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

Advice Memorandum

REVISED DATE: January 21, 2005

TO : Frederick J. Calatrello, Regional Director
Region 8

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

SUBJECT: Armstrong Air Conditioning, Inc.
Case 8-CA-34846 (4-CA-32824)
530-6067-6001-3750

The Region submitted this case for advice on whether (1) the Employer violated Section 8(a)(5) by refusing to provide the Union with bargaining notes that the Union asserts are relevant to pending or potential grievances and pending arbitrations; [*FOIA Exemption 5*

.][1]

We conclude that the Employer's bargaining notes are of dubious relevance to the Union's pending grievances or arbitrations. Rather, the Union's request for the bargaining notes pending arbitration of grievance 61-03 over the meaning of the contract clause appears to be merely a mechanism for unprivileged prearbitral discovery. Moreover, a request for bargaining notes raises serious questions of confidentiality for parties involved in a collective-bargaining relationship. In these circumstances, the Region should dismiss this charge, absent withdrawal.

FACTS

The Employer and Steelworkers Local 1623 (the Union) are parties to a collective-bargaining agreement with a term of April 21, 2002 to April 8, 2006. The parties have had a number of disputes concerning job classifications listed in Appendix A and A-1 of that contract. Article VIII-Seniority, Section 4 paragraph 4 of the contract provides:

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[1] [*FOIA Exemption 5*

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> Those employees assigned to a job classification listed in appendix A-1 may be placed on any job in any work group within that classification without regard to seniority.

The Employer asserts that, by this provision, it has an unlimited and unrestricted right to reassign employees in the A-1 category while its ability to move category A employees is restricted by those employees' seniority rights.

In contrast, the Union asserts that when the parties agreed to this provision during the April 2002 negotiations for the current contract, the Company's lead negotiator assured the Union's President that employees in the A-1 category would only be moved from group to group for reasons of absenteeism, vacations, and seasonal manning changes. The Union argues that these assurances resulted in the parties' agreement that the Employer would only reassign A-1 employees for these stated reasons.

On July 3, 2003,[2] the Union filed grievance 61-03 alleging that the Employer's reassignment of A-1 employees at any time for any reason violates the contract.

On July 7, the Union made an e-mail request for information that, it asserted, would help it to clarify the above contract section, to prepare for pending grievances and arbitrations and to assess other potential grievances. The Union requested copies of the Employer's bargaining notes pertaining to the April 2002 negotiations, covering all contract language. The Union qualified this request on February 3, 2004, limiting the request to bargaining notes relevant to nine enumerated issues that related to grievances, potential grievances and pending arbitrations. The first of the nine enumerated issues involved grievance 61-03 against the Company's reassigning A-1 employees at any time and for any reason. With the exception of this first enumerated issue involving grievance 61-03, the Union apparently has not asserted that any pertinent contract term involved in pending grievances and arbitrations, or potential grievances, was negated, modified, or supplemented by statements or assurances given during the 2002 negotiations. The Union otherwise offered no explanation as to why the Company's April 2002 bargaining notes would be relevant to any pending or potential grievances concerning the other eight issues.

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[2] All dates are 2003, unless otherwise designated.

The Employer admits that it has refused to provide any of its bargaining notes. The Employer does not assert that its bargaining notes are silent with respect to the scope of the disputed contract term at issued in grievance 61-03. Instead, the Employer asserts that the notes are not relevant because the cited contract provision gives it the unlimited right to assign employees in the A-1 category. The Employer also asserts its bargaining notes are confidential because they contain the Company's bargaining strategy.

Grievance 61-03 was appealed to arbitration on November 17, 2003.

ACTION

Since the bargaining notes are of dubious relevance, and the Union's request for them otherwise raises issues of prearbitral discovery and confidentiality, the Region should dismiss this charge, absent withdrawal.

An employer is obligated to provide information that may prove relevant to contract negotiation and contract administration, including determinations of whether to file a grievance, whether to proceed to arbitration, and what position to take once a grievance has been filed.[3] Once arbitration has been initiated, however, a party may not utilize the duty to supply information as a mechanism for arbitral discovery.[4] Lastly, under Detroit Edison v. NLRB,[5] a union's interest in arguably relevant information may not predominate when an employer asserts a legitimate and substantial interest in maintaining confidentiality.

The Union has not demonstrated how the Employer's bargaining notes concern any of its grievances, arbitrations, or potential grievances, other than grievance 61-03. With regard to grievance 61-03, the Union asserts that a portion of the bargaining notes are relevant to whether the Company had violated the contract by reassigning A-1 employees from their established work groups at any time for any reason. The Employer denied the grievance by claiming that Article VIII-Seniority, Section 4 paragraph 4 allows employee reassignment at any time for any reason. The Union's grievance rests on the failure of the above

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[3] Jamaica Hospital, 297 NLRB 1001, 1002 (1990).

[4] See, e.g., California Nurses Assn., 326 NLRB 1362 (1998), and cases cited therein.

[5] 440 U.S. 301, 318 (1979).

contract provision to explicitly specify the times when or the reasons why A-1 employees can be reassigned without regard to their seniority. The Union asserts that the Company's lead negotiator had assured Union officials involved in the 2002 negotiations that the only "reasons" for moving A-1 employees would be absenteeism, vacations and seasonal manning. The Union supports grievance 61-03 by offering statements of its own officials as evidence of the alleged oral agreement during bargaining which contradicts the Employer's interpretation of the contract.

First, the Union has not demonstrated that Employer's bargaining notes meet the statutory standard of relevance. When it requested the information the Union not only had already decided to pursue this grievance to arbitration, the Union also had already decided what position to take in the arbitration, i.e., to rely on the existence of the aforementioned oral agreement. The Union thus clearly does not need the Employer's bargaining notes to decide to take that position in the arbitration. The Union's own evidence was the basis for its position. The Union may have requested the Employer's bargaining notes on the belief that the notes will help the Union to convince the Employer of the strength of the Union's position. However, the Employer need not provide the Union with these notes to accomplish that result. The Employer can simply examine its own notes to see if they support the Union's position. Given that the notes are of dubious relevance to the Union's processing of the grievance, the Union's request for them appears to be directed at pre-arbitral discovery over grievance 61-03, and not within the scope of the statutory duty to furnish information.

We note that the Employer's argument for application of the parol evidence rule provides an additional reason for concluding that this charge should be dismissed. The parol evidence rule operates at a trial to prohibit the use of evidence that varies the terms of an unambiguous contract provision. In essence, it deems irrelevant oral evidence that is inconsistent with an unambiguous contract. The Employer argues that the parol evidence rule would bar the production of the bargaining notes relative to grievance 61-03 because Article VIII-Seniority, Section 4 paragraph 4 is clear and unambiguous needing no clarification. We need not decide whether this evidentiary rule would bar the disclosure of bargaining notes in the arbitration. We do note, however, that to the extent the contract is unambiguous, the parol evidence rule is another reason why the notes do not clearly meet the Acme standard. The Employer's parol evidence argument also indicates that the Union's request for the bargaining notes essentially involves pre-arbitral discovery. Since the Employer will

argue that the arbitrator may not consider the bargaining notes because of this rule, the Union's information request here appears to intrude on the province of the arbitrator, amounting to pre-arbitral discovery.

We also conclude that the Employer reasonably contends that its bargaining notes are confidential because they may contain the Employer's bargaining strategy. The interests of collective-bargaining are furthered by the parties' confidence that their good-faith bargaining strategies can be formulated without fear of exposure.[6] Thus the Union's request for the Employer's bargaining notes raises serious questions of confidentiality that may well interfere with the collective bargaining process.[7]

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[6] Cf. Berbiglia, Inc., 233 NLRB 1476, 1495 (1977)(Board approves ALJD ruling revoking subpoena seeking union records of membership meetings containing material regarding pending negotiations; ALJ determined that the union's interest in the confidentiality of its bargaining strategy outweighed the employer's interest in conducting a fishing expedition into the union's meeting notes.)

[7] We recognize that a party refusing to furnish information on confidentiality grounds typically has a duty to bargain in an effort to accommodate the other party. However, given the questionable relevance of this material, and the risk of harm to the collective-bargaining process that is entailed in compelling disclosure of bargaining notes, we find that the Employer here has no duty to bargain an accommodation.

In sum, where the relevance of the bargaining notes to grievance processing has not been clearly demonstrated, and the request appears instead to be directed at pre-arbitral discovery and also raises serious confidentiality concerns, the instant charge should be dismissed, absent withdrawal.

B.J.K.