

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

Advice Memorandum

DATE: May 26, 2011

TO: Marlin O. Osthus, Regional Director
Region 18

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

SUBJECT: Stock Roofing Co. 512-5030-8000
Case 18-CA-19622, 512-5030-8050
and 512-5030-8075
Tecta America Corp.
Case 18-CA-19650

The Region submitted these cases for advice as to whether the Employers' document requests and deposition questions in defense of a state lawsuit brought by a former employee violated Section 8(a)(1) of the Act.

We conclude that the Region should dismiss these charges, absent withdrawal. First, the Employers' deposition questions propounded to the three deponents, including Celso Alvarado, the chief Union activist and lawsuit plaintiff, regarding Alvarado's own Union and other protected activities and the identities of other unit employees who participated in public Union activities were lawful. These activities were relevant to the subject of the lawsuit, and the Employers' need for this information outweighed the employees' limited confidentiality in their open Union activity. Second, although deposition questions relating to the identities of employees who attended Union meetings and what they said at Union meetings arguably violate Section 8(a)(1) of the Act where their identities were actually disclosed, it would not effectuate the purposes and policies of the Act to issue a complaint here. There is no evidence that the named employees were retaliated against based on this disclosure, the state lawsuit and related unfair labor practice charges have been settled or dismissed, and the Employers have lawfully recognized another union to represent the unit employees. Finally, discovery requests that encompassed Union authorization cards and the Union's organizing strategies did not violate the Act. The Employers effectively withdrew their request for the cards; and information requested regarding organizing did not seek employee names, their Union sympathies, or their Union activities, and therefore did not implicate Section 7 rights.

FACTS

Tecta America Corp. is a large commercial roofing contractor, and Stock Roofing Co. is a local subsidiary of Tecta, located in Fridley, Minnesota ("the Employers"). Celso Alvarado worked as a roofer and a laborer for Stock since approximately 2003. Alvarado first contacted Roofers and Waterproofers Local 96 ("the Union") in about January 2009. He and other employees complained to the Union about what they believed were unsafe and discriminatory employment conditions. By about the fourth meeting between Stock employees and the Union, someone suggested taking pictures of the jobsite, the Target Center in Minneapolis. (Target Center is an arena where, among other events, the professional basketball team - Minnesota Timberwolves - plays its home games). Union organizer Jose Navejas and another organizer went on the roof of the Target Center and shot a video. On the video, employees carried out their jobsite tasks, identified themselves by name, and talked about the conditions on the site. The Union made copies of this video and gave them to Minneapolis city officials, as well as media outlets.

During the next few months, the Union took employees' complaints to various forums, including the Minnesota Human Rights Department, Equal Employment Opportunity Commission, City of Minneapolis, and OSHA. The Union obtained relief from the City of Minneapolis, including payments of settlement checks to specific employees. The Union called a press conference to announce the settlement. During the press conference, a number of Stock employees appeared on the steps of City Hall to accept reimbursement checks.

In addition to appealing to various governmental agencies and bodies, in June 2009, a group of about 20 employees went to the offices of Stock to present a petition, supported by authorization cards, requesting that Stock recognize the Union. When the employees turned over their petition, President Warren Stock wadded it up and threw it on the ground without reading it.

Also in June 2009, Celso Alvarado quit Stock. In July 2009, the Union amended a pending unfair labor practice charge to allege that Stock constructively discharged Alvarado. The Region found merit to that charge and issued complaint. Before trial, the Union and Stock reached a non-Board adjustment, which included a waiver of reinstatement by Alvarado in exchange for a monetary settlement.

On January 19, 2010, Alvarado filed a lawsuit in Minnesota state court against the Employers and certain named principals. The suit alleged that the defendants engaged in race and national origin discrimination under the Minnesota Human Rights Act; failed to pay appropriate wages under the

Minnesota Prevailing Wage Law; and failed to pay wages upon demand under the Minnesota Payment of Wages Act. The lawsuit also included two common-law claims - breach of contract (on a third-party beneficiary theory) and unjust enrichment. Alvarado was the sole plaintiff in this lawsuit, although he alleged discriminatory acts by the Employers against himself and "other Latino, immigrant employees."

The gist of the wage claims was that Alvarado and his work crew were misclassified as "landscapers" during a roofing job at the Target Center. As a result, Stock paid Alvarado and his work crew about \$20 an hour pursuant to the prevailing wage regulations, while "roofers" were paid about \$40 an hour. The lawsuit also alleged that this practice was discriminatory -- that only Latinos were classified as landscapers, while white and African American employees doing similar work were paid the higher roofers rate. In addition, the lawsuit claimed other mistreatment of Latinos, including verbal abuse, racial slurs, and subjection to substandard working conditions.

In order to defend itself against this lawsuit, the Employers deposed Alvarado, Union president Rob Snider, and Union organizer Jose Navejas. The Employers posed questions to Alvarado concerning his own Union and other protected activity, including his discussions with the Union and other employees regarding wage and safety claims based on laws other than the NLRA. Snider and Navejas were also asked about Alvarado's Union and other protected activities. All three witnesses were questioned about the identity of other employees who attended Union meetings or participated in the demonstrations in support of perceived employment grievances, including the press conference, a picket line, and the video shot at the Target Center. Alvarado named approximately 14 or 15 employees who attended Union meetings. Generally, neither Union president Snider, nor Union organizer Navejas were able to identify employees who attended either the Union meetings or the public events which the Union sponsored. On occasion, when either Snider or Navejas were questioned about the identities of other employees who attended Union meetings or sponsored events, Union counsel objected, and thereafter, those questions were not answered. All three witnesses were also questioned about the subjects that were discussed in Union meetings. In response to these questions, again Alvarado identified specific employees in attendance.

The Employers also made very broad document production requests that encompassed the authorization cards the Union had collected. The Union objected to the production of the authorization cards, on the ground that the cards were privileged under Board law, citing Wright Electric, Inc., 327 NLRB 1194 (1999), *enfd.* 200 F. 3d 1162 (8th Cir. 2000). The Employers made no further requests for the cards.

The Union also objected to producing documents that exposed organizing methods and strategies. However, it eventually produced ten pages of documents marked "for attorney's eyes only," which included organizers' notes regarding potential steps to take in a "corporate campaign" against Stock and lists of potential media and contractor contacts. The Union also objected to questions about what its agents may have told employees about organizing Stock.

In January 2011, the state lawsuit was dismissed pursuant to a confidential settlement agreement.

ACTION

We conclude that the Employers, for the most part, lawfully sought information relevant to their former employee's lawsuit. In that regard, the Employers were entitled to question all three deponents about Alvarado's Union and other protected activities, and to ask them about the public activities of other employees who participated in Union-sponsored demonstrations in support of the employee grievances that were the subject of the lawsuit. Thus, all such activities were relevant to the lawsuit, and the Employers' interest in defending against the lawsuit outweighed the minimal employee confidentiality interests. The Employers were also entitled to pose general questions to all the witnesses concerning what was discussed in Union meetings because the grievances discussed at these meetings were coextensive with the claims alleged in the state lawsuit. However, those questions that revealed the identity of employees who attended a Union meeting would arguably violate the Act. Nonetheless, we conclude, for the reasons noted below, it would not effectuate the purposes of the Act to issue a complaint in that regard. Finally, we conclude that the discovery requests concerning Union authorization cards did not violate the Act because the Employers in essence withdrew that request, and requests for information about allegedly confidential organizing methods and strategies did not violate the Act because they did not implicate the Section 7 rights of employees.

When an employer pursues in discovery information regarding Section 7 activity, the Board must consider whether the employer's constitutional interest in access to the courts and its legitimate use of legal proceedings in pursuit of such claims justifies the employer's actions. That inquiry has turned in part on the relevance of the protected information sought to the matter at issue in the lawsuit.¹

¹ See Maritz Communications Co., 274 NLRB 200, 201 (1985); Wright Electric, Inc., 327 NLRB 1194, 1195 (1999), enfd. 200

In Guess, the Board announced a three-step analysis for determining whether questions that pertain to employees' protected concerted activities are permissible when propounded during discovery in a civil proceeding.² Specifically, it held that (1) the questioning must be relevant; (2) if the questioning is relevant, it must not have an "illegal objective;" and (3) if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining the information must outweigh the employees' Section 7 confidentiality interests.³

Applying Guess,⁴ we first conclude that the information sought by the Employers regarding Alvarado's own Union activities as well as the identities of other employees who participated in Union and other protected activity were relevant to Alvarado's state lawsuit. The lawsuit encompassed wage and safety claims related to race and national origin discrimination, and the employees' complaints to the Union primarily involved these working conditions. Thus, Alvarado's lawsuit was inextricably intertwined with the unit employees' Union and other protected concerted activities, and those employees' potential usefulness as witnesses made this information highly relevant to that suit.

F.3d 1162 (8th Cir. 2000); and Guess?, Inc., 339 NLRB 432, 433 (2003) (Guess).

² 339 NLRB at 434.

³ Id.

⁴ [FOIA Exemption 5

Assuming, as the Board did in Guess, that the requests did not have an "illegal objective,"⁵ and applying the balancing prong of the Guess test, we conclude that the Employers' interest in Alvarado's activities, the public activities engaged in by other unit employees in support of the lawsuit claims, and the general discussions engaged in at Union meetings outweighed any potential harm to employees' Section 7 rights. With regard to Alvarado's protected activity, his confidentiality interests were minimal inasmuch as he made his interest in Union representation an issue by filing the unfair labor practice charge and made his other complaints against the Employers public by filing the lawsuit. The speculative nature of Alvarado's confidentiality interest here is attested to by the fact that counsel objected to questions about other employees' attendance at Union and other meetings, while permitting the questioning to continue regarding Alvarado's own statements at various meetings.⁶ While the other employees, none who were named in the lawsuit, had a greater confidentiality interest than Alvarado in their activities either in support of the Union or the lawsuit claims, we conclude that such an interest was still minimal with regard to public activities in which they freely participated. Lastly, information regarding discussions at Union meetings concerning matters covered by the lawsuit that did not identify who attended a Union meeting also did not implicate the personal confidentiality right of any particular employee.

In contrast, the Employers' interest in the requested information was critical to its defense to the lawsuit. Alvarado's discussions with the Union about the state law claims, as well as his Union and other protected activities in support of those claims, may have included evidentiary admissions that were inconsistent with his claims in the state lawsuit.⁷ Furthermore, the Employers had a clear interest in identifying other employees who attended these public events

⁵ 339 NLRB at 434. See also fn. 4, above, discussing the uncertainty over the meaning of "illegal objective" as a factor to consider in discovery cases.

⁶ See, Titus Electric Contracting/TIECO, Inc., 16-CA-23120, Advice Memorandum dated April 23, 2004, at p. 6, n. 14 (noting that the speculative nature of harm to confidentiality interests was demonstrated by counsel's failure to instruct witness not to answer).

⁷ Maritz Communications Co., 274 NLRB 200, 201 (1985) (questions about general union activity relevant where Section 8(a)(3) charge allegations were potentially inconsistent with age discrimination claim).

who were potential witnesses to the alleged discrimination against the Latino workers, including the alleged mischaracterizing of those workers as landscapers instead of roofers. For similar reasons, the Employers had a right to discover information discussed at the Union meetings since the topics discussed were coextensive with the grievances constituting Alvarado's lawsuit.

We therefore find that the Employers' substantial need for evidence regarding Alvarado's activities and his discussions with the Union, the identity of other employees who engaged in public activities in support of the Union or the lawsuit claims, and the content of general discussions in Union meetings that did not identify a particular employee outweighed any potential harm to employees' Section 7 rights.

On the other hand, the Employers' questions regarding the names of other employees who attended Union meetings and what they said at Union meetings implicated the confidentiality interests of those employees.⁸ In response to these deposition questions, Alvarado revealed the names of approximately 14 employees who attended Union meetings, thereby breaching their confidentiality interests. Therefore, the Employers' questions propounded to Alvarado that elicited the identities of employees who attended Union meetings arguably violated the Act. However, in these circumstances, it would not effectuate the purposes and policies of the Act to issue a complaint over these allegations.⁹ Thus, there is no evidence that any employee who was identified in the

⁸ See National Telephone Directory Corp., 319 NLRB 420,421 (1995) ("the confidentiality interests of employees who have signed authorization cards and attended union meetings are paramount to the Respondent's need to obtain the identities of such employees for cross-examination and credibility impeachment purposes").

⁹ We note that generally neither Union President Snider nor Union business agent Navejas were able to identify employees who attended Union meetings or Union-sponsored events. Moreover, such questioning of these deponents was objected to by counsel and then not answered. We would not find the mere asking of such questions violative of Section 8(a)(1), where there is no evidence that other employees besides Alvarado attended the depositions and witnessed the interrogation. Thus, unless an employee's identity is disclosed, there can be no violation because it is the breach of a specific employee's confidentiality interests in participating in union activity that is the basis of the violation when an Employer seeks discovery in response to a state lawsuit. See Guess, 339 NLRB at 434.

discovery process as attending a Union meeting was ever retaliated against by the Employers based on that disclosure. Moreover, the lawsuit has been dismissed, all the unfair labor practices between the parties, save this one, have been settled, and the unit is now lawfully represented by another union.

Finally, the Region also seeks advice as to whether discovery requests which encompassed Union authorization cards, statements Union agents made to employees, and organizing methods and strategies violated Section 8(a)(1) of the Act. We conclude that these requests did not violate the Act. First, although the Employers' document production request encompassed the authorization cards, when the Union explained to the Employers why it would not provide those cards, the Employers dropped the request. In view of the effective withdrawal of the request for the authorization cards, we conclude that the Employers' questions and requests were not coercive and therefore did not violate the Act.¹⁰ With regard to the requests for the Union's statements made to employees about Union organizing and documents regarding confidential organizing strategies, we conclude that such questions and requests did not relate to any employee confidentiality interests or Section 7 rights and therefore also did not violate the Act.¹¹

CONCLUSION

Accordingly, with the single exception of deposition questions as to which employees attended Union meetings and what they discussed at Union meetings, we conclude that the Employers' deposition questions and document requests were not unlawful. With regard to the arguably unlawful deposition questions relating to which employees attended Union meetings and what they discussed at those Union meetings, we conclude that in the circumstances of this case, it would not effectuate the purposes of the Act to issue a complaint.

¹⁰ See, Amercian Broadcasting Companies, et al., 31-CA-27698, Advice Memorandum dated May 24, 2006, at p. 4. ("withdrawn or revised requests were not coercive under totality of circumstances").

¹¹ See, Cintas Corp., 29-CA-27153, Advice Memorandum dated May 24, 2006, at p. 8-9 (such internal union information may be confidential Union "business activity," but a request for it does not implicate any employee rights under Section 7 and therefore, does not violate Section 8(a)(1)). See also, Titus Electric Contracting/TIECO, Inc., 16-CA-23120, Advice Memorandum dated April 23, 2004, at p. 6 (employer inquiry into the identity of Union organizers not a violation even it impairs a Union's covert salting operations).

Cases 18-CA-19622 and 18-CA-19650

- 9 -

Therefore, the charges should be dismissed in their entirety,
absent settlement.

B.J.K.