

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: September 29, 2000

TO: Gerald Kobell, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Allegheny Energy, Inc., d/b/a 530-6067-6067
Allegheny Energy Supply Company, 530-6067-6067-2900
Inc., Allegheny Power, Allegheny 530-6067-6067-3000
Energy Service Corp., and 530-6067-6067-3100
Allegheny Power Service Corp. 530-6067-6067-5100
Case 6-CA-31229 530-6067-
6067-6017
530-6067-6067-8000
530-6067-6067-8500
530-6067-6067-9500

This Section 8(a)(1) and (5) case was submitted for advice as to whether Utility Workers Union of America, System Local 102 ("the Union") is entitled to certain information it requested from Allegheny Energy, Inc. ("the Employer") concerning the Employer's new power-generating operations at its Springdale, Pennsylvania, station ("Springdale"), and also as to whether, prior to a determination of the Union's entitlement to this information, the Region must decide if the Union has representational rights over employees who now work at Springdale, or who may work there in the future.

FACTS

The Employer is an electric utility holding company. Allegheny Energy Supply Company, Inc. ("AES") is a wholly owned, non-utility generating subsidiary of the Employer. The Employer derives substantially all of its income from the operations of its regulated electric subsidiaries, Monangahela Power Company, The Potomac Edison Company, and West Penn Power Company (now Allegheny Power Service Corp.), which currently do business as Allegheny Power ("AP"). Thus, AES produces electricity, and AP distributes electricity.¹

¹ While the exact corporate structure of the Employer and its subsidiaries is unclear, it is immaterial to the issues addressed herein.

AES, AP's predecessor companies and the Union have been parties to successive collective-bargaining agreements for many years. The most recent collective-bargaining agreement ("the Contract") between West Penn Power Company and the Union ran from May 1, 1996, through April 30, 1999. In October 1997, Allegheny Power Service Corp. and the Union executed a Memorandum of Agreement ("the Agreement"), extending the Contract's terms through April 30, 2001.² The contract covers a number of facilities at different locations.

For roughly 65 years, West Penn Power Company owned and operated Springdale, which was at one time comprised of eight coal-fired electrical generators. In 1973, Units 1 through 6 were shut down, and sometime thereafter the Employer razed the buildings which housed them. In approximately 1976, Units 7 and 8 were converted from coal- to oil-fired generators. In 1983, Units 7 and 8 were placed in "cold reserve," becoming essentially non-operational. Nineteen bargaining unit employees continued to work at Units 7 and 8 until 1995, when the Employer permanently shut them down. Sixteen of these employees then bumped into jobs at other Employer facilities, and three were laid off and found employment elsewhere.

Though still standing, the buildings housing Units 7 and 8 are very dilapidated. Over the past ten years the Employer has stripped Units 7 and 8 for parts and equipment. The Region has concluded that, as of 1995, there was no indication that the Employer intended to resume operation of Units 7 and 8 or to install new generators at Springdale, and no employee had a reasonable expectation of recall to Springdale.

In 1999, the Employer installed two single combustion, gas-powered jet turbines ("Units 1 and 2") at Springdale, located approximately 200 yards from Units 7 and 8. It is undisputed that AES owns Units 1 and 2. General Electric ("G.E.") manufactured and installed Units 1 and 2, and, according to AES, has maintained them since they began operating in about January 2000.³ The Union asserts it has heard rumors that non-union employees from an Employer

² Although the Contract and the Agreement were executed by corporate entities other than the Employer, the Employer does not dispute that it is bound by their terms.

³ It is unclear whether a G.E. service contract was a component of the purchase of Units 1 and 2.

facility in West Virginia have been performing maintenance work at Units 1 and 2, the only jet engine turbines located within the Union's territory. The Employer asserts that these rumors are erroneous.

Units 1 and 2 are used only during "peaking" times when extra power is required, not to exceed 2,000 hours per year (a level set by the Pennsylvania Public Utility Commission). Since January 2000, Units 1 and 2 have been used, on average, one day per month. The units are operated remotely from AES/AP headquarters. The Employer contends that no AES employees regularly work at Units 1 and 2.

Springdale also contains two switching stations, currently owned by AP and maintained by AP bargaining unit employees from the Armstrong, Pennsylvania, station.

Despite the fact that no bargaining unit employees have worked at Units 7 and 8 since 1995, Springdale is included in the Contract's unit description. The Contract also sets forth wage rates for 1999 and 2000 for job classifications at Springdale.

The Union learned of AES's plans to build Units 1 and 2 in the fall of 1999 from newspaper articles and by word-of-mouth. By letter dated November 1, 1999, the Union requested that the Employer negotiate with it "concerning staffing, operation and maintenance positions" at Springdale. The Employer responded on November 15, 1999, stating that since Springdale was not reopening, the Employer did not understand the Union's request, and that "no one has any claim or rights to any of the work performed at the new facility currently under construction."

By letter dated January 19, 2000,⁴ the Union wrote to the Employer requesting information "[i]n order to investigate potential grievances and the need for negotiations...related to Springdale." Specifically, the Union sought the following:

1. Copies of contracts and contract-related documents (including letters of agreement, requests for bids or proposals, acceptances, amendment items and other agreement documents) related to (a) the operation or prospective

⁴ All dates hereafter are 2000, unless otherwise noted.

operation of the facility, (b) the purchase and installation of turbine equipment, or (c) subcontracts for services to be performed at Springdale.

2. The names (sic) of each individual who has been present on the Company's Springdale property at any time from January 1, 1998 to the present date (unless that individual was present for purposes clearly unrelated to the installation, operation or maintenance of any equipment), and further describing the names of the individual's payroll employer, name of his/her supervisors, dates of presence, and duties on the property on each date, and the nature and location of their work when they are off the property.

3. A detailed description of the Company's plans for operation and maintenance of equipment on the property, both tentative and final.

4. All documents related to hiring of (sic) filling positions involved with Springdale, including job descriptive materials and requests for applications of any sort.

On February 23, the Employer, referring to its November 15 correspondence, replied that Springdale was not reopening, nor was the Employer changing Springdale's status in any other way, and accordingly the Union was not entitled to any of the information requested.

On March 7, the Union renewed its request for the information sought in its January 19 letter and also asked for "copies of all press releases, correspondence and other written communications (including regulatory documents) in which the Company has (in 1999 or 2000) referred to its operations at its Springdale facilities." The Employer, on March 27, denied this request, based upon its assertions that Springdale was neither reopening nor opening under a new name.

On April 25, the Union responded that its contract and bargaining unit previously covered the Springdale generating facilities, and that if the Employer intended to generate power from that property, the Union reserved "rights and claims that the unit and the contract should cover that work," adding that "[w]e have a right to fully investigate the claims."

The Union asserts that in past instances where the Employer converted generators from sludge to coal, and from

coal to a coal/oil combination it did not dispute the Union's representational rights over employees working on those units. Those instances, however, did not involve significant interruptions in operations of the affected plants.

ACTION

The Region should issue a Section 8(a)(5) and (1) complaint, absent settlement.

We conclude, in agreement with the Region, that regardless of the Union's representational status with respect to employees at Springdale, the information that the Union requested from the Employer concerning the operation of Units 1 and 2 is relevant because the Union reasonably believed that the Employer was diverting bargaining unit work in violation of the extant collective-bargaining agreement.

It is well settled that an employer must provide its employees' collective-bargaining agent with requested information which is relevant to the agent's performance of its duties on behalf of the employees.⁵ An employer is obligated to provide information that is relevant to contract negotiation and contract administration.⁶ Information about terms and conditions of employment of employees actually represented by a union is presumptively relevant and necessary and is required to be produced.⁷

However, when a union requests information about employees or operations other than those represented by the union, there is no presumption that the information is necessary and relevant to the union's representation of employees.⁸ Under these circumstances, a union bears the initial burden of showing relevancy.⁹ The duty to disclose

⁵ NLRB v. Acme Industrial Co., 385 U.S. 342 (1967); Detroit Edison Co., 440 U.S. 301, 303 (1979).

⁶ Leland Stanford Junior University, 262 NLRB 136, 139 (1982), enf'd 715 F.2d 473 (9th Cir. 1983).

⁷ Proctor Mechanical Corp., 279 LRB 201, 204 (1986), quoting Bohemia, Inc., 272 NLRB 1128, 1129 (1984).

⁸ Id.

⁹ NLRB v. Associated General Contractors, 633 F.2d 766, 770 (9th Cir. 1980), cert. den. 452 U.S. 915 (1981).

information concerning non-unit employees is triggered by a showing that the requesting party has a reasonable basis for requesting the information.¹⁰ Thus, a union need garner only sufficient evidence to make its information request "reasonably calculated to lead to the discovery of admissible evidence."¹¹

The Board has found that where a union seeks to determine if bargaining unit work is being diverted, a union has met its burden of establishing that the information is relevant. In Dusquesne Light Co.,¹² the ALJ, affirmed by the Board, found that a union was entitled to information concerning the names of the employees it suspected were performing bargaining unit work, their duties and the names of their direct supervisors and departments, and that the employer had violated Section 8(a)(1) and (5) by failing and refusing to furnish the information. 306 NLRB at 1044. The ALJ stated that there was little question that the relevance of the requested information was established if the union had a sufficiently objective basis for its belief that bargaining unit work was being diverted. The ALJ found that the union had direct knowledge that the employer had created a number of new secretary/stenographer positions, and limited knowledge about the nature of their duties, sufficient to raise a question as to whether they should have been classified as stenographers within the bargaining unit. Id. at 1043.

In Bentley-Jost Corp., 283 NLRB 564 (1987), the ALJ, affirmed by the Board, noted that a union need not establish that, in fact, there was unlawful diversion of bargaining unit work in order to trigger the employer's obligation to furnish information relating to work transfer allegedly in violation of the contract. Rather, the union must show it "had a reasonable belief that enough facts existed to give rise to a reasonable belief that" there was an unlawful diversion of the work away from unit

¹⁰ Brisco Sheet Metal, Inc., 307 NLRB 361, 366 (1992), citing NLRB v. Leonard B. Herbert & Co., 696 F.2d 1120 (5th Cir. 1983), and Blue Diamond Co., 295 NLRB 1007 (1989).

¹¹ Id. at 366, quoting NLRB v. Associated General Contractors, 633 F.2d at 771, fn. 6.

¹² 306 NLRB 1042 (1992).

employees.¹³ In this regard, we note that it is not the Board's function in this type of case to pass on the merits of the union's claim that the employer breached the collective-bargaining agreement or committed a ULP.¹⁴

The instant case does not involve presumptively relevant information, but instead involves information pertaining to non-unit employees. Applying the above principles to the facts of the instant case, we conclude that the information sought by the Union is relevant to performing its duties as collective-bargaining agent, because the Union has shown a reasonable basis for requesting the information.

We note initially that the Employer cannot refuse to provide the requested information on the grounds that the Union has lost representational rights over employees working at Springdale because, as set forth above, the Union, which has continued to represent unit employees,¹⁵ may be entitled to information concerning non-unit employees. Here, the Union's correspondence makes clear that the information sought is necessary to determine whether the Employer is violating the collective-bargaining agreement by diverting bargaining unit work with respect to the installation, operation or maintenance of Units 1 and 2 at Springdale. Thus, the information requested by the Union is relevant to its ability to administer the current collective-bargaining agreement, regardless of whether the Union retains representational rights over the employees working at Springdale.¹⁶

¹³ 283 NLRB at 568, citing Pence Construction Corp., 281 NLRB 322, 324 (1986), quoting Walter N. Yoder & Sons, Inc., 754 F.2d 531, 536 (4th Cir. 1985).

¹⁴ NLRB v. Rockwell-Standard Corp., 410 F.2d 953, 957 (6th Cir. 1969).

¹⁵ Cf. Cen-Vi-Ro Corp., 180 NLRB 344 (1969) (where employer with union contract ceased all operations for four years and contact expired, union did not represent employees when employer resumed operations).

¹⁶ See Pall Biomedical Products Corp., 331 NLRB No. 192, slip op. at 5-6 (2000) (union entitled to information about non-union facility because of possible future impact on union's representational role).

Next we conclude that the Union was entitled to the separate categories of information it requested. The Board recently upheld an ALJ's finding that a union was entitled to any and all correspondence, records or other documents concerning an employer's subcontracting of work.¹⁷ The ALJ noted that it makes no difference whether a grievance has actually been filed at the time of the information request (as was the case there) or is only being contemplated.¹⁸ Thus, we find that the Union is entitled to the information requested in paragraphs 1 and 3 of its January 19 letter concerning installation, operation and maintenance work at Springdale, and the information must be disclosed to help the Union perform its duties as collective-bargaining agent, specifically to decide whether to file a grievance.¹⁹

The Board has also found that union information requests for the names of employees suspected of performing bargaining unit work, their job descriptions, the names of their supervisors, and payroll preparers are relevant.²⁰ Accordingly, we find that the information requested in paragraphs 2 and 4 of the Union's November 19, 2000, letter concerning the names and dates of individuals present at Springdale since January 1, 1998, the name of their payroll employer, the names of their supervisors, and their duties, both on and off the property, is likewise relevant to help the Union determine whether its contract rights have been violated.

Moreover, inasmuch as the Employer averred in its November 15, 1999, February 23, 2000, and March 27, 2000, correspondence that Units 1 and 2 constitute a separate and distinct operation from Springdale, the Union is entitled to obtain from the Employer copies of all press releases, correspondence and other written communications (including regulatory materials) which it requested on March 7, 2000. We find that these materials are relevant in order to help

¹⁷ Reno Sparks Citilift, 326 NLRB No. 155, slip op. at 1 (1998).

¹⁸ Id., slip op. at 4.

¹⁹ See also KIRO, 317 NLRB 1325, 1328-1329 (1995) (employer obligated to give union information about employer's contract with another employer because of potential impact on unit employees).

²⁰ See, e.g. Dusquesne Light Company, supra; Brisco Sheet Metal, Inc., supra.

the Union investigate the Employer's assertions and to determine whether to file a grievance relating to possible contract violations.

This information is relevant because the Union can demonstrate a reasonable basis for requesting the information related to the new operations at Springdale. In this regard, the Contract, extended by the Agreement until April 30, 2001, lists Springdale (as opposed to Units 7 and 8 specifically, or the switching stations at Springdale) in its recognition clause, and sets forth wage rates for 1999 and 2000 at that location. In addition, the Union learned of the new power-generating operations at Springdale through newspaper articles and by word-of-mouth. And, the evidence indicates that in previous instances where the Employer converted generators from one power source to another, no dispute arose regarding the Union's right to represent employees at those sites. Thus, we conclude that the Union can establish a reasonable basis for believing that bargaining unit work is being diverted and, accordingly, that the information sought is relevant.²¹

We therefore conclude that, absent settlement, the Region should issue complaint alleging that the Employer has violated Section 8(a)(1) and (5) by failing and refusing to provide the Union with the information it requested concerning the Employer's new operations at Springdale.²²

B.J.K.

²¹ See, e.g. Dusquesne Light Co., supra, at 1043; Bentley-Jost Corp., supra, at 568.

²² The Region states that it is unclear whether the Union also seeks the requested information in order to establish the single employer or alter ego status of AP, AES or the Employer. The legal standard for establishing the relevance of the information to such a claim is whether the Union has an objective factual basis for so believing. See, e.g., Brisco Sheet Metal, Inc., supra at 366 (citations omitted). The Union meets this standard.