

**United States Postal Service and Trenton Metropolitan Area Local 1020 American Postal Workers Union, AFL-CIO.** Case 22-CA-17769(P)

May 28, 1993

ORDER DENYING MOTIONS

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On July 19, 1991, the Acting Regional Director for Region 22 issued a complaint and notice of hearing in the above-captioned case alleging that since May 17 and June 7, 1991, the Respondent has refused to furnish certain information to the Union in violation of Section 8(a)(5) and (1) of the Act. The Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and submitting affirmative defenses.

On February 24, 1992, the General Counsel filed a Motion for Summary Judgment with the Board. On February 26, 1992, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. On March 10, 1992, the Respondent filed a response to the Notice to Show Cause and Cross-Motion for Summary Judgment. On March 16, 1992, the Board issued a Supplemental Notice to Show Cause why the Respondent's motion should not be granted. On April 2, 1992, the General Counsel filed a response to the Supplemental Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having reviewed the parties' submissions, we find, for the reasons that follow, that the complaint raises genuine issues of material fact which would best be resolved after a hearing before an administrative law judge, and that therefore neither the General Counsel nor the Respondent is entitled to summary judgment as a matter of law.

The Union represents a unit of the Respondent's employees and has a collective-bargaining agreement with the Respondent. Following the filing of a grievance over the Respondent's discipline of employee Loichle, the Union requested the attendance records of Supervisor Bennett (who administered Loichle's discipline). As part of the filing of a grievance regarding discipline in general, the Union requested the attendance records of Supervisors Shetter and Murray. The General Counsel alleges that the Respondent's denial of these requests violates Section 8(a)(5).

Under Section 102.24(b) of the Rules and Regulations, the Board in its discretion may deny a motion for summary judgment where it believes that a genuine issue of fact may exist. It is apparent from the plead-

ings, motions, and responses that a genuine issue of fact may exist as to whether the General Counsel can establish that the Union is entitled to information regarding nonunit matters.

Although our dissenting colleague claims he can discern no disputed issue of fact, he acknowledges what we consider the factual issue when he states that he cannot tell from the papers before us on what basis the Union believed the supervisory attendance records were relevant.<sup>1</sup> Having identified the factual uncertainty, our dissenting colleague faults the General Counsel for failing to prove the case at this stage of the proceeding.<sup>2</sup> We prefer to resolve this factual uncertainty on the basis of evidence developed at a hearing.<sup>3</sup>

ORDER

IT IS ORDERED that the General Counsel's motion and the Respondent's Cross-Motion for Summary Judgment are denied and the proceeding is remanded to the Regional Director for further appropriate action.

MEMBER OVIATT, dissenting.

Finding no material issue of fact that would warrant sending this case to a hearing, I would consider at this time the merits of the Union's requests for the three supervisors' attendance records. Because the General Counsel has not established the relevance of the requests, which concern persons who are not in the unit, I would grant the Respondent's Motion for Summary Judgment and dismiss the complaint. I would deny the General Counsel's Motion for Summary Judgment accordingly.

The complaint in this case alleges, among other things, that the Union requested, and the Respondent refused to supply, the attendance records of three supervisors: Kathleen Bennett, Mark Shetter, and Thomas Murray. The specific reasons for the Union's need-

<sup>1</sup> We agree with our colleague's statement that a union's request for information relating to persons outside the bargaining unit requires a special demonstration of relevance. In this case, as in *Postal Service*, 301 NLRB 709 (1991), the relevance of the requested information has a legal foundation, but the Union's entitlement to the information turns on the Union's possession of more than a mere suspicion of such relevance. We cannot, however, factually determine without a hearing that the Union had no more than a mere suspicion that the information was relevant.

Our colleague misinterprets the above paragraph. We are not amending the complaint. We are merely stating what the General Counsel must prove to prevail on the complaint he issued.

<sup>2</sup> This factual uncertainty is also our basis for denying the General Counsel's Motion for Summary Judgment.

<sup>3</sup> The cases on which our colleague relies all have records developed either at hearings or through factual stipulation of the parties. The Board's Rules do not provide for prehearing discovery, and, accordingly, it is not the Board's usual procedure to require more than allegations of legally significant factual issues to warrant a hearing in an unfair labor practice matter. See Sec. 102.24(b), which specifically states that the party opposing summary judgment need not file "affidavits or other documentary evidence."

ing this information are left to the complaint reader's imagination. In the most general of ways, the complaint states only that the supervisors' attendance records were "necessary for, and relevant to, the Union's performance of its function as exclusive bargaining representative." Although admitting the factual allegations of the complaint, the Respondent's answer denies the above-quoted legal conclusion. As one of its affirmative defenses, the answer avers that the complaint fails to state a claim for which relief can be granted.

In his response to the Board's Supplemental Notice to Show Cause, the General Counsel continues to leave the Board pretty much at sea as to the Union's need for this material. He comments vaguely that the request for the records "arose in the context of employees' grievances involving attendance [Exhs. A and B]." Exhibit A is a step 2 grievance appeal form alleging that Supervisor Bennett's attendance records are "needed to process a grievance."<sup>1</sup> Exhibit B is a form memorandum from a union representative to management requesting 2 years of Supervisor Murray's attendance records "to determine if discipline is even-handed between management and craft." Nothing is said in either of these exhibits about the need for Supervisor Shetter's attendance records. He apparently got lost in the shuffle.

We learn from the Respondent's papers filed in response to the Board's Supplemental Notice to Show Cause that the Union's basis for seeking Supervisor Bennett's record<sup>2</sup> was that it had "reason to believe that Bennett's attendance record is suspect" and that this would show disparate treatment between employees and supervisors. The basis for the Union's "belief" remains a mystery. According to Superintendent Wartel's affidavit, the Union asked for Murray's and Shetter's records just to determine whether discipline was "even-handed between management and craft, without offering specifics" and without relating the request to "any particular grievance," either already filed or that was under consideration for filing. None of this is denied by the General Counsel who, in agreement for once with the Respondent, advises us that there is no genuine issue as to any material fact.

Not to be deterred by any understanding of the parties, my colleagues deny the parties' Motions for Summary Judgment on the ground that they raise genuine issues of material fact. Perhaps inspired by the obscurity of the complaint, the majority leaves me (and the parties, as well) pretty much in the dark as to just what

are those factual issues. Thus, my colleagues contend, in essence, that when the General Counsel alleges that the attendance records are relevant, the Respondent denies that they are relevant, and, based on the papers, the Board cannot discern whether or not they are relevant, this creates a factual issue warranting an evidentiary hearing. Relevance, however, is not a question of fact, but of law. See, e.g., *Home Insurance Co. v. Ballenger Corp.*, 74 F.R.D. 93, 101-102 (N.D. Ga. 1977) (court finds that general allegation of relevancy of certain files does not establish their relevancy, and discovery not permitted); *Lynch v. Merrell-National Laboratories*, 646 F.Supp. 856, 864-866 (D.Mass.1986), affd. 830 F.2d 1190 (1st Cir. 1987); *Shape of Things To Come, Inc. v. Kane County*, 588 F.Supp. 1192, 1193 (N.D.Ill.1984). Thus, the Board may decide relevancy questions upon the undisputed underlying facts, and no evidentiary hearing is necessary.

In this case, there are no disputed underlying facts because, as I will show, the General Counsel has not backed up his claim of relevance with any facts that would justify such a claim. Hence, there is nothing to send to a hearing. In fact, my colleagues acknowledge as much when they admit that they cannot decide without a hearing whether the Union had "more than a mere suspicion" that the information was relevant. (See majority opinion fn. 1, supra.)<sup>3</sup> The charge alleges, however, only the Union's belief that Bennett's record was suspect—not more than that. Even if at a hearing the General Counsel proved that suspicion, my colleagues agree that this would not be enough to require turning over the attendance records. By, in effect, substituting an allegation—"more than a mere suspicion"—that does not appear in the complaint, my colleagues attempt to find a disputed factual issue that simply is not there.

Where, as here, the General Counsel has not alleged in his complaint sufficient facts at the least to make out *some*, if not a facially valid, showing of relevance, the Board should proceed, as I would do, to find the complaint insufficient as a matter of law. To do otherwise, like the majority, rewards the General Counsel for putting *no* facts in his complaint to justify his claim of relevance, and encourages similar loose pleading in the future. That approach is not consonant with what I understand to be fair notice pleading (particularly, as my colleagues are aware (see majority opinion fn. 3, supra), in the absence of this Agency's providing for prehearing discovery) and is thus unwise public policy. For these reasons, I prefer to decide the parties' motions on their papers, and I shall now do so.

<sup>1</sup> Exh. G attached to the General Counsel's Motion for Summary Judgment informs us that the grievance involved employee R. Loichle's being "disciplined on attendance."

<sup>2</sup> The Respondent's papers also reveal that Bennett, who supervised employee Loichle, was the one responsible for Loichle's suspension for attendance problems.

<sup>3</sup> If we cannot tell at this point in the case whether the Union had more than a mere suspicion, one may fairly ask how the Respondent was supposed to have known and determined its legal obligation.

It is well established that a union's request for information relating to persons outside the bargaining unit requires a special demonstration of relevance. *E. I. du Pont & Co.*, 268 NLRB 1031 (1984); *Amphlett Printing Co.*, 258 NLRB 86 (1981); and *Leland Stanford Junior University*, 262 NLRB 136 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983). The union must show that it has a reasonable basis for requesting the information. *NLRB v. Leonard B. Herbert, Jr & Co.*, 696 F.2d 1120, 1124 (5th Cir. 1983); *Blue Diamond Co.*, 295 NLRB 1007 (1989). What constitutes a reasonable basis obviously depends on the circumstances of each case. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867-868 (9th Cir. 1977); *Curtis-Wright Corp. v. NLRB*, 347 F.2d 61, 67 (3d Cir. 1965). But one thing is certain: the facts must establish more than a mere suspicion of possible relevance for the union to be entitled to information pertaining to nonunit employees. *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1985). Further, the required showing must be more than a mere concoction of some general theory that attempts to explain how the information would be useful to determine whether the employer has committed some unknown contract violation; otherwise, the union would have unlimited access to any data in the employer's possession. *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985), and cases cited there.

Even assuming for argument's sake that Supervisor Bennett's attendance record, if actually poor, might be relevant to the processing of the Loichle grievance,<sup>4</sup> I find that the Union's case for needing Bennett's record is legally unsupportable. Stating, as does the Union,

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<sup>4</sup> See *Postal Service*, 301 NLRB 709 (1991).

that someone's attendance record is "suspect" tells me nothing about that attendance record that would justify the assumption that it is in fact poor, or even that it is arguably poor. The Union's suspicion does not establish the record's relevance. See *Sheraton Hartford Hotel*, *supra*. In fact, all the Union's information request does is raise the specter of a fishing expedition, perhaps in retribution for Bennett's having disciplined Loichle. I prefer to "cut bait."

The Union's requests for Shetter's and Murray's attendance records are even farther afield. The requests relate to no particular grievance or dispute over an interpretation of the contract, or to the enforcement of the contract, and the Union does not contend the information is necessary for upcoming contract negotiations. We are told instead that the records are necessary to determine whether discipline is "even-handed." I note that there is not even an allegation that Shetter and Murray have bad attendance records for which they have not been properly disciplined. More to the point, although it may be good management practice in some circumstances, the General Counsel has not referred us to any rule of the Respondent or of law requiring even-handedness in the treatment of supervisors and employees that would justify the Union's interest in supervisors' attendance records, poor or otherwise. Plainly, their relevance has not been established in this case. See *Southern Nevada Builders Assn.*, *supra*.

I would find that the Respondent is entitled to summary judgment as a matter of law. Accordingly, I would deny the General Counsel's Motion for Summary Judgment.