

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

Advice Memorandum

DATE: February 8, 2007

TO : Helen Marsh, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 530-6067-6001-3770
530-6067-6001-5650

SUBJECT: Buffalo Wire Works Co. 530-6067-6001-8000
Case 3-CA-26013 530-6067-6067-4700
530-6067-6067-5200
530-6067-6067-8000

This case was submitted for advice as to whether the Employer unlawfully refused to provide the Union with the home addresses of permanent replacement employees or whether the Employer lawfully withheld that information due to misconduct on the picket line.

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer's refusal to provide the addresses violated Section 8(a)(5). [FOIA Exemption 5

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1. Clear and Present Danger Test

Under current Board law, relevant information about replacement employees must be provided unless the employer can establish a "clear and present danger" that the union will misuse the information.¹ An employer can establish that danger by showing that replacements were subject to serious incidents of violence, such as property damage and bodily injury, and the union has been implicated in the

¹ Metta Electric, 338 NLRB 1059, 1064 (2003), enf. denied in part sub nom. JHP & Associates v. NLRB, 360 F.3d 904 (8th Cir. 2004); Grinnell Fire Protection Systems Co., 332 NLRB 1257, 1257 (2000), enf. denied in relevant part 272 F.3d 1028 (8th Cir. 2001), rehearing denied (2002) (employer can rebut presumption by showing "harassment" of employees likely to result from furnishing information); Advertisers Composition Co. Typographers, 253 NLRB 1019, 1019 n.2 & 1023 (1981).

misconduct.² Confrontational but non-violent behavior at the picket line, such as insults and name-calling, does not establish a "clear and present danger," especially where there is no evidence that union representatives were involved and where the strike has ended.³

We agree with the Region that the Employer must furnish the Union with replacement employees' home addresses because there is no "clear and present danger" that the Union will misuse the information to harass the replacements. Most notably, the strike was largely peaceful, with only a few incidents involving misconduct and none involving physical violence,⁴ and included several months of no incidents at all. In addition, all of the alleged misconduct occurred at or near the picket line rather than at the replacements' homes and, because the

² See, e.g., Brown & Sharpe Mfg. Co., 299 NLRB 586, 590-91 (1990), remanded sub. nom. Machinists Dist. Lodge 64 v. NLRB, 949 F.2d 441 (D.C. Cir. 1991), on remand 312 NLRB 444 (1993) (strike violence included assault, bodily injury, property damage, arson, and explosions at employees' homes as well as at picket line; union did not deny responsibility); Webster Outdoor Advertising Co., 170 NLRB 1395, 1396 (1968), enfd. 419 F.2d 726 (D.C. Cir. 1969) (threats and assault, including conviction for assaulting replacement with a gun; union failed to provide assurances there would be no violence). See also A.T. Massey Coal Co., Cases 9-CA-23271-1 et al., Advice Memorandum dated February 3, 1987 (destruction of property, bodily injury, rock throwing; state and Section 10(j) injunctions obtained against union due to strike violence).

³ See, e.g., Advertisers Composition Co. Typographers, 253 NLRB at 1023 (incidents "[appear] to have been no more than the normal picket line name calling and verbal taunting;" no evidence of union involvement). See also Chicago Tribune Co., 303 NLRB 682, 687-89 (1991), enf. denied 965 F.2d 244 (7th Cir. 1992), rehearing denied (1992) (serious incidents, including vandalism and firebomb, but no evidence of union responsibility and union gave assurances against misuse of information). Cf. Armstrong World Industries, Inc., 254 NLRB 1239, 1244-45 (1981) (name-calling and one instance of a tire slashed by an unknown perpetrator did not establish a danger of harassment).

⁴ The misconduct going beyond general name-calling and harassment is detailed below in our analysis under the "totality of the circumstances" test.

strike has ended, there is no possibility of Union misconduct from picket line confrontations. A small number of former strikers have returned to work and there have been no incidents of misconduct towards replacement employees at the workplace. In light of this minimal risk of harm to replacement employees, the Employer's withholding of the replacements' home addresses was unlawful under the Board's current "clear and present" danger test.

2. Totality of Circumstances Test

We further agree with the Region that applying the courts' "totality of the circumstances" test does not warrant a different result. This test requires a balancing of the Union's actual need for the information, the Employer's claim of harassment, confidentiality or privacy concerns, the existence of alternative means for the Union to achieve its goals, and the Employer's offer of alternatives to providing the contested information.⁵

This case involves a nine-month strike that ended when the Union and Employer agreed to a collective-bargaining agreement with no union-security clause. Pursuant to the Union's request, the Employer furnished it with employee names but refused to provide their addresses, citing concerns over employee confidentiality and fear of harassment of replacements at their homes due to picket line misconduct. The Union now represents a complement of 45 employees; 42 are replacement employees and 3 are former strikers. Only three former strikers remain on the recall list.

Applying the "totality of the circumstances" test to these facts, we agree with the Region that the Union's need for replacement employees' home addresses outweighs the Employer's reasons for withholding that information. First, the Union has a strong need for the addresses in order to communicate with these employees so it can adequately administer the newly executed collective-bargaining agreement under which the replacements now work.⁶

⁵ See Tenneco, Inc., Case 7-CA-49251, Advice Memorandum dated August 23, 2006, at n.9; Anchor Harvey, LLC, Case 33-CA-14577, Advice Memorandum dated November 12, 2004, at n.13, both citing circuit court cases balancing the respective interests under the totality of the circumstances test.

⁶ See Pearl Bookbinding Co., 213 NLRB 532, 534 (1974), enfd. 517 F.2d 1108 (1st Cir. 1975) (the need for employee names

Indeed, the Union's statutory duty to fairly represent unit employees underscores its need to effectively communicate with the replacements about representational issues.⁷ This need is particularly strong given the large percentage of replacement employees in the employee complement, which makes it impractical for the Union, at least in the near term, to adequately uncover replacement employees' addresses to communicate with them.⁸ Likewise, the Union requested the addresses only two days after the strike ended, leaving little time for the Union to acquaint itself with these employees and personally obtain the information.⁹ Finally, the lack of a union-security clause in the new collective-bargaining agreement hampers the Union's ability to communicate with employees, providing no alternative

and addresses so a union can adequately represent unit employees is relevant to the administration of collective bargaining agreements already adopted).

⁷ The Union interest at stake here is much more demonstrable than the interests in either the Grinnell or JHP Assoc. circuit court decisions, supra. In Grinnell, the strike was ongoing and in JHP, the union requested the information before the end of the strike and its unconditional offer to return to work on behalf of the strikers. Thus, those unions' bargaining obligations with regard to the replacements arguably had not as fully matured as here with the end of the strike and the hiring of the permanent replacements. Furthermore, the court found the interest at stake in Grinnell, supra, 272 F.3d at 1030, was less likely intended to assess the bargaining goals of the replacements than to solicit them for union membership and/or to refer them to other union jobs. That latter reason, i.e., the potential raiding of the employer's work force by the union, weighed heavily in the court's balancing of interests.

⁸ Compare JHP & Associates v. NLRB, 360 F.3d at 912 (union knew replacement employee names and could contact them for their addresses). In JHP, however, the unit had only nine employees, and presumably even fewer replacements.

⁹ Compare Grinnell Fire Protection Systems Co. v. NLRB, 272 F.3d at 1030 (replacement employees had worked at employer for years, so union had ample opportunity to communicate with them and obtain the information); Chicago Tribune v. NLRB, 79 F.3d 604, 607 (7th Cir. 1996), denying enforcement to 316 NLRB 996 (1995) (same).

channel of communication via the collection of dues.¹⁰ In these circumstances, the Union's need for the Employer to provide this information is very high.

The Employer, on the other hand, has not established a basis for refusing to disclose the replacements' addresses that outweighs the Union's demonstrable need for the information. The Employer asserts that striker misconduct caused replacements to request that their addresses be kept confidential, but has presented no evidence to substantiate that claim. Even assuming all the replacements requested confidentiality, that request is insufficient to justify the Employer's refusal to disclose their addresses because there was no nexus between the isolated, minimal misconduct on the picket line and the possibility that the Union would engage in misconduct if it knew the replacements' home addresses.

As to the nature and frequency of picket line misconduct, the Employer alleges only five incidents other than name-calling during the course of a nine-month strike. These include: two separate incidents of placing nails in the facility driveway in November 2005 and August 2006;¹¹ one November 2005 instance of blocking replacement workers from exiting the facility while recording their license plate numbers; one November 2005 incident of a striker jumping on the hood of a replacement workers' car;¹² and one May 2006 instance of strikers allegedly throwing objects,

¹⁰ See Georgetown Holiday Inn, 235 NLRB 485, 486 (1978) (replacement employees' names and addresses were not readily available to the union from other sources, in part because there was no union security clause in the parties' collective bargaining agreement); Kelly-Springfield Tire Co., 223 NLRB 878, 880 (1976) (employer's failure to furnish union with addresses of new hires unlawful because the union could not obtain the information through other means due to, among other reasons, the relatively small percentage of union members).

¹¹ The Union asserts that in November 2005, nails fell off trucks entering and exiting the facility, but we assume arguendo that the strikers placed the nails in the driveway.

¹² The Union counters that the vehicle's driver provoked the incident by nudging the driver with his truck.

possibly rocks, at a replacement employee's vehicle.¹³ This misconduct would not substantiate a replacement's reasonable fear that the Union may misuse replacement employees' home addresses. In this regard:

- a) the misconduct was infrequent, as only five incidents occurred over a nine-month period and six months elapsed between November 2005, when much of the conduct occurred, and May 2006 without any allegation of misconduct;
- b) the misconduct occurred at or near the picket line rather than at employees' homes;
- c) harassment generally, let alone more serious misconduct, will likely no longer occur because the strike is over and very few former strikers either work with replacements or remain on the recall list;
- d) the former strikers who have returned are working peacefully with the replacements;¹⁴ and
- e) the conduct was far less severe than in other cases in which appellate courts have struck the balance in favor of nondisclosure.

As to this last point, we note that in Chicago Tribune,¹⁵ the picket line misconduct continued throughout the 11-month strike and thereafter, and clearly would lead reasonable replacements to continue to fear for their safety as it included rioting and multiple firebombing incidents, tire slashing, death threats, and the stabbing

¹³ The Employer also claims that in December 2005, a striker threw a management representative against wire racks. The Union claims the striker was provoked, but in any event the incident occurred at the entrance to the facility away from the picket line. No replacement employee witnessed or knows of the incident, and thus no employee would feel harassed by this striker's conduct. Moreover, the Employer fired that striker, so there would be no reason to fear further harassment from him.

¹⁴ Although the court in Chicago Tribune found no violation despite former strikers working side-by-side, we conclude that the replacement employees' concerns about harassment here are diminished by the significantly less severe pattern of picket line misconduct than that at issue in Chicago Tribune.

¹⁵ See Chicago Tribune v. NLRB, 79 F.3d at 606.

of a replacement employee.¹⁶ The instant case involved conduct of far less severity and frequency.¹⁷

Finally, we agree with the Region that the Union itself was not implicated in any misconduct, and throughout much of the strike was party to an agreement with the Employer brokered by the Buffalo Police Department on December 8, 2005. That agreement outlined the parameters of peaceful picketing, thereby assuring the Employer that the Union would take responsibility for curbing striker misconduct. Although the Union inexplicably failed to respond to the Employer's May 2006 request to renew the agreement, it is undisputed that the strikers continued adhering to it. And, despite the one subsequent incident of nails in August 2006, the Union immediately assured the Employer that it would remedy the situation and admonished the three strikers implicated in that conduct.¹⁸

In sum, we conclude that under the above circumstances, the Union's need for the information outweighs the unlikely potential of harassment to the

¹⁶ See also Page Litho, Inc. v. NLRB, 65 F.3d 169 (6th Cir. 1995) (unpublished), 1995 WL 510029, where the court found that the employer expressed a "bona fide concern" that its replacement workers would be harassed, where the employer argued without contradiction in its brief that substantial violence took place on the picket line from the strike's onset, including the destruction of employer property and the harassment of employees traveling to and from work.

¹⁷ As to the incident where the Employer asserts that a former replacement employee quit after strikers threw "stuff ... maybe rocks" at his vehicle, we note that the evidence of this misconduct is very weak. Assuming the misconduct occurred, there is no evidence that other employees viewed it or know that it occurred. Indeed, if other employees were aware, it does not appear they feared harassment as they continued to work at the facility, none of them reported it to the Employer, and the Employer never complained of it to the Union.

¹⁸ We distinguish Chicago Tribune Co. v. NLRB, 79 F.3d at 608, where, in light of the severe and pervasive misconduct during and after the strike, the court stated "it would be naïve to think that replacement workers would find union guarantees of their safety reassuring," because as discussed above, the conduct here was minor, sporadic, and isolated.

replacements. Because the Employer failed to establish a substantial privacy interest emanating from the picket line misconduct,¹⁹ we do not need to consider the Employer's proposal of an accommodation for the provision of the replacements' addresses.²⁰

3. Board Should Adopt "Totality of Circumstances" Test

For the reasons previously urged by the General Counsel,²¹ we agree with the courts that a balancing analysis based on the totality of the circumstances is a more appropriate way of evaluating information requests about strike replacements. [FOIA Exemption 5

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¹⁹ We recognize that one circuit court has determined that employees have a strong privacy interest in protecting the location of their homes, even without evidence of threats of violence. See Grinnell Fire Protection Systems Co. v. NLRB, 272 F.3d at 1030. [FOIA Exemption 5

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²⁰ Grinnell Fire Protection Systems Co., 332 NLRB at 1258 (accommodation offer irrelevant where no legitimate substantial accommodation concern exists). Compare Chicago Tribune Co. v. NLRB, 965 F.2d at 247 (intimidation comparable to, and requiring at least as much protection as confidential information request, such that reasonable offer of accommodation must be evaluated).

²¹ See Tenneco, Inc., Case 7-CA-49251, Advice Memorandum dated August 23, 2006; Anchor Harvey, LLC, Case 33-CA-14577, Advice Memorandum dated November 12, 2004.

B.J.K.