

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 23, 2016

TO: Terry A. Morgan, Regional Director
Region 7

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: ZF Friedrichshafen AG Corporation (ZF) and 530-6067-6001-3720
FCA US LLC (FCA) 530-6067-6001-3740
Case 07-CA-178346 530-6067-6001-3785
530-6067-6033-4000
530-6067-6067-3100

This case was submitted for advice as to whether ZF and FCA (collectively the Employers) violated Section 8(a)(5) of the Act by failing to provide the Union with a copy of their business agreement governing operations at FCA's manufacturing plant. We conclude that in the circumstances of this case, where FCA has leased the unit employees and its facility to ZF, but those employees' terms and conditions of employment are governed by FCA's collective-bargaining agreement with the Union, the business agreement between ZF and FCA is relevant to future collective bargaining. Consequently, the Employers violated Section 8(a)(5) of the Act by failing to either provide the Union with a copy of the agreement or offer to bargain over an accommodation of their confidentiality concerns.

FACTS

ZF Friedrichshafen Ag Corp. (ZF) is a worldwide technology leader in designing and manufacturing various powertrain components including axles for motor vehicles. FCA US LLC (FCA) is a major manufacturer of motor vehicles. Local 961, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (the Union) represents the employees employed by FCA at its Marysville plant in Michigan.

In January 2009, ZF and FCA¹ entered into a business agreement whereby ZF agreed to lease approximately 430,000 square feet of FCA's Marysville Axle Plant

¹ At the time of the agreement in 2009, FCA was Chrysler Group, LLC.

(MAP) and to utilize FCA hourly workers (leased employees) to produce powertrain components including axles for FCA and other customers. The agreement between FCA and ZF is set to expire (b) (4)

As a result of this agreement, in January 2009 FCA and the Union entered into a Memorandum of Understanding (MOU). The MOU sets forth the relationship at MAP between ZF and the employees and the Union, and in certain respects, between ZF and FCA. The MOU states that the leased employees working at MAP remain subject to the collective-bargaining agreement between FCA and the Union. The term of the MOU is explicitly tied to the term of the business agreement between ZF and FCA.

The most recent collective-bargaining agreement between the Union and FCA, effective September 15, 2015 – September 14, 2019, covers the following Unit:

All employees of Chrysler Group, LLC working at the facility located at 2900 Busha Highway, Marysville, Michigan (the Marysville facility), that are being leased to ZF Friedrichshafen Axle Drives Marysville, LLC, whose terms and conditions of employment are governed by the same contract as the bargaining units that are listed in Schedule A appended to the Production, Maintenance and Parts collective-bargaining agreement between Chrysler Group, LLC and the International Union.

ZF acts as the managing Employer at the Marysville facility, and processes grievances under the collective-bargaining agreement between FCA and the Union. On the other hand, the employees are paid by FCA, and FCA is the guarantor of the employees' collectively bargained rights. The Region has determined that FCA and ZF are joint employers.²

On October 5, 2015, the Union, via email to ZF,³ requested the business agreement between ZF and FCA mentioned in the MOU, in order to “properly police the contract.” On January 20, 2016,⁴ the Union renewed its request. On January 21, ZF's human resources manager advised the Union that the individual to whom the

² The Region issued a complaint against ZF and FCA as joint employers in *Chrysler Group LLC and ZF Friedrichshafen AG, Joint Employers*, Case 07-CA-105736. The case was settled on December 18, 2013 without an admission of joint-employer status.

³ All communications between the Union and ZF were by email.

⁴ Hereinafter, all dates are in 2016.

request was made no longer worked for ZF and directed the Union to resend the original signed copy of the request. On January 25, the Union did so.

On February 1, ZF responded, stating that the requested business agreement is between ZF and FCA, that the Union is not a party to the agreement, and that the Union has no right to monitor or police *that* contract. ZF further asserted that it did not see the document's relevance and the Union needed to be more specific regarding its alleged relevance. On February 2, the Union replied to ZF, reiterating that the Union needed the information to police the contract and noting that the business agreement is referenced in the MOU. On February 8, ZF responded that it still failed to see the relevance of the agreement to the Union's statutory duties, noting that the Union had mentioned that "volumes of work might need to be monitored." ZF responded: "volumes of work are not governed by the CBA. They are dependent upon the agreed upon sales volumes and are dictated through the scheduling by our customer, FCA, your employer." ZF further noted that it had offered to meet with the Union to go over Section 6 of the agreement, which pertains to the leased employees. The Union told ZF that would not be sufficient, and advised ZF that it wanted to see the agreement in its entirety to decide whether there is anything in it that would assist the Union in preparing for the "next step," i.e., negotiations, when the current collective-bargaining agreement expired in 2019.

On February 10, the Union further clarified the relevancy of the agreement. In particular, it stated that the agreement is related to the employer/employee relationships at MAP and that the Union needed to review the document so as to better "understand the complicated relationship between ZF and FCA." Specifically, it noted that the "information is likely to be of material assistance in evaluating and minimizing the adverse effects of the Employers' decision-making process on represented employees." ZF replied that the Union failed to articulate a legitimate reason for obtaining the entire agreement. ZF further stated that the agreement contains "much confidential financial information and other proprietary information." The Union answered that "information intrinsic to the employer-union relationship is considered relevant. Please supply the requested information in whole." Finally, on February 11, ZF advised the Union that the Employers' position had not changed and that while they were willing to provide relevant information, they were not willing to provide the entire agreement until the Union established non-speculative relevance.

ACTION

We conclude that in the circumstances of this case, the business agreement between these two joint employers is relevant for the Union to prepare for collective bargaining and in order to bargain intelligently for a successor contract. Therefore, the Employers violated Section 8(a)(5) by failing to either provide it to the Union or offer to bargain over an accommodation of their confidentiality concerns.

A collective-bargaining representative is entitled to information relevant and necessary to carrying out its statutory duties and responsibilities, including negotiating over mandatory bargaining subjects and policing a collective-bargaining agreement.⁵ When the requested information deals with the terms and conditions of employment of bargaining unit employees, the Board will deem the information presumptively relevant and necessary to the union's performance of its statutory duties.⁶ In seeking presumptively relevant information, a union is not required to demonstrate its precise relevance unless the employer rebuts that presumption.⁷

Where the information requested is not presumptively relevant, the burden is on the union to demonstrate its relevance.⁸ The Board applies a liberal discovery-type standard in determining whether information is relevant to a union's statutory functions.⁹ Potential or probable relevance is sufficient to trigger a duty to furnish information.¹⁰ Thus, "once this logical, or theoretical, relevance has been shown, the union need not prove actual relevance, but may simply demonstrate a *probability* that the data is useful for the purpose of bargaining intelligently."¹¹

⁵ See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979) (citing *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967), and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)).

⁶ See, e.g., *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (citing *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enforced*, 347 F.2d 61 (3d Cir. 1965)); see also *Fleming Cos.*, 332 NLRB 1086, 1086-87 (2000) (finding employer should have provided union with grievant's personnel file, work rules, other disciplinary actions taken, and a list of names and contact information for all unit employees employed by respondent's predecessor).

⁷ *Fleming Cos.*, 332 NLRB at 1087 (citing *Mathews Readymix*, 324 NLRB 1005, 1007 (1997), *enforced in relevant part*, 165 F.3d 74 (D.C. Cir. 1999)).

⁸ *Disneyland Park*, 350 NLRB 1256, 1257 (2007) (although contract term prohibited the employer from subcontracting work to evade bargaining obligation, union never made claim that any subcontracting had that evasive purpose, and union must do more than cite contract provision to prove relevance of subcontracting agreements).

⁹ *Acme Indus. Co.*, 385 U.S. at 437.

¹⁰ *Disneyland Park*, 350 NLRB at 1258.

¹¹ *E.I. du Pont de Nemours*, 264 NLRB 48, 51 (1982) (citations omitted) (emphasis in original) (union satisfied burden for obtaining wage information on nonunit employees in order to formulate proposal for parity with other plants because without this information the union "cannot intelligently formulate its desired approach to a

Because there are no facts which support a finding that the business agreement between ZF and FCA directly affects the terms and conditions of the unit employees, we conclude that the agreement is not presumptively relevant, and that the Union must make a relevancy showing in order to obtain the document.

We further conclude, however, that the Union has made that showing. The Union sought this information, in part, to prepare for future collective bargaining.¹² The relationship between joint employers is implicated in bargaining because that relationship vitally affects the terms and conditions of the unit employees.¹³ As the Board noted in *BFI Newby Island Recyclery*, when bargaining-unit members are jointly employed, each employer is bound to engage in good-faith bargaining with respect to the terms and conditions it controls.¹⁴ In some cases or as to certain issues, joint employers may engage in genuinely shared decision-making, and in others, they may exercise comprehensive authority over different terms and conditions of employment or even affect different components of the same term.¹⁵

The Union expressed a need for the document to better “understand the complicated relationship” between the ZF and FCA so that it could “evaluat[e]” ZF’s “decision-making process.” The MOU between FCA and the Union provides that the

wage policy different from that adhered to by [the Employer]”), *enforced*, 744 F.2d 536 (6th Cir. 1984).

¹² The Union initially requested the information to “police the contract.” We conclude that the Union failed to sufficiently establish any relevance for that purpose, but the Union later noted it would use the document to prepare for negotiations of a successor agreement when the current agreement expired in 2019. *Cf. Island Creek Coal Co.*, 292 NLRB 480, 489 (1989) (requirement that information request must be made in good faith “is met if at least one reason for the demand can be justified” (citing *Hawkins Construction Co.*, 285 NLRB 1313, 1314-1315 (1987), *enforcement denied on other grounds*, 857 F.2d 1224 (8th Cir. 1988)), *enforced*, 899 F.2d 1222 (6th Cir. 1990).

¹³ See *Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971) (an employer’s relationship with a third party is itself a mandatory subject of bargaining if it “vitally affects the ‘terms and conditions’ of [the employees’] employment.”).

¹⁴ 362 NLRB No. 186, slip op. at 16 (Aug. 27, 2015); *accord NLRB v. W. Temp. Serv., Inc.*, 821 F.2d 1258, 1265 (7th Cir. 1987) (observing that each employer in a joint-employment relationship need only bargain over the terms and conditions it controls).

¹⁵ *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 15 n. 80.

Maryville employees' terms and conditions of employment continue to be governed by the collective-bargaining agreement between FCA and the Union. But, it is ZF that acts as the managing Employer on the Marysville jobsite, exercising control over labor policy by, among other things, responding to information requests and processing grievances under FCA's collective-bargaining agreement with the Union. Whether the parties genuinely share decision-making over terms and conditions of employment, or whether ZF exercises comprehensive authority over some terms and conditions of employment and not others, or whether each joint employer controls different components of the same term are all relevant considerations for collective bargaining. There is a substantial "probability" that the business agreement between the putative joint employers will provide answers to those questions, and will aid the Union in preparation for collective bargaining, allowing the Union to bargain intelligently with the entity or entities that control the respective term and condition of employment. Moreover, to the extent the "agreed" upon "volumes of work" is covered in the business agreement it may be relevant to staffing, workload distribution, and scheduling.¹⁶ Given the intricate relationship between these joint employers, the business agreement between them has a vital effect on the employees' terms and conditions of employment and must be divulged to the Union, with appropriate accommodations made for the Employer's confidential and proprietary concerns.¹⁷

While an argument can be made that the Union's request was premature since the collective-bargaining agreement was not due to expire until September 2019, we do not find merit to that argument. Advance preparation for collective bargaining can

¹⁶ *Western Massachusetts Electric Co.*, 234 NLRB 118, 119 (1978) (employer unlawfully failed to provide internal analysis of meter reading routes and a formula used by the employer in revamping those routes relevant to any redistribution of the workload), *enforced*, 589 F.2d 42 (1st Cir. 1978).

¹⁷ Even where, as here, an employer asserts a legitimate confidentiality and/or proprietary interest in relevant information, the employer must bargain toward an accommodation between the union's information needs and the employer's justified confidentiality interests. *See Pennsylvania Power Co.*, 301 NLRB 1104, 1105-06 (1991). The Board has found that an appropriate accommodation can take the form of a confidentiality agreement or a protective order that will "permit the disclosure of the needed information subject to safeguards negotiated by the parties to ensure its proper use." *Exxon Co. USA*, 321 NLRB 896, 899 (1996), *aff'd mem.*, 116 F.3d 1476 (5th Cir. 1997). The Employers' offer to allow the Union to review a section of the business agreement that specifically pertained to the leased employees was not an adequate attempt to accommodate the Union's request.

begin at any time, particularly given that the need to litigate any refusal to provide relevant information can be a lengthy process.¹⁸

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employers violated Section 8(a)(5) of the Act by failing to provide the Union with their business agreement, without offering to bargain over an appropriate accommodation of their confidentiality concerns.

/s/
B.J.K.

ADV.07-CA-178346.Response.FiatChrysler (b) (6), (b) (7)(C)

¹⁸ Cf. *Kraft Foods North America, Inc.*, 355 NLRB 753, 756 (2010) (finding request for information fifteen months before bargaining was to commence was not premature, given the respondent's past refusals to provide the information and "the practical realities of litigation before the Board, which can proceed too slowly to make the statutory right to information a meaningful one."). Although Advice has previously concluded that a request for subcontracting information was premature where the union sought the information to prepare for bargaining negotiations for a successor contract to an agreement that was not due to expire for 33 months, (see *PPL Montana, LLC*), Case, 27-CA-21327 Advice Memorandum dated February 24, 2010, pp. 4-5, we decline to apply that analysis here.