

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

## Advice Memorandum

DATE: June 21, 1999

TO : B. Allan Benson, Regional Director  
Region 27

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

SUBJECT: Tri-State Generation & Transmission Assoc., Inc.  
Case 27-CA-16299

This Section 8(a)(5) case was submitted for advice on whether the Employer unlawfully refused to supply requested information about employees who may have constituted an accretion to the contractual bargaining unit.

In 1992, the Employer acquired the power generation and transmission assets of Colorado Ute Electric Association (Colorado Ute) whose employees were represented by the Union. At that time, the Employer owned and operated only power transmission equipment and employed only transmission employees, e.g., linemen. Anticipating that it would eventually hire Colorado Ute's employees, the Employer bargained with the Union over recognition. The parties eventually agreed in essence to maintain the representational status quo, viz., agreed that the Employer would recognize the Union for all former Colorado Ute employees, but not for the Employer's extant linemen. The parties first bargaining agreement contained a recognition clause providing that the Union represented the Employer's maintenance employees "in the service area covered by this agreement on April 14, 1992." It is undisputed that this language, referring to the "service area" on April 14, 1992, encompassed the southwest Colorado area served by Colorado Ute.

In January 1999, the Employer announced a merger with Plains Electric, a power and transmission company in New Mexico. Plains' employees are not represented by any union. On January 26, the Union requested that the Employer provide information concerning the terms and conditions of employment of the Plains' employees.<sup>1</sup> The

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<sup>1</sup> For example, the Union sought "rates of pay, benefits and other emoluments of employment", "the titles of the job

Union asserted that it needed this information because, after the merger, the Plains' employees would constitute an accretion to the existing contractual unit. The Employer denied the requested information. The Employer noted that the Plains' employees did not work in the service area covered by the bargaining agreement. The Employer therefore argued that they could not constitute an accretion to that contractual unit.

On May 7, the Union requested the same information, this time arguing that it was relevant "to the preservation of the work of the bargaining unit . . ." The Employer again denied the requested information.

We conclude, in agreement with the Region, that the Employer unlawfully denied the information because (1) the information was potentially relevant on the ground that the Union reasonably believed that the Plains' employees might constitute an accretion to its represented unit; and (2) the Union otherwise had not waived the right to represent the Plains' employees as an accretion merely because of the descriptive language in the recognition clause in the parties' bargaining agreement.

Regarding the first point, we concede that the requested information concerns non-unit employees and thus is not presumptively relevant.<sup>2</sup> However, we would argue that a union is entitled to information about non-unit employees which it reasonably believes may constitute an accretion to its contractual unit.

In Torrington Co., 223 NLRB 1233 (1976), the parties' bargaining agreement contained a clause automatically applying the contract to newly acquired plants within a radius of 75 miles. The Board found that requested information about a new plant was relevant because the plant reasonably might have resulted in a "merged or accreted unit." Unlike the circumstances in the instant case, however, the contract in Torrington contained an "after acquired" plant clause. The ALJ, adopted by the Board, thus found the information relevant for policing and

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classifications of all employees" and "the number of employees currently occupying each such classification."

<sup>2</sup> See, e.g., Ohio Power Co., 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6<sup>th</sup> Cir. 1976).

administering that provision in the bargaining agreement. Nevertheless, in our view the principle applied by the Board in Torrington is also applicable here, viz., information about employees who reasonably may constitute an accretion to the contractual unit is relevant and necessary information for a union to fulfill its statutory duties and responsibilities as the employees' representative.

We note that it is well settled that a representative union is entitled to information about nonunit employees which the union reasonably believes may be included in the unit. In Leland Stanford Junior University, 262 NLRB 136 (1982), the union observed over 100 nonunit employees performing unit work and requested information concerning their job classifications, pay, and the dates they began work. The ALJ, adopted by the Board, found the information relevant for three purposes: policing the bargaining agreement provision regarding layoffs; filing grievances to seek coverage by the bargaining agreement; and formulating a more restrictive clause in a future bargaining agreement. Id at 154-56. In Dusquesne Light Co., 306 NLRB 1042 (1992), the union requested information concerning certain employees who occupied in alleged "confidential positions" outside the bargaining unit. The Board first found that the union reasonably believed these employees were performing unit work, and then found the information relevant for grievance processing.

The Board has found unions entitled to information about other employers for reasons relating to whether certain employees belonged in the represented unit. In Public Service Electric and Gas Co., 323 NLRB 1182 (1997), the union sought information about the relationship between the utility company, whose employees the union represented, and a contractors who supplied the utility company with employees during power outages. The union also sought information about the degree of supervision and control exercised by the utility over the contractor's employees. The ALJ, adopted by the Board, found that the union reasonably believed that the contractor's employees might be bargaining unit employees, or alternatively that the utility might be using these employees to perform unit work. The ALJ thus found the information relevant to a potential breach of contract claim by the union, and/or for "any legal or other course of action it might want to

pursue . . . ."<sup>3</sup> In Associated General Contractors of Calif., 242 NLRB 891 (1979), a multiemployer association established an "open shop" classification of membership not bound to the union agreement. The union requested information about the employers in this classification, suspecting that some signatory member employers may have changed their names, or have alter egos, or may have been running a double-breasted operation. The Board found the requested information relevant for alleging possible breaches of the contract and also relevant for the union "to seek provisions in contracts under negotiation which will serve to preserve the integrity of their respective bargaining units." *Id* at 893.4 In sum, the Board has found that a union demonstrated the relevance of various kinds of information where the union showed that the information related to its reasonable belief that certain employees should appropriately be included within the existing bargaining unit.

In the instant case, it seems clear that the Union could reasonably believe that the Plains' employees may have constituted an accretion to the existing unit. In this regard, we note that the Board has long held that "in the public utility industry, the optimum unit is a system-wide unit."<sup>5</sup> In Baltimore Gas and Electric, the Board denied the union's election petition for a single plant unit even though that plant was markedly different from the employer's other plants as its only nuclear power generating plant. The Board stated generally that a smaller unit in this industry might be acceptable only if

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<sup>3</sup> See also American Federation of Television and Radio Artists, 318 NLRB 1166 (1995) where the union sought information about three operations owned by the employer's parent corporation. The Board found the information relevant to whether the various corporations were sufficiently interrelated as to constitute a single employer or alter ego, and thus whether certain employees were part of an existing bargaining unit. *IDEM*: Walter N. Yoder & Sons, 270 NLRB 652 (1984).

<sup>4</sup> Interestingly, the Board found immaterial the fact that the union there "also desired the requested information for . . . organizational purposes." *Id* at 894.

<sup>5</sup> See, e.g., Baltimore Gas and Electric, 206 NLRB 199 (1973).

it constituted (1) a separated administered segment of the utility's operation; or (2) a single plant servicing a distinctly identifiable geographic area. It does not appear that either of these exceptions apply to the Plains' employees in the instant case.

Given the Union's reasonable belief that the Plains' employees might constitute an accretion into the existing bargaining unit, we would argue that the Union had thereby demonstrated at least the potential relevance of requested information about these employees.<sup>6</sup>

Finally, we reject the Employer's argument that the parties' recognition clause language amounted to a geographic limitation upon the recognized unit and therefore in effect a Union waiver of the right to seek contractual representation of the Plains' employees.

In Mohenis Services, 308 NLRB 326 (1992), the union represented the employees of employer Linen whose contract contained a clause granting recognition to "all production employees at [Linen's] plant" at a specific address. When a related company, Textile, began operations nearby, the General Counsel argued that both companies constituted a single employer, and that the Textile employees constituted an accretion to the Linen unit. The ALJ rejected the single employer contention, and also found in any event

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<sup>6</sup> Cf. Connecticut Yankee Atomic Power Co., 317 NLRB 1266 (1995) where the Board found that the union reasonably believed that the employer may have been a joint employer of certain nonunit employees. The Board noted, however, that a joint employer finding would not automatically include these employees in the represented unit. The Board thus found that the union had not demonstrated that the information was relevant to either grievance filing, or to possible contract modifications, which were the only two reasons asserted by the union as a basis for requesting the information. The Board explicitly refused to pass on whether the information would be relevant "for different purposes related to the Union's collective-bargaining representative role." Id at note 16. In contrast to that case involving mere joint employer status, a finding of accretion in the instant case necessarily would entail finding that the accreted employees must be included in the existing unit and could not exist in a separate unit.

that the union had waived any right to claim that Textile's employees were part of the Linen unit. On the waiver point, the ALJ relied upon the above recognition clause language. The ALJ noted that, during contract negotiations, Linen had advised the union that its parent corporation was opening a new facility nearby; the parties had discussed and mutually agreed to apply the newly negotiated contract solely to the Linen plant; and the parties had agreed to modify the extant recognition clause to explicitly refer to only Linen's current plant. A Board majority agreed with the ALJ's analysis that, given this bargaining history, the recognition clause waived the union's right to argue that the Textile employees constituted an accretion.<sup>7</sup>

We find the circumstances in Mohenis distinguishable and the result inapplicable. The contract language in this case, limiting coverage to the "service area" in existence in 1992, clearly was intended only for the purpose of excluding the Employer's current employees from the unit. In contrast to the circumstances in Mohenis, the parties here did not discuss whether or not to cover or exclude future employees from the contract. Thus, the parties could not have intended, and did not intend, to exclude future employees from contract coverage merely because of this language.<sup>8</sup>

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<sup>7</sup> Cf. Weymouth Farms, 324 NLRB No. 151 (1998) where the Board distinguished Mohenis. In Weymouth, the Board gave no effect to the geographic limitation in the recognition clause, and thus found no union waiver, because the employer there had intentionally misled the union about the proximity of the new facility in order to obtain the union's agreement to the recognition clause.

<sup>8</sup> See also Westwood Import, 251 NLRB 1213 (1980) where the employer argued that contract language, which accorded the union recognition at a specifically identified facility, amounted to a geographical limitation and thus a union waiver of continued representation of those employees when the employer moved them to a nearby facility. The Board rejected this waiver defense. The Board found instead that the contract language was intended by the parties to be only a descriptive recitation of the physical location of the unit at the time of negotiations and was not intended to limit the union's representational rights.

In sum, the requested information was potentially relevant to the Union's reasonable belief that the Plains' employees may have constituted an accretion to the contractual unit, and the Union did not otherwise waive its representational rights to these employees.<sup>9</sup>

B.J.K

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<sup>9</sup> [*FOIA Exemption 5*