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

Advice Memorandum

DATE: December 13, 2004

TO : Frederick J. Calatrello, Regional Director
Region 8

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

SUBJECT: Armstrong Air Conditioning, Inc.
Case 8-CA-34846 (4-CA-32824) 240-3367-0415
530-6067-6001-3750

The Region submitted this case for advice on whether (1) the Employer violated Section 8(a)(5) by refusing to provide the Union with bargaining notes that the Union asserts are relevant to pending or potential grievances and pending arbitrations; and (2) [*FOIA Exemptions* 2 and 5

.][1]

We conclude that the Employer's bargaining notes are relevant to the Union's claims regarding the meaning of the contract clause at issue in the pending arbitration involving the Employer's reassignment of certain employees. The bargaining notes are relevant to establish an understanding of the parties which contradicts the Employer's interpretation of the contract, i.e., that the Employer could reassign these employees for "any" reason. While the bargaining notes may also contain confidential information, the Employer's refusal to provide or to bargain over a means of providing relevant material in the notes, violates the Act. The Union, however, failed to demonstrate the relevance of the Employer's bargaining notes to any matter at issue in its other requests. Accordingly, the Employer lawfully refused to supply bargaining notes in response to those matters.

---

[1] [*FOIA Exemptions* 2 and 5

.]

[*FOIA Exemptions* 2 and 5

.]

FACTS

The Employer and Steelworkers Local 1623 (the Union) are parties to a collective-bargaining agreement with a term of April 21, 2002 to April 8, 2006. The parties have had a number of disputes concerning job classifications listed in Appendix A and A-1 of that contract. Article VIII-Seniority, Section 4 paragraph 4 of the contract provides:

> Those employees assigned to a job classification listed in appendix A-1 may be placed on any job in any work group within that classification without regard to seniority.

The Employer asserts that, by this provision, it has an unlimited and unrestricted right to reassign employees in the A-1 category while its ability to move category A employees is restricted by those employees' seniority rights.

In contrast, the Union asserts that when the parties agreed to this provision during the April 2002 negotiations for the current contract, the Company's lead negotiator assured the Union's President that employees in the A-1 category would only be moved from group to group for reasons of absenteeism, vacations, and seasonal manning changes. The Union argues that these assurances resulted in the parties' agreement that the Employer would only reassign A-1 employees for these stated reasons.

On July 3, 2003,[2] the Union filed grievance 61-03 alleging that the Employer's reassignment of A-1 employees at any time for any reason violates the contract.

On July 7, in an attempt to clarify the quoted contract section, to prepare for pending grievances and arbitrations and to assess other potential grievances, the Union made an e-mail request for information. The Union requested copies of the Employer's bargaining notes pertaining to the April 2002 negotiations, covering all

[2] All dates are 2003, unless otherwise designated.

contract language. The Union qualified this request on February 3, 2004, limiting the request to bargaining notes relevant to nine enumerated issues that related to grievances, potential grievances and pending arbitrations, including grievance 61-03 against the Company's reassigning A-1 employees at any time and for any reason. With the exception of the first enumerated issue involving grievance 61-03, the Union has apparently not asserted that any pertinent contract term involved in pending grievances and arbitrations, or potential grievances, was negated, modified, or supplemented by statements or assurances given in the negotiations. The Union otherwise offered no explanation as to how the Company's April 2002 bargaining notes would be relevant to any pending or potential grievances concerning the remaining eight issues.

The Employer admits that it has refused to provide any of its bargaining notes. The Employer does not assert that its bargaining notes are silent with respect to the scope of the disputed contract term at issued in grievance 61-03. Instead, the Employer asserts that the notes are not relevant because the cited contract provision gives it the unlimited right to assign employees in the A-1 category. The Employer also asserts its bargaining notes are confidential because they contain the Company's bargaining strategy.

Grievance 61-03 was appealed to arbitration on November 17, 2003.

ACTION

The Region should issue complaint, absent settlement, alleging that under current Board law, the Employer unlawfully refused to provide the bargaining notes because they are relevant to Union grievance 61-03 concerning whether the Employer has an unlimited contractual right to reassign A-1 employees for any reason. The Employer's refusal to provide the notes was not privileged by the parol evidence rule because that rule is inapplicable here, and was not privileged by the Employer's claim of confidentiality because the Employer summarily refused to provide the requested notes without first seeking to accommodate the Union's need for this information. [*FOIA Exemptions* 2 and 5

.]

1. The bargaining notes requested by the Union in grievance 61-03 are relevant for contract administration, are not irrelevant because of the parol evidence rule, and although the Employer asserted a valid confidentiality interest, the Employer's blanket refusal to provide the notes without seeking any accommodation for the Union's need for the notes violated the Act.

Relevancy

An employer is obligated to provide 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.[3] The requested information need only be "potentially relevant" to be subject to disclosure under Section 8(a)(5).[4]

The Union asserts the bargaining notes are relevant to grievance 61-03 alleging that the Company had violated the contract by reassigning A-1 employees from their established work groups at any time for any reason. The Employer denied the grievance by claiming that Article VIII-Seniority, Section 4 paragraph 4 allows employee reassignment at any time for any reason.

The Union's argument for the requested information rests on the fact that the above contract provision did not specify the times when or the reasons why A-1 employees can be reassigned without regard to their seniority. The Union asserts that the Company's lead negotiator had assured Union officials involved in the 2002 negotiations that the only "reasons" for moving A-1 employees would be absenteeism, vacations and seasonal manning. The Union in effect argues that these assurances resulted in an understanding of this contract provision that contradicts the Employer's interpretation, and supports the Union's grievance. The bargaining notes are relevant evidence to establish the existence of the Union's understanding. The bargaining notes are thus clearly relevant to the processing of this grievance.[5]

---

[3] Jamaica Hospital, 297 NLRB 1001, 1002 (1990).

[4] See Daimler Chrsler Corp., 331 NLRB 1324-25 (2000).

[5] The Union never established the relevance of the bargaining notes to any other of its grievances, arbitrations, or potential grievances. Therefore all the

The Employer defends its refusal to supply the requested information in part because the Employer is unaware of any Board case in which the Board ordered disclosure of a party's bargaining notes under Section 8(a)(5). The fact that the Board has never ordered the production of bargaining notes does not mean that the Board would not order the production of otherwise potentially relevant information simply because the information is in the form of bargaining notes. The character of this information, i.e., notes of a bargaining session, may be pertinent to whether the requested information is confidential, discussed infra. However, the mere fact that the requested information is in the form of bargaining notes is not a bar to finding the notes potentially relevant to grievance processing. The Board has required an Employer to turn over requested "supervisor notes" of disciplinary proceeding, despite the employer's attempt to characterize them as "witness statements."[6] Furthermore, an ALJ has actually required the production of requested bargaining notes on the view that they were relevant to whether the union, during a negotiation session, had agreed to certain policy changes that had since become the subject of a grievance.[7] Finally, the fact that bargaining notes are routinely found to be relevant evidence at trial in Board proceedings[8] argues that the Board would also find bargaining notes to be "potentially" relevant under Section 8(a)(5). We therefore conclude that the Board would order the production of relevant bargaining notes under Section 8(a)(5).

Parol Evidence

Since this is a Section 8(a)(5) refusal to supply information allegation, it is not clear that the parol

---

allegations relative to these requests should be dismissed, absent withdrawal.

[6] See T U Electric, 306 NLRB 654, 656 (1992), See also New Jersey Bell, 300 NLRB 42, 43 (1990) (security investigative report), United Technologies Corp., 277 NLRB 584, 588 (1988) (technical expert reports).

[7] See Morton International, 1993 WL 1609483.

[8] See, e.g., Northwest Graphics, Inc., 343 NLRB No. 16 (2004), AMF Trucking & Warehousing Inc., 342 NLRB No. 116 (2004).

evidence rule applies. As noted above, an employer must supply requested information that is relevant to contract negotiations, contract administration, and to grievance filing,[9] and that requested information need only be "potentially relevant" to resolving a collective-bargaining dispute.[10] In contrast, the parol evidence rule operates at a trial to prohibit the use of evidence that varies the terms of an unambiguous contract provision.[11]

We note, however, some parallels between the parol evidence rule and this request for information case. The parol evidence rule concerns whether trial evidence is relevant; the alleged violation here concerns whether the requested bargaining notes are potentially relevant to the existence of the Union's understanding. We therefore consider the parol evidence rule as possibly instructive of whether a violation exists here.

The Region considered whether the parol evidence rule would bar the production of the bargaining notes relative to grievance 61-03 because Article VIII-Seniority, Section 4 paragraph 4 is clear and unambiguous and thus needs no clarification. We conclude that the rule would not bar reliance upon this evidence. The disputed contract provision clearly allows the Employer to assign A-1 employees to any job or work group without regard to seniority. However, the provision is silent as to the reasons that would justify reassigning an A-1 employee without regard to seniority. The alleged parol understanding does not vary or contradict this provision because of this silence. Rather, the Union's interpretation of this provision, based on the asserted parol understanding, merely supplements the contract term by providing explicit reasons for the reassignment of A-1 employees.[12] Thus, to the extent that the parol evidence

---

[9] See note 3, supra.

[10] See note 4, supra.

[11] America Piles, Inc., 333 NLRB 1118, 1129 (2001). The Board also does not permit evidence of other agreements that conflict with the written terms of the collective-bargaining agreement. See, e.g., Wehr Constructors, 315 NLRB 867, 868 fn. 4 (1994) enfd. denied in part on other grounds 159 F.3d 946 (6th Cir. 1998).

[12] See, e.g., Sanitation Salvage Corporation, 342 NLRB No. 41 (2004) (despite the fact that the contract unambiguously obligated employer to execute one of two contracts, parol

rule is at all applicable here, the rule would not bar the production at trial of this evidence.

Employer's confidentiality claim

Under Detroit Edison v. NLRB,[13] a union's interest in arguably relevant information may not predominate when an employer asserts a legitimate and substantial interest in maintaining confidentiality. In determining whether an employer has satisfied its burden of establishing a confidentiality interest, the Board considers factors such as whether the information possesses a "legitimate aura of confidentiality"[14] and whether another law protects the confidentiality of the information.[15] If an employer satisfies this burden, it then has a duty to bargain in good faith over an accommodation of its confidentiality concerns.[16] The accommodation may condition disclosure of

---

evidence not barred because the contract was silent as to which party had the option to choose which contract was to be executed).

[13] 440 U.S. 301, 318 (1979).

[14] See Exxon Co. USA, 321 NLRB 896, 898-99 (1996), enfd. 116 F.3d 1476 (5th Cir. 1997) (identities of persons who disclosed prior drug or alcohol-related arrests, convictions, and rehabilitation); Johns-Manville Sales Corp., 252 NLRB 368, 368 (1980) (employees with a certain medical disorder).

[15] See Postal Service, 305 NLRB 997, 998 (1991) ("When a defense of confidentiality is raised, the Board must balance the interests of the party seeking the information against those of the party asserting the defense, and may look to other statutes ... as sources of policy to be considered in striking the balance"), citing Detroit Edison, supra, at 318 n.16; Goodyear Atomic Corp., 266 NLRB 890, 891-92 (1983), enfd. 738 F.2d 155 (6th Cir. 1984) (disclosure of aggregate and statistical medical information not prohibited by Privacy Act); LaGuardia Hospital, 260 NLRB 1455, 1463 (1982) (patient's right of privacy not absolute under state law, which authorizes disclosure when otherwise required by law).

[16] See Exxon Co. USA, 321 NLRB at 899; Pennsylvania Power Co., 301 NLRB 1104, 1105-06, citing Minnesota Mining & Mfg. Co., 261 NLRB 27 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983). Cf. Lasher Service Corp., 332 NLRB 834 (2000) (requiring employer to furnish the requested information

the information upon allowing the employer to redact the confidential or individually identifiable information.[17] If the employer fails to bargain over an accommodation of its confidentiality interest, the Board will find a violation.[18]

We first conclude that the Employer here legitimately asserted that its bargaining notes are confidential because they may contain the Employer's bargaining strategy. The interests of collective-bargaining are furthered by the parties' confidence that their good-faith bargaining strategies can be formulated without fear of exposure.[19] We thus find that parties have an interest in the confidential nature of their bargaining strategies. Nonetheless, as noted above, the Employer was under a duty to try and accommodate its confidentiality concerns with the Union's need for the information.

---

because it failed to establish a legitimate confidentiality interest).

[17] See LaGuardia Hospital, 260 NLRB at 1455-56 (ordering disclosure of only those portions of patient charts containing information relevant to the resolution of grievances, which did not include patient identity information; to preserve patient privacy, Board ordered parties to act in good faith to ensure that patient identities were revealed only to nurses who already had been in a confidential relationship with the patients, and then only if a comparison of the abstracts with the original charts was necessary to verify their accuracy). Accord Washington Gas Light Co., 273 NLRB 116, 117 n.11 (1984) ("Inasmuch as the Union has never sought the confidential medical information, we shall order the Respondent to furnish the Union the disciplinary records with the medical information deleted."). The union there sought disciplinary records, some of which contained confidential references to employee alcoholism.

[18] See Borgess Medical Center, 342 NLRB No. 109, Slip Op. at p. 2, (2004)

[19] See Berbiglia, Inc., 233 NLRB 1476, 1495 (1977)(Board approves ALJD ruling revoking subpoena seeking union records of membership meetings containing material regarding pending negotiations; ALJ determined that the union's interest in the confidentiality of its bargaining strategy outweighed the employer's interest in conducting a fishing expedition into the union's meeting notes.)

The Union asked for the bargaining notes solely to establish the "fact" of an understanding regarding the disputed contract terms. The Employer summarily refused to provide the notes without seeking any accommodation of the Union's need for them. Moreover, it appears that the Employer easily could have accommodated the Union's request, e.g., by offering to provide bargaining notes relevant to this "fact" while at the same time preserving its right to redact any assertedly confidential information.[20] Since the Employer did not seek to bargain over an accommodation, it violated the Act.

2. [***FOIA Exemptions* 2 and 5**

.]

[*FOIA Exemptions* 2 and 5 ,[21]

,[22]

.]

[*FOIA Exemptions* 2 and 5

]

---

[20] The ALJ, in Morton International, supra, directed this same accommodation after finding that bargaining notes there were relevant to whether the Union had agreed to certain matters during bargaining. The ALJ required the disclosure of bargaining notes of only a "strictly factual nature", i.e., concerning the existence of the alleged agreement. See "Remedy" section of ALJD. The ALJ recognized the confidential nature of any discussion of bargaining strategy that may have also been contained in the notes, and thus explicitly did not require the disclose of any notes which would, among other things, disclose the company's bargaining strategy.

[21] [*FOIA Exemptions* 2 and 5 .]

[22] [*FOIA Exemptions* 2 and 5 .]

[*FOIA Exemptions* 2 and 5, cont'd.

.]

In sum, the Region should issue complaint, absent settlement, as detailed above, and in the event this case [*FOIA Exemptions* 2 and 5

.]

B.J.K.