

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

In the Matter of

CENTER CITY INTERNATIONAL
TRUCKS, INC.

and

Cases 9-CA-060153
9-CA-060157

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 54, LOCAL
LODGE 1471

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

I. STATEMENT OF THE CASE:

This case is before the Board on the Respondent's exceptions and Counsel for the Acting General Counsel's cross-exceptions to the decision of Administrative Law Judge George Carson, which issued on November 15, 2011. Counsel for the Acting General Counsel excepts to the Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(1) and (5) of the Act when it failed to provide the Union with correspondence between Respondent's broker and insurance agencies the broker contacted in shopping healthcare plans; or, if these documents do not exist, when it failed to timely notify the Union that this type of information does not exist.

II. FACTS:

The parties involved in this matter have been negotiating for a new contract since September of 2009. (Tr. 17) ^{1/} One point of contention is the Employer's November 1, 2010

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

unilateral implementation of a healthcare plan. (Tr. 24) On January 19, 2011,^{2/} Bill Rudis, chief negotiator for the Union, requested information from Respondent concerning Respondent's current and past healthcare plans. (G.C. Ex. 4) One of the requests was for "all correspondence with each insurance carrier *its representative* contacted or engaged discussion with to 'shop' a new health care plan." (G. C. Ex. 4) (emphasis added) The Union needed the information in order to submit it to insurance agencies to receive healthcare proposals and quotes that the Union then could use to develop its own healthcare plan proposals for purposes of contract negotiations. (Tr. 34)

In a bargaining session on January 21, Rudis asked Respondent to turn over the recently requested information. (Tr. 37) After Respondent failed to turn over the information by the January 25 deadline, on January 27 in a bargaining session, Rudis again sought the rates and requested information. (Tr. 37) On that same day during a break in negotiations, Rudis emailed Tim Reilly, Respondent's owner, and once more told Reilly that Respondent had failed to furnish the requested information and that the Union needed the information. (Tr. 38; G.C. Ex. 5) Although his email to Reilly on January 27 states that Respondent had provided some information to the Union, Rudis clarified that his statement referenced the information turned over to the Union on January 20 relating to G.C. Exhibit 2. (Tr. 40) The information provided was not responsive to the January 19 information request referenced as G.C. Exhibit 4. (Tr. 40)

On January 28, Rudis emailed Reilly once more to put the Respondent on notice that it had yet to provide the Union with the information requested in G.C. Exhibit 4. (Tr. 42; G.C. Ex. 6) Respondent failed to turn over the information at this time. (Tr. 43) Therefore, Rudis emailed Reilly again on February 2 and one more time explained to Reilly that Respondent still had not sent the Union the information it requested on January 19. (Tr. 45; G.C. Ex. 7) Respondent did not respond at this time. (Tr. 47) In a March 24 negotiating session when the

^{2/} All dates hereinafter will refer to the year 2011 unless otherwise noted.

parties were discussing healthcare issues, Rudis again asked Respondent to provide the Union with the information it had requested. (Tr. 54-56; R. Ex. 10, page 257, line 15) ^{3/} Rudis explained to Respondent that the Union was still missing information related to Employer bids, proposals, *correspondence*, as well as billing information from 2008, 2009, and 2010. (Tr. 54-56) Reilly responded to Rudis by saying Respondent would be happy to fulfill the Union's information request. (R. Ex. 2, page 00192) ^{4/}

With respect to correspondence with insurance agencies, John Colston, Secretary Treasurer for Respondent, testified that he "mostly" has verbal communications with insurance carriers. (Tr. 238) Although Respondent contends it does not have correspondence with insurance agencies, Colston testified that he never reached out to Respondent's hired insurance broker to inquire whether the broker had correspondence with insurance agencies. (Tr. 250-251)

After Respondent failed to turn over the requested information, Rudis sent Colston an email on June 27 again reiterating to Respondent what specific information the Union still had not received relative to healthcare. (Tr. 57-59; G.C. Ex. 9) Respondent did not respond to the email, nor did it turn over the requested information at this time. (Tr. 59) Once more, on July 19 in an email chain with Colston, Rudis again mentioned specifically that the Union was still seeking the healthcare information it originally requested on January 19. (G.C. Ex. 10) Yet again, the Respondent did not turn over the requested information at this time. (Tr. 62)

III. LEGAL ANALYSIS:

A. The Administrative Law Judge Erred in Concluding That Respondent Complied With the Portion of the Union's Information Request Seeking Correspondence With Each Insurance Carrier its Representatives Contacted.

With respect to the portion of the Union's information request dealing with correspondence between insurance carriers and Respondent's representative, Judge Carson

^{3/} When referencing Respondent's Exhibit 10, Counsel for the Acting General Counsel will cite to the page number listed in the upper right hand corner as Exhibit 10 is so expansive.

^{4/} When referencing Respondent's Exhibit 2, Counsel for the Acting General Counsel will cite to the last 5 digits of the page number listed in the bottom right hand corner as Exhibit 2 is so expansive.

determined there was no evidence that the responses of the insurers were not ultimately provided to the Union. (ALJD, p. 7) Carson further found that the Union “did not specifically request all correspondence between the Respondent and its agent, the benefit administrator.” (*Id.*)

Additionally, Carson found that “the brief of the General Counsel, citing *New York Post*, 353 NLRB 625, 629 (2008), argues that the Respondent was obligated to contact third parties, i.e. the insurers.” (*Id.*) Counsel for the Acting General Counsel submits that the Administrative Law Judge misconstrued the nature of the argument presented by Counsel for the Acting General Counsel, and erred in his conclusions in this regard.

Judge Carson correctly cited relevant facts regarding Respondent’s correspondence with insurance carriers: he noted that “Colston ^{5/} admitted that he did not request the benefits administrator to provide correspondence with any insurance companies,” and also that “Colston did not specifically deny the existence of correspondence with the benefits administrator.” (ALJD, p. 4) Furthermore, Judge Carson correctly cited the Union’s January 19 information request which “sought ‘all correspondence with each insurance carrier *its representative* contacted or engaged discussion with to ‘shop’ a new health care plan, and provide a copy of all the health care insurer’s responses.” (ALJD, p. 4) (emphasis added) Nevertheless, even though Judge Carson accurately cited the relevant portion of the Union’s information request, he erred in determining that Respondent was not obligated to contact its hired healthcare broker to inquire whether the broker had written correspondence with the insurance agencies it contacted. (ALJD, p. 7)

Colston testified that Respondent hired a benefits administrator, or broker, to shop a healthcare plan with insurance agencies on behalf of Respondent. (Tr. 250) As such, this benefits administrator, or broker, *represented* Respondent with respect to shopping healthcare plans. The Union requested Respondent to provide “all correspondence with each insurance

^{5/} John Colston is Respondent’s Secretary Treasurer and representative who corresponds with Respondent’s healthcare insurance broker.

carrier *its representative* contacted or engaged discussion with . . .” (G.C. Ex. 4) (emphasis added) Moreover, the Union did not request Respondent to provide correspondence between Colston and the benefits administrator; it requested correspondence between Respondent’s agent, i.e. the benefits administrator, and insurance carriers. Therefore, in determining that Respondent complied with this portion of the Union’s information request, it was error for Judge Carson to rely on the Union’s not having requested correspondence between Respondent and its agent. (ALJD, p. 7)

Furthermore, Colston testified that he “mostly” has verbal communications with Respondent’s broker. (Tr. 238) Colston could not definitively say he had no written communication with the broker. More importantly though, this response was to a question asking Colston about the type of communication he had with his *broker*. (Tr. 238) Once again, in its January 19 information request, the Union requested correspondence with each insurance carrier *its representative* contacted or engaged in discussions with to obtain a new healthcare plan. (G.C. Ex. 4) What matters is that Colston admittedly failed to make any effort to obtain from its broker any correspondence between the broker and insurance agencies, precisely the information sought by the Union in its January 19 information request. (Tr. 250-251)

Additionally, Judge Carson found that “the brief of the General Counsel, citing *New York Post*, 353 NLRB 625, 629 (2008), argues that Respondent was obligated to contact third parties, i.e. *the insurers*.” (ALJD, page. 7) (emphasis added) However, nowhere in Counsel for the Acting General Counsel’s brief was it argued that, in attempting to comply with the Union’s information request, Respondent was obligated to contact the insurance carriers themselves. Counsel for the Acting General Counsel argued that Respondent was obligated to seek written correspondence, i.e. the requested information, from *the third party benefits administrator* that Respondent hired, not the insurance agencies.

In *Fireman & Oilers*, the Board found the Union in violation of 8(b)(3) of the Act when it failed and refused to provide information to the Employer which was relevant and necessary to a pending grievance. *Fireman & Oilers*, 302 NLRB 1008, 1010 (1991). After a grievance was filed over Charles Gibson's discharge, the Employer requested the Union provide it with Gibson's doctor's records and hospital records. *Id.* at 1008. The Board acknowledged that it has extended an employer's normal duty to "supply relevant information . . . to situations where the information is not in the employer's possession, but where that information likely can be obtained from a third party with whom the employer has a business relationship that is directly implicated in the alleged breach of the collective-bargaining agreement." *Id.* at 1008-1009. The Board applied this duty to the Union, noting that "it [was] reasonable to require that the Respondent at least attempt to obtain from Gibson his medical records. His records relate directly to the subject of the grievance on which the Respondent is representing him." *Id.* at 1009. The Board continued in saying that "upon the Employer's request of the Respondent for Gibson's medical records, the Respondent was obligated to seek Gibson's assistance in obtaining those records." *Id.* Because the union never "requested that Gibson obtain the records from his doctor, or sign the release tendered by the Employer, or that the doctor produce the records to the Respondent," the Board found the union in violation of the Act. *Id.* at 1010.

Similarly, in *United Graphics*, the Board found the employer in violation of the Act for failing to request from a third party information requested by the Union. *United Graphics*, 281 NLRB 463, 466 (1986). In this case, the union requested information concerning the names, wages, addresses, and fringe benefits of temporary workers who it contended, and the employer did not dispute, performed bargaining unit work. *Id.* at 465. One of the employer's defenses was that the information was in the possession of Personnel Pool, a company who provided the employer with the names of temporary workers, and thus the employer could not supply the requested information. *Id.* at 465-466. Rejecting this argument, the Board found "there [was] no

evidence that the Respondent [had] requested Personnel Pool to provide it with the information that the Union [had] sought.” *Id.* at 466. In both *Fireman & Oilers* and *United Graphics*, the respondent failed to ask the third party with which it had a business relationship for the requested information. As such, in each case the Board found a violation of the Act.

Consequently, as the above cited authority maintains, Respondent was obligated to contact the benefits administrator and make a good-faith, reasonable effort to obtain any written correspondence the benefits administrator had with insurance agencies. As Colston admittedly failed to do just that, Counsel for the Acting General Counsel respectfully submits that Judge Carson erred by failing to find that Respondent violated the Act by not making a reasonable, good-faith effort to obtain the information.

Alternatively, if in fact these documents do not exist, it is Counsel for the Acting General Counsel’s position that Judge Carson should have found that Respondent violated Section 8(a)(1) and (5) of the Act by failing to timely notify the Union that this type of information does not exist. Based on Bill Rudis’ email on July 19, the Union still had not received written correspondence between Respondent’s agent and insurance agencies and had not been told that those documents do not exist. Accordingly, if these documents did not exist, as 6 months had passed between the initial information request on January 19 and Rudis’ email on July 19 without the Union being informed the documents did not exist, Counsel for the Acting General Counsel submits that Judge Carson should have found Respondent in violation of Section 8(a)(1) and (5) of the Act by failing to timely notify the Union.

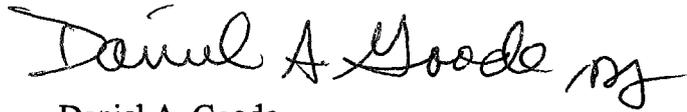
IV. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the Acting General Counsel respectfully submits that the Board should grant Counsel for the Acting General Counsel’s limited exceptions and the decision of Judge Carson should be reversed insofar as it concludes that Respondent complied with the portion of the Union’s information

request seeking correspondence with each insurance carrier its representatives contacted or engaged discussion with to 'shop' a new health care plan.

Dated at Cincinnati, Ohio this 27th day of December 2011.

Respectfully submitted,

A handwritten signature in black ink that reads "Daniel A. Goode" followed by a stylized flourish.

Daniel A. Goode
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