

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

ALCAN ROLLED PRODUCTS – RAVENSWOOD, LLC

and

Case 9-CA-46267

UNITED STEEL, PAPER AND FORESTRY, RUBBER
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL UNION, LOCAL 5668,
AFL-CIO-CLC

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I. STATEMENT OF THE CASE:

This case is before the Board on Respondent's exceptions and Counsel for the Acting General Counsel's cross-exceptions to the decision of the Administrative Law Judge David I. Goldman, which issued on September 12, 2011. Counsel for the Acting General Counsel excepts to the Administrative Law Judge's finding and conclusion that Respondent had a legitimate and substantial interest in protecting from disclosure the identities of two employees who made statements concerning the work performance of a grievant, thus permitting Respondent to bargain with the Union for a reasonable accommodation rather than requiring it to provide the identities as requested by the Union.

II. SUMMARY OF THE FACTS:

Respondent is engaged in the operation of an aluminum fabrication plant in Ravenswood, West Virginia. (G.C. Exs. 1(c) and 1(e)) ^{1/} Respondent employs between 1300 and 1400

^{1/} References to the Administrative Law Judge's Decision will be designated as (ALJD p. ____, l. ____); references to Respondent's exceptions and brief in support thereof will be designated as (Resp. Br. p. ____); references to the trial transcript will be designated as (Tr. p. ____); references to the Acting General Counsel's and Respondent's trial exhibits are designated as (G.C. Ex. ____ and (Resp. Ex. ____), respectively.

employees at its Ravenswood facility. (Tr. p. 33) There is a storeroom in the plant that supplies parts to various departments throughout the facility. (Tr. p. 28) Approximately 12 employees work in the storeroom – 9 employees on first shift, 2 employees on second shift and 1 employee on the third shift. (Tr. p. 29) Storeroom employees fill approximately 100 requisitions per day and deliver the requested parts using a buggy. (Tr. pp. 31-32) There are other types of mobile equipment that operate in the plant. (Tr. p. 33)

About January 28, 2011, during a suspension meeting, Hank Chawansky, manager of Labor Relations, told David Gandee, storeroom committeeman, that Respondent was suspending Robert Bush, storeroom attendant, pending discharge for violating Group 1, Line 2 Rules of Conduct by maliciously damaging Respondent's property. (Tr. pp. 20, 21) Chawansky also told Gandee that he also had two storeroom employees who said that they felt it was unsafe to work with Bush. (Tr. pp. 21, 43, 48) Gandee told Chawansky that he did not believe that there were two employees who complained about Bush. (Tr. p. 22) This meeting lasted less than 10 minutes. (Tr. p. 21) Within the hour, Gandee sent an e-mail to Elijah Morris, Union Grievance Committee Chairperson, advising him of Bush's suspension and also that Chawansky stated that someone from the storeroom told Chawansky that they were afraid to work around Bush. (Tr. pp. 22, 54-55; G.C. Ex. 2) This information had been relayed to Chawansky by Storeroom Supervisor Yvonne Zickefoose. (Tr. p. 98)

Later that same day, Morris made a written request for information involving Bush's suspension, including the names of the two employees who complained about working with Bush. (Tr. p. 55-57; G.C. Ex. 3) Respondent failed to provide any of the requested information. (Tr. pp. 57, 58-59) At Bush's February 1, 2011 suspension hearing prior to discharge, Morris orally asked Chawansky for the names of the two employees who complained that Bush was

unsafe. (Tr. pp. 27, 58) Chawansky refused to provide Morris with the names of the employees. (Tr. pp. 27, 59) Chawansky did not offer to bargain to accommodate the Union's request. (Tr. pp. 59-60) About February 12, 2011, Chawansky issued Bush's discharge letter which stated, in part, that his workplace behavior put other employees at risk. (Tr. p. 76; G.C. Ex. 6) Bush had been involved in two accidents in the plant while operating mobile equipment that resulted in minor damage. (Tr. pp. 7-9, 83-85, 88) Thereafter, on February 25, 2011, Morris, in writing, renewed his January 28, 2011 request for information (Tr. p. 62; G.C. Ex. 3) and requested some additional information involving Bush's suspension/discharge. (Tr. pp. 62-63; G.C. Ex. 5) Respondent again failed to respond to Morris' request for information. (Tr. p. 60)

Subsequent to the filing of the instant charge, Respondent provided the Union with all of the information that Morris had previously requested, excluding the names of the two employees who allegedly complained about Bush. (Tr. p. 60) At no time prior to the start of the hearing in the instant matter, did Respondent offer to meet and bargain about providing the Union with the names of the two complaining employees. (Tr. pp. 27-28, 59-60) Likewise, at no time prior to the beginning of the hearing in the instant matter did Respondent offer to make some accommodation to the Union with respect to providing the names of the two complaining employees. (Tr. pp. 59-60) In or about late May 2011, Respondent reinstated Bush without backpay (Tr. p. 54; G.C. Ex. 8); however, his discharge grievance is still pending. (Tr. p. 67)

III. ARGUMENT:

A. The Administrative Law Judge erred in concluding that Respondent established that it has a legitimate and substantial interest in preserving the confidentiality of the employees' identities.

Judge Goldman determined that the Respondent's interest in maintaining the confidentiality of the identities of the two employees who made statements about Bush's work

performance was “significant and legitimate.” (ALJD, p. 13, l. 30) At the same time, he concluded that Respondent’s assurances that their “off-the-record” conversations would be kept confidential were insufficient to establish that these particular conversations were confidential. Counsel for the Acting General Counsel submits that the Administrative Law Judge’s application of Board law with respect to the Respondent’s confidentiality defense in this case is in error.

When a collective-bargaining relationship exists, a party refusing to furnish requested information on the basis of confidentiality must initially show that it had a legitimate and substantial confidentiality interest in the information sought. *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006) (“*NIPSCO*”); *Pennsylvania Power Co.*, 301 NLRB 1004, 1005 (1991). If this showing is met, the Board must weigh the party’s interest in confidentiality against the requester’s need for the information, and such balance must favor the party asserting confidentiality. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Detroit Newspaper Agency*, 317 NLRB 1071, 1074 (1995). If a party fails to establish its confidentiality claim, a balancing test (between the union's need for the information against the employer's claimed confidentiality interest) is no longer necessary or proper. *Detroit Newspaper Agency*, 317 NLRB at 1072 (1995). The types of information that may give rise to a legitimate and substantial confidentiality interest are narrowly defined by *Detroit Newspaper Agency*:

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

Id. at 1073. The Administrative Law Judge correctly found that the information that Respondent seeks to conceal from the Union does not fall within any of these categories. Notably, Judge

Goldman rejected Respondent's argument that its vague and unsubstantiated claims that employees might fear being treated as having "ratted" on coworkers created a reasonable risk of harassment or retaliation. But the judge nonetheless proceeded to find that these concerns, as perceived by Respondent, are sufficient to make the requested information confidential in the instant case "under the more expansive understanding of confidentiality involving employee informants that the case law presents." (ALJD, p. 13, ll. 25-26)

Although the Board has found in certain cases that information outside of the four categories described in *Detroit Newspaper* may be confidential depending on the factual context, *NIPSCO*, 347 NLRB 210, 211 (citing *GTE California, Inc.*, 324 NLRB 424 (1997) (recognizing a confidentiality interest in the names and unlisted phone numbers of customers whose complaints led to an employee's discharge), *West Penn Power Co.*, 339 NLRB 585 (2003), *enfd.* in part 394 F.3d 233 (4th Cir. 2005) (confidentiality interest in an investigative report concerning an altercation between two employees)), the instant case is factually distinguishable from those cases that have found employee reports of misconduct were confidential.

First, it should be noted that the Administrative Law Judge mischaracterizes the employees as "informants." (ALJD, p. 12, l. 44.) The employees who made the statements about Bush were not reporting him. The statements, while relevant to Bush's suspension and discharge, did not inform Respondent of the accidents and surrounding circumstances. Respondent readily admits that it knew of the accidents prior to the discussions Zickefoose had with Bush's coworkers. Further, Respondent gives no indication that the conversations took place in the context of an investigation into the circumstances surrounding the accidents. In this regard, Zickefoose testified that she, "didn't go out and approach them. There had been conversations of different [employees] having comments to make toward the incidents."

(Tr. p. 91) Zickefoose continued on to explain that “there was never any conversation on how the accident took place.” Even assuming that the two accidents that led to Bush’s discharge did involve some illegal activity or workplace misconduct, the statements these two employees made did not address those concerns specifically. Instead, as the record reflects, the statements referred generally to concerns about Bush’s performance and perceived personal issues he was having with drug and alcohol abuse. Thus, Zickefoose testified, “I had one attendant just in discussions say that [Mr. Bush] knew that he needed help and should seek help but he refused.” (Tr. p. 91) “It was just mentioned that maybe he could go to another area in the plant where there wasn’t so much mobile equipment being used to where, you know, there’s a lot of traffic.” (Tr. p. 95) Therefore, the instant case can be distinguished from those cases finding a confidentiality interest in the identities of employees who acted as informants reporting on coworkers, e.g., for criminal drug activity or workplace theft, because the employees here were merely expressing general concerns that did not relate to any specific misconduct. Respondent has little interest in maintaining the confidentiality of the identity of employees who make such statements.

Moreover, Respondent made no express promise of confidentiality to the employees who made the statements. In fact, Respondent did not even warn the employees that their statements could be used in the discipline/discharge of Bush, which cuts against any claim of a confidentiality interest. And, as Judge Goldman correctly observes, the informal understanding between Zickefoose and employees that any comments made “off the record” would not be divulged is insufficient to create a confidentiality interest. (ALJD, p. 13, ll. 21-23) Indeed, Board precedent clearly establishes that the mere fact that an employee could object to the disclosure of information does not constitute grounds for refusing to provide such information

when relevant. *New Jersey Bell Telephone Co.*, 289 NLRB 318, 319 (1988). Additionally, Respondent admitted that the employees who made the statements did not express any concerns about retaliation by the Union or employees. (Tr. p. 101) The Board recently affirmed the decision of an Administrative Law Judge who found that an employer had failed to establish a legitimate and substantial confidentiality interest based on concerns about retaliation where it had “no information indicating that the [u]nion might be retaliating against, or intimidating, unit employees” and “did not offer evidence showing the nature of the alleged intimidation, or otherwise demonstrate that [an] isolated incident raised serious enough concerns about union retaliation to outweigh the [u]nion’s need for the information.” *Whitesell Corp.*, 357 NLRB No. 97, p. 44 (September 30, 2011) (citing *International Protective Services, Inc.*, 339 NLRB 701, 704 (2003); *Pennsylvania Power Co.*, 301 NLRB at 1105-1106). Other than vague speculation by Zickefoose, there was absolutely no showing that revealing their identities would discourage these employees from raising workplace safety concerns in the future.

Based on the foregoing considerations, Respondent clearly failed to demonstrate it had a confidentiality interest in the identities of the employees who made statements about Bush. The Administrative Law Judge’s overly broad application of Board case law concerning an employer’s confidentiality interests was erroneous. The Board should reverse the judge’s conclusion that Respondent had a legitimate and substantial interest in preventing the disclosure of the two employees’ identities.

B. The Administrative Law Judge erred in ordering Respondent only to bargain in good faith to reach an accommodation of the Union’s interests rather than provide the Union with the requested information.

Because Respondent failed to establish that it had a legitimate and substantial interest in maintaining the confidentiality of the employees’ identities, the Administrative Law Judge erred

in ordering Respondent to bargain over an accommodation of the Union's interests. If a party fails to establish its confidentiality claim, such a balancing test is no longer necessary or proper. *Detroit Newspaper Agency*, supra. Accordingly, Respondent should have been required under Board law to provide the requested information.

IV. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the Acting General Counsel respectfully submits that the decision of the Administrative Law Judge should be reversed insofar as it concludes that Respondent had a legitimate and substantial interest in concealing the identities of the employees who made statements about their coworker and grievant Bush, and that Respondent therefore should provide their identities forthwith.

Dated at Cincinnati, Ohio this 1st day of November 2011.

Respectfully submitted,



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