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Subject: United Steelworkers of America Local 00895 (Westrock), Case 16-CB-249139 (case-closing email)
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This case was submitted for advice as to whether the Union violated its duty of fair representation by refusing to provide the Charging Party the Employer's investigative documents related to the Charging Party's termination for allegedly cheating on competency exams. We conclude that the Union did not violate Section 8(b)(1)(A), as it raised a substantial countervailing interest against producing those documents based on the Employer's assertion that the documents were confidential.

A union's duty of fair representation includes providing requested information to a unit member when the request is reasonably directed toward ascertaining whether they have been treated fairly or relating to terms and conditions of employment. In determining whether a union's refusal to provide information to a unit member is unlawful, the Board examines whether:

(1) the documents requested pertained to a grievance filed by the [unit employee]; (2) the [unit employee] had a legitimate general interest in obtaining the documents; (3) [the] legitimate interest was communicated to the [u]nion; (4) the [u]nion raised no substantial countervailing interest in refusing to provide the [unit employee] with copies of the requested documents; (5) the ability of the [u]nion to provide copies of the documents; and (6) the relative ease in complying with the request taking into account the amount of documentation requested.

See Local 307, National Postal Mail Handlers Union, 339 NLRB 93, 95 (2003) (citing Letter Carriers Branch 529, 319 NLRB 879, 881 (1995)).

We conclude that the Union acted lawfully because it raised a substantial countervailing interest in refusing to provide the Charging Party with the requested documents, which included the Employer's internal investigation report of the Charging Party's and other employees' conduct, witness statements from other employees interviewed by the Employer during its investigation, and disciplinary files for other employees involved. The Union states that when the Employer first provided these documents to the Union on April 22, 2019, the Employer orally asserted they were "privileged and confidential" and the Union could only use them to process the Charging Party's termination grievance. The Union's review of the Employer's documents with the Charging Party on May 1—permitting (b) (6), (b) (7)(C) to take notes but not make copies—is consistent with this purpose. The Union's initial failure to inform the Charging Party that the documents were confidential and would not be provided was neither fatal to the Union's position, nor did it otherwise undermine its asserted countervailing interest. The Union's representative told the Charging Party that (b) (6), (b) (7)(C) needed to consult with the Union's legal department before (b) (6), (b) (7)(C) could provide copies. After the Charging Party refreshed (b) (6), (b) (7)(C) request for the information on June 28, that is precisely what the Union representative did. Once the Union's legal department received written confirmation from the Employer on July 11 that the documents were confidential and could not be released to the Charging Party, the Union representative notified the Charging Party and (b) (6), (b) (7)(C) attorney.

Whether the Employer's investigative documents are actually confidential is irrelevant. This case is distinguishable from *National Hockey League Players' Association (National Hockey League), Case*

02-CB-020453, Advice Memoranda dated June 30, 2006, and June 20, 2007, where Advice concluded that a union unlawfully failed to provide employees with 30 side letters to the parties' collective-bargaining agreement that the union and employer claimed were confidential. Advice concluded that the side letters that were expressly incorporated into the collective-bargaining agreement were not confidential and that the remaining side letters did not contain information sufficiently confidential to justify the union's complete denial of access. Here, unlike the side letters at issue in those Advice memos, the Union has not claimed that it considers the Employer's investigative documents to be confidential. Instead, it is acting in accordance with the *Employer's claim* that the documents are confidential. Notably, the Union provided the Charging Party with documents the Employer did not claim were confidential—copies of the Charging Party's suspension and termination notices, the Union's grievance, and the Employer's response to the grievance—and the Union has continued to process the Charging Party's termination grievance through arbitration. We are aware of no case that would require a union to challenge an employer's claim that information was confidential in order to satisfy the union's duty of fair representation where, as here, the employer had already provided an accommodation to the union regarding its information request (permitting the union to use claimed confidential documents solely for purposes related to the processing of an employee's grievance).

Furthermore, even assuming, as it apparently now contends, that the Employer made no oral confidentiality assertion at first, its July 11th email made it abundantly clear to the Union that the documents were, in fact, confidential and that any request for them would have to be made by subpoena. This is not at all surprising given that the Charging Party filed a federal discrimination lawsuit against the Employer in the Northern District of Texas the very next day. Whether guarding against an end-run around the discovery process in that case, or for some other reason, it is clear the Employer asserted a confidentiality interest in its documents, in writing, on [REDACTED]. Thus, we would still conclude the Union raised a substantial countervailing interest in refusing to provide the Charging Party with the Employer's confidential investigative documents. The fact that it was the Union's inquiry about confidentiality that prompted the July 11th written confirmation from the Employer was neither arbitrary nor discriminatory. Such an inquiry was understandable, where, as here, the Charging Party had retained legal counsel (and would soon file a federal anti-discrimination lawsuit against the Employer over his discharge), the documents that the Charging Party requested contained information about other employees that was not necessarily relevant to [REDACTED] grievance, and the investigative documents do not reveal if the employee witness statements were obtained pursuant to confidentiality assurances. *Cf. Northern Indiana Public Service Co.*, 347 NLRB 210, 212 (2006) (in Section 8(a)(5) refusal-to-provide-information context, "a promise of confidentiality is relevant to the issue of whether the information will be considered confidential").

We note, however, that the Employer, in an email to the Region, asserted that it had "lifted" its confidentiality claim as to the April 22 investigative documents at some point after it sent its written confirmation of confidentiality to the Union on July 11. The Region should determine if the Employer conveyed to the Union that it was lifting its confidentiality claim. If the Union refused to produce the Employer's investigative documents after it learned that the Employer had lifted its confidentiality assertion, the Union's refusal to provide the Charging Party with those documents would violate Section 8(b)(1)(A) absent some other substantial countervailing interest that would otherwise privilege the Union to refuse to produce those documents.

The email closes this case in Advice. Please feel free to contact us with questions or concerns.

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