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

Advice Memorandum

DATE: November 12, 2004

S.A.M.
TO : Ralph R. Tremain, Regional Director
Region 14

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

SUBJECT: Anchor Harvey, LLC
Case 33-CA-14577

530-6067-6001-3770
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The Region submitted this Section 8(a)(5) case under OM-04-72 for advice on whether the Employer unlawfully refused to provide the Union with information regarding strike replacements, including their names, addresses, and telephone numbers, or whether, given the strikers' picket line conduct, the Employer lawfully provided only redacted information.

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer's refusal to provide complete responses to the Union's requests of December 22, 2003 and later violated Section 8(a)(5). The Region should argue that the Employer violated the Act under both the Board's established "clear and present danger" test, as well as under the "totality of the circumstances" test applied by some circuit courts. Further, the Region should argue for the Board's adoption of the "totality of the circumstances" test in evaluating employer refusals to provide information about strike replacements.

FACTS

The Employer operates a facility in Freeport, Illinois, where it manufactures brass and aluminum forgings. UAW Local 2127 has represented the approximately 85 production and maintenance employees at that facility since 1979. In 2003, the parties had negotiations for a collective-bargaining agreement to succeed one that expired on September 30, 2003.[1] In the absence of agreement, on October 2, the Union began an economic strike. Shortly thereafter, the Employer started hiring strike replacements.

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[1] Subsequent dates are in 2003 unless indicated otherwise.

Tempers flared at the picket lines with the arrival of the replacements. Strikers frequently hurled insults and obscenities at the replacement workers. Strikers also reported similar behavior from replacements and supervisors. Most of the insults were variations of the scab-calling common during strikes and vulgar references to sex acts. There were some racial and ethnic slurs, such as "ragheads," "go back to Mexico," and a single reported use of the work "nigger." A handful of threatening comments were made, such as: "the INS is coming," "we killed Saddam and you're next," threats about replacements finding flat tires on their cars, and a threat by one unit employee to hide in the cornfield next to the plant and shoot factory parts out the replacements' hands. Jack rocks were discovered in the driveway on one occasion, although there is no evidence of who placed them there. However, there were many days when not even a single instance of scab-calling was reported.[2] There were no incidents of violence, such as fights or assaults, property damage, or bodily injury during the strike. The only arrests resulted from a verbal confrontation between the wife of a supervisor and some strikers, who traded insults such as "fat pig." The Employer did not discipline or discharge any strikers for their picket line behavior nor file a Section 8(b)(1)(A) charge. The Employer does not contend that Union officials participated in, or condoned, the verbal confrontations.

In October, shortly after the Employer began using strike replacements, the Union requested a list of the replacement employees and their terms and conditions of employment. The Employer refused to provide their names, contending that the picketers' confrontational behavior raised concerns over the harassment of replacements. The parties discussed the issue. The Union assured the Employer that it was taking measures to ensure peaceful, lawful conduct. The Employer offered redacted information, identifying the replacements solely by the last four digits of their Social Security numbers, and offered to discuss alternative manners in which the Union could contact the replacements, such as through a mailing service. Eventually, the Union accepted the redacted information and did not follow up on discussing means of contacting the replacements without obtaining their names and addresses.

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[2] For example, no incidents were reported between October 10-19, October 23-28, November 4-8, November 10-30. Since the lockout began, no incidents were reported for several months beginning in late January 2004.

On December 18, the Employer informed the Union that the replacement employees, who had originally been hired as temporary replacements, had been converted to permanent replacements. In response, on December 22, the Union requested the following information:

- dates on which each asserted permanent replacement was offered employment, accepted, and began working;
- a list of all positions filled by a permanent replacement and the dates the replacement accepted the position;
- any documents supplied to or completed by permanent replacements in connection with their hiring or continued employment, including want ads, agreements with a placement agency, employment applications, and documents outlining the replacements' terms and conditions of employment;
- a list of permanent replacements who had been terminated, along with the date and reason for the termination.

The Employer responded that it would need about two weeks to compile this information.

In the meantime, on December 29, the Union ended the strike and made an unconditional offer to return to work on behalf of the strikers. The Employer refused to allow the strikers to return, again contending that they had been permanently replaced. The Employer also questioned whether the Union's offer to return signified an acceptance of the Employer's contract offer. The parties discussed the Union's offer to return and the strikers' reinstatement rights. On January 7, 2004, after the Union clarified that it was not accepting the Employer's contract terms, the Employer declared a lockout of strikers and strike crossovers, but not permanent replacements. The Employer continued operating with replacements, and stated that during the lockout any new replacements would be hired as temporary replacements.[3]

Meanwhile, the Employer had provided most of the information requested by the Union on December 22. The Employer, however, did not provide the replacements' identities nor the employment documents completed by the replacements, providing instead only blank samples of the documents. During negotiations on January 27, 2004, and in writing on January 29, the Union repeated its request for

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[3] The Union filed a charge alleging that the lockout is unlawful. The Region dismissed the charge, and the case is now pending in the Office of Appeals.

the actual documents completed by the replacements, rather than blank forms. It also requested the names, addresses, telephone numbers, and Social Security numbers for all permanent replacements still employed, all replacements terminated since the beginning of the strike, and all temporary replacements hired since the Union's offer to return. The Employer asked the Union to explain the relevance of its expanded information request. The Union replied that it needed the information to fulfill its representational role, including offering assistance to terminated replacements over their terminations. The Union also explained that it needed the information in order to verify the replacements' status as permanent or temporary replacements.

On February 11, 2004, the Employer, again relying on the animosity exhibited to replacements during the strike, refused to provide any identifying information. The Employer offered instead the use of a mailing service to contact the replacements and a third-party audit of the employment documents to verify their permanent or temporary status. The Employer has since provided some updated information in the previously-used redacted format, but the Union has insisted on receiving the complete information, including names and contact information. The Employer has never provided the employment documents first requested on December 22, nor the names, addresses, telephone numbers, or Social Security numbers requested on January 29, 2004.

The parties have not reached agreement on a new contract and the unit employees remain locked out.

ACTION

We conclude that complaint should issue alleging that the Employer's refusal to provide complete responses to the Union's December 22 and January 2004 information requests about asserted permanent replacements, temporary replacements hired during the lockout, and replacements terminated during the lockout violated Section 8(a)(5) under current Board law, as well as under some circuit courts' "totality of the circumstances" test.[4] However, the complaint should not allege that the refusal to provide Social Security numbers of the replacements or information

[4] We conclude that the earlier October and November requests should not be pleaded in the complaint. Those requests are largely encompassed in the December and January requests. Moreover, before learning that the replacements were permanent, the Union had acquiesced to receiving redacted information.

about replacements who were terminated before the Union ended the strike is unlawful. Further, we conclude that the Region should argue for the adoption of a "totality of the circumstances" analysis in evaluating information requests about strike replacements.

1. The Conflicting Law on Strike Replacement Information

As discussed in Memorandum OM 04-72, there is a conflict between the Board and some circuit courts in the law applied to strike replacement information requests. It is well settled that information about bargaining unit employees, including names and addresses, is presumptively relevant to a union's representational duties.[5] The Board has repeatedly found that information regarding strike replacements, such as their names, home addresses, telephone numbers, and employment information is also presumptively relevant.[6] The presumptive relevance is based on the possibility that replacements may become part of the bargaining unit if they continue to be employed after the end of the strike.[7]

Social Security numbers, however, are not presumptively relevant; the Board will not order their disclosure absent a showing of relevance.[8] Similarly, information about replacements discharged during the

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[5] See Georgetown Holiday Inn, 235 NLRB 485, 486 (1978) and cases cited therein.

[6] See, e.g., Metta Electric, 338 NLRB No. 161, slip op. at 6-7 (2003), enf. granted in part and denied in part, 360 F.3d 904 (8th Cir. 2004); Grinnell Fire Protection Systems Co., 332 NLRB 1257, 1257 (2000), enf. denied in part 272 F.3d 1028 (8th Cir. 2001), rehearing denied (2002); Chicago Tribune Co., 303 NLRB 682, 687 (1991), enf. denied, rehearing denied, 965 F.2d 244 (7th Cir. 1992).

[7] Grinnell Fire Protection Systems, 332 NLRB at 1257 (although an employer has no duty to bargain over replacements' terms during a strike, replacements will become unit employees if their employment extends beyond the strike; the union will be bargaining for a contract that will apply to these former replacements).

[8] Cheboygan Health Care Center, 338 NLRB No. 115, slip op. at 2 & n. 2 (2003), and cases cited therein; Sea-Jet Trucking Corp., 304 NLRB 67, 67 (1991).

strike, who never become part of the bargaining unit, is not presumptively relevant.[9]

Under Board law, information about replacements, whether presumptively relevant or shown to be relevant, must be provided unless the employer can establish a "clear and present danger" that the union will misuse the information.[10] 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 misconduct.[11] Confrontational, but non-violent, behavior at the picket line, such as the insults and name-calling that are commonplace in strike situations, does not establish a "clear and present danger" that privileges the employer to withhold information, especially where there is no evidence that union representatives were involved.[12]

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[9] Safeway Stores, 268 NLRB 284, 285 (1983) (no duty to provide information about discharged replacements, distinguishing cases where replacements become part of the unit after the strike ends).

[10] Metta Electric, 338 NLRB No. 161, slip op. at 6-7; Grinnell Fire Protection Systems Co., 332 NLRB at 1257; Advertisers Composition Co., 253 NLRB 1019, 1023 (1981).

[11] See, e.g., Brown & Sharpe Mfg. Co., 299 NLRB 586, 590-91 (1990) (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), enf'd 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) injuctions obtained against union due to strike violence).

[12] See, e.g., 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); Advertisers Composition Co., 253 NLRB 1019, 1023 (1981) (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 at 687-89 (serious incidents, including vandalism and firebomb, but no evidence of union

Some circuit courts have refused to follow this approach to striker replacement information. These courts have instead applied a balancing test based on the totality of the circumstances. Under this balancing approach, the courts consider 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.[13] The Board's presumption of relevance does not fit within this framework, because the union must show an actual need for the information, which is weighed against the employer's reasons for refusing to provide it.

2. The Employer's Refusal to Provide Information under Board Law

Under current Board law, the Employer has a duty to provide the majority, but not all, of the information requested by the Union here. The names, contact information, and employment information of replacements still employed is presumptively relevant under Board law. The request for information about all replacements discharged after the Union's unconditional offer to return to work may not be presumptively relevant to the extent

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responsibility and union gave assurances against misuse of information).

[13] See, e.g., JHP & Assoc., LLC v. NLRB, 360 F.3d 904, 912 (8th Cir. 2004) (duty to provide information "turns on the circumstances of the particular case;" balancing union's need for home addresses and telephone numbers against confidentiality concerns); Grinnell Fire Protection Systems Co. v. NLRB, 272 F.3d 1028, 1029-30 (8th Cir. 2004)(same); Chicago Tribune Co. v. NLRB (Chicago Tribune II), 79 F.3d 604, 607(7th Cir. 1996) (rejecting Board test in favor of a "totality of the circumstances approach" based on Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979)); Chicago Tribune Co. v. NLRB (Chicago Tribune I), 965 F.2d 244, 247 (7th Cir. 1992) (clear and present danger formula poses an "insuperable burden" on employer and "has no proper application" to an information request; balancing instead the union's need for names and addresses of replacements, the employer's concerns of harassment, and the alternatives offered by employer). See also, the unpublished decision in Page Litho, Inc. v. NLRB, 65 F.3d 169 (6th Cir. 1995)(table), 1995 WL 510029.

that it encompasses temporary lockout replacements who are not in the bargaining unit. It is relevant in this case, however, because the positions of these discharged replacements, whether left unfilled or filled by temporary replacements during the lockout, will become available for returning strikers at the end of the dispute. The Union has a right to know about these terminations because this information will assist the Union in negotiating strikers' reinstatement and an end to the lockout.

Because this information is relevant to the Union's representation of striking employees and replacements who become part of the unit, the Employer must provide it in the absence of a "clear and present danger" of Union misuse. The Employer has not established that danger. The Union's strike was, as a whole, a peaceful affair. Although some threatening comments were made, the bulk of the Employer's allegations involve "no more than the normal picket line name calling and verbal taunting."[14] Over the course of a three-month strike there was no actual violence. The Employer did not discipline or discharge any strikers for picket line misconduct. Moreover, although the Employer does not contend that the Union was involved in any picket line incidents, the Union offered the Employer assurances of peaceful conduct.[15] Thus, the picket line incidents do not privilege the Employer's refusal to provide all of the relevant information.

Replacements' Social Security numbers, or information about replacements discharged before the end of the strike, are not presumptively relevant. The Union has made no showing of relevance of the replacements' Social Security numbers. In addition, its assertion of relevance of the terminated replacements' information fails. The Union contends that it represents these replacements and is entitled to offer them assistance over their terminations. Contrary to the Union's contention, however, there was no bargaining obligation over the replacements while the strike was ongoing.[16] The Employer had no duty to bargain

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[14] Advertisers Composition Co., 253 NLRB at 1023.

[15] See, e.g., Chicago Tribune Co., 303 NLRB at 687-89 (union gave assurances of confidential treatment of information to guard against misuse); Advertisers Composition Co., 253 NLRB at 1023 (no evidence of union involvement in strike incidents).

[16] Ryan Iron Works, Inc., 332 NLRB 506, 506 (2000) (during strike employer may unilaterally set replacements' terms

over the replacements while they were employed. The Union never represented them because they ceased to work before the end of the dispute, never becoming part of the unit.[17] Therefore, the Union has no representational rights over these employees that would make their information relevant.[18] Neither is their information relevant for purposes of representing the strikers. Because these replacements were discharged before the Union's unconditional offer to return, their employment tenure does not affect strikers' reinstatement rights, even if the Employer termed them "permanent" replacements during their employ. Thus, the complaint should not allege a refusal to provide the Social Security numbers or the information about replacements terminated during the strike.

3. The Employer's Refusal to Provide Information under a Totality of the Circumstances Approach

Applying the courts' "totality of the circumstances" analysis here does not change the result. We conclude that even using this balancing approach, the Employer unlawfully refused to provide names, addresses, and telephone numbers of the permanent replacements still working, temporary replacements working during the lockout, and any replacements terminated after the Union's unconditional offer to return to work, as well as any employment documents that may establish their permanent or temporary status.

All of this information is necessary for the Union to fulfill its representational role with respect to the locked-out striking employees.[19] The contact information and employment documents of the replacements still employed will enable the Union to judge for itself the permanent and temporary status of each replacement. This information is necessary for the Union to engage in informed negotiations over strikers' reinstatement rights and an end to the bargaining dispute. Similarly necessary, as discussed

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and conditions); Detroit Newspapers, 327 NLRB 871, 871 (1999) (same).

[17] See Grinnell Fire Protection Systems, 332 NLRB at 1257.

[18] Safeway Stores, 268 NLRB at 285.

[19] To the extent that permanent replacements will displace strikers after the end of the lockout and be covered by any new collective-bargaining agreement, the Union also needs their contact information to fulfill its representative duties with respect to these employees.

above, is the information about replacements discharged after the Union's unconditional offer to return to work and the Employer's lockout, whose positions should be made available to returning strikers. Thus, unlike in Grinnell and JHP Assoc., the Union here has a real need for the information, beyond merely wanting to communicate with potential bargaining unit employees.[20]

Further, unlike the Chicago Tribune cases, the Employer's basis for refusing to provide the information is not sufficient to outweigh this demonstrable need.[21] Although there was confrontational behavior on the picket line, the three-month strike was violence-free. Granted, the Employer's concern for the privacy of the replacements is not entirely baseless. Some of the strikers arguably may have engaged in unprotected verbal harassment by racial and ethnic slurs and some obscene sexual comments.[22] However, the vast majority of the verbal confrontations did not rise to this level, but were protected "scab"-calling.[23] Further, some of the behavior was reciprocal.

The Employer's contention that the picket-line confrontations were serious enough to raise concerns for the privacy of identified replacements is undermined by the fact that the Employer did not discipline or discharge any of the strikers for their picket-line conduct, or file any Board charge. There is also no evidence that replacements have requested confidential treatment of their contact information. More importantly, there is no evidence that Union officials, who would be privy to the replacements'

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[20] In those cases, the unions requested information for general communication purposes. JHP & Assoc. v. NLRB, 360 F.3d at 912; Grinnell Fire Protection Systems v. NLRB, 272 F. 3d at 1030

[21] In these cases, there was serious strike violence, including incidents at employees' homes, such as windows being shot out and a garage firebombed. Chicago Tribune I, 965 F. 2d at 246.

[22] See, e.g., Chicago Tribune Co., 304 NLRB 259, 28 (1991), adopted at 318 NLRB 920, 920 n. 7 (1995)(striker's "extremely abusive, obscene, and perverted" comments and racial and sexual harassment that "went beyond the pale" were unprotected conduct).

[23] See, e.g., MGM Grand Hotel, 275 NLRB 1015, 1015 n. 2 (1985)(yelling "scab" during confrontation with nonstrikers was not unprotected conduct).

information, participated in or condoned the confrontational behavior. Indeed, the Union did not disregard the Employer's concern for the replacements. The Union assured the Employer that it was instructing strikers on proper picket line conduct. The Union's efforts were not wholly ineffective, as shown by the fact that the verbal confrontations were sporadic, with significant periods of time during which not even minor incidents were reported. Further, the Union offered assurances of a legitimate, non-harassing use of the replacements' information. In these circumstances, where the strike conduct was mostly peaceful and lawful, unlike in Chicago Tribune, the privacy interests of the replacements do not outweigh the Union's real need for the information, even if there were some isolated instances of arguably unprotected striker misconduct.

In addition, given the Union's specific need for the information, the Employer's proposed alternatives are inadequate. The Employer's offer of a third-party audit of documents to corroborate replacements' status is insufficient. The status of replacements is not always a clear-cut issue, especially here, where the Employer has muddled the issue by assertedly switching from temporary hires to "converted" permanent hires and back to temporary employees. In these circumstances, the Union is entitled to judge for itself who is permanent or temporary, and when permanent status was attained. Thus, the Union needs the actual documents, rather than blank sample forms or a third-party assessment.[24]

The Union should also be able to directly contact the employees to interview them regarding their hiring circumstances and clarify any ambiguities raised by the

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[24] Detroit Newspapers, 326 NLRB 700, 707 & 778 (1998), enf. denied on other grounds, 216 F.3d 109 (D.C. Cir. 2000) (union entitled to employment documents to judge for itself whether strikers were permanently replaced, especially where employer's statements had clouded the issue). Accord: Assoc. Gen. Contractors, 242 NLRB 891, 893-94, enf'd in rel. part, 633 F.2d 766 (1980)(union entitled to copies of employer association documents to "intelligently evaluate the facts, and thereby, reach their own conclusions" about which members were exempt from contract application). See also, Crouse-Irving Mem. Hosp., 271 NLRB 1044 (1984)(where employer refused to reinstate strikers on the grounds that they had been permanently replaced, information about replacements was clearly relevant to grievance filed by union over reinstatement rights).

employment documents. Because the Union needs more than indirect, one-sided communications with the replacements, the Employer's offer of a mailing service is insufficient, unlike in JHP and Grinnell.[25] In short, the Employer's offered alternatives do not satisfy the Union's legitimate need for the information, especially in light the Employer's relatively weak basis for refusing the information.[26]

Thus, considering the totality of the circumstances, the Union's need for the relevant information outweighs the Employer's basis for refusing to provide it. The Region should argue that, even under the courts' "totality of the circumstances" the Employer unlawfully refused to provide the replacements' employment documents requested on December 22, as well as the names, addresses, and telephone numbers of replacements still employed, and replacements terminated after the Union's unconditional offer to return to work.

4. The Board Should Adopt the "Totality of Circumstances" Test

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. Even where the strike conduct does not establish a danger to replacements, the animosity commonly displayed during labor disputes may raise legitimate concerns about disclosure of replacements' information. Moreover, the union's need for the information may vary depending on various factors, including whether the replacements are permanent or temporary, whether there is a dispute about their status, whether the strike has ended or is ongoing, whether the replacements have become, or are likely to become, part of the bargaining unit.

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[25] In JHP & Assoc., 360 F.3d at 912, the union made a "routine request" to enable future contact with employees, without a "compelling need" to communicate with them. In Grinnell, 272 F. 3d at 1030, the union was similarly asserting general communication purposes, even though it had direct access to the employees in the workplace.

[26] Even with a more compelling concern for the replacements' safety, the Employer could have offered more useful alternatives, such as providing the actual employment documents with some personal information redacted out, or proposing a confidentiality agreement that would make the Union accountable for any misuse of the information.

Also, where there is a sufficient basis for the employer's concern of harassment, alternative modes of disclosure may adequately provide enough information for the union to fulfill its representational role.

The Board's current test, however, does not take into consideration these relevant factors. By relying on a presumption of relevance, the Board does not require the union to establish a need for the information. Nor does it take into account concerns over animosity or confrontations that fall short of showing a clear danger of misuse. The Board gives little or no weight to the employer's offer of alternatives that may satisfy the union's need for the information.

An approach that takes into account the totality of the circumstances, balancing the union's need for the information, the employer's privacy or harassment concerns, and whether alternative modes of disclosure are adequate, is better adapted to the realities surrounding requests for information about striker replacements. This approach is also consistent with the analysis applied in cases where the employer contends that the information requested is confidential.[27] For these reasons, we conclude that the Region should urge the Board to adopt the courts' "totality of the circumstances" test.

Accordingly, we conclude that the Region should dismiss allegations involving the pre-December 22 information requests, the replacements' Social Security numbers, and information about replacements who were terminated before the Union's December 29 unconditional offer to return to work. The Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to provide copies of replacements' employment documents, as well as the names, addresses, and telephone numbers of assertedly permanent replacements still employed beyond December 29, temporary

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[27] See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. at 318-20 (balancing the union's need for information against the employer's confidentiality claim and proferred accommodation); WCCO Radio, Inc. v. NLRB, 844 F.2d 511, 515 (8th Cir. 1988) (in evaluating confidentiality defense, court must weigh competing interests; extent of disclosure will depend on circumstances of the case); Exxon Co. U.S.A., 321 NLRB 896, 898 (1996), enf'd 116 F.3d 1476 (5th Cir. 1997) ("Board is required to balance a union's need for the information against any 'legitimate and substantial' confidentiality interest established by the employer").

replacements hired during the lockout, and replacements discharged during the lockout. Further the Region should argue that the Employer's failure is a violation under current Board law, as well as under the "totality of the circumstances" test applied by some circuits. Finally, the Region should argue for the adoption of the courts' "totality of the circumstances" test.

B.J.K.