UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

HOWARD INDUSTRIES, INC.	*	
and	*	**Cases 15-CA-070830**
	*	**15-CA-081543**
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1317	*	**15-CA-085642**

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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COMES NOW Caitlin E. Bergo, Counsel for the Acting General Counsel (Counsel) in the above-styled matter and files this brief with the National Labor Relations Board (Board).

I. STATEMENT OF THE CASE[1]

On June 13, 2013, Administrative Law Judge Keltner W. Locke (ALJ) issued his Bench Decision and Certification (ALJD) in this matter in which he found Howard Industries, Inc. (Respondent) violated Section 8(a)(5) of the National Labor Relations Act (Act) by failing to furnish the International Brotherhood of Electrical Workers, Local 1317 (Union) with information the Union had requested. The ALJ found Respondent violated Sections 8(a)(1) and 8(a)(5) as alleged in paragraphs 8 and 9 of the Third Consolidated Complaint and Notice of Hearing (Complaint) issued on December 17, 2012.

[1] References to the Exhibits of the General Counsel and Respondent will be designated as "GCX" and "RX" respectively, with the appropriate number or numbers for those exhibits. The Joint Exhibits of General Counsel and Respondent will be designated as "JX". Reference to the transcript and the ALJD in this matter will be designated as "Tr." and "ALJD" respectively. An Arabic numeral(s) after "Tr." or "ALJD" is a spot cite to a particular page of the transcript or the ALJD; and an Arabic numeral(s) following a page spot cite references specific lines of the page cited. E.g. Tr. 15, 13-16 is transcript page 15 at lines 13-16.

On July 10, 2013, Respondent filed Exceptions to the Decision of the Administrative Law Judge (Exceptions) and a Memorandum in Support of Exceptions to the Decision of the Administrative Law Judge (Memorandum). Therein, Respondent raised eight (8) exceptions as noted below:

1. Respondent excepted to the ALJ's finding that Respondent's "Bill of Labor" is not proprietary and confidential under Detroit Edison[2].

2. Respondent excepted to the ALJ's finding of witness Jack Delk's testimony as clearly contrary to the record evidence.

3. Respondent excepted to the ALJ's conclusion that the Union requested anything other than the "Bill of Labor".

4. Respondent excepted to the ALJ's reliance on the testimony of Respondent witness Loren Koski instead of Respondent witness Jack Delk.

5. Respondent excepted to what it characterizes as the ALJ understating the value of Respondent's process.

6. Respondent excepted to the ALJ's conclusion that the Union's need for the information should be given heavy weight.

7. Respondent excepted to the ALJ's conclusion that it did not offer a reasonable accommodation.

8. Respondent excepted to the ALJ's conclusion that Respondent engaged in a plot to control the Union.

II. STATEMENT OF FACTS

Counsel concurs with the facts of the cases as stated by the ALJ in the ALJD.

[2] Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).

III. EXCEPTION 1

Respondent asserts the ALJ erred in concluding its "Bill of Labor" is not proprietary and confidential under Detroit Edison. The "Bill of Labor" is a document that shows the times associated with different elements that make up a particular coil manufactured by Respondent (See Respondent Exhibit 6).

Respondent argues the ALJ erroneously concluded its "Bill of Labor" is not proprietary and confidential because the ALJ based his conclusion on the finding that 1) winding more than one coil at a time is not a trade secret, and 2) Respondent's process does not depart from general practices in the industry. However, Respondent misapplies the Supreme Court's ruling in Detroit Edison, and errs in its assertion that the ALJ deemed its expressed confidentiality concerns to be "legitimate." The ALJ correctly concluded that he "cannot conclude that Respondent has some distinctive proprietary process that it is trying to shield from other manufacturers." (ALJD 3, 41-45).

The ALJ applied the test endorsed by Detroit Edison and its progeny and found Respondent's argument for confidentiality failed the first part of the test. The three-part test used to analyze a claim of confidentiality is outlined in Northern Indiana Public Service Co., 347 NLRB 210 (2006), and incorporates Detroit Edison as quoted below:

> Under Board law, a party may refuse to furnish confidential information to the other party in a collective-bargaining relationship under certain conditions. Initially, the party must show that it has a legitimate and substantial confidentiality interest in the information sought. Pennsylvania Power Co., 301 NLRB 1104, 1105 (1991). If this showing is made, the Board must weigh the party's interest in confidentiality against the requester's need for the information, and the 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); Pennsylvania Power, supra at 1105. Finally, even if these conditions are met, the party may not simply refuse to provide the requested information, but must seek an accommodation that would allow the requester to obtain the

information it needs while protecting the party's interest in confidentiality. Borgess Medical Center, 342 NLRB 1105, 1106 (2004). Northern Indiana at 211.

The ALJ correctly concluded 1) winding more than one coil at a time is not a trade secret, and 2) Respondent's process does not depart from general practices in the industry. Thus, the ALJ correctly found that Respondent did not satisfy its burden of showing a"legitimate and substantial confidentiality interest." In addition, the ALJ also correctly found that the Union's need for the information outweighed any asserted confidentiality interest on the part of Respondent, and Respondent did not appropriately seek an accommodation. (ALJD 4, 30-40, and 5, 1-24). For the reasons stated above, the Board should deny Respondent's Exception 1.

IV. EXCEPTIONS 2 and 4

Respondent excepted to the ALJ finding the testimony of its witness Jack Delk as clearly contrary to the record evidence. Respondent argues the ALJ's conclusion that Respondent's evidence amounted to "pixie dust" does not give proper weight to Delk's testimony regarding the Bill of Labor. (ALJD 17, 39-42). Respondent also excepted to what it characterized as the ALJ's reliance on the testimony of its witness Loren Koski over the testimony of its witness Jack Delk.

Koski was the author and signer of all of Respondent's responses to the Union's requests for information. Koski was not able to articulate at trial why the requested information was confidential or a trade secret. Therefore, the ALJ properly found that Koski's testimony was "too vague to be much assistance," (ALJD 17, 16), and that if Respondent really wished to protect a trade secret, it would be able to describe it with some specificity. (ALJD 17, 32-36). Incredibly, Respondent agrees with the ALJ's assessment of its witness in that it argues that Koski's testimony should not be relied on in determining

whether the requested information is confidential or a trade secret, even though Koski repeatedly gave these reasons to the Union in his denials of its requests for information.

Based on Koski's and Delk's testimony, the ALJ properly found Respondent's claim that the information at issue amounted to a trade secret to be "unpersuasive." (ALJD 17, 22). In general, the ALJ is given wide latitude in NLRB proceedings to make credibility determinations and to decide the proper weight to be given the evidence presented at hearing. An ALJ may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, "and reasonable inferences which may be drawn from the record as a whole." In Re Daikichi Corp., 335 NLRB 622, 623 (2001) *quoting* Shen Automotive Dealership Group, 321 NLRB 586, 589 (1996). In this case, the ALJ rightly viewed the evidence as a whole and found Respondent had not met its burden. For the reasons stated above, the Board should deny Respondents' Exceptions 2 and 4.

V. EXCEPTION 3

Respondent excepted to the ALJ's finding the Union requested any documents other than the Bill of Labor. Respondent asserts the Bill of Labor is equivalent to the process of setting standards for employee performance.

The record evidence shows the Union requested more than Respondent's Bill of Labor. Larkin testified that he requested, "any and all information used to determine individual production standards." (Tr. 46, 12-19). In addition, the Union requested the following:

A) "copy of the method being used to determine how many coils that a coil winder is suppose (sic) to wind within a regular work day,"(JX 4).

B) " new coil winding standards as of October 1, 2010 and the old coil winding standards prior to October 1, 2010." (JX 7)

C) " quota for each coil that a winder has to wind within an 8 hour shift based upon the old and new standards." (JX 7)

D) " copy of the standards used, by which production quotas was determined, i.e. time study etc.." (JX 8)

E) "request is being made for copy of coil time report, and copy of time study report(s) that reflects the coil time report." (JX 14)

F) "any and all information used to determine individual employee production standards; any and all information used to determine if employees are meeting production standards; and any and all policies and/or procedures used by the Company from 2009 to present, used to determine if an employee should be disciplined for failure to meet production standards." (JX 18)

As evidenced above, the Bill of Labor was merely a part of the Union's overall requests, and therefore the Board should deny Respondent's Exception 3.

VI. EXCEPTIONS 5 and 6

Respondent claims the ALJ undervalued Respondent's process in his decision and gave improper weight to the Union's need for the requested information. Specifically, Respondent objects that the ALJ found that "even if the exact amount of time the Respondent took to manufacture a particular coil is secret, the record does not establish that disclosure of this information would place Respondent at a significant competitive disadvantage." (ALJD 4, 25-27) As previously noted, the ALJ correctly found that Respondent had not proven that the requested information is confidential or a trade secret. Assuming that some of the

requested information is confidential, the ALJ properly determined, “Respondent has not demonstrated a legitimate and substantial interest in keeping some trade secret confidential.”(ALJD 4, 1-5).

The ALJ properly found the Union’s interest in the requested information would outweigh any confidentiality interest of Respondent. In this determination, the ALJ rightly concluded the “Union’s need for this information weights heavily” because without it, the Union is unable to present evidence to an arbitrator regarding disciplinary actions based on that information. (ALJD 35-40).

Furthermore, Respondent’s assertion that the information is not needed by the Union because coilwinders know what standards they are held to is not supported by the evidence. Union President Larkin testified he had spoken with numerous coilwinders who informed him they did not know what production standards they were being held to or how those standards were created. (Tr. 28, 20-25; 29, 1-12).It was those conversations with coilwinders that led Larkin to make the requests for information at issue in this case.

Likewise, Respondent’s argument that this information is of no value to the Union is misplaced because it issued discipline to employees based on its coil standards of production. If Respondent is able to calculate a standard to which it holds its employees, the Union, in its capacity as a representative of bargaining unit employees, is entitled to the information used to create that standard.

Finally, Respondent did not produce sufficient evidence to show that releasing the information to the Union would place it at a competitive disadvantage. Therefore the ALJ properly found that even if the information was confidential, it was still releasable to the

Union. For the reasons stated above, the Board should deny Respondent's Exceptions 5 and 6.

VII. EXCEPTION 7

Respondent excepted to the ALJ's finding that Respondent did not offer an accommodation to the Union relating to its asserted confidentiality interest in the requested information. Respondent argues that Koski's invitation to the Union to tour the coil-winding area and visit the plant is a sufficient accommodation or at least was intended to be the beginning of the process of bargaining over an accommodation. However, the ALJ correctly concluded the offer of a tour of the facility was an insufficient accommodation. As Larkin testified at hearing, Respondent's offer of a tour did not satisfy the Union's need for the requested information because it needed documentary information it order to represent employees at the grievance meetings and arbitrations. As Larkin explained, a tour would not suffice because his own eyewitness account of the process would not allow him to evaluate the merit of specific grievances or effectively put on documentary evidence at an arbitration proceeding. (Tr. 40, 16-23.)

Furthermore, once Respondent proposed its tour of the facility and the Union rejected the offer as being insufficient, Respondent had a duty to find an accommodation that was in fact sufficient. The ALJ rightly concluded that Respondent did not engage in any real attempt to reach an accommodation with the Union. For example, Respondent never suggested the Union sign a confidentiality agreement or proposed any redactions. It was not until the hearing that Respondent offered to make redactions to the Bill of Labor, although the Union had been requesting documents for over a year. (Tr. 135, 11-13). Based on the above, the

ALJ properly found that Respondent did not offer an accommodation to the Union, and the Board should deny Respondent's Exception 7.

VIII. EXCEPTION 8

Respondent excepted to the ALJ's finding that Respondent intended to limit and control the Union's litigation strategy by not providing it with the requested information. Again, Respondent argues that Koski intended to discuss accommodations with the Union at its proposed tour of the facility. Respondent's argument is purely self-serving. If Respondent intended to make further accommodations beyond the offer of a tour, it had years to do so. The parties engaged in regular communication, and Respondent has provided no reason it could not offer other accommodations in writing or by telephone to the Union either before or after the charges in this matter were filed. As noted above, Respondent did not offer to redact documents until trial.

Here, the ALJ rightly concluded that without the requested information the Union could not litigate whether Respondent's standards were reasonable but could only litigate whether or not employees met those standards set by management. (ALJD 18, 20-35). At an arbitration, Respondent would clearly have an advantage over the Union. Therefore the ALJ properly concluded that without the requested information, Respondent would be able to control and limit the Union's litigation strategy regarding any grievance related to the requested information. For the reasons stated above, the Board should deny Respondent's Exception 8.

IX. CONCLUSION

Counsel respectfully submits, for the reasons detailed above, the Board should not

grant Respondent's Exceptions. Specifically, Counsel concurs with the ALJ's finding that Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act.

/s/

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I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 15, 2013, I **E-FILED** the above-entitled document with the National Labor Relations Board and served by **E-MAIL ,** as noted below, the following persons, addressed to them at the following e-mail addresses:

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