April 9, 1990

Elizabeth Kinney, Regional Director
Region 13

Harold J. Datz, Associate General Counsel 530-6067-6001-3740
Division of Advice 530-6067-6001-6200
530-6067-6067-2500
Coca-Cola Bottling Company of Chicago 530-6067-6067-5201
Case 13-CA-28896 530-6067-6067-7500

This Section 8(a)(5) and (1) case was submitted for advice on whether the Employer was required to furnish information to the Union where the Union has a dual motive for requesting the information.

FACTS

The facts underlying the instant charge are set forth in Soft Drink Drivers and Helpers, Local 744, IBT (Kemmerer Bottling Group, Inc., A.J. Canfield Co.), Cases 13-CB-12550, -12551, Advice Memorandum dated August 22, 1989. In that memorandum, we noted that the Union has separate contracts with three of the area's major soft drink distributors: Kemmerer, Canfield and Coke. Kemmerer and Canfield contracts require these employers to contribute equal amounts to a jointly administered pension fund (the Fund). These contracts also contain "most favored nations" language regarding pension contributions. Thus, if the Union and another soft-drink distributor enter into a contract which permits that distributor to provide retirement benefits under a single-employer retirement plan:

> sponsored by such employer rather than by means of such employer contributions to the Fund, [Kemmerer's/Canfield's] contributions rate to the Fund shall immediately and prospectively be reduced to an amount equal to the cost to such employer to provide

retirement benefits under the single-employer retirement plan sponsored by such employer.

In 1989, Coke reached a separate contract with the Union which permitted Coke to make pension contributions to its own single-employer fund and which also established a 401(k) plan for Coke employees.

In May 1989,[1] Kemmerer and Canfield informed the Union that they had learned about this provision in Coke's contract, that their contracts permit them to reduce their contributions to Coke's level, and that they therefore were requesting copies of the Coke contract and all information the Union had or was entitled to obtain regarding the cost to Coke to provide retirement benefits under its plan.

On June 28, the Union sent Coke copies of the Kemmerer and Canfield requests and demanded that Coke provide the requested information since it was relevant. On July 11, the Union informed Coke that it had received no response to its June 28 request for pension plan information and requested cost-data per employee of coverage under the Coke pension plan, or if that data was not available, actuarial estimates or projects of such costs to Coke under its pension plan. On that same date, Coke refused to provide the Union with "such confidential and proprietary information for use by its competition." Coke also noted that the request on its face shows that the information was not requested to administer the contract between Coke and the Union. On July 12, the Union again requested that Coke provide the requested information because it was relevant and necessary for administering the contract between the Union and Coke. The Union expressed its willingness to meet with Coke and negotiate appropriate provisions to protect any information Coke claimed was confidential but that, in the Union's view, Coke was obliged to provide the requested information.

Kemmerer and Canfield also filed a Section 8(b)(3) charge against the Union because the Union had failed to provide information about the Coke plan. In the prior Advice Memorandum, we directed the Region to issue a Section 8(b)(3) complaint unless the Union filed a Section 8(a)(5) charge against Coke to obtain the pension

---

[1] All dates hereinafter are 1989, unless otherwise indicated.

information. The Union then filed the instant charge and continued its efforts to obtain the information.

On July 17, Coke informed the Union that it had no obligation to provide the requested information. Coke conceded that the requested information was relevant to the Union's administration of the pension provisions of the contract between the Union and Coke. However, Coke took the position that the Union was requesting the information for other, unacceptable purposes--to provide cost information to its competitors--and rejected the Union's offer to meet and negotiate confidentiality provisions to protect any assertedly confidential information.

ACTION

We conclude that issuance of a Section 8(a)(5) complaint is warranted on the grounds that the Employer has not provided pension plan information relevant to the Union's need to administer the contract.

It is well established that an employer must provide a union with requested information:

> if there is a possibility that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' collective-bargaining representative. [2]

The Board applies a liberal "discovery-type" standard in determining whether Section 8(a)(5) requires the production of requested information, i.e., whether the information is "probably or potentially relevant" to the execution of the union's statutory duties.[3] The employer's obligation to provide information applies to information that may prove relevant to contract negotiation[4] and to the administration of a contract, including determinations of whether to file

---

[2] Associated General Contractors of California, 242 NLRB 891, 893 (1979), enfd. 633 F.2d. 766 (9th Cir. 1980). See generally NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[3] Washington Gas Light Co., 273 NLRB 116, 117 (1984).

[4] See Brazos Electric Power Cooperative, 241 NLRB 1016, 1018 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980); Weber Veneer & Plywood Co., 161 NLRB 1054, 1055-56 (1966).

a grievance,[5] whether to proceed to arbitration and what position to take once a grievance has been filed.[6] Thus, a union is entitled to information, regardless of the eventual merits of its claim, in order to judge for itself "whether to press [its] claims in the contractual grievance procedure, or before the Board or courts, or through remedial provisions in the contract under negotiation." Associated General Contractors of California, above, 242 NLRB at 894. Because pensions are mandatory subjects of bargaining,[7] information regarding pension plans is presumptively relevant and an employer must furnish such information upon request.[8]

Coke asserts that the Union has requested the information only to satisfy its contractual obligations with Kemmerer and Canfield. However, the Union had a second reason for requesting the pension fund information. The Union made it clear in its letters of July 11 and 12 that it was requesting such information in order to administer its contract with Coke. Concededly, the Union may not have shown a present need for the information for this second purpose. However, as noted supra, information must be supplied "if there is a possibility that such data is relevant and will be of use to the union." (Emphasis supplied). Thus, even if the relevance is only possible and in futuro, the information must be supplied. Since, under this test, the Union was entitled to the information for the second reason, the information must be supplied.

Coke further asserts a confidentiality defense to the Union's request for information. In this regard it is well established that an employer's legitimate and substantial interest in keeping relevant information confidential may privilege its refusal to comply with a union's request for information.[9] Whether the Employer is so privileged turns on whether it has made a reasonable and good-faith offer to accommodate its need for secrecy with the Union's need for

---

[5] See U.S. Postal Service, 276 NLRB 1282 (1985); General Dynamics Corp., 268 NLRB 1432, 1433, 1437 (1984); Western Massachusetts Electric Co., 234 NLRB 118, 119 (1978), enfd. 589 F.2d 42 (1st Cir. 1978); Texaco, Inc., 170 NLRB 142, 146 (1968).

[6] See General Dynamics Corp., above, 268 NLRB at 1437; Chesapeake & Potomac Telephone, 259 NLRB 225, 227 (1981), enfd. 687 F.2d 638 (2d Cir. 1982).

[7] TTP Corp., 190 NLRB 240 (1971).

[8] Curtiss-Wright Corp., 193 NLRB 940 (1971).

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

the relevant information.[10] We conclude that there is no merit to Coke's confidentiality argument. Coke has failed to present sufficient evidence to establish that the pension fund information requested by the Union is confidential. Moreover, Coke has refused the Union's request to negotiate confidentiality provisions in an apparent attempt to maintain, as its defense against disclosure, that the information will be used for purposes other than the administration of its contract with the Union.

For all of the above reasons, we conclude that the requested information is relevant despite the existence of a dual motive in requesting the information. Therefore, the Employer acted unlawfully by refusing to supply the information and by rejecting the Union's offer to negotiate suitable confidentiality provisions which would remove the possibility that the information would be used in a fashion not relevant to the Union's statutory obligations.

Accordingly, a Section 8(a)(5) complaint should issue against the Employer, absent settlement.

H.J.D.

---

[10] See General Dynamics Corp., above.