

Northern Indiana Public Service Company and Local Union No. 12775, United Steelworkers of America, a/w United Steelworkers of America, AFL-CIO-CLC. Case 25-CA-28040-1

May 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The issue presented in this case is whether an employer must comply with a union's request for a copy of notes of interviews conducted by the employer in investigating a bargaining unit employee's complaint of threatening conduct in the workplace. We find that in the circumstances presented here the Respondent did not violate the Act by refusing, on the basis of confidentiality, to furnish the Union with the interview notes at issue.¹

Facts

On August 27, 2001,² Northern Indiana Public Service Co. (NIPSCO or the Respondent) employee Randy Chaplin complained to his union representative, James Blythe, that Chaplin's supervisor, Patrick Long, behaved in a threatening manner toward Chaplin and other employees. In one incident on July 27, according to the later-filed formal grievance, Long allegedly approached Chaplin and stated, "Peace, love, and understanding, and then you empty the clip," while pointing his finger at Chaplin as if it were a gun. Blythe informed NIPSCO management of Chaplin's concerns, and Chaplin and

Blythe met that day with several management representatives to discuss the matter. NIPSCO allowed Chaplin to go home with pay for the remainder of that shift and then changed his schedule to separate him from Long. NIPSCO's EEO manager and labor relations coordinator, Barbara Sacha, was asked to discuss the matter with Chaplin and Long, in order to assess the situation and seek resolution. Sacha interviewed Chaplin on August 29, spoke to Operations Superintendent Mickey Bellard regarding Long that same day,³ and met with Long on September 5. Each individual spoke to Sacha voluntarily, and she prefaced her interviews by assuring each of them that she would keep their conversation confidential. Sacha personally typed up her handwritten notes of these interviews (the Sacha notes), protected them with a computer password, and did not provide them to NIPSCO's other managers.

Based on Sacha's recommendations after her investigation, Long's immediate supervisor, Lawrence Dora, held a meeting on October 22 with Long, Chaplin, and Union Representative Vern Beck,⁴ to discuss their concerns and resolve the matter. At the meeting, Chaplin explained his concerns about Long's conduct. Long responded that he wished Chaplin had come to him to resolve the issue, but that he wanted to put the matter behind him. Dora concluded the matter by instructing Long to keep his conversations with Chaplin strictly work related.

The following day, Blythe filed a grievance on behalf of Chaplin.⁵ The grievance stated that Long had "engaged in a violent manner toward subordinate(s)" and described the July 27 incident.⁶ The grievance cited arti-

¹ On August 30, 2002, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply 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 briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision.

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 all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also raised several procedural matters. We deny the Respondent's request for oral argument as the record, exceptions, and briefs adequately present the issues and the positions of the parties. We grant the Respondent's unopposed motion to correct errors in the transcript. Finally, we conclude that the judge correctly granted the Union's motion to quash the Respondent's subpoena for notes of union meetings regarding an employee's allegations of supervisory misconduct.

² All dates are in 2001, unless otherwise indicated.

³ Bellard was not a participant in the events Chaplin complained about. After Sacha coincidentally encountered Bellard, whom she knew from prior work together, she asked him about his opinion of Long, his relationship with Long, and his knowledge of any complaints made about Long. Bellard testified that he was unfamiliar with Chaplin's complaint when he spoke to Sacha.

⁴ We correct the judge's inadvertent statement that Blythe attended the October 22 meeting. The testimony establishes that Beck, not Blythe, was summoned to the meeting when Chaplin requested that a union representative be present.

⁵ Blythe testified that he spoke to both Chaplin and Beck after the October 22 meeting, and he filed the grievance on Chaplin's behalf the next day, because "Chaplin was extremely unhappy with the outcome of the meeting." NIPSCO conversely contends that Chaplin was satisfied with the outcome. Chaplin did not testify at the unfair labor practice hearing or otherwise document his reaction to NIPSCO's resolution of his complaint.

⁶ Despite the grievance's characterization of the July 27 incident as the "most recent" one, a log compiled by Chaplin and admitted into evidence at the hearing indicates otherwise. The log, which documents Chaplin's interactions with Long from July 27 through August 22, demonstrates that the July 27 incident was only one in a continuing series of events involving Long that troubled Chaplin. The log also

cle XVIII of the parties' collective-bargaining agreement, which requires NIPSCO to provide a safe workplace for employees. The grievance was processed through steps one and two of the grievance procedure and, at the time of the unfair labor practice hearing in this case, was proceeding to arbitration, in accordance with the collective-bargaining agreement.

Concurrent with his filing of the grievance, Blythe requested information regarding NIPSCO's investigation of Chaplin's complaint. In response, NIPSCO provided the names of employees who were involved in or interviewed in connection with Chaplin's claims.⁷ Citing confidentiality, however, NIPSCO refused to provide the Sacha notes to the Union.

The complaint alleges that the Respondent violated Section 8(a)(5) by refusing to provide the Union with requested information. The parties agree that the Sacha notes are the only information covered by the Union's request that NIPSCO has not provided.

Analysis

NIPSCO contends that it is not obligated to provide the Sacha notes to the Union because the notes are not necessary for the Union's role as bargaining representative and because they are confidential. The judge rejected NIPSCO's arguments. Contrary to the judge, we agree with NIPSCO that the information requested by the Union is confidential and that NIPSCO's interest in confidentiality outweighs the Union's need for the information. We further find that NIPSCO did not fail to meet its duty to offer an accommodation of the conflicting interests.⁸

Under Board law, a party may refuse to furnish confidential information to the other party in a collective-bargaining relationship under certain conditions. Initially, the party must show that it has a legitimate and substantial confidentiality interest in the information sought. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). If this showing is made, the Board must weigh the party's interest in confidentiality against the requester's need for the information, and the balance must favor the party asserting confidentiality. *Detroit Edison*

states that Long repeatedly mentioned a pistol he owned and said, "[D]eath means nothing to me."

⁷ The list provided by the Respondent did not include Bellard. As stated above, Bellard was not involved in the incident between Chaplin and Long, though Sacha did discuss Long with him.

⁸ NIPSCO raises several arguments about the timeliness and validity of the Union's grievance under the parties' collective-bargaining agreement, as well as about the Union's asserted reasons, other than its processing of the Chaplin grievance, for requesting the information at issue. Because we find the Sacha notes confidential, we, unlike our dissenting colleague, need not reach these additional arguments (which we construe as claims that this information is not relevant).

Co. v. NLRB, 440 U.S. 301 (1979); *Detroit Newspaper Agency*, 317 NLRB 1071, 1074 (1995); *Pennsylvania Power*, supra at 1105. Finally, even if these conditions are met, the party may not simply refuse to provide the requested information, but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality. *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). We apply that standard here.

First, we find that NIPSCO has a legitimate and substantial confidentiality interest in the information requested by the Union.⁹

We have previously identified some types of information that give rise to such an interest, including:

that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.

See *Detroit Newspaper Agency*, 317 NLRB at 1073. The Board's decisions following *Detroit Newspaper* demonstrate that this list of types of information that may be confidential is not exhaustive. For instance, we have recognized a confidentiality interest in the names and unlisted phone numbers of customers whose complaints led to an employee's discharge. *GTE California, Inc.*, 324 NLRB 424 (1997). We have also found that an employer demonstrated a confidentiality interest in an investigative report concerning an altercation between two employees. *West Penn Power Co.*, 339 NLRB 585 (2003), enfd. in part 394 F.3d 233 (4th Cir. 2005). In these decisions, the Board did not attempt to classify the confidentiality concerns as falling within the scope of the particular examples set out in *Detroit Newspaper*, supra, but rather considered whether the information was sensitive or confidential within the factual context of each case.

We find that the Sacha notes, which comprise the record of NIPSCO's investigation of alleged threats of workplace violence and which were created under an express promise of confidentiality, similarly give rise to a legitimate and substantial confidentiality interest. Con-

⁹ NIPSCO contends that the Sacha notes share relevant characteristics with witness statements that would be protected from disclosure under *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), but it does not argue that these notes actually constitute witness statements. Thus, we analyze them under the standards applicable to documents other than witness statements.

trary to the dissent's allegation that we alter Board law by protecting the confidentiality of the Sacha notes, we find that their protection is fully consistent with the policy underlying *Detroit Newspaper*.

Treating interview notes obtained in such circumstances as confidential serves two important purposes: (1) encouraging witnesses to participate in investigations of workplace misconduct and (2) protecting these witnesses from retaliation because of their participation. Long and Bellard, the only two individuals interviewed besides Chaplin, testified that they would have provided less information if they had not been assured of confidentiality. This evidence reinforces our conclusion that an employer's inability to reliably assure interviewees of confidentiality is likely to impede its investigations into workplace harassment or threats of violence and to deter the reporting of such incidents. *Pennsylvania Power*, supra, 301 NLRB at 1107. Such investigations are common and often necessary for safety in the current workplace. *IBM Corp.*, 341 NLRB 1288, 1291–1294 (2004). Without them, an employer would be handicapped in protecting its employees from harm by verifying and correcting workplace misconduct. Similarly, it would be hindered in defending itself against allegations of employer misconduct or vicarious liability for an employee's misconduct.¹⁰

Moreover, an individual's participation in such an investigation, whether as complainant or as witness, may subject the individual to intimidation and harassment by coworkers and/or supervisors. See, e.g., *Pennsylvania Power*, supra at 1107. In *Pennsylvania Power*, the employer declined a union request for the names of informants and the information they provided, which led the employer to suspect drug use by certain employees and subject those employees to drug testing. The Board

¹⁰ We recognize that Chaplin was the only employee who was interviewed. But the Respondent had an interest in securing the full story from Chaplin in response to questions framed by Sacha. In order to get that full story, the Respondent promised confidentiality to Chaplin. Unlike our dissenting colleague, we find that, in view of the clear threat in Long's conduct, Chaplin reasonably would have been less forthcoming without a promise of confidentiality. We do not agree with our colleague's assumption that, because Chaplin brought the matter to the Respondent's attention, he would have been equally candid with or without such assurance. Similarly, Long would reasonably fear retaliation from Chaplin and his sympathizers for telling Long's side of the story, and Bellard would fear retaliation from Long or from Chaplin and his sympathizers, depending upon his comments regarding Long's supervision of employees. As previously noted, both Bellard and Long testified that they would have provided less information if there were no assurance of confidentiality.

Moreover, contrary to our colleague's assertion, at the time of his discussion with Sacha, Chaplin had not formally complained about Long's conduct. In fact, Chaplin never filed a formal complaint; the later grievance was filed by Blythe on Chaplin's behalf.

found that the potential for harassment of witnesses distinguished investigations of such misconduct from investigations of accidents. *Id.* at fn. 15 (distinguishing *Transport of New Jersey*, 233 NLRB 694 (1977), which involved an employer's collection of passengers' statements about an employee's traffic accident). The Board found persuasive the employer's confidentiality interest in the identity of the informants and their statements. It required the employer to provide a summary of the statements only to the extent possible while protecting those important confidentiality concerns. Here, Sacha's investigation pertained to allegations of serious misconduct by a supervisor toward employees, including an alleged threat of violence and bodily injury or even death. The Respondent, in answer to the Union's information request, provided the names of individuals involved in the incident and interviewed by Sacha. In these circumstances, those employees would reasonably be concerned about retaliation if they confirmed the allegations. The considerations on which the Board relied in *Pennsylvania Power* apply equally in the face of an allegation that the subject of the investigation has already threatened deadly violence.

Finally, we believe that a promise of confidentiality is a reasonable and lawful step in securing information about alleged misconduct. Our colleague suggests that a promise of confidentiality is not a defense. Presumably, she would require the promisor to break the promise, contrary to the underlying confidentiality interest of the promisor and the promisee. Thus, contrary to the assertion of our dissenting colleague, a promise of confidentiality is relevant to the issue of whether the information will be considered confidential.

We disagree with our colleague that an unconditional promise of confidentiality "seems unrealistic in a business setting." There are a variety of reasons why such promises are made, e.g., to persuade employees to cooperate in an investigation of very sensitive matters involving other employees. It may well be that, in a particular case, a court or the Board will find that other interests outweigh those reasons. But that is not to say that it was unrealistic for the employer to make and defend its promise. Nor is it to say that the promise was not grounded in a legitimate business interest. Rather, it is a question of weighing that interest against other societal interests.¹¹

¹¹ The case that our dissenting colleague cites, *Postal Service*, 332 NLRB 635, 637 (2000), is inapposite. In that case, unlike here, the union did not request the notes taken by the employee assistance coordinator during the climate assessment interviews that she conducted, but rather the report that she submitted to management. The report did not specify what individual employees said in their interviews. More-

Next, we find that the balance between the Union's asserted need for the information and NIPSCO's interest in confidentiality favors NIPSCO.¹² Contrary to the judge, who found that the information sought by the Union "goes to the very heart of the grievance," we perceive this information as qualitatively different from the type of information on which a union relies to carry out its statutory responsibilities in the processing of a grievance.

Union grievance committeeperson James Blythe described the "Statement of the Grievance" that he inscribed on the grievance form as follows:

Supervisor Pat Long engaged in a violent manner toward subordinates. On the most recent event, Long approached Control Operator Randy Chaplin and stated "Peace, love, and understanding, and then you empty the clip." While saying this, Long made a physical gesture, acting out like he was firing a handgun at Mr. Chaplin.

Article XVIII of the contract, on which this grievance is based, requires NIPSCO to provide a safe work environment for its employees. Therefore, the merits of the grievance depended on whether Long's conduct was consistent with that contractual obligation. However, the information contained in Sacha's interview notes would not establish or measure NIPSCO's compliance. Because the Union already knew the identity of the witnesses and the substance of Chaplin's complaint, it could expect the interview notes to provide, at best, corroboration, denials, or assertions of mitigation regarding what was said.

The cases relied on by our dissenting colleague are inapposite. In *New Jersey Bell Telephone*, 300 NLRB 42 (1990), *enfd.* 936 F.2d 144 (3d Cir. 1991), the union representing an employee accused of disclosing an unpublished telephone number sought notes of conversations between the employer and the customer who had complained about the disclosure of the telephone number. In that case, the complaining customer had been offered no

over, contrary to our colleague's suggestion, the Board did not consider the relevance of the promise of confidentiality, because the employer did not rely on it in arguing that it was not obligated to furnish the requested information. Rather, the employer contended that the information was subject to an evidentiary privilege as witness statements and a self-evaluative report. We find no basis for our colleague's conjecture that, by not expressly considering the promise of confidentiality, an issue that was not argued in the litigation, the Board implicitly did consider it and deemed it irrelevant. Notably, although the Board rejected the employer's "possible claim of confidentiality" as untimely raised and lacking in merit, the employer insisted that it was not advancing such a claim.

¹² In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), cited by our dissenting colleague for the proposition that information requested by a union need only be useful or germane, no confidentiality concern was at issue.

assurance of confidentiality regarding the information she provided. In addition, the information pertaining to the employer's investigation was sought to establish the basis on which the employer had made its decision to issue the suspension that was the subject of the union's grievance.¹³

Similarly, in *Pennsylvania Power*, discussed above, the employer relied on statements from informants in conducting an investigation of employee drug use and ordering drug testing of certain employees.¹⁴ The drug testing led to discipline, including discharge, of those who tested positive for drugs. The Board found that the employer was entitled to withhold the identity of the informants and their statements, based on legitimate confidentiality concerns involving the potential for deterring informants from coming forward and for subjecting them to harassment, and not solely on the sensitive performance impairment issues related to that industry, as our dissenting colleague suggests. However, because the collective-bargaining agreement provided that the employer could require an employee to submit to drug testing only when the employer had a "suspicion" that the employee was under the influence of drugs, the Board found that the employer was required to provide a summary of the statements' contents, to the extent the safeguarding of confidential identifying information would permit, in order to demonstrate the basis for the required belief.¹⁵

In this case, by contrast, the Union seeks the Sacha notes neither to determine the basis for any action by NIPSCO against an employee nor to assess that basis against a contractual standard. Rather, the question is whether the statements made to Chaplin by Long are consistent with the contractual obligation to maintain a safe workplace. The Union has at its disposal, if only by virtue of Chaplin's account, the substance of what it must show to process a grievance related to workplace safety. Therefore, we find that the additional information that the Union could obtain from Sacha's notes does not go to the heart of that grievance.¹⁶ Moreover, we find that

¹³ Thus, there are *two* bases for distinguishing *New Jersey Bell*. And, as to the first basis, we believe that an assurance of confidentiality (as here) or lack of same is a *factor* to be considered.

¹⁴ 301 NLRB at 1106.

¹⁵ See also *Columbus Products Co.*, 259 NLRB 220, 220 (1981) (where the union knows the identity of all employees involved in the incident giving rise to a grievance and has conducted its own interviews with them, and knows as the substance of the employees' statements, "all relevant and needed information has been rendered . . . [so as to] enable the Union to represent employees more effectively." *American Standard, Inc.*, 203 NLRB 1132 (1973)).

¹⁶ *Booth Newspapers, Inc.*, 331 NLRB 296 (2000), relied on by our dissenting colleague, is also inapposite. There, the Board found that the union was entitled to documents that memorialized oral discipline and

NIPSCO's concerns about the consequences of disclosure were reasonable and substantial, particularly because it had already provided the Union the names of the interviewees who had provided the information. Accordingly, we conclude that the balance of interests favors NIPSCO's confidentiality interest.

Generally, a party that lawfully refuses to provide requested and relevant information on confidentiality grounds must seek an accommodation with the requesting party. *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999). In the particular circumstances of this case, however, we find that accommodations were offered.

The investigation conducted by Sacha involved alleged behavior that threatened violence toward employees, including Long's imitating firing a gun and at the same time making a statement about "empty[ing] the clip." Besides Long, Sacha had interviewed only two individuals, Chaplin and Bellard. NIPSCO provided the Union the names of the interviewees and those involved in the incident. Thus, the Union could interview them, just as the Respondent did.¹⁷

NIPSCO also provided the Union with all of the requested information regarding its handling of Chaplin's complaint, other than the Sacha notes. In addition, the Union's access to Chaplin provided it with sufficient information to evaluate and pursue its grievance regarding the Respondent's duty to maintain a safe workplace.

We find that there was accommodation, and that any further accommodation would compromise not only the pledge of confidentiality on which the interviewees relied but also their personal safety.¹⁸

We find irrelevant our dissenting colleague's observation, in hindsight, that the parties could have negotiated a mediation program exempt from information-sharing obligations. As noted, the Respondent offered accommodations. If the Union wanted more, it could have counterproposed same. Our colleague's suggestion of a mediation program far exceeds the bounds of any tradi-

were placed in employees' personnel files, rather than having to rely on the employees' recollections of the basis for the discipline. Sacha's notes here neither reflected nor resulted in any similar action by the Respondent.

We do not find, as asserted by our dissenting colleague, that the Union has the burden of showing that it could not obtain the information directly from Long and Bellard. Rather, in balancing the Union's need for the information against the Respondent's confidentiality concerns, we find that the Union had access at a minimum to Chaplin's account and could pursue its grievance on that basis.

¹⁷ Our colleague suggests that the supervisors would not permit an interview by the Union. However, the Union never asked, and, thus, the matter was never tested.

¹⁸ We believe that the Respondent's supply of the names was an effort to accommodate the Union's interests. We disagree with our colleague's contention that we have raised this contention post hoc.

tional accommodation required by the Board. More fundamentally, the Board has no authority to dictate the contents of agreements between parties.¹⁹ Accordingly, we find no basis for considering what the Union and NIPSCO could have negotiated had they anticipated the present dispute.

Our dissenting colleague contends that the Sacha notes have not been shown to contain confidential information. However, it is not *the substantive content* of the notes that makes them confidential. Rather, it is the promise of confidentiality that was made to the interviewees, and the concern that they might be subjected to intimidation.

Our dissenting colleague also contends that our decision today is "out of sync" with certain Federal court decisions. The cases cited by our colleague, however, expressly address the existence of a *discovery privilege* covering certain types of documents created under promise of confidentiality. Our decision here, however, does not involve a court proceeding or the Federal Rules of Evidence, including, as our colleague posits, the discovery privilege. Moreover, the frequency of information requests, and the continuing relationship between an employer and a union that represents its employees, implicate different considerations than those involved in litigation. In any case, the trend our dissenting colleague finds in federal courts is not unidirectional. Several district courts, in view of the need to encourage candid complaints and the risk of witness harassment, have recognized an evidentiary privilege for ombudsmen's communications. See, e.g., *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991); *Shabazz v. Scurr*, 662 F.Supp. 90 (S.D. Iowa 1987).

Finally, our colleague cites cases where the Board has declined to require the production of information. While she criticizes these cases, they constitute Board precedent, which we follow.²⁰

For these reasons, we conclude that NIPSCO did not violate the Act in refusing, on confidentiality grounds, to provide the Union with copies of Sacha's notes of her interviews with Chaplin, Long, and Bellard.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

Without even reading the documents, the majority erroneously finds: that Northern Indiana Public Service

¹⁹ *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

²⁰ Our colleague says that we have "repeatedly found ways to avoid requiring employers to turn over information to unions." We do not think it prudent to re-fight old battles in the instant case. Those cases, and this one, are confined to their specific facts, and the decisions speak for themselves.

Company (NIPSCO) had a legitimate and substantial confidentiality interest in the Sacha notes; that the balance of interests (even assuming that NIPSCO has a confidentiality interest) favors NIPSCO; and that NIPSCO adequately accommodated the Union's need for the Sacha notes by offering the Union nothing more than information it was otherwise obligated to provide. In accepting NIPSCO's confidentiality defense, the majority disregards protective measures available with regard to the assertedly confidential information—and ordered by the judge without challenge by the Union or the General Counsel—to answer NIPSCO's concerns. The majority departs from Board precedent at each step.¹

In recent decisions, while stating agreement with the Board's established framework for analyzing information requests, the Board has repeatedly found ways to avoid requiring employers to turn over information to unions. See *Richmond Times-Dispatch*, 345 NLRB 195 (2005); *Borgess Medical Center*, 342 NLRB 1105 (2004); *Southern California Gas Co.*, 342 NLRB 613 (2004); *Allen Storage & Moving Co.*, 342 NLRB 501 (2004). See also *Chemical Workers Union Council v. NLRB*, 2006 WL 1118514 (9th Cir. Apr. 28, 2006) (reversing Board's failure to require employer to disclose requested financial information). In this case, the majority again reaches a result contrary to settled principles.

Unlike the majority, I would reach NIPSCO's argument that it need not provide the Sacha notes to the Union because the notes are not relevant to the Union's representative duties and because of deficiencies in the related grievance. An employer's statutory duty to bargain collectively with a union that represents its employees includes the obligation to provide information that is relevant to the union's performance of its grievance-processing duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). Relevance is measured by a liberal, “discovery-type standard,” *id.* at 437, a standard these notes clearly meet. Further, “the Board, in passing on an information request, is not concerned with the merits of the grievance.” *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991).² Accordingly, I would find the Sacha notes relevant and reject NIPSCO's arguments that the grievance is invalid, untimely, and moot.

Next, I disagree with the majority's finding that NIPSCO's confidentiality interest is legitimate and substantial. The Board has narrowly limited the types of information that are confidential. *Detroit Newspaper*

Agency, 317 NLRB 1071, 1073 (1995). We require parties to provide investigative work product like the Sacha notes. *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990), *enfd.* 936 F.2d 144 (3d Cir. 1991). Assurances of confidentiality to interviewees do not override the Union's right to obtain the notes. *Postal Service*, 332 NLRB 635, 637 (2000) (ordering employer to provide summaries of work climate interviews despite assurance of confidentiality).³ Even “sensitive” facts may be subject to a party's obligation to provide information to its collective-bargaining partner. See, e.g., *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 103 fn. 13 (1996). But here we do not even know that the Sacha notes contain sensitive information: neither the judge nor we have had a chance to review the notes.⁴

To be sure, I recognize the importance of allowing employers thoroughly and effectively to investigate employees' complaints of workplace violence and harassment. But the Union's involvement would not necessarily interfere with investigations.⁵ As the majority recognized in *IBM Corp.*, 341 NLRB 1288 (2004), a union representative can facilitate the employer's investigation of workplace misconduct. In this case, the Union aided NIPSCO's investigation by identifying potential witnesses. But when the Union sought information from

³ Thus, the majority's effort to distinguish *New Jersey Bell*, *supra*, because that employer did not assure interviewees of confidentiality, is unavailing. Moreover, the majority's effort to distinguish *Postal Service*, *supra*, is not persuasive. The majority contends that *Postal Service* is inapposite because the union there requested a different type of information and because the employer ostensibly disclaimed its confidentiality defense before the Board. (As the majority recognizes, the Board considered and rejected the “possible claim” on the merits nonetheless.) Neither of the majority's stated rationales for distinguishing *Postal Service*, however, is relevant to the point for which I cite the case: the Board's unwillingness—before today—to allow an interviewer's promise of confidentiality to trump a union's right to obtain relevant information. The majority correctly observes that the Board did not expressly consider the relevance of the employer's promise of confidentiality. In my view, this merely reinforces the fact that the Board considered the promise irrelevant to the question of whether the information was actually confidential.

⁴ In contrast, in *West Penn Power Co.*, 339 NLRB 585 (2003), *enfd.* in part 394 F.3d 233 (4th Cir. 2005), relied on by the majority, the judge found the employer's investigative report confidential *after* reviewing it *in camera*. Despite the absence of such a finding in this case, the judge ordered several protective measures to limit dissemination of the notes' contents. Neither the General Counsel nor the Union has exceeded to these protective measures.

⁵ As I stated in *Fleming Cos.*, 332 NLRB 1086, 1089 (2000) (concurring opinion), I am “unwilling to presume that this concern [of witness harassment or intimidation] routinely exists to the same degree in grievance and arbitration proceedings as in adversarial unfair labor practice litigation.”

¹ I join the majority's resolution of the various issues addressed in the final two paragraphs of the majority's fn. 1.

² Even if NIPSCO's arguments were otherwise valid, it waived them by processing the grievance through steps one and two of the contract's grievance procedure.

NIPSCO about the investigation, it was treated as an intruder.⁶

The majority's reliance on *Pennsylvania Power* is misplaced. There, the Board found confidential the names and addresses of informants who told the employer about drug use by employees, but not the contents of the informants' statements. *Pennsylvania Power*, 301 NLRB at 1107. Here, the *substance* of Sacha's interview notes is at issue; thus, even under *Pennsylvania Power*'s analysis, the notes would not be protected from disclosure to the Union. Further, the Board gave "unusually great weight" to *Pennsylvania Power*'s confidentiality concerns because of the context: drug use could dangerously impair employees' performance of their duties in nuclear power plants. *Id.*⁷

The majority's conclusion that NIPSCO need not provide the Sacha notes to the Union is also out of sync with the approach taken by Federal courts, including the Supreme Court, in declining to recognize evidentiary privileges for similar information. In a case alleging discrimination in tenure decisions, the University of Pennsylvania failed to persuade the Supreme Court that peer review evaluations should be privileged from discovery by the Equal Employment Opportunity Commission (EEOC). The University argued that disclosure of the documents would have a "chilling effect" on candid communications and would impede the University's faculty selection process. In rejecting the University's claim, the Supreme Court required that evidentiary privi-

⁶ In contrasting a union representative's role with that of a coworker in a nonunionized setting, the *IBM* majority asserted that the union representative's fiduciary duty to unit employees will "help[] to assure confidentiality for the employer" with regard to information the union acquires about the employer's investigations. *IBM Corp.*, supra at 1293. While I question this claim (see *id.* at 1310 fn. 28 (dissenting opinion)), I wonder why the majority here does not expect the Union to exercise discretion with regard to the Sacha notes, based on its duty of fair representation to NIPSCO's employees.

⁷ The majority finds this case similar to *Pennsylvania Power* with regard to interviewees' assertedly reasonable fears of retaliation by a supervisor (if they confirmed Chaplin's allegation) or an employee (if they denied Chaplin's allegation). While rank-and-file employees might reasonably harbor such fears in that context, Sacha did not in this case interview any rank-and-file employees other than Chaplin himself, on whose behalf the grievance was being processed. Contrary to the majority's implication, there is no basis for concern that Chaplin would hesitate to tell Sacha the "full story" about Long's threatening behavior; Chaplin had already demonstrated his willingness to engage in NIPSCO's process by bringing his concerns about Long to the attention of the Union and NIPSCO and by seeking NIPSCO's assistance in resolving those concerns. In turn, the record provides no basis for concluding that Operations Shift Supervisor Patrick Long (whose own conduct was under investigation) and Operations Superintendent Mickey Bellard would reasonably fear retaliation from rank-and-file employees—or that Bellard would reasonably fear retaliation from Long—in a manner likely to affect their participation in the investigation.

leges "promote[] sufficiently important interests to outweigh the need for probative evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). The University's claim that the solicitation of evaluations traditionally included express or implied assurances of confidentiality did not persuade the Court that the requested privilege was appropriate.

Two circuit courts of appeals have ruled similarly. The Eighth Circuit rejected a claim of privilege covering the notes of a corporate ombudsman, who sought to resolve employees' complaints without resort to the grievance process.⁸ *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997). The court relied on "the significant burden of establishing that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* at 793 (internal quotation omitted). Similarly, the Fifth Circuit held that notes of a mediation process conducted under State law, which required such programs to be confidential, were not privileged from later discovery. *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487 (5th Cir. 1998). In each case, the court considered the importance of confidentiality in promoting open communication but found it insufficient to justify the creation of a new rule of secrecy.

The courts have not lightly created privileges related to alternative dispute resolution processes. And the Board most certainly should not do so in enforcing the duty to bargain. The importance of the exchange of information in collective bargaining has been underscored in numerous decisions.⁹ In particular, "[a]dequate information concerning grievances enables the union to make a considered judgment about the strength of its claim, to eliminate nonmeritorious claims at an early stage in the grievance process, and to prepare for arbitration."¹⁰

NIPSCO and the Union could have negotiated a mediation program, exempt from information-sharing duties, within the grievance and arbitration provisions of their collective-bargaining agreement. But they did not do so. NIPSCO's ad hoc "mediation" process, even if that aptly describes the process, was subject to no preexisting agreement that the investigation notes would be

⁸ McDonnell Douglas' ombudsman program was established and used regularly, in contrast to NIPSCO's ad hoc delegation of Sacha to investigate, evaluate and resolve Chaplin's complaint.

⁹ In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court emphasized the importance of information relevant to the union in its effort to police and administer the collective-bargaining agreement, and endorsed the "discovery-type standard" applied by the Board. It required disclosure of certain information pertaining to a grievance filed by the union. *Id.* at 437.

¹⁰ 1 Hardin, *Developing Labor Law* 858 (4th ed. 2001); *id.*, fn. 527 (citing cases).

unavailable to the Union.¹¹ By declining to order production of the Sacha notes, the majority diminishes the Union's ability to handle this grievance.

Unlike the majority, I would find that, even assuming NIPSCO has a confidentiality interest, the balance between the Union's need for the information and NIPSCO's interest in nondisclosure favors the Union.¹² The majority finds that the Union could get all the information it needed from Chaplin.¹³ This is both mistaken and irrelevant.

True, the Union could have obtained information about Sacha's interview *with Chaplin* by speaking to Chaplin himself. But Chaplin could not provide the Union with "the Respondent's officials[]" . . . impressions of what transpired in the conversations." *New Jersey Bell*, supra at 43. In any event, the availability of information from other sources is not a valid defense under Board law. E.g., *King Soopers, Inc.*, 344 NLRB 842, 845 (2005). In *Booth Newspapers, Inc.*, for example, 331 NLRB 296 (2000), we ordered the employer to provide the union a manager's notes of employee disciplinary meetings attended by a union official, because "[i]t is not incumbent upon the Union to go through the burdensome procedure of polling its members and Local officials to obtain their second hand opinions as to how [the manager] viewed a particular[] incident."¹⁴ The majority, however, would require the Union to do exactly that.

¹¹ The majority mischaracterizes my observation as seeking to impose an obligation on NIPSCO to negotiate such a program as an accommodation of its confidentiality interest. My point is simply that collective bargaining could address situations like that presented here, but that there is no contractual basis for NIPSCO's position.

¹² The majority charges that I "would require the promisor to break the promise" of confidentiality. At the outset, the Respondent's unconditional promise of confidentiality seems unrealistic in a business setting where collective-bargaining duties and other legal requirements may collide with the promise. But, in any event, the yielding of confidentiality promises to public interests in disclosure of information is hardly novel. See, e.g., *In re Grand Jury Subpoena*, 438 F.3d 1141, 1149–1150 (D.C. Cir. 2006) (even if a common-law privilege exists protecting journalists' confidential source information, it is not absolute; need for disclosure outweighed the reporters' and media's interests in confidentiality).

¹³ The majority's reliance on *Columbus Products Co.*, 259 NLRB 220 (1981), is misplaced. There, the employer provided the union with the substance of employees' statements about the conduct being investigated; NIPSCO, in contrast, did not. Moreover, to the extent that the majority suggests that the Union should have carried out its own investigation, rather than seeking information from NIPSCO, the majority fails to explain how the Union could have induced the Respondent's supervisors to cooperate in providing information of the type that the Respondent itself has already refused to provide. The majority errs further in its implication that the Union bears the burden of showing that it could not have obtained the information directly from Long and Bellard.

¹⁴ See also *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1008 (1994); *Detroit Newspaper Agency*, 317 NLRB at 1072.

The majority also errs in concluding that Sacha's notes of her interviews with Long and Bellard were not necessary for the Union to pursue its grievance. It is far from clear that the Union could process its grievance effectively without this information. To the extent that these notes may have provided information at odds with Chaplin's version, or which may have indicated mitigating circumstances, the Union was unable to fairly consider whether it should continue to pursue the grievance. Indeed, because the grievance was denied at steps one and two, the Union faced the expense and burden of arbitration without first being able to obtain the information to which it was entitled under the Act. That the Union persisted in pursuing the grievance is not evidence that it did not need the notes; rather, it reflects only that the Union engaged in what was, by necessity, blind advocacy.

Contrary to the majority's view, the information contained in the Sacha notes was important to the Union's enforcement of the collective-bargaining agreement's provision that NIPSCO would provide a "safe working environment." In order to assess whether NIPSCO was meeting this obligation, i.e., whether NIPSCO's response to the alleged threats was reasonable and adequate, the Union needed to know what NIPSCO's investigation had revealed.¹⁵ Cf. *New Jersey Bell*, supra (union was entitled to information it sought about employer's investigation, in order to determine appropriateness of employer's action, assertedly based on investigation findings).

The majority also applies a far narrower definition of "necessary" than the Board traditionally uses. In assessing the relevance of requested information, we have, with court approval, treated "necessary" as synonymous with "useful" or "germane." See *NLRB v. Acme Industrial*, supra, 385 U.S. at 435–436, 437.¹⁶ Without doubt, Sacha's notes of her interviews with Long and Bellard would be useful to the Union.

Worst, the majority disregards precedent establishing that a party that refuses to supply information on confidentiality grounds has an *absolute* duty to seek an accommodation. *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999); see also *U.S. Testing Co. v. NLRB*, 160 F.3d

¹⁵ The Union may have had good reason for concern about the adequacy of NIPSCO's response to Long's apparent death threat. After completing its investigation, NIPSCO appears to have taken no action beyond calling a meeting, at which Chaplin was asked to "voice his concerns" and Long was instructed to keep his conversations with Chaplin strictly work-related. The goal of the meeting, NIPSCO states, was to "attempt to reconcile any remaining acrimony between the two individuals."

¹⁶ Under Board law, "[i]t is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued." *Booth Newspapers, Inc.*, supra, 331 NLRB at 299 (citations omitted).

14, 20–21 (D.C. Cir. 1998). Here, despite the majority’s claim to the contrary, NIPSCO unquestionably failed to seek an accommodation and refused to provide the requested information based on a generalized claim of confidentiality. That should have been the end of the analysis; the 8(a)(5) violation should have been found. See *Mission Foods*, 345 NLRB 788, 793 (2005).

But the majority concludes that NIPSCO met its duty of accommodation by providing the Union with the names of interviewees and “all of the requested information regarding its handling of Chaplin’s complaint, other than the Sacha notes.” In fact, the only information that NIPSCO provided was the names of interviewees, which the Union had separately requested.

The Union’s written information request sought two types of information:

1. All notes, memos, summaries and conclusions from any meetings, discussions or conversations relative to the issue in item 1 by the following people:

All Labor Relations Representatives
All Management Employees at [the plant]
All Nipsco Security Personnel

2. The names of all employees involved or interviewed involving the claims made by Randy Chaplin in item 1.

NIPSCO’s labor relations coordinator, Jim Petrosky, responded to the request by letter. The letter began by summarizing the course of NIPSCO’s investigation, but without providing any details of Sacha’s interviews pertinent to item 1 of the Union’s information request. The letter then stated:

In response to your request for a copy of “all notes, memos, summaries and conclusions from any meetings . . .” which may have been kept or maintained by Management employees involved in this incident, the Company maintains that such records are strictly confidential and we are under no obligation to supply such records to the Union.

In response to Item No. 2, “The names of all employees involved or interviewed involving the claims made by Randy Chaplin . . .” the Company responds with the following names: Dennis Knight, William Breen, Patrick Long and Randy Chaplin.¹⁷

¹⁷ The record does not disclose NIPSCO’s basis for identifying Knight and Breen, who were not interviewed regarding the incident.

Please contact me if I can be of further assistance in this matter.

It is clear from the text of NIPSCO’s letter that it did not propose any accommodation of the Union’s request for item 1. NIPSCO simply stated that the notes were confidential and that it was under no obligation to supply them. Even NIPSCO does not contend, as the majority does, that providing the interviewees’ names (requested in item 2)¹⁸ in any way accommodated the Union’s need for the Sacha notes.¹⁹ The majority has simply fashioned, post hoc, an unsupported rationalization for NIPSCO’s failure to act.

Finally, the majority’s conclusion that “any further accommodation would compromise . . . [the interviewees’] personal safety” is purely hypothetical and wholly unsupported by the record. It also defies “[t]he Board’s cumulative experience [which] has shown that there should be, and almost always is, a way that the parties can effectively bargain for an accommodation that will satisfy both the union’s needs and the employer’s protective concerns.” *Metropolitan Edison*, 330 NLRB 107, 109 (1999). The majority’s conclusion unnecessarily rewards NIPSCO’s intransigence and is belied by the judge’s recommended protective order, which stringently limits the Union’s access to and use of the Sacha notes.²⁰

Today, without acknowledging it is doing so, the majority alters Board law regarding confidentiality defenses to information requests. It does so by expanding the types of information that may give rise to a legitimate and substantial confidentiality interest (despite a contrary Federal court trend), weighing factors that have not been part of the balancing test, and disregarding settled precedent on the duty to accommodate a request for confidential information. Because the majority’s decision is at odds with precedent and with the importance of the exchange of information to the collective-bargaining process, I dissent.

¹⁸ Neither NIPSCO’s summary of its investigation process nor its response to the Union’s item 2 included Mickey Bellard among the individuals interviewed regarding Chaplin’s complaint, though NIPSCO has subsequently acknowledged that Sacha interviewed him.

¹⁹ NIPSCO argues only that it met its duty to accommodate by ending its letter with “Please contact me if I can be of further assistance in this matter.” Not surprisingly, NIPSCO has provided no support for the proposition that such a formal pleasantry constitutes a legally-adequate offer of accommodation, and the majority does not contend that it suffices.

²⁰ In *West Penn Power Co.*, supra, the employer accommodated the union’s request for all investigative notes and related documents by providing the union with a summary of what it had discovered during its investigation. A similar accommodation might have sufficed here.

Patricia H. McGruder, Esq., for the General Counsel.
 Robert P. Casey, Esq. and Brian L. McDermott, Esq., for the
 Company.
 James Blythe, Committeeman, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a refusal to provide information case which I heard in Valparaiso, Indiana, on August 1, 2002. The complaint alleges Northern Indiana Public Service Company (the Company), a provider of electricity in northern Indiana, has, since about October 23, 2001, refused, upon request, to provide Local Union No. 12775, United Steelworkers of America, a/w United Steelworkers of America, AFL-CIO-CLC (the Union) with certain information relevant to the performance of its duties as the exclusive collective-bargaining representative for employees in an appropriate unit it represents. The Company's actions are alleged to violate Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses. At close of trial and after oral argument by the Government and company counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations setting forth findings of fact and conclusions of law.

For the reasons stated by me on the record at the close of the trial, I found the Company violated Section 8(a)(5) and (1) of the Act, by failing and refusing to provide the Union three, separate, one page each notes taken by Equal Employment Opportunity Manager and Labor Relations Coordinator Barbara Sacha of three separate interviews she conducted while investigating a harassment complaint by employee Randy Chaplin against Operations Shift Supervisor Patrick Long in August 2001. In finding a violation of the Act, I concluded the Government established that the requested information was relevant and necessary for the proper performance of the Union's duties in representing the unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). I rejected the Company's contention that the interview notes constituted witness statements under *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978). The record evidence established the notes were based on conversations Sacha had with two managers and an employee while investigating the harassment complaint. Sacha's notes were not verbatim accounts of the statements nor were they reviewed, adopted or even seen by the three persons interviewed. I likewise rejected the Company's contention the information was confidential. The information did not fall into the few exceptions for confidentiality recognized by the Board. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Finally, I found the Union's need for the information outweighed any of the Company's perceived confidentiality concerns or claims. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In ordering production of the information I granted a protective order safeguarding the information and upon final disposition of the underlying grievance directed the information be returned to the Company.

I certify the accuracy of the portion of the transcript, as corrected,¹ pages 145 to 165, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with certain requested information, I recommend the Company be ordered to cease and desist from engaging in such conduct and to supply the Union the investigative interview notes taken by Equal Employment Opportunity Manager and Labor Relations Coordinator Sacha when she individually interviewed employee Randy Chaplin, Operations Shift Supervisor Patrick Long, and Operations Superintendent Mickey Bellard regarding Chaplin's August 2001 harassment complaint.

[Recommended Order omitted from publication.]

APPENDIX A

145

This is my decision in the matter of Northern Indiana Public Service Company, herein "Company," Case No. 25-CA-28040-1.

Let me state, first, that it has been a pleasure to be in northern Indiana. I wish to thank Counsel and/or their representatives for their presentation of the case. Each of you are a credit to the party you represent.

This is an Unfair Labor Practice case, prosecuted by the National Labor Relations Board's, herein "Board," General Counsel, herein "Government Counsel," acting through the Regional Director for Region 25 of the Board, following an investigation by Region 25's staff.

The Regional Director for Region 25 of the Board, issued a Complaint and Notice of Hearing, herein "Complaint," on April 26, 2002, based on an Unfair Labor Practice charge filed on February 7, 2002, by Local Union No. 12775, United Steelworkers' of America a/k United Steelworkers' of America, AFL-CIO, CLC, herein "Union" or "Charging Party."

The facts in this case are admitted, stipulated, or undisputed. I am required to set forth certain of those facts,

146

such as jurisdictional information, which I shall now do.

It is admitted that the Company, is a corporation with its principal office and place of business in Merrillville, Indiana, and numerous other facilities throughout northern Indiana, including an office and place of business in Wheatfield, Indi-

¹ I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attachment C [omitted from publication].

ana, where it has been and is engaged in the generation, transmission, and sale of electricity.

During the twelve months preceding issuance of the Complaint herein, a representative period, the Company, in conducting its business operations that I have just described, purchased and received at its Indiana facilities, goods valued in excess of \$50,000, directly from suppliers located outside the state of Indiana. During that same time, the Company sold and shipped goods, or provided services, valued in excess of \$50,000, directly to customers located outside the state of Indiana.

The evidence establishes, the parties admit, and I find, that the Company is an Employer engaged in commerce within the meaning of Section 2(2), (5), and (6), of the National Labor Relations Act, as amended hereinafter, "Act."

It is alleged, the parties admit, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit, stipulate to, and I find that Labor Relations Coordinator and EEO Manager, Barbara Sacha, is an

147

agent of the Company, within the meaning of the Section 2(13) of the Act.

The employees of the Company, in the following unit, namely certain production, maintenance, generating station and other employees of the Company, herein called the "Unit," constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Since at least August 9, 1972, and at all times material, the Union has been the designated collective bargaining representative of the Unit, and since then, the Union has been recognized as the representative by the Company. This recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective from June 1, 1999 until May 31, 2004.

At all times, since at least August 9, 1972, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

It is alleged, and the Company admits the Union, on October 23, 2001, requested in writing, that it be provided certain information, namely, all notes, memos, summaries and conclusions from any meetings, discussions or conversations, relative to . . . [a grievance]. . . , by the following . . . Labor Relations Representatives, all management employees at RMSGS, all NIPSCO security personnel.

It is alleged the requested information is necessary for

148

and relevant to, the Union's performance of its duties, as the exclusive collective bargaining representative for employees in the Unit. It is acknowledged the Company has not provided the requested information.

It is alleged that the Company's actions violate Section 8(a)(5) and (1) of the Act. The Company denies having violated the Act in any manner alleged in the Complaint.

The facts of this case are taken from the testimony of various of the witnesses, and there are no credibility conflicts to be

resolved. Any differences that there might appear between the testimony of the witnesses can be easily reconciled.

James Blythe testified the Union and Company has had a bargaining history or relationship for approximately fifty years, and that he currently holds the position of Union Grievance Committeeperson. Blythe explained the Collective Bargaining Agreement has a grievance and arbitration provision, with a two-step procedure, with a third step being final and binding arbitration. According to Union Committee person Blythe, the Union has some 900 pending grievances with the Company, however this case involves only the grievance filed by Blythe on or about October 23, 2001, on behalf of bargaining unit employee, Randy Chaplin.

Union Committeeperson Blythe testified Chaplin spoke with him on several occasions about the conduct of Chaplin's immediate supervisor, Patrick Long. According to Blythe,

149

Chaplin specifically complained to him about Operations Shift Supervisor Long on August 27, 2001. Blythe testified Chaplin was upset and afraid that Long would do physical harm to him, based on statements and gestures Chaplin asserts Long made to and toward him.

According to Blythe, a meeting was arranged on August 27, 2001, between Chaplin, Operations Shift Supervisor Long, Union Committeeperson Blythe, Superintendent of Operations Fitzgerald, and Operations Manager Canner. At the meeting, Chaplin told the group of his concerns, and the basis for his concerns, related to Operations Shift Supervisor Long.

According to Blythe, the parties agreed to see how they could work through the situation. First, Chaplin was sent home for the shift with pay, and the Company separated the two individuals, putting them on different shifts, and/or teams, so as to keep them, as much as was possible, apart. The Company immediately undertook an investigation of Chaplin's complaint.

Company Operations Manager Dora testified he was Operations Shift Supervisor Long's immediate supervisor. Dora explained he was not present at the facility at the August 27, 2001 meeting, but learned of it immediately thereafter, by telephone at his home. Operations Manager Dora testified he spoke separately with Chaplin and Operations Supervisor Long, about a third or neutral person, speaking with both of them, to see if the matter and concerns related thereto, with both of

150

them, could be worked out or resolved. Dora testified both Chaplin and Long agreed to that procedure.

A relatively new management employee, namely EEO Manager and Labor Relations Coordinator Sacha, was selected by the Company to be the neutral investigator. She was selected because she was a new employee with the Company, and had investigative experience in her various capacities prior to this time. EEO Manager Sacha conducted separate interviews with Chaplin, Long, and Operations Superintendent Bellard.

Sacha testified she chose Bellard to be interviewed, because she knew him prior to this time, but did not know the others. Sacha said she and Bellard had served on a Civil Rights Committee together.

EEOC Manager Sacha testified she interviewed Chaplin alone in the control room on August 29, 2001. Sacha stated they discussed Chaplin's past history with the Company, his personal history with Operations Supervisor Long, and his current complaints against Long, and his complaints that other employees had against Long.

Sacha testified she gave Chaplin, as was her practice, her assurance that anything he said to her, was said in confidence, and was for her ears only. Sacha explained individuals spoke more freely, if they knew and understood what they said would be kept in confidence.

According to EEO Manager Sacha, Chaplin said he just

151

wanted to work in a professional manner, with Operations Supervisor Long. Sacha made notes of her conversation with Chaplin.

EEO Manager Sacha testified she saw Operations Superintendent Bellard in the hallway, at the facility that same day, August 29, 2001, and asked him if she could have a few minutes of his time. According to EEOC Manager Sacha, she asked Operations Superintendent Bellard his opinion of Operations Supervisor Long, his relationship with Long, and about any knowledge of complaints made about Long.

Sacha made notes of her meeting with Bellard. Sacha assured Bellard his comments were confidential, and would not be given to anyone.

Operations Superintendent Bellard testified he and EEO Manager Sacha, discussed his opinion of Operations Supervisor Long, Long's relationship with the employees, the situation between Chaplin and Long, and added no other supervisors were discussed, other than Operations Supervisor Long.

EEO Manager Sacha testified that she made notes of her meeting with Operations Supervisor Bellard, but did not reveal them to anyone.

EEO Manager Sacha interviewed Operations Supervisor Long on September 5, 2001. Sacha explained, she discussed with Long Chaplin's complaints against him. According to Sacha, Long stated he wished Chaplin had come to him right at the beginning,

152

so that it could have been worked out between them.

Sacha said they discussed Long's management style and the work facility, in general. Sacha told Long their conversation would be kept confidential. Sacha made notes of her conversation with Long.

It is the notes that Sacha made of her meetings with Chaplin, Long, and Bellard, that are at issue herein, with respect to the Union's information request.

On October 22, 2001, Operations Manager Dora held a meeting with Chaplin, Union Representative Blythe, Operations Supervisor Long, and one additional management person. At the meeting, Chaplin explained his concerns regarding Operations Supervisor Long, and Long listened without saying much, if anything.

According to Operations Manager Dora, it was decided that Long would keep his conversations with Chaplin, "strictly work related."

On October 23, 2001, Union Committeeperson Blythe filed the underlying grievance that gives rise to the information request, that forms the basis for the Government's Complaint herein. Blythe explained he filed the grievance, because the matter had not been resolved, and that Chaplin still feared for his physical safety.

According to Blythe, Chaplin and perhaps other employees under Long's supervision, feared Long was unstable, and that he

153

had mood swings. In the grievance, Blythe sets forth Article XVIII of the Collective Bargaining Agreement, as well as the opening part of the Agreement itself. Article XVIII of the current Collective Bargaining Agreement deals with the Company providing a safe work place for the employees.

The "agreement" part of the Collective Bargaining Agreement, in pertinent part provides, "It is the intent and purpose of the parties hereto, to provide a means of adjustment of differences, that may arise from time to time, and to promote harmony and efficiency, to the end, that the Company, the Union, and its members and the general public, may mutually benefit, and to establish a basic understanding relative to rates of pay, hours of work, and other conditions of employment."

On an attachment to the regular grievance form, Union Committeeperson Blythe attached a "statement of the grievance". That statement reads as follows: "Supervisor Pat Long engaged in a violent manner towards subordinates. On the most recent event, Long approached Control Room Operator Randy Chaplin and stated, 'Peace, love, and understanding, and then you empty the clip.' While saying this, Long made a physical gesture, acting out like he was firing a handgun at Mr. Chaplin."

The Company responded at step one, that it thought the matter had been resolved, that the two individuals were not working together, and that the Company was dedicated to providing a safe working environment for all.

154

On October 23, 2001, Union Committeeperson Blythe made a written request to the Company for certain information. The letter of request, at Paragraph 1, asked for, "All notes, memos, summaries, and conclusions from any meetings, discussions or conversations relative to the. . .[grievance]. . ., by the following people, all Labor Relations representatives, all management employees at RMSGS, and all NIPSCO security personnel."

The Union also requested the names of all employees involved or interviewed, involving the Randy Chaplin situation. The Company provided the requested names to the Union, but declined to provide any other of the requested information. In its letter of October 26, 2001, the Company stated to the Union, in pertinent part, "In response to your request for a copy of all notes, memos, summaries, and conclusions from any meetings, which may have been kept or maintained by management employees involved in this incident, the Company maintains that

such records are strictly confidential, and we are under no obligation to supply such records to the Union.”

Further the letter indicates, “Please contact me if I can be of further assistance in this matter.”

It is acknowledged by all parties that the only information in existence, that is responsive to the Union’s request, is the three one-page each, notes, that EEO Manager Sacha made of her meetings with Chaplin, Operations Supervisor Long, and Operations Superintendent Bellard.

155

Before addressing the specific application of case law to the instant facts, it is perhaps helpful to review certain applicable legal principles.

The principle has long been established that an employer is under a duty to provide a union which represents the employer’s employees with information requested by the union, which is relevant and necessary, for the proper performance of the union’s duties in representing the unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432(1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S.149 (1956). A failure to fulfill the obligation to furnish relative information upon request, conflicts with the statutory policy to facilitate effective, collective bargaining, *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310 at 1315 (8th Cir. 1980).

The duty to furnish information turns on the circumstances of each particular case, *Emeryville Research Center v. NLRB*, 441 F.2d 880 at 883 (9th Cir. 1971).

This duty extends not to just information which is useful and relevant for the purposes of contract negotiations, but also to that which is necessary to informed administration of a collective bargaining agreement, *Safeway Stores*, 252 NLRB 1323 (1980), and *Barcardi Corporation*, 296 NLRB 1220 (1989).

The key question in determining whether information must be produced is one of relevance. The standard for relevance is a liberal discovery type standard, and the sought after

156

information need not necessarily be dispositive of the issue between the parties, but rather only of some bearing upon it, and of probable use to the labor organization in carrying out its statutory responsibilities, *Barcardi Corporation*, supra.

It is well-established, however, that information concerning the terms and conditions of employment of unit employees, is presumptably relevant, and must be furnished, *Madison Center*, 330 NLRB No. 72 (January 13, 2000) [not reported in bound volumes].

The duty to furnish or provide information is not absolute, as the Supreme Court held in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1997).

There must be a balancing of interests of each side. The employer’s in retaining information and the union’s in obtaining it. Confidentiality claims may justify a refusal to provide relevant information. In making these determinations, the trier fact must balance the union’s need for the information sought, against the legitimate and substantial confidentiality interests of the employer. However, it is also well-settled, that as part of this balancing process, the party making a claim of confidentiality has

the burden of proving, that such interests are, in fact, present and of such significance, as to outweigh the union’s need for the information.

The party refusing to supply information on confidentiality grounds, has an absolute duty to seek an accommodation, *GTE California, Inc.*, 324 NLRB 424 at 427 (1997).

157

Thus, confidentiality, where adequately established, has been held to be a valid basis for declining to fully produce union-requested data, *Barcardi Corporation*, 296 NLRB 1220 (1989).

Stated differently, the right to disclosure is not without limits, and an employer’s obligation to provide such information is not unlimited. Under certain narrow circumstances, an employer may be excused from providing information presumed or shown to be relevant, when the employer has a good faith claim of undue burden, legitimate need for confidentiality, or justifiable fear of violence or harassment of employees, disclosure generally will not be required.

In *Detroit Newspaper Agency*, 317 NLRB 1071 at 1073 (1995), the Board stated confidential information is limited to a few categories: that which would reveal contrary to promises or reasonable expectations, highly personal information, such as individual medical records, or psychological test results, that which would reveal substantial proprietary information, such as trade secrets, that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses, and that which is traditionally privileged such as memoranda prepared for pending litigation.

An employer may not refuse to furnish relevant information to a union on the ground that the union has an alternative source or method of obtaining such information. A union is under no obligation to utilize a burdensome procedure, in order

158

to obtain desired information where the employer may have such information available in a more convenient form, *Orthodox Jewish Home for the Aged*, 314 NLRB 1006 at 1008 (1994).

An employer has an obligation to furnish requested relevant information without undue delay, and within a reasonable time reference to the request, *Barclay Caterers*, 308 NLRB 1025 at 1037 (1992).

If it is raised that a union has made its request for information in bad faith, one must look at the evidence to see if at least one reason for the demand can be justified and then, if it can, good faith has been established.

The Board has long adhered to its policy, that witness statements do not have to be produced under the teachings of *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978).

The basis for not having to disclose witness statements is based primarily on the fact that it would prevent intentional intimidation and harassment of witnesses, aimed at making them change their testimony, or decline to testify at all.

First, it must be determined whether or not the information requested by the Union, that I have specifically outlined twice in the Decision, is relevant for the purpose which the Union requested it. Applying the teachings of the case law, with re-

spect to relevance, I must look at it in the manner that I would as though it were a liberal discovery type policy. I must be concerned whether it has some bearing upon

159

the issues. I must consider whether it is of probably use to the Union in carrying out its duties.

I am persuaded that the information requested by the Union is relevant to the issues of the grievance filed. The subject matter of all three interviews dealt almost exclusively with the situation between Chaplin and Long.

The Company seemed to indicate that perhaps Bellard, if not any of the others, gave information regarding his views of supervisors' relationships with supervisors, or his view of other supervisors.

Operations Superintendent Bellard cleared that up. He said that no other discussions were had about any supervisors, other than Supervisor Long, that the discussions about Supervisor Long dealt with the matter that involved Chaplin, as well as Supervisor Long's conduct in the department.

The information sought is of the nature that goes to the very heart of the grievance, that was filed by the Union. The Union's grievance deals with allegations that Supervisor Long conducted himself in an improper manner, toward Employee Chaplin. That was the subject matter of the interviews by EEO Manager Sacha, with each of the three individuals she interviewed.

I am fully persuaded the Government has met its burden of establishing the relevancy under the Board's guidelines, of the information sought.

160

To the extent that the Company contends, and I am not sure they make a strong argument on this point, that the Union wants the information for some purpose other than to pursue the grievance involving Chaplin, and hints that the request would be made in bad faith, is of no merit in my opinion.

The Union limited its request in writing to the information and stated specifically, that it wanted it for the sole purpose of pursuing this grievance, and based on relevance and a lack of bad faith, it is entitled to the information.

Are the statements—are the notes that EEO Manager Sacha made at her three meetings with the three individuals, witness statements, as opposed to investigative work product.

I am persuaded that the statements that Sacha took are investigative work products, and not witness statements that would be privileged to be precluded from being provided under the teachings of *Anheuser-Busch*.

First, these notes that EEO Manager Sacha made, were not adopted by the individuals, she interviewed. They were not ratified by the individuals that she interviewed. They were not signed by the individuals interviewed.

Now, I recognize that the Board in a number of cases, has said that they haven't spelled out any formality that must be followed in order to qualify a statement, as a witness statement, as opposed to a work product investigative statement. But, looking at the purpose behind, which the Board allows the

161

non-production of witness statements, is that it would potentially preclude the intimidation of witnesses, or having witnesses change their testimony.

Neither of those items would be present in the production of the statements that are at issue herein. There is no witness intimidation or harassment to change testimony, or even to decline to testify at all in this case, because all this case involves is three sets of notes that an EEO Manager took during an investigative interview with one employee, and two management officials.

In summary, I am persuaded that these are not witness statements that the Company would be privileged to preclude from production, but are merely investigative work products.

The question then becomes, and perhaps is the most critical question of this case, which is the Company's contention that it is privileged not to provide the three statements, based on confidentiality claims.

There is no question but what the Company raised confidentiality claims early in the request for the information. The Company failed to make any effort in my opinion, to reach an accommodation with the Union, regarding the confidential nature of the information, and suggesting an alternative to it.

However, I do not view that as fatal to the Company's request, or the Company's contention that the information is of

162

such a confidential nature, that it should not be required to provide the information.

In a balancing of the interests with respect to confidentiality claims, the Company does, however, have the burden of establishing that it has a legitimate and substantial confidentiality claim.

The Company has failed, in my opinion, to meet those two burdens, that it has a legitimate and substantial confidential claim, such as which would preclude the production of these documents.

The few categories where the Board has allowed the confidentiality claim to be validly raised, involves and limited pretty much to, medical records, psychological test results, proprietary information, trade secrets, or confidential information that would lead to harassment or intimidation, or the identification of witnesses.

There are none of those categories in this case. The witnesses have already been identified by the Company in meeting the second request of the Union for information in its original information request. There is no indication in this record that the production of these documents could lead to harassment or retaliation against anyone. There is no proprietary information here. There is no psychological tests or medical records.

Thus, I find that the confidentiality defense is not available to the Company in this case.

163

I find that the Company's failure to provide this specific information, as I have outlined above, constitutes a violation of Section 8(a)(5), and (1) of the Act. I shall direct the Company to provide the Union the information requested, namely, EEO

Manager Sacha's notes of her meetings with Chaplin, Long, and Bellard, regarding Chaplin's complaints about Long, but with the following safeguards. In applying safeguards, I am not unmindful of the need for a free exchange between investigators and the individuals that are providing the information to the investigators, be they management or employees, so that a proper investigation may be made, and hopefully resolving employee complaints and management concerns, before they reach the level they are presently at in this case.

I direct that the information be provided to Union Committeeperson Blythe and/or the President of the Local Union involved. I direct that the Union not show the information to anyone, other than its local officials or legal Counsel. I direct that the Union make no copies of the information, and that it use the information only with respect to the underlying grievance.

If the information that is provided is to be used in any arbitration or legal proceeding, prior to such proceeding, the Union will, at the time it seeks to offer the information, seek a protective order from the arbitrator or legal authority involved.

164

After a final and complete resolution of the dispute between Chaplin and Long, as outlined in the grievance filed by Union Committeeperson Blythe on October 23, 2001, I direct that the

Union, at that point, return the information to the Company, with an indication that it has made no copies thereof.

I shall order that the Company post an appropriate notice regarding the allegations of the Complaint.

The Court Reporter is required, within ten days of today, or thereabout, to provide a copy of the transcript of this proceeding to me. At that time, I shall certify the pages of the transcript that constitute my decision. I shall, if necessary, make corrections or additions thereto.

I then, will certify that to the Board, attaching a copy of the transcript as corrected, that constitutes my decision, along with a Notice, that I shall direct be posted, and it is at that point, that any appeal period from this decision would commence, but please be advised, that you should follow the Board's rules and regulations with respect to any appeal period, rather than rely on my understanding of them.

I will serve on all parties, my certification of the decision, when I have received the transcript and have had the opportunity to review, make corrections, thereon, and certify it.

Let me again state, that it has been a pleasure to be in northern Indiana, and this trial is closed.

165

(whereupon the hearing in the above-entitled matter was closed.)