

**Alcan Rolled Products—Ravenswood, LLC, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5668, AFL–CIO–CLC.** Case 09–CA–046267

February 27, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 12, 2011, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alcan Rolled Products—Ravenswood, LLC, Ravenswood, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Linda B. Finch, Esq.*, for the General Counsel.

*Christopher L. Slaughter, Esq. (Steptoe & Johnson PLLC)*, of Huntington, West Virginia, for the Respondent.

*Elijah Morris (Grievance Committee Chairman, Local 5668)*, of Ravenswood, West Virginia, for the Charging Party.

DECISION

DAVID I. GOLDMAN, Administrative Law Judge. This case involves an employer's refusal to provide its employees' union with the names of two union-represented employees who told a supervisor—in confidence according to the employer—that a third employee, who had been disciplined for two mobile equipment accidents in 3 months, was unsafe to work with and needed "help."

The General Counsel contends that the requested information is relevant to the Union's investigation of the disciplined employee's grievance and to the Union's general safety-related representational activities. As discussed herein, I agree. The Employer contends that it has a confidentiality interest in shel-

tering the names of the complaining employees. As discussed herein, I agree with this too. Under settled Board precedent, the employer's duty is to seek an accommodation of the conflicting union and employer interests. The employer has failed to do so, and objects that there is no accommodation it can make. As discussed herein, I disagree and I will order the Employer to bargain for an accommodation.

STATEMENT OF THE CASE

On February 23, 2011, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 5668, AFL–CIO–CLC (the Union or Local 5668) filed an unfair labor practice charge against Alcan Rolled Products—Ravenswood, LLC (Alcan or the Employer), docketed by Region 9 of the National Labor Relations Board (the Board) as Case 09–CA–046267.

On April 27, 2011, based on an investigation into the charge filed by the Union, the Acting General Counsel, by the Acting Regional Director for Region 6, issued a complaint and notice of hearing against Alcan alleging violations of the Act. The complaint alleged that Alcan's refusal to provide the Union with certain requested information violated Section 8(a)(1) and (5) of National Labor Relations Act (the Act). Alcan filed an answer denying all violations of the Act.

A trial in this case was conducted June 21, 2011, in Ripley, West Virginia. Counsel for the General Counsel and the Respondent filed briefs in support of their positions by July 26, 2011. On the entire record, I make the following findings, conclusions of law, and recommendations.

Jurisdiction

The complaint alleges, the Respondent admits, and I find that the Respondent is a corporation, with offices and places of business located in Ravenswood, West Virginia, and has been engaged in the operation of an aluminum fabrication plant. The complaint further alleges, the Respondent admits, and I find that during the 12-month period preceding issuance of the complaint the Respondent in conducting its operations sold and shipped goods and materials valued in excess of \$50,000 from its Ravenswood, West Virginia facility directly to points outside the State of West Virginia. The complaint further alleges, the Respondent admits, and I find, that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also alleged, admitted, and found that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

Unfair Labor Practices

Background Facts

Approximately 1400 employees work at Alcan's aluminum fabrication facility. Alcan's production and maintenance employees are represented by the Union, which, along with the

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

International Union, are the designated exclusive collective-bargaining representative of the bargaining unit.<sup>1</sup>

The International Union and Alcan are parties to a labor agreement covering the terms and conditions of employment of the unit employees, effective July 15, 2010, to July 15, 2012. The labor agreement contains a multistep grievance and arbitration procedure governing resolution of alleged violations of the agreement, including discipline and discharge of employees.

The storeroom serves as a “parts store” for the facility, a secure area where parts needed for the plant’s operation are kept, and from where they are distributed to the plant’s departments. Individual departments requisition parts from the storeroom, sometimes picking up requests and other times storeroom employees deliver items to the requested department. In pulling orders from the storeroom area, employees are often required to drive mobile equipment through the aisles of the storeroom. When delivering orders, storeroom employees drive mobile equipment through the plant, such as forklifts and “buggies.” (Buggies are delivery vehicles approximately the size of a golf cart.) Safety concerns in the plant include the interaction of pedestrians and mobile equipment within the plant.

Nine employees work in the storeroom on the day shift. The evening shift has two storeroom employees. The overnight shift has one.

The Union assumes a role in monitoring the safety conditions in the facility. Article 14 of the labor agreement provides for an extensive array of safety procedures involving the Union, including a union safety representative, a joint safety and health committee, regular safety audits, and union involvement in safety investigations. Article 14 provides that “[t]he Company and the Union will continue to cooperate toward eliminating safety and health hazards and will encourage employees to use the procedures stated herein in reaching this objective.”

Employees voice safety complaints to a number of union and employer officials. Alcan employee and union representative, David Gandee, testified that typically if storeroom employees have a safety concern they go to the storeroom supervisor, Yvonne Zickefoose, or another company official. If the company does not agree with the safety concern and will not fix it, employees will then call the union “safety man.” According to Gandee, employees are not shy about involving the Union with safety concerns.

Article 14 of the labor agreement also contains a drug and alcohol policy, the preamble to which states that “[t]he Company and the Union agree that it is in everyone’s best interests to maintain a drug free work place.” The policy also states that “[t]he Company considers that in enforcing its policy it will receive the support of all concerned employees and it is hoped

that all employees will cooperate in addressing the issue at hand.”

Employee Robert Bush is employed in the Alcan storeroom, working day shifts. The Employer’s discipline of Bush led to the information request at issue in this case.

Bush had two accidents while driving mobile equipment in the Alcan facility, one in November 2010, and one in January 2011. One accident occurred when he backed the forklift he was driving into the hook of a crane and knocked out the back glass from the cab of the forklift. The other accident occurred when Bush drove a buggy over a curb or hit a barrier while looking backwards to remotely close a garage. The steering mechanism on the underside of the buggy was damaged.<sup>2</sup>

Neither accident took place in the storeroom, but rather, while Bush was driving equipment in other areas of the plant. After the first incident, Bush told Zickefoose that in the past he had consumed alcohol but did not say when this had last happened. After the second incident, Bush told Zickefoose that he had smoked marijuana the previous evening. Bush was drug and alcohol tested after each incident. His drug test was negative and he tested positive for alcohol but at low levels.

Storeroom Supervisor Zickefoose testified that within days after Bush’s second incident she received several different comments from storeroom employees who approached her regarding Bush. There were concerns about Bush operating mobile equipment in the storeroom: “It was just mentioned that maybe he could go to another area in the plant where there wasn’t so much mobile equipment being used. . . . I had people concerned about if there was another incident, you know, [how] would their wives react if, you know, the Company didn’t do something.” One employee told Zickefoose that Bush “knew he needed help and should seek help but he refused.” Zickefoose assumed (but the employee did not say) that the “help” referred to was with “alcohol, or whatever.”

The employees and Zickefoose discussed that these conversations were “off the record, which [Zickefoose testified] means, to me, it doesn’t go any further”; it was “between he and I, and it was off the record.” Zickefoose committed to the employee that the conversation would remain “off the record”: “Anytime anyone asks me that, I do try to keep it confidential.”

On January 28, 2011, Bush was suspended pending discharge. The disciplinary meeting was attended by Bush, Union Representative Gandee, Alcan HR Representatives Marty Lucki, Labor Relations Manager Hank Chawansky, and Bush’s supervisor, Zickefoose. At the meeting Chawansky stated that Bush was charged with a violation of company rules for damaging company property and was going to be discharged. During the meeting, Chawansky stated that two of Bush’s coworkers had said that “they felt it was unsafe to work with Bob Bush,” a suggestion that Union Representative Gandee disputed, saying he did not believe that was true. Gandee asked if

<sup>1</sup> The represented bargaining unit is composed of:

All production and maintenance employees employed at the Ravenswood, West Virginia plant, but excluding executives, administrative and professional employees, office and clerical employees, guards, full-time first-aid and safety employees, foremen and any other supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

<sup>2</sup> Union Representative Morris testified that the forklift incident occurred in November 2010, and the buggy incident in January 2011. Storeroom Supervisor Yvonne Zickefoose testified that the buggy incident occurred in November 2010 and the forklift incident in January 2011. I note the contradiction, but it is not necessary to resolve it.

anything could be done to avoid having Bush fired. Chawansky said that Bush could retire to avoid discharge.

After the meeting, Gandee emailed Eli Morris, the chairman of the union grievance committee, to report on the meeting, and included in his email the assertion that Chawansky “said somebody from the storeroom came to him and said they was scared to work around [Bush]” and “[I] told him [I] didn’t believe it.”<sup>3</sup>

That day, Morris called Chawansky and arranged for a grievance meeting over the Bush discipline. The meeting was originally scheduled for January 31. Morris also sent Chawansky a letter requesting certain information for use at the upcoming grievance meeting. In the letter, Morris requested a copy of Bush’s drug and alcohol tests from both the January 2011 and November 2010 incidents; the names of employees who had “incidents resulting in damage to equipment or property within the last 18 months”; copies of all significant “incident reports” for the past 2 years; and the

[n]ames of hourly employees referred to by Mr. Chawansky in [the] 5 day prior suspension meeting that allegedly told him they were afraid to work around Mr. Bush.

Morris told Gandee that he was requesting the names of the employees who complained about Bush. Morris asked Gandee if he knew of anyone who had said they felt it was a safety hazard to work around Bush. Gandee said he did not but that he would ask the employees about it. Gandee attempted to find out by raising the issue in the lunchroom early the next morning. Gandee testified that he told the employees:

Before this gets out of hand, I’d like to—if anybody in here has something, that it was unsafe to work with Bob Bush, . . . I need to get that information to Mr. Eli Morris.

Gandee told employees:

[I]f somebody here has went out and said they’re scared to work with [Bush] they need to call [Morris]. And I said, don’t even tell me, I said, just call him.

<sup>3</sup> Over the hearsay objection of counsel for the Respondent, Gandee’s email account of the meeting was introduced into evidence under Federal Rule of Evidence 803(1), the “present sense” exception. Although I admitted the document on that basis, I was wrong, and the Respondent right. The present sense exception applies to a statement “made while the declarant was perceiving the event or condition, or immediately thereafter.” According to the advisory committee notes, only a “slight lapse” of time is allowable and “spontaneity is the key factor.” According to Gandee, the meeting occurred at 2 or 2:30 p.m. It lasted about 10 minutes. He emailed Morris after the shift, between 3 and 4 p.m. That is too long. *U.S. v. Green*, 556 F.3d 151, 155–156 (3d Cir. 2009) (and cases cited therein). I reverse my ruling at trial and I do not rely on Gandee’s email for the truth of the matters asserted therein. However, the document remains useful to the extent it corroborates others accounts of the meeting, and explains how Union Representative Morris was first acquainted with the issues in this case and came to write and phrase the initial request for information at issue. In particular, I note that there is no evidence for the assertion in the email that Chawansky said that the complaining employees spoke directly to him about Bush. I do not credit that claim.

Gandee testified that “I felt like I talked to everybody,” but no one came forward in response to his request. Gandee testified that “it was known through[out] the whole story that I needed, if there was somebody that said they felt unsafe . . . that . . . [Morris] would like to know . . . who they were.” However, Gandee did not obtain any information from the employees. Gandee reported this to Morris.

The information requested by Morris from Alcan was not provided as of the time of the initial grievance meeting, which was rescheduled to February 2. Morris and Gandee attended for the Union. Zickefoose and Chawansky were present. Bush was at the meeting.

During the meeting Chawansky told the Union that the results of the drug testing showed no drugs in Bush’s system and limited alcohol. Morris contended that this was not a violation of the contract. The Employer said that it was not using drug and alcohol issues as a basis for the discharge.

Morris asked Chawansky for the names of the two employees that had reported feeling unsafe working with Bush. Chawansky refused to provide the names, contending that the names were confidential.<sup>4</sup>

Chawansky did tell the union representatives that the employees who complained about Bush were storeroom employees.<sup>5</sup> Morris told Chawansky that “I believe I’m entitled to this information under the National Labor Relations Act.” Chawansky still refused to provide the names, stating that Morris should “take whatever legal action” he felt necessary and that Chawansky would respond as directed by the Company’s legal department. Chawansky did not offer to bargain or otherwise accommodate the demand for the names.

On February 11, 2011, as anticipated by the original discipline, Alcan converted Bush’s suspension to a discharge, to be effective February 14, 2011. According to the discharge letter sent by Chawansky to Bush,

In the appeal hearing, the Company looked at other considerations based on the discussions with the Union and your comments related to circumstances outside of the work environment.

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.

<sup>4</sup> According to Morris, Chawansky stated that he had been “given the names in confidence.” Zickefoose testified that she shared with Chawansky the substance of the employees’ remarks, but did not provide Chawansky or anyone else the employees’ names. In his testimony, Chawansky did not address the issue of whether he had been provided the names. Given Zickefoose’s certainty on this score, I credit her testimony that she did not provide the names to Chawansky.

<sup>5</sup> It is not entirely clear from the record whether this happened at this meeting or in the discipline meeting. I think it is more likely, and I will assume, that it was stated at this grievance meeting. While it potentially is significant that the Union knew this, it is not significant at which meeting it was stated. However, if required, I would find that, based on the context, the statement was made during the grievance meeting.

Accordingly, your employment with Alcan Engineered Products—Ravenswood, has ended effective February 14, 2011.

The Union grieved the announcement by Alcan of the formal decision to discharge Bush. On February 25, 2011, Morris wrote to Chawansky, requesting additional information “in addition to information already requested and not yet provided” by letter dated “1/28/2011.”

Subsequently, pursuant to an agreement between Bush and Alcan, Bush’s discharge was converted to a suspension and he was reinstated without pay on May 31, 2011. The agreement contained a provision stating that “the Company recommends” that Bush participate in an employee assistance program [the REACH program] that is available to assist employees with a variety of personal, financial, drug and alcohol problems.” The agreement provided that the suspension could be grieved. As of June 2011, the Union maintained its grievance over the incident, the remaining issues being Bush’s backpay and the maintenance of the suspension in his file.

Zickefoose testified that employees frequently share information with her that is to be kept “off the record” or “confidential” concerning a range of work issues. Zickefoose testified that she had conversations with employees that she considered confidential often, as often as twice a week, although it varied greatly depending on what issues developed. This is, in effect, part of Zickefoose’s supervisory style, and aids her administration of the storeroom. Zickefoose testified that previously “in the storeroom, we kind of had a vindictive environment.” But under her supervision, “I’ve opened up the doors in there for them to help me make decision[s] on what we do in there. So I value their comments, and I—I just feel that their confidence stays with me.” Zickefoose described the comments made about Bush as no different than lots of “off the record” comments made to her by employees: “They come to me with the concerns, and I do what I need to do with those concerns.” Zickefoose testified that in the past (but not specifically with regard to comments made about Bush), that employees have expressed concern that if people knew they made the comments they might be “treated like they’ve ratted on someone.”

Out of all the comments Zickefoose received from employees on Bush, she “picked out two of the strongest concerns and brought those forward” to Chawansky.

#### Analysis

##### i. Precedent

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of its employees.” 29 U.S.C. § 158(a)(5). “An employer’s duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration.” *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 152–153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967).

Information pertaining to employees within the bargaining unit is presumptively relevant to a union’s representational duties, including that necessary to decide whether to proceed with a grievance or arbitration. Thus, employee personnel in-

formation, job descriptions, pay-related data, employee benefits, and policies that relate thereto are all presumptively relevant, as is similar information regarding employee hires, including strike replacements. Bargaining representatives are not required to make a specific showing of the relevance of requested information unless the employer has rebutted the presumption of such. Presumptively relevant information must be furnished on request to employees’ collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information.

*Ralphs Grocery, Co.*, 352 NLRB 128, 134 (2008), reaffirmed and incorporated by reference, 355 NLRB 1279 (2010); *Disneyland Park*, 350 NLRB 1256, 1257 (2007) (“Where the union’s request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information.”).

Where a showing of relevance is required—either because the presumption has been rebutted or because the request concerns nonunit matters, the burden is “not exceptionally heavy.” *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). “The Board uses a broad, discovery-type of standard in determining relevance in information requests.” *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).

Where the information is requested in connection with a grievance, the Board’s test for relevance remains liberal. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court endorsed the Board’s view that a “liberal” broad “discovery type” standard must apply to union information requests related to the evaluation of grievances. Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in *Moore’s Federal Practice* that “it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy.” 385 U.S. at 437 fn. 6, quoting 4 Moore, *Federal Practice* P26.16[1], 1175–1176 (2d ed.).

The issue is whether the Union’s request for information is of “probable” or “potential” relevance. *Transport of New Jersey*, 233 NLRB 694, 694 (1977) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)). As the Board explained in *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991):

the information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided.

Further,

the fact that the information, if produced at the early stages of grievance discussions would tend to establish that a grievance is without merit, equally serves a legitimate function of collective bargaining as such disclosure would thereby enable a

union to determine which grievances should be pursued to arbitration and which should be dropped.

*LaGuardia Hospital*, 260 NLRB 1455, 1461 (1982); *Acme Industrial*, supra.

As the Board affirmed in *W-L Moulding Co.*, 272 NLRB 1239, 1240 (1984), quoting *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969), and *Acme Industrial Co.*, supra at 437, in considering an information request, it is not the Board's role to pass on the merits of the Union's claim, "[t]he Board's only function in such situation is in 'acting upon the possibility that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" Accord, *Howard University*, 290 NLRB 1006, 1007 (1988).

The failure to provide requested relevant information is a violation of Section 8(a)(5) of the Act.<sup>6</sup> Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Even if requested information is relevant, in certain instances a party may assert a confidentiality defense to the demand for information. In two recent cases the Board has summarized the requirements of this defense. In *Postal Service*, 356 NLRB 483, 486 (2011), the Board explained:

A party asserting a confidentiality defense must prove a legitimate and substantial confidentiality interest in the information withheld. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Confidential information is limited to a few general categories that would reveal, contrary to promises or reasonable expectations, highly personal information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Such confidential information may include "individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits." *Id.* Additionally, the party asserting the confidentiality defense may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Id.* at 1072.

In *A-I Door & Building Solutions*, 356 NLRB at 502, the Board stated:

In considering union requests for relevant but assertedly confidential information, the Board balances the union's need for the information against any "legitimate and substantial" con-

fidentiality interests established by the employer. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) [parallel citations omitted]. The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh its bargaining partner's need for the information. See *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (footnotes omitted).

#### ii. Relevance

The Union asserts that the names of the employees who complained to Zickefoose about Bush are relevant to its representational duties in two ways. One, as part of the investigation and evaluation of the Bush grievance. Two, more generally to investigate safety concerns within the plant.

Both are legitimate subjects for the Union to be concerned with and for which it is entitled to request and receive information. The issue is whether under a liberal discovery standard the names of the employees are helpful to the Union's representational duties.

Because the information directly concerns unit employees whom the Union represents, the requested information is presumptively relevant. *Ralphs Grocery, Co.*, supra; *Disneyland Park*, supra.<sup>7</sup>

The Respondent, however, contends that the presumption is rebutted in the instant case because the Respondent's labor relations manager, Chawansky, stated at trial that it did not rely upon the employees' statements in issuing the discipline against Bush and did not intend to rely upon the statements in any arbitration over the grievance and, indeed, is precluded by the terms of the labor agreement from calling employees as witnesses in arbitration. The Respondent maintains that in issuing the discipline against Bush it relied on his admitted involvement in two accidents. "Therefore," contends the Respondent, "the storeroom employees are not necessary to prove that Alcan had just cause to discipline and discharge Mr. Bush." (R. Br. at 7.)

The Respondent's evidence and contentions do not rebut the presumptive relevance of the Union's information request.

In the first place, *the Respondent* raised and disclosed the employee comments in the initial discipline meeting, thereby making them and their source relevant to the matter at hand. *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011) (citing *NLRB v. Truitt Mfg.*, supra at 152-153 ("if . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy")).

Contrary to the assertions of the Respondent, it did not fore-swear reliance on the information in the grievance procedure, nor did it tell the Union at any time prior to the trial (or perhaps

<sup>6</sup> In addition, an employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679, enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

<sup>7</sup> Because the request for the identity of the two complaining employees concerned bargaining unit employees, and is presumptively relevant, the Union was not required to explain its rationale for wanting the information. However, were it necessary to establish relevance, Morris's explanation at trial provided more than sufficient rationale for the Union's desire for the information.

prior to the eve of trial—there were settlement discussions) that it did not, and did not intend to, rely on the employee statements. There was the suggestion at trial that this was conveyed to the Region early in the investigation, but that is not the same thing as telling the Union.

I credit Morris' testimony that the Union was not told by the Employer that it did not intend to rely upon the employee statements. In this regard, I discredit Chawansky's assertion that he told the Union this in the discipline meeting. In discrediting it I rely, in addition to Morris' testimony, on the clear implication of Chawansky's testimony that

I told them in the [discipline meeting] *because* [in] the rules of conduct we stated that he was discharged for damage to Company property. (Emphasis added.)

In other words, the Chawansky's explanation is not, really, that he told the Union that the Employer was not going to rely upon the employee statements, but rather, that the Union should have figured it out from the fact that the basis for the discharge was the two accidents and not the employee statements. On brief, the Respondent runs with this theme, contending that neither the discharge memo nor the step III grievance answer indicates that the comments were a basis for the decision. This is inadequate.

As Union Representative Morris pointed out at trial, the discharge letter states that Bush's behaviors "have put other employees and you at risk." The step 3 grievance answer states that as a result of the two accidents "Mr. Bush jeopardized the safety of other employees and himself."

While these characterizations of the offense do not explicitly state that the employer is relying on the employee statements that Bush made them feel unsafe and that he needed help, they are certainly consistent with reliance on comments by employees that *the Respondent* raised as part of the discharge meeting. There was no indication to the Union that the Employer was not relying on these statements.

The Respondent's representation at trial that it has not and will not rely on the employee statements, has no effect on the presumptive relevancy of the requested information at the time the request was made in January 2011 until the trial in this case in June 2011.

And prospectively, the Respondent's representation only diminishes the relevance of the Union having the names of the employees who allegedly complained, it does not eliminate it. It is natural that the Union would want to interview the two employees. This would allow the Union to verify the truth of the Employer's claim that employees felt it was unsafe to work around Bush, a matter that, whether relied upon by the Respondent or not, might influence the Union's position on how to proceed with the grievance. Whether it is for the purpose of evaluating how far to take the Bush grievance, or to ascertain what kind of "help" Bush may or may not need, or for the purpose of acting generally to represent the employees in safety matters, an interview with employees who allegedly have knowledge of and opinions on Bush and his effect on safety in the plant is clearly relevant to the Union's activities as the employees' representative. Any competent attorney or union grievor charged with handling a grievance such as the Bush

grievance would want to know all he could about Bush's work performance and safety record, practices, and reputation. These two employees have information that Morris, reasonably, wants for the purpose of fulfilling the union's representational duties. The names of the complaining employees will "be of use" to the Union in its efforts to interview them. The requested information is presumptively relevant and the presumption has not been rebutted.<sup>8</sup>

### iii. Confidentiality

Alcan asserts a confidentiality interest in protecting from disclosure the names of the employees who spoke with Zickefoose about Bush.

The Board has defined some types of information that give rise to a legitimate and substantial confidentiality interest:

Confidential information is limited to a few general categories: that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.

*Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995).

In *Detroit Newspaper Agency*, the Board was clear that information accorded confidential status "is limited to a few general categories" as described above. In that case the Board rejected the employer's claim of a legitimate confidentiality interest in an internal safety audit report because it "falls outside these general categories."

Notwithstanding this approach, the Board has held, in reference to the *Detroit Newspaper Agency* formulation, that "this description of confidential information is not intended to be exhaustive." *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006). Rather the Board has "considered whether the information was sensitive or confidential with in the factual context of each case." *Id.* In particular, the Board has recognized, at least in some contexts, the existence of a valid confidentiality interest for employees' reporting to management on the misconduct of other employees. The recognition of a confidentiality interest in the identity of informants turns on some combination of the importance of encouraging employees to report the issue to management in terms of employee or public safety, the illegality of and/or threat posed by the underlying conduct, the potential involvement of illegal drugs, and concerns about physical or other retaliation against the informants. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1107 (1991) (legitimate interest in keeping names of informants con-

<sup>8</sup> I recognize that even if the Union has the names the employees may be unwilling to talk to the Union, just as they have not come forward in response to the Union's general appeal to the storeroom employees. But the Union has a legitimate interest in making a personal appeal to the employees in question—employees whom they represent—and not being relegated to general solicitations to anonymous employees. The names will be "of use" to the Union in its efforts to investigate this matter.

fidential where employer was engaged in investigation of criminal drug activity with potential for harassment of informants); *Mobil Oil Corp.*, 303 NLRB 780, 780–781 (1991); See *Metropolitan Edison Co.*, 330 NLRB 107, 107–108 (1999) (assuming legitimate interest in confidentiality of informants’ names providing information on workplace theft); See also *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006).

In this case, the information sought to be protected is not highly personal, proprietary, or traditionally privileged. And there is no record evidence of fear by employees of retaliation or physical threat from Bush or the Union if they were identified.<sup>9</sup>

If legitimate confidentiality interests were limited to the “general categories” described in *Detroit Newspaper Agency*, supra, it might be easy to dismiss the employer’s assertion of a confidentiality interest here.

Certainly I reject any suggestion that the mere desire to ensure that employees talk more freely to management, a goal enhanced, to be sure, by assurances of confidentiality, establishes a legitimate confidentiality interest. Similarly, I reject the suggestion that a confidentiality interest is established by Zickefoose’s assurances to employees that their discussions with her—on nearly any subject—are confidential should they want them to be.<sup>10</sup>

And yet, under the more expansive understanding of confidentiality involving employee informants that the case law presents, one is hard pressed to say that the employer’s interest in the confidentiality of the identity of those making reports about Bush—even if not as weighty as in some cases—is not legitimate. If Alcan’s operation does not pose a significant risk to public safety, it clearly contains many inherent dangers for

<sup>9</sup> Zickefoose testified that employees (at least, in other instances, not the instances at issue here), have stated that they feared being treated as having “ratted” on others, and more generally, indicated by asking for confidentiality that they preferred that their identities not be disclosed. However, this does not provide evidence of a significant risk of retaliation or harassment. Concerns about social disapproval at having spoken negatively of another employee do not amount to a demonstration of the likelihood of harassment or retaliation. “While it “would be naïve to deny any latent possibility of retaliation against informants whose information leads to an investigation and discharge of an employee, . . . this case presents no more than just that—a possibility. There is nothing in this record to indicate a likelihood or real risk of retaliation or violence.” *Metropolitan Edison*, 330 NLRB at 108.

<sup>10</sup> I do not criticize the efficacy of this management approach (although it is also worth bearing in mind that confidentiality can also encourage dishonest reports, as the informants need never face scrutiny). But management’s willingness to grant confidentiality cannot, by itself, create a legitimate employer interest in confidentiality for purposes of avoiding disclosure of otherwise relevant information to a union. While the Board majority in *Northern Indiana Public Service Co.*, supra, found that a “promise of confidentiality is relevant to the issue of whether the information will be considered confidential,” that case also involved other factors. No Board precedent finds that a promise of confidentiality, by itself, transforms otherwise nonconfidential information into confidential information. A union’s right to request and receive relevant information is critical to the collective-bargaining process and an employer cannot unilaterally limit that right and insulate any information from disclosure just by offering not to disclose information to the union.

employees that make the safe operation of equipment a priority. There can be no doubt that Alcan has a significant and legitimate interest in encouraging employees to report other employees who may be acting in ways that endanger themselves, their coemployees or the facility. “The connection of confidentiality to the safety of . . . other employees and to job performance is plain.” *Pennsylvania Power*, supra. Moreover, the unsafe conduct at issue here, and the employees’ comments, do involve concerns about substance abuse, a subject that the Board has recognized, because of its threat to workplace safety, its illegality, and, the pervasiveness of the problem as a concern of national policy, heightens the need for confidentiality. *Id.* at 1107–1108.

Given these concerns, and the Board precedent, I find that the employer has a legitimate interest in preserving the confidentiality of the names of the employees who complained to management about their perception of Bush’s unsafe conduct and his need for “help.”

iv. The duty to bargain to accommodate the parties’ interests

The recognition of the legitimacy of the confidentiality interest in the employees’ names does not end the statutory inquiry under the Act.

When an employer demonstrates a substantial confidentiality interest, it cannot simply ignore the Union’s request for information. It must still seek an accommodation of its concerns and the Union’s need for the requested information. The burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998) (citing *Tritac Corp.*, 286 NLRB 522, 522 (1987)).

*Borgess Medical Center*, 342 NLRB 1105, 1106 (2004); *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998) (“an employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information”).

In this case, I find that while the confidentiality interest at stake here is legitimate, it is not entitled to the same “unusually great weight” as the claims asserted in *Pennsylvania Power*. It does not trump the Union’s need for the information. Accordingly, the Board’s reasoning in *Metropolitan Edison*, 330 NLRB at 109, is fully applicable here: the Respondent’s confidentiality claim, although

legitimate, is not entitled to the same “unusually great weight” as the claims asserted in *Pennsylvania Power* and *Mobil Oil*. We have further found that the Union has a legitimate and substantial need for the requested information. Finally, we have found that while a possibility of retaliation against informants exists, the likelihood of such retaliation in this case is purely speculative. In these circumstances, we find that the Respondent was not privileged to flatly reject the Union’s request for the informants’ names, but was obligated to bargain

with the Union to seek an accommodation. By failing to do so, the Respondent violated Section 8(a)(5).

In this case, the undisputed evidence is that no offer or effort to accommodate the Union's and Employer's concerns was made. The Employer did not offer to bargain or otherwise formulate or suggest a method of accommodation. Just saying no to a union's information request does not satisfy the employer's duty to seek an accommodation.

Thus, under settled precedent the Employer violated the Act by refusing to provide the requested information on grounds of confidentiality, while failing to make an effort to bargain to accommodate the Union's concerns with its own. Accordingly, "the violation found is the *failure to bargain* over an accommodation (i.e., an alternative means of satisfying the Union's need), not the failure to provide the names themselves." *Metropolitan Edison Co.*, 330 NLRB at 109 (original emphasis); *Borgess Medical Center*, 342 NLRB at 1106 fn. 6 ("we have made no finding that the Respondent violated Sec. 8(a)(5) by failing to turn over the incident reports. The violation was the failure to bargain about a possible accommodation").

Alcan contends that it could not have accommodated the Union under the circumstances, as "there was no accommodation which could have given the Union the information it needed while withholding the identities of the employees." (R. Br. at 13.)

I reject the Respondent's position. While I agree that it is far from clear that the Union would have accepted any offer of accommodation, the Respondent's duty was to make the effort. It could have, for instance, offered to provide the identities to a designated union official, subject to bargained restrictions on the Union's use and dissemination of the information. It could have offered to provide the identities subject to a confidentiality agreement to an International Union official unaffiliated with the facility for use interviewing the employees. Certainly there are other potential accommodations that the parties could discuss.

Of course, it is not for me or the Board (at least, not at this juncture) to say what kind of arrangement or accommodation would best suit the parties. But just saying no is not enough. *Pennsylvania Power*, 301 NLRB at 1106 ("a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests").

It is a virtue of Board precedent that the union and employer are required to work through the dispute: they, more than the Board, know how to best accommodate the interests at stake. And while cases can be found where the Board has intervened and resolved the matter in the absence of the parties' bargaining, they are the exception. See, e.g., *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1108 fn. 18 (1991) ("We recognize that the remedy ordered here deviates in some respects from the Board's usual view that parties should bargain over the disclosure of partially confidential information. However, we view this departure as necessitated by the peculiar circumstances of

this case and the strong interest in fostering efforts to create safe and drug-free workplaces").

As the Board explained in *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999):

We recognize merit both in the Union's asserted interest and in the Respondent's confidentiality concerns. The appropriate remedy in these circumstances is to give the parties an opportunity to bargain regarding the conditions under which the Union's need for relevant information could be satisfied with appropriate safeguards protective of the Respondent's confidentiality concerns. We do not now decide the particular content of accommodation bargaining that must occur, except to direct that the parties should thoroughly explore any and all reasonable alternatives.

As the Board further explained in *Metropolitan Edison*, 330 NLRB at 109:

The Board's cumulative experience has shown that "there should be, and almost always is, a way that the parties can effectively bargain' for an accommodation that will satisfy both the union's needs and the employer's protective concerns. . . . Indeed, to our knowledge, none of the cases in which the Board has employed this approach have ever returned to the Board, because the parties were unable or unwilling to arrive at a mutually acceptable accommodation of their respective interests.

(citing, *Exxon Co., USA*, 321 NLRB 896, 899 (1996)). See also *Minnesota Mining & Mfg.*, 261 NLRB 27, 32 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983); *General Dynamics Corp.*, 268 NLRB 1432 (1984); *National Steel Corp.*, 335 NLRB 747, 747-748 (2001), enfd. 324 F.3d 928 (7th Cir. 2003).

The Respondent will be ordered to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for the names of the employees complaining about safety concerns with regard to Bush. As the Board explained in *Metropolitan Edison*, supra at 109-110:

we recognize that if the Respondent and the Union are unable to reach an agreement on a method whereby their respective interests would be satisfactorily protected, they may be before us again. If the issue of whether the parties have bargained in good faith is presented to us, we shall decide that question then. If necessary, we shall also undertake the task of balancing the Union's right to the information it requested with the Respondent's expressed confidentiality concerns in accord with the *Detroit Edison* test and in light of proposals made during bargaining, and we shall make a final determination whether the Respondent has fulfilled its statutory obligation. We believe, however, that first allowing the parties an opportunity to adjust their differences best effectuates the Act's policy of encouraging the resolution of disputes between employees and employers through collective bargaining.

Accord, *Minnesota Mining & Mfg.*, supra at 32.

#### CONCLUSIONS OF LAW

1. The Respondent Alcan Rolled Products—Ravenswood, LLC is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 5668, AFL–CIO–CLC is a labor organization with the meaning of Section 2(5) of the Act.

3. At all material times the Union, along with the International Union, has been the designated exclusive collective-bargaining representative of the following bargaining unit of the Respondent’s employees:

All production and maintenance employees employed at the Ravenswood, West Virginia plant, but excluding executives, administrative and professional employees, office and clerical employees, guards, full-time first-aid and safety employees, foremen and any other supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by failing to offer to bargain with the Union for an accommodation of interests in response to the Union’s request for the names of employees who made safety-related complaints to the Respondent’s supervisor about fellow employee Bush, information that the Respondent considers confidential.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Generally, where an employer fails to provide relevant requested information, the appropriate affirmative remedy includes an order that the employer provide the information. This is not the appropriate remedy here, where, as I have found, the employer has established that there is a legitimate confidentiality interest in the information at issue. It is to be remembered that the violation found here is not the failure to provide the information, but the failure to attempt to bargain an accommodation.

The Respondent will be ordered to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union’s request for relevant information about the names of employees who made safety-related complaints regarding employee Bush.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer’s facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, Alcan Rolled Products—Ravenswood, LLC, Ravenswood, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union’s request for relevant information regarding safety-related complaints made by employees regarding another employee, in which the employer maintains a confidentiality interest.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the Union regarding its request for the names of employees complaining to supervisors and/or management about the safety issues related to grievant Robert Bush, in order to reach an accommodation of the Union and the Respondent’s interests, and thereafter comply with any agreement reached through such bargaining.

(b) Within 14 days after service by the Region, post at its union-represented facilities the attached notice marked “Appendix.”<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 28, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union in an effort to reach an accommodation of interests in response to the Union's request for relevant information that we consider confidential.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the Union regarding its request for the names of employees complaining to supervisors and/or management about the safety issues related to grievant Robert Bush, and thereafter comply with any agreement reached through such bargaining.

ALCAN ROLLED PRODUCTS—RAVENSWOOD, LLC