

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

Advice Memorandum

DATE: June 20, 2007

TO : Celeste J. Mattina, Regional Director
Region 2

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

SUBJECT: National Hockey League Player's Association (National Hockey League)
Case 2-CB-20453 536-2581-3342

The Region re-submitted this Section 8(b)(1)(A) case for advice on whether the National Hockey League Players Association (NHLPA or Union) violated its duty of fair representation when it refused to provide a requesting player representative with seven of 30 "Confidential Side Letters" expressly incorporated into the players' collective-bargaining agreement. In an earlier Advice Memorandum dated June 30, 2006, we concluded that to the extent a letter contained no information rightfully regarded as confidential, the Union's agreement with the League not to disclose the letter was not a defense to its statutory duty to represented employees. [FOIA Exemptions 2 and 5

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The NHLPA and the League no longer assert any confidentially interest in 23 of the 30 Side Letters. These letters are now included in the collective-bargaining agreement published on the Union's website. The agreement including those 23 side letters is therefore now available to anyone with internet access. The NHLPA and the League assert that the remaining seven Letters (1 through 4, 8, 10, and 16) contain confidential information which privileged the Union's refusal to disclose them.

We conclude that the employees have a legitimate interest in these seven letters; that Side Letters 3, 10, and 16 are not sufficiently confidential or proprietary in nature to privilege the Union to withhold them from employees and that Side Letters 1, 2, 4, and 8 contain substantial proprietary information. Applying a balancing test, we conclude that the Union's blanket refusal to provide these Letters, without accommodating the employees'

interest, breached the Union's duty of fair representation. We further conclude, however, that the Union's method of disclosing the letters in later meetings with employees was an adequate accommodation of employees' interests and the Union's confidentiality interests.

FACTS

The NHL and NHLPA's previous agreement (CBA) expired on September 15, 2004. On July 13, 2005, following a ten-month lockout and the cancellation of the entire 2004-05 hockey season, the NHLPA and NHL reached a new CBA.

A defining feature of the new CBA is a salary cap system that sets the annual League-wide aggregate of player compensation at a percentage of certain League and NHL Club revenues (Hockey Related Revenues or HRR).¹ Based on this salary cap, the parties established a payroll range for each Club's player payroll. Each club is allowed to pay total player salaries within this range.

Five of the Side Letters at issue identify certain streams of hockey-related revenues or define the value of specified HRR. Three letters (1, 2 and 8) deal with broadcast revenues associated with named teams. Letter 1 assigns specific monetary values to broadcast revenues derived from entities affiliated with five named NHL teams and attributes these valuations to HRR (Affiliates Broadcast Values). Letter 2 specifies a formula for valuing another named NHL team's broadcast revenues, also attributed to HRR (Affiliates Broadcast Values). Letters 1 and 2 are based on estimates of the fair market value of these broadcast rights because the affiliates do not purchase them in an arms-length transaction with the team. Letter 8 provides a specific valuation, to be included in HRR, of certain broadcasting revenues generated in the open market for a named NHL team (Non-Affiliates Broadcast Values). All agreements between the teams and purchasers of broadcast rights provide that the parties to the agreement will keep its terms confidential. Letter 3

¹ Article 50.1(a) of the agreement defines Hockey Related Revenues as "operating revenues ... from all sources, whether known or unknown ... of each Club or the League, for or with respect to that League Year...derived from or earned from, relating to or arising directly or indirectly out of the playing of NHL hockey games or NHL-related events." Article 50.1(a), which is twenty pages long, lists and defines various terms and sources of revenue to be included or excluded from the HRR.

provides the percentage equity ownership of a named team's owner in that team's arena and sets forth a formula (based on the equity percentage) for deriving the percentage of the arena revenues to be attributed to HRR (Arena Values). Letter 4 specifies that certain identified categories of costs will be deducted from the revenues of the National Hockey League Enterprises and thus not attributed to HRR (NHLE Costs).

The remaining two Side Letters deal with financial matters other than HRR. Side letter 10 provides that two named NHL teams have a limited exception to their obligation to provide tickets, both free and for sale, to players and the Union (Tickets as Player Compensation Exception). Side letter 16 provides that the Independent Accountants will have access to all necessary financial documents of one named NHL team for the purpose of determining whether that club has complied with the requirements of the collective bargaining agreement (Special Auditing).²

On October 7, 2005, Dwayne Roloson, player and elected player representative, telephoned the Executive Director of the NHLPA Ted Saskin and asked him for hard copies of the CBA for his team. Saskin replied that the agreement was still in draft form, but that he would send it to Roloson. Roloson then requested the "Confidential Side Letters." Saskin refused to provide them. To date, the NHLPA has not further responded to Roloson's request for the "Confidential Side Letters."

Union counsel asserts that Saskin made the side letters explicitly available for inspection under tightly controlled circumstances on two occasions, namely the season-end player meetings held on July 10-12, 2006, in Whistler, British Columbia, and August 1-2, 2006, in Stockholm, Sweden. According to Union counsel, about 50 players attended the first meeting and approximately 20 attended the second. At those meetings, Saskin allegedly distributed numbered binders to the attending players and let them review the side letters, but only under the following conditions:

² Under the CBA, the Union is not given direct access to the financial information for the clubs and the NHL. See, generally, CBA, Sec. 50.12 and especially Sec. 50.12(g). Instead, the parties appoint Independent Accountants to monitor club and NHL compliance with the HRR reporting requirements of the collective bargaining agreement. CBA, Sec. 50.12(a). Thus Side Letter 16 iterates the CBA auditing requirement for this named NHL team.

- they could not take notes;
- they could not make copies;
- they could not discuss the side letters with anyone except other players; and
- all of the numbered binders were collected at the ends of the meetings.

There is no evidence that any players were permitted to see any of the remaining seven side letters outside of the two season-end player meetings. There is no evidence that Roloson or any of his team members attended the two season-end meetings.

ACTION

We conclude that employees have a legitimate interest in these seven letters; that Side Letters 3, 10, and 16 are not sufficiently confidential or proprietary in nature to privilege the Union to withhold them from employees; and that Side Letters 1, 2, 4, and 8 contain substantial proprietary information. Applying a balancing test, we conclude that the Union's blanket refusal to provide these Letters, without accommodating the employees' interest, breached the Union's duty of fair representation. We further conclude, however, that the Union met its duty of fair representation by their method of disclosing the letters in later meetings with employees. We conclude that this was an adequate accommodation of employees' interests and the Union's confidentiality interests.

A union violates its duty of fair representation when it fails to provide unit employees who request it copies of their collective-bargaining agreement.³ The right to examine the agreement is necessary for an employee "to understand his rights under [the contract] and . . . to determine the quality of his representation under [the contract]." Id.

The Side Letters here are expressly incorporated into the CBA. We find South Jersey Detective Agency is not entirely dispositive of this case, however, because the Union asserts that these Side Letters contain confidential and proprietary information. This assertion clearly raises the possibility of a countervailing interest in non-disclosure that was not present in South Jersey Detective Agency. We therefore find that case not directly applicable here. Where a union asserts substantial countervailing interests against disclosing portions of a

³ Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB 419, 420 (1982).

bargaining agreement, those union interests should be balanced against the employees' interests in examining those portions of the agreement.⁴ We find support for this approach in analogous doctrine under Section 8(a)(5): even where an employer raises a legitimate and substantial claim of confidentiality against a Union's legitimate request for relevant information, the employer may not simply refuse to provide the information but must bargain in good faith to accommodate the union's interest.⁵ We acknowledge that the bargaining obligation defined in Detroit Edison does not directly apply to the Union's relationship with employees, which is governed by a duty of fair representation. Nevertheless, we conclude that it is appropriate to interpret that duty of fair representation to include an obligation to affirmatively accommodate the employees' interests articulated in South Jersey Detective Agency.

The Board has noted a few general categories of confidential information:

that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending law suits.⁶

⁴ In Branch 529, NALC, 319 NLRB 879, 881-882 (1995), the Board found that the Union violated its duty of fair representation by failing to provide a grievant copies of his own grievance form when that grievance settled at the second step. In so concluding, the Board balanced the "self-evident" nature of the grievant's need for this document as against the union's lack of a countervailing interest for failing to provide the documents. In Local No. 324, Operating Engineers, 226 NLRB 587 (1976), the Board balanced members' need for "job referral" information against the Union's asserted need in preserving the anonymity of its members, and concluded that the Union violated its duty of fair representation by failing to provide the information.

⁵ See, e.g., General Dynamics Corp., 268 NLRB 1432, 1433 (1984) citing Detroit Edison v. NLRB 440 U.S. 301 (1979).

⁶ Detroit Newspaper Agency, 317 NLRB 1071, 1073 (1985)

The Board has also specifically recognized that businesses have a substantial interest in maintaining the confidentiality of private information, such as trade secrets and other proprietary information.⁷

Under the common law, state courts weigh the following six factors to determine the adequacy of an enterprise's proprietary/trade secret claims:

- (1) the extent to which the information is known outside of the employer's business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and to his competitors;
- (5) the amount of effort or money expended by the employer in developing the information; and,
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁸

Thus, the character, relative value, and guarded nature of the information itself determine its confidentiality. Merely labeling information as proprietary and/or a trade secret does not confer confidential status.⁹

Proprietary information, or non-trade secret business information, is said to fall on a continuum:

⁷ Lafayette Park Hotel, 326 NLRB 824, 826 (1998) enfd. 203 F.3d 52 (D.C. Cir. 1999)

⁸ See e.g., Arcor, Inc. v. Hass, 842 N.E. 2d 265, 269-270 (Ill. App. Ct. 2005); Sunbelt Rentals, Inc. v. Head & Enguist Equipment, L.L.C., 620 S.E. 2d 222, 226 (N.C. Ct. App. 2005) *Review Dismissed* 629 S.E. 2d 289 (N.C. 2006).

⁹ Thompson v. Impaxx, Inc., 7 Cal Rptr. 3rd 427, 430-431 (Cal. Ct. App. 2002), *citing to* Morlife, Inc. v. Perry, 66 Cal. Rptr. 2d 731, 736 (Cal. Ct. App. 1997).

On one end lies entirely unprotected information—widely held knowledge such as common trade skills or public facts. For this type of information, the law offers little protection. On the other end of this spectrum lie trade secrets, highly valuable information that is closely protected within in a firm.¹⁰

While no precise definition of proprietary information can be said to emerge from the cases, a recent definition of the term given by the American Law Institute in its Draft Third Restatement of Employment is instructive:

[a]n employer's proprietary information is commercially valuable information that the employer has developed or obtained and taken reasonable measures to keep confidential. It does not include information that is generally known, derived from general training offered by the employer, or is readily ascertainable by proper means.¹¹

Proprietary information concerning the valuation of assets and business costs is "commercially valuable" because its disclosure to competitors, customers, and vendors, who would otherwise be unaware of it, places the disclosing business in a less advantageous commercial position in that it restricts that business's bargaining position in commercial dealings that take this information into account.

The Union and the League assert that the League has several confidentiality interests in the material contained in the Letters that privilege the Union's refusal to provide these Side Letters to employees.¹² We have divided the Side Letters into two groups based upon the Union asserted confidentiality interests. In the first group, Letters 3, 10, & 16, the Union argues that

¹⁰ *Reforming the Law Of Proprietary Information*, Chris Montville, 56 Duke L.J. 1159, 1161 (2007)

¹¹ *Restatement (Third) of Employment Law Sec. 601* (Preliminary Draft No. 3, 2005)

¹² We conclude, in agreement with the Region that the limited disclosure in the meetings with employees in 2006 did not waive the League's confidentiality interests in these documents. Cf. *H.B. Zachry Co.*, 310 NLRB 1037, 1038 (1993) (employees did not waive confidentiality rights regarding affidavits given to Board agents by virtue of having given copies to the union).

disclosure would disrupt the League's ability to govern the constituent clubs, and, in addition, with respect to Letter 16, that disclosure might cause embarrassment. In the second group, Letters 1, 2, 4 & 8, the Union argues that disclosure of financial information would result in competitive economic harm. We find no privilege with respect to the first group; and find it appropriate to balance the competing interests in the second group.

Letters 3, 10, & 16

The Union and the League do not assert that Side Letter 3, Arena Values for HRR,¹³ Side Letter 10, Tickets as Player Compensation Exception, and Side Letter 16 Special Auditing contain any proprietary information. The Union relies on the League's asserted need to negotiate private "Club-specific" arrangements as grounds for keeping them confidential. The Union asserts that the League's ability to make such agreements in private will preclude other teams from "second guessing" the League, and that flexibility is a necessary aspect of the League's ability to govern its constituent teams. With regard to Side Letter 16, the Union claims, in addition, confidentiality to protect the subject team entities from unnecessary public criticism or embarrassment, which would arise because this named team is the only Club for which the Union deemed specific auditing assurances necessary. In sum, the Union asserts League governance problems and public embarrassment as countervailing interests in these Letters.

The players have a substantial interest in examining these letters. Side Letter 3, Arena Values for HRR, and Side Letter 10, Tickets as Compensation Exception, bear directly on the players' ability to determine their rights under the CBA. Side Letter 3 comprises an element of HRR which is the basis for the player salary cap. Side Letter 10 addresses a direct form of player compensation. Side Letter 16, Special Auditing, is simply a reaffirmation of the auditing requirements already set forth in the CBA. Examination of this letter would allow players to assess how well their Union has protected their interests in bargaining.

We conclude that these letters contain no confidential material. Neither the Union nor the League asserts any

¹³ Letter 3 contains no valuations of any asset but rather sets a percentage of unknown Arena revenues to be attributed to the HRR. Thus, while this letter attributes revenues to the HRR, it does so without disclosing any proprietary information.

justification for withholding these Side Letters as "commercially valuable information." They do not cite any example of how the release of this information could interfere with any potential commercial transactions. Rather, they rely on the League's asserted need to negotiate private "Club-specific" arrangements as grounds for keeping them confidential, and in the case of Side Letter 16, because its release may cause embarrassment. We conclude that such interests are not proprietary, and are not otherwise recognized rationales for confidentiality under Board Law.¹⁴

Further, the League's concern that release of the information in Side Letters 3, 10 and 16 would impede its ability to govern the teams is insufficient to overcome the player's much more substantial interests in understanding the compensation system negotiated by their Union and to evaluate the Union's performance with respect to provisions to guarantee compliance with the CBA and the Side Letters. The agreements made for specific team members of the League are little different from individual agreements affecting individual members of any multi-employer association. The possibility that other members of the multi-employer group may be disgruntled by discovering that the association has agreed to different (particularly if more favorable) terms for another association employer is not a basis to decline to disclose the agreement to the employees. Further, the concern to avoid public embarrassment with respect to Side Letter 16 is also insufficient to overcome the player's substantial interests in understanding how well their interests were protected in the bargaining.¹⁵ Accordingly, we conclude that the Union's failure to provide the requesting player representative with copies of Side Letters 3, 10, and 16 violated the Union's duty of fair representation.

Letters 1, 2, 4, & 8

The Union and the League have identified substantial proprietary interests with regard to these Side Letters. Regarding letters 1, 2, and 8, all dealing with estimated values of broadcast rights, the Union and League assert that disclosure of these estimated values may have a negative impact on the economic value of these particular Broadcast rights in the future, and/or on the value of

¹⁴ See Detroit Newspaper Agency, 317 NLRB at 1073.

¹⁵ Cf. Detroit Newspaper Agency, 317 NLRB at 1074-1075 (fact that report was potentially embarrassing to employer did not outweigh union interest in receiving safety-related information).

Broadcast rights generally for all clubs in the several markets. In support of this assertion, the parties note that every NHL team agreement granting broadcasting rights to a broadcasting or cable company, e.g., Side letter 8 Non-Affiliate Broadcast values, contains a confidentiality clause requiring the parties to keep the terms of that agreement confidential.

We conclude that the assessments of broadcast values contained in Letters 1, 2¹⁶ and 8 are confidential proprietary information. Disclosure of these values, otherwise unknowable to competitors, vendors, other broadcasters, and other customers including advertisers, would place the League and or its constituent clubs in a less advantageous commercial position because disclosure would necessarily restrict their bargaining position in commercial dealings that take these values into account.

With regard to Side Letter 4, (NHLE costs), the business costs described therein, e.g., legal costs, marketing, rents, etc., are the type of business information the Board has found to be proprietary and confidential.¹⁷ Disclosure of these otherwise proprietary costs also would place the League and its constituent clubs at a competitive disadvantage relative to competitors, customers, and advertisers, who would otherwise be unaware of these costs.

Player employees also have a substantial interest in examining Side Letters, 1, 2, 4, and 8, so that they may fully understand their rights under this contract. Side Letters 1 and 2 dealing with the Affiliates Broadcast Values to be included in the HRR, Side Letter 8 dealing with a Non-Affiliate Broadcast Value to be included in the HRR, and Side Letter 4 dealing with the NHLE costs to be excluded from HRR, all directly involve HRR and thus player compensation. Player employees also have an interest in examining these Letters to determine how well the Union protected their interests. In sum, both the Union and the

¹⁶ Contrary to the Region, we conclude that Letter 2 should be included in this analysis even though it does not expressly state a monetary value. Letter 2 ties its monetary value to the value of another broadcast contract, and thus the value stated in Letter 2 is readily calculable if one knows the value of the referenced contract. Since broadcast values are typically treated as confidential, and since NHL team agreement granting broadcasting rights contain confidentiality agreements in the business contracts, we conclude that the Union and League have demonstrated a proprietary interest in Letter 2.

¹⁷ See, Good Life Beverage Co., 312 NLRB 1060 (1993)

employees have identified substantial interests in the withholding or examination of these Letters.

We conclude that the above employee interests in Side Letters 1, 2, 4, and 8, even when balanced against the Union's assertion of the League's substantial proprietary interests, remains too substantial and strong for the Union to ignore by completely denying any access. Rather, consistent with the principles discussed above, the Union was required to make some disclosure that would accommodate the employees' legitimate interests while protecting the League's legitimate proprietary interests.

The Union asserts that it disclosed all the Side Letters at the season-end player meetings in July 2006 in Whistler, British Columbia, and in August 2006 in Stockholm, Sweden.¹⁸ At those meetings, the Union allowed attending employees to examine the Letters, but did not allow them to take notes or make copies. Employees also were specifically told that they could not discuss the side letters with anyone except other players. We conclude that this limited disclosure was a sufficient accommodation of the employees' interests in these Letters. Thus, this limited disclosure granted employees access to the requested information, and once the employees examined this information they were apprised of the significance of these agreements to their overall compensation, including the fact that these agreements only constituted a small percentage of the overall HRR, i.e., less than 1%. Moreover, the Union's attorneys represent that this limited disclosure would be open to all employees who request it, and there is no evidence that any subsequent request has been turned down. Thus under this approach employees were able to determine their contractual rights under the Letters and also evaluate the quality of the Union's representation. Given that the Union's duty of fair representation, from which the duty to disclose the CBA flows, rests on a duty to act reasonably,¹⁹ the limited disclosure here is an adequate accommodation.

Although these two disclosures were an adequate method of accommodating the competing interests, we note that the Union had earlier refused to provide these Letters to the requesting player representative. And, there is no

¹⁸ During the Union's earlier contract ratification meetings in July 2005, the Union did not make any Letter available to employees. The Union's Power Point presentation concerning several of the Letters only summarized their material contents and provided no specific information.

¹⁹ Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

evidence that the player representative or any employee members of his team were present or given a similar opportunity to examine the Side Letters. Thus, complaint is warranted, with regard to Side Letters 1, 2, 4 and 8, as well as Letters 3, 10 and 16.

[FOIA Exemptions 2 and 5

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B.J.K.

²⁰ [FOIA Exemptions 2 and 5

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²¹ [FOIA Exemptions 2 and 5

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²² [FOIA Exemptions 2 and 5

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