

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

RECOLOGY CLEANSCAPES, INC.¹

Employer

and

Case 19-UC-256641

**TEAMSTERS LOCAL UNION NO. 174,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Petitioner

DECISION AND ORDER

The Petitioner, Teamsters Local Union No. 174, affiliated with the International Brotherhood of Teamsters, seeks to clarify the certification in Case 19-RC-250040 such that the “Operations Analyst/Data Analyst”² classification is explicitly included in the bargaining unit. During the pre-election process in Case 19-RC-250040, the Petitioner and the Employer, Recology Cleanscapes, Inc., specifically agreed to defer the issue of whether the Data Analyst should be included in, or excluded from, the bargaining unit. The sole question presented by the petition is whether Kevin Lau (“Lau”), who occupies the position of Data Analyst, is a confidential employee. Petitioner maintains Lau is non-confidential and the Data Analyst is properly included, the Employer maintains Lau is a confidential employee and the Data Analyst should be explicitly excluded from the unit.

Pursuant to the provisions of § 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director. The hearing in this case took place on February 28, 2020 before a hearing officer of the Board, and I affirm that the rulings of the hearing officer are free from prejudice and error.

I have carefully reviewed and considered the record evidence and the arguments of the parties at both the hearing and in their post-hearing briefs. In light of the full record I conclude, in agreement with the Petitioner, that Lau is not a confidential employee, and the Data Analyst is properly included in the bargaining unit. Accordingly, I have ordered the certification clarified to include the Data Analyst.

¹ The name of the Employer appears as stipulated to at the hearing.

² The parties stipulated that Operations Analyst and Data Analyst are used interchangeably to describe the same classification. Herein, this classification will be referred to as Data Analyst.

I. BACKGROUND FACTS

The Employer is a Washington State corporation providing sanitation and recycling services in the Seattle, Washington metropolitan area.³ Since at least 2015, Petitioner has represented a bargaining unit consisting of WRS Container Delivery, Operations Controller, Janitorial, Sorter, Equipment Operator, and Weighmaster employees employed by the Employer. The Petitioner and the Employer are parties to a collective bargaining agreement covering the aforementioned unit, effective December 5, 2015 through March 31, 2021.

In 2019, Petitioner filed the petition in Case 19-RC-250040, seeking to represent another, separate bargaining unit of employees employed by the Employer at the same facility. On November 13, 2019, pursuant to a Board election, the Region certified Petitioner as the exclusive collective bargaining representative of the following classifications of employees (the “Unit”):

All full-time and regular part-time employees in the Data Quality Department and GIS Specialists employed by the Employer at its facility located in Seattle, Washington; excluding all other employees, confidential employees, managers and guards and supervisors as defined by the Act.

The certification also includes the following notation:

However, Data Analyst is neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the parties did not agree on the inclusion or exclusion of Data Analyst but agreed to vote them subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

Following the certification, the parties engaged in bargaining and reached a memorandum of agreement (MOA) to expand the existing collective-bargaining agreement to cover the Unit. The MOA is effective January 18, 2020 through March 31, 2021. During the course of bargaining the MOA, the parties discussed inclusion of the Data Analyst into the Unit but were unable to reach agreement as to whether the Data Analyst classification should be included because of a dispute as to their status as a confidential employee.

On February 19, 2020, the Petitioner filed the instant petition seeking to include the Data Analyst classification in the Unit.

³ The Employer stipulated that it is an employer engaged in commerce within the meaning of §§ 2(6) and (7) of the Act and is subject to the jurisdiction of the Board. It further stipulated that within the past twelve months, a representative period, the Employer derived revenues in excess of \$500,000, and purchased and received goods and services valued in excess of \$50,000 directly from points located outside the State of Washington.

II. FACTS REGARDING DATA ANALYST LAU'S STATUS

Lau is employed by the Employer as its sole Data Analyst in the Data Quality Department. Lau started his employment with the Employer as a Data Quality Specialist⁴ in September 2016. In June 2018, Lau became a Data Analyst. According to his job description, Lau's job duties include monitoring and tracking performance quality for all internal operations and field operations teams; preparing weekly PowerPoint presentations concerning system data and operational metrics; collecting, formatting, and analyzing data using Microsoft Office tools; identifying key areas that need improvement and working to developing systematic responses; monitoring performance quality of internal operations, the call center, and other departments; preparing agendas and facilitating weekly quality of service review meetings; and preparing monthly city and county reports, as needed.

Lau testified that he generates reports using a programming language, Structured Query Language ("SQL")⁵ to convert raw data from the Employer's software database into a more meaningful form. The Employer utilizes a software database called "Tower" to store a variety of data. Lau exports that data into Microsoft Excel and/or Microsoft PowerPoint and provides the reports to the Employer. Lau also receives data concerning employee hours from the Employer's payroll department to create a weekly "statsology" report, which takes a reflective look at performance for the prior week. Lau provides the statsology report to operations supervisors and various members of management.⁶ All other reports are created from data residing in Tower. Lau expressly admitted during the hearing that, in his capacity as the Data Analyst, he has access to the hours provided to him by the Payroll Department, in the form of raw numbers which add up to a total number of hours. Lau also expressly stated that he has never been asked to determine whether a specific driver had been underperforming on their route through the data he compiles.

The record establishes that Lau color-codes division (e.g. trash collection or recycling) routes in the following manner: red for performance that did not meet the Employer's expectations; yellow for performance that met expectations; and green for divisions performing above expectations. The record does not disclose whether Lau uses his own discretion or follows pre-determined guidelines to color code routes. The Employer uses this color-coding as an indicator to engage in further review of its operations.

Lau reports directly to Customer Service Manager Kyle Kramer ("Kramer"). Kramer oversees twelve customer service employees and the data quality team comprised of four data quality specialists, one GIS specialist, and Data Analyst Lau. Kramer used to generate the statsology reports, before Lau became the Data Analyst. Kramer reports to General Manager Kevin Kelly ("Kelly"). Kelly is one of the members of management who receives the statsology report

⁴ Lau stated on the record that he started his employment as a Data Quality Analyst, though no such position exists. Later in the record, Lau used Data Quality Analysts to describe the Data Quality Specialists. It is logical to believe Lau intended to say he started his employment as a Data Quality Specialist. In any event, Lau's former position is immaterial to the issue at hearing.

⁵ The transcript also references SQL as "sequel scripts."

⁶ Lau also stated that he provides the report to Data Analysts, but the record does not disclose the identities of any other "Data Analysts." It is not clear who Lau intended to identify as another recipient of the statsology report.

from Lau. Kelly, in general terms, described the statsology report as one of the largest competitive advantages of the Employer over competition, and in a labor-management setting. Kelly expressly stated that the statsology report allows the Employer to understand how it performs and how long it takes to perform, which the Employer then considers in operational decisions.

Data Quality Specialists also have access to the raw data in Tower. The record establishes that Lau is the only employee in the Data Quality Department who is proficient in SQL, and thus, is the only individual capable of generating certain reports.

Lau attends the weekly statsology meetings, though, according to Lau's testimony, the meetings are open to all employees, and new employees frequently attend. The record indicates that there have been rare instances when discipline of other employees has been discussed in the statsology meetings, but the record does not disclose whether other employees were also present in the meetings when members of management discussed discipline or how often those discussions occurred. The record evidence explicitly shows that Lau does not make recommendations on discipline, nor does he know how members of management will evaluate potential discipline of other employees based on the reports he generates.

The record establishes that bargaining unit grievances are not discussed at meetings Lau has attended, nor has Lau attended meetings where the Employer discussed Union grievances. With regards to collective bargaining, the Employer thus far has not utilized Lau in formulating proposals. Nor has Lau attended meetings with the Employer's management team where bargaining strategy has been discussed.

III. LEGAL ANALYSIS

The Supreme Court formally approved the Board's longstanding policy decision to exclude confidential employees from bargaining units in spite of the fact that confidential employees are not necessarily § 2(11) supervisors or § 2(13) agents of an employer. Such employees have the right to engage in § 7 activities, and to receive the protections of the Act, but are not suitable for inclusion in a bargaining unit due to their close relationship with management-side individuals who formulate labor policy.

Specifically, the Supreme Court affirmed the Board's decision to limit "confidential employee" status "to only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981). This standard is known as the "labor-nexus" standard. *Id.*

In the same case, the Supreme Court affirmed that employees may be found to be "confidential" employees depending on their access to confidential information:

[C]onsistent with the underlying purpose of the labor-nexus test, [the Board has also] designated as confidential employees persons who, although not assisting persons exercising managerial functions in the labor-relations area, 'regularly have

access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.’

Id. at 189 (citing *Pullman Standard Division of Pullman, Inc.*, 214 NLRB 762, 762–763 (1974)). However, the Board has also found an employee was not confidential when the employee had no way of knowing from statistical data that he prepared what labor policy proposals might result. *American Radiator & Standard Sanitary Corp.*, 119 NLRB 1715, 1720–1721 (1958).

In *Swift & Co.*, 119 NLRB 1556, 1565 (1958), the Board found that the fact that some employees may be entrusted with business information to be withheld from their employer’s competitors or that their work may affect employees’ pay scales did not render such employees either confidential or managerial. Similarly, in *Consol. Papers, Inc.*, 179 NLRB 165 (1969), the Board found that a high-ranking supervisor who did research and formulated recommendations relied upon by an employer’s negotiator did not render said supervisor a person who “formulates, determines, or effectuates” labor relations policy, and as such the high-ranking supervisor’s secretary was not a confidential employee under the labor-nexus standard. Also see *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971) (that corporate officials consulted with certain supervisors before bargaining sessions did not render the secretaries of those supervisors confidential employees); *Eastern Corp.*, 116 NLRB 329, 333 (1956).

As the party asserting that the Data Analyst is a confidential position, the Employer bears the burden of proving that claim. *Crest Mark Packing Co.*, 283 NLRB 999 (1987). Here, the Employer argues that Lau is a confidential because he has access to the hourly data provided to him by the Payroll Department, is able to access more of the data in Tower due to his SQL skills, generates reports which show productivity and efficiency, attends certain meetings with management, and that the Employer intends to rely on Lau to generate reports which would assist in collective bargaining, including the formulation and evaluation of bargaining proposals.

Evaluating Lau’s duties under the labor-nexus standard, there are a number of factors that indicate Lau is not a confidential employee. First and foremost, Lau has not participated in or assisted management in labor negotiations for the MOA. The record is devoid of evidence to establish that Lau has ever had access to the Employer’s bargaining notes or other confidential information which may be prepared for or result from collective-bargaining negotiations. There is no evidence in the record that Kramer, Lau’s direct supervisor, has engaged in collective bargaining for the Employer. Thus, the record does not establish that Lau assisted or aided any of those individuals in a “confidential capacity.” *Hendricks County*, 454 U.S. at 170.

Second, while Lau has been responsible for statsology reports since June 2018, and has regularly attended the weekly meetings where the statsology report is discussed, there is no evidence to establish that the Employer had entrusted Lau with labor-management type issues, nor that Lau was acting as a personal secretary to the management team. In addition, Lau did not observe the private meetings of the Employer’s bargaining team in preparation for, or during, negotiations for the MOA.

The Employer testified that the work hours of the drivers impacts its competitive edge. However, the evidence also establishes that the only “confidential” information Lau has is data

concerning hours worked by other employees provided to him by the Employer's Payroll Department. All other data is housed in Tower and the only barrier to unit employees extracting information from Tower is their knowledge of SQL. Lau compiles data into a more meaningful format for the Employer but does not make any recommendations based on that data. Since the hours worked are the only "confidential" business information that Lau has access to, I do not find that data renders Lau to be a confidential. In addition, Lau is not a personal secretary, per se, but an analyst who supports supervision more generally. He does not serve as a confidential administrative assistant in the "normal course of [his] duties." *W. Chem. Prod., Inc.*, 221 NLRB 250, 251 (1975).

In its post-hearing brief, the Employer cites to *Kieckhefer Container Co.*, 118 NLRB 950, 953 (1957) and *NLRB v. Meenan Oil Co.*, 139 F. 3d 311, 315 (2d Cir. 1998), for the proposition that Lau is a confidential employee. However, the individuals in *Kieckhefer* were employed as personal secretaries to high level members of management and had regular access to confidential matters dealing with contract negotiations. Moreover, these secretaries directly reported to individuals who, together with other top officials of the Employer, formulated, determined, and effectuated broad management policies with respect to labor relations. The confidential employee in *Meenan*, a payroll and personnel administrator, kept copies of all employee personnel files in her office and, more importantly, assisted the general manager with the preparation of the employer's annual profit plan, and in that way had access to the current salary as well as salary changes forecast by the company for all employees and supervisors, and at least some managers. These cases are clearly distinguishable from Lau's situation; among other things, there is no evidence Lau has direct contact with any actual bargaining proposals or labor management documents and there is no record evidence to establish that Lau assists the Employer's management team involved in labor relations/contract negotiations. In addition, Lau has access to far less information than the payroll and personnel administrator in *Meenan*. Additionally, the Employer argues that Lau could potentially be called upon to generate reports to be used in labor relations negotiations. However, the Board has also held that the fact that an employee may, at some time in the future, function as a confidential employee does not warrant exclusion. *American Radiator*, above, at 1719 (1958).

I therefore find that Lau is not a labor confidential employee under the labor-nexus standard. Having found that Lau does not act in a confidential capacity to the persons who actually formulate, determine, and effectuate labor policy, the question then turns to whether or not Lau has access to confidential information regarding projected changes that may result from collective bargaining. *See Pullman Standard*, 214 NLRB 762, supra. In *Inland Steel*, 308 NLRB 868 (1992), the Board emphasized that this standard has relatively narrow application:

Board law makes clear that mere access to confidential labor relations material such as personnel files, minutes of management meetings, strike contingency plans, departmental strategic planning and grievance responses is not sufficient to confer confidential status unless it can be shown that the employee at issue played some role in creating the document or in making the substantive decision being recorded or has regular access to labor relations information before the union or employees involved.

Id. at 877.

In viewing these limitations, it is clear that Lau does not have access to confidential information that would make him a confidential employee under the Act. The record contains only one specific example, Lau's access to the hourly data provided by the Payroll Department for him to complete the weekly statsology report. This is considerably less than "mere access" to department-level strategic planning found in *Inland Steel*. Moreover, the reports Lau generates are retrospective rather than prospective. While the Employer could use these reports to determine the future course of its operations, there is no evidence that Lau can predict or project how the Employer will decide to operate in the future.

I therefore find that Lau is not a confidential employee under the *Pullman Standard* "access to confidential information" standard.

IV. ORDER

I find, and it is hereby ORDERED, that the Unit be clarified to include the position of Data Analyst.

RIGHT TO REQUEST REVIEW

Pursuant to § 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of § 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **May 21, 2020**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

DATED at Seattle, Washington, on the 7th day of May, 2020.



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