

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 ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I. INTRODUCTION:

This case is before the Board on Respondent's exceptions to the Administrative Law Judge's decision, which issued on September 12, 2011. In his decision, Administrative Law Judge David I. Goldman concluded that Respondent violated Section 8(a)(1) and (5) of the Act by when it refused to provide the Union requested, relevant information or to offer an accommodation. ^{1/} (ALJD p. 17) For the reasons set forth herein, Respondent's exceptions will be shown to be without merit and Judge Goldman's factual findings, analysis and legal conclusion that the Union's request is relevant will be proven to be accurate. ^{2/}

^{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.

^{2/} As more fully set out in Counsel for the Acting General Counsel's Cross-Exceptions and Brief in support thereof, Judge Goldman erred in concluding that the information requested by the Union was confidential. It is the position of Counsel for the Acting General Counsel that Respondent is required by law to provide the information and that Judge Goldman should have ordered Respondent to do so without requiring bargaining between the parties.

II. RESPONSE TO RESPONDENT'S EXCEPTIONS TO FINDINGS OF FACT:

A. Respondent's Exception 1

Respondent excepts to the Administrative Law Judge's finding that Respondent supported its discipline and/or discharge of Bush by arguing in the grievance proceedings that Bush's coworkers had complained about his unsafe work habits. Contrary to Respondent, the Judge correctly found that Respondent supported its decision by disclosing the coworkers' complaints during a discipline meeting.

Judge Goldman found that Respondent "raised and disclosed the employee comments in the initial discipline meeting, thereby making them and their source relevant to the matter at hand." (ALJD p. 11, ll. 5-6) Support for Judge Goldman's finding can be found in the record. Thus, David Gandee, department committeeman and witness for the Charging Party, testified at hearing that Hank Chawansky, Respondent's human resources manager, brought up the comments in the initial discipline meeting, (Tr. p. 21) and Respondent presented no evidence rebutting his testimony.

Moreover, Respondent's brief gives no indication why this factual finding should be considered erroneous. Respondent's faulty legal argument that the disclosure of those comments is irrelevant to Bush's discipline and/or discharge, is addressed below. See, Section III, *infra*.

B. Respondent's Exception 2

Contrary to Respondent, the Administrative Law Judge correctly found that Respondent did not "foreswear reliance" on the statements of Bush's coworkers in grievance proceedings.

Judge Goldman found that Respondent "did not foreswear reliance on the information in the grievance procedure, nor did it tell the Union at any time prior to the trial . . . that it did not, and did not intend to, rely on the employee statements." (ALJD p. 11, ll. 11-14) In making this

finding, Judge Goldman credited Union Representative Elijah Morris and discredited Chawansky. (ALJD, p. 11, ll. 18-20)

Thus, Respondent's Exception 2 is essentially urging the Board to overturn the Judge's credibility finding with regard to this conflict between Morris and Chawansky. The Board's established policy is not to overrule an Administrative Law Judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the Judge's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Although Respondent claims that Chawansky testified he told the Union that the employee statements had nothing to do with Bush's discharge, he never testified to that. When asked at hearing by Counsel for the Acting General Counsel when exactly he told the Union that, Chawansky replied, "in the five-day prior, because [of] the rules of conduct we stated that he was discharged for damage to Company property." (Tr. 111) Judge Goldman properly found that this testimony was misleading and accordingly discredited Chawansky: the testimony did not address whether Respondent ever represented to the Union that the statements would not be relied on. Instead, Chawansky claimed only to have presented the grounds for the discipline and/or discharge, leaving it to the Union to come to its own conclusion whether the statements factored into that decision. As Judge Goldman correctly observed, "[t]his is inadequate." In fact, at the hearing neither Zickefoose nor Chawansky could point to an instance where either of them unequivocally stated that they would not rely on the employees' statements in the grievance procedure. ^{3/}

^{3/} As intimated in the decision, and as discussed more thoroughly in the Section III below and in Counsel for the Acting General Counsel's Brief in Support of its Cross-Exceptions, this inquiry is entirely unnecessary. Even if Respondent had expressly disavowed reliance on the employees' statements and the Union had known that the employees would not be called as witnesses, the identities of those employees are still relevant to the grievance procedure in light of the fact that Respondent found the statements sufficiently relevant to disclose during the initial discipline meeting. Moreover, the information is necessary to the Union in order to fulfill its duty as collective-bargaining representative to maintain the safety of its bargaining unit members.

C. Respondent's Exception 3

Respondent excepts to the Judge's finding that the Union did not know that Respondent would not rely on the statements of Bush's coworkers in the arbitration of his discipline and/or discharge. As discussed above, Judge Goldman correctly found that Respondent did not inform the Union it would not rely on the employees' statements. Respondent essentially argues that the Union should have assumed the statements were not relied on based on its framing of the issues. Respondent may believe it was justified in discharging Bush on the basis of the two accidents alone, but that belief has no bearing on whether the Union knew Respondent was not relying on the employees' statements. Those statements were made in the context of the accidents, were raised by Respondent during disciplinary proceedings, and had a bearing on safety concerns referenced in the Employer's discharge letter and the Step 3 grievance answer. Respondent gave no indication that it would not rely on the statements. To the contrary, Respondent clearly communicated to the Union that it would rely on those statements when it raised and disclosed the statements at the initial discipline meeting. (See, ALJD p. 11) Therefore, Judge Goldman correctly concluded that the Union did not know whether Respondent would rely on the statements during the grievance procedure.

D. Respondent's Exception 4

Respondent mistakenly asserts that the Administrative Law Judge erred in concluding that the Union received no indication that Respondent would not rely on the statements of Bush's coworkers. Throughout these proceedings, Respondent has attempted to put a gloss on its communications with the Union. Judge Goldman had the opportunity as Administrative Law Judge to observe the witnesses at hearing and to examine their demeanor. In doing so, Judge Goldman found that Morris's testimony was credible and Chawansky's was not. Morris testified

at hearing that no company official informed him that Respondent did not intend to use the employees' statements in Bush's grievance. (Tr. 83) Although Respondent may believe that the Union should have known it would not rely on the employees' statements, Judge Goldman's finding to the contrary has ample support in the record and is entitled to deference under *Standard Drywall*.

E. Respondent's Exception 5

Respondent excepts to the Administrative Law Judge's conclusion that the Union would not be able to make a personal appeal to the employees who made the statements unless Respondent disclosed the names of those employees. Judge Goldman determined that the Union has "a legitimate interest in making a personal appeal to the employees in question - employees whom they represent - and not being relegated to general solicitation to anonymous employees." (ALJD p. 12, fn. 8) Respondent provides no support for its exception to this finding. Instead, it apparently argues that by interviewing each and every employee who may have made a comment about Bush, the Union will be able to determine the identity of the employees whose comments were referenced during Bush's disciplinary meetings and only then make a personal appeal. This exception appears to be a roundabout way of arguing that the Union had other avenues for obtaining the information requested of Respondent. But Respondent's obligation to furnish relevant information is not excused merely because the Union may have alternative sources for the information. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995); *New York Times Co.*, 265 NLRB 353 (1982); *Kroger Co.*, 226 NLRB 512 (1976). See also, *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 198 (6th Cir. 1986).

III. RESPONSE TO RESPONDENT'S EXCEPTIONS TO CONCLUSIONS OF LAW:

Respondent opposes the Administrative Law Judge's conclusion that it violated Section 8(a)(1) and (5) of the Act by failing to offer to bargain with the Union for an accommodation of interests in response to the Union's request for the names of employees who made safety-related complaints to Zickefoose about Bush. Respondent's argument is based in two parts: (1) that the identities of the employees who made the statements about Bush are not relevant, and (2) that the identities of those employees do not have to be disclosed because they are confidential.

A. The identities of the employees who made the statements about Bush are presumptively relevant, and their relevance is not diminished by Respondent's representations to the Board that it would not rely on those statements.

The primary question in determining whether information must be produced is relevancy. The standard for relevancy is a liberal discovery-type standard: the sought after information need not necessarily be dispositive of the issue between the parties but rather only of some bearing on it and of probable use to the labor organization in carrying out its statutory responsibilities. *Bacardi Corp.*, 296 NLRB 1220 (1989). It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant to a union's role as collective-bargaining representative and must be furnished. *International Protective Services, Inc.*, 339 NLRB 701, 704 (2003); *Madison Center*, 330 NLRB No. 72 (January 13, 2000) (unreported).

The Administrative Law Judge correctly concluded that the information requested by the Union is relevant, and Respondent provided no legal support whatsoever for excepting to that conclusion. Instead, Respondent argues that the statements of Bush's coworkers are not relevant because they are not necessary to prove it had just cause to discipline and discharge Bush. This argument misapprehends the inquiry by erroneously attaching a false precondition to the

determination of relevancy by requiring that information must be dispositive to be relevant. Rather, the issue is whether the information is of “probable” or “potential” relevance. *Transport of New Jersey*, 233 NLRB 694, 694 (1977) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)). As Respondent acknowledges, “the information need not be dispositive of the issue between the parties but must merely have some bearing on it.” *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1105 (1991). The information requested by the Union here undeniably has bearing on the issue of Bush’s suspension/discharge grievance, and Respondent’s representation that it will not rely on the statements does not diminish their relevance.

The names of the two employees who voiced complaints concerning safety in the workplace are clearly relevant to the processing of Bush’s grievance. Respondent admitted to receiving and discussing these complaints before it disciplined Bush. (Tr. 91, 95, 96, 98, 110) In fact, Zickefoose reported the complaints to Chawansky before Respondent issued its 5-day suspension pending discharge to Bush. (Tr. 98, 110) There was no evidence presented that the decision to suspend Bush was made prior to the receipt of these two employee complaints. Although Respondent contends that its discipline decision was not based on these employees’ comments, it is difficult to fathom that these employee complaints did not play some role in the discipline that was meted out to Bush on January 28, 2011. Zickefoose testified that one of the employee complainants stated that Bush needed help (Tr. 91), and the help to which the complainant was referring was Respondent’s Employee Assistance Program. (Tr. 100-101) Clearly, one aspect of Bush’s reinstatement agreement required him to participate in Respondent’s REACH program - an employee assistance program. (Tr. 99-100; G.C. Ex. 8) The requested information would permit the Union to consult with the complaining employees and determine whether to continue to pursue Bush’s suspension/discharge grievance. Counsel for the

Acting General Counsel submits that Respondent is obligated to furnish the Union with information that would help the Union make an informed judgment about the problem the information addresses. *Detroit Newspaper Agency*, 317 NLRB 1071, citing *General Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983), enfg. 257 NLRB 1068 (1981).

Respondent argues that the names of the complaining employees are not relevant because, in accordance with the collective-bargaining agreement, Respondent cannot present the testimony of bargaining unit employees in an arbitration proceeding. (Tr. 74, 83, 108-109) But information of probable relevance is not rendered irrelevant by Respondent's claims that it will neither raise a certain defense nor make certain factual contentions, because a "union has the right and the responsibility to frame the issues and advance whatever contentions it believes may lead to the successful resolution of a grievance." *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

Moreover, health and safety matters regarding unit employees' workplaces are of vital interest to the employees and are generally relevant and necessary for a union to carry out its bargaining obligations. *Detroit Newspaper Agency*, supra. In fact, few matters can be of greater legitimate concern. *Minnesota Mining and Manufacturing Co.*, 261 NLRB 27, 29 (1982), enf'd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). In the instant case the parties included a Safety and Health provision in their most recent bargaining agreement in which each party is obligated to continue eliminating safety and health hazards. (G.C. Ex. 4, Article 14) It follows that, even aside from Bush's suspension/discharge grievance, the requested information - the names of the two complaining employees - is relevant and necessary to assist the Union in policing that provision of the bargaining agreement.

Counsel for the Acting General Counsel respectfully requests that the Board reject Respondent's exceptions and adopt the Administrative Law Judge's conclusion that the

information requested by the Union is necessary and relevant and that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide that information.

B. Even if the requested information were confidential, Respondent would be required to seek an accommodation.

Even if Respondent's asserted confidentiality claim were legitimate, it would not be entitled to the unusually great weight accorded in *Pennsylvania Power and Light Company*, 301 NLRB 1104 (1991), where the employer asserted a confidentiality claim involving the names of informants whose tips resulted in employees being drug tested and subsequently disciplined or discharged. In *Pennsylvania Power*, the Board examined the facts of that case in light of the surrounding circumstances, including the national policy to create a drug-free workplace versus the national labor policy that favors disclosure of information. The Board found that where there were investigations of criminal activity (drug use), a potential for harassment of informants, and a concomitant chilling effect on future informants, that it was likely the employer had a legitimate, substantial interest in keeping the names confidential. However, the Board was not persuaded that the employer's confidentiality and other interests outweighed the union's need for the information with respect to the context of what the informants said. In the instant case, the surrounding circumstances do not involve the investigation of any criminal activity, or the potential harassment of the complaining employees. The comments made by the complaining employees were in regard to two accidents, involving Bush, that only resulted in minor damage to the equipment that Bush was operating. Moreover, the evidence presented at the hearing shows that the complaining employees did not express any concern about retaliation or harassment by the Union. (Tr. 101) Respondent presented no evidence that any union official intended to harass or retaliate against the complaining employees or that any such harassment or retaliation had occurred in the past. The Union also denies any such action. (Tr. 48, 101)

Even if the Board adopts the Administrative Law Judge's conclusion that Respondent had a legitimate, substantial interest in keeping the identities of the two complaining employees confidential, the burden is on Respondent, and not the Union, to suggest alternatives. Notably, in the decision on which Respondent principally relies, *Pennsylvania Power & Light Co.*, supra, the Board recognized that it was deviating from its "usual view that parties should bargain over the disclosure of partially confidential information." But the Board viewed "this departure as necessitated by the peculiar circumstances of this case and the strong interest in fostering efforts to create safe and drug-free workplaces." Judge Goldman rightly distinguished the instant case from the "peculiar circumstances" in *Pennsylvania Power*. Indeed, in the vast majority of cases where a request for relevant information involves a confidentiality concern, the Board has found a violation where the party in possession of that information refused to offer an accommodation to the requesting party. See, *Borgess Medical Center*, 342 NLRB 1105 (2004); *National Steel Corp.*, 335 NLRB 747, 748 (2001), enfd. 324 F.2d 928 (7th Cir. 2003); *Metropolitan Edison Company*, 330 NLRB 107 (1999).

Judge Goldman also correctly found that there was no merit to Respondent's claim that it could not provide an accommodation. While it is Respondent's affirmative duty, and not the Union's, to offer an accommodation, Judge Goldman did present a range of options available to Respondent that might satisfy the Union's request for the identities while still safeguarding Respondent's purported confidentiality concerns. (ALJD p. 15) Instead of availing itself of the Judge's suggestions, Respondent has flatly refused to provide the identities of the employees who made complaints about safety conditions under any conditions in a continuing violation of its duty to provide that information under Section 8(a)(1) and (5) of the Act.

III. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the Acting General Counsel submits that Respondent's exceptions should be rejected in their entirety and that the Administrative Law Judge's legal and factual conclusions be affirmed.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph F. Tansino". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

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