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

DATE: July 16, 2012

TO: Rik Lineback, Regional Director
Region 25

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

SUBJECT: United Electrical, Radio & Machine Workers of America, Local 735
(Autoline Industries Indiana, LLC)
Case 25-CB-072730

554-1475-0100
554-1475-0137
867-2575-7500-0000

This case was submitted for advice as to whether the Union violated Section 8(b)(3) by refusing to provide the Employer with information that it requested related to the Union's investigation of a grievance. Specifically, the Region requested advice as to whether the information gathered by the Union was protected work product. We conclude that the Union did not violate 8(b)(3) because the Employer requested information that was gathered by the Union at the direction of its legal counsel in anticipation of grievance litigation, and is therefore protected from disclosure under the work product privilege. Furthermore, the Employer has failed to demonstrate a substantial need for the material or an inability to obtain the substantial equivalent without undue hardship. Therefore, the Region should dismiss this charge, absent withdrawal.

FACTS

Autoline Industries Indiana, LLC (the Employer) is a manufacturer of sheet metal and automotive components. This case arises out of the Employer's facility in Butler, Indiana. United Electrical, Radio & Machine Workers of America, Local 735 (the Union) represents certain of the Employer's employees at the Butler facility.

On August 30, 2011,[1] the Employer informed the Union's chief steward that another employee had accused her of bumping into him while she was operating a forklift. The steward denied bumping the employee but was nonetheless informed by the Employer that she would receive a punch on her forklift card. After six punches,

[1] All dates are in 2011, unless otherwise indicated.

an employee may lose the ability to operate a forklift. On August 30, the steward filed a grievance over the punch on her forklift card.

Upon learning from the Union's local president that the chief steward had been disciplined, Union representative Tim Curtin contacted his supervisors and asked how to address the situation. Because of the importance of the steward to the bargaining unit, the Union made the unusual decision to immediately involve its general counsel in the matter. The Union's counsel gave Curtin detailed instructions on how to investigate the grievance, including what information he should gather about where the steward was working at the time of the incident, when the event took place, whether there were witnesses, whether she was charged with specific wrongdoing, and whether there were pertinent documents the Employer was relying upon. Only after receiving these instructions did Curtin begin his grievance investigation. Union counsel directed Curtin's investigation of the matter, including the legal aspects of the grievance.

On September 12, the Employer terminated the steward, assertedly because she made a false statement on her accident report concerning the forklift incident. The Union filed a grievance over the termination on September 16. The Employer denied the Union's termination grievance at the first, second and third steps. On November 7, the Union moved the grievance to arbitration.[2] On November 17, the Employer requested the following information from the Union:

1. A copy of any and all notes, documents, photographs, witness statements or similar documents taken or gathered by the Union during its investigation of the grievance.
2. A list of all person(s) the Union interviewed during the course of its investigations, including the name of the person that conducted the interview, any statements, notes or other documents resulting from the interview, the date, time and location of each interview.
3. A list of witnesses the Union intended to call at the arbitration hearing.
4. A copy of any and all notes the Union took at any meetings with the Employer regarding this grievance.

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[2] The Union filed a related charge in Case 25-CA-069082 on November 17, alleging that the Employer unlawfully discharged the steward in retaliation for her union activity, unlawfully failed to provide information the Union requested regarding the Employer's investigation of the incident, and committed various 8(a)(1) violations. The Region found merit to the allegation that the Employer delayed in providing information, along with various 8(a)(1) violations. A settlement was approved by the Region on January 31, 2012. The allegation concerning the discharge of the chief steward was deferred pursuant to the Board's *Collyer* doctrine. *See Collyer Insulated Wire*, 192 NLRB 837 (1971).

5. Any and all other documents, statements and exhibits the Union intended to rely upon at the arbitration hearing.
6. Any information or documents the Union gathered in its investigation of the accident victim's employment history.

The Employer contends that it needs the requested information to prepare for the arbitration and explore settlement of the grievance.

On November 30, the Union refused to provide any of the requested information, asserting that it was not obligated to turn it over because it was all attorney work product. The Union further asserted that the information requested by the Employer in items 3 and 5 was an improper attempt by the Employer to engage in pre-arbitral discovery.[3]

In response to the Union's assertions, on December 7, the Employer withdrew item 3 from its request, and specified that, as to item 5, it was no longer asking that the Union identify which documents it intended to rely upon in arbitration. The Employer disputes that the remainder of the requested information is attorney work product. The Employer further asserts that even if the work product privilege applies, the Union should be compelled to supply the requested information because the Employer has a "substantial need of the materials" and is unable, without undue hardship, to obtain the information by other means.[4]

ACTION

We agree with the Region that the Union did not violate Section 8(b)(3) by refusing to provide the requested information to the Employer. Thus, the information is protected from disclosure as attorney work product because it was prepared under the direction of the Union's legal counsel in anticipation of the Union's litigation of the grievances concerning the chief steward's discharge. Furthermore, the Employer has failed to establish that it has a substantial need for the requested information or that it cannot, without undue hardship, obtain the substantial equivalent of the information by other means. Therefore, the Region should dismiss the charge, absent withdrawal.

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[3] *See, e.g.*, *Central Telephone Co.*, 343 NLRB 987 (2004); *California Nurses Association (Alta Bates Medical Center)*, 326 NLRB 1362 (1998).

[4] *See* Fed. R. Civ. P. 26(b)(3).

A union's statutory duty to provide information parallels that of an employer.[5] A party is obligated to provide requested information that may be relevant to contract negotiation and administration, including grievance handling.[6] The Board applies a liberal standard to determine the relevancy of requested information, requiring only a showing that the information has a probability of being relevant to the party in undertaking its collective-bargaining responsibilities.[7] Thus, a party may be entitled to information during grievance processing that may assist it in making intelligent judgments regarding the merits of the grievance and determining how to process it.[8] Because the information requested by the Employer is arguably relevant to its decision to settle the grievances, the Employer has not attempted to engage in the type of pre-arbitral discovery that the Board found to be unenforceable in *California Nurses Ass'n (Alta Bates Medical Center)*, 326 NLRB 1362 (1998).[9]

The Board's inquiry does not end at relevance, however. The Board has found that otherwise relevant information may be exempt from disclosure under the work product doctrine, which protects from disclosure documents prepared by a party or its representative in anticipation of litigation.[10] The work product doctrine allows an attorney to "assemble information, sift what he considers to be the relevant from the

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[5] *Teamsters Local 921 (San Francisco Newspaper)*, 309 NLRB 901, 904 (1992); *Service Employees Local 144 (Jamaica Hospital)*, 297 NLRB 1001, 1003 (1990); *Teamsters Local 851 (Northern Air Freight)*, 283 NLRB 922, 925 (1987); *Detroit Newspaper Printing & Graphic Communications Union Local 13 (Oakland Press)*, 233 NLRB 994, 996 (1977), *enforced* 598 F.2d 267 (D.C. Cir. 1979).

[6] *Service Employees Local 144 (Jamaica Hospital)*, 297 NLRB at 1003.

[7] *Teamsters Local 851 (Northern Air Freight)*, 283 NLRB at 925; *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

[8] *Jewish Federation Council*, 306 NLRB 507, n.1 (1992); *Fawcett Printing Corp.*, 201 NLRB 964, 972-73 (1973) (finding that providing requested information, even after arbitration had been sought, might induce a compromise).

[9] The Board in *California Nurses* drew a line between protected information regarding the union's legal theory and the evidence which it planned to present at arbitration, and disclosable factual material, documents and witnesses in support of the underlying grievance, which the union was obligated to provide. *California Nurses Ass'n*, 326 NLRB at 1362.

[10] *See Hickman v. Taylor*, 329 U.S. 495 (1947); *Central Telephone Co.*, 343 NLRB at 988; Fed. R. Civ. P. 26(b)(3).

irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." [11] Because arbitrations are adversarial in nature, documents prepared for use in arbitration are accorded work-product protection.[12] And, courts have found information gathered by union representatives at the request of the union's attorney to be work product if prepared in anticipation of litigation.[13]

In his dissent in *Central Telephone*, Member Walsh advocated that the Board look to Circuit Court precedent under the Federal Rules of Civil Procedure to determine whether a document had been prepared in anticipation of litigation.[14] Member Walsh noted that some Circuit Courts accord work product protection only when a document was created "because of" anticipated litigation.[15] Other courts ask whether the "primary motivation" behind the document was to aid in potential litigation.[16] Whether the "because of" or "primary motivation" test is used, however, the courts agree that a document that was prepared by a party "in the ordinary course

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[11] *Hickman,* 329 U.S. at 511.

[12] *Jumper v. Yellow Corp.*, 176 F.R.D. 282, 286 (N.D. Ill. 1997); *Samuels v. Mitchell*, 155 F.R.D. 195, 200 (N.D. Cal. 1994).

[13] *See, e.g.*, *Scanlon v. Bricklayers & Allied Craftworkers, Local 3*, 242 F.R.D. 238, 247 (W.D.N.Y. 2007) (timeline created by officials of defendant union at attorney's request in preparation for possible future litigation following plaintiff's discharge from union apprenticeship program and removal from union membership constituted attorney work product); *E.E.O.C. v. Rose Casual Dining, L.P.*, 2004 WL 231287, at *2 (E.D. Pa. 2004) (non-party witness statements prepared at the direction of party's counsel, but without assistance from or communication with counsel, found to be attorney work product).

[14] *See Central Telephone*, 343 NLRB at 991-92; *Conoco Phillips*, Case 22-CA-061726, Advice Memorandum dated June 13, 2012; *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, Cases 37-CA-7043, et al., Advice Memorandum dated March 9, 2011.

[15] *Central Telephone*, 343 NLRB at 991, *citing EEOC v. Lutheran Social Services*, 186 F.3d 959. 968 (D.C. Cir. 1999); *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998); *and Binks Mfg. Co. v. National Presto Industries*, 709 F.2d 1109, 1119 (7th Cir. 1983).

[16] *Central Telephone*, 343 NLRB at 991, *citing U.S. v. El Paso Co.*, 682 F.2d 530, 542-43 (5th Cir. 1982). *See also* Fed. R. Civ. P. 26(b)(3) ("[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)").

of business or for other non-litigation purposes" is subject to disclosure, even if it may ultimately be used to assist in litigation.[17] Thus, like the *Central Telephone* majority, regardless of the Circuit Court standard used, Member Walsh agrees that the privilege does not apply to documents routinely prepared in the normal course of business.[18]

The information at issue here is protected work product under either the majority or dissenting opinions in *Central Telephone*.[19] Under the analysis applied by the majority, the information is protected because the Union conducted the investigation at the direction of its legal counsel and in reasonable anticipation of litigation. The information is also protected under the analysis used by Member Walsh, because the sole purpose of the Union's investigation in this case was to prepare for litigation over the Employer's decision to discipline and discharge the chief steward.[20] Thus, when Curtin contacted the Union's counsel after the Union's chief steward had been disciplined and threatened with discharge, one grievance had already been filed and the Union was anticipating filing another. The Union's counsel gave Curtin detailed instructions on what information he should gather with regard to the alleged incident, and directed him throughout the Union's grievance investigation.

Although the work product privilege is not absolute, the Employer has failed to overcome it by demonstrating that it has a substantial need for the materials and is unable, without undue hardship, to obtain the information by other means.[21] In this regard, the Employer bears the burden of demonstrating both prongs of this test.[22] The substantial need prong of the test examines whether the information requested is

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[17] *Central Telephone*, 343 NLRB at 991.

[18] *Id.* at 993-95.

[19] FOIA Exemption 5 [redacted]

[20] *Compare Central Telephone*, 343 NLRB at 995-96 (Walsh, dissenting) (employer's investigation was for the nonlitigation purpose of determining whether the union officials had committed any wrongdoing).

[21] Fed. R. Civ. P. 26(b)(3)(A)(ii).

[22] *See Hendrick v. Avis Rent A Car Sys.*, 916 F. Supp. 256, 260 (W.D.N.Y.1996).

an essential part of the requesting party's case, and whether the party has an alternate source for the information.[23] The Employer has not provided sufficient evidence that it has a substantial need for the information that it requested from the Union or that it would be unduly burdened by obtaining the information from another source.[24] Although the Employer contends that it needs the requested information to prepare for arbitration and consider its settlement options, it is aware of the facts and circumstances that led up to its discharge of the grievant, as it conducted its own investigation prior to making the decision to terminate her. As such, there is no evidence here that the Employer would be unduly burdened by obtaining the information it seeks via other means.

In sum, the Union did not violate Section 8(b)(3) when it refused to provide the information requested by the Employer because the information is protected from disclosure under the attorney work product doctrine. Accordingly, the instant charge should be dismissed, absent withdrawal.

/s/
B.J.K.

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[23] *See Fletcher v. Union Pacific Railroad Co*, 194 F.R.D. 666, 671 (S.D. Cal. 2000), *citing Moore's Federal Practice* § 26.70[5][c], at 26–221 to 26–222 (3d ed.1999).

[24] *See, e.g., Poulin v. Greer*, 18 F.3d 979 (1st Cir. 1994) (court did not abuse discretion in denying motion to compel production of photographs, when party requesting the photos could have taken its own, comparable ones); *Bradley v. Wal-Mart Stores, Inc.* 196 F.R.D. 557, 558 (E.D. Mo. 2000) (party not entitled to tape deemed to be attorney work product when it had its own witnesses and documents in support of its case and privileged material would only serve as corroborating evidence).