THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ALCAN ROLLED PRODUCTS—
RAVENSWOOD, LLC,

AND **CASE 9-CA-46267**

UNITED STEEL, PAPER AND
FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL, AND
SERVICE WORKERS INTERNATIONAL
UNION, LOCAL 5668, AFL-CIO-CLC.

BRIEF IN SUPPORT OF
EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE

Respondent, Alcan Rolled Products—Ravenswood, LLC,[1] ("Respondent" or "Alcan") submits the following brief in support of its *Exceptions to the Decision of the Administrative Law Judge* filed contemporaneously in the above-captioned matter.

I. INTRODUCTION

This case is about whether Respondent Alcan Rolled Products-Ravenswood, LLC ("Alcan") violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act") when it refused to provide to United Steel Workers Local 5668 (the "Union") the names of employees

[1] On August 1, 2011, Alcan Rolled Products—Ravenswood, LLC changed its name to Constellium Rolled Products Ravenswood, LLC. Respondent shall continue to use the Alcan corporate name in this brief.

who had raised safety concerns regarding one of their co-employees, Robert Bush. As the evidence during the hearing clearly showed: 1) Alcan did not rely upon these comments when determining whether to discipline and/or discharge Mr. Bush for his conduct; 2) Alcan informed the Union that the comments had nothing to do with Mr. Bush's discharge; 3) the collective bargaining agreement ("CBA") between the parties precluded Alcan from offering testimony of Mr. Bush's co-workers in any arbitration proceeding; 4) Mr. Bush admitted both of the mobile equipment accidents for which he was discharged; 5) Alcan did not support its arguments or its grievance answers with the employee comments at issue; 6) the employees who made the comments wanted the comments to remain confidential; 7) Alcan has a substantial interest in maintaining the confidentiality of the comments in order to avoid chilling further employee complaints about safety issues in the workplace; 8) and the Union would not have accepted anything other than disclosure of the names of the witnesses.

To prevent the potential harassment of employees who make comments about other bargaining unit employees, and to prevent the employees from being deterred in bringing future safety concerns forward, Alcan has a legitimate interest in keeping the names of these employees confidential. Alcan's interest outweighs any interest the Union may have in obtaining the names of the employees under the circumstances of this case.

II. STATEMENT OF FACTS

Robert Bush is a member of the bargaining unit and is employed as a storeroom attendant in Alcan's Storeroom Department (Tr. 87). On November 18, 2010, Mr. Bush was involved in an accident where a delivery buggy that he was operating collided with a concrete barrier (Id. at

89). Mr. Bush told his supervisor, Yvonne Zickefoose, about the accident on the following day (Id.).[2]

Several months later, on January 20, 2011, Mr. Bush was involved in a second accident (Id. at 87-88). Like the first accident, this accident involved damage to company property (General Counsel Ex. 6). During this accident, Mr. Bush knocked out the back glass of a forklift that he was operating (Tr. 88). Mr. Bush immediately informed Ms. Zickefoose of the accident and told Ms. Zickefoose that they needed to go to Medical so that he could be drug tested (Id.).[3] While they were waiting in Medical, Mr. Bush admitted to Ms. Zickefoose that he had been partying the night before with his sister and that he had smoked marijuana (Id. at 102).[4]

Sometime after the January 20th accident, one of the storeroom attendants had a confidential, off-the-record conversation with Ms. Zickefoose (Id. at 91-92).[5] During this conversation, the storeroom attendant told Ms. Zickefoose that Mr. Bush needed help but had refused to get help (Id. at 91). Ms. Zickefoose assumed the employee was indicating that Mr. Bush needed help with alcohol but the employee never specifically stated that it was alcohol (Id. at 91-92). Ms. Zickefoose and this storeroom employee discussed that his statement was confidential and that it was off-the-record (Id. at 92).

After the January 20th incident, Ms. Zickefoose also had a conversation with another employee about Mr. Bush (Id. at 95). This conversation involved the concerns an employee had

[2] The accident occurred after Ms. Zickefoose had finished her shift that day (Tr. 89-90).

[3] The collective bargaining agreement requires that employees be drug tested when there is an accident involving mobile equipment (Tr. 99).

[4] After the first accident, Mr. Bush had also admitted to Ms. Zickefoose that he had been drinking but did not say when he had been drinking (Tr. 102-03).

[5] At the time Ms. Zickefoose had these various conversations with the storeroom employees, Ms. Zickefoose already knew what had happened in both of Mr. Bush's accidents (Tr. 96). Moreover, Ms. Zickefoose did not need any of this information from the employees to assist Alcan with determining how to deal with Mr. Bush's accidents (Id. at 96).

about Mr. Bush operating mobile equipment and about the possibility of Mr. Bush moving to a part of the plant where there was less mobile equipment (Id.). Given that Mr. Bush had been involved in two prior accidents with mobile equipment, the employee was expressing concern that there could be a subsequent, serious accident with Mr. Bush (Id. at 95-96). As with the first conversation, the employee asked that the conversation be off-the-record (Id. at 96).[6] While Ms. Zickefoose provided the substance of the employees' concerns to Mr. Chawansky, Ms. Zickefoose has never revealed the names of any employees who made confidential statements to her (Id. at 103).

According to Ms. Zickefoose, employees frequently share information with her that is off-the-record or confidential (Id. at 93, 104). If an employee asks to keep a comment off-the-record or confidential, Ms. Zickefoose honors that request. (Id. at 92). According to Ms. Zickefoose, this arrangement helps with the administration of the workplace (Id.). For example, because there is trust concerning the confidentiality of statements, employees can come to her to discuss various issues, such as issues related to safety or to equipment. (Id. at 92, 94). Moreover, some employees have informed Ms. Zickefoose that confidentiality means a lot to them because they do not want to feel like a "rat" for making the comments (Id. at 105).[7]

If Ms. Zickefoose is required to provide the names of the employees who give her confidential information, the employees will no longer trust her and will not feel like they can confide in her (Id.). This lack of trust could cause the work environment to revert back to the way things were in the past (Id. at 93-94).[8] Moreover, if employees could not confide in her, it

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[6] Ms. Zickefoose also had conversations with several other storeroom employees (Tr. 103-04).

[7] According to Ms. Zickefoose, the employees who raised a concern about Mr. Bush did not raise this specific concern to her when they made their comments (Tr. 106).

[8] According to Ms. Zickefoose, in the past, the storeroom had a vindictive environment (Tr. 93).

would impede her ability to manage the workplace because employees would no longer feel free to come to her to raise any issues (Id. at 94).

On January 28, 2011, due to having two accidents which involved damage to company property within a two-month period, Alcan issued Mr. Bush a five-day suspension prior to discharge warning (Id. at 87-88, 109; General Counsel Ex. 6). On February 12, 2011, Alcan decided to discharge Mr. Bush from his employment (General Counsel Ex. 6).[9] In the discharge memorandum, Alcan provided the following reason for discharge:

> Your behaviors in the work place that contributed to damages to Company property on two (2) different occasions within approximately two (2) months of each other with alcohol detected in your system have put other employees and you at risk.

(Id.; see also Employer Ex. 1).[10]

During the five-day suspension prior to discharge meeting, Hank Chawansky, Manager of Labor Relations, mentioned to the Union that several employees had indicated that they felt it was unsafe to work with Mr. Bush (Tr. 21).[11] Chawansky informed the Union that these comments had nothing to do with the decision to discharge Mr. Bush. (Tr. 111, 112). He explained that the employees came to Alcan in confidence. (Tr. At 112). Prior to the January 31, 2011 hearing on the company's intent to discharge Mr. Bush, the Union asked Mr.

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[9] In mid-May, 2011, Mr. Bush returned to his position with the company pursuant to a settlement (Tr. 54, 82).

[10] As a storeroom employee, part of Mr. Bush's duties would have involved driving mobile equipment, called buggies, through the inside part of the plant to deliver various requested items (Tr. 30-32, 34). In making deliveries inside the plant, the buggy driver has to travel through different departments, avoid overhead cranes and watch for the many pedestrian crossways (Id. at 32, 34). Employees in the storeroom also use buggies and forklifts while working in the storeroom itself (Id. at 35-37). At the time of Mr. Bush's accidents, there were occasions when an employee could be walking down one of the storeroom aisles while another employee was operating one of the pieces of mobile equipment (Id. at 37).

[11] This comment was based on a discussion Mr. Chawansky had with Ms. Zickefoose after Mr. Bush's January 20, 2011 accident (Tr. 98, 103). Without identifying who made the comments, Ms. Zickefoose was simply informing Mr. Chawansky of comments employees had made to her (Id.at 103). The specific comments that employees made to Ms. Zickefoose are discussed below in the next section.

Chawansky to provide the names of the employees who "told him they were afraid to work around Mr. Bush" (General Counsel Ex. 3). Because the comments by the employees had been made in confidence, the names of the employees were not provided to the Union (Tr. 92, 96, 103).[12]

Alcan did not rely upon any comments that employees made to Ms. Zickefoose about Mr. Bush in making the decision to issue a five-day suspension prior to discharge. (Id. at 109). Nor did Alcan base its decision to proceed with the discharge, in any way, on comments that employees made to Ms. Zickefoose about Mr. Bush (Id.). Alcan does not intend to offer into evidence at any grievance or arbitration proceeding regarding Mr. Bush any statements or comments that storeroom bargaining unit employees made about Mr. Bush (Id. at 46-47, 108-09). In fact, the collective bargaining agreement between Alcan and the Union prohibits Alcan from calling a bargaining unit employee to testify in an arbitration proceeding (Id. at 74-75, 109).[13]

Significantly, though Mr. Morris, the Union's Grievance Committee Chairman, maintains that he needs the names of the employees to administer the agreement and to police safety in the workplace, he admitted that he has not spoken to the employees in the storeroom about Mr. Bush or safety issues related to him. (Tr. at 69-70). There are only a few employees in that department (nine on day shift, two on evening shift, and one on midnight shift), and Mr. Morris has access to them if he wants to speak to them. (Id. at 29, 70).

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[12] On February 25, 2011, the Union sent a follow-up letter regarding the information it requested in its January 28, 2011 letter (General Counsel Ex. 5).

[13] On February 11, 2011, the Union filed a grievance over Mr. Bush's discharge (General Counsel Ex. 7). At the time of the hearing, the grievance was still pending (Tr. 67).

III. ARGUMENT

A. The Identities of the Employees Who Made the Comments About Mr. Bush Are Not Relevant.

"An employer has a statutory obligation to supply requested information that is potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees' exclusive bargaining representative." Pennsylvania Power and Light Co., 301 NLRB 1104, 1104-05 (1991) (citing NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967)). "In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided." Id. at 1105 (citing Acme Industrial Co., 385 U.S. at 438). Moreover, "the information need not be dispositive of the issue between the parties but must merely have some bearing on it."

The identities of the storeroom employees who made the comments about Mr. Bush are not relevant because when Alcan made the decision to issue a five-day suspension prior to discharge and when Alcan made the decision to discharge Mr. Bush, Alcan did not rely upon or base its decision, in any way, on comments that employees made to Ms. Zickefoose about Mr. Bush (Tr. 109). Mr. Chawansky informed the Union that the comments had nothing to do with the decision during the Five-Day Prior Meeting. (Tr. 111, 112). Moreover, neither the discharge memo nor the Step III Grievance Answer indicates that Alcan based its decision to discharge Mr. Bush on comments made by the Storeroom employees (Employer Ex. 1; General Counsel Ex. 6). Instead, Alcan made the decision to discharge Mr. Bush because, over a two month period, he had been involved in two different accidents which resulted in damage to company property (Id.).

Furthermore, Mr. Bush admitted to having the two mobile equipment accidents (Tr. 76, 79). In fact, after the second accident, Mr. Bush admitted to Ms. Zickefoose that he had been partying the night before with his sister and that he had smoked marijuana (Id. at 102).[14] Therefore, due to Mr. Bush's admissions regarding his conduct, the comments from the storeroom employees are not necessary to prove that Alcan had just cause to discipline and discharge Mr. Bush.

Even if the storeroom employees' testimony was necessary, the collective bargaining agreement between Alcan and the Union specifically prohibits Alcan from calling a bargaining unit employee to testify in an arbitration proceeding (Tr. 74-75, 109). Thus, Alcan could not have called the storeroom employees as witnesses to provide any testimony during a grievance or arbitration proceeding. "[T]he Board and the courts have held that information that aids the arbitral process is relevant and should be provided." Pennsylvania Power and Light Co., 301 NLRB at 1104. Because the storeroom employees' cannot be called as witnesses, and because Alcan did not base its decision on any comments made by these employees, identifying these employees would not provide any aid or assistance to the arbitral process. Rather, requiring Alcan to provide the identities of the employees would only subject these employees to potential harassment for making comments about a fellow bargaining unit member. Additionally, if the employees know that Alcan cannot keep certain comments in confidence, it would seriously lessen the likelihood that employees would come forward to Alcan with sensitive issues.

Alcan recognizes that the Board has held that information "is not rendered irrelevant by an employer's claims that it will neither raise a certain defense nor make certain factual contentions, because 'a union has the right and the responsibility to frame the issues and advance

[14] After the first accident, Mr. Bush had also admitted to Ms. Zickefoose that he had been drinking but did not say when he had been drinking (Tr. 102-03).

whatever contentions it believes may lead to the successful resolution of a grievance.'" Id. (quoting Conrock Co., 263 NLRB 1293, 1294 (1982)). This principle, however, does not apply to this situation. Because Alcan never relied upon these comments when making the discharge decision, the Union cannot gain anything for the arbitration by either introducing these comments or knowing which employees made the comments. Similarly, knowing the names of the employees who made these comments will not assist the Union, in any way, with winning the arbitration. Thus, any information concerning the identity of the storeroom employees who made comments about Mr. Bush is not relevant.

B. Even If The Requested Information Is Relevant, Alcan Should Not Have To Disclose The Information Because It Is Confidential.

"A union's interest in information, however, will not always predominate over other legitimate interests." Id. "'[A] union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested.'" Id. (quoting Detroit Edison Co. v. NLRB, 440 U.S. 301, 314 (1979)). In Detroit Edison, the Supreme Court recognized the need for employers to keep certain information confidential. Id. at 319-20.

According to the Board, "in dealing with union requests for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case." Id. The Board has further held that "[t]he party asserting confidentiality has the burden of proof[,]" and that "[l]egitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not." Id.

In Pennsylvania Power and Light Co., the employer implemented a drug and alcohol testing policy, which permitted the employer to send an employee to be tested if there was suspicion that the employee was under the influence. Id. at 1104. After the employer suspended and discharged several employees who had tested positive, the union learned that the employer had obtained information by the use of employee informants. Id. The union sent a written request to the employer for the names of the informants who supplied information to the employer which ultimately led to the employer's investigation about the employees' drug use. Id. The employer refused to provide the names of the informants. Id.

In holding that the employer did not violate Sections 8(a)(1) and (5) by refusing to provide the names of the informants, the Board agreed that if the employer "is not able to maintain strict confidentiality in its drug program, informants will be deterred from coming forward with information regarding drug use by other employees." Id. at 1107. The Board further agreed with the employer that "identifying informants potentially subjects them to harassment." Id. As a result, although the Board concluded that the names of the informants was relevant to the union's collective bargaining responsibilities, the Board held that

> in investigations of this kind of criminal activity, a potential for harassment of informants, with a concomitant chilling effect on future informants, it is sufficiently likely that the [employer] has a legitimate interest in keeping the informants' identities confidential and that this confidentiality interest outweighs the Union's need for the informants' names and addresses.

Id.

Like the employer in Pennsylvania Power and Light Co., Alcan has a significant interest in maintaining the confidentiality of the identity of these employees. Id. at 1107. As the Board noted,

> [w]ith regard to the identity of the informants, the circumstances here compel us to conclude that, in which its efforts to control possible drug-related impairment of employee job performance are involved, the [Employer's] confidentiality interests are entitled to unusually great weight. The connection of confidentiality to the safety of the public and other employees and to job performance is plain here.

Id. Similarly, Alcan's employees came to their supervisor to raise legitimate safety concerns over Mr. Bush's use of mobile equipment and the inference that Mr. Bush needed help with a potential alcohol problem (Tr. 91-92, 95-96). The combination of potential alcohol abuse and operating mobile equipment in the work environment creates an extremely dangerous situation. Clearly, Alcan has a significant interest in maintaining a safe work environment. Alcan also has a significant interest in creating and fostering an environment where employees feel comfortable coming to supervisors to raise these types of concerns. To help create and maintain this type of environment, the employees have to believe and trust that, when the circumstances require confidentiality, they can come forward and raise concerns with Alcan without fear that their identities will be subsequently revealed.

Moreover, these employees only reported their safety concerns after they had the understanding that what they reported would be "off-the-record" or confidential (Id. at 92, 96). If Alcan is required to provide the names of these employees, it will punish those employees who believed they were making "off-the-record" statements and will significantly deter employees from coming forward in the future to raise concerns with Alcan. Pennsylvania Power and Light Co., 301 NLRB at 1107 (holding that a chilling effect on future informants helps to create a legitimate interest in keeping informants' identities confidential). Deterring employees from coming forward to raise a safety concern does not foster a good or safe work environment.

Additionally, if the employees were deterred from coming forward with issues, it would hinder the administration of the workplace and could potentially cause the storeroom to revert back to its previous negative work environment (Tr. 93-94). As Ms. Zickefoose noted, employees frequently share information with her that is off-the-record or confidential (Id. at 93, 104). In fact, some employees have told Ms. Zickefoose that confidentiality means a lot to them because they do not want to feel like a "rat" for making comments (Id. at 105). Allowing the employees to make confidential comments to supervisors creates an environment of trust where employees feel free to raise issues or concerns that the company can address. If employees can no longer feel that their comments to supervisors will remain confidential, the free flow of information will change dramatically and could create a potentially less-safe environment. For example, an employee may feel reluctant to raise an important safety issue, such as a concern over an employee's use of mobile equipment and a potential substance abuse problem.

Furthermore, it is important to note that these employees must have gone to the supervisor for a specific reason. According to the testimony, the employees have frequently involved the Union when raising safety concerns in the past (Id. at 45). Additionally, there is a detailed procedure that employees can use under the collective bargaining agreement to raise safety concerns (Id. at 80). Despite these options, these particular employees made a conscious decision to raise the issue with their supervisor, not with the Union, and specifically asked that their comments be considered "off-the-record." As the Board has noted, the potential for harassment of informants can give the employer a legitimate interest in keeping the informants' identities confidential. Pennsylvania Power and Light Co., 301 NLRB at 1107; Mobil Oil Corp., 303 NLRB 780, 781 (1991). Unfortunate as it is, given that these employees were making comments about issues associated with a fellow bargaining unit member, there is the possibility

that these employees will be subject to harassment. In fact, it is interesting that the Union is so adamant about learning the identities of employees who made comments about a fellow bargaining unit member when (1) the Union already knows what the comments were; (2) Alcan has stated that it did not rely upon these comments when discharging Mr. Bush; and (3) Alcan is prohibited from calling any of these employees as witnesses in an arbitration.

Based on the above, Alcan has a legitimate, confidentiality interest in the identities of those employees who made comments about Mr. Bush. Like the employer in Pennsylvania Power and Light Co., Alcan's "confidentiality interest outweighs the Union's need for the [employees'] names[.]" Id. at 1107. Thus, Alcan did not violate Section (8)(a)(5) and (1) of the Act by refusing to provide the employees' names to the Union. Id.

While Board law imposes an accommodation duty on a party who refuses to supply information on confidentiality grounds,[15] there was no accommodation which could have given the Union the information it needed while withholding the identities of the employees. Simply stated, the Union wanted to know which specific employees made the comments about Mr. Bush (General Counsel Ex. 3). At the hearing, the Union admitted that it would not accept a summary of what the employees said and confirmed that it needed to know the specific names so that it could talk to those specific employees (Tr. 72-74). There is simply no way for Alcan to provide this information without giving up the identities of the employees. Given this, and given the Union's position, any bargaining over how Alcan could provide the Union with the information it requested would be futile.

Although Alcan could not accommodate the Union by providing the specific names, Alcan has provided the Union with sufficient information to permit the Union to determine who may have made these comments. For example, Alcan provided the Union with the substance of

[15] Pennsylvania Power and Light Co., 301 NLRB at 1105-06.

what the employees said about Mr. Bush (Tr. 42-43, 114). Moreover, the Union knows that Mr. Bush was employed in the storeroom when these comments were made. With these two pieces of information, the Union can talk to each individual storeroom employee to determine exactly who had safety concerns about Mr. Bush.

IV. CONCLUSION

Alcan did not violate the Act by refusing to provide the names of the employees who made the comments about Mr. Bush. The employees' names were not relevant. Even if the names were relevant, Alcan had a legitimate interest in maintaining the confidentiality of the employees' names which outweighed the Union's interest in obtaining the names. Moreover, Alcan did not breach its duty to bargain because discussions between Alcan and the Union had already revealed that the Union would only accept the names of the employees, the Union admits that it would not have accepted a summary, and therefore bargaining would have been futile.

WHEREFORE, Respondent requests that the Board find that it did not violate Sections 8(a)(1) and (5) of the Act as alleged, reverse the decision of the Administrative Law Judge to the contrary, and dismiss the General Counsel's Complaint in its entirety, with prejudice to all parties.

Respectfully submitted this 11th day of October, 2011.

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