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

Advice Memorandum

DATE: September 30, 1996

TO : John D. Nelson, Regional Director
Region 19

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

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SUBJECT: UFCW Local 555 (Albertson's)
Case 36-CB-2056

This Section 8(b)(3) case, involving the Union's failure to furnish information which arguably is relevant to enforcement of the "off the clock" provision of the contract but may lead to discipline of unit employees, was submitted for advice, in part, because the issue may arise in other Regions.

FACTS

Article 16.1 of the contract between Albertson's and UFCW Local 555 provides:

> There shall be no "free" or "time off the clock" work practices under this Agreement. Any employees found by the Employer or the Union engaging in such unauthorized practice shall be subject to discipline.

In the early 1990s, the Employer worked with the Department of Labor to develop a problem to eliminate its historical problem of violating wage and hour laws. This program includes handbook policies and time clock notices against free time, as well as discipline of supervisors who permit employees to work "off the clock."

In October 1995,[1] the Union distributed a newsletter prepared by the International to unit employees. The newsletter contained numerous excerpts from statements of former Albertson's employees that they had worked off the clock because of managerial pressure, expectations, orders and threats of discharge or loss of promotion opportunities. The letter also gave accounts of altered time records by

[1] All dates from October to December are in 1995; all dates from January to August are in 1996, unless otherwise noted.

management, methods of termination and problems regarding reimbursement for work related expenses. The letter concluded by noting that "Albertson's members are victimized by job standards that put them in a Catch-22 of being disciplined for not completing their assigned duties or for working off the clock in violation of company policy." On November 10, Employer official Paolini responded in writing to the Union president by restating the Employer's policy, noting the above contract language, suggesting using the grievance procedure to resolve "off the clock" work complaints, stating "we guarantee that no employee will be retaliated against for raising an allegation of off the clock work," and requesting any present or future information developed by the Union regarding such work.

Shortly after November 10, the Union began conducting investigative interviews. The Union interviewers completed a form entitled "Cooperative Free Time Investigation" which contained, *inter alia*, the name, unit, department, social security number and wage rate of the employee, and asked the employees whether they performed work prior to the start of a shift, during breaks and/or lunch periods, after clocking out, or on their days off. The interview form provided space for details of any incidents and blanks for the identity of the Union representative and the date, time and location of the interview. In a small box bearing the Albertson's logo, the interview form also quoted portions of the November 10 Paolini letter, including the portion which gave assurances against retaliation for reporting free time allegations.

By letter dated December 4, the Union informed employees that free timing at the Employer's stores was a serious problem which the Union hoped to solve, and asked that they keep track of their paid and free time for 13 weeks and complete a survey regarding free time. The survey was enclosed with the letter. The survey specifically asked employees, *inter alia*, if they engaged in or saw others engaging in off the clock work, why employees work off the clock, whether Albertson's had a stated policy against off the clock work, whether time records were changed, and whether the employee believed that Albertson's managers/supervisors were aware that employees were working off the clock. The letter also asked whether the employee consented to a grievance and/or a complaint being filed on his or her behalf with the appropriate state or federal enforcement agency, and/or to become a plaintiff in a lawsuit to recover lost wages. The employees were further informed in the letter that after the Union receives the survey, "[y]ou may be contacted by our Union's legal department to verify certain information. This call will be confidential" (emphasis in original).

The Employer and the Union exchanged at least 11 letters from December 4 to January 19. On December 4, the Employer reiterated its information request but on December 11, the Union stated that despite Paolini's assurance that employees would not be retaliated against/disciplined for reporting free time, an Employer official had told a Union representative that employees admitting to working free time would be disciplined, but not discharged unless they had a previous history of working free time. In another letter dated December 11, the Union implicitly raised confidentiality concerns by referring to its duty of fair representation and set forth proposals for an accommodation.[2] On December 13, the Employer suggested that the parties meet to discuss the matter and asked the Union for its available dates in January. On December 18, the Union asked the Employer to contact the Union to arrange a convenient meeting date and on December 21, the Employer again suggested that the Union contact the Employer with their available meeting dates.

On December 27, the Union responded by reiterating its confidentiality concerns and stating "[u]pon receipt of the requested information and the signed statement below, Local 555 is prepared to meet at the Local 555 offices any day in January 1996." The statement at the end of the letter read "Albertsons will not discipline and/or retaliate against any employee that raises a claim of free time, provides information concerning free time practices and/or admits working free time. The Company will make employees whole for all free time worked" and was followed by a signature line and a date line. On January 9, the Union noted the Employer's failure to respond or sign the statement. On January 10, the Employer responded to the Union's December 27 and January 9 letters by stating that it had repeatedly told the Union that it had times available to meet and no one from the Union contacted the Employer to set up a date. By letter dated January 11, the Union asked the Employer to "sign the statement, and let me know when you can meet." On January 19, the Employer proposed meeting on the afternoon of February 14 but did not sign the statement. The Union did not respond.

After exchanging further written correspondence in August, the parties finally met on August 22. However,

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[2] The Union stated, "make us a commitment that no employee coming forward with a wage claim for working free time will be discriminated against, nor disciplined for working free time and/or filing a claim. Perhaps we could agree on a period of time for 'amnesty' claims."

according to the Employer, the Union refused to turn over information unless the discipline provision in Article 16.1 was clarified/renegotiated satisfactorily. According to the Union, the Employer refused to discuss confidentiality concerns and simply repeated its blanket demand for all free time information without conditions of any kind. No further meetings have been scheduled; both parties seem to agree that the August 22 meeting was totally unproductive.

The Employer continues to seek the information the Union obtained during its "free time" investigation,[3] and asserts that the Union's failure to provide the information violates 8(b)(3). The Union argues that the information is a witness statement and/or is confidential, and thus enjoys an absolute privilege from disclosure, at least in its current form. Additionally, the Employer contends that any employee working off the clock is contractually subject to discipline, while the Union asserts that the contractual reference to discipline applies only to free time worked without Employer "authorization."

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(3) of the Act by failing to provide the Employer with a summary of the information contained in the investigative interview forms and the employee surveys, absent details identifying the employees who participated and reasonably expected confidentiality.

A party engaged in collective bargaining generally has a statutory obligation to provide, upon request, information which is relevant for the purpose of contract negotiations or the administration of a collective-bargaining agreement.[4]

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[3] In a meeting with us on August 12, Employer's counsel stated that the Employer was only seeking general data from the investigative interviews, not the interview forms themselves. Counsel apparently was not aware of the December 4 Union survey. However, the November 10, December 4 and January 19 Employer correspondence, as well as its apparent position at the August 22 meeting, indicates a broader information request including actual copies of the completed investigative interview forms and the December 4 surveys.

[4] NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956); Howard University, 290 NLRB 1006, 1007 (1988). The Board has explicitly held that a union's duty to provide information is similar to that of an employer. Firemen & Oilers Local

The standard for relevance is a "liberal discovery-type standard".[5] Moreover, information which concerns the terms and conditions of employment of bargaining unit employees is deemed "so intrinsic to the core of the employer-employee relationship" as to be presumptively relevant.[6] The information requested by the Employer in this case, regarding instances, locations and circumstances under which "free time" work was performed, is unquestionably relevant to the administration of contract Article 16.1 under this liberal standard since, even under the Union's interpretation of that provision, the Employer is free to discipline employees who work "off the clock" without Employer "authorization."

The Board's inquiry does not end with a finding of relevance, as the Supreme Court has "recognized a limited exception [to the duty to provide relevant information] for information that is confidential in nature."[7] Under Detroit Edison, where the respondent has raised a "legitimate and substantial" claim of confidentiality, "the Board is...required to balance the need for the information against the legitimate confidentiality interest." General Dynamics Corp., 268 NLRB 1432, 1433 (1984). Where the confidentiality concern is "legitimate and substantial", the party claiming confidentiality generally has a duty to seek and bargain in good faith over an accommodation of its concern.[8] Thus, the Board normally orders bargaining as affirmative relief, since the resolution of disputes by resort to the collective bargaining process best effectuates labor peace, and will strike a balance by imposing an

288 (Diversy Wyandotte), 302 NLRB 1008, 1009, 1010 n.5 (1991), citing Printing & Graphic Communications Local 13 (Oakland Press), 233 NLRB 994, 996 (1977), enfd. 598 F.2d 267 (D.C. Cir. 1979) (Board refers to Detroit Edison balancing in 8(b)(3) context).

[5] Pfizer Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

[6] Aerospace Corp., 314 NLRB 100, 103 (1994).

[7] New Jersey Bell Telephone Co. v. NLRB, 720 F.2d 789, 791 (3d Cir. 1983), citing Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).

[8] Pennsylvania Power Co., 301 NLRB 1104, 1105-06 (1991), citing Minnesota Mining & Mfg. Co., 261 NLRB 27 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983).

accommodation only where bargaining does not result in agreement.[9]

However, in Anheuser-Busch, 237 NLRB 982, 984 (1978), the Board held that the general obligation to provide relevant information does not encompass witness statements obtained during the course of an investigation. The Board noted that witness statements are fundamentally different from the types of information contemplated in Acme and disclosure of witness statements may lead to coercion and intimidation of witnesses and reluctance of witnesses to give statements in the future.[10] Nevertheless, the Board has held that despite the privileged non-disclosure of witness statements, a respondent violates the Act by failing to provide a summary of the statements.[11]

In New Jersey Bell Telephone Co.,[12] the Board rejected the ALJ's finding that a security department investigation report and a copy of a computer note screen were witness statements under Anheuser-Busch. The Board instead found that the reports were the work product of the respondent since the witness did not review the report, did not have the report read to her at any time, did not adopt the report in any manner as a reflection of any statement she may have

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[9] Minnesota Mining & Mfg. Co., 261 NLRB at 32; E.I. du Pont & Co., 276 NLRB 335, 336 (1985); Exxon Company USA, 321 NLRB No. 126, slip op. at 3-4 (July 31, 1996) (although employer confidentiality concerns about "audits" or background checks did not outweigh union's need to know which employees were audited, Board ordered disclosure conditioned on bargaining to mutually satisfactory confidentiality agreement, protective order, etc.).

[10] See also Certainteed Corp., 282 NLRB 1101, 1125 (1987) (reports of trained security personnel deemed witness statements under Anheuser-Busch); M.S. Ginn Co., Case 5-CA-20314, Advice Memorandum dated June 30, 1989 (undercover investigator's report analogous to an Anheuser-Busch witness statement, thus privileged from disclosure). Cf. Square D Electric Co., 266 NLRB 795, 797 (1983) (video from in-plant camera was employer property rather than witness statement); United Technologies Corp., 277 NLRB 584, 589 (1985) (reports of technical experts who reviewed film of employees' work and then compiled technical data were not witness statements).

[11] Pennsylvania Power Co., 301 NLRB 1104, 1107 (1991).

[12] 300 NLRB 42, 43 (1990), enfd. 936 F.2d 144 (3d Cir. 1991).

made, and there was no contention that the report was an approximate or verbatim transcript of the witness' statements. 300 NLRB at 43. The Board also relied on the fact that the witness did not request and did not receive any assurance of confidentiality, and stated "the reports are in essence the handiwork of the Respondent's officials, reflective only of their impressions of what transpired in the conversations with the complaining customer, as well as whatever other material the officials may have deemed appropriate to include in the reports." Ibid.

In contrast to New Jersey Bell Telephone Co., the interview forms and employee surveys the Union obtained during the course of its "free time" investigation are privileged from disclosure as witness statements of employees under Anheuser-Busch, rather than being the work product of the Employer. Although the interview forms were completed by a Union representative, they solicited specific information directly from the employee being interviewed, and the survey forms were personally completed by the employees. The employees also received a commitment of confidentiality from the Respondent.[13] Additionally, applying Anheuser-Busch principles in this case is warranted based on the policies regarding non-disclosure of witness statements. If the Union were required to turn over the actual interview forms and employee surveys to the Employer prior to instituting legal proceedings, employees would be reluctant to participate and provide statements in future free time investigations conducted by the Union, making such investigations excessively difficult. Finally, having the Board strike the balance under Anheuser-Busch is more likely to resolve this dispute than a traditional bargaining order, as unfortunately evidenced by the parties' clear inability to reach an accommodation agreement at their August 22 meeting.

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[13] As set forth above, the December 4 cover letter to the "free time" survey states that a call from the "Union's legal department to verify certain information" would be "confidential." The survey itself asks each employee whether he/she consents to participating in a grievance, complaint and/or lawsuit "to recover your lost wages?" This language is followed by three yes/no check off boxes (grievance, complaint with government, lawsuit) and a line for the employee's signature and the date. Taken together, this would have created a reasonable expectation of confidentiality in the minds of the employees, at least prior to the institution of any legal action to recover their lost wages when the surveys might have to be disclosed.

Therefore, the Union did not violate the Act by failing to provide the interview forms and employee surveys to the Employer. However, we further conclude that a Section 8(b)(3) complaint should issue, absent settlement, alleging that the Union has failed to provide the Employer with *summaries* of the interview forms and surveys.[14] Thus, we reject the Union's claim that *all* requested information from employees is absolutely privileged based on its duty of fair representation. The Board has never so held. In Firemen & Oilers Local 288 (Diversy Wyandotte), 302 NLRB at 1009, the Board, after describing the union's duty of fair representation, implicitly rejected any notion of an absolute privilege by finding an 8(b)(3) violation based on the union's failure to attempt to obtain relevant information from a unit employee. At most, the Union's DFR implicates confidentiality concerns over disclosing names of employees who participated in the interviews/surveys rather than summaries of their statements, which concerns are addressed below.

Although the remedy herein would require the Union to provide a summary of the interviews and surveys, this summary need not include any information identifying the employees who disclosed free time information with an expectation of confidentiality.[15] In Pennsylvania Power Co., the Board, noting potential harassment and a chilling effect on future informants, did not require the names and addresses of the witnesses to be disclosed because the respondent's interest in keeping the informants' identities confidential outweighed the union's need for the informants' names and addresses.[16] Interestingly, immediately after

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[14] Pennsylvania Power Co., 301 NLRB at 1107 (unlawful failure to provide summary of Anheuser-Busch witness statements).

[15] Ibid., where given the "overwhelming" interest in protecting informants' identities, the Board decided "this summary need not, however, contain any information from which the identity of the informants can be ascertained, and any doubt whether the information can be used to identify the informants should be resolved in favor of nondisclosure." In the present case, such information includes, but is not limited to, names, addresses, social security numbers and phone numbers.

[16] 301 NLRB at 1107, citing Detroit Edison Co. and distinguishing Transport of New Jersey, 233 NLRB 694 (1977) (danger of harassment to bus passenger-witnesses to accident speculative at most, and their identities were ordered disclosed). We have relied on Pennsylvania Power Co. to justify non-disclosure of witness names in non-drug

making this determination, the Board cited two Fair Labor Standards Act (FLSA) cases for a discussion of similar considerations in other contexts.[17] In FLSA cases, the courts recognize an "informer's privilege": absent a showing of special circumstances, the identities of present or former employees who have provided information to the Department of Labor will be protected from disclosure.[18] We recognize that in this case the Union, rather than the Department of Labor, conducted the employee "free time" interviews and surveys. However, the mere fact that the "informer's privilege" exists under the FLSA indicates to us that the Union's interest during a "free time" investigation in not disclosing the identities of employees who witnessed/committed FLSA violations and reported them to the Union is entitled to considerable weight. "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, including the Privacy Act and the FOIA, as sources of policy to be considered in striking the balance."[19]

Additionally, as in Pennsylvania Power Co., and unlike Transport of New Jersey where the Board required disclosure of witness names, the employees in this case received a commitment of confidentiality from the Union.[20] Since the

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informant contexts. See Associated Wholesale Grocers, Case 17-CA-17892, Advice Memorandum dated June 7, 1995 (names of witnesses to alleged sexual harassment).

[17] Hodgson v. Charles Martin Inspectors of Petroleum, 459 F.2d 303 (5th Cir. 1972); Donovan v. Forbes, 614 F.Supp. 124 (D.Vt. 1985).

[18] 614 F.Supp. at 126 ("[t]he purpose of the privilege in the labor context is to promote enforcement of the Act and to protect present or former employees from economic reprisal").

[19] Postal Service, 305 NLRB 997, 1005 (1991), citing Detroit Edison Co. v. NLRB, 440 U.S. at 318 n.16, and Anheuser-Busch, 237 NLRB at 984.

[20] 301 NLRB at 1104, 1111. Although the witnesses in Anheuser-Busch, 237 NLRB at 984 n.5, were given express assurances of confidentiality, the Board cited Transport of New Jersey and noted in dicta the normal duty to provide the names of witnesses. However, the Board further noted that witness names were already known and never requested in Anheuser-Busch, and thus did not need to address the impact of the express assurances of confidentiality on the duty to provide witness names as it did in Pennsylvania Power.

Union's interest in keeping the identities of the employees who participated in the "free time" investigation confidential outweighs the Employer's need for the witnesses' identities at this time, the summary of the interviews and surveys need not contain the identities of the employees. In this regard, the summaries should be sufficient not to preclude the Employer from conducting its own investigation of off the clock work and taking whatever action is appropriate under its interpretation of contract Article 16.1.[21]

CONCLUSION

Complaint should issue, absent settlement, alleging that the Union violated 8(b)(3) of the Act by failing to provide the Employer with a summary of the information contained in the investigative interview forms and the employee surveys. [FOIA EXEMPTIONS 2 and 5

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B.J.K.

[21] In a July 12 letter to Advice, the Employer indicated that a Seattle law firm retained by the UFCW International was conducting a new free time survey. The Employer provided a copy of the survey and stated that it had requested this data from Local 555. This survey was conducted on a nationwide basis by a law firm retained by the International, not the 9(a) representative (Local 555). Thus, absent evidence that the International or the law firm was acting as an agent of Local 555, the Union at most had a duty to ask the International or the law firm for this information under Firemen & Oilers Local 288 (Diversy Wyandotte), 302 NLRB at 1009. Since the International and the law firm have made it very clear that the information will not be released, it would not effectuate the purposes and policies of the Act to issue an 8(b)(3) complaint for a failure to engage in the futile act of seeking this information.