

**WGN of Colorado, Inc. and International Brotherhood of Electrical Workers, Local 111.** Case 27-CA-10586

November 19, 1990

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On May 16, 1990, Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering 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 and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> 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, WGN of Colorado, Inc., Englewood, Colorado, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

<sup>1</sup>The judge found that the Respondent, in refusing to supply information requested by the Union regarding grievant Benton Cook, did not assert a confidentiality claim until August 30. The Respondent sent a letter to the Board on August 4, advising that, with Cook's written permission and a written request, it would provide the Union with information from Cook's personnel file "subject to legal standards of relevance, confidentiality and duty to furnish information under applicable statutes, including the National Labor Relations Act." The record indicates that the General Counsel conveyed this position to Union Assistant Business Manager Byrd before his August 30 meeting with WGN Engineering Manager Gratteau. Even assuming that the Respondent asserted a confidentiality claim before August 30, we note that the Respondent has not shown that its claim was valid. Consequently, whether the Respondent first asserted the claim on August 30, or earlier, is not dispositive.

<sup>2</sup>Member Oviatt agrees that in this case the Respondent delayed turning over plainly relevant information by insisting that the Union explain why it needed the requested information, in violation of Sec. 8(a)(5). However, where materiality is not so clear, he believes that it is not improper for a party asked to provide information to seek, in a timely manner, an explanation of why the information would be useful.

*Donald E. Chavez, Esq.*, for the General Counsel.  
*Dennis R. Homerin, Esq.*, of Chicago, Illinois, and *Andrew W. Loewi, Esq. (Brownstein, Hyatt, Farber & Madden)*, of Denver, Colorado, for the Respondent.  
*Michael A. Byrd (Business Representative)*, of Denver, Colorado, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

GORDON J. MYATT, Administrative Law Judge. Upon a charge filed by International Brotherhood of Electrical Work-

ers, Local 111 (the Union) against WGN of Colorado, Inc.<sup>1</sup> (Respondent), the Regional Director for Region 27 issued a complaint and notice of hearing on September 8, 1988. The complaint alleges Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq. Specifically, the complaint alleges the Union is the exclusive collective-bargaining representative of Respondent's employees in an appropriate unit.<sup>2</sup> Further, that Respondent unlawfully refused to furnish information in response to the Union's request in the following circumstances: (1) since June 16, 1988,<sup>3</sup> a Respondent refused to allow the Union to review, and copy as necessary, the personnel file of Benton Cook, a discharged unit employee on whose behalf the Union had filed a grievance; (2) since August 4, Respondent has required the Union to present written permission from Cook granting the Union the right to review Cook's personnel file, and a further written request from the Union for copies of materials contained in the personnel file; and (3) since August 30, Respondent refused to provide the Union, upon its request, with a copy of Cook's 1987 performance evaluation. Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied the commission of any unfair labor practices.

A hearing was held in this matter on December 8, 1988, in Denver, Colorado. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues.

Upon the entire record in this matter, including my observation of the demeanor of the witnesses while testifying, and upon due consideration of the briefs and the arguments made by the parties, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The pleadings admit that Respondent is a corporation engaged in television broadcasting and that it maintains an office and place of business in Englewood, Colorado. The pleadings further admit that Respondent, in the course of its business operation, annually purchases and receives goods, materials, and services valued in excess of \$50,000 directly from points located outside the State of Colorado. Further, that Respondent annually sells and ships goods, materials, and services valued in excess of \$50,000 directly to enterprises within the State of Colorado which, in turn, are directly engaged in interstate commerce. Finally, that Respondent annually derives gross revenues in excess of \$100,000 from its business operations. On the basis of the above, I find Respondent is, and was at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> Respondent's name appears as amended at the hearing.

<sup>2</sup> The pleadings establish the bargaining unit as:  
All technicians and Floor Directors employed by Respondent at its Englewood, Colorado, facility, but excluding office clerical employees, guards, professional employees, supervisors as defined in the Act, and all other employees.

<sup>3</sup> All dates herein refer to the year 1988 unless otherwise indicated.

## II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local 111 is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

There is little factual dispute in this matter. The record establishes that Benton Cook, a technician employed by Respondent, sustained injuries in an automobile accident sometime in November 1987. As a result, Cook was placed on disability leave under the terms of the collective-bargaining agreement between Respondent and the Union.<sup>4</sup> One of the requirements for an employee on such leave status was that the employee provide Respondent with substantiation of his medical condition on a periodic basis.

During the several months prior to April, Cook apparently failed to maintain contact with Respondent or to provide the necessary medical documentation concerning his condition. On April 7, Respondent's personnel manager, Craig Anzai, sent Cook a termination letter, effective April 5, for failure to inform Respondent of his "medical condition on a regular basis."<sup>5</sup> (G.C. Exh. 4.)

Michael Byrd, assistant business manager of the Union, filed a grievance on behalf of Cook regarding the employee's discharge (see G.C. Exh. 3). The collective-bargaining agreement in effect between the parties provided for a two-step grievance procedure and for the Union to elect to go to arbitration on any matters not resolved at the grievance stage.<sup>6</sup>

The parties held a step-one meeting on the grievance on April 22. Byrd and Cook attended the meeting on behalf of Cook.<sup>7</sup> Anzai and Gratteau, the latter was Respondent's engineering manager, were present for Respondent. During the discussion, Gratteau suggested Cook be examined by a physician selected by Respondent as a possible means of resolving the matter, and Byrd agreed. By mutual consent of the parties the step-one proceeding was adjourned until Cook had been examined by Respondent's physician and a report was given to Respondent.

On June 16, the parties resumed the step-one proceeding. At this meeting, Gratteau provided Byrd with a copy of a medical report issued by Dr. Taylor, the physician selected by Respondent to examine Cook. Gratteau also showed the union representative Cook's disability file, which contained Respondent's internal disability forms for the months of December 1987 and January 1988. The forms were filled out by doctors attesting to Cook's medical condition for those months (G.C. Exhs. 17 and 18). Gratteau also asked Byrd to provide Respondent with copies of all medical records that Cook might have available regarding his condition. Byrd agreed to do so at the next meeting between the parties.

Byrd, in turn, requested that Respondent permit him to view Cook's personnel file and make copies of any relevant documents that he might need in order to process the grievance. Gratteau refused this request and informed Byrd that

there were certain matters in the file that Byrd could not see. Gratteau did not give any further explanation as to why Respondent would not permit the Union to inspect Cook's personnel file. He did mention at this meeting, however, that Respondent had information that Cook had worked for Mile High Cable Company during the time he was on disability status from his employment with Respondent. When Byrd requested that Gratteau supply him with a copy of the information relating to Cook's alleged employment with Mile High, Gratteau responded by stating that the Union should get it by applying directly to Mile High just as Respondent did. He did not provide this information to Byrd at that meeting.

In order to initiate the second step of the grievance procedure, Byrd filed a written grievance on Cook's behalf on June 17 (G.C. Exh. 3). Byrd also sent a letter to Respondent, dated June 20, renewing the Union's request to inspect and copy Cook's personnel file as well as the records Respondent had detailing Cook's employment with Mile High (G.C. Exh. 5).

On June 22, Gratteau responded in writing to the Union's renewed request for the information (G.C. Exh. 6). Gratteau provided Byrd with a copy of the information relating to Cook's employment with Mile High but stated that Byrd had to indicate the "specific documents" he wished to see in Cook's personnel file. Gratteau concluded by stating, "[i]f pertinent to the grievance, we will consider making them available to you."

On June 29, Byrd sent another letter to Respondent in which he emphasized that the Union could not determine what was or was not pertinent since the grievance involved a termination. Byrd renewed his request to be permitted to review and copy Cook's personnel file in order to make a determination of what material was relevant to the grievance. He informed Gratteau that the Union did not wish to be "blind-sided" if the grievance proceeded to arbitration. He indicated that (by failing to provide the information), the Respondent would be causing the Union to incur a "costly expense" that it might not otherwise have to incur (G.C. Exh. 7).

On July 19, Byrd again made a request to inspect and copy the material contained in Cook's personnel file (G.C. Exh. 8). Gratteau failed to respond to this renewed request, although the parties were scheduled to hold the step-two meeting on July 28. The Union then filed the instant charge in this matter on July 27.

The parties held the step-two meeting on July 28. Byrd again requested that he be allowed the view and copy Cook's personnel file. Gratteau refused to permit this. While at the meeting, Byrd supplied Gratteau with copies of all of Cook's medical records which Respondent had been seeking to obtain.

On August 22, Byrd secured a signed statement from Cook authorizing the Union to view and copy his personnel file (G.C. Exh. 10). Byrd and Gratteau met on an unrelated matter on August 30 and during the course of this meeting, Byrd presented the authorization to Gratteau. Gratteau in turn handed Byrd a letter (dated August 31) stating that Respondent was prepared to permit the union representative to view Cook's personnel file, provided the Union had written permission from Cook. The letter also indicated that if the Union wished to have copies of any documents from the file, they would be provided only upon a written request from the

<sup>4</sup> See G.C. Exh. 2, arts. 35 and 36, pp. 48, 49.

<sup>5</sup> It was established at the hearing that Respondent took the position that Cook had abandoned his employment with Respondent.

<sup>6</sup> G.C. Exh. 2, arts. 9 and 10. Although the grievance and arbitration provisions contained a time limitation for each progressive stage, the record established that the parties mutually waived these limitations regarding the Cook grievance.

<sup>7</sup> Cook was present at all stages of the grievance proceeding.

Union (G.C. Exh. 11). As a result of this exchange, Gratteau permitted Bryd to inspect Cook's personnel file. Bryd then made a handwritten request for material detailed by him after his inspection of the file (G.C. Exhs. 12 and 13). Gratteau provided all of the copies of the documents requested by the Union with the exception of Cook's September 29, 1987 performance evaluation. Gratteau took the position that the evaluation had nothing to do with the grievance over Cook's termination. Bryd responded that an arbitrator in a discharge cases looks over everything that is considered important, including past work records and evaluations. However, Gratteau refused to supply the Union with a copy of this document. Gratteau ultimately supplied Byrd with a copy of the performance evaluation on September 21 (see R. Exh. 2).

#### Concluding Findings

As a general proposition, it is well established that an employe has a duty under the Act to provide to a union representing its employees, on request, relevant information which will enable the union to perform its statutory duties and responsibilities. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983); *Howard University Hospital*, 290 NLRB 1006 (1988); *Washington Gas Light Co.*, 273 NLRB 116 (1984); *Pfizer, Inc.*, 268 NLRB 916 (1984). This obligation also encompasses information requested and required by a union to process grievances on behalf of the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Howard University Hospital*, supra; *New Jersey Bell Telephone Co.*, 289 NLRB 318 (1988); *Washington Gas Light Co.*, supra.

A union's entitlement to relevant information, however, is not an absolute one. In *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979), the Supreme Court held that a union's interest in arguably relevant information does not always predominate over all other interests. There, in refusing to provide the union with certain information, or information in the manner requested by the union, the employer asserted a claim of confidentiality based on its past practice and published policy. The Court indicated that in these circumstances it was necessary to balance the union's need for the information against the legitimate and substantial confidentiality interest of the employer. *Ibid.* It is equally well settled that the party asserting the claim of confidentiality has the burden of proof to establish the validity of such a claim. *McDonnell Douglas Corp.*, 224 NLRB 881 (1976).

Applying these principles to the facts of the instant case, I find Respondent has not met its burden of proof. Nor has Respondent offered any persuasive arguments to justify its failure to provide the requested information to the Union in a timely manner.

First, the facts demonstrate that the Union's initial request, on June 16, to inspect and to be provided with copies of the materials in Cook's personnel file was met with a refusal which was not predicated on any articulated claim of confidentiality. Gratteau merely informed the Union representative there were matters which the representative could not see and refused to let him view Cook's personnel file. There is no evidence whatsoever in the record to demonstrate that Respondent had an announced policy or followed a practice of keeping information contained in employees' personnel files confidential. Nor is there any evidence in the record in-

dicating that the employees themselves requested that Respondent maintain such a confidentiality policy. But even if Gratteau's refusal to provide the information on June 16 were construed to be based on a purported claim of confidentiality, it is apparent that it was never articulated to the Union representative.

More important, the Union here was not seeking information from the files of other employees but, rather, was requesting information from the file of the very employee whose grievance the Union was pursuing. Moreover, the employee, Cook, was present at this grievance meeting—as he was at all stages of the grievance procedure—and Gratteau never informed him or the Union representative that it was necessary to get the employee's written permission before the information would be disclosed.

The conclusion that the refusal to provide the information was not based on any valid interest in confidentiality is further buttressed by Respondent's response to the Union's renewed request for the information. Thus, when Byrd made his first written request for the information on June 22, Respondent replied that the Union had to specify the documents it sought and, "if pertinent," Respondent would consider making it available. It is evident from this response that Respondent was not pressing a claim of confidentiality but rather was asserting that it would determine if the material were necessary for the Union in pursuing Cook's grievance and then it would make a further determination as to whether it would provide the material to the Union.

Bryd's letter in reply to Respondent's written refusal graphically illustrates the dilemma in which the Union found itself. As a result of Respondent's refusal to allow the Union to view Cook's personnel file, it would not specify the documents it desired nor could it intelligently evaluate the matter to make a determination whether to proceed to arbitration on the grievance. As the record shows, the Union's continued requests for the information were categorically denied by Respondent and the Union was compelled to go to the second step of the grievance procedure without benefit of this material. It was not until the Union's secured written permission from Cook—on its own volition and not as a result of Respondent's request—and presented it to Respondent on August 30, that Respondent belatedly asserted a confidentiality claim. Even then, when Respondent ultimately provided the information to the Union it failed to provide a copy of Cook's job evaluation for 1987 until September 21.

In these circumstances, I find the record fully establishes that Respondent unlawfully refused to provide relevant information requested by the Union to enable the Union to carry out its statutory duties and responsibilities in pursuing the grievance over the termination of Cook. I further find that Respondent's actions in this regard were not based on any valid claim of confidentiality but, rather, were based on a demonstrated effort to impede and frustrate the Union in carrying out its representation responsibilities.

One final matter remains to be addressed here. Respondent asserts that it ultimately provided the Union with the requested information and did so well before the arbitration proceeding on the Cook termination. By implication, Respondent seems to be contending that the matter of the violation of the Act is moot. I reject this contention.

Although Respondent ultimately complied with the Union's request for the information, it never offered the

Union a legally justifiable reason for its refusal to provide the information earlier. The unfair labor practice complaint in this case issued on September 8, 1988. The Board has held that belated compliance, such as occurred here, after issuance of an unfair labor practice complaint cannot retroactively cure the unlawful refusal to supply the requested information. *Interstate Food Processing Corp.*, 283 NLRB 303, 306 (1987). Cf. *Grey Line Scenic Tours*, 283 NLRB 58 (1987). Therefore, I find that since June 16 and continuing to September 21, 1988, Respondent refused to provide the Union with information in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent WGN of Colorado, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local 111 is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein, the Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

All technicians and Floor Directors employed by Respondent at its Englewood, Colorado, facility, but excluding office clerical employees, guards, professional employees, supervisors as defined in the Act, and all other employees.

4. By failing and refusing to permit the Union to view and to receive copies of the contents of the personnel file of employee Benton Cook as requested by the Union in relation to the termination grievance of Cook, the Respondent has violated Section 8(a)(5) and (1) of the Act.
5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, WGN of Colorado, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>8</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.

(a) Failing and refusing to bargain in good faith with International Brotherhood of Electrical Workers, Local 111, by refusing to furnish information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

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

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

(a) Upon request, furnish the Union information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

(b) Post at Englewood, Colorado, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>9</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."

#### 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with International Brotherhood of Electrical Workers, Local 111, by refusing to furnish information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

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

WE WILL permit the Union to view and timely furnish it, upon request, with copies of the contents of the personnel file of terminated employee Benton Cook in relation to a grievance of the terminated employee.

WGN OF COLORADO, INC.