

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

Advice Memorandum

DATE: January 29, 2009

TO : Marta Figueroa, Regional Director
Region 24

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

SUBJECT: United States Postal Service 530-6067-6001
Case 24-CA-10953 530-6067-6050
 530-6067-6067-2300
 530-6067-6067-5200

The Region submitted this case for advice as to whether the United States Postal Service unlawfully refused to provide the Union with information regarding a surveillance camera installed in a shop steward's assigned postal vehicle as part of an investigation by the Postal Service's Inspector General. We agree with the Region that the Postal Service lawfully declined to provide confidential information regarding the surveillance camera to the Union during an ongoing Inspector General investigation.

FACTS

National Association of Letter Carriers, Branch 869 ("Union"), represents letter carriers employed by the United States Postal Service ("USPS") at the Rio Grande Post Office in Puerto Rico.

On June 16, 2008,¹ mail handler [*FOIA Exemptions 6 and 7(c)*] was distributing mail on his route when he discovered a surveillance camera attached to a small computer in the dashboard of his assigned postal vehicle. [*FOIA Exemptions 6 and 7(c)*].

On June 17, Union President Montanez submitted an information request to Postmaster Robles of the Rio Grande Post Office asking who installed the surveillance camera and who authorized the installation. On June 17, Robles responded that he did not install or authorize the installation of any cameras, and that he had no knowledge of the matter.

¹ All dates are in 2008.

On June 18, Montanez requested the following information from the USPS Office of the Inspector General ("OIG") regarding the surveillance camera:

1. What was the purpose of installing a camera in this particular vehicle?
2. Who installed the camera?
3. How long was this camera installed?
4. What was the timeline that the camera was installed?
5. When did the camera record?
6. Copy of unedited DVR discs.

Montanez told OIG that he was requesting the information under Articles 17 and 31 of the collective-bargaining agreement,² and that the information was necessary to determine if employees' rights were violated.³ OIG did not respond to this request.

During the week of June 18-25, Montanez spoke with General Manager Reid of the USPS General Post Office - a central postal facility - regarding the surveillance camera. Reid explained that OIG was an independent entity, and that if it had installed the surveillance camera, it would not have informed USPS.

USPS contends that the information regarding the surveillance camera is in the possession of OIG, a separate and independent agency, which has not provided the information to USPS. USPS argues that it has no obligation to provide the Union with information unavailable to it, but that, in the event it receives information regarding the surveillance camera from OIG, which would occur at the conclusion of the investigation, the Union could request such information pursuant to the collective-bargaining agreement and postal regulations.

² Article 17 deals with the rights and responsibilities of Union stewards. Article 31 deals with USPS obligations to provide information to the Union.

³ Article 134.22 of the USPS Manual (M-39) states that: "The manager is not to spy or use other covert techniques. Any employee infractions are to be handled in accordance with the section in the current National Agreement that deals with these problems."

OIG contends that it is a separate and independent entity from USPS, owes no bargaining obligation to the Union, and therefore is under no obligation to respond to the Union's information request. In addition, OIG acknowledges that it installed the camera but states that it cannot provide the information requested because it relates to an ongoing OIG investigation. OIG asserts that releasing the information would "undermine the OIG's mission to detect and prevent fraud, waste, and abuse within the Postal Service." OIG also states that it routinely provides such information in response to union requests, so long as the investigation is no longer ongoing and the information requested is not otherwise privileged.

ACTION

We agree with the Region that the information requested was confidential, and that USPS did not violate the Act by declining to provide it to the Union prior to the conclusion of OIG's investigation.

A union is generally entitled to information that is relevant to its collective-bargaining responsibilities.⁴ The Board uses a liberal standard in judging whether requested information is relevant.⁵ However, where the requested information is arguably confidential, the interest in maintaining that confidentiality and the interest of the union in representing unit employees must be balanced.⁶ The Board has been reluctant to order the disclosure of requested information where its release could jeopardize an ongoing investigation. Thus, in Postal Service,⁷ USPS was deemed justified in refusing to provide the union with the names of confidential informants and audio and video tapes of drug transactions, despite being

⁴ See NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967).

⁵ Id. at 437.

⁶ Detroit Edison Co. v. NLRB, 440 U.S. 301, 319 (1979) (employer did not violate Section 8(a)(5) by refusing to provide union with confidential employee scores on aptitude tests absent consent of affected employees; employer's offer was reasonable accommodation of union's need for data, since obtaining consent of employees placed minimal burden on union).

⁷ 306 NLRB 474, 477 (1992).

relevant to a pending grievance, because disclosure might impair the ongoing investigations.⁸

Here, the requested information appears to be relevant to the Union's representational responsibilities in that it would help the Union determine whether to file a grievance. However, there is a legitimate confidentiality concern regarding the disclosure of this information while OIG's investigation is ongoing. [*FOIA Exemptions 6 and 7(c)*]

], in which case releasing information about that ongoing investigation to the Union would impede the investigation. Thus, OIG has a legitimate interest in being able to effectively investigate fraud, waste, and abuse at USPS, and it is reasonably likely that this interest would be impeded by disclosing this information during the investigation. Moreover, USPS has indicated that it will make this information available to the Union when the OIG investigation is concluded. In these circumstances, this is a reasonable accommodation to the Union's need for the information.

We further note that OIG arguably is separate and independent from USPS such that it owes the Union no bargaining obligation - and hence no duty to provide information.⁹ This would not extinguish USPS's duty to provide information, because an employer generally must

⁸ The Division of Advice reached a similar conclusion in United States Postal Service, Case 12-CA-24496, Advice Memorandum dated December 6, 2005 (USPS lawfully withheld memorandum prepared pursuant to Postal Inspection Service fraud investigation until management's subsequent independent disciplinary investigation was completed, because confidentiality interest outweighed union's interest in preparing for Weingarten interviews).

⁹ In this regard, on March 5, 2008, the Office of Appeals determined in Case 24-CA-10642 that USPS lawfully refused to provide a union with information regarding an ongoing OIG investigation because the information was in the possession and control of OIG, which was not a representative of USPS. Compare NASA v. FLRA, 527 U.S. 229, 237, 243-245 (1999), finding that NASA's inspector general was subject to the federal statute granting Weingarten rights to federal employees because it was a "representative" of NASA, notwithstanding the independent investigatory and auditing function set forth in the Inspector General Act of 1978, 5 U.S.C.A. App. 3 §1, et seq.

make a good faith attempt to obtain information not in its possession.¹⁰ However, because OIG's policy is to withhold information regarding ongoing investigations from USPS, it would have been futile for USPS to ask OIG to release the requested information regarding the surveillance camera.

Accordingly, the Region should dismiss the charge, absent withdrawal.¹¹

B.J.K.

¹⁰ See United Graphics, 281 NLRB 463, 466 (1986) (rejecting employer's argument that it lawfully refused to provide information not in its possession regarding temporary employees, because it failed to demonstrate that it could not obtain the information from temporary agency); Congreso de Uniones Industriales de Puerto Rico v. NLRB, 966 F.2d 36, 38 (1st Cir. 1992) (employer unlawfully refused to provide information in possession of parent corporation where evidence indicated that employer might have obtained the information by simply asking its parent corporation for it).

¹¹ [*FOIA Exemptions 2 and 5*