Respondent violated Section 8(a)(5) and (1) of the Act, when it refused to supply the Union with the disputed nonunit employee information herein.

II.

The requested information which Respondent has refused to furnish to the Union deals with individuals outside of the bargaining unit and, therefore the General Counsel has the burden of demonstrating the information's relevance.[7] *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985), and *Postal Service (Main Post Office)*, 289 NLRB 942 (1988), enfd. 888 F.2d 1568 (11th Cir. 1989). The standard for determining the relevance of requested information is a liberal discovery type standard that merely requires information to have some bearing on the issue between the parties. *Pfizer, Inc.*, supra at 918. Information of even probable or potential relevance to a union's duties must

[6] The findings herein are based upon a composite of the testimony of Union President/Chief Steward Leumer and Union Business Representative Phillips.

[7] Respondent provided the Union with the information it requested relating solely to the unit employees. There is no contention or allegation that Respondent violated the Act by its delay in furnishing that information.

be disclosed. *Conrock Co*., 263 NLRB 1293, 1294 (1982), enfd. without opinion 735 F.2d 1371(T) (9th Cir. 1984).

In the instant case, to enable itself to intelligently and meaningfully evaluate and process employee Pena's grievance, protesting his discharge for allegedly violating plant rule A.8, the Union requested information from Respondent about the way in which Respondent disciplined nonunit employees, as well as unit employees, who engaged in conduct which violated plant rule A.8. This information, even though it concerned nonunit employees, was relevant to Pena's grievance under a discovery standard, because Respondent's plant rules, including rule A.8, apply equally to nonunit and unit personnel. In view of this, while Respondent may have been able to persuade an arbitrator that it had good reason for treating the two groups dissimilarly, the requested information has at least prima facie relevance to the Union's contention that Pena was the subject of disparate or unduly harsh treatment.

That the General Counsel has established the potential or probable relevance of the nonunit information requested by the Union, accords with the case law. In *North Germany Area Council v. FLRA*, 805 F.2d 1044 (D.C. Cir. 1986), the union sought, in the context of an employee's grievance, documents relating to discipline of employees and supervisory personnel for violations of the same rule anytime during the previous 3 years. The Federal Labor Relations Authority (FLRA) ordered the employer to turn over the information relating to employees but not supervisors. On the union's appeal, the Circuit Court of Appeals for the District of Columbia remanded the case to the agency. Drawing on NLRB precedents, the court held that the requested information appeared to satisfy the liberal standard for assessing relevance (id. at 1048) and stated, ''we cannot comfortably conclude that teachers and their supervisors should be subject to different disciplinary standards for offenses involving dishonesty just because they perform different duties.'' Id. at 1049. On remand, the FLRA reversed its position and directed the employer to furnish the information. *Department of Defense Dependents Schools*, 28 FLRA 202 (1987). See also *Pfizer, Inc*., 268 NLRB 916 (1984), enfd. 763 F.2d 887 (7th Cir. 1985), and *Postal Service (Main Post Office)*, supra, and *Postal Service*, 301 NLRB 709 (1991), where the Board, with court approval, held that the unions were entitled to information, in the context of employees' grievances, concerning the employer's responses to similar rule infractions by nonunit employees.

In addition, as the Board stated in *Postal Service (Main Post Office)*, supra at 943, and *Pfizer, Inc*., supra at 919, the information concerning nonunit employees sought here is the kind arbitrators regularly consider in deciding whether unit employees have been disciplined for just cause. See also *North Germany Area Council v. FLRA*, 805 F.2d at 1048; *Salt River Valley Water Users/Assn. v. NLRB*, 769 F.2d 640, 642–643 (9th Cir. 1985); *Postal Service*, 301 NLRB 709, 711 (1991); and, Elkouri and Elkouri, *How Arbitration Works* 257, 643–644 (3d ed. 1973) .

It is for the reasons set forth by the Board and courts in the above-cited cases, that it is clear Respondent's records relating to nonunit employees' discipline or nondiscipline for violating rule A.8 are germane to the issue of whether the Respondent, in discharging Pena for violating that rule, treated like cases in a like manner, or whether there has been disparate treatment. I therefore find there was a probability that this information would be of use to the Union in deciding whether to proceed to arbitration, or in the arbitration proceeding itself. This conclusion is especially warranted with respect to Respondent's refusal to furnish that part of the requested information relating to the nonunit employees classified as nonexempt employees, inasmuch as Union Relations Manager Wilson, the management official who decided to discharge Pena for violating rule A.8, testified that in making this decision he considered Respondent's past treatment of all of its nonexempt employees, including the nonunit/- nonexempt employees, who had been previously disciplined for violating that rule.[8] Thus, if the requested information reveals that some of the nonexempt/nonunit employees were not disciplined for engaging in conduct similar to Pena's or were treated more leniently by Wilson for engaging in such conduct, it would have provided the Union with the basis to argue that Pena's punishment was too severe.

I have considered that Union Relations Manager Wilson is not responsible for administering the plant rules, insofar as they apply to the Company's exempt employees, and that in deciding to discharge Pena, did not consider the way in which exempt employees had been disciplined for violating rule A.8. This, however, does not constitute a defense to Respondent's refusal to furnish the Union with the names of the exempt employees who violated rule A.8 and with the record showing how those individuals where disciplined for violating that rule.[9] The fact that different management officials administer the plant rules as they apply to exempt and nonexempt employees does not detract from the undisputed fact that the rules equally apply to both groups of employees. In view of this, the fact that someone other than Wilson administers rule A.8 for the exempt employees does not warrant the conclusion that the disciplinary records of the exempt employees who violated rule A.8 are not germane to Pena's grievance. Rather, this circumstance only goes to the weight that the information concerning exempt employees' discipline would be given by an arbitrator, if submitted by the Union as evidence in support of Pena's grievance.

I recognize that when the requested information concerns nonunit employees, to satisfy the burden of showing relevance, the requesting party must offer more than mere suspicion for it to be entitled to the requested information. *Sheraton Hartford Hotel*, 289 NLRB 463 (1989), citing *Southern Nevada Builders Assn*., 274 NLRB 350, 351 (1985). See also *Bohemia, Inc*., 272 NLRB 1128, 1129 (1984). Rather, the duty to disclose information concerning nonunit employees will be triggered by a showing that the requesting party has a reasonable basis for requesting the information. *NLRB v. Leonard B. Hebert Jr. & Co*., 696 F.2d 1120, 1123 (5th Cir.

[8] I note in its posthearing brief ''Respondent concedes that the Union may be entitled to disciplinary records maintained by [Wilson].''

[9] I note Respondent did not demonstrate or contend that it did not possess that part of the requested information herein which dealt with the exempt employees. I also note that Union Relations Manager Wilson offered no excuse for his failure to transmit this portion of the Union's information request to the appropriate management official. The fact that Wilson may not have known the name of this person does not excuse his failure to transmit the Union's information request to the person who maintained the disciplinary records concerning the exempt employees. It is apparent, from the whole record, that it was only because Wilson believed the Union was not entitled to the information concerning Respondent's exempt employees, that he chose not to transmit its request for this information to the appropriate company official.

1983); *Blue Diamond Co*., 295 NLRB 1007 (1989). What constitutes a reasonable basis for further investigation depends on the particular facts of each case; however, it is clear that a union is not required to assemble a prima facie case. See *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867–868 (9th Cir. 1977); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 67 (3d Cir. 1965). To the contrary, a union need garner only sufficient evidence to make its information request '''reasonably calculated to lead to the discovery of admissible evidence.''' *NLRB v. Associated General Contractors of California*, 633 F.2d 766, 771 fn. 6 (9th Cir. 1980). See also *NLRB v. Acme Industrial Co*., 385 U.S. 432, 433 (1967).

Here, the Union's knowledge that Respondent's plant rules equally applied to all of Respondent's employees—nonunit/nonexempt and nonunit/exempt as well as unit employees—gave the Union a reasonable basis for believing that the disciplinary records of all of the Company's nonunit employees would be of use to the Union in deciding whether to proceed to arbitration on Pena's grievance or in the arbitration process itself. Since rule A.8 equally applied to both unit and nonunit employees, this fact was reasonably calculated to lead the Union to believe that its information request insofar as it related to nonunit employees would lead to the discovery of evidence which would have some bearing on Pena's grievance, namely, the manner in which Respondent had applied the rule to other personnel (nonunit as well as unit) who were expected to obey the rule, but like Pena had violated it. In view of this, the fact that the Union only had the names of three nonunit employees (Supervisor Diaz and employees Allison and Atters) who supposedly had engaged in conduct violative of rule A.8, did not preclude the Union from making a blanket request for the disciplinary records of all nonunit employees who in the past violated rule A.8.

Based upon the foregoing, I find Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with the names of the nonunit employees employed at its Sunnyvale, California facility who violated rule A.8 and by failing and refusing to furnish the Union with its records showing what, if any, discipline those nonunit employees received for violating the rule.

III.

Paragraph E3(a) of section 8 of the parties' collective-bargaining agreement, as described in detail supra, expressly prohibits an arbitrator from issuing any subpoena or other form of legal process or award to compel Respondent to produce evidence considered by Respondent to be either confidential or not relevant or material to the grievance proceeding before the arbitrator. Respondent contends that by this provision the Union waived its right under the Act to request, in connection with the processing of Pena's grievance, that Respondent provide it with the requested nonunit information in dispute herein, inasmuch as Respondent considered this information was not relevant or material to Pena's grievance.[10] This contention is without merit.

As Respondent recognizes, a union may contractually relinquish a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co*., 138 NLRB 15, 16 (1962). In *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1318 (8th Cir. 1979), quoted with approval in *Clinchfield Coal Co*., 275 NLRB 1384 (1985), the court stated that ''for there to be a waiver of a right to information, the language used must be clear and unmistakable. Likewise, there must be a conscious relinquishment by the Union, clearly intended and expressed to give up the right.'' I find that paragraph E3(a) of section 8 of the parties' collective-bargaining agreement does not meet this standard.

Paragraph E3(a) of section 8 of the parties' contract does not, as Respondent would have me find, state that if Respondent believes information requested by the Union, in connection with a contractual grievance, is confidential, irrelevant or immaterial, that Respondent is not obliged to furnish this information to the Union. Rather, the plain and unambiguous language of this contractual provision states that if Respondent believes that information requested by the Union in connection with a contractual grievance is confidential, irrelevant or immaterial, *an arbitrator cannot compel Respondent to furnish this information to the Union*. By agreeing that an arbitrator could not compel Respondent to furnish such information, the Union obviously did not also agree to relinquish its right to all information which Respondent believed was confidential, irrelevant or immaterial. The Union, by virtue of paragraph E3(a) of section 8 of its contract with Respondent, only relinquished the right to request an arbitrator to compel Respondent to furnish the Union with information which Respondent believed fell into those categories. The Union, by virtue of the contract, did not clearly and unmistakably waive its statutory right to request such information.

Based upon my review of the parties' collective-bargaining agreement, for the above reasons, I am unable to find it establishes a clear and unmistakable waiver by the Union of its statutory right to request from the Respondent the disputed nonunit information herein.

IV.

Also lacking in merit is Respondent's contention that the issuance of the arbitrator's opinion concerning Pena's grievance has rendered moot the unfair labor practice issue posed by the complaint. The issue framed by the complaint has nothing whatsoever to do with the merits of Pena's grievance. The complaint's allegations do not require that the Board pass on the merits of Pena's grievance. The issue posed by the complaint is not whether Pena was properly discharged, but whether Respondent failed to fulfill its statutory bargaining obligation by failing to provide upon request information relevant to the Union's proper performance of its duties under the Act. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967).

Since I have found supra, that the General Counsel has proven the allegations of the complaint, the General Counsel will, at the very least, be entitled to an order forbidding the resumption of the unfair labor practices found, inasmuch as there is no evidence that Respondent may not be expected to engage in similar misconduct in the future. Quite the opposite, it is reasonable to assume that in the future when, in connection with a unit employee's grievance over being discharged for violating a plant rule, the Union asks for the dis-

[10] Respondent's waiver argument is predicated entirely upon the express language contained in par. E3(a) of sec. 8 of the parties' contract.

ciplinary records of the nonunit employees who have violated that rule, Respondent, as was the case here, will refuse to furnish the Union with the requested information, even though the nonunit employees are expected to obey its plant rules. In other words, an important aspect of the remedial order in this case is the requirement that Respondent refrain from following similar nondisclosure practices concerning relevant information in connection with future grievances filed under the parties' contractual grievance procedure. See *C-B Buick, Inc. v. NLRB*, 506 F.2d 1086, 1092–1093 (3d Cir. 1974) (rejecting mootness defense court stated, ''we regard [the Respondent's] proscribed conduct as being capable of repetition in some relevant context with the Union''). In short, this is not a case where the issues presented are no longer live or where the parties lack a legally cognizable interest in the outcome. Rather, here the Respondent has failed to justify its refusal to supply upon request information relevant to the Union's performance of its statutory duties, and has persisted in its refusal to supply such information, thus no mootness defense exists.

CONCLUSION OF LAW

By refusing on and after August 13, 1990, to bargain with the Union by refusing upon request to furnish the Union with the names of the nonunit employees who violated plant rule A.8 and the record of their discipline for having violated the rule, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

THE REMEDY

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

I have not, as part of the recommended remedy, required Respondent to furnish, on request, the information concerning the nonunit employees which on May 13 the Union requested Respondent to provide in connection with the Union's processing of Pena's grievance, and which Respondent refused to furnish, in violation of Section 8(a)(5) and (1) of the Act.

It would be inappropriate to order Respondent to furnish that information to the Union because the information has no current relevancy for the sole purpose for which the Union sought the information, namely, to process Pena's grievance. As I have noted supra, rather than have the arbitrator postpone or delay deciding Pena's grievance until this case was decided, the Union chose to litigate Pena's grievance before the arbitrator on September 6[11] and the arbitrator in January 1991 issued his opinion denying the grievance. In view of this, the only possible relevance for the information dealing with nonunit employees which Respondent unlawfully refused to furnish to the Union, in connection with Pena's grievance, would be its use to the Union in requesting the arbitrator to reopen the arbitration proceeding, because of newly discovered evidence. However, such evidence is clearly not newly discovered inasmuch as the Union knew of its existence at the time of the arbitration, but chose to proceed with the arbitration. In any event, even if the arbitrator chose to regard the Union's evidence as newly discovered, the arbitrator would lack the authority to reopen the hearing because the law is settled that once an arbitrator issues an opinion or an award the arbitrator's jurisdiction is at an end and the arbitrator has no power to reopen the hearing based on newly discovered evidence. See generally, Brand, *Labor Arbitration, The Strategy of Persuasion* 219–221 (PLI, October 1987); Hill & Sinicropi, *Evidence in Arbitration* 117–118 (BNA, 1980). In view of the absolute certainty that, as a matter of law, the arbitrator who decided Pena's grievance has no power to reopen the hearing in that case, I have concluded that the information which Respondent unlawfully refused to furnish to the Union herein has no possible current relevancy in connection with the processing of Pena's grievance by the Union, and for this reason I have not required Respondent, on request, to provide that information to the Union. See *C-B Buick, Inc. v. NLRB*, 506 F.2d 1086, 1093–1096 (3d Cir. 1974).

I realize I am required to follow the Board's view of the law, rather than a court's, however, I believe that my opinion is not inconsistent with the Board's decision in *C-B Buick*.[12]

In *C-B Buick*, the Board, with court approval, held that the employer failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act when in 1972, during contract negotiations with a union for a new collective-bargaining contract, it refused the union's request for 1971–1972 financial data after having alleged it could not afford to accede to the union's economic demands. However, the court, in disagreement with the Board, concluded that to remedy this unfair labor practice the employer was not required to furnish the 1971–1972 financial information to the union where the union and employer thereafter, in 1973, signed a 3-year collective-bargaining contract, and where there was no showing that the information requested during the contract negotiations was relevant or could be of use to the union in carrying out its statutory responsibilities after the execution of the new contract. In so concluding the court rejected the Board's argument that if the employer's 1971–1972 financial records indicated that it could have afforded higher labor costs, the union could presently modify the existing contract's wage or benefit provisions by an action under Section 301 of the Act. *C-B Buick, Inc. v. NLRB*, supra at 1093–1094.

In the instant case, as I have found supra, the only possible relevance for the information dealing with the nonunit employees, which Respondent unlawfully refused to furnish the Union in connection with Pena's grievance, would be its use to the Union in requesting the arbitrator to reopen the record in the arbitration proceeding based upon the discovery of new evidence. But, as I have also found supra, it is certain that the arbitrator would not reopen the arbitration hearing because the law is settled that the arbitrator has no authority to reopen the arbitration proceeding in Pena's case, whereas in *C-B Buick* the Board apparently concluded that it was un-

[11] Compare this case with *Pfizer, Inc.*, 268 NLRB 916 (1984), and *Chesapeake & Potomac Telephone Co.*, 259 NLRB 225 (1981), where, at the union's request, the arbitration proceeding was held in abeyance pending the outcome of a proceeding before the Board regarding the legality of the employer's refusal to furnish the union with information it needed to process the grievance before the arbitrator.

[12] It was at the court's request that the Board in *C-B Buick* dealt with the issue involved herein and apparently did so in a supplemental decision which issued on November 15, 1973. See *C-B Buick v. NLRB*, 596 F.2d at 1090. I was unable to locate the supplemental decision in the Board's published reports, so have assumed it was unpublished.

certain whether or not the Union would succeed in a suit under Section 301 of the Act.[13]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Westinghouse Electric Corporation, Sunnyvale, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by refusing to furnish it with information that it requests which is relevant and reasonably necessary to the processing and evaluation of grievances and preparing them for arbitration.

(b) In any like or related manner engaging in conduct in derogation of its statutory duty to bargain in good faith with the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) In connection with the Union's processing and evaluation of employees' grievances protesting the employees' discipline for violating a plant rule or regulation, which all persons employed at its Sunnyvale facility are expected to obey, furnish to the Union, upon request, the names of all individuals employed at the facility (exempt and nonexempt employees) who violated the rule or regulation in question and the disciplinary records showing the discipline imposed upon them for violating the rule.

(b) Post at its Sunnyvale, California facility copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the attached notice marked ''Appendix'' for posting by the Union, if willing, in conspicuous places where notices to employees and members are customarily posted.

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

APPENDIX

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

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

WE WILL NOT refuse to bargain collectively with District Lodge No. 93 and Local Lodge No. 565, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO by refusing to furnish them with information upon request which is relevant and reasonably necessary to the processing and evaluation of grievances and preparing them for arbitration.

WE WILL NOT in any like or related manner engage in conduct in derogation of our statutory duty to bargain in good faith with the District Lodge No. 93 and Local Lodge No. 565, and in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL, in connection with the above-named unions processing and evaluation of employees' grievances protesting employees' discipline for violating a plant rule or regulation, which all persons employed at this facility are expected to obey, furnish to the above-named unions, upon request, the names of all individuals employed at this facility (exempt and nonexempt employees) who violated the rule or regulation in question and our disciplinary records showing the discipline imposed upon those individuals for violating the rule or regulation.

WESTINGHOUSE ELECTRIC CORPORATION

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[13] If I believed there was any uncertainty concerning the authority of the arbitrator to reopen the hearing concerning Pena's grievance, I would require Respondent to furnish the Union with the information it has unlawfully refused to furnish herein, inasmuch as in remedying Respondent's unfair labor practices any uncertainty must be resolved against Respondent because Respondent's unlawful refusal to furnish the information caused the uncertainty. See generally *Kawasaki Motors v. NLRB,* 850 F.2d 524, 527 (9th Cir. 1988); *NLRB v. Madison Courier, Inc*., 472 F.2d 1307, 1321 (D.C. Cir. 1972); and *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 572–573 (5th Cir. 1966).

[14] 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.

[15] 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.''