

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

## Advice Memorandum

DATE: December 3, 2009

TO : Joseph P. Norelli  
Regional Director, Region 20

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

SUBJECT: Service Employees International Union, Local 1877  
(Spencer Building Maintenance)  
Case 20-CB-13433

554-1450-0140  
554-1475-0137

This case was submitted for advice as to whether the Union violated Section 8(b)(3) of the Act by failing to provide information to the Employer, and if so, whether the Region should issue complaint and further argue that the Board should reconsider its policy of nondeferral where, as here, deferral would not result in a two-tiered arbitration process.

We conclude that the Union did not violate Section 8(b)(3) by failing to provide information to the Employer because the requested information involved a nonmandatory subject of bargaining. Accordingly, the Region should dismiss this charge, absent withdrawal.

### **FACTS**

#### Background

The Employer (Spencer Building Maintenance) provides commercial janitorial services. The Union (SEIU Local 1877) and the Employer are parties to the Northern California Maintenance Contractors Agreement ("the Agreement"). The Agreement is in effect from June 1, 2008 to April 30, 2012.

Article II, Section 2.1 of the Agreement establishes a multi-employer bargaining unit.<sup>1</sup> It provides that the Employer recognizes the Union "as the sole collective bargaining agent for all persons that come under the jurisdiction of the Union, in all establishments or places of business which the Employer is now, or may in the future be servicing under contract or otherwise . . . ."

The Agreement contains a "Job Bidding Procedures" section (Article XI Section 11.10), which provides that "when an employer is bidding on or taking over the servicing of an establishment where the Union represents the existing employees:

. . . . the incumbent contractor shall provide the Union within four (4) work days the number of employees, names, daily hours worked, vacation and sick leave accrual, medical plan and wage rates, including regular employees temporarily off work with Employer authorization. . . . The Union agrees to supply such requested information within seven (7) calendar days to any Union contractor requesting such information or the Employer is not obligated to any staffing levels . . . .

The Agreement also contains a Grievance and Arbitration Procedure that provides for final and binding arbitration.

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<sup>1</sup> Although the Employer is not a member of the multi-employer association, it has agreed to be part of the multi-employer bargaining unit. Specifically, On May 13, 2008, the Employer signed a "Multi-Employer Authorization: Sacramento Area Agreement," which "authorizes and empowers the multi-employer representative . . . to negotiate and enter into a Multi-Employer Collective Bargaining Agreement with SEIU Local 1877 . . . . and to take action required or necessary to obtain execution and enforcement of the [collective-bargaining agreement] on behalf of the Employer . . . ."

The information request

By email of July 24,<sup>2</sup> the Employer requested from the Union wage and benefit information regarding two buildings (on Armstrong Avenue and Peter A. McCuen Boulevard) in order to bid for janitorial work. On July 30, the Union faxed to the Employer a spreadsheet indicating that employees worked at Armstrong or Peter A. McCuen, but not specifying in which building they worked. The spreadsheet listed the employee's name, employee I.D., title, date of hire, shift, full time or part time, pay rate, vacation, medical benefits, status and pension. However, according to the Employer, the information it received covered more people than actually worked in the two buildings and did not specify the daily hours worked as required by the Agreement. The Employer called the Union and requested the information from a Union representative.

On August 4, the Employer, after failing to receive the information, again called the Union. Another Union representative stated that he was sure that one of the employees on the list did not work in the two buildings and he would check the matter further and get back to the Employer. On August 7, the Employer again called the Union and a third Union representative stated that she could not get the requested information about the job because their people were on vacation. On August 12, the Employer emailed the Union stating that the information received thus far was inaccurate.

On August 14, the Employer submitted a written grievance to the Union. The grievance alleges that the Union failed to provide to the Employer wages and information required to be produced under Article XI of the Agreement. The Union responded only by stating that the Employer was entitled to file the grievance.

On August 27, the Union emailed the Employer and stated that the information it provided complied with the

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<sup>2</sup> All dates herein are 2009 unless otherwise noted.

bidding rules process. The Employer responded that the Union's response was not consistent with the Agreement.

On August 31, the Union emailed more information to the Employer. The Employer responded that the information was inaccurate and also requested information on additional locations. On September 1, the Employer forwarded to the Union an email with a written request from the property manager of the Peter A. McCuen and Armstrong addresses to bid on those properties and four other locations in Sacramento. On September 11, the Union faxed the Employer a spreadsheet for all six properties that included the employees' job title, status, part time or full time, social security number, name, pay rate, seniority date, benefits, and which building they worked in. The spreadsheet did not designate the employees' daily hours. Following receipt of the fax, the Employer called the Union and stated that the hours were incorrect. The Employer noted, for instance, that the spreadsheet indicated that one custodian worked full-time on one building, even though that building had less than 2000 square feet and needed the custodian for only one hour.

On September 8, the Employer filed the instant charge alleging, inter alia, that the Union violated Section 8(b)(3) by refusing to provide relevant and necessary information.

To date, the Union has not filed a grievance against the incumbent contractor, who is obligated under Article XI, Section 11.10 of the Agreement to provide the staffing information to the Union.

#### **ACTION**

We conclude that the Union did not violate Section 8(b)(3) by failing to provide information to the Employer because the requested information involves a nonmandatory subject of bargaining. Accordingly, the Region should dismiss this charge, absent withdrawal.

It is well settled that a union's statutory duty to supply information parallels that of an employer.<sup>3</sup> A party is obligated to provide requested information that may prove relevant to contract negotiation and contract administration, including determinations of whether to file a grievance, whether to proceed to arbitration, and what position to take once a grievance has been filed.<sup>4</sup> However, neither party has any obligation under either Section 8(a)(5) or 8(b)(3) to provide information regarding a permissive subject of bargaining.<sup>5</sup>

The duty to furnish information "stems from the underlying statutory obligation imposed on employers and unions to bargain in good faith with respect to mandatory subjects."<sup>6</sup> Mandatory subjects "are limited to those that settle an aspect of the relationship between an employer and its employees, or that involve individuals outside the employment relationship but vitally affect the terms and conditions of employment of those within that relationship."<sup>7</sup> By bargaining and agreeing on a permissive

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<sup>3</sup> Firemen & Oilers Local 288 (Diversy Wynandotte), 302 NLRB 1008, 1009 (1991); Service Employees Local 144 (Jamaica Hospital), 297 NLRB 1001, 1003 (1990); Teamsters Local 851 (Northern Air Freight), 283 NLRB 922, 925 (1987).

<sup>4</sup> Jamaica Hospital, 297 NLRB at 1002-1003.

<sup>5</sup> Pieper Electric, Inc., 339 NLRB 1232, 1235 (2003).

<sup>6</sup> Id., quoting Cowles Communications, Inc., 172 NLRB 1909 (1968).

<sup>7</sup> Pieper Electric, Inc., 339 NLRB at 1235 (union not entitled to names of employees who participated in the employer's stock purchase plan because the contractual provision restricting stock ownership by covered employees did not come within the scope of those subjects of bargaining made mandatory by Section 8(d) of the Act: wages, hours, or other terms and conditions of employment. The plan did not constitute "wages" because employees received no "emolument of value," and did not come within scope of "other conditions of employment" because it did not operate as a retirement plan).

subject, the parties do not make the subject a mandatory topic of bargaining, i.e., parties "do not have the power to alter this result merely by reaching agreement on the terms of a nonmandatory subject."<sup>8</sup> Thus, since there is no duty to furnish information concerning a nonmandatory subject, it is not a violation of 8(a)(5) or 8(b)(3) to refuse to furnish information relevant to policing a nonmandatory provision in a contract.<sup>9</sup>

In the instant case, we conclude that the Employer's request for information did not involve a mandatory subject. The Employer requested information pursuant to Article XI, Section 11.10 of the parties' Agreement. That Article provides that where work is being bid out at an establishment where the Union represents the employees, the Union will supply a signatory employer, upon request, with unit information about the facility. Since the sole purpose of that provision is to aid employers in their efforts to submit competitive bids for new jobs, the information that the Employer seeks pursuant to the provision has no nexus to employees' terms and conditions of employment.<sup>10</sup> Here, the Employer sought the information

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<sup>8</sup> Id. See also SEIU Local 535 (North Bay Development Disabilities Services, Inc.), 287 NLRB 1223, 1223 (1998), enfd. 905 F.2d 476 (D.C. Cir. 1990), cert. denied 498 U.S. 1082 (1991) ("To violate the Act, a refusal to supply information must, inter alia, pertain to a bargaining subject categorized as a mandatory one.")

<sup>9</sup> Pieper Electric, Inc., 339 NLRB at 1234; SEIU Local 535, (North Bay Development Disabilities Services, Inc.), 287 NLRB at 1223, 1225) (to say simply that information is needed to implement contract provisions does not establish that the Act compels its production; neither employers nor labor organizations are obliged under the Act to furnish information pertaining to nonmandatory subjects).

<sup>10</sup> Compare Iron Workers Local 207 (Steel Erecting Contractors), 319 NLRB 87, 91 (1995) ("most favored nations" clause creates duty on part of union to provide information concerning wages, hours, and terms and conditions to employer association so that it can attempt

in order to calculate competitive bids for new work contracts and its follow-up requests for more accurate information were designed to ensure that its bid did not over-calculate the number of employees needed to perform the work.<sup>11</sup>

Further, the fact that the Agreement contained a "most favored nations" clause did not thereby entitle the Employer to the information, since the Employer did not request the information for the purpose of policing that clause.<sup>12</sup> In sum, since the requested information was unrelated to any aspect of the employees' terms and conditions of employment, it involved a nonmandatory subject of bargaining and the Union did not violate Section 8(b)(3) by failing to provide the information to the Employer. Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/  
B.J.K.

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to ensure that non-association employer-contractors are not obtaining a competitive advantage by paying apprentices less than contractual wage rates or benefit amounts).

<sup>11</sup> For example, the Employer was concerned that the spreadsheets it received indicated that one custodian worked full-time in a building that should have required only one daily hour of custodial work.

<sup>12</sup> Cf. Iron Workers Local 207 (Steel Erecting Contractors), 319 NLRB at 91.