

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CATHOLIC HEALTH INITIATIVES
COLORADO d/b/a CENTURA HEALTH-ST.
MARY CORWIN MEDICAL CENTER

Cases 27-CA-092767
 27-CA-097152

and

COMMUNICATION WORKERS OF
AMERICA, LOCAL 7774

**REPLY IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S
DECISION**

INTRODUCTION

Respondent Catholic Health Initiatives Colorado d/b/a Centura Health – St. Mary-Corwin Medical Center (“Respondent”) contends that the current proceeding is about the respective bargaining rights of the Respondent and the Union—under specific terms of a negotiated contract. General Counsel repeatedly asserts that the Union has a statutory right to the information it requested and that the Union’s statutory right includes gaining information generally deemed relevant to its duties as the exclusive bargaining agent of the unit.

The duties and rights of the Union are not only defined by statute. The rights and duties of the Union are further defined and limited by collective bargaining agreements. Statutory rights are, after entering into such agreements, shaped by the negotiated terms of those collective bargaining agreements. *See, e.g., NLRB v. Honolulu Star-Bulletin, Inc.*, 372 F.2d 691, 693 (1967); *NLRB v. McClatchy Newspapers, Inc. Publisher of Sacramento Bee*, 964 F.2d 1153, 1168 (D.C. Cir. 1992)(discussing that even though there is a statutory duty to bargain regarding “wages, hours, and other terms and conditions of employment,” those subjects can be altered by bargaining: “whether the subject will be committed to one party’s discretion or set by definite terms should be decided by bargaining and the relative economic strength of the employer and the union.”). Further, the facts, evidence, and bargaining history between two parties also shapes, defines, and alters basic statutory rights. *See, e.g., Watkins Contracting Inc.*, 335 NLRB 222, 224 (2001); *Coca-Cola Bottling*, 311 NLRB 424, 425 (1993); *Local Union 1395, International Brotherhood of Electrical Workers v. NLRB*, 797 F.2d 1027, 1033, 1036 (D.C. Cir. 1986); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). Statutory rights must thus be confirmed through a

case-by-case analysis; their application is not assumed, as General Counsel asserts¹. Additionally, the duty to provide information derives from a duty to bargain. *See discussion below*. If the terms of the collective bargaining agreement relieve parties from a duty to bargain regarding a subject, there is not a duty to provide information about that subject. *Id.*

In the present proceeding, the Collective Bargaining Agreement (“CBA”), as modified by the Letter of Agreement (“LOA”), clearly defines the rights between the two parties as related to the Pay for Performance Plan. Under that contract, the Union does not have a statutory right to the information requested because the Union does not have a legitimate role or duty related to the Pay for Performance Plan that would justify its broad request for information. Further, the CBA relieves either party of a duty to bargain about any subject whatsoever during the term of the contract. Because there is no duty to bargain, there is no duty to provide the requested information. Finally, Respondent contends that General Counsel is mistaken in the assertions about confidentiality.

I. Bargaining Rights are Defined And Structured By Terms of a Collective Bargaining Agreement.

a. *The collective bargaining agreement structures the bargaining rights between the two parties.*

In a broad sense, the terms of a collective bargaining agreement define and structure relative bargaining rights between parties. *See McClatchy Newspapers*, 964 F.2d at 1168. Once an agreement has been reached and signed into contract, the terms of that contract, even general clauses such as “zipper clauses,”² are and should be enforceable as binding contractual

¹ For a lengthy discussion about the interplay between statutory rights and legitimate rights/duties, please see Respondent’s Responding Brief, filed on July 29th, 2013. Those arguments will not be reiterated in depth in this Reply Brief.

² General Counsel essentially asserts that a zipper clause is only effective if it is attached to clear and unmistakable evidence that a specific, detailed subject was bargained into that zipper clause (Answering Brief To Exceptions, p. 15). This contention defeats the exact purpose of a zipper clause. Zipper clauses are negotiated in specifically to cover subjects where there is not clear language incorporated into the collective bargaining agreement. While the

stipulations between the parties. *See id.*; *NLRB v. USPS*, 8 F.3d 832 (D.C. Cir., 1993); *Collyer Insulated Wire*, 192 NLRB 837, 839-840 (1971). Insofar as terms appear in the contract, this means they are “covered by” that contract; thus, contract interpretation principles, not waiver principles³, must be employed.⁴ *USPS*, 8 F.3d at 837. If the terms of the contract were bargained for, the parties’ relative positions regarding subjects appearing in the contract were also bargained for. *See Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 290 (D.C. Cir. 1991).

Additionally, the relative bargaining rights between a Union and an employer do not have to be equal; the Union may have a weaker role as related to certain subjects contained in a collective bargaining agreement. *See id.*; *Colorado-Ute Electric Ass’n v. NLRB*, 939 F.2d 1392, 1402 (10th Cir. 1991). An employer may, for example, reserve to itself exclusive rights as against the Union without being guilty of bad faith. *Cincinnati Newspaper*, 938 F.2d at 290. Because of this, it cannot be assumed a Union has carte blanche rights to request bargaining or information about any subject it wishes, especially subjects relegated to the employer’s exclusive control.⁵ *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314, 318 (1979) (“A union’s bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply

zipper clause may indeed be general, that does not change the fact that its inclusion into the agreement is proof that there was a bargained-for understanding between the Union and Respondent that during the course of the contract neither party would be required to bargain about any subject whatsoever. The language of the zipper clause cannot be stated more clearly and unmistakably than that.

³ It is an interesting distinction that in most cases involving the “clear and unmistakable waiver” standard, generally an employer acts unilaterally in changing the terms of a “mandatory” bargaining subject and only after making the change attempts to point to contract provisions to justify its unilateral action. *See NLRB v. McClatchy Newspapers, Inc. Publisher of Sacramento Bee*, 964 F.2d 1153, 1167-1168 (D.C. Cir. 1992). The current proceeding is factually distinct. In this case, the Union and the Respondent had already bargained for the Pay for Performance Plan during the wage re-opener period. This is not a case where the Respondent, for example, unilaterally implemented the Pay for Performance Plan without consulting the Union. Any bargaining over the Pay for Performance Plan has already occurred and concluded at the time the parties signed the LOA into effect. Further, the record shows that the Union was given an opportunity to make changes to the LOA prior to its implementation. The only change they requested was the addition of three “s’s” to the agreement. TR: 87: 19-25; TR: 88: 1-21.

⁴ See Respondent’s Brief in Support of Exceptions, filed July 15th, 2013 for extensive discussion of “waiver” v. “contract coverage” principles.

⁵ Again, please refer to Respondent’s Responding Brief, filed Aug. 29th, 2013.

all the information in the manner requested”; “The Board’s position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established”). Allowing a Union’s statutory rights regarding information requests to blindly trump negotiated, bargained-for contractual terms significantly weakens the needed efficacy as well as the basic function and purpose of a collective bargaining agreement.

b. The Board cannot require actions that would effectively change the substance of the terms in a collective bargaining agreement.

While General Counsel makes repeated assertions about Board precedent that would seemingly require the Respondent to simply hand the requested information over, the Union’s statutory right to request information is not available in a vacuum and must be construed with the applicable contract provisions. *McClatchy Newspapers*, 964 F.2d at 1168.

Insofar as this is the case, the Board does not have authority to interpret a contract beyond its statutory role in promoting bargaining between the two parties. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437-438 (Board may incidentally interpret contract provisions as related to unfair labor charge); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203 (1991); *NLRB v. Strong*, 393 U.S. 357, 360 (1968)(“Admittedly, the Board has no plenary authority to administer and enforce collective bargaining contracts. Those agreements are normally enforced as agreed upon by the parties, usually through grievance and arbitration procedures, and ultimately by the courts.”) The Board may attempt to ameliorate unfair labor practices by requiring bargaining. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (discussing purpose of the Board and the NLRA as promoting bargaining between two parties). However, the Board may not require the parties to act in ways that would substantively alter the terms of the collective bargaining agreement or the bargaining positions of the parties. *See id.*; *Cincinnati*

Newspaper Guild, 938 F.2d at 288-89. Therefore, any actions by an ALJ or the Board that would require a party to act in ways that controvert established contract terms are impermissible under the NLRA because such actions effectively alter bargaining positions by changing those agreed-upon terms. This exceeds the Board's statutory authority.

II. The Duty To Provide Information Derives From A Party's Duty To Bargain.

General Counsel takes issue with Respondent's "assumption" that the duty to provide information is related to the duty to bargain. Under General Counsel's construction, the duty to provide information and the duty to bargain are separate, distinct, and unrelated duties.

However, the duty to provide information derives from a duty to bargain; it is not distinct or separate from it as the General Counsel asserts. *See, e.g., Norris, a Dover Resources Co. v. NLRB*, 417 F.3d 1161, 1168 (10th Cir. 2005) ("The employer's duty to bargain collectively 'includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative.'"); *NLRB v. PDK Investments, LLC*, 433 Fed. Appx. 297, 300 (5th Cir. 2011)("The duty to bargain collectively includes the duty to 'provide information needed by the bargaining representative for the proper performance of its duties.'"); *North Bay Dev. Dis. Serv. v. NLRB*, 905 F.2d 476, 480 (D.C. Cir. 1990)(It is not an unfair labor practice to refuse to supply information relevant to a subject about which a party does not have an obligation to bargain.). Thus, if it is determined there is no duty to bargain, there is also no duty to provide information.

Further, the ALJ determined that Respondent had violated section 8(a)(5) and (1) by not supplying the requested information. That determination implicitly confirms the very relationship the General Counsel denies. The NLRA's purpose is to promote bargaining between

parties.⁶ Refusing to supply information is concurrently a refusal to bargain. General Counsel's contentions on this point must fail because they simply do not make sense, given the NLRA's purpose and the judicial interpretations thereof.

III. As applied, the CBA and LOA clearly define the rights and responsibilities between the Union and Respondent, as bargaining parties, related to the Pay for Performance Plan.

General Counsel asserts that the Union's request for information regarding the Pay for Performance Plan does not relate to Management's exclusive right to establish standards and judge workmanship. General Counsel cites email evidence to instead show that the Union wanted the information to assess fairness of the plan, to "test it for accuracy and reasonableness," and to make sure that all was "just, fair and equitable."

However, the CBA clearly and unequivocally reserves to Management the exclusive, unilateral right to establish assessment standards and judge workmanship. The CBA also clearly states that only where "clearly and explicitly" stated are these managerial rights altered. Under the CBA, the Union was not explicitly granted rights to challenge what the standards were, how employees were to be assessed under them, or how pay increases were to be granted using the standards. Thus, during the term of the current contract, the Union did not (and does not) have a cognizable bargaining position related to issues of establishment of standards and judgment of workmanship. Any information requests by the Union related to such subjects exceed legitimate Union duties under the contract and are incursions into Management's negotiated bargaining rights. Respondent should not be required to produce such information.

⁶ See 29 U.S.C. § 151 (N.L.R.A.) : "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (emphasis added).

While General Counsel attempts to assert that the Union's request for information had nothing to do with this exclusive managerial right, such assertions are short-sighted, crabbed, and miss the broader point entirely. The Pay for Performance is a clear exercise of Management's right to establish standards and then implement them in assessing employees' performance. The entire Plan's purpose is to tie an employee's actual performance to standards defined by Management. That is exactly within the purview of establishing standards and judging workmanship. There is simply no fair reading or understanding of the Plan that could reach a different conclusion.

Further, assuming the Union wanted the information to assess fairness and test for accuracy (as the General Counsel submits),⁷ such purposes would inherently include the Union making judgments about the standards established by Management and the judgments about employees' workmanship. There is no reasonable interpretation that could reach a different conclusion. Further, if the Union were to use the information to challenge⁸ the Pay for Performance Plan, that challenge would concurrently constitute an attempt by the Union to garner a role in the establishment of what those standards should be. Respondent should not have to provide information to the Union when clear contractual terms exclude the Union from such a role.

⁷ General Counsel seems to forget that Union Representative, Lew Ellingson, clearly stated in the hearing that the Union wanted the information to be able to assess and challenge how the Pay for Performance Plan worked. See TR: 101: 11-16 (cited in Respondent's Answering Brief as well as Brief In Support Of Exceptions). This is clear evidence and testimony that the General Counsel does not attempt to refute. Further, Mr. Ellingson then foreclosed the suggestion that the Union might use the information in future bargaining. See TR: 114: 8-24. Thus, at least according to the Union's representative, its attested purposes for wanting the requested information clearly related to the exclusive managerial right at issue in Article 2.2.

⁸ As indicated by Mr. Ellingson's testimony, TR: 101: 11-16.

Additionally, while an employee who receives a 0% increase may grieve such an increase⁹, the Union's role in such a grievance is only triggered upon a specific employee making the decision to file that grievance.¹⁰ If the employee does not wish to pursue filing a grievance, the Union has no role in managing the dispute.¹¹ In this case, the employee who received the 0% increase did not instigate grievance proceedings related to the increase. Thus, the Union truly did not have a duty related to the Pay For Performance Plan, under the terms of the CBA or the LOA, to justify its request for information.¹²

Finally, because the terms of the CBA and the LOA clearly define duties and responsibilities, any decision by the ALJ or Board that would require the Respondent to give the Union its demanded information effects a substantive change in the terms of the collective bargaining agreement and the relative bargaining positions of the parties. Requiring the Respondent to produce the information negates the clear import of Article 20 because it would require the Respondent to bargain about a subject during the contract term (which Article 20 specifically forecloses). Further, it substantively alters the exclusive right reserved to Management regarding establishment of standards and judgment of workmanship by giving the Union the ability to judge, possibly challenge, and require bargaining where the clear and

⁹ General Counsel asserts that Respondent misunderstands the clear language of Article 25.8 in how Respondent positions the "only." See Respondent's Brief In Support Of Exceptions, pp.14-19, for an in-depth discussion on how the terms of the CBA and LOA affect the construction of the 0% stipulation. Also, this very issue reiterates that this case really is a "contract coverage" case, not a "clear and unmistakable waiver" case.

¹⁰ See CBA, Article 8.1: "A grievance is defined as a dispute or controversy between the Employer and the employee"; Article 8.2: "Step 1: If the employee wishes to pursue the grievance, it will be taken by the appropriate Steward and/or Union officer..." (emphasis added).

¹¹ See CBA, Article 8.2: "The Hospital and Union encourage the employees to attempt to settle the dispute or controversy on an informal basis with the immediate supervisor." This reiterates that the Union is not presumptively involved in settling disputes that arise.

¹² General Counsel relies on *Industrial Welding Co.*, 175 NLRB 477 (1969) for the proposition that even if a union waives the right to negotiate a subject, it does not give up its right to have related information. However, the facts in that case are to be distinguished from the present proceeding. In that case, the financial secretary needed merit increase information for merit increases he was already in the middle of trying to negotiate for specific employees. *Id.* at 478. In the present proceeding, there is no grievance proceeding the Union is attempting to process. The need for the requested information is therefore also unsubstantiated by the facts on the ground.

explicit terms do not otherwise give the Union that duty or right; doing so enlarges the Union's bargaining position regarding this subject in contravention to the terms agreed to by both parties.

IV. General Counsel's Arguments Regarding Confidentiality Are Mistaken.

As a final point, General Counsel mistakenly contends that Respondent has not adequately supported its confidentiality argument and that even if Respondent had, personnel performance ratings do not fall under information traditionally protected by confidentiality.

First, Respondent is not, as General Counsel suggests, addressing their confidentiality concern in a post-hoc or inadequate fashion. General Counsel's Exhibit No. 10 is a letter from Respondent's counsel to Ms. Saveland (Field Attorney for the NLRB) addressing Respondent's confidentiality concerns. This letter was delivered on January 11, 2013¹³. In that letter, Respondent's counsel explained why the Hospital had confidentiality concerns about disclosing employee appraisals, and cited relevant authority to support its specific contentions. These arguments were repeated in Respondent's Closing Brief. Therefore, arguments Respondent made in their Brief In Support of Exceptions merely reiterated the arguments that had already been presented before, during, and after the hearing.

Second, in both the letter and its Closing Argument brief, Respondent presented arguments derived from specific terms in the LOA as proof of the Hospital's existing confidentiality interest and concern. Respondent contended that the negotiated provisions in the LOA protected the privacy interests of employees because only the employee, by the words in Article 25.8, was able to request a copy of their appraisals. This demonstrates and provides a

¹³ Further, insofar as it appears in General Counsel's exhibits, clearly the Respondent's arguments regarding confidentiality are not being presented post-hoc.

clear, contractual expectation of confidentiality for all unit employees by the Hospital.¹⁴ Respondent further pointed out there is a conceded confidentiality interest in employee appraisals, and cited cases supporting this proposition.¹⁵ Contrary to General Counsel's assertions, Respondent did not make a blanket, unsupported statement claiming confidentiality.

Finally, General Counsel's assertions that employee ratings are not considered information worthy of confidentiality must fail. In *Detroit Edison Co. v. NLRB*, the Supreme Court of the United States clearly stated otherwise: "The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice."¹⁶ 440 U.S. 301, 318 (1979). Employee performance appraisals clearly contain information regarding a person's "basic competence" to perform their job.

CONCLUSION

For the above reasons, and in response to General Counsel's Answering Brief To Respondent's Exceptions, Respondent respectfully requests the Board to vacate the ALJ's decision and order.

Respectfully submitted this 12th day of August, 2013.

KUTAK ROCK LLP

s/ Melvin B. Sabey
Melvin B. Sabey, Esq.

¹⁴ While General Counsel downplays Ms. Krenzel's testimony about the confidentiality of her own performance review, that testimony confirms that in addition to the contractual expectation of privacy, there was an established pattern of confidentiality at the Hospital regarding performance appraisals.

¹⁵ In this way, pointing to Mr. Ellingson's statement about confidentiality and Judge Pollack's protection of confidentiality in the Hearing simply substantiate the conceded confidentiality interest related to personnel files.

¹⁶ The Court further confirmed this in footnote by stating that, "A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation" *Detroit Edison*, 440 U.S. at 318, n. 16.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of August, 2013, a true and correct copy of the foregoing was served via e-mail transmission, as follows:

Mr. Lew Ellingson
Staff Representative
Communications Workers of America, District 7
8085 E. Prentice Avenue
Greenwood Village, CO 80111-2705

Via E-mail: lellingson@cwa-union.org

Julie M. Durkin
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower
Denver, CO 80202-5433

Via E-Mail: Julia.Durkin@nlrb.gov

Leticia Pena
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower
Denver, CO 80202-5433

Via E-Mail: Leticia.Pena@nlrb.gov

s/ Peggy L. Forest
