

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

Advice Memorandum

DATE: June 30, 2006

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) 220-7517
Case 2-CB-20453 240-0175
536-2581-0120
536-2581-3342
536-2581-3370-7900
536-2581-6767-7500

The Region submitted these Section 8(b) (1) (A) cases for advice on whether the Board has jurisdiction over the National Hockey League Players Association (NHLPA), a bi-national Union, regarding an alleged misrepresentation during Union contract ratification meetings held in Toronto, Canada, and denials of members' requests made over the telephone from the Union's Toronto offices. Assuming jurisdiction, did the Union violate its duty of fair representation (1) by its statement about a contract term made prior to employee contract ratification which is alleged to be intentionally misleading; (2) by denying a request for the names and e-mail addresses of all the players representatives for all NHL teams; and (3) by not providing "Confidential Side Letters" which are incorporated into the collective-bargaining agreement.

We conclude that the NHLPA's conduct at the Toronto ratification meeting and its subsequent telephonic denials of information requests emanating from Toronto had a substantial effect on the unit employees in the U.S., and therefore, the Board has jurisdiction to consider the substantive allegations. We then conclude that (1) the Union did not intentionally misrepresent the parties' contractual agreement regarding escrow of players' salaries or its application; (2) the Union did not violate its duty of fair representation when it denied its member's request for player-representative information, because the request was not directed to the Union in its representative capacity, but rather concerned a purely internal Union matter; and (3) the Union's failure, upon a request by player representatives, to provide its members with copies of the "Confidential Side Letters" prima facie violated the duty to provide members with an opportunity to examine the collective-bargaining agreement negotiated on their behalf,

because those Side Letters explicitly state that they are incorporated into the bargaining agreement. The Union does not have an absolute privilege to withhold the letters simply because it agreed with the NHL to treat them as "Confidential." Accordingly, complaint is warranted, absent settlement, with regard to the Union's failure to turn over any Side Letters that do not contain confidential information. [FOIA Exemptions 2 and 5

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FACTS

A. Background

The NHL and its 30 constituent clubs are engaged in the operation of a professional hockey league throughout the United States and Canada. At all material times 24 American and 6 Canadian clubs have been constituent members of the league. All Canadian clubs pay taxes and fees to Canadian authorities. Like all NHL clubs, they also pay taxes in the United States because of their ownership interest in NHL Enterprises, an American company that functions as the NHL's property licensing arm, and because of royalty income they earn in the United States.

In 1967 the NHL voluntarily recognized the NHLPA as the exclusive " representative of the professional hockey players employed by the clubs. The NHLPA maintains a principal office in Toronto. The NHLPA and the NHL have been party to a series of collective-bargaining agreements.

The bargaining unit members of each NHL team elect a player representative and an alternate player representative. Each elected player representative serves as a member of the NHLPA's Executive Board. The Executive Board elects the NHLPA officers—a president, two vice presidents, and a secretary treasurer. The Executive Board elects the Executive Director and determines the terms and conditions of his employment. The Executive Director is charged with implementing the NHLPA's policies and directing its activities. Prior to July 28, 2005, Robert

Goodenow was the Union's Executive Director. As described below, the current Executive Director is Ted Saskin.

B. The New Contract and Relevant Union Conduct

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 an agreement, pending ratification, on the terms of a new CBA.

A defining feature of the new CBA is an unprecedented 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 The CBA, also, establishes a "Payroll Range"—an "Upper Limit" and a "Lower Limit" for each Club's player payroll. Each club is allowed to pay total player salaries somewhere between these two limits. An important element of the new economic system is an escrow procedure, under which each Club places in escrow a percentage of each player's salary. Because the parties are unable to fix with certainty annual HRR - and thus the allowable total compensation - until the end of the fiscal year, they agreed to escrow a sufficient portion of player salaries to cover a payback to the owners should the players receive more than can be covered by the HRR. The CBA provides that the NHL and NHLPA will adjust the escrow percentage at the end of each fiscal quarter.

The CBA is supplemented by 30 Side Letters, each of which contains the express designation "Confidential Side Letter." The Side Letters, by their express terms, are incorporated into the CBA. According to the NHLPA, during bargaining the NHL sought to prevent the public disclosure of certain information in the Side Letters that relates to certain Clubs' business plans and financial structures. The NHLPA asserts that the parties explicitly agreed that the first "several" Side Letters that referenced such plans or structures would be designated confidential. According to the NHLPA, the parties thereafter maintained this format

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.

of "Confidential Side Letter" designation for all subsequent side letters. The NHLPA does not claim that these later Side Letters actually contain confidential information.

Side Letters 1-4 and 8 set forth agreements that contain the source and amounts of certain club revenues or costs for purposes of determining HRR. For example, Side Letters 1, 2 and 8 include a dollar-amount valuation of revenues derived from the licensure of cable distribution rights or television broadcast rights by named NHL Clubs. Side Letter 3 designates to be included in the HRR a percentage of revenues derived from a sports complex which is partially owned by team owners. Side Letter 4 states that revenues from NHL Enterprises will be included in the HRR, and then defines the costs that will be subtracted from those revenues.

Side Letters 5-7, 15, 16, 19 and 20 set forth other agreements that are relevant to pay but contain no dollar-amount valuations related to HRR. Side letters 9-14, 17, 18 and 21-30 set forth agreements unrelated to pay. Side Letter 30 states that the parties have reached an agreement subject to ratification and will work to correct typographical errors and cross-references.

On July 18, 2005, five days after the parties reached the agreement in principle, the NHLPA scheduled a meeting for player representatives and alternate player representatives, as well as a meeting for all players, for July 20, in Toronto, Canada. On July 19, the NHLPA posted a message on the SOURCE, a password-protected website that the NHLPA maintains for the exclusive use of its members. The message stated that: (i) the CBA would be posted on July 20; (ii) player representatives would conduct conference calls with the membership at 9 a.m. on July 21; and (iii) voting would be conducted online, through the SOURCE, on July 21. On July 20 the NHLPA posted the proposed CBA and a summary of the CBA, but not the side letters, on the SOURCE.

On July 20, the NHLPA conducted in Toronto one meeting with its player representatives and a second meeting that was open to the general membership. The first meeting was attended by the NHLPA's seven-member Executive Committee, which also served as its bargaining committee, and 44 player representatives and alternate player representatives. They were joined at the second meeting by about 175 additional players. At the meetings, the NHLPA distributed copies of the proposed CBA and CBA summary and gave a PowerPoint presentation. Ted Saskin, then the

NHLPA's Senior Director of Business Affairs and Licensing, addressed the group about the terms of the proposed CBA.

Among the matters discussed was the escrow system. Dwayne Roloson, a Minnesota Wild player and elected player representative, recalls that a player at the meeting asked if there was a maximum amount that could be held in escrow, to which Saskin responded "there was no number." Roloson asserts that Saskin then said that if every team spent \$39 million on payroll during the first year, then the percentage of salary held in escrow would be no more than 15%. According to Trent Klatt, who was then a Los Angeles Kings player and player representative, Saskin stated at the meeting that, if all teams were to spend to the upper end of their payroll limit, then the maximum percentage of salary that a player would be required to pay into escrow during the first year of the CBA was 15%.

The NHLPA denies that it ever told players that the escrow would never exceed 15%. Although the NHLPA declined to make witnesses available for affidavits during the investigation, in support of its defense it submitted copies of the PowerPoint slides used during the July 20 presentation to illustrate the operation of the escrow system.

The first PowerPoint slide about the escrow system contains the following information:

Escrow

The Escrow is not an automatic 15% (or any other number). Instead, we will review the need for an Escrow every year. If one is needed, we will set the Escrow Percentage by using real numbers.

Other PowerPoint slides used during the NHLPA presentation illustrated hypothetical escrow calculations. These slides include various examples of possible escrow contributions, including 5.5%, 15%, and another in which no escrow would be required. The CBA and CBA summary, posted on the SOURCE and distributed at the July 20 meetings, also provide examples of escrow calculations. There are no references in the PowerPoint slides, the CBA, the CBA side letters, or the CBA summary to a fixed or maximum escrow number or escrow percentage for the 2005-2006 season or for any other year.

The NHLPA did not make or offer to make the actual Side Letters available to players for review at the July 20 meetings and the Union asserts it will not provide any of

the Side Letters to its members.² However, the NHLPA claims that it described all of the "material" contents of the Side Letters to players at the July 20 pre-ratification meetings. In support of this contention, the NHLPA produced PowerPoint slides from the meetings that present information about the contents of Side Letters 1-6, 10, 15, 20, and 26.³

On July 21, each Player Representative conducted a conference call with his respective teammates regarding the proposed CBA. On the same day, the NHLPA conducted a ratification vote online through the SOURCE. Of the 728 bargaining unit members, 532 participated in the on-line balloting. The CBA was ratified by a vote of 464 to 68.

On July 28, 2005, former NHLPA Executive Director Robert Goodenow resigned from his position. On August 31, the NHLPA conducted a conference call with its Executive Committee, which includes all player representatives. During a voice vote held during the call, participants elected Ted Saskin to be the next Executive Director. This open election process appears to have been inconsistent with the procedures set forth in Article VII of the NHLPA constitution, which call for the position to be filled by secret ballot election. Citing the procedure that resulted in Saskin's appointment as Executive Director, Klatt, Roloson, Chris Chelios, Detroit Red Wings player and alternate player representative, and certain other players thereafter called for Saskin's resignation, a development that was widely reported in the sports media.

In or around the first week of September 2005, Minnesota player representative Roloson telephoned NHLPA counsel Ian Pulver and asked for a list of the names and e-mail addresses of all player representatives. Roloson placed the call from the United States, while Pulver spoke from his office in Toronto. Pulver told Roloson that he could not provide the player representative information and that Roloson would have to ask Saskin. Pulver added that he was certain that Saskin would not want to give the information to Roloson because it was a breach of privacy. Roloson then telephoned Saskin who declined to give the information to Roloson. To date, Roloson has not received a list of the names or e-mail addresses of the NHLPA player representatives. Although he did not reveal the reason why

² It appears that the NHLPA may have recently published some of the non-confidential Side Letters on its website. (See discussion *infra* n .27.)

³ Side Letters 6 and 15 relate to the escrow system.

he was requesting the information, Roloson informed the Region during the investigation that he desired to communicate with the other player representatives in order to discuss Saskin's selection as the new NHLPA Executive Director.

On September 21, 2005, Detroit player Chelios telephoned Saskin and requested the names of the NHLPA player representatives who participated in the August 31, 2005 conference call that resulted in the election of Ted Saskin to be Executive Director of the NHLPA. Chelios placed the call from the United States, while Saskin spoke from his office in Toronto. Saskin said the requested information was not available. Chelios also asked NHLPA Director of Player Relations Steve Larmer for the information. Larmer, who later resigned in protest over Saskin's selection and leadership, provided the requested information to Chelios. After receiving the list of player representatives from Larmer, Chelios notified the NHLPA that he no longer needed the information from Saskin. Chelios's objection to Saskin's selection and the reasons for his request for the contact information were also reported in the press.

The player representatives are the first NHLPA agents that players approach about grievances and contractual issues. Further, prior to changing teams during the course of their careers, players sometimes contact the player representative on their potential new team to discuss working conditions and to solicit general information about the new club and locale. Whenever players call the NHLPA for player representative contact information, the NHLPA furnishes the requested information after verifying the caller's identity. In such cases, players are not required to state why they desire to speak with a specific player representative.

On October 7, 2005, Roloson telephoned Saskin and asked him for hard copies of the CBA for his team. Roloson placed the call from the United States, while Saskin spoke from his office in Toronto. Saskin replied that the agreement was still in draft form, but that he would send it to Roloson. Roloson then observed that there generally were some documents or footnotes outside the agreement that clarify the agreement. When Saskin conceded that such documents existed, Roloson asked for those as well. Saskin replied that he could not provide that information to Roloson and could only furnish the agreement. Later that day, Roloson sent an email to Saskin requesting 30 hard copies of the CBA, one for each member of his team. The NHLPA furnished the requested copies of the agreement, but did not include any of the Side Letters. The NHLPA admits

that Roloson requested copies of the " agreement, but denies that Roloson specifically requested the Side Letters. Although, the NHLPA initially stated that it would not provide copies of the Side Letters to its membership, the NHLPA may have recently posted some non-confidential Side Letters on its website.

ACTION

We conclude that the Board has jurisdiction over the Union in all these matters because the alleged Union conduct substantially affects its U.S. members. We then conclude that the Union (1) did not willfully, intentionally mislead employees about the salary escrow percentage prior to employee contract ratification; and (2) did not violate its duty of fair representation by denying the requests for all of the players' representatives for all the NHL teams, because the requests were made regarding a wholly internal union matter. Accordingly, those charges should be dismissed, absent withdrawal. We conclude that the Union violated Section 8(b)(1)(A) by failing to provide employees with copies of the "non-confidential" Side Letters, which by their express terms were incorporated into the CBA, and complaint is warranted, absent settlement. [FOIA Exemptions 2 and 5

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Jurisdiction

Initially, we note that the Union does contest Board jurisdiction with regard to the U.S. teams, but argues only that the Board has no jurisdiction over Canadian teams.⁴ [FOIA Exemptions 2 and 5

⁴ Cf. North American Soccer League, 236 NLRB 1317, 1319 (1978) (Board declines to assert jurisdiction over two Canadian teams found to be joint employer with U.S. teams, election directed in league-wide unit excluding Canadian teams.)

[FOIA Exemptions 2 and 5, cont'd.
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The Union also does not dispute its status as a Section 2(5) labor organization. The NHLPA clearly is a Section 2(5) labor organization because it represents unit employees located in the U.S. working for U.S. Employers.⁶ We note, however, that some of the relevant Union conduct here occurred in Canada, i.e., the alleged misrepresentation occurred at the pre-ratification meeting held in Canada, and both the requests for the names of all the player representatives and the Side Letters were denied over the phone from the Union's Canadian offices. This dispute thus raises an issue of extra-territorial jurisdiction.

Whether Congress has exercised its authority to enforce its laws outside of the United States is a matter of statutory construction. There is a long-standing legal presumption against the extraterritorial application of U.S. statutes; without a clear statement of congressional intent to the contrary, United States statutes are presumed to have domestic application only. EEOC v. Arabian American Oil Co. (Aramco), 499 U.S. 244, 258-259 (1991) (no statutory jurisdiction to apply Title VII of the Civil Rights Act to an American employee of a U.S. company who was permanently employed in Saudi Arabia, because there was no clear congressional intent to give Title VII extraterritorial effect). In Computer Science Raytheon, 318 NLRB 966, 968 (1995), the Board recognized, consistent with Aramco, that it could not assert statutory jurisdiction over a permanent work site in a foreign country because there is no clear Congressional intent to grant to the Board extraterritorial jurisdiction.

Notwithstanding Aramco, when conduct that involves international elements occurs in the United States, the Supreme Court has applied an "effects" test to determine whether or not the application of a statute is domestic or foreign, using a case-by-case analysis.⁷ In Norwegian

⁵ [FOIA Exemptions 2 and 5

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⁶ See, e.g., National Hockey League And Its Constituent Member Clubs, 1999 WL 33454755 (N.L.R.B. Div. of Judges), Slip Op. at p.2 (June 8, 1999).

⁷ See Spector v. Norwegian Cruise Line Ltd, 545 U.S. 119, 125 S.Ct. 2169, 2177, 2182, (2005) (plurality opinion)

Cruise Line, the Court held that the provisions of the Americans with Disabilities Act could be enforced in US territorial waters against a foreign flag cruise ship that carried U.S. passengers. The Court concluded that it is reasonable "to presume Congress does intend its statutes to apply to entities in the United States territory that serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility of the United States." Id., at 2178. In support of that conclusion the Court cited to Longshoremen v. Ariadne Shipping Co., 397 U.S. 195, 198-201 (1970) noting that there the Court found the NLRA was fully applicable to labor relations between a foreign flag vessel and American longshoremen, because this relationship, unlike the one between a vessel and its own crew, does not implicate a foreign ship's internal order and discipline. Id.

In similar circumstances, the Board has found jurisdiction over an American labor dispute that involved a foreign flag vessel in US territorial waters but did not implicate the foreign ship's internal order and discipline of the crew.⁸ The Board also has found jurisdiction where the affected employees' work station was permanently in the U.S. and the labor dispute was between American employees and their American employer who temporarily moved outside the U.S.⁹

(general statutes are presumed to apply to a foreign-flag vessel in US territory if US interests rather than interests internal to the ship are at stake; case-by-case adjudication necessary to resolve whether application of U.S. law permitted). See also id. at 2184, n.1 (Ginsburg and Breyer concurring) (only potential for international discord can preclude jurisdiction; case-by-case adjudication appropriate).

⁸ See, ILA (Kansas Farm Bureau), 264 NLRB 404, 405-06 (1982) (American union's threat to boycott neutral foreign flag vessel "Belgium" considered "in commerce" under NLRA, where internal affairs of ship not being affected), enfd. 723 F.2d 923 (D.C. Cir. 1983).

⁹ December 12, Inc., 273 NLRB 1, 2-3 and n. 11 (1984) (Board asserted jurisdiction over discharge of employee in U.S. for protected conduct engaged in while outside the country), enfd. 772 F.2d 912 (9th Cir. 1985) (table); Asplundh Tree Expert Co., 336 NLRB 1106, 1107 (2001) (Board agreed with the ALJ that "the main effect of the Respondent's actions . . . was not extraterritorial" (emphasis added), enf. denied 365 F.3d 168 (3d Cir. 2004).

Assertion of Board jurisdiction here over the Union's conduct emanating from Canada is consistent with the "effects" test of Norwegian Cruise Line. The alleged misrepresentations were made to employees of a U.S. employer because 24 of the 30 constituent NHL clubs are owned and located in the U.S. The misrepresentations also concerned these employees' employment conditions in the U.S. The information requests, for both the player representative information and the Side Letters, were made by U.S. employees in telephone calls they initiated from the U.S. Although the Union refused from its offices in Canada, the refusal allegedly had a substantial effect in the U.S. Asserting jurisdiction over these alleged violations, as they concern the U.S. teams and the U.S. players, does not attempt to apply the Act to, or to interfere with, a foreign operation outside of the U.S. Thus, there is no danger that Board action will create a conflict with foreign law. In these circumstances, application of the NLRA to the allegations in this case does not raise any issues of extraterritoriality.¹⁰

The Third Circuit's denial of enforcement in Asplundh Tree is not controlling. In that case, the Board asserted jurisdiction over the discharges of American employees of a U.S. company temporarily stationed in Canada. The Third Circuit denied enforcement, relying on the Fifth Circuit's opinion in Norwegian Cruise Line,¹¹ subsequently reversed by the Supreme Court, as detailed above. The Third Circuit found Aramco controlling, as had the Fifth Circuit in Norwegian Cruise Line, and concluded Congress did not intend to grant to the Board the power to assert the NLRA in such an extraterritorial manner. See 365 F.3d at 178-180. Significantly, the Third Circuit failed to recognize the factual and legal distinctions between the permanent work station involved in Saudi Arabia in Aramco, which lacked any effects in the United States, compared to the temporary work site in Canada presented in Asplundh Tree where the conduct had clear effect on labor relations in the United States, i.e., a discharge of two American employees by an American employer from their permanent jobs in the United States. Moreover, the Supreme Court's rejection of the Fifth Circuit's approach in Norwegian Cruise Line undermines the viability of the Third Circuit's decision in Asplundh Tree.

¹⁰ See Asplundh Tree Expert Co., 336 NLRB at 1107.

¹¹ Spector v. Norwegian Cruise Line Ltd, 427 F.3d 285 (5th Cir. 2005) *rev'd*. 545 U.S. 119 (2005).

Further, the Third Circuit's decision in Asplundh Tree is arguably inapplicable to the factual circumstances in the instant case, where at least some of the conduct occurred in the U.S. To permit a union which has undertaken to represent employees of U.S. employers in the United States to avoid scrutiny of its performance of that duty, simply by performing those duties telephonically from an office outside the U.S., would be completely antithetical to the fundamental purposes and policies of the Act, namely to protect the rights of employees to self-organization and " within the United States. ¹²

Misrepresentation

Where there is an express agreement between an employer and a union to submit a contract for ratification, ratification is not purely an internal union matter,¹³ but rather is subject to the union's duty of fair representation.¹⁴ Whether a union breaches its duty of fair representation in making statements to employees concerning the substantive provisions of a proposed contract prior to a ratification vote depends on whether the union willfully and intentionally misled the employees concerning the contract proposals.¹⁵

In the instant case, the evidence does not establish that, prior to ratification, the Union willfully and intentionally misled the employees concerning whether, under the escrow provisions of the contract, the escrow payments would be no greater than 15% of a player's salary. The documents made available to the players at the time of the pre-ratification meeting, and in particular the

¹² See "Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?," 105 Colum. L. Rev. 2135 (November 2005), at n. 209 and accompanying text.

¹³ See Beatrice/Hunt-Wesson, 302 NLRB 224 (1991) (employer lawfully refused to sign a contract that had not been ratified according to an express agreement between the employer and the union); The Hertz Corporation, 304 NLRB 409 (1991) (ratification not purely internal union matter when required by an express agreement).

¹⁴ See Aero Restaurant, Inc., 241 NLRB 22, 22, 25 (1979), and Western Conference, 251 NLRB 331, 333 (1980) (applying duty-of-fair-representation analysis to alleged misrepresentations where parties implicitly agreed ratification was prerequisite to agreement).

¹⁵ Western Conference, supra, at 339.

PowerPoint presentation made to the players at that meeting do not make any such representation. To the contrary, the Union's PowerPoint presentation gave several examples of possible escrow percentages. Only one was 15%, which was not described as a maximum percentage. In fact, there are no references in the PowerPoint slides, or in the other Union documents, to any maximum escrow percentage.

The Charging Parties allege as an unlawful misrepresentation the alleged statement of NHLPA's then Senior Director of Business Affairs and Licensing Ted Saskin at a pre-ratification meeting that if the owners spend to the upper limit in salary, then the maximum percentage of salary that a player would be required to pay into the escrow during the first year of the CBA was 15%.

First, according to a Charging Party's testimony, that statement followed a question from another member of the Union who had asked Saskin in the general meeting whether there was a maximum or limit on the amount that could be held in escrow. Saskin responded that there was no number. Saskin thus specifically denied that there was any "maximum." Saskin's denial was consistent with the Union's Power Point presentation. Saskin went on to make the statement noted above.

We find Saskin's statement was only a worst-case prediction based on Saskin's experience of what Hockey revenues had been in the past. As a simplistic prediction, Saskin's statement would not be accurate if Hockey Revenues unexpectedly dropped. However, there is no evidence indicating that Saskin issued anything other than a good faith prediction. Rather, Saskin's denial immediately preceding this statement, that there was any maximum contribution as well as the Union's PowerPoint presentation, which also contained hypothetical examples of escrow percentages, strongly argue against any intention by Saskin or the Union to willfully mislead employees with the hypothetical predictions.¹⁶ We therefore conclude that Saskin's follow-up hypothetical statement did not intentionally misrepresent either the contract term regarding salary escrow procedures, or the effects of that provision.¹⁷

¹⁶ See Western Conference, 251 NLRB at 339 (if Local's negotiator, an international representative, intended to misrepresent the contract proposal to the Local and its membership, he would not have almost immediately furnished a copy of the provision to the Local officers and explained its meaning to one of them).

¹⁷ [FOIA Exemptions 2 and 5

Failure to Provide Player Representative Names and Contact Information

A union acting in its role as an exclusive representative has the "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."¹⁸ In Miranda Fuel, the Board held that Section 7 of the Act "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," and that "Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." (Emphasis added).¹⁹ When a union is not operating in its representative capacity nor in a manner which affects its members' employment, no duty of fair representation applies.²⁰

[FOIA Exemptions 2 and 5, cont'd.

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¹⁸ Vaca v. Sipes, 386 U.S. 171, 177 (1967); See also, Miranda Fuel Co., Inc., 140 NLRB 181, 185 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963). Although Miranda was denied enforcement, the Supreme Court approved the Miranda doctrine in Vaca v. Sipes. See Laborers Local 300 (Memorial Park), 235 NLRB 334 (1978), enf. 613 F.2d 203 (9th Cir. 1980).

¹⁹ 140 NLRB at 185.

²⁰ See, Carpenters Local 370 (Eastern Contractors Assn.), 332 NLRB 174 (2000) (no duty of fair representation applies to nonexclusive hiring halls because "[w]ithout the exclusive bargaining representative status, the statutory justification for the imposition of the duty of fair representation does not exist," quoting from Teamsters Local 460 (Superior Asphalt), 300 NLRB 441, 442 (1990)) This limited breadth of the duty of fair representation is consistent with the scope of Section 8(b)(1)(A) proviso and its application to Union discipline cases. See, Office Employees Local 251 (Sandia Natl. Laboratories), 331 NLRB 1417, 1418-19 (2000) (Section 8(b)(1)(A) does not proscribe

Neither Roloson nor Chelios told Respondent why they needed the names and e-mail addresses of all the player representatives. However, the circumstances indicated, and the NHLPA reasonably believed, that both players were requesting the information over a wholly internal matter, i.e., the selection of Ted Saskin as Executive Director of the NHLPA.²¹ Therefore, no duty of fair representation obtains.²² Since neither of these information requests were directed to the Union in its representative capacity, the Region should dismiss this allegation, absent withdrawal.

Failure to Provide Copies of the Side Letters

A union violates its duty of fair representation when it fails to allow unit employees who request copies of

wholly intraunion conduct that does not affect employment matters).

²¹ Roloson has admitted that he sought this information in order to communicate with other player representatives over Saskin's selection. While Chelios has not admitted that was his reason, his dissatisfaction with Saskin's selection had been contemporaneously reported in the press. In any case, Chelios has in fact received the information.

²² We assume that a player's request for the name of his own player representative, and even the name of several player representatives should he anticipate moving to another team, would be directed to the Union in its representative capacity. However, here there is no claim that these player representatives sought the names and e-mail addresses of all the other player representatives for any representative purpose. See, e.g., American Postal Workers Union Local 434, AFL-CIO, 2002 WL 506338 (N.L.R.B. Div. of Judges), Slip Op. 5 (General Counsel fails to prove member had a cognizable purpose for his request for the name, address and telephone number of national business agent; member himself could not remember why he need the information and counsel for the General Counsel merely speculated he might need it for a second opinion on a grievance.) Cf. International Union of Operating Engineers, Local 12 (Nevada Contractors Association), 344 NLRB No. 131, slip op. at 1 (2005) (GC required to prove that Charging Party had "reasonable belief" that Respondent treated him unfairly before union obligated to turn over hiring hall information.)

their collective-bargaining agreement "the opportunity to examine its agreement with their employer" ²³ 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 them." Id.

Here, the Side Letters are expressly incorporated into the collective-bargaining agreement. Initially, we reject the NHLPA's contention that Roloson did not request the Side Letters. Although Roloson's e-mail requesting 30 copies of the agreement did not explicitly include a request for the Side Letters, Roloson testified that he did explicitly request them in his phone call earlier that day. We also reject the Union's assertion that its description of material portions of the Side Letters at the July 20th pre-ratification meetings satisfies its duty under South Jersey Detective Agency. Rather, we conclude that that duty of fair representation obligates the Union to allow its members to "examine" the contract, as written. That duty may not be discharged by a mere description, as the Union sees fit, of that contract.

We further find without merit the NHLPA's contention that it is privileged to withhold the Side Letters because several of them contained sensitive financial or transactional information divulged to the NHLPA in confidence during negotiations and it agreed with the NHL and/or its constituent Clubs not to disseminate the Side Letters. The NHLPA asserts that this sensitive financial and transactional information is not shared among the clubs for competitive reasons.

The Board has recognized that businesses have a substantial interest in maintaining the confidentiality of private information, such as trade secrets and other proprietary information.²⁴ 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;

²³ Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB 419, 420 (1982).

²⁴ Lafayette Park Hotel, 326 NLRB 824, 826 (1998) enfd. 203 F.3d 52 (D.C. Cir. 1999)

- (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.²⁵

Thus, the character, relative value, and guarded nature of the information itself determines its confidentiality. Merely labeling information as confidential and/or a trade secret does not confer confidential status.²⁶

Indeed, in the instant case, the NHLPA admits that at least some of the Side Letters contain no confidential information. Nor has it, at this point, established the confidential nature of the material in the remaining documents. In addition, even if the material were trade secrets or other proprietary information, the public disclosure of allegedly confidential material undermines a claim that it remains proprietary (see item 2, of the common law test noted above) and evidences a diminished effort to maintain information as private, (see item 3 of that test). Here, the NHLPA avers that it described the "material" portions of the Side Letters to unit members in the pre-ratification meeting in Toronto, a public disclosure to over 200 unit members. If the "material" information disclosed was the information the Union now claims is proprietary, its disclosure undermines a confidentiality claim. Indeed, given the Union's statutory obligation, under both its NLRA representational duty and

²⁵ 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).

²⁶ 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).

the LMRA (see, 29 U.S.C. 414), to allow represented employees to examine any negotiated contract, it might be argued that the very act of including these Side Letters in a collective-bargaining agreement may amount to a public disclosure sufficient to vitiate any claim that this information remains confidential (see item 6 of the common law test noted above, regarding the ease with which information can properly be acquired).

To the extent that the Union has failed to establish that any material contained in the Side Letters should rightfully be regarded as confidential, we conclude that its private agreement with the NHL not to disseminate Side Letters is not a defense to its statutory obligation to provide the employees it represents with a copy of their labor contract. Employer and union parties to a collective-bargaining agreement may not by private agreement invariably defeat the statutory rights of third party employees.²⁷

²⁷ See, e.g., NLRB v. Magnavox Co., 415 U.S. 322, 325-326 (1974) (union may not waive by contractual provision employees' section 7 right to distribute literature regarding the choice of a bargaining representative); Alexander v. Gardner-Denver Corp., 415 U.S. 36, 51 (1974) (union may not waive employees' statutory right to file suit under Title VII).

Northern Indiana Public Service Company (NIPSCO), 347 NLRB No. 17 (2006) is not dispositive of the instant case. There the Board considered whether an employer violated its Section 8(a)(5) duty to provide information when it denied a union's request for its notes of interviews with witnesses in an investigation of an employee's complaint that a supervisor engaged in threatening conduct. The employer refused to provide the notes because it had promised the witnesses to keep their information confidential. The Board concluded the employer's promise created a legitimate confidentiality interest because it encouraged the witnesses to participate in an investigation of threatened workplace violence and protected the witnesses from reasonable fear of retaliation for their participation. Slip op. at 2-3. The NHLPA has offered no comparable rationale for its agreement with the NHL to keep the Side Letters confidential.

Moreover, NIPSCO involved a Section 8(d) bargaining obligation, which by definition requires a balancing of legitimate employer and union interests. See, e.g., Detroit Edison v. NLRB, 440 U.S. 301 (1979). In contrast, the instant case involves the basic, and perhaps unqualified, duty of a union, based on the union's duty of

Accordingly, with regard to the Union's failure to provide the Side Letters that do not contain confidential information, complaint is warranted, absent settlement.²⁸

The Union maintains that several of Side Letters do contain proprietary/confidential information. As noted above, the Union has not substantiated that claim. On the other hand, the Union has not been fully afforded an opportunity to establish that claim.

[FOIA Exemptions 2 and 5

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fair representation, to provide represented employees either with a copy of the contract or an opportunity to examine that contract. See also 29 U.S.C. Sec. 414 (LMRDA duty to provide contract to members imposed on secretary or corresponding principal officer of each labor organization). We also note that the promise of confidentiality made in NIPSCO occurred prior to the request to provide the information. Id at pp. 1-2. In contrast, here the Union's obligation to provide represented employees with the contract existed prior to its agreement with the NHL to include the Letters in the collective-bargaining agreement but keep them confidential. In essence the Union created its own dilemma by its agreement with the NHL.

²⁸ It appears that the NHLPA may have published some of the non-confidential Side Letters on its website. This website is password protected, reserved for players, and we do not have access to it. [FOIA Exemptions 2 and 5

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

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In sum, the Region should dismiss charges relating to the alleged misrepresentation and the failure to provide the names of all the player representatives. Complaint is warranted over the refusal to provide nonconfidential Side Letters. [*FOIA Exemptions 2 and 5*

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B.J.K.

²⁹ [*FOIA Exemptions 2 and 5*

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